§ 388 (321). **Power to Tax Marketmen must be Plainly Conferred.** — But authority to erect a market, and power "to regulate the general police," and "to preserve the peace and good order of the city," do not authorize the corporation to impose a *tax* for revenue purposes upon persons occupying market stands in *the streets*, or selling produce therein. Such a power must be plainly conferred or it will not be held to exist.[1]

§ 389 (322). **Power to Regulate is a Police Power.** — The right *to regulate markets* established by a city under its charter is one of municipal police. The city authorities may, if their action be not unreasonable, provide what articles shall or shall not be sold at the public markets, and may impose penalties on those who violate their ordinances. They may, for example, prohibit groceries and oysters from being sold at the public markets, and require oysters, which have a great tendency to putrefaction, to be sold at certain designated stands, and prevent their being sold elsewhere.[2]

§ 390 (323). **Inspection Ordinances.** — A municipal corporation, says Mr. Willcock, may regulate the manner of carrying on trade within a municipality so far as to prevent monopolies or the sale of unfit commodities, and to ensure proper conduct in those who

affirmed by the same court in Commonwealth *v.* Rice, 9 Met. (Mass.) 253 (1845). See this case also as to requisites in certain respects of complaints for the violation of such an ordinance, and as to what acts will be deemed to be violations.

In *Louisiana*, on the other hand, an ordinance imposing a tax upon every load of supplies carried to the public markets by persons not occupying stalls in the markets, was held to be void as being a tax for revenue and not in the exercise of the police power. State *v.* Blaser, 36 La. An. 363. See *supra*, sec. 319, note; Shelton *v.* Mayor, &c., of Mobile, 30 Ala. 540 (1857); Wartman *v.* Philadelphia, 33 Pa. St. 202 (1854). An ordinance forbade the sale of fresh meats except by persons licensed, but contained a proviso in favor of *farmers*, authorizing them to sell meats, the *produce of their own farms*. The evident object was considered to be to protect *licensed butchers*, and at the same time to allow farmers to come in and sell the produce of their own farms. It was held that an unlicensed *butcher* was not a "*farmer*" within the meaning of the *proviso*, although the meats which he sold came from sheep fattened on his farm, if the farm was only a convenient appendage to his business as a butcher. Rochester *v.* Pettinger, 17 Wend. (N. Y.) 265 (1837); St. Paul *v.* Traeger, 25 Minn. 248 (1878), cited *supra*, sec. 386, note.

[1] Kip *v.* Paterson, 2 Dutch. (N. J.) 298 (1857). This power, it was said, would authorize "the renting of stalls in the market-house, and perhaps of even prohibiting sales in the public streets." *Ib. per Elmer*, J.

[2] Municipality *v.* Cutting, 4 La An. 335 (1849); Morano *v.* New Orleans, 2 La. 217. Power of city to vacate leases and stalls in public market, under ordinance reserving the right, see City Council *v.* Goldsmith, 2 Speers (S. C.) Law, 428. Occupant of city market failing to pay rent in advance, according to contract, held a tenant *at will*. Dubuque *v.* Miller, 11 Iowa, 583. Control over tenants. Woelpper *v.* Philadelphia, 38 Pa. St. 203.

practise it within their jurisdiction.[1] In general, it may be said that incorporated cities and larger towns in this country have conferred upon them the power to pass ordinances regulating, to a reasonable extent, the mode in which the traffic of the place shall be conducted; but they can exercise no powers in this respect not conferred.[2] Laws requiring articles to be inspected or weighed and measured before being sold are in the nature of police regulations, and are valid in the absence of special constitutional provisions. When reasonable in their nature, they are not regarded as being in restraint of trade.[3]

[1] Willc. Corp. 142, pl. 332.

