A TREATISE

ON THE

LAW OF MUNICIPAL CORPORATIONS.

CHAPTER XV.

CORPORATE PROPERTY.

§ 556 (427). **Corporate Capacity in the Roman Law.** — We have next to consider the *powers of municipal corporations in respect of taking, holding, and alienating property.*[1] The *history of the capacity* of such corporations to acquire and hold property is so clearly given by Mr. Justice Campbell, in his learned judgment in the great McDonough Will Case,[2] in the Supreme Court of the United States, that it fittingly serves as an introduction to the more special discussion and treatment of the subject. "The Roman jurisprudence," he observes, "seems originally to have denied to cities a capacity to inherit, or even to take by donation or legacy. They were treated as composed of uncertain persons, who could not perform the acts of volition and personalty involved in the acceptance of a succession. The disability was removed by the Emperor Adrian in regard to donations and legacies, and soon legacies *ad ornatum civitatis* and *ad honorem civitatis* became frequent. Legacies for the relief of the poor, aged, and helpless, and for the education of children, were ranked of the latter class. This capacity was en-

[1] The extent of *legislative authority* over the *property* of municipal and public corporations has been considered in a previous chapter (chap. iv.). The *liabilities* of such corporations in respect of property owned by them is treated of in a subsequent chapter. Chap. xxiii. sec. 985 *et seq.*

[2] McDonough Will Case, 15 How. 367, 403 (1853). The nature of Mr. McDonough's will, in favor of the cities of New Orleans and Baltimore, will be found stated further on in this chapter. Sec. 569.

larged by the Christian emperors, and after the time of Justinian there was no impediment. Donations for charitable uses were then favored; and this favorable legislation was diffused over Europe by the canon law, so that it became the common law of Christendom."[1]

§ 557 (428). **Subsequent Modification in Europe; Statutes of Mortmain.** — "When the power of the clergy began to arouse the jealousy of the temporal authority, and it became a policy to check their influence and wealth, — they being, for the most part, the managers of the property thus appropriated, — limitations upon the capacity of donors to make such gifts were first imposed. These commenced in England in the time of Henry III.; but the learned authors of the history of the corporations of that realm affirm that *cities were not included in them*, 'perhaps upon the ground that the grants were for the public good;' and although 'the same effect was produced by the grant in perpetuity to the inhabitants, . . . the same practical inconvenience did not arise from it, nor was it at the time considered a mortmain.[2] . . . A century later there was a *direct inhibition upon grants to cities, boroughs, and others, which have perpetual commonalty*,' and others, 'which have offices perpetual,' and therefore 'be as perpetual as people of religion.' The English statutes of mortmain forfeit to the king or superior lord the estates granted, which right is to be exerted by entry; a license, therefore, from the king severs the forfeiture. The legal history of the Continent on this subject does not materially vary from that of England. The same alternations of favor, encouragement, jealousy, restraint, and prohibition are discernible. The Code Napoléon, maintaining the spirit of the ordinances of the monarchy, in 1731, 1749, 1762, provides 'that donations, during life or by will, for the benefit of hospitals of the poor of a commune, or of establishments of public utility, shall not take effect, except so far as they shall be authorized by an ordinance of the government.' The learned Savigny, writing for Germany, says: 'Modern legislation, for reasons of policy or political economy, has restrained conveyances in mortmain, but those restrictions formed no part of the common law.' The laws of Spain contained no material change of the Roman and ecclesiastical laws upon this subject."

§ 558 (429). **These Restrictions not in Force in this Country.** — "This legislation of Europe was directed to check the wealth and

[1] See *ante*, secs. 3, 3 *a*, as to the property rights of municipal corporations in the Roman law, and as to the necessity of such corporations having the capacity to acquire, take, and hold property for the benefit of the incorporated community.

[2] Mereweth. & Steph. Hist. Corp. 489, 702.

influence of juridical persons who had existed for centuries there, some of whom had outlived the necessities which had led to their organization and endowment. Political reasons entered largely into the motives for this legislation, — reasons which never extended their influence to this continent, and consequently it has not been introduced into our systems of jurisprudence."[1]

§ 559 (430). **Result of Legislation in Europe.** — "The precise result of the legislation is that corporations there (in England, and Europe generally), with the capacity of acquiring property, must derive their capacity from the sovereign authority, and the practice is to limit that general capacity within narrow limits, or to subject each acquisition to the revisal of the sovereign."[2]

§ 560 (431). **Grants to Unincorporated Communities; Definite Grantee.** — It is a settled rule of the common law that a *grant*, to be valid, must be *to a corporation, or to some certain person* named, who can take, by force of the grant, and hold either in his own right or as trustee.[3] Therefore, a grant by an individual of a lot of land to "the people of" a specified county, not incorporated, is void.[4] So a *reservation* in a deed, in favor of the inhabitants of an unincorporated place, is invalid.[5] But a grant by the state or by

[1] 2 Kent. Com. 282, 283; Whicker *v.* Hume, 14 Beav. 509; see, also, Chambers *v.* St. Louis, 29 Mo. 543, 575, and remarks of *Scott*, J.

[2] *Per* Mr. Justice *Campbell*, McDonough Will Case, 15 How. 404–407.

