A TREATISE ON THE LAW

OF

PUBLIC CONTRACTS

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PREFACE

In the leisure hours which fell to my lot in the occupancy of public office, I undertook to gather notes upon the law of Public Contracts. The practice of my profession had brought me in close contact with this phase of the law in representing contractors for subways, railroads, reservoirs, roads, and other public works. I appreciated from experience the difficulty of ascertaining the law affecting this subject and set to work in idle hours to codify it somewhat for my own benefit.

As I proceeded with my work it occurred to me that no book had been written on the law of Public Contracts and so I entered upon the task of gathering together for the benefit of the profession all of the principles relating to the subject. I have done this largely in the hope that this work might prove a vade mecum for counsel to governmental bodies, municipal corporations, and public contractors.

The method by which I proceeded, wherever this was possible, was to state the general principle affecting the particular subject in hand, then to state the subsidiary principles or exceptions to the rule, and lastly to illuminate these, when possible, by appropriate illustrations. In the examination of thousands of cases I have selected those best illustrating the text and have not attempted to weigh down the footnotes by excessive citation. With very few exceptions every case cited is a public contract case.

The work does not include the subject of governmental or municipal bonds.

I desire to acknowledge my thanks for the kindly criticism and counsel which I received from Mr. Franz Sigel of the New York Bar, who read the work when finished and gave me the benefit of valuable suggestions. My acknowledgment of indebtedness would not be complete without a recognition of the assistance rendered me by Mr. Edward H. Ryan, the librarian of the Bronx County Law Library.

JAMES F. DONNELLY.

New York City, January 19, 1922.

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A TREATISE ON THE LAW OF PUBLIC CONTRACTS

PART I. THE POWER TO CONTRACT

CHAPTER I

KINDS OF POWERS

§ 1. Inherent Power.

The nation and the State being sovereigns have inherent power to contract, but that attribute cannot strictly be said to exist in the political subdivisions of the State which are called municipal corporations. Inherent power embodies the idea of permanence and inseparableness. Political subdivisions possess no power to contract. If this power inhered in them as accident does in substance the exercise of what was inherent could not be denied. While many authorities declare that since political subdivisions of the State are bodies corporate and politic, they, therefore, possess and enjoy the same powers which private corporations possess and enjoy,[1] it might more appropriately be said that such power is implied from the grant of other powers as the only suitable and available means of giving expression to or carrying out those powers. The true rule seems to be that municipalities must receive their powers by express grant, or by necessary implication from such express grant, and that they accordingly derive their sole

[1] Portland Lumbering Co. *v.* East Portland, 18 Oreg. 21, 22 Pac. 536; East Tenn. Univ. *v.* Knoxville, 6 Baxt. (Tenn.) 166; Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849.

source of power from legislative enactment.[1] Municipalities and political subdivisions generally can exercise only such power to contract as is expressly conferred or necessarily implied from or incident to the power expressly conferred or such power as is essential to the carrying out of the declared objects and purposes.[2] Where, therefore, the power is sought to be derived, because not express, it is rather implied in and incidental to express powers and purposes, than inherent in the corporation. The State has the power to prohibit municipalities from contracting and it may indeed provide another agency to make contracts for them. As matter of instance, the State in the case of the City of New York has provided a separate State agency which makes all subway contracts and leaves the city to appropriate the money to pay the bills which the Public Service Commission contracts.[3]

§ 2. Express Power.

The express powers of a municipality and particularly its power to contract, are usually set out in the charter granted to it by the State, or in the laws regulating the particular class of municipalities to which it belongs or in the general municipal or county law, although some instances may be cited where rights and powers of municipalities are to be found in special acts. The powers of the State and of the nation to contract are as absolute as sover-

[1] Brooklyn City R. Co. *v.* Whalen, 191 App. Div. 737, 229 N. Y. 570, 128 N. E. 215; Detroit Cits. St. Ry. Co. *v.* Detroit, 110 Mich. 384, 68 N. W. 304, 171 U. S. 48, 43 L. Ed. 67; Saginaw G. L. Co. *v.* Saginaw, 28 Fed. 529; Detroit Cits. S. R. Co. *v.* Detroit, 64 Fed. 628; Long *v.* Duluth, 49 Minn. 280, 51 N. W. 915; Parkhurst *v.* Salem, 23 Oreg. 471, 32 Pac. 304; Ketchum *v.* Buffalo, 14 N. Y. 356.

[2] Detroit Cits. St. Ry. Co. *v.* Detroit, *supra.*

[3] Chap. 4, Laws of 1891 of New York; Chap. 429, Laws of 1907 of New York; Chap. 134, Laws of 1921 of New York; Matter of McAneny, 198 N. Y. App. Div. 205, aff'd 232 N. Y. 377.

eignty. These powers, however, are usually delegated to boards, departments, agencies and officers and when so delegated, can only be exercised as granted, the same as in the case of municipalities. But the enumeration of express powers in a statute, including a portion of such powers as are usually implied from powers granted, will not necessarily operate as a limitation of corporate powers, and exclude those not enumerated,[1] although where a statute by specific provisions, and extended detailed statement provides the manner and the only manner in which contracts may be made, this excludes any implied power to contract and all liability on contract can only be express.[2]

§ 3. Implied Power.

Public bodies authorized to do a particular act have with respect to such act the power to make all contracts which natural persons might make.[3] They have all the powers possessed by natural persons, as respects their contracts, except when they are expressly, or by necessary implication, restricted.[4] A public body may accordingly provide in its contract to purchase on credit, and issue its non-negotiable notes in payment.[5] But it has no implied power to borrow money for corporate purposes.[6]

Where, therefore, public bodies have certain powers expressly granted to them or certain duties imposed upon them, in the absence of legal restrictions, they possess the implied power to enter into such contracts as are necessary

[1] Galena *v.* Corwith, 48 Ill. 423, 425; Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849.
[2] Wellston *v.* Morgan, 65 Ohio St. 219, 62 N. E. 127.
[3] Ketchum *v.* Buffalo, 14 N. Y. 356.
[4] Galena *v.* Corwith, 48 Ill. 423.
[5] Ketchum *v.* Buffalo, *supra;* Galena *v.* Corwith, *supra;* Douglass *v.* Mayor of Virginia City, 5 Nev. 147.
[6] Luther *v.* Wheeler, 73 S. C. 83, 52 S. E. 874.

to carry out the express powers and obligations imposed upon them.[1] It is generally accepted that public bodies have the implied power to contract for things which are essential to the proper management of modern communities and which are considered to be in the general public interest and for the general public welfare, such as sanitary measures, the construction of streets and sidewalks,[2] and their repair,[3] the lighting of streets,[4] and the construction of sewers and this power to contract will readily be inferred from general powers to maintain such works, under a liberal interpretation of powers granted for public purposes. The power to build a sewer, therefore, implies the power to contract to build it.[5] The power to provide water and lighting confers the power to enter into contracts with individuals for these purposes.[6] The power to erect waterworks grants by implication the right to repay those who made connections with it the amount expended in so doing.[7] The power to provide sewers confers the power to contract for sewage disposal outside of the city,[8] and likewise authority to buy a right of way.[9] The power to abate nuisances gives power to remove garbage beyond city limits.[10] And of course, in each instance cited, the power to contract with reference to the power conferred, arises.

[1] Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981; Cunningham *v.* Cleveland, 98 Fed. 657; Los Angeles W. Co. *v.* Los Angeles, 88 Fed. 720, 730; Douglass *v.* Virginia City, *supra;* Greenville *v.* Greenville W. Co., 125 Ala. 625, 27 So. 764; Webb G. Co. *v.* Worcester, 187 Mass. 385, 73 N. E. 639; Schefbauer *v.* Kearney, 57 N. J. L. 588, 31 Atl. 454.

[2] Jones *v.* Camden, 44 S. C. 319, 23 S. E. 141.

[3] Seitzinger *v.* Tamaqua, 187 Pa. St. 539, 41 Atl. 454.

[4] Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029; Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849; Mauldin *v.* Greenville, 33 S. C. 1, 11 S. E. 434.

[5] Jones *v.* Holzapfel, 11 Okla. 405, 68 Pac. 511.

[6] Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981.

[7] State *ex rel.* Crow *v.* St. Louis, 169 Mo. 31, 68 S. W. 900.

[8] McBean *v.* Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794.

[9] Coit *v.* Grand Rapids, 115 Mich. 493, 73 N. W. 811.

[10] Kelley *v.* Broadwell, 3 Neb. 617, 92 N. W. 643.

But the power to tax does not confer authority to contract to pay one-half of the taxes obtained from disclosing to the public officials certain unassessed personal property belonging to residents liable to be assessed.[1] Nor can a public body spell out the right to engage in the business of plumbing from a grant of power to erect waterworks.[2] It has no implied power to contract to move improvements affected by the widening of a street, as it may not assume the risk of possible collapse and incident injury to persons, and because it has power to acquire property for the purpose of widening a street will not authorize it to agree to move back a building affected and restore it to its former condition in consideration of dedication of the land needed for the widening.[3] Again, authority to sell bonds will not empower a municipality, by implication, to settle a claim for breach of a contract to sell bonds.[4] The power to contract carries with its exercise the power to insert and impose reasonable restrictions in the contract.[5] Where a public body has power to grant a franchise upon such terms and conditions as it may prescribe, it may impose such reasonable conditions precedent or subsequent as it may consider necessary or proper including the requirement that the grantee of the franchise shall give a bond conditioned for the speedy erection of the plant by which the franchise is to be exercised.[6] It may grant a franchise on condition that the rate of fare be not increased, when authorized.

[1] Grannis *v.* Blue Earth Co., 81 Minn. 55, 83 N. W. 495.

[2] Keen *v.* Waycross, 101 Ga. 588, 29 S. E. 42.

[3] Wheeler *v.* Sault Ste. Marie, 164 Mich. 338, 129 N. W. 685, 35 L. R. A. N. S. 547.

[4] Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973.

[5] Salem *v.* Anson, 40 Oreg. 339, 67 Pac. 190, 56 L. R. A. 169; D., L. & W. R. Co. *v.* Oswego, 92 N. Y. App. Div. 551; Phœnix *v.* Gannon, 195 N. Y. 471, 88 N. E. 1066; Knapp *v.* Swaney, 56 Mich. 345, 23 N. W. 162; Capital City B. & P. Co. *v.* Des Moines, 136 Iowa, 243, 113 N. W. 835; New York *v.* Union News Co., 222 N. Y. 263, 118 N. E. 635.

[6] Salem *v.* Anson, *supra.*

CHAPTER II

WHERE POWER LODGED—LIMITATIONS ON AND EXHAUSTION OF POWER

§ 4. Who Possesses Power.

The general powers conferred upon municipalities exist in the common council, board of aldermen, board of supervisors or other similar governing body, except when delegated by charter or statute to some other body or official, and persons dealing with these public bodies, in respect to a matter within the scope of its general powers, need not go behind the doings of such general governing body, apparently regular, to inquire after preliminary or extrinsic irregularities.[1]

But where these powers are devolved by law upon the governing body to make contracts for purposes designated in the statute, the general and precise authority conferred upon it may not in toto be delegated to others.[2] The governing body cannot in any case delegate to a member or committee functions or prerogatives of a legislative character, or involving the exercise of judgment and discretion,[3] although merely ministerial functions may be so delegated.[4]

[1] Moore *v.* Mayor of New York, 73 N. Y. 238, 29 Am. R. 134.

[2] Birdsall *v.* Clark, 73 N. Y. 73; Thompson *v.* Schermerhorn, 6 N. Y. 92; Chase *v.* Scheerer, 136 Cal. 248, 68 Pac. 768; Bluffton *v.* Miller, 33 Ind. App. 521, 70 N. E. 989.

[3] People *ex rel.* Healy *v.* Clean Street Co., 225 Ill. 470, 80 N. E. 298; Jewell Belting Co. *v.* Bertha, 91 Minn. 9, 97 N. W. 424; Phelps *v.* New York, 112 N. Y. 216, 19 N. E. 408; Att'y. Gen. *v.* Lowell, 67 N. H. 198, 38 Atl. 270; Blair *v.* Waco, 75 Fed. 800; Foster *v.* Cape May, 60 N. J. L. 78, 36 Atl. 1089.

[4] Jewell Belting Co. *v.* Bertha, *supra;* Harcourt *v.* Asbury Park, 62 N. J. L. 158, 40 Atl. 690.

Powers vested in a particular officer can only be exercised by him and not by his subordinates.

§ 5. Limitations on Power.

Whoever deals with the officers of a public body is bound at his peril to take notice of the limitations upon their power and authority, for they can only bind the public body which they represent within the limits of their chartered authority.[1] These officers cannot make a contract which is expressly prohibited by charter or statute and a contract beyond the scope of corporate power is void.[2] Where a particular manner of contracting is prescribed, the manner is the measure of power and must be followed to create a valid contract.[3] And no implied contract can be predicated upon acts of such officers in attempting to make contracts beyond the scope of corporate power.[4] Provisions of statutes relating to the power to contract, the manner of its exercise, or its terms may not be waived, but must be strictly pursued.[5]

But not only are public bodies required to have authority to contract but they are generally required to have funds available or appropriated to carry out the contract

[1] Osgood *v.* Boston, 165 Mass. 281, 43 N. E. 108; Bennett *v.* Mt. Vernon, 124 Iowa, 537, 100 N. W. 349; Jewel Belting Co. *v.* Bertha, 91 Minn. 9, 97 N. W. 424; N. J. & N. E. Tel. Co. *v.* Fire Comm'rs, 34 N. J. Eq. 117, 34 *Id.* 580; Taft *v.* Pittsford, 28 Vt. 286; *Re* Niland, 113 N. Y. App. Div. 661, 193 N. Y. 180, 85 N. E. 1012.

[2] McCoy *v.* Briant, 53 Cal. 247; Weitz *v.* Des Moines, 79 Iowa, 423, 44 N. W. 696; Reeside *v.* U. S., 2 Ct. Cl. 1.

[3] Zottman *v.* San Francisco, 20 Cal. 102; McCoy *v.* Briant, *supra;* Fiske *v.* Worcester, 219 Mass. 428, 106 N. E. 1025; Wellston *v.* Morgan, 65 Ohio St. 219, 62 N. E. 127.

[4] Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001; Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660; St. Louis *v.* Davidson, 102 Mo. 149, 14 S. W. 825; Farwell *v.* Seattle, 43 Wash. 141, 86 Pac. 217; *Re* Niland, *supra.*

[5] Medina *v.* Dingledine, 211 N. Y. 24, 104 N. E. 1118; Schliess *v.* Grand Rapids, 131 Mich. 52, 90 N. W. 700; Carpenter *v.* Yeadon Borough, 208 Pa. 396, 57 Atl. 837.

before it can have any validity.[1] Where such is the provision, no power to award a contract exists in the absence of a prior appropriation.[2] And when money has been appropriated, no recovery is permitted beyond the amount appropriated or the power to expend limited by law.[3] A contract to incur an obligation in excess of existing appropriations for the purpose is illegal and void,[4] and a like result follows where there is a failure to comply with constitutional limitations on the power to create debts.[5] If public agents are authorized to contract not to exceed a sum stated, they have no power to contract for a larger sum and this limitation of power binds all dealing with such agents.[6]

The mere fact that funds are available in the form of an unexpended balance in the public treasury arising from a levy for the same purpose in the previous year will not suffice as an appropriation to support an obligation.[7] But if an appropriation exists and is subsequently exhausted, the supplies ordered upon such existing appropriation will constitute a valid contract.[8] By special act of Congress it has been provided that none of its acts shall be construed to make an appropriation or to authorize the making of a contract involving the payment of money in excess of the appropriations made by law, unless such act shall in specific terms declare that an appropriation is

[1] Williams *v.* New York, 118 App. Div. 756, 192 N. Y. 541, 84 N. E. 1123; Bradley *v.* U. S., 98 U. S. 104, 25 L. Ed. 105, aff'g 13 Ct. Cl. 166; May *v.* Gloucester, 174 Mass. 583, 55 N. E. 465; Johnston *v.* Phila., 113 Fed. 40.

[2] Williams *v.* New York, *supra*, and cases note 1.

[3] May *v.* Gloucester, *supra*.

[4] Hurley *v.* Trenton, 66 N. J. L. 538, 49 Atl. 518, 67 N. J. L. 350, 51 Atl. 1109.

[5] McNeal *v.* Waco, 89 Tex. 83, 33 S. W. 322; Drhew *v.* Altoona, 121 Pa. St. 401, 15 Atl. 636.

[6] Turney *v.* Bridgeport, 55 Conn. 412, 12 Atl. 520; May *v.* Gloucester, *supra*.

[7] Neumeyer *v.* Krakel, 110 Ky. 624, 62 S. W. 518.

[8] Chicago *v.* Berger, 100 Ill. App. 158.

made or that a contract may be executed.[1] This negatives any possibility of appropriations by construction or implication. Prohibition has also been levelled against payments which will exceed the value of services already rendered or of articles or supplies delivered in part performance of a contract.[2] Payments made in violation of this statute are void,[3] although payments to a contractor may be made where he has performed, even if the government has received no benefit therefrom.[4] These and other statutory provisions which form a part of the contract may not be waived but must be adhered to strictly as they are generally accepted as mandatory.[5] Stipulations or conditions which are merely contractual may be waived.[6]

When the power to contract relates to public improvements, such power is limited by the terms of the legislation under which it proceeds to contract. A failure to comply with these in material matters will make the contract void, especially in the case of improvements to be paid for by local assessment, where a strict interpretation of this rule is enforced.[7]

§ 6. Exhaustion of Power.

The grant of unlimited power by the legislature to a

[1] Sec. 6763, U. S. Compiled Statutes.
[2] Sec. 6647, U. S. Compiled Statutes.
[3] Pierce *v.* U. S. (The Floyd Acceptances), 7 Wall. 666, 682, 19 L. Ed. 169, aff'g. 1 Ct. Cl. 270.
[4] McClure *v.* U. S., 19 Ct. Cl. 173.
[5] Roberts *v.* Fargo, 10 N. D. 230, 86 N. W. 726.
[6] Creston Water Wks. *v.* Creston, 101 Iowa, 687, 70 N. W. 739; Kennedy *v.* New York, 99 N. Y. App. Div. 588; Schliess *v.* Grand Rapids, 131 Mich. 52, 90 N. W. 700; Norton *v.* Roslyn, 10 Wash. 44, 38 Pac. 878.
[7] Hendrickson *v.* New York, 160 N. Y. 144, 54 N. E. 680; McDonald *v.* Mayor, 68 N. Y. 23, 23 Am. R. 144; People. *ex rel.* O'Reilly *v.* Common Council, 189 N. Y. 66, 81 N. E. 557; Lancaster *v.* Miller, 58 Ohio St. 558, 51 N. E. 52; Noel *v.* San Antonio, 11 Tex. C. A. 580, 33 S. W. 263; Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603.

public body is not exhausted by the first or a single attempt at its exercise.[1] If the legislature surrounds the power with no limits or bounds, the extent of the use of the power is left to the discretion of the public body, and is a legislative question, not a judicial one, upon which the court cannot substitute its judgment for that of the governing body and voters of the community.[2] Under such grants of power, new water, light or other public service plants or contracts for new or additional supplies of these commodities may be made in the discretion of the public body without interference.[3] Where the grant authorizes a supply and two distinct methods by which the supply may be obtained, the making of the contract in the former case or the exercise of either method in the latter exhausts the power conferred by the grant and a further attempt to exercise the power will be enjoined.[4] In these circumstances, the municipality may neither erect its own plant or create competition by making another contract for a supply, under that particular grant of power.[5] On the other hand, general terms in a statute have been declared not to create an exclusive franchise to furnish a public utility, so as to preclude the public body from obtaining it from other sources.[6] There is a distinction, however, between grants of power or contracts made which exclude all competition and those which merely exclude competition by the public body until it shall pur-

[1] Lucia *v.* Montpelier, 60 Vt. 537, 15 Atl. 321, 1 L. R. A. 169; Janeway *v.* Duluth, 65 Minn. 292, 68 N. W. 24.

[2] *Idem.*

[3] *Idem.*

[4] White *v.* Meadville, 177 Pa. St. 643, 35 Atl. 695; Wilson *v.* Rochester, 180 Pa. St. 509, 38 Atl. 136; Troy Water Co. *v.* Troy, 200 Pa. St. 453, 50 Atl. 259.

[5] Atlantic City Water Works *v.* Atlantic City, 39 N. J. Eq. 367. Cases, note 4.

[6] *Re* Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

chase the plant of the existing company or make compensation to it.[1] And when there is no agreement that the public body will not compete, or purchase the plant, should it decide to compete, there is no barrier to such action,[2] and it may after granting a franchise which is not exclusive contract to erect its own plant,[3] where it has not expressly or by necessary implication agreed otherwise. Such outstanding contract with a company still willing to carry out its contract does not operate to exhaust the power to procure water and light or other public service from another source.[4] Even the exclusive right to light the streets of a municipality with gas for a definite period will not prevent it from contracting to light the streets by electricity.[5] In like manner, where a public body has charter power to abate nuisances injurious to the public health and safety and to make regulations necessary to the preservation of health and the suppression of disease, it does not exhaust its power with respect to dust raised by the operation of a street railway where it requires by the franchise contract that such railway shall clean and repair so much of the street as is between the rails, but it may also require the sprinkling of the tracks to lay the dust.[6] Where a clerk in publishing a required notice under a public improvement contract fails in his first effort to properly publish it, this will not deprive him or the

[1] Walla Walla W. Co. *v.* Walla Walla City, 60 Fed. 957, aff'd 172 U. S. 1, 43 L. Ed. 341.

[2] Knoxville W. Co. *v.* Knoxville, 200 U. S. 22, 50 L. Ed. 353; Westerly Waterworks Co. *v.* Westerly, 80 Fed. 611; United R. R. *v.* San Francisco, 249 U. S. 517, 63 L. Ed. 739.

[3] North Springs Water Co. *v.* Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214.

[4] Nalle *v.* Austin, 85 Tex. 520, 22 S. W. 668, 960.

[5] Saginaw G. L. Co. *v.* Saginaw, 28 Fed. 529.

[6] St. Paul *v.* St. Paul City Ry. Co., 114 Minn. 250, 130 N. W. 1108, 36 L. R. A. N. S. 235.

public body of further power but they may treat the first publication as of no validity and proceed with the second publication.[1] Where a committee has been authorized by the general governing body to make a contract and made it, it exhausted its power and had no authority to enter into a second contract.[2]

[1] Gilmore *v.* Utica, 131 N. Y. 26, 29 N. E. 841.
[2] Boston Elec. L. Co. *v.* Cambridge, 163 Mass. 64, 39 N. E. 787.

CHAPTER III

CONTROL OF EXERCISE OF POWERS BY JUDICIAL AND LEGISLATIVE BRANCHES OF GOVERNMENT

§ 7. Judicial Control.

The State has the right to make contracts, incur obligations or expend money even though the work or purpose may be improvident and prove to be useless to the public. The legislature as the depositary of the sovereign powers of the people is the judge of the propriety and utility of making the contracts, incurring the obligations or expending the money, and the courts cannot institute an inquiry concerning the motives and purposes of the legislature in order to attribute to it a design contrary to that clearly expressed or fairly implied in the bill, without disturbing and impairing the functions assigned by the constitution to each department of government. The courts may not by independent inquiry, upon the testimony of witnesses, determine that the purpose of the legislature was to appropriate public money and make a contract expending it in improvements for the benefit of an individual and in this manner overthrow the legislative act and deny validity to such a contract.[1]

Accordingly legislation under which public contracts may be made cannot be impeached or attacked or investigated when before the court, because the motives of the legislators were improper or against the general policy of the

[1] Waterloo W. Mfg. Co. *v.* Shanahan, 128 N. Y. 345, 28 N. E. 358; Devoy *v.* Craig, 231 N. Y. 186, 131 N. E. 884; Daggett *v.* Colgan, 92 Cal. 53, 28 Pac. 51; McCulloch *v.* State, 11 Ind. 424; State *v.* Hays, 49 Mo. 604.

State.[1] Nor may they be attacked even when fraud or corruption procured the legislation.[2]

In the case of political subdivisions of the State it is settled by an overwhelming weight of authority that within the sphere of their powers they are not subject to judicial control and supervision except in cases of fraud,[3] or gross abuse of power or discretion.[4] The courts may construe their powers, but the public bodies themselves are vested with the sole power of determining when they shall be exercised.[5] This exercise being a matter of discretion is not subject to judicial control which would simply result in the substitution of the court's judgment for that of the officers to whom it was specifically intrusted by law.[6]

The motives which induce the legislative action of a governing body of a municipality or the influences which controlled it in enacting ordinances may not be inquired into by the judicial branch of government.[7] Whether the act is within powers granted is for the courts to decide; whether it is a wise exercise of power is for the public body to determine.[8]

[1] People *v.* Shepard, 36 N. Y. 285; Chase Hibbard M. Co. *v.* Elmira, 207 N. Y. 460, 467.

[2] U. S. *v.* Old Settlers, 148 U. S. 427, 37 L. Ed. 509; New Orleans *v.* Warner, 175 U. S. 120, 44 L. Ed. 96; Fletcher *v.* Peck, 6 Cranch (U. S.), 87, 3 L. Ed. 162.

[3] Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029.

[4] Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849; Valparaiso *v.* Gardner, 97 Ind. 1, 49 Am. R. 416.

[5] Fawcett *v.* Mt. Airy, *supra.*

[6] Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. R. 80; *In re* Borough of Millvale, 162 Pa. St. 374, 29 Atl. 641; Des Moines G. Co. *v.* Des Moines, 44 Iowa, 505, 24 Am. R. 756.

[7] Soon Hing *v.* Crowley, 113 U. S. 703, 710, 28 L. Ed. 1145; Gardner *v.* Bluffton, 173 Ind. 454, 89 N. E. 853; People *v.* Gardner, 143 Mich. 104, 106 N. W. 541; Moore *v.* Haddonfield, 62 N. J. L. 386, 41 Atl. 946; Kittinger *v.* Buffalo T. Co., 160 N. Y. 377, 54 N. E. 1081; Wood *v.* Seattle, 23 Wash. 1, 62 Pac. 135; New Orleans *v.* Warner, 175 U. S. 120, 44 L. Ed. 96; Lilly *v.* Indianapolis, 149 Ind. 648, 49 N. E. 887; Paine *v.* Boston, 124 Mass. 486.

[8] Douglas *v.* City Council of Greenville, 92 S. C. 374, 75 S. E. 687; Devoy *v.* Craig, 231 N. Y. 186, 131 N. E. 884.

But while these governing bodies of municipalities are clothed with the sovereignty of the State to legislate precisely the same as the legislature might do, there are many duties devolved upon them which are not legislative in character, but are administrative, and in some instances quasi-judicial in nature and not at all impressed with the character of sovereignty. When they are acting in an administrative capacity, the courts may supervise their conduct and inquire into the motives which induced the members to vote and if their action was the result of corruption, fraud or bad faith amounting to fraud, it may be set aside.[1] Such action and a contract entered into thereby will in any event be determined void and against public policy,[2] or illegal and void.[3]

If an act of Congress is in question, its acts or the conduct or motives of its members cannot be made the subject of judicial investigation. Under no circumstances, may the judicial invade the legislative department for the correction of discretionary acts.[4] The same rule applies to the executive department. The courts may not invade it to correct alleged mistakes or wrongs arising from asserted abuse of discretion.[5]

A determination of municipal authorities that a new street should be laid out across a steam surface railroad is not an act of political sovereignty merely but an exercise of a judicial function which may be reviewed in the courts, where the authority to determine as to the necessity of the crossing is qualified.[6]

[1] Weston *v.* Syracuse, 158 N. Y. 274, 53 N. E. 12; State *v.* Gates, 190 Mo. 540, 89 S. W. 881.

[2] Weston *v.* Syracuse, *supra;* Honaker *v.* Bd. of Educ., 42 W. Va. 170, 24 S. E. 544.

[3] McMillan *v.* Barber Asph. P. Co., 151 Wis. 48, 138 N. W. 94.

[4] U. S. *v.* Old Settlers, 148 U. S. 427, 466, 37 L. Ed. 509.

[5] Dakota Cent. Tel. Co. *v.* South Dakota, 250 U. S. 163, 184.

[6] Matter of Delavan Ave., 167 N. Y. 256, 60 N. E. 589.

Thus the determination by a mayor or engineer under whose direction a contract is being carried out that it is not proceeding properly may be reviewed by the courts since it is the exercise of a judicial function, and, therefore, must be based upon facts to justify it. When it is exercised capriciously or arbitrarily the courts will afford a contractor relief against it.[1] In like manner the determination as to who is lowest bidder is judicial and may not be capriciously or arbitrarily determined.[2] The question whether a reserved power to suspend the work is properly exercised under the terms of the contract may be judicially reviewed.[3]

§ 8. Legislative Control.

The powers which have been delegated to municipalities by charter or statute are always subject to amendment or alteration by the legislature, unless restrained by constitutional provision.[4]

The political or governmental powers of municipalities are not vested rights and the legislature may alter, amend, change or revoke them at pleasure. They are mere agents of the State who stand in no contract relation to their sovereign. Even charters granted under the sovereignty of England are subject in the same manner to amendment, change or revocation. It is only with respect to their private or proprietary rights and interests that they may be entitled to protection under the contract clause

[1] Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263; Wakefield Cons. Co. *v.* New York, 157 N. Y. App. Div. 535, 213 N. Y. 633.

[2] Erving *v.* Mayor, 131 N. Y. 133; People *ex rel.* Coughlin *v.* Gleason, 121 N. Y. 631, 25 N. E. 4; Molloy *v.* New Rochelle, 198 N. Y. 402, 92 N. E. 94.

[3] Johnston *v.* New York, 191 N. Y. App. Div. 205.

[4] Demarest *v.* Mayor, 74 N. Y. 161; New Orleans *v.* New Orleans W. Co., 142 U. S. 79, 35 L. Ed. 943; Hunter *v.* Pittsburgh, 207 U. S. 161, 52 L. Ed. 151, aff'g 217 Pa. St. 227, 66 Atl. 348.

of the Federal Constitution.[1] While municipalities are created by the legislature as instrumentalities of government, and so far as legislation for governmental purposes is concerned are thus subject to control, yet where the purpose is a private one, they cannot be compelled to enter into contracts,[2] and this obtains although the contract is public in some respects. They cannot, therefore, be compelled to take stock in a private corporation against their will and without their consent.[3] Property of which a public body has acquired absolute ownership as an agency of the State is subject to legislative control, but not the property which it holds as proprietor in its private capacity.[4]

Municipalities possess all the powers of corporations generally and, therefore, may not be deprived of their property by legislative action without their consent or due process of law any more than a private corporation can, and since their revenues must be used for municipal purposes, the legislature cannot make contracts for them which involve the expenditure of these revenues without their consent.[5]

[1] New Orleans *v.* New Orleans W. Co., *supra;* Demarest *v.* Mayor, *supra.*
[2] People *ex rel.* Dunkirk W. & P. R. Co. *v.* Batchellor, 53 N. Y. 128, 13 Am. R. 480.
[3] People *ex rel.* Dunkirk W. & P. R. Co. *v.* Batchellor, *supra.*
[4] Higginson *v.* Boston, 212 Mass. 583, 99 N. E. 523.
[5] People *ex rel.* Rodgers *v.* Coler, 166 N. Y. 1, 59 N. E. 716.

CHAPTER IV

SURRENDER OR BARTER OF DISCRETIONARY POWERS— BINDING SUCCESSORS

§ 9. Surrender and Barter of Legislative and Governmental Power.

The States and their agents, the municipalities acting through their legislative or general governing bodies, may not agree that they will refrain from the exercise of their governmental powers. They have no power to enter into contracts which diminish or prohibit the exercise of legislative authority, whenever the public interests demand that they should act. They may not bind themselves to subserve private interests. The functions of legislative and governmental power must be preserved for the public good and not curtailed or embarrassed.[1] The judgment of public officials in these matters must be without restraint or control so that it may be exercised impartially and at all times.[2] They may not render themselves, as occasion for its exercise shall occur from time to time, unable to control any matter which may arise in the future concerning which they shall have a legislative duty.[3]

Municipalities, therefore, cannot divest themselves of

[1] Darling *v.* Newport News, 249 U. S. 540, 63 L. Ed. 759; Martin *v.* Brooklyn, 1 Hill, 546; People *ex rel.* Healy *v.* Clean Street Co., 225 Ill. 470, 80 N. E. 298.

[2] Edwards *v.* Goldsboro, 141 N. C. 60, 53 S. E. 652.

[3] Davis *v.* N. Y., 14 N. Y. 506; Snyder *v.* Mt. Pulaski, 176 Ill. 397, 52 N. E. 62; Gale *v.* Kalamazoo, 23 Mich. 344; Wash. R. Co. *v.* Defiance, 167 U. S. 88, 42 L. Ed. 87, aff'g 52 Ohio St. 262, 40 N. E. 89; State *ex rel.* Townsend *v.* Bd. of Park Commrs., 100 Minn. 150, 110 N. W. 1121.

the legislative discretion conferred upon them by law. They can neither surrender it by contract, nor bind themselves not to exercise it whenever it may become necessary.[1] They may not delegate its exercise to private individuals or even to administrative officials.[2] They cannot surrender or contract away any of the great governmental powers such as the police power, the power of taxation or the power of eminent domain. These powers cannot be bartered away.[3] They are inalienable even by express grant.[4] But a State or its local government when so empowered may make a binding contract divesting itself for a substantial period of time of the power to regulate rates.[5] The time must be only for a reasonable time.[6] It cannot divest itself by a perpetual contract.[7]

Merely because a statute requires the consent of a city before tracks can be laid will not authorize a city to contract away the police power or power of taxation of the State on consenting to the construction of tracks in the public street.[8] Not even the State itself could do this, for these great powers of government must be re-

[1] Brick Pres. Church *v.* New York, 5 Cowen, 540; Johnson *v.* Phila., 60 Pa. St. 445.

[2] New Orleans *v.* Sanford, 137 La. 628, 69 So. 35; Thompson *v.* Schermerhorn, 6 N. Y. 92; Zable *v.* Louisville Bapt. Orphan Home, 92 Ky. 89, 17 S. W. 212.

[3] Northern Pac. Ry. Co. *v.* Duluth, 208 U. S. 583, 52 L. Ed. 630, aff'g 98 Minn. 429, 108 N. W. 269; Stone *v.* Mississippi, 101 U. S. 814, 25 L. Ed. 1079.

[4] Denver & R. G. R. R. Co. *v.* Denver, 250 U. S. 241, 63 L. Ed. 958.

[5] Home Tel. Co. *v.* Los Angeles, 211 U. S. 273, 53 L. Ed. 176, aff'g 155 Fed. 554; Minneapolis *v.* St. Ry. Co., 215 U. S. 417, 54 L. Ed. 259.

[6] Home Tel. Co. *v.* Los Angeles, *supra;* Danville *v.* Danville W. Co., 178 Ill. 299, 53 N. E. 118; Columbus G. L., etc., Co. *v.* Columbus, 50 Ohio St. 65, 33 N. E. 292; McBean *v.* Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794.

[7] Westminster W. Co. *v.* Westminster, 98 Md. 551, 56 Atl. 990; Mobile Elec. Co. *v.* Mobile, 201 Ala. 607, 79 So. 39, L. R. A. 1918 F. 667.

[8] Rochester Ry. Co. *v.* Rochester, 205 U. S. 236, 51 L. Ed. 784, aff'g 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

tained undiminished to be exercised whenever the welfare of the State requires.[1]

In like manner, a provision in a charter by which the State barters away any of the powers of sovereignty, as, for instance, the power of eminent domain, is void and when the bargain is attacked, the constitutional protection of the obligations of contract will not apply.[2] Under these principles municipalities may through legislative act when properly and clearly thereunto authorized make inviolable contracts fixing the rates which those exercising public service functions or franchises shall charge during a definite term provided it be not unreasonable in duration, and it does not matter that the effect of such a contract is to suspend, during the life of such contract, the governmental power to regulate rates.[3] But where, on the other hand, an ordinance is passed by a city council and accepted by a public service company as part of its franchise by which it is required to sell half fare tickets to certain classes of passengers, this does not constitute an inviolable contract protected from change or annulment by the legislature under the contract clause of the Federal Constitution, but is a mere governmental rule or regulation which is subject to revocation by the legislature of the State.[4]

Since the provisions of municipal charters are subject to the legislative authority of the State, contractual pro-

[1] State *ex rel.* Townsend *v.* Bd. of Pk. Commrs., 100 Minn. 150, 110 N. W. 1121.

[2] Hyde Park *v.* Oakwoods Cemetery Assn., 119 Ill. 141, 7 N. E. 627.

[3] Home Tel. Co. *v.* Los Angeles, 211 U. S. 265, 53 L. Ed. 176, aff'g 155 Fed. 554; Englewood *v.* Denver & S. R. Co., 248 U. S. 294, 63 L. Ed. 253; Worcester *v.* Worcester St. Ry. Co., 196 U. S. 539, 49 L. Ed. 591, aff'g 182 Mass. 49, 64 N. E. 581; New Orleans *v.* New Orleans W. Co., 142 U. S. 79, 35 L. Ed. 943; Minneapolis R. Co. *v.* Street Ry. Co., 215 U. S. 417, 54 L. Ed. 259.

[4] Pawhuska *v.* Pawhuska O. & G. Co., 250 U. S. 394, 63 L. Ed. 1054; Dubuque Elec. Co. *v.* Dubuque, 260 Fed. 353.

visions in franchises conferred by municipal corporations upon public service companies are subject to be set aside by the exercise of the sovereign power of the State,[1] unless the legislature has expressly provided that municipal corporations may make a binding agreement with such companies respecting the rates or fares.[2] The provisions of the State constitution that consent to construct street railroads must be obtained from the local authorities is not a surrender by the State of the right to govern or regulate fares under its police power. These provisions do not affect the inherent power of the State to regulate the fares to be charged by a public service corporation.[3] In the acquiring of land to be used in widening or opening a street it may not agree, in consideration of a conveyance of such land, to maintain the street as widened,[4] or perpetually as a particular class of highway,[5] as such action divests it of legislative powers. Nor may it contract away its continuing duty to keep highways safe and under its control.[6] Under such attempted exercise of power, no enforceable right can arise to maintain a private drain in a highway,[7] nor a private railroad spur,[8] nor for the

[1] Ewing *v.* Seattle, 55 Wash. 229; Puget Sound Traction Co. *v.* Reynolds, 244 U. S. 574, 61 L. Ed. 1325, aff'g 223 Fed. 371.

[2] Detroit United Railway *v.* Michigan, 242 U. S. 238, 248, 61 L. Ed. 268; Matter of Quimby *v.* Public Service Comm., 223 N. Y. 244, 119 N. E. 433; People *ex rel.* Village of So. Glens Falls *v.* Public Service Comm., 225 N. Y. 216, 121 N. E. 777; Matter of Inter. Ry. *v.* Pub. Serv. Comm., 226 N. Y. 474, 124 N. E. 123; Matter of Niagara Falls *v.* Pub. Serv. Comm., 229 N. Y. 333, 128 N. E. 247; Matter of McAneny, 198 N. Y. App. Div. 205; aff'd 232 N. Y. 377; People *ex rel.* New York *v.* Nixon, 229 N. Y. 356, 128 N. E. 245.

[3] Matter of McAneny, *supra.*

[4] Penley *v.* Auburn, 85 Me. 278, 27 Atl. 158.

[5] State *ex rel.* Townsend *v.* Bd. of Pk. Commrs., 100 Minn. 150, 110 N. W. 1121.

[6] Ft. Smith *v.* Hunt, 72 Ark. 556, 82 S. W. 163; Chicago, B. & R. Co. *v.* Quincy, 136 Ill. 563, 27 N. E. 192; Vandalia R. Co. *v.* State, 166 Ind. 219, 76 N. E. 980.

[7] Eddy *v.* Granger, 19 R. I. 105, 31 Atl. 831.

[8] Hatfield *v.* Straus, 189 N. Y. 208, 82 N. E. 172.

continuance of any private purpose or enterprise.[1] And it may not deprive itself of the right to compel the owners of a street railway to keep that part of the streets occupied by it clean.[2] It may not agree to maintain a bridge or other structure perpetually.[3]

§ 10. **Surrender of Legislative Power—Binding Successors.** A municipality has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereign and governs its people;—the other proprietary, or business powers, quasi-private in their nature, conferred upon it not for the purpose of governing its people, but for the private advantage of such public body itself as a legal personality. In the exercise of the former class of powers officers of the municipality can make no grant and conclude no contract which will bind it beyond the terms of their offices. They cannot circumscribe the legislative powers of their successors and deprive them of the right to their unrestricted exercise, as the exigencies of the times may demand. They are bound to transmit their powers of government to each successive set of officers unimpaired.[4]

But in the exercise of their proprietary powers, they are controlled by no such rule, because they are acting and contracting for the private benefit of the municipality and its inhabitants, and they may exercise the business powers conferred upon it in the same way and subject to the same rules as govern a natural person.[5] They may, therefore, just as natural persons, unless they have been limited by

[1] People *ex rel.* Healy *v.* Clean Street Co., 225 Ill. 470, 80 N. E. 298; State *ex rel.* Belt *v.* St. Louis, 161 Mo. 371, 61 S. W. 658.

[2] Chicago *v.* Chicago U. T. Co., 199 Ill. 259, 65 N. E. 243.

[3] State *ex rel.* St. Paul *v.* Minnesota Transfer Co., 80 Minn. 108, 83 N. W. 32.

[4] Ill. Trust & Sav. Bk. *v.* Arkansas City, 76 Fed. 271; Omaha Water Co. *v.* Omaha, 147 Fed. 1; Gale *v.* Kalamazoo, 23 Mich. 344; Tempe *v.* Corbell, 17 Ariz. 1, 147 Pac. 745.

[5] *Idem.*

statute, make contracts of long duration relating to the proprietary or business side of their existence, and these contracts when executed will bind their successors.[1] The only limitation which the law imposes, however, in the case of these public bodies is that the term or duration of the contract shall not be unreasonable. These powers of a business nature include the power to contract for goods and supplies, for public printing, for buildings, for water, gas, electricity, subways and similar needs of the community.[2] Contracts whose duration has extended variously up to thirty years affecting the supply of water and light, have been sustained as reasonable,[3] although in some few jurisdictions when the duration reaches or approaches a term of thirty years, it has been held unreasonable.[4] Public officials may not bind their successors in office to a surrender of legislative discretion,[5] as by a perpetual,[6] or unreasonable contract.[7] An exception has also been made in the case of personal or professional service contracts to the effect that such do not bind succeeding officials into whose term of office they extend.[8]

[1] *Idem.*

[2] *Idem.;* Matter of Board of Rapid Transit Commrs., 197 N. Y. 81, 90 N. E. 456, 91 N. E. 1110, 36 L. R. A. N. S. 647; Valparaiso *v.* Gardner, 97 Ind. 1, 49 Am. R. 416; Pickett Pub. Co. *v.* Carbon County, 36 Mont. 188, 92 Pac. 524.

[3] Hartford *v.* Hartford L. Co., 65 Conn. 324, 32 Atl. 925; Vincennes *v.* Cits. G. L. Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; Monroe W. Co. *v.* Heath, 115 Mich. 277, 73 N. W. 234; Walla Walla *v.* Walla Walla W. Co., 172 U. S. 1, 43 L. Ed. 341, aff'g 60 Fed. 957.

[4] Long *v.* Duluth, 49 Minn. 280, 51 N. W. 915; Brenham *v.* Brenham W. Co., 67 Tex. 542, 4 S. W. 143.

[5] Waterbury *v.* Laredo, 68 Tex. 565, 5 S. W. 81; Westminster W. Co. *v.* Westminster, 98 Md. 551, 56 Atl. 990.

[6] Westminster W. Co. *v.* Westminster, 98 Md. 551, 56 Atl. 990; State *ex rel.* St. Paul *v.* Minnesota Trans. Co., 80 Minn. 180, 83 N. W. 32; Danville W. Co. *v.* Danville, 178 Ill. 299, 53 N. E. 118.

[7] Columbus W. Co. *v.* Columbus, 48 Kan. 99, 28 Pac. 1097.

[8] Emmett *v.* DeLong, 12 Kan. 67; Wilmington *v.* Bryan, 141 N. C. 66, 54 S. E. 543; Mack *v.* New York, 37 Misc. 371, 82 N. Y. App. Div. 637; Jacobs *v.* Elmira, 147 N. Y. App. Div. 433.

