§ 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upon a city to prohibit and suppress bawdy-houses; in such case the general State law upon the subject was held to be superseded by an ordinance passed to enforce the power.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]

§ 379. **Extent of Authority over Nuisances.** — Finally, it may be remarked that *the extent of municipal authority over nuisances* depends, of course, upon the powers conferred in this regard upon the municipality. They may be general or specific, or both. The authority to preserve the health and safety of the inhabitants and their property, as well as the authority to prevent and abate nuisances, is a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance.[1] The authority to *declare* what is a nuisance is somewhat broader; but neither this nor the general authority mentioned in the last preceding sentence will justify the declaring of acts, avocations, or structures not injurious

332 (1846); Miller *v.* Burch, 32 Tex. 208 (1869); s. c. 5 Am. Rep. 242. A license from a board of health to carry on a manufactory of fertilizers cannot be urged as a defence to an indictment for creating a public nuisance by the process of manufacturing. Garrett *v.* State, 49 N. J. L. 94.

When equity will interfere to prevent and remove nuisances which affect the public generally. People *v.* St. Louis, 5 Gilm. (10 Ill.) 372; Hoole *v.* Attorney-General, 22 Ala. 190; Attorney-General *v.* Gas Co., 19 Eng. Law & Eq. 639; Aldrich *v.* Howard, 7 R. I. 87; Zabriskie *v.* Jersey City & B. R., 13 N. J. Eq. 314; Jersey City *v.* Hudson, *Ib.* 420; Attorney-General *v.* Brown, 9 C. E. Green (24 N. J. Eq.), 89; Moore *v.* Walla Walla, 2 Wash. Ter. 184; Metropolitan City Ry. Co. *v.* Chicago, 96 Ill. 620; Wood on Nuisances, chap. xxv.; Dumesnil *v.* Dupont, 18 B. Mon. (Ky.) 800 (1857). "It is now well settled that, in addition to the purely legal remedies, which may be resorted to in such cases, courts of equity will take jurisdiction of such public nuisances, and, in proper cases, afford relief *by injunction*, especially where the nuisance threatened or committed is of a nature to be permanent or continuous." *Dickinson*, J., Stearns County *v.* St. Cloud, M. & A. R. Co., 36 Minn. 425; see *post*, sec. 405, note; Index, title *Injunction*. A *city council may*, by resolution, *direct its officers to proceed against a specified establishment as a nuisance*, and cause the same to be abated under a general ordinance of the corporation; this is a different thing from passing an ordinance inflicting a fine upon a particular person for keeping a nuisance, which cannot be lawfully done. Kennedy *v.* Phelps, 10 La. An. 227 (1855). See Commonwealth *v.* Goodrich, 13 Allen (Mass.), 545; Municipality *v.* Blineau, 3 La. An. 688. The power to abate nuisances must be reasonably exercised, so as to do the least practicable injury to private rights. State *v.* Newark, 5 Vroom (38 N. J. L.), 264; Wood on Nuisances, sec. 741. Power to *suppress gambling-houses* does not, it is apprehended, authorize the corporation to demolish the houses so used. All common gaming-houses are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices, and entice numbers of persons to idleness, whose time might be otherwise employed for the good of the community. 1 Hawk. P. C. cap. 32, s. 4; Bosley *v.* Davies, L. R. 1 Q. B. Div. 84; Brodie & Bowmanville, 38 Upper Can. Q. B. 580; Harrison Munic. Manual, 5th ed. 396. As to *liability* of a city authorized to abate nuisances *for failure to exercise the power*. Kiley *v.* Kansas, 69 Mo. 102; Parker *v.* Macon City, 39 Ga. 729; Bassett *v.* St. Joseph, 53 Mo. 290; Cain *v.* Syracuse, 95 N. Y. 83. *Post*, chap. xxiii. Where a municipal corporation does an act, lawful in itself, in such a manner as to create a nuisance, it is liable in the same manner that an individual would be. Judge *v.* Meriden, 38 Conn. 90 (1871); Railroad Co. *v.* Norwalk, 37 Conn. 109; Mooty *v.* Danbury, 45 Conn. 550 (1878). More fully, *post*, chap. xxiii.

