of inquiry, does not admit the truth of the facts stated therein; and such a report, though accepted by a vote of the corporation, is not admissible in evidence against it.[1] In an action of *assumpsit* against a town corporation, to support his cause of action, the plaintiff produced the books of the corporation, by which it appeared that the sum demanded in the declaration had been allowed by the council to the plaintiff on the 5th of September, on final settlement, at which time the plaintiff was present and assented to the settlement. The defendant contended that the resolution had been passed by mistake, and offered to show, by the same books, the passage, *three days afterwards*, in the plaintiff's absence, of a resolution rescinding the amount of the plaintiff's account. It was held that the subsequent resolution was not competent evidence, the court basing this opinion on the proposition that the books of a corporation are evidence against it, but not in its favor, in an action against the corporation by a stranger.[2]

[1] Dudley *v.* Weston, 1 Met. (Mass.) 477 (1846); followed by Collins *v.* Dorchester, 6 Cush. (Mass.) 396 (1850); and both relating to defective highways. In The King *v.* Hardwick, 11 East, 578, a rated parishioner made a confession, which was admitted in evidence against the parish, on the ground that the parish was an aggregate corporation or company, of which he was a member; compare Mayor, &c. *v.* Long, 1 Camp. 22. But this is not the law in this country, and it may be safely laid down that the admission of a corporator cannot be received against the body. Hartford Bank *v.* Hart, 3 Day (Conn.), 493, denying The King *v.* Hardwick, *supra;* Osgood *v.* Manhattan Co., 3 Cow. (N. Y.) 612, 623. But the *admission of an officer* when made in the ordinary course of his official duty, and within the scope of his powers, may be admissible against the corporation. Peyton *v.* Hospital, 3 C. & P. 363; Angell & Ames on Corp. sec. 309; *Ib.* sec. 659; *ante*, sec. 237, note, and cases.

Notice to corporator or member is not notice to the corporation; it should be formally given as such to the authorized head or proper officer. Powles *v.* Page, 3 Com. B. 31; Edwards *v.* Railroad Co., 1 Myl. & Cr. 659; Grant Corp. 315. Lancey brought an action for *libel* against the mayor and clerk of the city of Bangor for the following statement contained in their annual report: "Balance due from John Lancey, Collector, $6,004.50." The balance was shown to be less. It was held that there was no presumption of law that the officers of a city or town knew the contents of the city records, and no rule of law obliging them to be acquainted therewith; and unless the defendants made the publication maliciously they were entitled to a verdict. Lancey *v.* Bryant, 30 Me. (10 Shep.) 466 (1849); *ante*, sec. 237, note, and cases.

[2] Mayor *v.* Wright, 2 Port. (Ala.) 230 (1835), citing 1 Stark Ev. 292; but is not the proposition too broadly stated?

CHAPTER XII.

MUNICIPAL ORDINANCES OR BY-LAWS.

§ 306 (243). **Subject outlined.** — This subject will be considered under the following heads: —

1. Definition, General Nature and Common-Law Requisites of Ordinances — secs. 307–330.
2. Of the Signing, Publication, and Recording — secs. 331–335.
3. Of the Power to impose Fines, Penalties, and Forfeitures — secs. 336–353.
4. On Whom Binding, and Notice thereof — secs. 354–356.
5. Ordinances relating to the Licensing, Taxing, and Regulation of Amusements and Occupations, including the Sale of Intoxicating Liquors — secs. 357–365.
6. Ordinances relating to Public Offences — secs. 366–368.
7. Ordinances relating to the Public Health, Safety, and Convenience: Herein of Hospitals, Cemeteries, and Burials; Nuisances; Markets and Inspection Regulations; Dangerous Occupations and Practices; and of the Police Power and General Welfare Clauses in Charters — secs. 369–407.
8. Mode of enforcing Ordinances: Herein of Actions and Prosecutions, and their Nature; Mode of pleading Ordinances; Requisites of Complaints to enforce Ordinances; Construction, Defences, Evidence, &c. — secs. 408–422.

Definition, General Nature, and Common-Law Requisites of Ordinances.