When one municipality is about to be merged into a larger city, it is deprived of power to bind itself beyond the term of its own existence and so cannot bind its successors. Accordingly, a contract for a term of ten years entered into by a town fourteen days before the town was merged into the greater city by virtue of the Greater New York Charter was declared to be a scheme to incumber and burden the new city and would not be permitted to have effect.[1] A public body has power, even though the terms of office of its members is about to expire, and their successors have been elected, to contract for county printing for a term which will extend almost throughout the entire time the succeeding board will be in office.[2] The erection of a bridge and agreement to maintain it perpetually will not bind.[3]

In some States, the legislature has provided a limit of duration during which public contracts may continue in force and effect. Contracts made for a term longer than permitted by statute are wholly void,[4] but such contracts have been declared bad only for the excess period,[5] which is a more reasonable and logical result. A lease of property by the national government through its officials is only binding for the fiscal year.[6] In like manner, where a public body was limited in its power to contract for water supply to one year and it entered into a contract for twenty years the contract was held good so

[1] Hendrickson *v.* New York, 160 N. Y. 144, 54 N. E. 680.
[2] Picket Pub. Co. *v.* Carbon County, 36 Mont. 188, 92 Pac. 524.
[3] State *ex rel.* *v.* Minn. Trans. Co., 80 Minn. 108, 83 N. W. 32.
[4] Gas L. Coke Co. *v.* New Albany, 156 Ind. 406, 59 N. E. 176; Somerset *v.* Smith, 105 Ky. 678, 49 S. W. 456.
[5] State *v.* Ironton G. Co., 37 Ohio St. 45; Neosho &c. W. Co. *v.* Neosho, 136 Mo. 498, 38 S. W. 89; Defiance W. Co. *v.* Defiance, 90 Fed. 753; Mobile Elec. Co. *v.* Mobile, 201 Ala. 607, 79 So. 39, L. R. A. 1918 F. 667.
[6] Hooe *v.* U. S., 218 U. S. 322, 54 L. Ed. 1055, aff'g 43 Ct. Cl. 245; Chase *v.* U. S., 155 U. S. 489, 39 L. Ed. 234, aff'g 44 Fed. 732.

far as executed, in other words, that the public body should pay for the benefits it received under the contract, and that an action would lie for water used in any one year.[1]

[1] Montgomery *v.* Montgomery Works Co., 79 Ala. 233.

CHAPTER V

POWERS OF OFFICERS

§ 11. Powers of Public Officers to make Contracts.

All persons who deal with municipalities and subordinate boards and agencies of the State and national governments, must at their peril inquire into the power of the officers or agents of such municipalities, boards or agencies to make the contract contemplated, for acts of such officers can only bind in the manner and to the extent authorized.[1] Those dealing with these officials are chargeable with knowledge of the limitations upon their power to contract, and where they transgress the powers, their acts are void and will bind no one.[2] In like manner, even though a contract is not ultra vires but is entirely within the scope of its corporate powers, public bodies are not bound by such a contract executed in its name, if the officer who executes it had no power or authority to enter into the contract.[3]

In this latter class of cases, of course, the public body may ratify the contract,[4] but where the public body had no power to enter into the contract, such a contract

[1] Baltimore *v.* Musgrave, 48 Md. 272, 30 Am. R. 458; May *v.* Chicago, 124 Ill. App. 527, 222 Ill. 595, 78 N. E. 912; Smith & Co. *v.* Denver, 20 Colo. 84, 36 Pac. 844; Nesbit *v.* Riverside &c. Dist., 144 U. S. 610, 36 L. Ed. 562, aff'g 25 Fed. 635; Moore *v.* Detroit, 164 Mich. 543, 129 N. W. 715.

[2] Peters *v.* St. Louis, 226 Mo. 62, 125 S. W. 1134; Cits Bk. *v.* Spencer, 126 Iowa 101, 101 N. W. 643.

[3] Floyd County *v.* Allen, 137 Ky. 575, 126 S. W. 124; Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535.

[4] Marsh *v.* Fulton County, 77 U. S. 676, 19 L. Ed. 1040.

cannot be ratified except by the legislature.[1] It is no defense for a contractor to say that he presumed that the agents of the public body transacted their business properly and under sufficient authority, as that principle of the law of agency has no application to officers and agents of a public body where powers are defined by statute.[2] Nor may a contractor rely upon a claim by him that the public officials have frequently before made similar transactions for, however common such occasions they cannot establish a usage in cases not authorized. Custom cannot be made the substitute for undelegated authority.[3] And the receipt of the benefits will not imply a promise.[4] So, a material man who sells gravel to a city officer is chargeable with knowledge of his power to contract,[5] and where he had no power, and the gravel has been used in mending the streets and cannot be returned specifically, there arises no liability of any kind, not even for reasonable value.[6] Though if the material as such was in the city's possession when the action was begun it would have had to return it or pay for it.[7] Public authorities who have charge of the sale of a building cannot bind the public body by a guaranty which differs from the conditions

[1] *Re* Niland, 193 N. Y. 180, 85 N. E. 1012; Peterson *v.* New York, 17 N. Y. 449; Lyddy *v.* Long Island City, 104 N. Y. 218, 10 N. E. 155.

[2] McDonald *v.* Mayor, 68 N. Y. 23; Smith *v.* Newburgh, 77 N. Y. 137.

[3] Delafield *v.* State of Illinois, 26 Wend. 192; The Floyd Acceptances, 74 U. S. (7 Wall.) 666, 677, 19 L. Ed. 169; Wormstead *v.* Lynn, 184 Mass. 425, 68 N. E. 841.

[4] McDonald *v.* Mayor, 68 N. Y. 23; Dickinson *v.* Poughkeepsie, 75 N. Y. 65; Appleton W. Wks. Co. *v.* Appleton, 132 Wis. 563, 113 N. W. 44; O'Rourke *v.* Phila., 211 Pa. 79, 60 Atl. 499.

[5] Bartlett *v.* Lowell, 201 Mass. 151, 87 N. E. 195; see Osgood *v.* Boston, 165 Mass. 281, 43 N. E. 108; Roberts *v.* Fargo, 10 N. D. 230, 86 N. W. 726; Ecroyd *v.* Coggeshall, 21 R. I. 1, 41 Atl. 260.

[6] Bartlett *v.* Lowell, *supra;* See Des Moines *v.* Spencer, 126 Iowa, 101, 101 N. W. 643; Keating *v.* Kansas City, 84 Mo. 415; Turney *v.* Bridgeport, 52 Conn. 412, 12 Atl. 520.

[7] Bartlett *v.* Lowell, 201 Mass. 151, 87 N. E. 195.

set out in the ordinance authorizing such officials to act.[1] Nor may selectmen bind a city to pay for meals procured from the keeper of a restaurant while in session under a statute which provided compensation per hour and their necessary expenses.[2] The agent of a public body who undertakes to bind it by contract must show authority for his action therefor and a contract made beyond his powers is void.[3] The authority which he relies upon may come either from the legislature or from the general governing body of the municipality. The latter may authorize appropriate agencies to make contracts when not limited or restricted and the acts of such agents will bind.[4]

But while it is true that if a public officer acts outside of the scope of his official authority given him by law, the public body which he represents will not be bound by his acts,[5] yet where a specific law is not the source of his authority, but rather he receives it from the contract, which is authorized by law, necessarily entered into and conducted by the officers of the public body, they must necessarily have such powers as will make the contract effective in its beginning and progress, and the public body will accordingly be bound by its exercise.[6] Again

[1] Osgood *v.* Boston, 165 Mass. 281, 43 N. E. 108.

[2] Heublein Bros. *v.* New Haven, 75 Conn. 545, 54 Atl. 298.

[3] Burchfield *v.* New Orleans, 42 La. Ann. 235, 7 So. 448; Black *v.* Detroit, 119 Mich. 571, 78 N. W. 660; Cheeny *v.* Brookfield, 60 Mo. 53; Farrell *v.* Coatesville, 214 Pa. St. 296, 63 Atl. 742; Wahl *v.* Milwaukee, 23 Wis. 272; Ross *v.* Long Branch, 73 N. J. L. 292, 63 Atl. 609; Friedenstein *v.* U. S., 35 Ct. Cl. 1.

[4] Donovan *v.* N. Y., 33 N. Y. 291; Walsh *v.* Columbus, 36 Ohio St. 169.

[5] State Trust Co. *v.* Duluth, 104 Fed. 632; Wisconsin Cent. R. Co. *v.* U. S., 164 U. S. 190, 212, 41 L. Ed. 399, aff'g 27 Ct. Cl. 440; Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973; Logan County *v.* U. S., 169 U. S. 255, 42 L. Ed. 737, aff'g 31 Ct. Cl. 23; Maryland Steel Co. *v.* U. S., 235 U. S. 451, 59 L. Ed. 312.

[6] Maryland Steel Co. *v.* U. S., 235 U. S. 451, 59 L. Ed. 312; Brady *v.* Mayor, 132 N. Y. 415, 30 N. E. 757; Messenger *v.* Buffalo, 21 N. Y. 196.

the public body may so deal with third persons as to justify them in assuming the existence of an authority in another, which in fact has never been given.[1] Where the circumstances of the contract require the affirmative duty of the public body to act and it fails to act with reference to the subject-matter, it will be assumed that the continued receipt of the fruits and benefits of the contract was by its authority and acquiescence.[2]

§ 12. When Public Body is Bound by Acts of Public Officers.

Public bodies are not bound by the acts of their officers in making unauthorized changes in public contracts. Individuals as well as courts must take notice of the extent of the authority conferred by law upon a person acting in an official capacity. Ignorance of the law furnishes no excuse for any mistake or wrongful act.[3] Different rules prevail in respect to the acts and declarations of public agents from those governing in the case of private agents. Principals of the latter are often bound by the acts and declarations of their agents even where the act or declaration was done or made without any authority, if it appear that the act was done, or the declaration made, in the regular course of employment. But public bodies or the public authority are not bound in such a case unless it manifestly appears that the agent was acting within the

[1] Davies *v.* N. Y., 93 N. Y. 250; see Van Dolsen *v.* Bd. of Educ., 162 N. Y. 446, 56 N. E. 990.

[2] Davies *v.* N. Y., 93 N. Y. 250.

[3] Hawkins *v.* U. S., 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181; Whiteside *v.* U. S., 93 U. S. 247, 23 L. Ed. 882, aff'g 8 Ct. Cl. 532; Logan County *v.* U. S., 169 U. S. 255, 42 L. Ed. 737, aff'g 31 Ct. Cl. 23; Maryland Steel Co. *v.* U. S., 235 U. S. 451, 59 L. Ed. 312; State *ex rel. v.* Hays, 52 Mo. 578; Delafield *v.* Illinois, 26 Wend. 192; Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535.

scope of his authority, or that he had been held out as having authority to do the act, or make the declaration, for or on behalf of the public authorities.[1]

Public officials cannot bind public bodies either by making or ratifying a fraudulent contract[2] or an illegal contract.[3] Boards of audit even in allowing accounts are limited to the powers conferred and when they transgress their limitations, their acts are void.[4] An illegal audit can be attacked either directly or collaterally because it is void. But an audit based upon a legal power to act, but erroneous as to some matter of fact or law is a judicial determination under competent jurisdiction and cannot be reaudited by some other officer or collaterally attacked.[5] However, public officials may bind the public body of which they are officers by acts done or words uttered when done or spoken or uttered by an authorized officer or agent who had charge of the matter or in the line or scope of his duty.[6] In the case of contracts, authorized by law, and not merely special law which may limit and control, and which are necessarily entered into and conducted by officers of a public body, they must of necessity possess the powers to make such contracts effective not merely in their beginning but in their progress as well. They therefore have authority to waive and modify conditions of such a contract and their acts are binding.[7]

[1] Hawkins *v.* U. S., 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181.
[2] Nelson *v.* Mayor, 131 N. Y. 4, 29 N. E. 814.
[3] Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973.
[4] Nelson *v.* Mayor, *supra;* People *ex rel.* Smith *v.* Clarke, 174 N. Y. 259, 262, 263, 66 N. E. 819.
[5] People *ex rel.* Smith *v.* Clarke, *supra.*
[6] Halbut *v.* Forrest City, 34 Ark. 246; Nelson *v.* New York, 5 N. Y. Supp. 688, 131 N. Y. 4, 29 N. E. 814; Town Dist. of Hardwick *v.* Wolcott, 78 Vt. 23, 61 Atl. 471; Maher *v.* Chicago, 38 Ill. 266.
[7] Maryland Steel Co. *v.* U. S., 235 U. S. 451, 59 L. Ed. 312.

§ 13. Public Officer Signing Individually.

Where a contract is signed by the officers of a public body with their individual seals attached but it is intended to be effectual as a contract with the public body and its contractor, it will be sustained as such.[1]

§ 14. Liability of Public Officers.

No right of action will lie against a public official for failure to award a contract to a bidder on public work even though he acts maliciously in so doing.[2] But where his refusal is not regarded in the light of a judicial act he must act in good faith in refusing the award.

§ 15. Agents—Omission to Perform Extrinsic Act which is Foundation of Authority to Act.

It is a settled doctrine of the law of agency that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. This rule is of course not of universal application in the case of public corporations or boards and must of necessity have limited application to them because of their prescribed powers.[3] It has, however, been applied against towns in favor of bona fide holders of its obligations.[4]

[1] Parr *v.* Greenbush, 72 N. Y. 463.

[2] Talbot Pav. Co. *v.* Detroit, 109 Mich. 657, 67 N. W. 979; East River G. L. Co. *v.* Donnelly, 93 N. Y. 557.

[3] Van Dolsen *v.* Bd. of Education, 162 N. Y. 446, 56 N. E. 990.

[4] Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 122, 21 N. E. 168; Bank of Rome *v.* Rome, 19 N. Y. 20.

It serves to protect the innocent against the active or constructive deceit of public officers, who, having the power in their discretion to do the act lying at the foundation of their authority, omit it, and fail to disclose the omission but contract as if there were none. Of course, where the act omitted or represented as performed is not within the power of the principal or agent to perform, the rule cannot apply.[1]

Defenses by official boards resting upon their omission to do the acts they had the power to do in order to perfect the authority they assumed to exercise, are not favored when invoked against innocent parties dealing with them in good faith.[2] Where a contract was made but the board making it failed to make an appropriation the contract will not be invalidated where the contractor performed the work in good faith, without knowledge that the appropriation had not been made, and he had no means of protecting himself against the exhaustion of appropriations available and sufficient at the time his contract was made, but which were not specifically appropriated to his contract through carelessness until the exhaustion prevented it being made at all.[3] The failure of a contractor to file plans or comply with other similar requirements will not deprive a contractor of his rights under a contract, where there is no duty to perform the act, or the duty rests on the owner.[4]

§ 16. Powers of Particular Officers.

The mayor of a city has no general power or any implied

[1] Cogwin *v.* Hancock, 84 N. Y. 532; Van Dolsen *v.* Bd. of Education, *supra;* Wormstead *v.* Lynn, 184 Mass. 425, 68 N. E. 841.

[2] Moore *v.* Mayor, 73 N. Y. 238; Reilly *v.* Albany, 112 N. Y. 30, 19 N. E. 508; Van Dolsen *v.* Bd. of Education, *supra.*

[3] Van Dolsen *v.* Bd. of Education, *supra;* Davidson *v.* White Plains, 197 N. Y. 266, 90 N. E. 825; McGovern *v.* New York, 185 N. Y. App. Div. 609; see O'Rourke Eng. & Cons. Co. *v.* New York, 140 *id.* 498.

[4] Ordway *v.* Newburyport, 230 Mass. 306, 119 N. E. 863.

power to bind the public body by contract, and where he has power conferred upon him, he acts simply as the instrument and agent of the council, which alone has power to obligate the city, and can only bind it to the extent of the power conferred.[1] He cannot impose obligations by new terms and conditions in the contract, nor has he power to change it in any degree. In like manner, the comptroller while he is the chief financial officer of the city and in some cities by charter is given very extraordinary and extensive powers, can only act within the authority expressly given to him.[2] The corporation counsel or chief law officer of the city possesses only the power of a lawyer retained and can obligate the public body he represents only in the same manner as a lawyer may bind an individual client.[3] An armory board has no power to employ an architect.[4]

[1] State *ex rel.* Keith *v.* Comm. Council, 138 Ind. 455, 37 N. E. 1041; Willoughby *v.* City Council, 51 S. C. 412, 29 S. E. 242.
[2] Paul *v.* Seattle, 40 Wash. 294, 82 Pac. 601.
[3] Bank of Commerce *v.* Louisville, 174 U. S. 428, rev'g 88 Fed. 398; Bush *v.* O'Brien, 164 N. Y. 205, 58 N. E. 106.
[4] Horgan & Slattery, Inc., *v.* New York, 114 N. Y. App. Div. 555.

CHAPTER VI

MANNER OF EXERCISING POWERS

§ 17. When Manner Is or Is Not Prescribed.

When the legislature grants to public bodies full power and unlimited authority to construct or erect public works or to do or perform some act in the carrying out of the purposes and objects for which they were created and prescribes no manner of making contracts necessary to the exercise of such powers, the contract may be made in the manner selected by the governing body by a vote upon a motion or by the passage of a resolution to that end, and it is not essential that the contract be made by ordinance to be valid.[1] The courts will not interfere with or undertake to control the manner of the exercise of these powers where the statute leaves the manner of exercising them to the governing body of the municipality.[2]

But where a public body is authorized to make a contract only in a certain prescribed manner and under certain conditions or circumstances and the making of the contract in any other manner is impliedly excluded, the contract which does not conform to the statute is void and no recovery will be permitted even upon an implied liability to pay for benefits received under the contract.[3]

A practice or custom of the officers of public bodies

[1] San Francisco G. Co. *v.* San Francisco, 9 Cal. 453.

[2] Admiral Realty Co. *v.* New York, 206 N. Y. 110, 99 N. E. 241; Perry *v.* Town of Panama City, 67 Fla. 285, 65 So. 6.

[3] McDonald *v.* New York, 68 N. Y. 23; New Jersey Car. Spr. &c. Co. *v.* Jersey City, 64 N. J. L. 544, 46 Atl. 649; Wellston *v.* Morgan, 65 Ohio St. 219, 62 N. E. 127; Bosworth-Chanute Co. *v.* Brighton, 272 Fed. 964.

in transacting business, not in strict compliance with the requirements of its charter, cannot bind such public bodies on a contract not executed or authorized in the manner provided by such charter.[1]

A seal is unnecessary to the valid exercise of the power to contract.[2] But if the statute provides for a vote of the taxpayers, or a prior appropriation or a certificate of the head of a department as a prerequisite to the making of the contract the failure to fulfill these conditions will avoid the contract.

§ 18. **Defects in Preliminary Proceedings.**

If the charter or statutes require certain acts to be performed before public contracts may lawfully be let, the omission to comply with these requirements will invalidate the contract.[3] But where the defect is only technical, or a trivial defect in the notice, such a slight departure from the authority conferred will not be allowed to operate so as to destroy the whole proceeding.[4] And where the public body has the power to contract for the subject-matter in hand and the express contract is invalid for some irregularity in its execution it will be liable on an implied contract for the benefits received.[5] But where the statute provides that the work or improvement shall be let by separate contract for each particular work this is an essen-

[1] Paul *v.* City of Seattle, 40 Wash. 294, 82 Pac. 601; Wormstead *v.* Lynn, 184 Mass. 425, 68 N. E. 841.

[2] Draper *v.* Springport, 104 U. S. 501, 26 L. Ed. 812; Rumford Dist. *v.* Wood, 13 Mass. 193.

[3] People *ex rel.* J. B. Lyon Co. *v.* McDonough, 173 N. Y. 181, 65 N. E. 963; Cits. Bk. *v.* Spencer, 126 Iowa, 101, 101 N. W. 643; Hall *v.* Chippewa Falls, 47 Wis. 267, 2 N. W. 279; Rork *v.* Smith, 55 Wis. 67, 12 N. W. 408.

[4] Portland Lumbering Co. *v.* East Portland, 18 Oreg. 21, 22 Pac. 536.

[5] San Francisco G. L. Co. *v.* San Francisco, 9 Cal. 453; Boyd *v.* Black Sch. Tp., 123 Ind. 1, 23 N. E. 862; Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400; Long *v.* Lemoyne, 222 Pa. 311, 71 Atl. 211.

tial part of the legislative scheme and if not observed will be fatal to an assessment for the improvement.[1]

§ 19. **Failure to Follow Statute—Unimportant Variances.** When a statute under which a public body makes its contract prescribes special formalities, these must be complied with or the contract will be void. These requirements of the statute must be substantially complied with to render the acts of public officers valid. But such provisions need not be literally performed in unessential particulars, where there has been a substantial compliance which answers the purpose or intent of the statute. The failure therefore to annex a guaranty for the proper performance of a contract in the precise language of the statute is an unimportant variance which does not render the contract invalid.[2]

[1] People *ex rel.* O'Reilly *v.* Comm. Council, 189 N. Y. 66, 81 N. E. 557.
[2] People *ex rel.* J. B. Lyon Co. *v.* McDonough, 173 N. Y. 181, 65 N. E. 963.

CHAPTER VII

GIFTS TO PUBLIC BODY TO INDUCE EXERCISE OF POWERS

§ 20. Gifts for Location of Public Buildings.

Where public authorities charged with the duty of locating public structures are confronted with inducements of money aid to erect the structures, provided they are erected in a certain locality, there can be no impropriety or illegality in their taking such offers into consideration in making a choice of location. Nor will such proposed aid be against public policy. Of course, public officials in the performance of their duty should keep perfect freedom of judgment so that public welfare and not the private gain of others shall control their judgments.

If in the selection of a site to locate courthouses or other public buildings, the public officials keep within these limitations, there can be no objection to receiving a donation of land upon which to erect the structure, as a consideration for such selection.[1]

Indeed in many jurisdictions statutes have been passed fixing the location of the State House at a certain city provided the inhabitants would subscribe a certain sum of money toward its erection and these subscriptions have been upheld as based upon a sufficient consideration and as not offending public policy.[2] But where a public official, before his appointment to office in consideration of a

[1] Stilson *v.* Lawrence County, 52 Ind. 213; Island County *v.* Babcock, 17 Wash. 438, 50 Pac. 54; Wisner *v.* McBride, 49 Iowa, 220; Odineal *v.* Barry, 24 Miss. 9.

[2] Carpenter *v.* Mather, 4 Ill. 374; State Treas. *v.* Cross, 9 Vt. 289.

nominal rental agrees to keep the post office in a certain location so long as he remains in office, such agreement is void since the contract amounts to a sale of the exercise of his judgment for private emolument.[1]

It has, however, been held that an agreement by a municipality to locate its city hall and market house at a certain place in consideration of a donation toward the expense of its erection was void as against public policy.[2]

§ 21. **Gifts for Location of Public Buildings—Is it Bribery?**

The donation of land or money for the location of public buildings and the erection thereof is in general not to be considered against public policy, and is not bribery.[3] In like manner, an offer of money to change the county seat will not be deemed either a bribe or opposed to public policy.[4]

Where the action of the officials in charge of the project is influenced solely by reason of the financial aid given by individuals, the entire scheme will on that account be void,[5] as in the nature of a bribe. But gifts of this character are not necessarily illegal or contrary to public policy where some advantage results to the public. If there is a degree of public benefit likely to spring out of the enterprise all questions of policy in carrying it out devolve upon the legislative or governing body in whose keeping the discretion to adopt such enterprise is reposed, and the

[1] Spence *v.* Harvey, 22 Cal. 336; Benson *v.* Bawden, 149 Mich. 584, 113 N. W. 20.

[2] Edwards *v.* Goldsboro, 141 N. C. 60, 53 S. E. 652.

[3] State *v.* Elting, 29 Kan. 397; Dishon *v.* Smith, 10 Iowa, 212; Commrs. *v.* Hunt, 5 Ohio St. 488; Adams *v.* Logan County, 11 Ill. 336.

[4] Stillson *v.* Lawrence County Commrs., 52 Ind. 213; Hall *v.* Marshall, 80 Ky. 552.

[5] Edwards *v.* Goldsboro, 141 N. C. 60, 53 S. E. 652.

exercise of discretion by such public body cannot be controlled by the courts.[1]

Accordingly, a note given to a board of education to purchase a library site or books in the discretion of the board is valid as a gift and does not influence the action of the board in the performance of its official duty and is not against public policy where the board had previously determined the question, but were unable to proceed with their project owing to lack of funds which were thus supplied.[2] And a municipality may deed land to the State for an armory, reserving the right to use the armory for purposes of drill by its police and fire departments.[3]

§ 22. Gifts to Public Body in Consideration of Street Improvement.

A gift of money or land as consideration for laying out of a street or highway or for the location of it in a particular place cannot in the absence of proof of corrupt action, be regarded as a bribe to influence official action or as against public policy.[4] The location and laying out of highways is a matter of public concern and projects relating to such affairs are in the public interest and promotive of the public welfare. So, an offer to contribute money by a private citizen to pay a portion of the cost of laying out a street is not opposed to public policy, but, on the other hand since it diminishes the expense falling upon the public is a gain for the public. Its acceptance apart from direct proof of fraud or corruption, cannot be considered to be a bribe to influence the general governing

[1] State *v.* Mayor of Orange, 54 N. J. L. 111, 22 Atl. 1004.
[2] Kansas City Sch. Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. 656.
[3] State *ex rel. v.* Turner, 93 Ohio St. 379, 113 N. E. 327.
[4] State *ex rel. v.* Mayor of Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62.

body to whom is delegated the discretionary power of laying out and locating streets.[1] While earlier cases seem to have taken the view that mere proof of a gift would be sufficient to move the courts to interfere with the exercise of such discretion,[2] the later and more modern opinion is that the gift is valid and not contrary to public policy.[3] A mere offer to donate so much of an owner's land as is contemplated to be taken in a proceeding to widen the street cannot be considered to invalidate the decision of the public body to make the widening.[4] It is only when the acceptance is upon a condition which amounts to a surrender or barter of some legislative discretion,[5] or when fraud or corruption is shown that such a donation is invalid.

[1] *Idem.* See cases cited.

[2] Comm. *v.* Cambridge, 7 Mass. 158; Smith *v.* Conway, 17 N. H. 586.

[3] Patridge *v.* Ballard, 2 Me. 50; Crockett *v.* Boston, 59 Mass. 182; Ford *v.* North Des Moines, 80 Iowa, 626, 45 N. W. 1031; Springfield *v.* Harris, 107 Mass. 532; Townsend *v.* Hoyle, 20 Conn. 1; Pepin Co. *v.* Prindle, 61 Wis. 301, 21 N. W. 254.

[4] Crockett *v.* Boston, *supra.*

[5] Penley *v.* Auburn, 85 Me. 278, 27 Atl. 158.

CHAPTER VIII

POWER TO ENGAGE IN OR TO AID PRIVATE ENTERPRISE

§ 23. Engaging in Private Enterprise—Rule Stated.

Municipalities are agents of the State intrusted with certain powers of government to be exercised for public uses and purposes and they must keep within the limits of delegated power and function only for the purposes and objects for which they were created.

These governmental purposes not only include the protection of life, liberty and property, but also the promotion of health, convenience, comfort and welfare of its inhabitants. Municipalities possess no power to invade the sphere of purely private enterprise and engage in commercial activities wholly disconnected from public needs and public purposes. Public moneys may only be appropriated and expended for a public purpose. It is, indeed, difficult to say where governmental purposes and functions end and private enterprise begins. Our views in this respect have been altered very considerably in the past few decades of progressive and energetic activity to keep pace with the needs of our growth and the ability of inventive genius in this age of invention to supply them. The wants of to-day are entirely different from those of a century ago, and as another century of development is put behind us in the onward march of events, new needs undreamed of now will lie before the governmental authorities of the future. Tempora mutantur et

nos mutamur in illis. The genius of our government is the ability to temporize.

§ 24. **History of Development of Municipal Enterprise.**

It is not so long ago in the story of our advance that decisions may be encountered which deny even the right to supply water to our municipalities, as a power to be implied from general powers, and that in order to be able to furnish to its inhabitants so great a need as water, the power to supply it must be conferred in express terms. It was said that the matter of furnishing water was the duty of each individual. But this could not with wisdom and sense be said to-day. Each citizen could not build a well in his back yard, for modern apartment houses in our large cities with their numberless tenants leave no back yard of any size, and if the individual could dig a well, the supply would be utterly insufficient from subterranean sources with his neighbors every few feet away tapping his supply. And if he could obtain a supply, it would probably be polluted and poisoned by gas seeping through the ground from leaking gas mains so that it would be utterly unfit for human consumption. What answer would a city which consumes as does the city of New York, six hundred fifty million gallons daily make to such a ruling? Her necessities would compel the courts to imply such a power from the most general grant of powers. Circumstances would compel the courts to alter their views in the face of a controlling necessity. The growth in these public uses has been exceptional. From the private well and the town pump, was evolved the private water company which has almost wholly disappeared, and municipal ownership and operation of waterworks is everywhere the recognized rule under

controlling and imperative necessity which makes them essential to the very existence of our cities in these times. In the same way from the candle and the paper lighter to the kerosene lamp and beyond it to gas and electricity, our towns and cities have grown to the point where it is recognized that the legislatures have full power to authorize the ownership and erection of lighting plants. And so essential is the use of this commodity that from very general powers to furnish a supply to the municipality, the courts have held municipalities were entitled to sell the products of these plants to its inhabitants. In like manner, the power to furnish gas and electricity to light its streets and to sell to its inhabitants for lighting purposes has been declared to be impressed with a public use for which public money could be lawfully expended. And while the courts were wrestling with the problem as to whether the city of Toledo could engage in the municipal ownership and operation of natural gas works to furnish gas for public and private use and consumption and to thereby furnish fuel to its inhabitants for heating purposes, every one of these municipalities engaged in selling electricity for lighting purposes without amendment of charter by the legislature, but through the agency of invention, were put into the heating business by the invention of electric heaters, electric stoves and irons, curlers, toasters and other uses ad lib. Although it was not intended that these municipalities should sell heat but only light, the current sold is used for all purposes of heat and light which modern invention admits.

But in the case referred to,[1] it was determined that heat

[1] State *ex rel.* Atty.-Gen. *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729.

was an indispensable agency of public health, comfort and convenience of every inhabitant of our cities and that the imposition of taxes to meet the cost of erecting a plant to supply gas for heating uses was a public purpose, even though a new object of municipal policy.

It was also determined in deciding whether the objects for which taxes are assessed, constitute a public or a private purpose, that the courts cannot leave out of sight the progress of society, the change of manners and customs, the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power, and that courts are not bound by the objects for which taxes have been customarily levied in other times.

Similarly, under stress of great public necessity the statute which authorized the city of New York to build its subways was upheld. That city, built on a narrow strip of island, with all of its business and congestion at one end, was in dire distress for need of transit facilities. The Rapid Transit Act authorized the formation of a company to construct a subway. The Commissioners appointed laid out the route and tried to induce private capital to construct and operate it. But private enterprise and capital would not construct it and the city either had to build it itself or go without it despite its needs because of the crowded and congested condition of travel. Since the work was authorized by the legislature, was necessary and required for the welfare of the people, and was public in character, the act was sustained as promoting a lawful municipal purpose.[1] To those who know the situation in the city of New York, it is manifest

[1] Sun Print. & Pub. Ass'n *v.* Mayor of New York, 152 N. Y. 257, 46 N. E. 499.

that it would have been a calamity of the highest degree had the legislation not been sustained.

Thus the providing of water, light, heat and impliedly fuel and transportation have been sustained as legitmate objects of municipal enterprise each impressed with a public purpose for which money raised by taxation may be expended.

§ 25. History of Municipal Enterprise—View of Courts—Too Narrow.

The evolution of the engaging by municipalities in commercial enterprise seems to be by challenge. One case denies a municipality the right to engage in the business of plumbing and suggests the utter impossibility of implying the right to sell ice as an incident to the power to supply water.[1] But straightaway it is decided and in the same jurisdiction that ice is but water in another form and it is necessary to the health of the people of the southern climate of Georgia, and at once the municipality is set up in the ice business.[2] Another case allows the sale of natural gas or fuel and derides by challenge the possibility of municipalities engaging in the business of mining and selling coal.[3] Immediately but quite independently the query is answered in another case, if ice is necessary to the health of Georgia, a southern climate, coal is necessary to the health of Maine, a northern climate.[4] The Ohio court argues that coal can be transported by ordinary channels of transportation and at slight expense, while natural gas must be carried through pipes in the streets and by machinery and plant purchased at great expense beyond the enterprise

[1] Keen *v.* Waycross, 101 Ga. 588, 29 S. E. 42.
[2] Holton *v.* Camilla, 134 Ga. 560, 68 S. E. 472.
[3] State *ex rel.* Atty. Gen. *v.* Toledo, 48 Ohio St. 112, 11 L. R. A. 729.
[4] Laughlin *v.* Portland, 111 Me. 486, 90 Atl. 318.

and capital of the individual.[1] Immediately the Maine court, but quite unconscious of the other court's attitude, answers that coal fuel is a monopoly and that the use of the streets for pipes is not the test by which the use is to be determined to be public and it raises a question about grocery stores, meat markets, and bakeries.[2]

The city of New York starts in the bus business and it is declared to be without power because not granted expressly to it by the legislature and, in turn, the New York court raises the question that if the Home Rule Act will authorize the omnibuses, it will authorize municipal markets, municipal department stores, municipal drug stores.[3] If these queries are prophetic as in the case of ice and coal, whither is municipal enterprise bound?

Courts in these cases seem to have become obsessed with the subject in hand, and while holding it to be a valid exercise of municipal power close the bars to every other possible commodity, as an object of municipal enterprise. They lay down tests which are somewhat artificial and questionable.

If the municipalities have the power to regulate the sale of liquor by establishing municipal dispensaries and taking over the exclusive sale of it,[4] why cannot they take over the sale of drugs and narcotics? Indeed, there is a much stronger reason in the case of these drugs, for when cocaine enters the human system, morality leaves it. If coal can be sold to citizens, why not wood which is just

[1] State *ex rel.* Atty. Gen. *v.* Toledo, *supra.*
[2] Laughlin *v.* Portland, *supra.*
[3] B'klyn City Ry. Co. *v.* Whalen, 191 N. Y. App. Div. 737, 229 N. Y. 570, 128 N. E. 215.
[4] Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759; Farmville *v.* Walker, 101 Va. 323, 43 S. E. 558.

as essential for fuel. If coal and gas and water, why not milk and bread. No situation has been quite so acute or so embued with necessity as has been the milk and the ice situation in our larger cities in recent years. The entire comfort and welfare of the general population is dependent during the very warm summers upon a proper ice supply, and the welfare and comfort of the infant population depend upon a healthful milk and ice supply. The young are the assets of the State, its future citizens upon whom its future welfare will depend. Can it be said that where private enterprise fails through strikes or otherwise that the municipality cannot step in under appropriate legislation to prevent infant mortality and engage in the business of ice and milk supply by contracting for its delivery and taking charge of its distribution or by municipal herds and ice plants. Indeed, almost every municipality which runs a penitentiary or reformatory has a municipal herd, and if it is lawful for one use, it is for the other and, in the latter case, it cannot be justified under a claim of police power as it is not at all essential to the exercise of its police power that it shall maintain cows for a milk supply. And it would seem an anomaly of the deepest sort to say that a city could lawfully maintain a herd to supply pure milk to criminals but it could not maintain one for the innocent babes who inhabit it, when the obligation so to do arises. To say that a supply of bread under proper exigencies may not be furnished by a municipality is likewise untenable.

Yet it is not necessary because municipalities have these powers that they should use them, but it is still competent and proper to maintain that the powers exist. They are not new powers but simply new exercises of powers always possessed.

Everyone is familiar with the passage of the Home Rule provisions of the Ohio Constitution and the Home Rule Act of New York and what was claimed by their sponsors could be accomplished under them. The courts should exercise caution in imposing limitations upon the application of legislative acts of this character by invoking hidden prohibitions of the Constitution.

There is altogether too unscientific a handling of this entire question and an utter disregard in most cases of the essential bases upon which its proper solution rests. These suggestions are urged not so much to uphold or encourage a practice of using these powers as they are for a recognition of the existence of these powers and of the principles upon which they rest. Granting the need in any community of any one of the essential commodities of life within the general classification of fuel, food and clothing, it must be admitted that as long as they are offered without discrimination to the general public they are a proper public use for which public moneys may be appropriated, and it is indeed a rather feeble government which must acknowledge a lack of power to furnish them. As to the exercise of this power in competition with private enterprise or when private enterprise can act, unhesitatingly the power should not be used. It must be admitted that the State and nation possess as does every sovereign possess these powers as a part of its war power to preserve its existence. Can we say in times of peace when, in our present complex civilization, our cities necessarily depend upon these articles of general necessity to be furnished from outside, that when the preservation of lives of our inhabitants depends upon a proper supply of these commodities that the State or its agencies cannot furnish them?

§ 26. **Proper Objects of Home Rule Should be Attained.**

The State as the sovereign has taken of its omnipotence in the matter of local self-government and conferred it upon municipalities as absolutely as it was possessed by itself.

Many home rule acts have been passed in various States conferring upon localities the time-honored function of local self-government. Some constitutions confer this power absolutely. The beneficent purposes of these acts should be upheld when possible. They are remedial in their nature and should be liberally construed for the benefit of the public.

While agreeing in the result that moving picture theatres are not a public purpose for which taxes might be imposed,[1] it cannot be contended that moving pictures may not be used for educational purposes and paid for out of the tax purse. They constitute one of our most impressive educational mediums and, no doubt, the purely pleasurable and emotional side of this modern enterprise will some day give way to a larger development of it upon the educational side when they will come into general use for exposition in municipal auditoriums; and certainly such a purpose would be public and would be authorized under the broad powers of local self-government conferred by the Home Rule Acts. The particular is included in the general, and when the legislature intended specific enterprises should be undertaken under these broad general powers, the courts should be slow to curtail or suppress them. In like manner, if the broad powers conferred under the New York Act intended the right to engage in the operation of omnibuses, the courts should not send the city to the legislature to obtain the special right already conferred

[1] State *ex rel.* Toledo *v.* Lynch, 88 Ohio St. 71, 102 N. E. 670.

and so intended by general language, unless forced so to do by defects or omissions in the statute.

§ 27. Views of Justice Holmes—A True Basis.

The dissenting opinion of a distinguished jurist in the Massachusetts fuel decision,[1] states the case squarely, when read in conjunction with our concept of government which is founded on the principle of individualism.

Mr. Justice Holmes declared that when money was taken to enable a public body to offer to the public without discrimination, an article of general necessity, the purpose is no less public when that article is wood or coal than when it is water, gas, electricity or education, to say nothing of the cases of paupers or of taking of land for railroads or public markets.

There is and always will be a public necessity impressed upon certain articles of fuel, food or clothing[2] and as the stress of times grow, with increasing populations, greater tendency to congregate in cities, disregard of agricultural and engaging in industrial pursuits, the necessity will grow. Cities depending upon outside for food supply may be ultimately forced in the interest of keeping themselves going to take hold of the marketing of these commodities which are essential to their own existence. Civilization is becoming more complex and, as the complexity increases, who can foresee the needs of the future and limit the exercise of powers which those needs will demand? This reasoning of this learned jurist is neither paternalistic, socialistic, nor altruistic. It supports the doctrine of individualism and laissez faire and is expressed in view of the exigencies of to-morrow, unblinded by visionary

[1] Opinion of Justices, 155 Mass. 598, 30 N. E. 1142.
[2] See Munn *v.* Illinois, 94 U. S. 113, 126, 24 L. Ed. 77, aff'g 69 Ill. 80.

generalities, or doubts about the wisdom of the people and of their ultimate rights to exercise their own powers.

§ 28. Limitations on Municipal Enterprise—Rules Controlling Limitations.

There is, however, a proper line at which these powers must be arrested. It is not the artificial boundary attempted to be made by some of the courts after they themselves have crossed their own line with their own favorite commodity. It is not enough to say that electricity, water and gas can only be produced by coöperation of all the populace in the erection of plants and works because of the expense which individuals could not bear. The cost will not make the use public. It is not a proper test to call these commodities public because permission must be obtained to convey them through pipes and wires, under or over the public streets. As matter of fact, if food or fuel was sent through the pipes by pneumatic or other agency, it would by this operation become public according to this test.

If the object is private, if the business is purely private, not impressed with real public necessity, the public have no power to invest public moneys in such speculative ventures or strictly commercial endeavors. The commodity must be one of general public necessity, convenience or welfare and it must be supplied without discrimination when private enterprise fails. These are the only appropriate tests. Difficulty of supply is an artificial barrier invented by the courts under legislative urging to meet what the legislature deemed a public emergency when it called upon the court a second time for its opinion.[1] It was also

[1] See Massachusetts fuel cases, preceding sections.

urged by the Maine court [1] that grocery stores, meat markets and bakeries will not fall within its test of difficulty to obtain supply. Difficulty is not the test either of the power or the public use. What could be more necessitous than the ice and milk supply which certainly fall within the general group of commercial activities mentioned. If coal, why not ice? Under the reasoning of the Maine court, ice would immediately become both difficult and necessary. If electricity which comparatively few use, why not bread which all use? The test should be the common sense view of Justice Holmes when private enterprise fails. He, with clear vision and confidence in his countrymen, meets the issue on logical grounds undismayed by fear of socialistic legislation and so-called communistic activities of our cities.

§ 29. Implied Power to Engage in Private Business.

Municipalities possess no implied power to engage in private enterprise or business.[2] In the exercise of its private or business functions, it must have authority either express or necessarily implied to empower it to engage in the private or business activities which municipalities may be authorized to assume.[3] It has been held under a narrow interpretation of Home Rule grants that the right to engage in private enterprises will not be implied from a general grant of power such as general welfare or home rule provisions of its charter or statutes.[4] No implica-

[1] See cases, preceding sections.

[2] Brooklyn City Ry. Co. *v.* Whalen, 191 N. Y. App. Div. 737, 229 N. Y. 570, 128 N. E. 215; *Re* Municipal Fuel Plants, 182 Mass. 605, 66 N. E. 25; Opinion of Justices, 155 Mass. 598, 30 N. E. 1142; Att'y Gen. *v.* Detroit, 150 Mich. 310, 113 N. W. 1107.

[3] State *ex rel.* Att'y Gen. *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729.

[4] State *ex rel.* Toledo *v.* Lynch, 88 Ohio St. 71, 102 N. E. 670; Brooklyn City Ry. Co. *v.* Whalen, *supra*. See § 23–28 *ante*.

tion can be drawn of a grant of power to municipalities to assume those activities which according to our conception of government founded on the principle of individualism is left to the enterprise of private individuals,—a system under which all of our success as a government industrially, commercially and financially has been accomplished.[1] They may not, therefore, erect buildings to rent or lease them or engage in the sale of commodities unless expressly thereunto authorized by legislative sanction and then only when the purpose is public.[2]

§ 30. Power to Authorize Municipal Enterprise Exists in State Legislature.

By the great weight of authority, the power to authorize the municipality to engage in the business of supplying commodities which may be impressed with a public necessity and constitute a public use clearly exists in the legislature, as the repository of the sovereign power of the State, but such power must be conferred upon municipalities before the latter can exercise the power, and until so authorized they possess no implied power to engage in business in competition with private persons engaged in the same business.[3] These authorities differ as to the test to be applied in determining what constitutes a public use.[4]

[1] Laughlin *v.* Portland, 111 Me. 486, 90 Atl. 318; Brooklyn City Ry. Co. *v.* Whalen, *supra.*

[2] State *ex rel.* Att'y Gen. *v.* Toledo, 48 Ohio St. 112, 11 L. R. A. 729; Heald *v.* Cleveland, 19 Ohio Nisi Prius N. S. 305; Sugar *v.* Monroe, 108 La. 677, 32 So. 961; Warden *v.* New Bedford, 131 Mass. 23; Kingman *v.* Brockton, 153 Mass. 255, 26 N. E. 998; Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200.

[3] Brooklyn City R. Co. *v.* Whalen, 191 App. Div. 737, 229 N. Y. 570, 128 N. E. 215; Sugar *v.* Monroe, 108 La. 677, 32 So. 961; Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200; Worden *v.* New Bedford, 131 Mass. 23; Milligan *v.* Miles City, 51 Mont. 374, 153 Pac. 276; Atty. Gen. *v.* Detroit, 150 Mich. 310, 113 N. W. 1107; Hunnicutt *v.* Atlanta, 104 Ga. 1, 30 S. E. 500; Laughlin *v.* Portland, 111 Me. 486, 90 Atl. 318.

[4] Laughlin *v.* Portland, *supra; Re* Municipal Fuel Plants, 182 Mass. 605, 66 N. E. 25. See preceding sections, this chapter.

