been exercised on important occasions, such as incorporating the banks of the United States, the national banks, and the various Pacific railroad companies; and, within the above limitations, it is no longer disputed. Congress habitually passes acts for the organization of Territorial governments, the local legislatures of which may, under congressional authority, create corporations, public and private, in the Territories; but it is not within the power of Congress to establish municipal corporations within the limits of the States, and it has never attempted to exercise it.

A provision in a *Territorial Organic Act*, that the power of the territorial legislature "shall extend to all *rightful subjects of legislation*," authorizes the legislature to create municipal corporations, and to invest them with the power to make ordinances, and to provide corporation courts in which to enforce them. And such courts may be provided, although by the organic act it is declared that the *judicial power* of the Territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace.[1]

§ 39 (19). **Outline of ordinary Municipal Charter.** — In this country, until comparatively a recent period, municipal corporations *have been created singly, each with its special or separate charter* passed by the legislature of the State. These *charters*, in all of the States, were framed after the same general model; but in the extent

[1] State *v.* Young, 3 Kan. 445 (1866); People, *ex rel. v.* City of Butte, 4 Mont. 174; Burnes *v.* Atchison, 2 Kan. 454; s. p. Reddick *v.* Amelia, 1 Mo. 5 (1821). In this case the objection made was, that such a legislature was not sovereign, and that nothing short of sovereign power could create a corporation. The answer given was, that Congress could give, and had given, the power to legislate on such subjects. That a Territorial legislature, vested with general legislative powers, may create a corporation which is not affected by the subsequent adoption of a State constitution, was held in Vincennes University *v.* Indiana, 14 How. 268 (1852). See also Vance *v.* Bank, 1 Blackf. (Ind.) 80; Myers *v.* Bank, 20 Ohio, 283. Under the Territorial organic act of Colorado, the legislative assembly has power to establish a municipal corporation, but the question of such establishment by special or general law is not discussed. Deitz *v.* City of Central, 1 Col. 323 (1872). Under the same organic act it was decided that the legislative assembly had no power to confer upon a justice of the peace a denomination not warranted by the organic act; and, in so far as a municipal charter undertook to confer upon a justice of the peace exercising jurisdiction under the ordinances of the city the name of "police magistrate," it is void. *Ib.*

It is now provided by act of Congress, "That the legislative assemblies of the several Territories of the United States shall not, after the passage of this act, grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits." Act of March 2, 1867, 14 Stats. at Large, 426, sec. 1; Rev. Stats. of U. S. sec. 1889. In Seattle *v.* Tyler, Wash. Territory, 1877, this section was held by Ch. J. *Lewis* of Washington Territory to extend to and embrace municipal corporations within its prohibition.

of the special powers conferred, and in the peculiar constitution of the governing body, and the like, there was great variety. It will be useful to *notice the outline features of one of these charters*, since it constitutes the organic act of the corporation, and bestows upon it its legal character. Such a charter usually sets out with an incorporating clause declaring "that *the inhabitants* of the town of (naming it), or city of (naming it), are hereby constituted a body politic and corporate by the *name* of the 'town of ——,' or 'city of ——,' and by that name shall have perpetual succession, may use a common seal, sue and be sued, purchase, hold, and sell property," &c.[1] The charter then defines *the territorial boundaries* of the town or city thus incorporated.[2] After that follow provisions relating to *the governing body* of the corporation, usually styled the *town or city council*.[3] This is generally composed of one body, though in some instances of two; the members being called aldermen, councilmen, or trustees. The corporate territory is divided into *wards*, and each ward elects one or more aldermen, the number being specified and definite.[4] The charter fixes the *qualifications of the voters*, which are usually that the voter shall be a male citizen of the United States and of the State, be of age, and a resident, for a specified time, within the limits of the corporation. The *mode of holding elections* is prescribed; and the power is often given to the council to canvass returns, and to settle disputed elections to corporate offices.[5] Provision is made for the *election of a mayor*, or other chief executive officer of the corporation, and his duties defined. The *charter contains a minute and detailed enumeration of the powers of the city council*, which are usually numerous;[6] the most important of which are, the authority to create debts (sometimes restricted); to levy and collect taxes within the corporation, for corporate purposes;[7] to make local improvements, and assessments to pay therefor; to appoint corporate officers;[8] to enact ordinances to preserve the health of the inhabitants, to prevent and abate nuisances, to prevent fires, to establish and regulate markets, to regulate and license given occupations, to establish a police force; to punish offenders against ordinances; to open and grade and improve streets;[9] to hold corporation courts,[10] &c.

