§ 460 (384). **Same subject.** — "The doctrine of *implied municipal liability*," says Mr. Chief Justice Field, in a case where the subject underwent very thorough examination, "applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it, — not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial.[1] If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation: the law, which always intends justice, implies a promise. In reference to *money* or *other property*, it is not difficult to determine in any particular case whether a liability with respect to the same has attached to the city. The money must have gone into her treasury, or been appropriated by her;[2] and when it is property other than money, it must have been used by her, or be under her control. But with reference to *services rendered*, the case is different. Their acceptance must be evidenced by ordinance [or express corporate action] to that effect. If not originally authorized, no liability can attach upon any ground of implied contract. The acceptance, upon which alone the obligation to pay could arise, would be wanting."

faith, under a misapprehension, they and the contractor, as well as the adjacent owner of real estate, believing the street to be within the corporate limits of the city, the contractor having like knowledge with the members of the council, they cannot be held liable for the cost of such improvement, though the place where the same is made is not within the corporate limits. Newman *v.* Sylvester, 42 Ind. 106 (1873).

It is the general doctrine that corporations possess the powers expressly conferred by law, and such implied powers as are necessary to enable them to exercise the powers expressly granted, and no others; yet, although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the charter of the corporation or any statute prohibiting it, and the corporation by its promise induced a party, relying upon such promise and in execution of the contract, to expend money and perform his part of the contract, the corporation is liable on the contract. The State Board of Agriculture *v.* The Citizens' Street Railway Co., 47 Ind. 407 (1874). See on this point and as to this case *supra*, sec. 457, note.

[1] See Dowell *v.* Portland, 13 Oreg. 248.

[2] The power of the *Massachusetts towns* to appropriate money is derived wholly from the statutes (*ante*, sec. 30), and when they are *confined to a particular mode of creating a debt, the mode is a limitation of the power*. One, therefore, who loans money to a town treasurer in a manner not authorized by statute has no right of action against the town to recover it, although the money was used in paying the debts of the town. Agawam Nat'l Bank *v.* South Hadley, 128 Mass. 503.

§ 461. **Same subject.** — "As a *general rule*, undoubtedly, a city corporation is *only liable upon express contracts*, authorized by ordinance [or other due corporate proceedings]. The *exceptions relate to liabilities* from the use of money or other property which does not belong to her, or to liabilities springing from the neglect of duties imposed by the charter, from which injuries to parties are produced. There are limitations even to these exceptions in many instances, as where property or money is received in disregard of positive prohibitions; as, for example, the city would not be liable for moneys received upon the issuance of bills of credit, — as this would be, in effect, to support a proceeding in direct contravention of the inhibition of the charter." [1] But it may in a proper case make a new contract purging a former contract of its illegality.[2] Nor is a city liable for money received for notes issued by it to circulate as money, in violation of an express statute and the public policy of the State.[3]

[1] *Per Field*, C. J., in Argenti *v.* San Francisco, 16 Cal. 255, 282 (1860). Where statute provisions enacted to prevent the making of certain contracts are disregarded and a contract made without observing them, the contractor cannot recover the value of articles supplied under the contract upon an implied liability; in such a case no liability can be implied. McDonald *v.* New York, 68 N. Y. 23; s. c. 23 Am. Rep. 144, commenting on Nelson *v.* New York, 63 N. Y. 535; and Argenti *v.* San Francisco, *supra*.

"The law," says an eminent judge, "never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Assumpsit may be maintained against a municipal corporation in certain cases upon an implied promise, but the better opinion is that a promise to pay can never be implied in a case where the corporation possesses no power to contract." *Per Clifford*, J., in Burrill *v.* Boston, 2 Clifford C. C. 590, 596 (1867). The subject is further expounded by the same learned justice in his opinion in The Collector *v.* Hubbard, 12 Wall. 1, 12 (1870). See, also, Curtis *v.* Fiedler, 2 Black (U. S.), 478; Murphy *v.* Louisville, 9 Bush (Ky.), 189 (1872).

See on subject of implied liability, the judgment of the United States Supreme Court in City of Louisiana *v.* Wood, 102 U. S. 294; see secs. 459 and 938, where the subject is further considered; and see Litchfield *v.* Ballou, 114 U. S. 190. Morawetz on Corp. (2d ed.) secs. 689-706, 714-724, collects and reviews the authorities as to the rights and obligations arising out of the performance or part performance of contracts in excess of corporate power.

[2] Little Rock *v.* Merch. Nat. Bank, 98 U. S. 308, quoted *supra*, sec. 448, note.

