place), and to their successors forever, with a prohibition against any alienation or division of the real estate, under penalty of forfeiture. This devise was made for the purpose of "*educating the poor*, without the cost of a cent to them, *in the cities of New Orleans and Baltimore*, and their respective suburbs." The estate thus devised was to be managed by six agents, three to be selected annually by each city; and the municipal authorities were, by the will, excluded from the management of the estate or the application of its revenues. By the civil code of Louisiana, corporations created by law are permitted to possess an estate, *receive donations and legacies*, make valid contracts, and manage their own business; and the city of New Orleans was, by statute, authorized and required to establish *public schools* for gratuitous education, &c. The city of Baltimore was authorized, by statute, to establish *public schools*, and to receive property in trust, and to control and exercise the trust for any of its general corporate purposes, including educational and charitable purposes of any description, within its limits. This will was contested by the heirs. It was held by the Supreme Court of the United States that these cities, under the powers conferred upon them, had the right to receive this devise, and that the will was valid. It was also held that under the Louisiana code (C. C. 2026), the prohibition against alienation did not invalidate the will.[1]

§ 570 (440). **McMicken Will Case; Devise to Cincinnati for the Education and Support of Poor and Orphan Children.** — The subject again underwent a full examination in the *McMicken Will Case*, reported under the name of Perin *v.* Carey.[2] Charles McMicken devised and bequeathed a large amount of real and personal property

[1] McDonough Will Case, 15 How. (U. S.) 367 (1853); referred to *supra*, secs. 556-559. The same will was previously adjudged to be valid by the Supreme Court of *Louisiana*. Mr. Chief Justice *Eustis*, in delivering the opinion of the State court, sustaining McDonough's will, says: "That without a positive prohibition municipal corporations in *Louisiana* should be incapacitated from receiving legacies for the public purposes of health, education, and charity, seems to me repugnant to all sound ideas of policy and to the reason of the law." 8 La. An. 171 (1853). The Girard legacy was sustained by the same court. Girard Heirs *v.* New Orleans, 2 La. An. 898.

[2] Perin *v.* Carey, 24 How. 645 (1860). In *Maryland* (where, however, the statute of 43 Elizabeth is not in force) a devise to the city of Baltimore, "to be applied, under the direction of said corporation, to the relief and support of the indigent and necessitous poor persons who may, from time to time, reside within the limits, as now known, of the twelfth ward of said city," was adjudged void, as being "too vague and indefinite, and too difficult of being correctly ascertained, to be enforced." The case was regarded as being embraced in the prior decisions. Tripp *v.* Frazier, 4 Har. & Johns. (Md.) 446; Dashiell *v.* Attorney-General, 5 Har. & Johns. (Md.) 392; 6 Har. & Johns. (Md.) 1. *Infra*, secs. 648, 651, note.

"to the city of Cincinnati and its successors, in trust, for the purpose of building, establishing, and maintaining two colleges for the *education* of boys and girls; and if there shall remain a sufficient surplus of funds, the same to be applied to the *support* of poor white male and female orphans." By the will, the city is directed to make and establish all necessary regulations, and to appoint directors to the institution; and it *is prohibited from ever selling* any portion of the real estate devised, or any which the city should purchase for the benefit of said institution. By its charter, the city had express power given it to acquire and hold real estate for the legitimate objects of the city. There was nothing in the charter or statutes of the State prohibiting the city from taking and administering charitable trusts. The court decided that the will was valid; that the city, as a corporation, was capable of taking and administering the devises and bequests for the charitable uses specified; and that the restraint upon alienation created no perpetuity in the sense forbidden by the law.

§ 571 (441). **Mullanphy's Will; Devise to St. Louis in trust for the Relief of poor Emigrants.** — By *the will of Mr. Bryan Mullanphy* (founding a charity still in beneficent operation), he devised "one-third of all his property, real and personal, to the *city of St. Louis in trust*, to be and constitute a fund *to furnish relief to all poor emigrants and travellers coming to St. Louis* on their way, *bona fide*, to settle in the West." The greater part of his estate, valued at over $1,500,000, consisted of lands in St. Louis County, *but outside of the city limits*. It was held, under special provisions of the statute and charter of the city, that the city corporation had the capacity to take, and that, as the statute concerning wills did not prohibit it, it could take by devise the same as natural persons. It was further held that the city could take upon the trusts mentioned in the will, and could execute them subject to the control of the court of equity, whose jurisdiction in Missouri was considered to be founded, not upon the statute of 43 Elizabeth, but upon the common law.[1]

§ 572 (442). **Devise for Erection and Support of Hospital.** — So a bequest *to the city of Philadelphia*, in trust, to purchase a lot of ground in the city or neighborhood, and erect thereon *a hospital for the indigent, blind, and lame*, and to apply the income of the remainder to the comfort and accommodation of as many of such

[1] Chambers *v.* St. Louis, 29 Mo. 543 (1860).

persons as it will admit of, giving preference to persons resident in Philadelphia or its neighborhood, is valid, since it is in trust for objects within the scope of the corporate duties of the city.[1] Other instances, showing the capacity of public corporations to take property and to act as trustees, are given in the note.[2]

§ 573 (443). **Devises and Grants for Objects foreign to Corporate Purposes.** — But municipal corporations cannot, for the same reasons applicable to ordinary corporations aggregate, hold lands *in trust for any object or matter foreign to the purpose* for which they are created, and in which they have no interest.[3] Thus, while the supervisors of a *county*, who are made, by statute, a corporation for

[1] Philadelphia *v.* Elliott, 3 Rawle (Pa.), 170.

[2] A bequest "to the citizens of W. to purchase a *fire engine*" was regarded as a charitable gift, and sustained, the court considering the name, whether to the corporation or the citizens composing it, as immaterial, and that, as the object was meritorious, the testator's intention should be allowed to take effect, notwithstanding any misnomer or other defect in name or form. Wright *v.* Linn, 9 Pa., 433; see Kirk *v.* King, 3 Pa. 436; Tyrone Tp. School Directors *v.* Dunkleberger, 6 Pa. 31. As to *name and misnomer*, see *ante*, secs. 179–181.

