authorizing the trustees of a village corporation to make ordinances "in relation to hucksters, and for the good government of the village," it was held that an ordinance was unauthorized which required that hucksters should, before exercising their employment, take a license, and be taxed a sum varying from five to thirty dollars.[1]

§ 360 (294). **Same subject.** — On the other hand, the power to "license, regulate, and restrain amusements," it was admitted or taken for granted, would authorize an ordinance taxing, or requiring exhibitors to pay a specific sum for the privilege, this being considered as a means of regulating and restraining them.[2] So a grant of power to a city or town to license exhibitions "on such terms

A municipal corporation may under its ordinary powers of local government pass ordinances requiring a street-railway company incorporated by legislature, and having its rails down and in use through the streets under legislative sanction, to make its tracks conform to the grade, to keep in repair the space between the rails, and to remove snow and the like. But it has no power to require such a company *so organized* to take out a license and pay license fee as a means of taxation, unless power is given to resort to licenses and license fees for revenue purposes. A provision in the charter, granting power "to license and regulate," does not authorize the exaction of license fees for revenue purposes. Power to license when specially given in a charter is nevertheless a police power. The exaction of license fees for revenue purposes is the exercise of the power of taxation. The distinction between the power to license as a police regulation and the same power as a revenue measure is of the utmost importance. If granted with a view to revenue, the amount of tax, if not limited by charter, is in the discretion and judgment of the authorities; if given as a police power, it must be exercised as a means of regulation only, and cannot be used as a source of revenue. North Hudson Railway Co. *v.* Hoboken, 41 N. J. L. 71; Mayor *v.* Avenue Railroad Co., 32 N. Y. 261. Power to license, tax, and regulate horse railroads, hackney carriages, &c., does not extend to taxation of *private vehicles* used by a merchant or manufacturer. St. Louis *v.* Grove, 46 Mo. 574 (1870). Nor does power to license, tax, and regulate authorize the grant of an *exclusive* right to run omnibuses within the limits of the city. Logan *v.* Pyne, 43 Iowa, 524 (1876); Snyder *v.* North Lawrence (hackney coach, what is), 8 Kan. 82 (1871).

[1] Dunham *v.* Rochester, 5 Cow. (N. Y.) 462, 466 (1826). See further, Index, *Markets*.

Under a charter authorizing the license of wagons, &c., and requiring owners and keepers of wagons, &c., *using them in the city*, to take out a license, all hucksters, gardeners, &c., who are not residents and taxpayers of other towns, may be compelled to take out a license. Frommer *v.* Richmond, 31 Gratt. 646. A city has no right to require that persons owning vehicles for hire within its limits and who have paid their city licenses shall obtain from the city, at a certain fixed and exorbitant price, the plates which an ordinance of the city has prescribed for the convenient identification of the vehicles. Such an exaction is another license in disguise, and therefore unconstitutional. Walker *v.* New Orleans, 31 La. An. 828.

[2] Hodges *v.* Mayor, 2 Humph. (Tenn.) 61. See also, Carter *v.* Dow, 16 Wis. 299; Tenney *v.* Lenz, *Ib.* 566. Speaking of this subject, Mr. Justice *Cooley* expresses it as his opinion that where the right to impose license fees to operate as a restriction upon the business or thing licensed can be fairly deduced from the taxing power conferred upon the corporation, it should be done, rather than to derive the right solely from the power to regulate. Const. Lim. 202, note.

and conditions as to it may seem just and reasonable," authorizes it to exact *money* for the license; it is not confined to regulating time and place, establishing police regulations, &c.[1]

§ 361 (295). **Right must be plainly conferred.** — Even the *right to license must be plainly conferred*, or it will not be held to exist. Thus, power to make "by-laws *relative to* hucksters, grocers, and victualling shops" does not authorize the corporation to exact a *license* from persons carrying on such business. Nor does the general power to pass prudential by-laws, not inconsistent with the laws of the State, confer the authority to demand a license.[2]

§ 362 (296). **Monopolies Invalid.** — The power to license and regulate a lawful and necessary business will not give the corporation the power to make contracts which *create or tend to create a monopoly*.[3]

[1] Boston *v.* Schaffer, 9 Pick. (Mass.) 415 (1830); distinguished from Commonwealth *v.* Stodder, 2 Cush. (Mass.) 562, 572 (1848).

