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).

Baltimore, by ordinance, forbade any person *to erect or maintain any steam-engine or boiler* without authority from the mayor, and authorized the mayor, upon six months' notice, to revoke any permit to use or maintain a steam-engine or boiler, and that thereupon the same should be removed, under a heavy penalty for failure to remove it, in an action to restrain the prosecution of a suit for the penalty by one maintaining a steam-engine after notice to remove the same by the mayor, it was held that, by itself, a stationary steam-engine is not a nuisance; and that an ordinance which commits to the unrestrained will of a single public officer a power practically absolute over the use of steam within a city, so that he might prohibit its use altogether, the exercise of which may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences, and motives easy of concealment and difficult to be detected and exposed, does not fall within the domain of law, and is void and inoperative.[1]

§ 322 (256). **Must be Impartial, Fair, and General.** — As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. *Special and unwarranted discrimination,* or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation.[2]

[1] Baltimore *v.* Radecke, 49 Md. 217; s. c. 21 Alb. Law Jour. 117.

[2] Russ *v.* Mayor, &c. of New York, 12 N. Y. Leg. Obs. 38; White *v.* Mayor, 2 Swan (Tenn.), 364 (1852); De Ben *v.* Gerard, 4 La. An. 30; Chicago *v.* Rumpff, 45 Ill. 90; Hudson *v.* Thorne, 7 Paige, 261; Baton Rouge Council *v.* Crémonini, 36 La. An. 247; *Ex parte* Chin Yan, 60 Cal. 78; Zanone *v.* Mound City, 103 Ill. 552; Citizens' Gas & M. Co. *v.* Elwood, 114 Ind. 332 (1887). The doctrine of the text approved and applied. Tugman *v.* Chicago, 78 Ill. 405 (1875). An ordinance *prohibiting a particular railroad corporation by name* from running locomotives by steam on a specified street is valid, and does not contravene the principle stated in the text. Richmond, &c. Railroad Co. *v.* Richmond, 96 U. S. 521 (1877); s. c. 10 Chicago Legal News, 379. So an ordinance compelling a railroad company *to station flagmen* wherever the railroad may cross streets, &c., is a valid exercise of legislative power, as a police regulation for the safety of the public and passengers on the trains. Such ordinance when passed is a judicial act, imposing pecuniary burden and loss on the railroad company, and is subject to review by courts, which will determine whether the power conferred was exercised in a legal and reasonable manner. State *v.* East Orange, 41 N. J. L. 127. So, also, a resolution of a water board, under authority of a city charter, requiring certain consumers *to put in expensive meters,* without their consent, under the penalty of cutting off the water for non-payment of the price of the meters, was declared void as being an unwarranted discrimination. Red Star Steamship Co. *v.* Jersey City, 45 N. J. L. (16 Vroom) 246, citing the text.

Ordinances *should be general,* or, at all events *not discriminating* in their operation. They may, it is said, impose fines on persons violating their provisions within the corporation or within a designated district therein, or in a certain street; but an ordinance *naming one individual* and directing him to do certain acts with respect to a building alleged to be a nuisance, and in default of compliance, imposing a fine of a specific amount upon him, was held to be unreasonable, contrary to common right, and void. Municipality *v.* Blineau, 3 La. An. 688 (1848). Compare Bozant *v.* Campbell, 9 Rob. (La.) 411 (1845), where, without repealing an ordinance prohibiting private hospitals, the grant of permission to one or more individuals to erect such hospitals was sustained. And see, also, Commonwealth *v.* Goodrich, 13 Allen (Mass.), 545, where a municipal regulation, limited in its character, was considered valid. Such cases depend upon their special circumstances. The test is that the regulation must be reasonable as applied to the subject-matter.

If an ordinance is general in its application, the mere fact *that it peculiarly affects a particular person* raises no presumption that it was enacted for the purpose of annoying him or depriving him of his rights. Shinkle *v.* Covington, 83 Ky. 420. Ordinances may be adapted to the varying municipal necessities and exigencies. Covington *v.* East St. Louis, 78 Ill. 548 (1875); *post,* sec. 394. In exercising its power to require adjacent lot-owners to make local improvements, the corporation, it has been held in *Tennessee,* must not act in a partial and oppressive manner; therefore *it cannot select particular individuals by name,* and require them to construct pavements or local improvements in front of their lots, and omit others in the same improvement district, if this be done without good cause or reason for the distinction. White *v.* Nashville, 2 Swan (Tenn.), 364 (1852); *post,* sec. 799.

