tion, after enumerating various objects, "*in general* to pass every *other* by-law that to it shall seem requisite and necessary for the security, welfare, and convenience of the city," &c., was, by the Court of Appeals of South Carolina, considered to give authority to regulate the burial of the dead, and particularly to prevent the establishment of new burial grounds within the limits of the city, and, in the opinion of the organ of the court, also to regulate the time of burial, the manner of interment so as to prevent noxious effluvia, and to prohibit interments in the private gardens, yards, and by-places of the city.[1] But as every by-law must be reasonable, an arbitrary or unnecessary or oppressive restraint upon the right of burying the dead is invalid.[2]

§ 373 (307.) **Same subject.** — Where the burden to support a public cemetery is required to be borne by all the citizens, an ordinance throwing that burden upon a particular class is unreasonable and void.[3] Cemeteries in cities *are not per se nuisances*, but special circumstances may make them so. It is not, however, sufficient that they affect the market value of property in the vicinity.[4] A city

The power of disinterment may be delegated by the legislature to municipalities. Kincaid's Appeal, 66 Pa. St. 411 (1870).

[1] City Council *v.* Baptist Church, 4 Strob. (S. C.) Law, 306, 309 (1850), *per Frost*, J.; s. p. Bogert *v.* Indianapolis, 13 Ind. 134, *per Perkins*, J.; New Orleans *v.* St. Louis Church, 11 La. An. 244; distinguished from 5 Cowen, 538, *supra;* Musgrove *v.* St. Louis Catholic Church, 10 La. An. 431.

[2] Austin *v.* Murray, 16 Pick. (Mass.) 121 (1834); Coates *v.* Mayor, &c. of New York, 7 Cow. (N. Y.) 585; Commonwealth *v.* Fahey, 5 Cush. (Mass.) 408 (1850).

The *law of burials*, in some of its relations to property and municipal rights, was ably considered by the Hon. Samuel B. Ruggles, referee, in the matter of the opening of *Beekman* Street, in New York City, whose report, establishing the following principles, was confirmed by the Supreme Court: 1. In this country, corpses and their burials are not matters of ecclesiastical cognizance. 2. That the right to bury a corpse and preserve its remains is a legal right, belonging, in the absence of testamentary disposition, exclusively to the next of kin, and includes the right to select and change the place of sepulture at pleasure. 3. If place of burial is taken for public use the next of kin may claim indemnity for expense of removing and suitably re-interring their remains. Beekman Street, *In re*, 4 Bradf. (N. Y.) 503, 532 (1856); Bogert *v.* City of Indianapolis, 13 Ind. 134 (1859), *per Perkins*, J. Many cases relating to the law of cemeteries are collected in Mr. Thompson's note to Louisville *v.* Nevin, 19 Am. Rep. 78, 79 (1874); s. c. 10 Bush 549. See, also, Brick Presb. Church, *In re*, 3 Edw. Ch. Rep. (N. Y.) 155. Laying streets and highways through cemeteries. Cemetery Assoc. *v.* New Haven, 43 Conn. 234 (1875); s. c. 21 Am. Rep. 643, and note and cases cited. Trustees *v.* Walsh, 57 Ill. 363; s. c. 11 Am. Rep. 21. Local assessments for improvements of adjoining streets. Louisville *v.* Nevin, 10 Bush (Ky.), 549 (1874); s. c. 19 Am. Rep. 78. See on this point, *post*, sec. 776.

[3] Beroujohn *v.* Mobile, 27 Ala. 58 (1855).

[4] New Orleans *v.* St. Louis Church, 11 La. An. 244 (1856); Musgrove *v.* Same, 10 La. An. 431; Lake View *v.* Letz, 44 Ill. 81 (1867).

corporation had power, by charter, "to establish cemeteries or burial places within or without the city." It was held that this would authorize the city to establish cemeteries of its own, and regulate them; but that it did not empower the council to subject to the control of the city sexton cemeteries other than those belonging to the city, nor to pass an ordinance prohibiting lot owners in private cemeteries, though within the city limits, from entering to bury without the permission of the city sexton, to be obtained only by paying him the price of digging a grave.[1] Certain statutes of New York, authorizing incorporated rural cemetery associations to condemn lands for cemetery purposes, where no right on the part of the public to buy lots or bury their dead there, or to fix the price of lots, is secured, were held to be unconstitutional, on the ground that the use was private and not public.[2]

§ 374 (308). **Nuisances, and of the Power to prevent and abate.** — It is to secure and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally endowed with *power to prevent and abate nuisances*. This authority and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extra-judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such.[3] Speaking upon this

[1] Bogert *v.* Indianapolis, 13 Ind. 134 (1859).

[2] Deansville Cemetery Association, *In re*, 66 N. Y. 569; overruling s. c. 5 Hun, 482.