When authorized by the legislature to engage in these activities, the money raised by municipalities and used by them in conducting the enterprise is engaged in a public purpose.[1] When money is appropriated and expended by municipalities in the exercise of these business powers and functions, the fact that some incidental benefit is conferred upon individuals is not an objection to the existence or exercise of the power so long as the main purpose of the expenditure is to subserve a public municipal purpose.[2] If the primary object of the expenditure is to serve some private end, it is illegal although incidentally it may serve some public purpose. But if the primary object is to serve some public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense which standing by itself would be illegal.[3] Thus while a municipality might not erect a building to rent or lease, where it had an old building useless for public needs, because superseded by a new one, it may lawfully and in the exercise of prudence and a lawful regard not to sacrifice its property expend money upon it so as to put it in condition for rental purposes.[4] If a municipality is without power to erect a steam plant and engage in the sale of power, its action in expending money for such a purpose would be illegal, but where it has authority and has erected a steam plant which produces a surplus of steam, it may lawfully sell such surplus power, although primarily it could not have erected a plant for such a purpose.[5] While a municipality may

[1] Laughlin *v.* Portland, *supra.*
[2] Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200; Daggett *v.* Colgan, 92 Cal. 53, 28 Pac. 51; Milligan *v.* Miles City, 51 Mont. 374, 153 Pac. 276.
[3] Bates *v.* Bassett, *supra.*
[4] Bates *v.* Bassett, *supra.*
[5] Milligan *v.* Miles City, 51 Mont. 374, 153 Pac. 276.

supply and sell water to its inhabitants under a grant of authority to erect waterworks or provide a supply of water, it may not enter upon the business of selling the water to inhabitants of neighboring municipalities, as this becomes a private enterprise in which the public may not engage without express authority from the legislature.[1] For the same reason, municipalities are denied the power to engage in the business of selling light for private use in the absence of express grant of power,[2] but this power should be readily inferred from general powers.[3] The power to engage in the business of selling ice will also be inferred from the grant of power to supply pure and wholesome water, since ice is merely a variant form of water.[4] But powers thus granted are not unreasonably extended. A grant of authority to repair streets under its charter will not imply a power to operate a stone quarry outside of its corporate limits.[5] Exclusive grant of power to one person to run omnibuses is not a valid exercise of a power to license, tax and regulate omnibuses.[6] Nor will a municipality by implication from a general grant of power be deemed authorized to make a contract which is in effect a pledge of its credit to support a private enterprise.[7]

[1] Childs *v.* Columbia, 87 S. C. 566, 70 S. E. 296; Farwell *v.* Seattle, 43 Wash. 141, 86 Pac. 217; Rehill *v.* Jersey City, 71 N. J. L. 109, 58 Atl. 175.

[2] Baily *v.* Philadelphia, 184 Pa. St. 594, 39 Atl. 494; Swanton *v.* Highgate, 81 Vt. 152, 69 Atl. 667.

[3] Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849; Keenan *v.* Trenton, 130 Tenn. 71, 168 S. W. 1053; Andrews *v.* South Haven, 187 Mich. 294, 153 N. W. 827.

[4] Holton *v.* Camilla, 134 Ga. 560, 68 S. E. 472.

[5] Donnable *v.* Harrisonburg, 104 Va. 533, 52 S. E. 174.

[6] Logan *v.* Pyne, 43 Iowa, 524.

[7] Scott *v.* LaPorte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; Ottawa *v.* Carey, 108 U. S. 110, 27 L. Ed. 669.

§ 31. Emergency Which Will Authorize—Engaging in Municipal Enterprise Without Express Authorization.

The inadequacy of the street railway service in a municipality is not a sufficient justification for a municipality to assume a power not granted, nor does such inadequacy create an emergency calling for such immediate action as will authorize a municipality to engage in the business of operating stages or omnibuses, or empower it to contract for automobiles for that purpose. A permanent condition of inadequacy of railroad service is not an emergency which will justify continued operation of stage lines.[1]

§ 32. Power to Authorize Municipalities to Engage in Certain Enterprises Does Not Exist.

The legislature has been denied the power to enact legislation which will authorize a town to establish manufactories and operate them either municipally or by lease to private individuals or corporations,[2] and in like manner it has been denied the power to engage in commercial enterprise such as buying and selling of coal in competition with private dealers, as such use of money is not for a public purpose,[3] unless great inadequacy or difficulty of supply exists.[4] Where authority has been conferred to supply electricity the power to supply lamps and fittings as incidental was denied.[5] The power to engage in the moving picture business was denied to cities under the

[1] Brooklyn City R. Co. *v.* Whalen, 191 N. Y. App. Div. 737, aff'd 229 N. Y. 570, 128 N. E. 215.

[2] Opinion of Justices, 58 Me. 590.

[3] Baker *v.* Grand Rapids, 142 Mich. 687, 106 N. W. 208; Opinion of Justices, 155 Mass. 601, 30 N. E. 1142.

[4] *Re* Municipal Fuel Plants, 182 Mass. 605, 66 N. E. 25; *Contra*, Laughlin *v.* Portland, 111 Me. 486, 90 Atl. 318. But see §§ 23–28, *ante*.

[5] Atty. Gen. *v.* Leicester, 80 L. J. Ch. 21.

home rule clause of the Constitution of Ohio because such enterprise did not come within the powers of local self-government.[1]

The city was denied the implied right in the absence of express legislative authority to engage in the general plumbing business as an incident to its authority to operate a waterworks, and in the course of such business to sell supplies and materials to private citizens and dc contract work in placing and installing these upon their premises.[2]

Nor does a statute which authorizes the holding of real estate empower a municipality to engage in the business of buying and selling real estate or dealing generally in it as principal or broker.[3]

A general power to hold, purchase and convey real estate, and to make regulations for health, will not authorize a city to lease land for use of picnic parties and people generally.[4] In the absence of an express sanction from the legislature, a municipality may not engage in the manufacture of brick for paving purposes.[5] But a city authorized by charter to grade and pave streets and purchase and hold real estate necessary or convenient for its use, has been declared to have power to purchase a stone quarry and manufacture crushed stone.[6] But under similar statutory power, the right to operate a quarry outside of its limits was declared not to be implied.[7]

[1] State *ex rel.* Toledo *v.* Lynch, 88 Ohio St. 71, 102 N. E. 670.
[2] Keen *v.* Waycross, 101 Ga. 588, 29 S. E. 542.
[3] Hayward *v.* Red Cliff, 20 Colo. 33, 36 Pac. 795; Champaign *v.* Harmon, 98 Ill. 491.
[4] Bloomsburg Land Imp. Co. *v.* Bloomsburg, 215 Pa. 452, 64 Atl. 602.
[5] Atty.-Gen. *v.* Detroit, 150 Mich. 310, 113 N. W. 1107.
[6] Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94.
[7] Donable *v.* Harrisonburg, 104 Va. 533, 52 S. E. 174; Duncan *v.* Lynchburg, 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 331.

§ 33. **Sale of Fuel by Municipalities.**

In Maine, the reason advanced to sustain the legislation authorizing the municipality to engage in the fuel business, was that fuel was not an ordinary article of merchandise for which there are substitutes, but an indispensable necessity of life. The element of commercial enterprise was entirely lacking. The act did not contemplate embarking in business for the sake of direct profits since the fuel was to be furnished at cost, nor for the sake of indirect gains that might result to purchasers through reduction in price by governmental competition, but simply to enable the citizens to be supplied with something which was a necessity in its absolute sense to the enjoyment of life and health which could otherwise be obtained with great difficulty, and whose absence would endanger the whole community.[1]

In Massachusetts, it was declared that the legislature possesses no power to authorize the purchase of fuel by municipalities for resale since this is not a public purpose for which public money could be expended, and they may not be given power by the legislature to buy and sell coal and wood in competition with private enterprise, although such fuel was scarce and high, or because thereby, the cost to their inhabitants could be reduced, unless there was such a local scarcity as created widespread distress which could not be taken care of by private enterprise. Unless the last described circumstances exist, municipalities may not be given power by the legislature to engage in common kinds of business which can be conducted successfully by individuals without the use of any governmental function, and to engage in these businesses

[1] **Laughlin** *v.* Portland, 111 Me. 486, 90 Atl. 318.

in buying and selling, in competition with private enterprise.[1]

§ 34. Power to Authorize Use of Public Money to Erect Homes for Wage Earners—To Acquire Surplus Land in Street Widening and Use Same to Promote Manufacture.

The legislature has no power to use the money of the public or money deposited in the State treasury as unclaimed deposits by savings banks to purchase land and develop it by buildings to be rented, managed and sold by it for the purpose of providing homes for mechanics, laborers or wage earners or for the purpose of improving the public health by providing homes in the more sparsely populated areas of the State for those who might otherwise live in the most congested areas of the State.[2]

It cannot authorize a municipality to exercise the right of eminent domain in connection with the laying out of a public thoroughfare by taking land adjoining but outside the proposed thoroughfare with a view to its subsequent use by private individuals under conveyance, lease or agreement, although such use may be intended to promote trade and manufacturing by the erection of suitable buildings on the land, the purpose not being public within the constitution.[3]

The Constitution of New York was amended to permit, in a somewhat parallel situation, the acquiring of surplus lands above the actual needs for a given public purpose, its object being to prevent excessive awards for consequential damages to lands remaining after a taking.[4]

[1] Opinion of Justices, 155 Mass. 598, 30 N. E. 1142; *Re* Municipal Fuel Plants, 182 Mass. 605, 66 N. E. 25.

[2] Opinion of Justices, 211 Mass. 624, 98 N. E. 611.

[3] Opinion of Justices, 204 Mass. 607, 91 N. E. 405.

[4] New York Const., Art. I, sec. 7.

§ 35. Power to Engage in Certain Enterprises May Be Conferred.

A municipality, while it has the power to erect an auditorium hall and to issue bonds therefor, and may use such auditorium for any lawful purpose and derive revenue therefrom, has no authority to issue bonds to be used primarily for the erection of a building for exposition purposes. Nor may it use portions of such auditorium for lodge rooms, concert halls, show rooms or theaters as purely private enterprise.[1]

The theory upon which the erection and maintenance of such buildings is sustained is because they afford a means to exercise the right of assemblage which is an inherent right of the people which has been anciently exercised. The same right has been accorded in other States,[2] but in one State, the erection was sustained as being a public utility.[3] When the legislature grants power to municipalities to sell intoxicating liquors or establish dispensaries for the same, this is a valid exercise of the police power, the promotion of the public good, and money expended is for a public purpose.[4]

§ 36. Usual Powers of Municipalities in America.

The support of schools, the relief of paupers, the maintenance of highways are public uses. Legislation has been declared valid which conferred on municipalities the power to own and operate railroads, lighting plants, power and heating plants, water works for a water supply,

[1] Heald *v.* Cleveland, 19 Ohio *Nisi Prius* N. S. 305.

[2] Denver *v.* Hallett, 34 Colo. 393, 83 Pac. 1066; Wheelock *v.* Lowell, 196 Mass. 220, 81 N. E. 977.

[3] State *ex rel. v.* Barnes, 22 Okla. 191, 97 Pac. 997.

[4] Equit. Loan & Security Co. *v.* Edwardsville, 143 Ala. 182, 38 So. 1016; Farmville *v.* Walker, 101 Va. 323, 43 S. E. 558; Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759.

public grounds, parks and recreation centers. They may hold property for charitable purposes, establish municipal lodging houses, public baths and bath houses, public libraries, reading rooms. They may purchase books and may even maintain and regulate public band concerts. They may fill and improve lands for terminal facilities, may improve harbors, docks and terminals and may erect and carry on machine shops, repair shops and garages, the ownership of markets and the ownership and operation of ferries.

In England in addition to engaging in all or nearly all of the foregoing activities, cities and other municipalities have assumed as legitimate public enterprises the operation of slaughter houses, cold air stores, ice plants, buildings for entertainment and music, and they have engaged in the sale of milk and the manufacture of brick. They have built and rented dwellings to laborers. The tendency in both countries is to permit a wider extension of powers and the engaging by cities in many activities heretofore considered solely within the province of private enterprise.[1] Indeed, the nation itself has set the example and led the way both in England and America by establishing a parcel post in competition with the express companies and is using all post routes including the air for this purpose.

§ 37. Aid to Private Enterprise.

Public money can only be expended for public purposes. The giving of aid to manufacturing and other private enterprises to induce them to locate, construct and operate their establishments within the confines of a municipality, will not justify it in raising money by taxation. Taxation

[1] See Dillon, Mun. Corp., § 21.

to pay bonds for the aid and support of private enterprise is not taxation for a public object. It is taxation which takes the private property of one individual for the private use of another.[1]

Stock may not be purchased in a manufacturing enterprise, to procure or keep its location within the confines of a municipality. While it tends directly to benefit every citizen by the increase of general business activity, the greater facility of obtaining employment, the consequent increase in population, the enhancement in the value of real estate, and the opportunities for its sale and the multiplication of conveniences, these are not the direct and immediate public uses and purposes to which moneys raised by taxation may be devoted,[2] and such purchase contracts are therefore void. A statute which authorized a municipality, therefore, to build a dam for the purpose of leasing the water power obtained to manufacturing industries was declared void.[3] While the contemplated improvement of the water power on certain rivers if judiciously and properly carried out, might build up a city and add greatly to its general growth, welfare and prosperity, just as would the establishment of any kind of

[1] People *v.* Westchester Co. Nat. Bank, 231 N. Y. 465, 132 N. E. 241; Loan Assn. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455; Parkersburg *v.* Brown, 106 U. S. 487, 501, 27 L. Ed. 238; Cole *v.* LaGrange, 113 U. S. 1, 28 L. Ed. 896, aff'g 19 Fed. 871; Missouri Pac. Ry. Co. *v.* Nebraska, 164 U. S. 403, 41 L. Ed. 489; State *v.* Osawkee Tp., 14 Kan. 418; Central Branch Un. Pac. R. Co. *v.* Smith, 23 Kan. 745; Coates *v.* Campbell, 37 Minn. 498, 35 N. W. 366; Allen *v.* Jay, 60 Me. 124; Deering & Co. *v.* Peterson, 75 Minn. 118, 77 N. W. 568; Minn. Sugar Co. *v.* Iverson, 91 Minn. 30, 97 N. W. 454; Eufala *v.* McNab, 67 Ala. 588; Markley *v.* Mineral City, 58 Ohio St. 430; Manning *v.* Devil's Lake, 13 N. D. 47, 99 N. W. 51; Michigan Sugar Co. *v.* Auditor Gen., 124 Mich. 674, 83 N. W. 625; Deal *v.* Mississippi County, 107 Mo. 464, 18 S. W. 24; Feldman *v.* Charleston, 23 S. C. 57; Sutherland Innes Co. *v.* Evart, 86 Fed. 597; Bissell *v.* Kankakee, 64 Ill. 249, 21 Am. R. 554; Low *v.* Marysville, 5 Cal. 214.

[2] Weismer *v.* Douglas, 64 N. Y. 91.

[3] Atty. Gen. *v.* Eau Claire, 37 Wis. 400.

manufactures which employ capital and labor, yet municipalities have no power to impose taxes to raise money to be devoted to such purposes.[1] A statute which purported to authorize the levy of a tax for the promotion of the establishment and erection of factories to manufacture sorghum into cane sugar, was declared invalid.[2] In like manner, the power of a municipality to give aid to a grist mill was denied.[3] So the attempt at aid to a private cemetery association was in like manner held without power.[4] But towns and cities may be authorized and empowered to aid in the establishment of irrigation districts.[5] They may also be authorized to subscribe to aid a turnpike company,[6] or to purchase bonds in aid of a plankroad company[7] or one operating a toll bridge.[8] The improvement of harbors where the object is to promote commerce will sustain taxation as for a public purpose. So will the construction of docks, wharves and possibly of warehouses to be used under governmental authority as part of the facilities for the transportation of merchandise in commercial enterprises and the building of railroads for the same purpose may affect the public so directly as to constitute a public purpose for which money raised by taxation may be expended.[9]

By the overwhelming weight of authority, the power of

[1] Mather *v.* Ottawa, 114 Ill. 659, 3 N. E. 216; Coates *v.* Campbell, 37 Minn. 498.
[2] Dodge *v.* Mission Tp., 107 Fed. 827.
[3] Osborne *v.* Adams County, 106 U. S. 181, 27 L. Ed. 129; State *v.* Adams County, 15 Neb. 569, 20 N. W. 96.
[4] Luques *v.* Dresden, 77 Me. 186.
[5] Fallbrook Irrig. Dist. *v.* Bradley, 164 U. S. 112, 41 L. Ed. 369.
[6] Comm. *v.* McWilliams, 11 Pa. St. 61.
[7] Mitchell *v.* Burlington, 71 U. S. 270, 18 L. Ed. 350.
[8] Dodge County Commrs. *v.* Chandler, 96 U. S. 205, 24 L. Ed. 625.
[9] Moore *v.* Sanford, 151 Mass. 285, 24 N. E. 323; Opinion of Justices, 204 Mass. 607, 91 N. E. 405.

the legislature, unless limited by the Constitution, to authorize municipalities to subscribe for the stock of railroad corporations or make gifts to them, has been sustained on the ground that their construction is for a public purpose.[1] But in the absence of express authority, they have no power to subscribe aid to a railroad or other private enterprise.[2]

§ 38. Power to Engage in Ownership and Operation of Railroads.

Railroads are highways constructed on rails, affording means of rapid communication between all points of land for the transportation of men and animals and the various products and necessities, raw and manufactured, of industry and commerce, and the instrumentalities by which these and all businesses of life are conducted. They are regulated and controlled by the public authorities, National and State, for the general welfare, and are required to furnish impartial accommodations to all citizens upon uniform rates established by law to that end from time to time.

They are considered in the highest sense to be necessary instruments of commerce and indispensable to the necessities of the complex civilization under which we live.

They, therefore, constitute in its broadest sense a public use and purpose and are none the less highways because a fare is charged in order that their use may be allowed.

[1] Gelpcke *v.* Dubuque, 68 U. S. 175, 17 L. Ed. 519; Moultrie *v.* Fairfield, 105 U. S. 370, 26 L. Ed. 945; Otoe County *v.* Baldwin, 111 U. S. 1, 28 L. Ed. 331; State *v.* Nemaha County, 7 Kan. 542; Gibbons *v.* Mobile, etc., R. Co., 36 Ala. 410; Society for Savings *v.* New London, 29 Conn. 174; Butler *v.* Dunham, 27 Ill. 474; Cotten *v.* Leon County, 6 Fla. 610; People *v.* Mitchell, 35 N. Y. 551; Comm. *ex rel.* Armstrong *v.* Perkins, 43 Pa. 400; Aurora *v.* West, 22 Ind. 88.

[2] *Idem.*

Tolls are charged on turnpikes and plankroads, the ancient means which provided a way of transportation which preceded the modern railroad in the evolution of transportation methods, yet these were always considered public highways.[1] Railroads in like manner constitute public highways and are a public use for which public moneys raised by taxation may be expended.[2]

A public use is one the purpose of which must be necessary to the common good and general welfare of the people of the public body, sanctioned by its citizens, public in character, and authorized by the legislature.[3] The building of subways for the carriage of such passengers as pay the regular fare is, therefore, for a public use, and the legislature has power to order or sanction taxation for these and it may provide for their construction at the expense of the city through other agents than those regularly appointed by the municipality.[4] When municipalities engage in the ownership and operation of these railroads, they are not exercising governmental functions but merely their private business powers.[5] Since it is purely a business enterprise, it must be justified if at all under the proprietary powers of the State or political subdivision, and where constitutional provisions indicate a clear purpose that the counties or other political subdivisions should never go into the business of railroad building and forbid donation or ownership in part, such political organization

[1] Sun Print. & Pub. Assn. *v.* Mayor of New York, 152 N. Y. 257, 46 N. E. 499; New York *v.* Brooklyn City R. R. Co., 232 N. Y. 463.

[2] *Idem.* Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446; Platt *v.* San Francisco, 158 Cal. 74, 110 Pac. 304.

[3] Sun Print. & Pub. Ass'n *v.* Mayor, *supra.*

[4] Prince *v.* Crocker, *supra;* Sun Print. & Pub. Ass'n *v.* Mayor, *supra;* Matter of McAneny, 232 N. Y. 377.

[5] Matter of Board of Rapid Transit Commrs., 197 N. Y. 81, 90 N. E. 456, 91 N. E. 1110, 36 L. R. A. N. S. 647; Atkinson *v.* Board of Commrs., 18 Idaho, 282, 108 Pac. 1046; New York *v.* Brooklyn City R. R. Co., 232 N. Y. 463.

will not be allowed to do by indirection what was directly prohibited.[1]

Statutes which authorize cities to engage in such enterprise are not invalid because they impose a heavy debt upon the cities and to an extent deprive them of the control of their streets, as the legislature may impose these burdens and duties upon municipal subdivisions of the State without their consent. Their powers conferred by the legislature are in no sense a contract and do not become vested rights as against the legislature.[2]

§ 39. Private Enterprise—Erection of Halls for Public Assembly—What Private Uses Permitted.

Municipalities possess the power to expend money for the purpose of erecting public meeting halls where citizens may exercise their ancient right of assemblage and discussion of public questions.[3] These purposes are considered public upon the same footing as the erection of a city or town hall. But municipalities have not the power to expend public money in the erection or maintenance of buildings which contain public halls used principally or mainly for lodge meetings, concerts, lectures, dances and theatrical exhibitions, to the members or promoters of which it is let out for profit,[4] and this is so even though the building incidentally housed the fire department and town officers.[5] Accordingly it was declared that munici-

[1] Atkinson *v.* Bd. of Commrs., *supra;* Pleasant Tp. *v.* Ætna Life Ins. Co., 138 U. S. 67, 34 L. Ed. 864; Underground R. Co. *v.* New York, 116 Fed. 952; Walker *v.* Cincinatti, 21 Ohio St. 14; Taylor *v.* Ross County, 23 Ohio St. 22; Cincinnati *v.* Dexter, 55 Ohio St. 93, 44 N. E. 520.

[2] Prince *v.* Crocker, *supra;* Matter of McAneny, *supra.*

[3] Wheelock *v.* Lowell, 196 Mass. 220, 81 N. E. 977; Denver *v.* Hallett, 34 Colo. 393, 83 Pac. 1066.

[4] Wheelock *v.* Lowell, *supra;* Sugar *v.* Monroe, 108 La. 677, 32 So. 961; Brooks *v.* Brooklyn, 146 Iowa, 136, 124 N. W. 868.

[5] Brooks *v.* Brooklyn, *supra.*

palities may not engage in the business of running a theater in one of the school buildings belonging to it, the reasons assigned being that they possess no implied power to engage in business in competition with private persons engaged in the same business, and further that they cannot erect buildings for speculative or business purposes.[1] While such buildings when lawfully erected for a public purpose may be used casually and incidentally to serve a private purpose, either gratuitously or for compensation, nevertheless they cannot use such buildings in a manner which is inconsistent with or prejudicial to the main purpose for which they were erected.[2]

§ 40. Private Enterprise—Erection of Public Buildings—Renting of Same.

Where a city has a public building already erected which is larger than its present needs for municipal purposes, it may allow portions of such buildings to be used for private purposes for the time being, either for a stipulated rent or gratuitously.[3] In erecting a public building, it may also make reasonable provision for probable future wants and need not limit the size of it to actual existing needs.[4] But municipalities possess no implied power to expend public money in acquiring land or in improving lands they own in order to rent for income[5]. The power of taxation

[1] Sugar *v.* Monroe, 108 La. 677, 32 So. 961.

[2] Sugar *v.* Monroe, *supra.*

[3] Worden *v.* New Bedford, 131 Mass. 23; Wheelock *v.* Lowell, 196 Mass. 220, 81 N. E. 977; Sugar *v.* Monroe, 108 La. 677, 32 So. 961; Biddleford *v.* Yates, 104 Me. 506, 72 Atl. 335; Gottlieb K. Co. *v.* Macklin, 109 Md. 429, 71 Atl. 949; Palmer *v.* Albuquerque, 19 N. M. 285, 142 Pac. 929; Jones *v.* Camden, 44 S. C. 319, 23 S. E. 141; Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200.

[4] Kingman *v.* Brockton, 153 Mass. 255, 26 N. E. 998.

[5] Brooks *v.* Brooklyn, 146 Iowa, 136, 124 N. W. 868; Sugar *v.* Monroe, *supra;* Wheelock *v.* Lowell, *supra;* Bates *v.* Bassett, *supra;* White *v.* Stamford, 37 Conn. 586.

may only be used to raise money for public uses and purposes and this is not such a purpose until expressly so declared by the legislature itself.[1] A municipality may not, therefore, divert from public to private use space in such buildings actually needed by the public and so in use.[2]

Obedient to these general principles, the right of a city to erect a memorial hall to be used and maintained as a memorial to soldiers and sailors is conceded, but the authority to turn such building over to a post of the Grand Army has been denied as such a purpose is not public and public money may not be contracted away for such a purpose.[3] In like manner and in accord with the same principle as applies to public buildings, the right to lease a portion of the public streets to street vendors for market use has been denied.[4] Where a town has on its hands an old building formerly used for municipal purposes, it may lawfully expend money in repairing it to put it in condition for renting it. While it could not expend the money primarily as an investment in a building to rent it, it may nevertheless prudently and properly expend it for the purpose cited.[5] Parks are pleasure grounds set apart for the recreation of the public to promote its health and enjoyment. The ground may be used for public libraries, zoölogical gardens and restaurants.[6] A State capitol may be erected therein.[7] But the buildings in a park may not be leased for any purpose which departs from these objects without legislative authority.[8]

[1] Kingman *v.* Brockton, *supra.*
[2] Chapman *v.* Lincoln, 84 Neb. 534, 121 N. W. 596.
[3] Kingman *v.* Brockton, 153 Mass. 255, 26 N. E. 998.
[4] Schopp *v.* St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783.
[5] Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200.
[6] Williams *v.* Gallatin, 229 N. Y. 248, 128 N. E. 121.
[7] Hartford *v.* Maslen, 76 Conn. 599, 57 Atl. 740.
[8] Williams *v.* Gallatin, *supra.*

CHAPTER IX

LOANS OR GIFTS OF MONEY OR CREDIT

§ 41. Loan or Gift of Money to Individual.

The power in municipalities to borrow money and issue bonds therefor implies power to levy a tax for payment of the obligation incurred. But this power contained in the charter or statute to borrow money will not authorize an issue of bonds unless they are issued for a corporate or public purpose where it is provided as it is under the Constitutions of most of the States of the Union that the power of taxation may not be used by municipalities except for corporate or public purposes.[1] They, therefore, have no power to raise money by public taxation to be donated to persons or corporations as a bonus for developing the water power within its limits or in its vicinity for manufacturing purposes.[2] In like manner, they have no power to loan to the owners of land whose buildings were burned in a great fire funds with which they may erect new buildings, as such a use of the public moneys is not for a public purpose.[3] Nor may they give or loan money to provide destitute farmers with seed grain and grain to feed their stock while putting in crops, and such a use may not even be authorized by statute since it is not a public use.[4]

§ 42. Payment of Moral Obligation.

If a State, in carrying out a policy of justice appropriates

[1] Ottawa *v.* Carey, 108 U. S. 110, 27 L. Ed. 669.
[2] *Idem;* Peo. *v.* Westchester Co. Nat. Bk., 231 N. Y. 465, 132 N. E. 241.
[3] Lowell *v.* Boston, 111 Mass. 454, 15 Am. R. 39.
[4] State *v.* Osawkee Tp., 14 Kan. 418, 19 Am. R. 99.

money to pay a debt or to make a contract to repair an injury inflicted upon an individual or a locality, obligatory upon it in honor and justice, this is but part of its legitimate functions and duties as sovereign and the purposes are public.[1] Where a State diverts waters of a river into a canal to the injury of riparian owners and later it endeavors to restore by making improvements in the river bed, under a contract, a portion of the water thus diverted to the use of such owners who had been deprived of it by the act and authority of the State, such an expenditure and the contract made pursuant to it are for a public purpose.[2] The satisfaction of a moral obligation by appropriating money for exempt firemen is using the money for a public purpose and is valid.[3] The legislature of course has full authority to empower a municipality to pay additional compensation to a contractor with the municipality even though no such power existed under its charter.[4] A municipality may also indemnify its officers for personal liability incurred in the discharge of their official duties even though they exceed their authority.[5]

Claims supported by a moral obligation and founded in justice, where the power exists to create them but is defectively exercised, may be legalized by the legislature and enforced against the State or any of its political subdivisions. So it may authorize a contractor to sue in such a case, for the fair and reasonable value of his work.[6]

[1] Waterloo Woolen Mfg. Co. *v.* Shanahan, 128 N. Y. 345, 28 N. E. 358; Davis *v.* Comm., 164 Mass. 241, 41 N. E. 292.

[2] Waterloo Woolen Mfg. Co. *v.* Shanahan, *supra.*

[3] Trustees of Exempt F. Ben. Fund *v.* Roome, 93 N. Y. 313.

[4] Brewster *v.* Syracuse, 19 N. Y. 116.

[5] Bancroft *v.* Lynnfield, 18 Pick. 566; Fuller *v.* Groton, 11 Gray, 340; Pike *v.* Middleton, 12 N. H. 278; Sherman *v.* Carr, 8 R. I. 431; Briggs *v.* Whipple, 6 Vt. 95.

[6] Wrought Iron Bridge Co. *v.* Attica, 119 N. Y. 204, 23 N. E. 542.

The legislature does not exceed its constitutional authority when it compels a municipality to pay a debt which has merit in it, even though a statute of limitations has run against it, or to pay back money expended for services performed for the benefit of a city without lawful authority.[1]

There is no good reason why the State should be powerless to do justice, or to recognize obligations which are meritorious and to provide tribunals to pass on them.[2] The legislature likewise has power to require a municipality to audit and pay debts which have not a sufficient legal basis to enforce payment in a court of law, as long as the claim is just and equitable and of a meritorious nature and it matters not that it is not even cognizable in equity.[3]

But where the municipality never had a legal or moral obligation to pay, payment cannot be compelled by the legislature,[4] unless there is a public purpose in some way involved in the case.[5] Such a purpose does not inhere in a claim for expenses incurred by a public officer in defending himself against charges of official misconduct.[6] And it may not enforce payment of a gratuity or a charity by municipalities.[7] In this connection, it is to be noted that

[1] Brewster *v.* Syracuse, 19 N. Y. 116; Brown *v.* New York, 63 N. Y. 239; New Orleans *v.* Clark, 95 U. S. 644; New York *v.* Tenth Nat. Bk., 111 N. Y. 446, 18 N. E. 618; Friend *v.* Gilbert, 108 Mass. 408; State *v.* Seattle, 60 Wash. 241, 110 Pac. 1008.

[2] Cole *v.* State, 102 N. Y. 48, 6 N. E. 277; O'Hara *v.* State, 112 N. Y. 146, 19 N. E. 659; Cayuga County *v.* State, 153 N. Y. 279, 47 N. E. 288; Lehigh V. R. R. *v.* Canal Bd., 204 N. Y. 471, 97 N. E. 964; Munro *v.* State, 223 N. Y. 208, 119 N. E. 444. See Peo. *v.* Westchester Co. Nat. Bk., 231 N. Y. 465, 132 N. E. 241.

[3] Wrought Iron Bridge Co. *v.* Attica, *supra;* Gaynor *v.* Portchester, 230 N. Y. 210, 129 N. E. 657; People *ex rel.* Dady *v.* Prendergast, 203 N. Y. 1, 96 N. E. 103.

[4] Chapman *v.* New York, 168 N. Y. 80, 61 N. E. 108; Bush *v.* Bd. of Supervisors, 159 N. Y. 212, 53 N. E. 1121; People *ex rel.* Waddy *v.* Partridge, 172 N. Y. 305, 65 N. E. 164; Gordon *v.* State, 233 N. Y. 1.

[5] Stemmler *v.* New York, 179 N. Y. 473, 72 N. E. 581; Sun Print. & Pub. Assn. *v.* Mayor, 152 N. Y. 257, 46 N. E. 499.

[6] Chapman *v.* New York, *supra.*

[7] *In re* Greene, 166 N. Y. 485, 60 N. E. 183.

in some jurisdictions a claim which is merely a moral obligation is declared to be a gratuity,[1] and as such cannot be enforced.

§ 43. Power to Indemnify Public Officials.

Municipalities have implied power to indemnify their officials against any loss or liabilities which they may incur in a bona fide performance of their duties, even though they exceed their legal rights and authority.[2] It is one of the ordinary expenses of a municipality to protect and so reimburse its officer who in good faith has exercised the functions and duties of his office, and has incurred a liability thereby. The reason for the rule is to be found in the fact that it is in the interest of good government and the promotion of the public welfare that the power to indemnify and protect be exercised, for if it were not, it would make officials timid and overcautious in the discharge of their duties, especially in the enforcement and maintenance of law and order, and great harm would consequently result to the public service. The power to indemnify reposed in the general governing bodies of our municipalities in this regard is a discretionary one to be exercised or withheld by them as they see fit. Where the conduct of an official is meritorious and grounded in good faith, even though it prove wrongful because authority was exceeded, they may indemnify, and on the other hand, where officials act in bad faith and imprudently and are compelled to pay damages,

[1] Conlin *v.* San Francisco, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474, 114 Cal. 404, 46 Pac. 279, 33 L. R. A. 752.

[2] Shermann *v.* Carr, 8 R. I. 431; Cullen *v.* Carthage, 103 Ind. 196, 2 N. E. 571, 53 Am. R. 504; State *ex rel.* Crowe *v.* St. Louis, 174 Mo. 125, 73 S. W. 623; Moorhead *v.* Murphy, 94 Minn. 123, 102 N. W. 219; Pike *v.* Middleton, 12 N. H. 278; State, Bradley *v.* Hammonton, 38 N. J. L. 430, 20 Am. R. 404; Fuller *v.* Groton, 11 Gray, 340; Bancroft *v.* Lynnfield, 18 Pick. 566, 29 Am. D. 623; Gregory *v.* Bridgeport, 41 Conn. 76, 19 Am. R. 485.

such payment can be made suitable personal punishment to them by withholding the power of reimbursement, because the acts of the officers were not in the public interest and such conduct ought not be encouraged.[1]

But, where a town collector illegally permitted a party liable to taxation to give his note instead of money for taxes which was received and accounted for as money, and such note was paid by the collector because the maker failed to pay the town, this may not be the subject of indemnity. The vote of a friendly majority even at a town meeting will not permit the bestowal of public money upon a deliquent officer or the diversion of public money raised by taxation to satisfy such a purpose. The public can only be taxed for lawful public purposes, of which this is not one, since it is not connected with the exercise by the town of its legal powers.[2] And, where municipalities are restrained by constitutional provision from making a gift of money to an individual and from incurring indebtedness for other than municipal purposes, it may not be compelled to pay a claim arising under a statute which authorizes the issue of revenue bonds to be paid by taxation to reimburse a city or county officer in the amount of his expenses incurred in defending himself against charges of official misconduct.[3] The usual cases calling for reimbursement are those of police officers sued for false imprisonment or other torts committed in the performance of duty, and in such cases indemnification is proper and usual.[4] So, village trustees

[1] Shermann *v.* Carr, 8 R. I. 431; Cullen *v.* Carthage, 103 Ind. 196, 2 N. E. 571, 53 Am. R. 504; Moorhead *v.* Murphy, 94 Minn. 123, 102 N. W. 219.

[2] Thorndike *v.* Camden, 82 Me. 39, 19 Atl. 95.

[3] Chapman *v.* New York, 168 N. Y. 80, 61 N. E. 108. (See, on the power of the State to make a gift where restrained by constitutional limitation,—People *v.* Westchester County Nat. Bank, 231 N. Y. 465, 132 N. E. 241.)

[4] State *ex rel.* Crowe *v.* St. Louis, 174 Mo. 125, 73 S. W. 623; Cullen *v.* Carthage, *supra;* Moorhead *v.* Murphy, *supra.*

will be protected against acts done in discharge of their official duties,[1] or where a public officer's official report results in libel.[2] An Indian freight agent will be reimbursed for freight paid by him on supplies in a sudden emergency.[3]

§ 44. Power to Indemnify Where No Public Rights are Concerned.

A municipality has no power to indemnify one against his act which may cause resulting damage to others unless public rights are concerned.[4] And where a city contracts to buy land for the purpose of widening a street it cannot assume the responsibility of moving back the building for the owner and restoring it nor indemnify him for risks which may arise during its removal, as municipalities cannot indemnify risks for individuals or others,[5] and they have no power to acquire property for public use by making contracts of this character.[6]

§ 45. Loan of Credit.

Usually by constitutional provision the power to loan its credit or aid individuals by gift is denied to municipal political organizations of the State,[7] although some Constitutions permit the legislature to authorize such loans of

[1] Powell *v.* Newburgh, 19 Johns. 284.
[2] Fuller *v.* Groton, 11 Grav, 340.
[3] U. S. *v.* Stow, 19 Fed. 807.
[4] American Malleables Co. *v.* Bloomfield, 82 N. J. L. 79, 81 Atl. 500, aff'd 83 N. J. L. 728, 85 Atl. 167; Wheeler *v.* Sault Ste. Marie, 164 Mich. 338, 129 N. W. 685, 35 L. R. A. N. S. 547.
[5] Nashville *v.* Sutherland, 92 Tenn. 335, 21 S. W. 674; Wheeler *v.* Sault Ste. Marie, *supra;* Carter *v.* Dubuque, 35 Iowa, 416.
[6] Penley *v.* Auburn, 85 Me. 278, 27 Atl. 158; Stewart *v.* Council Bluffs, 50 Iowa, 668; Wheeler *v.* Sault Ste. Marie, *supra.*
[7] Chapman *v.* New York, 168 N. Y. 80, 61 N. E. 108. (Q. V. for history of gift litigation and occasion for constitutional prohibition.) Coleman *v.* Broad River Tp., 50 S. C. 321, 27 S. E. 774; Sutherland Innes Co. *v.* Evart, 86 Fed. 597.

credit.[1] But a loan of credit is not affected by sharing one-half of the expense of abolishing grade crossings with a railroad company even though the agreement effecting this result takes the form of a promise by the city to assume the entire cost of elevating the tracks on the reciprocal promise of the railroad company to pay back its one-half to the city.[2] Nor is it a loan of credit to share part of the cost, even though the municipality could require the railroad company to build a viaduct at its own expense. This right will not prevent the municipality from sharing the expense where it is deemed to be just, a question the decision of which rests with the legislative authority of the city.[3] So it has been declared that the indorsement of the agreement as to payment of rent on bonds issued by a water company supplying the city with water under a contract is not a loan of credit.[4] Congress has enacted against the loaning of national credit on public contracts through advance payments to a contractor performing public work by providing that no payments may be made in excess of the value of services already rendered or of articles or supplies delivered in part performance of the contract.[5] The legislatures of many of the States are under constitutional restrictions in this respect and may not loan the credit of the State. A contract to advance money through interest-bearing warrants which the contractor could use to raise money to aid him in carrying on his work is invalid, even though the contractor agreed to repay the interest on the final adjustment.[6] A municipality may lawfully make

[1] Neale *v.* Wood County, 43 W. Va. 90, 27 S. E. 370.
[2] Brooke *v.* Philadelphia, 162 Pa. St. 123, 29 Atl. 387.
[3] Argentine *v.* Atchison, T. & S. F. R. Co., 55 Kan. 730, 41 Pac. 946.
[4] Brady *v.* Bayonne, 57 N. J. L. 379, 30 Atl. 968; State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15.
[5] U. S. Comp. Stat., § 6647 (R. S., § 3648); Fowler *v.* U. S., 3 Ct. Cl. 43.
[6] Moran *v.* Thompson, 20 Wash. 525, 56 Pac. 29.

and deliver its notes in payment of assessments due in a mutual insurance company in which it has membership and such constitutes neither a loan of its credit, a guaranty nor a gratuity.[1]

Bonds issued for local improvements and which are payable out of assessments are not a loan of credit.[2] The power to borrow money for a public purpose, will not be made the basis of or authorize a loan of credit.[3] Nor may a municipality imply the power from a general grant of authority to make a contract which is in effect a pledge of its credit to support a private enterprise.[4] An issue of bonds, however, made for the purpose of paying a valid stock subscription is not a loan of credit.[5] In some States the Constitution prohibits the gift or loan of the credit of the State to or in aid of any individual. Such limitation not only prevents the use of the credit of the State in supporting or fostering the growth of private enterprise or business, but makes a State powerless to issue its bonds to pay a bonus to residents who served the Nation in the World War.[6]

§ 46. The Same: Acting as Surety.

Since municipalities may not loan their credit without express legislative authority, they may not by any implied authority from a general grant, act as a guarantor.[7] Accordingly, these public bodies cannot guarantee the payment of bonds of a railroad company by indorsing

[1] French *v.* Millville, 66 N. J. L. 392, 49 Atl. 465, 67 N. J. L. 349, 51 Atl. 1109.
[2] Redmond *v.* Chacey, 7 N. D. 231, 73 N. W. 1081.
[3] Chamberlain *v.* Burlington, 19 Iowa, 395; Brenham *v.* German Amer. Bk., 144 U. S. 173, 36 L. Ed. 390.
[4] Scott *v.* La Porte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675.
[5] Johnson City *v.* Charleston R. Co., 100 Tenn. 138, 44 S. W. 670.
[6] People *v.* Westchester Co. Nat. Bk., 231 N. Y. 465, 132 N. E. 241.
[7] Scott *v.* La Porte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675.

them, if by its charter it is limited to subscribe for stock and issue bonds for payment.[1]

But where the statute authorizes a municipality to obtain money on loan on the faith and credit of the city for the purpose of contributing to works of internal improvement, this permits the municipality to guarantee the payment of the bonds,[2] since it is not important to the character of the transaction that the money be obtained in the first instance by the railroad company upon the credit of the city.[3] The power to sell its negotiable paper will not by implication authorize a guarantee of a promissory note.[4] Nor will power to acquire suitable water works and to do all things necessary to carry into effect powers conferred, authorize a city to guarantee the bonds of an electric company.[5] The agreement of a city made in a deed of a right of way for a sewer to so construct the sewer that water would not back upon the grantor's premises is invalid as to such provision, where no express power was given to make such a contract.[6]

§ 47. Acting as Trustee.

Municipalities may act as trustee of a charitable trust where the gift is made for or in aid of some public purpose charitable in its nature, for which it is the legal duty of the municipality to provide and support.[7] This power to

[1] Blake *v.* Macon, 53 Ga. 172.

[2] Savannah *v.* Kelly, 108 U. S. 184, 27 L. Ed. 696.

[3] Savannah *v.* Kelly, *supra;* Rogers *v.* Burlington, 3 Wall. (U. S.) 654, 18 L. Ed. 79; Venice *v.* Murdock, 92 U. S. 494, 23 L. Ed. 583.

[4] Carter *v.* Dubuque, 35 Iowa, 416.

[5] Lynchburg &c. R. Co. *v.* Dameron, 95 Va. 545, 28 S. E. 951.

[6] Nashville *v.* Sutherland, 92 Tenn. 335, 21 S. W. 674.

[7] Barnum *v.* Baltimore, 62 Md. 275, 50 Am. R. 219; Skinner *v.* Harrison Tp., 116 Ind. 139, 18 N. E. 529; Maxcy *v.* Oshkosh, 144 Wis. 238, 128 N. W. 899; Quincy *v.* Atty. Gen., 160 Mass. 431, 35 N. E. 1066; Chambers *v.* St. Louis, 29 Mo. 543; Delaney *v.* Salina, 34 Kan. 532, 9 Pac. 271; Maynard *v.* Woodard, 36 Mich. 423; Philadelphia *v.* Girard, 45 Pa. St. 9, 84 Am. D. 470,

act as trustee does not depend upon express legislative authority, but even without it municipalities may accept a gift of personalty or a dedication of lands for a public purpose, or for a purpose within and germane to the objects for which it was created.[1] But a trust which is not for a public purpose and which does not fall into one or all of the purposes or objects for which the municipality was organized may not be assumed, and no power exists to acquire or in any manner take property for purposes not corporate, or administrative.[2] A town is without power accordingly to accept a gift to support a clergyman of a particular denomination,[3] although such a gift was declared to be within the purposes and objects for which a town was organized.[4] But where a trust has been created which is repugnant to the proper purposes of municipal existence, this is no ground upon which to declare an otherwise unobjectionable trust void. The municipality cannot be compelled to execute it, but equity will appoint a new trustee to accomplish that end.[5]

7 Wall. 1; Vidal *v.* Philadelphia, 2 How. (U. S.) 126, 11 L. Ed. 205; Hanscom *v.* Lowell, 165 Mass. 419, 43 N. E. 196; Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. Ed. 701.

[1] Atlantic City *v.* Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822; Atlantic City *v.* Ass'd Realties Corp., 73 N. J. Eq. 721, 70 Atl. 345.

[2] Bullard *v.* Shirley, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110; Dailey *v.* New Haven, 60 Conn. 314, 22 Atl. 945; Fosdick *v.* Hempstead, 125 N. Y. 581; Maysville *v.* Wood, 102 Ky. 263, 43 S. W. 403; Philadelphia *v.* Fox, 64 Pa. St. 169.