§ 307 (244). **Definition.** — Under the general term of "ordinances" have been sometimes included all the regulations by which a corporation is itself governed, including special charter or statute regulations, as well as by-laws. In this country, the term "ordinance" is not usually applied, if ever, to charters, or acts of the legislature respecting municipal corporations regulating their powers and mode of action, but is limited in its application to the acts or regulations, in the nature of local laws, passed by the proper assembly or governing body of the corporation. Indeed, in general and professional use the term "ordinance" is almost, if not quite, equivalent in meaning

to the term "by-law," and is the word most generally used to denote the by-laws adopted by municipal corporations. According to Lord Coke, the word "by" or "bye" signifies a habitation; and thence a by-law in England, and a by-law or ordinance in this country, may be defined to be the law of the inhabitants of the corporate place or district, made by themselves or the authorized body, in distinction from the general law of the country or the statute law of the particular State.[1]

[1] Willc. 73; 2 Kyd, 95, 98.

Definition and Nature of Ordinances or By-Laws. — In a case in *Massachusetts*, denying to towns in that State power under the statute to prohibit by ordinance the sale of intoxicating liquor, Mr. Chief Justice *Shaw* observed that the term "by-law" has a limited and peculiar meaning, and is used to designate such ordinances or regulations which a corporation, as one of its legal incidents, has power to make with respect to its own members and its own concerns. In respect to municipal and *quasi* corporations this meaning has been somewhat extended, but even here the word is used to designate such ordinances and regulations as have reference to legitimate and proper municipal or corporate purposes. There is a broad distinction between the power of a public corporation to make "by-laws" and the general power to make "laws:" authority to make the former does not include the power to legislate upon general subjects. Commonwealth *v.* Turner, 1 Cush. (Mass.) 493. See also Taylor *v.* Lambertville, 43 N. J. Eq. (16 Stew.) 107. "It means a local law prescribing a general and permanent rule." *Elliott*, J., Citizens' Gas. & M. Co. *v.* Elwood, 114 Ind. 332 (1887). *A municipal by-law*, according to the definition of a distinguished English judge, is a rule obligatory over a particular district, not being at variance with the general laws of the realm, and being reasonable and adapted to the purposes of the corporation; and any rule or ordinance of a permanent character which a corporation is empowered to make, either by the common or statute law, is a by-law. *Per Parke*, B., Gosling *v.* Veley, 19 L. J. (N. S.) Q. B. 135.

Resolutions and Ordinances discriminated. — A *resolution* is an order of the council of a special and temporary character; an *ordinance* prescribes a permanent rule of conduct or government. Blanchard *v.* Bissell, 11 Ohio St. 96, 103, *per Scott*, J. Where the charter commits the decision of a matter to the council and is silent as to the mode, the decision may be evidenced by a *resolution*, and need not necessarily be by an *ordinance*. State *v.* Jersey City, 3 Dutch. (N. J.) 493; Merch. Union B. Wire Co. *v.* Chicago, B. & Q. Ry. Co., 70 Iowa, 105; Butler *v.* Passaic, 44 N. J. L. 171. But if the organic law requires an act to be done by ordinance, or if such requirement is implied by necessary inference, a resolution is not sufficient. Newman *v.* Emporia, 32 Kan. 456; Hunt *v.* Lambertville, 45 N. J. L. (16 Vroom) 279 (a resolution granting authority to build a sewer set aside).

Resolution or vote held equivalent to formal ordinance in a case where the latter was not expressly required by the charter or statute. Merch. Union B. Wire Co. *v.* Chicago, B. & Q. R. Co., 70 Iowa, 105. In State *v.* Bayonne, 6 Vroom (35 N. J. L.), 335, resolutions and ordinances are discriminated, and the latter said to require more solemnity than the former. A resolution adopted by a city council, not approved by the mayor, and not published in the manner required by the charter, has not the effect of an ordinance. Central *v.* Sears, 2 Col. 588 (1875). The legislative powers of a city council, as in fixing the compensation of city officers (it was held, construing the charter), must be exercised by ordinance, when this is intended to be permanent. *Ib.* A *resolution* has ordinarily the same effect as an *ordinance*, as both are legislative acts. Sower *v.* Philadelphia, 35 Pa. St. 231 (1860); Gas Co. *v.* San Francisco,

§ 308 (245). **Authority delegated to Municipalities; Nature of Ordinances; Repeal.** — Although the proposition that the legislature of a State is alone competent to make laws is true, yet it is also settled that it is competent for the *legislature to delegate to municipal corporations the power to make by-laws and ordinances*,[1] with appro-