[2] Dunham *v.* Rochester, 5 Cowen, (N.Y.) 462 (1826); Commonwealth *v.* Stodder, 2 Cush. (Mass) 562 (1848); Mays *v.* Cincinnati, 1 Ohio St. 268 (1853); Gale *v.* Kalamazoo (market-house contract), 23 Mich. 344 (1871); s. c. 9 Am. Rep. 80; St. Paul *v.* Traeger, 25 Minn. 248 (1878); St. Paul *v.* Stoltz, 33 Minn. 233 (ordinance requiring license to peddlers held void). By-laws requiring a *license*, which may be so heavy as to *amount to a prohibition*, were justly considered to be in restraint of trade, which the general law favors, and in this case were adjudged void, "both for want of jurisdiction" in the corporation to pass them, and for want of "conformity to the general law." 1 Ohio St. 268. Where the charter gave the corporation the power "to *license* bakers, and to prohibit sales of bread except by those licensed," the court doubted whether under this, aside from the taxing power of the corporation, an ordinance could be supported which required twenty dollars to be paid by the baker for a license, although it admitted that the corporation could require a fee for issuing and registering the license. Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137 (1841). Statutory conditions precedent must be complied with to make a license valid; and licenses are generally considered personal, ceasing with the life of the license, and not transferable without consent. Munsell *v.* Temple (grocery license), 3 Gilm. (8 Ill.) 96; Lewis *v.* United States, Morris (Iowa), 199; Lombard *v.* Cheever (ferry license), *Ib.* 473; Brunetti *v.* New Orleans, 9 La. 430. As to power to *revoke* licenses. Towns *v.* Tallahassee, 11 Fla. 130 (1866). "Junk shops," defined by O'Neall, C. J., "to be a place where odds and ends are purchased or sold," and cities are often empowered to exact a license from keepers thereof. City Council *v.* Goldsmith, 12 Rich. (S. C.) Law, 470 (1860). "Shows" defined: McKee *v.* Town Council, Rice (S. C.) Law, 24. *Licensed auctioneer* held not liable to the payment of a pawnbroker's license, under a city ordinance. Hunt *v.* Philadelphia, 35 Pa. St. 277.

[3] Chicago *v.* Rumpff, 45 Ill. 90 (1867). In this case, under a power granted to the city, in its charter, *to regulate and license the slaughtering of animals* within the corporate limits, the common council passed an ordinance, whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted the *exclusive right*, for a specified period, to have all such animals slaughtered at their establishment, they to be paid a specific sum for the

§ 363 (297). **Intoxicating Liquors.** — The authority of municipalities to license, tax, restrain, or prohibit the *traffic in or sale of intoxicating liquors*, is so differently conferred, and so largely influenced by the general legislation and policy of the State on the subject, that the decisions relating to it are mostly of local application. Sometimes the State laws are manifestly intended to repeal or modify prior special charter provisions, which gave the control of the matter to the local authorities;[1] and at other times incorporated places have, by the course of legislation, been excepted from the general operation of the State laws, and have been allowed to license, regulate, or prohibit the traffic, as they deemed best.[2]

