§ 669 (530). **No title by Adverse Possession as against the Public.** — It will be seen, on examination, that quite a number of the cases cited in the last note declare that the public may even lose their right to streets and public places by long-continued adverse occupation by private individuals. But, on the other hand, it has been repeatedly held by the Supreme Court of Pennsylvania "that

v. Phila. & R. R. R. Co., 58 Pa. St. 253. On the general subject of the application of the statute of limitations to municipal corporations, see, also, Galveston *v.* Menard, 23 Tex. 349, 408 (1859); School Directors *v.* Goerges (ejectment) 50 Mo. 194 (1872); Abernethy *v.* Dennis, 49 Mo. 468; Baker *v.* Johnson, 33 Iowa, 151 (1871); Rowan's Ex. *v.* Portland, 8 B. Mon. (Ky.) 259; Alves *v.* Henderson, 16 B. Mon. (Ky.) 151, 171 (1855); Dudley *v.* Frankfort Trs., 12 B. Mon. (Ky.) 610, 617; Newport *v.* Taylor, 16 B. Mon. (Ky.) 699, 806; Paine *v.* Commissioners, &c., Wright's (Ohio) Rep. 417; Kelly's Lessee *v.* Greenfield, 2 Har. & McHen. (Md.) 132, 137; North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 137; Fort Smith *v.* McKibbin, 41 Ark. 45; May *v.* School District, 22 Neb. 205. And see Judge *Storer's* argument, 8 Ohio, 304; St. Charles *v.* Powell, 22 Mo. 525 (1856); Armstrong *v.* Dalton, 4 Dev. (N. C.) 568 (1834); Pella *v.* Scholte, 24 Iowa, 283; Bowen *v.* Team, 6 Rich. (S. C.) Law, 298; Clements *v.* Anderson ("swamp-lands"), 46 Miss. 581 (1872); State *v.* Pettis, 7 Rich. (S. C.) 390; Barnwell *v.* McGrath, McMullan (S. C.) 174; Lancaster County *v.* Brinthall, 29 Pa. St. 38; *ante*, secs. 487 note, 504 note, 562 note; Magee *v.* Commonwealth, 46 Pa. St. 358, where the statute of limitations was held not applicable to assessments for local improvements. But see Evans *v.* Erie County, 66 Pa. St. 222. In *Iowa* recovery by municipal corporations for taxes becoming delinquent more than five years before the commencement of the action is barred by the statute of limitations. When a city lays aside its sovereignty, and places itself in the position of a contracting power, it subjects itself to the laws controlling the natural person. Burlington *v.* Railroad Co., 41 Iowa, 134 (1875). *Inability to serve process* upon a city, caused by the designed elusion of it by its officers, is no excuse for not commencing an action within the period limited by law. Amy *v.* Watertown (No. 2), 130 U. S. 320 (1889); Knowlton *v.* Watertown, 130 U. S. 327. The *Missouri* statute of limitations respecting a "liability created by statute" applies to an action by a city corporation to recover a special tax assessed against property for a street improvement; and as by express provision of the statute its limitations apply to actions brought in the name of the State or for its benefit, the statute, as it would clearly run against the State, runs equally, in the absence of special provision to the contrary, against the public and municipal corporations of the State. St. Louis *v.* Newman, 45 Mo. 138 (1869). The statute of limitations does not, in any event, begin to run against the inhabitants of a town until they are incorporated, and thus capacitated to sue. Reilly *v.* Chouquette, 18 Mo. 220 (1853); Sims *v.* Chattanooga, 1 Lea (Tenn.), 694, approving text. It seems that the legislature may require a municipal subdivision of the State to pay a *just debt*, though barred by the statute of limitations. Caldwell County *v.* Harbert, 68 Tex. 321; see *ante*, chap. iv. as to extent of legislative power. See further as to *Limitations*, *post*, secs. 675, 815 note.

A city permitting a street which had not been opened to be partially enclosed or occupied for sixteen years by the owner of abutting property, was held not be estopped to assert its ownership in the land enclosed. Solberg *v.* Decorah, 41 Iowa, 501 (1875). But when a city has permitted a party, under a claim of right, to occupy for thirty years land granted to it for a street, it will be presumed to have abandoned its right thereto. Simplot *v.* Dubuque, 49 Iowa, 630.

the lapse of time furnishes no defence for an encroachment on a public right," such as an obstruction on a street or a public square. The view of the court is, in substance, this: Streets and public squares are dedicated or acquired for the *public use*, and not alone for that of the people of the city, the corporation being the mere trustee for the public; that erections by private persons on property thus dedicated or acquired, cannot be authorized by the original proprietor, or by the city corporation, and can be authorized only by act of the legislature; that unauthorized obstructions and erections thereon are public nuisances, and may be prosecuted by indictment or other proceedings on behalf of the public, and that no length of time, unless there be a limit *by statute*, will legalize a public nuisance, or bar the right of the public to proceed by indictment to abate it; and that, in the absence of a grant shown from a competent source, no presumption from mere lapse of time can be made to support a nuisance which is an encroachment on the public right. In one case Mr. Justice Sergeant forcibly observes: "These principles pervade the laws of the most enlightened nations, as well as our own code, and are essential to the protection of public rights, which would be gradually frittered away if the want of complaint or prosecution gave the party a right. Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have an interest sufficient to make them vigilant. But in public rights of property each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right."[1]

