

considered as sound.<sup>1</sup> As respects the usual and ordinary legislative and governmental powers conferred upon a municipality, the better to enable it to aid the State in properly governing that portion of its people residing within the municipality, such powers are in their very nature public, although embodied in a charter and not conferred by laws general in their nature and applicable to the entire State. But powers or franchises of an exceptional, or extraordinary or non-municipal nature may be, and sometimes are, conferred upon municipalities, such as are frequently conferred upon individuals or private corporations. Thus, for example, a city may be expressly authorized in its discretion to erect a public wharf and charge tolls for its use,<sup>2</sup> or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby.<sup>3</sup> In one sense such powers are public in their nature because conferred for the public advantage. In another sense they may be considered private, because they are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality as distinct from the public at large. In this limited sense, and as forming a basis for the *implied civil liability for damages* caused by the negligent execution of such powers, it may be said that a municipality has a *private* as well as a *public* character. And so, as hereafter shown, a municipality may have property rights which are so far private in their nature that they are not held at the pleasure of the legislature.<sup>4</sup>

§ 28 (11). **The New England Town.**— In the New England States, public corporations have, in many respects, a peculiar character. In some instances, there are acts incorporating *cities*, giving them defined powers and providing a special mode of government; but even then the general laws in relation to *towns*, when not inconsistent with the provisions of the local act, ordinarily apply to the places specially incorporated. In the New England *town* proper, the citizens administer the general affairs in person, at the stated corporate or town meetings, and through officers elected by themselves.<sup>5</sup> The towns are charged with the support of schools, the

<sup>1</sup> See cases cited *post*, sec. 66; and for illustrations and application of the doctrine, *post*, secs. 57, 58, 775; also chap. xxiii., Actions, secs. 963-967, 1014, 1018. See observations of Hunt, J., in Barnes v. District of Columbia, 91 U. S. 540 (1875); and of Gray, C. J., in Hill v. Boston, 122 Mass. 344 (1877), noted *infra*, sec. 965.

<sup>2</sup> Pittsburg v. Grier, 22 Pa. St. 53 (1853); *post*, sec. 113, note, and the chapter xxiii. on Actions, secs. 966, 967, 980.

<sup>3</sup> *Ib.*, *post*, chap. xxiii. on Actions.

<sup>4</sup> Chap. iv., *post*.

<sup>5</sup> In *towns*, according to the use of the word in the New England States and some of the others, the citizens administer the general affairs in person, in town meet-

relief of the poor, the laying out and repair of highways, and are empowered to preserve peace and good order, maintain internal police, and direct and manage generally, in a manner not repugnant to the laws of the State, their prudential affairs; and for defraying these and all necessary and lawful charges, they may levy and collect taxes. Speaking generally, the New England towns are organized after the same model; and an exact notion of their character will be best obtained by reference to the leading statutory provisions in Massachusetts respecting them, given in the note.<sup>1</sup> The town in

ings. In *cities*, this is done by means of a mayor, aldermen, and council, to whom the citizens entrust most of the legislative and executive powers of the place. State v. Glennon, 3 R. I. 276, 278, *per Staples*, C. J. In New England, "town" is a generic term, and it will embrace *cities*, unless the contrary appears in other parts of the statute to have been the intent of the legislature. *Ib.* The reader will find the opinion of Gray, C. J., in Hill v. Boston, 122 Mass. 344; s. c. 23 Am. Rep. 332, 1877, highly instructive as to the character of New England towns and cities. As to general liabilities, there is no substantial distinction between cities and towns under the legislation of Massachusetts. *Ib.* p. 354.

<sup>1</sup> Every town has the corporate right to send representatives to the General Court (the legislature). If by a majority vote a town declines to send a representative, the dissenting minority cannot legally choose one. Opinion Justices Sup. Court, 7 Mass. 526; 15 Mass. 537. "Towns in Connecticut, as in the other New England States, differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations, into which the State is divided by the legislature, from time to time, at its discretion, for political purposes and the convenient administration of government; they have those powers only which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs; and all the inhabitants of the town are members of the quasi corporation." *Per Gray, J.*, Bloomfield v. Charter Oak Bank, 121 U. S. 121, citing 1 Swift's System, 116, 117; Granby v. Thurston, 23 Conn. 416; Webster v.