privilege by all persons exercising it, and to have the option of accepting such proposition, but which was not to take effect until they executed a certain bond therein required; and it was held that this action of the corporate authorities could not be regarded as regulating or licensing the business, but was simply a conditional proposition, which, if accepted, would constitute a contract. It was also held that this contract tended to create a monopoly, and was therefore void. And the opinion was expressed that, under the charter, authority was conferred simply to pass ordinances to locate and construct, and to regulate, license, restrain, abate, or prohibit slaughtering establishments within the prescribed limits; and to that end the corporate authorities may so regulate the business as to prohibit its exercise, except in a particular place; but the spot so designated must be open to the enjoyment of all persons alike, upon the same terms and conditions. A monopoly cannot be *implied*, but must rest upon express grant. Tuckahoe Canal Co. *v.* Railroad Co., 11 Leigh (Va.), 42, *per Tucker*, President. A city charter granting the city the right to "exercise and enjoy all the rights, immunities, powers, and privileges appertaining to a municipal corporation," and to "license, tax, and regulate hackney carriages, omnibuses," &c., does *not* authorize the city authorities *to grant to one person the sole and exclusive right to run omnibuses* in the city. Logan *v.* Pyne, 43 Iowa, 524 (1876); s. c. 22 Am. Rep. 261; Gale *v.* Kalamazoo, 23 Mich. 344 (1871); s. c. 9 Am. Rep. 80, in which the opinion of *Cooley*, J., will be found to be highly instructive. *Monopolies* are odious to the law. A monopoly exists when the sale of any merchandise or commodity is restrained to one or to a certain number (11 Co. 86); and it has three inseparable consequents, — the increase of the price, the badness of the wares, the impoverishment of others. *Ib.* Statute of Monopolies: By *statute*, 21 *Jac. I. ch. iii., all monopolies* and all commissions, grants, licenses, &c., to any person, &c., for any sale, buying, selling, making, working, using of a thing, &c., are void. And any one grieved, &c., may have an action on the statute, and recover treble damages and double costs. So monopolies are contrary to Magna Charta. 2 Inst. 63. By statute, 38 Edw. III. a merchant may freely deal in all manner of merchandise. The statute of 21 Jac. II. does not extend to letters-patent for inventions, &c. The first part of this section is simply a declaration of the common law. 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. *Ante*, secs. 319, 323, 325, 326. *Post*, sec. 369, as to power to preserve the Public Health, Safety and Convenience. Legal restraints in the form of regulations, may, however, be imposed upon the few for the benefit of the many. It is sometimes difficult to determine when a by-law is in restraint of trade, and when it is a mere regulation of trade. The former is illegal, the latter legal. *The following have been held to be bad, as in restraint of trade:* That no member should sell the barrel of any handgun, &c., ready proved, to any person of the trade not a member in London, or within four miles thereof. The Master, &c., of Gunmakers, &c., *v.* Fell, Willes, 384. No member should strike his stamp or mark on the barrel of any person not a member of the company, &c. *Ib.* That every person not being already free of the city, occupying, using, or exercising, or who shall occupy, use, or exercise the art, trade, or mystery of a butcher within the said city or its liberties, shall take upon himself the freedom of the Company of Butchers, and that if any person or persons (except such as are already free, &c.) shall use the trade of a butcher, not being free of this company, he shall pay, &c. Harrison *v.* Godman, 1 Burr. 12. So as "to persons using the occupation of music and dancing." Robinson *v.* Groscourt, 5 Mod. 104. That no person should erect any booth, for the purpose of any show or public entertainment, in any

public place within the borough, without license from the mayor, which license should not be given at or for any other time than during the annual fairs, if three inhabitant householders, residing within 100 yards of the place intended to be used, should have previously memorialized the mayor to withhold such license, &c. Elwood *v.* Bulloch, 6 Q. B. 383. So where it was provided that those only to whom licenses were granted should have slaughter-houses within the city. Nash *v.* McCracken, *In re*, 33 Upper Can. Q. B. 181. Or that none but three persons appointed by the city should sweep for hire or gain any chimney or flue in the city. The Queen *v.* Johnson, 38 Upper Can. Q. B. 549. Prohibiting the use of canals on Sundays. The Calder and Hebble Navigation Co. *v.* Pilling, 14 M. & W. 76. Prohibiting licensed tavern-keepers from having a light in their bars. Regina *v.* Belmont, 35 Upper Can. Q. B. 298. Harr. Munic. Manual (Canada), 5th ed. 313. *Criminal conspiracies in restraint of trade fully discussed.* 3 Stephen, Hist. Criminal Law, chap. xxx., pp. 202–227.

Power of the legislature to grant or authorize the granting of monopolies, or exclusive privileges, as affected by the 13th and 14th amendment to the Federal Constitution, see Slaughter-house Cases, 16 Wall. 36 (1872); Barthet *v.* New Orleans, 24 Fed. Rep. 563; *post*, chap. xviii., as to gas companies; *post*, sec. 385, note. An ordinance granting to a *water company the exclusive right to furnish water* to the inhabitants held to be void as creating a monopoly. Brenham *v.* Brenham Water Co., 67 Tex. 542.

[1] State *v.* Harris, 10 Iowa, 441; Burlington *v.* Kellar, 18 Iowa, 59; Hammond *v.* Haines, 25 Md. 541. The adoption of a *general law* regulating the sale of liquors does not estop the State from granting power to municipal corporations to further regulate the traffic by requiring licenses of retail dealers. Wolf *v.* Lansing, 53 Mich. 367.

