every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void.[1] Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations. Their reasonableness, their necessity, and their salutary character have been often vindicated, but never more forcibly than by the late learned Chief-Justice Shaw, who, speaking of municipal and public corporations, says: "*They can exercise no powers* but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. This principle is derived from the nature of corporations, the mode in which they are organized, and in which their affairs must be conducted."

§ 90. **Same subject.** — "In aggregate corporations, as a general rule," continues Chief-Justice Shaw, "the act and will of a majority is deemed in law the act and will of the whole, — as the act of the

v. Water Co., 67 Tex. 542; Hanger *v.* Des Moines, 54 Iowa, 193; City of Corvallis *v.* Carlile, 10 Oreg. 139; Kirkham *v.* Russell, 76 Va. 956; Tax Collector *v.* Dendinger, 38 La. An. 261.

[1] McCann *v.* Otoe Co., 9 Neb. 324; Stewart *v.* Otoe Co., 2 Neb. 177; S. C. & P. R. R. Co. *v.* Washington Co., 3 Neb. 42; Somerville *v.* Dickerman, 127 Mass. 272; Boylston Market *v.* Boston, 113 Mass. 528; Harvard College *v.* Boston, 104 Mass. 470; Brimmer *v.* Boston, 102 Mass. 19; People *v.* Webber, 89 Ill. 347; Bryan *v.* Page, 51 Tex. 532; Francis *v.* Troy, 74 N. Y. 338; State *v.* Passaic, 41 N. J. L. 90; Perrine *v.* Farr, 2 Zabr. (22 N. J. L.) 356; Carron *v.* Martin, 2 Dutch. (N. J.) 594; State *v.* Hudson, 5 Dutch. (N. J.) 104; State *v.* Marion Co., 21 Kan. 419; Green *v.* Cape May, 41 N. J. L. 45; Lord *v.* Oconto, 47 Wis. 386; Garvey, *In re*, 77 N. Y. 523; Smith *v.* Newburgh, 77 N. Y. 130; Allen *v.* Galveston, 51 Tex. 302; Dore *v.* Milwaukee, 42 Wis. 18; Butler *v.* Nevins, 88 Ill. 575; Kansas City *v.* Flanagan, 69 Mo. 22; Bentley *v.* County Comm'rs, 25 Minn. 259; Fulton *v.* Lincoln, 9 Neb. 358; Hurford *v.* Omaha, 4 Neb. 350; Reis *v.* Graff, 51 Cal. 86. Text cited with approval in Cook Co. *v.* McCrea, 93 Ill. 236; Birmingham & Pratt M. Ry. Co. *v.* Birmingham Street Ry. Co., 79 Ala. 465; Davenport *v.* Kleinschmidt, 6 Mont. 502; Heiskell *v.* Baltimore, 65 Md. 125; Dwyer *v.* City of Brenham, 65 Tex. 526; St. Johnsbury *v.* Thompson, 59 Vt. 300; Christie *v.* Malden, 23 W. Va. 667; Spengler *v.* Trowbridge, 62 Miss. 46 (an appropriation to pay expenses of a committee in endeavoring to obtain legislation from Congress held illegal, and payment enjoined); Gas Co. *v.* Parkersburg, 30 W. Va. 435 (1887). The citizens of a city cannot confer upon its common council powers not granted by charter. Torrent *v.* Muskegon, 47 Mich. 115. Applying the rule in the text, an act authorizing the sale of municipal bonds at not less than par was held not to warrant the allowance of a commission to a purchaser of the bonds from the city at par. Whelen's Appeal, 108 Pa. St. 162, 197.

corporate body. The consequence is that a minority must be bound not only without, but against, their consent. Such an obligation may extend to every onerous duty, — to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated, viz., *that corporations can only exercise their powers over their respective members, for the accomplishment of limited and defined objects.* And if this principle is important, as a general rule of social right and municipal law, it is of the highest importance in these States, where corporations have been extended and multiplied so as to embrace almost every object of human concern."[1] The language of another learned judge on this subject is well chosen, and fittingly supplements that which we have quoted in the preceding section. "In this country," says Church, J., "all corporations whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. But if we were to say that they can do