[3] Crosby *v.* Warren, 1 Rich. (S. C.) 385; Roberts *v.* Ogle, 30 Ill. 459; Salem *v.* Eastern R. Co., 98 Mass. 431; Dingley *v.* Boston, 100 Mass. 544; Van Dyke *v.* Cincinnati, 1 Disney (Ohio), 532; Lake View *v.* Letz, 44 Ill. 81; Wreford *v.* People, 14 Mich. 41 (1865); State *v.* Jersey City, 5 Dutch. (N. J.) 170; Ward *v.* Little Rock, 41 Ark. 526; City of Denver *v.* Mullen, 7 Col. 345; McKibbin *v.* Fort Smith, 35 Ark. 352; Mayor of Monroe *v.* Gerspach, 33 La. An. 1011; St. Paul *v.* Gilfillan, 36 Minn. 298. The legislature may invest a municipal corporation with *power to abate nuisances summarily*, without requiring resort to legal proceedings (Baumgartner *v.* Hasty, 100 Ind. 575), or by a trial by jury. King *v.* Davenport, 98 Ill. 305; s. c. 38 Am. Reg. 89. That which is authorized by legislative authority cannot be declared a nuisance by a city corporation. Cases *supra*. The power to abate nuisances is a portion of police authority necessarily vested in the corporation of all populous towns. Kennedy *v.* Phelps, 10 La. An. 227, *per Buchanan*, J. A city cannot *create* a nuisance upon private property, as, in this case, by diverting a stream, and *compel* its owner to abate it. Hannibal *v.* Richards, 82 Mo. 330. Nuisances are of two kinds, — public or common nuisances, which affect people generally, and private nuisances, which may be defined as anything done to the hurt of the lands, tenements, or hereditaments of another. Russell on Crimes, 4th ed. 435. A public nuisance can only be abated by a public prosecution, or by a party whose damages are special,

subject in *a very important* case, where a city, under authority to prevent and restrain encroachments on rivers running through it, com-

and different from those sustained by the public generally. School District, &c. *v.* Neil, 36 Kan. 617; Billard *v.* Erhart, 35 Kan. 611; Blanc *v.* Murray, 36 La. An. 162. See also Moore *v.* Langdon, 2 Mackey, 127. A public nuisance is not made legal by having been maintained *for twenty years*. Commonwealth *v.* Upton, 6 Gray, 473; New Salem *v.* Eagle Mill Co., 138 Mass. 8. The erection of a *building in a public street* to be used as a market, and as a pound for confining swine, would be both a public and a private nuisance, and *may be enjoined* at the suit of any one threatened with injury thereby. Lutterloh *v.* Cedar Keys, 15 Fla. 306. But see Henkel *v.* Detroit, 49 Mich. 249; Index, tit. *Injunction*. That which affects only *three or four persons* is a private and not a public nuisance. The King *v.* Lloyd, 4 Esp. 200. The term "nuisance" is well understood, and means literally annoyance, — anything that worketh hurt. The King *v.* White, 1 Burr. 333; The King *v.* Davey, 5 Esp. 217; Burditt *v.* Swenson, 17 Tex. 489.

Offensive Trades and Occupations. It is not necessary, to constitute a nuisance, to show that the smell, &c., produced should be unwholesome. It is enough if it renders the enjoyment of life and property uncomfortable. *Per* Lord *Mansfield*, in The King *v.* White *et al.*, 1 Burr. 337; The King *v.* Neil, 2 C. & P. 485; St. Helen's Chemical Co. *v.* Corporation of St. Helen's, L. R. 1 Ex. Div. 196. "If there be smells offensive to the senses, that is enough, as the neighborhood has a right to fresh and pure air." *Per Abbott*, C. J., The King *v.* Neil, 2 C. & P. 485. "The only question therefore is, Is the business (slaughter-house), as carried on by the defendant, productive of smells to persons passing along the public highway?" *Ib.* A by-law providing "that no person shall keep a *slaughter-house* within the city without a special resolution of the council" was held bad, tending to create a monopoly. Nash *v.* McCracken, *In re*, 33 Upper Can. Q. B. 181. So a by-law imposing a fine upon every person "who shall keep or suffer to be kept, any swine within the said borough from 1st February to 31st October inclusive, in any year." Everett *v.* Grapes, 3 L. T. N. S. 669. A resolution or license from the corporation held to be no defence to a prosecution for a public nuisance. The King *v.* Cross, 2 C. & P. 483. "This certificate is no defence; and even if it were a license from all the magistrates in the county to the defendant to slaughter horses in this very place, it would not entitle the defendant to continue the business there one hour after it became a public nuisance to the neighborhood. . . . If the defendant's *slaughtering house* was so conducted as to be a public nuisance at common law, the parish might at any time have caused it to be removed; and I am clearly of opinion that in this case it was so conducted as to be a nuisance at common law, and that the defendant would not have been and is not entitled to any compensation." It was in this case proved that smells proceeded from the slaughter-house which were a great nuisance to persons passing along the public highway. If a certain noxious trade is already established in a place remote from habitation and public roads, and persons afterwards come and build houses within reach of its noxious effects, or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the persons using the road, in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the houses in the one case, and the making of the road in the other. *Per Abbott*, C. J., in The King *v.* Cross, 2 C. & P. 484. But *quære;* and see cases *supra*. But if the man so situated increase the nuisance by the manner or extent to which he carries on the trade he is liable to indictment. The King *v.* Watts, M. & M. 281; The King *v.* Neville, 1 Peake, 92. In countries, however, where great works are carried on, which are the means of developing national wealth, persons must not stand on extreme rights. Bamford *v.* Turnley, 3 B. & S. 62–66; Tipping *v.* St. Helen's Smelting Co., 4 B. & S. 608; s. c. 11 H. L. C. 642; Gaunt *v.*

menced *summary proceeding to remove a private wharf*, an eminent judge uses this language: "But the mere declaration by the city

