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-

§ 412 (345). **Same subject. In Massachusetts.** — On the other hand, in Massachusetts, prosecutions for breaches of by-laws or ordinances made to enforce police regulations are regarded as *substantially public prosecutions*, and in such prosecutions it is competent, though confessed not to be very just, to disallow the defendant costs. Applying this doctrine, it is held that a statute providing that prosecutions for violations of city ordinances in the name of the State or commonwealth is not unconstitutional, notwithstanding the result is that the defendant does not recover costs on acquittal.[1]

diction in England and extent of their powers under the Summary Jurisdiction Act of 1879, see 1 Stephen, Hist. of Criminal Law, chap. iv. A statute requiring security for costs, in prosecutions for "penal statutes," does not embrace prosecutions under city ordinances which impose penalties for their violation, such ordinances not being "statutes" within the meaning of the act. Lewiston *v.* Proctor, 27 Ill. 414 (1860); s. p. Quincy *v.* Ballance, 30 Ill. 185. Further, as to the nature of the proceeding and kind of process. Alton *v.* Kirsch, 68 Ill. 261 (1873); and see, also, Municipality *v.* Cutting, 4 La. An. 335; Ewbanks *v.* Ashley, 36 Ill. 177; Wayne County *v.* Detroit, 17 Mich. 390; People *v.* Detroit, 18 Mich. 445, construing the phrase "penal laws," as used in the *Michigan* Constitution. Phrase "municipal fine," in the Constitution of *California*, construed. People *v.* Johnson, 30 Cal. 98 (1866). Violations of ordinances imposing fines and penalties are in *the nature of torts*, and actions for such violations may be prosecuted against one or more of the offending parties; they need not all be joined. Jacksonville *v.* Holland, 19 Ill. 271 (1857). The defendant in such a prosecution cannot raise the question whether the charter of the city is forfeited. Whalin *v.* Macomb, 76 Ill. 49 (1874).

[1] Goddard, *In re*, 16 Pick. (Mass.) 504 (1835); Commonwealth *v.* Worcester, 3 Pick. (Mass.) 462. "If," says Chief Justice *Shaw*, in the case first cited, "the prosecution were to enforce a *private* right by the city, there would be weight in the objection, and it would stand on different grounds." 16 Pick. 508; see Commonwealth *v.* Gay, 5 Pick. (Mass.) 44; Commonwealth *v.* Fahey, 5 Cush. (Mass.) 408. Similar observations in relation to making sidewalks, by *Ford*, J., in Paxson *v.* Sweet, 1 J. S. Green (N. J.), 200 (1832). So, in *New Hampshire*, a public prosecution for an offence made penal by a city ordinance because of its supposed evil consequences to society — as, for example, the offence of unlawfully keeping a bowling-alley — is considered to be a criminal, and not a civil, proceeding. State *v.* Stearns, 11 Fost. (31 N. H.) 106 (1855). In *Alabama* such a prosecution is considered *quasi* criminal, and the defendant cannot testify in his own behalf as he may in a civil action. Mobile *v.* Jones, 42 Ala. 630 (1868); Fink *v.* Milwaukee, 17 Wis. 26 (1863), is decided upon the basis that a prosecution of a party for the violation of a city ordinance, where the penalty is a fine, is a criminal prosecution to which the Bill of Rights applies, which declares that "in all criminal prosecutions, the accused shall be entitled to demand the nature and cause of the accusation against him." But a principle so broad, it is believed by the author, can hardly be maintained where the act charged is not a crime at common law or in its essential nature. See chapter on Municipal Courts, *post*. In *Indiana* an action to recover the penalty of a by-law, though a warrant for the arrest of the defendant be issued and served, is considered to be a *civil suit*, and governed by the rules of practice in such suits. Goshen *v.* Croxton, 34 Ind. 239 (1870), and notes.

