liable, on the principle of *respondeat superior*, or otherwise, for their conduct.[1]

§ 954. **Municipal Water-Works; Failure to supply Water.** — A municipal corporation, *owning water-works or gas-works* which supply private consumers on the payment of tolls, is liable for the negligence of its agents and servants the same as like private proprietors would be.[2] But in the absence of contract it is not liable to the consumer of water *for negligently laying its mains* too near the surface of the ground so that they are frozen, whereby the water is cut off, except for the loss of the rents during the period when the water is not supplied: the court observing that the claim in suit was not for damages caused by the bursting of the water-pipes laid by the city, but for the loss of water, and that the introduction of water by the city into private houses was a *license* which was paid for, and was not on the footing of a contract guaranteeing a constant supply.[3]

[1] In the case of Cohen *v.* New York, 113 N. Y. 532 (1889), a city, without authority, and in violation of a statute enacting that it should have no power to authorize the placing or continuing of encroachments or obstructions upon any street or sidewalk (except building materials), granted a permit to a grocer, in consideration of an annual license fee, the privilege of keeping a wagon used in his business, the same not being a public licensed cart, in the street in front of his store day and night. The wagon being so placed at night with the thills tied up by a string in a perpendicular position, a passing ice-wagon struck it, turning it around and causing the thills to fall upon and kill a passer-by upon the sidewalk. It was held, in an action by his administratrix against the city, that under these circumstances the city was liable, being regarded as itself maintaining the nuisance. *Peckham*, J., said: "We do not say that this principle of responsibility would render the city liable in every case of a mistaken exercise of power, authorizing the use or occupancy of a public street by an individual. We confine ourselves to the decision of this case, and we simply say that when the city, without the pretence of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct the public highway, while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance, so long as the obstruction is continued by reason of and under such license, and it must be liable for all damages which may naturally result to a third party who is injured in his person or property by reason or in consequence of the placing of such obstruction in the highway."

If this case is well decided, it is so upon grounds which, as we think, do not impeach the doctrines of the text, the controlling considerations therein being not the relation of licensee of the city, but the authorization by it, in violation of a statute, of a nuisance upon a street, rendering the same unsafe to travellers. See *infra*, secs. 1011, 1013, 1021; Stanley *v.* Davenport, 54 Iowa, 463, noticed *ante*, sec. 722, note; Shearm. & Red. Neg. sec. 263.

[2] Bailey *v.* New York, 3 Hill (N. Y.), 531; 2 Denio, 433; Western Sav. F. Soc. *v.* Philadelphia, 31 Pa. St. 175. Shearm. & Red. Neg. (4th ed.) 286. *Infra*, secs. 984–986.

[3] Smith *v.* Philadelphia, 81 Pa. St. 38 (1876); s. c. 22 Am. Rep. 731; *ante*, sec. 697. Liability for water escaping from the pipes or reservoir, and for damages from the bursting of pipes, see Hand *v.* Brookline, 126 Mass. 324; Wilson *v.* New Bedford, 108 Mass. 261; McAvoy *v.* New York, 54 How. Pr. Rep. 245; Stock *v.* Boston, 149 Mass. 410 (1889), where a city, having contracted to supply the owner of a green-house with water and steam heat, was held liable for the destruction of plants by reason of the freezing of the water supply pipe from being uncovered and negligently exposed while the city was constructing a sewer in the adjacent street, it appearing that the owner could not obtain a supply of water and heat by the use of ordinary diligence. The exposure of the water-pipe was the proximate cause of the injury, and the city was liable in tort, notwithstanding the owner might recover the same damages in an action on the contract. *Infra*, secs. 961, 967, 984, 985.



§ 955 (756). **Demolition of Houses to prevent spreading of Fire.** — The rights of private property, inviolable as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex.* Upon this principle, *in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures* in a city or compact town, to prevent the spreading of an existing conflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains. The ground of this exemption from liability is the *public necessity*, the public good; and, therefore, if the public good did not require the act to be done, — if the act was not apparently and reasonably necessary, — the actors cannot justify, and would be responsible.[1]

[1] Mouse's Case, 12 Coke, 63; *Ib.* 13, where Lord *Coke* says: "For the commonwealth, a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do, without being liable to an action." Maleverer *v.* Spinke, 1 Dyer, 36 *b*; British Cast Plate Co. *v.* Meredith, 4 D. & E. T. R. 797, *per Buller*, J.; Respublica *v.* Sparhawk, 1 Dallas, 337, and authorities cited by *McKean*, C. J. "We find, indeed, a memorable folly recorded in the third volume of Clarendon's History, where it is mentioned that the lord mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down of forty wooden houses, or to removing the furniture, &c., belonging to the lawyers of the Temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half of that great city was burned." *Ib.*; 15 Vin. Abr. title "*Necessity*," pl. 8; 2 Kent Com. 338; Taylor *v.* Plymouth, 8 Met. (Mass.) 462, 465 (1844), *per Shaw*, C. J.; Neuert *v.* Boston, 120 Mass. 338; New York *v.* Lord, 18 Wend. 126, affirming s. c. 17 Wend. 285 (1837); Smith *v.* Rochester, 76 N. Y. 506; Conwell *v.* Emerie, 2 Ind. 35 (1850); Field *v.* Des Moines, 39 Iowa, 575 (1874); s. c. 18 Am. Rep. 46, where *Miller*, C. J., applies the doctrine of the text; Keller *v.* Corpus Christi, 50 Tex. 614; Bowditch *v.* Boston, 101 U. S. 16. In the case of Field *v.* Des Moines, *supra*, the court held that the fact that the officers of a municipal corporation are authorized by ordinance to direct the destruction of private dwellings and other property to prevent the spread of fire, does not make the corporation liable, on the doctrine of *respondeat superior*, to the owners for property thus destroyed, unless there is an express statute or provision in the charter creating such liability. The *destruction of private property to prevent the spread of conflagration is not a "taking of private property for public use,"* entitling the owner to compensation from the city. The destruction of private property in such cases is an exercise of the right which individuals possess to