[3] Thomas *v.* Richmond, 12 Wall. 349 (1870). The principles upon which the decision rests are admirably stated in the opinion of Mr. Justice *Bradley*. Cheeney *v.* Brookfield, 60 Mo. 53 (1875), citing text; State Board *v.* Aberdeen, 56 Miss. 518 (approving text); Brown *v.* Belleville, 30 Upper Can. Q. B. 373; Wentworth *v.* Hamilton, 34 Upper Can. Q. B. 585; Brown *v.* Lindsey, 35 Upper Can. Q. B. 509; Parsons *v.* Monmouth, 70 Me. 262 (1879), approving text. *Supra*, sec. 448; *post*, sec. 938.

In Cheeney *v.* Brookfield, 60 Mo. 53 (1875), it was held that a municipal corporation is not liable upon a warrant issued to a bank-note company in payment of a debt to the company for engraving and printing on bank-note paper notes payable to bearer, to be put into circulation by the corporation as money without authority of law. The court held that there could be no implied assumpsit in such a

§ 462. **Contracts; Ultra Vires; Assumpsit.** — Where a city, without authority of law, issued its bonds in exchange for the bonds of a railroad company, which remain wholly unpaid, the city is not liable on its bonds. If in such case value has been received by the city, the remedy, if any exists under the special circumstances, must be for the money or property received without consideration.[1]

case, and distinguished it from Allegheny City *v.* McClurkan, 14 Pa. St. 81, and denied Underwood *v.* Newport Lyceum, 5 B. Mon. (Ky.) 130.

Illustrations of implied liability. — City is liable for gas furnished to it with knowledge of the council, though no ordinance or resolution was passed authorizing it to be furnished. Gas Co. *v.* San Francisco, 9 Cal. 453, 466 (1858), opinion of *Field*, J. If a city sells its *void* bonds, there is an implied assumpsit to repay the purchase-money. Paul *v.* Kenosha, 22 Wis. 266 (1867). See and compare Litchfield *v.* Ballou, 114 U. S. 190. Assumpsit held to lie against a city which had availed itself of the property and services of an individual in the care of the indigent sick. Nashville *v.* Toney, 10 Lea, 643. Where a bridge corporation was requested by the city authorities to communicate to them the terms upon which the city might attach its water-pipes to the bridge, to carry the water from one side of the river to the other, which the bridge company answered, fixing a sum, upon which the city council took no action, but proceeded to extend the water-works and used the bridge, the court held the city was liable. Bridge Co. *v.* Frankfort, 18 B. Mon. (Ky.) 41 (1857). Broom Commentaries on Com. Law, 567, where the English cases are cited in which corporations have been held *liable by reason of enjoying the benefits* resulting from particular contracts. See McDonald *v.* New York, 68 N. Y. 23 (1876); s. c. 23 Am. Rep. 144, *Folger*, J., suggests instances of implied liability; *post*, secs. 938, 939.

Chief Justice Harrison, in his excellent "Municipal Manual for Upper Canada," has digested the decisions in the Province on the subject of the power of corporations to contract. He says (5th ed. p. 11), "It is a principle applicable to all corporations that they must contract under seal. To this principle there are some exceptions. Albert Cheese Co. *v.* Leeming, 31 U. C. C. P. 272. One of some moment has been created with regard to municipal corporations. It is that such a corporation is liable to be sued in an action of debt on simple contract for the price of goods furnished, or labor done at their request and accepted by them. Fetterly *v.* The Municipality of Russell and Cambridge, 14 Upper Can. Q. B. 433. Though in such a case there be no contract under seal, the law implies an undertaking by a corporation to pay for labor and materials employed in their service, and of which they have accepted and are enjoying the benefit, provided the purpose for which the labor and materials have been applied is one clearly within the legitimate object of their charter. Bartlett *v.* The Municipality of Amherstburg, 14 Upper Can. Q. B. 152; Fetterly *v.* The Municipality of Russell and Cambridge, 14 Upper Can. Q. B. 433; Pim *v.* The Municipal Council of Ontario, 9 Upper Can. C. P. 302; Perry *v.* The Corporation of Ottawa, 23 Upper Can. Q. B. 391; Brown *v.* Belleville, 30 Upper Can. Q. B. 373; Wentworth *v.* Hamilton, 34 Upper Can. Q. B. 585; Brown *v.* Lindsay, 35 *Ib.* 509. The exception, however, does not extend to executory contracts, such as work, &c., *to be* done, but is confined to work in fact done and accepted. McLean *v.* The Town Council of the Town of Brantford, 16 Upper Can. Q. B. 347; Wingate *v.* The Enniskillen Oil Refining Co., 14 Upper Can. C. P. 379; Mayor, &c. *v.* Hardwick, L. R. 9 Exch. 13; Austin *v.* Guardians, &c., L. R. 9 C. P. 91; Houck *v.* Whitty, 14 Grant, 671."