[2] Perdue *v.* Ellis, 18 Ga. 586; Trustees *v.* Keeting, 4 Denio (N. Y.), 341; Phillips *v.* Tecumseh, 5 Neb. 305 (1877). Construction of charters in connection with State laws on the subject. Town Council *v.* Harbers, 6 Rich. (S. C.) Law, 96; *Ib.* 404; State *v.* Estabrook, 6 Ala. 653; West *v.* Greenville, 39 Ala. 69; Adams *v.* Mayor, 29 Ga. 56; Chastain *v.* Town Council, 29 Ga. 333; Cuthbert *v.* Conley, 32 Ga. 211; State *v.* Garlock, 14 Iowa, 444; Harris *v.* Intendant, &c. 28 Ala. 577; Robinson *v.* Mayor, &c. 1 Humph. (Tenn.) 156; Pekin *v.* Smelzel, 21 Ill. 464; State *v.* Plunkett, 3 Harr. (N. J.) 5; both held consistent and able to stand together. Byers *v.* Olney, 16 Ill. 35; Page *v.* State, 11 Ala. 849; Benefield *v.* Hines, 13 La. An. 420; Louisville *v.* McKean, 18 B. Mon. (Ky.) 9; Deitz *v.* Central, 1 Col. 323 (1871); Burckholter *v.* McConnellsville, 20 Ohio St. 308; Baldwin Co. *v.* Liquor Dealers, 42 Ga. 325; State *v.* Sherman, 20 Mo. 265. A *general law* authorizing towns to require licenses of persons selling liquor held to be constitutional. Moundsville *v.* Fountain, 27 W. Va. 182.

A general power in a city or town charter to prohibit the sale of intoxicating liquors is sufficient to authorize the adoption of an ordinance for any partial prohibition deemed advisable. Under a section giving the exclusive power to *license, prohibit or regulate in any manner* they may see fit, the sale, &c., of liquors within the said city, an ordinance prohibiting the sale, &c., in less quantities

§ 364 (298). **Effect of General Laws respecting the Liquor Trade.** — Where there are general laws of the State respecting the sale of intoxicating liquors, a public corporation, by virtue of a general power "to make all *by-laws* that may be necessary to preserve the peace, good order, and internal police" therein, is not authorized to pass an ordinance requiring a corporate license, and punishing persons who sell such liquors without being thus licensed.[1]

than five gallons, is valid and may be enforced. Where the power is conferred on the municipalities by the legislature it is wholly discretionary with the municipality to license and regulate, or partially or entirely to prohibit the traffic. Gunnarssohn *v.* Sterling, 92 Ill. 569; Goddard *v.* Jacksonville, 15 Ill. 588; Kettering *v.* Jacksonville, 50 Ill. 39; Pekiu *v.* Smelzel, 21 Ill. 464; Harbaugh *v.* Monmouth, 74 Ill. 371; Schwuchow *v.* Chicago, 68 Ill. 444; Baldwin *v.* Murphy, 82 Ill. 485; Byers *v.* Olney, 16 Ill. 35; Martin *v.* People, 88 Ill. 390. Where the power is to "license, regulate and prohibit," the *prohibition need not be total*, but applies to any sales not licensed by law. Dennehy *v.* Chicago, 120 Ill. 627. A *power to regulate* places where liquors are sold held sufficient to validate an ordinance preventing the *employment of women in them*. Bergman *v.* Cleveland, 40 Ohio St. 651. A power "to license saloons, taverns, and eating houses" held, under the legislation applicable to the question, not to authorize licensing the sale of liquors. Mount Pleasant *v.* Vansice, 43 Mich. 361. Prohibiting by ordinance the *sale of liquor on Sunday* is not a violation of the constitutional provision forbidding the establishment of any religion by law. Minden *v.* Silverstein, 36 La. An. 912. A *power to regulate* the liquor traffic confers the power to confine it to designated *parts* of a city. *In re* Wilson, 32 Minn. 145.

Liquor license fee held not a *tax*, in the constitutional sense of the term, compelling uniformity of taxation. East St. Louis *v.* Wehrung, 46 Ill. 392. Special provision of charter construed not to give power to *prohibit absolutely* the sale of liquor in the town. Hill *v.* Decatur, 22 Ga. 203. A State law providing for the assessment of a specified tax on liquor dealers, the money raised to be devoted to towns and cities in which the business was carried on, was held to be a tax and not a licensing of the sale, and not to be unconstitutional because unjust or unequal, nor because the municipality had no voice in the levy. Youngblood *v.* Sexton, 32 Mich. 406 (1875); s. c. 20 Am. Rep. 654.