[2] Nightingale, *In re*, 11 Pick. (Mass.) 168; Stokes *v.* New York, 14 Wend. (N. Y.) 87; Raleigh *v.* Sorrell, 1 Jones (N. C.) Law, 49; Chicago *v.* Quimby, 38 Ill. 274 (1858); Howe *v.* Norris, 12 Allen (Mass.), 82; Libby *v.* Downey, 5 Allen (Mass.), 299; Collins *v.* Louisville, 2 B. Mon. (Ky.), 134 (1841). Power to appoint measurers of wood, and affix a reasonable allowance to them, does not justify the imposition of a tax for revenue. *Ib.* The legislature created a board of *railroad and warehouse commissioners* composed of three persons, appointed by the governor and confirmed by the senate for the term of two years, and empowered them to fix the rate of charges for the inspection of grain in cities. The court sustained this legislation. It regarded the board as a *quasi* public corporation, and held that it was competent for the legislature to delegate the power of inspection to it, instead of to the corporate authorities of the city of Chicago, and that the official bond of such inspector was a valid obligation against him and his sureties. People *v.* Harper, 91 Ill. 357 (1878), distinguishing it from People *v.* Salomon, 51 Ill. 50, and other cases holding, under the Constitution of Illinois, that local and municipal taxation can only be imposed by the local "corporate authorities."

[3] Cooley Const. Lim. 596; Raleigh *v.* Sorrell, *supra;* Stokes *v.* New York, *supra;* Paige *v.* Fazackerly, 36 Barb. (N. Y.) 392; Mayor, &c. of New York *v.* Nichols, 4 Hill (N. Y.), 209 (1843); compare Mayor *v.* Hyatt, 3 E. D. Smith (N. Y.), 156; Rogers *v.* Jones, 1 Wend. (N. Y.) 237; Yates *v.* Milwaukee, 12 Wis. 673. The system of *inspection laws*, and the hosts of officers which they engendered, were considered by the constitutional convention of *New York* to entail annoyances and burdens upon the community sufficient to outweigh any benefits resulting from them; and the Constitution of 1846 (art. V. sec. viii.) abolished all such offices and forbade the legislature to re-create them, in this language: "All offices for the weighing, measuring, culling, or inspecting of any merchandise, produce, manufacture, or commodity whatever, are hereby abolished, and no such offices shall hereafter be created by law." See Tinkham *v.* Tapscott, 17 N. Y. 144, 147 (1858), where the origin, scope, and purpose of this provision are very satisfactorily discussed by *Denio*, J. In *Illinois* it is held that inspection power conferred upon a board of trade, to be exercised when requested by its members, may co-exist with like power in the city authorities, to be exercised in all cases when requested. Chicago *v.* Quimby, 38 Ill. 274 (1858).

The following cases are referred to as showing the solicitude of the law to preserve the public health; but in this country the power of municipal corporations in this respect depends on their charters or other legislative provision.

Knowingly to expose for sale in a public market meat which is not fit for human food is indictable. Regina *v.* Stevenson, 3 F. & F. 106. So knowingly taking unfit meat to public market for sale. The Queen *v.* Jarvis, 3 F. & F. 108. But in either event the knowledge of the unfitness of the food is essential to the creation

§ 391 (324). **Weighing.** — Power to a city "to regulate the public market, and to pass such other ordinances as shall seem meet for the improvement and good government of the city," authorizes an ordinance *requiring oats, hay, &c., to be weighed by the public weighmaster* before being offered for sale, and imposing a penalty for its violation.[1]

§ 392 (325). **Same subject.** — A grant to the common council of "all powers, rights, &c., incident to municipal corporations and necessary to the proper government of the same," might authorize a city to *prevent the sale of bread made out of unwholesome flour*, and, as a consequence, to provide for its inspection, but it would not give the power to regulate the assize, that is, the weight and price of bread, for the latter is a power not absolutely necessary for the proper government of a city. Power, however, to a city, "to regulate everything which relates to bakers," does authorize an ordinance regulating the weight, size, and, it seems, the price, of bread, and the forfeiture of bread illegally baked; and such an ordinance, it has been held, is not in violation of any provision of the Constitution of Louisiana.[2]

§ 393 (326). **Police Regulations respecting the Public Peace and Safety; Use of Streets.** — Our city governments usually possess the

of the offence. Regina *v.* Crawley, 3 F. & F. 109. The offence is a nuisance at common law. Shillito *v.* Thompson, L. R. 1 Q. B. Div. 12. Each single act of exposure of tainted meat is a distinct offence. Hartley, *In re*, 31 L. J. M. C. 232. A salesman who sells in a public market meat which is afterwards found to be unfit for human food, but which he has no means of knowing or reason to suspect was other than good and wholesome meat, is not liable to an action upon an implied warranty or for money had and received. Emmerton *v.* Mathews, 7 H. & N. 586; but a person who sends animals destined for human food to a public market for sale impliedly represents that they are, so far as he knows, not infected with any contagious disease dangerous to life or health.