In Emporia *v.* Volmer, 12 Kan. 622 (1874), it was decided that the provision of the Constitution, that all prosecutions shall be in the name of the State, did not include prosecutions by a municipality in its own courts for a violation of its ordinances, and that such prosecutions might

§ 413 (346). **Mode of pleading Ordinances.** — The courts, unless they are the courts of the municipality, *do not judicially notice the ordinances* of a municipal corporation, unless directed by charter or statute to do so.[1] Therefore, such ordinances, when sought to be enforced by action, or when set up by the defendant as a protection, should be set out or stated in substance in the pleading. It has been sometimes decided that it is not sufficient that they be referred to generally by the title or section. It is, however, believed to be sufficient, in the absence of special legislative provision prescribing the manner of pleading, to set forth the legal substance of that part of the ordinance alleged to have been violated, it being advisable, for purposes of identification, to refer also to the title, date, and section. The liberal rules of pleading and practice which characterize modern judicial proceedings should extend to, and doubtless would be held to embrace, suits and prosecutions to enforce the by-laws or ordinances of municipal corporations.[2]

be in the name of the municipality. But in Neitzel *v.* Concordia, 14 Kan. 446 (1875), it was held, without professing to overrule the previous decision, that a prosecution in a municipal court, under a city ordinance, for a matter made penal by the laws of the State or because of its evil consequences, was a criminal proceeding. Whether the rule would be the same if the prosecution was to enforce a private right of the city, the court left open for further consideration. *Ante*, secs. 366–369; *post*, secs. 429, 432.

[1] See *ante*, sec. 83. Elizabethtown *v.* Leffler, 23 Ill. 90; Mooney *v.* Kennett, 19 Mo. 551 (1854); New Orleans *v.* Boudro, 14 La. An. 303 (1859); Harker *v.* Mayor, 17 Wend. (N. Y.) 199 (1837); Case *v.* Mobile, 30 Ala. 538 (1857); People *v.* Mayor, &c. of New York, 7 How. Pr. R. (N. Y.) 81 (1851); Cox *v.* St. Louis, 11 Mo. 431 (1848); Garvin *v.* Wells, 8 Iowa, 286; Goodrich *v.* Brown, 30 Iowa, 291 (1870); Austin *v.* Walton, 68 Tex. 507; Wheeling *v.* Black, 25 W. Va. 266; People *v.* Buchanan, 1 Idaho, 681. In *England*, when an action on a by-law founded on a custom is brought in a *court of the municipality* the court will take judicial notice of it, but in an action in the *Superior Courts* the custom and the by-law must be set out, for these courts will not take notice of them. Wilc. 166, pl. 403; *Ib.* 172, pl. 423; *Ib.* 173, pl. 425; Braddnox's Case, 1 Vent. 196; Barber Surgeons *v.* Pelson, 2 Lev. 252; Norris *v.* Staps, Hob. 211. In Conboy *v.* Iowa City, 2 Iowa, 90, it was held that the mayor, on whom was conferred exclusive jurisdiction of the violation of the ordinances of the city, was authorized to take judicial notice, *ex officio*, of the city ordinances. The provision of a city charter that its published and printed ordinances shall be received in evidence in all courts without proof does not dispense with the necessity of making them part of the record in order to bring them to the knowledge of an appellate court. Cox *v.* St. Louis, 11 Mo. 431 (1848); New Orleans *v.* Boudro, 14 La. An. 303 (1859).

[2] Harker *v.* New York, 17 Wend. (N. Y.) 199 (1837). Text cited, Emporia *v.* Volmer, 12 Kan. 622, 628 (1874). See Stokes *v.* Corporation of New York, 14 Wend. (N. Y.) 87; Mooney *v.* Kennett, 19 Mo. 551 (1854); Austin *v.* Walton, 68 Tex. 507; *ante*, sec. 356, note. In justifying, the defendant must set out in his plea or answer the ordinance, or so much thereof as will show on what the defence rests. *Ib.*; Keeler *v.* Milledge, 4 Zabr. (24 N. J. L.) 142 (1857). It is sufficient to set out the substance of that part of the ordinance which has been violated, with a reference to the title, date, and section. *Ib.* Approved, Kip *v.* Paterson, 2 Dutch. (N. J.) 298. Regularly, the by-law or its sub-