In *Texas* it is decided that a bequest to a county "for the benefit of *public schools*" is not void for uncertainty, and that it is consistent with the object and function of the corporation, which may take and administer such a trust. And so of a bequest for the benefit of *indigent persons* residing in the county, counties being charged with the duty of providing for the support of the poor. Bell County *v.* Alexander, 22 Tex. 350 (1858). A school society in *Connecticut* is a corporation, and as such it is held that it may, upon well-settled principles, take a devise or bequest in trust for *educational purposes*. Southington First Cong. Soc. *v.* Atwater, 23 Conn. 34 (1854). Bequest held void because the "*school commissioners*" named were not a corporate body. Janey's Executor *v.* Latane, 4 Leigh (Va.), 327 (1833).

A devise to a town of property "to be used by the town in repairing its *highways and bridges* yearly," being in its character both public and charitable, is valid, not only by a special statute in *Connecticut*, but also, it would seem, without the aid of any special enactment. Hamden *v.* Rice, 24 Conn. 350 (1856); Coggeshall *v.* Pelton, 7 Johns. (N. Y.) Ch. 292 (bequest to erect *town-house*). See, also, Attorney-General *v.* Shrewsbury, 6 Beav. 220. In *Ohio*, "gifts, grants, and devises to the poor of any township" are by statute (Swan's Stat. 637) "good and valid in law" when made *directly* to the poor; and they are held to be good when made to a trustee, in trust for the *poor of a township*. Urmey's Executors *v.* Wooden, 1 Ohio St. 160 (1853). Bequest "*to the orphans*" of a municipal corporation sustained. Succession of, &c., 2 Rob. (La.) 438. In *Indiana*, the statute of 43 Elizabeth, chap. iv., is in force (McCord *v.* Ochiltree, 8 Blackf. 15), and a devise of real property in a town in that State, to be "forever appropriated to the education of —— children of this town," is within that statute, and valid, and trustees will be appointed by the court to manage the trust. Richmond *v.* State, 5 Ind. 334 (1854).

[3] Plowd. 103; 1 Kyd on Corp. 72; Howe, *In re*, 1 Paige (N. Y.), 214 (1828); So. Newmarket Meth. Sem. Trs. *v.* Peaslee, 15 N. H. 317, 331; Farmers' Loan & T. Co. *v.* Carroll, 5 Barb. 613; Hornbeck *v.* Westbrook, 9 Johns. 73; North Hempstead *v.* Hempstead, 2 Wend. 109; Coggeshall *et al.*, New Rochelle Trs. *v.* Pelton (legacy for townhouse), 7 Johns. Ch. 292; Sloane *v.* McConahy, 4 Ohio, 157; *supra*, sec. 567. *Infra*, secs. 648, 651, note.

special purposes, may take by grant a parcel of land in trust that they should erect a *court-house and jail*, these being county purposes, they cannot be seized as trustees for the use of an individual, or in trust for building a church or school-house for the use of the inhabitants of a *particular town* in the county.[1] So a corporation, with authority to establish, in a designated town, an institution "for the instruction of youth," cannot be a trustee under a will or grant to hold funds and pay over the income thereof for the support of missionaries.[2]

[1] Jackson *v.* Hartwell, 8 Johns. (N. Y.) 422; see, also, Jackson *v.* Cory, 8 Johns. (N. Y.) 385.

"Our laws are full of instances of persons clothed with corporate powers for certain special purposes. The loan officers of a county are a corporation; and could they, as such, receive a grant of land for the use of a town or of a church? Certainly not. Nor can the supervisors of Oneida County take a grant of land for the use of the town of Rome. Such a grant must be deemed void upon every principle, whether we consider the special and defined objects of a corporate capacity in the board of supervisors; whether we consider the power given them by statute to take conveyances of land for the *use of the county;* or, lastly, whether we refer to the incapacity of all corporations to hold lands in trust for any other object than that for which the corporation was created. Whether the court of equity would or would not prevent the trust as to the inhabitants of Rome from failing for want of a trustee is not a question for a court of law (in an action of ejectment) to decide." *Per Curiam*, in Jackson *v.* Hartwell, 8 Johns. (N. Y.) 422 (1811). See *ante*, sec. 568, note. *Legislature or chancery may, in proper cases, appoint trustees.* Bryant *v.* McCandless, 7 Ohio, Part 2, 135; Chapin *v.* School District, 35 N. H. 445; Girard Will Case, 2 How. 127; Shotwell *v.* Mott, 2 Sandf. (N. Y.) Ch. 46. It was said by Mr. Justice *Story*, in Vidal *v.* Mayor, &c. of Philadelphia, 2 How. (U. S.) 128, that there is "no positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of its institution, but collateral to it; nay, for the benefit of a stranger or another corporation." See, also, Perin *v.* Carey, 24 How. 465 (1860), *per Wayne*, J. But Chancellor *Kent*, in stating that a corporation may be a trustee, adds: "And at this day, the only reasonable limitation is, that it cannot be seized of land in trust for purposes foreign to its institution." 2 Kent Com. 280.

[2] South Newmarket Methodist Seminary Trustees *v.* Peaslee, 15 N. H. 317 (1844). But towns in *New Hampshire*, it has been decided, may legally hold lands in trust for the *support of religion within their limits.* The Dublin Case, 38 N. H. 459 (1859). "Such instances," says *Perley*, C. J., giving the judgment of the court (*Ib.* p. 577), "are, it is believed, very numerous in this State. . . . Under our Constitution no one can entertain a doubt that to maintain the institutions of religion is an object quite consistent with the general purpose for which towns are created, and that towns have at least an indirect interest in promoting religion within their limits." Cases and text cited. Sargent *v.* Cornish, 54 N. H. 18 (1873). As to nature of New England towns, *ante*, secs. 28–30; Bryce's Am. Commonwealth, Vol. I., ch. xlviii. In the case last cited, it was held that municipal corporations, in *New Hampshire*, may take and hold property in trust for any purpose not foreign to their institution, nor incompatible with the objects of their organization. A town is capable of receiving by bequest and holding in trust a sum of money, the income of which shall be invested yearly in the purchase and use for display of United States flags. Although capable of holding such fund for the purpose designated, a town has not the power of raising money by taxation for the purpose of executing the trust.

