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;

religious corporation to establish a cemetery within the limits of a city, on obtaining the consent of the city, and such consent having been given, the city authorities cannot, after their consent has been acted upon, repeal the resolutions giving it, and enjoin the religious corporation from the use of the cemetery, unless, indeed, it is shown to be an actual nuisance, detrimental to the health of the city, in which case its police and governmental powers might doubtless be exercised.[1]

§ 315 (250). **Mode of conferring the Power; Construction of Grants of Authority.** — Municipal charters, or incorporating acts, are sometimes *silent as to the power to pass by-laws* or ordinances; and where this is the case, the municipal body has the power, incidental to all corporations, to enact appropriate by-laws.[2] Occasionally, the charter or incorporating act, without any specific enumeration of the purposes for which by-laws may be made, contains a general and comprehensive grant of power to pass all such as may seem necessary to the well-being and good order of the place. More frequently, however, the charter or incorporating act authorizes the enactment of by-laws in certain specified cases, and for certain purposes; and after this specific enumeration a general provision is added, that the corporation may make any other by-laws or regulations necessary to its welfare, good order, &c., not inconsistent with

Stoddard *v.* Gilman, 22 Vt. 568; Pond *v.* Negus, 3 Mass. 230; *ante*, chap. x.; State *v.* Graves, 19 Md. 351 (1862); Bigelow *v.* Hillman, 37 Me. 52; Reiff *v.* Conner, 5 Eng. (10 Ark.) 241; Road, *In re*, 17 Pa. St. 71, 75; Nelson *v.* St. Martin's Parish, 111 U. S. 716; Louisiana *v.* Pillsbury, 105 U. S. 278; Cape May & S. L. R. R. Co. *v.* Cape May, 35 N. J. Eq. 419; People *v.* O'Brien, 111 N. Y. 1 (1888); Cunningham *v.* Almonte, 21 Upper Can. C. P. 459; Great Western R. Co., &c., *In re*, 23 U. C. C. P. 28. An act changing an incorporated town into a city does not of itself repeal pre-existing ordinances. *Per Strong*, J., Erie Academy Trus. *v.* Erie, 31 Pa. St. 515 (1858); *ante*, sec. 85, note. Subsequent *constitutional provision* or *legislative enactment*, in conflict with existing by-laws, renders the latter void. Mobile *v.* Dargan, 45 Ala. 310 (1871).

[1] New Orleans *v.* St. Louis Church, 11 La. An. 244 (1856), distinguished from Brick Presb. Church *v.* Mayor, 5 Cow. (N. Y.) 538; Musgrove *v.* Catholic Church, 10 La. An. 431; *ante*, sec. 97. The *repeal* of an ordinance *puts an end to a pending prosecution* under the repealed ordinance, unless there be a saving clause. The contrary rule as to State statutes held not to apply to by-laws or ordinances. Naylor *v.* Galesburg, 56 Ill. 285 (1870); Kansas City *v.* Clark, 68 Mo. 588; Barton *v.* Gadsden, 79 Ala. 495, which also holds that an ordinance prohibiting the sale of liquor under a penalty is repealed by an ordinance prohibiting such sale without a license, because of inconsistency and repugnancy. The fact that an ordinance directing a certain street improvement to be made was repealed, *held*, to be conclusive in favor of a perpetual injunction, restraining the contractor or the city from proceeding. Kaime *v.* Harty, 4 Mo. App. 357.

[2] A Coal-Float *v.* Jeffersonville, 112 Ind. 15, citing the text. *Supra*, sec. 308, note. Chamberlain *v.* Evansville, 77 Ind. 542.

the Constitution or laws of the State. This difference is essential to be observed, for the power which the corporation would possess under what may, for convenience, be termed "the general welfare clause," *if it stood alone*, may be limited, qualified, or, when such intent is manifest, impliedly taken away by provisions specifying the particular purposes for which by-laws may be made. It is clear that the general clause can confer no authority to abrogate the limitations contained in special provisions.

