§ 143 (94). **Prevention of Fires.** — The *prevention of damage by fire* is usually an object within the scope of municipal authority either by express grant or by the power, in a chartered town or city, to make police regulations or needful by-laws. Under such power, it may establish fire limits,[1] prevent the erection of wooden buildings,[2] regulate the mode and removal of ashes,[3] and make any other reasonable regulations to prevent and extinguish fires. Under such power the town or municipal body is authorized to appropriate money for the purchase of engines, or for the repair thereof, if to be used for the purpose of extinguishing fires therein; and this, whether they belong to the corporation or were purchased by private subscription.[4] And money may also be appropriated for the benefit of engine and hook and ladder companies therein.[1]

ing them to be removed *at the expense of the owners*, it was held that the ordinance was a valid exercise of the police power, and did not impair the obligation of the contract under the deed, nor was it a taking of private property without compensation. Davenport *v.* Richmond City, 81 Va. 636 (1887). So in the case of the Boston Beer Company, where the legislature of Massachusetts, on the 1st of February, 1827, incorporated the "Boston Beer Company," "for the purpose of manufacturing malt liquors in all their varieties in the city of Boston," &c. By an act of June, 1869, the manufacture of malt liquors to be sold in Massachusetts, and brewing and keeping them for sale, were prohibited under penalties of fine and imprisonment and the forfeiture of the liquors to the Commonwealth. In The Boston Beer Co. *v.* The Commonwealth, the Supreme Court of Massachusetts held that "the act of 1869 did not impair the obligations of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals. The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the legislature." This judgment was affirmed by the Supreme Court of the United States, 97 U. S. 25.

The question whether certain requirements are a part of a system of police regulation adapted to aid in the protection of life and health, is properly one of legislative determination, and a court should not lightly interfere with such determination, unless the legislature has manifestly transcended its province. Daniels *v.* Hilgard, 77 Ill. 640 (1875).

[1] *Post*, sec. 405.

[2] *Post*, sec. 405.

[3] Many fires are said to be "accidental" which are the result of neglect to keep ashes in fire-proof utensils; and yet regulations for the safe keeping of ashes are seldom made, and when made, rarely enforced. Filbey *v.* Combe, 2 M. & W. 677; Law *v.* Dodd, 1 Ex. 845; Lyndon *v.* Stadbridge, 2 H. & N. 45. See further, The Queen *v.* Wood, 5 E. & B. 49; Guardians of Holborn Union *v.* Vestry of St. Leonard, Shoreditch, L. R. 2 Q. B. Div. 145; Gay *v.* Cadby, L. R. 2 C. P. Div. 391; Harrison's Munic. Manual, 4th ed.; Clark *v.* South Bend, 85 Ind. 276 (ordinance regulating the *storage of straw*).

[4] Allen *v.* Taunton, 19 Pick. 485 (1837). Hunneman *v.* Fire District, 37 Vt. 40; Robinson *v.* St. Louis, 28 Mo. 488 (repair of engine-house); Wadleigh *v.* Gillman, 12 Me. 403; Vanderbilt *v.* Adams, 7 Cow. 349, 352; *post*, secs. 405, 572 n., 690, chap. xxiii. Text approved. Green *v.* Cape May, 41 N. J. L. 45. A town possesses implied power, in the absence of express legislative enactment, to purchase fire-engines. Bluffton *v.* Studabaker, 106 Ind. 129; Carleton *v.* Washington, 38 Kan. 726; Bridgford *v.* Tuscumbia, 16 Fed. Rep. 910.

§ 144 (95). **Quarantine and Health; Scope of Power to preserve the Public Health.** — The *preservation of the public health and safety* is often made in express terms a matter of municipal duty, and it is competent for the legislature to delegate to municipalities the power to regulate, restrain, and even suppress, particular kinds of business, if deemed necessary for the public good.[2] The subject will be considered more in detail in the chapter on Ordinances.[3] The general nature and scope of the authority, as it is not unfrequently bestowed, are well illustrated by a case in Maryland. By its charter the city of Baltimore was vested with "full power and authority to enact *all ordinances necessary to preserve the health* of the city, prevent and remove nuisances, and to prevent the introduction of contagious diseases within the city and within three miles of the same." Commenting on this provision of the charter, the Court of Appeals say: "The transfer of this salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish, within

[1] Van Sicklen *v.* Burlington, 27 Vt. (1 Wms.) 70 (1854). Approving Allen *v.* Taunton, *supra*. See *post*, chapter on Ordinances. Power of council over fire companies, and to appoint officers therefor. See Miller *v.* Savannah Fire Co., 26 Ga. 678.

