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.

§ 404 (337). **General Welfare Clause continued.** — The general welfare clause, in a charter empowering the city council to pass such other ordinances as appear necessary for the *security* of the city, authorizes an ordinance regulating the *mode of keeping and the sale of gunpowder*, within the limits of the corporation, such as requiring all gunpowder brought into the city to be conveyed to the public magazine of the city, except when it is to be retailed, and then to be kept in limited quantities and in secure canisters. And it was so held, notwithstanding the point was made in argument that the general welfare clause in the charter could not enlarge the powers of the corporation further than is necessary to carry into effect the specific grants of power.[1]

§ 405 (338). **Public Safety; Fire Limits.** — Municipal corporations, with general power to provide for the safety of their inhabitants, may prohibit the throwing of heavy or *dangerous articles* from the upper stories of buildings *into the streets* or open spaces near them, where persons are in the habit of passing; and may, where this is consistent with the general and special legislation applicable to the municipality, establish *fire limits*, and prevent erection therein of *wooden buildings*.[2]

[1] Williams *v.* Augusta City Council, 4 Ga. 509 (1848); Frederick *v.* Augusta City Council, 5 Ga. 561, where the charter of Augusta is more fully given.

In *California* it has been held that, under such a power, a municipality may prohibit the carrying on of a laundry within the city limits in any building not constructed of brick or stone. Matter of Yick Wo, 68 Cal. 294; and in *Missouri* a city may, under the general welfare clause, prohibit *cruelty to animals*. St. Louis *v.* Schoenbusch, 95 Mo. 618 (1888).

[2] City Council *v.* Elford, 1 McMullan, (S. C.), Law, 234 (1841); Brady *v.* N. W. Insurance Co., 11 Mich. 425; Douglass *v.* Commonwealth, 2 Rawle (Pa.), 262; Wadleigh *v.* Gilman, 12 Me. 403; Vanderbilt *v.* Adams, 7 Cow. (N. Y.) 349, 352, *per Woodruff*, J., *arguendo*. Charleston *v.* Reed, 27 W. Va. 681, quoting text; King *v.* Davenport, 98 Ill. 305; Baumgartner *v.* Hasty, 100 Ind. 575; Klingler *v.* Bickel, 117 Pa. St. 326; Knoxville *v.* Bird, 12 Lea, 121; holding also that the exercise of this power does not "impair the obligation of a contract," where a contract to build was made before the passage of the ordinance. In Pye *v.* Peterson, 45 Tex. 312 (1876); s. c. 23 Am. Rep. 608, the conclusion was reached in view of the legislation of the State that a general grant of power to a city "to ordain such ordinances, not inconsistent with the laws of the State, as shall be needful for the government, interests, welfare, and good order of the corporation," did not authorize the city to establish fire limits and to prevent the erection of wooden buildings within such limits. The text is referred to, and it is admitted that it is supported by Wadleigh *v.* Gilman, and, on the other hand, the Mayor of Hudson *v.* Thorne is considered as opposed to it. Of course the question in each case must be decided in view of all the legislation of the State bearing upon it. The text in this edition has been slightly modified. The prevention of fires in towns and cities is peculiarly a matter for local regulation, and is universally so regarded. *Ante*, secs. 141, 143. It belongs to the ordinary police powers of a city; and unless such a course is inconsistent with the legislation of the State touching the subject (as Mr. Justice *Gould* shows it to have been in *Texas*), it seems to us to be presumptively authorized by a general grant of power to provide for the safety and welfare of the inhabitants.

A power *to establish fire limits should be strictly construed* in favor of the owners of buildings which are subject to be removed. Louisville *v.* Webster, 108 Ill. 414.