[1] *Per Sergeant*, J., Commonwealth *v.* Alburger, 1 Whart. (Pa.) 469, 488; Sims *v.* Chattanooga, 1 Lea (Tenn.), 694, approving text. See, also, Commonwealth *v.* McDonald (indictment for "actual obstruction," &c.), 16 Serg. & Rawle (Pa.), 390 (1827); Barter *v.* Commonwealth (ownership of wells in streets), 3 Pa. (Penr. & W.) 253 (1831). In this case, *Gibson*, C. J., remarks: "The title of the corporation [of Lancaster] to the soil [of the streets] for uses that conduce to the public enjoyment and convenience, is paramount and exclusive; and no *private* occupancy, for whatever time, *and whether adverse or by permission*, can vest a title inconsistent with it. The case of the Commonwealth *v.* McDonald, by which this salutary principle has been conclusively established, is founded in the purest reason, and fortified by the strongest authorities." *Ib.* 259; Rung *v.* Shoneberger (claim of ownership in public square), 2 Watts (Pa.), 23 (1833). This position was adhered to in Kopf *v.* Utter, 101 Pa. St. 27, where the right of the municipality to part of a street, which had been fenced in by an adjoining owner for over twenty-one years, was sustained. As to title by adverse possession, compare with remarks by *Gibson*, C. J., above quoted, Commonwealth *v.* Alburger (indictment for erecting church in Franklin Square, Philadelphia), 1 Whart. (Pa.) 469 (1836); Penny Pot Landing Case, 16 Pa. St. 79, 94, citing and reaffirming the foregoing cases; Philadelphia *v.* Phila. & R. R. R. Co., 58 Pa. St. 253. It is a fair deduction from the foregoing cases, that a prescriptive right to maintain an encroachment upon the public streets or squares cannot be set up as against the public,

§ 670 (531). **Same subject. Civil Law Doctrine.** — In Louisiana, also, it is considered, that streets, levees, commons, or public

and that, as against the public, a title by adverse possession cannot be acquired by individuals. The above-cited cases in *Pennsylvania* were approved in Burbank *v.* Fay, 65 N. Y. 57, 71 (1875). As to private rights, the statute of limitations runs, in *Pennsylvania*, against municipal corporations. Evans *v.* Erie County, 66 Pa. St. 222. This case holds that as respects real property owned by a municipal corporation, the statute of limitation applies the same as against other owners of private property.

The doctrine that a right to a portion of a public street may be acquired as against the public by prescription or adverse possession, was rejected, and characterized "eminently disastrous to the public interests," by *Whelpley*, J., in Jersey City *v.* Morris Canal & B. Co., 12 N. J. Eq. 547, 561, denying the correctness of Knight *v.* Heaton, 22 Vt. 480, and similar cases, which hold that the enclosure and occupation of lands within the limits of a highway for twenty years, under a claim of right, make title in the occupier by prescription as against the public. Smith *v.* State, 23 N. J. L. 712 (1852). In Manko *v.* Chambersburgh, 25 N. J. Eq. 168, the court refused under the circumstances to dissolve an injunction to restrain the municipal authorities from removing a building alleged to encroach upon the street, on which it had been erected under a claim of right on a line on which for thirteen years numerous other houses had been built. It was held in Simmons *v.* Cornell, 1 R. I. 519, that no adverse possession and use of a *portion* of a highway by individuals, however long, would give a title as against the State or the public, as the statute of limitations does not run against them, because the adverse claim could never have had a legal commencement. But see Beardslee *v.* French, 7 Conn. 125, where an entire *non-user* for ninety years of the whole way, and an exclusive possession by an individual, was held to extinguish the right of the public. Litchfield *v.* Wilmot, 2 Root (Conn.), 288. A street when dedicated was eighty feet in width, and subsequently, under proceedings void in law, twenty feet were vacated, leaving the street sixty feet wide, to which width only did the municipal authorities work it, and adjacent lot-owners improved with reference to its being a sixty-feet street. It was the opinion of the Chief Justice that the city, acting under the mistake of supposing the proceedings to vacate to be binding upon it, was not thereby estopped to insist that the street was eighty feet wide. Jersey City *v.* State, 30 N. J. L. 521 (1863); Cross *v.* Morristown, 18 N. J. Eq. 305 (1867). The reader will find a review of some of the more important decisions on the subject of prescriptive rights as against the public, in the able and learned opinion of Mr. Commissioner *Dwight* in Burbank *v.* Fay, 65 N. Y. 57 (1875). The conclusions arrived at are that, as the theory of prescription rests upon a supposed grant, no grant can be presumed where the grant would be unlawful or in violation of law; and that no length of user can confer a right contrary to the provisions of a statute. "Where no express grant can be allowed the law will not resort to the fiction of an implied grant so as to create a prescriptive right. If it would, the whole policy of the prohibitory statute might be subverted by the supineness or wilful frauds of public officers. This doctrine is clearly maintained by the following authorities: Staffordshire Canal Nav. *v.* Propr. Birmingham Nav., Law Rep. 1 E. & I. Appeals, 254 (1866); Rochdale Canal Co. *v.* Radcliffe, 18 Q. B. 287; Elwell *v.* Prop. Birmingham Canal Nav., 3 H. of Lords Cases, 812; Grand Surrey Canal Co. *v.* Hall, 1 M. & G. 392."