§ 956 (757). **Same subject. Statutory Liability.** — Municipal corporations, or certain officers thereof, are sometimes appointed, by charter or statute, "*agents to judge of the emergency,* and direct the performance of acts which any individual might do at his peril, without any statute at all."[1] And by statute or charter, such corporations are not unfrequently made liable for damages which individuals may sustain for buildings or property which are destroyed, under the direction of the proper officers, to prevent the extension of a fire. *The liability of the municipal corporation in such cases is purely statutory,* and therefore, in order to charge the corporation, the case must be clearly and fairly within the enactment.[2]

destroy private property in cases of imperative necessity. See, also, the interesting cases of the American Print Works, 23 N. J. L. 590 (1851), affirming s. c. *Ib.* 9; and see s. c. on former appeal, 21 N. J. L. 248; *Ib.* 714, which arose out of the great fire of 1835, in the city of New York; *ante,* sec. 141. See opinion of Mr. Justice *Field* in the case of United States *v.* Pacific Railroad, 120 U. S. 227, in respect of property destroyed in the Civil War, in pursuance of military orders or from military necessity. It was there held by the court that the United States are not liable in damages for the injury or destruction of private property caused by their military operations; nor are private parties chargeable for works constructed on their property by the United States to facilitate such operations. Accordingly, where bridges on the line of the Pacific Railroad (of Missouri) were destroyed during the Civil War by either of the contending forces, their subsequent rebuilding by the United States as a measure of military necessity, without the request of, or any contract with the railroad company, imposed no liability upon it therefor. If it becomes necessary for the improvement of the sanitary condition of its inhabitants, that a city must create a nuisance, — as the depositing of refuse, filth, &c., in a particular place, — its liability to persons affected thereby is confined to its careless or negligent execution of the work. Fort Worth *v.* Crawford, 64 Tex. 202.

[1] People *v.* Wynhammer, 12 How. N. Y. Pr. (Court App.) 260, *per Comstock,* J.; s. p. *per Selden,* J., *Ib.* 274 (*sub nom.* Wynehamer *v.* People, 13 N. Y. 378); Russell *v.* New York, 2 Denio (N. Y.), 461, 474 (1845), opinions of *Sherman* and *Porter,* Senators; *infra,* sec. 974, note. Text approved, Keller *v.* Corpus Christi, 50 Tex. 614; and see Harman *v.* Lynchburg, 33 Gratt. 37, where, in 1865, whiskey was destroyed by the police in anticipation of the presence of fugitive soldiers, and of the occupation of the city by Federal troops; and Jones *v.* Richmond, 18 Gratt. 517, noticed *ante,* sec. 443, note.

[2] Taylor *v.* Plymouth, 8 Met. (Mass.) 462, 465; Ruggles *v.* Nantucket, 11 Cush. (Mass.) 433; Hafford *v.* New Bedford, 16 Gray, 297; McDonald *v.* Red Wing, 13 Minn. 38 (1868); Sorocco *v.* Geary, 3 Cal. 69; Dunbar *v.* San Francisco, 1 Cal. 355 (1850); Howard *v.* San Francisco, 51 Cal. 52; Wheeler *v.* Cincinnati, 19 Ohio St. 19; Western Col. of Hom. *v.* Cleveland, 12 Ohio St. 375 (1861), *per Gholson,* J.; Fisher *v.* Boston, 104 Mass. 87; Neuert *v.* Boston, 120 Mass. 338; Hayes *v.* Oshkosh, 33 Wis. 314. The text was approved in Field *v.* Des Moines, 39 Iowa, 575 (1874); s. c. 18 Am. Rep. 46, in which it was held, where the mayor of the city, in pursuance of an ordinance, caused buildings to be destroyed to prevent the spread of fire, that the city was not liable to the owner of the buildings. *Miller,* C. J., collects and reviews the principal cases. See, also, Bowditch *v.* Boston, 101 U. S. 16. *Contra,* Bishop *v.* Macon, 7 Ga. 200 (1849), but the subject of *corporate* liability for the act of mayor and council in ordering the destruction is not distinctly discussed. *Lumpkin,* J., seems erroneously to suppose or assume that there is an *implied assumpsit* on the part of the city for the destruction of such property as might otherwise have been saved to the owner.