The protection of all the buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants, and for their relief from a common danger; and cities and towns are therefore authorized by general law in Massachusetts to provide and maintain fire engines, reservoirs, and hydrants to supply water for the extinguishment of fires. Allen *v.* Taunton, 19 Pick. 485; Hardy *v.* Waltham, 3 Met. 163; Fisher *v.* Boston, 104 Mass. 87; Tainter *v.* Worcester, 123 Mass. 311. The question whether and where *public hydrants* should be erected is within the exclusive control of the municipal authorities, as the public interests may from time to time require; and such municipality does not assume any liability to the owners of property to furnish means of extinguishment of fires upon which an action can be maintained. Grant *v.* Erie, 69 Pa. 420; Wheeler *v.* Cincinnati, 19 Ohio St. 19; Brinkmeyer *v.* Evansville, 29 Ind. 187; Fisher *v.* Boston, 104 Mass. 87; Hill *v.* Boston, 122 Mass. 344. The mere fact that a *volunteer fire association* renders services in extinguishing fires imposes no obligation upon a municipal corporation to pay its members therefor. Jacksonville *v.* Ætna Fire Engine Co., 20 Fla. 100. *Post*, sec. 976 and cases.

[2] Shrader, *In re*, 33 Cal. 279 (1867); Ashbrook *v.* Commonwealth, 1 Bush (Ky.), 139 (1866); Tucker *v.* Virginia City, 4 Nev. 20; Johnson *v.* Simonton, 43 Cal. 242 (1872). Aaron *v.* Broiles, 64 Tex. 316; *post*, chap. xxiii. The power of the State to protect the public health cannot be surrendered; but a municipality entrusted with the execution of this power may make contracts to accomplish the purpose, and while the State or the municipality may recall or modify such contracts, they cannot do so from mere caprice or to gain pecuniary advantage. Louisville *v.* Wible, 84 Ky. 290, where a contract giving the *exclusive right to remove dead animals* for five years was held valid.

[3] *Post*, secs. 369 *et seq.*, 374–378.

the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the legislative powers which the general assembly could have exercised. Of the degree of necessity for such municipal legislation, the *Mayor and City Council of Baltimore* were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributory to the end) of exercising the powers which they might deem requisite to the accomplishment of the objects of which they were made the guardians. 'To prevent the introduction of contagious diseases within the city, and within three miles of the same,' they might impose heavy penalties on the captain, owner, or consignee of any ship or other vessel entering the port of Baltimore, on board of which small-pox or other contagious diseases might prevail, or they might seek the accomplishment of their object by causing the vessel and all persons to be taken possession of and controlled until their purification and disinfection were effected, and impose on the captain, owner, or consignee, the payment or reimbursement of all the expenses incurred by such proceedings; or they might adopt, at the same time, both suggested remedies, if for the successful and faithful execution of their powers they deemed it necessary to do so."[1]

§ 145 (96). **Same subject. Appointment of Health Officers and their Powers.** — And it was held that, under this authority, it was competent for the city to pass an *ordinance providing for the appointment of a "health officer,"* prescribing his duties and powers;[2] and that the city might recover from the consignee of a vessel, and was not confined to the charterer, the expenses incurred by it in disinfecting and purifying the vessel, persons, and baggage on board of her at the time of her arrival, from the infection of the small-pox. Respecting the extent of liability, the court decided that the defendant was not entitled to an instruction that the recovery must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of the small-pox. On this point the court expressed its judgment to be that, "if the health officer" (on whom the duty of disinfecting the vessel was imposed by ordinance), in causing expenses, "acted *bona fide*, within the limits of a sound discretion, and with reasonable skill and judgment, in the discharge of his official duties, the reasonable expenses thus incurred must be paid." Concerning the power of the corporation over the persons

[1] Harrison *v.* Baltimore, 1 Gill (Md.), 264 (1843); *ante*, sec. 94.

