authority were plainly and exclusively local, such as the board of water commissioners and board of sewer commissioners for a particular city.[1]

§ 58 *a*. **Same subject.** — The Constitution of New York[2] provides that *municipal officers shall be elected by the electors of the municipality, or appointed by the authorities thereof*. The purpose of this provision is to secure to the political and municipal divisions of the State the right of *local self-government*, and to prevent the legislature from depriving the inhabitants of the several counties, cities, towns, and villages of the right to choose their officers.[3] The Supreme Court of Indiana has sustained the right of local self-government

[1] People *v.* Hurlbut, *supra*, distinguished from People *v.* Mahaney, 13 Mich. 481; *ante*, sec. 9, and notes. In People *v.* Detroit, 28 Mich. 228 (1873); s. c. 15 Am. Rep., The People *v.* Hurlbut is explained, and its doctrine adhered to, and it was held that *the board of Park Commissioners for Detroit*, selected by the legislature without its consent, were not the officers or representatives of the city. *Infra*, secs. 72–74 *a*. So, under the Constitution of *Kentucky*, which contains a provision that "officers of towns and cities shall be *elected* for such terms, and in such manner, and with such qualifications, as may be prescribed by law," and "shall reside within their respective districts," it was held that *the legislature could not authorize the governor to appoint municipal officers*, since the Constitution requires that they shall be elected by the voters of the town or city: Speed *v.* Crawford, 3 Met. (Ky.) 207 (1860); but it was also likewise held that it was within the power of the legislature to pass an act depriving the mayor and council of a designated city of the power to elect the *police* force thereof, and establishing, instead, a *board of police* for the city *and the county* in which the city was situate, to be elected by the qualified voters of the city and county, and that this board, thus elected, should select and enroll the permanent police force of the city, which, it was provided should be taxed to pay them. Police Commissioners *v.* Louisville, 3 Bush (Ky.), 597 (1868). See Richmond Mayoralty Case, 19 Gratt. (Va.) 673. *Infra*, secs. 60, 72–74 *a*.

[2] Art. x. sec. 2.

[3] People *v.* Albertson, 55 N. Y. 50 (1873), criticising People *v.* Draper, 15 N. Y. 532; and People *v.* Shepherd, 36 N. Y. 285; People *v.* Bull, 46 N. Y. 57; People *v.* McKinney, 52 N.Y. 374 (1873), overruling People *v.* Batchelor, 22 N. Y. 128. And see People *v.* Palmer, 52 N. Y. 83 (1873); People *v.* Clute, 50 N. Y. 451 (1872); *ante*, sec. 9, and note. The legislature may, notwithstanding the constitutional provision mentioned in the text and others, provide for the improvement of city streets through commissioners appointed by legislative act, instead of being chosen by the municipal authorities. *Re* Woolsey, 95 N. Y. 135; Astor *v.* New York, 62 N. Y. 567. *Infra*, sec. 74, note. It is otherwise under the Constitution of California. People *v.* Lynch, 51 Cal. 15; Schumacher *v.* Toberman, 56 Cal. 508. Concerning the general inquiry how far right of local government and municipal self-regulation, including the right of the local citizens to select local officers, is rooted in our American Constitutions, the reader will find the opinion of *Cooley*, J., in the People *v.* Detroit, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202, in connection with the opinions in The People *v.* Hurlbut, 24 Mich. 44 (1871); s. c. 9 Am. Rep. 103, highly instructive. See *ante*, chap. i. where the subject is viewed in its general historical aspects. In Indiana, see State *v.* Denny (two cases), 21 Northeastern Rep. 252 and 274; Evansville *v.* State, 21 Northeastern Rep. 267. *Post*, secs. 72–74 *a*.

in that State in opinions of marked ability, vigor, and learning, which hold to be unconstitutional two acts of the legislature which deprived certain classes of municipalities of the usual rights of municipal control and local regulation.[1] It has elsewhere been held, however, that administrative agencies and officers, such as police boards, and even boards of water commissioners, park commissioners, &c., may, in the absence of special constitutional limitation, be authorized by the legislature to assist in local or municipal administration.[2]