"Licenses to sell liquors *are not contracts* between the State and the person licensed, giving the latter vested rights, and partaking of the nature of contracts, but are merely temporary permits to do what otherwise would be an offence, issued in the exercise of police powers, and subject to the direction of government, which may revoke them as it deems fit." *Per Day*, Ch. J., in Columbus City *v.* Cutcomp, 61 Iowa, 672, citing Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657; Calder *v.* Kurby, 5 Gray, 597; Commonwealth *v.* Brennan, 103 Mass. 70. A municipal ordinance imposing a license upon the sale of liquor without prohibiting it, does not abridge the right of a citizen to pursue a lawful employment, within the meaning of the *Fourteenth Amendment* to the Constitution of the United States. *In re* Bickerstaff, 70 Cal. 35. The payment of a license tax upon the sale of liquor imposed by a city does not exempt the person who pays it from liability to pay a similar tax imposed by the county. *In re* Lawrence, 69 Cal. 608. In *Kansas* the power to license or authorize the sale of intoxicating liquors is not vested in the cities, but is conferred upon the probate judges. Kansas *v.* Topeka, 31 Kan. 452. See also State *v.* Topeka, 30 Kan. 653. A license tax has been held not to be a penalty but a debt, so far as relates to the application of the Statute of Limitations. San Luis Obispo *v.* Hendricks, 71 Cal. 242.

[1] Commonwealth *v.* Turner, 1 Cush. (Mass.) 493 (1848); Loeb *v.* Attica, 82 Ind. 175; and see notes to sec. 363, *ante; post*, sec. 436. The limitations on such a general power to make by-laws, discussed by *Shaw*, C. J. As to text, see Commonwealth *v.* Dow, 10 Met. (Mass.) 382 (1845). General welfare clause does not authorize a municipal corporation to pass an ordinance prohibiting the retail of intoxicating liquors, when this is repugnant to the State laws on the subject. Burnett, *In re*, 30 Ala. 461 (1857). But under a different state of general legislation, see State *v.* Clark, 8 Foster (28 N. H.), 176 (1854); Heisembrittle *v.* City of Charleston, 2 McMullan (S. C.), 233; State *v.* Ferguson, 33 N. H. 424 (1851); distinguished from and commenting on the above cases. State *v.* Freeman 38 N. H. 426, approving and following State *v.* Clark, 8 Fost. (28 N. H.) 176; Megowan *v.* Commonwealth, 2 Met. (Ky.) 3 (1859). Where there is no legislation authorizing township officers incorporated under general laws of the State to regulate and license the sale of intoxicating liquors, or to exact a fee for such license, there is no power in the board of trustees either to pass an ordinance requiring, or to grant a license for this purpose. A provision limiting the amount that may be charged for liquor licenses by cities and towns does not give the power. They have just such powers as the law has conferred upon the board, and none other. Walter *v.* Columbia City, 61 Ind. 24; Cowley *v.* Rushville, 60 Ind. 327; McFee *v.* Greenfield, 62 Ind. 21.

Ordinance ultra vires. License to sell liquors at retail. Subsequent ordinance restricting sale invalid. A. obtained a license to sell liquors; subsequently an ordinance was passed prohibiting the sale of liquor during the continuance of divine service at any time thereafter to be held by any denomination of Christian people within the corporate limits, providing that the prohibition should cover the entire appointed time for divine worship from its commencement to its final close, and on all protracted occasions covering intermissions by day and night: Held invalid, as the element of time was not fixed by the corporate will, but left to a casual and incidental control, dependent upon the will and pleasure of the various denominations of Christian people, and ignoring all others. Gilham *v.* Wells, 21 Alb. Law Jour. 319; 64 Ga. 192 (1880).

§ 365 (299). **Power to license Sale of Liquor under the General Welfare Clause.** — In the absence, however, of controlling general legislation, power to a city to pass "in general, *every other by-law or regulation that shall appear to the city council* requisite and necessary for the security, welfare, and convenience of the city, or for preserving the peace, order, and good government within the same," was held to authorize an ordinance (and the same is constitutional) to prevent shopkeepers, unless licensed by the city, from keeping spirituous liquors in their shops or in any adjacent room.[1]