[1] Thomas *v.* Port Hudson, 27 Mich. 320 (1873). In this case *Cooley*, J., observes: "A municipal corporation has no general authority to exchange promises with other corporations or persons; its contracts, to be valid, must be within the scope of the authority conferred upon it

§ 463 (385). **Ratification of Unauthorized Contract.** — A municipal corporation *may ratify* the unauthorized acts and contracts of its agents or officers, which are *within the scope of the corporate powers, but not otherwise.* Ratification may frequently be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals.[1] But a subsequent ratification cannot

by law, and for municipal purposes. And if, under pretence of law, its officers in its name obtain money, property, or rights in action which equitably belong to another, the fact may entitle the party to the proper remedy, but it cannot make good bonds issued in violation of law, unless it is to be held [which is not the law] that the power of municipal corporations to make legal promises is co-extensive with that of individuals, and that any contracts they may make are valid where it can be said that anything of value was given or inconvenience submitted to in exchange."

If the consideration received under an *ultra vires* contract can be restored, equity will not relieve a municipal corporation from the contract without providing for its restoration. Turner *v.* Cruzen, 70 Iowa, 202. See Litchfield *v.* Ballou, 114 U. S. 190, where bonds were issued by a city in excess of a constitutional limitation, and the holder was adjudged to have no remedy against the city. *Post*, sec. 529 *a*.

[1] People *v.* Swift, 31 Cal. 26 (1866); Blen *v.* Bear River Co., 20 Cal. 602 (1862); Peterson *v.* Mayor, 17 N. Y. 449, 453 (1858), and authorities cited, reversing s. c. 4 E. D. Smith, 413; San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453; Hoyt *v.* Thompson, 19 N. Y. 207, 218 (1859); Clarke *v.* Lyon Co., 8 Nev. 181 (1873); Howe *v.* Keeler, 27 Conn. 538; Emerson *v.* Newberry, 13 Pick. (Mass.) 377; Hodges *v.* Buffalo, 2 Denio (N. Y.), 110 (1846); 5 Denio (N. Y.) 567; People *v.* Flagg, 17 N. Y. 584; s. c. 16 How. (N. Y.) Pr. 36; Brady *v.* Mayor, &c. of New York, 20 N. Y. 312; affirming s. c. 2 Bosw. 173; Delafield *v.* State of Illinois, 2 Hill (N. Y.), 159, 176 (1841); s. c. 8 Paige, 531, and 26 Wend. 192; Mills *v.* Gleason, 11 Wis. 470 (1860); s. c. 8 Am. Law Reg. 693; Dubuque Fem. College *v.* Dubuque, 13 Iowa, 555; Merrick *v.* Plank Road Co., 11 Iowa, 74, *per Wright*, J.; Detroit *v.* Jackson, 1 Doug. (Mich.) 106; Crawshaw *v.* Roxbury, 7 Gray (Mass.), 374; Burrill *v.* Boston, 2 Clifford C. C. 590 (1867); Albany National Bank *v.* Albany, 92 N. Y. 363; City *v.* Hays, 93 Pa. St. 72; Galveston *v.* Morton, 53 Tex. 409; Strong *v.* District of Columbia, 1 Mackey, 265; Town of Durango *v.* Pennington, 8 Col. 257; Town of Bruce *v.* Dickey, 116 Ill. 527; Morris County *v.* Hinchman, 31 Kan. 729; Lincoln *v.* Stockton, 75 Me. 141; Davis *v.* Mayor of Jackson, 61 Mich. 530; Schmidt *v.* County of Stearns, 34 Minn. 112; Kinsley *v.* Norris, 60 N. H. 131 (a vote authorizing an attorney to compromise or settle suits held a ratification of authority to commence them); Moore *v.* Albany, 98 N. Y. 396; Lewis *v.* Shreveport, 108 U. S. 282 (a city cannot ratify a subscription to a railroad, which it had no power to make, unless authorized to do so by statute). *Mere silence* on the part of a town will not create a ratification. Otis *v.* Stockton, 76 Me. 506; *post*, sec. 779, note.