Harwinton, 32 Conn. 131; Dillon, Mun. Corp., secs. 28-30.

SUMMARY of the leading statutory provisions in MASSACHUSETTS respecting towns:—

1. *As to powers and duties.*— They are "bodies corporate, with all the powers heretofore exercised by them, and subject to all the duties to which they have heretofore been subject." Gen. St. 1860, chap. xviii. sec. 1. "Towns may, in their corporate capacity, sue and be sued in the name of the town." *Ib.* sec. 8. They may hold real estate and personal property "for the public use of the inhabitants," and also "in trust for the support of schools and the promotion of education within the limits of the town." *Ib.* sec. 9. They may make *contracts* necessary and convenient "for the exercise of their corporate powers," and may dispose of their *corporate property*. *Ib.* secs. 8, 9. "They may, at legal meetings, grant and vote such sums as they judge necessary for the following purposes: For the support of town *schools*; for the relief, &c. and employment of the *poor*; for the laying out and discontinuing and repair of *highways*; for procuring the writing and publishing of *town histories*; for *burial grounds*; for encouraging the destruction of *noxious animals*; for all other *necessary charges* arising therein." *Ib.* sec. 10. "May make necessary *by-laws*, not repugnant to the laws of the State, for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof." *Ib.* sec. 11. But such by-laws must, before taking effect, be approved by the Superior Court, or, in vacation, a judge thereof. *Ib.* sec. 14. They are binding



New England, while somewhat anomalous, has some of the usual powers of a regular municipal corporation, and some of the charac-

upon all within the limits of the town, strangers as well as inhabitants. *Ib.* sec. 15.

2. *Corporate or Town Meetings.* — "Every male citizen of twenty-one years of age and upwards (except paupers, &c.), who has resided within the State one year, and within the town in which he claims the right to vote, six months, and who has paid a State or county tax, &c., shall have a right to vote upon all questions at all meetings for the transaction of town affairs, and no other person shall be entitled to vote." *Ib.* sec. 19. "The annual meeting of each town shall be held in February, March, or April; and other meetings at such time as the selectmen may order." *Ib.* sec. 20. Warrants issue for all meetings, under the hands of the selectmen, directed to constables or others, who notify such meeting in the manner prescribed by the by-laws or vote of the town. *Ib.* sec. 21. "The warrant shall express the time and place of the meeting and the subjects to be there acted upon; . . . and nothing acted upon shall have a legal operation unless the subject matter thereof is contained in the warrant." *Ib.* sec. 22. [See *infra*, secs. 266-268, as to necessity and requisites of the notice or warning.] If selectmen unreasonably refuse to call a meeting, any justice of the peace may do so upon the application of ten or more legal voters of the town. *Ib.* sec. 23. Provision is made for moderating and conducting the meeting. *Ib.* secs. 25-30. *Town officers* are elected at the annual meeting, who serve for one year, and until others are chosen and qualified. These consist of selectmen, assessors, treasurer, constables, who are *ex-officio* collectors unless others be specially chosen; field-drivers, fence-viewers, surveyors of lumber, measurers of wood, unless selectmen appoint, "and all other usual town officers." *Ib.* sec. 31. Then follows a variety of provisions respecting the duties of these several officers, and the manner of their performance. In addition, there are acts incorporating and establishing cities. "The laws in relation to towns, where not inconsistent with the general or special