§ 59. **Same subject.** — Recognizing and applying the distinction in the preceding section between *State officers and municipal officers*, the Supreme Court of Missouri held that *the mayor of a city was not an officer under the State*, within the meaning of a constitutional provision, giving the Supreme Court jurisdiction only when title to an office under the *State* is in contest.[3]

[1] In The State *v.* Denny (Ind. 1889), 21 Northeastern Rep. 252, an act of the legislature creating a board of public works and affairs for cities having 50,000 inhabitants, to consist of three members selected from the two leading political parties, and to be *appointed by the legislature*, and giving to such board exclusive power and jurisdiction over streets, alleys, sewers, water supply, and lights, was held unconstitutional, as infringing the right of local self-government vested in the people of such cities. In Evansville *v.* State (Ind. 1889), 21 Northeastern Rep. 267, and The State *v.* Denny, Mayor, *Ib.* 274, an act creating metropolitan police and fire boards for cities having over 29,000 inhabitants, provided that no persons should be eligible as commissioners of the police board unless they had resided in the respective cities for five years, and that the officers and employees of the police board should be selected from the two leading political parties. It was held that these provisions as to residence and politics were repugnant to Art. 1, sec. 23 of the Constitution of Indiana, prohibiting the legislature from granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not belong equally to all citizens. The act also gave to the boards, whose members were to be selected by the legislature, supreme and exclusive control over the fire and police departments, and of the property of the city used in them, as well as of the purchase of supplies for them. It was held void as being an attempt to deprive the people of the cities affected by the act of the right of local self-government. *Ante*, secs. 9, 11, 45, and note; *post*, sec. 183.

[2] County Court *v.* Griswold, 58 Mo. 175, 198 (1874); People *v.* Draper, 15 N. Y. 532; Daily *v.* St. Paul, 7 Minn. 390, following People *v.* Draper. See People *v.* Albertson, 55 N. Y. 50 (1873), where People *v.* Draper is questioned and distinguished. State *v.* Valle, 41 Mo. 29; State *v.* St. Louis County Court, 34 Mo. 546. Limitations on the right suggested. People *v.* Detroit, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202.

[3] Britton *v.* Steber, 62 Mo. 370 (1876). A State officer may be connected with some of the municipal functions, but he must derive his powers from a State statute, and execute his powers in obedience to a State law. State *v.* Valle, 41 Mo. 29. Aldermen and common councilmen are considered "civil officers" within the meaning of the provisions of the Constitution of *Rhode Island* relating to the qualifications of voters. *In re* The Newport Charter, 14 R. I. 655. Water committee with statute authority to construct and manage the water-works of a city, was held to be agents, and not "officers," within the meaning of the constitutional

§ 60 (34). **Same subject. — Police Officers; Mode of Appointment.** — And it has been several times determined that the legislature may, unless specially restricted in the Constitution, *take from a municipal corporation its charter powers respecting the police and their appointment*, and by statute itself directly provide for a permanent police for the corporation, under the control of a board of police not appointed or elected by the corporate authorities, but consisting of commissioners named and appointed by the legislature. Police officers are in fact State or public officers, and not private or corporate officers. And a provision in such a law, transferring to such commissioners, for the purposes of the new police, the use of the police-telegraph, station-houses, watch-boxes, &c., provided by the corporation, is valid since it only takes city property dedicated to a particular use and applies it to the same purpose, changing only the agency by which the use is directed; the property is still the city's.[1]

provision that the legislature "shall not create any *office*, the term of which shall be longer than four years." But a provision in the Constitution of Connecticut prohibiting an increase of the compensation of *any public officer* during his term, is violated by a resolution of the common council to pay compensation to a committee of the council who were entitled to no salary, for customary services rendered during the year. Garvie *v.* Hartford, 54 Conn. 440; David *v.* Portland Water Committee, 14 Oreg. 98.