A municipal corporation may *ratify unauthorized expenditures*, not *ultra vires*, which they deem beneficial to it, and such ratification, as in the case of natural persons, is equivalent to previous authority. Backman *v.* Charlestown, 42 N. H. 125; Harris *v.* Canaan School District, 8 Fost. (28 N. H.) 65; Wilson *v.* Chester School District, 32 N. H. 118; Keyser *v.* Sunapee Charitable School District, 35 N. H. 477; Episcopal Society *v.* Dedham Episcopal Church, 1 Pick. (Mass.) 372; Bank of Columbia *v.* Patterson, 7 Cranch, 299; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60; Trott *v.* Warren, 2 Fairf. (11 Me.) 227; Topsham *v.* Rogers, 42 Vt. 199; People *v.* Swift, 31 Cal. 26. In DeGrave *v.* Mon-

make valid an unlawful act without the scope of corporate authority. An absolute excess of authority by the officers of a corporation, in violation of law, cannot be upheld; and where the officers of such a body fail to pursue the requirements of a statutory enactment under which they are acting, the corporation is not bound. In such cases the statute must be strictly followed; and a person who deals with a municipal body is obliged to see that its charter has been fully complied with: when this is not done, no subsequent act of the corporation can make an *ultra vires* contract effective.[1] The employment, however, by a municipal council, of an attorney to defend a policeman charged with an assault, does not adopt his act so as to render the city liable for the damages recovered against him.[2]

§ 464 (386). **Assent and Ratification.** — Where work done for a corporation without complete legal authorization is for a corporate purpose and is beneficial to it, and the price reasonable, strong *evidence of the assent* of the corporation is not required; *but such assent must be shown.* Ratification of the acts of a committee in building upon the land of a school district a more expensive house than they were authorized to do by the vote of the corporation cannot be inferred from the mere fact that the school is kept in it for a few weeks, there being no evidence that the corporation had knowledge of the over-expenditure, or had taken any action on the subject.[3]

mouth, 19 Eng. C. L. 300, it was held that the examination of weights and measures, which had been ordered by a mayor *de facto*, and which were the subject of the controverted contract, at a meeting of the corporation, and the subsequent use of some of them, recognized the contract for their purchase and made the corporation liable to pay for them. As to ratification of contracts for local improvements when not primarily a charge on the city, see Murphy *v.* Louisville, 9 Bush (Ky.), 189 (1872); *post*, sec. 481, note; *infra*, secs. 465, 813; 4 Broom Commentaries on Com. Law, 567. A vote ratifying an unauthorized contract cannot be rescinded at a subsequent meeting. Brown *v.* Winterport, 79 Me. 305.

[1] Sault Ste. Marie Co. *v.* Van Dusan, 40 Mich. 429; Jefferson Co. *v.* Arrighi, 54 Miss. 668; Nash *v.* St. Paul, 11 Minn. 174; Hague *v.* Philadelphia, 48 Pa. St. 528; Brady *v.* Mayor, 20 N. Y. 312; Bryan *v.* Page, 51 Tex. 332; Peterson *v.* Mayor, 17 N. Y. 449; Cowen *v.* West Troy, 43 Barb. (N. Y.) 48; Brown *v.* Mayor, 63 N. Y. 239; Hodges *v.* Buffalo, 2 Denio (N. Y.), 110; McDonald *v.* Mayor, 68 N. Y. 23; Smith *v.* Newburgh, 77 N. Y. 130; Green *v.* Cape May, 41 N. J. L. 45, approving text; Taymouth *v.* Koehler, 35 Mich. 22; Marsh *v.* Fulton Co., 10 Wall. 676; Horton *v.* Thompson, 71 N. Y. 513; McCracken *v.* San Francisco, 16 Cal. 591; Ashbury Railway Carriage & Iron Co. *v.* Riche, L. R. 7 E. & I. App. C. 653; Lewis *v.* Shreveport, 108 U. S. 282; Scott *v.* Shreveport, 20 Fed. Rep. 714; San Diego Water Co. *v.* San Diego, 59 Cal. 517; Bank *v.* Statesville, 84 N. C. 169; City of Laredo *v.* Macdonnell, 52 Tex. 511.

[2] Buttrick *v.* Lowell, 1 Allen (Mass.), 172 (1861); *post*, secs. 479, 975; Moore *v.* Mayor, 73 N. Y. 238, approving text; Bryan *v.* Page, 51 Tex. 352; Wilhelm *v.* Cedar Co., 50 Iowa, 254, approving text.

[3] Wilson *v.* School District, 32 N. H. 118 (1855). See, further, as to effect of *use as a ratification*, Kingman *v.* School District, 2 Cush. (Mass.) 425; Davis *v.* School District, 24 Me. 349; Lane *v.* School District, 10 Met. (Mass.) 462; Chaplin *v.* Hill, 24 Vt. (1 Dean) 628; Fisher *v.* School District, 4 Cush. (Mass.) 494; Taft *v.* Montague, 14 Mass. 285; Keyser *v.* School District, 35 N. H. 477; Pratt *v.* Swanton, 15 Vt. 147 (use of bridge by public).