[1] *Per Shaw*, C. J., in Spaulding *v.* Lowell, 23 Pick. 71, 74 (1839); Bangs *v.* Snow, 1 Mass. 181; Stetson *v.* Kempton, 13 Mass. 272; Willard *v.* Newburyport, 12 Pick. 227; Keyes *v.* Westford, 17 Pick. 273, 279; Comw. *v.* Turner, 1 Cush. 493, 495 (1848); Cooley *v.* Granville, 10 Cush. 57 (1852); Merriam *v.* Moody, 25 Iowa, 163 (1868); Minturn *v.* Larue, 23 How. 435; Lafayette *v.* Cox, 5 Ind. (Port.) 38 (1854); Paine *v.* Spratley, 5 Kan. 525; Vincent *v.* Nantucket, 12 Cush. 103, 105; Clark *v.* Davenport, 14 Iowa, 494; Mays *v.* Cincinnati, 1 Ohio St. 268; Gallia Co. *v.* Holcomb, 7 Ohio, Part I. 232; Comm'rs *v.* Mighels, 7 Ohio St. 109; Fitch *v.* Pinckard (taxing power) 4 Scam. (5 Ill.) 78; Caldwell *v.* Alton (market ordinance), 33 Ill. 416; Trustees, &c. *v.* McConnel, 12 Ill. 140; Louisiana State Bank *v.* New Orleans Nav. Co., 3 La. An. 294; State *v.* Mayor, &c. (market-house case), 5 Port. (Ala.) 279; Head *v.* Ins. Co., 2 Cranch, 168; DeRussey *v.* Davis (sale of ferry lease), 13 La. An. 468; People *v.* Bank, &c., 1 Doug. (Mich.) 282; City Council *v.* Plank Road Co., 31 Ala. 76; State *v.* Mayor, 5 Port. (Ala.) 279; Burnett, *In re*, 30 Ala. 461, and cases cited; Le Couteulx *v.* Buffalo, 33 N. Y. 333; Hayes *v.* Appleton, 24 Wis. 544; People *v.* Railroad Co., 12 Mich. 389; Vance *v.* Little Rock, 30 Ark. 435 (1876); Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396. Text approved in the following cases: Noyes *v.* Mason, 5 N. W. R. 595; Frank, *In re*, 52 Cal. 606; Green *v.* Cape May, 41 N. J. L. 45.

"*The powers of all corporations are limited by the grants in their charters, and cannot extend beyond them.*" *Per Breese*, J., Petersburg *v.* Metzger, 21 Ill. 205. "Corporations have only such rights and powers as are expressly granted to them, or as are necessary to carry into effect the rights and powers so granted." *Per Storrs*, J., in New London *v.* Brainard (illegal appropriation of money to celebrate Fourth of July), 22 Conn. 552 (1853), approving Stetson *v.* Kempton, 13 Mass. 272; Hodges *v.* Buffalo, 2 Denio, 110. So, where the statute placed the care of fire departments in the hands of chief engineers, a power "to regulate and protect fire engines," &c., was held not to authorize a city to establish a "fire board" to have charge of that department. Benjamin *v.* Webster, 100 Ind. 15. *Ante*, sec. 29.

nothing for which a warrant could not be found in the language of their charters, we should deny them, in some cases, the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore it has long been an established principle in the law of corporations, that they *may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted.* In doing this, they must [unless restricted in this respect] have a choice of means adapted to ends, and are not to be confined to any one mode of operation."[1]

§ 91. **Same subject. Principles of Construction.** — The *extent of the powers of municipalities,* whether express, implied, or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary, is, that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the State or general public, and against the State's grantee. The rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipal and public bodies which are out of the usual range, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant. The subject is copiously illustrated in the notes.[2]

[1] Bridgeport *v.* Railroad Co., 15 Conn. 475, 501 (1843), *per Church*, J. So where power is conferred upon a city council to levy and collect taxes, and no officer for the purpose is provided in the charter, the authority to use and employ the necessary machinery to make the levy and collection was held to be implied. Union Pacific Ry. Co. *v.* Ryan, 2 Wyo. 408. But see s. c. in Supreme Court of United States, 113 U. S. 516, where the judgment was reversed on other grounds. Express authority to establish and maintain a public bath includes the power to secure a proper location for it. Poillon *v.* Brooklyn, 101 N. Y. 132. The *incidental powers* of a municipal corporation must be germane to the purposes for which it is created. Mayor *v.* Yuille, 3 Ala. 137 (license to bakers); Harris *v.* Intendant, 28 Ala. 577 (retailing liquors); Intendant *v.* Chandler, 6 Ala. 899 (retailing liquors).