§ 574 (444). **When the State alone can question the Power.** — Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, *has acquired and is holding such property for other purposes*, is a question which can only be determined in a proceeding instituted at the *instance of the State*. If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a complete sale; and whether the corporation, in purchasing, exceeds its power is a question between it and the State, and does not concern the vendor or others.[1]

Where a testator bequeathed a sum of money to a town "on condition that the same be accepted, and invested by said town so as to yield an income of not less than six per centum per annum, which income shall be invested yearly in 'United States flags,' to be used within the said town on all proper occasions," with provision for a forfeiture of the legacy in case the town should omit to fulfil the condition, — *Held*, that the town might properly expend a reasonable portion of the income of the fund in the purchase and erection of flagstaffs, ropes, halliards, and other necessary paraphernalia.

As towns in *Massachusetts* were liable by statute, under a penalty, for neglect to support schools (*ante*, sec. 28), and as *parishes* (organizations created for parochial or religious purposes) *may* legally establish schools and raise taxes to maintain them, though not required to do so under a penalty for neglect, as towns are, it was decided by the Supreme Court of that State, that a parish, as well as a town, was capable of taking and holding a devise of real estate, "to be applied for the use of schools." Sutton First Parish *v.* Cole, 3 Pick. (Mass.) 232 (1825). In this case the court seemed to be of opinion that such corporations could not take or hold real property for purposes *wholly foreign* to the specific objects for which they were created. 2 Washb. Real Prop. (4th ed.) p. 519, pl. 3.

[1] Chambers *v.* St. Louis (Mullanphy's devise to city of St. Louis), 29 Mo. 543, 577 (1860); Land *v.* Coffman, 50 Mo. 243 (1872); s. c. 12 Am. Law Reg. (N. S.) March, 1873, p. 143, and Mr. Johnson's note; Smith *v.* Sheeley, 12 Wall. 35; Myers *v.* Croft, 13 Wall. 291; s. c. 11 Am. Law Reg. (N. S.) 308; Goundie *v.* Water Company, 7 Pa. St. 233 (1847); Leazure *v.* Hillegas, 7 Serg. & Rawle (Pa.), 313, 320 (1821); Davidson Col. *v.* Chambers's Executors, 3 Jones Eq. (N. C.) 253, 258, *per Pearson*, J.; Raley *v.* Umatilla County, 15 Oreg. 172; Eufaula *v.* McNab, 67 Ala. 588; Natoma W. & M. Co. *v.* Clarkin, 14 Cal. 544; Barrow *v.* Nashville, & C. Turnp. Co., 9 Humph. 304. A corporation cannot *hold* property in violation of its charter, nor can it *take* it in violation of its charter by an *act of the law*. *Ib.* See Bank of Mich. *v.* Niles, 1 Doug. (Mich.) 401; Bank of Va. *v.* Poitiaux, 3 Rand. 136; Martin *v.* Br. Bank, 15 Ala. 587; Baird *v.* Bank of Wash., 11 Serg. & R. 411; Goundie *v.* North. Water Co., 7 Pa. St. 233; Angell & Ames Corp. secs. 152, 153. "If a corporation be forbidden by its charter to *purchase or take* land, a deed made to it would be void." *Ib.;* Leazure *v.* Hillegas, 7 Serg. & Rawle (Pa.), 313. Distinction between prohibition to *take*, and a prohibition merely to *hold*. See Bank *v.* Niles, 1 Doug. (Mich.) 401; Bank *v.* Poitiaux, 3 Rand. (Va.) 136; Leazure *v.* Hillegas, *supra*. A deed of real estate was made by Betsy Flagg to the town of *Worcester*, in consideration of five dollars (nominal), and that the town should support her (she being lawfully settled in the town while single. The court, without deciding that the acceptance of a deed by the officers of the town, the consideration of which imposes upon the inhabitants any expense or burden, would create a binding contract on the part of the town, or that the grantor might not avoid a deed of which such obligation was the only consideration, held that the town, on the delivery of the deed to it, became seized of the estate, could maintain ejectment against a disseizor, and that the deed would remain good until avoided by the grantor, or by some one in privity of estate. Inhabitants of Worcester *v.* Eaton, 13 Mass. 371 (1816). The court says (*Ib.* p. 378), "Whether the inhabitants of a town can be assessed to raise money to purchase lands to be used for any other purpose than the execution of some lawful requisition, is a different question." Text approved. Commonwealth *v.* Wilder, 127 Mass. 1; Matthews *v.* Alexandria, 68 Mo. 115; Parish of Plaquemines *v.* Foulhouze, 30 La. An. 64.

"The rule stated by Dillon [in this section] has been indorsed by two well considered cases in Indiana, — Hayward *v.* Davidson, 41 Ind. 214, and Baker *v.* Neff, 73 Ind. 68. Other States where the question has been presented adopted the same rule, and the Supreme Court of the United States, in Union Nat. Bk. *v.* Matthews, 98 U. S. 628, holds to the same doctrine." *Per Craig*, J., in Barnes *v.* Suddard, 117 Ill. 237. See, also, Hough *v.* Cook County Land Co., 73 Ill. 23; and Alexander *v.* Tolleston Club of Chicago, 110 Ill. 65; *ante*, sec. 565.