6 Cal. 190. Where the power to make ordinances and by-laws is general, and no form in which these shall be enacted or passed is prescribed, it was held that an *ordinance* containing a prohibition and annexing a penalty was valid, notwithstanding it purported by its terms to be a *resolution*. In substance it was an ordinance or regulation, and the form in which it was passed did not make it void. Municipality *v.* Cutting, 4 La. An. 335 (1849). Where a city has power, by charter, to make "ordinances, rules, resolutions, and by-laws," which are required to be passed by the vote of a majority of the council and signed by the mayor, any form of procedure may be adopted if it appears upon the record in a permanent form, — as, by a record in the minutes of an oral motion with the vote thereon. Green Bay *v.* Brauns, 50 Wis. 204. By one section of the charter the council was authorized to make "by-laws, ordinances, resolutions, and regulations," and by another "by-laws and ordinances" were to be submitted to the mayor for his approval, and it was held that there was no such distinction as to require that "by-laws and ordinances" must, and "regulations and resolutions" need not, be submitted to the mayor, to be approved by him. Kepner *v.* Commonwealth, 40 Pa. St. 124. The words "regulation," "resolution," and "ordinance," as used in the charter, defined by *Lowrie*, C. J. *Ib. How construed.* The charter of a city bears the same general relation to the ordinances of a city that the Constitution of a State bears to its statutes, and the general rules applicable to unconstitutional statutes may be applied in construing ordinances. Quinette *v.* St. Louis, 76 Mo. 402.

Construction of particular charter provisions when corporate purpose may be expressed in the form of a resolution. — State *v.* Elizabeth (acceptance of dedication), 8 Vroom (37 N. J. L.), 432; State *v.* Jersey City (building sewers), 3 Dutch. (N. J.) 493; *Ib.* 185, 196; State *v.* Jersey City (signature of mayor), 1 Vroom (30 N. J. L.), 148; State *v.* Trenton, 7 Vroom (36 N. J. L.), 499, 503. *Instances where an ordinance was held essential.* State *v.* Bayonne (grading street), 6 Vroom (35 N. J. L.), 335; *Ib.* 205; Cross *v.* Morristown (alteration of width of street and sidewalk), 3 C. E. Green (N. J.), 305; State *v.* Bergen (appointment of commissioners to assess damages), 4 Vroom (33 N. J. L.), 39, 72; Paterson *v.* Barnet, 46 N. J. L. (17 Vroom) 62; *ante*, sec. 258, note; sec. 270, note.

Mode of Exercising Power. — Where the power to do certain acts or pass certain ordinances is conferred upon the council, but the particular *mode* of exercising the power is not prescribed, this may be done by ordinance, and any mode may be adopted which does not infringe the charter or general law of the land. Thus, for example, power was given to a city "to levy and *collect* a special tax," not specifying the mode of collection. *Held*, that an ordinance requiring the mayor to enforce the collection of the tax by suit in the nature of an action for debt, was valid, as it did not violate the charter or the general law. Cincinnati *v.* Gwynne, 10 Ohio, 192; Markle *v.* Akron, 14 Ohio, 586 (1846). Prescribed mode essential. Cross *v.* Morristown, 18 N. J. Eq. 305; Anderson *v.* O'Conner, 98 Ind. 168; *post*, chap. xix.

[1] Perdue *v.* Ellis, 18 Ga. 586 (1855); St. Paul *v.* Coulter, 12 Minn. 41 (1866); Commonwealth *v.* Duquet, 2 Yeates (Pa.), 493; Hill *v.* Decatur, 22 Ga. 203; State *v.* Clark, 8 Fost. (28 N. H.) 176 (1854); Milne *v.* Davidson, 5 Martin, N. S. (La.) 586; Markle *v.* Akron, 14 Ohio, 586, 590 (1846); Mayor, &c. *v.* Morgan, 7 Martin, N. S. (La.) 1, *per Martin*, J.; Trigally *v.* Memphis, 6 Coldw. (Tenn.) 382 (1869); Metcalf *v.* St. Louis, 11 Mo. 103 (1847). That such a power may be delegated to

priate sanctions, which, when authorized, have the force, in favor of the municipality and against persons bound thereby, of laws passed by the legislature of the State.[1] A penalty imposed by an ordinance