Mr. Digby maintains with force and apparent correctness, that the doctrine of the English law, that all *prescriptive* rights must be such as could have originated in a valid grant, has arisen from false historical notions, and is in reality a legal fiction. Digby Hist. Law of Real Prop., chap. iii. sec. 2, note, p. 156.

The constant and exclusive use by a railroad company of part of a street of a town, *as and for a right of way*, cannot in any time ripen into an absolute ownership

grounds, &c., are lands which are *out of commerce*, incapable of being alienated, and must ever remain free to the public. It is, therefore, held, that no silence or length of time can deprive a public corporation of its power over public places; that its inaction may give an occupier an estate at sufferance, but nothing more; and that inasmuch as such property is not susceptible of alienation by the corporation, no prescriptive or adverse right thereto can be acquired, since prescription presupposes a title fairly acquired, but not now capable of proof.[1]

§ 671 (532). **Statutes of Limitation held Inapplicable.** — In Illinois, where the statute of limitations protects an actual possession of lands, under a *bona fide* claim or color of title, for seven years, to the extent and according to the purport of the possessor's paper title, it is held that this statute does not apply to a suit brought by a municipal corporation to recover possession of property which was dedicated to it for the use of the public, since the corporation has no power to *alien* or *dispose* of the property, and hence there could be no paper title to be protected such as the statute contemplated. Whether an adverse possession for twenty years would defeat an action by the corporation, no opinion was given.[2] As an incorpo-

of such part. Indianapolis, P. & C. R. R. Co. *v.* Ross, 47 Ind. 25 (1874).

[1] New Orleans *v.* Magnon, 4 Martin (La.), 2 (1815); s. p. New Orleans *v.* Maggioli, 4 La. An. 73 (1849). Text cited and approved: Sims *v.* Chattanooga, 1 Lea (Tenn.), 694; Ingram *v.* Police Jury, 20 La. An. 226 (1868). It may be observed that in neither of these cases did the defendants show a state of facts of which adverse possession could be fairly predicated, or in which a right or title could be fairly acquired. See, also, Delabigarre *v.* Second Municipality, 3 La. An. 230, 237; Shreveport *v.* Walpole, 22 La. An. 526 (1870). Acts of city authorities, in ignorance of its rights, and prejudicial to those rights with respect to streets and commons, are not binding upon the corporation. Lewis *v.* San Antonio (Exidos grant for pasturage, &c.), 7 Tex. 288 (1851); New Orleans *v.* United States, 10 Pet. 734; Plaquemines Par. Pol. Jury *v.* Foulhouze, 30 La. An. 64, approving text.

As to title against the public, or a municipal corporation, by *adverse possession*, see, further, 1 Domat, 492; Henshaw *v.* Hunting, 1 Gray (Mass.), 203; Jersey City *v.* Morris Canal & B. Co., 12 N. J. Eq. 547; Manko *v.* Chambersburgh, 25 N. J. Eq. 168; Fox *v.* Hart, 11 Ohio, 414; Rowan's Ex. *v.* Portland, 8 B. Mon. (Ky.) 232, 259; Georgetown Street Comm'rs *v.* Taylor, 2 Bay (S. C.), 282; Galveston *v.* Menard, 23 Tex. 349; Onstott *v.* Murray, 22 Iowa, 457 McFarlane *v.* Kerr, 10 Bosw. (N. Y.) 249; Kellogg *v.* Thompson, 66 N. Y. 88 (1876); Litchfield *v.* Wilmot, 2 Root (Conn.), 288; State *v.* Pettis, 7 Rich. (S. C.) Law, 390; Memphis *v.* Lenore, 6 Coldw. (Tenn.) 412; Bowen *v.* Team, 6 Rich. 298; Pella *v.* Scholte, 24 Iowa, 283; Brooks *v.* Riding, 46 Ind. 19 (1874).

Mere *non-user* of an easement acquired in real property by a city — in this case by condemnation for public use — will not extinguish the right to the use. An *abandonment* of a right so acquired can only be established by proving acts of a conclusive character, such as show an *intention* to abandon the use. Curran *v.* Louisville, 83 Ky. 628.