[1] *Ante,* chap. iii. sec. 35, and note. *Post,* sec. 362, note and cases as to monopolies and ordinances in restraint of trade. *Criminal conspiracies* in restraint of trade and the various English statutes in respect thereof are instructively presented by Mr. Justice *Stephen,* 3 Hist. Criminal Law, chap. xxx. The fact that certain persons were engaged in a particular kind of business in a given locality, at the time of the adoption of an ordinance, would not authorize the municipal corporation, by such ordinance, to permit such persons to continue their business, whilst it prohibited others from engaging in the same business in the same locality. Tugman *v.* Chicago, 78 Ill. 405 (1875).

A statute authorizing municipal authorities to license and regulate such callings, trades, and employments as the public good may require, will empower them to exact a license for revenue purposes, if that construction is not inconsistent with the whole charter and the general legislation of the state. An ordinance fixing one rate of license for selling goods which are within or in transit to the city, and another rate for goods not within or in transit to the city, is invalid. Frank, *In re,* 52 Cal. 606; s. p. Mayor *v.* Althrop, 5 Coldw. 554; Cronin *v.* People, 82 N. Y. 318 (an ordinance regulating the slaughter of animals held valid). *Supra,* sec. 319, note.

§ 323 (257). **May regulate, but not restrain Trade.** — In England, certain customs prevail in prescriptive corporations restrictive of freedom of trade and against common right. Such customs, from long usage and unknown origin, are regarded in the light of regulations prescribed by a charter which is supposed to have existed, but is lost. Such customs, while not favored by the English courts, are yet held legal, but must be incontrovertibly established. But by the Municipal Corporations Act of 1835 (5 & 6 Wm. IV. chap. lxxvi. sec. 14),[1] exclusive rights of trading have been abolished, and

it is enacted "that, notwithstanding such custom or by-law [to the contrary], every person in any borough may keep any shop for the sale of all lawful wares and merchandise, by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft, for hire, gain, sale, or otherwise, within any borough."

§ 324 (258). **Customs in Restraint of Trade.** — In *this country* corporations derive all their powers from legislative acts of comparatively modern date, and *prescriptive customs in restraint of trade or against common right are unknown.* No inconsiderable portion of the cases in the old books in England relate to these customs, their validity and mode of proof, but they are in the main inapplicable to the present period and to the institutions in this country, where freedom in the choice and pursuit of all occupations never has been denied. The inapplicability of the English decisions is noticed by Mr. Justice Dewey, in delivering the opinion of the Supreme Court of Massachnsetts in an important case involving the validity of an ordinance of the city of Boston regulating the use of hackney coaches and other vehicles within the city. He observes that "in the arguments addressed to the court, the question was somewhat discussed as to the power incident to municipal corporations to create by-laws of the character here adopted; and a reference was made to various cases in the English courts, where questions of this nature had arisen. Upon examination of those cases they will be found less important and less satisfactory as guides here, inasmuch as it is quite obvious that in many of them, and particularly those where the ordinance seemed most questionable as not being within the ordinary exercise of municipal authority, the by-laws were sustained upon the ground of ancient and long-continued usage, ripening into a prescriptive right on the part of the municipal corporation." But "no such ground," he adds, "can be urged here; and the present ordinance, if sustained at all, must be shown to be authorized by the express provision of the charter, or be derived as an incidental power resulting from its incorporation as a city, or be found in some general or special statute." [1]