municipal corporations is admitted even in those States which deny the validity of what are known as *Local Option Laws*. Wall, *In re*, 48 Cal. 279 (1874); s. c. 17 Am. Rep. 425; *ante*, sec. 44, note; Gloversville *v.* Howell (local option as to sale of intoxicating liquors), 70 N. Y. 287 (1877); Gilbert Elevated Railway Co., *In re*, 70 N. Y. 361 (1877); Covington *v.* East St. Louis, 78 Ill. 548 (1875). In Strauss *v.* Pontiac, 40 Ill. 301 (1866), the Supreme Court held that a provision in a town charter forbidding any person to do a certain act, fixing the amount of fine and prescribing the penalty, was a complete enactment of itself; that an ordinance to the same effect was void; and that a party could be prosecuted only under the charter, and not under the ordinance. In view of the general authority given in the same charter to make all ordinances necessary to carry into effect the powers granted in the charter, the correctness of this decision may admit of fair debate, although it is undoubtedly true that no ordinance is necessary where the prohibition in the charter is complete, the penalty fixed, and the remedy prescribed. Ashton *v.* Ellsworth, 48 Ill. 299.

The subject of the *power of the legislature to delegate the legislative function to municipalities* was considered in an able opinion by Chief Justice *Doe*, in State, *ex rel. v.* Hayes, 61 N. H. 264, 314 (1881), in which he reviews the authorities *in extenso*. The facts, briefly stated, were that the legislature had submitted a proposition as to whether an act authorizing shareholders in corporations to cast all their votes for one candidate for director or to distribute them among two or more candidates, should become a law, to the vote of the people of the State, voting in their several towns and wards. The election having been held and the law having been declared adopted and put into effect, the validity of the proceeding was tested by *quo warranto* proceedings against one who had been declared elected a director of a railroad company. It was *held* that the act was intended to be a delegation of legislative power, and that, while the principle of local government authorizes the grant of limited powers of local legislation to municipalities, the power of general State legislation cannot be so delegated. See also Bowles *v.* Landaff, 59 N. H. 164, and Gould *v.* Raymond, *Ib.* 260. Council may order sewer to be built by a committee. Collins *v.* Holyoke, 146 Mass. 298 (1888). See Dorey *v.* Boston, *Ib.* 336, 339, and cases. *Ante*, secs. 97, 289.

[1] Heland *v.* Lowell, 3 Allen (Mass.), 407 (1862); Brick Presb. Church *v.* City, &c., 5 Cow. 538; St. Louis *v.* Boffinger, 19 Mo. 13, 15, *per Gamble*, J.; St. Louis *v.* Bank, 49 Mo. 574; Jones *v.* Ins. Co., 2 Daly (N. Y.), 307; McDermott *v.* Board of Police, 5 Abb. Pr. (N. Y.) 422 (1857); Mason *v.* Shawneetown, 77 Ill. 533 (1875); Des Moines Gas Co. *v.* Des Moines (city of), 44 Iowa, 508; s. c. 24 Am. Rep. 756, citing text; State *v.* Tryon, 39 Conn. 183 (1872); Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396, citing text; Bearden *v.* Madison, 73 Ga. 184; St. Johnsbury *v.* Thompson, 59 Vt. 300; Starr *v.* Burlington, 45 Iowa, 87. A city council is "a miniature general assembly, and their authorized ordinances have the force of laws passed by the legislature of the State." *Per Scott*, J., Taylor *v.* Carondelet (forfeiture clause in lease), 22 Mo. 105 (1855); St. Louis *v.* Foster, 52 Mo. 513 (1873). In Hopkins *v.* Mayor of Swansea, 4 M. & W. 621, 640, Lord *Abinger* said: "The by-law has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an act of parliament has upon the subjects at large." Valid ordinances of corporations are as binding on the corporators and inhabitants of the place as the general laws of the State upon the citizens at large. Milne *v.* Davidson, 5 Martin N. s. (La.) 586. And therefore it has been held *that contracts* between the inhabitants of a city, *in violation of the express provisions of a valid ordinance* of a municipal corporation, are illegal, and cannot be enforced. Milne *v.* Davidson (lease of house

authorized by the legislature for the doing of certain specified acts amounts to a prohibition, and the prohibited acts become thereby unlawful.[1]