[1] *Post*, chap. viii.
[2] *Post*, chap. viii.
[3] *Post*, chap. x.
[4] Constitutional provisions to secure *equality* of *representation* held applicable to municipal corporations and to disable the legislature to divide a city into *wards*, in some of which a voter should have several times as much power as a voter in another. People *v.* Canaday, 73 N. C. 198 (1875); s. c. 21 Am. Rep. 465.
[5] *Post*, chap. ix.
[6] *Post*, chaps. v. and vi.
[7] *Post*, chap. xix.
[8] *Post*, chap. ix.
[9] *Post*, chap. xii.
[10] *Post*, chap. xiii.

When it is remembered that *the charter of such a corporation is its constitution*, and gives to it all the powers it possesses (unless other statutes are applicable to it), its careful study, in any given case, is indispensable to an understanding of the nature and extent of the powers it confers, the duties it enjoins, and liabilities it creates. The construction of its various provisions, and the determination of the relation which these bear to the general statutes of the State, — how far the charter controls, or how far it is controlled by other legislation, are often among the most difficult problems which perplex the lawyer and the judge. The study of a question of corporation law begins with the charter; but it must oftentimes be pursued into the constitution, the general statutes and legislative policy of the State, and after this into the broad field of general jurisprudence.

§ 40. **Corporators and Members.** — In *municipal and public corporations*, as cities, towns, parishes, school-districts, and the like, membership, so to speak, is, under the legislation and polity of this country, usually constituted by living within certain limits, whatever may be the desire of the individual thus residing or that of the municipal or other incorporated body. In *private corporations*, on the other hand, especially those organized for pecuniary profit, membership is constituted by subscribing to or receiving, with the assent of the corporation when that is necessary, transfers of its stock.[1] It is the citizens or inhabitants of a city, not the common council or local legislature, who constitute the "corporation" of the city. The members of the council and other charter officers are the agents or ministers of the corporation.[2]

§ 41 (20). **General municipal Incorporating Acts in the United States.** — Within a period comparatively recent, the legislatures of a number of the States, following in this respect the example of the English Municipal Corporations Act of 5 and 6 Wm. IV. ch. lxxvi., heretofore mentioned, have passed *general acts respecting municipal corporations*. These acts abolish all special charters, or all with enumerated exceptions, and *enact general provisions for the incorporation, regulation, and government* of municipal corporations. The usual scheme is to grade corporations into classes, according to their size, as into Cities of the First class, Cities of the Second Class,

[1] Overseers of Poor, &c. *v.* Sears, 22 Pick. 122, 130, *per Shaw*, C. J.; Oakes *v.* Hill, 10 Pick. 333, 346, *per Morton*, J.; *ante*, sec. 9, and notes.

[2] *Ante*, sec. 21; Lowber *v.* Mayor, &c. of N. Y., 5 Abbott's Pr. R. 325; Clarke *v.* Rochester, 24 Barb. 446 (1857); Baumgartner *v.* Hasty, 100 Ind. 575.

and Towns or Villages, and to bestow upon each class such powers as the legislature deems expedient; but the powers and mode of organization of corporations of each class are uniform.[1]