§ 316. **Special and general Grants of Authority.** — When there are *both special and general provisions*, the power to pass by-laws under the special or express grant can only be exercised in the cases and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject-matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority, and not repugnant to the Constitution and general laws of the State.[1]

[1] State *v.* Ferguson, 33 N. H. 424 (1856), where this subject is ably treated in a judgment delivered by Mr. Justice *Foster*, holding a by-law of the city of Concord, in relation to the sale of intoxicating liquor, invalid, as contravening the special provisions of the charter, and therefore not sustainable under the general welfare clause of the charter.

"The power to make by-laws, when not expressly given, *is implied* as an incident to the very existence of a corporation; but in the case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication." *Per Sawyer*, J., *arguendo*, in State *v.* Ferguson, 33 N. H. 424, 430 (1856); citing 2 Kyd on Corp. 102; Angell & Ames on Corp. 177; and Child *v.* Hudson's Bay Co., 2 P. Wms. 207. The true rule in such cases *may*, perhaps, be correctly expressed to be, that the enumeration of special cases does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions. Heisembrittle *a.* Charleston, 2 McMullan (S. C.), 233; Wadleigh *v.* Gilman, 3 Fairf. (12 Me.) 408; State *v.* Clark, 8 Fost. (28 N. H.) 176, and comments in 33 N. H. 432; State *v.* Freeman, 38 N. H. 426; Commonwealth *v.* Turner, 1 Cush. (Mass.) 493; Collins *v.* Hatch, 18 Ohio, 523; see New Orleans *v.* Philippi (taxation), 9 La. An. 44; Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396, citing text; Laundry License Case, 22 Fed. R. 701; Clark *v.* South Bend, 85 Ind. 276. Huesing *v.* Rock Island, Supreme Court, Ill. MSS. 1889, applying text. *Post*, sec. 432 *et seq.*, and cases.

In *Georgia*, the Superior Courts adopt the following as the true rule for ascertaining *the extent of the power* of a city to pass ordinances. "The city council is restrained to such matters, whether specially enumerated or included under general grant, as are indifferent in themselves, such matters as are free from constitutional objection and have not been the subject of general legislation; or, as it is expressed in the charter, are not repugnant to the constitution or laws of the land." Dubois *v.* Augusta (health ordinance), Dudley (Ga.) Rep. 30 (1831); Williams *v.* Augusta (powder ordinance), 4 Ga. 509, 514 (1848). Power to pass

And it has been very properly held that a special grant of power to a municipal corporation to adopt ordinances on enumerated subjects connected with municipal concerns is in addition to the incidental power of the corporation.[1]

§ 317 (251). **Ordinances cannot enlarge or change the Charter or Statute.** — Since all the powers of a corporation are derived from the law and its charter, it is evident that *no ordinance or by-law of a corporation can enlarge, diminish, or vary its powers.*[2] A similar

necessary by-laws is incidental, but this power is limited not only by the terms, but the spirit and design, of the charter, and the general principles and policy of the common law. Taylor *v.* Griswold, 2 J. S. Green (N. J.), 222 ; Mount Pleasant *v.* Breeze, 11 Iowa, 399 (1860), *per Wright*, J.

A power to pass ordinances to "improve the morals and order" of the people does not authorize an ordinance to "punish" the offence of keeping houses of ill-fame. Whether the legislature can constitutionally confer power upon cities to punish acts made crimes by the laws of the State, *not decided*. Chariton *v.* Barber, 54 Iowa, 360 (1880), *Beck*, J.; s. c. 11 Cent. Law J. 358 ; 37 Am. Rep. 209. More fully, *post*, sec. 432 *et seq.*

[1] State *v.* Morristown, 33 N. J. L. 57 (1868). *Depue*, J. in his opinion, distinguishes such a case from Norris *v.* Staps, Hobart, 210, where the corporation was created by the crown, and where it was held that a special clause in the letters-patent authorizing the corporate body (a fellowship of weavers) to make by-laws, did not add to implied powers, and that its by-laws were subject to the general law of the realm and subordinate to it. "But," he adds, "a special grant of power to a municipal corporation is an entirely different thing ; it is a delegation of authority to legislate by ordinance on the enumerated subjects, and does add to the powers incident to the creation of the corporation. The numerous instances, in our own State, of the grant of such powers in relation to the opening and improvement of streets, the making of sewers, and the assessment of taxes, afford illustrations of this distinction." *Ib.* 62.