[3] Co. Litt. 3 *a*; 10 Co. 26 *b*; Com. Dig. tit. *Capacity*, B. 1; Shep. Touch. 236. "It is a general rule, that corporations must take and grant by their corporate name." 2 Kent Com. 291. A corporation aggregate can have no predecessor, and in a writ of right can only count on its own seizin. A statute of 1772, in *Massachusetts*, provided that twelve persons should be chosen annually by the inhabitants of the town of Boston as overseers of the poor, and they were duly incorporated. In 1822 the town of Boston was changed to a city, the act providing for the election of a board of overseers for the city, "who shall have all the powers, and be subject to all the duties, now by law appertaining to the overseers of the poor for the town of Boston." It was decided, upon great consideration, — *Shaw*, C. J., delivering the opinion, — that this was a *continuance*, and not a *dissolution or suspension*, of the corporation of 1772 [see *ante*, chap. vii. on Dissolution of Corporations]; that the bodies were public corporations, aggregate and not sole, with perpetual succession; that a grant to them of real estate carried the fee, without being, to their successors; and that in a writ of right they can count only upon their own seizin within thirty years next before the commencement of the action. Boston Overseers of the Poor, *v.* Sears, 22 Pick. (Mass.) 122 (1839).

[4] Jackson *v.* Cory, 8 Johns. (N. Y.) 385 (1811); Jackson *v.* Hartwell, *Ib.* 422.

[5] Hornbeck *v.* Westbrook, 9 Johns. (N. Y.) 73 (1812). See reference to this case and Jackson *v.* Cory, 8 Johns. (N. Y.) 385, by *Savage*, C. J., in North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109, 133. Although a deed may not operate as a *grant*, because of a want of legal capacity in the grantee to take, yet if it contains a general covenant of warranty it may operate by way of *estoppel*. Terrett *v.* Taylor,

the *sovereign authority* having the right to create corporations, to one or more persons who are *named* as patentees, for themselves and the inhabitants of a designated town, is valid, because the grant itself, coming from this source, confers a capacity to take and hold the lands in a corporate character.[1]

§ 561. **Corporate Property; Capacity in this Country.** — At *common law*, prior to and aside from the Statutes of Mortmain, corporations, it is laid down, might, in the absence of special restraints, take, hold, and alien lands *for any purposes not inconsistent with those for which they were created.*[2] Such is not and cannot be, we think, the rule in this country. Here all corporations are created by the legislature. They have such powers only as the legislature expressly confers, and such as are necessarily or fairly incident to the express powers, which would include such as are absolutely essential to the declared objects of the corporation.[3] The same doctrine applies to and measures the corporate capacity in respect of property. The principles, therefore, which apply to the capacity of a corporation in this country in respect of acquiring and holding property seem to the author to be plain. In the absence of express prohibitory statutes, or of statutes which in terms confer and limit, and therefore define and measure, the power, the capacity to acquire and hold property, real or personal, must be fairly incidental to some power expressly granted or absolutely indispensable to the declared purposes of the corporation. Any greater right than this is not only not granted, but is impliedly denied. The sound and true doctrines on this subject in this country are, it is believed, those that are laid down in this and in the three succeeding sections.

9 Cranch (U. S.), 43, 52, 53; Mason *v.* Muncaster, 9 Wheat. 445. As to grants and devises for charitable purposes, see *infra*, sec. 567, *et seq.*

[1] North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109, 133 (1828); and see also, Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320; People *v.* Schermerhorn, 19 Barb. 540, 555; Goodell *v.* Jackson, 20 Johns. (N. Y.) 706; Jackson *v.* Leroy, 5 Cow. (N. Y.) 397; Bow *v.* Allentown, 34 N. H. 351, 372. The right of a municipal corporation to its grants of property is not destroyed by a change of its name and an enlargement of its territory and a reconstruction of its powers. Girard *v.* Philadelphia, 7 Wall. 1; *ante*, sec. 85; chap. vii. secs. 171–173. Effect of *absolute repeal of municipal charter*, and of declaring the municipal corporation to be dissolved, upon its property rights and upon the rights and remedies of creditors. See *ante*, chap. vii. Property may be granted to a municipal corporation *upon condition*, and upon its failure to comply with the condition, the title will revert to the grantor, as in case of a similar grant to an individual. Clark *v.* Brookfield, 81 Mo. 503.

[2] 1 Wash. Real Prop. (4th ed.) 50, pl. 26; Sutton *v.* Cole, 3 Mass. 239; 1 Blacks. Com. 475, 478; 1 Kyd, 108.

[3] *Ante*, secs. 89–92, and cases there cited. For the public policy which underlies the principles of construction stated in the text, as applied to corporations taking and holding lands, see Thompson *v.* Waters, 25 Mich. 214.