[1] Baltimore *v.* Board of Police (affirming validity to the Baltimore Police Bill), 15 Md. 376 (1859). There is nothing in the maxim that "Taxation and representation go together," that can preclude the legislature from establishing in a city a *metropolitan police board*, with power to estimate the expenses of the police, and compelling the city authorities to raise by taxation the amount so estimated. Every city is represented in the State legislature; and it is for that body to determine how much power shall be conferred by the municipal charters which it grants. People *v.* Mahaney, 13 Mich. 481; see also same principle, People *v.* Draper, 15 N. Y. 532 (1857), where the act to establish the metropolitan police district was held constitutional. But see People *v.* Albertson, 55 N. Y. 50 (1873), where People *v.* Draper is questioned and distinguished, and People *v.* Shepherd, 36 N. Y. 287, is doubted; People *v.* McDonald, 69 N. Y. 362 (1877); People *v.* Detroit, 28 Mich. 228, 236; People *v.* Chicago, 51 Ill. 17. Text approved. Burch *v.* Hardwick, 30 Gratt. 24; Police Comm'rs *v.* Louisville, 3 Bush, 597; Diamond *v.* Cain, 21 La. An. 309 (1869); State *v.* Leovy, 21 La. An. 538; *ante*, sec. 58 n. The cases concur in holding that *police officers* are, in fact, State officers and not municipal, although a particular city or town be taxed to pay them. *Post*, sec. 210, and chap. xxiii. Cooley, Taxation (2d ed.), 681. An act which makes the mayor and aldermen of a corporation *commissioners of the court-house and jail* may be repealed by the legislature, and these buildings placed under the control of county or other officers. State *v.* Mayor, R. M. Charlt. (Ga.) 250; see also State *v.* Dews, R. M. Charlt. 397. A grant to a city to aid in building a *court-house*, and for educational purposes, is subject, until executed, to legislative resumption and control. Bass *v.* Fontleroy, 11 Texas, 698. In the absence of constitutional restriction the legislature may *directly appoint officers* to act within the municipality. Hudson, &c. Co. *v.* Seymour (highway commissioners), 6 Vroom, 35 N. J. L. 47. Many of the recent Constitutions contain prohibitions against such appointments. See for example Const. of California 1879, Art. xi. secs. 12–14.

§ 61. **Same subject. — Mode of Payment.** In the absence of special constitutional restriction it is competent likewise to the legislature of a State to enact that *the county* shall pay a portion of the *expenses of a police force in a city* situated wholly within, and forming part of the county. Police officers really execute public or State as distinguished from corporate duties. It may even direct a county to appropriate part of its revenue already collected in this way, since such legislation is not unconstitutional, as being retrospective in its operation, or as taking away vested rights, or impairing the obligation of contracts, or violating the principles of taxation. As moneys acquired by taxation are not strictly the private property of the county, such legislation is not the application of private property to public use without compensation, since the police board, by virtue of the act creating it, was an agency of the State government and performed public duties.[1] Such is the legislative power over counties and their property paid for by taxation that the General Assembly may constitutionally enact a law to take railroad stock from the county after it has been subscribed and paid for out of funds raised by taxation, and transfer it to those from whom the money was collected, and, in the event they do not apply for it, to vest it in townships for school purposes.[2]

Infra, sec. 74 *a*. So held in Indiana. State *v.* Denny, 21 Northeastern Rep. 252; Evansville *v.* State, *Ib.* 267; State *v.* Denny, *Ib.* 274.

The management and mode of electing trustees of an *incorporated academy*, which is endowed *entirely by the State*, may be changed by the legislature at its pleasure. Dart *v.* Houston, 22 Ga. 506; see also University of North Carolina *v.* Maultsby, 8 Ired. Eq. 257; University of Alabama *v.* Winston, 5 Stew. & Port. 17; Louisville *v.* University of Louisville, 15 B. Mon. 645; Visitors, &c. *v.* State, 15 Md. 330; Regents *v.* McConnell, 5 Neb. 423 (1877).