Thus, where the statute allows such a recovery only when a building is demolished by the order of *three* fire wards or directors, a destruction of it by the order or direction of one of these officers creates no liability against the corporation; and a *by-law* authorizing one to exercise, in urgent cases, the powers of the three, was adjudged to be void.[1]

§ 957 (758). **Same subject. Respondeat superior not applicable.** — The city council of Charleston, acting under the general municipal powers of the city, and without any special statute creating a liability, *adopted an ordinance authorizing the intendant,* among other officers, *in time of fire, to demolish such buildings "as may be judged necessary"* by him to prevent the further spread of fire, thereby investing this officer with the power to judge whether the necessity existed. A fire being in progress, the plaintiff's house was blown up by the order of the intendant, and the fire was subsequently extinguished before it reached his premises. He brought his action of trespass against the city, claiming that the property had been destroyed by the intendant without necessity, and that the ordinance authorizing the intendant to destroy the property for the benefit of the city was sufficient to charge the *city corporation* in case the plaintiff established that the destruction was unnecessary, and that the discretion of the officer had been abused. The court decided that the plaintiff could not recover, placing its judgment upon the

[1] Coffin *v.* Nantucket, 5 Cush. (Mass.) 269 (1850). Note remarks of *Metcalf,* J., 272, as to whether a *majority* of the fire wards or directors could lawfully authorize the destruction of buildings. Bowditch *v.* Boston, 101 U. S. 16; *ante,* secs. 283, 317. See, also, Ruggles *v.* Nantucket, 11 Cush. (Mass.) 433 (1853), on this point, and on the construction of the word "owner." As to the estate or interest necessary to justify recovery, and as to the right of recovery for *personal property* under the *New York* statute (2 Rev. Laws, 368), see Stone *v.* New York, 25 Wend. 157 (1840), affirming s. c. 20 Wend. 139; New York *v.* Lord, 18 Wend. 126; 17 Wend. 285. *Insurance.* It is held that the fact that the owner is insured does not affect the right of recovery or the amount to be recovered of the corporation. The insurers are entitled to be subrogated to all the rights of the owner or assured, and to have applied on their policies the amount received by him from the corporation. New York *v.* Pentz, 24 Wend. 668 (1840). And see Pentz *v.* Ætna Ins. Co., 9 Paige (N. Y.), 568; City F. Ins. Co. of N. Y. *v.* Corlies, 21 Wend. 367. *Interest.* Interest on the amount should be allowed from time of destruction. New York *v.* Pentz, 24 Wend. 668; 25 Wend. 157, but not intermediate the time of assessment and confirmation by the court. Lord *v.* New York, 3 Hill (N. Y.), 426. *Evidence.* The opinions of *bystanders* as to whether the buildings destroyed *would* have taken fire, not admissible; as to the opinion of *firemen, quære.* New York *v.* Pentz, 24 Wend. 668.

broad ground that the city, being a public corporation, was not liable to an action by individuals, unless it be given by statute.[1]

§ 958 (759). **Same subject. Statutory Remedy.** — As one whose property has been destroyed by the order of the public authorities, for the public benefit, has a strong natural equity for compensation, and as *statutes making the public corporation liable are remedial*, while they are not to be strained to cover cases not fairly embraced by them, they are yet to be liberally expounded.[2] If the statute creating the liability against the corporation prescribes the remedy, that alone can be pursued, as, if the statute provides for an assessment, a civil action will not lie against the corporation.[3] But if the statute gives the right or creates the liability and prescribes no specific remedy, an action may be brought.[4]

§ 959 (760). **Destruction of Property by Mobs.** — Public or municipal corporations are under no common-law liability to pay for

[1] White *v.* Charleston Council, 2 Hill (S. C.), 571 (1835). The result was right; but assuming the power to pass the ordinance, the decision should be placed, we think, upon the ground that the intendant was discharging a *public*, as distinguished from a *municipal* or *corporate* duty, and is not in this matter to be regarded as the agent of the city, and therefore the city would not, on the principle of *respondeat superior*, be responsible for his acts. Approved, 18 Am. Law Review, 1009. See oscillations in later cases. Johnston *v.* Charleston, 3 S. C. 232; Coleman *v.* Chester, 14 S. C. 286; Black *v.* Columbia, 19 S. C. 412. *Infra*, sec. 976, note. *Ante*, secs. 66, 950; *post*, secs. 974–980, 1043–1052; Fisher *v.* Boston, 104 Mass. 87; s. c. 6 Am. Rep. 196; Hafford *v.* New Bedford, 16 Gray, 297; Neuert *v.* Boston, 120 Mass. 338; Wheeler *v.* Cincinnati, 19 Ohio St. 19; Keller *v.* Corpus Christi (citing text with approval), 50 Tex. 614; Hamilton County *v.* Garrett, 62 Tex. 602; Edgerly *v.* Concord, 59 N. H. 78.

[2] New York *v.* Lord, 17 Wend. 285, 292 (1837), *per Nelson*, C. J., affirmed, 18 Wend. 126; New York *v.* Pentz, 24 Wend. 668; Stone *v.* New York, 25 Wend. 157. In *Massachusetts* it is held that the statute does not apply to a building which is pulled down by order of the public officers *after* it is so far burnt that it is impossible to save it. Taylor *v.* Plymouth, 8 Met. (Mass.) 462 (1844). And the *New York* statute does not impose a liability on the corporation for property which would inevitably have been destroyed by the fire. Pentz *v.* Ætna F. Ins. Co., 9 Paige, 568; New York *v.* Lord, 17 Wend. 285. Construction of *Georgia* statute, making municipal corporations liable. Dorrosan *v.* Huttner, 48 Ga. 133 (1873). As to liability for neglect of firemen, see *infra*, sec. 976.