An ordinance establishing fire limits is not in violation of the *Fourteenth Amendment* to the United States Constitution; nor is it oppressive, unreasonable, or special in its operation; it is not an unwarrantable delegation of power to municipal officers. *Ex parte* Fiske, 72 Cal. 125. An ordinance prohibiting the erection of wooden buildings within prescribed limits does not violate either the Constitution of Pennsylvania or the Fourteenth Amendment to the Constitution of the United States. Klingler *v.* Bickel, 117 Pa. St. 326. In an action of trespass the officers of a city may justify the demolition of a wooden building in course of construction in violation of the ordinance. *Ibid.*, distinguishing Fields *v.* Stokley, 99 Pa. St. 306.

A court of equity *will not enjoin the erection of a wooden building* within the fire limits although such erection is forbidden by ordinance. St. Johns (village of) *v.* McFarlan, 33 Mich. 72 (1875); s. c. 20 Am. Rep. 671. *Marston*, J. says: "A court of chancery has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done, if carried out, will be a nuisance. . . . If a proper ordinance was framed with an appropriate penalty, we think the remedy at law would be found adequate." Compare City Council *v.* Louisville &c. R. R. Co. (Ala.), 4 Southern Rep. 626; see Forcheimer *v.* Port of Mobile (Ala.), *Ib.* 112.

*Whether the municipality may resort to equity to aid it in enforcing its public duties:* Equity will not enjoin, at the instance of the municipality itself, even where the ordinance directs such a suit to be brought against any person about to erect a wooden building contrary to its provisions. Waupun *v.* Moore, 34 Wis. 450 (1874); s. c. 17 Am. Rep. 446. *Lyon*, J., says that "equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation, restraining an act, unless the act is shown to be a nuisance *per se*. High on Injunc. sec. 788; Hudson *v.* Thorne, 7 Paige, 261; Phillips *v.* Allen, 41 Pa. St. 481."

In *Massachusetts*, on the other hand, a city or town is held entitled to maintain a bill in equity to prevent the carrying on of trades or occupations therein which are intrinsically nuisances, contrary to the regulations which the town or city, by delegated authority from the legislature, is authorized to make. Winthrop *v.* Farrar (offensive trade), 11 Allen (Mass.), 398. So where a statute prohibited the use, in cities and towns of a specified size, of any building not then so in use, for carrying on the business of "slaughtering cattle," &c., without the permission of the municipal or town authorities, it was held that the act was constitutional as an exercise of the police power, and that the town or city might, in the *corporate name*, file a bill in equity to restrain the use of a building therein for the prohibited purpose, where the required consent of the local authorities had not been obtained. Watertown *v.* Mayo, 109 Mass. 305 (1872); s. c. 12 Am. Rep. 694. No solid reason, in the author's judgment, exists, why, in proper cases, a municipal corporation may not resort to a court of equity to aid it in enforcing its public duties to preserve the health and property of the inhabitants; and by proper cases is meant those which fall within some recognized head of equity jurisdiction. *Ante*, sec. 375, note.

In *Connecticut*, where the city charter authorized the common council of a city to make ordinances to protect a city from fire, and to establish districts within which it should not be lawful without a license to erect, enlarge, or place any wooden building, the council passed an ordinance establishing a fire district and



§ 406 (339). **Public Safety; Hoistways.** — Under authority to make police regulations, or to pass by-laws for the good rule and

government of the corporation, it has the *power to require hoistways inside of stores* (usually places of public resort) to be enclosed by a railing, and closed by a trap-door after business hours each day. It was justly regarded as a reasonable police regulation not unnecessarily interfering with private rights.[1]