[1] State, *ex rel.* St. Louis Police Comm'rs *v.* St. Louis County Court (mandamus), 34 Mo. 546 (1864); *contra*, Mayor, &c. *v.* Tows, 5 Sneed (Tenn.), 186. The view of the Supreme Court of Missouri is undoubtedly the correct one. Approved. St. Louis *v.* Shields, 52 Mo. 351 (1873); People *v.* Morris, 13 Wend. 325; Sangamon Co. *v.* Springfield, 63 Ill. 66; Weymouth, &c. Fire Dist. *v.* County Comm'rs, 108 Mass. 142; Stilz *v.* Indianapolis, 55 Ind. 515.

The maintenance of a police force may be committed to the corporate authorities of a municipality, and if there are no special constitutional restrictions on the power of the legislature, it may authorize the assessment of a tax upon the keepers of saloons and restaurants in the municipality for the purpose of maintaining such police force therein, to be levied and collected as other taxes. Durach's Appeal, 62 Pa. St. 491 (1869); *post*, secs. 746, 750, 793; Railroad Co. *v.* Adler, 56 Ill. 344 (1870).

School districts being public corporations, under legislative control, a law providing that school debts may be paid in bills of the State bank of the State, is valid as against the objection that the legislature had no power to direct that anything except gold and silver should be received in payment of debts. Bush *v.* Shipman, 4 Scam. (5 Ill.) 190.

A municipal corporation may constitutionally be *exempted from prospective liability* for non-feasance of its officers or liability for torts. Gray *v.* Brooklyn, 10 Abb. Pr. R. N. S. 186; *post*, chap. xxiii.

[2] Lucas *v.* Tippecanoe Co., 44 Ind. 524

§ 62 (35). **Legislative Power over Revenues.** — The legitimate authority of the legislature over municipal corporations extends to *making provisions concerning their funds and revenues*,[1] and the authority is not abridged because the purpose to which the revenue is to be appropriated is specified in the charter; and the ground of the doctrine is that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes. Thus, the legislature may repeal the power it had given to cities to grant licenses for the sale of intoxicating liquors, although the money to be derived from the sale of such licenses was directed to be appropriated to the support of paupers within the city.[2] Such an authority, it was remarked, "gives the city no more a vested right to issue licenses, because the legislature specified the objects to which the money should be applied, than if it had been put into the general fund of the city."[3]

(1873); *Downey*, *Worden*, and *Osborn*, JJ., concurring, *Buskirk* and *Pettit*, JJ., dissenting. The opinions are elaborate, and refer to the leading authorities on the subject. The dissenting judges consider Spaulding *v.* Andover, then recently decided by the Supreme Court of New Hampshire, as strongly sustaining their views. In the Board of Comm'rs of Tippecanoe County *v.* Lucas, Treasurer, the Supreme Court of the United States, 93 U. S. 108 (1876), was of the opinion, as counties were mere agencies of government whose powers may be changed at pleasure, that revenues raised by taxation, although levied for specific public purposes, are so far subject to the legislature that it may direct them to be applied to other uses of the municipality; and, therefore, that it was competent for the legislature to direct restitution to the taxpayer of property exacted from him by taxation in whatever form the property may have been changed, so long as it remained in the possession of the municipality.

[1] *Ante*, secs. 57, 60, 61, and notes.

[2] Gutzweller *v.* People, 14 Ill. 142 (1852); *ante*, sec. 54, note.