§ 309 (246). **Ordinances must be adopted by Proper Body and in the Prescribed Mode.** — Ordinances being among the most important and solemn acts of a corporation, it is essential to their validity that they shall be *adopted by the proper body*, duly assembled, and in the manner prescribed by the charter.[2] What is necessary to constitute

for private hospital), 5 Martin, *supra* (1827); Heland *v.* Lowell, 3 Allen (Mass.), 407 (1867); but compare Baker *v.* Portland, 58 Me. 199; s. c. 10 Am. Law Reg. (N. S.) 559, and see Judge *Redfield's* note. And see also Heeny *v.* Sprague, 11 R. I. 456 (1877); s. c. 23 Am. Rep. 502, holding that no private action for damages impliedly exists in favor of a person injured by a breach of duty imposed by a municipal by-law against the person who violated the by-law. A distinction between by-laws and statutes suggested and discussed by *Durfee*, C. J.; see Johnson *v.* Simonton, 43 Cal. 242 (1872). The courts *will not enjoin the passage* of unauthorized ordinances, and will ordinarily act only when steps are taken to make them available. Chicago *v.* Evans, 24 Ill. 52 (1860); Smith *v.* McCarthy, 56 Pa. St. 359; Des Moines Gas Co. *v.* Des Moines (city of), 44 Iowa, 505 (1870); s. c. 24 Am. Rep. 756, distinguishing Davis *v.* Mayor, 14 N. Y. 506; People *v.* Sturtevant, 9 N. Y. 263. *Ante*, sec. 197, note; *post*, chap. xxii. But if a party is injuriously affected by an ordinance, he may have its validity judicially determined before it is attempted to be executed. State *v.* Paterson, 34 N. J. Law, 163; State *v.* Jersey City, *Ib.* 31, 390 (1870). But see Sheridan *v.* Colvin, 78 Ill. 237.

The jurisdiction of every council is not only to be confined to the municipality the council represents, but is to be exercised, when not otherwise provided for, by by-law. When a corporation is duly erected, the law tacitly annexes to it the power of making by-laws or private statutes. This power is included in every act of incorporation; for, as is quaintly observed by Blackstone, "as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic." 1 Bl. Com. 476. Though the power to make by-laws is unquestionably an incident of every corporation, it is rarely left to implication; but is usually, as in the present case, conferred by the express terms of the act of parliament. A by-law is a rule obligatory over a particular district, not being at variance with the general laws, and being reasonably adapted to the purposes of the corporation. Gosling *v.* Veley *et al.*, 19 L. J. (N. S.) Q. B. 135. Hopkins *v.* Swansea, 4 M. & W. 621; The Queen *v.* Osler, 32 Upper Can. Q. B. 324. The courts upon general principles recognize judicially what municipal councils are competent to do, and hold that it is not necessary for them to recite in a by-law all that is requisite to show that they have proceeded regularly in passing it. Grierson *v.* Ontario, 9 Upper Can. Q. B. 623; Fisher *v.* Vaughan, 10 Upper Can. Q. B. 492; The King *v.* Harrison, 3 Burr. 1328; Methodist Prot. Church *v.* Baltimore, 6 Gill (Md.), 394; Stuyvesant *v.* New York, 7 Cow. (N. Y.) 588; Harr. Munic. Manual, 4th ed.

[1] Johnson *v.* Simonton (swill milk ordinance of San Francisco), 43 Cal. 242 (1872). Thus a city ordinance, duly authorized, imposing a penalty for feeding distillery slops to cows, and also for vending the milk of cows so fed, amounts to an authoritative prohibition in both respects; and the acts thus prohibited are illegal. *Ib.*

The code of *Iowa* (sec. 489), requires that "no ordinance shall contain more than one subject, which shall be *clearly expressed in its title*." Under it an ordinance entitled "*Regulating* the use and sale of intoxicating liquors" was declared

a valid corporate meeting, and the manner of performing valid corporate acts, are subjects treated of in another chapter.[1] When the *mode of enacting ordinances is prescribed*, it must be pursued. Thus, if the charter provides that no by-law shall be passed unless introduced at a previous regular meeting, this is a restriction on the power, and must be observed; and, accordingly, an ordinance for opening a street was adjudged void, on the ground that the name of one of the commissioners was changed without laying the ordinance over until another meeting.[2] So where by the charter the *mayor is*

void, its subject being entirely *prohibitory*. Town of Cantril *v.* Sainer, 59 Iowa, 26. See also Dempsey *v.* Burlington, 66 Iowa, 687. There is a similar statutory provision in *Kansas*. Smith *v.* Emporia, 27 Kan. 528; Stebbins *v.* Mayer, 38 Kan. 573. See, *ante*, secs. 51, 270–287.

[1] *Ante*, chap. x.