[2] Alton *v.* Illinois Transportation Co., 12 Ill. 60. Approved, Chicago *v.* Wright, 69 Ill. 327 (1873); Turney *v.* Chamberlain

rated town or city holds the title to its streets and alleys for the use of the public, and has no rightful authority to grant the streets for any purpose inconsistent with the public use, it follows that an individual cannot acquire a prescriptive right therein for any private use.[1]

§ 672. **Prescriptive Right of Lateral Support of Soil.** — In Georgia the principle that the owner of a building erected on the line of his lot may, by lapse of time, acquire a prescriptive right to the lateral support of the adjacent soil does not exist, especially against a public or municipal corporation in respect of its streets.[2]

§ 673. **Laches; Limitation; Distinction asserted between State and Municipality.** — In the case cited in the note, the court observed that "the reason sometimes assigned why no laches shall be imputed to the king, is that he is continually busied for the public good, and has not leisure to assert his right within the period limited to subjects. A better reason is the great public policy of preserving public rights and property from damage and loss through the negligence of public officers. This reason certainly is equally if not more cogent in a representative government where the power of the people is delegated to others, and must be exercised by them if exercised at all; and accordingly the principle is held to have been transferred to the sovereign people of this country when they succeeded to the rights of the king of Great Britain and formed independent governments within the respective States. This principle we approve, and regard the exemption from the effect of limitation statutes as essential to the well-being of the government of the States; but this exemption belongs and appertains to sovereignty alone. The reason for it is very apparent. If the statutes of limitation would run against the State, her public lands, if she had any, would be liable to be taken possession of by squatters, who would hold them for the time required by the statute and defy the State; and the State in that portion being sparsely populated, there would be few or none to complain, as it would be the cheapest way to obtain lands from the State. The highways of the State would be liable to be impaired or destroyed by encroachments, and the country not being thickly settled, and the neighbors all acquainted with each other, and the State officers being remote from these highways, there would perhaps be little complaint. But in a city or town, where so many people are to

(as to adverse possession), 15 Ill. 271. Text approved, Sims *v.* Chattanooga, 2 Lea (Tenn.), 694.

[1] Quincy *v.* Jones, 76 Ill. 231 (1875).

[2] Mitchell *v.* Rome, 49 Ga. 19 (1873).

suffer inconveniences by such encroachments, and the officers of the city or town are on the spot, such encroachments are not apt to be tolerated for a long period, and they would be less likely to be tolerated if it was known that an uninterrupted possession of a street, alley, or square would, in a certain number of years, give title to the occupier."[1]

§ 674. **Same subject. Conflicting Views.** — In the same case it is also said that the courts of Pennsylvania, New Jersey, Rhode Island, and Louisiana have held that the maxim *Nullum tempus occurrit regi* is not restricted in its application to sovereignty, and that it applies to municipal corporations as trustees of the rights of the public.[2] On the other hand, the courts of Vermont, Massachusetts, New York, Connecticut, Maryland, Virginia, North Carolina, South Carolina, Mississippi, Texas, Missouri, Kentucky, Ohio, Illinois, and Iowa have restricted the application of the maxim to sovereignty alone, and most of them have held in cases requiring the decision that municipal corporations, like natural persons, are subject to the statutes of limitation.[3]

§ 675 (533). **Same subject; The Author's View and Suggestions as to the True Doctrine.** — Upon consideration, it will, perhaps, appear that the following view is correct: Municipal corporations, as we have seen, have, in some respects, a double character, — one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations

[1] Wheeling *v.* Campbell, 12 W. Va. 36.

[2] *Ib.*; Cross *v.* Morristown, 18 N. J. Eq. 311; Jersey City *v.* State, 30 N. J. L. 521; Simmons *v.* Cornell, 1 R. I. 519; Philadelphia *v.* Phila. & Read. R. R., 58 Pa. St. 253, 263; Commonwealth *v.* McDonald, 16 S. & R. (Pa.) 401; Rung *v.* Shoneberger, 2 Watts (Pa.), 23; Jersey City *v.* Morris Canal & B. Co., 12 N. J. Eq. 561; New Orleans *v.* Magnon, 4 Martin (La.), 1.

[3] Wheeling *v.* Campbell, *supra;* Kelly's Lessee *v.* Greenfield, 2 Har. & M. (Md.) 138; Knight *v.* Heaton, 22 Vt. 480; Varick *v.* New York, 4 Johns. Ch. (N. Y.) 53; Inhabitants of Litchfield *v.* Wilmot, 2 Root (Conn.), 288; Armstrong *v.* Dalton, 4 Dev. (N. C.) 568; State *v.* Pettis, 7 Rich. (S. C.) 390; Bowen *v.* Team, 6 Rich. (S. C.) 298; Galveston *v.* Menard, 23 Tex. 349; Rowan's Ex. *v.* Portland, 8 B. Mon. (Ky.) 232; Dudley *v.* Frankfort Trs., 12 B. Mon. (Ky.) 610; Alves' Ex. *v.* Henderson, 16 B. Mon. (Ky.) 131; Clements *v.* Anderson, 46 Miss. 581; St. Charles County *v.* Powell, 22 Mo. 525; School Directors *v.* Goerges, 50 Mo. 194; Cincinnati *v.* Evans, 5 Ohio St. 594; Lane *v.* Kennedy, 13 Ohio St. 42; Oxford Township *v.* Columbia, 38 Ohio St. 87; Forsyth *v.* Wheeling, 19 W. Va. 318; Peoria *v.* Johnston, 56 Ill. 45; Ch. R. I. & P. R. R. *v.* Joliet, 79 Ill. 40; Richmond *v.* Poe, 24 Gratt. (Va.) 149; Levasser *v.* Washburn, 11 Gratt. (Va.) 572; Pella *v.* Scholte, 24 Iowa, 283; Burlington *v.* Burlington & M. R. Co., 41 Iowa, 134; see *ante*, secs. 562, note, 668, 669; *post*, sec. 815, note.