[3] Holmes, J., in Bullard *v.* Shirley, *supra.*

[4] Denio, J., in Williams *v.* Williams, 8 N. Y. 525.

[5] Vidal *v.* Girard, 2 How. (U. S.) 127; Dailey *v.* New Haven, *supra;* Fosdick *v.* Hempstead, *supra;* McDonogh *v.* Murdoch, 56 U. S. 367, 14 L. Ed. 732.

CHAPTER X

CONTRACTS TO INFLUENCE ACTION OF PUBLIC OFFICIALS

§ 48. General Rule.

All agreements which tend to introduce personal influence and solicitation as elements in procuring and inducing legislative action or action by any department of the national government or of the State or any of its political or municipal subdivisions are contrary to sound morals and so are malum in se and are void as contrary to public policy.[1]

§ 49. Effect on Contract of Influence on Action of Officials.

Contracts for the purchase of the influence of private persons upon the action of public officials either administrative or legislative are against public policy and void.[2] In order to condemn this class of contracts, it is not necessary to show that they are bad but merely that their tendency is bad.[3] It is not essential to their condemnation that the parties shall be guilty of bribery or corruption under the contract. If the performance of the

[1] Sage *v.* Hampe, 235 U. S. 99, 59 L. Ed. 147; Providence Tool Co. *v.* Norris, 69 U. S. (2 Wall.) 45, 17 L. Ed. 868; Burke *v.* Child, 88 U. S. 441, 22 L. Ed. 623; Elkhart County Lodge *v.* Crary, 98 Ind. 238, 49 Am. R. 746; Lyon *v.* Mitchell, 36 N. Y. 235, 93 Am. D. 502; Milbank *v.* Jones, 127 N. Y. 370, 28 N. E. 31; Mills *v.* Mills, 40 N. Y. 543, 100 Am. D. 535; Winpenny *v.* French, 18 Ohio St. 469; Powers *v.* Skinner, 34 Vt. 274, 80 Am. D. 677; Bryan *v.* Reynolds, 5 Wis. 200, 68 Am. D. 55; Fuller *v.* Dame, 18 Pick. 472; Houlton *v.* Nichol, 93 Wis. 393, 67 N. W. 715.

[2] Linees *v.* Hesing, 44 Ill. 113, 92 Am. D. 153; Burke *v.* Child, 88 U. S. 441, 22 L. Ed. 623; Brown *v.* Brown, 34 Barb. 533.

[3] Crichfield *v.* Bermudez A. P. Co., 174 Ill. 466, 51 N. E. 552; Dodson *v.* McCurnin, 178 Iowa, 1211, 160 N. W. 927.

contract obligations has an evil tendency or furnishes a temptation to use improper means, as where they contemplate high contingent compensation, the contract is illegal as contra bonos mores.[1]

All agreements for a pecuniary consideration to control the business operations of the government or of the State or one of its subdivisions, political or municipal, are against public policy and void without reference to whether improper means are actually used or are contemplated in their execution. The mere tendency toward evil controls judicial action and it destroys the occasion for temptation and wrongdoing by refusing recognition to any contract which has in it even the likelihood of such a result.[2] Of course those contracts which obviously and directly tend to bring about results which the law seeks to prevent cannot be made the basis of a successful suit.[3] Every public officer is a guardian of the public welfare and, therefore, no transaction growing out of his official service or position can be allowed to enure to his personal benefit. From such transactions, the law will not imply a contract which binds the government.[4] A contract with the State produced through bribery upon officers who have the power to make it is against public policy and void and cannot be enforced against the State.[5] In like manner, a contract made through corrupt influences with an agency of the State government is void for similar reasons.[6] A contract to bring to bear or tending to bring to bear

[1] *Idem.*

[2] Oscanyan *v.* Winchester Arms Co., 103 U. S. 274, 26 L. Ed. 539, aff'g 15 Blatch. 79.

[3] Sage *v.* Hampe, 235 U. S. 99, 59 L. Ed. 147.

[4] Davis *v.* U. S., 23 Ct. Cl. 329; James *v.* City of Hamburg, 174 Iowa, 301, 156 N. W. 394.

[5] State, Bradford *v.* Cross, 38 Kan. 696.

[6] Honaker *v.* Bd. of Education, 42 W. Va. 170, 24 S. E. 544.

improper influence upon an officer of the United States and to induce attempts to mislead him in the sale of Indian lands is contrary to public policy and void.[1] But a contract to present to the Secretary of the Interior the situation with reference to certain public lands and to do all that might be necessary to have them thrown open to settlement so that filing of claims might be made thereon under the law, affording equal rights to all persons, without any attempt to procure legislation is not void or against public policy unless it is shown that illegal acts or acts of a corrupt tendency were contemplated.[2] While the State may employ agents or attorneys to enforce and prosecute claims of the State which require the procuring of legislation, no such authority exists in a subdivision of the State to expend its funds to send lobbyists to the legislature.[3] But a municipality has power to employ an attorney to appear before the legislature and oppose a division of its territory.[4] A contract to pay a lawyer to appear before a board of street commissioners and to argue for the laying out of a street, and to obtain as much damages as possible for the land taken does not, as matter of law, contemplate the use of improper influence, or necessarily tend to induce it, and accordingly it is not against public policy, nor does it become so merely because the lawyer in some degree uses his personal influence as chairman of a committee of a political party.[5]

[1] Sage *v.* Hampe, *supra.*

[2] Houlton *v.* Nichol, 93 Wis. 393, 67 N. W. 715.

[3] Davis *v.* Comm., 164 Mass. 241, 41 N. E. 292; Denison *v.* Crawford, 48 Iowa, 211; Chesebrough *v.* Conover, 140 N. Y. 382, 35 N. E. 633; Mills *v.* Mills, 40 N. Y. 543, 100 Am. D. 535; Milbank *v.* Jones, 127 N. Y. 370, 28 N. E. 31; Elkhart Lodge *v.* Crary, 98 Ind. 238, 49 Am. R. 746.

[4] Farrel *v.* Derby, 58 Conn. 234, 20 Atl. 460.

[5] Barry *v.* Capen, 151 Mass. 99, 23 N. E. 735.

§ 50. **Purchasing Consents for Street Improvement.**

Where abutting property owners sign a petition for a street improvement and thereby ask for legislative action by the general governing body of a municipality they become to a certain extent charged with a duty to the public. The policy of the State requires their uninfluenced and unbiased judgment in initiating a proceeding. Since the rights of the public and of third persons are involved in the action of the signers to such a petition, public policy denies them the right to sell their signatures. Purchased consents are against the policy of the law, since they create injustice to other owners. The fair judgment of all owners and not their greed must decide the question whether they shall be assessed.[1] In like manner, any arrangement or combination made whereby signatures are obtained by a few interested in causing a grading and paving to be done, by paying a consideration therefor either directly or indirectly, is a fraud upon the law, and contrary to public policy.[2]

And a contract made to pay a sum of money for obtaining such signatures is void and unenforceable.[3]

[1] State, Kean *v.* Elizabeth, 35 N. J. L. 351; Doane *v.* Chicago City R. Co., 160 Ill. 22, 45 N. E. 507.

[2] Howard *v.* First Indep. Church, 18 Md. 451; Maguire *v.* Smock, 42 Ind. 1.

[3] Doane *v.* Chicago City R. Co., *supra*.

CHAPTER XI

ULTRA VIRES CONTRACTS

§ 51. Classification.

Contracts made and entered into by public bodies and which are said to be ultra vires may properly be divided into two general classifications: those which are ultra vires because illegal, and those which are ultra vires because unauthorized merely. The first class are utterly void and will not be enforced by the courts except in those divisible contracts which permit of a severance of the good from the bad features and which will allow of an enforcement of the former. The second class are generally enforced by the courts where executed and the public body has received and retained the benefits of performance, either on the contract itself, upon an implied contract for quantum meruit, or for money had and received, depending upon the character of the particular contract.

Those cases included in the first class are the following:

1. Contracts expressly prohibited by law.

2. Contracts prohibited by law, unless executed in the manner and upon the conditions prescribed by law.

3. Contracts outside of the scope of the objects and purposes of corporate existence or not to be implied from powers expressly conferred.

4. Contracts against public policy.

Those in the second class may be stated to be:

1. Contracts unauthorized because of a defect of power or want of power but whose subject-matter is within the

scope of the objects and purposes of corporate existence, or

2. Contracts invalid merely because the power granted is defectively or irregularly exercised.

§ 52. Contract Prohibited By Law—Receipt of Benefits. Where powers are denied to a municipality, the intention of the law is that these powers shall not be exercised. It would be a strange anomaly if the exercise of a prohibited power would cause it to be endowed with validity and dissolve the prohibition. Such a result would by repeated usurpations make municipalities the recipients of omnipotence. Their powers would grow by infringement. Because municipalities do forbidden things and make contracts prohibited by public policy will not make such contracts valid. Such a result cannot be accomplished by continued violation of the law. This would make a mockery of the law. Were this permitted, these very violations would have the effect of endowing these bodies with powers which the legislature has denied them. To claim that such a result must follow because the municipalities have received the benefits of a contract is to make an easy route to a nullification of wise measures enacted to protect the taxpayers. The consummation of such violations cannot bring with it the protection of the very law which has been flaunted and violated and thereby create a cause of action on the void contract.[1]

In accord with this reasoning, it has been declared that if the legislature expressly prohibits a contract from being entered into at all, or except upon the performance or existence of certain prior conditions or circumstances, such as an

[1] Dickinson *v.* Poughkeepsie, 75 N. Y. 65.

appropriation to pay the contract compensation; or that an ordinance shall be passed authorizing the work; or that the contract shall be in writing; or that the contract shall be let to the lowest bidder after public advertisement; or that a certificate by the head of department of the necessity of the work or supplies and that an appropriation to pay therefor exists and is outstanding shall be issued;—a contract made in violation of the positive command of the legislature that these or similar circumstances or facts must exist before a lawful contract may be made, can never be made the basis of recovery.[1] And where the policy of the State thus forbids the making of a contract except in the manner and upon the conditions prescribed, no recovery is permitted upon the theory of an implied contract to pay for the benefits received under the prohibited contract.[2] No recovery is therefore permitted either on the contract or on quantum meruit.[3]

§ 53. When Sustained so far as Executed.

Where an ultra vires contract is executory, it will not be enforced,[4] and the law upholds its repudiation by either

[1] Indianapolis *v.* Wann, 144 Ind. 175, 42 N. E. 901; Newbery *v.* Fox, 37 Minn. 141, 33 N. W. 333; McDonald *v.* New York, 68 N. Y. 23, 23 Am. R. 144; Gutta Percha M. Co. *v.* Ogalalla, 40 Neb. 775, 59 N. W. 513; Reams *v.* Cooley, 171 Cal. 150, 152 Pac. 293; Denver *v.* Hindry, 40 Colo. 42, 90 Pac. 1028; Jersey City S. Co. *v.* Jersey City, 71 N. J. L. 631, 60 Atl. 381; Snipes *v.* Winston, 126 N. C. 384, 35 S. E. 610; Perry Water, L. & Ice Co. *v.* Perry, 29 Okla. 593, 120 Pac. 582.

[2] Bluthenthal *v.* Headland, 132 Ala. 249, 31 So. 87; Zottmann *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Reams *v.* Cooley, 171 Cal. 150, 152 Pac. 293; Fox *v.* New Orleans, 12 La. Ann. 154, 68 Am. D. 766; State *v.* Helena, 24 Mont. 521, 63 Pac. 99; Jersey City S. Co. *v.* Jersey City, 71 N. J. L. 631, 60 Atl. 381; McDonald *v.* New York, 68 N. Y. 23, 23 Am. R. 144; Goose River Bk. *v.* Willow Lake Sch. Tp., 1 N. D. 26, 44 N. W. 1002; McGillivray *v.* Joint Sch. Dist., 112 Wis. 354, 88 N. W. 310.

[3] Anderson *v.* Fuller, 51 Fla. 380, 41 So. 684; Chippewa B. Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603.

[4] Columbus Water Co. *v.* Columbus, 48 Kan. 99, 28 Pac. 1097; East St. Louis G. L. Co. *v.* East St. Louis, 98 Ill. 415, 38 Am. R. 97.

party with impunity.[1] Where, however, a contract has been made by a municipality to supply some commodity such as water, gas, electricity or the like, and the contract is for some reason ultra vires, it will be sustained so far as it has been executed as one for the furnishing of the commodity during the pleasure of the municipality. The reason for this rule is that courts should not interfere to destroy the contracts of parties further than some good reason requires. Even where a contract obstructs the legislative or governmental power of a municipality over its subject because it is in the nature of an exclusive franchise or monopoly or in some manner binds the successors of the officers on the legislative side of municipal power, this does not require that a contract shall be held to be void, but rather voidable so far as it is still executory.[2] The defense of ultra vires should not absolve municipalities from adhering to the principles of common honesty,[3] and this defense will not be allowed to obtain where it works injustice or a positive wrong.[4] When the defense, however, is properly interposed, it will be strictly applied in favor of public bodies.[5] And in these last cases, it may

[1] McKee *v.* Greensburgh, 160 Ind. 378, 66 N. E. 1009; Greenough *v.* Wakefield, 127 Mass. 275, 1 N. E. 413; Swift *v.* Falmouth, 167 Mass. 115, 45 N. E. 184; Spaulding *v.* Peabody, 153 Mass. 129, 26 N. E. 421; Halstead *v.* Mayor, 3 N. Y. 430; Philadelphia *v.* Flanigen, 47 Pa. St. 21; Alleghany County *v.* Parrish, 93 Va. 615, 25 S. E. 882.

[2] Columbus W. Co. *v.* Columbus, *supra;* East St. Louis G. L. Co. *v.* East St. Louis, *supra;* Decatur G. & C. Co. *v.* Decatur, 24 Ill. App. 544; Carlyle W. & L. P. Co. *v.* Carlyle, 31 Ill. App. 325.

[3] Bass F. & M. Co. *v.* Parke County, 115 Ind. 244, 17 N. E. 593.

[4] Portland Lumb. & Mfg. Co. *v.* East Portland, 18 Oreg. 21, 22 Pac. 536.

[5] Cleveland Sch. F. Co. *v.* Greenville, 146 Ala. 559, 41 So. 862; Higgins *v.* San Diego, 118 Cal. 524, 45 Pac. 824; Hope *v.* Alton, 214 Ill. 102, 73 N. E. 406; Citizens Bk. *v.* Spencer, 126 Iowa, 101, 101 N. W. 643; Mealey *v.* Hagerstown, 92 Md. 741, 48 Atl. 746; State *v.* Murphy, 134 Mo. 549, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132.

even set up the defense even though it has received the benefits under the contract.[1]

§ 54. Illegal Contract—Recovery on Denied.

The general rule is that courts will not entertain any action brought upon an illegal agreement. *Ex turpi causa non oritur actio.*[2] Where it is executory, it will not be enforced; and where it is executed, it may not be rescinded. Not only will courts refuse to enforce such a contract but they will not even permit any recovery upon a contract which is illegal or which is against public policy.[3] The defense of illegality may be availed of although it is not pleaded, especially where the contract is contra bonos mores, and courts of their own motion will be quick to uncover the illegality and use it as a bar to the action.[4] However, it is declared in some jurisdictions that the defense of illegality must be pleaded in order to be raised.[5]

§ 55. The Same —Invalid in Part—Severance.

Where a contract is challenged as illegal, the general rule applicable is that if the illegal part cannot be severed from the legal part of the contract, it is altogether void and will not be enforced.[6] But where these parts can be

[1] Mealey *v.* Hagerstown, *supra;* Balch *v.* Beach, 119 Wis. 77, 95 N. W. 132; Thomas *v.* Pt. Huron, 27 Mich. 320; State *v.* Pullman, 23 Wash. 583, 63 Pac. 265.

[2] Levy *v.* Kansas City, 168 Fed. 524; Sewell *v.* Norris, 128 Ga. 824, 58 S. E. 637; Henderson *v.* Palmer, 71 Ill. 579, 22 Am. Rep. 117; Honaker *v.* Bd. of Education, 42 W. Va. 170, 24 S. E. 544.

[3] State *v.* Bd. of Commrs. Dickinson County, 77 Kan. 540, 95 Pac. 392.

[4] Crichfield *v.* Bermudez Asph. P. Co., 174 Ill. 466, 51 N. E. 552; Cansler *v.* Penland, 125 N. C. 578, 34 S. E. 683.

[5] Ocorr & Rugg Co. *v.* Little Falls, 77 N. Y. App. Div. 592, 178 N. Y. 622, 70 N. E. 1104.

[6] Casady *v.* Woodbury County, 13 Iowa, 113; Levy *v.* Kansas City, 168 Fed. 524; Crichfield *v.* Bermudez Asph. P. Co., 174 Ill. 466, 51 N. E. 552; Edwards *v.* Randle, 63 Ark. 318, 38 S. W. 343.

severed, whether the illegality be created by statute or by the common law, the bad may be rejected and the good retained.[1] If the promise is to do two things, one legal and the other illegal, the promise to do the legal act will be enforced and the promise to do the illegal act will be disregarded or considered waived.[2] And it makes no difference whether there are two distinct promises or whether there is one promise that is divisible, or whether the consideration for the two promises is entire or apportionable.[3]

Where the consideration is twofold, one legal and the other illegal, both supporting one promise, such promise cannot be enforced.[4]

If the consideration is in no way tainted by illegality but some of the promises are illegal, the illegality of those which are bad does not communicate itself to those which are good, except where in consequence of some peculiarity in the contract, its parts are inseparable, or dependent on one another.[5] And even if one party to the contract performs illegal services, if the other party's promise is in consideration of his performing legal ones only, the contract would be legal and could not be made illegal by misconduct in carrying it out.[6] The test of legality is in its making. Where accordingly provisions, such as a provision regulating the hours of labor or the kind of labor, that it shall be union labor or shall not be convict or alien

[1] State *v.* Wilson, 73 Kan. 343, 84 Pac. 737; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219.

[2] U. S. *v.* Bradley, 10 Pet. (U. S.) 343, 9 L. Ed. 448; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. Ed. 520; McCullough *v.* Virginia, 172 U. S. 102, 43 L. Ed. 382.

[3] Greenwood *v.* Bishop of London, 5 Taunt. 727.

[4] Sedgwick Co. *v.* State, 66 Kan. 634, 72 Pac. 284.

[5] State, Laskey *v.* Perrysburg Bd. of Educ., 35 Ohio St. 519; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219.

[6] Barry *v.* Capen, 151 Mass. 99, 23 N. E. 735.

labor, and kindred provisions, or provisions which oust the courts of jurisdiction, which do not constitute its main or essential feature or purpose are void for illegality or as against public policy, but are clearly separable and severable from the other parts which are relied on, such other parts are not affected by the invalid provision, and may be enforced, as if no such provision had been incorporated in the contract.[1] But when a statute requires all contracts to be let by competitive bids upon public advertisement to the lowest bidder and illegal or invalid provisions are inserted, it must be shown that the inclusion of such provisions in the contract did not enhance the cost, in order to have them disregarded.[2]

§ 56. **Invalid in Part—Severance—Valid Part Enforceable.** Where a public contract is valid in part and ultra vires in part, such invalidity will ordinarily not affect the other provisions or parts of the contract, which are in no way dependent upon the invalid part or provision, and the valid part may be enforced while that which is illegal and invalid may be rejected.[3] If the contract is so indivisible that the parts cannot be separated, so that the illegal can be prevented and the legal performed, the entire contract must be declared void.[4] But in order to defeat the

[1] People *ex rel.* Rodgers *v.* Coler, 166 N. Y. 1, 59 N. E. 716; Cleveland *v.* Clement Bros. Const. Co., 67 Ohio St. 197, 65 N. E. 885.

[2] De Wolf *v.* People, 202 Ill. 73, 66 N. E. 868.

[3] Kimball *v.* Cedar Rapids, 100 Fed. 802; Ft. Dodge Elec. L. & P. Co. *v.* Ft. Dodge, 115 Iowa, 568, 89 N. W. 7; Nebraska City *v.* Nebraska City H. G. L. & C. Co., 9 Neb. 339, 2 N. W. 870; City of Valparaiso *v.* Valparaiso City W. Co., 30 Ind. App. 316, 65 N. E. 1063; Turney *v.* Bridgeport, 55 Conn. 412, 12 Atl. 520; Uvalde Asph. P. Co. *v.* New York, 128 N. Y. App. Div. 210, 198 N. Y. 548, 92 N. E. 1105; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219; Myers *v.* Penn. Steel Co., 77 N. Y. App. Div. 307.

[4] Nicholasville W. Co. *v.* Nicholasville, 18 Ky. L. R. 592, 36 S. W. 549; New Orleans *v.* New Orleans Sugar Shed Co., 35 La. Ann. 551; LeFeber *v.* West Allis, 119 Wis. 608, 97 N. W. 203; Kansas City *v.* O'Connor, 82 Mo. A. 655.

whole contract, the invalidity presented must consist of something of more moment than that a small part of the contract is ultra vires, for in these cases the right to avail of this defense depends upon the circumstances of the case and it will not be sustained where it works inequity or injustice,[1] provided, of course, that the particular objected to is not prohibited by statute or beyond the objects and purposes for which the municipality was created.[2]

Under these general principles, it has been declared that a contract for the construction of a sewer and of a sewage disposal plant is severable, so that a recovery may be had for constructing the sewer, although the provision for the disposal plant is void, when it is apparent that the intention was that the two improvements should be separate. In such case, there is nothing in the nature of the sewer which makes its completion in any way dependent upon the construction of the disposal plant, especially where the advertisement refers to "contracts" and the bids for one were kept separate from the other.

In such circumstances, if everything pertaining to the disposal plant were stricken from the contract, there is left a complete contract for the construction of the sewer.[3] A contract affecting the rentals for water which granted an exclusive privilege to the operating company is unenforceable as to the monopoly but enforceable as to rentals.[4] On the other hand, a contract to purchase a water and lighting plant and to settle a valid judgment, where the

[1] Bell *v.* Kirkland, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. N. S. 793; Coit *v.* Grand Rapids, 115 Mich. 493, 73 N. W. 811; Spier *v.* Kalamazoo, 138 Mich. 652, 101 N. W. 846.

[2] Bell *v.* Kirkland, *supra.*

[3] Uvalde Asphalt Pav. Co. *v.* New York, 128 N. Y. App. Div. 210, 198 N. Y. 548; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219.

[4] Kimball *v.* Cedar Rapids, 100 Fed. 802; Monroe W. Wks. Co. *v.* Monroe 110 Wis. 11, 85 N. W. 685.

former was ultra vires because the constitutional provision as to sinking funds was violated and the city was without power to purchase, and the parts were not capable of severance, the contract was void in toto and could not be enforced for either object.[1]

§ 57. Incurring Valid Debt or Obligation but Exceeding Limit on Power to Incur Indebtedness—Severance.

When a municipality has power to incur a debt or liability to a definite limited extent and makes a promise to pay a larger amount, and the contract is executed by the other party and the municipality has obtained something that it had the authority to purchase, such acts of municipalities in incurring an indebtedness or an obligation in excess of a limit prescribed by the constitution or by law may be given effect up to the limit so prescribed.[2] In the revision of governmental acts claimed to exceed the limits placed upon governing bodies by the fundamental laws under which they exist, the courts uniformly strive to give effect to such acts so far as is possible without disobeying the restrictions thus imposed, and will hold acts valid up to such limits notwithstanding some excess beyond constitutional or legal limits if the excess can be separated and can be denied effect without defeating the clear and obvious purpose of such limitation.[3]

[1] Austin *v.* McCall, 95 Tex. 565, 68 S. W. 791.

[2] McPherson *v.* Foster, 43 Iowa, 48, 22 Am. R. 215; Stockdale *v.* Sch. Dist. 47 Mich. 226, 10 N. W. 349; Culbertson *v.* Fulton, 127 Ill. 30, 18 N. E. 781; Chicago *v.* McDonald, 176 Ill. 404, 52 N. E. 982; May *v.* Gloucester, 174 Mass. 583, 55 N. E. 465; Winamac Sch. Town *v.* Hess, 151 Ind. 229, 50 N. E. 81; Citizens Bk. *v.* Terrell, 78 Tex. 450, 14 S. W. 1003; Daviess County *v.* Dickinson, 117 U. S. 657; Ætna Life Ins. Co. *v.* Lyon County, 82 Fed. 929; Herman *v.* Oconto, 110 Wis. 660, 86 N. W. 681.

[3] McCullough *v.* Virginia, 172 U. S. 102, 43 L. Ed. 382; Detroit *v.* Detroit City R. Co., 60 Fed. 161; Illinois Trust & Sav. Bk. *v.* Arkansas City, 76 Fed.

The only difficulty which the courts have at all had was whether a severance could be made at the dividing line between that which was legal and that which was forbidden, or whether they were bound by the principles which determined whether the duty created by the contract and assumed by the contractor was capable of severance.

But the more modern tendency is to carry out the equitable principles involved in paying for what has been received within permissible limits and accordingly where as in most instances of contract with municipalities their only obligation is the mere payment of money such an obligation is considered in its nature severable, as one dollar is severable from another, and where that is the only obligation questioned or sought to be enforced, it is sufficiently severable without inquiring whether the duty of the contractor under the contract is also capable of division. When the latter's obligation has been fully performed and he finds that for complete performance he can only receive partial payment, it is of no concern to anyone to what part of his services the money paid shall be ascribed. To do this measure of justice to a contractor who in good faith supplies a municipality with things which it has the power to purchase, is in practical effect to pay him a less price for the entire work. And to accomplish this act of equity technical constructions should be discarded, especially where the prohibition is not against purchasing the material or labor or making the contract, but against incurring

271; Kimball *v.* Cedar Rapids, 100 Fed. 802; Johnson *v.* Stark County, 24 Ill. 75; Briscoe *v.* Allison, 43 Ill. 291; Scofield *v.* Council Bluffs, 68 Iowa, 695, 28 N. W. 20; Thompson *v.* Indep. Sch. Dist., 102 Iowa, 94, 70 N. W. 1093; Chicago & N. W. R. Co. *v.* Langlade Co., 56 Wis. 614, 14 N. W. 844; Monroe W. Wks. Co. *v.* Monroe, 110 Wis. 11, 85 N. W. 685; Allen *v.* Lafayette, 89 Ala. 641, 8 So. 30; State *ex rel.* Hicks *v.* Stevens, 112 Wis. 170, 88 N. W. 48.

the indebtedness. It is more equitable and just to pay up to the amount which a municipality had the power to promise to pay than that the contractor should suffer the entire loss of his services.[1]

Where the authority to make a particular contract exists and another contract is made beyond the authority of the public body, the substance of the contract within the power of the public body will, after performance by the contractor, be held to be valid notwithstanding the fact that it is coupled with a condition which exceeds the powers of the public body and is unlawful.[2] Accordingly where the public body had power to make a contract for the improvement of sidewalks and it made such a contract but agreed to pay therefor in bonds which it was without power to do, and the public body received the benefits of performance, justice requires the elimination of the ultra vires conditions from the contract and its enforcement so far as it is lawful.[3]

Under similar circumstances where the constitutional debt limit was reached by a municipality and it entered into a contract to pave a street and to pay in part and to assess the cost in part against the abutting owners, the contract was severable and it was declared valid as to the provision for the levy of an assessment but invalid and unenforceable in so far as the city agreed to pay for the improvement out of its general fund.[4] But a contract made in excess of the debt limit for the purpose of installing a fire alarm system does not admit of change by a court of equity so as to imply a grant to the contractor of a franchise to operate it because the express contract has

[1] McGillivray *v.* Joint Sch. Dist., 112 Wis. 354, 88 N. W. 310.
[2] Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. Ed. 659.
[3] Hitchcock *v.* Galveston, *supra.*
[4] Ft. Dodge &c. Co. *v.* Ft. Dodge, 115 Iowa, 568, 89 N. W. 7.

failed for this reason, especially where certain of the apparatus was provided by the city, and the wires were in part strung on poles owned by the city.[1]

§ 58. Contract Beyond Powers of Public Body and Beyond Scope of Corporate Purposes—Receipt of Benefits.

Public bodies cannot be held liable to pay for the benefits which it may receive under a contract which has been made by it in relation to a subject-matter which is beyond the powers of such public body and outside of the scope of the corporate objects and purposes for which it was created.[2]

§ 59. Where Want of Power but no Express Prohibition—Receiving Benefits of Performance.

There seems to be a strong current of authority upholding the rule that where a public body receives the benefits of performance under a contract fully performed by the contractor and which the public body had the power to make or which accomplishes some object or fulfills some purpose which is germane to those purposes and objects for which it was created, the public body is bound to pay the reasonable value of what it receives.[3] In like manner,

[1] Gamewell F. A. T. Co. *v.* LaPorte, 102 Fed. 417.

[2] Thomas *v.* Richmond, 12 Wall. 349; Merrill *v.* Monticello, 138 U. S. 673. 34 L. Ed. 1069; Swanson *v.* Ottumwa, 131 Iowa, 540, 106 N. W. 9; Brooks *v.* Brooklyn, 146 Iowa, 136, 124 N. W. 868; Hanger *v.* Des Moines, 52 Iowa, 193, 2 N. W. 1105; Newport *v.* Ry. Co., 58 Ark. 270, 24 S. W. 427; Hampton *v.* Logan County, 4 Idaho, 646, 43 Pac. 324; Hovey *v.* Wyandotte County, 56 Kan. 577, 44 Pac. 17; Minneapolis Elec. T. Co. *v.* Minneapolis, 124 Minn. 351, 145 N. W. 609; Wells *v.* Salina, 119 N. Y. 280, 23 N. E. 870; Perry *v.* Superior, 26 Wis. 64; Nashville *v.* Sutherland, 92 Tenn. 335, 21 S. W. 674; Murphy *v.* Jacksonville, 18 Fla. 318, 43 Am. R. 323; Bell *v.* Kirkland, 102 Minn. 213, 113 N. W. 271; Mullan *v.* State, 114 Cal. 578, 46 Pac. 670; New Decatur *v.* Berry, 90 Ala. 432, 7 So. 838; Westminster W. Co. *v.* Westminster, 98 Md. 551, 56 Atl. 990; State *ex rel.* St. Paul *v.* Minn. Trans. Ry. Co., 80 Minn. 108, 83 N. W. 32; Winchester *v.* Redmond, 93 Va. 711, 52 Pac. 28.

[3] Louisiana *v.* Wood, 102 U. S. 294, 26 L. Ed. 153; Parkersburg *v.* Brown, 106 U. S. 487, 27 L. Ed. 238; Chapman *v.* Douglas County, 107 U. S. 348, 27

where a contract, which is ultra vires because unauthorized merely and not prohibited by law, has been fully performed by a municipality, the contractor may not set up the defense of ultra vires but will be bound to perform where he has thus received the benefits of performance from the municipality.[1] So where a municipality loaned money to a hotel company to construct a hotel receiving as security for the loan a mortgage covering the hotel, while this transaction was ultra vires yet the company having received the benefits, the municipality was allowed to enforce the mortgage by foreclosure action.[2]

But there is authority to the contrary in many jurisdictions that such contracts may not be enforced and that all the municipality is entitled to receive is what it parted with or the amount of funds loaned,[3] and that a municipality will be estopped to enforce the performance of a contract under the same or like conditions in which an individual will be estopped.[4] So, it was held that a bond given by a contractor as an independent undertaking to keep the pavement in repair for a stated period was invalid and unenforceable because unauthorized.[5]

L. Ed. 378; Argenti *v.* San Francisco, 16 Cal. 256; Nat. Tube Wks. *v.* Chamberlain, 5 Dak. 54, 37 N. W. 761; Chicago *v.* McKechney, 205 Ill. 372, 68 N. E. 954; Schipper *v.* Aurora, 121 Ind. 154, 22 N. E. 878; Turner *v.* Cruzen, 70 Iowa, 202, 30 N. W. 483; Brown *v.* Atchison, 39 Kan. 37, 17 Pac. 465; Ward *v.* Forest Grove, 20 Oreg. 355, 25 Pac. 1020; Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94.

[1] New York *v.* Delli Paoli, 202 N. Y. 18, 94 N. E. 1077; Mayor *v.* Sonneborn, 113 N. Y. 423, 21 N. E. 121; Buffalo *v.* Balcom, 134 N. Y. 532, 32 N. E. 7; Middleton *v.* State, 120 Ind. 166, 22 N. E. 123; Deering *v.* Peterson, 75 Minn. 118, 77 N. W. 568; St. Louis *v.* Davidson, 102 Mo. 149, 14 S. W. 825; Belfast *v.* Belfast Water Co., 115 Me. 234, 98 Atl. 738, L. R. A., 1917 B. 908; Hendersonville *v.* Price, 96 N. C. 423, 2 S. E. 155; Mayor of Hoboken *v.* Harrison, 30 N. J. L. 73.

[2] Fergus Falls *v.* Fergus Falls Hotel Co., 80 Minn. 165, 83 N. W. 54.

[3] Kansas City *v.* O'Connor, 82 Mo. App. 655; City of Portland *v.* Portland Bituminous Pav. & I. Co., 33 Oreg. 307, 52 Pac. 28.

[4] Portland *v.* Portland B. P. & I. Co., *supra*.

[5] *Idem*.

The reason behind this last line of decisions is simply that if the contract is invalid as to one of the contracting parties, it is invalid also as to the other,[1] and neither may enforce or bring suit upon the contract. Some authorities ground the liability, on the other hand, in estoppel. They assert that a contract made by a municipality, where there exists a defect of power or even a want of power to so contract, if it is not made in violation of charter regulations or any statute prohibiting it, is not illegal; and if such a contract has been executed and the benefits received and appropriated, the party receiving them is estopped to deny its validity.[2] This theory also finds support in the proposition that although the contract is not authorized, if the other party has been induced to expend money on the strength of its validity, the public body is liable.[3]

§ 60. Where Want of Power but no Express Prohibition—Receiving Benefits of Contract—Measure of Recovery Permitted.

Where a municipality receives the benefit of money, labor or property upon a contract made without due formality, or which it had no authority to make, and which it refuses to execute, it will nevertheless be liable to the person conferring the benefit to the extent of the value of what has been received and appropriated unless the contract was prohibited by statute or in violation of public policy.[4] Public bodies are not permitted to acquire possession of property under a contract which is invalid

[1] Portland *v.* Portland B. P. & I. Co., *supra.*

[2] St. Louis *v.* Davidson, 102 Mo. 149, 14 S. W. 825; State Bd. of Agric. *v.* Cits. St. R. Co., 47 Ind. 407, 17 Am. R. 702; Allen *v.* Lafayette, 89 Ala. 641, 8 So. 30; East St. Louis *v.* East St. Louis Gas Co., 98 Ill. 415, 38 Am. R. 97.

[3] East St. Louis *v.* Gas Co., *supra;* Columbus Water Co. *v.* Columbus, 48 Kan. 99, 28 Pac. 1097.

[4] Schipper *v.* Aurora, 121 Ind. 154, 22 N. E. 878.

and plead its invalidity in support of a claim and effort to retain the property in their possession. Where the vendor has acted in good faith and without fraud he will be permitted to recover possession of the property.[1] But where material has been used in the mending of streets so that it cannot be returned specifically there arises no obligation of any kind, not even for reasonable value, although if the material as such was in the possession of the city at time of suit, it would have to return or pay for it.[2]

Where a municipality receives money under a contract of this character and the money is expended for a lawful corporate purpose such as the laying of sidewalks, the regulating and grading, curbing or paving or other street improvement, for water supply or lighting, for school house or other municipal or public building, although bonds issued in payment of these may not be enforceable, the public body nevertheless having received and retained the benefits must return the money or property or pay its reasonable value. To this end the defense of ultra vires has been considerably broken down by the courts and recovery is permitted on the contract in some instances or estoppel is invoked to preclude the defense of ultra vires; or recovery on quantum meruit or for money had and received is permitted to accomplish what in justice and equity should result.[3] The whole purpose of this attitude of the courts is to have municipalities obedient to the general obligation to do justice so that if they receive money which belongs to another by mistake or without

[1] Chapman *v.* Douglas County, 107 U. S. 348, 27 L. Ed. 378; Bardwell *v.* South Engine Wks., 130 Ky. 222, 113 S. W. 97, 20 L. R. A., N. S. 110; Stebbin *v.* Perry County, 167 Ill. 567, 47 N. E. 1048; LaFrance Engine Co. *v.* Syracuse, 33 Misc. 516.

[2] Bartlett *v.* Lowell, 201 Mass. 151, 87 N. E. 195.

[3] *Idem.*

authority they will refund it. And in similar manner if they obtain property which does not belong to them, they will restore it or if they use it, render an equivalent to the true owner of such property.[1] Where persons part with money or property on the faith of a contract which is ultra vires, the courts in the general desire to effect equity and do justice will permit a recovery of the property or the money specifically or as money had and received.[2] Such recovery is permitted upon the theory of an implied contract.[3] So, if a municipality has power to purchase land for a court house and does so by a contract void because the manner of payment is forbidden, it nevertheless will be required to convey back the property or pay the purchase price.[4] In like manner where bonds given in aid of a railroad were found unauthorized and void and all recovery upon them was denied, the right to reclaim the capital stock held by the county as consideration for the issue of the bonds will be sustained.[5] Where, however, the money did not go into the treasury of the municipality and it received no part of the proceeds of the bonds, but instead it was paid directly by the lender to a railroad company in exchange for the bonds of the municipality issued to the railroad without authority so that the contract was ultra vires, and the benefits which the municipality received were only the general benefits conferred on all alike from the construction of the railroad, no

[1] Argenti *v.* San Francisco, 16 Cal. 256; Allen *v.* LaFayette, 89 Ala. 641, 8 So. 30. But see Bartlett *v.* Lowell, cited *supra.*

[2] Allen *v.* LaFayette, *supra;* Pimental *v.* San Francisco, 21 Cal. 362; Clark *v.* Saline County, 9 Neb. 516, 4 N. W. 246; Marsh *v.* Fulton County, 77 U. S. 676, 19 L. Ed. 1040; Louisiana *v.* Wood, 102 U. S. 294, 26 L. Ed. 153; Chapman *v.* Douglas County, 107 U. S. 348, 27 L. Ed. 378; Salt Lake City *v.* Hollister, 118 U. S. 256, 30 L. Ed. 176, aff'g 3 Utah, 200, 2 Pac. 200.

[3] Argenti *v.* San Francisco, 16 Cal. 256; Allen *v.* LaFayette, *supra.*

[4] Chapman *v.* Douglas County, *supra.*

[5] Stebbins *v.* Perry County, *supra.*

implied obligation would arise against the municipality to repay the proceeds of the bonds.[1]

§ 61. Defective Execution.

If a municipality or other public body has power and authority to make a contract with reference to a given subject-matter, but the contract becomes invalid because the power granted is defectively or irregularly exercised, and the performance of the contract has been effected in good faith by the contractor, the public body is liable on the contract, unless the contract was prohibited by law or in violation of public policy.[2] On the other hand, some jurisdictions only uphold a liability by the municipality to the person conferring the benefit to the extent of the value of what has been received and appropriated, and therefore admit a recovery not upon the contract but upon quantum meruit.[3]

§ 62. Making Contract Valid in Substance but Invalid in Extent of Exercise of Power.

Where a contract proves invalid in part because of an

[1] Traveler Ins. Co. *v.* Johnson City, 99 Fed. 663, 49 L. R. A. 123.

[2] Chapman *v.* Douglas County, 107 U. S. 348, 27 L. Ed. 378; Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. Ed. 659; Drainage Commrs. *v.* Lewis, 101 Ill. App. 150; Argenti *v.* San Francisco, 16 Cal. 256; Sanitary Dist. *v.* Blake Mfg. Co., 179 Ill. 167, 53 N. E. 627; Mound City *v.* Snoddy, 53 Kan. 126, 35 Pac. 1112; State *v.* Moore, 46 Neb. 590, 65 N. W. 193; State *v.* Long Branch, 59 N. J. L. 371, 35 Atl. 1070; Portland, etc., Co. *v.* East Portland, 18 Oreg. 21, 22 Pac. 536; McGuire *v.* Rapid City, 6 Dak. 346, 43 N. W. 706; Nat. Tube Wks. *v.* Chamberlain, 5 Dak. 54, 37 N. W. 761; Bell *v.* Kirkland, 102 Minn. 213, 113 N. W. 271; Laird Norton Yds. *v.* Rochester, 117 Minn. 114, 134 N. W. 644; First Nat. Bk. *v.* Goodhue, 120 Minn. 362, 139 N. W. 599; Saleno *v.* Neosho, 127 Mo. 627, 30 S. W. 190; Moore *v.* New York, 73 N. Y. 238, 29 Am. R. 134; Portland *v.* Portland Bitum. Pav. & I. Co., 33 Oreg. 307, 52 Pac. 28; Long *v.* LeMoyne, 222 Pa. St. 311, 71 Atl. 211.

[3] Schipper *v.* Aurora, 121 Ind. 154, 22 N. E. 878; Bluthenthal *v.* Headland, 132 Ala. 249, 31 So. 87; State *ex rel.* Morris *v.* Clark, 116 Minn. 500, 134 N. W. 130; Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400; Carey *v.* East Saginaw, 79 Mich. 73, 44 N. W. 168; Ellsworth *v.* Rossiter, 46 Kan. 237, 26 Pac. 674; Lincoln Land Co. *v.* Grant, 57 Neb. 70, 77 N. W. 349.

attempt to grant an exclusive franchise to a public service corporation to use the city streets after the contract has been substantially performed by the corporation, after its plant had been constructed according to its terms, and after the city had accepted and used it for years, and had secured the benefits of the grant, it may not repudiate all the obligations it had the power to assume, because it assumed one that was beyond its power. The grant of such exclusive privilege is merely ultra vires and not immoral or illegal. There is therefore no rule of law or of morals which will relieve the recipient of the substantial benefits of a partially executed contract from the obligation to perform or to pay, because the performance of an insignificant portion of it is beyond the powers of the public body. The true rule is that when a part of a divisible contract is ultra vires, but neither malum in se nor malum prohibitum, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void.[1]

§ 63. Want of Power to Enter into Contract—Equitable Relief.

If a public contract has been entered into in good faith between a public corporation and a contractor, and the contract is partially or wholly void because of want of power to make it, or make it in the manner it was made, and the contract is not immoral, inequitable or unjust, and the contract is performed in whole or in part by one of the parties, and the other party receives the benefits of

[1] Illinois Trust & Savings Bk. *v.* Arkansas City, 76 Fed. 271; Saginaw Gas Light Co. *v.* Saginaw, 28 Fed. 529, 540; Reagan *v.* Farmers L. & T. Co., 154 U. S. 362, 395, 38 L. Ed. 1014; Mobile Elec. Co. *v.* Mobile, 201 Ala. 607, 79 So. 39, L. R. A., 1918 F. 667.

such performance, which the contractor may lawfully give and the public body lawfully receive, the party receiving the benefits will be required to do equity towards the other party by either rescinding the contract, and placing the other party in statu quo or by accounting to the other party for all benefits received for which no equivalent has been rendered in return, and all this will be done as nearly in accordance with the terms of the contract as law and equity will permit.[1]

But of course, the rule in equity can be no different than that which prevails at law where there is not a mere irregularity in letting the contract or where the contract let is not merely unauthorized but where it is let in violation of law and is utterly and jurisdictionally illegal.

§ 64. Illegal Contract—Relief in Equity—Cancellation.

Where a public body seeks relief in equity from an ultra vires contract, if the consideration received by it can be restored, a court of equity will not relieve the public body therefrom, without providing for a restoration of the consideration.[2]

§ 65. Illegality—Ratification—Waiver.

Where action is brought upon a contract which is illegal, no recovery may be had upon the theory that the acts have been ratified, for there can be no ratification of a contract which is illegal as distinguished from one which is merely unauthorized.[3] And whether the defense of

[1] Brown *v.* Atchison, 39 Kan. 37, 17 Pac. 465, 7 Am. St. R. 515.

[2] Turner *v.* Cruzen, 70 Iowa, 202, 30 N. W. 483; Moore *v.* New York, 73 N. Y. 238, 29 Am. R. 134; Argenti *v.* San Francisco, 16 Cal. 256; Lucas Co. *v.* Hunt, 5 Ohio St. 488; see Coker *v.* Atlanta K. & N. R. Co., 123 Ga. 483, 51 S. E. 481.