[3] Gutzweller *v.* People, 14 Ill. 142, (1852), *per Caton*, J. See, also, Richland Co. *v.* Lawrence Co., 12 Ill. 1 (1850); adhered to, Sangamon Co. *v.* Springfield, 63 Ill. 71 (1872); Spaulding *v.* Andover (full discussion by *Foster*, J.), 54 N. H. 38 (1871); Home Ins. Co. *v.* City Council, 93 U. S. 116 (1876); People *v.* Supervisors, 50 Cal. 561; People *v.* Power, 25 Ill. 187; Richmond *v.* Richmond, &c. Railroad Co., 21 Gratt. (Va.) 604 (1872), holding that the State may *exempt property from municipal taxation*. By the charter of a municipal corporation there was granted to it sole power to grant licenses to sell spirituous liquors within its limits, and to appropriate the money arising therefrom to city purposes. Subsequently the legislature passed an act directing the money thus raised to be paid by the corporation to an academy located within the town. The municipal corporation refused to pay over to the academy an amount received for licenses after the passage of the last-named act, and the academy brought an action to recover it. The court held the subsequent act to be unconstitutional, and that the town was not liable. The court were of opinion, that, by its charter, the town had a vested right in the profits arising from licenses. It admitted that the legislature might altogether take away from the town the power to grant licenses; but if it allowed the power to remain, it denied the right of the legislature "to make a different disposition of the funds arising from such licenses from that contained in the charter, unless with the consent of the corporation." Trustees of Aberdeen Academy *v.* Aberdeen, 13 Sm. & M. (21 Miss.) 645 (1850). See, also, Aberdeen *v.* Saunderson, 8 Sm. & M. 663. The doctrine that the town corporation had a vested right in profits arising from licenses cannot, we think, be sustained, and is not in harmony with the decisions elsewhere. Indianapolis *v.* Indianapolis Home, &c., 50 Ind. 215 (1875).

City, county, and township funds are under legislative control. County *v.* State, 11 Ill. 202; County *v.* County, 12 Ill. 1; Dennis *v.* Maynard, 15 Ill. 477; Love *v.* Schenck, 12 Ired. Law, 304; Love *v.* Ramsour, *Ib.* 328; Youngs *v.* Hall, 9 Nev. 212 (1874); People *v.* Ingersoll, 58 N. Y. 1; People *v.* Fields, 58 N. Y. 491 (1874); Home Ins. Co. *v.* City Council, 93 U. S. 116 (1876); *ante*, sec. 57, note; Indianapolis *v.* Indianapolis Home, &c., 50 Ind. 215 (1875). The Indianapolis Home for Friendless Women is so far a public corporation or institution, that an appropriation by the legislature of fines, collected for the violation of certain city ordinances, to its support, is not the appropriation of money to a private purpose (Lucas *v.* Board, &c., 44 Ind. 524); Indianapolis *v.* Indianapolis Home, &c., 50 Ind. 215 (1875).

[1] Smith *v.* Inge, 80 Ala. 283. Rights of creditors of municipal corporations, see *post*, sec. 68 *a*, chaps. vii. viii., and xiv. As to constitutional rights of creditors, mortgagees, contractors with and shareholders, of *private* corporations, as against the legislative power of the State, see opinion *Ruger*, C. J., in People *v.* O'Brien, 1888, known as the *Broadway Surface Railway Case*, 111 N. Y. 1. *Infra*, sec. 68 *a*.

[2] Layton *v.* New Orleans, 12 La. An. 515 (1857). See, also, Girard *v.* Philadelphia, 7 Wall. 1 (1868); People *v.* Hill, 7 Cal. 97 (1857); *post*, chap. viii.; State *v.* Flanders, 24 La. An. 57; U. S., *ex rel.* Brown *v.* Memphis, 97 U. S., 300; Vance *v.* Little Rock, 30 Ark. 435, 439; Hawkins *v.* Jonesboro, 63 Ga. 527; Sedgwick Co. *v.* Bailey, 11 Kan. 631 (1873); San Francisco *v.* Canavan, 42 Cal. 541 (1872). A statute extinguishing one corporation

§ 63 (36). **Legislative Power over Municipal Charters.** — Legislative acts respecting the political and governmental powers of municipal corporations not being *in the nature of contracts*, the provisions thereof may be changed at pleasure where the *constitutional rights of creditors* and others are not invaded.[1] By act of the legislature the separate city of Lafayette was added to and incorporated with the city of New Orleans, with a provision that the added district, which was *less in debt* than the city of New Orleans, should be charged only with its own debts; and by a *subsequent* act of the legislature it was provided that taxes should be equal and uniform throughout the entire limits of the city; the effect of which was to increase the amount of taxes to be raised within that portion of the corporation which was formerly the city of Lafayette. A bill was filed by residents and property owners of the annexed district to enjoin the collection of the excess of taxes beyond the amount fixed by the act incorporating the annexed district into the "old city," claiming that the act was a contract, and the levy of taxes under the latter act, so far as regards debts due antecedently to the annexation, violated the vested rights of the inhabitants of the annexed district. The Supreme Court, on the ground that public corporations are wholly under the control of the legislature, which has the power to provide in what manner taxes shall be levied for their support, and how their debts shall be paid on their dissolution, held the act authorizing increased taxation to be valid, and dismissed the bill.[2] So