§ 562 (432). **Same subject.** — The *English statutes of mortmain* are not in force in this country, unless by virtue of express legislation to that effect;[1] and consequently a municipal corporation has the *common law*, or more accurately, perhaps, *the implied power*, unless restrained by charter or statute, to purchase and hold all such real estate as may be reasonably or fairly necessary to the proper exercise of any power specifically granted, or essential to those purposes of municipal government for which it was created.[2] This power may be, and indeed often is, conferred in terms; but it may result, in the absence of express provision, as a reasonable or necessary incident to powers specifically granted. To illustrate the last proposition: Power is given to a city to "establish markets," that is, public places for the sale of commodities. To establish such place, ground is necessary. A market-house on the public streets, or on the public square, would be a nuisance. It could not be erected or established upon private property without consent or grant. Thus, by this course of reasoning, the result is reached that power "to establish a market" reasonably, if not necessarily, implies or carries with it the power to acquire by lease or purchase the requisite site. Such an authority could not probably be deduced from the words "*to regulate* markets," because the words "to regulate" "naturally, if not necessarily, presuppose the existence of the thing to be regulated."[3]

[1] Perin *v.* Carey (charitable devise to Cincinnati), 24 How. 465 (1860); Davidson College *v.* Chambers's Executors, 3 Jones Eq. (N. C.) 253 (1857); 2 Kent Com. 282, 283; Chambers *v.* St. Louis, 29 Mo. 543, 575, *per Scott*, J.; Washb. Real Property (4th ed.), 76; Downing *v.* Marshall, 23 N. Y. 392; Page *v.* Heineberg, 40 Vt. 81. The English statutes of mortmain have never been in force in *Wisconsin*. Dodge *v.* Williams, 46 Wis. 70; Gould *v.* Taylor Orphan Asylum, *Ib.* 106. They do not extend to *Massachusetts*. Jackson *v.* Phillips, 14 Allen, 591.

[2] Ketchum *v.* Buffalo, 14 N. Y. 356, 360 (1856), *per Selden*, J.; Rensselaer, &c. R. R. Co. *v.* Davis, 43 N. Y. 137; 2 Kent Com. 281; Co. Litt. 44 *a*, 300 *b*; 1 Kyd on Corp. 76, 78, 108, 115; State *v.* Mansfield Comm'rs, 23 N. J. L. 510; Nicoll *v.* N. Y. & E. R. R. Co., 12 N. Y. (2 Kern.) 121, 127; McCartee *v.* Orphan Soc. of N. Y., 9 Cow. 437; Peru Iron Co., *In re*, 7 Cow. 540, 552; Reynolds' Heirs *v.* Stark County Comm'rs, &c., 5 Ohio, 204 (1831); Perin *v.* Carey, *supra*; State *v.* Brown, 27 N. J. L. 13; Davidson College *v.* Chambers's Executors (full discussion), 3 Jones Eq. (N. C.) 253; Page *v.* Heineberg, 40 Vt. 81; State *v.* Madison, 7 Wis. 688; Louisville *v.* Commonwealth, 1 Duvall (Ky.), 295; Leeds *v.* Richmond, 102 Ind. 372. Implied or express restrictions on the right to take and hold real estate are not, in this country, construed in a spirit of hostility and jealousy. *Per Scott*, J., in Chambers *v.* St. Louis, 29 Mo. 543, 573, 576; Pacific R. R. Co. *v.* Seely, 45 Mo. 212; Coleman *v.* San Rafael Turnpike Co., 49 Cal. 517. In *Nebraska*, see Root *v.* Shields, Woolw. C. C. 340.

[3] Ketchum *v.* Buffalo, 14 N. Y. 356 (1856). See, also, Peterson *v.* Mayor, &c., of New York, 17 N. Y. 449, reversing s. c. 4 E. D. Smith, 413 (1858); Le Couteulx *v.* Buffalo, 33 N. Y. 333 (1865). An act of the legislature of *California* authorized a municipal corporation *to enter into a contract* to supply water to a city,

§ 563 (433). **Same subject.** — *The charter or other legislative act is the source of power* in respect to the property rights of the corporation. If the charter be silent, the implied power exists, at least to the extent just stated, to acquire, hold, and alienate or dispose of property. But it is not unusual for the charter to grant the power and to fix its limits. Where this is done, the terms and purpose of the grant determine the nature, extent, and limitations of the power, the charter being construed, of course, in the light of the general legislation of the State. And general authority to purchase and hold property should, doubtless, be construed to mean for purposes authorized by the charter, and not for speculation or profit.[1]

also machinery and pipes; this was held not to authorize the municipal authorities to purchase a site upon which to erect the water-works. People *v.* McClintock, 45 Cal. 11 (1872).

[1] Bank of Michigan *v.* Niles, 1 Doug. (Mich.) 401; Davidson College *v.* Chambers's Executors, 3 Jones Eq. (N. C.) 253 (1857); State Bank *v.* Brackenridge, 7 Blackf. (Ind.) 395 (1845); *ante*, chaps. v., vi., xii., xiv. With reference to the *power of corporations to take and hold real estate*, they have been classified in an opinion in the Supreme Court of *Indiana* as follows: *First.* Those whose charters, or laws of creation, forbid that they should acquire or hold real estate. Such corporations cannot take and hold real estate, and a deed or devise to such a corporation can pass no title. *Second.* Those whose charters, or laws of creation, are silent as to whether they may or may not acquire or hold real estate. In such a case, if the objects for which the corporation is formed cannot be accomplished without acquiring and holding real estate, the power so to do will be implied. *Third.* Those whose charters, or laws of creation, authorize them, in some cases, and for some purposes, to take and hold the title to real estate. *Fourth.* Those whose charters, or laws of creation, confer upon them a general power to acquire and hold real estate. Corporations thus empowered may, it is said, take and hold real estate (for corporate purposes) as fully as natural persons. *Counties* are *quasi* corporations, and fall within the third class above mentioned, and in some cases, and for some purposes, are authorized to take and hold title to real estate. They are in this State expressly empowered to acquire and hold title to real estate for a location for county buildings and for a poor-farm, and there may be other instances. Hayward *et al. v.* Davidson *et al*, 41 Ind. 212 (1872).