[1] Kyd, 108; Smith *v.* Barrett, 1 Siderf. 162; 2 Kent Com. 281; Reynolds *v.* Stark County, 5 Ohio, 204 (1831); Meriwether *v.* Garrett, 102 U. S. 472; Augusta *v.* Perkins, 3 B. Mon. (Ky.) 437; Colchester *v.* Lowten, 1 Vesey & B. 226; Alves' Ex. *v.* Henderson, 16 B. Mon. (Ky.) 131, 168 (1855); Bowlin *v.* Furman, 28 Mo. 427; Kennedy *v.* Covington, 8 Dana (Ky.), 50; Newark *v.* Elliott, 5 Ohio St. 113 (1855); Ransom *v.* Boal, 29 Iowa, 68 (1870); Angell & Ames Corp. sec. 187; Still *v.* Lansingburgh (conveyance of public square void), 16 Barb. (N. Y.) 107; Knox County *v.* McComb, 19 Ohio St. 320; Philadelphia *v.* P. & R. R. R. Co. 58 Pa. St. 253; Holladay *v.* Frisbie, 15 Cal. 630 (1860); *ante*, sec. 475. Text approved: Shannon *v.* O'Boyle, 51 Ind. 565 (1876); Matthews *v.* Alexandria, 68 Mo. 115; Lord *v.* Oconto, 47 Wis. 386. *Ante*, sec. 475. Warren Co. Sup. *v.* Patterson, 56 Ill. 111; *post*, ch. xxii. Kings County Fire Ins. Co. *v.* Stevens, 101 N. Y. 411; Roper *v.* McWhorter, 77 Va. 214 (ferries); Hoadley's Admrs. *v.* San Francisco, 124 U. S. 639 (squares dedicated to public use cannot be conveyed to private persons). Board of supervisors not entitled to *extra* pay for selling, in pursuance of a statute, the stock owned by a county in a railroad corporation. Andrews *v.* Pratt, 44 Cal. 309 (1872). A municipal corporation charged by its charter with the "management of its financial, prudential, and municipal concerns," while it would have no power to erect buildings for business purposes, it has the power to lease a hall owned by it — in this case in the municipal building — for concerts, theatres, and other entertainments. Bell *v.* Platteville, 71 Wis. 139; Stone *v.* Oconomowoc, 71 Wis. 155. As to similar power in private corporations to dispose of or make advantageous use of surplus property. Simpson *v.* Westminster Palace Hotel Co., 8 House Lds. Cas. 712; Morawetz on Corp. (2d ed.) sec. 367; Green's Brice's *Ultra Vires* (2d ed.), 66–69. Where a city, having a general power to hold and convey real property for the convenience of its inhabitants, purchased a lot to be used as *a site for a city hall*, and afterwards purchased another for the same purpose, it was held that the power was a continuing one, and that the city had the right to sell and convey the lot first purchased. Konrad *v.* Rogers, 70 Wis. 492. Town may lawfully repair an old building owned by it, for rental purposes, as any other prudent owner might do. Bates *v.*

§ 575 (445). **Power of Alienation.** — Municipal corporations possess the *incidental or implied right to alienate* or dispose of the property, real or personal, of the corporation, of *a private nature*, unless restrained by charter or statute; they cannot, of course, dispose of property of *a public nature*, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons.[1]

The distinction is between property which a corporation may own the same as a natural person and that which it holds in general or

Bassett, 60 Vt. 530 (1888). An improvident sale made by a municipal corporation in the exercise of its discretionary power may be set aside by the court. Terre Haute *v.* Terre Haute Water Works, 94 Ind. 305. A contract of sale having been executed, the corporation was held estopped from setting up the plea of *ultra vires*. Searcy *v.* Yarnell, 47 Ark. 269.

A corporation *may alien land* held by it in *fee simple*, though purchased for the use of a common. Beach *v.* Haynes, 12 Vt. 15 (1840). But not if after its purchase it has dedicated it to the public. State *v.* Woodward, 23 Vt. 92 (1850). In a contract of sale of land to a county was this clause: That the party of the first part "agrees to sell to the said party of the second part [certain described property] for court-house and other county buildings." And the same clause was contained in the deed to the county. *It was held that these words* did not operate to limit or restrain the power of alienation by the proper county authorities. Warren Co. Sup. *v.* Patterson, 56 Ill. 111 (1870).

Where an act of the legislature confers upon a corporation the power to *sell* certain property originally donated by the State to the corporation, and enumerates the objects for which such sale may be made, it is not competent for the corporation to dedicate such property to the public use of the citizens. Wright *v.* Victoria, 4 Tex. 375.

Mr. Grant, after an examination of the English authorities, observes that "no decision of the common-law courts, directly in point, can be found, laying down the law to be that to *alien* its real property at pleasure is incident to a corporation." Grant, 129, 134. But in this country there can be no doubt as to the general *implied authority* of corporations, unless restrained, *to dispose of property* of a private nature. Newark *v.* Elliott, 5 Ohio St. 113; 3 Washb. Real Prop. (4th ed.), 565, pl. 25 *a*. The English Municipal Corporations Act of 1835 imposes certain specific restraints on the right of municipal corporations to alien, mortgage, or lease their real property. 5 and 6 Wm. IV. chap. lxxvi. sec. 94; Grant Corp. 140; *post*, chap. xxii.

A *condition* annexed to a grant of land in fee simple by a city corporation may, as in the case of similar conditions in the deed of an individual, *be dispensed with or waived by the grantor*, and this as well by acts as by express agreement; and when once dispensed with or waived, it is gone forever. Sharon Iron Company *v.* Erie, 41 Pa. St. 341 (1861). As to breach of condition in a deed of land to be used only as a place for a *town house*. French *v.* Quincy, 3 Allen (Mass.), 9. A municipal corporation, having by its charter full power to purchase, hold, and convey lands, received, for a valuable consideration, a deed of a parcel of land containing one acre, "*for the use of the said town*," *for the purposes mentioned in the deed*. The deed then states, in substance, that it *is conveyed for a court-house and jail* to be erected and kept thereon, with a proviso that if it ceased to be used for such purposes, the property was to re-vest in the grantor. While the land was used by the town for the specified purposes, the title was held to be in the town, and it was held that the grantor could not interfere to prevent the town from leasing portions of the tract not needed for the purposes specially named in the deed. The court was of opinion that the true construction of the grant was that, while the condition on which the corporation held the lot was not broken, they had full dominion over it, and might use it as they saw fit. Bolling *v.* Petersburg, 8 Leigh (Va.), 224 (1837). As to covenants and conditions in such and like cases, and their effect, see Berkley *v.* Union Pacific Ry. Co., 33 Fed. Rep. 794 (1888), *Brewer*, J.; Indianapolis, P. & C. Ry. Co. *v.* Hood, 66 Ind. 580 (1879); Jeffersonville, M. & I. R. R. Co. *v.* Barbour, 89 Ind. 375; s. c. 14 Am. & Eng. R. R. Cas. 466; Close *v.* Burl., C. R. & N. Ry. Co., 64 Iowa, 149; s. c. 17 Am. & Eng. R. R. Cas. 33; Taylor *v.* Cedar Rap. & St. P. R. R. Co., 25 Iowa, 371; Varner *v.* St. Louis & C. R. R. Co., 55 Iowa, 677; Ayer *v.* Emery, 14 Allen (Mass.), 67; Memphis & C. R. R.

special trust. The rights of the corporation as a *property holder* are distinct from the *legislative rights* of the corporation: the corporation may alien its private property, but it cannot (as elsewhere shown) cede away the power of municipal control.