[1] Heisembrittle *v.* City Council, 2 McMullan (S. C.) Law, 233 (1842). Followed and affirmed. City Council *v.* Ahrens, 4 Strob. (S. C.) Law, 241 (1850). See City Council *v.* Baptist Church (giving preamble to charter in question), *Ib.* 306, 308. A town had exclusive authority over the sale of liquors therein, and it was held that power to "regulate, restrain, and suppress shops and places for the sale of ardent spirits by retail" amounted to an authority to forbid the sale; for if there is a sale it must be made in some shop or place. Clintonville *v.* Keeting, 4 Denio (N. Y.), 341 (1847); Thomas *v.* Mt. Vernon, 9 Ohio, 290. Requiring a license tax from the owner of a saloon situated three miles from the settled portions of a city, though within its limits, held unlawful on the ground that the benefits of the parties should be reciprocal, and in this case the saloon owner received no benefits whatever from the city government. Salt Lake City *v.* Wagner, 2 Utah, 400. Construction of charter provisions holding that the sale of intoxicating liquors might be declared a nuisance by the municipal authorities. Block *v.*

A corporation whose charter contained the general welfare clause, and also specific power "to license persons to retail spirituous liquors, and to prohibit persons from selling without such license," and was, it seems, silent as to the amount which might be demanded for a license, was adjudged competent to enact an ordinance demanding $500 as a fee for a retail license.[1]

Power by its charter to a city "*to tax*, or entirely suppress, all petty groceries," was held, in connection with other provisions of the charter expressly authorizing certain other subjects to be licensed, not to confer upon the corporation the power to grant licenses for retailing vinous liquors, and to demand a sum of money therefor.[2]

Ordinances Relating to Public Offences.

§ 366 (300). **Distinction between Laws and By-Laws; Concurrent Prohibitions, &c.** — Statute law and by-laws are intended to

Jacksonville, 36 Ill. 301; Goddard *v.* Same, 15 Ill. 588; Byers *v.* Trustees, &c., 16 Ill. 35; Pekin *v.* Smelzel, 21 Ill. 464.

[1] Perdue *v.* Ellis, 19 Ga. 586 (1855). But see Burnett, *In re*, 30 Ala. 461, and compare that with Intendant *v.* Chandler, 6 Ala. 899. See, also, St. Louis *v.* Smith, 2 Mo. 113; where there was charter power to "restrain and prohibit tippling-houses," and the corporation was held entitled to impose a license fee. Power to "tax" and "restrain" sale of liquor includes power to grant licenses. Mt. Carmel *v.* Wabash County, 50 Ill. 69; Schweitzer *v.* Liberty, 82 Mo. 309; Portland *v.* Schmidt, 13 Oreg. 17. Where authority was conferred upon a corporation to suppress and prohibit the sale of intoxicating drinks, as well as to license the same, an ordinance which imposes a penalty for selling such drinks without license, which penalty exceeds that fixed by the general law of the Territory, is reasonable. Deitz *v.* Central, 1 Col. 323 (1872).

There should be no arbitrary discrimination in granting such licenses. Zanone *v.* Mound City, 103 Ill. 552. If the power to fix the fee is granted to the municipal corporation its discretion in fixing it cannot be reviewed by the courts. Wolf *v.* Lansing, 53 Mich. 367. Courts will not presume, as matter of law, that the amount of a license tax upon selling liquor is unreasonable, oppressive or prohibitory. *In re* Guerrero, 69 Cal. 88. *Ex parte* McNally, 73 Cal. 632.

[2] Leonard *v.* Canton, 35 Miss. (6 George) 189 (1858). Power "to prohibit tippling-houses," does not authorize an ordinance prohibiting sales of beer by brewers. Strauss *v.* Pontiac, 40 Ill. 301 (1866). Prohibition in ordinance to sell liquors without license held not to apply to sales by manufacturers, but to retail dealers. St. Paul *v.* Troyer, 3 Minn. 291.

Under a law requiring a majority of citizens to petition for a license to the city council, a license granted upon a petition signed by a less number is void and affords no protection. Eureka *v.* Davis, 21 Kan. 578; and the mayor is not bound to sign any license so ordered. Welsford *v.* Weidlein, 23 Kan. 601; s. p. State *v.* Young, 17 Kan. 414; Ins. Co. *v.* State, 9 Kan. 210; Eureka *v.* Davis, 21 Kan. 578; Wabaunsee Co. *v.* Muhlenbacker, 18 Kan. 129; Bouldin *v.* Baltimore, 15 Md. 18. Cannot compel its issue by *mandamus*. State *v.* Stevens, 23 Kan. 456. Where there is no law governing the amount, it is a question of expediency, of which the city authorities are the sole judge. Goldsmith *v.* New Orleans, 31 La. 646.