In Wilson *v.* School District, above cited, Mr. Justice *Bell* well remarks: "In most cases where work and labor is performed upon real estate by contract, the *mere fact that the owner makes use* of the building or structure built upon his land furnishes no evidence of approval or acceptance, because he has no choice to reject it. Alone, the use of such buildings gives no evidence of acceptance. Accompanied by silence and absence of complaint, where to complain would be natural and suitable, or by any circumstance indicating acquiescence, it would be sufficient." 32 N. H. 125. As to *effect of acceptance of public work* by the agents of the town, see Wadleigh *v.* Sutton, 6 N. H. 15 (1832). Of school-house built upon a *quantum meruit* employment by a committee, but without a legal contract. Kimball *v.* School District, 28 Vt. 8 (1855). See, also, Corwin *v.* Wallace, 17 Iowa, 334; Zottman *v.* San Francisco, 20 Cal. 96 (valuable discussion); approved, Murphy *v.* Louisville, 9 Bush (Ky.), 189 (1872); Jordan *v.* School District, 38 Me. 164 (1854); Reichard *v.* Warren County, 31 Iowa, 381 (1871). Surveyor of highways cannot recover of the town for work voluntarily performed, there being no contract, not even if beneficial. Sikes *v.* Hatfield, 13 Gray (Mass.), 347 (1859); *infra*, sec. 466.

A public corporation is not liable for work done against, or even without, its direction or authority (such as building a bridge, road, school-house, &c.), although these are afterwards used by the public or the district. Loker *v.* Brookline, 13 Pick. (Mass.) 343 (1832); Knowlton *v.* Inhabitants, &c., 14 Me. (2 Shep.) 25, where note *critique* on, and remarks of *Mellen*, C. J., as to Hayden *v.* Madison, 7 Greenl. (Me.) 79; Morrell *v.* Dixfield, 30 Me. (16 Shep.) 157, 160; Davis *v.* School District, 24 Me. (10 Shep.) 349; Hayward *v.* School District, 2 Cush. (Mass.) 419 (1848); *Ib.* 426; Moor *v.* Cornville, 13 Me. 293 (1836) (where the action was brought by the surveyor or supervisor of highways, who built a bridge without pursuing the course pointed out by law); Allen *v.* Cooper, 22 Me. 133 (deciding that the power of a committee with authority to contract to make a road, does not embrace power to accept the work or waive performance). But if the work be done under belief of authority, as where it was performed under a contract with a committee who assumed to have authority, but who, in fact, had none, then if the corporation accept it, or even knowingly avail itself of it, it will be liable to pay a reasonable compensation; and a promise thus to pay may be implied on the part of a corporation from the acts of its general agent, or an agent with powers of a general character [?]. Abbot *v.* Herman, 7 Me. (Greenl.) 118; Hayden *v.* Madison, *Ib.* 79. "Perhaps these two cases carry the doctrine of the implied responsibility of corporations as far as it ought to be carried." *Per Emery*, J., in Ruby *v.* Abysin. Society, 15 Me. 306, 308 (1839). As to extent of powers of New England towns, see *ante*, secs. 29, 30. And see, particularly, Jordan *v.* School District, and other cases cited, *supra*; Baltimore *v.* Reynolds, 20 Md. 1 (1862); Hague *v.* Philadelphia, 48 Pa. St. 527; Moore *v.* Mayor, 73 N. Y. 238, approving text.

§ 465 (387). **Same subject.** — The *ratification*, whatever its form, must be by the *principal or by authorized agents.* This is well illustrated by a case where, by statute, certain agents or officers of a *State* were authorized to borrow money for public use, and for that purpose to sell its bonds at not less than their *par* value. They exceeded their power by selling for *less than par*, and *on credit.* It

was contended that this contract was *ratified*, because the governor, after he knew of the contract, signed the bonds and caused them to be delivered, and because the auditor and some of the other State officers acted under the contracts, drawing money and receiving payments. But it was held that these officials were likewise agents of limited authority; that, as they would have had no power to make the contracts originally, they could not ratify them; that ratification must come from the principal, — the State, represented by its legislature.[1]