forbidding the erection or placing of any wooden building therein, without license given by the board of aldermen, declaring that such building should be deemed a common nuisance, and making it the duty of certain officers after reasonable notice, to abate it; and it was held that the ordinance was fully authorized by the charter and was reasonable. Hine *v.* New Haven, 40 Conn. 478 (1873). In the case of a building erected without license within the fire limits of a city in violation of such an ordinance, it is not sufficient reason for the interference of a court of equity by injunction, at the instance of the owner, that he had obtained the consent individually of a majority of the aldermen, notice being given him that the board when in session might refuse its assent, as it afterwards did; nor that he had, after placing the building, covered it with a sheathing of iron and tinned the roof, before proceedings were instituted against him, and had by further work upon it during the pendency of the proceedings made it substantially fire-proof. The city authorities were considered by the court to be the proper judges as to how far these facts should affect their action. The court expressed the further view that the prompt enforcement of an ordinance establishing fire limits in a city is important to the public safety, and a court of equity ought not to interfere, in a case like that before the court, by injunction to prevent such enforcement, but leave the party aggrieved to his legal remedy, if he is entitled to any remedy. Nor was it a reason for the interference of chancery that the building erected in such fire limits had become real estate, since it had become so by the unlawful act of the owner, and was such only in the most technical sense, and the value of the building could be easily ascertained and proved. *Ib.* City enjoined at instance of owner from such an enforcement of fire limit ordinance as would violate the owner's legal rights. City Council *v.* Louisville &c. R. R. Co. (Ala.), 4 South Rep. 626. Compare Dunham *v.* New Britain (Conn.), 11 At. Rep. 354.

Where the ordinance passed under the authority above referred to provided that no person shall build or enlarge any building within the fire limits, without a license first issued by the fire marshal, for which *a license fee of fifty cents* was required to be paid, it was held that the license fee thus required was not a revenue tax, in any proper sense, but rather a reasonable sum collected of the party interested for the purpose of defraying in part the expense of issuing and recording the license, and that the power to require such a fee was conferred by the charter by intendment, as convenient, if not essential to full enjoyment of the powers expressly granted. Welch *v.* Hotchkiss, 39 Conn. 140 (1872).

As to *license fee*, see *ante*, secs, 357, 358; Kinsley *v.* Chicago, 124 Ill. 359 (1888), holding that a license fee may be exacted under a mere power to regulate a calling or business without express power of taxation. Such a fee is not illegal for being in excess of the necessary or probable expense of issuing the license and inspecting the business. In Chicago *v.* Phoenix Ins. Co., 126 Ill. 276 (1888), it was held that an ordinance prohibiting foreign insurance companies from doing business in a city, without taking out a license which called for the payment of two per cent of their gross receipts from business done in the city, was not sustainable as an exercise of the police power granted to the city by its charter. New Orleans *v.* Great South Tel. Co., 40 La. An. 41; State *v.* Hilbert (license fees on cars), 72 Wis. 184; s. c. 39 North West. Rep. 326. *Post*, chap. on Taxation.

Instance of a want of power to restrict erection of wooden buildings. Hudson *v.* Thorne, 7 Paige, 261; Pye *v.* Peterson, 4 Tex. 312; Alexander *v.* Greenville T. C., 54 Miss. 659; approving text. Cities may constitutionally be authorized to prevent the erection of *wooden buildings* in certain portions thereof. Respublica *v.* Duquet, 2 Yeates (Pa.), 493. In Wadleigh *v.* Gilman, *supra*, it was decided that the *removal* of a wooden building to the prohibited district, or even from one part of the district



§ 407 (340). **Preservation of Order.** — Power "to prevent disturbances and disorderly assemblages, and maintain the good government of the city," authorizes it to take measures *to preserve the peace* and to protect the lives and property of the citizens, and the acts of the city in procuring a loan of arms and giving a bond for their return are valid and binding upon it.[2] Authority to preserve the peace and quiet of the place authorizes an ordinance forbidding