[1] *Ohio.* — By the Towns, Cities, and Villages' Act of May 3, 1852 (Swan's Stat. 954), all corporations existing for the purposes of municipal government are thereby organized into *cities* and *incorporated villages*. (Sec. 1.) In respect to the exercise of certain corporate powers, municipal corporations are divided into classes, thus: 1. Cities of the first class, which comprise all cities having a population exceeding twenty thousand inhabitants; 2. Cities of the second class, which comprise all cities not embraced in the first class; 3. Incorporated villages; and 4. Incorporated villages for special purposes. *Ib.* sec. 39 *et seq.* These are "declared to be bodies politic and corporate, under the name and style of the city of ——, or the incorporated village of ——, as the case may be, — capable to sue and be sued; to contract and be contracted with; to acquire, hold, and possess property, real and personal; to have a common seal; and to exercise such other powers, and to have such other privileges, as are incident to municipal corporations of like character or degree, not inconsistent with this act or the general laws of the State." *Ib.* sec. 18. These powers and privileges are then specified with great minuteness, twenty sections of the act being devoted to this purpose. Incorporated villages are governed by one mayor, one recorder, and five trustees, elected annually; the mayor, recorder, and trustees constituting the village council, any five of whom make a quorum. *Ib.* sec. 43. The corporate authority of cities is vested in the mayor, one board of trustees (two from each ward), who compose the city council, together with such officers as are mentioned in the act, or as may be created under its authority. *Ib.* sec. 52 *et seq.*

"The governing all cities and villages under one general law was a new experiment, supposed to be required by the present Constitution. It was to be expected that, in the working of the experiment, omissions, if not mistakes, would be discovered, to be corrected by additional legislation. It will be a work of care and time to perfect an orderly and harmonious system." *Per Gholson*, J., in Thomas *v.* Ashland, 12 Ohio St. 124, 130 (1861). *Infra*, sec. 46.

California. — Constitution, Art. XI., on Cities, Counties, and Towns, contains provisions as to their incorporation, organization, and government. The entire subject of the creation and government of cities is provided for in Part IV. title iii. of the Political Code. It does not apply to cities existing at the time of its adoption. *Ex parte* Simpson, 47 Cal. 127; People *v.* Clunie, 70 Cal. 504. If the course pursued in establishing a municipality is substantially such as is pointed out in the act, courts will not disturb it, the propriety of establishing a municipality, and of including particular territory within its boundaries, being a political question for the legislature to determine. People *v.* City of Riverside, 70 Cal. 461.

Illinois. — The General Assembly has the power to delegate legislative authority incident to municipal government to cities; but this can only be done by *general law*, under the Constitution of 1870. When, however, it is done by such law, the constitutional mandate is fully complied with, and the ordinances to be adopted by different municipalities, under the power so conferred, may be as variant in their terms as the varying municipal necessities or sense of public policy in those who exercise the legislative authority may require. Covington *v.* East St. Louis, 78 Ill. 548 (1875).

Iowa. — The Ohio act is, in substance, adopted in Iowa. Revision 1860, chap. li. But it does not apply to cities having special charters, unless adopted by them. Burke *v.* Jeffries, 20 Iowa, 145.

Kansas. — The act of *Kansas* (Comp. Laws 1885, chaps. 18, 19, 20) provides for three classes of cities, and is in other respects similar to that of Ohio. It has been decided in that State that a supplemental act by which it was intended to extend corporate powers, but which was so

These acts are generally held not to violate constitutional provisions against local or special legislation.[1] *General incorporation*

special in its provisions that it could by no possibility apply to more than three certain cities, was void, as being in violation of the State Constitution forbidding the legislature from conferring corporate powers by *special* act. Topeka *v.* Gillett, 32 Kan. 431.