[3] Russell *v.* New York, 2 Denio (N. Y.), 461 (1845). Same principle, *infra*, 992; *supra*, secs. 815–818. Where in such a case there is power to demolish the building a court of equity will not in general be disposed to interfere with the exercise of the power. See Auckland *v.* Westminster Local Board, L. R. 7 Ch. 597; Kerr *v.* Preston Corp., L. R. 6 Ch. Div. 463. Remedy by action and by injunction in respect of acts by public boards and commissioners in excess of statutory powers, and to prevent unnecessary injury from the execution of such powers, see Addison on Torts (4th ed.), chap. 16, sec. 3.

[4] Lowell *v.* Wyman, 12 Cush. (Mass.) 273, 276 (1853).



the property of individuals destroyed by mobs or riotous assemblages;[1] but in such case, the *legislature may constitutionally give a remedy*, and regulate the mode of assessing the damages.[2]

[1] Western Col. of Hom. *v.* Cleveland, 12 Ohio St. 375 (1861). It was held in this case that a provision *inter alia* in the constituent act of the city that it "shall be the *duty* of the council to regulate the police of the city, preserve the peace, *prevent riots*, disturbances, and disorderly assemblages," had reference to the passage of ordinances to be enforced by officers appointed for the purpose, and did not make the city responsible for the riotous destruction of property, or for the neglect of the officers of the city in not preventing such destruction. Hart *v.* Bridgeport, 13 Blatchf. C. C. R. 289, opinion by *Shipman*, J. *Supra*, sec. 949. See, also, Prather *v.* Lexington, 13 B. Mon. 559 (1852); Ward *v.* Louisville, 16 B. Mon. 184 (1855). In these cases liability was sought to be grounded on the existence of power in the officers *to prevent and suppress mobs, and their failure and neglect of duty in this respect.* The court did not regard the omissions or acts of the executive officers of the city as imposing any liability on the city in its corporate capacity. Cheaney *v.* Hooser, 9 B. Mon. 330 (1848); Robinson *v.* Greenville, 42 Ohio St. 625, where a municipal corporation was held not to be liable for an injury caused by the *discharge of a cannon in a public street by an assembly of disorderly persons*, though it had given them permission to fire it and took no steps to stop the firing. To same effect on similar facts, Norristown *v.* Fitzpatrick, 94 Pa. St. 121; and see Lincoln *v.* Boston (Mass.), 148 Mass. 578; s. c. 20 N. E. Rep. 329, where a city was held not to be liable for damages caused by the frightening of a horse in an adjacent street by the firing of cannon in a public common under a license from the city. In further support of the doctrine stated in the text, see *supra*, sec. 949; Ball *v.* Woodbine (damage from fireworks discharged in violation of ordinance), 61 Iowa, 83; Hill *v.* Charlotte, 72 N. C. 55; *infra*, sec. 974 *et seq.*; Pennsylvania Hall, *In re*, 5 Pa. St. 204 (1847); Allegheny County *v.* Gibson, 90 Pa. St. 397; Fauvia *v.* New Orleans (construing statute), 20 La. An. 410; Howe *v.* New Orleans, 12 La. An. 481; Baltimore *v.* Poultney (construing *Maryland* legislation), 25 Md. 107 (1866); Duffy *v.* Baltimore, Taney C. C. 200 (1852); Williams *v.* New Orleans, 23 La. An. 507 (1871); Hagerstown *v.* Dechert, 32 Md. 369 (1869); Brightman *v.* Bristol, 65 Maine, 428; Martin *v.* Brooklyn, 1 Hill (N. Y.), 545, 551; Underhill *v.* Manchester (liability of towns under statute), 45 N. H. 214; Chadbourne *v.* Newcastle, 48 N. H. 196; Bailey *v.* New York, 3 Hill (N. Y.), 531; Buttrick *v.* Lowell, 1 Allen (Mass.), 172; Ely *v.* Niagara Co. Sup., 36 N. Y. 297; Dale County *v.* Gunter, 46 Ala. 118 (1871); Campbell *v.* Montgomery, 53 Ala. 527; Newberry *v.* New York, 1 Sweeny (31 N. Y. Sup'r Ct.), 369 (1869); Moody *v.* Niagara Co. Sup., 46 Barb. 659.

[2] Darlington *v.* New York, 31 N. Y. 164 (1865), cited *ante*, sec. 66, and notes. Pennsylvania Hall, *In re*, 5 Pa. St. 204 (1847); Russell *v.* New York, 2 Denio (N. Y.), 461 (1845); Lowell *v.* Wyman, 12 Cush. (Mass.) 273, 276 (1853); Gray *v.* Brooklyn, 10 Abb. (N. Y.) Pr. N. S. 186 (1869); Campbell *v.* Montgomery Council, 53 Ala. 527, citing text. It is held under the *statutes of Kansas*, that an action against a city, for damages resulting from the *killing* of a man by a mob, should be brought in the *name of the personal representative* of the deceased. Atchison *v.* Twine, 9 Kan. 350 (1872). Statute of *Maine* construed. Brightman *v.* Bristol (contributory fault and measure of damages), 65 Me. 426 (1876); s. c. 20 Am. Rep. 711. Statute of *New Hampshire* construed. Underhill *v.* Manchester, 45 N. H. 214. The fact that plaintiff kept a disorderly house held no defence. Ely *v.* Niagara Co. Sup., 36 N. Y. 297.