§ 414 (347). **Requisites of Complaints.** — Under a charter authorizing "complaint" to be made of the violation of ordinances, but not prescribing the mode or requisites, a complaint is not in the nature of an information by a common informer, and the same strictness is not required as in an information or indictment. "It is sufficient if it sets out with clearness the offence charged, and the substance of that part of the ordinance which has been violated, with a reference to the title, date, or section."[1]

stance should be set forth. Case *v.* Mobile, 30 Ala. 538 (1857); Charleston *v.* Chur, 2 Bailey (S. C.), 164. By-law need not be pleaded in full; complaint is sufficient if it refers to the ordinance and alleges facts showing a violation thereof. Lane, *Ex parte*, 76 Cal. 587; s. c. 18 Pac. Rep. 677; *infra*, sec. 414, note. Defective pleading of an ordinance held to be waived by a plea of not guilty and going to trial on the merits. State *v.* Reckards, 21 Minn. 47. In *England*, the by-law itself must be fully set out in an action of *debt* upon it, and not by way of recital; but in *assumpsit* upon the same by-law, latitude is allowed. Willcock, 173, pl. 425. But in this country it is said that "it is not necessary to hold to the strictness anciently required." Keeler *v.* Milledge, 4 Zabr. (24 N. J. L.) 142. In *Missouri* by statute, fines and penalties accruing to any town may be recovered by *civil* action; but the complaint, while it need not contain all the requisites of an indictment, must specify the offence with reasonable certainty. St. Louis *v.* Smith, 10 Mo. 438. This is the true rule. Hence a complaint charging only that "the defendant committed an offence [naming it] contrary to an ordinance of the town" is insufficient. Memphis *v.* O'Connor, 53 Mo. 468 (1873). So a charge that "the defendant knowingly associated with thieves previous to August 21, 1871," is too vague, no place being named and the names of the thieves not being given. St. Louis *v.* Fitz, 53 Mo. 582 (1873). In *Indiana*, before the act of 1867, it was necessary to file with the complaint a copy of the ordinance or section thereof alleged to have been violated. Green *v.* Indianapolis, 25 Ind. 490; Whitson *v.* Franklin, 34 Ind. 392 (1870). On demurrer to a complaint which does not set out the ordinance alleged to be violated, but refers only to the number of the section, the validity of the ordinance was presumed. Frankfort *v.* Aughe (Ind.), 15 N. E. Rep. 802. In *North Carolina*, it is held not to be necessary to set forth an ordinance alleged to have been violated; it is sufficient to refer to it by *indicia*, pointing it out with reasonable certainty. State *v.* Cainan, 94 N. C. 880. Unless required by law or ordinance a complaint, *not under oath*, will not necessarily vitiate the proceedings if the magistrate has jurisdiction of the subject. Alton *v.* Kirsch, 68 Ill. 261 (1873). Several breaches of an ordinance may be sued for in one suit, if the judgment does not exceed the amount of the magistrate's jurisdiction. Hensoldt *v.* Petersburg, 63 Ill. 111 (1872). Where a charter provides that "a warrant shall issue in favor of a city . . . for a violation of any ordinance when, &c., or upon affirmation by the city attorney, there is no authority for a deputy city attorney to swear to a complaint; power thus provided must be exercised by the city attorney in person." Kansas City *v.* Flanagan, 69 Mo. 22.

[1] Keeler *v.* Milledge, 4 Zabr. (24 N. J. L.) 142 (1857). Approved, Kip *v.* Paterson, 2 Dutch. (N. J.) 298; City Council *v.* Seeba, 4 Strob. (S. C.) Law, 319; Commonwealth *v.* Bean, Thach. (Mass. Crim. Cas.) 85. Compare Fink *v.* Milwaukee, 17 Wis. 26 (1863); see, also, Commonwealth *v.* Bean, 14 Gray (Mass.), 52; Deitz *v.* City, 1 Col. 323; Napman *v.* People, 19 Mich. 352 (1869); Goshen *v.* Croxton, 34 Ind. 239 (1870); Frankfort *v.* Aughe (Ind.), 15 N. E. Rep. 802; Whitson *v.* Franklin, 34 Ind. 392 (1870); State *v.* Cainan, 94 N. C. 880; Nodine *v.* Union, 13 Oreg. 587. Where the process did not state what ordinance had been violated,