[2] State *v.* Bergen, 33 N. J. Law, 39 (1868), distinguished from State *v.* Jersey City, 2 Dutch. (N. J.) 448, where the variance was immaterial. New Orleans *v.* Brooks, 36 La. An. 641; Danville *v.* Shelton, 76 Va. 325. See as to constitutional requirement that bills shall be read on successive days before their passage, Cooley Const. Lim. 139, and cases there cited. Construction of similar restriction requiring previous publication. Douglass, *In re*, 46 N. Y. 42; N. Y. &c. School, *In re*, 47 N. Y. 556; Dubuque *v.* Wooton, 28 Iowa, 571. Where a statute requires that no vote shall be taken upon an assessment ordinance or resolution until it has been published three days, a resolution passed without such prior publication was held illegal, and the assessment founded upon it void. Addison Smith, *In re*, 52 N. Y. 526. The provision is held to be mandatory. Phillips, *In re*, 60 N. Y. 16; Little, *In re*, 60 N. Y. 343; Anderson, *In re*, 60 N. Y. 457; Douglass, *In re*, 46 N. Y. 42; State *v.* Hoboken, 38 N. J. L. 110; State *v.* Smith, 22 Minn. 218. Under a provision that no act or ordinance of any board of trustees of a town should be valid until the certificates of their election should be filed, the filing to be within ten days after the election, it was held that the effect of filing the certificates a year or more after the election was to legalize and validate ordinances previously made for street improvements, and to authorize the recovery of assessments provided for by them. Jennings *v.* Fisher, 103 Ind. 112, overruling Ligonier *v.* Ackerman, 46 Ind. 552, and Pratt *v.* Luther, 45 Ind. 250. Where the statute authorized an ordinance prohibiting the erection of wooden buildings in any block, *upon the petition of two-thirds* of the property owners thereon, an ordinance adopted without a petition being first made was declared void. Des Moines *v.* Gilchrist, 67 Iowa, 210; compare Keokuk *v.* Scroggs, 39 Iowa, 447. Where, under a rule of a city council, a councilman was not allowed to vote upon questions in which he was directly interested, an ordinance passed by the lowest number necessary, of which one vote was cast by an interested councilman, was declared invalid. Buffington Wheel Co. *v.* Burnham, 60 Iowa, 493. By the Iowa code, sec. 489, an *ordinance containing more than one subject* is void. Under this clause an ordinance, the first section of which vacated an alley, and the second granted the vacated land to a private person, was held to be valid, its purpose being to transfer the title. Dempsey *v.* Burlington, 66 Iowa, 687. Where the law required *the reading of the ordinance on three different days*, the fact that the third reading was after the annual election and entrance upon office of a new mayor and four new aldermen, was held to be a sufficient compliance with it. McGraw *v.* Whitson, 69 Iowa, 348. The readings may be at "adjourned" meetings; three general meetings of the council are not intended. Cutcomp *v.* Utt, 60 Iowa, 156. Where the minutes of the council showed the adoption of a motion to reduce certain licenses, and stated that "the mayor was instructed to prepare an ordinance covering said changes," it was held, on an application for a *man-*

part of the law-making power, his concurrence in legislative action is essential to its validity.[1] Municipal ordinances, otherwise valid, may, like an act of the legislature, be adopted *to take effect in future* and upon the happening of a contingent event.[2] The *ordaining clause of an ordinance* has been held, under the circumstances stated in the note, not to be essential to its validity, although the charter contains a provision requiring such a clause and prescribing the form, the court considering the provision to be directory only.[3]

§ 310 (247). **Evidence of Adoption of Ordinances.** — In the absence of required *record evidence of the passage of an ordinance*, it is not

damus to compel the issue of a license at the reduced rate, that the record did not show a complete legislative act, and that the resolution did not effect a change in the rate of license. Jones *v.* McAlpine, 64 Ala. 511.

[1] Saxton *v.* Beach, 50 Mo. 488 (1872); Saxton *v.* St. Joseph, 60 Mo. 153 (1875); therefore a *resolution* without the mayor's signature ordering local improvements is a nullity. *Ib.;* Irvin *v.* Devors, 65 Mo. 625 (1877). The act of a mayor in announcing that a motion is lost does not amount to an adjudication, so as to prevent its being attacked collaterally. Chariton *v.* Holliday, 60 Iowa, 391. *Ante*, sec. 272 *et seq.*