where. *after* a contract for paving streets had been made, but before it was fully executed, certain wards were added to the city (in which wards, however, no part of the paving was ever done), and no provision as to the debts of the corporation was made in the act of annexation, it was held that the legislature might afterwards constitutionally enact, as against the contractor, that the people within the wards thus added should not be taxed to pay any part of the debt of the city contracted prior to the passage of the act by which they were brought within the limits of the corporation.[1] And the same principle was asserted by the Supreme Court of the United States, which held to be valid a legislative act by which the city of Carrollton was annexed to New Orleans, with a provision that the latter city should succeed to all the rights and property, and assume and pay all of the debts of the former.[2]

§ 64 (37). **Same subject.** — The power of the legislature *to alter and abolish municipal corporations*, to erect new corporations in the place of the old, to add to the old, or to carve out of the old a new corporation, or the power to divide and dispose of the property held by such corporations for municipal purposes, is not defeated or affected by the circumstance that the corporation is, by its charter, made the *trustee of a charity, or of other private rights and interests.* Where the legal existence of the municipal trustee is destroyed by legislative act, the Court of Chancery will assume the execution of the trust, and, if necessary, will appoint new trustees to take charge of the property and carry into effect the trust.[3]

and throwing its obligations on another raises an implied promise on the part of the successor to pay the same. Little *v.* Union Township Committee, 40 N. J. L. 397. *Post*, secs. 170, 186–189.

[1] United States, *ex rel.* Brown *v.* Memphis, 97 U. S. 300 (1877). Further as to effect of dissolution and of change of boundaries, see *post*, sec. 68 *a*; chaps. vii. and viii. In town of Flatbush, *In re*, 60 N. Y. 398 (1875), the court of appeals expressed the opinion that it was beyond the competency of the legislature to assess lands in the town of Flatbush to pay debts previously incurred by the adjoining city of Brooklyn under prior acts for a park, although the portion of the park was carved out of the corporate limits of Flatbush. *Miller*, J., after stating that had an original assessment for benefits been made it might be said to be an assessment for public use, and enforceable as such, says: "But such is not this case. . . . There is no principle that I am aware of which sanctions the doctrine that it is within the taxing power of the legislature *to compel one town, city, or locality to contribute to the payment of the debts of another*. The government has no such authority, and this case is entirely without a precedent. If such assessments were authorized they might not be limited to adjoining towns, cities, or villages, but applied to those located at great distances from each other. Such legislation would be unjust, mischievous, and oppressive, and cannot be tolerated."

[2] New Orleans *v.* Clark, 95 U. S. 644 (1877). Such legislation is not within the prohibition of the State Constitution against the passage of retroactive laws. *Ib.*

[3] Girard *v.* Philadelphia, 7 Wall. 1 (1868); Meriwether *v.* Garrett, 102 U. S. 472, 528 (1880); Philadelphia *v.* Fox, 64 Pa. St. 169 (1870); *infra*, secs. 74 *a*, 80, Montpelier *v.* East Montpelier (division of town, and contest as to trust property held for the benefit of the inhabitants of the original township), 29 Vt. (3 Wms.) 12 (1856); same controversy at law, 27 Vt. 704. See *infra*, sec. 80, and chapters on Corporate Property and Remedies against Illegal Corporate Acts, *post*. Text approved. Luehrman *v.* Tax. Dist., 2 Lea (Tenn.), 425; Ellerman *v.* McMains, 30 La. An. 190; *infra*, sec. 68; Cincinnati *v.* Cameron, 33 Ohio St. 336.