[2] *Post*, sec. 370, and note, as to Health Officers and their powers.

on board of an infected vessel, the court was of opinion that it was competent for the health officer to be authorized by ordinance to send persons laboring under infectious disease to the hospital, and also those on board of the vessel liable to be affected by the disease, if, in his opinion, such a course be necessary to prevent the spread of disease; and the owner, master, or consignee may be liable for expenses thus incurred, if the health officer acts with reasonable skill and judgment, and exercises a sound and honest discretion.[1]

§ 146 (97). **Water Supply.** — A city having power to pass ordinances respecting the *police* of the place, and *to preserve health*, is authorized, as a sanitary and police regulation, to contract to procure a *supply of water*, by boring an artesian well on the public square, or otherwise, and is the judge of the mode best adapted to accomplish the object.[2]

§ 147 (98). **Indemnifying Officers.** — Where a municipal corporation *has no interest in the event of a suit*, or in the question involved in the case, and the judgment therein can in no way affect the corporate rights or corporate property, it cannot assume the defence of the suit, or appropriate its money to pay the judgment therein; and warrants or orders for the payment of money based upon such a consideration are void.[3] But such a corporation has power to

[1] Harrison *v.* Baltimore, 1 Gill (Md.), 264 (1843).

[2] Livingston *v.* Pippin, 31 Ala. 542 (1858); Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396, approving text; *ante*, sec. 94. As to water-works, Rome *v.* Cabot, 28 Ga. 50; Hale *v.* Houghton, 8 Mich. 458; *ante*, sec. 58; *post*, sec. 443. A municipal corporation owning lands on a water-course, distant from the city, to supply its inhabitants with water, has no right (unless acquired by purchase or by the exercise of the right of eminent domain) to divert water to the injury of other riparian proprietors. Stein *v.* Burden, 24 Ala. 130 (1854); Fleming's Appeal, 65 Pa. St. 444. As against the owner of the *fee* abutting on a highway the selectmen of a town have a right to drain a spring on the owner's side of such road, and dispose of the water in such mode as to protect the highway from overflow; but if they divert the water for any other purpose, they act individually, and not for the public good, and as against the owner have no capacity to act at all. Suffield *v.* Hathaway, 44 Conn. 521; *ante*, sec. 30; *post*, secs. 1038–1046. Power to purchase or condemn lands for water-works. People *v.* McClintock, 45 Cal. 11 (1872); *post*, secs. 561, 562, 597, 610. Regulations of water supply. *Post*, sec. 320. Pipes in streets. *Post*, sec. 697. As to liability for wrongful acts of firemen, *post*, sec. 976.

[3] Halstead *v.* Mayor, &c. of N. Y., 3 Comst. (3 N. Y.) 430 (1850), affirming s. c. 5 Barb. 218, and deciding that corporate funds cannot be appropriated to pay penalties personally incurred by officers for refusing to discharge their official duties; see, in explanation, Morris *v.* The People, 3 Denio, 381. And see, also, People *v.* Lawrence, 6 Hill, 244, holding that the supervisors of a county had no right to appropriate money to defray the costs of a justice of the peace who had been prosecuted for official misconduct and acquitted; recognized in Bank *v.* Supervisors, 5 Denio, 517, 521. Same

indemnify its officers against liability which they may incur in the *bona fide* discharge of their duties, although the result may show that the officers have exceeded their legal authority.[1] Thus, it may vote to defend suits brought against its officers for acts done in good faith in the exercise of their office.[2] So, if a public corporation is charged with the duty of repairing highways, and is made liable for defects therein, it has the *incidental* power to indemnify an officer who digs a ditch for the purpose of raising a legal question as to the boundary line of the highway.[3]

§ 148 (99). **Same subject. Refund-Taxes illegally assessed.** — So, a vote by a town to refund money paid by assessors of the town on an illegal assessment made by them of a *town* tax, is an express promise, founded upon a meritorious and legal consideration, and is irrevocably binding upon the town. And this, although without such vote the town could not have been compelled to refund or indemnify the assessors. But such a vote, by a *town*, would be without consideration in respect to *State* and *county* taxes.[4] So, if

principle, Merrill *v.* Plainfield, 45 N. H. 126. The trustees of a town may employ counsel to defend an action against the marshal for false imprisonment brought by a person arrested by him for violating an ordinance of the town. Cullen *v.* Carthage, 103 Ind. 196.