§ 576 (446). **Sale on Execution.** — In some of the States it is held that the private property of municipal corporations, that is, such as they own for *profit*, and charged with no public trusts or uses, may *be sold on execution* against them.[1] In other States, either

Co. *v.* Neighbors, 51 Miss. 412; Hubbard *v.* St. Joseph & C. B. R. R. Co., 63 Mo. 68; Aikin *v.* Albany, Vt. & C. R. R. Co., 26 Barb. 289; Hornback *v.* Cinc. & Z. R. R. Co., 20 Ohio St. 81 (1870); Mead *v.* Ballard, 7 Wall. 290 (1868). See chapters on Streets and Dedication, *post*. Powers of *private* corporations to dispose of property. Morawetz on Corp. (2d ed.) sec. 335.

[1] Holladay *v.* Frisbie, 15 Cal. 630; Davenport *v.* Peoria Ins. Co., 17 Iowa, 276; Louisville *v.* Commonwealth (as to public and private property), 1 Duvall (Ky.), 295; Brown *v.* Gates, 15 W. Va. 131; Birmingham *v.* Rumsey, 63 Ala. 352; Hart *v.* New Orleans, 12 Fed. Rep. 292; approving text. It seems that a municipal corporation may sometimes own some description of property, or have debts of a strictly private nature due it, which are subject to levy, and to the lien of such writ or garnishment. Brown *v.* Gates, *supra*. It has been held that a place of traffic called *a market bazaar*, owned by a municipal corporation, for the sale of merchandise, from which the sale of fresh meats, fish, and vegetables was excluded, and which had been rented out by the corporation for a term of years, is not such a market as is protected from execution; and, no authority having been given by the legislature to establish such a bazaar, it is subject to levy and sale. New Orleans *v.* Morris, 3 Woods C. C. 103, *Billings*, J.; *ante*, sec. 100, and note; New Orleans *v.* Home Ins. Co., 23 La. An. 61 (1871). *Water-works*, owned by a city, have been held to be of such public utility and necessity as to be practically held in trust for the use of the citizens, and not liable to sale under execution. New Orleans *v.* Morris, 105 U. S. 600. *Ante*, sec. 3 *a*; *infra*, sec. 579. Further, see chapters on Dedication and Mandamus, *post*. And an act of the legislature of the State, granting to a city certain real property within its limits, with a proviso in the act that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent of all moneys arising from the sale or other disposition of the property, gives to the city an *absolute interest*, qualified by no conditions or trusts attaching to the property, and subject to no specific uses; and hence the property may be levied on and sold under execution. Holliday *v.* Frisbie, above cited.

In Foster *v.* Fowler, 60 Pa. St. 27 (1868), the corporation known as the Monongahela Water Company, empowered to introduce water into a city for the use of the inhabitants, was held to be a corporation for public purposes; and on principles recognized in *Pennsylvania* it was held that its buildings and property, necessary to carry on its operations, could not be seized and sold on execution, or be subjected to a mechanic's lien. But the property of a storage and warehouse company may be sold on execution. Girard Point Storage Co. *v.* Southwark Foundry Co., 105 Pa. St. 251. As to sale on execution of property of private corporations necessary to enable it to perform its public duties, see Morawetz on Corp. (2d ed.), sec. 1125, and cases cited. See also Winslow *v.* Perquimans Co. Comm'rs, 64 N. C. 218 (1870). Judgment against county which has no private property must be enforced by *mandamus*, and not by execution. Gooch *v.* Gregory, 65 N. C. 142. More fully see *post*, chapter on Mandamus.

by statute or on general principles, it is declared that judgments against municipal corporations cannot be enforced by ordinary writs of execution, and that the remedy of the creditor is by *mandamus* to compel payment, or the levy of a tax for that purpose. Questions of this kind are influenced much by local legislation.[1] On principle, in the absence of statutable provision, or legislative policy in the particular State, it would seem to be a sound view to hold that the right to contract and the power to be sued give to the creditor a right to recover judgment; that judgments should be enforceable by execution against the strictly private property of the corporation, but not any against property owned or used by the corporation for public purposes, such as public buildings, hospitals, and cemeteries, fire-engines and apparatus, water-works, and the like; and that judgments should not be deemed liens upon real property except when it may be taken in execution.[2] Outside of the New England States the creditors of a municipal corporation cannot resort, for the purpose of making their debts, to the private property of the inhabitants.[3] The indebtedness of a city is conclusively established by a judgment recovered against it in a court of competent jurisdiction; and in enforcing payment by *mandamus*, the plaintiff is not restricted to any particular property or revenues, or subject to any conditions, unless the judgment or the statute so provides.[4]

[1] Crane *v.* Fond du Lac, 16 Wis. 196 (1862); Chicago *v.* Halsey, 25 Ill. 595 (1861); Olney *v.* Harvey, 50 Ill. 453; Elrod *v.* Bernadotte, 53 Ill. 368; Bloomington *v.* Brokaw, 77 Ill. 194, 197 (1875); Cairo *v.* Allen, 3 Ill. App. 398; Morrison *v.* Hinkson, 87 Ill. 587; Klein *v.* New Orleans, 99 U. S. 149; Curry *v.* Savannah, 64 Ga. 290 (1879); s. c. 21 Alb. L. J. 34; Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 290; Commonwealth *v.* Perkins, 43 Pa. St. 400; State *v.* Milwaukee, 20 Wis. 87; State *v.* Beloit, *Ib.* 79 (1865); *infra*, sec. 850.