[2] *Courts adopt a strict, rather than liberal construction of powers:* "It is a well settled rule of construction of grants by the legislature to corporations, whether *public* or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary [fair and reasonable] implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be *resolved in favor of the public.*" Minturn *v.* Larue, 23 How. 435, 436 (1859). *Per Nelson*, J., construing municipal charter as to *ferry rights* of corporation thereunder. In subsequent cases, the Supreme Court has said that a municipal corporation "can exercise no power which is not, in *express terms* or by *fair implication*, conferred upon it." Thomson *v.* Lee Co. (municipal bond case), 3 Wall. 320; Thomas *v.* Richmond, 12 Wall. 349 (1871); s. p. Clark *v.* Davenport, 14 Iowa, 495; Merriam *v.* Moody's Executors, 25 Iowa, 163; Nichol *v.* Mayor, &c., 9 Humph. 252; Leonard *v.* Canton, 35 Miss. 189; where *Fisher*, J., gives a clear exposition of the *rationale* of the doctrine that corporate grants should be strictly construed. Douglass *v.* Placerville, 18 Cal. 643, 647; Argenti *v.* San Francisco, 16 Cal. 282; Wallace *v.* San Jose, 29 Cal. 180. With us, cities, towns, and municipal corporations of all kinds are created and endowed with powers by the legislature. These are of a legislative and administrative character, to aid in the better government of localities or portions of the State. This power exists no further than it has been delegated. And municipal corporations, in their action, are confined "to a *strict construction* of the grants of powers contained in their charters" or acts of incorporation. Lafayette *v.* Cox, 5 Ind. (Porter) 38 (1854). "It is proper, too, that these powers should be strictly construed, considering with how little care chartered privileges are these days granted." Bank *v.* Chilicothe, 7 Ohio, Part II. 31, 35 (1836), *per Hitchcock*, J.; Collins *v.* Hatch, 18 Ohio, 523; Port Huron *v.* McCall, 46 Mich. 565; "Boroughs and towns are, confessedly, inferior corporations. They act not by any inherent right of legislation, like the legislature of the State, but *their authority is delegated*, and their powers, therefore, must be *strictly pursued*. *Within* the limits of their charter, their acts are valid; *without it* they are void." Willard *v.* Killingworth, 8 Conn. 247, *per Daggett*, J., approved 10 Conn. 442. "The action of municipal corporations is to be held strictly within the limits prescribed by statute. Within these limits, they are to be favored by the courts. Powers expressly granted, or necessarily implied, are not to be defeated or impaired by a stringent construction." Smith *v.* Madison, 7 Ind. 86; Kyle *v.* Malin, 8 Ind. 34; 57, *per Stuart*, J.; Memphis *v.* Adams (implied power to employ an attorney), 9 Heisk. (Tenn.) 518; s. c. 24 Am. Rep. 331. *Per Nicholson*, C. J. A municipal corporation has no right to appropriate its revenues to obtain an increase of its powers, through persons sent by the city council to appear before the State General Assembly and Congress. Henderson *v.* Covington, 14 Bush (Ky.), 312; Spenzler *v.* Trowbridge, 62 Miss. 46.

In concluding this note, the author may be permitted to observe that *the principle of strict construction* should not be pressed in any case to such an unreasonable extent as to defeat the legislative purpose fairly appearing upon the entire charter or enactment. Perhaps the rule as it is briefly expressed in the text (secs. 90, 91) best embodies the result of the adjudications upon this point, namely: If, upon the whole, there be fair, reasonable, substantial doubt whether the legislature intended to confer the authority in question, particularly if it relates to a matter extra-municipal or unusual in its nature, and the exercise of which will be attended with taxes, tolls, assessments, or burdens upon the inhabitants, or oppress them, or abridge natural or common rights, or divest them of their property, the doubt should be resolved in favor of the citizen, and against the municipality. The rule as here expressed has been cited and approved in *Ex parte* Mayor of Florence, *in re* Jones, 78 Ala. 419; Grand Rapids Electric, &c. Co. *v.* Grand Rapids Edison, &c. Co., 33 Fed. Rep. 659 (holding that a power to make, amend, and repeal ordinances deemed advisable *for lighting streets* did not confer control of the streets to the exclusion of the legislature, or authorize the city to *grant the exclusive use* of the streets for electric lights for fifteen years). Power to *fill up and drain lots* holding stagnant water, at the expense of their owners, was held not to authorize filling them up to a greater height than was necessary to abate the nuisance. Bush *v.*