In *California* it is not necessary that a claim against a county, for damages for property destroyed by a mob, should be presented to the board of supervisors for allowance before bringing an action to recover judgment on it. The act of the

§ 960. **Same subject. Legislative Power as to Remedy.** — As the right to reimbursement in such cases, when given, is wholly based upon the statute, and does not rest upon contract, the legislature may, in the absence of special constitutional limitations, *regulate the remedy or the means of enforcement of the liability* at its pleasure, even after judgment has been rendered against the municipality.[1]

legislature compelling a county to pay for property destroyed by a mob created a new right, and provided a new remedy therefor, complete in itself. The statute of *Pennsylvania* gives to the owner of *property destroyed by a mob* a right of action for damages *against the county* where such property is situated. But under the statute, no person can recover if it appears that the destruction was caused by his illegal or improper conduct, nor unless it appears that upon knowledge of the intention to destroy the property, if there be sufficient time, notice be given to the sheriff or other specified officials. In a case under this statute (The Pittsburg Riot) it was held (1) that the property-owner is not in default for not giving notice, unless he had first knowledge of the intention to destroy; (2) that the improper conduct to prevent recovery must be the proximate cause of the destruction, and the assertion of a legal right in a legal manner would not be improper conduct; (3) that the fact that the riot was widespread, and beyond the power of local authorities to anticipate or subdue, did not constitute a defence; (4) that the owner of personal property *in transitu*, though a non-resident, was entitled to the benefit of the statute; and (5) that such property destroyed in a county by a mob was situated in the county. Allegheny County *v.* Gibson, 90 Pa. St. 297; s. c. 20 Alb. L. J. 429 (Pa. St. 1879); see Clear Lake W. W. Co. *v.* Lake County, 45 Cal. 90 (1872).

[1] Louisiana, *ex rel.* Folsom, *v.* New Orleans, 109 U. S. 285 (1883). In affirming a judgment in this case, which denied the writ of *mandamus* to compel a levy of taxes to pay judgments against a city for damages caused by a mob, Mr. Justice *Field* said: "The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure. . . . It is their [municipal corporations'] duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has, therefore, been generally considered as a just burden cast upon them to require them to make good any loss sustained from the acts of such assemblages which they should have repressed. The imposition has been supposed to create, in the holders of property liable to taxation within their limits, an interest to discourage and prevent any movements tending to such violent proceedings. But, however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject, like all other measures of policy, to any change the legislature may see fit to make, either in the extent of the liability or in the means of its enforcement. And its character is not at all changed by the fact that the amount of the loss, in pecuniary estimation, has been ascertained and established by the judgments rendered. The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously." It was held, applying these principles, that a statute passed and a constitutional provision adopted, after the judgments were obtained, *which restricted the power of taxation by a city to such an extent as to make it impossible to pay the judgments*, were valid, and did not deprive the judgment creditor of property within the meaning of the Fourteenth Amendment to the Constitution of the United States. Louisiana, *ex rel.* Folsom, *v.* New Orleans, 109 U. S. 285 (1883).



*Implied Liability ex delicto.*

§ 961 (761). **Implied Liability; Distinction between Quasi Corporations and Municipal Corporations.** — In considering the subject of *the implied liability* (by which we mean a liability where there is no express statute creating or declaring it) of municipal corporations *to civil actions for misconduct or neglect on their part, or on the part of their officers in respect to corporate duties*, resulting in injuries to individuals, it is essential to bear in mind the distinction pointed out in a former chapter,[1] and to be noticed again hereafter,[2] between *municipal corporations proper*, such as towns and cities specially chartered or voluntarily organizing under general acts, and *involuntary quasi corporations*, such as townships, school districts, and counties (as these several organizations exist in most of the States), including therein for this purpose the peculiar form of organization, before referred to, known as the New England town.[3] The decisions of the courts in this country are almost uniform in holding the former class of corporations to a much more extended liability than the latter, even where the latter are invested with corporate capacity and with the power of taxation;[4] but respecting the *grounds* for this

[1] *Ante*, chap. ii. secs. 22, 66.

[2] *Infra*, secs. 962, 996, 1017–1023 *a*.

[3] *Ante*, secs. 28–30.

[4] *Ante*, sec. 22 and note; sec. 66; Soper *v.* Henry County, 26 Iowa, 264 (1868); Sussex Co. Freeh. *v.* Strader, 3 Harr. (18 N. J. L.) 108 (1840). Approved Cooley *v.* Essex Co. Freeh., 27 N. J. L. 415; Pray *v.* Jersey City, 32 N. J. L. 394; Passaic Br. Prop. *v.* Hoboken Land & Imp. Co., 13 N. J. Eq. 524; Cooley Const. Lim. 240 *et seq.*; Niles Tp. Comm'rs *v.* Martin, 4 Mich. 557; Larkin *v.* Saginaw County (defective bridge), 11 Mich. 88; Lesley *v.* White, 1 Speers L. (S. C.) 31; Young *v.* Edgefield R. Comm'rs, 2 Nott & McC. (S. C.) 537; Carroll *v.* Tishamingo Co. Pol. Bd., 28 Miss. 38; Anderson *v.* State, 23 Miss. 459; Hedges *v.* Madison County, 6 Ill. 567; Levy *v.* Salt Lake City, 3 Utah, 63; *infra*, secs. 962, 964, 968, 996, 1017, and cases cited.

In *Maryland*, a county is liable for injuries caused by unsafe roads and bridges. Calvert Co. Comm'rs *v.* Gibson, 36 Md. 229 (1872). Index, tit. *County*.