Fynney, L. R. 8 Ch. Ap. 8; Harrison *v.* Good, L. R. 11 Eq. 338; Salvin *v.* North Brancepeth Coal Co., L. R. 9 Ch. Ap. 705; Ball *v.* Ray, L. R. 8 Ch. Ap. 467; Broder *v.* Saillard, L. R. 2 Ch. Div. 692; Harr. Munic. Man. 5th ed. 397.

But a *private individual* cannot justify damaging the property of another on the ground that it is a public nuisance, unless it do him a special and particular injury. Dimes *v.* Petley, 15 Q. B. 276; Arnold *v.* Holbrook, L. R. 8 Q. B. 96; The Mayor, &c. of Scarborough *v.* Rural Sanitary Authority of Scarborough, L. R. 1 Ex. Div. 344; Price *v.* Grantz, 118 Pa. St. 402. A distinction must be drawn between a house which is a nuisance *per se*, and one that is only a nuisance by reason of its use or abuse. In the latter case there is no legal right to destroy the property. In several parts of England public slaughter-houses are established, under a provision that "no person shall slaughter any cattle or dress any carcass for sale as food for man in any place within the limits other than a slaughter-house." It was held that the enactment only applied to the slaughtering of beasts intended by the person slaughtering the same for sale for human food. Elias *v.* Nightingale, 8 E. & B. 698; see further, Anthony *v.* The Brecon Markets Co., L. R. 2 Ex. 167; reversed, L. R. 7 Ex. 399. An indictment will lie for a public nuisance, but not for a private nuisance. The King *v.* Atkins, 3 Burr. 1706. That which is not of public concern is a mere civil injury. The King *v.* Storr, 3 Burr. 1698; The King *v.* Johnson, 1 Wils. 325. The non-repair of a private road, even by a public body, is not indictable. The King *v.* Richards, 8 T. R. 634; The King *v.* Trafford, 1 B. & Ad. 874. The writ *quod permittat* lay at common law to prostrate a public nuisance (Palmer *v.* Poultney, 2 Salk. 458), and after judgment on an indictment for a nuisance, a writ of prostration may still be issued. The King *v.* Newdigate, Comb. 10; Houghton's Case, Sir T. Boyd, 215; Vin. Abr. "Nuisance," A; *Ib.* "Chemin," Fitz. Nat. Brev. 124; The Queen *v.* Haynes, 7 Ir. L. R. 2. An action on the case will lie for the *continuance of a nuisance* after recovery for its erection. Rosewell *v.* Prior, 2 Salk. 460. Though an indictment for a nuisance is in form a criminal, it is in substance a civil proceeding remedial in its object. The King *v.* Sadler, 4 C. & P. 218; Holmes *v.* Wilson, 10 A. & E. 503; Douglas, *In re*, 3 Q. B. 825; Thompson *v.* Gibson, 7 M. & W. 456; The Queen *v.* Chorley, 12 Q. B. 515; The King *v.* Russell, 3 E. & B. 942; The Queen *v.* Loughton, 3 Smith, 575; The Queen *v.* Lincombe, 2 Chit. 214. Upon an indictment for a continuing nuisance — such as a wall across a highway — the *proper judgment is*, that it be abated (The King *v.* Stead, 8 T. R. 142; The King *v.* Yorkshire, 7 T. R. 467), and when the court is satisfied before judgment that a nuisance has been abated, the judgment need not be pronounced. The King *v.* Incledon, 13 East, 164; The Queen *v.* Paget, 3 F. & F. 29. The practice followed is to respite judgment until it be seen whether or not the nuisance is abated, and, if not, to inflict a heavy fine to compel the abatement. There may be an indictment for the continuance of a nuisance (The Queen *v.* Maybury, 4 F. & F. 90), and in such a case the former judgment is conclusive that the *locus in quo* was a highway, and that the erection upon it was a nuisance. This being so, upon proof of the continuance of the nuisance the jury must find the defendant guilty. See further, Regina *v.* Jackson, 40 Upper Can. Q. B. 290.

As to the right of an adjoining owner to recover damages for *a private injury resulting from a public nuisance* in a public highway, where there is a direct and particular damage, such as that arising from unreasonable obstruction to the access to his premises from the highway. Fritz *v.* Hobson, 19 Am. Law Reg. 615 (1880), and note; Bushnell *v.* Robeson, 62 Iowa, 540; (Slaughter-house) Irwin *v.* Telephone Co., 37 La. An. 63; McDonald *v.* Newark, 42 N. J. Eq. (15 Stew.) 136. A *dense smoke* which is detrimental to certain classes of property and business and is a personal annoyance to the public at large

council that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the State within which a given structure can be shown to be a nuisance, can, by the mere declara-

is a public nuisance whether declared so by ordinance or not. Harmon *v.* Chicago, 110 Ill. 400; see cases below cited.