[2] Schaffer *v.* Cadwallader, 36 Pa. St. 126 (1860); State *v.* Tiederman, 69 Mo. 306, approving text; Davenport *v.* Insurance Co., above cited; President, &c. *v.* Indianapolis, 12 Ind. 620; Lamb *v.* Shays, 14 Iowa, 567; Brown *v.* Gates, 15 W. Va. 131; Cole *v.* Green, 25 Ill. 104; Green *v.* Marks, 25 Ill. 221; Meriwether *v.* Garrett, 102 U. S. 472; Lowe *v.* Howard County, 94 Ind. 553; Foster *v.* Fowler, 60 Pa. St. 27; Davenport *v.* Peoria Ins. Co., 17 Iowa, 276; Brickley *v.* Boston, 20 Fed. Rep. 207 (holding that a *police boat* owned by a city is not subject to a libel *in rem* without the consent of the city); Darling *v.* Baltimore, 51 Md. 1; Mariner *v.* Mackey, 25 Kan. 669; Lilly *v.* Taylor, 88 N. C. 489; Wallace *v.* Trustees, 84 N. C. 164; *infra*, sec. 577, note. A school-house is not liable to levy and sale on execution, nor can the insurance money, if it burns down, be garnished by a creditor. Fleishel *v.* Hightower, 62 Ga. 324.

[3] Horner *v.* Coffey, 25 Miss. (3 Cush.) 434 (1853). The court refused to follow the doctrine laid down in Beardsley *v.* Smith, 16 Conn. 368; s. p. Miller *v.* McWilliams, 50 Ala. 427 (1874); s. c. 20 Am. Rep. 297; Meriwether *v.* Garrett, 102 U. S. 472; *post*, chap. xx. sec. 849, note.

As to exemption of *municipal revenues* from judicial seizure, and as to *garnishment* of municipal corporations, see *ante*, secs. 100, 101.

[4] United States *v.* New Orleans, 98 U. S. 381.

§ 577. **Same subject.**— It is clear that property owned by a municipal corporation and used for public purposes cannot be sold by virtue of an execution issued on a judgment rendered against the corporation.[1] As one of the results of this general rule, there is no right to a *mechanic's lien* against such property. Thus, county bridges, school-houses, court-houses, and other public buildings which cannot be sold under an execution cannot, without a plain statute to that effect, be sold on foreclosure of a mechanic's lien; it is only such property as can be sold under judicial process that is subject to such lien. Laws creating liens in favor of mechanics are enacted with reference to that class of property which may be so sold. The remedy of the mechanic is to obtain judgment against the municipal corporation, and then to enforce its payment by *mandamus*.[2]

§ 578 (447). **Mode of Alienation; "City Slip Cases."**— If the charter or constituent act of the corporation prescribes a particular *mode* in which *the property* of the corporation *shall be disposed of*, that mode must be pursued. This is well illustrated in an interesting and important series of adjudications in California known as the "City Slip Cases," in which, upon the most deliberate consideration, it was repeatedly held, where the officers of the city, under the authority of a *void* ordinance, made sales of real estate belonging to the city, that no title passed, and that under the charter of the city (which required sales of its property to be made by an ordinance adopted for the purpose, after advertisement of the time,

[1] *Ante*, sec. 576; Lyon *v.* Elizabeth, 43 N. J. L. 158; Amy *v.* Galena, 7 Fed. Rep. 163; Odell *v.* Schroeder, 58 Ill. 353.

[2] Foster *v.* Fowler, 60 Pa. St. 27 (1868); Winslow *v.* Comm'rs, 64 N. C. 218 (1870); Gooch *v.* Gregory, 65 N. C. 142; Olney *v.* Harvey, 50 Ill. 453; Elrod *v.* Bernadotte, 53 Ill. 368; Bloomington *v.* Brokaw, 77 Ill. 194; Cairo *v.* Allen, 3 Ill. App. 398; Morrison *v.* Hinkson, 87 Ill. 587; Curry *v.* Savannah, 64 Ga. 290 (1879); s. c. 21 Alb. L. J. 34; Chadwick *v.* Colfax, 51 Iowa, 70; Loring *v.* Small, 50 Iowa, 271; Board, &c. *v.* Neidenberger, 78 Ill. 58; Wilson *v.* Comm'rs, 7 W. & S. (Pa.) 197; Bouton *v.* Supervisors, 5 C. L. J. 105; Klein *v.* New Orleans, 99 U. S. 149; Plaquemines *v.* Foulhouze, 30 La. An. 64; McKnight *v.* Parish of Grant, 30 La. An. 361; New Orleans *v.* Morris, 3 Woods C. C. 103; Portland Lumbering, &c. Co. *v.* School District, 13 Oreg. 283; Chicago *v.* Hasley, 25 Ill. 595; Parke Co. Comm'rs *v.* O'Conner, 86 Ind. 531. Unless the right be given by statute, a *mechanic's lien* cannot be enforced against the real estate of a municipal corporation held for public use. Leonard *v.* Brooklyn, 71 N. Y. 498 (1877); *post*, chapter on Mandamus. But in *Louisiana* a mechanic was permitted to file and foreclose a lien on the building erected for a jail; and it was held that the jail might be sold, but not the ground on which it stood. McKnight *v.* Parish of Grant, 30 La. An. 361. In *New York*, by statute (1878, chap. 315), contractors for the erection of public municipal buildings may secure a lien upon moneys in the control of the city, due or to become due under the contract. Bell *v.* New York, 105 N. Y. 139.

place, and terms of sale) the appropriation, for municipal purposes, of the proceeds of the sales, while it would or might impose on the city the liability to pay back to the purchasers the moneys received from them, would not have the effect to ratify the sales.[1] This is upon the principle that if the use of the proceeds obtained from sales made under a void ordinance would have the effect to validate the sales, the restraints imposed by the legislature upon the power of the city in this behalf would be defeated and be practically useless.