A special provision in a charter, authorizing the corporation to take and hold real estate by purchase, was construed as meaning that it may do this, subject to the restrictions created by the general statutes of the State relating to this matter. McCartee *v.* Orphan Asylum Society, 9 Cow. (N. Y.) 437 (1827). Where power to purchase exists, the municipal corporation has the incidental power to secure the purchase-money by mortgage of the property purchased. Edey *v.* Shreveport, 26 La. An. 636 (1874). Charter and general law construed together, being *in pari materia*. Chambers *v.* St. Louis (Mullanphy Will Case), 29 Mo. 543; Jefferson City *v.* Curry, 71 Mo. 85. A city, owning the soil, may, like other owners, reclaim the *land between high and low water mark*, and when thus reclaimed a highway may be laid out upon it. Richardson *v.* Boston, 24 How. (U. S.) 188, and cases cited; *ante*, sec. 109. Rights to *alluvium* within corporate limits. Kennedy *v.* Municipality, 10 La. An. 54; Barrett *v.* New Orleans, 13 La. An. 105; *Ib.* 154; *Ib.* 349; Remy *v.* Municipality, 11 La. An. 148; Carrollton R. R. Co. *v.* Winthrop, 5 La. An. 36; Beaufort *v.* Duncan, 1 Jones (N. C.) Law, 234; Richardson *v.* Boston, 24 How. (U. S.) 188, and cases cited. *Rights of municipality as riparian proprietor to wharf out.* *Ante*, sec. 106; Dana *v.* Jackson St. Wharf Co., 31 Cal.

§ 564 (434). **Same subject.** — "The inference," says Chancellor Kent, "from the statutes creating corporations and authorizing them *to hold real estate to a certain limited extent* is, that our statute cor-

118; People *v.* Broadway Wharf Co., *Ib.* 33; San Francisco *v.* Calderwood, *Ib.* 585; Bell *v.* Gough, 23 N. J. L. 624; *ante*, secs. 106, 111.

A municipality owning land is *not estopped to claim title* to it because its officers, without authority, have *assessed the same for taxation* to a private person, returned the same as delinquent, and subsequently sold it at a tax sale. The reason is, that all these acts of its officers are unauthorized and void, and a purchaser at a tax sale is bound to take notice of the extent of their powers. St. Louis *v.* Gorman, 29 Mo. 593 (1860). Same principle. Rossire *v.* Boston, 4 Allen (Mass.), 57; McFarlane *v.* Kerr, 10 Bosw. (N. Y.) 249; Ellsworth *v.* Grand Rapids, 27 Mich. 250.

In *Iowa* the doctrine is laid down that a corporation, by levying a tax upon land as the plaintiff's, may be estopped afterwards to deny his title, in an action by him to restrain the collection of the tax. Brandruff *v.* Harrison County, 50 Iowa, 164. So where it permits one, under claim of right, to occupy and pay taxes levied by itself, it cannot deny his ownership. Simplot *v.* Dubuque, 49 Iowa, 630. This is on the ground of a recognition of another's title to the land. Am. Em. Co. *v.* Iowa R. R. L. Co., 52 Iowa, 325; Big. Estoppel (3d ed.), 577; Herman on Estoppel, chap. xix., where many of the cases are collected. *Estoppel by contract.* Calhoun County *v.* Am. Emigrant Co., 93 U. S. 124. In *Massachusetts* a town may acquire a private right of way as appurtenant to a public burial ground *by prescription*. Deerfield *v.* Connecticut River R. R. Co., 144 Mass. 325.

As to *adverse possession* against public corporation. Herman on Estoppel, *supra*; Turney *v.* Chamberlain, 15 Ill. 271; Alton *v.* Illinois Transportation Co., 12 Ill. 60; Burbank *v.* Fay, 65 N. Y. 57 (1875); Fort Smith *v.* McKibbin, 41 Ark. 45. *Post*, secs. 637, 667–673. In *California* no one can acquire by adverse possession, as against the public, the right to a street or square dedicated to public uses. San Leandro *v.* Le Breton, 72 Cal. 170, following Hoadley *v.* San Francisco, 50 Cal. 265, and People *v.* Pope, 53 Cal. 437. A municipal corporation *may acquire realty by adverse possession*, and may use it for other than municipal purposes. New Shoreham *v.* Ball, 14 R. I. 566; New York *v.* Carleton, 113 N. Y. 284 (1889); *post*, secs. 667–673.