provisions of the acts establishing cities, apply to them; and cities are subject to the liabilities, and city councils have the powers of towns. The mayor and aldermen shall have the powers and be subject to the liabilities of selectmen, &c., if no other provisions are made in relation thereto." Gen. St. 1860, chap. xix. 166. "The marked and characteristic distinction between a TOWN organization (in Massachusetts) and that of a CITY is, that in the former all of the qualified inhabitants meet, deliberate, act, and vote in their natural and personal capacities; whereas, under a city government, this is all done by their representatives." *Per Shaw, C. J.*, in *Warren v. Charlestown*, 2 Gray, 84, 101. As to the origin and power of towns in Massachusetts, consult *Commonwealth v. Roxbury*, 9 Gray, 451 (1857); opinion of *Shaw, C. J.*, 476, and the valuable note of Mr. (since Chief Justice) Gray, pp. 503, 528; and the opinion of the same eminent judge in *Hill v. Boston*, 122 Mass. 344 (1877); s. c. 23 Am. Rep. 332; Quincy's *Municipal History of Boston*, chap. i.; *ante*, chap. i. Towns were not expressly authorized to sue and be sued until 1694, nor formally incorporated until 1785. *Ib.* 9 Gray, 511, note "G"; 2 Dana's Ab. 698; *Willard v. Newburyport*, 12 Pick. 227, 231; *Spaulding v. Lowell*, 23 Pick. 77, 78. *Post*, sec. 187, note. *The necessity of the representative system in a populous place* is strikingly illustrated in *The People v. Detroit*, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202, where the legislature had provided that an important question should be decided by a vote of a citizens' meeting. Two meetings were held, but the noise, confusion, and violence prevented discussion and determination, and this provision was subsequently repealed. Speaking of the representative system in general, the learned Dr. Lieber calls it "a flower of civilization, such as neither antiquity nor the Middle Ages either enjoyed or suspected; something direct and positive in itself; . . . one of the very greatest political institutions which adorn the pages of the history of civilization, for through it alone can be

teristics of the county organizations in many of the States. The New England town is especially interesting as affording, perhaps, an example of as pure a democracy as anywhere exists. All of the qualified inhabitants meet and directly act upon and manage, or direct the management of, their own local concerns. Each citizen has a vote and an equal voice. This form of government was adopted at a very early period, and is firmly adhered to and deeply cherished by the people of the New England States. The result has demonstrated how well adapted it is to promote the well-being of the communities that for so long a space of time have thus governed themselves. The remarkable growth and prosperity of the New England States, not the most favored by nature, and the intelligence and character of the people, are known to all; and it is not strange that these results should be attributed, in a large measure, to this system of local popular government.<sup>1</sup> But, in the course of time, many of the towns, or portions thereof, grew to be large and populous, and the system of meetings of the electors, in their original capacity, became inconvenient and almost impracticable. When the population of a town or place exceeds 10,000 or 12,000 persons, the need for the representative system is urgently felt. Accordingly, in the New England States, there are now, in addition to towns, a large number of incorporated cities, with charters or constituent statutes, organized upon the usual representative model, with a legislative or governing body, and an executive head and subordinate officers. The people of the large city of Boston, in particular,

obtained real civil liberty, broad, extensive, and natural freedom." 2 Pol. Ethics, 489. History of Political Representation in England, — why it was unknown in antiquity, and why it was used and developed in England, — see Hearn, *Government of England*, chaps. xvii., xviii. The general justice of Dr. Lieber's eulogium cannot be denied; but this system has worked everywhere better than it has in our large cities, where the representative is often elected by those who do not pay the taxes, the expenditure of which it is his principal function to direct and control. See chap. i. *ante*, for a discussion of the defects in the practical working of our municipal corporations, and for some suggestions as to the best method of remedying them.

<sup>1</sup> Mr. Ralph Waldo Emerson took great interest in the practical workings of the town meeting system. He writes, "I see in them the safety and strength

of New England. At the town meeting one is impressed with the accumulated virility of the four or five men who speak so well to the point, and so easily handle the affairs of the town, — only four last night, and all so good that they would have satisfied me had I been in Boston or Washington. The speech of — was perfect, and to that handful of people, who heartily applauded it." And again, "The most hardfisted, disagreeably restless, thought-paralyzing companion sometimes turns out in the town meetings to be a fluent, various, and effective orator. Now I find what all that excess of power which chafed and fretted me so much in — was for." This illustrates what De Tocqueville means in the passages quoted *ante*, sec. 9, "that local assemblies of citizens constitute the strength of free nations," &c.