[2] Thompson *v.* Carroll, 22 How. 422 (1859); Andrews *v.* Insurance Co., 37 Me. 256 (1854) ; Thomas *v.* Richmond, 12 Wall. 349 (1871); Garden City *v.* Abbott, 34 Kan. 283, (license tax upon non-resident attorneys, imposed by ordinance under a law authorizing such a tax upon residents only held unlawful) ; Commonwealth *v.* Roy, 140 Mass. 432 ; State *v.* Municipal Court of St. Paul, 32 Minn. 329 ; State, *ex rel. v.* Nashville, 15 Lea, 697 (power to *change* a salary confers no power to *abolish* it). "A power vested by legislation in a city corporation, to make by-laws for its own government and the regulation of its own police, cannot be construed as imparting to it the power to repeal the [general] laws in force, or to supersede their operation by any of its ordinances. Such a power, if not expressly conferred, cannot arise by mere implication, unless the exercise of the power given be inconsistent with the previous law, and does necessarily operate as its repeal *pro tanto*. Nor can the presumption be indulged, that the legislature intended that an ordinance passed by the city should be superior to, or take the place of, the general law of the State upon the same subject." *Simpson*, C. J., March *v.* Commonwealth, 12 B. Mon. (Ky.) 25, 29 (1851); Rothschild *v.* Darien, 69 Ga. 503 ; Breninger *v.* Belvidere, 44 N. J. L. 350. "Huckster" means a petty dealer or retailer of small articles of provisions, &c., and an *ordinance cannot enlarge the ordinary meaning* so as to embrace "any person not a farmer or butcher who should sell, or offer for sale, any commodity not of his own manufacture," and subject such person to a penalty ; it not being, says *Ranney*, J., "part of the franchise of municipal corporations to change the meaning of English words." Mays *v.* Cincinnati, 1 Ohio St. 268, 272 (1853). "Butcher" defined. Henback *v.* State, 53 Ala. 523 (1875); s. c. 25 Am. Rep. 650 ; 18 Alb. Law Jour. 364.

rule obtains in England, where it is held that neither the king's charter nor any by-law can introduce an alteration in rules which have been prescribed to a corporation by an act of parliament.[1] By-laws are in their nature strictly local, and subordinate to the general laws.

§ 318 (252). **Ordinance need not recite Authority to pass it.**— *It is not essential to the validity* of an ordinance executing powers conferred by the legislature that it should state the power in execution of which the ordinance is passed. If it state no particular power as its basis, it will be judicially regarded as emanating from that power which would have warranted its passage. If two such powers exist, it may be imputed to either, in conformity to which its provisions and prerequisites show that it has been adopted. If, in these respects it is in accordance with both, no injustice can result in regarding it as the offspring of both or either of the powers.[2]

§ 319 (253). **Must be Reasonable and Lawful.** — In England, the subjects upon which by-laws may be made were not usually specified in the king's charter, and it became an established doctrine of the courts that every corporation had the implied or incidental right to pass by-laws ; but this power was accompanied with these limitations, namely, that *every by-law must be reasonable*, and not inconsistent with the charter of the corporation, nor with any statute

[1] Rex *v.* Miller, 6 Term R. 277 ; Rex *v.* Barber Surgeons, 1 Ld. Raym. 585. It has even been said that the general assembly cannot authorize a municipal corporation to repeal, by ordinance, a statute of the State. Haywood *v.* Mayor, &c., 12 Ga. 404, *per Lumpkin*, J. But it may provide that on the passage of an ordinance of a certain character, the State law on the subject shall not be in force in the corporate limits. State *v.* Binder, 38 Mo. 450; *post*, chap. xxiii.