[1] Commonwealth *v.* Stodder, 2 Cush. (Mass.) 562, 568 (1848). See as to English decisions, remarks of *Rhodes*, J., in Herzo *v.* San Francisco, 33 Cal. 134, 145 (1867). *Post*, sec. 362, note. In the case first cited the court decided that the business of *carrying persons for hire* from town to town in stage-coaches and omnibuses is not so far a territorial or local occupation as will authorize one city, unless it has express and direct authority so to do from the legislature, to pass an ordinance requiring the inhabitants of other towns to obtain from it a license before exercising that employment in carrying persons to or from it. Such an ordinance was considered to be an unnecessary restraint upon business, and is not binding upon citizens of other places. The court does not question the right of the city, by reasonable by-laws, to require *inhabitants*, whose business is local and carried on within the city, to obtain a license before exercising certain employments. *Per Dewey*, J., Commonwealth *v.* Stodder, 2 Cush. (Mass.) 562, 575; see also Napman *v.* People, 19 Mich. 352 (1869); Barling *v.* West, 29 Wis. 307; s. c. 9 Am. Rep. 576 (1871); Hayes *v.* Appleton, 24 Wis. 542; Taylor *v.* Pine Bluff, 34 Ark. 603 (excessive charge for weighing cotton); *post*, sec. 369.

Whenever a by-law seeks to *alter a well-settled* and fundamental *principle of the common* law, or to establish a rule interfering with the rights of individuals or the public, the power to do so must come from plain and direct legislative enactment. Taylor *v.* Griswold, 2 Green (N. J.), 222 (1834); *ante*, sec. 89, and note.

§ 325 (259). **Must not contravene Common Right.** — An ordinance cannot legally be made *which contravenes a common right*, unless the power to do so be plainly conferred by a valid and competent legislative grant; and in cases relating to such a right, authority to regulate, conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit.[1] Thus, in Connecticut, it is held that every one has, presumptively, *a common-law right to fish* in navigable rivers, and that, though every town may, by statute, have the power to make by-laws to *regulate* fisheries of clams and oysters within its limits, yet this power does not authorize a by-law *prohibiting all persons* except its own inhabitants from taking shell-fish in a navigable river, within the limits of such town; such a by-law, being in contravention of a common right, is void.[2]

§ 326 (260). **Same subject.** — But there is, however, *no common right* to do that which, by a valid law or ordinance, is prohibited; and hence courts will not declare an authorized ordinance void because it prohibits what otherwise might lawfully be done. In discussing the subject, Mr. Justice Evans illustrates it in this wise: "If there was no law interfering, the butcher might kill his beeves and hogs in the street. If the butcher could do it, any man might, and it might, therefore, be said to be a common right; but when the law prohibited it, it was no longer a common right. A legal restraint may be imposed on a few for the benefit of the many." [3] Therefore, while ordinances which unnecessarily restrain

[1] Taylor *v.* Griswold, 2 Green (N. J.), 222 (1834); State *v.* Mott, 61 Md. 297; Milliken *v.* Weatherford, 54 Tex. 388, where an ordinance *prohibiting the renting of private property* to lewd women was declared void.

[2] Hayden *v.* Noyes, 5 Conn. 391 (1824); Peck *v.* Lockwood, 5 Day (Conn.), 22; Willard *v.* Killingworth, 8 Conn. 247; Clason *v.* Milwaukee, 30 Wis. 316. The general welfare clause does not authorize the imposition of a license tax for engaging in a lawful business, — sale of lemonade, cake, &c., at temporary stands on sidewalk. Barling *v.* West, 29 Wis. 307 (1871); s. c. 9 Am. Rep. 576; see *post*, sec. 387; *ante*, sec. 89.

[3] *Per Evans*, J., in City Council *v.*

trade or operate oppressively upon individuals will not be sustained, yet such as are reasonably calculated to preserve the public health are valid although they may abridge individual liberty and individual rights in respect of property.[1] Accordingly, in a populous city an ordinance is valid as a sanitary regulation which *prohibits the purchasing of carcasses of animals* for boiling, steaming, or rendering the same, and the rendering and steaming of the same, within the city, except in certain enumerated cases and under specified conditions of a reasonable character.[2]

§ 327 (261). **Validity is for the Court, and not the Jury, to determine.** — Whether an ordinance be reasonable and consistent with the law or not *is a question for the court*, and not the jury, and evidence to the latter on this subject is inadmissible. But in determining this question the court will have to regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country.[3]

Ahrens, 4 Strob. (S. C.) Law, 241, 257 (1850); City Council *v.* Baptist Church, *Ib.* 306, 310; Peoria *v.* Calhoun, 29 Ill. 317, (1862); St. Paul *v.* Colter, 12 Minn. 41, (1866).