Ringing of bells, blowing of horns, and other *unusual noises*, are treated as nuisances. They may or may not be nuisances according to circumstances. It is in the power, however, of the corporation at any time to treat all such, when in streets and public places, as nuisances, and prevent them. It is difficult to describe, though easy to imagine, such "an unusual noise" as would be a nuisance. Some examples may, however, be given. The noise of a tinsmith in carrying on his trade, if in a neighborhood where there is a number of offices, and of sufficient volume to prevent the occupants from following their lawful business, will, if it affect a considerable number of inhabitants, be deemed a public nuisance. The King *v.* Lloyd, 4 Esp. 200.

A *circus*, the performances in which were to be carried on for eight weeks near the plaintiff's house, and the performances, which took place every evening, lasted from about half-past seven till half-past ten o'clock. The noise of the music and shouting in the circus could be distinctly heard all over the house, and was so loud that it could be heard above the conversation in the dining-room, though the windows and shutters were closed. This was held to be a nuisance. Inchbald *v.* Robinson, L. R. 4 Ch. App. 388. If a man builds a *rolling-mill* close to inhabited cottages, so that the vibration produced by the hammers cracks the walls of the cottages, and the noise of the mill causes them to become and remain uninhabited, the rolling-mill will be a nuisance. Scott *v.* Firth, 4 F. & F. 349; s. c. 10 L. T. N. S. 240.

A *shooting ground* near a public highway, where persons come to shoot with rifles at pigeons, targets, &c., may be a nuisance. The King *v.* Moore, 3 B. & Ad. 184. So, by means of powder, working stone quarries near the public streets and dwelling-houses. The Queen *v.* Mutters, 10 Cox, 6; Harr. Munic. Man. 5th ed. 401, 402.

A *corporation has no more right to license or maintain a nuisance* than an individual would have, and for a nuisance maintained upon its property the same liability attaches against a city as to an individual. Haag *v.* Co. Comm'rs, 60 Ind. 511; Petersburg *v.* Applegarth, 28 Gratt. 321; Brayton *v.* Fall River, 113 Mass. 218; Franklin Wharf Co. *v.* Portland, 67 Me. 46; Harper *v.* Milwaukee, 30 Wis. 365; Hannibal *v.* Richards, 82 Mo. 330; Wood on Nuisances, sec. 742. *Infra*, sec. 375, note. A city was held liable for *erecting a pest-house* whereby plaintiff's premises became unhealthful and infected with the same disease, and the occupancy rendered unsafe and unpleasant. Niblett *v.* Nashville, 12 Heisk. 684. May pass ordinances *to prevent* as well as *to remove* nuisances. Gregory *v.* New York, 40 N. Y. 273; see Wood on Nuisances, secs. 740, 741, and cases cited. A city held to have no power to destroy a dam across a creek within its limits as a nuisance. Clark *v.* Mayor, &c. of Syracuse, 13 Barb. (N. Y.) 32. *Abatement by individuals and by public officers.* Manhattan Manuf. & Fert. Co. *v.* Van Keuren, 23 N. J. Eq. 251; Meeker *v.* Van Rensselaer, 15 Wend. (N. Y.) 397. Destruction of building by *mob*. Brightman *v.* Bristol, 65 Me. 426; s. c. 20 Am. Rep. 711. Under the laws of *New York* establishing *boards of health*, while the board of health of a town cannot go outside of its own boundaries to abate a nuisance summarily, it may restrain the violation of its order and enforce abatement, though the cause of the nuisance arises in an adjoining municipality. Gould *v.* Rochester, 105 N. Y. 46.

tion that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city, at the uncontrolled will of the temporary local authorities."[1]

[1] *Per Miller*, J., Yates *v.* Milwaukee, 10 Wall. 497 (1870); Pieri *v.* Shieldsboro, 42 Miss. 493; Underwood *v.* Green, 42 N. Y. 140; Darst *v.* People, 62 Ill. 306 (1869); Miller *v.* Burch, 32 Tex. 208 (1869); Everett *v.* Council Bluffs, 46 Iowa, 66 (1877), approving Yates *v.* Milwaukee; Pye *v.* Peterson, 45 Tex. 312 (1876); s. c. 23 Am. Rep. 608, approving Yates *v.* Milwaukee. Cole *v.* Kezler, 64 Iowa, 59; Everett *v.* Marquette, 53 Mich. 450 (a *staircase in a sidewalk* is not a nuisance *per se*); St. Paul *v.* Gilfillan, 36 Minn. 298 (*dense smoke* not a nuisance *per se*); Joyce *v.* Woods, 78 Ky. 386; Green *v.* Lake, 60 Miss. 451; McCrowell *v.* Bristol, 5 Lea (Tenn.), 685; Ison *v.* Manley, 76 Ga. 804. A person sick, even with *contagious disease*, in his own house or at a hotel, is not a nuisance. Boom *v.* Utica, 2 Barb. (N. Y.) 104 (1848).