The general principles of law, stated in this and in the preceding sections, are indisputably settled, but difficulty is often experienced

in their application, on account of the complex character of municipal duties, and the various, miscellaneous, and frequently indefinite purposes or objects which municipalities are authorized to execute or carry into operation.[1]

Usage as affecting Municipal Powers and their Construction.

§ 92 (56). **Usage and Prescription.** — In *England* municipal corporations claim and exercise many powers wholly in virtue of long-established *usage*, or of *prescription*, which implies a lost charter conferring such powers.[2] Indeed, from immemorial usage, powers are recognized as valid which could not lawfully originate in a royal charter. A usage to give a right must, however, be long established, and forty years' duration was not considered of itself to be sufficient for this purpose.[3] But *usage in this country* has a much more limited operation. It is a necessary result of the manner in which our municipal corporations are created — viz., by express legislative act, wherein their powers and duties are wholly prescribed — that the powers themselves cannot be added to, enlarged, or diminished by proof of usage.

§ 93 (57). **Same subject.** — In a case in Massachusetts, the learned Chief-Justice Bigelow, after stating the decision of the Supreme Court, that towns in Massachusetts had no authority *to appropriate money for the celebration of the Fourth of July*, remarks, in relation to the attempt to sustain the appropriation on *the ground of usage:* "Usage cannot alter the case. An unlawful expenditure of money by a town cannot be rendered valid by usage, however long continued. Abuses of power and violations of right derive no sanction from time or custom. A casual or occasional exercise of a power by one or a few towns will not constitute usage. It must not only be general and of long continuance, but, what is more important, it must also be a custom necessary to the exercise of some corporate power, or the enjoyment of some corporate right, or which contributes essentially to the necessities and convenience of the inhabitants. The usage relied on in the present case would not satisfy either of these last-named requisites, which are necessary to give it validity."[4] But

Dubuque, 69 Iowa, 233. *Infra*, sec. 109; Logan *v.* Pyne, 43 Iowa, 524 (1876); s. c. 22 Am. Rep. 261.

[1] Spaulding *v.* Lowell, 23 Pick. 71; *ante*, secs. 8–28; *post*, ch. vi., where some of these miscellaneous or special powers are considered.

[2] *Ante*, ch. ii. sec. 29; ch. iii. sec. 32.

[3] Chad *v.* Tilsed, 5 J. B. Moore, 185. As to the proper office of usage in England, both as a source of power and to aid in the interpretation of charters, see Grant on Corp. 19, 27, 28, 29, 552, 564.

[4] Hood *v.* Lynn, 1 Allen (Mass.), 103 (1861). Further as to usage consult Willard *v.* Newburyport, 12 Pick. 227; Spaulding *v.* Lowell, 23 Pick. 71; Smith *v.* Cheshire, 13 Gray (Mass.), 308 (1859); Butler *v.* Charlestown, 7 Gray, 12, 16 (1856); Benoit *v.* Conway, 10 Allen, 528.

general and long-continued usage is not without its importance, and usage of this character may be resorted to *in aid of a proper construction of the charter or statute*, but no further. If the language be uncertain or doubtful, a uniform, long-established, and unquestioned usage will be regarded by the courts in determining the mode in which powers may be exercised, and to a reasonable extent in determining the scope of the powers themselves; but usage can have no room for operation where the language of the enactment is plain and the legislative intent is clear upon the face of it.[1]

§ 94 (58). **Discretionary Powers not subject to Judicial Control.** — Power to do an act is often conferred upon municipal corporations, in general terms, without being accompanied by any *prescribed mode* of exercising it. In such cases the common council, or governing body, necessarily have, to a greater or less extent, a *discretion as to the manner* in which the power shall be used.[2] This discretion,