§ 415 (348). **Same subject.** — In an action or proceeding to recover a penalty for the violation of a by-law or ordinance of a corporation, *the declaration or complaint should state facts* which make the liability of the defendant distinctly to appear.[1] And regularly,

nor the time or manner, the proceedings were held defective. State *v.* Trenton, 7 Vroom (36 N. J. L.), 283; Hendersonville *v.* McMinn, 82 N. C. 532. The complaint need not state the number of the section violated. Meyer *v.* Bridgeton, 8 Vroom (37 N. J. L.) 160. The ordinance need not be recited in full. Emporia *v.* Volmer, 12 Kan. 622 (1874); Goldthwaite *v.* Montgomery, 50 Ala. 486 (1874); St. Louis *v.* Smith, 10 Mo. 438. *Supra*, sec. 413, and note. An allegation in a pleading that an ordinance was duly passed held to imply, by necessity, that all essential antecedents for its legal enactment had been observed. Becker *v.* Washington, 94 Mo. 375 (1888). By statute, prosecutions for the violations of the ordinances of Boston may be prosecuted in the name of the commonwealth; and it is decided that in a complaint for such a violation it is not sufficient that it concludes "against the form of the by-laws of the said city," but it must conclude also against the form of the statute. Commonwealth *v.* Gay, 5 Pick. (Mass.) 44 (1827); Commonwealth *v.* Worcester, 3 Pick. (Mass.) 462 (1826). Complaint must be in the name of the treasurer of the city or town, and not in that of the commonwealth, for violation of health ordinances, since the statute of 1849. Ch. ccxi. sec. 7; Commonwealth *v.* Fahey, 5 Cush. (Mass.) 408 (1850). Policemen, marshals, and other officers of a municipal corporation, where such a course is not repugnant to the Constitution or general law of the State, may be empowered by an ordinance to *arrest offenders without warrant*, for breaches of ordinances committed in their presence. Bryan *v.* Bates 15 Ill. 87; Main *v.* McCarty, 15 Ill. 442; State *v.* Lafferty, 5 Harring. (Del.) 491. *Ante*, secs. 210, 211. A city ordinance providing that any person who shall refuse to obey an order at a fire given by any officer duly authorized, "may be arrested and detained in custody *until the fire is extinguished*," is unconstitutional, because the person is deprived of his liberty without due process of law, and because his right to trial by jury is invaded. The court distinguish between an arrest of this kind and where the purpose of the arrest is preliminary to and contemplates a judicial examination. Judson *v.* Reardon, 16 Minn. 431 (1871). Under the charter of Newark a violator of an ordinance of that city cannot, without his consent, be brought into court for trial, unless by a warrant or summons. Newark *v.* Murphy, 40 N. J. L. 145; *ante*, secs. 210, 211; Mitchell *v.* Lemon, 34 Md. 176 (1870); Butolph *v.* Blust, 5 Lansing (N. Y.), 84 (1871). Requisites of *warrants* for the violation of municipal ordinances. White *v.* Washington, 2 Cranch Cir. C. 337. Other cases: *Ib.* 356; *Ib.* 459; 4 Cranch Cir. C. 103; *Ib.* 582; Prells *v.* McDonald, 7 Kan. 426 (1871). A penalty cannot be imposed without notice. Alexandria *v.* Bethlehem, 5 Dutch. (N. J.) 375, 377. Sufficiency of *notice* to the accused under special charter provisions, Keeler *v.* Milledge, 4 Zabr. (24 N. J. L.) 142. Essentials of *summary convictions*. Commonwealth *v.* Borden, 61 Pa. St. 272.

[1] Saund. Pl. & Ev. 324; Comyns Dig. tit. *Pleader* (2 W. 11); Feltmakers *v.* Davis, 1 Bos. & Pul. 98; Piper *v.* Chappell, 14 M. & W. 623; Case *v.* Mobile, 30 Ala. 538 (1857); Coates *v.* Mayor, 7 Cow. (N. Y.) 585, 608 (1827), where the substance of a declaration in debt is given; Charleston *v.* Chur, Bailey (S. C.), 164; Krickle *v.* Commonwealth, 1 B. Mon. (Ky.) 361 (1841). Plea need not negative exception in a proviso to the enacting clause of an ordinance or in a subsequent section, this being a matter of defence. Lynch *v.* People, 16 Mich. 472 (1868). See Roberson *v.* Lambertville, 9 Vroom (38 N. J. L.), 69; McGear *v.* Bridgeton, 4 Vroom (33 N. J. L.), 213; Farwell *v.* Smith, 1 Harr. (N. J.) 133. The conviction must be for the same offence for which the defendant is prosecuted. Columbus *v.* Arnold, 30 Ga. 517.