[3] U. S. *v.* Grossmayer, 9 Wall. (U. S.) 72, 19 L. Ed. 627; Lancaster County *v.* Fulton, 128 Pa. 48, 18 Atl. 384; Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973.

illegality is pleaded or not, if the facts develop it, the court will not enforce the contract but will of its own motion take notice of its illegality, its corruption or immorality.[1] The defense of illegality may not be waived by the officers of a public body [2] and where the Constitution denies recovery on illegal contracts, not even the legislature may waive the illegality.[3] Even contracts which are permitted by the laws of other countries are not enforceable in the courts of this country, if they contravene our laws, our morality or our policy.[4]

So a contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country, not on account of regard for the interests or policy of such government but because the transaction is inherently vicious, is repugnant to our code of morality and because of the pernicious effect which its enforcement would have upon our own people.[5]

While no sort of ratification can make good an act, outside the scope of corporate authority, if a public body with full knowledge of the facts ratifies the doings of one who has assumed to act in its behalf it will be bound thereby and the ratification will make the contract as effectual as if the acts had been originally authorized by express resolution of the public body.[6] The ratification may be by express assent or by acts or conduct inconsistent with any other supposition than that the public

[1] Oscanyan *v.* Arms Co., 103 U. S. 261, 26 L. Ed. 539; Nelson *v.* Mayor, 131 N. Y. 4, 29 N. E. 814.
[2] Northport *v.* Northport Townsite Co., 27 Wash. 543, 68 Pac. 204.
[3] Norbeck & N. Co. *v.* State, 32 S. D. 189, 142 N. W. 847.
[4] Oscanyan *v.* Arms Co., *supra.*
[5] *Idem.*
[6] Peterson *v.* Mayor, 17 N. Y. 449; Albany City Nat'l Bk. *v.* Albany, 92 N. Y. 363.

body intended to adopt the act done in its behalf.[1] There must be full knowledge of all material facts in order to bind a public body by ratification.

But the rule that in order to bind a public body by ratification it must have knowledge of all material facts has no application, where its own records are in concern and it is chargeable with such knowledge, and a mere change in the individuals who constitute such body does not destroy its continuity or relieve it from the presumption of knowledge of the official acts of record performed by its predecessors.[2]

§ 66. **Estoppel.**

The doctrine of estoppel in pais applies to municipal corporations as well as to private corporations, but the public will only be estopped or not as justice and right require. Any positive acts by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the public body to stultify itself by retracting what its officers may have done, will work an estoppel.[3] A city is accordingly estopped from recovering a penalty from a person for pursuing a lawful trade or calling for the privilege of which it has received and retains the license fee exacted of him, even though it was paid to one not a de jure officer, as long as the city retains it with knowledge of the purpose for which it was paid.[4] A city is bound in justice and equity to repay the unearned portion of a license fee paid for the conduct of a privilege in the community where

[1] Albany City Nat. Bk. *v.* Albany, *supra.*
[2] *Idem.*
[3] Martel *v.* E. St. Louis, 94 Ill. 67.
[4] *Idem.*

the privilege is revoked before the term paid for has expired.[1]

But courts will not compel a municipality to restore money paid for a license to carry on a business prohibited by a penal statute or against public policy, since it is a general rule that no action may be maintained to recover moneys or property lost, or damages sustained through transactions or contracts wherein the suitor is guilty of moral turpitude or which arise out of his violation of a general law—enacted to carry into effect the public policy of a State or Nation. If a municipality makes an ultra vires contract to authorize a business forbidden by general law and then repudiates it, no recovery of any fee paid is permissible.[2]

§ 67. Voluntary Payment—Recovery Back by Public Body of Money Paid Under an Illegal Contract.

If the agent of a public body pays out its money without power and authority under an illegal contract such money is recoverable back. The doctrine of voluntary payment cannot be invoked by the payee to retain the money illegally paid to him. That doctrine cannot apply to the agent of a public corporation, who pays its money out without power, to one who accepts it with full knowledge. Such action is void, and a void payment is no payment. It is not, therefore, a payment voluntarily made by the corporation, but by its agent in excess of his authority. Accordingly it is not the act of the public body but of one, who assumes to act for it, without authority. An action will therefore lie at the suit of the public body to recover back the moneys paid.[3]

[1] Pearson *v.* Seattle, 14 Wash. 438, 44 Pac. 884; State *v.* Cornwell, 12 Neb. 470, 11 N. W. 729.

[2] Levy *v.* Kansas City, 168 Fed. 524.

[3] Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973; Bd. of Supervisors *v.* Ellis,

Where a contract provides that no payment shall be made for certain classes of work, if the public body makes payment therefor, it will not be considered as irrevocable or as paid under a mistake of law. Such money must be regarded as paid for work done under the contract, the only purpose for which it may lawfully be paid. If paid, it will be regarded as nothing more than an overpayment, which may properly be deducted from whatever sum was due the contractor for any portion of the work.[1] Where the public body or its officers fail to perform their duty to sue for recovery of the money, an action may be brought by a taxpayer for such purpose.

59 N. Y. 620; Ward *v.* Barnum, 10 Colo. App. 496, 52 Pac. 412; Wayne Co. *v.* Reynolds, 126 Mich. 231, 85 N. W. 574; Bayne *v.* U. S., 93 U. S. 642, 23 L. Ed. 997; Cayuga County *v.* State (N. Y. Ct. Cl.), 183 N. Y. Supp. 646.

[1] Chicago *v.* Weir, 165 Ill. 582, 46 N. E. 725.

CHAPTER XII

EXERCISE OF PARTICULAR POWERS

§ 68. Water and Lighting.

It would seem that such an essential to a community as water would readily lay a foundation to imply a power to procure it from the grant of general powers such as the welfare clause common to municipal charters. But the courts have in many jurisdictions determined that the procuring of water is a matter of concern for the individual, and the community is without power to supply it except by express grant.[1] If water were used merely for drinking purposes such a conclusion might not be questioned, but even for such a purpose in the interest of the general health nothing could be so essential as a sufficient supply of wholesome and pure water. But its uses for fire and general sanitation of the streets and houses of a community make it an absolute need in our complex city civilization of to-day. In like manner, the implied power to light streets has been denied.[2] Lighted streets uncover the lurking highwayman and destroy the opportunity for immorality under cover of darkness in public places. These purposes relate intimately to the personal security and the moral welfare of the citizen and should afford substantial ground for the courts to infer the power to light streets from general powers granted to a community.

[1] Wichita Water Co. *v.* Wichita, 234 Fed. 415; Huron Water Works Co. *v.* Huron, 7 S. D. 9, 62 N. W. 975.

[2] Posey *v.* North Birmingham, 154 Ala. 511, 45 So. 663.

However, in other jurisdictions the supplying of water and the lighting of streets has been determined to be one of the fundamental grants of power which would be implied from its creation and existence and a necessary incident thereto.[1] Such power will be implied even though not expressly conferred, since the use of the power is necessary to fully protect the lives, comfort, security and property of the inhabitants.[2] A grant of power to provide a water supply carries with it by implication the power to contract with private persons or corporations to supply water.[3] Public bodies which enter into contracts with private water companies for such a supply under express statutory authorization are not precluded from obtaining a supply from other sources. The mere fact that a public body consents to the incorporation of a company to supply water and to use its streets for that purpose and subsequently enters into a contract with such company for a supply will not constitute the franchise which the company obtains exclusive or bind the public body to obtain water exclusively from it. Such facts will not create a grant of a right to supply water exclusive in its nature,[4] as legislative grants will not be extended by implication but on the contrary are construed strictly in favor of the public.[5] Except so far as the privileges granted are exclusive under the terms of a grant, the power is reserved to grant and permit the exercise of competitive grants no matter how

[1] State *ex rel.* Ellis *v.* Tampa W. Wks. Co.,56 Fla. 858, 47 So. 358; Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029.

[2] Lott *v.* Waycross, 84 Ga. 681, 11 S. E. 558; Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849; Opinion of Justices, 150 Mass. 592, 24 N. E. 1084; Ellinwood *v.* Reedsburg, 91 Wis. 131, 64 N. W. 885.

[3] Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981.

[4] Syracuse W. Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381; *Re* Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

[5] *Re* Brooklyn, 143 N. Y. 596, 26 L. R. A. 270; Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381.

injurious they may be to those taken by the earlier grantee.[1] And in determining the extent of the grant reference can only be had to the terms of the grant itself.[2] Where the legislature has provided that a city might condemn, if it chose to buy, the plant of a public service company such statute would conditionally protect the company during the life of the statute from municipal competition, but such statute cannot operate to enlarge the original franchise, nor grant any new franchise. It constitutes no agreement with the company and it is entirely competent for the legislature subsequently to repeal the statute and leave the city free to compete.[3] In like manner, where authority was given to a town to light its streets and it made a contract with a company for five years to furnish light and the legislature repealed the act in the year following its passage, the service company could not recover from the town. Since the town had no authority to make a continuing contract, it could not bind the legislature not to repeal.[4] Simply because a legislature passes an act which empowers municipalities to deal with public utility corporations formed under the act, is not evidence that the legislature intended to compel public bodies to deal with these corporations against their will. It is the concern of municipal authorities to light their streets by the cheapest means attainable, and they must have discretion in determining the merits and reliability of the means of reaching that result. So it may make

[1] Syracuse W. Co. *v.* Syracuse, *supra;* Andrews *v.* South Haven, 187 Mich. 294, 153 N. W. 827, L. R. A., 1916 A. 908; *Re* Brooklyn, *supra;* Knoxville W. Co. *v.* Knoxville, 200 U. S. 22, 50 L. Ed. 353; United R. Co. *v.* San Francisco, 249 U. S. 517, 63 L. Ed. 739.

[2] Halstead *v.* New York, 3 N. Y. 433; Syracuse W. Co. *v.* Syracuse, *supra.*

[3] *Re* Brooklyn, *supra.*

[4] Richmond Co. G. Co. *v.* Middletown, 59 N. Y. 228; *Contra,* Cits. Water Co. *v.* Bridgeport Hyd. Co., 55 Conn. 1, 10 Atl. 170.

contracts with individuals as well as with the corporations organized.[1]

Where the power is granted, the means to carry out the power is left to the discretion of the public body. It may erect its own plant or may contract for a supply.[2] And it may supply its inhabitants as an incident to the power granted.[3] But in some jurisdictions, it has been declared that the public body may not erect a municipal plant under a grant of power to light streets.[4] Without express power, it cannot give an exclusive franchise to a private company to furnish water or to light the streets or furnish a supply to the inhabitants.[5] Nor may it grant a perpetual franchise,[6] nor agree to pay annually in perpetuity to a company supplying it with water a sum equal to a certain amount on the present assessed valuation of its property.[7] But a municipality has the power to make a contract with a water company for a water supply and provide as one of the terms of compensation that a sum equal to a portion of the taxes for each year shall be allowed in addition to payment of a definite sum for water supplied.[8] Such a provision is not an exemption

[1] Cits. Elec. L. Co. *v.* Sands, 95 Mich. 551, 20 L. R. A. 411; State *v.* Tampa W. Wks. Co., 56 Fla. 858, 47 So. 358.

[2] Middleton *v.* St. Augustine, 42 Fla. 287, 29 So. 421; Overall *v.* Madisonville, 31 Ky. L. R. 278, 102 S. W. 278; Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870; Oakes Mfg. Co. *v.* New York, 206 N. Y. 221, 99 N. E. 540, 42 L. R. A., N. S. 286.

[3] Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849; Middleton *v.* St. Augustine, *supra;* Overall *v.* Madisonville, *supra; Contra,* Hyatt *v.* Williams, 148 Cal. 585, 84 Pac. 41; Christensen *v.* Fremont, 45 Neb. 160, 63 N. W. 364.

[4] Spaulding *v.* Peabody, 153 Mass. 129, 26 N. E. 421; Howell *v.* Millville, 60 N. J. L. 95, 36 Atl. 691.

[5] Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75; Ill. Trust & Sav. Bk. *v.* Arkansas City, 76 Fed. 271.

[6] Westminster W. Co. *v.* Westminster, 98 Md. 551, 56 Atl. 990.

[7] *Idem.*

[8] Utica Water Works Co. *v.* Utica, 31 Hun, 426; Maine Water Co. *v.* Waterville, 93 Me. 586, 45 Atl. 830; Ludington W. S. Co. *v.* Ludington, 119 Mich. 480, 78 N. W. 558.

from taxation. Its effect is not to relieve the company from the payment of taxes, but it is to adopt the amount of taxes paid by the company as a partial measure of compensation.[1] The power to provide water carries with it the power to supply ice, as one is but the other in frozen condition.[2]

Municipalities have no duty to supply other municipalities or non-residents with water. It is declared that if the plant as constructed for itself affords opportunity to sell its surplus to others it has the right to do so, but cannot extend its plant outside its limits for this purpose.[3] It has the right to terminate its contract at any time upon reasonable notice.[4] Power to contract to supply water confers no power to contract to supply another city therewith.[5] Under a power to supply water to its inhabitants there arises no implied power to contract to furnish water for fifty years at a nominal rate to induce a public institution to locate within the limits of the municipality.[6]

When a municipal corporation engages in the business of supplying water to its inhabitants it is engaged in an undertaking of a private nature.[7] The enterprise is one

[1] *Idem.*

[2] Holton *v.* Camilla, 134 Ga. 560, 68 S. E. 472.

[3] Childs *v.* Columbia, 87 S. C. 566, 70 S. E. 296; Dyer *v.* Newport, 123 Ky. 203, 94 S. W. 25; Lawrence *v.* Methuen, 166 Mass. 206, 44 N. E. 247; *Contra*, Farwell *v.* Seattle, 43 Wash. 141, 86 Pac. 217.

[4] Childs *v.* Columbia, *supra.*

[5] Rehill *v.* Jersey City, 71 N. J. L. 109, 58 Atl. 175.

[6] Eastern Ill. St. Normal School *v.* Charleston, 271 Ill. 602, 111 N. E. 573.

[7] Piper *v.* Madison, 140 Wis. 311, 122 N. W. 730, 25 L. R. A. N. S. 239, 133 Am. St. Rep. 1078; People *ex rel.* Park Comrs. *v.* Detroit, 28 Mich. 229, 15 Am. Rep. 202; Aldrich *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434; Judson *v.* Winsted, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. N. S. 91; Wagner *v.* Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; Esberg Cigar Co. *v.* Portland, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651; Brown *v.* Salt Lake City, 33 Utah, 222, 93 Pac. 570, 14 L. R. A. N. S. 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004; Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487, 17 Am. Neg. Rep. 445; Lynch *v.* Springfield, 174 Mass. 430, 54 N. E. 871; Philadelphia *v.* Gilmartin, 71 Pa. St. 140; Asher *v.* Hutchinson Water

which involves the ordinary incidents of a business wherein something is sold which people desire to buy and which may become profitable. Under these circumstances a municipality becomes liable for the breach of its contract or for negligence just as a proprietor of a private business might become.[1] There is no implied warranty that water is wholesome.[2] A municipality, however, acts in a governmental capacity and discharges a governmental function when it furnishes water to its own Fire Department, and when so acting in a governmental capacity, of course is not liable.[3] In the absence of an express agreement to pay for water an implied contract will arise, where a consumer actually uses the water.[4]

§ 69. Contracts Relating to Sanitation.

While the powers of political subdivisions to contract cannot be extended by intendment or implication beyond the terms of the express grant of powers or those which are a necessary incident to carry out the express powers, there is nevertheless included as incidental to their ordinary powers, the power of self-preservation, and the means to carry out the essential purposes and objects of their existence.

One of the powers necessary to preserve society and to properly exercise the functions of local government is the

Light & P. Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52; Keever *v.* Mankato, 113 Minn. 55, 129 N. W. 158, 775, 33 L. R. A. N. S. 339, Ann. Cas. 1912 A. 216; Oakes Mfg. Co. *v.* New York, 206 N. Y. 221 99 N. E.540, 42 L. R. A. N. S. 286.

[1] Oakes Mfg. Co. *v.* New York, *supra;* Stock *v.* Boston, 149 Mass. 410, 21 N. E. 871; Watson *v.* Needham, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287; Milnes *v.* Huddersfield, L. R. 13, 2 B. D. 443; Lynch *v.* Springfield, 174 Mass. 430, 54 N. E. 871.

[2] Canavan *v.* Mechanicsville, 229 N. Y. 473, 128 N. E. 882.

[3] Springfield F. & M. Co. *v.* Keeseville, 148 N. Y. 48, 42 N. E. 405.

[4] Woodward *v.* Livermore Falls Water Dist., 100 Atl. (Me.) 317.

power to enact sanitative regulations for the preservation of the health and the lives of its inhabitants,[1] and to make necessary contracts to fulfill such a purpose;[2] and exclusive contracts granting a monopoly to the contractor for the removal of offensive products, objects and things dangerous to the health of the community have been sustained as entirely valid.[3] The reason for the rule is to be found in this that the removal of noxious and unwholesome matter tends directly to promote the public health, comfort and welfare and is, therefore, a proper exercise of the police power; and the privileges granted although exclusive are therefore an incident to the proper exercise of the police power of the State.[4] The legislative power cannot, however, under the guise of police regulations arbitrarily invade personal rights and private property unless these have in fact some relation to the public health or public welfare and such is the end sought to be attained thereby.[5] General power under a charter to make regulations for the promotion of health and the suppression of disease will not confer upon a municipality power to give an exclusive privilege to one contractor who will pay for it with the effect of destroying the legitimate business of many others.[6] And under the guise of such regulations the public body may not deprive the owners of their property.[7]

[1] St. Paul *v.* Laidler, 2 Minn. 190.

[2] Smiley *v.* McDonald, 42 Neb. 5, 60 N. W. 355; Alpers *v.* San Francisco, 32 Fed. 503; Walker *v.* Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869.

[3] Rochester *v.* Gutberlett, 211 N. Y. 309, 105 N. E. 548; Smiley *v.* McDonald, 42 Neb. 5, 60 N. W. 355; Alpers *v.* San Francisco, 32 Fed. 503; National Fertilizer Co. *v.* Lambert, 48 Fed. 458; State *v.* Orr, 68 Conn. 101, 35 Atl. 770; Tiede *v.* Schneidt, 105 Wis. 470, 81 N. W. 826.

[4] Smiley *v.* McDonald, *supra.*

[5] Smiley *v.* McDonald, *supra;* Landberg *v.* Chicago, 237 Ill. 112, 86 N. E. 638.

[6] Landberg *v.* Chicago, 237 Ill. 112, 86 N. E. 638.

[7] River Rendering Co. *v.* Behr, 77 Mo. 91.

§ 70. Exclusive Privileges—Monopoly.

Municipal corporations having the power express or implied to contract with others to furnish its inhabitants with ferry, railway, telephone, water, gas, electricity or other public service or utility may grant franchises, and when the privilege thus granted is accepted and the grantee enters upon its right to use the streets, a contract is created which is valid and enforceable, and which may not be revoked or rescinded except for cause.[1]

But these political subdivisions of the State have no power to grant exclusive privileges or franchises to deal in such commodities unless the power to do so is clearly and unmistakably conferred by the legislature, by express grant or necessary implication therefrom,[2] and, indeed, in some States there prevail constitutional limitations in regard to the granting of exclusive privileges, perpetuities and monopolies which deny such power even to the legislatures.[3] In the absence of such constitutional restrictions the power to grant exclusive privileges or franchises may be conferred by the legislature upon municipalities.[4] In construing charter and statutes conferring upon municipalities the right to provide for these public conveniences and utilities the authority to grant exclusive privileges

[1] People *ex rel.* Pontiac *v.* Cent. Union Tel. Co., 192 Ill. 307, 61 N. E. 428; Baxter Springs *v.* Baxter Springs L. & P. Co., 64 Kan. 591, 68 Pac. 63; Peo. *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692.

[2] Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381; Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75; Detroit Cits. St. Ry. *v.* Detroit Railway, 171 U. S. 48, 43 L. Ed. 67, aff'g 110 Mich. 384, 35 L. R. A. 859; Minturn *v.* Larue, 64 U. S. 435, 16 L. Ed. 574.

[3] Thrift *v.* Bd. of Commrs. of Elizabeth City, 122 N. C. 31, 30 S. E. 349; Atlantic City W. Wks. Co. *v.* Consumers Water Co., 44 N. J. Eq. 427, 15 Atl. 581.

[4] Freeport Water Co. *v.* Freeport City, 180 U. S. 587, 45 L. Ed. 679, aff'g 186 Ill. 179, 57 N. E. 862; Danville W. Co. *v.* Danville, 180 U. S. 619, 45 L. Ed. 696, aff'g 186 Ill. 326, 57 N. E. 1129; Milwaukee Elec. Ry. & L. Co. *v.* Railroad Commrs., 238 U. S. 174; Logan *v.* Pyne, 43 Iowa, 524.

will not be implied from the use of general language,[1] and these grants will be strictly construed and any ambiguity or doubt resolved in favor of the public and against the grantee.[2] Municipalities can bind themselves by contract only as they are empowered by statute or charter so to do. They may not accordingly grant exclusive privileges to put in mains, pipes, hydrants and wires for water, light or telephone supply and service. Where it cannot well be claimed that express power to grant exclusive franchises was delegated to them, public policy will not permit the inference of authority to make a contract inconsistent with its legislative duty which is continuously operative to make such regulations from time to time as the public interest may require.[3]

While public bodies may make contracts for legitimate public purposes and become liable for failure to observe them, it is not consistent with the discretionary or legislative powers vested in them and effected through their general governing body in the discharge of duty, for them by contract to grant exclusive privileges having the character of perpetuity.[4] Franchises for a term of years may come within the condemnation of monopoly as well as those of indefinite or perpetual duration.[5] The powers of municipal corporations are limited to the express terms of the grant, and will not be extended by inference. They

[1] Detroit Cits. St. Ry. Co. *v.* Detroit, 110 Mich. 384, 68 N. W. 304, 171 U. S. 48; Long *v.* Duluth, 49 Minn. 280, 51 N. W. 915; Logan *v.* Pyne, *supra;* Saginaw G. L. Co. *v.* Saginaw, 28 Fed. 529.

[2] Saginaw G. L. Co. *v.* Saginaw, *supra;* Syracuse W. Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381.

[3] Syracuse W. Co. *v.* Syracuse, *supra;* Gale *v.* Kalamazoo, 23 Mich. 344; Logan *v.* Pyne, *supra;* Des Moines G. Co. *v.* Des Moines, 47 Iowa, 505; Norwich G. L. Co. *v.* Norwich G. Co., 25 Conn. 19.

[4] Syracuse Water Co. *v.* Syracuse, *supra;* Westminster W. Co. *v.* Westminster, 98 Md. 551, 56 Atl. 990.

[5] Columbus Water Co. *v.* Mayor of Columbus, 48 Kan. 99, 28 Pac. 1097.

cannot confer exclusive privileges for the prosecution of business except under express grant of authority from the legislature. Since monopolies are prejudicial to the public welfare, grants thereof will not be inferred, for to do so would presume a legislative intent in conflict with public policy.[1] Accordingly, an ordinance which granted the exclusive franchise for five years of running omnibuses in the city of Dubuque was held invalid in so far as it attempted to prevent competitors of the grantee in the ordinance from carrying on the same business.[2]

Under similar reasoning where a party has been given the right by contract with a city to build and control a market house for the period of ten years, the contract was declared void because it created a monopoly which the city had no authority to grant.[3] And the right to do all slaughtering of animals in a city for a specified period was void for the same reason.[4]

Monopolies are more readily sustained in matters relating to the abatement of nuisances, sanitative matters and matters relating to the public health and in these regards monopolies have been sustained for the removal of garbage dead animals, offal and other deleterious, offensive and unwholesome substances.[5] A covenant by a city not to grant to any other person or corporation a privilege or exclusive franchise similar to that granted to the covenantee does not restrict the city from itself exercising similar power, and this principle applies to legislative grant. A grantee takes the risk of judicial interpretation

[1] Logan *v.* Pyne, *supra.*
[2] *Idem.*
[3] Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. R. 80.
[4] Chicago *v.* Rumpff, 45 Ill. 90.
[5] Smiley *v.* McDonald, 42 Neb. 5, 60 N. W. 355; Rochester *v.* Gutberlett, 211 N. Y. 309. (Cases preceding section.)

of its franchise and of the possible competition by a city of operating railroads of its own.[1]

§ 71. **Granting Franchise to Use Streets.**

A municipality has only power to grant franchises for the use of the public streets so far as this power has been delegated to it by the legislature. Primarily this power to grant franchises resides in the State. But where it has been conferred, municipalities may grant to individuals and not merely to corporations, a franchise for the construction and operation of street surface railroads, and a municipality has power to require a bond conditioned for the construction of the road, as a bond given to secure performance of a duty which is coupled with a right granted is valid.[2]

But a municipality may not grant to a private business corporation, the license or right to maintain spurs or tracks in its streets for the private purpose of conveying goods from a store to a street railroad. The charter powers of the municipality which authorize it to make contracts for the occupation of its streets will not confer power to make contracts for the use of streets by private individuals.[3] And such a spur or siding may not be maintained even by a railroad corporation to connect a private freight station with its main tracks where the maintenance and use of it does not bear a relation so direct and necessary to the fulfillment of the functions of the railroad corporation as to bring it by fair implication within the scope of the grant, and the department of highways may not by permit enlarge the powers of the railroad company and allow the

[1] Knoxville Water Co. *v.* Knoxville, 200 U. S. 22, 50 L. Ed. 353; United Railroads *v.* San Francisco, 249 U. S. 517, 63 L. Ed. 739, 239 Fed. 987.
[2] Phœnix *v.* Gannon, 195 N. Y. 471, 88 N. E. 1066.
[3] Hatfield *v.* Straus, 189 N. Y. 208, 82 N. E. 172.

maintenance of the spur. Furthermore, were such an exercise of power lawful in its origin, it would be a mere revocable privilege.[1] Conducting private business and using private easements in public streets, even where expressly authorized, will be condemned by the courts.[2] The municipality may not authorize permanent encroachments of the walls of the buildings upon its public streets. It holds the title to its streets impressed with the trust to keep the same open for the public use by the whole people, and it has no power to use them or permit them to be used other than as the legislature may authorize for some public use or benefit. It, therefore, cannot divert them by contract to private uses.[3] And an ordinance which attempts to legalize the projection of a building into a public street, withdrawing a portion of it from public use, is unconstitutional and void.[4]

When the power to grant a franchise for the use of its streets by a railroad is granted, the municipality may require as a condition of obtaining the consent of the municipality to permit the construction and maintenance of the railroad that the railroad company shall pave the street, change the grade of the street, or that it shall erect a depot at a specified place. These are lawful and proper conditions. It may also require at any time when the public interest demands it that such company shall discontinue the use of the street and shall remove its tracks

[1] Brooklyn Heights R. R. Co. *v.* Steers, 213 N. Y. 76, 106 N. E. 919; Lincoln Safe Dep. Co. *v.* New York, 210 N. Y. 34, 103 N. E. 768. See Denver & R. G. R. Co. *v.* Denver, 250 U. S. 241, 63 L. Ed. 958.

[2] Fifth Ave. Coach Co. *v.* New York, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. N. S. 744, aff'd 221 U. S. 467, 55 L. Ed. 815; State *ex rel.* Belt *v.* St. Louis, 161 Mo. 371, 61 S. W. 658; People *ex rel.* Healy *v.* Clean Street Company, 225 Ill. 470, 80 N. E. 298.

[3] New York *v.* Rice, 198 N. Y. 124, 91 N. E. 283.

[4] McMillan *v.* Klaw & Erlanger, 107 N. Y. App. Div. 407; Ackerman *v.* True, 175 N. Y. 355, 67 N. E. 629.

therefrom. And the municipality where it thus expressly reserves the right to revoke the franchise, may revoke the same at its pleasure even though the railroad has gone to large expense and has complied with all the other conditions imposed. It is simply a matter of complying with the terms of its engagement.[1] But a railroad may gain such an exclusive use of a street that a municipality may not thereafter interfere with its structures or require their relocation.[2]

Where a city grants the right to use that part of its streets under the sidewalks for vault purposes, even though it imposes a fee therefor, such right is not a contract but a mere revocable license which may be revoked at any time that the city sees fit to use the space for any other purpose,[3] which may not necessarily be a street purpose, but may be even a private purpose.[4]

§ 72. Power to Arbitrate.

Municipalities usually possess the power to sue and to be sued either expressly granted or derived necessarily from the power to contract. The power to arbitrate springs as an incidental or implied power from both of these other powers, and unless restricted by statute such public body may without express authority submit claims in its favor or against it to arbitration.[5] They have the same power to liquidate claims and indebtedness which natural persons have and from that source proceeds power to adjust old dis-

[1] Del,. L. & W. R. Co. *v.* Oswego, 92 N. Y. App. Div. 551.
[2] New York *v.* Hudson & M. R. Co., 229 N. Y. 141, 128 N. E. 152.
[3] Deshong *v.* New York, 176 N. Y. 475, 68 N. E. 880.
[4] Lincoln Safe Dep. Co. *v.* New York, 210 N. Y. 34, 103 N. E. 768. See Matter of Rapid Trans. Commrs., 197 N. Y. 81, 90 N. E. 456.
[5] Buckland *v.* Conway, 16 Mass. 396; Dix *v.* Dummerston, 19 Vt. 262; Shawneetown *v.* Baker, 85 Ill. 563, 25 Am. R. 321; Hartupee *v.* Pittsburgh, 131 Pa. 535, 19 Atl. 507; Walnut *v.* Rankin, 70 Iowa, 65, 29 N. W. 806; Kane *v.* Fond du Lac, 40 Wis. 495; Brady *v.* Brooklyn, 1 Barb. 584.

puted claims and, when the amount is ascertained, to pay it, as other indebtedness. By the same reasoning, they may submit to arbitration all unsettled claims with the same liability to perform the award as would rest upon a natural person.[1] But while this power is not denied to municipalities, if a special mode is provided to exercise a particular power, as for instance, the power of eminent domain, this impliedly disables the public body from submitting such a cause to arbitration.[2] The power of submission rests with the general governing body of the municipality,[3] although it is declared that its attorney may consent to a reference for it.[4] Since a submission is a contract, if the power of a municipality is limited to contracting in writing, and it is prohibited from paying any claim not specifically appropriated for, this negatives the existence of a common-law power to submit to arbitration.[5]

§ 73. Compromise of Disputed Claims.

The power to sue or be sued, which municipalities possess, carries with it the implied power to settle or compromise claims which are in dispute. These public bodies have no power to give away their funds or appropriate them to unwarranted purposes. As they cannot directly dispose of them by way of gratuity, they cannot accomplish such a result by indirection.[6] They have the power to compromise and settle a claim in their favor or against them if

[1] Shawneetown *v.* Baker, *supra.*
[2] Paret *v.* Bayonne, 39 N. J. L. 559, 40 N. J. L. 33.
[3] Shawneetown *v.* Baker, *supra;* Griswold *v.* N. Stonington, 5 Conn. 367.
[4] Paret *v.* Bayonne, *supra.*
[5] Dist. of Columbia *v.* Bailey, 171 U. S. 161, 43 L. Ed. 118.
[6] Bd. of Supervisors Orleans County *v.* Bowen, 4 Lans. 124; Petersburg *v.* Mappin, 14 Ill. 193, 56 Am. D. 501; Agnew *v.* Brall, 124 Ill. 312, 16 N. E. 230; Ludlow Valve Mfg. Co. *v.* Chicago, 181 Ill. App. 388; Gordon *v.* State, 233 N. Y. 1.

there is a bona fide dispute about the claim or its amount, and they may accept in settlement a sum less than the full amount.[1] A settlement of an existing controversy if made in good faith is binding, but is not if collusively made.[2] But where a claim has been reduced to judgment, they have no power to compromise the judgment,[3] unless the adverse party has appealed [4] or is about to appeal from the judgment or his time to appeal has not run.[5] But the doctrine above stated that they possess no power to compromise a claim which is reduced to judgment no longer applies after a municipality has exhausted its legal remedies to collect it. They may then pursue the methods which ordinary prudence dictates in the management of business by private persons, for these apply to municipalities, and may make a settlement.[6]

When the power to audit and settle has been expressly conferred by law upon the chief financial officer of the municipality no power any longer exists in its law officer to settle and adjust or compromise claims, even though they are involved in pending litigation where he has appeared.[7]

Even where power exists to compromise claims, a municipality may not confess judgment upon a liability which it would have no power to incur by direct contract. Such cannot be indirectly made valid by a consent to judgment,

[1] Petersburg *v.* Mappin, *supra;* Agnew *v.* Brall, 124 Ill. 312, 16 N. E. 230; Orleans County *v.* Bowen, *supra;* Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104; People *v.* San Francisco, 27 Cal. 655; Bailey *v.* Philadelphia, 167 Pa. 569, 31 Atl. 925.

[2] Petersburg *v.* Mappin, *supra.*

[3] Farnsworth *v.* Wilbur, 49 Wash. 416, 95 Pac. 642.

[4] Orleans County *v.* Bowen, 4 Lans. 124.

[5] Agnew *v.* Brall, *supra;* Petersburg *v.* Mappin, *supra;* State *v.* Davis, 11 S. D. 111, 75 N. W. 897.

[6] Washburn County *v.* Thompson, 99 Wis. 585, 75 N. W. 309.

[7] Bush *v.* O'Brien, 164 N. Y. 205, 58 N. E. 106.

where the consent related to a railroad subscription which the town authorities had no power to make.[1] Consent judgments are in effect contracts recorded in open court, and such a contract cannot bind a party to it which had no power to make a subscription or give a donation to a railroad any more than its contracts not of record could bind it for such a purpose.[2]

§ 74. Contract with Attorney.

Municipalities have the implied power to employ counsel. This power is possessed by every public body which has the power to sue and be sued.[3] It needs not much argument to see that this is necessarily so, for if it could be sued and still could not employ an attorney, it would be at the mercy of litigants against it, deprived of power to defend itself.

Where, however, the charter or statutes provide for a city attorney or counsel to the corporation whose duties are to prosecute and defend suits and to take care of the law business of the public body, these express provisions exclude the power to employ any other attorney.[4] When it becomes necessary for the protection of the interests of a municipality to employ additional counsel, such may be employed,[5] to assist but not to supersede the city attorney.[6] Where one who was legal adviser for the municipality continues to conduct the lawsuit without objection

[1] Union Bk. of Richmond *v.* Commrs. of Oxford, 119 N. C. 214, 25 S. E. 966.
[2] *Idem.*
[3] Farrel *v.* Derby, 58 Conn. 234, 20 Atl. 460; Memphis *v.* Adams, 9 Heisk. (Tenn.) 518.
[4] Lyddy *v.* Long Island City, 104 N. Y. 218, 10 N. E. 155; Hope *v.* Alton, 214 Ill. 102, 73 N. E. 406; Merriam *v.* Barnum, 116 Cal. 619, 48 Pac. 727.
[5] Boise City *v.* Randall, 8 Idaho, 119, 66 Pac. 938; Moorehead *v.* Murphy, 94 Minn. 123, 102 N. W. 219; Vicksburg W. Co. *v.* Vicksburg, 99 Miss. 132, 54 So. 852.
[6] Clough *v.* Hart, 8 Kan. 487; State, Hoxsey *v.* Paterson, 40 N. J. L. 186.

after his official term has expired, he may recover for his services upon an implied obligation.[1] This power of a municipality to employ counsel extends to the defense of one of its police officers who is sued for false imprisonment.[2] But because it empowers its attorney to appear and defend an action wherein the officer is charged with a tort will not make the city liable for the tort.[3] Not being liable for these acts of its police officers, it is not the duty of the municipality to defend them, and while it may, this will not authorize the city attorney to agree to pay a stenographer for performing services in an action to which the city is not a party.[4] The governor of a State has no implied power to employ counsel at the expense of the State,[5] and where authorized to make a contract with an attorney, he may not exceed the authority conferred.[6] The mayor has no implied power to employ attorneys although in case of an emergency such power will be implied to protect the city.[7]

But where the mayor finds himself forced into court with the official law officer arrayed against him to compel him to take a course of official action which he deemed violative of law and detrimental to the interests of the city and he is thereby compelled to engage counsel to defend him, while no authority will be implied in him to employ counsel, he will be compensated under the general principle of law that where an officer is required by law to

[1] Langdon *v.* Castleton, 30 Vt. 285.
[2] Cullen *v.* Carthage, 103 Ind. 196, 2 N. E. 571.
[3] Buttrick *v.* Lowell, 83 Mass. (1 Allen) 172.
[4] Chicago *v.* Williams, 182 Ill. 135, 55 N. E. 123.
[5] Cahill *v.* Bd. of State Auditors, 127 Mich. 487, 86 N. W. 950; People *ex rel.* Spencer *v.* Knight, 116 Cal. 108, 47 Pac. 925.
[6] Julian *v.* State, 122 Ind. 68, 23 N. E. 690, 140 Ind. 581, 39 N. E. 923.
[7] Louisville *v.* Murphy, 86 Ky. 53, 5 S. W. 194; see Barnert *v.* Paterson, 48 N. J. L. 395, 6 Atl. 15.

perform a duty involving the disbursement of money out of pocket, he is entitled to be reimbursed.[1]

Under some circumstances, where benefits are received and employment by the mayor is acquiesced in, there will arise an implied obligation to pay.[2] Where the legislature authorizes the employment of an attorney to prosecute a claim of the State requiring the procuring of legislation upon an agreement to compensate him only in event of success, and the State is bound, when the payment of the claims is obtained, to hold the funds for the benefit of the persons for whom they were collected and cannot pay part of them as a fee, it is liable to pay the moral obligation which it owes out of its own funds.[3]

§ 75. To Acquire and Hold Property.

Municipalities may take by purchase and hold real estate, by the immemorial usage of the country creating such right as an incident to their corporate powers. In colonial days they possessed the power upon a majority vote to make grants of the same for purposes of settlement. And in these days, the same right is exercised and much land comes into their possession which is not essential for their corporate needs, such as the erection of public buildings and the like.[4] While the inhabitants of municipalities may not be taxed to raise money for the purchase of lands to be used for a purpose not corporate,[5] these public bodies may under implied powers take real or personal property by gift or devise even though not

[1] Barnert *v.* Paterson, 48 N. J. L. 395, 6 Atl. 15.
[2] Mound City *v.* Snoddy, 53 Kan. 126, 35 Pac. 1112.
[3] Davis *v.* Comm., 164 Mass. 241, 41 N. E. 292.
[4] Worcester *v.* Eaton, 13 Mass. 371, 9 Am. Dec. 155; Christy *v.* St. Louis, 20 Mo. 143, 61 Am. D. 598.
[5] Markley *v.* Mineral City, 58 Ohio St. 430, 51 N. E. 28; Worcester *v.* Eaton, *supra*.

intended to be used for a corporate purpose.[1] They may accordingly own, control and manage farms, buildings or other property, operating them as individuals do for their own emolument, profit and advantage, and entirely disconnected from any public use.[2] They may in like manner take a voluntary grant of an easement for street purposes.[3] But they possess no power to acquire real estate for the purpose of donating same to third persons to induce them to construct and operate manufacturing plants within their corporate limits.[4] If in the course of acquiring property they exceed their corporate powers, the grantors may not avail themselves of this fact; the only authority who may question the misuser of powers is the State and even the courts may not in a collateral way declare void conveyances made to them in good faith.[5]

§ 76. To Sell Property.

The real or personal property of a private nature which belongs to a municipality may be alienated or sold by it under powers which will be implied from its general powers.[6] But these public bodies have no power to sell or dispose of property of a public nature in violation of the trusts or uses upon which it is held unless relieved of the trusts and authorized to sell by the legislature.[7] The

[1] Worcester *v.* Eaton, *supra;* Oliver *v.* Worcester, 102 Mass. 489, 3 Am. R. 485; Libby *v.* Portland, 105 Me. 370, 74 Atl. 805; Hathaway *v.* Milwaukee, 132 Wis. 249, 111 N. W. 570.

[2] Libby *v.* Portland, 105 Me. 370, 74 Atl. 805.

[3] Hathaway *v.* Milwaukee, 132 Wis. 249, 111 N. W. 570.

[4] Markley *v.* Mineral City, *supra.*

[5] Raley *v.* Umatilla, 15 Oreg. 172, 13 Pac. 890.

[6] Ft. Wayne *v.* Lake Shore & M. S. R. Co., 132 Ind. 558, 32 N. E. 215; Beach *v.* Haynes, 12 Vt. 15; Jamison *v.* Fopiana, 43 Mo. 565, 97 Am. D. 414; Newbold *v.* Glenn, 67 Md. 489, 10 Atl. 242; Warren County *v.* Patterson, 56 Ill. 111; Reynolds *v.* Stark County Commrs., 5 Ohio St. 204.

[7] Brooklyn Park Commrs. *v.* Armstrong, 45 N. Y. 234; Douglas *v.* Montgomery, 118 Ala. 599, 24 So. 745; Alton *v.* Illinois T. Co., 12 Ill. 38, 52 Am. D.

authorities, however, establish a distinction between property which is purchased for a public purpose and actually dedicated to that use and property so purchased but not actually dedicated to the public purpose. In the former case, there is no implied power to alienate or dispose of it,[1] while in the latter case such power will be implied,[2] unless restrained by charter or statute. Even where it is expressed in the deed of conveyance of the land purchased that it is for a public common, until it is devoted actually to such a purpose, it may be alienated.[3] But when so devoted, it may not be alienated or disposed of.[4] Public buildings, parks, squares, wharves, landing places, waterworks, fire apparatus and fire houses and like properties of a municipality are generally regarded as held for a public purpose and may not be sold without statutory sanction.[5] In those instances, where a power of sale is conferred, it will not permit the municipality to indulge in barter or exchange.[6] Where a privilege or easement is conferred by a municipality to use its property for vault purposes under a city sidewalk, the privilege or easement may be recalled by it when it needs the land for any purpose, and the right of recall is not to be limited to cases where the land is necessary for street purposes but it may be taken back for its proprietary or business purposes, since the very object of acquiring title in fee as

479; Lake County W. Co. *v.* Walsh, 160 Ind. 32, 65 N. E. 530; Cook *v.* Burlington, 30 Iowa, 94, 6 Am. R. 649; Rose *v.* Baltimore, 51 Md. 256, 34 Am. R. 307; Palmer *v.* Albuquerque, 19 N. M. 285, 142 Pac. 929, L. R. A. 1915 A. 1106.

[1] State *v.* Woodward, 23 Vt. 92; Ft. Wayne *v.* Lake Shore & M. S. R. Co., *supra.*

[2] Ft. Wayne *v.* Lake Shore & M. S. R. Co., *supra;* Beach *v.* Haynes, *supra.*

[3] *Idem.*

[4] State *v.* Woodward, *supra;* Ft. Wayne *v.* Lake Shore & M. S. R. Co., *supra.*

[5] Huron Waterworks Co. *v.* Huron, 7 S. D. 9, 62 N. W. 975; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. Ed. 197; New Orleans *v.* Morris, 105 U. S. 600, 26 L. Ed. 1184.

[6] Cleveland *v.* State Bank, 16 Ohio St. 236.

distinguished from an easement is to vest in the public the right to use the land for all purposes.[1]

Wharves and piers which are the continuations of public streets held by the municipality in trust for the public use may not be alienated as the municipality has no power to convey title in contravention of the trust unless authorized to do so by legislative sanction. But a city has power to dedicate its own lands to street uses and may bind itself by covenant with the grantees of abutting property that the lands so dedicated shall be kept open forever as a public street.[2]

A municipality under these principles may lease for the erection of summer cottages its common lands, which it had power by appropriate vote to divide amongst its inhabitants, as long as they are not needed for public purposes.[3]

§ 77. To Borrow Money and Incur Indebtedness.

Since municipalities can only exercise those powers which have been expressly granted to them by statute or such as are necessarily and fairly implied from those conferred or are essential to the declared objects and purposes for which they were created and ordained, the people and their property can only be bound in accordance with those powers. It does not belong to local governments as a mere matter of course to raise loans. It is not a power incident to their creation. When they incur debts, the appropriate method of paying for them is in cash or its equivalent obtained through the power of taxation.[4] In

[1] Lincoln Safe Dep. Co. *v.* New York, 210 N. Y. 34, 103 N. E. 768.

[2] Knickerbocker Ice Co. *v.* Forty-Second St. & G. S. F. Co., 85 N. Y. App. Div. 530, 176 N. Y. 408, 68 N. E. 864; People *ex rel.* N. Y. Cent., etc., R. Co. *v.* Priest, 206 N. Y. 274, 99 N. E. 547.

[3] Davis *v.* Rockport, 213 Mass. 279, 100 N. E. 612.