[1] Text approved, State *v.* Holcomb, 68 Iowa, 107; Commonwealth *v.* Patch, 97 Mass. 221.

[2] State *v.* Fisher, 52 Mo. 174 (1873).

[3] Kneedler *v.* Norristown, 100 Pa. St. 368, approving text. Bacon Abr. tit. *By-Law;* Commonwealth *v.* Worcester, 3 Pick. (Mass.) 462 (1862); Paxson *v.* Sweet, 1 Green (N. J.), 196 (1832); Vandine, Petitioner, &c., 6 Pick. (Mass.) 187 (1828). Boston *v.* Shaw, 1 Met. (Mass.) 130, 135 (1840); Austin *v.* Murray, 16 Pick. (Mass.) 121, 125 (1834); Hudson *v.* Thorne, 7 Paige Ch. (N. Y.) 261; Commonwealth *v.* Stodder, 2 Cush. (Mass.) 562, 575 (1848); Commissioners *v.* Gas Co., 12 Pa. St. 318; Dunham *v.* Rochester, 5 Cow. (N. Y.) 462, 465 (1826); Buffalo *v.* Webster, 10 Wend. (N. Y.) 100; Brooklyn *v.* Breslin, 57 N. Y. 591, 596 (1874); Frank, *In re*, 52 Cal. 606, approving text. *Ante*, sec. 319.

"Where the municipal legislature has authority to act, it must be governed, not by our discretion, but by its own; and we shall not be hasty in convicting them of being unreasonable in the exercise of it." *Per Lowrie*, J., Fisher *v.* Harrisburg, 2 Grant (Pa.) Cases, 291 (1854); s. p. St. Louis *v.* Weber, 44 Mo. 547. "The courts," says *Dewey*, J., "doubtless have the power to deny effect to a by-law obnoxious to the objection that it is unreasonable. It is, however, a power to be cautiously exercised," especially where the question is a practical one, — for example, the length of time which ought to be allowed to vehicles to remain in the street, and as to which the city authorities, it is to be presumed, can judge better than the court. Commonwealth *v.* Robertson, 5 Cush. (Mass.) 438, 442 (1850). See, also, Vintners *v.* Passey, 1 Burr. 239; Workingham *v.* Johnson, Cas. temp. Hardw. 285; Poulters' Co. *v.* Phillips, 6 Bing. N. C. 314; St. Paul *v.* Colter, 12 Minn. 41; Commonwealth *v.* Patch, 97 Mass. 221.

The doctrine of the text that the validity of a by-law is in all *cases a question for the court*, and that evidence to the jury is inadmissible, *has been denied* by the Supreme Court of *Wisconsin*, which, in Clason *v.* Milwaukee, 30 Wis. 316 (1872) (involving the validity of an ordinance to protect the harbor, and also the city, from inundation by preserving the shore or beach), considered it to be no violation of principle, in a case where the reasonableness of the ordinance depended upon extrinsic facts, to submit testimony to the jury bearing upon the reasonableness of the requirements of the ordinance. But the argument of the counsel for the city, that this view makes the same by-law "valid in one case and invalid in another, according to the varying weight of testimony and the varying views of juries," seems unanswerable, and the text states probably the true doctrine. See Glover on Corp. 297, and cases in this note.

[1] Peoria *v.* Calhoun, 29 Ill. 317 (1862); St. Paul *v.* Colter, 12 Minn. 41 (1866); Brooklyn *v.* Breslin, 57 N. Y. 591, 596 (1874); A Coal-Float *v.* Jeffersonville, 112 Ind. 15; Breninger *v.* Belvidere, 44 N. J. L. 350; *post*, sec. 420. Speaking of a provision of the charter of the city of St. Louis, authorizing the city authorities "to regulate," and, by construction, to permit *bawdy houses*, and the objection made by counsel to an ordinance licensing such houses, *Napton*, J., says: "It is naked assumption to say that any matter allowed by the legislature is against public policy. The best indications of public policy are to be found in the enactments of the legislature. To say that such a law is of unusual tendency is disrespectful to the legislature, who, no doubt, designed to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern," when the legislative will has been plainly expressed. State *v.* Clarke, 54 Mo. 17, 36 (1873).

[2] See *ante*, secs. 89, 317, 319.