Special powers construed. State *v.* Nashville Univ., 4 Humph. 157; State *v.* Madison, 7 Wis. 688; Beaver Dam *v.* Frings, 17 Wis. 398; Galloway *v.* London, Law Rep. 1 H. L. 34; Heyward *v.* Mayor, &c. of New York, 7 N. Y. 314; Lauenstein *v.* Fond du Lac, 28 Wis. 336 (1871). A deed of land to a town and its assigns, for value, expressed in the usual terms of a conveyance, and containing covenants, was construed *to grant a fee simple*, although the land was expressed to be for the use of a common, or "a meeting-house green." Beach *v.* Haynes, 12 Vt. 15 (1840); State *v.* Woodward, 23 Vt. 92 (1850). When conveyance to a corporation passes *a full title*, and not one in trust or conditional. Kerlin *v.* Campbell, 3 Harris (15 Pa. St.), 500; Wright *v.* Linn, 9 Barr (9 Pa. St.), 433; Holladay *v.* Frisbie, 15 Cal. 630. When a tract of land is granted for a *specific purpose*, as for a school-house, and a school-house is erected and a school maintained therein, the grant is not forfeited by the use of a portion of the land, not needed for the school, for other purposes, such as leasing it for cultivation, or for building an engine-house thereon, or the like. Castleton *v.* Langdon, 19 Vt. 210 (1847); *vide* Index, tit. *Dedication*. Under the power to purchase and hold property, a *city* and *county* may *own buildings as tenants in common*, to be used for their respective public purposes. De Witt *v.* San Francisco, 2 Cal. 289 (1852). See Bergen *v.* Clarkson, 1 Halst. (N. J.) 352; *ante*, sec. 140. Rights of *county and city* respecting *jail* built by the corporate authorities of the city. Felts *v.* Memphis, 2 Head (Tenn.), 650. See Callam *v.* Saginaw, 50 Mich. 7; noted *ante*, sec. 140, note.

porations cannot take and hold real estate for purposes foreign to their institution." [1] Not only so, but if the charter is silent on the subject, the further inference is, we think, that they can only take and hold such property as a means of carrying out or accomplishing the declared and specified purposes and objects of the corporation. In an important case in Louisiana it was decided that a purchase of real estate by the corporation defendant, for $247,000, payable in bonds at twenty-five years from date, for the purpose of platting and re-selling the same, and thereby improving the salubrity of the city, and promoting the convenience of citizens as to streets, was legal.[2] If the court was right in holding that the charter and laws authorized the purchase of real estate without restriction, — which we strongly doubt, — the case shows the wisdom of the usual limitations in charters disabling such corporations from acquiring, by purchase, real estate for other than corporate purposes.

§ 565 (435). **Real Estate beyond Corporate Limits.** — Municipal corporations being created chiefly as governmental agencies, and for the attainment of local objects merely, the general rule is that they *cannot purchase and hold real estate beyond their territorial limits,* unless the power is conferred by the legislature.[3] It has been expressly decided that a conveyance to a municipal corporation of lands *beyond its boundaries, for the purpose of a street,* is void, though the corporation has by its charter power "to purchase, hold, and convey any real property for the public use of the corporation." [4] The author is, however, inclined to think that there are purposes for which such a corporation may, without special grant, purchase and hold extra-territorial lands, as for a pest-house, cemetery, and the like objects of a municipal character.[5]

[1] 1 Kent Com. 283; Champaign *v.* Harmon, 98 Ill. 491; 1 Wash. Real Prop. (4th ed.) p. 76, pl. 28.

[2] Municipality *v.* McDonough, 2 Rob. (La.) 244 (1842).

[3] Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320; North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 131; Hopk. 594; Riley *v.* Rochester, 9 N. Y. (5 Seld.) 64 (1853), reversing s. c. 13 Barb. 321; Girard *v.* New Orleans, 2 La. An. 897; Chambers *v.* St. Louis, 29 Mo. 543 (1850); Bullock *v.* Curry, 2 Met. (Ky.) 171; Concord *v.* Boscawen, 17 N. H. 465; Thompson *v.* Moran, 44 Mich. 602, where *Cooley*, J., said that a city would hold land *without its limits for a park*, "not in its public capacity as an agency of the government, and subject to the unrestricted control of the State, but as a corporate individual, having private rights of its own, which it is at liberty to enjoy undisturbed by the State, and in the enjoyment of which the Constitution will protect its people." *Ante*, secs. 68, 68 *a*, 69, 73; *post*, sec. 598.

[4] Riley *v.* Rochester, *supra.*

[5] See observations of *Scott*, J., Chambers *v.* St. Louis, 29 Mo. 542, 574, 575, as to object of express authority to hold lands beyond corporate limits for such purposes. Municipal corporations may, for proper or authorized purposes, *hold lands in other States*, unless restrained by the laws of the latter State. The right depends upon comity, or the consent, expressed or implied, of the sister State. McDonough Will Case, 15 How. (U. S.) 567 (1863); Angell & Ames Corp. chap. v. sec. 161; 1 Wash. Real Property, 50, pl. 27; Chambers *v.* St. Louis, *supra;* Seebold *v.* Shitler, 34 Pa. St. 133; Bank of Augusta *v.* Earle, 13 Pet. 519, 584 (1839); Runyan *v.* Coster's Lessee, 14 Pet. 122. In these last two cases the extra-territorial rights of private corporations are very elaborately discussed and examined. See *infra*, sec. 574.