[2] *Per Dorsey*, C. J., Methodist P. Church *v.* Baltimore, 6 Gill (Md.), 391 (1848). Under power to pass an ordinance if found *necessary*, the *necessity* for its enactment, being implied from its mere passage, need not be recited in the ordinance, nor averred in proceedings to enforce it. Stuyvesant *v.* Mayor, &c. of New York, 7 Cow. (N. Y.) 588 ; s. p. Young *v.* St. Louis, 47 Mo. 492 (1871). This case reaffirmed in Kiley *v.* Forsee, 57 Mo. 390 (1874); Platter *v.* Elkhart County, 103 Ind. 360. But the charter may be *imperative* in requiring the necessity to be expressed by ordinance or resolution ; so held in Hoyt *v.* East Saginaw, 19 Mich. 39 (1869). So, in England it is not necessary that the preamble to a by-law should state the reasons for making it. Rex *v.* Harrison, 3 Burr. 1328. See, also, Grierson *v.* Ontario, 9 Upper Can. Q. B. 623 ; Fisher *v.* Vaughan, 10 Upper Can. Q. B. 492. If a municipal corporation attempt to act according to a statute not in force, this does not invalidate their proceedings, if the same are in accordance with existing statutes. State *v.* Jersey City, 3 Dutch. (N. J.) 493.

of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property.[1] In this country the courts have often affirmed the general incidental power of municipal corporations to make ordinances, but have always declared that ordinances passed in virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State.[2]

[1] Sutton's Hospital Case, 10 Rep. 31 *a;* Feltmakers *v.* Davis, 1 Bos. & P. 98, 100; Norris *v.* Staps, Hob. 211; Rex *v.* Maidstone, 3 Burr. 1837; Com. Dig. Franch. F. 10; London *v.* Vanacre, 1 Ld. Raym. 496; 2 Kyd, chap. iv. sec. 10, p. 95, and cases cited; Bac. Abr. tit. *By-law.*

[2] An ordinance which is *within express powers granted* cannot be held to be unreasonable and void. Haynes *v.* Cape May, 50 N. J. L. 55 (1887). In such case the court can only construe the extent of the grant, and has nothing to do with the reasonableness of an ordinance carrying it into effect. District of Columbia *v.* Waggaman, 4 Mackey, 328. *Must be reasonable.* Kip *v.* Paterson, 2 Dutch. (N. J.) 298; Dayton *v.* Quigley (citing text), 29 N. J. Eq. 77 (1878); Comm'rs *v.* Gas Co., 12 Pa. St. 318 (1859); Fisher *v.* Harrisburg, 2 Grant (Pa.) Cases, 291 (1854); Commonwealth *v.* Robertson, 5 Cush. (Mass.) 438 (1850); Waters *v.* Leech, 3 Ark. 110; Mayor *v.* Winfield, 8 Humph. (Tenn.) 707 (1848); Davis *v.* Anita, 73 Iowa, 325 (1887). Text approved. Frank, *In re*, 52 Cal. 606. Commonwealth *v.* Steffee, 7 Bush (Ky.), 161 (1870); People *v.* Throop, 12 Wend. (N. Y.) 183, 186 (1834); Mayor *v.* Beasly, 1 Humph. (Tenn.) 232 (1839); State *v.* Freeman, 38 N. H. 426 (1859); White *v.* Mayor, &c., 2 Swan (Tenn.), 364 (1852); Pedrick *v.* Bailey, 12 Gray (Mass.), 161; Dunham *v.* Rochester, 5 Cow. (N. Y.) 462; Clason *v.* Milwaukee, 30 Wis. 316 (1872); Tugman *v.* Chicago, 78 Ill. 405 (1875); *Ex parte* Chin Yan, 60 Cal. 78; Gilham *v.* Wells, 64 Ga. 192; Meyers *v.* Chicago, R. I., & P. R. Co., 57 Iowa, 555, approving text; Cape Girardeau *v.* Riley, 72 Mo. 220; Kneedler *v.* Norristown, 100 Pa. St. 368; O'Maley *v.* Freeport, 96 Pa. St. 24; Kirkham *v.* Russell, 76 Va. 956; Atkinson *v.* Goodrich Transportation Co., 60 Wis. 141 (ordinance requiring *spark arrester* on steam-boats). An ordinance requiring *druggists to furnish quarterly verified statements* of the kind and quantity of intoxicating liquors sold, to whom, &c., was held unreasonable and oppressive. Clinton (city of) *v.* Phillips, 58 Ill. 102; s. c. 11 Am. Rep. 52. An ordinance forbidding the placing or carrying of *signboards on side-walks* is reasonable and valid. Commonwealth *v.* McCafferty, 145 Mass. 384. An ordinance *exacting a license from peddlers* of "not less than one nor more than twenty-five dollars for a fixed time, in the discretion of the mayor," held unreasonable. State Center *v.* Barenstein, 66 Iowa, 249. An ordinance requiring *cotton merchants to keep a record* of the name of the seller of loose cotton, and the quantity of each purchase, also held to be against the principles of personal liberty and common right. Long *v.* Taxing District, 7 Lea, 134. An ordinance *forbidding preaching, lecturing, &c., on a public common*, held reasonable. Commonwealth *v.* Davis, 140 Mass. 485; Mankato *v.* Fowler, 32 Minn. 364 (license fee of $300 upon auctioneers unreasonable). An ordinance absolutely prohibiting (not regulating) street processions with musical instruments, banners, torches, &c., or while singing or shouting, without the consent first obtained of the mayor, under a penalty of a fine not exceeding $500, and costs, and in default of payment, imprisonment not exceeding ninety days, was held, in the absence of any express legislative authority therefor, to be unreasonable and void, and for this reason a member of the Salvation Army, convicted thereunder, was discharged on *habeas corpus*. *Re* Frazee, 63 Mich. 396 (1886); s. c. 30 N. W. Rep. 72; 35 Alb. Law J., 6. The opinion of *Campbell*, C. J., states the grounds of this conclusion with great, and *almost* convincing, force. See People *v.* Rochester, 51 N. Y. Sup. Ct. (44 Hun) 166 (Salvation Army walking through streets with banners). "An ordinance, general in its scope, may be adjudged reasonable as applied to *one state of facts*, and unreasonable when applied to circumstances of a different character." *Knapp*, J., in Nicoulin *v.* Lowery, 49 N. J. Law, 391; Pennsylvania R. R. Co. *v.* Jersey City, 47 N. J. Law, 286.