[4] Nashville *v.* Ray, 86 U. S. 468, 22 L. Ed. 164; Wells *v.* Salina, 119 N. Y. 280, 23 N. E. 870; Hackettstown *v.* Swackhamer, 37 N. J. L. 191.

order to exercise a different means of payment, such as borrowing money through an issue of bonds, municipalities must be in possession of the power to do so by express grant or it must be clearly implied from legislative enactment.[1] Accordingly, it is generally and uniformly declared that the power to borrow money is not to be implied as an incident to general powers, but on the contrary its existence will not be inferred from general language but will be denied.[2] Its negation rests in addition upon grounds of public policy as a safeguard against heavy and ruinous debt which might be incurred by improvident, careless or faithless officials. Were the rule otherwise, money could be borrowed for one purpose and spent for another, to the utter ruin of municipalities.[3]

There is, however, a well-recognized distinction between the power to borrow money to pay a contract debt and the power to contract the debt on credit. In the latter case, the use of credit promotes the accomplishment of the authorized object, and payment is made by taxation. This power to use credit is generally recognized.[4] Where the power to borrow money is not derived from express grant but is incidental to general powers of government it exists with the limitation upon it that money may only be borrowed to carry out express powers and for purposes for which it may legitimately be raised by taxation.[5]

[1] Allen *v.* Intendant & C. of Lafayette, 89 Ala. 641, 8 So. 30; Nashville *v.* Ray, *supra;* Wells *v.* Salina, *supra;* Hackettstown *v.* Swackhamer, *supra;* Hanger *v.* Des Moines, 52 Iowa, 193, 2 N. W. 1105; Lemon *v.* Newton, 134 Mass. 476.

[2] Wells *v.* Salina, *supra.*

[3] Ketchum *v.* Buffalo, 14 N. Y. 356.

[4] Ketchum *v.* Buffalo, *supra;* Galena *v.* Corwith, 48 Ill. 423.

[5] Merrill *v.* Monticello, 138 U. S. 673, 34 L. Ed. 1069; Chillicothe Bk. *v.* Chillicothe, 7 Ohio, 31, 30 Am. D. 185.

§ 78. To Assume Responsibilities which the Law Places on Others.

Municipalities have no power to assume obligations or responsibilities which the law casts upon others.[1] They have no power to aid a railroad corporation in the performance of the duties and responsibilities which the maintenance of its road imposes. Such an attempt by way of a contract to do so is not only ultra vires but is without consideration to support it.[2] Contracts by which municipalities undertake to assume obligations and duties properly resting on others to restore a street,[3] to build a bridge,[4] or to maintain a bridge [5] are wholly beyond their powers, and void. And it may not make a contract to bear part of the expense of building a bridge or repairing it.[6] Even a State may not assume an obligation which belongs to the Nation, when limited by its own Constitution.[7]

§ 79. Expending Money for Purposes not Public and Making Contracts to Carry Out Such Objects.

The National and State governments, except as restricted and limited by their Constitutions, have unlimited power to determine what is for the public good and what are public uses and purposes for which public money may be expended. These are matters confided to the keeping

[1] Snow *v.* Deerfield Tp., 78 Pa. St. 181; Minneapolis R. Co. *v.* Minneapolis, 124 Minn. 351, 145 N. W. 609.

[2] Snow *v.* Deerfield Tp., *supra;* Newton *v.* C. R. I. & Pac. Ry. Co., 66 Iowa, 422, 23 N. W. 905.

[3] Snow *v.* Deerfield Tp., *supra.*

[4] State *v.* St. Paul M. & M. Ry. Co., 98 Minn. 380, 108 N. W. 261.

[5] State *ex rel.* St. Paul *v.* Minnesota Trans. Ry. Co., 80 Minn. 108, 83 N. W. 32.

[6] Minneapolis, St. P. R. & D. E. T. Co. *v.* Minneapolis, 124 Minn. 351, 145 N. W. 609.

[7] People *v.* Westchester Co. Nat. Bank, 231 N. Y. 465, 132 N. E. 241.

of the Congress and the legislatures and cannot be controlled by the courts by judicial revision. Whenever accordingly contracts are made by these National and State departments of government or by agents and officers of the Nation or State thereunto duly authorized, pursuant to appropriate legislation, the courts have no power to determine that the purpose is not public, except in case of constitutional restraint, that power being vested solely as indicated. Contracts made, therefore, and liabilities incurred by a World's Fair Commission appointed under State authority are valid and enforceable even though a private corporation in charge of such World's Fair might profit by it, since the statute was not passed to confer such incidental benefit but to promote the public good.[1] But where municipalities or other similar public bodies undertake such expenditures they must find warrant for so doing in express grant of authority and it will not be implied, from the general powers possessed by such bodies. Unless so authorized they have no right or authority to expend money or contract a liability to pay it for a purpose which was not clearly public. Accordingly these various political subdivisions of the State have no power to appropriate money and make contracts involving their expenditure to celebrate important events in the history of the country such as the anniversary of the Declaration of Independence,[2] nor to celebrate the anniversary of the surrender of Cornwallis.[3] They may not make valid contracts for the celebration of such an occa-

[1] Daggett *v.* Colgan, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474. See Waterloo Woolen Mfg. Co. *v.* Shanahan, 128 N. Y. 342, 28 N. E. 358; U. S. *v.* Old Settlers, 148 U. S. 427, 37 L. Ed. 509.

[2] Hodges *v.* Buffalo, 2 Denio, 110; Hood *v.* Lynn, 1 Allen, 103; New London *v.* Brainard, 22 Conn. 552; Austin *v.* Coggeshall, 12 R. I. 329.

[3] Tash *v.* Adams, 10 Cush. 252.

sion as the centennial anniversary of their existence as cities, counties and towns [1] nor for entertainments and dinners for its citizens or guests.[2] Such contracts are void and even though they have been fully carried out and performed by the contractor with the public body and the latter has had the advantages of performance, there is no liability on the part of the public body.[3] Long established custom may not be resorted to as a basis to sustain such contracts and relieve them from invalidity.[4] A town cannot build places of amusement for its inhabitants,[5] nor abate taxes.[6] It may not expend money to obtain a city or town charter [7] nor to oppose division of the town [8] nor to pay a private fire company [9] nor to build a court-house [10] or a county jail.[11] In like manner it may not build a bridge in another town,[12] or contribute to a private cemetery association.[13] It cannot divide among its inhabitants money received from the State,[14] nor expend money for purposes of local defense.[15] Where, however, power has been conferred upon a city to provide for the entertainment of visitors and to celebrate anniversaries of historical events [16] or where such power has been given

[1] Love *v.* Raleigh, 116 N. C. 296, 21 S. E. 503.
[2] Stegmaier *v.* Goeringer, 218 Pa. St. 499, 67 Atl. 782.
[3] Hodges *v.* Buffalo, *supra;* Austin *v.* Coggeshall, *supra.*
[4] Stegmaier *v.* Goeringer, *supra.*
[5] Stetson *v.* Kempton, 13 Mass. 272.
[6] Cooley *v.* Granville, 10 Cush. 56.
[7] Frost *v.* Belmont, 6 Allen, 152.
[8] Coolidge *v.* Brookline, 114 Mass. 592; Westbrook *v.* Deering, 63 Me. 231; *Contra,* Farrel *v.* Derby, 58 Conn. 234, 20 Atl. 460.
[9] Greenaugh *v.* Wakefield, 127 Mass. 275.
[10] Bachelder *v.* Epping, 28 N. H. 354.
[11] Drew *v.* Davis, 10 Vt. 506.
[12] Concord *v.* Boscawen, 17 N. H. 465.
[13] Luques *v.* Dresden, 77 Me. 186.
[14] Hooper *v.* Emery, 14 Me. 375.
[15] Stetson *v.* Kempton, *supra;* Perkins *v.* Milford, 59 Me. 315.
[16] Tatham *v.* Philadelphia, 11 Phila. 276.

under general statutes, contracts made in carrying out such celebrations are valid.[1] It may through its selectmen submit disputed claims to arbitration and the award will bind the town.[2] It may settle cases and employ counsel in appropriate instances.[3]

[1] Hill *v.* Easthampton, 140 Mass. 381, 4 N. E. 811; Hubbard *v.* Taunton, 140 Mass. 467, 5 N. E. 157.
[2] New Haven *v.* Weston, 87 Vt. 7, 86 Atl. 996, and cases cited.
[3] *Idem.*

CHAPTER XIII

IMPAIRING OBLIGATION OF CONTRACTS

§ 80. Impairment of Obligation.

No absolute right beyond legislative control vests in persons named in a statute upon whom is conferred power to do certain things, and a repeal of the statute will not impair the obligation of a contract.[1] A contract does not spring into existence from the passage of a statute which gave to persons claiming to have paid an illegal tax an opportunity to present to the general governing body of a county a claim for reimbursement.[2] The power conferred by statute upon a municipality to make a contract to furnish light in its streets without power to make a continuing contract does not prevent the legislature from later repealing the statute and terminating any contract that was made thereunder.[3] Empowering municipalities to deal with public service corporations does not compel them so to deal, nor does it confer upon such corporations the exclusive right to sell the commodity.[4] And where a statute conditionally protects a public service company during the continuance of the statute from

[1] Wilkes County *v.* Call, 123 N. C. 308, 31 S. E. 481, 44 L. R. A. 252; People *ex rel. v.* Montgomery Co., 67 N. Y. 109, 23 Am. R. 94.

[2] People *ex rel.* Canajoharie Nat. Bk. *v.* Montgomery Co., 67 N. Y. 109, 23 Am. R. 94.

[3] Richmond Co. G. Co. *v.* Middletown, 59 N. Y. 228; *Contra*, Cits. W. Co. *v.* Bridgeport Hyd. Co., 55 Conn. 1, 10 Atl. 170; White *v.* Meadville, 177 Pa. St. 643, 35 Atl. 695.

[4] Cits. Elec. L. & P. Co. *v.* Sands, 95 Mich. 551, 55 N. W. 452; Andrews *v.* South Haven, 187 Mich. 294, 153 N. W. 827.

municipal competition such a statute confers no new or additional franchise and creates no contract and its repeal will leave the municipality free to compete.[1] The grantee of the charter takes nothing by implication. There is no prohibition against granting another charter for a similar franchise.[2] Provisions in charters or statutes whereby the State barters away its powers of sovereignty, such as the police power, the power of taxation or the power of eminent domain are void. No rights vest, no powers are conferred and no contract arises from such provisions and when questioned are not protected by the contract clause of the Federal Constitution.[3]

When a municipality enters into a lawful contract which it had the power to make, the legislature may not deprive it of its power to carry it out, nor can it impair its obligation.[4] A franchise granted to and accepted by a public service company on specified conditions is a contract and cannot be impaired without the company's consent.[5] And rights acquired under a statute of a State which is in its nature a contract and which does not reserve to the legislature the power of repeal cannot be divested by subsequent legislation.[6] But it is otherwise where the power is reserved.[7] The exclusive right to light streets with gas for a definite period is not impaired by a later contract

[1] *Re* Brooklyn, 143 N. Y. 596, 26 L. R. A. 270, 166 U. S. 685.

[2] *Re* Brooklyn, *supra;* Skaneateles W. Co. *v.* Skaneateles, 161 N. Y. 154, 55 N. E. 562; Sears *v.* Akron, 246 U. S. 242, 62 L. Ed. 688.

[3] Hyde Park *v.* Oakwoods Cemetery Assn., 119 Ill. 141, 7 N. E. 627; Matter of McAneny, 198 N. Y. App. Div. 205, aff'd 232 N. Y. 377; Williamson *v.* New Jersey, 130 U. S. 189, 32 L. Ed. 915, aff'g 44 N. J. L. 165; Saginaw County *v.* Bubinger, 137 Mich. 72, 100 N. W. 261; Westminster W. Co. *v.* Westminster, 98 Md. 551, 56 Atl. 990.

[4] Goodale *v.* Fennell, 27 Ohio St. 426, 22 Am. R. 321.

[5] New York *v.* Second Ave. R. Co., 32 N. Y. 261.

[6] Brooklyn Cen. R. Co. *v.* Brooklyn C. R. Co., 32 Barb. 358.

[7] Sears *v.* Akron, *supra;* Ramapo Water Co. *v.* New York, 236 U. S. 579, 59 L. Ed. 731.

with another company to light the same streets by electricity.[1]

The repeal of a statute under which an award has been made in condemnation proceedings cannot affect the validity of the award or prevent its payment as it has all the force and effect of a judgment, a contract of the highest nature,[2] and the validity of judgments may not be impaired.[3]

Where valid franchises are obtained their exercise may not be held in abeyance for an indefinite time. For although they constitute property they may be forfeited by failure of exercise,[4] or by subsequent abandonment after they have been exercised.[5] And when no time is prescribed they must be exercised within a reasonable time.[6]

§ 81. Power to Contract—Obligation of Contract—Power of Public Body to Change Laws Forming Basis of Contract.

Where a contract between the government and its contractor consists of several acts of Congress, the contract when acted upon and in operation is binding upon the government and it cannot, without the consent of its contractor, change the terms of the contract by subsequent legislation.[7]

[1] Saginaw G. L. Co. *v.* Saginaw, 28 Fed. 529.
[2] People *ex rel.* Reynolds *v.* Buffalo, 140 N. Y. 300, 35 N. E. 485.
[3] Hadfield *v.* New York, 6 Robt. 501.
[4] People *v.* Broadway R. Co., 126 N. Y. 29, 26 N. E. 961; New York Elec. Lines Co. *v.* Empire City Subway Co., 201 N. Y. 329, 94 N. E. 326, aff'd 235 U. S. 179, 59 L. Ed. 184.
[5] People *v.* Albany & Vermont R. Co., 24 N. Y. 261; First Construction Co. *v.* State, 221 N. Y. 295, 116 N. E. 1020.
[6] N. Y. *v.* Bryan, 196 N. Y. 158, 89 N. E. 467; First Construction Co. *v.* State, 221 N. Y. 295, 116 N. E. 1020.
[7] U. S. *v.* Cent. Pac. R. Co., 118 U. S. 235, 30 L. Ed. 173, aff'g 21 Ct. Cl. 180; Sinking Fund Cases, 99 U. S. 700, 718, 25 L. Ed. 496.

PART II. CREATION AND FORMATION OF THE CONTRACT

CHAPTER XIV

DEFINITION AND CLASSIFICATION OF CONTRACT

§ 82. The Contract Defined.

A contract is an agreement to do or not to do a particular thing [1] or as more fully stated it is a bargain or agreement voluntarily made upon good consideration, between two or more persons capable of contracting to do or forbear to do some lawful act.[2] And a public contract is measured and governed by the same laws that control natural persons in contract matters, whether it be the nation,[3] State,[4] city, town or village.[5] If even the United States, or the States, step down from their position of sovereignty and enter the domain of commerce, they submit themselves to the same laws that govern individuals

[1] Marshall, C. J., in Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; People *v.* Dummer, 274 Ill. 637, 113 N. E. 934.

[2] Justice *v.* Lang, 42 N. Y. 493; U. S. *v.* Richards, 149 Fed. 443; Virginia City Gas Co. *v.* Virginia City, 3 Nev. 320.

[3] Hollerbach *v.* U. S., 233 U. S. 165, 58 L. Ed. 898; U. S. *v.* Tingey, 5 Peters (U. S.), 115, 8 L. Ed. 72; U. S. *v.* Bradley, 10 Peters (U. S.), 343, 9 L. Ed. 448; U. S. *v.* Bostwick, 94 U. S. 53, 24 L. Ed. 65; Whiteside *v.* U. S., 93 U. S. 247, 23 L. Ed. 882, aff'g 8 Ct. Cl. 532; Cooke *v.* U. S., 91 U. S. 389, 23 L. Ed. 237; Skelsey *v.* U. S., 23 Ct. Cl. 61; Harvey *v.* U. S., 8 Ct. Cl. 501.

[4] People *ex rel.* Graves *v.* Sohmer, 207 N. Y. 450, 101 N. E. 164; State *v.* Heath, 20 La. Ann. 172, 96 Am. Dec. 390.

[5] Long Beach Sch. Dist. *v.* Dodge, 135 Cal. 401, 67 Pac. 499; Sexton *v.* Chicago, 107 Ill. 323; Vincennes *v.* Cits. G. Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; Hudson E. L. Co. *v.* Hudson, 163 Mass. 346, 40 N. E. 109; Dausch *v.* Crone, 109 Mo. 323, 19 S. W. 61; Jersey City *v.* Harrison, 71 N. J. L. 69, 58 Atl. 100; Horgan *v.* N. Y., 160 N. Y. 516, 55 N. E. 204; Preston *v.* Syracuse, 92 Hun, 301, 158 N. Y. 356, 53 N. E. 39.

there.[1] Governments are bound to observe the same rule of conduct in their contractual relations with their citizens as they require citizens to observe with each other.[2] Accordingly they become bound by their contracts the same as individuals.[3]

§ 83. Implied Contracts—Defined and Classified.

Public contracts may be express or implied and while liability has been denied under the theory of an implied contract arising against public bodies, the non-liability exists rather because under the particular circumstances a special mode of contracting was provided by statute, or certain conditions or preliminaries were required to exist or be performed before a contract could be made which was otherwise prohibited, or because the purpose and object of the contract were entirely beyond the corporate powers of the public body. Ordinarily, public bodies when acting within their corporate powers are bound on implied contracts the same as individuals. Implied contracts or quasi contracts are obligations created by law without regard to the assent of the party on whom the obligation is imposed. They are not contract obligations in the true sense, but are constructive contracts created by law and dictated by reason and justice.[4] Implied contracts are divided into two classes,—obligations implied in fact and obligations implied in law. The former are based upon the actual agreement of the parties which is deduced from their conduct and the circumstances of the case, and all the elements essential to an express contract must appear.

[1] Cooke *v.* U. S., 91 U. S. 389, 23 L. Ed. 237; Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277.

[2] State *v.* Clausen, 94 Wash. 166, 162 Pac. 1; State *v.* Maddough, 74 Wash. 649, 134 Pac. 492.

[3] People *ex rel.* Graves *v.* Sohmer, *supra.*

[4] People *v.* Dummer, 274 Ill. 637, 113 N. E. 934; Ward *v.* Kropf, 207 N. Y. 467.

The latter may arise without there having been a promise or any intention to enter into a contract, and even against an intention to the contrary.[1]

While implied contracts are enforceable at law, implied contracts in fact will not arise from mere denials and contentions of parties but from their common understanding in the ordinary course of business, wherefrom mutual intent to contract without formal words is shown.[2] A contract will not be implied where an express contract would be contrary to law,[3] nor where the service or benefit conferred has been given as a gratuity,[4] for services intended to be gratuitous when rendered, may not afterwards be used as a basis of an implied promise to pay.[5] A contract may not be implied in fact where the facts are inconsistent with its existence, where there is an express contract concerning the subject-matter, or where an express contract would be contrary to law.[6] And where a party is incompetent to make an express contract, such incompetency is equally fatal to any theory of implied contract,[7] for if one is without power to bind by express contract, clearly he cannot by implication. The distinction between express contracts and implied contracts lies, not in the nature of the undertaking, but in the mode of proof.[8]

[1] Highway Commrs. *v.* Bloomington, 253 Ill. 164, 172, 97 N. E. 280; Underhill *v.* Rutland, R. R. Co., 90 Vt. 462, 475, 98 Atl. 1017; Meade County *v.* Welch, 34 S. D. 348, 148 N. W. 601; Milford *v.* Comm., 144 Mass. 64, 10 N. E. 516; Bigby *v.* U. S., 103 Fed. 597, 188 U. S. 400, 47 L. Ed. 519.

[2] Knapp *v.* U. S., 46 Ct. Cl. 601, 643.

[3] Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

[4] Montgomery County Commrs. *v.* Ristine, 124 Ind. 242, 247, 24 N. E. 990.

[5] Albany *v.* McNamara, 117 N. Y. 168, 22 N. E. 931.

[6] Miller *v.* Schloss, 218 N. Y. 400, 113 N. E. 337; Creighton *v.* Toledo, 18 Ohio St. 447; Hawkins *v.* U. S., 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181; Hartman *v.* U. S., 40 Ct. Cl. 133; Appleton W. Wks. Co. *v.* Appleton, 132 Wis. 563, 113 N. W. 44.

[7] Curved Electrotype P. Co. of N. Y. *v.* U. S., 50 Ct. Cl. 258; Beach *v.* U. S., 226 U. S. 243, 260, 57 L. Ed. 205, aff'g 41 Ct. Cl. 110.

[8] Montgomery *v.* Montgomery W. W. Co., 77 Ala. 248, 254.

CHAPTER XV

OFFER AND ACCEPTANCE

§ 84. Acceptance of Offer.

In public contracts as in contracts between individuals offer and acceptance are essential elements of contract.[1] An acceptance to constitute or create a binding contract must correspond to the offer at every point and must conclude the agreement,[2] and the acceptance of the offer, to be effective, if no time is fixed in the offer, must be made within a reasonable time.[3] The acceptance of the offer must be unconditioned and an acceptance which varies from the offer in any substantial particular is in effect a rejection, amounts to a new proposition and must be accepted in turn.[4] Silence is not an acceptance, and an offer to make or alter a contract cannot be transformed into an agreement because the public body makes no reply. Silence will not be taken to mean voluntary assent merely because there is no dissent.[5] To make a binding agreement, therefore, there must be an acceptance of the offer by word or by act or deed and it must accord to the terms of the offer.[6] An acceptance of goods sent and

[1] U. S. *v.* Carlin Construction Co., 224 Fed. 859; Curtis *v.* Portsmouth, 67 N. H. 506, 39 Atl. 439; Jersey City *v.* Harrison, 72 N. J. L. 185, 62 Atl. 765; Snow Melting Co. *v.* New York, 88 N. Y. App. Div. 575; Landsdowne *v.* Cits. El. L. Co., 206 Pa. St. 188, 55 Atl. 919; Kaukauna E. L. Co. *v.* Kaukauna, 114 Wis. 327, 89 N. W. 542.

[2] U. S. *v.* Carlin Cons. Co., *supra.*

[3] U. S. *v.* Carlin Cons. Co., *supra.*

[4] Wheaton Bldg. Co. *v.* Boston, 204 Mass. 218, 90 N. E. 598.

[5] Beach *v.* U. S., 226 U. S. 243, 57 L. Ed. 205, aff'g 41 Ct. Cl. 210; Titcomb *v.* U. S., 14 Ct. Cl. 263.

[6] Smith *v.* Nemaha County Sch. Dist., 17 Kan. 313; Baldwin *v.* Comm., 11

their use,[1] or of materials taken by a county to repair its roads raises an implied promise to pay reasonable value for them.[2] While voluntary services rendered without knowledge or request do not make an agreement, the acceptance of services under circumstances which no reasonable person would consider a benefaction or a gratuity or charity will imply an acceptance and a promise to pay.[3] A distinction is to be observed between an acceptance of an offer and an authorization to some agent of a public body to enter into a contract. For instance, a landowner offers to sell his land to a public body at a price named and the public body authorizes and empowers its chairman to purchase on terms set out by the public body in its authorization. This will not constitute an acceptance but is a naked authorization to buy, which, of course, may be revoked and withdrawn.[4] But if a landowner offers to sell his land at a fixed price and the public officials vote to purchase it at that price this will, on the other hand, constitute a complete contract and, upon a refusal to take, resort may be had to equity for specific performance.[5] And when written acceptance is essential to a binding agreement, the entry on the minutes of the council coupled with written acceptance by the contractor suffices.[6]

Bush, (Ky.), 417; State *ex rel.* Henderson *v.* State Prison Commrs., 37 Mont. 378, 96 Pac. 736; Couch *v.* State, 14 N. D. 361, 103 N. W. 942.

[1] U. S. *v.* Berdan Mfg. Co., 156 U. S. 552, 39 L. Ed. 530, aff'g 26 Ct. Cl. 48.

[2] Harrison *v.* Palo Alto County, 104 Iowa, 383, 73 N. W. 872.

[3] Seagraves *v.* Alton, 12 Ill. 371; Albany *v.* McNamara, 117 N. Y. 168, 22 N. E. 931; Salsbury *v.* Phila., 44 Pa. St. 303.

[4] Madden *v.* Boston, 177 Mass. 350, 58 N. E. 1024.

[5] McManus *v.* Boston, 171 Mass. 152, 50 N. E. 607.

[6] Ft. Madison *v.* Moore, 109 Iowa, 476, 80 N. W. 527; Aurora W. Co. *v.* Aurora, 129 Mo. 540, 31 S. W. 946; McManus *v.* Boston, *supra;* Argus Co. *v.* Albany, 55 N. Y. 495; see Curtis *v.* Portsmouth, *supra.*

§ 85. **Acceptance of a Proposal which Follows Advertisement is a Contract.**

A proposal in accordance with an advertisement by a public body and the acceptance by the public body of such proposal create a contract of the same force and effect as if a formal contract is written out and signed by the parties.[1]

§ 86. **Offer—Terms Implied by Law.**

As in contracts there are many terms which though not actually stated therein are implied by law, so in the offer which precedes the agreement there are many terms implied by law which are just as binding as if actually set out in the oral or written terms of the contract.[2] Indeed the very reason that they bind both parties after acceptance is because the law implies them in the offer. Such terms as good faith and fair dealing, that neither party will do anything either to disable or prevent himself or the other party from performing, that existing law forms a part of the contract and is incorporated therein; that the work will be commenced and completed within a reasonable time,[3] these and many similar terms the law implies *in limine* in every mutual undertaking and they are implied not merely in the making of the contract but in the performance as well.[4] And these implied obligations are as much a part of the offer as of the contract, just as if incorporated therein by express language.[5] Covenants

[1] Garfielde *v.* U. S., 93 U. S. 242, 23 L. Ed. 779; U. S. *v.* Purcell Envelope Co., 249 U. S. 313, 63 L. Ed. 620.

[2] U. S. *v.* Bostwick, 94 U. S. 53, 24 L. Ed. 65.

[3] Gardner *v.* Town of Cameron, 155 N. Y. App. Div. 750, 756; Commrs. of Highland County *v.* Rhoades, 26 Ohio St. 411; New York *v.* Continental Asphalt Co., 163 N. Y. App. Div. 486, 218 N. Y. 685, 113 N. E. 1052.

[4] *Idem.*

[5] U. S. *v.* Bostwick, 94 U. S. 53, 24 L. Ed. 65.

which the language and intent of the parties necessarily imply will also be supplied to effectuate the contract.[1] Where a public body advertised for bids for the privilege of picking over refuse at public dumps, the law necessarily implies a covenant by the public body to deliver its refuse gathered from the streets at those dumps, since such covenant is indispensable to the effectuation of the contract. It is not a case of an omission by the parties which the courts will not feel justified in supplying, but one where the language used shows that an additional, or correlative covenant was intended, which the courts should and will supply.[2]

§ 87. **Bid as Offer.**

In public contracts the offer is usually adduced in response to public advertisement requesting bids upon work therein specified. The legal status of such bids is in frequent controversy. A mere request by a public body for bids to do work is not an offer to accept the bids submitted in response to such advertisement or even to accept the lowest bid. There is no contract, therefore, until acceptance by the public body, either express or implied, after the receipt of the bid. The bid of the prospective contractor is, of course, his offer and if accepted by the public body asking for bids, before it is withdrawn, makes a complete and binding contract.[3] And where a formal written contract is desired, it must conform substantially to the terms of the advertisement for bids, the proposal of the bidder, and its acceptance;

[1] New York *v.* Delli Paoli, 202 N. Y. 18, 94 N. E. 1077; Kinser Cons. Co. *v.* State, 125 N. Y. S. 46, 145 N. Y. App. Div. 41, 204 N. Y. 381, 97 N. E. 871. See §§ 158–159, *infra*.

[2] New York *v.* Delli Paoli, *supra*.

[3] North Eastern Cons. Co. *v.* North Hempstead, 121 N. Y. App. Div. 187; Bull *v.* Talcott, 2 Root (Conn.), 119, 1 Am. Dec. 62.

and the bidder may not be required to sign a written contract which contains conditions not included in the offer and acceptance. Neither party may insist upon the introduction of stipulations or conditions not named or implied in their former negotiations.[1]

§ 88. **Negotiations Preliminary to Contract.**

Negotiations which are intended merely to be preliminary to a formal contract, do not create a contract. Public bodies usually seek bids by advertisement. Mere invitations to bid are not offers which will be transformed into a contract by acceptance. The public body is not obliged to accept the offer or make a contract under these circumstances.[2] It is only where the public body accepts the bid that it becomes a contract.[3] It is the contractor's bid that is the offer and its acceptance makes the contract.[4] No contract can arise even from preliminary negotiations which result in an oral agreement of all the terms, where the contractor as well as the public body understand it is not to be binding until put in writing and signed. Where proposals and an award look to the future execution of a contract, such award is not an agreement but signifies an intention to make one.[5]

Where of course the parties reach an agreement through correspondence, intending a formal writing to be subsequently signed expressing it, the obligatory character of the agreement cannot ordinarily be defeated by either

[1] Highland Co. Commrs. *v.* Rhoades, 26 Ohio St. 411.

[2] Colorado Paving Co. *v.* Murphy, 78 Fed. 28, 37 L. R. A. 630; Argenti *v.* San Francisco, 16 Cal. 256; Smith *v.* New York, 10 N. Y. 504; State *v.* Ohio Penitentiary, 5 Ohio St. 234; Anderson *v.* Public School, 122 Mo. 61, 27 S. W. 610.

[3] Garfielde *v.* U. S., 93 U. S. 242, 23 L. Ed. 779; Smith *v.* Mayor, 10 N. Y. 504.

[4] Garfielde *v.* U. S., *supra.*

[5] Edge Moor Bridge Wks. *v.* Bristol County, 170 Mass. 528, 49 N. E. 918; Jersey City Water Comm'rs *v.* Brown, 32 N. J. L. 504, 510.

party refusing to sign such formal contract. When the minds of the parties have met upon a proposal submitted by one and accepted by the other party, and the terms of the contract have been in all respects definitely agreed upon, one of the parties cannot evade or escape from his obligation by refusing to sign the formal writing which both parties understood was to be subsequently drawn and executed.[1] Clearly, where a written contract eventually follows these preliminary negotiations it merges all previous negotiations and is presumed in law to express the final undertaking of the parties.[2]

§ 89. **Meeting the Offer.**

An offer of a public body will constitute a valid contract between such public body and any person who brings himself within the provisions of the offer.[3] But the assent must comprehend the whole of the proposition. It must be exactly equal to its extent and terms, and must not qualify them by any new terms. A proposal to accept or an acceptance of an offer on terms varying those proposals amounts to a rejection of the offer. The acceptance must be unconditional, and without proviso.[4] But until an offer is accepted and acted upon it may be withdrawn or modified.[5] Where an offer is thus withdrawn it no longer outstands to be the subject of an acceptance.[6]

[1] U. S. *v.* P. J. Carlin Cons. Co., 224 Fed. 859; Peirce *v.* Cornell, 117 N. Y. App. Div. 66. See Highland County Comm'rs *v.* Rhoades, 26 Ohio St. 411; Jungdorf *v.* Little Rice, 156 Wis. 466, 145 N. W. 1092; Joy *v.* St. Louis, 138 U. S. 1; Slade *v.* Lexington, 141 Ky. 214, 132 S. W. 404.

[2] Simpson *v.* U. S., 172 U. S. 372, 43 L. Ed. 482, aff'g 31 Ct. Cl. 217.

[3] Gardner *v.* Hartford, 14 Conn. 195; Austin *v.* Supervisors, 24 Wis. 278.

[4] Baker *v.* Johnson County, 37 Iowa, 186; State *ex rel.* Henderson *v.* Board of State Prison Comm'rs., 37 Mont. 378, 96 Pac. 736; U. S. *v.* P. J. Carlin Cons. Co., 224 Fed. 859; McCotter *v.* New York, 37 N. Y. 325; North Eastern Cons. Co. *v.* North Hempstead, 121 N. Y. App. Div. 187.

[5] Foster *v.* Boston, 39 Mass. 33; McCotter *v.* New York, *supra.*

[6] McCotter *v.* New York, *supra.*

And, of course, it is no longer open when it is rejected, or when the time limited by its own terms has expired,[1] or in the absence of a time limited for acceptance, after a reasonable time has elapsed.[2] Performance is of course acceptance. A contingent acceptance does not bind and will not prevent a withdrawal of the offer.[3]

[1] Haldane *v.* U. S., 69 Fed. 819; Potts *v.* Whitehead, 20 N. J. Eq. 55, 23 Id. 512.
[2] U. S. *v.* P. J. Carlin Cons. Co., 224 Fed. 859, 866.
[3] North Eastern Cons. Co. *v.* North Hempstead, *supra*.

CHAPTER XVI

OTHER ELEMENTS OF CONTRACT

§ 90. Validity of Contract.

Contracts of public bodies when ultra vires because illegal, are void, and no recovery may be had on them even though executed and the benefits of performance are retained by the public body.[1] But where they are ultra vires because unauthorized, although they are void if executory, if executed and the public body retains the benefits, a recovery for their reasonable value so far as executed will be sustained.[2] Void contracts are in contemplation of law no contracts at all and are the same as if no agreement had been undertaken. Therefore contracts in violation of statute will be void. In like manner and for like considerations contracts against public policy[3] or obnoxious to good morals[4] are void and unenforceable. Fraud[5] will also vitiate a contract as will duress,[6] undue influence or mistake[7] but these do not intrinsically defeat the contract but create a voidable validity only. They do

[1] Portland *v.* Bitum. Pav. Co., 33 Oreg. 307, 52 Pac. 28.

[2] Berka *v.* Woodward, 125 Cal. 119, 57 Pac. 777; Bay *v.* Davidson, 133 Iowa, 688, 111 N. W. 25.

[3] U. S. *v.* Cooke, 207 Fed. 682; Patterson *v.* Chambers P. Co., 81 Oreg. 328, 159 Pac. 568.

[4] Thompson *v.* St. Charles County, 227 Mo. 220, 126 S. W. 1044.

[5] Bd. Water Comm'rs *v.* Robbins, 72 Conn. 623, 74 Atl. 938; Richards *v.* Sch. Tp. of Jackson, 132 Iowa, 612, 109 N. W. 1093; Baird *v.* New York, 96 N. Y. 567.

[6] Harrison Tp. *v.* Addison, 176 Ind. 389, 96 N. E. 146; Memphis *v.* Brown, 20 Wall. 289, 307, 22 L. Ed. 264; Koewing *v.* West Orange, 89 N. J. L. 539, 99 Atl. 203.

[7] Griffith *v.* Sebastian County, 49 Ark. 24, 3 S. W. 886; State *v.* Paup, 13 Ark. 129.

not destroy the contract but may be availed of to defeat it. On the other hand, the party injured may affirm the contract and sue for the damages which he has suffered because of the existence or imposition of any of these vitiating facts or conditions. Where the fraud complained of is in the execution of the contract, it may be avoided at law, since the assent necessary to constitute a binding contract is lacking. Fraud in the consideration, however, is usually only the subject of cognizance by a court of equity in order to have relief from the contract, since in this class of cases there is assent both to the contract and its execution, but there is deceit with reference to the value or character of the consideration received. Mistake as to the law or ignorance of the law will not excuse. Every one is presumed to know the law. But this presumption does not accord with fact. No one can know all the law, and some know very little. The presumption is, however, essential for government to endure. Otherwise the greater the ignorance of law the greater would be the license to violate it.[1] It has been said, however, that while ignorance of the law is not a valid excuse, contractors engaged in work over the country cannot be expected to be familiar with every detail of city and town charters, and where an honest mistake was made in attempting to comply with the city charter, and no damage resulted, recovery would be allowed so far as a contract was executed.[2]

But while mistakes as to law will not relieve a contractor or a public body for liability for his act, in cases where intent or good faith is the issue, the party's knowledge of the law may be material.[3] When the mistake is not

[1] Knowles *v.* New York, 176 N. Y. 430, 438, 68 N. E. 860.
[2] Konig *v.* Baltimore, 128 Md. 465, 97 Atl. 837.
[3] Knowles *v.* New York, *supra*, at page 439; U. S. *v.* Realty Co., 163 U. S. 427, 41 L. Ed. 215.

mutual, and a contractor in making his bid overlooks a part of the proposed contract work, since he has not been led into error by anything said or done by the other party, he is remediless.[1] When a provision or stipulation in a contract has no obvious meaning, or is reasonably capable of diverse interpretation and in fact is differently understood by the parties, there is no agreement.[2] But where there is simply a misconception in the interpretation of the language of a contract or specifications and of its effect this is not a mistake of fact, but one of law, against which the courts afford no remedy.[3] But a court of equity will relieve against a mistake of fact superinduced by a mistake of law.[4] The validity of public contracts is generally presumed since public officers who make them are presumed to act within the limits of their authority in good faith, and for the best interests of the public body they represent.[5]

§ 91. Essential Elements of Contract.

To create a valid public contract, there must be authority to make it;[6] it must relate to a subject-matter within the scope of the corporate powers of the public body,[7] and of course must be upon sufficient consideration.[8] Mutuality of contract is also an essential element.[9] The parties must agree upon all the terms and conditions of

[1] American Water Softener Co. *v.* U. S., 50 Ct. Cl. 209.
[2] Wheaton Bldg. & Lumber Co. *v.* Boston, 204 Mass. 218, 90 N. E. 598.
[3] Wheaton B. & L. Co. *v.* Boston, *supra.*
[4] Griffith *v.* Sebastian County, 49 Ark. 24, 3 S. W. 886.
[5] Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981; Memphis *v.* Brown, 20 Wall. (U. S.) 289, 22 L. Ed. 264; Lincoln *v.* Sun Vapor Street L. Co., 59 Fed. 757, 760; Brown *v.* Bd. of Education of Pomona, 103 Cal. 531, 37 Pac. 503.
[6] Bosworth-Chanute Co. *v.* Brighton, 272 Fed. 964.
[7] See cases, § 58, *ante.*
[8] U. S. *v.* Cooke, 207 Fed. 682, 687.
[9] New York *v.* Delli Paoli, 202 N. Y. 18, 94 N. E. 1077; U. S. *v.* McMullen. 222 U. S. 460, 56 L. Ed. 269; Toomey *v.* Bridgeport, 79 Conn. 229, 64 Atl. 215,

the contract, and their minds must meet upon its terms and subject-matter.[1] If any part remains to be settled, the agreement is incomplete.[2] They must agree upon plans and specifications which are definite and certain, as to kinds, quality and character of materials and workmanship, the time of completion, the price and method of payments. If these are not definitely settled, no intelligible contract can result and the parties are without remedy against each other. Accordingly, the language of the agreement in relation to these and other matters of the contract must be so clear and intelligible as to make the contract capable of being performed.[3] The meaning and intent of the public body and its contractor must be capable of ascertainment from the language used to a reasonable degree of certainty.[4] Where there is an irreconcilable conflict between essential provisions of the assumed contract for public work and the specifications, and the latter cannot be ignored, the contract will be void for uncertainty and cannot be enforced.[5] Where, accordingly, an owner of land offers to sell all his land on an island to a public body which accepts by offering to buy all lands on the island which has many ownerships, there is no meeting of the minds.[6] Where the price is not fixed the contract is incomplete and there remains an essential element still to be negotiated.[7] Where a method of fixing the price by two

[1] People's Railroad *v.* Memphis Railroad, 10 Wall. (U. S.) 38, 19 L. Ed. 844, aff'g 4 Coldw. 406; McCotter *v.* New York, 37 N. Y. 325.

[2] McCotter *v.* New York, *supra.*

[3] Lyle *v.* Jackson County, 23 Ark. 63.

[4] U. S. *v.* Ellicott, 223 U. S. 524, 56 L. Ed. 535; U. S. *v.* McMullen, 222 U. S. 460, 56 L. Ed. 269; Long *v.* Battle Creek, 39 Mich. 323, 33 Am. R. 384; Wheaton Bldg. & L. Co. *v.* Boston, 204 Mass. 218, 90 N. E. 598; Eugene *v.* Chambers P. Co., 81 Oreg. 352, 159 Pac. 576; Patterson *v.* Chambers Power Co., 81 Oreg. 328, 159 Pac. 568.

[5] U. S. *v.* Ellicott, *supra.*

[6] McCotter *v.* New York, *supra.*

[7] *Idem.*

arbitrators is suggested in the offer, the additional term in the acceptance that if they cannot agree, a third arbitrator shall be called in, prevents a meeting of the minds and therefore a contract.[1]

§ 92. **Delivery Essential.**

To create a binding written contract, there must be a delivery of the instrument expressing it.[2] The delivery, however, is no part of the contract and is not proved by it. Delivery is an act done in reference to the contract and is indispensable to give it efficacy. The act of delivery intervenes between the execution of the contract and the time when it becomes operative. Proof of delivery, accordingly, is usually to be established by parol and it is a question of fact to be determined from all the conflicting evidence in the case.[3] Delivery may, however, be upon condition. And the annexing of conditions to delivery is not an oral contradiction of the writing. There must be a delivery to make the writing binding in any degree, and the extent that it shall have effect and bind the parties, may be limited by the conditions annexed to its delivery. Delivery may sometimes be complete upon acceptance in accordance with modes recognized in commercial business. It is a universal rule that when an offer is made by one person to another the minds of the parties meet and a contract is deemed to be concluded, when such offer is accepted in a reasonable time, either by telegram duly sent in the ordinary way or by letter duly posted to the proposer, as long as either is done before a withdrawal of the offer to the knowledge of the acceptor.[4]

[1] *Idem.*
[2] Blanchard *v.* Blackstone, 102 Mass. 343.
[3] Springfield *v.* Harris, 107 Mass. 532.
[4] Burton *v.* U. S., 202 U. S. 344, 384, 50 L. Ed. 1057; 2 Kent Comm. 477.

§ 93. **Assent.**

The acceptance which will create a valid and binding contract is one which is unequivocal, unconditional and unvarying from the offer. The assent of the parties to the terms and subject-matter of the contract must be mutual, and they must assent to the same thing in the same sense. Absolute acceptance, therefore, of an offer coupled by any qualification or condition will not constitute a completed contract because there is lacking this essential mutuality of assent.[1]

If parties intend to contract orally and there is a misunderstanding as to the terms, neither is bound because their minds have not met. Where the contract is written and similar misunderstanding arises, a court of equity will refuse to enforce it.[2] But misunderstanding of terms not capable of reasonable misconstruction will not obviate the contract. Error in interpretation, or misconception of the legal effect of language, cannot avoid it.[3] A contract is not concluded so long as in contemplation of both parties to it, something remains to be done to establish contract relations. The law does not make a contract when the parties intend none, nor regard an arrangement as completed which the parties to it regard as incomplete.[4] Nor does it compel assent to a contract composed of several instruments which are in irreconcilable conflict, and none of which may be disregarded.[5] There may, however, be assent to a contract without full

[1] State *ex rel.* Henderson *v.* Bd. of State Prison Commrs., 37 Mont. 378, 96 Pac. 736; Lord & Hewlett *v.* U. S., 217 U. S. 340, 54 L. Ed. 790, aff'g 43 Ct. Cl. 282; U. S. *v.* P. J. Carlin Cons. Co., 224 Fed. 859; Tilley *v.* County of Cook, 103 U. S. 155, 26 L. Ed. 374.

[2] Scott *v.* U. S., 12 Wall. 443, 445; Hume *v.* U. S., 132 U. S. 406, 33 L. Ed. 393, aff'g 21 Ct. Cl. 328.

[3] Wheaton Bldg. & Lum. Co. *v.* Boston, 204 Mass. 218, 90 N. E. 598.

[4] Central Bitulithic Pav. Co. *v.* Vil. of Highland Park, 164 Mich. 223, 129 N. W. 46.

[5] U. S. *v.* Ellicott, 223 U. S. 524, 56 L. Ed. 535.

knowledge of its terms, as where a contractor, who has an opportunity to read a contract before signing it, executes it. He cannot, except where the contents of the writing itself are misrepresented to him, escape the obligation of his contract by showing that he signed the contract without reading it.[1] A contractor is presumed to know what he signs.[2]

§ 94. Reality of Assent.

If a contract is entered into because of the assumed existence of certain facts, which do not in reality exist, no contract arises. In such event the contract is nullified in its inception by the non-existence of material facts which constituted at once its inducement and the foundation of all negotiations. Mistake as to such excludes real assent, and the possibility of a meeting of minds.[3] Courts of equity under such circumstances frequently decree the surrender and cancellation of agreements.[4] And in addition a recovery is allowed for what has been done under the contract so far as executed.[5] If the contract is executory and the contractor refuses to proceed with performance for such reasons he may defend an action by the public body and set up the lack of real assent. Where the mistake is unilateral and is induced by no fraud, concealment or inequitable conduct of the other party and the true state of facts could be ascertained by ordinary diligence on the part of the mistaken party, equity will not relieve. Equity only assists the vigilant. Conscience, good faith and reasonable diligence are necessary to rouse a court of equity to action.

[1] Stone *v.* Prescott Spec. Sch. Dist., 119 Ark. 553, 178 S. W. 399.
[2] People *v.* Dunbar Cont. Co., 215 N. Y. 416, 424, 109 N. E. 554.
[3] Griffith *v.* Sebastian County, 49 Ark. 24, 3 S. W. 886; Long *v.* Athol, 196 Mass. 497, 82 N. E. 665; U. S. *v.* Charles, 74 Fed. 142.
[4] U. S. *v.* Charles, *supra;* Long *v.* Athol, *supra.*
[5] Long *v.* Athol, *supra.* See Hayes *v.* Nashville, 80 Fed. 641.