[1] *Ante*, secs. 141, 144, 369 *et seq.*, 374; *post*, sec. 396, and note.

to health or property to be nuisances.[1] Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights, or clearly transcend the powers granted to them;[2] in which case the contemplated action may be prevented or the injuries caused, redressed by appropriate suit or proceedings. As there is in such cases a judicial remedy in favor of the citizen, so on principle the right of the corporate authorities to resort at their election to the courts in proper cases, to aid them when the citizen is in the wrong, should, in the author's judgment, be also recognized.[3] It is not unusual to invest the municipal council with *special authority* in respect of particular avocations, trades, acts, omissions, and structures, with a view to conserve the public health and safety, of which many examples have been given in the notes to this chapter. The terms in which such authority is conferred measure its scope, but in view of the end for which it is given, it is not subjected to a hostile or even a narrow construction.[4]

§ 380 (313). **Markets, and of the Power to establish and regulate.** — The States, under their police power, may delegate to municipal corporations the *authority to establish, or authorize the establishment of markets;* and it is competent to such corporations, under proper grants of power, to enact ordinances forbidding sales and purchases of marketable articles, except at designated market-places. The extent of the power possessed by a particular corporation depends upon its charter. In England the regulation of markets by by-laws has long been exercised, and such by-laws are sustained as being reasonable, and conducive to the health and good government of the municipality.[5] In this country the practice is almost uni-

[1] *Supra*, sec. 374, and notes.

[2] *Ante*, secs. 94, 95, 319, 320 *et seq.*

[3] *Post*, sec. 405, note. The principles upon which courts of equity interfere by injunction in the case of nuisances are clearly stated by Ld. Chancellor *Brougham* in Earl of Ripon *v.* Hobart, 3 Mylne & Keen, 169, 179. See also Flint *v.* Russell, 5 Dillon, 151, where the authorities are collated.

[4] *Post*, sec. 396, and note.

[5] Pierce *v.* Bartram, Cowp. 270; Player *v.* Jenkens, 1 Sid. 284; Rex *v.* Cottrell, 1 B. & Ald. 67 (1817). See also Mosley *v.* Walker, 7 Barn. & Cr. 40; Macclesfield *v.* Pedley, 4 Barn. & Adol. 397; Grant on Corp. 166, as to exclusive privileges in England as to markets and market tolls. *Definition.* — A market is a franchise or liberty derived from the crown, by grant, or prescription which presupposes a grant. 2 Black. Com. 37. "It is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale." *Per Breese*, J., Caldwell *v.* Alton, 33 Ill. 416. Under the police power it is competent for the legislature to prohibit private markets within a reasonable designated distance of the public market. New Orleans *v.* Stafford, 27 La. An. 417; s. c. 21 Am. Rep. 563.

versal on the part of the legislature to confer upon the municipal agencies more or less authority with respect to markets and market-places, and such grants are not so strictly construed as those which invest the corporation with powers of a more extraordinary or unusual character; at least such is the case unless a monopoly in favor of private individuals is sought to be sustained, against which the courts strongly lean.[1]

§ 381 (314). **Power to Build and Establish.** — Incorporated cities and towns may have the power to build market-houses without an *express* grant. Thus it has been held that a town having authority "to make by-laws for managing and ordering its *prudential* affairs" has power — the court looking somewhat to usage and custom to ascertain what subjects of common interest are embraced under the term "*prudential*" — to appropriate money for the erection of a market-house, and to raise the amount by taxation. This power, it was admitted, more clearly exists in the case of large towns and populous villages.[2]

"A *municipal market* consists: 1. In a *place* for sale of provisions and articles of daily consumption. 2. Convenient fixtures. 3. A system of police regulations, fixing market hours, making provisions for lighting, watching, cleaning, detecting false weights and unwholesome food, and other arrangements calculated to facilitate the intercourse and ensure the honesty of buyer and seller. 4. Proper officers, to preserve order and enforce obedience to the rules." *Per Lane*, C. J., Cincinnati *v.* Buckingham, 10 Ohio, 257 (1840).