should not fall within limitation statutes, and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations.[1] But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will, perhaps, be found, that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes.[2] It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not, as right and justice may require.[3]

[1] Powers *v.* Council Bluffs, 45 Iowa, 652 (1877). Where the defendant, a city, had constructed a ditch along a street by plaintiff's property in such a negligent and unskilful manner that his property was injured thereby, it was held that the right of action was barred in five years from the time when the injury to the property began. *Ib.;* Strosser *v.* Fort Wayne, 100 Ind. 443; Simplot *v.* Chicago, M. & St. P. Ry. Co., 16 Fed. Rep. 350; School Directors *v.* School Directors, 105 Ill. 653; Piatt County *v.* Goodell, 97 Ill. 84; People *v.* Oran, 121 Ill. 650 (an action by a town, from which territory was taken, against the town to which it was added, to compel a contribution to the payment of indebtedness, it being held that the statute of limitation could be pleaded in bar). A charter provision that no action for damages, of any character whatever, to either person or property, shall be instituted against the city unless *within six months* after the cause of action accrues, held not to be unconstitutional for being an attempt to confer a special privilege upon a city. Preston *v.* Louisville, 84 Ky. 118. Where, by statutory provision, no action can be brought against a city to recover or enforce a claim until the expiration of a specified time after the claim shall have been presented to it, the requirement is a condition precedent to the institution of an action, and compliance with it must be alleged. Reining *v.* Buffalo, 102 N. Y. 308.

[2] Text "adopted" in District of Columbia *v.* Washington & G. R. R. Co., 1 Mackey, 361; "approved," Sims *v.* Frankfort, 79 Ind. 446, and Vicksburg *v.* Marshall, 59 Miss. 563.

[3] Consult on this subject: Chicago & N. W. R. R. Co. *v.* Elgin, 91 Ill. 251; Chicago, R. I. & P. R. R. Co. *v.* Joliet, 79 Ill. 25; Ramsay *v.* Clinton Co., 92 Ill. 225; Logan Co. *v.* Lincoln, 81 Ill. 156; Leroy *v.* Springfield, 81 Ill. 114; Brooks *v.* Riding, 46 Ind. 15 (1874), where the subject is well discussed by *Buskirk*, J.; Simplot *v.* Dubuque, 49 Iowa, 630; Quincy *v.* C., B. & Q. R. R., 92 Ill. 21; Sims *v.* Chattanooga, 2 Lea (Tenn.), 694; Cheek *v.* Aurora, 92 Ind. 107; Sims *v.* Frankfort, 79 Ind. 446; Greene County Comm'rs *v.* Huff, 91 Ind. 333; Waterloo *v.* Union Mill Co., 72 Iowa, 437; Elliott *v.* Williamson, 11 Lea (Tenn.), 38; Piatt County *v.* Goodell, 97 Ill. 84. In Brooks *v.* Riding, *supra*, *Buskirk*, J., says, "Where the lines of a street have been practically established by the occupancy and improvements of the lots bordering upon it, and the city authorities have recognized the correctness of the lines so established by permitting the owners to so occupy and improve their property, and have acquiesced in it for a considerable length of time, and to such an extent that to change the lines would work great wrong to the owners and disturb long-established lines and possession, the city or public authorities would undoubtedly be estopped from disturbing the lines so practically established, although an accurate survey should show that they were wrong according to the plat, and that the lots as occupied extended into the street as originally established. But it does not appear, in the case under examination, that the owners or occupants of any other lot on the line of the street, upon which the lot in question was situated, had extended it so as to occupy any portion of the street. It only appears that the city authorities had simply permitted the occupant of the lot in question to occupy a small portion of the street not then needed by the public. In our opinion, the inclosure and occupation of the five feet of the street by Brooks and those under whom he claims did not destroy the rights of the public in such strip of ground and vest the title thereto in him or those through whom he derived his title."

[1] State *v.* Putnam Co. Comm'rs, 23 Fla. 632 (1887), citing text.

The Establishment and Control of Ordinary Highways and Roads within Municipal Limits.

§ 676 (534). **Ordinary Highways as distinguished from Streets, within the limits of an Incorporated Place.** — Throughout the United States, township, county, or other local authorities have the general control and supervision over the ordinary public highways, while in incorporated towns and cities this power, as respects streets, is usually conferred upon the corporate authorities. When the jurisdiction and power in the one is excluded by the charters of the other, has given rise to nice and difficult questions of construction, depending upon the supposed intention of the legislature, to be gathered from the whole course of legislation on the subject in the particular State, and with reference to the particular municipality.[1] A few illustrations, drawn from actual decisions, may be useful; and first, of cases where it has been held that the *municipal authority was exclusive* of the authority conferred upon other officers or tribunals by the general statutes.