Where, however, the true state of facts could only be revealed by careful and accurate scaling of maps and drawings and by processes of computations by specially skilled persons, the failure to follow such course will not be such negligence as will deny relief. Such would not be ordinary but extraordinary diligence.[1] And in some instances equity may rescind an apparent contract for the mistake of one party only, without a finding of fraud or inequitable conduct in the other.[2]

§ 95. Mutuality Essential.

Where reciprocal promises are not equally obligatory upon each of the parties, the agreement is *nudum pactum* and void for want of mutuality. Where one of the parties is not bound to do anything there is a lack of mutuality which makes the agreement void.[3] But merely because one party to a contract has a privilege or right which the other party has not is not want of mutuality.[4] Therefore, a privilege to a town, under a contract to purchase water works, to inspect the books and vouchers of the water company, even though it might not exercise its right to purchase, will not make it unmutual.[5] But if one party only is bound to perform, this is a clear instance of want of mutuality.[6] However, there are cases where, although exact words are wanting to bind a public body to do its

[1] Long *v.* Athol, *supra.*

[2] Harper *v.* Newburgh, 159 N. Y. App. Div. 695; New York *v.* Dowd Lumber Co., 140 N. Y. App. Div. 358; Moffett & Co. *v.* Rochester, 178 U. S. 373, 44 L. Ed. 1108.

[3] Farrell *v.* County of Greenlee, 15 Ariz. 106, 136 Pac. 637; Taber *v.* Dallas County, 101 Tex. 241, 106 S. W. 332; Storm *v.* U. S., 94 U. S. 76; State *ex rel. v.* Holcomb, 46 Neb. 612, 65 N. W. 873.

[4] Mayor of Boonton *v.* United W. S. Co., 88 N. J. Eq. 61, 102 Atl. 454, 84 N. J. Eq. 197, 93 Atl. 1086, 83 N. J. Eq. 536, 91 Atl. 814.

[5] Mayor of Boonton *v.* United W. S. Co., *supra.*

[6] Harley *v.* Chicago San. Dist., 107 Ill. App. 546.

part under a contract, the courts will imply a covenant to perform which the language used by the parties shows was intended as indispensable to effectuation of the contract. Under such covenant thus necessarily implied each party to the contract would have mutuality of remedy.[1]

Reservations in public contracts to annul or change contracts involve sometimes the question of mutuality. The reserved right on the part of one party to terminate a contract will not destroy the mutuality of a contract, since it is simply an option which the parties contract with reference to, and which may or may not be exercised.[2] Such a provision to terminate or annul a contract is frequently found in public contracts. In like manner, a reserved power to change details is often provided. Where such exists, it does not create a lack of enforceability of contract because of want of certainty or mutuality, especially where there are provisions for ascertaining a change in compensation should any change in contract be deemed proper.[3] This principle of mutuality of contract does not apply to executed contracts. Where one party has actually received the consideration of a written contract, it is no defense to an action brought against him for breach of his covenants to assert that the agreement did not bind his adversary to perform his promises, as long as it appears that the latter did in fact perform such promises in good faith and without prejudice.[4]

§ 96. Definiteness and Certainty are Essential.

Public contracts to be valid and enforceable must be definite and certain both as to the character and extent

[1] New York *v.* Delli Paoli, 202 N. Y. 18, 94 N. E. 1077.
[2] Taber *v.* Dallas County, *supra.*
[3] U. S. *v.* McMullen, 222 U. S. 460, 56 L. Ed. 269.
[4] Storm *v.* U. S., 94 U. S. 76, 83, 24 L. Ed. 42.

of the obligations and duties which each party must render to the other thereunder.[1] But if there is a patent ambiguity merely in one clause of a contract which renders it void for uncertainty, the nullity of such clause will not affect the remainder of the instrument, if enough is left to constitute a complete contract.[2] And where the parties leave to the court by the very terms of a contract to provide what regulations and what fair and equitable compensation should be paid thereunder, such a contract is neither void for uncertainty or for want of mutuality.[3] Renewal contracts are oftentimes the subject of suit where the compensation during the extension period is to be fixed by agreement or by arbitrators, and where one of the parties will neither agree nor appoint arbitrators, the courts will undertake to carry out and enforce the provisions of the contract in such regard.[4] A contract is not void for uncertainty merely because no definite term of duration is fixed, as long as some act or event is made the period of expiration. Such an uncertainty will not render the contract terminable at will.[5] Nor will a contract be void for want of certainty as to the terms of compensation thereunder, if such compensation is capable of being rendered certain by reference to a standard provided in the contract. That is certain which may be rendered certain.[6] But an agreement by a school trustee to pay good wages is too indefinite and uncertain to support an action.[7] The language of the contract must, however, be

[1] Lyle *v.* Jackson County, 23 Ark. 63; Atkins *v.* Van Buren Sch. Tp., 77 Ind. 447; Long *v.* Battle Creek, 39 Mich. 323.
[2] State *v.* Racine Sattley Co., 134 S. W. (Tex.) 400.
[3] Joy *v.* St. Louis, 138 U. S. 1, 34 L. Ed. 843.
[4] Slade *v.* Lexington, 141 Ky. 214, 132 S. W. 404. See Joy *v.* St. Louis, *supra*.
[5] Superior *v.* Douglas County Tel. Co., 141 Wis. 363, 122 N. W. 1023.
[6] Caldwell *v.* School Dist. Lake County, 55 Fed. 372.
[7] Fairplay Sch. Tp. *v.* O'Neal, 127 Ind. 95, 26 N. E. 686.

such as when interpreted makes a contract capable of performance. A building contract should at least permit of the erection of a building of known dimensions to possess that certainty which will call for enforcement.[1] The meaning of a contract must of course be capable of ascertainment to be sustained.[2] But even if it be physically impossible to construct a building according to plans and specifications, and if ordinarily such a situation might admit of recovery on quantum meruit for work done, this is not permissible where it would exceed a fixed sum authorized to be expended about which there was no uncertainty.[3]

§ 97. Consideration.

A promise is, of course, a good consideration for a promise. A seal will import a consideration or at any rate render proof of it unnecessary. But when not under seal, every contract must have a consideration to support it. Inadequacy of consideration, in the absence of fraud or undue influence, does not destroy the obligation of the contract. Any benefit or advantage accruing to the party making a promise, or any loss or disadvantage incurred by the party for whose benefit the promise is made, will be a sufficient consideration. Of course, if a consideration wholly fails the promise cannot be enforced.[4] Where a party is under obligation of law to do something and he requires something additional to be done or paid before he will perform what is already his legal duty, a contract made or given under such circumstances is wholly without

[1] Lyle *v.* Jackson County, 23 Ark. 63.

[2] U. S. *v.* Ellicott, 223 U. S. 524, 56 L. Ed. 535; U. S. *v.* McMullen, 222 U. S. 460, 56 L. Ed. 269; Long *v.* Battle Creek, 39 Mich. 323.

[3] Turney *v.* Bridgeport, 55 Conn. 412, 12 Atl. 520.

[4] State *v.* Illyes, 87 Ind. 405; Scott *v.* U. S., 12 Wall. 443; Hume *v.* U. S., 132 U. S. 406.

consideration.[1] The doing of what one is already bound to do upon a further promise or obligation, makes the promise or obligation without consideration. Where a duty accordingly is expressly imposed by law upon a public official and no fee or other compensation therefor is allowed by law, no audit or allowance of such a claim can be made and an agreement to pay extra compensation creates no binding obligation,[2] and this is true whether the extra compensation is or is not forbidden by law.[3] The question often arises again in connection with the performance of public contracts, where a contractor with a public body having entered into a contract and upon its performance refuses to further perform, unless given an increased compensation. If in such circumstances the public body promises an increased price to induce the contractor to continue performance, the latter promise is founded upon a valuable consideration.[4] The theory upon which a consideration seems to be worked out is that a contractor has the legal right on general principles to violate, abandon or renounce his contract upon the usual terms of compensation to the other for damages which the law recognizes and allows, and this right is universally recognized and acted upon.[5] If the contractor waives this right to stop and pay damages, the waiver of such right will support the new promise, if this be a new contract.[6]

There is no rule of law which hinders a public body

[1] McCook County *v.* Burstad, 30 S. D. 266, 138 N. W. 303.

[2] Wadsworth *v.* Bd. of Supervisors, 217 N. Y. 484, 499, 112 N. E. 161.

[3] Wadsworth *v.* Bd. of Supervisors, *supra;* McCook County *v.* Burstad, *supra;* Rochester *v.* Campbell, 184 Ind. 421, 111 N. E. 420.

[4] U. S. *v.* Cooke, 207 Fed. 682, 688; Parrott *v.* Mexican C. R. Co., 207 Mass. 184, 93 N. E. 590; Domenico *v.* Alaska Packers' Assn., 112 Fed. 554, 557; Rowe *v.* Peabody, 207 Mass. 226, 93 N. E. 604.

[5] Lord *v.* Thomas, 64 N. Y. 107.

[6] Lattimore *v.* Harsen, 14 Johns. 330; Vanderbilt *v.* Schreyer, 92 N. Y. 392, 402; Abbott *v.* Doane, 163 Mass. 433, 40 N. E. 197; Rowe *v.* Peabody, *supra.*

having power to make a public improvement, and incidentally the power to contract for doing the work, from increasing the contract price, under circumstances, equitably justifying it, unless prohibited from doing so in its charter.[1]

An agreement to pay more, or to pay less, or to alter or modify the terms of an existing parol agreement made under the circumstances indicated constitutes a valid new contract. Of course, the intent of the parties as to what the new agreement is will control. If the agreement is made in consideration of the new promise, it is binding when made. If the agreement is in consideration of the performance of the promise, then the agreement is only binding as it becomes executed. An accord is reached when, in any case, the agreement between the parties is complete. And in the case of change in a contract under seal, the modification being by parol, it is only valid if executed, but not if executory. But this latter rule does not prevent, either under the common law or now, the modification of a valid executory parol agreement by a new executory parol agreement.[2]

§ 98. **Fraud Avoids a Contract.**

A contract procured through fraud is voidable, not void, and unless tainted by illegality or contrary to public policy it may be subsequently ratified.[3] Fraud when charged must be proved and is not presumed.[4] Where fraud may even be found to exist in the making of a contract, it may not be avoided on that ground if, after knowledge of the

[1] Meech *v.* Buffalo, 29 N. Y. 198, 214; Atlantic City *v.* Warren Bros., 226 Fed. 372; Rowe *v.* Peabody, *supra*. See Gordon *v.* State, 233 N. Y. 1.

[2] See §§ 165, 309, *post*.

[3] Richards *v.* School Tp. of Jackson, 132 Iowa, 612, 109 N. W. 1093.

[4] Baird *v.* Mayor, 96 N. Y. 567, 593.

fraud, the public body accepts and retains the property delivered under the contract. This rule applies to public corporations, the same as to private individuals.[1] It is the duty of all parties who have been induced to enter into the making of an executory contract for the purchase of property, through fraud, if they desire to avail themselves of such objection, to act upon the first opportunity and rescind it by repudiating its obligations and restoring whatever has been received under it immediately upon discovering the alleged fraud. If they delay acting, and retain the property delivered beyond a reasonable time to act, or accept performance after such discovery, they are held to have ratified the contract and waived objections to it. Such a contract is not void but is simply voidable at the option of a party defrauded and requires affirmative action on his part to relieve himself from its obligations.[2] It is not competent for a public corporation, any more than for a private individual, to relieve itself from its contract obligations by assailing the general character and reputation of its lawful agent, or to repudiate the performance of its promises on the ground of the infidelity of its agent in other transactions.[3] While fraud may be established indirectly from circumstantial evidence, when such is relied on, it must be by the proof of such circumstances as are irreconcilable with any other theory than that of the guilt of the persons accused. When the facts are as consistent with innocence as with guilt, proof of fraud is lacking.[4]

While it is true that one who is led into a contract by fraud is privileged to repudiate an executory contract,

[1] Baird *v.* Mayor, 96 N. Y. 567.
[2] *Idem.*
[3] *Idem.*
[4] *Idem.*

if, and only if, he proceeds to do so promptly upon discovery of the fraud, or within a reasonable time thereafter, he may, however, pursue another course where the contract is partly executed at the time of the discovery of the fraud, that is, he may continue in the execution of the contract, and seek his redress for the fraud in an action to recover damages.[1] Fraud may consist of representations as to the quantities of different kinds of work and material needed under a contract, claimed by the public body, although furnished as estimates and approximations, to be approximately accurate and the result of expert engineering examination, and these are to be regarded not as representations of opinion but of fact.[2] Although all prior agreements, proposals, negotiations and bids became merged in the contract, such merger does not prevent these or any other matter antecedent to the execution of the contract from becoming the foundation of a claim of fraud.[3] The engineer of such a public body is their agent, having the control and direction of the construction of a public work, and such public body is liable for his action including statements and representations, in all that he did within the scope of his agency. Such public body may not claim immunity from the consequences of what he did within the line of his duty.[4] Merely because a party to a public contract sets up that the instrument signed was not the agreement of the parties would not preclude an attempt to avoid the contract on the ground that he was induced to enter into the contract and execute it because of the fraud of the

[1] New London *v.* Robbins, 82 Conn. 623, 74 Atl. 938.
[2] New London *v.* Robbins, *supra;* Wheaton Bldg. & L. Co. *v.* Boston, 204 Mass. 218, 90 N. E. 598.
[3] New London *v.* Robbins, *supra.*
[4] *Idem.*

public body. The contractor will not be estopped to change his ground of avoidance.[1]

§ 99. Illegality.

Illegal agreements are void and will not be enforced. A contract to induce public officers to act corruptly, or to bias them in the discharge of their official duties, is against public policy and void and one who induces such officers to act corruptly may not when the vice is disclosed, retire from the transaction, with his consideration returned to him, as if he had acted with honesty and in good faith.[2] Nor will such corruption be healed and a contract tainted with bribery made whole by the retirement of the erring official from his public office.[3] If this could wipe out the guilt a new method of successful bribery would be set up. Any effort to further or enforce a previous illegal and corrupt agreement is in like degree void. The only way the illegality may be overcome or obviated is by a new contract upon a new and lawful consideration.[4] And even where the benefits of the illegal transaction are retained no liability upon an implied contract to pay for such benefits will arise.[5] The general rule is that a contract which is illegal because expressly prohibited, is void and no one can acquire any rights under it, not even by performance in whole or in part. Parties to illegal contracts are left where

[1] New London *v.* Robbins, *supra.*

[2] State *v.* Cross, 38 Kan. 696, 17 Pac. 190; Lindsey *v.* Philadelphia, 2 Phila. 212.

[3] McMillan *v.* Barber A. P. Co., 151 Wis. 48, 138 N. W. 94.

[4] McMillan *v.* Barber A. P. Co., *supra;* Chippewa B. Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603.

[5] Medina *v.* Dingledine, 211 N. Y. 24, 104 N. E. 1118; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219; Richardson *v.* Scotts Bluff County, 59 Neb. 400, 81 N. W. 309; Norbeck & Co. *v.* State, 32 S. D. 189, 142 N. W. 847; Palmer *v.* State, 11 S. D. 78, 75 N. W. 818; Smith *v.* Albany, 61 N. Y. 444; Berka *v.* Woodward, 125 Cal. 119, 57 Pac. 777; Northport *v.* Northport T. Co., 27 Wash. 543, 68 Pac. 204.

the law finds them. It will not aid them to extricate themselves from a situation of their own creation.[1]

It is not necessary that a statute shall pronounce an act void or expressly prohibit it, in order to make a contract founded on such statute void so long as such action is made penal. A contract that is declared null and void by express statute is in like manner just as null and void as if made penal. The effect upon a contract is the same in either event.[2] There are certain exceptions to the rule that no recovery will be permitted. Where a contract is merely unauthorized or is merely malum prohibitum not involving moral turpitude, or there has been some defect in execution not substantial, and in other cases where public policy is promoted or where the parties are not in pari delicto or the prohibition of the statute has not been levelled against them, a recovery to the extent of compelling restoration of property or its value is permitted.[3] The provisions of a statute which prohibit certain contracts are not the subject of waiver by a public body to the extent of permitting compensation for work done and materials furnished upon the basis of quantum meruit.[4] If a contract contains conditions some of which are legal, and others of which are not, and they are separable, the legal ones will be enforced and the illegal ones disregarded.[5] And where an agreement has two or more distinct stipula-

[1] Norbeck & Co. *v.* State, 32 S. D. 189, 142 N. W. 847; Harrison Tp. *v.* Addison, 176 Ind. 389, 96 N. E. 146; Worcester *v.* Eaton, 11 Mass. 378; Hough *v.* New York, 145 N. Y. App. Div. 718; Carranza *v.* Hicks, 190 S. W. (Tex.) 540.

[2] Norbeck & Co. *v.* State, *supra;* Berka *v.* Woodward, *supra.*

[3] Berka *v.* Woodward, *supra;* Bay *v.* Davidson, 133 Iowa, 688, 111 N. W. 25; Hill County *v.* Shaw & B. Co., 225 Fed. 475; Parkersburg *v.* Brown, 106 U. S. 487, 503, 27 L. Ed. 238.

[4] Medina *v.* Dingledine, 211 N. Y. 24, 104 N. E. 1118.

[5] U. S. *v.* Hodson, 10 Wall. 77 U. S. 395, 408, 19 L. Ed. 937; Ohio *v.* Findley, 10 Ohio, 51; U. S. *v.* Bradley, 10 Pet. (U. S.) 343, 9 L. Ed. 448.

tions or promises, one of which is against public policy, and the others are not, the illegality of the one will not relieve from liability upon the promises or stipulations which are valid.[1] Where one of two considerations or a distinct part of one consideration, is unlawful because forbidden by statute, or the common law, the illegality taints the entire contract and makes it wholly void. This is so, because, whether the promise is to perform one lawful act, or several acts, some of which are illegal, the entire contract is vitiated, since the consideration permeates the whole and is the basis of the promises.[2] Where property real or personal has been acquired by means of a contract forbidden by some constitutional or legislative enactment, or otherwise unauthorized, the seller while denied an enforcement of the illegal agreement may recover the specific property in all cases where it can be clearly identified, by a return of all, if anything, that he may have received by virtue of the contract of sale.[3] When a contract is void for want of power to make it, a court of equity has no jurisdiction to enforce such a contract. Courts of equity cannot disregard statutory and constitutional requirements any more than courts of law, and may not interpose their power to give validity to such a contract.[4]

[1] McMullen *v.* Hoffman, 174 U. S. 639, 666, 43 L. Ed. 1117, aff'g 83 Fed. 372, 45 L. R. A. 410; U. S. *v.* Mora, 97 U. S. 413, 24 L. Ed. 1013; McCullough *v.* Virginia, 172 U. S. 102, 43 L. Ed. 382; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. Ed. 520; State *v.* Williams, 29 Ohio St. 161; State *v.* Perrysburg Bd. of Educ., 35 Ohio St. 519; U. S. T. G. Co. *v.* Brown, 166 N. Y. App. Div. 688, 217 N. Y. 628; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219; Worcester *v.* Eaton, 11 Mass. 368.

[2] State *v.* Wilson, 73 Kan. 343, 84 Pac. 737. See Hart *v.* New York, *supra.*

[3] Ft. Worth *v.* Reynolds, 190 S. W. (Tex.) 501; Parkersburg *v.* Brown, 106 U. S. 487, 27 L. Ed. 238. See Bartlett *v.* Lowell, 201 Mass. 151, 87 N. E. 195.

[4] Hedges *v.* Dixon County, 150 U. S. 182, 192, 37 L. Ed. 1044, aff'g 37 Fed. 304.

§ 100. **Public Policy.**

It is against the general policy of the law to restrict the power of citizens to make any kind of a contract which they may see fit to enter into so long as the proposed contract does not affect the morals or well-being of society to such a degree as to be against public policy.[1] Contracts opposed to the public policy of a State or nation are void.[2] All agreements for pecuniary considerations to control the business activities of government, the administration of justice, appointments to office, the course of legislation are void, and where such contracts are in controversy it matters not that a particular contract is free from any taint of actual fraud, oppression or corruption. It is the general tendency of such contracts which condemns them all as belonging to a class which the law will not tolerate.[3] Agreements to influence official action or secret agreements whereby officials are to share in profits of contracts which they enter into are void. Public policy and good morals forbid a public official from having a personal interest in bids or contracts, lest he might advance his own interests at the expense of the public body, and allow the hope of personal gain to prevent a faithful discharge of his public duties.[4] Contracts made by a public body with its own agents and officers are likewise void on grounds of public policy both at the common law and under various statutes

[1] Patterson *v.* Chambers P. Co., 81 Oreg. 328, 159 Pac. 568; Eugene *v.* Chambers P. Co., 81 Oreg. 352, 159 Pac. 576.

[2] State *v.* Metcalfe, 75 Ala. 42; Pickett *v.* Wiota Sch. Dist., 25 Wis. 551.

[3] McMullen *v.* Hoffman, 174 U. S. 639, 43 L. Ed. 1117, aff'g 83 Fed. 372, 45 L. R. A. 410; Atcheson *v.* Mallon, 43 N. Y. 147; Colusa County *v.* Welch, 122 Cal. 428, 55 Pac. 243.

[4] Crocker *v.* U. S., 240 U. S. 74, 60 L. Ed. 533, aff'g 49 Ct. Cl. 85; Critchfield *v.* Bermudez A. P. Co., 174 Ill. 466, 51 N. E. 552; Denison *v.* Crawford County, 48 Iowa, 211; State *v.* Cross, 38 Kan. 696, 17 Pac. 190.

declaratory thereof.[1] Contracts tending to stifle and lessen competition in bidding for public work, secret agreements to combine interests and conceal it from the public, and to submit simulated bids are illegal, against public policy and will not be enforced to aid any party to such a contract.[2] Contracts to influence public officials by donation of a site for public buildings are against public policy and cannot be enforced.[3] But where a public institution must be located or a structure built, private contributions on condition that a particular location is selected are not against public policy.[4] If a contract offends against public morals, the courts will not enforce it wherever made for a contract which is illegal is illegal and void everywhere. Again, courts will refuse to regard the law of the place of contract, if it be immoral or unjust, or if it harms the citizens of the State where enforcement is sought, or impairs its own authority or the rights of its citizens.[5]

§ 101. Contracts against Public Policy—Fees of Public Officers.

Where a statute forbids a person to ask or receive compensation for services in an official capacity greater than prescribed by law, an agreement to pay such extra compensation creates no binding obligation.[6] An agreement

[1] Smith *v.* Albany, 61 N. Y. 444; Seaman *v.* New York, 172 App. Div. 740, 225 N. Y. 648; Klemm *v.* Newark, 61 N. J. L. 112, 38 Atl. 692.

[2] McMullen *v.* Hoffman, *supra;* Richardson *v.* Crandall, 48 N. Y. 348; Atcheson *v.* Mallon, 43 N. Y. 147.

[3] Edwards *v.* Goldsboro, 141 N. C. 60 53 S. E. 652. See §§ 20–21, *ante.*

[4] Currier *v.* U. S., 184 Fed. 700; Island County *v.* Babcock, 17 Wash. 438, 50 Pac. 54; State *v.* Elting, 29 Kan. 397; Pepin County *v.* Prindle, 61 Wis. 301, 21 N. W. 254; Wisner *v.* McBride, 49 Iowa, 220; State *v.* Johnson, 52 Ind. 197; George *v.* Harris, 4 N. H. 533, 17 Am. Dec. 446; Davis *v.* Choctaw County, 58 Okla. 77, 158 Pac. 294.

[5] West Cambridge *v.* Lexington, 18 Mass. 506; Oscanyan *v.* Winchester Arms Co., 103 U. S. 261, 26 L. Ed. 539, aff'g 15 Blatch. 79.

[6] Wadsworth *v.* Bd. of Supervisors, 217 N. Y. 484, 499, 112 N. E. 161;

for the payment of a less sum for any public service by an official than the fee fixed by statute is void for the same reason that it is against public policy.[1]

In like manner the promise of a candidate for public office that if elected he would pay all fees into the treasury of the public body and accept a salary is illegal and cannot be enforced. The fees or salary of a public officer as fixed by law are an incident of the office and it is contrary to public policy for candidates to attempt to attain office by promises to perform the duties for any other compensation except that fixed by law, and such promise cannot be enforced;[2] nor can estoppel be urged against his claim for the compensation fixed by statute because of his public promises to take less.[3] Nor will acceptance of a less amount prevent recovery of unpaid arrears.[4] The giving of contingent fees or compensation for services rendered to the public is contrary to public policy. A contract by tax commissioners whose duties and salary are fixed by statute to pay a firm of attorneys for advice and counsel rendered to them to enable them to learn of and place upon the tax list certain lands omitted is against the public policy of this country which does not permit any system of farming out the collection of public revenues.[5]

McCook County *v.* Burstad, 30 S. D. 266, 138 N. W. 303; Rochester *v.* Campbell, 184 Ind. 421, 111 N. E. 420.

[1] Wolf *v.* Humboldt County, 36 Nev. 26, 131 Pac. 964; Russell *v.* Cordwent, 152 S. W. (Tex.) 239.

[2] Galpin *v.* Chicago, 269 Ill. 27, 109 N. E. 713; Abbott *v.* Hayes County, 78 Neb. 729, 111 N. W. 780; People *ex rel.* Satterlee *v.* Bd. of Police, 75 N. Y. 38.

[3] Galpin *v.* Chicago, *supra;* Grant *v.* Rochester, 79 N. Y. App. Div. 460, 175 N. Y. 473; Moore *v.* Bd. of Education, 121 N. Y. App. Div. 862, 195 N. Y. 601, 614, 88 N. E. 645, 89 N. E. 1105.

[4] Pitt *v.* Bd. of Education, 216 N. Y. 304, 110 N. E. 612.

[5] Platte County *v.* Gerrard, 12 Neb. 244, 11 N. W. 298.

CHAPTER XVII

WHEN PUBLIC CONTRACT IMPLIED

§ 102. Implied Contracts—When Liability upon Implied Obligation Will Arise.

A public corporation having the legal power to contract may be bound by an implied contract in the same manner as a natural person.[1] Public bodies are liable upon unauthorized contracts which are not illegal where there has been performance and the benefits of such are retained by the public body. But the suit in such cases is not upon the contract but upon quantum valebat.[2] An implied contract may be proved by circumstances, acts and conduct and sayings of public officers having authority to bind the corporation.[3]

Public bodies may be bound the same as individuals upon implied contracts made by its agents and to be deduced from corporate acts even without a vote of the governing body, provided the contract is one which is within the scope of its corporate powers and is not one which by charter or statute must be made in a particular

[1] Harlem G. L. Co. *v.* Mayor, 33 N. Y. 309; *Re* Dugro, 50 N. Y. 513; Nelson *v.* Mayor, 63 N. Y. 535; Baird *v.* Mayor, 96 N. Y. 567; Moore *v.* Mayor, 73 N. Y. 238, 29 Am. R. 134; Pt. Jervis W. Co. *v.* Pt. Jervis, 151 N. Y. 111, 45 N. E. 388; Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; Argenti *v.* San Francisco, 16 Cal. 256; Brush-Elec. L. Co. *v.* Montgomery, 114 Ala. 433, 21 So. 960; Taylor *v.* Lanbertville, 43 N. J. Eq. 107.

[2] St. Louis Hay Co. *v.* U. S., 191 U. S. 159, 48 L. Ed. 130, aff'g 37 Ct. Cl. 281; Clark *v.* U. S., 95 U. S. 539, 24 L. Ed. 518.

[3] Hardwick Town Dist. *v.* Wolcott, 78 Vt. 23, 61 Atl. 471; Maher *v.* Chicago, 38 Ill. 266.

way or manner.[1] As pointed out if the act is ultra vires because illegal, it is void and there can be no ratification, as, for instance, where the manner of contracting is limited by statute. In these cases no implied contract can arise. But this does not prevent public bodies from being liable upon quantum meruit, when they have enjoyed the benefit of work performed or goods purchased, when no statute forbids or limits the power to contract therefor.[2]

§ 103. Taking or Using Property in Performance of Duty but Against Will of Owner.

Often a public body is authorized by express statute to carry out some public enterprise, in the maintenance and establishment of which, and as a necessary incident to which it has the power to designate and procure a location. If in the exercise of that implied power it takes the property of an individual, not by agreement, but against his will, the public body is bound to pay for the use of property which it is thus authorized to take upon an implied contract to pay what it is reasonably worth, or an action may be maintained upon the duty of the public body to make compensation for property taken by its officers against the will of its owners. Both actions have their foundation in the obligation to do justice, which rests upon public bodies in like degree as upon other persons.[3] The statutes relating to awards of contracts to the lowest bidder upon competitive bidding or requiring a prior appropriation can have no application to a situation of this character.[4]

[1] Kramrath *v.* Albany, 127 N. Y. 575, 28 N. E. 400; Peterson *v.* Mayor, 17 N. Y. 449; Nelson *v.* Mayor, 63 N. Y. 535.
[2] Kramrath *v.* Albany, *supra.*
[3] Poillon *v.* Brooklyn, 101 N. Y. 132, 4 N. E. 191.
[4] Poillon *v.* Brooklyn, *supra.*

§ 104. Where Money is Received or Property Appropriated.

Implied contracts arise in those cases where money or other property of a party is received by a public body under such circumstances that the general law independent of the express contract, imposes the obligation upon the public body to do justice with respect to the same.[1] It is a rule of the common law that an action lies for money paid by mistake, or upon a consideration which happens to fail, or for money obtained through imposition. This arises as above stated from the obligation to do justice which rests upon all persons, natural or artificial. So where a public body obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.[2] Accordingly where a public body obtains money by the sale of bonds which are invalid and deceived the purchaser, by pretending false dates upon the bonds were in fact true, an implied contract to repay the money arises.[3] It requires neither argument nor authority to support this proposition that where the money or property of an innocent person has gone into the treasury of any public body whether it be the nation, the State or their subdivisions or territories, by means of a fraud to which its agent is a party, such money or property cannot be held by such public body against the claim of the wronged and injured party.[4] An agent is not an agent for such a purpose, his doings are vitiated by dishonesty and confer no rights on his

[1] Ward *v.* Kropf, 207 N. Y. 467, 101 N. E. 469; Argenti *v.* San Francisco, 16 Cal. 256.

[2] Louisiana *v.* Wood, 102 U. S. 294, 26 L. Ed. 153; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040.

[3] Louisiana *v.* Wood, *supra.*

[4] U. S. *v.* State Nat. Bank, 96 U. S. 30, 24 L. Ed. 647, aff'g 10 Ct. Cl. 519.

principal.[1] The law creates an exception to the general rule stated, where the promise is for money received or property appropriated, and if the express promise is not enforceable an implied obligation for the money or the value of the property springs into existence.[2]

§ 105. When Obligation Arises for Money Had and Received—Trust Liability.

Where a public body receives materials without authority under a void contract and uses them, and obtains their value from property owners by means of assessments, it becomes liable for the actual value of the property or what it obtained therefor, but it will not be concluded, however, by the contract price as the liability arises not upon the contract.[3] And a public body will be held liable as trustee where a contractor made a contract with it to remove garbage at a monthly rate and when his work was finished there was paid into the treasury of the public body an unexpended balance more than sufficient to pay his claim, for the reason that in such a situation the fund becomes impressed with a trust which will sustain an action for money had and received to his use.[4] In similar manner where a health board undertakes without authority to remove certain nuisances and makes a contract therefor without a sufficient appropriation and thereafter the public body levies assessments part of which were paid into its treasury it will be liable in equity to pay this amount to the contractor in an action for money had and received.[5]

[1] U. S. *v.* State Nat. Bank, *supra;* Long *v.* Lemoyne Boro., 222 Pa. St. 311, 71 Atl. 211.

[2] Argenti *v.* San Francisco, *supra;* Ward *v.* Kropf, *supra;* see Agawam Nat'l Bank *v.* South Hadley, 128 Mass. 503.

[3] Nelson *v.* Mayor, 63 N. Y. 535, 544; Argenti *v.* San Francisco, 16 Cal. 256.

[4] Swift *v.* New York, 83 N. Y. 528.

[5] Parker *v.* Philadelphia, 92 Pa. St. 401.

§ 106. When Liability Arises—Failure to Comply with Statute.

Where a public body occupies certain property and continues beyond the term, even if the holding over fails to comply with the statutory manner of entering into the contractual relations, if its occupation confers some pecuniary gain, benefit or advantage upon the public body, or is a performance of some public duty enjoined by statute, it is liable upon an implied contract.[1]

§ 107. Emergency Contracts.

Contingencies may arise in the administration of city affairs where a thing of absolute necessity is required to be furnished and is furnished at a reasonable price, or where services, materials and property may be immediately needed and where competitive offers and written contracts would be of no service or impossible of obtainment. In these cases it was never intended that the statutes requiring competition, or writing, would have application. Where officers acting in entire good faith to meet the public needs, deem themselves wanting in power, under a mistake of law, or in opportunity because of the emergency, they may incur binding obligations within the corporate purposes of the public body. Where a public body has the legal power to contract for a thing under such circumstances, it may become liable upon an implied obligation for the services, materials or property thus obtained.[2] But the emergency must be a real emergency which is a sudden and unexpected occurrence or condition calling for

[1] Commercial Wharf Corp. *v.* Boston, 208 Mass. 482, 94 N. E. 805; Dickinson *v.* Boston, 188 Mass. 595, 75 N. E. 68; Douglas *v.* Lowell, 194 Mass. 268, 80 N. E. 510; Witt *v.* Mayor, 6 Robt. 441.

[2] Harlem G. L. Co. *v.* Mayor of New York, 33 N. Y. 309; North River Elec. L. Co. *v.* New York, 48 N. Y. App. Div. 14. See Brooklyn City R. Co. *v.* Whalen, 191 N. Y. App. Div. 737, 229 N. Y. 570, 128 N. E. 215.

immediate action.[1] The furnishing of light for city streets to prevent a city from being plunged in darkness is such an emergency.[2] But permanent inadequacy of street railroad service is not such an emergency, and will not justify a city in embarking in the business of operating stage lines.[3]

Where a city fails to insert the amount of a contract in the tax levy for a current year but water has been furnished under circumstances which imply a contract, and under a statute authorizing the authorities to obtain a water supply it has been declared that such contract was an exception to the rule requiring its amount to be inserted in the tax levy and that the city would be liable to pay what the commodity was fairly and reasonably worth during the period.[4]

When, however, these various statutes which require a prior appropriation, provision for the contract compensation in a tax levy, an award to the lowest bidder upon competition, approval by the voters or by a certain number of taxpayers in a locality or that the contract to be enforceable shall be in writing, have application, they must be fully complied with and public bodies are not liable upon an implied contract made in violation of such charter or statutory requirements.[5] An exception to the rule exists in the cases of money received or property appropriated.[6] Where a public body obtains property

[1] Brooklyn City R. Co. *v.* Whalen, *supra.*

[2] North River Elec. Co. *v.* New York, *supra.*

[3] Brooklyn City R. Co. *v.* Whalen, *supra.*

[4] Pt. Jervis Water Co. *v.* Pt. Jervis, 151 N. Y. 111, 45 N. E. 388.

[5] McDonald *v.* Mayor, 68 N. Y. 23; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219; Wadsworth *v.* Bd. of Super's Livingston County, 217 N. Y. 484, 112 N. E. 161; Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973.

[6] Louisiana *v.* Wood, 102 U. S. 294, 26 L. Ed. 153; Lincoln Land Co. *v.* Vil. of Grant, 57 Neb. 70, 77 N. W. 349; Higgins *v.* San Diego, 118 Cal. 524, 45 Pac. 824.

under a void contract and actually uses it and collects from property owners its value through assessments, the obligation to do justice which rests alike on public bodies as on natural persons imposes the duty to make compensation for the value of such property to the person from whom it was obtained. The public body in such cases is liable only for the actual value of the property or what it obtained for it and is not concluded by the contract price.[1]

§ 108. When Liability upon Implied Obligation will not Arise.

An implied contract will not arise where an express contract is forbidden by law. It stands to reason that if there is no power to make an express contract, an implied contract cannot arise against the express prohibition of the law.[2] Where a particular manner is prescribed to make a contract, a contract which does not follow that manner cannot be enforced upon the basis of an implied liability.[3] In similar manner if work or services or supplies are ordered by an officer or agent of a municipality or the head of a department or board or committee of the State or nation who is unauthorized to make a contract, no implied obligation arises.[4] Where a statute exists to prevent the

[1] Nelson *v.* New York, 63 N. Y. 535, 544; Argenti *v.* San Francisco, 16 Cal. 256; Bluthenthal *v.* Town of Headland, 132 Ala. 249, 31 So. 87.

[2] McDonald *v.* Mayor, 68 N. Y. 23; Parr *v.* Greenbush, 72 N. Y. 463; Dickinson *v.* Poughkeepsie, 75 N. Y. 65; Berka *v.* Woodward, 125 Cal. 119, 57 Pac. 777; Niles Water Wks. Co. *v.* Niles, 59 Mich. 311, 26 N. W. 525; Citizens' Bk. *v.* City of Spencer, 126 Iowa, 101, 101 N. W. 643; Schumm *v.* Seymour, 24 N. J. Eq. 143; Boston Co. *v.* Cambridge, 163 Mass. 64, 39 N. E. 787.

[3] *In re* Niland, 193 N. Y. 180, 85 N. E. 1012; Medina *v.* Dingledine, 211 N. Y. 24, 104 N. E. 1118; Vito *v.* Simsbury, 87 Conn. 261, 87 Atl. 722; City of Wellston *v.* Morgan, 65 Ohio St. 219; Newbery *v.* Fox, 37 Minn. 141, 33 N. W. 333; Fiske *v.* Worcester, 219 Mass. 428, 106 N. E. 1025.

[4] Bartlett *v.* Lowell, 201 Mass., 151, 87 N. E. 195; Floyd County *v.* Owego Bridge Co., 143 Ky. 693, 137 S. W. 237; New Jersey Car. Spring Co. *v.* Jersey City, 64 N. J. L. 514, 46 Atl. 649.

making of certain contracts and its terms are disregarded in the making of the contract, the contractor cannot recover for supplies furnished under such contract upon an implied promise.[1] The reason for these rules is stated thus: the law never implies a promise to pay unless some duty creates such an obligation and it never implies a promise to do an act contrary to duty or contrary to law. Assumpsit may properly be maintained against public bodies in certain circumstances upon an implied promise, but a promise to pay can never be implied in circumstances where the public body possesses no power to contract.[2]

Where charter or statute prohibits contracts except in the manner there prescribed, or under defined conditions and circumstances, no implied contract can arise for work done or materials furnished in violation of or without complying with such requirements.[3] This is true even though the work has been done and the public body has received the benefits.[4] In some jurisdictions, however, it has been announced that where the public body has received the benefits of an executed contract, the law implies a promise to pay for what it enjoys provided it had the power to contract therefor, although the manner prescribed or the exact powers were not followed.[5] When statutes forbid the making of contracts between public bodies and officials of that body, and whether a statute exists or not, for the rule is a rule of the

[1] Edison Elec. Co. *v.* Pasadena, 178 Fed. 425; Salt Creek Tp. *v.* King Iron B. & M. Co., 51 Kan. 520, 33 Pac. 303; Perry Water Co. *v.* Perry, 29 Okla. 593, 120 Pac. 582.

[2] Burrill *v.* Boston, 2 Clifford C. C. 590, 596, 4 Fed. Cas. 826; Bryan *v.* Page, 51 Tex. 532, 32 Am. Rep. 637; Buchanan *v.* Litchfield, 102 U. S. 278; Berlin Iron B. Co. *v.* San Antonio, 62 Fed. 882.

[3] Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219; Donovan *v.* Mayor, 33 N. Y. 291.

[4] Buchanan *v.* Litchfield, 102 U. S. 293, and cases cited, *ante*.

[5] Maher *v.* Chicago, 38 Ill. 266; East St. Louis *v.* East St. Louis G. L. & C. Co., 98 Ill. 415.

common law, of which these statutes are in most instances merely declaratory, no contract can be implied contrary to the statute or to the common-law rule. Accordingly no contract will be implied to pay a pound master who furnishes his own premises to be used as a pound.[1] It has been declared, however, that an implied contract will arise unless it would be against public policy.[2] But a mere irregularity in the exercise of the general powers of the governing body of a municipal corporation will not operate to defeat an implied contract where the municipality receives the fruits of the contract. This is for the reason that acts of the general governing body of a municipality within its general powers which are published and represented as valid, with invitations to individuals to enter into engagements and expend money and labor on the faith of them, may be assumed by those dealing with the municipal authorities to be as represented, and where the public body receives the benefits of the contract entered into on the faith of such representations it is estopped from setting up any irregularity not of substance of power or jurisdictional in character.[3]

But public bodies are not liable under a void contract to pay even quantum meruit for the materials used.[4] While the principles of estoppel underlie many of the decisions affecting situations above referred to where an implied obligation has been raised,[5] public bodies are not pre-

[1] Macy *v.* Duluth, 68 Minn. 452, 71 N. W. 687. See Seaman *v.* New York, 172 N. Y. App. Div. 740, 225 N. Y. 648.

[2] Call Pub. Co. *v.* Lincoln, 29 Neb. 149, 45 N. W. 245.

[3] Moore *v.* New York, 73 N. Y. 238, 29 Am. R. 134; Brady *v.* New York, 20 N. Y. 312; Marion W. Co. *v.* Marion, 121 Iowa, 306, 96 N. W. 883; State Board *v.* Cits. St. R. Co., 47 Ind. 407; Laird Norton Yards *v.* Rochester, 117 Minn. 114, 134 N. W. 644.

[4] Bartlett *v.* Lowell, 201 Mass. 151, 87 N. E. 195; Bigler *v.* New York, 5 Abb. N. C. 51; Donovan *v.* New York, 33 N. Y. 291; Keane *v.* New York, 88 N. Y. App. Div. 542; Worell Mfg. Co. *v.* Ashland, 159 Ky. 656, 167 S. W. 922.

[5] Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263; London & N. Y. Land Co. *v.* Jellicoe, 52 S. W. (Tenn.) 995.

cluded from setting up the defense of ultra vires in these cases where, as shown, an implied contract is not permitted.[1] Other cases admit of recovery on the theory of unjust enrichment. If complete performance is prevented by law, a recovery is allowed for benefits conferred by part performance upon the principle of the maxim that no one shall be made rich by making another poor. The recovery in such cases is not upon a contract which is invalidated but upon an implied agreement, founded upon a moral obligation to account for moneys or property received, which arises by virtue of a new and quasi contractual relation.[2] If in making a contract the provisions of the charter are not complied with, and the contract thereby proved void, yet where the public body obtained the use of an asphalt plant under the contract to repair its streets, it will be liable for the reasonable value of the use of the plant for the period of such repairs.[3]

§ 109. When Contract not Implied—Taking Property under Claim of Right.

Where the public body takes property not in the exercise of the power of eminent domain and not under a concession of ownership in an individual, it is not liable to pay therefor upon an implied contract, as its action precludes the implication of a promise to pay. It is liable if at all in tort.

It is only where in the exercise of its governmental power it takes property, the ownership of which it concedes to be in an individual that it is liable upon an implied

[1] Wheeler *v.* Poplar Bluff, 149 Mo. 36, 49 S. W. 1088; Ft. Scott *v.* Eads Brokerage Co., 117 Fed. 51.

[2] Ward *v.* Kropf, 207 N. Y. 467, 101 N. E. 469; First Nat. Bk. *v.* Goodhue, 120 Minn. 362, 139 N. W. 599.

[3] Nebraska Bitulithic Co. *v.* Omaha, 84 Neb. 375, 121 N. W. 443.

promise to pay.[1] The public body, where it is the national government, may not be sued without its consent for torts. It is liable, however, for the use of patented articles with the consent of the owner of the patent, upon an implied obligation.[2]

§ 110. Use and Occupation of Private Property—Adoption of Tortious Acts of Agents.