In *California*, incorporated cities are not liable for injuries sustained by private individuals, caused by the neglect of the city officers in keeping streets or bridges in repair, unless made liable by charter or statute. In the case below cited the court says: "Incorporated cities in this State are mere governmental instruments formed under the State laws for the purposes of internal administration. They are not distinguishable in principle from counties created by law for the same purpose. Under the acts organizing counties, boards of supervisors and road overseers are charged with the duty of keeping public highways in repair; and it was held, in Huffman *v.* San Joaquin County, 21 Cal. 426, and Crowell *v.* Sonoma County, 25 Cal. 313, that counties are not liable for injuries sustained by private individuals through the neglect of the officers charged with such duties, and it was intimated that responsibility, if any, for such injuries rested upon the individual officers in default." Winbigler *v.* Los Angeles, 45 Cal. 36 (1872); Tranter *v.* Sacramento, 61 Cal. 271.

*A board of education* is not liable in its corporate capacity for damages *for an injury resulting to a pupil* while attending a common school, from its negligence, in the absence of a *statute* creating a liability.

difference, there is considerable diversity of opinion. The principle involved lies at the basis of a large class of actions against municipal corporations, and it is desirable to examine it in the light of the adjudications which have established it. It may, in the first place, be remarked that it is a general principle of law, founded in reason, that where one suffers an injury by the neglect of any duty of perfect obligation owing to him which rests upon another, the person injured has his action. This doctrine applies not only to individuals, but to private corporations aggregate, and it obliges such corporations to respond in a private action, though such action be not expressly given by statute, for the damages which another may suffer by reason of neglect or default in the performance of any corporate duty.[1]

§ 962 (762). **Limited Liability of New England Towns.** — In this state of the law the question was presented for decision at an early day in Massachusetts, whether *towns* in that State (the statute

Finch *v.* Toledo Bd. of Ed., 30 Ohio St. 37; s. p. Flori *v.* St. Louis, 69 Mo. 341 Brabham *v.* Hinds Co. Sup., 54 Miss. 363; Kincaid *v.* Hardin County, 53 Iowa, 430; *post*, secs. 964, 965, 1017–1023 *a*; 1 Thomps. Neg. chap. xv.

[1] As to private corporations, this is well illustrated by the early case in *Massachusetts* of Riddle *v.* Merrimac River Canal Prop., 7 Mass. 169. This was an action of *case* against the defendants, a canal corporation, which were bound by their charter to construct their canal so deep and wide that rafts of a certain description could pass through it when the same could pass the river with which it was connected, but which failed, to the plaintiff's injury, thus to construct their canal. It was objected that no private action lay against a corporation for a breach of its duty, even though special injury was suffered, the only remedy being by information or indictment. And it was specially urged that there were technical objections to maintaining trespass, or trespass upon the case. These objections were disposed of in the most satisfactory manner by the terse and luminous judgment of *Parsons*, C. J., who decided that the action would lie, and placed the decision upon the broad and clear grounds stated in the text, viz.: that private corporations, *i. e.*, corporations created for their own benefit, equally with individuals, are liable for any damages which another may suffer by reason of any neglect or default to perform any corporate duty. Weld *v.* Androscoggin Boom Prop., 6 Me. 93 (liability of boom companies); Ward *v.* Newark & P. Turnp. Co., Spencer (20 N. J. L.), 323, 325; Parnaby *v.* Lancash. Canal Co., 11 A. & E. 223. This principle as to private corporations is at the present day so well established as to be among the fundamental doctrines of our jurisprudence. "The result of the cases is," says the Supreme Court of the United States, "that for acts done by the agents of a [private] corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." This rule is applicable to municipal corporations, but it is applied with greater care. Salt Lake City *v.* Hollister, 118 U. S. 256, 262 (1885), Philadelphia, W. & B. R. R. Co. *v.* Quigley, 21 How. 202. In Quigley's Case, *supra*, it was held that the railroad company might be liable to an action for *libel*. In Reed *v.* Home Sav. Bank, 130 Mass. 443, it was held that the bank might be liable to an action for *malicious prosecution*. *Infra*, sec. 973 *a*.



being silent upon the subject) stood upon the same footing as respects liability for damages *arising from their neglect of duty* as individuals and private corporations; and it was decided that they did not, and that in order to subject them to a civil action in favor of an individual for neglect in respect to their public duties concerning highways, though such duties were enjoined by statute, the legislature must expressly give the action. Applying this principle, it was accordingly held, in Mower *v.* Leicester,[1] that a town was not liable in a common-law action for damages sustained by an individual through a *defect in the highways of the town*. This case, or the English case upon which it was based,[2] has been generally fol-