[1] Smith *v.* Cheshire, 13 Gray, 308; Butler *v.* Charlestown, 7 Gray, 12, 16; Sherwin *v.* Bugbee (validity of school meeting), 16 Vt. 439, 444, where *Redfield*, J., remarks: "In construing statutes applicable to public corporations, courts will attach no slight weight to *the uniform practice* under them, if this practice has continued for a considerable period of time." It is a rule "founded on reason and common sense," says the Court of Appeals of Maryland, that "*doubtful words in a general statute may be expounded with reference to a general usage;* and *when a statute is applicable to a particular place only, such words may be construed by usage at that place.*" Frazier *v.* Warfield (Inspection Act for Baltimore), 13 Md. 279, 303; s. p. Love *v.* Hinckley, Abt. Adm. 436; see, also, Rex *v.* Chester, 1 Maule & Selw. 101; Rex *v.* Salway, 9 B. & C. 424.

Where the true construction of a charter admits of doubt, and the construction adopted by the city authorities has been acquiesced in generally, and acted upon by third persons in good faith, in their transactions with the city, it will be precluded by the courts in actions by such third parties from denying its construction to be the true one. Van Hostrup *v.* Madison City (on railroad bonds), 1 Wall. (U. S.) 291 (1863); Meyer *v.* Muscatine (on railroad bonds), *Ib.* 384, 391. *Post*, secs. 420, 457, 560 n., 562 n., 591 n.; chaps. xxii. xxiii.

[2] Railroad Co. *v.* Evansville (power to subscribe stock and to borrow money), 15 Ind. 395 (1860); Kelly *v.* Milwaukee, 18 Wis. 83; Slack *v.* Railroad Co., 13 B. Mon. 1; Bridgeport *v.* Railroad Co., 15 Conn. 475, 501 (1843), *per Church*, J.; Harrison *v.* Baltimore, 1 Gill (Md.), 264 (1843); Cincinnati *v.* Gwynne, 10 Ohio, 192; Markle *v.* Akron, 14 Ohio, 586. Where a municipal corporation is entrusted with the execution of a power, and is not confined to a particular mode, but *has a discretion* in the choice of means, a *plain case of abuse* must be shown, resulting in an injury to the petitioner, to warrant an injunction against the corporation. Page *v.* St. Louis (special assessment), 20 Mo. 136 (1853); Colton *v.* Hanchett, 13 Ill. 615; Bush *v.* Carbondale, 78 Ill. 74 (1875); Mayor of Baltimore *v.* Gill, 31 Md. 375; Holland *v.* Baltimore, 11 Md. 186; *post*, sec. 146; Dodd *v.* Hartford, 25 Conn. 232; Sheldon *v.* School District, *Ib.* 224; Lockwood *v.* St. Louis, 24 Mo. 20; Deane *v.* Todd, 22 Mo. 90; Mayor, &c., *v.* Meserole, 26

where it is conferred or exists, cannot be judicially interfered with or questioned except where the power is exceeded or fraud is imputed and shown, or there is a manifest invasion of private rights. Thus where the law or charter confers upon the *city council, or local legislature, power to determine upon the expediency or necessity of measures relating to the local government*, their judgment upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the courts. In such case the decision of the proper corporate body is, in the absence of fraud, final and conclusive, unless they transcend their powers.[1] Thus, for example, if a city has power to *grade streets*, the courts will not inquire into the necessity of the exercise of it, or the refusal to exercise it, nor whether a particular grade adopted, or a particular mode of executing the grade, is judicious.[2] So if a city has power to *build*

Wend. 132; Union Pacific Ry. Co. *v.* Ryan, 2 Wyo. 408; s. c. on appeal *sub nom.* Union Pacific Ry. Co. *v.* Cheyenne, 113 U. S. 516; Poillon *v.* Brooklyn, 101 N. Y. 132. A power "to remove or confine persons having infectious or pestilential diseases" confers *authority to select the means* of carrying it out, and a city may, under such a power, rent a house to be used as a small-pox hospital. Anderson *v.* O'Conner, 98 Ind. 168. See chapters on Contracts and Taxation, *post;* Wells *v.* Atlanta, 43 Ga. 67 (1871); Coulson *v.* Portland, Deady R. 481 (1868); *post*, sec. 112, also ch. xxiii. In respect to the *legislative functions* of a municipal body, the courts are bound to presume that they will exercise any discretion with which they are clothed properly, and that they had sufficient reasons for doing an act, the result of such discretion. Railroad Co. *v.* Mayor of New York, 1 Hilton, 562 (1858); Des Moines Gas Co. *v.* Des Moines, 44 Iowa, 508 (1876); s. c. 24 Am. Rep. 756; *post*, sec. 379.