[1] Delafield *v.* State of Illinois, 2 Hill (N. Y.), 159, 175, where difference between ratification by a *State* and by other corporations or by individuals is clearly set forth by *Bronson*, J.; affirming s. c. 8 Paige, 531; s. c. further, 26 Wend. 192. In further illustration of the text, see Hague *v.* Philadelphia, 48 Pa. St. 527; Hotchin *v.* Kent, 8 Mich. 526; Murphy *v.* Louisville, 9 Bush (Ky.), 189 (1872); Marsh *v.* Fulton County, 10 Wall. 676 (1870), (a leading case in the Supreme Court of the United States on the subject of ratification); Dubuque Fem. College *v.* Dubuque, 13 Iowa, 555; Estey *v.* Inhabitants of Westminster, 97 Mass. 324; Branham *v.* San Jose, 24 Cal. 585; Attorney-General *v.* Lathrop, 24 Mich. 235 (1872); Wilhelm *v.* Cedar County, 50 Iowa, 254. The case of the City [of St. Louis] *v.* Armstrong, 56 Mo. 298 (1874), is a strong instance in which the city was held to ratify the acts of its officers by availing itself of the benefit of their acts. The case was this: The city wished to build a sewer through the defendant's lot; it was necessary to condemn or get his consent; he consented on condition that he could have three years in which to pay his proportion of the cost of the sewer; the officers of the city, without any express authority, so agreed. The sewer was built, and before the three years expired the city sued the defendant for his portion of the cost of the sewer; and it was held that the suit was prematurely brought, and that the city, by using the defendant's land under the agreement of its officers, was bound by that agreement. What would have been the rights if the city had put the defendant *in statu quo*, by condemning the right of way, and tendering the amount before bringing suit for the cost of the sewer, was a question not involved, and not decided.

In applying the doctrine that *unauthorized corporate acts may be ratified*, other principles of law must be borne in mind. The care which, in this respect, should be observed, is very clearly set forth by *Denio*, J., in giving judgment in Peterson *v.* Mayor, &c. of New York, 17 N. Y. 449, 454 (1858). "For instance, no sort of ratification can make good an act without the scope of the corporate authority. So where the charter or a statute binding upon the corporation has committed a class of acts to particular officers or agents, other than the governing body, or where it has prescribed certain formalities as conditions to the performance of any description of corporate business, the proper functionaries must act, and the designated forms must be observed, and generally no act of recognition can supply a defect in these respects." Brady *v.* Mayor, &c., 20 N. Y. 312; Hodges *v.* Buffalo, 2 Denio (N. Y.), 110; 17 N. Y. 584; Gates *v.* Hancock, 45 N. H. 528; Reilly *v.* Philadelphia, 60 Pa. St. 467; *supra*, secs. 463, 464; Wilhelm *v.* Cedar County, 50 Iowa 254.

Where the corporation can only act by *ordinance*, the ratification must be by ordinance. McCracken *v.* San Francisco, 16 Cal. 591 (1860); Pimental *v.* San Francisco, 21 Cal. 351; Cross *v.* Morristown, 18 N. J. Eq. 305 (1867); *ante*, chap. xii.

Legislature may, within constitutional limits, *ratify or authorize ratification.* Campbell *v.* Kenosha, 5 Wall. 194; Supervisors *v.* Schenck, *Ib.* 772; Keithsburg *v.* Frick, 34 Ill. 405; Mills *v.* Gleason, 11 Wis. 470; Winn *v.* Macon, 21 Ga. 275; Grogan *v.* San Francisco, 18 Cal. 590

§ 466 (388). **Letting to the Lowest Bidder.** — Where the charter or incorporating act requires the officers of the city to award *contracts to the lowest bidder*, a contract made in violation of its requirements is illegal; and in an action brought on such contract for the work, the city may plead its illegality in defence;[1] and neither the

(1861); Hasbrouck *v.* Milwaukee, 21 Wis. 217 (1866); Mills *v.* Charleton, 29 Wis. 400 (1872); s. c. 9 Am. Rep. 578 and note; *ante*, sec. 79; sec. 161, note. In Shawnee County *v.* Carter, 2 Kan. 115 (1863), the Supreme Court of *Kansas* held invalid, as not being within the rightful scope of legislative power, an act of the legislature which declared valid and binding *bonds* which had been issued by the county officers on account of the county court-house, and which *bonds* were not enforceable against the county because differing in form and substance from the warrants authorized by the statute. Such a strict limitation on legislative power is not generally asserted. See, on this point chap. iv. *ante*, and *post*, sec. 544.