to another, was an "erection" within the meaning of the term "*erection*," as used in the ordinance. "The mischief," says *Weston*, C. J., "did not consist in the act of erecting, but in the continuance of the erection. The ordinance did not meddle with erections as they stood; this would have transcended their power." Difference between "erecting" and "repairing." Brady *v.* N. W. Ins. Co., 11 Mich. 425, 449, opinion of *Campbell*, J.; City Council *v.* Louisville &c. R. Co. (Ala.), 4 South. Rep. 626; Carroll *v.* Lynchburg (Va.), 6 South East. Rep. 133; Brown *v.* Hunn, 27 Conn. 332; Booth *v.* State, 4 Conn. 65; Tuttle *v.* State, *Ib.* 68; Stewart *v.* Commonwealth, 10 Watts (Pa.), 306. Remedy against wrong-doer, by private action in favor of an adjoining owner specially injured by a violation of a statute in relation to the erection of wooden buildings. Aldrich *v.* Howard, 7 R. I. 199. See Index — *Fire*. *Ante*, sec. 109. A municipal corporation has inherent power, independent of legislative grant, to forbid the erection within the densely built up parts of a town, and compel the removal therefrom, of buildings formed of combustible materials. Monroe *v.* Hoffman, 29 La. An. 651. An ordinance prohibiting the *erection or enlargement* of any building except with brick or stone; that no wooden building should be enlarged without a permit from the local authorities, was sustained. McCloskey *v.* Kreling (Cal.), 18 Pac. Rep. 433 (1888). A municipality is under *no implied or common-law liability* in damages for a loss caused by a fire originating in a wooden building erected and maintained in known violation of an ordinance. Hines *v.* Charlotte (Mich.), 40 N. W. Rep. 333; *post*, chap. xxiii.

[1] Mayor, &c. of New York *v.* Williams, 15 N. Y. 502 (1859). *Johnson*, J., observes: "The danger is not confined to the owner and ordinary occupants of the building. The ordinance, in that respect, stands on the same footing as a regulation prohibiting a well or cistern in a man's yard unprotected by curb or cover, the reasonableness of which could not be doubted. In case of fire, these openings would tend directly and powerfully to allow the fire to extend through all parts of the building, and if left uncovered, would also tend to endanger those whom duty might require to enter to effect the extinguishment of the fire." *Paige*, J., considered the ordinance the same in principle as fire laws, prescribing the height, thickness of walls, and materials of buildings within the city.

[2] State *v.* Buffalo, 2 Hill (N. Y.), 434 (1842); New Orleans *v.* Costello, 14 La. An. 37. An ordinance against *disorderly conduct* has no reference to a simple trespass on a vacant lot, though committed in an attempt to assert an adverse right to the property. Mobile *v.* Barton, 47 Ala. 84 (1872). A municipal legislative body, empowered by law to prohibit or suppress practices against *good morals or public decency*, may, by ordinance, punish the utterance of *profane language*, whether uttered frequently or only once by the same person. The decision of the council that the use of profane language is against good morals will not be judicially reviewed. Delaney, *In re*, 43 Cal. 478 (1872).

"all *disorderly shouting, dancing,* &c., in the streets and public places," though such conduct violates no existing State law.[1]

*Mode of enforcing Ordinances.*

§ 408 (341). **In England; Civil Actions and Complaints.** — In the old corporations in England, by-laws were usually made in virtue of their implied power; they did not extend to matters criminal in their nature, and could only be enforced, unless by virtue of a statute or valid custom, by fines, or pecuniary penalties, commonly for a small sum, and always, or almost always, in a fixed or certain amount.[2] So, by the Municipal Corporations Act of 1835, the council are empowered to make such by-laws as to them shall seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not punishable by act of parliament in force in the borough, and to appoint such *fines* as they shall deem necessary for the prevention and suppression of such offences, with the proviso that no fines shall exceed the sum of five pounds.[3] The act provides that prosecutions for a breach of by-laws made under it shall be commenced within three months after the commission of the offence; that the charge shall be made on oath; that a summons shall issue and be served, with power to the magistrate to proceed without the appearance of the defendant, or to issue a warrant for his arrest; that if convicted, the penalty shall be paid, either immediately or within such period as the magistrate shall think fit; that it may be levied by distress and sale of the goods and chattels of the offender, and for want of sufficient distress the offender may be imprisoned for a term not exceeding one month; the imprisonment to cease upon payment of the sum due.[4] It is suggested that the remedy thus prescribed is cumulative, and will not debar the corporation from availing itself