[1] Wartman *v.* Philadelphia, 33 Pa. St. 202, 209 (1854); LeClaire *v.* Davenport, 13 Iowa, 210; White *v.* Kent, 11 Ohio St. 550; St. John *v.* Mayor, &c. of New York, 6 Duer (N. Y.), 315; Ash *v.* People, 11 Mich. 347; St. Louis *v.* Jackson, 25 Mo. 37; St. Louis *v.* Weber, 44 Mo. 547 (1869); Nightingale, *In re*, 11 Pick. (Mass.) 168; Cougot *v.* New Orleans, 16 La. An. 21; Buffalo *v.* Webster, 10 Wend. (N. Y.) 99; Yates *v.* Milwaukee, 12 Wis. 673; Bethune *v.* Hughes, 28 Ga. 560; distinguished, Badkins *v.* Robinson, 53 Ga. 613 (1875); Ketchum *v.* Buffalo, 14 N. Y. 356; Municipality *v.* Cutting, 4 La. An. 336; New Orleans *v.* Guillotte, 12 La. An. 818 (corporate partnership with individuals); State *v.* Lieber, 11 Iowa, 407; Dubuque *v.* Miller, 11 Iowa, 583; Morano *v.* New Orleans, 2 La. 217; St. Paul *v.* Coulter, 12 Minn. 41; Atlanta *v.* White, 33 Ga. 229.

The power to establish and regulate markets, like most other municipal powers, is a *continuing one*, and markets once established may be abandoned or changed at the pleasure of the corporation, and the taxpayers or property owners cannot restrain the action or determination of the council entrusted by the charter with the exercise of the power. Gall *v.* Cincinnati, 18 Ohio St. 563 (1869).

[2] Spaulding *v.* Lowell, 23 Pick. (Mass.) 71 (1839). If the real and principal object is the building of a market-house, the appropriation of a portion of the building for other purposes, as the holding of courts, does not render the erection of the building illegal. If, however, the building of the market-house is merely colorable, that is, done for the purpose of accomplishing distinct and unauthorized objects, it would, says Chief Justice *Shaw*, probably be treated as an abuse of power and a nullity. *Ib.* Power "to appoint market-places and to regulate the same" was held, in connection with a general welfare clause, to authorize the corporation to build a market-house. Smith *v.* Newbern, 70 N. C. 14 (1874); s. c. 16 Am. Rep. 766.

§ 382 (315). **Power to Establish and Regulate.** — Power conferred upon a municipality "to *establish* and regulate markets," authorizes, as a necessary incident, the purchase of ground upon which to erect a market building.[1] If the title to land purchased for the erection of a market-house be taken by the municipal corporation in fee, no length of use of the same for a market will *dedicate* it for market purposes; and the markets may be abandoned or changed at the will of the council, and the land thus acquired and held be sold.[2] It is incident to the general power to build a market to determine upon the form, dimensions, and style of the edifice, and therefore to employ an architect to prepare plans, specifications, &c.[3]

§ 383 (316). **Limitation of such Power.** — But power to a municipal corporation to establish markets and build market-houses will not give the authority *to build them on a public street.* Such erections are nuisances though made by the corporation, because the street, and the entire street, is for the use of the whole people. They are nuisances when built upon the streets, although sufficient space be left for the passage of vehicles and persons. Such erections may, it seems, be legalized by an express act of the legislature. But unless so legalized, a nuisance erected and maintained by a public corporation may be proceeded against, criminally or otherwise, the same as if erected by private persons.[4]

[1] Ketchum *v.* Buffalo, 14 N. Y. 356; 17 N. Y. 449; Caldwell *v.* Alton, 33 Ill. 416. It is immaterial whether this power is conferred in express or direct terms, or given only as part of the power to make by-laws, ordinances, &c. *Per Selden*, J., in Ketchum *v.* Buffalo, 14 N. Y. 356, 362. Purchase of land for market. People *v.* Lowber, 28 Barb. (N. Y.) 65; s. c. more fully, 7 Abb. (N. Y.) Pr. 158; Gale *v.* Kalamazoo, 23 Mich. 344 (1871).