were wedded to the town system, and struggled long against the inevitable change to the representative plan; and five successive times between 1784 and 1821 they rejected well-considered schemes for a city government. The town continued to be governed by meetings of the electors *en masse*, acting through boards and officers, until the place had 40,000 inhabitants, of whom *seven* thousand were qualified voters. In 1822, however, the legislature, at the desire of a majority of the voters, granted the place a city charter, by which it was provided that the control of its affairs should be in a mayor and city council. After this, other towns, from time to time, made the change from the town to the city plan; so that, as before observed, we have in the New England States both modes of local administration. The *town system* is the general one; the *city, or representative system*, is the exceptional one, and is confined to places of compact population and considerable size.<sup>1</sup>

<sup>1</sup> No city was incorporated in Massachusetts until after the amendment of the Constitution of that State in 1820. *Per Shaw, C. J.*, in *Warren v. Charlestown*, 2 Gray, 84. The purpose and effect of the change in the form of municipal governments in Massachusetts under the constitutional provision authorizing the establishment of cities, is discussed by *Gray, C. J.*, in *Hill v. Boston*, 122 Mass. 344 (1877); s. c. 23 Am. Rep. 332. After referring to the previous attempts in 1784, 1785, 1791, 1804, and 1815, to change the town government of Boston, Mr. Josiah Quincy, in his *Municipal History of Boston*, p. 28, continues: "In 1821 the impracticability of conducting the municipal interests of the place, under the form of town government, became apparent to the inhabitants. With a population upwards of forty thousand, and with seven thousand qualified voters, it was evidently impossible calmly to deliberate and act. When a town-meeting was held on any exciting subject, in Faneuil Hall, those only who obtained places near the moderator could even hear the discussion. A few busy or interested individuals easily obtained the management of the most important affairs, in an assembly in which the greater number could have neither voice nor hearing. When the subject was not generally exciting, town-meetings were usually composed of the selectmen, the town officers, and thirty or forty

inhabitants. Those who thus came were, for the most part, drawn to it from some official duty or private interest, which, when performed or obtained, they generally troubled themselves but little, or not at all, about the other business of the meeting. In assemblies thus composed, by-laws were passed, taxes, to the amount of one hundred or one hundred and fifty thousand dollars, voted, on statements often general in their nature, and on reports, as it respects the majority of voters present, taken upon trust, and which no one had carefully considered, except perhaps the chairman. In the constitution of the town government there had resulted, in the course of time, from exigency or necessity, a complexity little adapted to produce harmony in action, and an irresponsibility irreconcilable with a wise and efficient conduct of its affairs. On the agents of the town there was no direct check or control; no pledge for fidelity but their own honor and sense of character. The prosperity of the town of Boston, under such a form of government; the few defalcations which had occurred; the frequent, and often, for years, uninterrupted re-election of the same members to the officiating boards, are conclusive evidence of the prevailing high state of morals and intelligence among the inhabitants." After mentioning the different boards among which the executive power was divided, and which acted independently

§ 29 (12). *Same subject.* — The character of towns in New England, and in what respects they differ from English municipal corporations, existing by prescription or special charter, prior to the legislation by parliament in 1835, before mentioned,<sup>1</sup> and the care to be observed in applying the English cases relating to such corporations to the town and city organizations of New England, are instructively set forth by the learned Chief-Justice Perley, in delivering the opinion of the Supreme Court of New Hampshire, in an important case to which we shall again have occasion to allude.<sup>2</sup>