[1] Raleigh *v.* Sorrell, 1 Jones (N. C.) Law, 49 (1853); approving Nightingale's Case, 11 Pick. (Mass.) 168; Stokes *v.* Corporation of New York, 14 Wend. (N. Y.) 87. This power was also held to authorize the creation of the office of weighmaster and the payment of his salary. 1 Jones, 49, *supra*. Construction of ordinance as to weighing hay on public scales. Gass *v.* Greenville, 4 Sneed (Tenn.), 62; Yates *v.* Milwaukee, 12 Wis. 752. Construction of statute as to mode of measuring grain. Frazier *v.* Warfield, 13 Md. 279. Of ordinance as to survey of lumber before sale. Briggs *v.* Boat, 7 Allen (Mass.), 287. An ordinance requiring that every person selling meat or articles of provision by retail, whether by weight, count, or measure, should provide himself with scales, weights, and measures, but that no spring balance, spring scale, spring steelyards, or spring weighing machine should be used for any market purpose, was held valid. Snell and Belleville, *In re*, 30 Upper Can. Q. B. 81.

[2] Guillotte *v.* New Orleans, 12 La. An. 432 (1857); Paige *v.* Fazackerly, 36 Barb. (N. Y.) 392. But as to forfeiture, *quære*, in absence of express power, and see Phillips *v.* Allen, 41 Pa. St. 481; Mobile *v.* Yuille, 3 Ala. 139.

power, either by express grant or by virtue of their authority, to make by-laws relating to the public safety and good order of the inhabitants, to regulate the rate of *speed of travel in the public streets;* the route or streets over which omnibuses, stage coaches, drays, &c., may run; the time of day in which the streets may be used for certain purposes; to interdict stoppages in the street to the delay of others; to exclude vehicles of all kinds from entering upon or passing over the sidewalks, &c. The public safety and convenience may require regulations of this character; but they must not, unless made by virtue of specific authority, be unreasonable or improperly in restraint of trade.[1] Power to make by-

[1] Commonwealth *v.* Stodder, 2 Cush. (Mass.) 562 (1848), where the subject of the power of cities over streets, particularly in reference to omnibuses, is fully considered by Mr. Justice *Dewey;* Commonwealth *v.* Robertson, 5 Cush. (Mass.) 438 (1850), as to stoppages in streets contrary to ordinance; Baker *v.* City of Boston, 12 Pick. (Mass.) 184 (1831); Vanderbilt *v.* Adams, 7 Cow. (N. Y.) 349; *Ib.* 385; Austin *v.* Murray, 16 Pick. (Mass.) 126; St. Paul *v.* Smith, 27 Minn. 364. A regulation or ordinance *prohibiting the stoppage of vehicles* in a public street for a longer time than twenty minutes is a valid police regulation. Commonwealth *v.* Brooks, 109 Mass. 355; Commonwealth *v.* Fenton, 139 Mass. 195. The license of a hawker or peddler does not authorize him to violate such an ordinance. Commonwealth *v.* Fenton, *supra;* Commonwealth *v.* Lagorio, 141 Mass. 81. Power to a city "to *regulate* the *running* of railroad cars" authorizes the adoption of an ordinance prohibiting the propulsion of cars by *steam* within the corporate limits. Buffalo & N. F. R. Co. *v.* Buffalo, 5 Hill (N. Y.), 209 (1843).