The common council of a city in *Connecticut*, under authority of the city charter, enacted a by-law with respect to wharves, and the anchoring, moving, and mooring of vessels in the harbor, *and appointed a superintendent of wharves*, to discharge the duties provided for in the by-law; the performance of his duties was not enforced by a penalty, and he acted only upon application of parties interested and at their expense. In the discharge of his duties, and while acting in good faith, he ordered a vessel lying at a wharf to be hauled astern to make more room for another at an adjoining wharf, and was sued by the owner of the wharf for damages. It was held, on the principle stated in the text, that *the city could not legally indemnify him* for the expenses incurred by him in defending against the suit, and a threatened payment of such expenses by the city was enjoined at the suit of a resident and taxpayer. Gregory *v.* Bridgeport, 41 Conn. 76, 87 (1874); s. c. 19 Am. Rep. 485, where *Phelps*, J., cites the text, and refers to other cases to the same point.

[1] Pike *v.* Middleton (indemnifying tax collector), 12 N. H. 278 (1841); Fuller *v.* Groton, 14 Gray, 340; Sherman *v.* Carr (indemnifying executive officer), 8 R. I. 431 (1867); Briggs *v.* Whipple, 6 Vt. 95 (1834); Bancroft *v.* Lynnfield, 18 Pick. 566 (1836); Nelson *v.* Milford, 7 Pick. 18, 26 (1828); Babbitt *v.* Savoy, 3 Cush. 530 (1849); Hadsell *v.* Hancock, 3 Gray, 526 (1853); State *v.* Hammonton, 9 Vroom (38 N. J. L.), 430 (1876); s. c. 20 Am. Rep. 404, where many of the cases are referred to by *Dixon*, J.; Text approved in Roper *v.* Laurinburg, 90 N. C. 427; Lewis *v.* Rochester, 9 C. B. (N. S.) 401; Queen *v.* Litchfield, 4 Ad. & E. (N. S.) 897; Attorney-General *v.* Norwich, 2 Mylne & Cr. 406. In Page *v.* Frankford, 9 Greenl. (Me.) 115, this was left an open question.

[2] *Ib.* Baker *v.* Windham, 13 Me. (1 Shep.) 74 (1836); Cullen *v.* Carthage, 103 Ind. 196. See *infra*, sec. 148.

[3] Bancroft *v.* Lynnfield, *supra*.

[4] Nelson *v.* Milford, 7 Pick. 18 (1828). A separate action, on such a vote, lies against the town in favor of each assessor for his share, which does not include, however, his own tax, paid by him voluntarily. *Ib.*

the town is not concerned, having nothing to lose or gain in the result of the litigation, a vote to indemnify an officer would be in excess of its power, and void;[1] but it would be otherwise if the suit against the officer was in respect to matters in which the corporation was interested.[2]

§ 149 (100). **Furnishing Entertainments.** — Without express power, a public corporation cannot make a contract to provide for celebrating *the Fourth of July*, or to *provide an entertainment* for its citizens or guests. Such contracts are void, and, although the

[1] Vincent *v.* Nantucket, 12 Cush. 105 (1853); Gregory *v.* Bridgeport, 41 Conn. 76 (1874). "A promise to indemnify a tax collector if he would collect, by pretence of his official authority, a tax which he knew was illegal, would be an agreement to violate the law, and could not be enforced." Pike *v.* Middleton, 12 N. H. 281, *per Gilchrist*, J. Selectmen, under their authority "to order and manage all of the prudential affairs of the town," may bind the town thus to indemnify its officers. 12 N. H. 281, *supra; ante*, sec. 30, and notes.

[2] Briggs *v.* Whipple, 6 Vt. 95 (1834). A by-law declaring that the officers of the corporation shall be indemnified for all lawful acts done in an official capacity is not illegal. Irwin *v.* Mariposa, 22 Upper Can. C. P. 367. The principles laid down in the text are applied to municipal corporations in England. Thus, where the suits are of such a nature that the rights of the corporation are not in any way affected by the result, costs and expenses for attorneys cannot be defrayed out of the corporate funds; as, for example, in Reg. *v.* Leeds, 4 Q. B. 796, where the question was which of two councillors was legally elected. So costs of defending *Quo warranto* against an alderman of a borough cannot be paid by the corporation. Reg. *v.* Bridgewater, 2 P. & D. 558. But where the object of the *Quo warranto* or other proceeding or suit is to affect the legal rights of the corporation, or to question its legal existence, the expenses may be defrayed out of the corporate funds. Holdsworth *v.* Dartmouth, 11 Ad. & El. 490.