of each other, and which were invested with the expending power, and, in effect, with exercise of the whole power of taxation, Mr. Quincy proceeds: "A conviction of the want of safety and of responsibility in a machine thus complicated and loosely combined became at length so general that the inherited and inveterate antipathy to a city organization began perceptibly to diminish. About this time, also, one of the most common and formal objections to a city organization was removed. The constitution of Massachusetts, which was passed in 1780, contained no express authority to establish a city organization; and in every attempt to change that of the town, it never failed to be zealously contended that the legislature of the commonwealth possessed no such power. But by the amendments to the constitution made by the convention of 1820, and adopted by the people, this power was expressly recognized. The question, therefore, now stood on its own merits, and independent of constitutional objections. The debates, also, which occurred in this convention had a tendency to open the eyes of the inhabitants to their own interests, and to allay some of the long-cherished prejudices against a city organization." In 1821 the people voted to make the change, and measures were immediately taken to obtain the sanction of the legislature. The legislature, on the 23d day of February, 1822, passed "An Act establishing the *City of Boston*," commonly called "the city charter." The following is a brief outline of the principal features of this charter, taken from Quincy's *Municipal History of Boston*, p. 41: (1) The title of the corporation to be, "The City of Boston." (2) The control of all its concerns is vested in a mayor, a

board of aldermen, consisting of eight, and common council, of forty-eight inhabitants, to be called, when conjoined "The City Council." (3) The city to be divided into twelve wards. The mayor and aldermen and common council to be chosen annually, by ballot, by and from inhabitants; four of the common council from and by those of each of the wards. (4) The city clerk to be chosen by the city council. (5) The mayor to receive a salary. His duty, to be vigilant and active in causing the laws to be executed; to inspect the conduct of all subordinate officers; to cause carelessness, negligence, and positive violation of the laws to be prosecuted and punished; to summon meetings of either or both boards; to communicate and recommend measures for the improvement of the finances, the police, health, security, cleanliness, comfort, and ornament of the city. (6) The mayor and aldermen are vested with the administration of the police and executive power of the corporation generally, and with specific enumerated powers. (7) All other powers belonging to the corporation are vested in the mayor, aldermen, and common council, to be exercised by concurrent vote. *Post*, sec. 187, note. Boston has an amended or reformed charter dating from 1854, but the changes are not structural. They give the mayor increased power. The City Council still consists of two branches. Certain executive officers are elected by the people, and others are appointed by the mayor and aldermen. See Bugbee, "City Government of Boston," in *Johns Hopkins University Studies*, 1887, fifth series.

<sup>1</sup> *Ante*, chap. i.; *post*, chap. iii.

<sup>2</sup> *Eastman v. Meredith*, 36 N. H. 284.



He says: "It is to be observed that municipal corporations in England are broadly distinguished in many important respects from towns in this and the other New England States. There is no uniformity in the powers and duties of English municipal corporations. They were not created and established under any general public law, but the powers and duties of each municipality depended upon its own individual grant or prescription. Their corporate franchises were held of the crown by the tenure of performing the conditions upon which they had been granted, and were liable to forfeiture for breach of the conditions. They indeed answered certain public purposes, as private corporations do which have public duties to perform, and some of them exercised political rights. But they are not like towns (with us) general political and territorial divisions of the country, with uniform powers and duties, defined and varied, from time to time, by general legislation. Towns (in New England) do not hold their powers ordinarily under any grant from the government to the individual corporation; or by virtue of any contract with the government, or upon any condition, express or implied. They give no assent in their corporate capacity to the laws which impose their public duties or fix their territorial limits." And referring to the case then before the court, he added: "In all that is material to the present inquiry, municipal corporations in England bear much less resemblance to towns in this country than to private corporations which are charged with the performance of public duties; and for these reasons the English authorities on the subject are but remotely applicable to the present case."<sup>1</sup>

§ 30 (12 a). Legal powers of New England towns. — *The distinctive character of the New England towns*, and particularly the limited nature of their powers, will be further seen by a brief glance at the course of judicial decisions with respect to their authority to make contracts and to obtain revenue. Money can only be raised by them for the purposes expressed in the statute, and for expenses incident to such purposes. The power of the majority is wisely limited by law to the object and cases which are clearly provided for and defined by statute.<sup>2</sup>

290 (1858). And see also *Hill v. Boston*, *supra*; *post*, secs. 32, 35, 37, 183.