§ 677 (535). **Same subject.** — In Tennessee it was held, in an early case, that the county court had no power to lay off roads through incorporated towns: Because, 1. The act of assembly authorizing them to lay off such *roads* within a county as they shall deem proper does not literally extend to *streets*. 2. Every town supposes the existence of lots and streets, and its erection into a town by the legislature creates a state of private interest distinct from the body of the county, and this should be regulated by the townspeople.

3. The magistrates composing the county court are from the country, at least most of them, and consequently cannot be expected to know the interest of the corporation, and if they did they might feel inimical to it.[1] So, by statute in Texas, the counties had general authority to keep in repair the public highways therein, and an incorporated town, by its charter, had the right to improve its streets and alleys; and the question arose, whether the county or town authorities had power to keep in repair streets or highways within the corporate limits of the town. The court, to prevent conflict of jurisdiction, held that the town had exclusive control of the streets and highways therein.[2] So it is held in Indiana, that the general statutes of the State in relation to "public highways" do not apply to the *streets* and *alleys* of an incorporated town or city.[3]

§ 678 (536). **Same subject. General Law and Special Charter Provisions construed.** — On the principle of the foregoing cases, it is held that a *general State law*, authorizing counties and townships to impose the burden of road labor only on persons between twenty-one and fifty years of age, *does not limit the express charter power of a city* to impose such burden upon all persons over twenty-one years

[1] Cowan's Case, 1 Overton (Tenn.), 311 (1808). "A highway is not a street, either technically or in common parlance; so judicially settled." Indianapolis *v.* Croas, 7 Ind. 9; Lafayette *v.* Jenners, 10 *Ib.* 74, 79. But a street is of course a highway, in the sense that it is free for every person to use it for the purpose of travel, conforming, of course, to all proper police regulations; and the right of passage is one which the municipal authorities cannot abridge or deny. Bell *v.* Foutch, 21 Iowa, 119, 131 (1866); Barrett *v.* Brooks, *Ib.* 144; St. Charles *v.* Nolle, 51 Mo. 122 (1872); People *v.* Chicago & N. W. Ry. Co., 118 Ill. 520.

Public roads and streets are distinct thoroughfares, managed and controlled by distinct municipal authorities, and a statute punishing a purpresture of the one will not be extended to the other, in the absence of any words in the statute showing that such other was intended to be included. Clark *v.* Commonwealth, 14 Bush (Ky.), 166 (1878).

[2] State *v.* Jones, 18 Tex. 874 (1857).

[3] Indianapolis *v.* Croas, 7 Ind. 9 (1855). So, in *New Jersey*, it is held that the general road acts of the State do not apply to incorporated places having special power to regulate and improve streets. Cross *v.* Morristown, 18 N. J. Eq. 305; State *v.* Morristown, 33 N. J. Law, 57. A similar ruling has been made in *Kentucky*. Clark *v.* Commonwealth, 14 Bush. 166. Where, upon the incorporation of a city, it was given control over the public highways within its limits, to the exclusion of the county, and the charter, in a provision relating to obstructions, enumerated "public highways, streets, &c.," thus recognizing the two classes of ways, it was held that the transfer of control did not change the highway into a street so as to make abutting owners liable for assessments for improving it as a street by paving, grading, &c. Heiple *v.* East Portland, 13 Oreg. 97. But in *Illinois* a highway or public road becomes a street when a town is incorporated covering territory which includes it, and the rights and obligations of the town and of the public are the same as if it had been laid out by the town after its incorporation. Palatine *v.* Kreuger, 121 Ill. 72.

of age, and hence it may require persons over fifty years of age to perform road labor.[1]

§ 679 (537). **Same subject.** — On the other hand, power, by charter, conferred upon a city to lay out new highways, and to alter, enlarge, and extend highways within its limits, was held not to divest by implication or implied repeal the jurisdiction of the county court over the same subject given by general statutes.[2] So it is held, in Ohio, that general powers being conferred upon the commissioners of the county to lay out and establish roads within the limits of the county, they are thereby authorized, unless their authority is especially restricted in the acts of incorporation, to lay out and establish *county* roads, whose *termini* are wholly within, or which run through, an incorporated town or city, — these corporations, unless expressly exempted, being subject to the operation and control of the general laws of the State.[3]

[1] Fox *v.* Rockford, 38 Ill. 451 (1865). See O'Kane *v.* Treat, 25 Ill. 557, as to exemption of cities under charters from road taxes levied by township and county authorities. In general, the jurisdiction of a city or town over its streets is exclusive, as to road labor, of the general laws of the State relating to public or county roads. *Ib.*; Ottawa *v.* Walker, 21 Ill. 605.

Road labor may be constitutionally imposed by statute unless the power of the legislature be specially limited. Sawyer *v.* Alton, 4 Ill. 130; Skinner's Ex. *v.* Hutton, 33 Mo. 244. See chapter on Taxation, *post*.