An indemnity to an officer for *lawful acts* gives him no claim for compensation against the consequences of unlawful acts. Irwin *v.* Mariposa, 22 Upper Can. C. P. 367. By-law to indemnify a councillor for the costs of a contested election would be illegal. Bell and Manvers, *In re*, 2 Upper Can. C. P. 507; 3 *Ib.* 400. In England an agreement by a corporation with one of its officers for an increase of the salary of an office retained by him as compensation for the loss of an office of which he was deprived, is not binding unless under the seal of the corporation. The Queen *v.* Stamford, 6 Q. B. 433; see also Cope *v.* Thames, &c., Dock and Railroad Co., 3 Ex. 841. So the appointment of a corporation solicitor should be regularly under the corporation seal. Arnold *v.* Poole, 4 M. & G. 860. A town clerk, if a solicitor, may have a lien on papers of the corporation, with respect to which he has done work as an attorney or solicitor. The King *v.* Sankey, 5 A. & E. 423. But *quære* in this country.

Where persons entrusted with the administration of a fund have incurred legitimate and proper expenses thrown upon them by their fiduciary situation, they have a right to reimburse themselves out of the funds. See The King *v.* The Inhabitants of Essex, 4 T. R. 591; The King *v.* The Commissioners of Sewers for the Tower Hamlets, 1 B. & Ad. 232; Attorney-General *v.* Mayor of Norwich, 2 M. & C. 406; Regina *v.* The Mayor and Town Council of Sheffield, L. R. 6 Q. B. 652. An attempted appropriation contrary to the terms of the trust may be restrained. Attorney-General *v.* Aspinall, 2 M. & C. 613; Harrison's Municipal Manual, 4th ed.; *post*, chap. xxii. sec. 709 *et seq.*

plaintiff complies therewith on his part, he cannot recover of the corporation.[1]

§ 150 (101). **Impounding Animals.** — Power to *impound and forfeit domestic animals* must be expressly granted to the corporation, and laws or ordinances authorizing the officers of the corporation to impound, and upon taking specified proceedings to sell the property, are penal in their nature, and where doubtful in their meaning will not be construed to produce a forfeiture of the property, but rather the reverse. The *pound-keeper cannot justify* in an action brought against him by the property-owner unless he has strictly complied with all the requirements of the law under which he acts. Thus, if he sells without giving the requisite notice, or for the full length of time required, he is liable although the owner sustains no actual injury from the omission, or the owner may treat the sale as void and recover his property.[2] A statute directing the

[1] Hodges *v.* Buffalo, 2 Denio (N. Y.), 110 (1846). Same principle. Cornell *v.* Guilford, 1 Denio, 510; Hood *v.* Lynn, 1 Allen (Mass.), 103 (1861); Gerry *v.* Stoneham, *Ib.* 319; Hale *v.* People, 87 Ill. 72. Nor to celebrate *surrender of Cornwallis*. Tash *v.* Adams, 10 Cush. 252 (1852). Nor can towns in Massachusetts vote money for the *purchase of uniforms for an artillery company*. Claflin *v.* Hopkinton, 4 Gray, 502 (1855). "Corporations," says *Jewett*, J., in Hodges *v.* Buffalo, 2 Denio, 110, "have no other powers than such as are expressly granted, or such as are necessary to carry into effect the powers expressly granted." *Ante*, secs. 89–91. In *New York* there is a statutory declaration of this common-law principle. 1 Rev. Sts. 599, secs. 1–3. "Until the case of Hodges *v.* Buffalo, 2 Denio, 110, nothing," says *Pratt*, J., 3 Comst. 433, "was more frequent than for city authorities to vote largesses and give splendid banquets for objects and purposes having no possible connection with the growth or weal of the body politic, thus subjecting their constituents to unnecessary and oppressive taxation." Under a clause in a charter providing that "nothing in this charter shall be construed . . . as giving the power to vote money for any ordinary object except for the regular, ordinary, and usual expenses of the city," the city council of Newport gave *a ball and banquet;* certain taxpayers obtained a temporary injunction restraining the treasurer from paying the bills, which, upon final hearing, was sustained and made perpetual. Austin *v.* Coggeshall, 12 R. I. 329; s. p. Greenough *v.* Wakefield, 127 Mass. 275; *post*, chap. xxii. sec. 916 *et seq.*