§ 566 (436). **Gifts and Grants to and for the Benefit of a Municipality.** — Municipal and public corporations *may be the objects of public and private bounty.* This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Burdens of a peculiar character rest upon compact populations residing within restricted and narrow limits, to meet which property and revenues are absolutely necessary, and, therefore, legacies of personal property, devises of real property, and grants or gifts of either species of property directly to the corporation for its own use and benefit, intended to and which have the effect to ease it of its obligations or lighten the burdens of its citizens, are, in the absence of disabling or restraining statutes, valid in law.[1] Thus, a conveyance of land to the English statutes of Henry VIII., "bodies politic and corporate" are incapacitated to take real estate; and a devise *directly* to a corporation, and not to a natural person in trust for the corporation, was adjudged to be void by the statute, and this notwithstanding the corporate devisee was by its charter declared to be "capable in law of *purchasing*, holding, and conveying real estate for the use of the said corporation." This special authority to take by "*purchase*" (which term was held not to include a *devise*) was, by the majority of the Court of Errors, considered to mean subject to the restrictions and incapacities created by the general statutes. McCartee *v.* Orphan Asylum Society, 9 Cow. (N. Y.) 437 (1828). As to devises in *New York* in trust for a corporation, under a new Statute of Wills, see Auburn Theol. Sem. *v.* Childs, 4 Paige (N. Y. Ch.), 418; Wright *v.* M. E. Church, 1 Hoff. (N. Y.) Ch. 225. But authority to a corporation to take land "by direct purchase *or otherwise*," gives capacity to take by devise. Downing *v.* Marshall, 23 N. Y. 366 (1861); Kerr *v.* Dougherty, 79 N. Y. 327; Fox's Will, 52 N. Y. 530; s. c. 94 U. S. 315. Authority "to hold, purchase, and convey" confers capacity to receive a devise of lands. American Bible Society *v.* Marshall, 15 Ohio St. 537. Devises to corporations and construction of Statute of Wills, see Morawetz on Corp. (2d ed.) secs. 331–334.

[1] Sutton First Parish *v.* Cole, 3 Pick. (Mass.) 232, 238 (1825), *per Parker*, C. J.; Worcester *v.* Eaton, 13 Mass. 371, 378 (1816); Hamden *v.* Rice, 24 Conn. 350 (1856); Coggeshall *v.* Pelton, 7 Johns. (N. Y.) Ch. 292 (bequest to erect townhouse); McDonough Will Case, 15 How. 367 (1855); 2 Kent Com. 285; Angell & Ames, secs. 177, 178; Sargent *v.* Cornish, 54 N. H. 18 (1873). Approving text. Brown *v.* Brown, 7 Oreg. 285; *ante*, secs. 3, 3 *a;* Dunbar *v.* Soule, 129 Mass. 284.

Speaking of *Missouri*, *Scott*, J., says: "There is nothing in our statute *concerning wills* which prohibits corporations from taking by devise; so that, as to their capacity to take by devise, they stand on the same ground as natural persons." Chambers *v.* St. Louis, 29 Mo. 543, 574. So in *Ohio*. Perin *v.* Carey, 24 How. 465, 505, *per Wayne*, J. In *New York*, by the statute of wills, following

a town or other public corporation, *for benevolent or public purposes*, as for a site for a school-house, city or town house, and the like, is based upon a sufficient consideration, and such conveyances are liberally construed in support of the object contemplated.[1]

§ 567 (437). **Power to take and hold in Trust; Charitable Uses.** — Not only may municipal corporations take and hold property in their own right by direct gift, conveyance, or devise, but the cases firmly establish the principle, also, that such corporations, at least in this country, are capable, unless specially restrained, of *taking property*, real and personal, *in trust for purposes germane to the objects of the corporation*, or which will promote, aid, or assist in carrying out or perfecting those objects. So such corporations may become *cestuis que trust*, within the scope of the purposes for which they are created. And where the trust reposed in the corporation is for the benefit of the corporation, or for a charity within the scope of its powers or duties, it may be compelled, in equity, to administer and execute it.[2] But the *legislature may, in the absence of constitutional restriction on its power, divest* a municipal corporation of the *power to administer the charitable trusts* conferred upon it, and appoint or provide for the appointment of new trustees independent of the corporation, and vest in them the management of such trusts.[1]

[1] Castleton *v.* Langdon (land conveyed to town for *school-house*), 19 Vt. 210 (1847); Jackson *v.* Pike (land conveyed to county for *court-house and jail*), 9 Cow. (N. Y.) 61 (1828); State *v.* Atkinson ("*public common*"), 24 Vt. 448; Le Couteulx *v.* Buffalo (conveyance for "*free school*"), 33 N. Y. 333 (1865); French *v.* Quincy (conveyance for "*town house*"), 3 Allen (Mass.), 9; Kelley *v.* Kennard, 60 N. H. 1 (donation for erection of a *bridge*). Corporations may, for such purposes, purchase and *take the fee* of lands, and change the location at will. This is unlike the ordinary case of the dedication by an individual of the *use* of lands to some public purpose, — *e. g.* a town common, — in which case the corporation cannot alien the land. Beach *v.* Haynes, 12 Vt. 15 (1840); State *v.* Woodward, 23 Vt. 92 (1850). That municipal corporations may be authorized to take, hold, and alienate lands *in fee*, see also 2 Kent Com. 281; Heyward *v.* Mayor, &c. of New York, 7 N. Y. 314 (1852); The People *v.* Mauran, 5 Denio (N. Y.), 389 (1848); Reynolds' Heirs *v.* Stark County Comm'rs, 5 Ohio, 204 (1848); Nicoll *v.* N. Y. & E. R. R. Co., 12 N. Y. 121 (1854); Page *v.* Heineberg, 40 Vt. 81. In *Maine* the right of cities and towns to receive money by devise or bequest for *school purposes* is recognized by statute. Piper *v.* Moulton, 72 Me. 155. In *Kansas* it has been held that a city may take and receive real and personal property by will for the purpose of *prospecting for and developing a coal mine near it*. Delaney *v.* Salina, 34 Kan. 532 (1886), quoting text, secs. 566, 567; *infra*, sec. 648, note.