Works that amount to a private nuisance, causing actual damage to private persons, *cannot be justified, under a license from the city council* to erect them. But the fact of such license is evidence of great but not conclusive weight in favor of the party erecting and owning the works claimed to be a nuisance. Ryan *v.* Copes, 11 Rich. (S. C.) Law, 217 (1858) A *pig-sty* in a populous place is, *per se*, a nuisance. Com'lth *v.* Van Sickle, Bright. (Pa.) 69. *Livery stable* in a town is not, *per se*, a nuisance, it depends upon its location and the manner in which it is built, kept, or used. Aldrich *v.* Howard, 7 R. I. 87; s. c. 8 R. I. 246; Burditt *v.* Swenson, 17 Tex. 489 (1856); Morris *v.* Brower, Anthon's N. P. (N. Y.) 368; Flint *v.* Russell, 5 Dillon C. C. R. 151 (1879); Harrison *v.* Brooks, 20 Ga. 537 (1856); Wood on Nuisances, secs. 528, 529; Pickard *v.* Collins, 23 Barb. (N. Y.) 444; Shiras *v.* Olinger, 50 Iowa, 571; 20 Alb. L. J. 56. Nor is a *liberty pole* a nuisance *per se*. Allegheny *v.* Zimmerman, 10 Pitts. Leg. Jour. 168; s. c. 95 Pa. St. 287; Dargan *v.* Waddell, 9 Ire. (N. C. Law) 244; Kirkman *v.* Handy, 11 Humph. (Tenn.) 406; Coker *v.* Birge, 10 Ga. 336. A *tannery* is not, *per se*, a nuisance. State *v.* Cadwalader, 7 Vroom (36 N. J. L.), 283. *Brick-making:* Wanstead, &c. *v.* Hill, 13 C. B. (N. S.) 479. *Slaughter-house:* Dubois *v.* Budlong, 10 Bosw. (N. Y.) 700; Atty.-General *v.* Steward (5 C. E. Green), 20 N. J. Eq. 415; Villavaso *v.* Barthet, 39 La. An. 247; see cases in this note *supra*. *Powder-house*, with large quantities of powder therein, located in a city, is a nuisance. Cheatham *v.* Shearon, 1 Swan (Tenn.), 213, 216; Dumesnil *v.* Dupont, 18 B. Mon. (Ky.) 800. The manufacturing and keeping large quantities of gunpowder in towns or closely inhabited places is an indictable offence at common law. Rex *v.* Williams, 1 Russ. on Cr. *439; The King *v.* Taylor, 2 Str. 1167; Crowder *v.* Tinkler, 19 Ves. 617. *Planing mill:* Rhodes *v.* Dunbar, 57 Pa. St. 274; Duncan *v.* Hayes, 22 N. J. Eq. 25 (1871). As to *gas-works:* Cleveland *v.* Cit. Gasl. Co., 20 N. J. Eq. 201. *Steam flouring mill:* Gilbert *v.* Showerman, 23 Mich. 448. *Stock-yards*: *Ib.* 296; Ashbrook *v.* Commonwealth, 1 Bush (Ky.), 139. *Porgy oil factory:* Brightman *v.* Bristol, 65 Me. 426 (1876); s. c. 20 Am. Rep. 711. *Privies:* Wahle *v.* Reinbach, 76 Ill. 322. *Gas companies:* Cleveland *v.* Citizens' Gasl. Co., 5 C. E. Green (20 N. J. Eq.), 203. *Potteries:* Ross *v.* Butler, 19 N. J. Eq. 294. *Glass* and *broken-ware* in public place. *Ex parte* Casinello, 62 Cal. 538. *Smoke and noxious vapors* caused by burning, under public authority, clothing, bedding, &c., to prevent the spread of contagious diseases is *not* an indictable nuisance. State *v.* Knoxville, 12 Lea, 146. *Coasting* on a public street held not necessarily a nuisance. Burford *v.* Grand Rapids, 53 Mich. 98; see *post*, chap. on Streets. A *wooden awning* over a side-walk is not a nuisance *per se*. Hawkins *v.* Sanders, 45 Mich. 491; see Index, tit. *Awning*. Whether a particular *lime kiln* is a nuisance or not is a mixed question of law and of fact. State *v.* Mott, 61 Md. 297. A *market-cart* in a street held

§ 375 (309). **General Power over Nuisances.** — Power to municipal corporations to make "by-laws relative to *nuisances* generally" has been decided to authorize an ordinance prohibiting the keeping, in any manner whatsoever, of a *bowling-alley for gain or hire*, such a place being a public nuisance at common law.[1] So under power to pass by-laws to prevent and remove nuisances, an ordinance may be passed inflicting a fine on any person who should exhibit a *stud-horse* in the streets of the corporation.[1]

not a nuisance *per se*. State *v.* Edens, 85 N. C. 522. A *wooden building* in a city is not a nuisance *per se*, but may become so by the way in which it is used. Fields *v.* Stokley, 99 Pa. St. 306. *Dead animals* are not nuisances *per se*, but may become such. River Rendering Co. *v.* Behr, 77 Mo. 91; Underwood *v.* Green, 42 N. Y. 140. *Flouring Mill:* Under the power to prevent nuisances and dangerous manufactories, a municipal corporation cannot, on petition of citizens, deal with a flouring mill as a nuisance, unless it is shown by the record to fall within some law or ordinance previously passed. Lake *v.* Aberdeen, 57 Miss. 260. In *Louisiana*, where the civil code (art. 655) provides that works, &c., causing annoyance "shall be regulated by the rules of the police or the customs of the place" where located, an ordinance of a city council ordering a blacksmith shop to be closed as a nuisance is authorized by law, and may be carried into effect by an injunction, procured by the city in its corporate name, restraining the owner from continuing the shop. New Orleans *v.* Lambert, 14 La. An. 247 (1859).