In *Tennessee* (Acts 1849, chap. xvii.) provision is made by general act for the incorporation of towns, cities, and villages. The constitution of Tennessee declares that "the legislature shall have power to grant charters of incorporation as they may deem expedient for the public good." Art. XI. sec. 7. In the State *v.* Armstrong, 3 Sneed (Tenn.), 634, it was held that the act of 1856, by which full power to *create corporations*, and determine the extent of their powers, was given to the Circuit Courts, was unconstitutional, on the ground that the legislature could not delegate its authority to the courts. But in the Mayor, &c. *v.* Shelton, 1 Head, 24 (1858), it was held that the act of 1849 — which was a general statute for the incorporation of towns and cities, and by which a petition was to be presented by the inhabitants of a place proposing to organize under the act to the County Court, which had power simply to record the petition and designate the boundaries of the corporation — was not in conflict with the Constitution, as the statute, and not the court, determined the extent and nature of the powers of the corporation. In *Ex parte* Chadwell, 3 Bax. 98, s. c. 1 Tenn. Ch. 95, and *Ex parte* Burns, 1 Tenn. Ch. 83, the act of 1871, under the Constitution of 1870, was declared void in so far as it undertook to confer upon the Court of Chancery the power to grant corporate franchises. See also Willett *v.* Bellville, 11 Lea (Tenn.), 1. For abstract of legislation in this State establishing *Taxing Districts*, see *post*, ch. vii.

Missouri. — A general act for the incorporation of towns was passed in Missouri in 1845, and it was held not unconstitutional by reason of certain duties which it imposes on the County Court with reference to organization of towns under the act, as these duties are not legislative but judicial, and the law itself, and not the court, declares the powers of which the corporation shall be possessed. Kayser *v.* Trustees, &c. 16 Mo. 88 (1852). Construction of statute. Woods *v.* Henry, 55 Mo. 560; State *v.* McReynolds, 61 Mo. 203 (1876). The case of Kayser *v.* Trustees, &c. *supra*, is thought by *Campbell*, J., to conflict with the general course of decision, since such duties are in their nature administrative or political rather than judicial. People *v.* Bennett, 29 Mich. 451; s. c. 18 Am. Rep. 107. See Damodhar Gordhani *v.* Deoran Kanji, L. R. 1 App. Div. 332.

Indiana. — The general law of 1857, for the incorporation of cities, is not unconstitutional for want of *uniformity* in the mode of their organization. Lafayette *v.* Jenners, 10 Ind. 70, 80 (1857). See also Welker *v.* Potter, 18 Ohio St. 85. In the Revised Statutes of 1881, secs. 3031–3406 are collected the statutory law of the State relating to cities and towns, their organization, powers, methods of taxation, opening of streets, &c. In an election held under its provisions to determine whether a town shall become a city, a *majority of the votes cast* is sufficient to decide; it is not essential that there be a majority of the legal voters. State *v.* Tipton, 109 Ind. 73.

The Supreme Court of Indiana, in the recent cases (April, 1889) of the State *v.* Denny, 21 Northeast. Rep. 252, and Evansville *v.* State, 21 Northeast. Rep. 267, has asserted and maintained the *constitutional right* of local self-government in that State in opinions of marked ability and learning. *Post*, sec. 58.

Pennsylvania. — A general act was passed in 1851, designed to form a system for the regulation of boroughs incorporated *thereafter*. Commonwealth *v.* Montrose, 52 Pa. St. 391. Course of legislation and decision in Pennsylvania as to the incorporation of boroughs discussed in People *v.* Bennett, *supra*. A general act for the incorporation and regulation of municipal corporations, dividing them into three classes, and having other features similar to the Ohio act, was adopted in this State May 3, 1874. It has since been amended. Reading *v.* Savage, 120 Pa. St. 198 (1888).

North Carolina. — By general act, every incorporated town may elect, each year, not less than three nor more than seven commissioners, who are a body corporate and the governing body of the town. These commissioners are elected by the vote of the citizens of the place. At the same time they are also to elect a mayor, who presides at the meetings of the commissioners, but who has no vote except in case of a tie. The mayor is both a peace officer and a judicial officer, with the same jurisdiction as a justice of the peace, with power also to "hear and determine all cases that may arise upon the ordinances of the commissioners," &c. The commissioners may levy certain specified taxes, and make ordinances in relation to their officers, records, markets, nuisances, the repair of streets and bridges in the town, &c. These general provisions apply to all incorporated towns when not inconsistent with special charters or acts in reference thereto. Rev. Code 1854, chap. iii. p. 586.