The trustees of public schools had statutory authority to direct what branches should be taught, and to adopt and enforce all necessary *rules and regulations for the management and government of schools*. A candidate for admission passed a satisfactory examination in everything but grammar, and was refused admission on that account. *Held*, a rule or regulation denying him admission on that account was unreasonable, and that *mandamus* would lie to compel his admission to study the other branches. Trustees *v.* People, &c., 87 Ill. 303; s. p. Rulison *v.* Post, 79 Ill. 567.

Ordinance may be shown to be unreasonable, as that one for building a sidewalk was unnecessary and oppressive, it being located in an uninhabited portion of the city and disconnected with any other street or sidewalk. Corrigan *v.* Gage, 68 Mo. 541.

Must not conflict with the charter or statute, or be repugnant to fundamental rights. Dubois *v.* Augusta (health ordinance), Dudley (Ga.) Rep. 30 (1831); Williams *v.* Augusta (powder ordinances), 4 Ga. 509 (1848); Adams *v.* Mayor, &c. (liquor statute), 29 Ga. 56; Taylor *v.* Griswold, 2 Green (N. J.), 222 (1834); New Orleans *v.* Philippi (taxation), 9 La. An. 44; Perdue *v.* Ellis (liquor traffic), 18 Ga. 586; Haywood *v.* Mayor, 12 Ga. 404; Paris *v.* Graham (tax on dram-shops), 33 Mo. 94; St. Louis *v.* Cafferata, 24 Mo. 94; St. Louis *v.* Bentz, 11 Mo. 61; Carr *v.* St. Louis (fee of officers), 9 Mo. 191 (1845); Marietta *v.* Fearing (estray animals), 4 Ohio, 427 (1831); Collins *v.* Hatch (animals at large), 18 Ohio, 523 (1849); Mayor, &c. of New York *v.* Nichols (inspection laws), 4 Hill (N. Y.), 209 (1843); Commonwealth *v.* Turner (liquor traffic), 1 Cush. (Mass.) 493 (1848); Philips *v.* Wickham, 1 Paige (N. Y.) Ch. 590; Howard *v.* Savannah, T. Charlt. R. 173; Smith *v.* Knoxville, 3 Head (Tenn.), 245 (1859); Cowen *v.* West Troy, 43 Barb. (N. Y.) 48 (1864); Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205; City Council *v.* Benjamin, 2 Strob. (S. C.) 508; City Council *v.* Ahrens, 4 Strob. (S. C.) 241; Heisembrittle *a.* Charleston Council, 2 McMul. (S. C.) 233; City Council *v.* Goldsmith, 2 Speers (S. C.), 435; State *v.* Welch, 36 Conn. 215; Newton *v.* Belger, 143 Mass. 598; White *v.* Bayonne, 49 N. J. L. 311; Lozier *v.* Newark, 48 N. J. L. (19 Vroom) 452; Volk *v.* Newark, 47 N. J. L. (18 Vroom) 117; *Ex parte* Kearny, 55 Cal. 212; Cape Girardeau *v.* Riley, 72 Mo. 220; State *v.* Brittain, 89 N. C. 574. An ordinance authorizing the tax-collector and police to *put the purchaser* of land at a sale for taxes *in possession thereof*, held void for violating the constitutional provision declaring that no person shall be deprived of property without "due process of law." Calhoun *v.* Fletcher, 63 Ala. 574. An ordinance imposing a *license tax* upon the owners of towboats running between New Orleans and the Gulf of Mexico held to be a regulation of commerce between the States, and void under art. 1, sec. 8, par. 3, of the U. S. Constitution. Moran *v.* New Orleans, 112 U. S. 69. An ordinance which gave to the municipal authorities arbitrary power to give or withhold consent for carrying on the *laundry business*, without regard to legal discretion or to the competency of persons applying therefor, and the administration of which caused unjust discriminations founded on differences of race, declared to be in violation of the Fourteenth Amendment to the U. S. Constitution. Yick Wo *v.* Hopkins, 118 U. S. 356, reversing Matter of Yick Wo, 68 Cal. 294. See also *In re* Tie Loy, 26 Fed. Rep. 611. But a municipal ordinance prohibiting washing and ironing in public laundries, in speci-