[1] St. Louis *v.* Allen (extension of city limits), 13 Mo. 400 (1850); St. Louis *v.* Russell, 9 Mo. 503 (1845). *Ante*, sec. 54. It is justly observed, that "most, if not all, of the leading cases in the books, involving the question of the inviolability of municipal charters, in the *English* courts, arose between the *prerogative of the crown* and the *corporation*. The right or power of *parliament* in England, or of the legislature here, would present (and was decided to present) quite a different question." *Per Nelson*, J., in People *v.* Morris, 13 Wend. 325, 334 (1835); Philadelphia *v.* Field, 58 Pa. St. 320 (1868); Hudson County *v.* Seymour, 6 Vroom (35 N. J. L.), 47; People *v.* Bennett, 29 Mich. 451 (1874); s. c. 18 Am. Rep. 107; Austin *v.* Coggeshall, 12 R. I. 329, citing and approving text.

[2] *Ante*, secs. 22, 25, 28. "The distinction is well established between the responsibilities of towns and cities for acts done in their *public capacity*, in the discharge of duties imposed on them by the legislature for the public benefit, and for acts done in what may be called their *private character*, in the management of property and rights voluntarily held by them

§ 65 (38). **Legislative Power not wholly Unlimited.** — The supremacy of the *legislative authority over municipal corporations is not, however, in all respects, unlimited;* but the limitations must be sought either in the national or State Constitution; and except as there found, in terms or by fair implication, they do not exist. In England it is settled that the *Crown* has no power, without the consent of those to be affected thereby, to alter or abolish municipal charters, or to impose new ones on the corporation. But *Parliament* may create new corporations, or abolish or alter charters, or impose new ones, at its will, and without the consent of the inhabitants. And so may the State legislatures in this country, if there be no constitutional restriction upon the power.[1]

§ 66 (39). **Public and Private or Proprietary Rights distinguished.** — It assists to an understanding of the extent of legislative power over municipal corporations proper (incorporated towns and cities) to observe that these, as ordinarily constituted, possess a double character: the one *governmental, legislative,* or *public;* the other, in a sense, *proprietary* or *private.* The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, or officers in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability.[2] In *its governmental or public character,* the corpora-

tion is made, by the State, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the State rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the Constitution of the particular State. But *in its proprietary or private character*, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the compact community which is incorporated as a distinct *legal personality* or *corporate individual;* and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it, is omnipotent.[1]

for their own immediate profit or advantage, as a corporation, although inuring, of course, ultimately to the benefit of the public." *Per Gray*, J., in Oliver *v.* Worcester, 102 Mass. 489, 499 (1869); s. p. Detroit *v.* Corey, 9 Mich. 165, 184 (1861); Hill *v.* Boston, 122 Mass. 344, 359; s. c. 23 Am. Rep. 332. In the one case, no private action lies unless it be expressly given; in the other, there is an implied or common-law liability for the negligence of their officers in the discharge of such duties. In further illustration of this dual character, the reader is referred to the cases cited in the next note. See reference to this section of the text in Spaulding *v.* Andover, 54 N. H. 38, 54 (1873); and in Meriwether *v.* Garrett, 102 U. S. 528; *post*, secs. 72–74 *a*, and chap. xxiii., and cases.