[2] 2 Kent Com. 279, 280; Jackson *v.* Hartwell, 8 Johns. (N. Y.) 422; 1 Kyd, 72; Green *v.* Rutherford, 1 Ves. 462; Phillips Acad. Trs. *v.* King, 12 Mass. 546; Pickering *v.* Shotwell, 10 Pa. 27; Chambers *v.* St. Louis, 29 Mo. 543 (1860); Philadelphia *v.* Elliott, 3 Rawle, 170; McDonough Will Case, 15 How. 367 (1853); McDonough's Case (in Supreme Court of Louisiana), 8 La. An. 171 (1853); Girard's Will, 2 La. An. 898; Vidal *v.* Philadelphia, 2 How. 127 (1844); Girard *v.* Philadelphia, 7 Wall. 1; 2 Wash. Real Prop. 205, pl. 3; Angell & Ames Corp. sec. 168; Willis Trust. 33-45; Perin *v.* Carey, 24 How. 465 (1860); Bell County *v.* Alexander, 22 Texas, 350 (1858); Columbia Bridge Co. *v.* Kline, Bright. (Pa.) 320; Miller *v.* Lerch, 1 Wall. Jr. (U. S. C. C.) 210; Webb *v.* Neal, 5 Allen (Mass.), 575 (1863); Orford Union Cong. Soc. *v.* West Cong. Soc. 55 N. H. 463 (1874); Sargent *v.* Cornish, 54 N. H. 18 (1873); Barnum *v.* Baltimore, 62 Md. 275 (where, however, the power was expressly conferred by charter).

It is quite usual in England for municipal corporations to hold property for *charitable trusts* of a public nature, over the administration of which chancery has jurisdiction, and the subject of such trusts is regulated by the Municipal Corporations Act of 5 and 6 Wm. IV. chap. lxxvi. sec. 71. See Rex *v.* Sankey, 5 A. & E. 423; Grant Corp. 136, and *post*, sec. 910 *et seq.*, where the remedy for *abuses of trust* by municipalities is considered. Tolls granted by charter to a corporation, for the reparation of walls and bridges within the borough, are gifts for charitable purposes, within 39 Eliz. chap. v., to be administered in chancery. Attorney-General *v.* Shrewsbury, 6 Beav. 220; Newcastle *v.* Attorney-General, 12 Clark & Fin. 402; *Ib.* 487; Dublin *v.* Attorney-General, 3 Cl. & F. 289; 2 Spence, Eq. Jurisd. 33 *et seq.*; *post*, sec. 775, note, sec. 910 *et seq.* A perpetual lease to a municipal corporation, for corporate purposes, of land devised to trustees for a charitable use, upheld in Richmond *v.* Davis, 103 Ind. 449. In Peynado's Devisees *v.* Peynado's Executors, 82 Ky. 5, a foreign will devising the proceeds of property situated in this country to a foreign city in trust for a charitable use, was sustained. *Infra*, secs. 648, 651, note.

[1] Philadelphia *v.* Fox, 64 Pa. St. 169 (1870). In this case the constitutionality of the act of June 30, 1869, *depriving the city of Philadelphia of the power to administer the trusts under wills of Mr. Girard and others*, and vesting the powers of the city in this respect in an independent and separate board, not appointed by the city, was sustained. In giving the judgment of the court Mr. Justice *Sharswood*, in the course of his interesting and learned opinion, remarks: —

"A municipal corporation may be a trustee, under the grant or will of an individual or private corporation, but only, as it seems, for public purposes, germane to its objects. Philadelphia *v.* Elliott, 3 Rawle (Pa.), 170; Cresson's Appeal, 6 Casey (30 Pa. St.), 437; Vidal *v.* Philadelphia, 2 How. 127. I am aware that it has been said by high authority in England that it may take and hold in trust for purposes altogether private. Gloucester *v.* Osborn, 1 H. of Lords Cases, 285. But the administration of such trusts, and the consequent liabilities incurred, are altogether inconsistent with the public duties imposed upon the municipality. It could hardly be pretended, I think, in this country, that it could be a trustee for the separate use of a married woman, to educate the children of a donor or testator, or to accumulate for the benefit of particular persons. It certainly is not compellable to execute such trusts, nor does it seem competent to accept and administer them. The trusts held by the city of Philadelphia, which are enumerated in the bill before us, are germane to its objects. They are charities, and all charities are in some sense public. If a trust is for any particular persons, it is not a charity. Indefiniteness is of its essence. The objects to be benefited are strangers to the donor or testator. The widening and improvement of streets and avenues; planting them with ornamental and shade trees; the education of orphans; the building of school-houses; the assistance and encouragement of young mechanics; rewarding ingenuity in the useful arts; the establishment and support of hospitals; the distribution of soup, bread, or fuel to the necessitous, — are objects within the general scope and purpose of the municipality. The king himself may be a trustee, though he cannot be reached by the process of any court without his consent. Hill on Trustees, 49. And so may the State, though, as I take it, under the Constitution, only for objects germane to the purpose of government. The Govern-