<sup>1</sup> Mr. Bryce, in his "American Commonwealth," has two interesting chapters on the subject of rural local government in the United States. He traces the origin and influence of the New England town (chaps. xlviii. and xlix.). Prof. Herbert

B. Adams has an essay on the "Germanic Origin of New England Towns," in Johns Hopkins University Studies, first series.

<sup>2</sup> *Stetson v. Kempton*, 13 Mass. 272 (1816); *Parsons v. Goshen*, 11 Pick. 396 (1831). "This limitation," says Mr. Justice *Wilde*, with great truth, in the case last cited, "upon the power and authority

Thus a town, under a statute which restricts it to raising money to provide for "the poor, for schools, for the support of public wor-

of towns to enter into contracts and stipulations, is a wise and salutary provision of law, not only as it protects the rights and interests of the minority of the legal voters, but as it may not unfrequently prove beneficial to the interests of the majority, who may be hurried into rash and unprofitable speculations by some popular or delusive excitement, to the influence of which even wise and considerate men are sometimes liable. A town in its corporate capacity will not be bound, even by the express vote of the majority, to the performance of contracts or other legal duties, not coming within the scope of the objects and purposes for which they are incorporated." The power of towns to raise money is discussed at large by *Endicott, J.*, in *Minot v. West Roxbury*, 112 Mass. 1 (1873); s. c. 17 Am. Rep. 52; cited *post*, ch. xxii. *Anthony v. Adams*, 1 Met. (Mass.) 284, 286 (1840), *per Shaw, C. J.*; quoted and followed in *Vincent v. Nantucket*, 12 Cush. 105 (1853). See also *Norton v. Mansfield*, 16 Mass. 48; *Dill v. Wareham*, 7 Met. (Mass. 1844) 438 (contract by the town, undertaking to transfer the right of taking oysters within its limits).

Whether towns in Massachusetts are authorized by statute to make any contracts which involve the payment of money, unless the contracts are such that a tax on the inhabitants may be laid to raise the money, does not seem to be settled by express adjudication. *Bancroft v. Lynnfield*, 18 Pick. 566 (1836), *per Shaw, C. J.*; *Tash v. Adams*, 10 Cush. 252 (1852).

"The inhabitants of every town in this state" — Maine — says *Shepley, C. J.*, in *Hooper v. Emery*, 14 Maine (2 Shep.), 375 (1837), "are declared to be a body politic and corporate by the statute; but these corporations derive none of their powers from, nor are any duties imposed upon them by the common law. They have been denominated *quasi* corporations, and their whole capacities, powers, and duties are derived from legislative enactments." See also *Pittson v. Clark*, 15 Maine, 460, 463; *Augusta v. Leadbetter*, 16 Maine, 45

(1839); *Estes v. School Dist.*, 33 Maine, 170 (1871); *Mitchell v. Rockland*, 45 Maine, 496, 504 (1858); *Salem Mill Dam v. Ropes*, 6 Pick. 23, 32; *School Dist., &c. v. Wood*, 13 Mass. 193 (1816), *per Parker, C. J.*; *Mower v. Leicester*, 9 Mass. 247, 250 (1812). The legislature may authorize and require a town in Massachusetts to raise and expend money for public use within its limits, or for reimbursing money paid for such public use. *Agawam v. Hampden*, 130 Mass. 528, and cases cited. Non-residents of municipalities. *Post*, sec. 195.

Where the legislature has prescribed the purposes for which money may be raised by taxation, it cannot be raised for other and distinct purposes; nor when it is raised and collected for authorized and proper purposes can it be appropriated to or expended upon other and different objects. This would be to break down and defeat the limitation. Hence towns cannot give away or distribute, *per capita* or otherwise, money collected by taxation. *Hooper v. Emery*, 14 Maine (2 Shep.), 375, explaining *Ford v. Clough*, 8 Greenl. (Maine) 334; *Davis v. Bath*, 17 Maine, 141 (1840); *Pease v. Cornish*, 19 Maine, (1 Appl.), 191 (1841); *Stetson v. Kempton*, 13 Mass. 272; *Dillingham v. Snow*, 5 Mass. 547; *Spaulding v. Lowell*, 23 Pick. 71 (1830); *Woodbury v. Hamilton*, 6 Pick. 101; *Cooley v. Granville*, 10 Cush. 56.