[3] Marietta *v.* Fearing, 3 Ohio, 427 (1831). See also Grand Rapids Electric,

§ 328 (262). **Legislative Authority to adopt what would otherwise be Unreasonable Ordinances.** — Where the *legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character*, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.[1]

§ 329 (263). **Must be consistent with Public Legislative Policy.** — The rule that a municipal corporation can pass no ordinance which conflicts with its charter or any general statute in force and applicable to the corporation, has been before stated.[2] Not only so, but it cannot, *in virtue of its incidental power* to pass by-laws, or under any general grant of that authority, adopt by-laws which infringe the spirit or are repugnant to the policy of the State as declared in its general legislation. This principle is well exemplified by a case in Ohio,[3] in which incorporated towns were, by statute,

prohibited from *subjecting stray animals* owned by persons *not residents* of such towns to their corporation ordinances. It was held that an ordinance operating, not on the animals but on the non-resident *owner*, in the shape of a penalty, violated the spirit of the statute, and was void. So, in a later case in the same State, it was shown that the general policy of the State was to allow animals to run at large; and it was ruled that a municipal corporation with power to pass "all by-laws deemed necessary for the well-regulation, health, cleanliness, &c.," of the borough, and with power to "abate nuisances," had no authority to pass a by-law restraining cattle from running at large, such a by-law being in contravention of the general law of the State.[1]

§ 330 (264). **Same subject.** — The general statutes of the State abolished the system of inspecting hay, and, in the place of it, the seller was required to prepare the article for market in a particular manner, at the peril of being subjected to certain designated penalties. In other words he was at liberty to dispose of his hay without inspection if he chose to do so. Under these circumstances, it was decided that a city ordinance, prohibiting the sale of pressed hay *without inspection*, was void, because it *conflicted with the laws of the State* upon the same subject.[2]

&c. Co. *v.* Grand Rapids Edison, &c. Co., 33 Fed. Rep. 659; *Ex parte* Chin Yan, 60 Cal. 78; Baltimore *v.* Scharf, 54 Md. 499.

[1] Collins *v.* Hatch, 18 Ohio, 523 (1849). But in *Illinois* it has been decided that a town, authorized by its charter to declare what should be nuisances, and to provide for the abatement thereof by ordinance, may pass an ordinance declaring *swine running at large* within the corporation to be nuisances, and providing for the taking up of the same, &c., and this though under the laws of the State the owners of stock may lawfully allow it to run at large upon the common, the court regarding the power named in the charter as abridging or limiting any right of common which might otherwise exist. Roberts *v.* Ogle, 30 Ill. 459 (1863). By-laws which contravene the policy of the general statutes of the State, by undertaking to punish acts which those statutes authorize, are void. Canton *v.* Nist, 9 Ohio St. 439, holding void a by-law, which, disregarding the statutory exceptions of cases of necessity, charity, &c., prohibited the opening of shops for business on Sunday. Followed, Thompson *v.* Mount Vernon, 11 Ohio St. 688, adjudging an ordinance to be invalid because inconsistent with the liquor law of the State. And see Adams *v.* Mayor, &c., 29 Ga. 56; Sill *v.* Corning, 1 E. P. Smith (15 N. Y.), 297; Cincinnati *v.* Gwynne, 10 Ohio, 192; Wood *v.* Brooklyn, 14 Barb. (N. Y.) 425; Markle *v.* Akron, 14 Ohio, 586; Thomas *v.* Richmond, 12 Wall. 349 (1870). But a corporation may, in some cases, consistently with general law, *further regulate* by ordinance subjects already regulated by statute. Huddleson *v.* Ruffin, 6 Ohio St. 604; Rogers *v.* Jones, 1 Wend. (N. Y.) 237; State *v.* Welch, 36 Conn. 215 (1869).

[2] Mayor, &c. of New York *v.* Nichols, 4 Hill (N. Y.), 209 (1843). Compare Mayor *v.* Hyatt, 3 E. D. Smith (N. Y.), 156; Rogers *v.* Jones, 1 Wend. (N. Y.) 237. Construction of power to appoint weighmasters. Hoffman *v.* Jersey City, 34 N. J. L. 172 (1870).

Of the Signing, Publication, and Recording of Ordinances.