Power to the city of Richmond to make "ordinances, not contrary to the Constitution and laws of the State, as shall be thought necessary for the good ordering and government" of its inhabitants, was considered by the Supreme Court of the United States to imply the power to ordain and establish suitable police regulations, and that includes the power *to prohibit the use of locomotive engines propelled by steam* on the public streets, when such action does not interfere with any vested rights; and legislative authority to a specified railway company to construct its road "from some point within the corporation of Richmond to be approved by the common council," does not give it a vested right to the use of a particular street free from municipal control, when the city, in consenting to such use, reserved its chartered powers in that behalf. Richmond, F. & P. R. Co. *v.* Richmond, 96 U. S. 521 (1877). Special charter construed to authorize an ordinance for filling a street, although it is covered by a plank road laid under special legislative authority. State *v.* Jersey City, 2 Dutch. (N. J.) 444; *post*, chapter on Streets, sec. 713. In Napman *v.* People, 19 Mich. 352 (1869), a lawful arrangement between a railroad company and an omnibus company as to the delivery of passengers was held to be beyond municipal interference. Cities having exclusive control of streets may take such precautions as are necessary for the safety of their inhabitants in the use of them, as by *erecting gates at railroad crossings* or by permitting the railroad company to erect them. Textor *v.* Baltimore & O. R. R. Co., 59 Md. 63.

Charter power to a municipal corporation to require railroad companies *to fence their respective railroads* within the municipal limits, *to keep flagmen* at street *crossings*, and *to provide protection* against injury to persons and property in the use of such railroads, confers plenary police powers over railroads within the corporate limits to provide protection against injuries to person and property; and the grant of a right of way to a railroad company by

laws for "the good rule and government" of the borough (*ante*, sec. 337), has reference to the government of the borough as a corporation, and the making of regulations for carrying into effect the purposes for which it was incorporated. (*Post*, sec. 408.) General powers of this character, without more, do not enable a town council to carry out any unreasonable ideas of general good government, and to impose penalties for the doing of things which are not prohibited by any public statute, nor by the common law.[1]

§ 394 (327). **Same subject. Salutary By-Laws.** — Under a general power to make "needful and salutary by-laws," a city ordinance of Boston, requiring the tenant or occupant, or, in case there shall be no tenant, the owners of buildings bordering on *certain streets, to clear the snow from the sidewalks adjoining their respective buildings*, is reasonable and valid. It was objected against this ordinance that it violated the fundamental maxim that all burdens and

an ordinance which provides that the company shall erect suitable fences, &c., is not a mere contract, but is an exercise of the right of municipal legislation, and as such has the force of law within the corporate limits. Hayes *v.* Michigan Central R. R. Co., 111 U. S. 228 (1883). The duty thus devolved on the railroad is one due, not to the city as a municipal body, but to the public considered as composed of individuals, and each person specially injured by breach of the obligation is entitled to his individual compensation, and to an action for its recovery. *Ib.* and cases cited.

A by-law prohibiting *rapid driving in the streets of a city* by carters and others is not in restraint of trade, and is reasonable and valid; and in a prosecution for its violation, it is not necessary to prove that any individual was actually endangered by the fast driving. As the mayor and aldermen have no authority to give a person permission to violate an ordinance, evidence of such permission, as well as evidence of the defendant's general character as a careful driver, is inadmissible. Commonwealth *v.* Worcester, 3 Pick. (Mass.) 462 (1826); Commonwealth *v.* Stodder, 2 Cush. (Mass.) 562, 570 (1848); Washington *v.* Nashville, 1 Swan (Tenn.), 177. Commented on. McBean *v.* Chandler, 9 Heisk. (Tenn.) 349 (1872); *post*, chapter on Streets, sec. 713. Where an intent to injure is not made an essential ingredient of the offence of rapid driving under the ordinance the intent necessary to a criminal assault and battery is not supplied by a mere intent to violate the ordinance. Commonwealth *v.* Adams, 114 Mass. 323; s. c. 19 Am. Rep. 362.

An ordinance prohibiting "night-walking" is not "class legislation" but a proper police regulation. Braddy *v.* Milledgeville, 74 Ga. 516.

There is no obligation, in the absence of a valid municipal by-law or statute, on the part of people to keep *roofs clear of snow*, or to detain the snow so that it cannot slide into the street, though there may be, it seems, such a faulty construction of roof as, on proof thereof, would involve a liability on the part of the owner or occupier for accidents. Lazarus *v.* Toronto, 19 Upper Can. Q. B. 13, *per Robinson*, C. J. Power to local board to provide for the removal of "dirt, ashes, rubbish, filth, dung, and soil" does not authorize a by-law for the removal of snow. Reg. *v.* Wood, 5 E. & B. 49. *Infra*, sec. 394, note. See *post*, chap. xxiii.