§ 579 (448). **Power to Mortgage.** — Where property charged with no trusts or public uses is held by the corporation without restriction for sale or profit, it may, in the absence of restrictive legislation, *mortgage it to secure any debt or obligation that it has the power to create or enter into.* The power to mortgage, if not expressly given or denied, would in such case be an incident to the power to hold and dispose of property, and to make contracts.[2] Power given to the city of Memphis, in its charter, "to hold real, personal, or mixed property," and "to sell, lease, or dispose of the same for the use and benefit of the city," was held by the Supreme Court of Tennessee to confer, without further legislative authority and by necessary implication, the power upon the common council of the city of Memphis to mortgage a large tract of land ceded to the city in fee by the United States, lying within the corporate limits, to secure the payment of a large number and amount of bonds, to be issued by a railroad company to aid in the construction of its railroad, the initial point of which was on the bank of the river opposite Memphis, the court regarding this as a proper corporation purpose and for the benefit of the city.[3] It will be seen that there was no special or express legislative authority to the city to aid it by pledging its property to secure bonds issued by the railroad company. Without express authority the city could not have

[1] McCracken *v.* San Francisco, 16 Cal. 591 (1860); Grogan *v.* San Francisco, 18 Cal. 590 (1861); Pimental *v.* San Francisco, 21 Cal. 351 (1863). In these cases the principles stated in the text are vindicated with characteristic clearness and striking logical force, in able and interesting opinions of Mr. Chief Justice *Field*, now holding a seat on the Supreme Bench of the United States. His views and conclusions are clearly sound. See, also, Satterlee *v.* San Francisco, 23 Cal. 214 (1863); Herzo *v.* San Francisco, 33 Cal. 134 (1867); *ante*, secs. 449, 459, 460; *post*, secs. 581, 938.

See *ante*, chap. xiv. as to *mode* of contracting. *Mode* of exercising *corporate* powers. *Ante*, chap. v.; *post*, chap. xix.; *infra*, sec. 910 *et seq.*

[2] As to power to mortgage real estate. Middleton Bank *v.* Dubuque, 15 Iowa, 394; Braham *v.* San Jose, 24 Cal. 585; Gordon *v.* Preston, 1 Watts (Pa.), 385; Goodwin *v.* McGehee, 15 Ala. 233 (1849).

[3] Adams *v.* Memphis & L. R. R. R. Co., 2 Coldw. (Tenn.) 645 (1866).

guaranteed the bonds of the company; and upon the accepted canons of construction of municipal powers, the author cannot concur with the learned court in the doctrine that the ordinary clause in the charter, giving the municipality the authority to take, hold, sell, and dispose of property, empowered it to pledge it as a security for the bonds or debts of the railway company.[1] Under charter authority to make all contracts which they may deem necessary for the welfare of the city, a mayor and council were considered to have *power to mortgage the city water-works* to secure payment of bonds lawfully issued for the construction of the same. The effect of various provisions of the charter was considered; and it was also held that a special act of the legislature, providing for a tax and sinking fund for the payment of such bonds, did not affect the power, under the charter, to mortgage. Nor is a vote of the citizens made necessary to the exercise of the power to mortgage, by the mere fact that the special act required such a vote as a preliminary to the issue of the bonds. The right to foreclosure, on breach of condition, is a necessary incident to the mortgage.[2]

§ 580 (449). **Leases of Corporate Property.** — It is undoubtedly competent for the legislature to authorize municipal corporations to pass an ordinance, providing, that *in all leases of corporate property*, if the rent remain unpaid the corporation may terminate the lease by a resolution to that effect; in which case equity could not, at least ordinarily, relieve against the forfeiture. So such a corporation may, by stipulation in the lease, provide for such a forfeiture; in which case the right to forfeit owes its existence to the convention of the parties, and not to the action of the corporation in its political or legislative capacity; and where the right to forfeit rests upon *contract*, equity may relieve against it the same as if the contract were made between private individuals.[3]

[1] See *ante*, secs. 89–92, also chap. vi. sec. 153 *et seq.*; *ante*, sec. 471.

A municipal corporation has the power to receive, as payee, a note and mortgage for a debt lawfully due to such corporation, and it has the right to execute a note and mortgage for a debt lawfully due from such corporation. And it may assign the note and mortgage of another owned by it, instead of executing its own. Floyd Co. Comm'rs *v.* Day, 19 Ind. 450; Sturgeon *v.* Daviess Co. Comm'rs, 65 Ind. 302; Vanarsdall *v.* State, 65 Ind. 176.

[2] Adams *v.* Rome, 59 Ga. 765. *Quære*, as to *implied* power to mortgage water-works. See *supra*, secs. 576, and note, 577.

[3] Taylor *v.* Carondelet, 22 Mo. 105 (1855), where this subject is very ably discussed. The dissenting opinion of *Leonard*, J., in the special case in judgment, probably rests upon the most tenable ground. See, also, Woodson *v.* Skinner (power to annul sale), 22 Mo. 13; State *v.* Balt. & O. R. R. Co., 3 How. (U. S.) 534.

Power to lease. Bush *v.* Whitney, 1 Chip. (Vt.) 369; Angell & Ames, sec. 191; Grant, Corp. 146; Taylor *v.* Carondelet, 22 Mo. 105; Hand *v.* Newton, 92

§ 581 (450). **Requisites of Conveyances.** — *Conveyances of real estate* should, in general, be *executed in the corporate name* and under the *corporate seal.*[1] If the constituent act or charter prescribes the conditions upon which the conveyance of its real estate shall be made, — as, for example, if it requires the previous consent of a majority of the legal voters, — a conveyance without such consent is void.[2] A conveyance of real estate, regular on its face, and under the corporate seal, executed by a municipal corporation having the

N. Y. 88 (lease of oyster beds); Davies *v.* Mayor, &c. of New York, 83 N. Y. 207, an action against a city for rent, wherein *Folger*, Ch. J. said: "We have no doubt that a municipal corporation or a *quasi* corporation, such as is a county in this State, has the power to enter into a lease and become a tenant of real estate, when the use thereof is needed to carry out any of its acknowledged powers, and to attain the public purposes for which it was erected (Inhabitants, &c. *v.* Wood, 13 Mass. 193)." Lease valid, though it does not use precise *corporate name.* McDonald *v.* Schneider, 27 Mo. 405. No particular language essential. Poole *v.* Bentley, 12 East, 168. *Estoppel* of lessee to deny title of corporation lessor. St. Louis *v.* Merton, 6 Mo. 476.