[2] Baltimore *v.* Clunet, 23 Md. 449 (1865); Northern C. R. Co. *v.* Baltimore, 21 Md. 93 (1863); State *v.* Kirkley, 29 Md. 85 (1868); *ante*, sec. 44. See Troy *v.* Atchison, &c. Railroad Co., 13 Kan. 70 (1874); *ante*, sec. 300, note. Another common but erroneous belief is, that a municipal council can by order or resolution do that which, if done through a by-law or ordinance, would be illegal. This it cannot do. No municipal council can do that informally which it has no power to do directly and formally. Daniels *v.* Burford, 10 Upper Can. Q. B. 478. A by-law, order, or resolution which revives an illegal by-law is of course itself illegal. Canada Co. *v.* Oxford, 9 Upper Can. Q. B. 567. An order or resolution duly signed and sealed is virtually a by-law or ordinance, but many orders and resolutions pass by mere vote, without being thus authenticated. The municipal rules of proceeding generally require more formal steps to be taken, in passing a by-law or ordinance, than in adopting an order or resolution. Municipal corporations, however, may become liable as wrong-doers for things done by direction of the councils without by-laws. Croft *v.* Peterborough, 5 Upper Can. C. P. 35; Nevill *v.* Ross, 22 Upper Can. C. P. 487; Darby *v.* Crowland, 38 Upper Can. Q. B. 338; Lewis *v.* City of Toronto, 39 Upper Can. Q. B. 343. The power to make by-laws or ordinances necessarily supposes the power to enforce them by pecuniary penalties, competent and proportionable to the offence. In construing a by-law, &c., the court will look at the whole of it, to ascertain its meaning, and construe one part with another or other parts, so as, if possible, to give full effect to the whole. Cameron and East Nissouri, *In re*, 13 Upper Can. Q. B. 190.

[3] St. Louis *v.* Foster, 52 Mo. 513 (1873). The Supreme Court of *Missouri* having decided in the Pacific Railroad *v.* Governor, 23 Mo. 353, and Cape Girardeau *v.* Riley, 52 Mo. 424, that the validity of a statute, duly authenticated, could not be impeached by showing a departure from the forms prescribed in the Constitution in the passage of laws, applied the same principle to the passage of ordinances. Therefore, although the charter required that the style of ordinances shall be, "Be it ordained," &c., yet this is directory; and omitting the enacting clause, or using an imperfect enacting clause does not invalidate the ordinance. St. Louis *v.* Foster, *supra*. To same effect, People *v.* Murray, 57 Mich. 396. As to the conflicting decisions in respect to whether the forms prescribed in Constitutions to be observed in the enactment of laws are imperative or directory only, see Cooley Const. Lim. chap. vi.

competent, except possibly under peculiar circumstances, to establish its adoption by extrinsic testimony;[1] but where unanimity is necessary to legal authority to make an order, and an order is entered, it will be presumed, when the contrary does not appear, that it was made with the required unanimity.[2]

§ 311. **Motives for adopting Ordinances not subject to Judicial Inquiry.** — It is well settled that *the judicial branch of the government cannot institute an inquiry into the motives of the legislative department in the enactment of laws.* Such an inquiry would not only be impracticable in most cases, but the assumption and exercise of such a power would result in subordinating the legislature to the courts.[3] In analogy to this rule it is doubtless true that the courts will not, in general, inquire into the motives of the council in passing ordinances.[4] But it would be disastrous, as we think, to apply the analogy to its full extent. Municipal bodies, like the directories of private corporations, have too often shown themselves capable of using their powers fraudulently, for their own advantage or to the injury of others. We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, *may be impeached for fraud* at the instance of persons injured thereby.

§ 312 (248). **Same subject.** — Accordingly, in Ohio, in a case where the legislature chartered a gas company, reserving the power of control, and subsequently empowered the city council to regulate the price of gas, the court considered the intention to be to limit the

[1] Covington *v.* Ludlow, 1 Met. (Ky.) 295 (1858). See *ante*, secs. 297, 300, note, 304, note; *post*, sec. 335.

[2] Lexington *v.* Headley, 5 Bush (Ky.), 508 (1869); Covington *v.* Boyle, 6 Bush (Ky.), 204 (1869); McCormick *v.* Bay City, 23 Mich. 457 (1871); see Steckert *v.* East Saginaw, 22 Mich. 104; *post*, sec. 800. The final action of a city council, or other deliberative body, on any measure, is shown by its adjournment thereon, the public promulgation of its action, or subsequent proceedings inconsistent with a purpose to review. State *v.* Van Buskirk, 40 N. J. L. 463. In *Illinois* a book or pamphlet containing the ordinances of a municipal corporation and purporting to be published by its authority, is evidence of the passage and contents of the ordinances contained in it, and of their legal publication. Lindsay *v.* Chicago, 115 Ill. 120; *infra*, sec. 334. Where a record is silent as to proceedings required by law to to be taken, — as that the yeas and nays shall be called, — no presumption arises that other proceedings than those mentioned in the record took place. Tracey *v.* The People, 6 Col. 151.