If a municipality undertakes to use property of an individual which it has no power or authority to use, it cannot be held liable upon an implied contract for use and occupation. And even if the acts constitute a trespass the ordinary right to waive the tort and sue upon an implied contract will not arise against a municipality or other public body, as such rule has no application in the case of such public bodies since their powers are limited and they cannot exercise powers which have not been expressly granted or those which are necessary incidents to the powers granted.[3] If a public body, without knowledge through its public officers that a well was located upon private property, paid a plumber for connecting its water mains with such well, this is not a ratification sufficient to

[1] Tempel *v.* U. S., 248 U. S. 121, 63 L. Ed. 162; U. S. *v.* Great Falls Mfg. Co., 112 U. S. 645, 28 L. Ed. 846, aff'g 16 Ct. Cl. 160; U. S. *v.* Cress, 243 U. S. 316, 61 L. Ed. 746; U. S. *v.* Lynah, 188 U. S. 445, 47 L. Ed. 539; U. S. *v.* Buffalo Pitts. Co., 234 U. S. 228, 58 L. Ed. 1290, aff'g 193 Fed. 905; Peabody *v.* U. S., 231 U. S. 530, 58 L. Ed. 351, aff'g 46 Ct. Cl. 39; U. S. *v.* Palmer, 128 U. S. 262, 32 L. Ed. 442, aff'g 20 Ct. Cl. 432.

[2] See Farnham *v.* U. S., 240 U. S. 537, 60 L. Ed. 786; Cramp & Sons Ship Co. *v.* Curtis Turbine Co., 246 U. S. 28, 62 L. Ed. 560; Marconi Wireless Co. *v.* Simon, 246 U. S. 46, 62 L. Ed. 568.

[3] Wilson *v.* Mitchell, 17 S. D. 515, 97 N. W. 741; Rowland *v.* Gallatin, 75 Mo. 134, 42 Am. Rep. 395; Bigby *v.* U. S., 188 U. S. 400, 409, 47 L. Ed. 519, aff'g 103 Fed. 597. See Smith *v.* Rochester, 76 N. Y. 506; Ft. Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973; Morrison *v.* Lawrence, 98 Mass. 219; Cavanagh *v.* Boston, 139 Mass. 426, 1 N. E. 834, 52 Am. Rep. 716; Seele *v.* Deering, 79 Me. 313, 10 Atl. 45. And see Fountain *v.* Sacramento, 1 Cal. App. 461, 82 Pac. 637.

make it liable for water used from the well.[1] Nor does the employment of an attorney by the governing body of a municipality to defend a policeman for an assault amount to an adoption of his conduct so as to make the municipality liable for the damages recovered against the officer.[2] A municipality is liable as a hold-over lessee on an implied contract for use and occupation of realty.[3] And it is liable to pay the reasonable value of the use of a private dwelling for pest-house purposes even though it get possession through a trick or trespass as long as its charter authorizes it to keep a pest house or hospital.[4] The mere fact that a tort accompanies its act will not change the act if it be sufficient to imply a contract for an authorized purpose.[5]

§ 111. Volunteer.

Where services are rendered without any request from the public body therefor, and even with the knowledge of its officers, even though the public body is benefited thereby, it cannot be made liable as no implied contract can arise from the rendition of purely voluntary services.[6] It is in like manner an elementary principle in an action to recover back moneys paid and expended by one for another, that money voluntarily paid cannot be recovered back. In order to support such an action it is essential that a request, on the part of the one benefited, to make such payment, either expressly or by fair implication from

[1] Wilson *v.* Mitchell, *supra.*

[2] Buttrick *v.* Lowell, 83 Mass. (1 Allen) 172.

[3] Witt *v.* New York, 6 Robt. 441; Commercial W. Co. *v.* Boston, 208 Mass. 482, 94 N. E. 805.

[4] Bodewig *v.* Pt. Huron, 141 Mich. 564, 104 N. W. 769.

[5] *Idem.*

[6] Holmes *v.* Kansas City, 81 Mo. 137; Woods *v.* Ayres, 39 Mich. 345; Bd. of Commrs. *v.* Harrison, 20 La. Ann. 201; Baltimore *v.* Hughes, 1 Gill. & J. (Md.) 480, 19 Am. Dec. 243; Coleman *v.* U. S., 152 U. S. 96, 38 L. Ed. 368; Boston *v.* Dist. of Columbia, 19 Ct. Cl. 31; Barnert *v.* Paterson, 48 N. J. L. 395, 6 Atl. 15.

the circumstances, be proved.[1] The claim that a party was requested to act is not the subject of a presumption but is a substantive fact which must be proved since it lies at the very foundation of the claimed right of recovery.[2] Moneys, given voluntarily to aid and assist a person without expectation of reimbursement, are accordingly not recoverable back.[3]

The mere acceptance and use of property is insufficient, therefore, to create an implied liability on the part of the public body to pay for it.[4] And similarly a voluntary performance of work, labor or services will not give rise to a promise to pay upon an implied contract,[5] unless such services or the use of the property be ratified through acceptance of such by persons authorized.[6] No person can make himself the creditor of a public body by voluntarily discharging a duty which belongs to that other.[7] Upon this principle it has been declared that acceptance and use with knowledge of the governing body of a munici-

[1] Albany *v.* McNamara, 117 N. Y. 168, 172, 22 N. E. 931.

[2] Albany *v.* McNamara, *supra;* People *v.* Brooklyn, 21 Barb. 484; U. S. *v.* Ross, 92 U. S. 281, 23 L. Ed. 707.

[3] Deer Isle *v.* Eaton, 12 Mass. 328; Medford *v.* Learned, 16 Mass. 215; Albany *v.* McNamara, *supra.*

[4] Alton *v.* Mulledy, 21 Ill. 76; Jeffersonville *v.* Louisville & J. S. F. Co., 27 Ind. 100, 89 Am. D. 495; New Jersey Car. Spring Co. *v.* Jersey City, 64 N. J. L. 544, 46 Atl. 649; Salsbury *v.* Philadelphia, 44 Pa. St. 303; Siebrecht *v.* New Orleans, 12 La. Ann. 491; Forehand *v.* U. S., 23 Ct. Cl. 477; Duloff *v.* Ayer, 162 Mass. 569, 39 N. E. 191; Boston Elec. Co. *v.* Cambridge, 163 Mass. 64, 39 N. E. 787; Virginia City G. Co. *v.* Virginia City, 3 Nev. 320.

[5] Jeffersonville *v.* Steam Ferryboat, 35 Ind. 19; Baltimore *v.* Poultney, 25 Md. 18; Haughwout *v.* Mayor of N. Y., 2 Keyes, 419; Lydecker *v.* Nyack, 6 N. Y. App. Div. 90; Dolloff *v.* Ayer, 162 Mass. 569, 39 N. E. 191.

[6] Boston Elec. Co. *v.* Cambridge, *supra;* Harrison County *v.* Bline, 34 Ind. App. 352, 72 N. E. 1034; Morgan County *v.* Seaton, 122 Ind. 521, 24 N. E. 213; Huntington County *v.* Boyle, 9 Ind. 296; Moon *v.* Howard County, 97 Ind. 176; Fouke *v.* Jackson County, 84 Iowa, 616, 51 N. W. 71; Cleveland County *v.* Seawell, 3 Okla. 281, 41 Pac. 592; Ostendorff *v.* Charleston Co., 14 S. C. 403.

[7] Salsbury *v.* Philadelphia, *supra;* Alton *v.* Mulledy, *supra;* Barnert *v.* Paterson, 48 N. J. L. 395, 6 Atl. 15.

pality will not suffice to create an implied contract.[1] The contrary has, however, been declared and municipalities have been made to pay for gas furnished with knowledge of its governing body.[2] But acceptance and use without the knowledge of the governing body cannot be made the foundation of an implied obligation.[3] It is said that the only safe rule is to hold public bodies not bound unless there is an authorization expressed by a resolution of the council, and so where furnishings were delivered for a court room upon the order of judicial authorities without sanction or knowledge of the council and were worn out before the bill was presented, there could be no implied contract to pay for them.[4] By a parity of reasoning it was declared that where fire hose the property of a resident was used by a municipal fire department by mistake, because intermixed with hose belonging to the town, and its use was under a belief that it belonged to the town no implied contract to pay for it or its use arises.[5]

Where, however, an officer is required by law to perform a duty involving the disbursement of money out of his own pocket, the law will not consider him a volunteer, but will require his reimbursement.[6] And where the law imposes an obligation upon a public body which it refuses to perform, while one volunteering to perform may not become a creditor, nevertheless it may be held liable upon an implied contract at the suit of one who suffers damage in consequence of its refusal to perform such duty.[7]

[1] New Jersey Car Spring Co. *v.* Jersey City, 64 N. J. L. 544, 46 Atl. 649.
[2] San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453.
[3] Seibrecht *v.* New Orleans, 12 La. Ann. 496.
[4] *Idem.*
[5] Dolloff *v.* Ayer, 162 Mass. 569, 39 N. E. 191.
[6] Barnert *v.* Paterson, *supra.*
[7] Seagraves *v.* Alton, 13 Ill. 366.

CHAPTER XVIII

LETTING OF PUBLIC CONTRACTS

§ 112. Conditions Precedent.

When a statute confers on a public officer the power to enter into a contract and requires the officer to advertise for bids before making the contract, such advertising is a condition precedent to the grant of authority and without the advertising there is no authority. Hence any contract not made through advertising for bids, when so required, is void.[1] In like manner, the requirement of statutes that there must be a prior appropriation,[2] a provision in the tax levy,[3] approval by the head of department,[4] or a vote of certain electors, are all conditions precedent to the making of a valid contract where they are required by statute. The making of definite plans and specifications,[5] of a contract in writing[6] and the opening of bids in the presence of named officials are likewise conditions precedent which must be fulfilled before an enforceable contract can result.[7] These various provisions of law are not merely permissive but mandatory.

§ 113. Necessity for Plans and Specifications.

Most public contracts are awarded to contractors for

[1] Hartford *v.* Hartford Elec. L. Co., 65 Conn. 324, 32 Atl. 925; Schumm *v.* Seymour, 24 N. J. Eq. 153.

[2] See cases, §§ 145 and 146, *post.*

[3] Pt. Jervis W. Co. *v.* Pt. Jervis, 151 N. Y. 111, 45 N. E. 388.

[4] See § 130, *post*, and cases.

[5] Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219.

[6] Edge Moor Bridge Works *v.* Bristol County, 170 Mass. 528, 49 N. E. 918; Wellston *v.* Morgan, 59 Ohio St. 149, 52 N. E. 127.

[7] People *ex rel.* Rodgers *v.* Coler, 35 N. Y. App. Div. 401.

public work after advertisement for proposals or bids to do the work, and the competitive bids thus obtained are the basis of an award to the lowest bidder under statutes existing in most jurisdictions requiring such manner of public letting to be followed. In most jurisdictions there is a maximum amount fixed for letting of contracts without competitive bidding.

Contracts exceeding such amount are invalid unless the manner of letting is substantially followed, as such statutes are considered mandatory. Even where the statutes have not specifically required plans and specifications, the courts have declared that in order to comply with these statutes, it is essential that plans and specifications of reasonable definiteness as to work, which is required to be let by public competitive bidding, should be prepared in advance of the bids. These plans and specifications are absolutely essential to form a basis of competition and they must be of sufficient definiteness to require competition on every material item, and they must state the quantity of work as definitely as practicable.[1]

The object of letting public work to the lowest bidder after inviting public bids is to preclude favoritism and jobbing on the part of public officials in whom authority

[1] Brady *v.* New York, 20 N. Y. 316; Matter of Merriam, 84 N. Y. 596; Matter of Rosenbaum, 119 N. Y. 24, 23 N. E. 172; Matter of Anderson, 109 N. Y. 554, 17 N. E. 209; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219; Tifft *v.* Buffalo, 25 App. Div. 376, 164 N. Y. 605, 58 N. E. 1093; Gage *v.* New York, 110 N. Y. App. Div. 403; Andrews *v.* Ada County, 7 Idaho, 453, 63 Pac. 592; Wells *v.* Burnham, 20 Wis. 112; Ricketson *v.* Milwaukee, 105 Wis. 591, 81 N. W. 864; Coggeshall *v.* Des Moines, 78 Iowa, 235, 41 N. W. 617; Fones Bros. Hdw. Co. *v.* Erb, 54 Ark. 645, 17 S. W. 7; Wilkins *v.* Detroit, 46 Mich. 120, 8 N. W. 701; Mazet *v.* Pittsburgh, 137 Pa. 548, 20 Atl. 693; Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374; Wilson *v.* Collingswood, 80 N. J. L. 626, 77 Atl. 1033; Huntington County *v.* Pashong, 41 Ind. App. 69, 83 N. E. 383; Yaryan *v.* Toledo, 28 Ohio C. C. 278, 76 Ohio St. 584, 81 N. E. 1199; Hannan *v.* Bd. of Education, 25 Okla. 372, 107 Pac. 646.

to make contracts is vested and to whom the supervision of the execution of contracts is intrusted.[1]

To permit each bidder to propose his plans and specifications not only prevents competition but opens the door to favoritism, and wipes out the standard by which the public body may determine who is the lowest bidder.[2] The omission in proposals, therefore, to provide sufficiently definite specifications which are furnished to the bidder, or to require the bidder, where the statute does not prohibit it, to furnish definite specifications to accompany his bid, is not a mere irregularity but is a direct violation of such statute, and although the work under a contract has been performed and the public body has the benefit of it, there can be no recovery upon such a contract.[3] Where the advertisement states in general terms the character and extent of the work and informs an intending bidder that plans and drawings which are a part of the specifications may be seen at a public office, and he is there shown such plan, he is justified in submitting his bid based upon what he is shown, in the absence of any hint or suggestion that there are other more detailed plans in existence; and when later he is required to perform more costly work in accordance with other plans, he may recover as for a breach of the contract the extra cost.[4]

But where he has had presented to him an agreement which he accepts which is precise and strict in its requirements he cannot claim reliance on plans on file in municipal offices, which accompanied prior grading contracts

[1] Brady *v.* New York, 20 N. Y. 312; Gage *v.* New York, *supra;* Ertle *v.* Leary, 114 Cal. 238, 46 Pac. 1; Packard *v.* Hayes, 94 Md. 233, 51 Atl. 32.

[2] Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219; Ertle *v.* Leary, *supra.*

[3] Hart *v.* New York, *supra.*

[4] Beckwith *v.* New York, 148 N. Y. App. Div. 658, 210 N. Y. 530, 103 N. E. 1121.

affecting the same roadways, for these constitute no representation to bidders upon the proposals for contracts as to any fact and are not in their nature a warranty.[1] While the manner of letting public contracts provided by statute is the measure of power and controls the conduct of public officials, it nevertheless does not deprive him of the exercise of reasonable discretion and care in the public interest. Public officials have the power, therefore, to insert in the proposals provisions intended to exclude irresponsible bidders from competition. Conditions precedent to considering proposals may properly be included in the specifications, which will require prospective bidders to give proof of their capacity to furnish the necessary materials, plant and means to complete the work. They may also be required to furnish satisfactory evidence that they have installed the type of work or materials required in the contract.[2] These provisions are inserted for the benefit of the city and not for other or higher bidders and may not be taken advantage of by them.[3] Proposals and plans, and specifications accompanying them, if so ambiguous as to prevent fair competition among bidders, cannot result in a valid contract.[4] Nor may they be indefinite in amount, for if this were permitted an advertisement for a small amount of work, so small as not to induce bidders to assemble a plant and organization, might be let at an extravagant price and subsequently enormously enlarged in the discretion of some public officer.[5] Where no plans

[1] Dunn *v.* New York, 205 N. Y. 342, 98 N. E. 495.

[2] Nathan *v.* O'Brien, 117 N. Y. App. Div. 664; Knowles *v.* New York, 37 Misc. 195, 176 N. Y. 430, 68 N. E. 860.

[3] Nathan *v.* O'Brien, *supra.*

[4] Gage *v.* New York, 110 N. Y. App. Div. 403; Piedmont Pav. Co. *v.* Allman, 136 Cal. 88, 68 Pac. 493.

[5] Morris & Cummings Dredging Co. *v.* New York, 116 N. Y. App. Div. 257, 193 N. Y. 678, 87 N. E. 1123; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219.

and specifications are submitted with a bid, it is practically impossible for bidders to compete with one another on a common basis of work to be done and materials to be furnished, and the question of determining who is the lowest bidder is left to the discretion and judgment of public officers. Under such conditions, a bid made and contract entered into in response thereto are illegal.[1] A mere summary of the general results to be accomplished by the work cannot furnish a basis for real competitive bids, which may be subjected to an intelligent and uniform test for the purpose of determining which is the lowest.[2]

So also a proposal which allows a bidder to select out of many methods or systems of accomplishing a work or erecting a plant, the method which the bidder prefers, is invalid. The duty of selection of a type, a system, a method or a plan is upon public officers under these statutes and they must choose out of those which are available the one to be adopted or constructed. The allowing of each bidder to submit his own independent proposition as to anything which would form an important element of the contract violates the statute.[3]

If the known standard systems for the work in hand involve such radically different theories that bids cannot be based on a common set of specifications, the obligation rests upon the public officers to adopt what seems the most promising system and make appropriate specifications for it or to call for bids on any one of the different systems upon which such bids are to be received. If the

[1] Hart *v.* New York, *supra;* Packard *v.* Hayes, *supra.*

[2] Hart *v.* New York, *supra;* Ricketson *v.* Milwaukee, 105 Wis. 591, 81 N. W. 864; Fones Hardware Co. *v.* Erb, 54 Ark. 645, 17 S. W. 7; Ertle *v.* Leary, *supra;* Packard *v.* Hayes, *supra;* Mazet *v.* Pittsburgh, 137 Pa. St. 548, 20 Atl. 693; Bennett *v.* Emmetsburg, 138 Iowa, 67, 115 N. W. 582.

[3] Packard *v.* Hayes, *supra.*

right is reserved to reject any and all bids, the public authorities may then make a choice and a lawful award.[1] While objection has been made to the latter course as shifting the responsibility of selecting the type or system from the public official to the contractor, the hypothesis outlined seems to exclude that result.[2] Where a proposed contract authorizes changes in the character of the work and materials which might involve expenditures in excess of the statutory amount fixed for non-competitive letting, and delegates to the engineer the exclusive right to determine the additional amount to be paid, it is invalid, since it confers the exercise of a discretion and power not vested by law in the public officials and violates the statute regulating the manner of letting.[3]

Where specifications call for alternative kinds of material of greater difference in value and the plans are drawn with dimensions which are sufficient for one kind of material, and the contract is ambiguous as to who shall decide which of the materials shall be used, the contract and specifications are so indefinite that full and free competition which the charter provisions require cannot be had.[4] Public officials are not restricted in their efforts to obtain the best quality of work and materials for the public body they represent, and accordingly they may limit the kind or quality of materials to be used, as long as they leave the purchaser free to procure it in the open market and do not limit him by fixing a price or otherwise. Where the product of a particular manufacturer is of a generally recognized excellence, public officials who are required by statute to award contracts to the lowest bidder may, like

[1] Hart *v.* New York, *supra;* Baltimore *v.* Flack, 104 Md. 107, 64 Atl. 702.
[2] Hart *v.* New York, *supra.*
[3] Gage *v.* New York, 110 N. Y. App. Div. 403.
[4] *Idem.*

private individuals, call for it in proposals for bids in preference to similar products.[1] But they have no right to fix a price in the advertisement for a portion of the work.[2] Fixing a price for earth excavation as a stated proportion of the price to be given by the bidder for rock excavation is not an interference with fair competition.[3] Specifications which state the quality of materials required but not the quantities are invalid as there can be no competitive bidding in a contract of that description, for unless quantities are stated there can be no comparison of bids.[4] If from the facts and data given all bidders are enabled to know by computation what material would be needed and the quantities, the specifications are valid.[5] But where bids are called for under conditions which are calculated to practically exclude competition, the contract will not be upheld.[6] Where a public body fails to provide specifications which are sufficiently definite to enable a contractor to complete his work, unless he is given full discretion in this regard, it is unreasonable to require him to take daily instructions and he is entitled to additional plans before he can be required to proceed with the work.[7] Bids may call for the use of alternative materials where the interests of the public body are fully protected.[8] And if it is im-

[1] Knowles *v.* New York, 37 Misc. 195, 176 N. Y. 430, 68 N. E. 860.

[2] Matter of Manhattan Sav. Inst., 82 N. Y. 142; Matter of Merriam, 84 N. Y. 596; *Re* Mahan, 81 N. Y. 621; *Re* Met. G. L. Co., 85 N. Y. 526; *Re* Pelton, 85 N. Y. 651; *Re* Paine, 26 Hun, 431, 89 N. Y. 605; *Re* Rosenbaum, 119 N. Y. 24, 23 N. E. 172; Larned *v.* Syracuse, 17 N. Y. App. Div. 19; Smith *v.* Syracuse, 161 N. Y. 484, 55 N. E. 1077.

[3] Matter of Marsh, 83 N. Y. 431.

[4] Bigler *v.* Mayor, 5 Abb. N. C. 51, 69.

[5] Jenney *v.* Des Moines, 103 Iowa, 347, 72 N. W. 550.

[6] Kay *v.* Monroe, 93 N. Y. App. Div. 484.

[7] Delafield *v.* Westfield, 41 N. Y. App. Div. 24, 169 N. Y. 582, 62 N. E. 1095.

[8] Gilmore *v.* Utica, 131 N. Y. 26, 29 N. E. 841; Schieffelin *v.* New York, 65 Misc. 609; Lentilhon *v.* New York, 102 N. Y. App. Div. 548; Walter *v.* Mc-

possible because of the character of the work to determine the amount of work to be done, lump sum bids for all the work or unit prices based upon estimated quantities are permitted.[1] Unbalanced bids which do not materially enhance the aggregate cost of the work are not ground of complaint.[2]

§ 114. Notice for Proposals and Bids—Necessity of Advertising.

The purpose of the statutes requiring advertising for proposals upon all public work is to create genuine competition in bidding and, therefore, the time during which and the medium in which such advertisement shall appear are material matters which must be strictly complied with to make a valid contract or create a valid assessment. It is essential that bidders, so far as possible, be put upon terms of perfect equality and that they be permitted to bid on substantially the same proposition and upon the same terms. Accordingly, a valid contract in accordance with these statutes can only be made after the public body has advertised for bids and then only upon a bid tendered in response to such advertisement. Every substantial requirement of the statute intended for the protection of the public and property owners must be complied with or the contract will be invalid.[3] These statutes are mandatory

Clellan, 113 N. Y. App. Div. 295, 190 N. Y. 505, 83 N. E. 1133; Connersville *v.* Merrill, 14 Ind. App. 303, 42 N. E. 1112; Barber A. P. Co. *v.* Gaer, 115 Ky. 334, 73 S. W. 1106; Baltimore *v.* Flack, 104 Md. 107, 64 Atl. 702; Detroit *v.* Hosmer, 79 Mich. 384, 44 N. W. 622; Nusff *v.* Cameron, 134 Mo. App. 607, 114 S. W. 1125, 117 S. W. 116; Dixey *v.* Atlantic City &c. Co., 71 N. J. L. 120, 58 Atl. 370.

[1] O'Brien *v.* Mayor, 139 N. Y. 543, 35 N. E. 323; Walter *v.* McClellan, 113 N. Y. App. Div. 295, 190 N. Y. 505, 83 N. E. 1133.

[2] *Re* Anderson, 109 N. Y. 554, 17 N. E. 209.

[3] Mut. Life Ins. Co. *v.* Mayor, 144 N. Y. 494, 39 N. E. 386; Tifft *v.* Buffalo, 25 N. Y. App. Div. 376, 164 N. Y. 605, 58 N. E. 1093; *Re* Pennie, 108 N. Y. 364, 15 N. E. 611; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219; Hewes *v.*

and the evils which they are designed to prevent can only be circumvented by construing these restrictive statutory provisions so as to accomplish the objects intended. The preliminary steps leading up to the contract are conditions precedent to the power of the public body to enter into the contract.[1] Requiring the notice to be published a certain number of weeks in a stated number and class of publications is a requirement and a condition precedent which must be strictly followed.[2] Provision for publication in five successive numbers of an official paper implies that the plans and specifications referred to in the notice shall be on exhibition during all these days to have proceedings valid.[3] The advertisement or notice should itself contain the essential elements required to give due notice of the nature and extent of the work or supplies, the quality and estimated quantities, as near as possible, of the work to be done or supplies to be furnished and the kinds and classes of such work or supplies. It should also state the time within which the work should be done or the supplies delivered, and the location of the work as well as a time and place for the receipt of proposals. If these material matters are not complied with a valid contract cannot be made.[4] It is unusual to publish the specifications, but they may be sufficiently included in the

Reis, 40 Cal. 255; Fairbanks M. Co. *v.* North Bend, 68 Neb. 560, 94 N. W. 537; California Imp. Co. *v.* Moran, 128 Cal. 373, 60 Pac. 969; Duffy *v.* Saginaw, 106 Mich. 335, 64 N. W. 581; Connersville *v.* Merrill, 14 Ind. App. 303, 42 N. E. 1112; Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651.

[1] McCloud *v.* Columbus, 54 Ohio St. 439, 44 N. E. 95; Hewes *v.* Reis, *supra.*

[2] McCloud *v.* Columbus, *supra.*

[3] Tifft *v.* Buffalo, *supra.*

[4] Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219; Polk *v.* McCartney, 104 Iowa, 567, 73 N. W. 1067; Windsor *v.* Des Moines, 101 Iowa, 343, 70 N. W. 214; Inge *v.* Bd. of Public Works, 135 Ala. 187, 33 So. 678; Heidelburg *v.* St. Francois County, 100 Mo. 69, 12 S. W. 914; Detroit *v.* Hosmer, 79 Mich. 384, 44 N. W. 622; Pilcher *v.* English, 133 Ga. 496, 66 S. E. 163; Adams *v.* Essex County, 205 Mass. 189, 91 N. E. 557.

notice by reference and many of the matters which may ordinarily appear in the notice can be set out in specifications thus made a part of the notice and this will be a sufficient compliance with the statute.[1] But since intelligent bids can only be made after an opportunity of inspecting the plans and specifications and learning precisely what kind of work is required and its details, a reasonable interpretation of the statute requires that these shall be on file before proposals are advertised for so as to give fair chance of competition among all bidders.[2] Where a contract is advertised to be let at the site of a proposed bridge, letting of it by outcry at a point half a mile from such site is not a compliance with law.[3] And additions and alterations to public work need not be advertised for where they are made in good faith, the general plan is not changed and there is no attempt to evade the statute.[4] If the notice fairly complies with the statute, slight irregularities in the giving of it will be disregarded.[5] Where the statute specifies no length of time of publication of the notice, the time of advertising must be a reasonable time.[6] But where the statute does not require that a notice shall be given inviting proposals, this matter becomes one resting in discretion and public officers are not required to

[1] Swift *v.* St. Louis, 180 Mo. 80, 79 S. W. 172; Dixon *v.* Greene County, 76 Miss. 794, 25 So. 665; Ampt *v.* Cincinnati, 17 Ohio C. C. 516, 60 Ohio St. 621, 54 N. E. 1097; Owens *v.* Marion, 127 Iowa, 469, 103 N. W. 381; but see Wilkins *v.* Detroit, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427.

[2] Smith *v.* Syracuse, 17 N. Y. App. Div. 63, Rev. O. G. 161 N. Y. 484, 55 N. E. 1077.

[3] Sparks *v.* Jasper County, 213 Mo. 218, 112 S. W. 265.

[4] Escambia County *v.* Blount Const. Co., 66 Fla. 129, 62 So. 650.

[5] Potts *v.* Philadelphia, 195 Pa. St. 619, 46 Atl. 195; Ellis *v.* Witmer, 134 Cal. 249, 66 Pac. 301; Belser *v.* Allman, 134 Cal. 399, 66 Pac. 492; Newport News *v.* Potter, 122 Fed. 321.

[6] Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603; Augusta *v.* McKibben, 22 Ky. Law. Rep. 1224, 60 S. W. 291.

give notice but at their option may award a contract without notice.[1]

§ 115. **Necessity of Advertising—Patented Articles.**

Where from a consideration of the object and purpose of these provisions which restrict the letting of public contracts except upon advertisement for proposals and then by award to the lowest bidder, it appears that they can be made to apply only by a disregard of their plain purpose and intent, they become inapplicable.[2] In the case of desired articles which are patented and which can be obtained from only one person, manifestly to submit the matter to public letting is impossible.[3]

Recognizing the impossibility of such a situation, even where contracts for the use of patented pavements have been prohibited, the prohibition has been made conditional, —namely, that the purchase of or contract for patented articles shall be under such circumstances that there can be a fair and reasonable opportunity for competition, the conditions for which shall be prescribed by the public body.[4]

Where the scheme devised under such a statute affords the owners of patented and unpatented pavements to join in the bidding on equal terms there is that fair and reasonable opportunity for competition which meets the statute. A contract to lay a smooth and noiseless pavement let under such scheme is a valid contract.[5] An unpatented

[1] Crowder *v.* Sullivan, 128 Ind. 486, 28 N. E. 94; Dillingham *v.* Spartanburg, 75 S. C. 549, 56 S. E. 381.

[2] Baird *v.* Mayor, 96 N. Y. 567; Matter of Dugro, 50 N. Y. 513; Yarnold *v.* Lawrence, 15 Kan. 103; Hobart *v.* Detroit, 17 Mich. 246; *Contra*, Dean *v.* Charlton, 23 Wis. 590; Nicholson Co. *v.* Painter, 35 Cal. 699.

[3] Baird *v.* Mayor, *supra;* Matter of Dugro, *supra;* Yarnold *v.* Lawrence, *supra;* Hobart *v.* Detroit, *supra*[2] *Contra*, Dean *v.* Charlton, *supra;* Nicholson Co. *v.* Painter, *supra.*

[4] Greater N. Y. Charter, § 1554.

[5] Warren Bros. Co. *v.* New York, 190 N. Y. 297, 83 N. E. 59. See Rose *v.*

pipe of a type known as a lock bar joint even though made by patented machinery is not within such a statute.[1] Where the advertisement for patented articles presents a fair and reasonable opportunity for competition, the courts cannot interfere with an award.[2] It has been said that there should be advertising even though patented articles are required.[3] But where the contract calls for an exchange of equipment the provision of an ordinance will not apply.[4]

§ 116. Form of Bid.

Public bodies may invite bids in various forms provided each proposal is upon a definite and specific plan, and attended by specifications covering every material detail of the work. These must be free from ambiguity and sufficiently clear to afford bidders an opportunity to compete. This can only be afforded by definite specifications to which all bidders can conform.[5] Irregularities in the form of the bid may justify rejection by the public authorities, but they may waive regulations made for their protection,[6] unless such act of waiver will permit the public body to be defrauded or damaged. A bid is not invalid because the bidder or his sureties failed to appear before the notary who took their verification or because of misrepresentations of the sureties as to their qualifications.[7]

Low, 85 N. Y. App. Div. 461; Barber A. P. Co. *v.* New York, 86 *Id.* 617; Barber A. P. Co. *v.* Willcox, 90 *Id.* 245; Kay *v.* Monroe, 93 *Id.* 484.

[1] Holly *v.* New York, 128 N. Y. App. Div. 499.

[2] Hastings Pav. Co. *v.* Cromwell, 67 Misc. 212.

[3] Newark *v.* Bonnel, 57 N. J. L. 424, 31 Atl. 408.

[4] Worthington *v.* Boston, 152 U. S. 695, 38 L. Ed. 603.

[5] Van Reipen *v.* Jersey City Mayor, 58 N. J. L. 262, 33 Atl. 740; Moreland *v.* Passaic, 63 N. J. L. 208, 42 Atl. 1058; Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603; *In re* Marsh, 83 N. Y. 431; *Re* Clamp, 33 Misc. 250. Sec. 113, *ante.*

[6] McCord *v.* Lauterbach, 91 N. Y. App. Div. 315; Gage *v.* New York, 110 N. Y. App. Div. 403.

[7] McCord *v.* Lauterbach, *supra.*

Invalidity will not arise because the price bid was written over an erasure, without any note of such erasure having been made, as long as it appears by affidavit that the erasure was made before the bid was verified or submitted.[1] It is not invalid because not signed, if the statute only requires verification, and the bid is verified.[2] Nor is it illegal and invalid because one of the sureties on the bid is a member of the municipal assembly. This makes the bid voidable at the option of the comptroller who may waive irregularities or even illegalities of this kind.[3] A blank bid upon which the names of the bidders do not appear is not a bid, and, against strict provisions of law providing how a contract shall be made, cannot be the basis of a valid contract.[4]

§ 117. Deposit of Bids.

A provision of a statute that all bids shall be publicly opened by the officers advertising for the same and in the presence of the comptroller, but that such opening shall not be postponed if the comptroller after notice fails to attend, is mandatory and requires that such opening shall not take place except in the presence of the officers advertising for bids or proposals. These must of necessity be present, while the absence of the comptroller can be excused. Such provisions are salutary in their nature and purpose and are intended to prevent the manipulation of bids before they come into the hands of the officer who is to report them to the comptroller. The public officer advertising may not absent himself from the opening and has no power to waive the requirements of the statute and to make that legal

[1] Matter of Clamp, 33 Misc. 250.
[2] *Idem.*
[3] *Idem.*
[4] Williams *v.* Bergin, 129 Cal. 461, 62 Pac. 59.

which the law prohibits. If he is absent the bids are invalid and may not be made the basis of any further proceedings.[1] But where the bids are received, and an adjournment is taken to bring all the officers together, who are charged with the duty of making the examination, and they all do come together and act within a reasonable time, the statute which is merely directory in that respect is satisfied.[2]

§ 118. **Modification of Bid.**

A bidder who submits a sealed bid for public work cannot change it after it is opened, nor may the public authorities who receive the bid permit a change in any material respect. To allow such a change after bids are opened violates the purpose and intent of the statutes regulating competitive bidding. It opens the door to favoritism and preference if not to jobbing and gross fraud. The public authorities have power to accept or reject bids as submitted, but they possess no power to permit material changes or amendment to be made in the terms or conditions of the bid.[3] Modification of a bid before it is accepted or acted on, but after the time limited for submission of bids, is not permissible for like reasons.[4] Such a bid can be regarded in no other light than as a new bid, and as one made after all other competitors are led to believe no further bids will be received. Bidders would not be bidding upon equal terms or even upon the same

[1] People *ex rel.* Rodgers *v.* Coler, 35 N. Y. App. Div. 401.
[2] McCord *v.* Lauterbach, 91 N. Y. App. Div. 315.
[3] Chicago *v.* Mohr, 216 Ill. 320, 74 N. E. 1056; State *v.* Bd. of Comm'rs Douglas County, 11 Neb. 484, 9 N. W. 691; Beaver *v.* Trustees, 19 Ohio St. 97; Boren *v.* Comm'rs Darke County, 21 Ohio St. 311; Fairbanks, Morse & Co. *v.* North Bend, 68 Neb. 560, 94 N. W. 537; Dickinson *v.* Poughkeepsie, 75 N. Y. 65.
[4] Fairbanks, Morse & Co. *v.* North Bend, *supra.*

proposition if this were allowed.[1] But of course all bidders have the right previous to the opening of sealed proposals to modify their bids by letter or telegram. Before acceptance of his bid there is no valid or binding contract, and so long as there is no valid contract a bidder has the right to change his bid and insist that his bid when opened shall only be considered as modified.[2] He may do this without sacrificing the deposit which he has been compelled to make as a condition of bidding.[3]

When a bid is thus modified, it may be accepted as modified and a binding contract will result.

§ 119. Mistake in Bid—Rescission—Relief in Equity.

If a bidder makes an unintentional mistake in his bid, he has a right to withdraw his bid before it is acted on.[4] And in the event that a bid is accepted and the mistake reveals itself then for the first time, if the bidder calls the attention of the public authorities to the mistake upon its discovery he may be relieved in equity,[5] or he may set up the facts in defense of an action at law for damages.[6]

Sometimes, as a consequence of the haste in which bids are prepared, errors or omissions inadvertently and unintentionally creep into the bids, and the bidder never con-

[1] Fairbanks, Morse & Co. *v.* North Bend, *supra;* Dickinson *v.* Poughkeepsie, *supra.*

[2] Thompson *v.* U. S., 3 Ct. Cl. 433; North Eastern Cons. Co. *v.* North Hempstead, 121 N. Y. App. Div. 187.

[3] North Eastern Cons. Co. *v.* North Hempstead, *supra.*

[4] Martens & Co., Inc. *v.* Syracuse, 183 N. Y. App. Div. 622; Harper *v.* Newburgh, 159 *Id.* 695; New York *v.* Dowd Lumber Co., 140 *Id.* 358; Moffett & Co. *v.* Rochester, 178 U. S. 373, 44 L. Ed. 1108; Northeastern Cons. Co. *v.* North Hempstead, 121 N. Y. App. Div. 187; Chicago *v.* Mohr, 216 Ill. 320, 74 N. E. 1056; Fairbanks & Co. *v.* North Bend, 68 Neb. 560, 94 N. W. 537; Bromagin *v.* Bloomington, 234 Ill. 114, 84 N. E. 700.

[5] Harper *v.* Newburgh, 159 N. Y. App. Div. 695; Moffett Co. *v.* Rochester, 178 U. S. 373, 44 L. Ed. 1108.

[6] New York *v.* Dowd Lumber Co., 140 N. Y. App. Div. 358.

sciously or intentionally enters into an agreement, his apparent agreement being the result of an honest mistake in transcription. In such a case, he may not have reformation in equity as this may only be given in cases of mutual mistake.[1] He may, however, have a rescission of the contract; for rescission may be had for a unilateral mistake. In the view of the law, there was no meeting of the minds and hence the court may rescind the contract for the apparent mistake of one party only, and in order to do this, it is not necessary that there should be fraud or inequitable conduct on the side of the other party. Relief may be had from an unconscionable bid through rescission or cancellation.[2]

It appears that relief may be had against a negligent omission, as long as the bidder is not guilty of gross negligence.[3] Under such circumstances, injunction will not be issued against a return of deposit.[4] Where accordingly a bidder in preparing his estimate because of his hurry to get his bid in, by mistake turned two pages of his book instead of one and thus omitted to carry forward a material portion of his estimate, making his bid several thousand dollars less than he intended, the acceptance of such a bid could not create a meeting of minds and, in equity, he may have rescission and a return of his deposit.[5] In a case of mistakes in figures aggregating many thousands of dollars differing from what a bidder intended to make, there is likewise no meeting of the minds and there

[1] New York *v.* Dowd Lumber Co., *supra;* Moffett Co. *v.* Rochester, *supra.*

[2] Harper *v.* Newburgh, *supra;* Moffett Co. *v.* Rochester, *supra;* New York *v.* Dowd Lumber Co., *supra;* Board of Sch. Comm'rs *v.* Bender, 36 Ind. App. 164, 72 N. E. 154. See New York *v.* Seeley T. Co., 149 N. Y. App. Div. 98, 208 N. Y. 548.

[3] Moffett Co. *v.* Rochester, *supra;* Barlow *v.* Jones, 87 Atl. (N. J. Eq.) 649.

[4] Barlow *v.* Jones, *supra.*

[5] Board of Sch. Comm'rs. *v.* Bender, *supra.*

can be no contract from which relief in equity will not be granted which will include a return of the deposit.[1] Where, however, a bidder in his proposal to perform work states that his information concerning the work to be done and the materials to be furnished for the completion of his contract was secured by personal investigation and not from estimates furnished by the State, he cannot rely upon a mere suggestion, made in the estimate sheets which directs his inquiry for stone to an available source of supply. So, when it turns out that stone is not available at such place, he cannot refuse to execute the contract on the claim of a mutual mistake of fact as to the possibility of obtaining the stone at such place. Accordingly he is not entitled to a mandamus, upon such a state of facts, to compel a return of his deposit money which is forfeited by a refusal to execute the contract.[2]

When estimates of amounts and quantities of material to be furnished and work to be done are not even approximately correct, and whether they are or not, could only be ascertained by a skilled engineer, by correct scaling of maps and plans, the statement that they are approximate only will not prevent a contractor from obtaining relief in equity. Such a contract is entered into under a mutual mistake and if followed by prompt action after a discovery of the mistake will afford ground for rescission of the contract.[3]

Similarly where courts can properly find mutual mistake in a bid, such may be the subject of an action for reformation, or for rescission.[4]

[1] Moffett Co. *v.* Rochester, *supra.*
[2] Matter of Semper *v.* Duffey, 227 N. Y. 151, 124 N. E. 743.
[3] Long *v.* Athol, 196 Mass. 497, 82 N. E. 665.
[4] U. S. *v.* Milliken Imprinting Co., 202 U. S. 168, 50 L. Ed. 980; Long *v.* Athol, 196 Mass. 497, 82 N. E. 665.

§ 120. Deposit Money with Bids—Forfeiture Measure of Damage for Failure to Execute Contract.

The provision in statutes governing bidding on public work, that a bond or other security such as cash or a certified check shall accompany the bid, is mandatory, and bids proffered without a compliance therewith are a nullity. The purpose of requiring such deposit to be made is not only to insure good faith on the part of bidders but to indemnify the public body against the expense of readvertising.[1] Such deposit is also to advise bidders, if the contract is awarded to them and they refuse to enter into it, the precise amount of damage they will have to pay. The only damage a contractor can be subjected to for refusing to execute the contract after its award to him is the forfeiture of his deposit.[2] The only bond which the public body can require is the statutory bond. Where the statute determines the amount of the deposit to be the amount of the damage, a surety who gave a bond conditioned to pay the difference between the sum which the bidder would be entitled to on completion and the sum the public body would be obligated to pay to another contractor on reletting, cannot be held by the public body to any damages beyond those mentioned in the statute.[3] But where there is no such limitation in the statute, actual damage which is the increased cost is recoverable.

A public body may lawfully require a contractor, where the amount is not provided by statute, to furnish a bond, in its discretion, in a reasonable sum, which will not prevent fair and honest competition.[4]

[1] Erving *v.* Mayor, 131 N. Y. 133, 29 N. E. 1101; New York *v.* Seely Taylor Co., 149 App. Div. 98, 208 N. Y. 548, 101 N. E. 1098; Matter of Semper *v.* Duffey, 227 N. Y. 151, 124 N. E. 743.

[2] New York *v.* Seely Taylor Co., *supra.*

[3] New York *v.* Seely Taylor Co., *supra;* Selpho *v.* Brooklyn, 5 App. Div. 529, 158 N. Y. 673, 52 N. E. 1126.

[4] Selpho *v.* Brooklyn, *supra.*

And under an ordinance passed pursuant to lawful delegation of power it may exact a bond in addition to the usual bond, conditioned to pay materialmen and workmen.[1] In order to forfeit a deposit under these statutes, it is essential that the bidder have written notice that the contract has been awarded to him.[2]

If the statute requires a cash deposit, a certificate of deposit or certified check is its equivalent and will satisfy the statute.[3] The award of the contract constitutes an approval of the sufficiency of the deposit.[4]

Where a bidder has paid the usual deposit money which accompanied a bid on public work to the public body, and the latter has accepted his bid, but the bidder refuses to enter into a contract, he is not estopped from showing that the preliminary proceedings were defective and illegal or that a contract if made would be illegal and from requiring a return of his deposit.[5] The maxim in pari delicto potior conditio possidentis has no application to such a case, for one who pays money under an illegal contract may recover it back before the contract is executed.[6]

The statute requiring forfeiture of a deposit for failure to enter into a contract contemplates a contract based upon legal proceedings. Where the proceedings are illegal his bid is a naked offer met and supported by no consideration. A promise resting upon a consideration which has totally failed is no longer binding, and a deposit of money accompanying such a promise is recoverable at law.[7]

[1] Buffalo Cement Co. *v.* McNaughton, 90 Hun, 74, 156 N. Y. 702.
[2] Erving *v.* Mayor, *supra.*
[3] People *v.* Contracting Bd., 27 N. Y. 378.
[4] Baird *v.* New York, 83 N. Y. 254.
[5] Perine Cont. & Pav. Co. *v.* Pasadena, 116 Cal. 6, 47 Pac. 777; Fairbanks, Morse & Co. *v.* North Bend, 68 Neb. 560, 94 N. W. 537.
[6] Fairbanks, Morse & Co. *v.* North Bend, *supra.*
[7] Perine Cont. & Pav. Co. *v.* Pasadena, *supra.*

In a proper case, however, failure to execute the contract forfeits the security, since this is a term of the agreement of deposit, and if the provisions of the statute regarding the forfeiture are followed, no relief will be granted, for a party will not be aided contrary to the express terms of his own contract.[1]

[1] Morgan Park *v.* Gahan, 136 Ill. 215, 26 N. E. 1085; Erving *v.* New York, 131 N. Y. 133, 29 N. E. 1101; New York *v.* Seely Taylor Co., 149 N. Y. App. Div. 98, 208 N. Y. 548, 101 N. E. 1098; Matter of Semper *v.* Duffey, 227 N. Y. 151, 124 N. E. 743; Mutchler *v.* Easton, 148 Pa. St. 441, 23 Atl. 1109; Langley *v.* Harmon, 97 Mich. 347, 56 N. W. 761; Willson *v.* Baltimore, 83 Md. 203, 34 Atl. 774; Middleton *v.* Emporia, 106 Kan. 107, 186 Pac. 981.