Until the town the plat of which is recorded becomes incorporated, the streets are under the control of the county authorities, who cannot enlarge or diminish their width, but may direct how much thereof shall be worked or improved. Waugh *v.* Leech, 28 Ill. 488 (1862). Streets need not be recorded in the *county* records. Townsend *v.* Hoyle, 20 Conn. 1.

Free and toll bridges: Unless authorized by statute, a county cannot use county funds to aid in the construction of *toll bridges*, or to aid a private individual in the construction of a free bridge. Colton *v.* Hanchett, 13 Ill. 615 (1852); Clark *v.* Des Moines, 19 Iowa, 198. In *Iowa*, counties have been held, under the legislation of that State, to have power to aid in the construction of *free* bridges, erected with the sanction of the proper municipal authorities, for public use, upon public lines of travel, within incorporated towns or cities. Bell *v.* Foutch *et al.*, 21 Iowa, 119 (1866); Barrett *v.* Brooks, *Ib.* 144; see *ante*, chap. xiv.

Rights of city as the purchaser of a *toll bridge*, and particularly as to the right to replace old bridge by a new one. Scott *v.* Des Moines, 34 Iowa, 552.

As to liability in *Iowa* of *county* for defective bridges *within* city limits. McCullom *v.* Black Hawk County, 21 Iowa, 409. A city was held not to be exempt from liability in respect of a defective culvert built by it in one of the streets of the city, by reason of the culvert having been paid for by money appropriated by the *county*. Van Pelt *v.* Davenport, 42 Iowa, 308 (1875); s. c. 20 Am. Rep. 622; *post*, chap. xxiii.

[2] Norwich *v.* Story, 25 Conn. 44 (1856). Duty of repair held to rest on the *town*, and not the city, the former being made liable by statute, and the latter not. Guthrie *v.* New Haven, 31 Conn. 308.

As to right of city to recover a street from an incorporated turnpike company after the expiration of its charter, see St. Clair County Turnp. Co. *v.* Illinois, 96 U. S. 63 (1877).

[3] Wells *v.* McLaughlin, 17 Ohio, 99; Butman *v.* Fowler, *Ib.* 101 (1848); Swan's Ohio Stat. 796. Municipal charter held not

Power of the Municipality over Streets and Their Uses.

§ 680 (538). **Extent of Power over Streets.** — As the highways of a State, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may be put, depends entirely upon their charters or the legislative enactments applicable to them.[1] It is usual in this country for the legislature to confer upon municipal corporations very extensive powers in respect to streets and public ways within their limits, and the uses to which they may be appropriated.[2] This will be illustrated everywhere throughout the present chapter. The authority to open, care for, regulate, and improve streets, taken in connection with the other powers usually granted, gives to municipal corporations all needed authority to keep the streets free from obstructions, and to prevent improper use, and to pass ordinances to this end.[3]

to divest county authorities of their jurisdiction over part of the road lying within the limits of the town. Baldwin *v.* Green, 10 Mo. 410. Under the special act incorporating Bennington, it was held that the trustees of the village had not the exclusive authority to lay out highways within its limits, but that the general law upon the subject was still applicable. Bennington *v.* Smith, 29 Vt. 254 (1857).

Further as to power of county or township authorities with respect to roads and highways within the limits of incorporated towns and cities, see Pope *v.* St. Luke's Par. R. Comm'rs, 12 Rich. (S. C.) Law, 407; Sharett's Road, 8 Pa. St. 89; Pennsylvania R. R. *v.* Duquesne Bor., 46 Pa. St. 223; Mercer Bor. Road, 14 Serg. & R. (Pa.) 447; Newville Road, 8 Watts (Pa.), 172; Easton Road, 8 Rawle (Pa.), 195; Milton Road, 40 Pa. St. 300; Knowles *v.* Muscatine, 20 Iowa, 248; McCullom *v.* Black Hawk County, 21 Iowa, 409.

Extent of municipal control over *turnpike road* constructed in the streets of a city. State *v.* New Brunswick, 30 N. J. L. 395. See State *v.* Hoboken, *Ib.* 225; Quinn *v.* Paterson, 27 N. J. L. 35; State *v.* Passaic Turnp. Co., *Ib.* 217.

Power over *plank road* in street. State *v.* Jersey City, 26 N. J. L. 445; McKay *v.* Detroit & E. Pl. R. Co., 2 Mich. 138; Detroit *v.* Detroit & E. Pl. R. Co., 12 Mich. 333. See Regina *v.* Cottle, 3 Eng. Law & Eq. 474; *post*, sec. 723.

[1] Text approved. Grand Rapids Electric L. & P. Co. *v.* Grand Rapids Edison, &c., Co., 33 Fed. Rep. 659; Denver Circle R. Co. *v.* Nestor, 10 Col. 403.

[2] This section quoted by *Hunt*, J., and its doctrines applied in Barnes *v.* District of Columbia, 91 U. S. 540 (1875).