§ 568 (438). **Girard Will Case; Devise to City in Trust for the Education and Support of Orphans.** — The *leading case in this country* on the subject mentioned in the last section is the celebrated *Girard Will Case*, in the Supreme Court of the United States, reported under the name of Vidal *v.* Girard's Executors.[1] The act

ment of the United States has accepted and administered such a trust under the will of James Smithson 'for the promotion of knowledge among men.' When, therefore, the donors or testators of these charitable funds granted or devised them in trust to the municipality, they must be held to have done so with the full knowledge that their trustee so selected was a mere creature of the State, an agent acting under a revocable power. Substantially they trusted the good faith of the sovereign. It is plain — too plain, indeed, for argument — that the corporation, by accepting such trusts, could not thereby invest itself with any immunity from legislative action. Such an act could not change its essential nature. It is surely not competent for a mere municipal organization, which is made a trustee of a charity, to set up a vested right in that character to maintain such organization in the form in which it existed when the trust was created, and thereby prevent the State from changing it as the public interest may require. Montpelier *v.* East Montpelier, 29 Vt. 21. This whole question is put at rest, and that as to one of the most important of these trusts and as to its trustees, by the opinion of the Supreme Court of the United States in Girard *v.* Philadelphia, 7 Wall. 14. 'It cannot admit of a doubt,' says Mr. Justice *Grier*, 'that where there is a valid devise to a corporation, in trust for charitable purposes, unaffected by any question as to its validity because of superstition, the sovereign may interfere to enforce the execution of the trusts, either by changing the administrator if the corporation be dissolved, or if not, by modifying or enlarging its franchises, provided the trust be not perverted, and no wrong done to the beneficiaries. Where the trustee is a corporation, no modification of its franchises or change in its name, while its identity remains, can affect its right to hold property devised to it for any purpose.' With equal plausibility might it be pretended that the acceptance by the Government of the United States of the bequest of James Smithson limited the power of amendment contained in the Federal Constitution. If it could have such effects, the only logical consequence would be that the acceptance of a trust would be *ultra vires* and void; and so if the acceptance of a trust by a municipal corporation can operate to impair the power of the sovereign over it as such, the acceptance is a nullity." By a constitutional provision subsequently adopted in *Pennsylvania*, the legislature is thereafter forbidden to enact legislation, such as the act of June 30, 1869, which was sustained in Philadelphia *v.* Fox, *supra*. Constitution, 1870, Art. 3, sec. 20. *Ante*, sec. 74 *a*.

[1] Vidal *v.* Girard's Executors, 2 How. 127 (1844). The court lays down this rule: "Where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that if the trust be repugnant to, or inconsistent with, the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But it will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust." Reaffirmed, Perin *v.* Carey, 24 How. 465 (1860); Girard *v.* Philadelphia, 7 Wall. 1 (1868); *infra*, sec. 573, note. The following further observations of Mr. Justice *Story* (who delivered the opinion of the court in the Girard Will Case) are of especial value: "If the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote and aid and perfect

incorporating the city of Philadelphia expressly provided that the corporation should have power "to purchase, take, possess, and enjoy lands, franchises, goods, chattels," &c., without limitation as to value or amount; and the acts of 32 and 34 Henry VIII., disabling corporations from taking by devise, were declared not to be in force in Pennsylvania. Under these circumstances, it was held that the corporation of the city had the capacity to take real and personal property by *devise and bequest*, as well as by deed. The city also possessed general power "for the suppression of vice and immorality, the advancement of the public health and order, and the promotion of trade, industry, and happiness." Girard's devise was *to the city, in trust*, for the establishment of a *college for the education and support of indigent orphan boys*. This presented the inquiry whether the corporation was capable of taking real and personal estate in trust and of executing the trust, and the affirmative of both propositions was adjudged.

§ 569 (439). **McDonough Will Case; Devise to New Orleans and Baltimore to educate the Poor.** — The *McDonough Will Case*, also decided by the Supreme Court of the United States, affords an interesting and instructive illustration of the foregoing principles. John McDonough died in New Orleans, and by will gave a large amount of real and personal property to the city of New Orleans (his adopted residence), and to the city of Baltimore (his native

those objects; if they tend (as the charter of the city of Philadelphia expresses it) 'to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness,' where is the law to be found which prohibits the corporation from taking the devise upon such trust, in a State where the statutes of mortmain do not exist (as they do not in *Pennsylvania*), the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know of no authorities which inculcate such a doctrine or prohibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government, and regulation, and powers. If, for example, the testator by his present will had devised certain estate of the value of $1,000,000 for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the uses of its citizens, from the River Schuylkill, why, although not specifically enumerated among the objects of the charter, would not such a devise upon such a trust have been valid, and within the scope of the legitimate purposes of the corporation, and the corporation capable of executing it as trustees?" The learned judge further observes: "Neither is there any positive objection, in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of the institution, but collateral to them." See, also, 24 How. 465, *supra*. By this it is not meant that a corporation may take and *execute* trusts for objects "utterly *dehors* the purposes of the incorporation." See, also, Augusta *v.* Walton, 77 Ga. 517, holding that the State of Georgia had not conferred power upon the city of Augusta to accept or administer a particular trust.