Michigan. — The general act of 1873 for the incorporation of villages within any two square miles of territory was held unconstitutional because the rights of the people concerned were not respected, and the legislature had attempted to delegate legislative powers to private citizens instead of to corporate authorities or local boards of officers. People *v.* Bennett, 29 Mich. 451 (1874); s. c. 18 Am. Rep. 107.

New York. — In this State there are cities with local and special charters, and also towns whose powers, duties, and privileges are particularly prescribed by statute. Each town is a body corporate for specified purposes; but it is declared that "no town shall possess or exercise any corporate powers except such as are enumerated in this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given." Rev. Stats. Part I. chap. xi. p. 337, secs. 1, 2. "The several towns in this State," says *Denio*, J., in Lorillard *v.* The Town of Monroe, 11 N. Y. (1 Kern.) 392 (1854), "are corporations for certain special and very limited purposes, or, to speak more accurately, they have a certain limited corporate capacity. They may purchase and hold lands within their own limits for the use of their inhabitants. They may, as a corporation, make such contracts and hold such personal property as may be necessary to the exercise of their corporate or administrative powers, and, as a necessary incident, may sue and be sued, where the assertion of their corporate rights, or the enforcement against them of their corporate liabilities, shall require such proceedings. (1 Rev. Stats. 337, sec. 1 *et seq.*) In all other respects — for instance, in everything which concerns the administration of civil or criminal justice, the preservation of the public health and morals, the conservation of highways, roads, and bridges, the relief of the poor, and the assessment and collection of taxes — the several towns are political divisions, organized for the convenient exercise of portions of the political power of the State, and are no more corporations than the judicial, or the senate and assembly districts. *Ib.* sec. 2. The functions and duties of the several town officers respecting *these subjects* are judicial and administrative, and not in any sense corporate functions or duties," and hence, as to *such subjects*, the towns as corporations are not

[1] State *v.* Graham, 16 Neb. 74; Pritchett *v.* Stanislaus Co., 73 Cal. 310. An act known as the "McClure charter," held not to be a "general law" for the incorporation of cities under the Constitution of California. Desmond *v.* Dunn, 55 Cal. 242; *Ex parte* Wells, 21 Fla. 280. A constitutional provision authorizing cities having over 100,000 inhabitants to frame charters for their own government held to be self-acting and not to require legislation to give it effect. People *v.* Hoge, 55 Cal. 612.

acts, rather than special charters, would seem clearly to be the best method of creating and organizing municipal corporations. 1. Such

acts tend to prevent favoritism and abuse in procuring extraordinary grants of special powers. 2. They secure uniformity of rule and of construction. All being created and endowed alike, real wants are the sooner felt and provided for, and real grievances the sooner redressed.[1]

Creation by Implication.

§ 42 (21). **No Precise Form of Words essential.** — It is well settled *in England* that, while a corporation must commence or be instituted by the proper authority, yet *no fixed, prescribed, or precise form of words* is necessary in order to create a corporation. While the words "to found" "to erect or establish," or "to incorporate," are commonly used to evince the intention to erect or create a body politic, they are not necessary.[2] The king grants a charter to the men of Dale, that they may annually elect a mayor, and plead and be impleaded by the name of the mayor and commonalty. This is considered to be sufficient to incorporate them.[3] So a grant by a charter containing no *direct clause* of *incorporation* to the inhabitants of a town, "that their town shall be a *free borough*," incorporates it.[4] So, also, a grant by the king to the men of Dale that they be discharged of tolls incorporates them for this particular purpose, but does not enable them to purchase.[5] The settled doctrine is that *a corporation may be created by implication*, as well as by the use of words. But this implication, to be sufficient, must clearly manifest or express the intention to establish or constitute a body politic or corporate, that is, to invest it with corporate powers and privileges. But the *absence of express provision respecting the incidents* which the law tacitly annexes to corporations is considered immaterial. Thus the omission in the charter or act of the words "to plead and be impleaded," or "to have a seal," or "to make by-laws," would not make it essentially defective.[6] So it would not be essentially defective were *the name omitted*, if the name could be ascertained from the terms of the charter or act, or from the nature of the thing or matters granted.[1] Certain attributes or powers are absolutely essential to constitute a body corporate, such as perpetual succession, the right to contract, to sue and be sued as a corporation, &c. Now if the charter or act which is relied upon as creating a body corporate by implication, instead of simply *omitting* to express these essential properties, negatives and excludes them, it is plain that the body would not be deemed to be incorporated.[2]