[1] Washington *v.* Frank, 1 Jones (N. C.) Law, 436; State *v.* Debnam, 98 N. C. 712; State *v.* Cainan, 94 N. C. 880; construction of ordinance in respect to disturbing public peace. — *Charivari,* St. Charles *v.* Meyer, 58 Mo. 86. As to what regulations of this kind are necessary, "much," says the court, "must be left to the judgment and discretion" of the corporate authorities. Washington *v.* Frank, 1 Jones (N. C.) Law, 436; *ante,* sec. 319; State *v.* Bill, 13 Ire. (N. C. Law), 378; *post,* chap. xiii. Ordinance prohibiting the visiting of gambling houses held valid. Lane, *ex parte,* 76 Cal. 587; s. c. 18 Pac. Rep. 677.

[2] Gee *v.* Wilden, Lutw. 1320, 1324; Wood *v.* Searl, J. Bridg. 139; Piper *v.* Chappell, 14 M. & W. 624; Rawlinson on Corp. 665, note. *Post,* sec. 424 *et seq.* See *post,* chapter on Municipal Courts, sects. 426, 427, 432 *et seq.*

[3] 5 and 6 Wm. IV., chap. lxxvi., sec. 90. *Ante,* secs. 35, 336, 337, 393; *post,* sec. 426.

[4] 5 and 6 Wm. IV., chap. lxxvi., sec. 139; secs. 187–193; *supra,* sec. 266.



of the usual common-law mode of enforcing a by-law by action of debt or assumpsit.[1] But the point seems not to have been yet adjudged.

§ 409 (342). **Same subject.** — Aside from statutory regulation, the general method of enforcing a by-law in England is, as just stated, by bringing, in the name of the proper party or corporation, an action, in the proper court, against the person who has violated the by-law, to *recover the penalty* which it imposes; and this action may be either *debt or assumpsit.* By the common law, assumpsit may be maintained for the breach of any duty which the defendant has been legally liable to perform in favor of the plaintiff, the law implying a promise to perform the particular act, and hence no principle was violated in holding that assumpsit would lie to recover the penalty of a by-law. As the penalty was for a sum certain, and was considered to be in the nature of liquidated damages, an action of debt would also lie to recover the amount of the penalty; but where the by-law itself provided that the penalty should be recovered by debt, then that form of action alone could be maintained. But, aside from statute authority or a valid custom, it was not competent for the by-law to provide that its penalty should be recovered by "distress and sale" of goods, that being contrary to the common law.[2]

§ 410 (343). **Same subject. In America.** — In *this country,* the courts hold that where the *mode of enforcement is prescribed by the charter,* that mode must be pursued;[3] but if the *mode or form of*

[1] Rawlinson on Corp. (5th ed.) 167, note. See Adley *v.* Reeves, 2 Maule & Sel. 61; Bodwic *v.* Fennell, 1 Wils. 233. On the other hand, Mr. Grant is of opinion that the remedy prescribed by the act is exclusive, and supersedes the common-law remedy of debt or assumpsit for the amount of the fine or penalty. Grant on Corp. 364; *supra,* secs. 337, 341.

[2] Willc. 164–181; 1 Saund. Pl. & Ev. 683; 2 Wheat. Selw. 1178; 2 Chitty Pl. 401, where form of declaration in debt is given; Adley *v.* Reeves, 2 M. & S. 60. The law implies a promise on the part of a corporator to pay all penalties incurred for his violation of by-laws; and if the mode of enforcing such penalties is not pointed out, the corporation may sue therefor in any competent court. Columbia *v.* Harrison, 2 Mill Const. (S. C.) 213, *per Nott,* J.; Brookville *v.* Gagle, 73 Ind. 117; *supra,* secs. 336–346.