A city holds its streets in trust for the public, and has no power to divest itself of control thereof. (*Ante*, sec. 97.) An ordinance setting apart a street for a pleasure-way, and attempting to give the park commissioners control over the same, is to be regarded as a license to protect them from prosecution for interfering with such street, but not as relieving the city of its duty to improve the same as the public necessity may require. Kreigh *v.* Chicago, 86 Ill. 407.

[3] Philadelphia *v.* Phila. & R. R. R. Co., 58 Pa. St. 253; Commonwealth *v.* Brooks, 99 Mass. 434; Dudley *v.* Frankfort, 12 B. Mon. (Ky.) 610, 617; Sinton *v.* Asbury, 41 Cal. 525; Mercer *v.* Pittsburgh, Ft. W. & C. R. R. Co., 36 Pa. St. 99; Toledo, P. & W. Ry. Co. *v.* Chenoa, 43 Ill. 209; Ill. Central R. R. Co. *v.* Galena, 40 Ill. 344; Terre Haute *v.* Turner, 36 Ind. 522; Citizens' Gas & Mining Co. *v.* Elwood, 114 Ind. 332 (1887).

Construction of special powers in respect of streets: The *power to open new streets*, given in a city charter, was held to be synonymous with the power *to lay out and establish streets*, and not merely to limit the authority of the city to opening streets already existing on the plan or plat of the corporation and its additions. Hannibal *v.* Hannibal & St. J. R. R. Co., 49 Mo. 480 (1872). Under such authority a city may open streets across the track of existing railroads within the city limits. *Ib.*; Hannibal *v.* Winchell, 54 Mo. 172 (1873). Power to "open and extend streets" includes power to construct. Matthiessen & W. Sugar Ref. Co. *v.* Jersey City, 26 N. J. Eq. 247. But not to lay the same out *longitudinally* over a railroad track. New Jersey So. R. R. *v.* Long Branch Comm'rs, 39 N. J. L. 28 (1877); Alexandria & F. Ry. Co. *v.* Alexandria & W. R. R. Co., 75 Va. 780; Boston & Maine R. R. Co. *v.* Lowell & Lawrence R. R. Co., 124 Mass. 368; Bridgeport *v.* N. Y. & N. H. R. R. Co., 36 Conn. 255; Illinois Cent. R. R. Co. *v.* C. B. & N. R. R. Co., 122 Ill. 473; Pittsburgh Junction Co.'s Appeal, 6 Atl. Rep. 564; *post*, sec. 705, note. The common council of Detroit cannot start proceedings to open a private alley, except on application by responsible and interested parties. People *v.* Detroit Rec. Ct. Judge, 40 Mich. 64.

Power to the common council of a city, by the charter, to adopt ordinances "to prevent the *cumbering* of streets, sidewalks," &c., in view of the distinction recognized in the charter, and which the legislation of *Michigan* had always made, between cumbering and obstructing a public way, and encroaching upon it, was held to refer to impediments to travel placed in the open street, and not to actual inclosures of a portion of the street by fences, or occupation by buildings. Grand Rapids *v.* Hughes, 15 Mich. 54 (1866). Power to a city, by its charter, to regulate the use of streets and alleys, and to prevent and remove obstructions from them, contemplates the preservation of actual ways against nuisances which interfere with their accustomed use, and until they have become actually open obstructions thereon, under a claim of title apparent on the face of the prosecution, cannot be punished under an ordinance in the municipal tribunal, but the rights of the parties must be determined in the public courts. Jackson *v.* People, 9 Mich. 111 (1860). See, also, Warwick *v.* Mayo, 15 Gratt. 528. Construction of power to remove obstruction. State *v.* Jersey City, 37 N. J. L. 348; State *v.* Jersey City, 34 N. J. L. 31; Dawes *v.* Hightstown, 45 N. J. L. 501; s. c. *Ib.* 127. A municipal corporation may cause *surveys of streets*, squares, and other public property to be made, and may employ a surveyor or engineer to furnish copies of an original map or a new map of the city or town. People *v.* Flagg, 17 N. Y. 584 (1858); Randall *v.* Van Vechten, 19 Johns. 60 (1821).

Municipal power to regulate streets and sidewalks includes the power to determine *the width* of each. State *v.* Morristown, 33 N. J. L. 57 (1868). Authorized or lawful *temporary obstructions*, *post*, sec. 730. Power to *construct sidewalks* "as the public convenience may require," includes the power to *remove* them. *Per Devens*, J. "It is urged that this power to construct sidewalks, even if it be discretionary, cannot be treated as giving authority to remove or dispense with them where they already exist. To hold thus would be to give too limited an interpretation to the statute. The general power to construct sidewalks in all streets or not, whether macadamized or paved, must be construed as one which deals with the whole subject, and places it within the control of the local authorities. It authorizes them, in their discretion, not merely to construct them or not where they do not now exist, but to remove or dispense with them where they do exist, if in their judgment it is desirable." Attorney-General *v.* Boston, 142 Mass. 200.

[1] White *v.* Kent, 11 Ohio St. 550

Thus, a city, having "the care, supervision, and control of streets, squares, and commons" within its limits, may, by ordinance, prohibit the appropriation of these to private use, such as sales by individuals at auction thereon, or upon the sidewalks or streets.[1]