liable for any default or malfeasance of these officers. See, as to the corporate capacity of towns in New York, Denton *v.* Jackson, 2 Johns. Ch. R. 320; North Hempstead *v.* Hempstead, 2 Wend. 109; affirming s. c. Hopk. 288; Cornell *v.* Guilford, 1 Denio, 510.

Arkansas. — State *v.* Jennings, 27 Ark. 419 (1872). The legislature cannot delegate the power to create municipal corporations, — as, in this case, to a district court. State *v.* Simons, 32 Minn. 540; State *v.* Leatherman, 38 Ark. 81.

[1] Cairo *v.* Bross, 101 Ill. 475 (1882), quoting text. *Post*, sec. 46, and note.

[2] 10 Co. 27*a*, 28*a*, 29*b*, 30; 1 Kyd, 62; 2 Kent, Com. 27.

[3] 21 Edw. IV. 56. The doctrine of a corporation by implication originated in the time of Edward IV. *Ib.* 8 Edw. IV. 28. *Post*, sec. 560.

[4] Kyd, 62, cites Firm. Burg. ch. ii.; Madox, Hist. Exch. 402.

[5] Vin. Abr. Corp. F. pl. 6; *Ib.* pl. 4; Bagot's Case, 7 Edw. IV. 29; Grant on Corp. 43, note *e*, and cases cited.

[6] Rol. Abr. 513; 1 Kyd, 63. The Conservators, &c. *v.* Ash, 10 Barn. & Cress. 349 (21 Eng. C. L. 97), 1829. "It is not necessary," says Mr. Kyd, "that the

§ 43 (22). **Same subject.** — Although corporations *in this country* are created by statute, still the rule is here also settled that not only private corporations aggregate, but municipal or public corporations, *may be established without any particular form of words* or technical mode of expression, though such words are commonly employed.[3] If powers and privileges are conferred upon a body of men, or upon the residents or inhabitants of a town or district, and if these cannot be exercised and enjoyed, and if the purposes intended cannot be carried into effect, without acting in a corporate capacity, a corporation is, to this extent, created by implication. The question turns upon the intent of the legislature, and this can be shown constructively as well as expressly.[4] This is well illustrated in a case in Massachusetts,[5] where the question was whether the plain-

charter should *expressly* confer those powers without which a collective body of men cannot be a corporation, such as the power of suing and being sued, and to take and grant property, though such powers are in general expressly given." 1 Kyd, Corp. 63. Thus, in the case of the *Borough of Yarmouth*, 1609, 2 Brownlow & Goldsb. 292, Part II., it was decided by the common bench, *per* Lord Coke, that a grant of incorporation to the burgesses or citizens of a borough or city, which, being an old grant, should be favorably construed, was good without the words "their successors." And see, on this subject, the learned opinion of *Shaw*, C. J., in Overseers of Poor, &c. *v.* Sears, 22 Pick. 122, 130 (1839). He says: "The *mode* of perpetuating the existence of a corporate body is not essential; all that is essential is that some mode be provided by the charter or act by which it is constituted, or by the general laws of the government, by means of which it shall be so perpetuated." 22 Pick. 130; The Conservators *v.* Ash, 10 Barn. & Cress. 349 (21 Eng. C. L. 97). *Ante*, sec. 32; *post*, sec. 84.

[1] Trustees *v.* Parks, 10 Me. (1 Fairf.) 441; School Com. *v.* Dean, 2 Stew. & Port. (Ala.) 190 (1832).

[2] Grant on Corp. 30.