[2] Gall *v.* Cincinnati, 18 Ohio St. 563; Cooper *v.* Detroit, 42 Mich. 584. Construction of market-grants in England. Where according to the grant of a market it was to be held in a town, the grantee might from time to time remove the place for holding it according to the convenience of the inhabitants for the time being. Dixon *v.* Robinson, 3 Mod. 108; Curwen *v.* Salkeld, 3 East, 538; The King *v.* Cotterill, 1 B. & Al. 67; Wortley *v.* The Nottingham Local Board, 21 L. T. N. S. 582. And this applies, although the limits of the town be afterwards extended and the market established within the extended limits. Mayor, &c. of Dorchester *v.* Ensor, L. R. 4 Ex. 335. But this is subject to the rights of any person owning property adjoining the site of the old market. Ellis *v.* The Corporation of Bridgnorth, 4 L. T. N. S. 112; 2 Johns. & H. 67; 15 C. B. N. S. 52; Harr. Munic. Manual, 5th ed. 451 *et seq.*, and cases.

[3] Peterson *v.* Mayor, &c. of New York, 17 N. Y. 449 (1858). His unauthorized employment by a committee is ratified by a resolution of the council passed with notice of the facts, adopting his plans, drawings, &c., and he may recover of the city for the labor and service of preparing them. *Ib.*

[4] Wartman *v.* Philadelphia, 33 Pa. St. 202, 210 (1854); St. John *v.* New York, 3 Bosw. (N. Y.) 483; State *v.* Mobile, 5 Port. (Ala.) 279 (1837); Commonwealth *v.* Rush, 14 Pa. St. (2 Harris) 186; Commonwealth *v.* Bowman, 3 Pa. St. (3 Barr) 202, 206; McDonald *v.* Newark, 42 N. J. Eq. (15 Stew.) 136. See chapter on

§ 384 (317). **Power under General Welfare Clause.** — Every municipal corporation which has power to make by-laws and establish ordinances to promote the general welfare and preserve the peace of a town or city may fix the time or places of *holding public markets* for the sale of food, and make such other regulations concerning them as may conduce to the public interest.[1] The right to establish a market includes the right to abandon it, or shift it to another place when the public convenience demands it; and of this the council is the judge.[2]

§ 385 (318). **Nature of Power to Establish and Regulate.** — A city corporation was invested by its charter with power "to erect market-houses, to establish markets and market-places, and to provide for the government and regulation thereof," and it was at first decided, and in the author's judgment properly decided, by the Supreme Court of the State, that this did not authorize the corporation to pass an ordinance *delegating* to an individual the right to erect market-houses, and to charge rent for the use of the stalls therein, reserving to itself no power to *control* the same, and that the corporation could not compel persons to go to such markets; but subsequently this ruling was reversed, and it was held that such an ordinance was valid, and that the city had the power to authorize the erection of market-houses by an individual, and to declare the same a public market, and to covenant to protect the owner in the exclusive privilege thereof; and that the city was liable for failing to protect him by the passage of the requisite ordinances, he having, on the faith of the ordinance, erected an expensive market-house.[3]

Streets, *post*, secs. 657, 660. Under the Constitution of *New Jersey*, the legislature cannot authorize a market in the public streets without providing compensation to adjoining lot owners. State *v.* Laverack, 34 N. J. Law, 201 (1870); Higgins *v.* Princeton (injunction refused), 4 Halsted Ch. 309, 320.

[1] *Per Black*, C. J., Wartman *v.* Philadelphia, 33 Pa. St. 202, 209 (1854). Note his observations in this case upon the necessity and convenience of markets.

[2] *Ib.* "The right to *establish* markets is a branch of the sovereign power, and the right *to regulate* them is necessarily a power of municipal police." *Per Eustes*, C. J., Municipality *v.* Cutting, 4 La. An. 335.