By statute in Canada, certain superior courts have power in their discretion to set aside by-laws for illegality, on the application of persons interested, but these courts will not entertain an application to set aside a by-law on a matter of fact, which, according to municipal act, or a by-law passed under it, should be ascertained and finally determined by an officer of the corporation, unless perhaps fraud or corrupt conduct be imputed to such officer. See Michie and the Corporation of the City of Toronto, *In re*, 11 Upper Can. C. P. 379.

Powers which involve the exercise of judgment or discretion — as whether to commence a suit in the name of a county, &c., — cannot be delegated to others. Scollay *v.* County of Butte, 67 Cal. 249.

[1] Baker *v.* Boston, 12 Pick. 184; Hovey *v.* Mayo, 43 Me. 322 (1857); Fay, Petitioner, 15 Pick. 243 (1834); Parks *v.* Boston, 8 Pick. 218 (1829); Danielly *v.* Cabaniss, 52 Ga. 211 (1874); Sheridan *v.* Colvin, 78 Ill. 237 (1875); Droz *v.* Baton Rouge, 36 La. An. 307; Alberger *v.* Baltimore, 64 Md. 1; United States *v.* New Orleans, 31 Fed. Rep. 537; Torrent *v.* Muskegon, 47 Mich. 115. Where a common council was authorized by the city charter to *construct breakwaters*, &c., and to defray the cost thereof by special assessments upon the property benefited, and was required to determine the amounts to be charged to each lot, it was held that the action of the council in determining *what property* would be benefited was conclusive, while its decision of what amounts should be charged to each lot could be reviewed. Teegarden *v.* Racine, 56 Wis. 545.

[2] Hovey *v.* Mayo, street commissioner, 43 Me. 322 (1857); Benjamin *v.* Wheeler, 8 Gray, 409, 413 (1857); Richmond *v.* McGirr (purchase of land for public buildings), 78 Ind. 192 (1881), citing text.

a market-house, the courts cannot inquire into the size and fitness of the building for the object intended.[1] So, in the absence of fraud, the court refused to interfere by injunction with the action of the city council in agreeing to rent a room for city purposes for twenty years and to pay for the same in advance.[2] So, also, the *use of the revenue* of a city, above that set apart by law for the payment of interest on its bonded debt and for a sinking fund, is within the discretion of the municipal authorities, and the court will not interfere by *mandamus* to require a part of it to be applied to the payment of a judgment before there is an ascertained surplus over expenditures.[3]

§ 95 (59). **The Subject illustrated.** — So, also, where, by its charter, a municipal corporation is empowered, if it deems the public welfare or convenience requires it, *to open streets or make public improvements thereon*, its determination, whether wise or unwise, cannot be judicially revised or corrected.[4] On the ground that it is the province of the municipal authorities, and not of the judicial tribunals, to determine what improvements shall be made in the streets and highways of the corporation, the court, on application of citizens, *refused to compel a city to cover over an open draining canal* of long standing, it "not appearing to be a nuisance in the legal sense of the word."[5] So where it is made the duty of a city to remove, as far as they may be able, *every nuisance* which may endanger health, the courts, unless the power be transcended, cannot ordinarily interfere to control the manner in which this shall be done.[6] But the power to abate nuisances, like all other *municipal powers, must be reasonably exercised;* and although the power be given to be exercised in any manner the corporate authorities may deem expedient, it is not an *unlimited power*, and such means only are intended as are reasonably necessary for the public good; wanton or unnecessary injury to private property and private rights are not thereby

[1] Spaulding *v.* Lowell, 23 Pick. 71, 80 (1839). So where a city has power to lease real estate at a "reasonable rent," the council is to determine what is reasonable, and their discretion in the absence of fraud cannot be judicially revised. Schanck *v.* Mayor, 69 N. Y. 444 (1877).

[2] Moses *v.* Risdon, 46 Iowa, 251 (1877); *quære*, and compare Garrison *v.* Chicago, 7 Bissell, 480 (1877).

[3] East St. Louis *v.* Zebley, 110 U. S. 321. More fully *post*, chap. xiv.