[3] Thomas *v.* Dakin, 22 Wend. 9, 84, *per Cowen*, J., and authorities cited; Bow *v.* Allentown, 34 N. H. 351, 372; Stebbins *v.* Jennings, 10 Pick. 172; Benton *v.* Jackson, 2 Johns. Ch. 325, 326 (1817); Mahoney *v.* The Bank of the State, 4 Ark. 620 (1842); s. c. well digested in Angell & Ames on Corp., sec. 77; North Hempstead *v.* Hempstead, 2 Wend. 109, 133, opinion by *Savage*, C. J.; Conservators of River Tone *v.* Ash, 10 Barn. & Cress. 349; Jefferys *v.* Gurr, 2 B. & Adol. 841; Newport Trustees, *In re*, 16 Sim. 346; 2 Kent, Com. 27.

[4] Same cases last cited.

[5] Inhabitants, &c. *v.* Wood, 13 Mass. 193 (1816). Mr. Fessenden for the plaintiff, and Mr. Greenleaf for the defendant. In Bow *v.* Allentown, 34 N. H. 351, it was

tiffs were a corporate body with power to sue. They were not incorporated expressly. But, by statute, the inhabitants of the several school-districts were empowered, at any meeting properly called, to raise money to erect, repair, or purchase a school-house, to determine its site, &c., the majority binding the minority. The cause was argued by able counsel, and, after several consultations, the judges of the Supreme Judicial Court finally agreed in the opinion that the plaintiffs possessed sufficient corporate powers to maintain an action on a contract to build a school-house, and to make to them a lease of land. But the *intention* of the legislature, where it is sought to show that a corporation has been created by implication, must satisfactorily appear.[1]

§ 43 *a*. **Corporate Existence not open to Collateral Attack.** — Where a municipal corporation is acting under color of law, and its existence is not questioned by the State, it *cannot be collaterally drawn in question* by private parties; and the rule is not different although the Constitution may prescribe the manner of incorporation.[2]

held that the annexation by the legislature of other territory to *the town* of Allentown made that a corporate town by *implication*, if it was not so before; and such also was the effect, under the Constitution of New Hampshire, of a grant to a place having less than one hundred and fifty polls to send a representative. A legislative grant gives capacity to hold the thing granted. Lord *v.* Bigelow, 6 Vt. 465.

[1] Medical Institute *v.* Patterson, 1 Denio, 61; s. c. affirmed in Court of Errors, 5 Denio, 618 (1846); Myers *v.* Irwin, 2 Serg. & Rawle, 368 (1816); Angell & Ames, sec. 79, and cases cited; Wells *v.* Burbank, 17 N. H. 393; Society, &c. *v.* Town of Pawlet, 4 Pet. (U. S.) 480, 502. To establish a corporation by implication, says *Shaw*, C. J., in Stebbins *v.* Jennings, 10 Pick. 172, it must appear that the rights and powers conferred can only be enjoyed by the exercise of corporate powers, and, therefore, if such powers are not necessary, they are not impliedly given.

[2] St. Louis *v.* Shields, 62 Mo. 247 (1876); Cooley, Const. Lim. 180, 254. Hence in an action by such a corporation to recover penalties imposed by its ordinances, *nul tiel* corporation is not a good plea. Mendota *v.* Thompson, 20 Ill. 197; Hamilton *v.* Carthage, 24 Ill. 22; Kettering *v.* Jacksonville, 50 Ill. 39; Geneva *v.* Cole (action to recover a tax), 61 Ill. 397 (1871); Burt *v.* Winona & St. Peter Ry. Co., 31 Minn. 472; Fredericktown *v.* Fox, 84 Mo. 59; Austrian *v.* Guy, 21 Fed. Rep. 500.

In State *v.* Leatherman, 38 Ark. 81, *Eakin*, J., said: "We are emboldened to declare in behalf of the public good, that the State herself may, by long acquiescence, and by the continued recognition through her officers, State and county, of a municipal corporation, be precluded from an information to deprive it of franchises long exercised in accordance with the general law." In this case the proceedings to incorporate the city were had in a court not empowered to entertain them. People *v.* Maynard, 15 Mich. 463, 470. See *post*, chap. xxi., *Quo Warranto*. Entering into an obligation with a corporation admits the corporate capacity, and precludes a plea of *nul tiel* corporation. St. Louis *v.* Shields, 62 Mo. 247, 251, and cases cited. *Post*, sec. 449.