[1] Brady *v.* Mayor, &c. of New York, 20 N. Y. (6 Smith) 312 (1859). It is intimated that it is not essential to the defence that the city should show a fraudulent collusion between the bidder and the officers awarding the contract. Whether the city is liable on a *quantum meruit* to one who has *bona fide* performed labor under a void contract, where the work has been accepted and used, was not determined. *Ib.;* s. c. 2 Bosw. 173; 7 Abb. Pr. R. 234; 16 Abb. Pr. R. 432. As further illustrating the text, see People *v.* Flagg, 17 N. Y. 584; Peterson *v.* Mayor, &c., 17 N. Y. 457, referring to but expressing no opinion upon Christopher *v.* Mayor, &c., 13 Barb. (N. Y.) 567; Appleby *v.* Mayor, &c., 15 How. (N. Y.) Pr. 428; Harlem Gas Co. *v.* Mayor, &c. of New York, 33 N. Y. 389; Macey *v.* Titcombe, 19 Ind. 135 (1862); Bonesteel *v.* Mayor, &c., 22 N. Y. 162; Smith *v.* Mayor, &c., 21 How. (N. Y.) Pr. 1; Greene *v.* Mayor, 60 N. Y. 303 (1875); reversing s. c. 1 Hun, 29; Yarnold *v.* Lawrence, 15 Kan. 126 (1875); Dickinson *v.* Poughkeepsie, 75 N. Y. 65, citing text; Eager, *In re*, 46 N. Y. 100; Nash *v.* St. Paul, 8 Minn. 172 (1863); s. c. 11 Minn. 174; White *v.* New Orleans, 15 La. An. 667; State *v.* Barlow, 48 Mo. 17 (1871); *post*, sec. 832, note; Breevort *v.* Detroit, 24 Mich. 322 (1872); May *v.* Detroit, 2 Mich. N. P. Rep. 235 (1871); Shaw *v.* Trenton, 49 N. J. Law, 339; State *v.* Trenton (N. J.), 12 At. Rep. 902 (1888); Trenton *v.* Shaw (N. J.), 10 At. Rep. 273 (1887); Davenport *v.* Kleinschmidt (contract to take water), Mont., 13 Pac. Rep. 249. There can be no recovery against a municipal corporation for *extra work* where the officers who requested it to be done had no authority. Hague *v.* Philadelphia, 48 Pa. St. 527; O'Hara *v.* New Orleans, 30 La. An. 152; Addis *v.* Pittsburg, 85 Pa. St. 379 (1877); Bonesteel *v.* Mayor, &c. of New York, 22 N. Y. 162. Thus a contract by S. to erect a building for a city stipulated that the work should be done according to certain plans and specifications; that a certain committee, or the architect, might direct in writing any deviations therefrom, in which case such sums of money should be added to or deducted from the agreed price as the parties should judge the increase or diminution to be worth, and that no alterations should be paid for unless directed in writing. In excavating, the soil was found by the architect to require piles to be driven to secure a firm foundation; whereupon he furnished piling plans, directed S. to do the work, and orally promised him that he should be paid for it. *Held*, that the city was not bound by the architect's oral promise. Stuart *v.* Cambridge, 125 Mass. 102.

If the lowest bidder is required to *give security* and the law *requires public notice of proposals*, any contract without a compliance with the law is unauthorized and void. Dickinson *v.* Poughkeepsie, 74 N. Y. 65; Eager, *In re*, 46 N. Y. 100; Maxwell *v.* Stanislaus, 53 Cal. 389.

A provision that the "commissioners shall in no case proceed with the construction of any sewer except upon advertisement" to be let to the lowest bidder, applies only to a contract for original con-

municipality nor its subordinate officers can make a binding contract for such work except in compliance with the requirements of the law.[1] So where the charter requires any sale or lease of the real estate of a city *to be made at public auction to the highest bidder*, an ordinance of the council of the city making a lease of a portion of its realty, upon the payment of a rent reserved, is void.[2]

§ 467 (389). **Lowest Bidder; Patented Inventions.** — The Supreme Court of Michigan has affirmed, while the Supreme Court of Wisconsin and of other States have denied, the proposition that where a city charter provides that no contracts shall be made by the city except with the *lowest bidder*, after advertisement of proposals, it does not prohibit the corporation from contracting to lay *Nicholson pavement*, though the right to lay it is patented and owned by a

struction. If the original contractor abandons the work, it is not necessary to re-advertise and let to the lowest bidder, the original contractor being liable for the excess of cost over his contract price. Leeds, *In re*, 53 N. Y. 400 (1873).

Where contracts for public work are required by law to be made *by advertising proposals* and specifications, for the purpose of securing competitive bidding, such specifications must be definite as to the quantity as well as the quality of materials required, or the contract will be void. Bigler *v.* New York, 5 Abb. (N. Y.) N. Cas. 51.

Construction of New York Act of 1886, chap. 142, requiring sale at auction by municipal corporations of right to build and operate railways on streets to the highest bidder. See People *v.* Barnard, 110 N. Y. 548 (1888).

A bid for street-paving is not defective in not distinguishing between the portions of the improvement chargeable to the lots fronting on the street, and the portion chargeable to the city, where the relative proportions have already been fixed. Beniteau *v.* Detroit, 41 Mich. 116. Remedy of taxpayer. Follmer *v.* Nuckolls Co., 6 Neb. 204; compare Clark *v.* Dayton, *ib.* 192. Whether, when the work is of such a character that its ultimate cost cannot be foreseen, there can be any choice among bids, *quære*. McBrian *v.* Grand Rapids, 56 Mich. 95.