[4] Methodist P. Church *v.* Baltimore, 6 Gill (Md.), 391 (1848.) Passing ordinances in relation to opening, &c., of streets, is the exercise of legislative, not judicial power. Wiggin *v.* Mayor, &c. of New York, 9 Paige, 16 (1841). See chapter on Eminent Domain, *post*.

[5] Inhabitants *v.* New Orleans, 14 La. An. 452 (1859).

[6] Baker *v.* Boston, 12 Pick. 184 (1831); see also Kelly *v.* Milwaukee, 18 Wis. 83 (1864); Goodrich *v.* Chicago, 20 Ill. 445. Further as to nuisances, see chapter on Ordinances, *post*. Index — *Nuisances*.

authorized.[1] And generally the judicial tribunals will not interfere with municipal corporations in their internal police and administrative government, unless they are transcending their powers or some clear right has been withheld or wrong perpetrated or threatened.[2]

§ 96 (60). **Public Powers and Trusts incapable of Delegation.** — The principle is a plain one, that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as *it* shall judge best, *cannot be delegated to others.* This principle, its scope and limitations, is best shown by examples of its application to actual cases. Thus, where by charter or statute, local improvements, to be assessed upon the adjacent property owners, are to be constructed in "such *manner* as the *common council* shall prescribe" by ordinance, it is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation, the power to determine the mode, manner, or plan of the improvement. Such an ordinance is void, since powers of this kind must, as above shown,[3] be exercised in strict conformity with the charter or incorporating act.[4]

[1] Babcock *v.* Buffalo, 56 N. Y. 268 (1874), where the city was enjoined from filling up plaintiff's slip in the canal, because, under the circumstances, it was not a proper exercise of the power to abate nuisances.

[2] State *v.* Swearingen, 12 Ga. 23; *post*, chap. xxii.

[3] *Supra*, secs. 90, 91.

[4] State *v.* Hauser, 63 Ind. 155; State *v.* Bell, 34 Ohio St. 194; Birdsall *v.* Clark, 73 N. Y. 73; N. Y. &c. Trustees, *In re*, 57 How. Pr. 500; Thompson *v.* Schermerhorn, 6 N. Y. (2 Seld.) 92 (1851), relating to grading and levelling streets; affirming s. c. 9 Barb. 152, and approving in the main the views there expressed by Mr. Justice *Cady*. Brooklyn *v.* Breslin, 57 N. Y. 591 (1874), distinguishing Thompson *v.* Schermerhorn, *supra;* State *v.* Jersey City, 1 Dutch. (N. J.) 309; see 4 Dutch. 500; *post*, secs. 357, 716, 780; Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396; Baltimore *v.* Scharf, 54 Md. 499, citing this section. Same principle applied in similar case, Ruggles *v.* Collier, 43 Mo. 359 (1869), holding that where the charter gave the city power to require *streets to be paved*, "in all cases where the *city council* shall deem it necessary," it could not by ordinance make the mayor the judge of the necessity for paving. Reaffirmed but distinguished, Shehan *v.* Gleeson, 46 Mo. 100 (1870); East St. Louis *v.* Wehrung, 50 Ill. 28 (1869). So, where the charter gives the *city council* power *to construct sewers* of such "dimensions as may be prescribed by ordinance," the council cannot by ordinance require sewers to be constructed of such dimensions as may be deemed requisite by the city engineer. St. Louis *v.* Clemens, 43 Mo. 395 (1869), overruling St. Louis *v.* Eters, 36 Mo. 456; reaffirmed, St. Louis *v.* Clemens, 52 Mo. 133 (1873); Jackson Co. *v.* Brush, 77 Ill. 59 (issuing bonds). See further, State *v.* New Brunswick, 1 Vroom (30 N. J. L.), 395 (1863); Meuser *v.* Risdon, 36 Cal. 239; Hydes *v.* Joyes, 4 Bush (Ky.), 464; Darling *v.* St. Paul, 19 Minn. 389, (1872), citing text. When a charter authorized a city *by ordinance* "to erect lamps and to provide for lighting the city," &c., the delegation of the power so conferred *to a committee* whose action was to be final, was declared illegal. Minneapolis Gas Light Co. *v.* Minneapolis, 36 Minn. 159. The doctrine of the text applied where a city, empowered to erect and regulate public wharves, and *fix the rates* of wharfage thereat, undertook to lease the wharf, farm out its revenues, and delegate a person to fix the rates. Matthews *v.* Alexandria, 68 Mo. 115; *post*, chapter on Taxation. So, where a charter directed the *common council to appoint a time* when persons interested in an *application for opening a street* would be heard, the council must itself fix the time, and cannot delegate that duty to the clerk. If it does so, its proceedings will be set aside on *certiorari* or other direct proceeding. State *v.* Jersey City, 1 Dutch. (N. J.) 309 (1855); State *v.* Jersey City, 2 Dutch. 444, 447; State *v.* Patterson, 34 N. J. L. 163 (1870). The text is cited and approved in the following cases: Birdsall *v.* Clark, 73 N. Y. 73; State *v.* Trenton, 42 N. J. L. 74; Parker *v.* New Brunswick, 1 Vroom (30 N. J. L.), 395; State *v.* Patterson, 5 Vroom (34 N. J. L.), 163. A municipal corporation cannot delegate powers conferred upon and to be exercised by *it* to a *street committee or others.* Whyte *v.* Mayor (sidewalk assessment), 2 Swan (Tenn.), 364 (1852). See Smith *v.* Morse, 2 Cal. 524; Oakland *v.* Carpentier, 13 Cal. 540; White *v.* Nashville, 2 Swan (Tenn.), 364; compare State *v.* Atlantic City, 5 Vroom (34 N. J. L.), 99, 108. See Brooklyn *v.* Breslin, 57 N. Y. 591 (1874), distinguishing Thompson *v.* Schermerhorn, *supra.* A delegation of power is of course valid when expressly authorized by the legislature. Brooklyn *v.* Breslin, *supra;* State *v.* Patterson, 5 Vroom (34 N. J. L.), 163; *post*, secs. 716, 779.