[3] Cooley Const. Lim. 186, 187, where many of the cases are collected.

[4] Freeport *v.* Marks, 59 Pa. St. 253; Buell *v.* Ball, 20 Iowa, 282 (collateral action between third persons). It being well settled that the courts may decide upon the reasonableness of ordinances, they will in general judge of these, whatever their purpose, by considering their nature and effect, rather than by instituting an inquiry into the motives of the members of the council; although where the latter is material and relevant, it may in the author's judgment be done.

company to a fair and reasonable price, and that it must be fairly exercised; and, if, in the colorable exercise of the power, a majority of the members, for a fraudulent purpose, combined to fix the price at a rate at which they knew it could not be made and sold without loss, their action would not bind the company, and in such a case, their good faith, it was held, might be inquired into.[1]

§ 313. **Legislative Officers are not personally liable for Adoption of Ordinances.** — Where the *officers of a municipal corporation* are invested with legislative powers, they *are of course exempt from individual liability* for the passage of any ordinance within their authority, and their motives in reference thereto will not be inquired into; nor are they individually liable for the passage of any ordinance not authorized by their powers; for such ordinance is void, and need not be obeyed.[2]

§ 314 (249). **Duration and Repeal of Ordinances.** — Since a valid by-law never becomes obsolete, it remains in force until *repealed* by the legislature or the corporation. The power to make includes the power to repeal without reference to the people of the municipality.[3] The *repeal cannot operate retrospectively* to impair private rights vested under it.[4] Therefore, the legislature, having authorized a

[1] State *v.* Cincinnati Gas Company, 18 Ohio St. 262 (1868), distinguished from Fletcher *v.* Peck, 6 Cranch, 87; Bank *v.* United States, 1 G. Greene (Iowa), 553. The courts will not inquire, even on the complaint of the State, into the motives which governed members of the legislature in the enactment of a law, or allow to be shown, for the purpose of defeating the operation of the law, that it was passed by fraud, corruption, and bribery of the members. Wright *v.* Defrees, 8 Ind. 298; followed, McCulloch *v.* State, 11 Ind. 424, 431 (1858); s. p. Sunbury, &c. Railroad Co. *v.* Cooper, 7 Am. Law Reg. 158 (1858); Cooley Const. Lim. 135, 136, 186, 208.

[2] Jones *v.* Loving, 55 Miss. 109; Paine *v.* Boston, 124 Mass. 486; Freeport *v.* Marks, 59 Pa. 257; Baker *v.* State, 27 Ind. 485; Commissioners *v.* Ducket, 20 Md. 468; Weaver *v.* Devendorf, 3 Denio (N. Y.), 117; Pike *v.* Megoun, 44 Mo. 491.

[3] Kansas City *v.* White, 69 Mo. 261; The King *v.* Ashwell, 12 East, 22; The King *v.* Bird, 13 East, 367; Great Western Railway Co. and North Cayuga, *In re*, 23 Upper Can. C. P. 28; Bloomer *v.* Stolley, 5 McLean, 158; Santo *et al. v.* State of Iowa, 2 Iowa, 165; Bank of Chenango *v.* Brown, 26 N. Y. 467; Rice *v.* Foster, 4 Harring. (Del.) 479; The People *v.* Collins, 3 Mich. 347; Welch *v.* Bowen, 103 Ind. 252; Greeley *v.* Jacksonville, 17 Fla. 174. *In re* Mollie Hall, 10 Neb. 537, where an ordinance to suppress houses of prostitution, passed under the authority of the general incorporation law, was held *not to be repealed* by the adoption of a new incorporation law by the legislature, containing authority for cities to "restrain, prohibit, and suppress" such houses, and expressly repealing the old law.

A provision in an ordinance which is plainly repugnant to an ordinance previously adopted repeals the latter ordinance to the extent of the conflict between them. *Ex parte* Wolf, 14 Neb. 24; Burlington *v.* Estlow, 43 N. J. L. 13.

[4] Rex *v.* Ashwell, 12 East, 22; 3 Term R. 198; The King *v.* Bird, 13 East, 379; Terre Haute *v.* Lake, 43 Ind. 480 (1873); State *v.* City Clerk, &c., 7 Ohio St. 355;