The New York city charter of 1873, containing a provision similar to that stated in the text, was construed to require a submission for competition of every important item of a contemplated work. Matter of Merriam, 84 N. Y. 596. Where the charter is imperative that contracts for public works should be let to the lowest bidder and the lowest bidder withdraws his bid, it is the duty to advertise again and not to award the contract to the next lowest bidder. Twiss *v.* Port Huron, 63 Mich. 528 (1886); s. c. 30 N. W. Rep. 177.

[1] Addis *v.* Pittsburg, 85 Pa. St. 379 (1877).

[2] San Francisco & Oakland R. Co. *v.* Oakland, 43 Cal. 502 (1872).

Where the charter requires that all work for the city shall be let to the lowest bidder, after a prescribed notice of the time and place of letting shall have been given, and requires that similar notice shall be given where work is re-let, an assessment upon a lot for work done is void if the contract was let or re-let without notice. Mitchell *v.* Milwaukee, 18 Wis. 92 (1864); see, also, Wells *v.* Burnham, 20 Wis. 112; Hasbrouck *v.* Milwaukee, 21 Wis. 217 (1866). Owner may, in such case, restrain the sale. *Ib.* The contract must be the same that was advertised. Nash *v.* St. Paul, 11 Minn. 174.

single firm. The question is close; but there seems, so far, to be a tendency in the courts to adopt the Wisconsin view.[1]

§ 468 (390). **Same subject.** — Where the municipal authorities were required by law *to advertise for sealed proposals* for making local improvements, and award the work to the *lowest responsible bidder*, to publish a notice of the award, and to allow the owners of the major part of the frontage to take the contract upon the same terms if they should desire, the court were of opinion that the city authorities had no power to do work which could not be contracted for in this mode, or which the abutters could not themselves perform, and that the award of a contract for *a patented pavement* to the assignee of the patentee, who had the exclusive right to lay the same, was unauthorized, and the contract void.[2]

As the purpose of such a provision in the charter is to secure, through competition, the most advantageous terms, something is necessarily left to the discretion, to be fairly exercised of course, of

[1] Dean *v.* Charlton, 23 Wis. 590 (1869); Nicholson Pavement Co. *v.* Painter, 35 Cal. 699; Hobart *v.* Detroit, 17 Mich. 246 (1868). Dean *v.* Charlton, *supra*, was approved by *Sutherland*, J., in Dolan *v.* Mayor, &c. of New York, 4 Abb. Pr. (N. S.) 397 (1868), and followed by the Supreme Court of *Louisiana* in Burgess *v.* Jefferson, 21 La. An. 143 (1869), in which it appeared that the contractors with the city had the exclusive right to lay the patented pavement in the State. But under provisions of law relating to the city of New York, which require all work to be done and supplies to be furnished to be by contract, where the expenditure will exceed $1,000, and which direct all contracts to be made or let, after advertisement, to the lowest bidder, the city council is not, in the opinion of the Court of Appeals, prohibited from making or paving a street in the manner or with materials which do not admit of competitive bids. Dugro, *In re*, 50 N. Y. 513 (1873). The subject is discussed by *Brewer*, J., in Yarnold *v.* Lawrence, 15 Kan. 126 (1875), who inclined to the *Michigan* view, but the question was not decided by the court. Further, as to rights of lowest bidders, see Attorney-General *v.* Detroit, 41 Mich. 224; s. c. 12 Am. Law Reg. (N. S.) 149; see also Detroit *v.* Robinson, 42 Mich. 198; Detroit *v.* Robinson, 38 Mich. 108; *post*, secs. 468, 870, note, 909, 791, note. Sequel to Dean *v.* Charlton, *supra*, see Mills *v.* Charleston, 29 Wis. 400, and Dean *v.* Borchenius, 30 Wis. 236, the legislature having validated the assessment. *Post*, sec. 814 and note. See, also, Eager, *In re*, 46 N. Y. 100 (1871). Liability of city to patentee to pay him "royalty." Bigelow *v.* Louisville, 3 Fish. Pat. Cas. 602 (1869); *post*, sec. 966. Where a charter does not require a contract to be let to the lowest bidder after advertising for proposals at the expense of abutters, although such contracts may be made by private agreement with the city, they must be fairly made at reasonable prices, with due regard to the lot-owners' interests, or equity will relieve against them. Cook *v.* Racine, 49 Wis. 243; s. c. 5 N. W. Rep. 352.

[2] Nicholson Pavement Company *v.* Painter, 35 Cal. 699 (1868). This case was decided before Dean *v.* Charlton, *supra*, and the opinion of *Sanderson*, J., in its general scope, sustains the view of the *Wisconsin* court; and approving of the language of *Field*, C. J., in Zottman's Case, 20 Cal. 102, treats "the *mode* as constituting the measure of the power." *Post*, chap. xix.; *ante*, sec. 98; *post*, sec. 669.