Acceptance of Charter.

§ 44 (23). **Incorporating Act may be made binding without Consent, or only upon Consent.** — The rule which applies to private corporations, that the incorporating act is ineffectual to constitute a corporate body until it is *assented to or accepted* by the corporators, has no application to statutes creating municipal corporations.[1] These are laws, and as such are imperative and binding according to their terms without any consent, unless the act is expressly made conditional.[2] All who live within the limits of the incorporated district are bound by them, and can withdraw from their operation only by removal. Over such corporations the legislature, except as restrained by the Constitution, has entire control; and unless otherwise provided by the act itself, or a different intention be manifested, the public corporation is legally constituted as soon as the incorporating act declaring it to exist goes into effect.[3] But while the legislature is not bound to obtain the acceptance or assent of the municipal corporation, it is well established that a provision in a municipal charter that it shall not take effect unless assented to or accepted by a majority of the inhabitants, is not unconstitutional, it being in no just sense a delegation of legislative power, but merely a question as to the acceptance or rejection of a charter.[4] So a provision in a charter, or the constituent act

[1] *Post*, secs. 54, 84, note, 183.

[2] It is competent for the legislature to make the acceptance or rejection of a charter dependent upon the result of an election by the qualified voters of the territory to be affected by it. Clarke *v.* Rogers, 81 Ky. 43.

[3] Berlin *v.* Gorham, 34 N. H. 266 (1856), *per Bell*, J., where it is accordingly held that to make an incorporation of a town effectual it is not necessary that there should be a legal town meeting holden in it. See also People *v.* Wren, 4 Scam. (5 Ill.) 269; Warren *v.* Charlestown, 2 Gray, 104; Mills *v.* Williams, 11 Ire. 558; State *v.* Curran, 7 Eng. (12 Ark.) 321; Fire Department *v.* Kip, 10 Wend. 267; People *v.* Morris, 13 Wend. 325, 337; Brouwer *v.* Appleby, 1 Sandf. 158 (1847); People *v.* President, 9 Wend. 351; Wood *v.* Bank, 9 Cow. 194, 205 (1828); Proprietors, &c. *v.* Horton, 6 Hill, 501; Gorham *v.* Springfield, 21 Maine, 58 (1842); People *v.* Stout, 23 Barb. 349 (1856); Bristol *v.* New Chester, 3 N. H. 524, 532 (1826); State *v.* Canterbury, 8 Fost. (28 N. H.) 218; People *v.* City of Butte, 4 Mont. 174. Acceptance, when requisite, may doubtless be *implied* in proper cases, as where no particular mode of expressing acceptance is prescribed, from corporate acts and conduct, as in cases of private corporations. Taylor *v.* Newberne, 2 Jones Eq. N. C. 141 (1855). See Zabriskie *v.* Railroad Co., 23 How. (U. S.) 381, 397 (1859). *Post*, sec. 270, note.

[4] People *v.* Salomon, 51 Ill. 53 (1869); Alcorn *v.* Horner, 38 Miss. 652 (1860); Patterson *v.* Society, &c., 4 Zabr. (24 N. J. L.) 385 (1854); Smith *v.* McCarthy, 56 Pa. St. 359; Commonwealth *v.* Quarter Sessions, 8 Pa. St. 395; Commonwealth *v.* Painter, 10 Pa. St. 214; and see also Bull *v.* Read, 13 Gratt. (Va.) 78 (1853); People *v.* Reynolds, 5 Gilm. (10 Ill.) 1; State *v.* Scott, 17 Mo. 521; Hudson Co. *v.* State, 4 Zabr. (24 N. J. L.) 718; Bank *v.* Brown, 26 N. Y. 467 (1863); Call *v.* Chadbourne, 46 Maine, 206; State *v.* Wil-