§ 320 (254). **Same subject.** — The principle of law, that ordinances passed under the general authority to enact all such as will be

necessary, *must be reasonable*, or they will be void, is well illustrated by a case in Pennsylvania.[1] A municipal corporation passed two ordinances *in relation to a gas company*, — a private corporation, with a special charter authorizing the construction and maintenance of suitable gas-works within the limits of the municipal corporation, and the use of the streets for the laying down of pipes. The first ordinance prohibited the gas company from opening paved streets from December to March in each year, for the purpose of laying gas mains. This ordinance the court considered to be reasonable, in view of the difficulty of repairing the paved streets during the winter months. And the other ordinance prohibited the gas company from opening a paved street at any time, for the purpose of laying pipes from the main to the opposite side of the street. The court say: "The effect of this ordinance is to compel the company to construct two mains, one on each side of the street instead of one;

fied territorial limits, from ten at night till six in the morning, and operating upon all engaged in the same business under like conditions, sustained as a legitimate police regulation, within the competency of a municipality possessed of the ordinary powers, and is not in conflict with the Fourteenth Amendment of the Constitution of the United States, since this Amendment does not impair the police power of the State. Barbier *v.* Connolly, 113 U. S. 27 (1884); Soon Hing *v.* Crowley, *Ib.* 703. Index title, "Police Power"; *infra*, secs. 324, 325, 357, and note. When a *legislature has no power*, under the Constitution, to authorize a municipal corporation to pass an ordinance (as here, to permit a railway to construct its road upon certain streets) *it cannot, by a special act*, legalize such an ordinance adopted by a city without authority. Strange *v.* Dubuque, 62 Iowa, 303. And see Independent School Dist. of Burlington *v.* Burlington, 60 Iowa, 500. A power to *construct sewers* when, in the judgment of the council, "the public good required," held not to confer power to grant the use of a public street to an *individual* for a private sewer. Hutchinson *v.* Trenton Board of Health, 39 N. J. Eq. (12 Stew.) 569.

An ordinance *prohibiting any auctioneer to make any sale* "except to the highest bidder" was held void for want of legislative or charter authority to enact it. Martin, *In re*, 27 Ark. 467 (1872). An ordinance prohibiting heavy *awnings* over sidewalks, without consent of municipal authorities, is reasonable and valid. Pedrick *v.* Bailey, 12 Gray (Mass.), 161. Under the general welfare clause an ordinance forbidding *sale of lemonade, cake*, &c., at a temporary stand without paying a license tax is unauthorized and unreasonable. Barling *v.* West, 29 Wis. 307; s. c. 9 Am. Rep. 576; *post*, sec. 387.