[1] Mower *v.* Leicester, 9 Mass. 247 (1812). "From a very early period in *Massachusetts* towns have been, by general laws, required to keep highways and bridges in repair, and made liable to actions for defects therein by persons sustaining special damage in their persons or property. Mass. Col. St. 1648; 2 Mass. Col. Rec. 229; Mass. Col. Sts. (ed. 1672) 12; Prov. St. 1693–94 (5 W. & M.) chap. vi., secs. 1, 6; 1 Prov. Laws (State ed.), 136, 137; Anc. Chart. 55, 56, 267, 269; St. 1786, chap. lxxxi., secs. 1, 7; Rev. St. chap. xxv., secs. 1, 22; St. 1850, chap. v.; Gen. Sts. chap. xliv., secs. 1, 22." Hill *v.* Boston, 122 Mass. 344, 350 (1877). In Mower *v.* Leicester, says *Gray*, C. J., "the question was directly presented for judgment, in an action at common law against a town [in *Massachusetts*] for a personal injury caused by a defect in a highway, of which the town had not had the notice required to charge it under the statute. It was argued for the plaintiff that none of the objections which prevailed in Russell *v.* Devon County [2 T. R. 667], applied, because here the town was a corporation created by statute, capable of suing and being sued, was bound by statute to keep the public highways in repair, was called upon to answer only for its own default, and had a treasury out of which judgments recovered against it might be satisfied; and that the objection that a multiplicity of actions would be the consequence of levying the execution on one or more inhabitants of the town could have no effect, because it would equally apply to every action against a town or parish, and yet such actions were every day brought and supported. But the court arrested judgment, saying: 'It is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals. But *quasi* corporations, created by the legislature for purposes of public policy, are subject, by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute.'" Hill *v.* Boston, *supra*; *post*, secs. 965, 997, 1003.

[2] Russell *v.* Devon Co., 2 D. & E. T. R. 667. In this case an individual brought his action against the county for an injury he sustained by its neglect to repair a county bridge. The duty to repair was admitted. That the defendant was liable to indictment for neglect to repair was conceded. And inasmuch as it had no *corporate fund*, or means of obtaining such a fund, out of which a judgment could be satisfied, and because each inhabitant would be liable to satisfy the judgment which might be levied on one or two individuals, who would have no (practicable) means whatever of reimbursing themselves, it was considered that the action could not be maintained. But this reason clearly does not apply to ordinary chartered municipalities, or, in fact, to any public body having a corporate fund, or the means of obtaining one, out of which the judgment may be satisfied. In Riddle *v.* Merrimac River Canal Prop., 7 Mass. 169, 187, the decision in Russell *v.* Devon, *supra*, is considered as based upon "sound reason," and it was approved in England in Mack-

lowed throughout the New England States, and has resulted in the establishment therein, and in the very general recognition elsewhere, of the doctrine that, without a statute giving it, no private action lies against towns in New England or other *quasi* corporations, for the neglect of duties imposed on them by general legislative enactment applicable to all such corporations as governmental or public agencies.

§ 963. **Limited Liability of Counties.** — According to the prevailing rule, *counties are under no liability in respect of torts*, except as imposed (expressly or by necessary implication) by statute. They are political divisions of the State created for convenience, and are usually regarded not to be impliedly liable for damages suffered in consequence of neglect to repair a county-road or bridge;[1] such a

innon *v.* Penson, 25 Eng. L. & Eq. 457 (1854). It is reviewed and commented on in many subsequent cases; see particularly, Weightman *v.* Washington Corp., 1 Black (U. S.), 39, 52, 53; Morey *v.* Newfane, 8 Barb. (N. Y.) 645; Young *v.* Edgefield R. Comm'rs, 2 Nott & McC. (S. C.) 537; Beardsley *v.* Smith, 16 Conn. 375; Ball *v.* Winchester, 32 N. H. 443; Gilman *v.* Laconia, 55 N. H. 130 (1875); s. c. 20 Am. Rep. 175, explaining and limiting Ball *v.* Winchester; Eastman *v.* Meredith, 36 N. H. 284 (1858), cited *infra*, sec. 964, note. McConnell *v.* Dewey (road supervisor's liability), 5 Neb. 385 (1875); 1 Thomps. Neg. chap. xv.

*Mode of enforcing liabilities of New England towns.* It may here be remarked that, *at common law, corporators are not personally liable for the debts of the corporation; but by usage and practice*, peculiar in this country to the New England States, *quasi* corporations, as towns, counties, and parishes, are an exception to this rule, and private property may be taken to satisfy a corporate judgment. The history of this anomalous usage, and the reasons for it, are stated at large by *Church*, J., in Beardsley *v.* Smith, 16 Conn. 368 (1844). See, also, Hill *v.* Boston, 122 Mass. 344 (1877); s. c. 23 Am. Rep. 332; Union *v.* Crawford, 19 Conn. 331; Fernald *v.* Lewis, 6 Me. 264. 268, *per Weston*, J.; Brewer *v.* New Gloucester, 14 Mass. 216; Merchants' Bank *v.* Cook, 4 Pick. (Mass.) 405, 414; Chase *v.* Merrimack Bank, 19 Pick. (Mass.) 564; Gaskill *v.* Dudley, 6 Met. (Mass.) 551. The usage, as established by statute, is not a taking of property without "due process of law." Eames *v.* Savage, 77 Me. 212. See, also, *ante*, sec. 849, note. Remedy of inhabitant over, Beers *v.* Botsford, 3 Day (Conn.), 159. Index, tit. *New England Towns.* But it is otherwise in case of corporations proper; and the author is aware of no instance, out of New England, even in the case of *quasi* corporations, in which, without a statute to that effect, private property has been considered liable to pay public debts. *Ante*, secs. 576, 849, note, 861, note; North Lebanon *v.* Arnold, 47 Pa. St. 488; Miller *v.* McWilliams, 50 Ala. 427 (1874); s. c. 20 Am. Rep. 297. In accord with the author's views are Flori *v.* St. Louis, 69 Mo. 341; Brabham *v.* Hinds Co. Sup., 54 Miss. 363; Kincaid *v.* Hardin County, 53 Iowa, 430, distinguishing Wilson *v.* Jefferson County, 13 Iowa, 181; s. p. Sherbourne *v.* Yuba County, 21 Cal. 113; Mitchell *v.* Rockland, 52 Me. 118; Symonds *v.* Clay Co. Sup., 71 Ill. 355; Crowell *v.* Sonoma County, 25 Cal. 313. In the chapters on Corporate Boundaries, Dissolution, Contracts, and Mandamus we have had occasion to consider the remedies of creditors against municipal and public corporations, to which the reader is referred.