[3] Le Claire *v.* Davenport, 13 Iowa, 210 (1862); overruling Davenport *v.* Kelly, 7 Iowa, 102. It may be suggested that the right to pass such an ordinance, and the liability for failing to pass others, may admit, at least, of fair debate, in view of the surrender by the city of its charter powers, and its inability in law to make binding contracts with reference to the future exercise of its legislative authority. The soundness of this suggestion is confirmed by the decision in Gale *v.* Kalamazoo, 23 Mich. 344 (1871), *post*, chap. xxiii. In the Kelly case, *supra*, the point was decided, and is not overruled, that the charter power to establish markets, &c., conferred upon the council the authority to prohibit the exposing and offering for sale meat in any other places than those the ordinance designated. Ash *v.*

§ 386 (319). **Construction of Special Powers in Relation to Markets.** — Power to make "by-laws relative to the public markets," &c., while it would not authorize a corporation entirely to prohibit the sale of meats, &c., within its limits, because this would be in general restraint of trade, will nevertheless authorize a by-law forbidding the *hawking about* or *selling by retail*, meats, &c., except at the public markets and within certain limits about the same.[1] The courts differ somewhat in their construction of the extent of the power to *establish* and *regulate* markets, as will be seen by the cases cited in the note.[2]

People, 11 Mich. 347; Hatch *v.* Pendergast, 15 Md. 251.

A city in granting a license and selling to a party the right to occupy a stall in the market, *does not impliedly contract to protect the lessee* from competition by unlicensed persons; nor can such a contract be implied against the corporation from the existence of an ordinance prohibiting the same; and the failure of the officers of the corporation, though wilful, to enforce the ordinance against unlicensed sellers, is no defence to a bond given by the lessee for the payment of stall rent. Peck *v.* Austin, 22 Texas, 261 (1858). Nor does a city owning and leasing a market-house impliedly engage or covenant that it will not exercise its power to establish markets by erecting other market-houses and leasing them to others; if it does so, the injury to the first lessees is *damnum absque injuria*. Cougot *v.* New Orleans, 16 La. An. 21 (1861). A municipal corporation may contract for building a market-house with an individual or corporation, conceding in consideration of such building, and the use of part of the same, exclusive market privileges in such city, with rights to lease stalls, collect rents, and exemption from taxes for twenty-one years; but a purchaser at a sale under a judgment against the owner takes only the right of the owner bound by the judgment, but this will not affect the rights of the city to use of the rooms contracted for, of which it had possession. Palestine *v.* Barnes, 50 Tex. 539.

As to duty of corporation where they sell or farm out an exclusive privilege to vend articles, to enforce ordinances designed to protect the privilege. La Rosa *v.* New Orleans, 4 La. 24; Rosa *v.* Same, 1 La. 126; New Orleans *v.* Peyroux, 6 Martin, N. S. (La.) 155; Griffon *v.* New Orleans, 5 Martin, N. S. (La.) 279. City corporation cannot agree to abdicate its legislative powers in relation to markets, nor contract to create a monopoly. Gale *v.* Kalamazoo, 23 Mich. 344 (1871); *ante*, sec. 362.

[1] Buffalo *v.* Webster, 10 Wend. (N. Y.) 100 (1833). Chief Justice *Savage* affirms, *arguendo*, that such an ordinance would be valid under the common-law power of corporations to make by-laws for the general good of the corporation. *Ib.* Approving Pierce *v.* Bartram, Cowp. 269; following Bush *v.* Seabury, 8 Johns. (N. Y.) 418 (1811), and distinguished from Dunham *v.* Rochester, 5 Cow. (N. Y.) 462; Shelton *v.* Mobile, 30 Ala. 540 (1857). "The fixing the *place* and times at which markets shall be held and kept open," says the Supreme Court of *New York* in Bush *v.* Seabury, 8 Johns. (N. Y.) 418, "and the prohibition to sell at other places and times, are among the most ordinary regulations of a city or town police, and would naturally be included in the general power to pass by-laws relative to the public markets. If the corporation had not the power in question, it is difficult to see what useful purpose could be effected, or what object was intended, by the grant of power to pass laws 'relative to the public markets.'"