[1] Addison on Torts, 34; Rex . Westwood, 4 B. & C. 781; Reg. *v.* Wood, 5 Ell. & Bl. 55; *post*, secs. 396, 408.

taxes laid upon the people for the public good shall be equal. The objection was overruled. And it was justly regarded by the court as in the nature of a police regulation, requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely built city, and imposed upon the persons named because they are so situated that they can promptly and conveniently perform it; and it is laid not upon a few, but upon a numerous class, and equally upon all who are within the description composing the class and who commonly derive a peculiar benefit from the duty required. It would doubtless be otherwise if the ordinance arbitrarily imposed this duty upon the mechanics or merchants, or any other class of citizens between whose convenience and the labor required there is no natural relation.[1]

§ 395 (328). **Same subject.** — The power to make "salutary by-laws" with respect to the use of streets, will, it seems, authorize a city to pass by-laws regulating the *removal of buildings* and the temporary use of the streets and highways for that purpose.[2]

§ 396 (329). **Ordinances under Police Power and General Welfare Clause.** — Other illustrations of what a municipal corporation may do *under the general welfare clause* in its organic act, or *under its police power* or its implied right to pass by-laws, or under a general grant of authority for that purpose, may be here given.

Under authority "to ordain and publish such acts, laws, and regulations, not inconsistent with the Constitution and laws of the

[1] Goddard, *In re*, 16 Pick. (Mass.) 504 (1835); Union Railway Co. *v.* Cambridge, 11 Allen (Mass.), 287; Kirby *v.* Boylston Market Assoc., 14 Gray (Mass.), 252; *post*, chap. xxiii., note and cases cited. The same power held to authorize an ordinance to prevent the placing of show boards and signs upon the side-walks so as to obstruct them, and also to prevent the carrying of placards and signs on the side-walk for the purpose of displaying them. As the tendency of this is to collect crowds and thus to interfere with the use of the side-walks by the public, such an ordinance is not unreasonable. Commonwealth *v.* McCafferty, 145 Mass. 384 (1888).

In *Illinois* it is held that a city has no power by ordinance to compel an abutter, under penalty, to remove the snow from the sidewalk within a certain time. He has no more interest in such removal than any other citizen. Gridley *v.* Bloomington, 88 Ill. 554; *supra*, sec. 393, note.

An ordinance requiring personal labor upon streets, or, in lieu thereof, payment of a specified sum, held valid; held also that labor so required is not "involuntary servitude" within the meaning of the Constitution of Kansas or of the United States. *In re* Dassler, 35 Kan. 678.

[2] Day *v.* Green, 4 Cush. (Mass.) 433, 437, *per Shaw*, C. J. And where such a by-law prohibits the moving without a license granted by the mayor *and aldermen*, a license granted by the mayor is void, even though the board of aldermen, by a vote, had previously undertaken to delegate the power to grant such license to the mayor alone. The by-law contemplates that the mayor and aldermen should act unitedly as one body. *Ib.*

State, as shall be needful to the *good order* of the city," it can, says Howard, J., "subject to these restrictions and certain statute regulations, establish all suitable ordinances for administering the government of the city, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits, and for the performance of the general duties required by law of municipal corporations." [1]

§ 397 (330). **Same subject. Observance of the Sabbath.** — Power to pass such ordinances "to maintain the peace, good government, and order of the city, and the trade, commerce, and manufactures thereof, as the council may deem expedient, not repugnant to the Constitution and laws of the State," authorizes an ordinance prohibiting the *keeping open of stores, shops, and places of business on Sunday*, if its provisions do not conflict with State legislation.[2] But

[1] *Per Howard*, J., State *v.* Merrill, 37 Me. (2 Heath) 329 (1853). Such would undoubtedly be the proper construction if this were the only power given to the city to pass ordinances or by-laws. It should then be somewhat liberally construed. But if such a general grant is given in connection with, or at the end of, a long list of specific powers, perhaps so extended a construction might not then be due to it. The power conferred by the general welfare clause is restricted by reference to other provisions of the charter or constituent act. Montgomery City Council *v.* Montgomery & W. Pl. R. Co., 31 Ala. 76 (1857); Mount Pleasant *v.* Breeze, 11 Iowa, 399, 400 (1860), *per Wright*, J. Under the general welfare clause a city may require sellers of meat, &c., to take out licenses. Kinsley *v.* Chicago, 124 Ill. 359 (1888). The general welfare clause has been held to confer power to prevent the keeping of *bawdy-houses*. State *v.* Williams, 11 S. C. 288. See *ante*, secs. 376, 393; *post*, secs. 432–436.