[2] White *v.* Tallman, 2 Dutch. (N. J.) 67 (1856); Willis *v.* Legris, 45 Ill. 289; *Ib.* 218; Rounds *v.* Stetson, 45 Me. 596 (1858); Gilmore *v.* Holt, 4 Pick. 258 (1826); Rounds *v.* Mansfield, 38 Me. 586 (1854); Smith *v.* Gates, 21 Pick. 55, where the rule in the text was applied, although the sale was made only twenty minutes before the expiration of the time required by law. So actual knowledge, by the owner of the beasts, of the impounding thereof, is not equivalent to the *written notice* required by the statute. Coffin *v.* Field, 7 Cush. 355. Abridgment of the required notice for the shortest period avoids the sale; and so does a sale, at one bidding, of two animals having different owners. Clark *v.* Lewis, 35 Ill. 417 (1864). Purchaser must show a regular and authorized sale when his title is questioned by the former owner. *Ib.* Breach of a pound, and liberating an animal therein confined, is no violation of an ordinance prohibiting "any person from opposing or interrupting any city officer in the execution of the ordinances of the city." Mayor, &c. *v.* Omburg, 22 Ga. 67 (1857). Marshal must strictly comply with the ordinance, or he becomes a trespasser from the beginning. 13 Pick. 384; 4 Pick. 258; 21 Pick. 55; 13 Met. 407; 7 Cush. 355; 9 Pick. 14; 12 Met. 118; 23 Pick. 255; 12 Met. 198. Owner cannot legally break pound and rescue animals. 5 Pick. 514; 5 Cush. 267. *Pound defined.* 2 Cush. 305. Marshal cannot delegate his authority to others to impound for him generally, and in his absence, but may have assistants to act in concert with him. Jackson *v.* Morris, 1 Denio, 199. See Friday *v.* Floyd, 63 Ill. 50 (1872). Officers must use the public pound. 1 R. I. 219. *Replevin* does not lie against a pound-keeper, at common law, while the creatures are in his legal custody. Co. Litt. 47 B.; *Ib.* 145 B.; 1 Chit. Pl. 159; Pritchard *v.* Stevens, 6 Durn. & E. 522; Ilsley *v.* Stubbs, 5 Mass. 283; Smith *v.* Huntington, 3 N. H. 76; King *v.* Ford, 70 Ga. 628; but it does lie if he voluntarily parts with his legal control over them, or if he impounds them in any other places than those prescribed by the law, as, for example, in his pasture or barn, although this be done the more conveniently to furnish them with food and drink. Bills *v.* Kinson, 1 Foster (N. H.), 448 (1850). In *New Hampshire* if creatures are found "doing damage," they may be impounded, and appraisers are to ascertain "whether *any* damage was done." Held that the statute contemplated *actual*, and not merely nominal damages, to justify impounding. Osgood *v.* Green, 33 N. H. 318, and cases cited. As to power to take up and forfeit animals, at large, see also chapter on Ordinances, *post; infra*, sec. 348.

[1] Blair *v.* Forehand, 100 Mass. 136. Approved in Mowery *v.* Salisbury, 82 N. C. 175. The Act of July 3, 1863, entitled "An Act in Relation to Damages occasioned by Dogs," so far as it undertakes to charge the owner with the amount of damage done by his dog, as fixed by the selectmen of the town, without an opportunity to be heard, is unconstitutional; because it is contrary to natural justice and not within the scope of legislative authority conferred by the Constitution on the general court; and also because it is in violation of the provision of the Bill of Rights, which secures the right of trial by jury in all controversies concerning property, except in cases where it had not theretofore been used and practised. East Kingston *v.* Towle, 48 N. H. 57. The legislature have power to make towns liable for damage done within their limits by dogs, and to give towns a right of action to recover the actual damage from the owners of the dogs. *Ib.*

[2] State *v.* Topeka, 36 Kan. 76, where the constitutionality of ordinances regulating the keeping, registering, and destruction of dogs is fully considered, and many authorities cited in the opinion, by *Valentine*, J.

[3] Hunt *v.* Ambruster, 17 N. J. Eq. (2 C. E. Green) 208 (1865).