[2] Power to make ordinances concerning "markets, health, and good order" of the town authorizes an ordinance prohibiting the sale of butcher's meat within the corporate limits, excepting at the public market. Winnsboro *v.* Smart, 11 Rich. (S. C.) Law, 551 (1858). It seems the defendant was convicted, though he sold the meat inside his own

§ 387 (320). **Stands in Streets.** — In a well-considered case in Massachusetts it is decided that a city corporation has the clear *right to prohibit, by ordinance, the occupation of a stand for the vending of commodities in the streets.* It may thus prohibit not only its own inhabitants, but others. It may make the prohibition absolute, or it may make it conditional on obtaining license or permission. It is in the nature of a police regulation, and does not violate private rights or improperly restrain trade.[1]

blacksmith shop. Such ordinances are sustained, says the court, on the ground that they are not in restraint of trade, but a proper regulation of it. *Ib.* Legislative power to a city "to erect market-houses, establish markets and market-places, and provide for the government and regulation thereof," authorizes an ordinance with a pecuniary penalty, providing that fresh beef shall not be sold in the city less than by the quarter at any other than the market-place during market hours. Bowling Green *v.* Carson, 10 Bush (Ky.), 64 (1873). So, in St. Louis *v.* Jackson, 25 Mo. 37 (1857), where it appeared that the city, under proper authority, had erected a public, or city, market-house, and that by its charter it had power also, "to *regulate*," by ordinance, the sale of meats, it was held that this gave the city authority to provide, by ordinance, that "no person, not a lessee of a stall in the market, shall sell, or offer for sale, meat in less quantities than one quarter." The court considered such an ordinance as reasonable, highly proper, and not in restraint of trade, and not embraced in the reasoning in the case of Dunham *v.* Trustees of Rochester, 5 Cow. (N. Y.) 462; s. p. see, also, St. Louis *v.* Weber, 44 Mo. 547 (1869); Le Claire *v.* Davenport, 13 Iowa, 210; Davenport *v.* Kelley, 7 Iowa, 102; Ash *v.* People, 11 Mich. 347. But in Caldwell *v.* Alton, 33 Ill. 416 (1864), where the city, by its charter, had power "*to establish and regulate markets,*" and under the power passed an ordinance forbidding, during market hours, the sale of vegetables outside the limits of the market, it was held that the city could not restrain a regular dealer or merchant from vending vegetables at his place of business outside of market limits during any part of the day, such a restraint of trade being unreasonable. The court reviewed many of the cases in other States on this subject, and were of opinion that the power to *regulate* could only extend to the market limits, and that these limits could not, under this power, be made to extend throughout the city. The court adhered to its views in a subsequent case, in which it was held that power "to erect market-houses, establish markets and market-places, and provide for the government and regulation thereof," does not authorize the council of a large and growing town to fix upon one market-place, and prohibit all persons at all hours of the day from selling fresh meats elsewhere. Such an ordinance was regarded as unreasonable, in restraint of trade, and tending to create a monopoly. It was admitted, however, that if the ordinance had fixed a reasonable number of hours each day in which the prohibition should operate, leaving persons free to sell outside of market hours, it would probably be unobjectionable. Bloomington *v.* Wahl, 46 Ill. 489 (1868). So, in Bethune *v.* Hughes, 28 Ga. 560 (1859), the court, leaning against exclusive privileges, held that power by the charter to the corporation "*to establish and keep up* a public market in the city for the sale of," &c., does not confer upon the city power to pass an ordinance prohibiting the sale of marketable articles elsewhere than at the market-place. Distinguished, Badkins *v.* Robinson, 53 Ga. 613 (1875); s. p. St. Paul *v.* Laidler, 2 Minn. 190 (1858); commented on and disapproved in St. Louis *v.* Weber, 44 Mo. 547 (1869); see St. Paul *v.* Coulter, 12 Minn. 41. Charter power to a city, "to establish public markets and other public buildings, and make rules and regulations for the government of the same, to appoint suitable officers for overseeing and regulating such markets and to restrain all persons from interrupting or interfering with the due observance of such rules and regulations," does not confer upon its common council authority to pass an ordinance prohibiting "every farmer, gardener, or person producing vegetables" from selling the same in and along its streets without first procuring an annual license from the city authorities, paying therefor into the city treasury the sum of twenty-five dollars. St. Paul *v.* Traeger, 25 Minn. 248 (1878); and see Burlington *v.* Dankwardt, 73 Iowa, 170 (1887). The nature of the power "to establish public markets," &c., is very satisfactorily discussed in this case by *Cornell*, J. An ordinance regulating the killing and bleeding of meats is authorized by power to regulate butchers, the place and mode of selling, and to prevent unlicensed persons from acting as butchers. City of Brooklyn *v.* Cleves, Hill & Denio (N. Y.) Suppl. 231 (1843). Under power to regulate the vending of meats, a conviction under an ordinance forbidding the sale of unwholesome meats and other provisions cannot be sustained for selling putrid eggs. Mayor, &c., of Rochester *v.* Rood, Hill & Denio (N. Y.), Suppl. 146.