meet different wants and exigencies, and to serve different purposes. The former, when general in its nature and operation, is intended to furnish a rule for the government of the people of the State everywhere. The latter, made by the corporation under derivative authority, are local regulations for the government of the inhabitants or the regulation of the local concerns of the incorporated place; and of course they must be void, unless specially authorized by the charter or organic act of the corporation, whenever they are repugnant to, or inconsistent with, the general law of the land. No *implied* power to pass by-laws, and no express *general* grant of the power, can authorize a by-law which conflicts with the statutes of the State, or with the general principles of the common law adopted or in force in the State.[1]

§ 367 (301). **Same subject.** — The laws of the State operate within the limits of municipal corporations and upon their inhabitants the same as elsewhere, unless it is otherwise clearly provided in the charter, or by some statute of the State; and unless so provided, *in case of conflict between laws and by-laws*, the latter must give way. But the State may, and as to local matters frequently does, except municipal corporations from the operation of its laws, and either provides a special law for them or authorizes them to provide special regulations for themselves; and when this is done there is no conflict. But these local laws and regulations are at all times subject to the paramount authority of the legislature. Questions of difficulty have arisen in consequence of grants of power to municipal corporations to make ordinances *respecting matters and acts already regulated by general statute*, and, if criminal in their nature, punishable under the laws of the State. Hence, the same

[1] *Ante*, secs. 317, 319, 320–330; see, also, *post*, sec. 429 *et seq.*, 432, *et seq.* and cases. New Hampton *v.* Conroy, 56 Iowa, 498; Foster *v.* Brown, 55 Iowa, 686; State *v.* Lee, 29 Minn. 445. An ordinance authorizing the licensing of an *occupation which is illegal and criminal* under the general law of the State is null and void. A license issued under such an ordinance is no defence against an indictment under the general law. State *v.* Lindsay, 34 Ark. 372 (keeping a gaming table).

An ordinance making that *which is a crime under the general law* an offence against the town, held to be void. State *v.* Keith, 94 N. C. 933 (resisting officer), *citing* Town of Washington *v.* Hammond, 76 N. C. 33; State *v.* Langston, 88 N. C. 692; State *v.* Brittain, 89 N. C. 574; Centerville *v.* Miller, 57 Iowa, 56; People *v.* Brown, 2 Utah, 432 (an ordinance creating and punishing the offence of assault and battery declared void). But see *Ex parte* Douglass, 1 Utah, 108, where an ordinance to punish persons keeping a house for gaming purposes was held to be authorized by the charter of Salt Lake City, though the offence was punishable by the general law of the State. In *Indiana* a statute forbidding towns to punish offences which are provided for by general law, is held constitutional. Jett *v.* Richmond, 78 Ind. 316; Indianapolis *v.* Huegle, 18 N. E. Rep. 172.

act comes to be forbidden by general statute and by the ordinance of a municipal corporation, each providing a separate and different punishment. The same transaction may, if complex in its nature, be in one part of it an offence against the general law, and in another against the by-law; but such cases present no difficulty. But can the same act be twice punished, once under the ordinance and once under the statute? The cases on this subject cannot be reconciled. Some hold that the same act may be a double offence, one against the State and one against the corporation. Others regard the act as constituting a single offence, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction.

§ 368 (302). **Author's Conclusions.** — In view of the somewhat strict construction of grants of corporate powers, elsewhere explained and illustrated, and of the subordinate nature and purposes of by-laws, the following rules, although seeming to rest on sound principles, are, in view of the decisions, stated with some distrust of their entire correctness: I. A general grant of power, such as mere authority to make by-laws, or authority to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act — for example, an assault and battery — which is made punishable as a criminal offence by the laws of the State.[1] The intention of the State that the general laws shall not extend to the inhabitants of municipal corporations, or that these corporations shall have the power, by ordinance, to supersede the State law, will not be inferred from grants of power general in their character; nor will such authority in the corporation be held to exist as an implied or incidental right. II. Where the act is, in its nature, one which constitutes two offences, one against the State and one against the municipal government, the latter may be constitutionally authorized to punish it, though it be also an offence under the State law; but the legislative intention that this may be done ought to be manifest and unmistakable, or the power in the corporation should be held not to exist. III. Where the act or matter covered by the charter or ordinance, and by the State law, is not essentially criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further,

[1] Text approved State *v.* Langston, 88 N. C. 692.

and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties, and fully provided for by the general laws. Such are the general principles to be extracted from the authorities, but the exact state of the law will more satisfactorily appear, and indeed, can only be seen, by reference to the adjudicated cases; accordingly, the leading cases upon the subject are stated in the note,[1] and in some of