Regulations as to party-walls must be strictly followed. If a person, under color of such regulations, does injury to his neighbor, he is liable to be sued. Pratt *v.* Hillman, 4 B. & C. 269; see also The Queen *v.* Ponsford, 1 D. & L. 116. No

mayor to issue a warrant annually, within ten days from July 1, commanding police officers to "kill all dogs not licensed according to law, whenever and wherever found," is not in conflict with the Constitution of Massachusetts,[1] or of Kansas.[2]

§ 151 (102). **Party Walls.** — Power in a charter to pass ordinances "to authorize the erection of party walls and fences, and to regulate them," includes the power to authorize their erection upon the application of either owner, and without the consent of the other; and such an ordinance is not unconstitutional because compensation is not provided for the land occupied by the wall.[3]

§ 152 (103). **Public Defence; Loans and Taxation to pay Bounties.** — During the Rebellion acts were passed by many of the legislatures of the adhering States in effect authorizing municipalities *to raise money by loans and taxation, to pay bounties to volunteers to enable the municipality to fill its quota* under the calls of the President for troops, and thereby avoid an anticipated draft. The constitutional principles involved in legislation of this character will be found learnedly discussed in the cases below cited, which fully establish the validity of such legislation.[1] But without express authority a municipality possesses no such power;[2] yet if exercised, it may be validated by subsequent legislative action.[3]

§ 153 (104). **Aid to Railroad Companies; Municipal Subscriptions and Bonds, and Taxation to pay the Same.** — The most noted of extraordinary powers conferred upon municipal and public corpo-

man has a right to presume that his neighbor will hereafter build a house adjoining to his, and erect half of his outside wall on his neighbor's ground in consequence of such presumption. Barlow *v.* Norman, 2 W. Bl. 959. An external wall cannot be said to be a party-wall. Sims *v.* Estate Company, 14 L. T. N. S. 55. A party-wall is a wall which belongs to two persons as part-owners, or divides two buildings one from another. Weston *v.* Arnold, L. R. 8 Ch. Ap. 1084. The English Stat., 14 Geo. III. ch. lxxviii., was held not to make party-walls common property. Matts *v.* Hawkins, 5 Taunt. 20. If one proprietor added to the height of such a party-wall, and the other pulled down the addition, the first might maintain trespass for pulling down so much of it as stood on the half of the wall which was erected on his own soil. *Ib.* The property in a wall, though erected at joint expense, follows the property of the land whereon it stands. *Ib.* Power to pass ordinances "to authorize the erection of party-walls, &c., and to regulate them," has been held to include the power to authorize their erection upon the application of either owner, and without the consent of the other. Hunt *v.* Ambruster, 17 N. J. Eq. 208; Harrison's Municipal Manual, 4th ed. Further as to party-walls: McAdam on Landlord and Ten. 145–160, and works on Easements.

[1] Speer *v.* School Directors, 50 Pa. St. 150, two judges dissenting. See Hilbish *v.* Catherman, 64 Pa. St. 154 (1870), where the prior cases in that State are commented on by *Agnew*, J. State *v.* Richland Township, 20 Ohio St. 362; Thompson *v.* Pittson, 59 Me. 545; Broadhead *v.* Milwaukee, 19 Wis. 652; State *v.* Tappen, 29 Wis. 664; s. c. 9 Am. Rep. 622; Sperry *v.* Horr, 32 Iowa, 184; Booth *v.* Woodbury, 32 Conn. 118; Shackford *v.* Newington, 46 N. H. 415; Lowell *v.* Oliver, 8 Allen (Mass.), 247; Freeland *v.* Hastings, 10 Allen, 570; Comer *v.* Folsom, 13 Minn. 219; Dayton *v.* Rounds, 27 Mich. 82; Cooley, Const. Lim. 219–229. Cooley on Taxation (2d ed.) 136, collects the cases and states the result. Veazie *v.* China, 50 Me. 518; Clark Co. *v.* Lawrence, 63 Ill. 32; *Ib.* 40; Bowles *v.* Landaff, 59 N. H. 164; Gould *v* Raymond, *Ib.* 260.

[2] Stetson *v.* Kempton, 13 Mass. 272; Fiske *v.* Hazzard, 7 R. I. 438; Shackford *v.* Newington, *supra; ante*, sec. 30. It is not the duty or function of a town to *procure the passage of an act* by the legislature, authorizing it to pay bounties. An appropriation for that purpose is illegal. Mead *v.* Acton, 139 Mass. 341.