A city government under the usual grants of power has the general authority to so regulate the use and enjoyment of private property in the city as to prevent its proving pernicious to the citizens generally, and may, when the use to which the owner devotes his property becomes a *nuisance*, compel him to cease so to use it, and punish him for refusing to obey its ordinances and regulations concerning such use. Louisville City Railway Co. *v.* Louisville, 8 Bush (Ky.), 415 (1871).

The statute of *California*, authorizing supervisors of San Francisco "to make all regulations which may be necessary or expedient for the preservation of the public health," is within the constitutional power of the legislature to enact; and under it the supervisors may pass an ordinance against *feeding cows on distillery slops*, and vending the milk of cows thus fed. Johnson *v.* Simonton, 43 Cal. 242 (1872); *ante*, secs. 141, 144, 369, 374, 379.

A common council has power to adopt a penal ordinance requiring auctioneers to procure licenses from the city. This power is in the nature of a police regulation. Goshen *v.* Kern, 63 Ind. 468; Kinsley *v.* Chicago, 124 Ill. 359 (1888). See further, Index, title *License*.

[2] St. Louis *v.* Cafferata, 24 Mo. 94 (1856); see State *v.* Cowan, 29 Mo. 330; State *v.* Ambs (constitutionality of Sunday laws affirmed), 20 Mo. 214; s. p. Frolickstein *v.* Mobile, 40 Ala. 725 (1367); Hudson *v.* Geary, 4 R. I. 485 (1857); Specht *v.* Commonwealth, 8 Pa. St. 312; Cincinnati *v.* Rice, 15 Ohio, 225; Karwisch *v.* Atlanta, 44 Ga. 204 (1871); McPherson *v.* Chebanse, 114 Ill. 46. In the case of the City Council *v.* Benjamin, 2 Strob. (S. C.) Law, 508 (1846), it was decided by the Court of Appeals of *South Carolina* that an ordinance of the city of Charleston, prohibiting "public exposures for sales,

the general welfare clause does not authorize a city to construct, or aid in constructing, a *plank road or toll bridge* built by a private company beyond the corporate limits of the city.[1]

§ 398 (331). **Limitation of Power under the General Welfare Clause.** — The general welfare clause to pass ordinances for the good government, &c., of the corporation does not authorize an ordinance requiring the *proprietor of a theatre*, circus, or other exhibition licensed by the corporation, *to pay a peace or police officer* of the place two dollars, or any sum, for each night's attendance upon such place for the purpose of enforcing order. Such an ordinance is unreasonable, and can only be passed when clearly authorized.[2] Under such a clause an ordinance subjecting to a fine "any person whose known character is that of a prostitute," was held to be unlawful.[3]

§ 399 (332). **Good Order Clause; Trees in Streets.** — Where a city corporation is authorized "to ordain such laws not inconsistent with the Constitution and laws of the State as shall be needful to the *good order* of the city," it may pass an ordinance imposing a penalty upon any person who shall "mutilate or *destroy any ornamental tree planted in any of the streets*, lanes, or other public places within the limits of the city." Such an ordinance is not inconsistent with a State law punishing the *malicious* or *wanton* destruction of trees