[3] Weeks *v.* Forman, 1 Harris. (N. J.) 237 (1837); State *v.* Zeigler, 3 Vroom (32 N. J. L.), 262; Ewbanks *v.* Ashley, 36 Ill. 177 (1864); Israel *v.* Jacksonville, 1 Scam. (2 Ill.) 290; Williamson *v.* Commonwealth, 4 B. Mon. (Ky.) 146, 151 (1843). An action may be brought for the fines and penalties incurred for the violation of ordinances, and it is not necessary that the fine be assessed before the suit is brought. King *v.* Jacksonville, 2 Scam. (3 Ill.) 306. In Weeks *v.* Foreman, 1 Harris. (N. J.) 237 (1837), it was held that although certain corporate officers were *ex-officio* justices of the peace within the city, with power to take cognizance of violations of by-laws, they could not entertain or try actions of *debt,* to recover a debt or penalty for a breach of

*action is not prescribed*, then the recovery of the penalty or fine for the violation of a valid municipal ordinance may be as at common law, by an action of debt or assumpsit, or where these forms are abrogated, by a *civil action* in substance the same.[1] And where such an action is brought, the proceeding is civil and not criminal, and the rules of procedure in civil cases, unless otherwise provided, are applicable to it.[2] The penalties to ordinances are often fixed upon a movable scale; and this would appear to be done under the supposition that they will be enforced, not by a common-law action in the common-law courts to recover the amount of the penalty, but by a complaint or proceeding before the proper municipal magistrate, who will, within the prescribed limits, determine the amount of the fine or penalty to be paid, by reference to the circumstances of the particular case.[3]

an ordinance, although it was conceded that they had jurisdiction of the *quasi* criminal proceeding founded upon a complaint or information, resulting in what is technically called a *conviction;* but *quære*. *Supra*, secs. 336–353.

[1] Ewbanks *v.* Ashley, 36 Ill. 178 (1864); Israel *v.* Jacksonville, 1 Scam. (2 Ill.) 290; Coates *v.* Mayor, 7 Cow. (N. Y.) 585, 608 (1827). Unless it is otherwise provided by statute or charter, it is considered that corporations have an inherent power to provide for the recovery of a penalty by an action of debt in their own courts. Hesketh *v.* Braddock, 3 Burr. 1858; Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253. Where a city, by ordinance, requires the taking out of licenses to carry on business, it has no right of action for the amount of such licenses before they are taken out, but is confined to enforcing the penalty for doing business without license. Santa Cruz *v.* Santa Cruz R. R. Co., 56 Cal. 143; *supra*, sec. 341.

[2] *Ib.;* Municipality *v.* Cutting, 4 La. An. 335; Lewiston *v.* Proctor, 27 Ill. 414 (1860); Quincy *v.* Ballance, 30 Ill. 185; Davenport *v.* Bird, 34 Iowa, 524 (1872); Williamson *v.* Commonwealth, 4 B. Mon. (Ky.) 146, 151 (1843); Jenkins *v.* Cheyenne, 1 Wy. Ter. 287; St. Louis *v.* Vert, 84 Mo. 204; Miller *v.* O'Reilly, 84 Ind. 168; Brophy *v.* Perth Amboy, 44 N. J. L. 217, approving text.

[3] *Ante*, secs. 337, 341. Court held not to be authorized to inquire into the reasonableness of an ordinance fixing a fine within the prescribed statutory limit. Haynes *v.* Cape May, 50 N. J. L. 55; s. c. 11 Cent. Rep. 578. If the statute under which the conviction takes place applies the penalty with certainty, it is sufficient for the justice to award the penalty to be paid and applied according to law. Queen *v.* Barrett, 1 Salk. 383; The King *v.* Seale, 8 East, 573; The King *v.* Thompson, 2 T. R. 18; The King *v.* Hyde, 21 L. J. Mag. Cas. 94; Boothroyd, *In re*, 15 M. & W. 1; The Queen *v.* Cridland, 7 E. & B. 853; The Queen *v.* Johnson, 8 Q. B. 102; see also The King *v.* Glossop, 4 B. & Ald. 616; Brown *v.* Nicholson, 5 C. B. N. S. 468; Seamen's Hospital *v.* Liverpool, 4 Ex. 180; Wray *v.* Ellis, 1 E. & E. 276. If there be any material variance between the conviction and the statute as to the appropriation of the penalty, the conviction will be bad. Griffith *v.* Harries, 2 M. & W. 335; Chaddock *v.* Wilbraham *et al.*, 5 C. B. 645; Harr. Munic. Man. (Canada), 5th ed. 313, 314. A city ordinance prescribing a term of imprisonment which may, but does not necessarily exceed that authorized by the Constitution, may be enforced within the constitutional limit. Keokuk *v.* Dressell, 47 Iowa, 597. Ordinance held void because the fine or penalty was uncertain in amount, the provision being that the offender should be fined not exceeding five dollars, and one dollar for each day's neglect to do a certain act. State *v.* Rice (N. C.), 2 Southeast. Rep. 180.