Power of municipal corporations to remove nuisances, and how far their decision as to fact of nuisance is conclusive. Welch *v.* Stowell, 2 Doug. (Mich.) 332; Kennedy *v.* Board of Health, 2 Pa. St. 366; Com'lth *v.* Van Sickle, Bright. (Pa.) 69; Green *v.* Savannah, 6 Ga. 1; Roberts *v.* Ogle, 30 Ill. 459; Clark *v.* Mayor, &c., 13 Barb. (N. Y.) 32; Saltonstall *v.* Banker, 8 Gray (Mass.), 195; Kennedy *v.* Phelps, 10 La. An. 227; Green *v.* Underwood, 42 N. Y. 140; Mayor of Hudson *v.* Thorne, 7 Paige (N. Y.), 261; Salem *v.* Eastern R. Co., 98 Mass. 431; Chicago *v.* Laflin, 49 Ill. 172; Babcock *v.* Buffalo, 56 N. Y. 268; Darst *v.* People (intoxicating liquors), 51 Ill. 286 (1869). The power of municipal corporations, with respect to nuisances, is treated in the chapter xxii. of Mr. Wood's work on the Law of Nuisances. Instance of refusal by a court of chancery to interfere with the municipal authorities in removing nuisances. Ferguson *v.* Selma, 43 Ala. 398 (1869).

Under the English Municipal Corporations Act the council of any borough is empowered to make by-laws for the good rule and government of the borough, and *the prevention and suppression of nuisances* (*ante*, sec. 337); and it is held that this power respecting the suppression of nuisances is confined to the suppression and prohibition of acts which, if done, *must necessarily and inevitably cause a nuisance*, and it does not empower the council to impose penalties for the doing of things which may or may not be a nuisance according to circumstances. Thus, where the town council imposed a fine upon every person who should "keep or suffer to be kept any swine within the borough between the first of May and the first of October," it was held that the by-law was wholly invalid, as the keeping of a pig did not necessarily create a nuisance. Addison on Torts, 34, citing Everett *v.* Grapes, 3 Law T. R. N. S. Q. B. 669; Wanstead Local Board *v.* Hill, 13 C. B. N. S. 479.

[1] Tanner *v.* Albion, 5 Hill (N. Y.), 121 (1843); followed, Updike *v.* Campbell, 4 E. D. Smith (N. Y.), 570 (1855); The People *v.* Sergeant, 8 Cow. (N. Y.) 139, which held that a room kept for the *playing of billiards* was not a public nuisance, though a profit was made of it, commented on and distinguished, and by *Cowen*, J., doubted, in 5 Hill, *supra*. A power to "*suppress and restrain*" gaming held to grant power to license *billiard playing*. *In re* Snell, 58 Vt. 207. Whether a *ball alley* could be prohibited under the general authority to pass by-laws relative to good government, &c., was alluded to, but not determined. See Jackson *v.* People, 9 Mich. 111; Smith *v.* Madison, 7 Ind. 86. In The State *v.* Hall, 32 N. J. 158 (1867), it was held that a *ten-pin alley* kept for gain and public use in a town is not, *per se*, a nuisance. The law on the subject is very fully examined in the opinion of *Beasley* C. J., and the case of Tanner *v.* Albion, *supra*, reviewed and disapproved. Where a city has, by its charter, the power to determine whether *bowling alleys* should be allowed, and, if so, under what restrictions, an ordinance requiring them to be closed at a certain hour is valid. State *v.* Hay, 29 Me. (15 Shep.) 457 (1849); State *v.* Freeman, 38 N. H. 426; *supra*, sec. 368, note. A statute of *Missouri* designed to *suppress gambling* in St. Louis authorized the police to seize gaming tables and gaming devices used for gambling, and made it the duty of the president of the police to cause the same to be publicly destroyed. This could be done without notice to the owner or any semblance of judicial investigation. The statute was declared unconstitutional as depriving the owner of such gambling tables, &c., of his property without due process of law. Lowry *v.* Rainwater, 70 Mo. 152 (1879); s. c. 35 Am. Rep. 420 (1879); 21 Alb. Law Jour. 72; Fisher *v.* McGirr, 1 Gray (Mass.), 1; Hibbard *v.* People, 4 Mich. 126; Lincoln *v.* Smith, 27 Vt. 354. Under authority to pass such ordinances as the council "may consider fit and proper to remove nuisances or causes of disease," &c., it was held that the city of Savannah might prohibit *the growing of rice within the corporate limits*, as being injurious to the health of the city, and abate the same, and that such an ordinance was valid as a police regulation. Green *v.* Savannah, 6 Ga. 1 (1849). City held to have no power to license a *keno table* to be kept for gaming. Schuster *v.* State, 48 Ala. 199 (1872). Where proceedings in respect to nuisances are instituted by order of the city council, *chancery will not enjoin or interfere*, "unless the municipal corporation have clearly transcended their powers." Kennedy *v.* Phelps. 10 La. An. 227 (1855) (building for *curing hides*); S. P. Milne *v.* Davidson (private hospital), 5 Mar. (La.) 586 (1827); Potter *v.* Menasha, 30 Wis. 492 (1872); *post*, sec. 405, note.