[1] *Post*, secs. 997–1003, 1022, 1023 *a*; Brabham *v.* Hinds Co. Sup., 54 Miss. 363; Hollenbeck *v.* Winnebago County,



liability, unless declared by statute, is generally, but not quite universally, denied to exist.[1] On the same grounds, such organizations as townships, school-districts, road-districts, and the like, though possessing corporate capacity and power to levy taxes and raise money, for their respective public purposes, have been very generally considered *not to be liable in case, or other form of civil action, for neglect of public duty, unless such liability be created by statute.*[2] A *county*, though it has power to erect and repair public buildings, and to levy and collect a tax for that purpose, is not responsible, in the absence of a statute making it so, for *injuries resulting from the unsafe and dangerous condition of county buildings*, especially where there exists no statute authorizing the levy of a tax to satisfy such a judgment. A county was accordingly held not to be liable for an

95 Ill. 148; Waltham *v.* Kemper, 55 Ill. 346; White *v.* County, 58 Ill. 297; Granger *v.* Pulaski County, 26 Ark. 37 (1870); White *v.* Chowan Co. Comm'rs, 90 N. C. 437; Abbett *v.* Johnson County, 114 Ind. 61 (1887); Shearm. & Red. Neg. (4th ed.), sec. 256, note, and cases cited.

[1] Cases, *supra; post*, secs. 996–1003, 1022, 1023; Askew *v.* Hale County, 54 Ala. 639; s. c. 25 Am. Rep. 730; Barbour County *v.* Horn, 48 Ala. 566.

In *Indiana* it is considered that the *duty of the county to keep bridges in repair is imperative*, and having the power to make appropriations of money for that purpose, *the county is held impliedly liable for damages sustained by a traveller* from a county bridge negligently suffered to remain out of repair. House *v.* Montgomery Co. Comm'rs, 60 Ind. 580; Knox County *v.* Montgomery, 109 Ind. 69, and cases cited; Abbett *v.* Johnson County, 114 Ind. 61 (1887). *Post*, secs. 997–1003, 1022, 1023 *a*.

In *Nebraska* the general rule of the *non-liability of counties* in such cases is held. Woods *v.* Colfax Co. Comm'rs, 10 Neb. 552 (1880); s. c. 23 Alb. L. J. 14.

[2] Text approved. Kincaid *v.* Hardin County, 53 Iowa, 430; s. c. 5 N. W. Rep. 590; Lane *v.* Woodbury, 58 Iowa, 462; s. p. Bartlett *v.* Crozier, 17 Johns. (N. Y.) 439; Farnum *v.* Concord, 2 N. H. 392; Adams *v.* Bank, 1 Me. 361; Baxter *v.* Winooski Turnp. Co., 22 Vt. 123; Beardsley *v.* Smith, 16 Conn. 375; Chidsey *v.* Canton, 17 Conn. 475; Niles Tp. H. Comm'rs *v.* Martin, 4 Mich. 557; Lorillard *v.* Monroe, 11 N. Y. 392; Reardon *v.* St. Louis, 36 Mo. 555; Tritz *v.* Kansas City, 84 Mo. 632; Sherbourne *v.* Yuba County, 21 Cal. 113; State *v.* Hudson County, 30 N. J. L. 137; Weightman *v.* Washington Corp., 1 Black (U. S.), 39; Eastman *v.* Meredith, 36 N. H. 284; Sutton *v.* Carroll Co. Pol. Bd., 41 Miss. 236; Treadwell *v.* Hancock Co. Comm'rs, 11 Ohio St. 190, *per Gholson*, J.; Hedges *v.* Madison County, 6 Ill. 567; Sussex Co. Freeh. *v.* Strader, 3 Harr. (18 N. J. L.) 108; Van Eppes *v.* Comm'rs, 25 Ala. 460 (1854); Larkin *v.* Saginaw County, 11 Mich. 88; Bray *v.* Wallingford, 20 Conn. 416, 419; Hollenbeck *v.* Winnebago Co., 95 Ill. 148; *ante*, secs. 22, 66, 961, and cases cited. The doctrine of the text, as elsewhere shown in this chapter, does not apply to New England towns, where the duty is private or corporate, as distinguished from public; nor does it appear to be applied when the wrongful act is in the nature of a trespass upon the property rights of others. Gilman *v.* Laconia, 55 N. H. 130 (1875); s. c. 20 Am. Rep. 175, explaining and limiting Ball *v.* Winchester, 32 N. H. 435; Weed *v.* Greenwich, 45 Conn. 170. In order to establish a liability upon such an organization for damages, it must be shown that prior to the accident the corporation must have had exclusive control of the bridge or building where the injury occurred. Titler *v.* Iowa County, 48 Iowa, 90; Hollenbeck *v.* Winnebago County, *supra*.