or sales of merchandise, on Sunday," was not a violation of that section of the State Constitution which declares that "the free exercise and enjoyment of religious profession or worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind." In that case the defendant was a Jew, and the city was not denied to be possessed of all the power on the subject which the legislature could constitutionally bestow. In the case of Columbia *v.* Duke and Marks, cited 2 Strob. 530, and approved, a similar decision was made at *nisi prius* by Mr. Justice *Martin*. And in this last case it was further ruled, that power in the charter to "establish such by-laws as may tend to the quiet, peace, safety, and good order of the inhabitants," authorized the passage of such an ordinance. Under "full power to pass such ordinances as the city council shall deem expedient for the government of the city, not contrary to the Constitution of the State or the United States," a city may prohibit, within its limits, the sale of liquor on Sunday. Megowan *v.* Commonwealth, 2 Met. (Ky.) 3 (1859); State *v.* Welch, 36 Conn. 215 (1869). In Shreveport (city of) *v.* Levy, 26 La. An. 671 (1874); s. c. 21 Am. Rep. 553, an ordinance forbidding the sale of goods on Sunday, but excepting those persons keeping their places closed on Saturday, was held to be unconstitutional as giving to Jews a privilege denied to others. Power to make rules for the good order and public peace of a city held to imply power *to appoint policemen*. State *v.* Sims, 16 S. C. 486. A mere power to "secure the health, peace, and improvement of the city" held not to authorize an ordinance prohibiting the keeping open of stores on Sunday. Corvallis *v.* Carlile, 10 Oreg. 139.

[1] Montgomery City Council *v.* Montgomery & W. Pl. R. Co., 31 Ala. 76 (1857); *ante*, sec. 161.

[2] Waters *v.* Leech, 3 Ark. 110 (1840); *supra*, sec. 319; *post*, sec. 663.

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

growing for ornament or use. Under the ordinance it is not necessary to allege or prove that the mutilation was malicious or wanton, and it would seem to be considered that it was no defence that the tree alleged to be mutilated was upon the street in front of the lot of the accused, who owned, subject to the public easement, *ad medium filum viæ*.[1]

§ 400 (333). **Regulation of Saloons, &c., under General Welfare Clause.** — Under a general power to pass "any other by-laws for the well-being of the city," its council may, by ordinance, prohibit saloons, restaurants, and other places of public entertainment, to be *kept open after ten o'clock at night*. The objections that such a by-law was unreasonable, and deprived the citizen of the constitutional right of "acquiring property," were not considered to be well taken. It regulates, but does not deprive the party of his rights.[2] Under similar powers an ordinance confining the carrying on of the laundry business to a certain portion of a city, is a police regulation and reasonable.[3]

§ 401 (334). **Powers under Authority to regulate the Police.** — Power "to regulate the police of the city," and to pass ordinances not inconsistent with law, authorizes an ordinance for *arresting and fining vagrants*, although, by the general law of the State, vagrants may be proceeded against before a justice of the peace, the court considering that this did not forbid the corporation to make a local regulation on the same subject not in conflict with the general law.[4]

[1] State *v.* Merrill, 37 Me. (2 Heath) 329 (1853). *Contra*, as to right of adjoining owner. Lancaster *v.* Richardson, 4 Lansing (N. Y.), 136 (1871); see *post*, sec. 663, note. The case in *Maine* is a quite liberal construction of the words "*good order*." But it is necessary that cities should have such an authority, and the power to pass the ordinance could, perhaps, be sustained as incidental to the power of the city over its streets and public places. *Post*, chapter on Streets. Further as to shade trees. *Post*, sec. 663, note.

[2] The State *v.* Freeman, 38 N. H. 426 (1859); following and approving on this point, State *v.* Clark, 8 Fost. (28 N. H.) 176; Morris *v.* Rome City Council, 10 Ga. 532; Hudson *v.* Geary, 4 R. I. 485. "It is an unavoidable consequence of city ordinances, that they in some degree interfere with the unlimited exercise of private rights." *Per Bell*, J., in State *v.* Freeman, 38 N. H. 428; State *v.* Welch, 36 Conn. 215 (1869). In further support of text, Platteville *v.* Bell, 43 Wis. 488 (1878); Staats *v.* Washington, 45 N. J. L. (16 Vroom) 318; Staates *v.* Washington, 44 N. J. L. (15 Vroom) 605.

[3] Matter of Hang Kie, 69 Cal. 149; see Index, tit. *Laundry*.