So, where a power, for example, the power to issue licenses, is granted by law, or by an ordinance duly passed, *to the mayor and aldermen,* they are constituted to act as one deliberative body, to the end that they may assist each other by their united wisdom and experience, and the result of their conference be the ground of their determination: where this is the case, the board of aldermen cannot, even by a vote, delegate the power to the mayor alone.[1] But the

[1] Day *v.* Green, 4 Cush. 433 (1849), and cases there cited. Further, as to delegation of power, Coffin *v.* Nantucket, 5 Cush. 269 (1850); Ruggles *v.* Nantucket, 11 Cush. 433; Clark *v.* Washington, 12 Wheat. 40, 54 (1827); Cooley, Const. Lim. 204; Railway Co. *v.* Baltimore, 21 Md. 93 (1863); Winants *v.* Bayonne, 44 N. J. L. 114; State *v.* Patterson, 34 N. J. L. 163. Power of mayor and aldermen as to choosing site for markets cannot be delegated to commissioners. *Ib.*

A grant by the council of a corporation *to build a street railroad* must be made by ordinance *directly to the parties to be therein named,* and the *authority to make the grant cannot be delegated by the council to any officer or board.* State *v.* Bell, 34 Ohio St. 194. So where the city built a pier in respect of which it was authorized to fix tolls for its use and collect the same. It *leased* it to a party; failing to keep the pier in repair the lessee brought an action for damages; the power of the council not being subject to delegation the lease was declared void. Lord *v.* Oconto, 47 Wis. 386; s. p. Lauenstein *v.* Fond du Lac, 28 Wis. 336; Mullarky *v.* Cedar Falls, 19 Iowa, 21; Gale *v.* Kalamazoo, 23 Mich. 344; Milhau *v.* Sharp, 19 Barb. 435; Rogers *v.* Collier, 43 Mo. 359; East St. Louis *v.* Wehrung, 50 Ill. 28. Any work not done within the time specified, the *common council* was required to cause to be done by contract or otherwise. An ordinance directed that the superintendent of streets should "cause the work to be done," thus delegating the precise authority conferred upon it. This was held to be unauthorized. The charter conferred the power, said the court, to cause it to be done by contract or otherwise; this required the exercise of discretion and judgment as to the manner in which the work should be done. The legislature said it must be the judgment of the council, and they attempted to invest the superintendent of streets with its exercise. This they had no power to do; they could not delegate the power thus conferred. Birdsall *v.* Clark, 73 N. Y. 73.