[3] Booth *v.* Woodbury, 32 Conn. 118; Kunkle *v.* Franklin, 13 Minn. 127; Comer *v.* Folsom, 13 Minn. 219; Hilbish *v.* Catherman, 64 Pa. St. 154 (1870); State *v.* Richland Township, 20 Ohio St. 362 (1870); *ante*, sec. 79.

rations is *the authority to aid in the construction of railways* by subscribing to their stock, issuing negotiable bonds as a means of paying their subscription, and taxing the inhabitants or the property within their limits to pay the indebtedness thereby incurred. Legislation of this kind belongs to a period comparatively recent, and has been more or less resorted to at times, by almost every State in the Union. As it is an author's duty to state what the law is rather than what, in his judgment, it ought to be, he is constrained to admit that a long and almost unbroken line of judicial decisions in the courts of most of the States has established the principle that, in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal or public corporation to aid, in the manner above indicated, the construction of railways running near, or to, or through its territory. The cases on the constitutional validity of such legislation are referred to in the note.[1] Notwithstanding the opinion of so many learned and

[1] Goddin *v.* Crump (act authorizing the city of Richmond to subscribe stock in a company incorporated to improve the navigation of the James River, and to build a road to the falls of the Kanawha River). 8 Leigh (Va.), 120 (1837). This is the earliest case of the class. Bridgeport *v.* Railroad Co., 15 Conn. 475 (1843); Society, &c. *v.* New London, 29 Conn. 174; Douglass *v.* Chatham, 41 Conn. 211 (1874); Nichol *v.* Nashville, 9 Humph. (Tenn.) 252 (1848); Powers *v.* Superior Court, 23 Ga. 65 (1857); Talbot *v.* Dent, 9 B. Mon. (Ky.) 526 (1849); Slack *v.* Railroad Co., 13 B. Mon. (Ky.) 1 (1852); Maddox *v.* Graham, 2 Met. (Ky.) 56; Commonwealth *v.* McWilliams, 11 Pa. St. 61 (1849); Sharpless *v.* Mayor, etc., 21 Pa. St. 147; *Ib.* 188; Commonwealth *v.* Perkins, 43 Pa. St. 410; 47 Pa. St. 189; Cotton *v.* County Comm'rs, 6 Flor. 610 (1856); Railroad Co. *v.* Comm'rs, 1 Ohio St. 77 (1852); Cass *v.* Dillon, 2 Ohio St. 607 (1853); Ohio *v.* Comm'rs, &c. 6 Ohio St. 280; 7 Ohio St. 327; 8 Ohio St. 394; 12 Ohio St. 596, 624; 14 Ohio St. 569; Strickland *v.* Railroad Co., (Miss.) MSS.; City *v.* Alexander, 23 Mo. 483 (1856); 39 Mo. 485; Leavenworth County *v.* Miller, Supreme Court of Kansas (1871), 7 Kan. 479; s. c. 12 Am. Rep. 425. The opinion of *Valentine*, J., covers the whole ground of controversy. *Kingman*, C. J., concurred, and *Brewer*, J., dissented. Clarke *v.* Rochester, 24 Barb. 446 (1857); Bank of Rome *v.* Rome, 18 N. Y. 38 (1858); Starin *v.* Genoa, 23 N. Y. 439 (1861); People *v.* Mitchell, 35 N. Y. 551 (1866); Police Jury *v.* Succession of McDonough, 8 La. An. 341; Aurora *v.* West, 9 Ind. 74 (1857); 22 Ind. 88; Mt. Vernon *v.* Hovey, 52 Ind. 563 (1876); Robinson *v.* Bidwell, 22 Cal. 379; Stein *v.* Mayor, &c., 24 Ala. 591 (1854); Gibbons *v.* Railroad Co., 36 Ala. 410; Prettyman *v.* Supervisors, 19 Ill. 406 (1858); s. p. 24 Ill. 75, 208; Butler *v.* Dunham, 27 Ill. 474 (1861); Robertson *v.* Rockford, 21 Ill. 451; Chicago, &c. Railroad Co. *v.* Smith (donation to Railroad Co.), 62 Ill. 268 (1871); s. c. 14 Am. Rep. 99; Sibley *v.* Mobile, 3 Woods C. C. 535; and see also as to authority to precinct to levy tax to maintain a bridge, Shaw *v.* Dennis, 5 Gilm. (Ill.) 405; San Antonio *v.* Jones, 28 Tex. 19; Copes *v.* Charleston, 10 Rich. (S. C.) 491 (1857); Augusta Bank *v.* Augusta, 49 Me. 507; Clark *v.* City, &c., 10 Wis. 136; *Ib.* 195 (1859) (compare Whiting *v.* Sheboygan Railroad Co., *infra*). The Supreme Court of *Wisconsin*, in an opinion delivered in Phillips *v.* Albany, 28 Wis. 340 (1871), say the power of the legislature to authorize municipal subscriptions to the stock of railroads is settled by former decisions in this State, as well as in other States, though the majority of this court would be disposed to deny the power, if it were