An ordinance conferring upon one person the right to *remove and convert to his own use dead animals*, to the exclusion of their owners' rights, held unconstitutional as being a taking of private property for public use without compensation, and as depriving a person of his property without due process of law. River Rendering Co. *v.* Behr, 77 Mo. 91. Where power was conferred upon a town "to prevent the introduction of infectious or contagious diseases, and to preserve the health of the inhabitants," an ordinance forbidding any person "to import, sell, or otherwise deal *in second-hand or cast-off garments*," &c., with a proviso excepting the sale of such articles when not imported or when they had not been used by persons having infectious diseases, was held not included in the power conferred, and unlawful *as being in restraint of lawful trade*. Greensboro *v.* Ehrenreich, 80 Ala. 579.

[1] Commissioners of North Liberties *v.* Gas Co., 12 Pa. St. 318 (1849).

thereby materially increasing the expense to the company, and consequently enhancing the price of gas to the inhabitants of the district." And this ordinance was declared to be void. So, where *the city owns water-works*, its by-laws in respect to the supply of water to the citizens must be reasonable; and a supply cannot be refused on the application of the *owner*, because the tenant was in arrears for water supplied to him while he occupied another house owned by another landlord.[1]

§ 321 (255). **Must not be Oppressive.** — Courts will declare *ordinances to be void that are oppressive* in their character. Thus, the Supreme Court of Tennessee, in a judgment which reflects credit upon the tribunal that pronounced it, declared void an ordinance of the city of Memphis which ordered the arrest, imprisonment, and fine of all free negroes who might be found out after ten o'clock at night, within the limits of the corporation.[2] So, an ordinance forbidding, under penalty, the "knowingly associating with persons having the reputation of being thieves and prostitutes," can only be sustained, by construing it to require proof of complicity, actual or intended, with the persons named in the complaint as the reputed thieves and prostitutes; otherwise it would be void, as an invasion of the right of personal liberty.[3] So, where the common council of

[1] Dayton *v.* Quigley, 29 N. J. Eq. (2 Stew.) 77 (1878); see cases cited in reporter's note at end of the opinion. The Chancellor in substance says: "The water-works belong to the municipality, and are for the benefit of the inhabitants of the city. The inhabitants are entitled to the use of the water on compliance with reasonable regulations. The use of the water for the complainant's tenants is necessary to the full enjoyment by him of his property. To refuse to furnish water to his tenant there unless the complainant pays a debt due from the tenant to the city for water furnished to him elsewhere, on premises not belonging to the complainant, would, obviously, be to compel him to pay the tenant's debt as a condition precedent to obtaining the water for his premises while occupied by the tenant. The regulations must be reasonable. 1 Dill. on Mun. Corp. secs. 319, 320. The refusal to furnish water to complainant is, under the circumstances, unjustifiable, and is an injury for which he is entitled to relief in this court. High on Inj. sec. 787."

[2] Mayor *v.* Winfield, 8 Humph. (Tenn.) 707 (1848). The oppressiveness and inequality, alleged to invalidate a by-law, must be made apparent to the court. Mayor *v.* Beasly, 1 Humph. (Tenn.) 232 (1839); St. Louis *v.* Weber, 44 Mo. 547 (1869). A by-law prohibiting *swine running at large* in a city is presumptively reasonable as a sanitary or police regulation. Commonwealth *v.* Patch, 97 Mass. 221; Commonwealth *v.* Bean, 14 Gray (Mass.), 52.

Ordinances to regulate callings and trades must not be unreasonable, partial, in restraint of trade, or in contravention of public policy. Frank, *In re*, 52 Cal. 606 (1877). Thus a statute forbidding the reservation of seats at public exhibitions, upon the sale of tickets of admission, after the opening of the doors, is an unconstitutional interference with private property. Dist. of Columbia *v.* Saville, 1 McArthur, 581.

[3] St. Louis *v.* Fitz, 53 Missouri, 582 (1873).