[1] Nolin *v.* Franklin, 4 Yerger, 163 (1833). Under power "to prevent and remove nuisances," a corporation may, if a vacant building is so used as to endanger by fire the property of others, or the health of the community, declare the same a nuisance, and notify owner to abate it, and if he fails, the individual officer of the corporation who abates the nuisance may, on being individually sued, justify the act. Harvey *v.* Dewoody, 18 Ark. 252 (1856).

Where a city council has authority under its charter to prevent and remove all nuisances within the city, "such as *all decayed and dilapidated houses and structures* calculated to produce disease of any kind, or unfit for use or habitation," &c., a court of chancery will not interfere to prevent the removal of such nuisance unless it appears that the complainant's right is illegally assailed, or threatened with an irreparable injury, and there is no sufficient remedy at law. Ferguson *v.* Selma, 43 Ala. 398 (1869). In this case the court denied an injunction to prevent the removal by the city authorities of two old, dilapidated, substantially valueless houses, on a lot in an improving and flourishing part of the city, which were filthy, and crowded with filthy tenants, and which had also been condemned as a nuisance by the board of health of the city. *Ib.*; *infra*, secs. 377, 405, note. But a city under a charter authorizing the common council "to *regulate all wharves* on the shore of the Ohio River adjoining said city," cannot by ordinance define the line of high-water mark, and declare the erection of buildings below said line a nuisance, and impose a fine upon persons erecting such buildings on their own lands. Evansville *v.* Martin, 41 Ind. 145 (1872). In Nevada *v.* Hutchins, 59 Iowa, 506, it was held that, under a power to *abate* nuisances, an incorporated town is not authorized to pass an ordinance imposing a fine for maintaining a nuisance; but *quaere*.

If a sewer is declared to be a private nuisance to property, the owner is entitled

§ 376 (310). **Suppression of Houses of Ill-fame.** — Power "to suppress *bawdy-houses*" gives the corporation authority, by implication, to adopt by ordinance the proper means to accomplish the end; and among the methods which may be adopted is one forbidding the owners of houses from renting or letting the same for this purpose or with knowledge that they are to be thus used.[1] But power to the common council of a city "to make all such by-laws as it may deem expedient for effectually preventing and suppressing houses of ill-fame," does not authorize the council to decide that a given house is kept for that purpose, nor, if kept for that purpose, does it authorize the council to order it to be demolished; nor if thus demolished, will it justify the officers of the city who did it, in execution of the ordinance and resolution of the council.[2] Neither

to an injunction against the city as he would be against a private individual; but a court in granting such injunction will postpone its operation a reasonable time in order to enable the city to take adequate measures to remove the nuisance without unnecessary injury to the public health and interests. Haskell *v.* New Bedford, 108 Mass. 208; Boston Rolling Mills *v.* Cambridge, 117 Mass. 396; Attorney-General *v.* Birmingham, 4 K. & J. 528; Spokes *v.* Banbury, L. R. 1 Eq. 42; Goldsmid *v.* Tunbridge, L. R. 1 Eq. 161; Attorney-General *v.* Bradford, L. R. 2 Eq. 71; Attorney-General *v.* Colney, &c., L. R. 4 Ch. 146; Breed *v.* Lynn, 126 Mass. 367; *supra*, sec. 374, note.

[1] Childress *v.* Mayor, &c., 3 Sneed (Tenn.), 347 (1855); Shreveport *v.* Roos, 35 La. An. 1010. The legislature *may confer exclusive power* upon a city to prohibit and suppress bawdy-houses; in such case the general State law upon the subject was held to be superseded by an ordinance passed to enforce the power. Rogers *v.* The People, 9 Col. 450 (*quaere*); *supra*, sec. 366; *post*, secs. 396, note, 432–436 and notes. Construction of power "to *regulate* or *suppress bawdy-houses*." State *v.* Clarke, 54 Mo. 17 (1873); State *v.* De Bar, 58 Mo. 395 (1874); commented on, *ante*, sec. 87, note; *post*, sec. 436. Power to make by-laws relative to nuisances gives authority to impose penalties on the keepers of houses of ill-fame, and on persons owning houses used, with their knowledge, for this purpose. McAlister *v.* Clark, 33 Conn. 91 (1865); see Ely *v.* Supervisors, 36 N. Y. 297; Shaffer *v.* Mumma, 17 Md. 331 (1861). In prosecutions for keeping bawdy-houses, the law, it has been said, so far relaxes the ordinary rule that common reputation as to the character of the defendants, and of the houses which they keep, is admissible. State *v.* McDowell, Dudley (S. C.), Law, 346. A power to "repress and restrain disorderly houses" held to confer power to make it penal to visit such houses. State *v.* Botkin, 71 Iowa, 87; s. p. *Re* Johnson, 73 Cal. 228 (1887). A power to "license, regulate, and suppress" includes power to prevent soliciting for bawdy-house, &c. Thomas *v.* Hot Springs, 34 Ark. 553. Keeping house of ill-fame, what? Queen *v.* Rice, L. R. 1 C. C. 21. Sufficient to charge that the defendant did on, &c., in the city of, &c., keep a common disorderly bawdy-house on a specified street in said city, as a place of resort for both men and women of lewd character. Queen *v.* Munro, 24 Upper Can. Q. B. 44; Queen *v.* Levecque, 30 Upper Can. Q. B. 509; Queen *v.* Smith, 35 Upper Can. Q. B. 518; Harr. Mun. Man. 5th ed. 395.