The Vermont statute respecting the powers of towns is nearly a transcript of that of Massachusetts. The Supreme Court of Vermont approves of the exposition of the statute given by the Supreme Court of Massachusetts in *Willard v. Newburyport*, 12 Pick. 230; *Allen v. Taunton*, 19 Pick. 485; *Torry v. Milbury*, 21 Pick. 64; *Spaulding v. Lowell*, 23 Pick. 71; *Hardy v. Waltham*, 3 Met. 163, *per Isham, J.*, in *Van Sicklen v. Burlington*, 27 Vt. (1 Wms.) 70. For discussion of powers and duties of *selectmen*, and digest of previous decisions in *New Hampshire*, see *Carleton v. Bath*, 2 Fost. (22 N. H.) 559. Have no general authority to bind the town by contract. *Andover v. Graf-*



ship, and other *necessary* charges," cannot raise money, even in the time of war, and when the town is in immediate danger from the enemy, for the payment of additional wages to the drafted and enlisted militia, and for other purposes of defence. This is not a *corporate* duty, but the duty of the general government.<sup>1</sup> Nor can it appropriate money, contract for, or levy a tax to aid in the construction of a road, which, by law, is to be made at the expense of the *county*, and not the town.<sup>2</sup> A town may, it is said, raise money to meet ordinary expenditures, such as the payment of officers, the support and defence of actions, the expenses incident to discharging duties imposed by law, looking to the safety and convenience of the citizens. Thus it can erect a town or city hall, or market-house, but not a theatre, a circus, or any place of mere amusement, nor even a statue or monument, unless in populous and wealthy towns as suitable ornaments to public buildings or squares.<sup>3</sup> So towns may provide for the support of a public clock, hay-scales, burying-ground, wells, reservoirs, and many other like objects, which relate to the accommodation and convenience of the inhabitants, and which have been placed under the municipal jurisdiction of towns by statute or by usage.<sup>4</sup>

ton, 7 N. H. 300. But are confined to such acts as are necessary to the discharge of their duties. *Sanborn v. Deerfield*, 2 N. H. 253. Cannot, *ex-officio*, adjust controversies of suits, or release a cause of action. *Carleton v. Bath*, 2 Fost. (22 N. H.) 559. May indemnify town officers in proper cases. *Pike v. Middleton*, 12 N. H. 278. *Post*, sec. 147. But there is no promise *implied* in law against a town to indemnify selectmen in any case for damages which they have been compelled to pay, arising out of the discharge of official duty. *Eaves v. Shattuck*, 35 N. H. 189. Are supposed to be liable to the corporation for gross neglect of official duty. *Sanborn v. Deerfield*, 2 N. H. 253, by *Woodbury, J.* Notes made by a treasurer of a New England town to a bank, in payment for money borrowed without the knowledge of the town, are not binding upon the town, unless authorized by a vote of the town at a meeting duly warned for that purpose, or ratified by the vote of such a meeting duly warned for the purpose of such ratification. *Bloomfield v. Charter Oak Bank*, 121 U. S. 121 (1886). See *infra*, secs. 266-268.

<sup>1</sup> *Stetson v. Kempton*, 13 Mass. 272

(1816), where the phrase, *necessary town charges*, is construed by *Parker, C. J.*; and see comment of *Shaw, C. J.*, 12 Pick. 227, 230; s. c. 23 Pick. 74; and of *Dewey, J.*, in *Allen v. Taunton*, 19 Pick. 485, 487; 18 Pick. 566; 10 Cush. 57; of *Clifford, J.*, in *Burrill v. Boston*, 2 Clifford, C. C. 590 (1867).

<sup>2</sup> *Parsons v. Goshen*, 11 Pick. 396 (1831); *Anthony v. Adams*, 1 Met. (Mass.) 284 (1840).