[1] West Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175; *Ib.* 185; Bailey *v.* Mayor, &c. of New York, 3 Hill, 531; People *v.* Fields, 58 N. Y. 491; People *v.* Ingersoll, 58 N. Y. 1 (1874); Maxmillian *v.* Mayor, &c. of New York, 62 N. Y. 160 (1875); People *v.* Briggs, 50 N. Y. 553, 560 (1872); Nichol *v.* Nashville, 9 Humph. 252; Small *v.* Danville, 51 Me. 359; Jones *v.* New Haven, 34 Conn. 1; Western College *v.* Cleveland, 12 Ohio St. 375 (1861); Howe *v.* New Orleans, 12 La. An. 481; Martin *v.* Mayor, &c., 1 Hill, 545; Buttrick *v.* Lowell, 1 Allen, 172; Oliver *v.* Worcester, 102 Mass. 489 (1869); Touchard *v.* Touchard, 5 Cal. 306; Gas Co. *v.* San Francisco, 9 Cal. 453; Commissioners *v.* Duckett, 20 Md. 468; Weet *v.* Brockport, 16 N. Y. 161, note; Louisville *v.* University of Louisville, 15 B. Mon. 642; Louisville *v.* Commonwealth, 1 Duvall (Ky.), 295; Weightman *v.* Washington, 1 Black (U. S.), 39 (1861); Reading *v.* Commonwealth, 11 Pa. St. 196 (1849); Richmond *v.* Long's Admr., 17 Gratt. (Va.) 375; De Voss *v.* Richmond, 18 Gratt. 338; s. c. 7 Am. Law Reg. (N. S.) 589; New Orleans, &c. R. R. Co. *v.* New Orleans, 26 La. An. 478; s. c. *Ib.* 517 (1874); Askew *v.* Hale Co., 54 Ala. 639; Detroit *v.* Corey, 9 Mich. 165, 184 (1861); People *v.* Hurlbut, 24 Mich. 44 (1871), opinion of *Cooley*, J.; s. c. 9 Am. Rep. 103; People *v.* Detroit, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202. *In re* Malone's Estate, 21 S. C. 435. As to what are municipal duties, and what falls within the scope of municipal powers, see United States *v.* Baltimore & Ohio Railroad Co., 17 Wall. 332 (1872); *post*, sec. 775 *et seq.*; Niles Water Works *v.* Niles, 59 Mich. 311. On the ground that legislation concerning municipal corporations is of a peculiar character on account of their being agencies of the government, the Court of Appeals of *Kentucky* held that a charter provision *limiting the right to bring actions to recover money improperly paid for taxes to six months*, when the general statute of limitations allowed five years in such cases, was not unconstitutional for granting a special privilege. Covington *v.* Hoadley, 83 Ky. 444.

§ 67. **Same subject.** — This division of the powers of a municipal corporation into two classes, one public and the other private, has been before alluded to, and is well established, but the *private* character thus ascribed to such powers it is difficult exactly to define. It is easy to understand that if under the exercise of lawful powers by the authority of the legislature, property has been acquired by a municipality, such property may not be subject to legislative appropriation to uses distinctly foreign to the interests of the municipality; but in what sense are powers conferred and to be exercised for the good of all the people of the place private? Wherein do such powers, in their origin or nature, differ from those admitted to be public? Are not all powers conferred upon municipalities, whether many or few, given, and given only, for their better regulation and government, and to promote their welfare as parts of the Commonwealth? The small municipality, with few and simple powers, is no more completely under the supreme dominion of the legislature than the more populous one, requiring for its proper government organs and powers peculiar to itself. Are the latter, therefore, *private?* If so, it must be in a qualified and peculiar sense.[1] Contracts in favor of the creditor are protected by the national Constitution; but as against a State, the difficulty is to find a logical and sound basis on which to rest private rights in favor of a municipality, if, under the Constitution of the particular State, it is within the power of the State which breathed into it the breath of life utterly to extinguish its existence at pleasure. The distinction originated with the courts, to promote justice, and has been most frequently applied to escape technical difficulties in order to hold such corporations liable to private actions.[2] The distinction, how-

[1] *Ante*, secs. 25, 26.

[2] Section approved in State, *ex rel. v.* Smith, 44 Ohio St. 348. On this subject the opinion of Chief-Justice *Denio*, in Darlington *v.* Mayor, &c., 31 N. Y. 164 (1865), may be read with profit. The Chief-Justice there asserts the unlimited power of the legislature over municipal corporations and their property. He maintains that such corporations are altogether public, and all their rights and powers public in their nature, and that their property, though held for income or sale, and unconnected with any use for the purposes of the municipal government, is under the control of the legislature, and not within the provisions of the Constitution protecting private property. He denies the correctness of the distinction taken in Bailey *v.* The Mayor, &c. of New York, 3 Hill, 531, and other cases, *between the public and private functions* of city governments, and maintains that, as respects