as before stated, the by-law should be set forth or its substance stated, as well as the breach and the plaintiff's right to sue for the penalty. But where the charter or organic act of the corporation will be judicially noticed, it cannot be necessary to set out, as it has been held to be in England, the authority of the corporation to make the by-law.[1]

§ 416 (349). **Action in Corporate Name; Prescribed Method to be strictly followed; Demand; Notice.** — Where the penalty is given in general terms, it is understood to be to the use of the corporation, and the action or prosecution must be by and in the *name* of the corporation.[2] In England, it was the practice, in many cases, to appoint in the by-law the penalty to be sued for in the name of the chamberlain, treasurer, or some other officer of the corporation; and though the power of thus suing for the penalty could not be given to a mere stranger, yet it was not absolutely necessary that the penalty should be given to the corporation, but it might be given to the informer.[3] Whenever the mode of enforcing obedience to a by-law is prescribed by such by-law, that mode must be strictly pursued, and the plaintiff (where the rules of common-law pleading prevail) must be the party to whom the penalty is given. Where it is given to the chamberlain for the use of the corporation, the action must be in the name of the chamberlain, and not in that of the corporation. And when the chamberlain may sue, he need not set out his election or appointment, but may aver generally that he is chamberlain, and set forth his right to sue and to recover.[4] Unless the ordinance show that it was intended that no action for a penalty should lie without a previous demand, it is not necessary to aver one.[5] Nor is it necessary to aver that the defendant had notice of the ordinance, for this is conclusively presumed with respect to all on whom it is binding.[6]

[1] Norris *v.* Staps, Hob. 211.

[2] Bodwic *v.* Fennell, 1 Wils. 233; Vintners' Co. *v.* Passey, 1 Burr. 235; Glover, 313; 2 Kyd, 157; Graves *v.* Colby, 9 Ad. & El. 356; Williamson *v.* Commonwealth, 4 B. Mon. (Ky.) 146, 151 (1843); *ante*, chap. viii.

[3] Glover, 313, 314, 315; Feltmakers' Co. *v.* Davis, 1 B. & P. 101; Bodwic *v.* Fennell, 1 Wils. 233; Totterdell *v.* Glazby, 2 Wils. 266; Hesketh *v.* Braddock, 3 Burr. 1848; Wood *v.* Searl, Bridg. 141; Graves *v.* Colby, 9 Ad. & El. 356.

[4] Harris *v.* Wakeman, Say. 254; Exeter *v.* Starre, 2 Show. 159. Under constituent act, town treasurer held entitled to sue in his own name for penalties. Watts *v.* Scott, 1 Dev. (N. C.) 291; Commonwealth *v.* Fahey, 5 Cush. (Mass.) 408 (1850).

[5] Butchers' Co. *v.* Bullock, 3 Bos. & P. 434, 437.

[6] London *v.* Bernardiston, 1 Lev. 16; James *v.* Putney, Cro. Car. 498.

§ 417 (350). **Mode of Procedure, Defences, Evidence, &c.** — In prosecutions to enforce ordinances, the *ordinary rules of evidence* apply, except so far as specially modified by statute; and it is not competent for a municipal corporation, without express authority, to make or alter the rules of evidence or of law.[1] It is, however, competent for a city to provide by general ordinance, after suit commenced to recover a penalty for acting without a license, that the granting of a license, though by its terms it takes effect from a day previous to the commission of the offence, shall not (as might otherwise be the case) *release or waive the penalty.*[2]

§ 418 (351). **Corporate Existence not to be questioned in such actions.** — In proceedings to enforce ordinances, the *illegality* of the *corporate organization* cannot be shown to defeat a recovery; in such a collateral proceeding, evidence that the corporation is acting as such is all that is required.[3]

§ 419 (352). **Ratification of Illegal Ordinances by Legislature.** — The legislature may ratify ordinances not otherwise binding; and offenders should thereafter be prosecuted under the *ordinances*, and not under the validating act.[4]

[1] City Council *v.* Dunn, 1 McCord (S. C.), 333; Fitch *v.* Pinckard, 4 Scam. (5 Ill.) 78. The defendant's admission of a violation of an ordinance is competent evidence. Columbia *v.* Harrison, 2 Const R. (S. C.) 213 (1818).