[1] Smith, *In re*, Hempst. 201 (1832); Mayor, &c. of Savannah *v.* Hussey, 21 Ga. 80 (1857); Brownville *v.* Cook, 4 Neb. 101 (1875); St. Charles *v.* Meyer, 58 Mo. 86 (1874); New Orleans *v.* Miller, 7 La. An. 651 (1852); Municipality *v.* Wilson, 5 La. An. 747; State *v.* Cowan, 29 Mo. 330 (furious driving); St. Louis *v.* Cafferata, 24 Mo. 94 (Sunday ordinances); Amboy *v.* Sleeper, 31 Ill. 499; State *v.* Ledford, 3 Mo. 102; Independence *v.* Moore, 32 Mo. 392; McLaughlin *v.* Stephens, 2 Cranch C. C. 148; St. Louis *v.* Bentz, 11 Mo. 61 (ordinance against vagrants); United States *v.* Holly, 3 Cranch C. C. R. 656; Jefferson City *v.* Courtmire, 9 Mo. 693 (ordinance against riots); Davis *v.* State, 4 Stew. & Port. (Ala.), 83; State *v.* Plunkett, 3 Harrison (N. J.), 5 (1840); Rice *v.* State, 3 Kan. 141 (1865); Rogers *v.* Jones, 1 Wend. (N. Y.), 261; Mayor, &c. of New York *v.* Hyatt, 3 E. D. Smith (N. Y.), 156; Borough of York *v.* Forscht, 23 Pa. St. 391; March *v.* Commonwealth, 12 B. Mon. (Ky.) 25; Commissioners *v.* Harris, 7 Jones (Law), 281; Brooklyn *v.* Toynbee, 31 Barb. (N. Y.) 282; Davenport *v.* Bird, 34 Iowa, 524 (1872); Zylstra *v.* Charleston, 1 Bay (S. C.), 382; Petersburg *v.* Metzker, 21 Ill. 205 (1859); Howe *v.* Treasurer of Plainfield, 37 N. J. L. 145; Barter *v.* Commonwealth, 3 Pa. 253; State *v.* Clark, 1 Dutch. (N. J.) 54; State *v.* Pollard, 6 R. I. 290; People *v.* Jackson, 8 Mich. 110; *post*, sec. 376 n.; sec. 411; State *v.* Topeka, 36 Kans. 76; *In re* Sic, 73 Cal. 142, approving text; *Ex parte* Bourgeois, 60 Miss. 663.

Treating of the *constitutional* question involved, Mr. Justice *Cooley* remarks that, although the decisions are not uniform, the clear weight of authority is, "that the same act may constitute an offence both against the State and the municipal corporation, and both may punish it without violation of any constitutional principle." Const. Lim. 199; s. p. March *v.* Commonwealth, 12 B. Mon. (Ky.) 25, 29, *per Simpson*, C. J.; Howe *v.* Plainfield, *supra*; Brownville *v.* Cook, 4 Neb. 101 (1875). In *England* a by-law imposing a penalty on a corporator for refusing to serve in a *corporate* office, is valid, notwithstanding the party may be indicted for the same refusal, as he may be in all cases of municipal offices necessary or proper to carry on the government of the corporation. Grant on Corp. 82. A distinction was there early made between grave offences classified as *pleas* of the crown, and triable upon an issue of not guilty between the king and the defendant, and lesser or petty offences punishable by fine or amerciament upon *presentment* in court leet, or inferior jurisdictions. See Hale, P. C., Vol. I. ch. lii.; Vol. II. ch. xix.; Norton's Com. London, 370, 453.

The history of *Courts of Summary Jurisdiction* in England, and an outline of their jurisdiction under the Summary Jurisdiction Act of 1879, will be found in Mr. Justice Stephen's History of Criminal Law, Vol. I., ch. iv. *Post*, secs. 428, 432, 433.

In *Georgia* the *general welfare clause* in a charter was decided not to authorize the passage of an ordinance prescribing a different *mode of trial and punishment in addition* to that provided for by the general criminal code of the State, for harboring and enticing seamen. Savannah *v.* Hussey, 21 Ga. 80 (1857). The power of municipal corporations to legislate respecting offences fully covered by the State law is denied, and the general subject is largely and satisfactorily discussed; and it is well remarked that, in such cases, "the law of the State is the law of