[4] St. Louis *v.* Bentz, 11 Mo. 61 (1857); distinguished from Jefferson City *v.* Courtmire, 9 Mo. 692, which was a summary proceeding for an *indictable* offence. See State *v.* Cowan, 29 Mo. 330; St. Louis *v.* Schoenbush, (Mo.) 8 S. W. Rep. 791; s. c. 95 Mo. 618 (1888); Byers *v.* Commonwealth, 42 Pa. St. 89, *per Strong*, J.; Shafer *v.* Mumma, 17 Md. 331 (1861); *supra*, sec. 440; *post*, sec. 427, note.

§ 402 (335). **Same subject.** — By virtue of its police power a municipal corporation may pass an ordinance imposing a fine upon the owner of any *animal found astray* or *at large* within the limits of the corporation.[1]

§ 403 (336). **Power under Authority to preserve Good Order, &c.** — If a municipal corporation has, by its charter, power to pass ordinances to preserve the peace and good order of the place, this gives it authority to provide for the punishment, in the manner allowed by its charter, of persons who shall rescue, or attempt to *rescue prisoners* from the lawful custody of municipal officers.[2] But the general power, though expressly conferred, to enact by-laws for the good government of the town, does not confer the power to *levy taxes* of any kind, not even upon retailers of ardent spirits.[3]

A *statute* by which "two or more overseers of the town" were authorized to commit to the workhouse, until discharged by law, by writing under their hands, to be there employed and governed according to the rules and orders of the house, &c., "all persons, able of body to work, and not having estate or means otherwise to maintain themselves, who refuse or neglect to do so, live a dissolute, vagrant life, and exercise no ordinary calling or lawful business sufficient to gain an honest livelihood," does not violate the constitutional right to "life and liberty," or the right, in "criminal proceedings, to be heard by counsel, confronted with witnesses," &c. The court did not regard it as a criminal proceeding, but as a reformatory or correctional one, so far as the person proceeded against was concerned, and designed to protect the community from becoming chargeable with the person's support. Nott's Case, 11 Me. (2 Fairf.) 208 (1834); s. p. Portland *v.* Bangor, 42 Me. 403 (1856), *Rice*, J., dissenting. It is now admitted by the Supreme Court of *Maine* that this statute is in conflict with the 14th amendment of the Constitution, "That no State shall deprive any person of life, *liberty*," &c., "without due process of law," and that Nott's Case and Portland *v.* Bangor, *supra*, are no longer the law. Now there can be no restraint of liberty without first having a judicial investigation of the charge. Portland *v.* Bangor, 65 Me. 120 (1876); s. c. 20 Am. Rep. 681. See Byers *v.* Commonwealth, 42 Pa. St. 89; *post*, sec. 427, note, sec. 433. In a late case in *Illinois*, the Supreme Court of that State decided that the act creating the Reform School was unconstitutional, and that the act, so far as it restrained liberty for any cause except actual crime, was in violation of the Bill of Rights. People *v.* Turner, 10 Am. Law Reg. (N. S.) 366, and approving note of Judge *Redfield*; s. c. 55 Ill. 280; People *v.* Weissenbach (power to bind out children), 60 N. Y. 385.

[1] Municipality *v.* Blanc, 1 La. An. 385 (1846); Case *v.* Hall, 21 Ill. 632; Commonwealth *v.* Bean, 14 Gray (Mass.), 52; Commonwealth *v.* Curtis, 9 Allen (Mass.), 266; Roberts *v.* Ogle, 30 Ill. 459; McKee *v.* McKee, 8 B. Mon. (Ky.) 433 (1848); Waco *v.* Powell (hogs at large), 32 Texas, 258 (1869); Cartersville *v.* Lanham, 67 Ga. 753; *ante*, sec. 321, note; *supra*, sec. 348. Construction of ordinance prohibiting the *suffering* of animals to run at large, and what must be shown to subject a person to liability under such an ordinance. Collinsville *v.* Scanland, 58 Ill. 221 (1871); Kinder *v.* Gillespie, 63 Ill. 88 (1872).

[2] Independence *v.* Moore, 32 Mo. 392 (1862); St. Louis *v.* Schoenbush, 95 Mo. 618 (1888).

[3] Comm'rs of Ashville *v.* Means, 7 Ire. (N. C. Law) 406 (1847); Burnett, *In re*, 30 Ala. 461 (1857); *post*, chap. xix.