<sup>3</sup> *Stetson v. Kempton*, 13 Mass. 272 (1816), *per Parker, C. J.*; *Allen v. Taunton*, 19 Pick. 485, 487, opinion by *Dewey, J.*, as to power of towns in Massachusetts; *Spaulding v. Lowell*, 23 Pick. 71; opinion of *Shaw, C. J.*, on same subject.

<sup>4</sup> *Willard v. Newburyport*, 12 Pick. 227, 230 (1831). General municipal powers held to include power to erect a town-hall. *Greeley v. People*, 60 Ill. 19 (1871); *Bell v. Platteville*, 71 Wis. 139. But does not include power to defray expenses of a committee to petition the legislature to destroy the existence of the town by annexing it to another town. *Minot v. West Roxbury*, 112 Mass. 1 (1873); s. c. 17 Am. Rep. 52; *Coolidge v. Brookline*, 114 Mass. 592 (1874). *Lia-*

§ 31 (14). Each one of the United States, in its organized political capacity, although it is not in the proper use of the term a corporation, yet it has many of the essential faculties of a corporation, a distinct name, indefinite succession, private rights, power to sue, and the like. Corporations, however, as the term is used in our jurisprudence, do not include States, but only derivative creations, owing their existence and powers to the State acting through its legislative department. Like corporations, however, a State, as it can make contracts and suffer wrongs, so it may, for this reason and without express provision, maintain in its corporate name actions to enforce its rights and redress its injuries.<sup>1</sup> But a State is not liable to be sued without its consent;<sup>2</sup> although it is not unusual for States, by special provision, to authorize suits to be brought against them, but, as the permission is voluntary, they may prescribe the terms, and, unless it impairs the obligation of existing contracts, may withdraw the consent at pleasure.<sup>3</sup> The like distinction between the State and its corporate creations existed in the Roman law. The State like the corporation was a Juristical Person, but unlike corporations it was not subject to the jurisdiction of any judge. Corporations were the subject of Private-law relations, but not so the State or Fiscus. The jural relations of the State and of corporations are, in many respects, essentially dissimilar.<sup>4</sup> A devise to a State for any object which it may properly aid or provide for is valid.<sup>5</sup> Extended consideration of the powers of the States, and of their relation to the United States and to each other, is not within the scope of the present work, which is limited strictly to municipal corporations.

*bility of towns in actions of tort.* See *post*, chap. xxiii. *Private property of the inhabitants* may be taken to satisfy a judgment against the town. *Post*, sec. 962, note and cases, chap. xxii.

<sup>1</sup> *Delafield v. Illinois*, 2 Hill (N. Y.), 159, 162; 26 Wend. 192 (1841), affirming s. c. 8 Paige, 531; *Indiana v. Woram*, 6 Hill (N. Y.), 33 (1843). These cases hold that States may sue as plaintiff in the State courts. *State v. Delesdenier*, 7 Tex. 76; *People v. Assessors*, 1 Hill (N. Y.), 620. The governor of a State, as the head of the executive department, is a corporation sole, and bonds made payable to him may be enforced for the benefit of those interested. *Governor v. Allen*, 8 Humph. (Tenn.) 176 (1847); *Polk, Governor, v. Plummer*, 2 Humph. 500.

<sup>2</sup> *Briscoe v. Bank*, 11 Pet. 257, 321.

<sup>3</sup> *Beers v. Arkansas*, 20 How. 527 (1857); *Dodd v. Miller*, 14 Ind. 433; *Auditor v. Davies*, 2 Pike (Ark.), 494; *Ellis v. State*, 4 Ind. 1; *State v. Trustees*, 5 Ind. 77. The Supreme Court of the United States has original jurisdiction in cases in which a State shall be a party, as also in suit between States. *Kentucky v. Dennison*, 24 How. 66; *Wisconsin v. Duluth*, 2 Dillon, C. C., 406 (1872). The United States Circuit Court has not. *Id.*

<sup>4</sup> *Savigny, Jural Relations* (Rattigan's Translation, secs. 86, 87). *Ante*, sec. 3. *Post*, sec. 45, note.

<sup>5</sup> *McDonough Will Case*, 15 How. 367, 382 (1853); *post*, sec. 569.