An ordinance to prevent the keeping of bawdy-houses held to be clearly within a charter authority to adopt by-laws "for preserving peace, order, and good government." State *v.* Williams, 11 S. C. 288.

[2] Welch *v.* Stowell, 2 Doug. (Mich.) 332 (1846). In *England* municipal corporations have the power to *prevent indecent public exposure of the person and other indecent exhibitions*. In order to render a person liable to an indictment for indecently exposing his person in a public place, it is not necessary that the exposure should be made in a place open to the public. The Queen *v.* Thallman, 9 Cox C. C. 388; s. c. 9 L. T. N. S. 425. If the act is done where a great number of persons may be offended by it, and several see it, it is sufficient. *Ib.* If the indictment, however, charge the offence to have been committed *on* a highway, such an indictment will not be sustained by evidence that the offence was committed in a place *near* the highway, though in full view of it. The Queen *v.* Farrell, 9 Cox C. C. 446. An indecent exposure in a place of public resort, if actually seen by only one person, no other person being in a position to see it, is not an indictable offence. The Queen *v.* Webb, 1 Den. C. C. 338; The Queen *v.* Watson, 2 Cox C. C. 376; The Queen *v.* Farrell, 9 Cox C. C. 446. A party was indicted for an indecent exposure in an omnibus, several passengers being therein. *Held*, a public place. The Queen *v.* Holmes, 3 C. & K. 360. But a urinal, with boxes or divisions for the convenience of the public, though situated in an open market, was held not to be a public place within the meaning of the allegation. The Queen *v.* Orchard, 3 Cox C. C. 248. Keeping a booth in a public place containing an indecent exhibition for hire, is an indictable offence. Regina *v.* Saunders, L. R. 1 Q. B. Div. 15; Harr. Munic. Manual, 5th ed. 394, 397.

[1] Buell *v.* State, 45 Ark. 336.

[2] Paralee *v.* Camden, 49 Ark. 165.

[3] Hart *v.* Mayor, &c. of Albany, 9 Wend. (N. Y.) 571 (1832), a valuable and very carefully considered case, affirming s. c. 3 Paige (N. Y.), Ch. 213; People *v.* Vanderbilt, 28 N. Y. 396. See Dutton *v.* Strong, 1 Black, 23. The corporate body may abate or remove the nuisance; but without *express authority* cannot ordain a *forfeiture* of the structure, or seize and *sell it*, or convert the materials to their own use. Hart *v.* Mayor, 9 Wend. (N. Y.) 571, 609, *supra;* Compton *v.* Waco Bridge Co., 62 Tex. 715.

[4] *Ib.;* Respublica *v.* Caldwell, 1 Dal. 150; King *v.* Russell, 6 East, 427; King *v.* Cross, 3 Camp. 224; King *v.* Jones, 3 Camp. 229.

[5] Hart *v.* Mayor, &c., 9 Wend. (N. Y.) 571, 608; Strange R. 1247; 3 Bac. Abr. 686; 1 Hawk. P. C. 363, note 1.

[6] Clark *v.* Syracuse, 13 Barb. (N. Y.) 32; Welch *v.* Stowell, 2 Doug. (Mich.)

does such a power authorize an ordinance making it a misdemeanor for a prostitute to reside or be found within the corporate limits,[1] nor to return to a city.[2]

§ 377 (311). **Nuisances upon Rivers within City Limits.** — A city charged by law with the duty of preventing obstructions of a river within its limits may, by its own act, and without proceeding by indictment, abate or remove anything which obstructs the free and public use of the river, such as a *floating storehouse*, calculated to remain stationary in the water, and which exclusively occupies a portion of the river, such a structure being a public nuisance.[3] It is no answer to this right of abatement that room enough is left for the public, or that the structure is beneficial,[4] or that the party erecting it is the owner of the adjacent lots.[5]

§ 378 (312). **Power to demolish; Indictment.** — But under the power to abate nuisances, property lawfully erected and existing, or a house which is only a nuisance because occupied by a business which is such, cannot be destroyed or demolished. The public can proceed by indictment, or the business carried on in the house be suppressed.[6]