[2] City Council *v.* Schmidt, 11 Rich. (S. C.) Law, 343; City Council *v.* Corleis, 2 Bailey (S. C.), 189. Commented on by *O'Neall*, J., in City Council *v.* Feckman, 3 Rich. (S. C.) Law, 385. And see case last cited as to other circumstances, in which it was held that a prior penalty was not waived by a subsequent acceptance of the amount of a license for a year.

A license granted by a *de facto* officer of a municipal corporation is valid; if the city receives and retains the money, it is estopped from maintaining an action for selling liquor without license. Martel *v.* East St. Louis, 94 Ill. 67 (1880); s. c. 21 Alb. L. J. 195.

Any positive acts (*infra vires*) by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself, by retracting what its officers had done, will work an estoppel. Martel *v.* East St. Louis, 94 Ill. 67; Roby *v.* Chicago, 64 Ill. 447; Chicago, R. I. & P. R. Co. *v.* Joliet, 79 Ill. 39; Logan County *v.* Lincoln, 81 Ill. 156.

[3] Hamilton *v.* Carthage, 24 Ill. 22; Mendota *v.* Thompson, 20 Ill. 197; Coles County *v.* Allison, 23 Ill. 437; Decorah *v.* Gillis, 10 Iowa, 234; Kettering *v.* Jacksonville, 50 Ill. 39; Tisdale *v.* Minonk, 46 Ill. 9 (1867); Hardenbrook *v.* Ligonier, 95 Ind. 70.

[4] Truchelut *v.* City Council, 1 Nott & McC. (S. C.) 227 (1818); Lennon *v.* New York, 55 N. Y. 361 (1874); *ante*, chap. iv. sec. 79, and note. *Post*, sec. 544; Logansport *v.* Crockett, 64 Ind. 319, approving text. In State *v.* Plainfield, 9 Vroom (38 N. J. L.), 95, where an ordinance was void for want of proper notice to the persons interested, it was held that the error could not be remedied by subsequent legislation. But see cases cited *post*, sec. 814, note. And in *New Jersey* also it has been frequently held that the legislature may validate informal or irregular

§ 420 (353). **Ordinances to be construed reasonably.** —In prosecutions or actions to enforce ordinances, or in considering the question of their validity, *courts will give them a reasonable construction*, and will incline to sustain rather than to overthrow them; and especially is this so where the question depends upon their being reasonable or otherwise. Thus, if by one construction an ordinance will be valid, and by another void, the courts will, if possible, adopt the former. But an ordinance which transcends the power vested in the body which passed it is void, and may be taken advantage of by plea or answer to an action to recover the penalty, or other proceedings to enforce it.[1] Its validity may also be tested in proper cases by suits against the corporation or its officers for acts done under it,[2] or by a return to a *mandamus* where the party justifies his

municipal action, when the matters dispensed with or cured did not relate to the jurisdiction of the courts. Bergen *v.* State, 3 Vroom (32 N. J. L.), 490; State *v.* Union, 4 Vroom (33 N. J. L.), 350; State *v.* Newark, 5 Vroom (34 N. J. L.), 236.