Where a *city leased its water-works* to an individual who agreed to keep them in good condition, to keep the reservoir supplied with water, and, in case of fire, to put the pumps at work, it was held, in a proceeding in chancery to rescind the contract for gross violation of the agreement, that, as no provision was made by charter how the works should be operated, the city had power to make the lease, but it could not convey its control of the works for a long time so as to lose its right to have the contract annulled if necessary for its safety. Mahon *v.* Columbus, 58 Miss. 310. See *ante*, sec. 97. In well-known cases the Supreme Court of the United States has held that the franchise to construct and operate a railway and to take tolls cannot be leased or the control parted with, except by virtue of express legislative authority therefor. Thomas *v.* West Jersey R. R. Co., 101 U. S. 70; Pennsylvania R. R. Co. *v.* St. Louis, A. & T. H. R. R. Co., 118 U. S. 290 (1885); *Ib.* 630.

[1] As to necessity of *seal*, see Index, tit. *Seal;* Pennington *v.* Tanier, 12 Q. B. 1011; Grant, Corp. 148; *ante*, chaps. viii. and xiv.

Kent, Com. 291. As to name and misnomer, see *ante*, chap. viii.; also, De Zeng *v.* Beekman, 2 Hill (N. Y.), 489 (1842); Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543 (1869); Tiffin *v.* Shawhan, 43 Ohio St. 178, where a deed, made under authority of an ordinance directing the city clerk to make a *proper* conveyance, sealed with his private scroll and his official seal, was held effectual to convey.

"In general, corporations must *take and convey their lands* and other property in the *same manner as individuals*, the laws relating to the transfer of property being equally applicable to both." Angell & Ames Corp. sec. 193.

[2] Still *v.* Lansingburgh, 16 Barb. 107; Middleton Sav. Bank *v.* Dubuque, 15 Iowa, 394. Charter mode of conveyance must be pursued. 3 Washb. Real Prop. (4th ed.) p. 262, pl. 25. *Ante*, sec. 578. In *Vermont*, the selectmen of the several towns in which there are glebe lands are empowered by statute to *lease* them. This was held to be the extent of their authority, and an absolute conveyance was utterly void, neither conveying title to the grantee nor affecting the rights of the town. Bush *v.* Whitney, 1 Chip. (Vt.) 369 (1821). In *California* it is held that where the legislature authorizes the corporate board of a city to convey its lands, a majority of the members of such board may make the conveyance. San Diego *v.* S. D. & L. A. R. R. Co., 44 Cal. 106 (1872).

As to liability on *covenants of warranty* in conveyances of real estate, to which the municipality had no title or right to convey. Findler *v.* San Francisco, 13 Cal. 534.

power to dispose of its property, will be presumed to have been executed in pursuance of that power; and hence it is unnecessary for the grantee, or party claiming under it, to produce the special resolution or ordinance authorizing its execution.[1]

§ 582 (451). **Same subject.** — A town cannot, without express authority, *pass the legal title to lands by a vote*, and when conveyed by an agent under the authority of a vote, the deed should, regularly, be in the name of the principal.[2] A corporation in North Carolina was the owner of the land on which the town was laid out; and between Front Street and the water of the sound there was a small strip of land. After the town was laid out, the corporation passed this ordinance: "*Ordered*, That for the future, whatever small strips of land are to be found between the outward lines of Front Street and the water shall be the property of the person owning the front lot on the opposite side of the street." In *ejectment* by

[1] Jamison *v.* Fopiana, 43 Mo. 565 (1869); Swartz *v.* Page, 13 Mo. 603 (1850); Choquette *v.* Barada, 33 Mo. 249 (1862); Flint *v.* Clinton Comp'y, 12 N. H. 43. See Hart *v.* Stone, 30 Conn. 94. When authorized by statute the conveyance need not recite the authority by which it is made. Henry *v.* Atkinson, 50 Mo. 266 (1872).

Conveyances of real property by the officers of a municipal corporation must be made by virtue of a special authority for that purpose. Merrill *v.* Burbank, 23 Me. 538 (1844). *How given.* Clark *v.* Pratt, 47 Me. 55; Hascard *v.* Somany, Freem. 504; Grant, Corp. 146. *Requisites and proof of corporate conveyances.* Osborne *v.* Tunis, 25 N. J. L. 633, 658; Lovett *v.* Steam Saw Mill Assoc., 6 Paige, 54; Hamilton *v.* Newcastle & D. R. R. Co., 9 Ind. 359; Middleton Sav. Bank *v.* Dubuque (deed by mayor *pro tempore*), 19 Iowa, 467; Gourley *v.* Hankins, 2 Iowa, 75.

When the legislature authorized a board exercising the corporate authority of a city to convey its lands to a corporation, and vested such board with discretion in the matter, *a member of such board, who is a stockholder or director in the grantee corporation*, cannot act officially in the city board in relation to the matter, or in making the conveyance; and if he does, and his vote or signature to the deed was requisite to complete the conveyance, the deed will be set aside as a cloud on the title. San Diego *v.* S. D. & L. A. R. R. Co., 44 Cal. 106 (1872). See *ante*, secs. 283, note, 444.

[2] Cofran *v.* Cockran, 5 N. H. 458 (1831); Coburn *v.* Ellenwood, 4 N. H. 99, 102, and cases cited. As to title under a vote, where possession is taken, see Copp *v.* Neal, 7 N. H. 275, 278, and authorities cited. In Ward *v.* Bartholomew, 6 Pick. (Mass.) 409, it was held that a conveyance of land by an individual as an agent of the commonwealth, under a resolve authorizing him to convey, might be sufficient even if the deed was executed in the name of the agent. And in Cofran *v.* Cochran, *supra*, it was determined that, from long usage, and in view of the great public mischief which would be produced by a contrary holding, land might be conveyed by a deed in the name of a duly authorized agent of the town. This decision is expressly put upon the maxim "*Communis error facit jus.*" Special legislative authority to certain "*trustees*" (declared to be a body corporate) to sell a lot is well executed by a deed in which the grantors describe themselves properly as the "*trustees*," and then sign and seal the conveyance in their individual names. De Zeng *v.* Beekman, 2 Hill (N. Y.), 489 (1842).