§ 411 (344). **Nature of Proceeding, Civil or Criminal.** — Where, instead of a civil action to recover the pecuniary fine or penalty, the proceeding *is in the nature of a complaint for the violation of the ordinance*, this has sometimes been considered to be a criminal or *quasi* criminal, and not a civil, proceeding. The cases on this subject are not harmonious, but the difference in them depends, to a large extent, upon the character of the act or offence charged, the nature of the charter, and of the legislation in the particular State as to the extent of jurisdiction intended to be conferred upon the municipal authorities.[1] The Constitution of Georgia declares that "*trial by jury*, as heretofore used in this State, shall remain inviolate." It was claimed that the legislature could not constitutionally confer on the city council the power to pass an ordinance inflicting a fine for its violation, where the guilt of a party was to be tried by the council, without a jury. The court held that the objection was not sound, observing *that violations of ordinances are not criminal cases* within the meaning of the State Constitution, and "that, inasmuch as the right of trial by jury existed in England, and was secured by *Magna Charta*, and municipal corporations in that country enforced their by-laws by *pecuniary penalties in a summary manner*, and the same right being conferred upon similar corporations in this State anterior to the adoption of the Constitution, and constantly exercised, 'the right of trial by jury, as heretofore used in this State,' was not violated by the city council of Augusta, by the imposition of the penalty for the breach of the *local police* regulations of that city."[2]

[1] Wayne County *v.* Detroit, 17 Mich. 390; People *v.* Detroit, 18 Mich. 445; Davenport *v.* Bird, 34 Iowa, 524 (1872); Charleston *v.* Oliver, 16 S. C. 47, which was an action for carrying on business without license, in which the municipal court held the defendant liable "for the amount of the license and penalty, *and*, in default of payment, *to an imprisonment* of thirty days." The court said that "where, as in this case, no mode of enforcement is prescribed by the charter, we see no reason why the mode pursued in this case is not sufficient," citing the text. See chapter on Municipal Courts, *post*, sec. 427, and note, sec. 432 *et seq.*, and notes; *supra*, secs. 347, 366, 368, and note.

[2] Williams *v.* Augusta (gunpowder ordinance), 4 Ga. 509 (1848), *per Warner*, J., approving Low *v.* Comm'rs of Pilotage, R. M. Charlt. (Ga.) 316; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194; Floyd *v.* Comm'rs, &c., 14 Ga. 354; *ante*, sec. 432 *et seq.*, and notes; Kip *v.* Paterson, 2 Dutch. (N. J.) 298; Keeler *v.* Milledge, 4 Zab. (24 N. J. L.) 142; Shafer *v.* Mumma, 17 Md. 331. "Summary convictions for petty offences against statutes were always sustained, and they were never supposed to be in conflict with the common-law right to a trial by jury." *Per Strong*, J., Byers *v.* Commonwealth, 42 Pa. St. 89, 94 (1862). In the case last cited, the extent of the right of jury trial at common law is learnedly examined by Mr. Justice *Strong*. See, also, Dunmore's Appeal, 52 Pa. St. 374; Rhines *v.* Clark, 51 Pa. St. 96 (1865). Compare Plimpton *v.* Somerset, 33 Vt. 283 (1860); see *post*, Municipal Courts, sec. 432 *et seq.* History of Courts of Summary Juris-