§ 331 (265). **Signing, Publication, and Recording.** — When ordinances are *required to be published* before they shall go into effect, this requirement is essential, and the publication must be in the designated mode. Until such publication be made, or until they have gone into operation, no penalty can be enforced under them.[1] Whether *the mayor's signature* is essential to the validity of an ordinance depends upon the charter; but unless made essential, such provisions, where the ordinance is duly enacted, have sometimes been regarded as directory.[2]

[1] Barnett *v.* Newark, 28 Ill. 62 (1862); Conboy *v.* Iowa City, 2 Iowa, 90 (1855); Higley *v.* Bunce, 10 Conn. 567 (1835); Meyer *v.* Fromm, 108 Ind. 208; Napa *v.* Easterby, 61 Cal. 509; Waln *v.* Philadelphia, 99 Pa. St. 330; Schwartz *v.* Oshkosh, 55 Wis. 490. Specified *mode of publishing* the proceedings of the council is essential. State *v.* Hoboken, 9 Vroom (38 N. J. L.), 110; *Ib.* 113; Hoboken *v.* Gear, 3 Dutch. (N. J.) 265. Failure to publish ordinance held not to affect validity of bonds issued under a subsequent act authorizing the corporation to incur a debt. Amey *v.* Allegheny City, 24 How. 364; Clark *v.* Janesville, 10 Wis. 136 (1859); State *v.* Newark, 1 Vroom (30 N. J. L.), 303; People *v.* San Francisco, 27 Cal. 655. Where publication for *five successive days* is required, a publication for five successive week-days is sufficient, though a Sunday intervenes when no paper is issued. *Ex parte* Fiske, 72 Cal. 125. Publication in a newspaper published *only on Sunday* held valid under the *Ohio* statute. Hastings *v.* Columbus, 42 Ohio St. 585. Under a charter forbidding the increase of salaries during terms of office, and providing that ordinances should *not take effect* until after publication for twenty days, an ordinance respecting salaries, adopted before a term began, but the last publication of which was after that time, was held to fix the salaries for that term. Stuhr *v.* Hoboken, 47 N. J. L. (18 Vroom) 147. Where the charter provided that a *failure to publish* should not make ordinances void unless the delay caused them to operate retrospectively, it was held that an ordinance became a law without publication. Schweitzer *v.* Liberty, 82 Mo. 309. When *no provision* for the publication of ordinances is contained in a special charter, the promulgation should be reasonably sufficient to notify all parties interested, and the presumption is in favor of the reasonableness of the time adopted by the corporation, which must prevail unless countervailing facts are proved. Pitts *v.* Opelika, 79 Ala. 527, which further decides that a provision for publication contained in a general law applies only to municipalities organized under that law. Publication held *not necessary when not required* by the charter. *In re* Guerrero, 69 Cal. 88. In *Massachusetts a provision by ordinance* for the publication of ordinances is held *to be directory*, and not a condition precedent to their validity. Commonwealth *v.* Davis, 140 Mass. 485.

[2] Blanchard *v.* Bissell, 11 Ohio St. 96, 101, 103 (1860); Striker *v.* Kelly, 7 Hill (N. Y.), 9; Elmendorf *v.* Mayor of New York, 25 Wend. (N. Y.) 693. See, however, Conboy *v.* Iowa City, *supra*; State *v.* Newark, 1 Dutch. (N. J.) 399; State *v.* Hudson, 5 Dutch. (N. J.) 475; Kepner *v.* Commonwealth, 40 Pa. St. 124; State *v.* Jersey City, 1 Vroom (30 N. J. L.), 93; Creighton *v.* Manson, 27 Cal. 613; Taylor *v.* Palmer, 31 Cal. 241; Dey *v.* Jersey City, 19 N. J. Eq. 412; State *v.* Jersey City, 1 Vroom (30 N. J. L.), 93; *Ib.* 148; State *v.* Newark, 3 Dutch. (N. J.) 185 (1876); Gas Co. *v.* San Francisco, 6 Cal. 190; State *v.* Henderson, 38 Ohio St. 644; Waln *v.* Philadelphia, 99 Pa. St. 330; Opelousas *v.* Andrus, 37 La. An. 699; New York & N. E. R. R. Co. *v.* Waterbury, 55 Conn. 19 (holding also that