By the Municipal Act of Canada the council may pass by-laws "for establishing and regulating all markets; for preventing or regulating the sale by retail in the public streets of any meat, vegetables, fruit, or beverages; for regulating the place and manner of selling and weighing butcher's meat, fish, hay, straw, fodder, wood, and lumber, &c. Harr. Munic. Manual, 5th ed. p. 451. The following cases, digested by Mr. Harrison, show the judicial construction of the act.

The power under the act is to regulate *all* markets established, apparently including those established by the Crown, as well as those established by municipal authority. "Regulation must of necessity include the appropriation of one or more parts of the market for one purpose, and other part or parts for other purposes; of providing that free passage through the market be kept open for ready access to shops, stalls, or other places where different commodities are exposed for sale. *Per Draper*, C. J., in Kelly and the Corporation of the City of Toronto, 23 Upper Can. Q. B. 426." A by-law enacting "that no butcher or other person shall cut up or expose for sale any fresh meat in any part of the city except in the shops and stalls in the public markets, or at such places as the Standing Committee on Public Markets may appoint," was held good. *Ib.* But a by-law enacting "that no person should expose for sale any meat, fish, poultry, eggs, butter, cheese, grain, hay, straw, cord-wood, shingles, lumber, flour, wool, meal, vegetables, or fruit (except wild fruit), hides or skins, within the town, at any place but the public market, without having first paid the market fee thereon as therein provided, except all hides and skins from animals slaughtered by the licensed butcher of the corporation, holding a stall in the market," was held bad. Fennell and the Corporation of the Town of Guelph, *In re*, 24 Upper Can. Q. B. 238. Also, "that meat, fish, *poultry*, *eggs*, *cheese*, *grain*, hay, straw, cord-wood, *shingles*, lumber, *flour*, *wool*, *meal*, *vegetables*, or *fruit* (except wild fruit), should not be exposed for sale within the municipality, except in the market, before 12 o'clock, noon," was held bad as to the articles mentioned in italics. *Ib.* See *In re* Snell and Belleville, 30 Upper Can. Q. B. 91; Harr. Munic. Man. 5th ed. 452, 457, and cases.

[1] Nightingale, *In re*, 11 Pick. (Mass.) 168 (1831). In this case the ordinance of the city (Boston) provided "that no inhabitant of the city of Boston, or of any town *in the vicinity* thereof, not offering for sale the produce of his own farm, &c., should, without the permission of the clerk of Faneuil Hall market, be suffered to occupy any stand with cart, sleigh, or otherwise, for the purpose of vending commodities in either of the streets mentioned in the first section of this ordinance," &c. It was objected against this ordinance that it was void: 1. Because it was partial, not operating upon all the citizens of the State equally. 2. Because it was uncertain, the term "*vicinity*" being indefinite. And, 3. Because it was in restraint of trade. But neither of these objections was considered tenable. The validity of such an ordinance was again