[1] Commonwealth *v.* Robertson, 5 Cush. (Mass.) 438, 442; Vintners' Co. *v.* Passey, 1 Burr. 239; Poulters' Co. *v.* Phillips, 6 Bing. N. C. 314, 323; Taylors of Ipswich, 11 Rep. 54 *a*; Norris *v.* Staps, Hob. 211; Tobacco, &c. Co. *v.* Woodroffe, 7 B. & C. 838; Moir *v.* Munday, Sayer, 181, 185; Rounds *v.* Mumford, 2 R. I. 154 (1852). The rules for the construction of ordinances are the same as for statutes. Matter of Yick Wo, 68 Cal. 294. Where the legislature has conferred full and exclusive jurisdiction on a municipal corporation over a certain subject, the acts of the corporation will be supported by every fair intendment and presumption. Baltimore *v.* Clunet, 23 Md. 449 (1865). The title and the body of the ordinance may be taken together to give it the necessary certainty to sustain it. Martindale *v.* Palmer, 52 Ind. 411 (1876). In view of the inartificial character of town by-laws, they are especially entitled to a reasonable construction. Whitlock *v.* West, 26 Conn. 406; Wille. Mun. Corp. 159, pl. 382. By-laws with penalties are not properly penal statutes. The penalty is in the nature of liquidated damages, established as such in lieu of damages which a court would be authorized to assess. Therefore the strict rules by which the validity of penal statutes are to be tested are not to be applied to the by-laws or ordinances of municipal corporations. It is well remarked that "the by-laws of very few of these corporations could stand such a test. They should receive a reasonable construction, and their terms must not be strictly scrutinized for the purpose of making them void." *Per Eustis*, C. J., Municipality *v.* Cutting, 4 La. An. 335; Merriam *v.* New Orleans, 14 La. An. 318; S. P. Loze *v.* Mayor, &c., 2 La. 427. If, however, the ordinance is, in its nature, highly penal, it will and ought to be construed strictly, and it must clearly embrace the offence charged. Krickle *v.* Commonwealth, 1 B. Mon. (Ky.) 261 (1841). See also Pacific *v.* Seifert, 79 Mo. 210, stating the rule in *Missouri* to be that an *ordinance* "*in its nature penal must be strictly construed*, and its provisions cannot be carried beyond its express terms." In State *v.* Paris Ry. Co., 55 Tex. 76, the court, referring to an ordinance authorizing a railroad company to extend its track to a certain point, said, — "There is no ambiguity in the ordinance authorizing its explanation by parol evidence of representations made prior to its passage, or of the actual intention or understanding of those by whom it was passed, as to the precise point at which the road was to be constructed." Contemporaneous construction often of great weight in interpreting doubtful provisions. State *v.* Severance, 49 Mo. 401 (1872); *ante*, sec. 93, note; sec. 184, note.

[2] Moir *v.* Munday, Sayer, 181, 185. St. Charles *v.* Meyer, 58 Mo. 86 (1874).

refusal to comply with the writ on the ground that the ordinance is invalid,[1] or, as elsewhere shown, in cases of equitable cognizance, by bill in chancery to enjoin proceedings thereunder.

§ 421 (354). **Ordinances void in part.** — If *part of a by-law be void*, another essential and connected part of the same by-law is also void.[2] But it must be essential and connected to have this effect.[3] Thus, if an ordinance, or even the same section of an ordinance, contains two separate prohibitions relating to different acts, with distinct penalties for each, one of which is valid and the other void, the ordinance may be enforced as to that portion of it which is valid.[4]

See protective provisions to corporate officers and agents in Municipal Corporations, Act 5 and 6 Wm. IV. chap. lxxvi. secs. 132, 133. In the *Canadian Municipal Act*, sec. 332 (Harrison's Munic. Man. 5th ed. p. 238), there is what the author would suppose to be a very useful provision to test summarily the validity of by-laws, to the effect that a resident of a municipality or any other person interested in a by-law, order, or resolution may, within one year, apply to either of the superior courts of common law to have it quashed, and the court, after notice to the corporation, may quash the by-law, order, or resolution, in whole or in part, for illegality; and it is further provided (sec. 338), that in case anything has been done under such illegal by-law, order, or resolution, which gives any person a right of action, no action shall be brought until one month's notice thereof be given to the corporation, and such action must be brought against the corporation and not against any person acting under the by-law, order, or resolution. Construction of provision, see Harrison's Munic. Man. (5th ed.) pp. 239, 245.

[1] Rex *v.* Harrison, 3 Burr. 1322; Grant on Corp. 89. An ordinance may be void for uncertainty in its provisions, as, for example, one which alters street grades, without referring to any plan or establishing new grades. Kearney *v.* Andrews, 2 Stock. (N. J.) 70.

[2] Austin *v.* Murray, 16 Pick. (Mass.) 121, 126 (1834), Com. Dig. By-law, chap. vii.; Rex *v.* Faversham Fishermen's Co., 8 Durnford & East Term Rep. 356. See Commonwealth *v.* Stodder, 2 Cush. (Mass.) 562 (1848); Fisher *v.* McGirr, 1 Gray (Mass.), 1; Warren *v.* Mayor, &c., 2 Gray (Mass.), 84; Commonwealth *v.* Hitchings, 5 Gray (Mass.), 482; Hershoff *v.* Beverly, 45 N. J. L. (16 Vroom) 288.

[3] Villavaso *v.* Barthet, 39 La. An. 247.

[4] Commonwealth *v.* Dow, 10 Met. (Mass.) 382 (1845); Amesbury *v.* Bowditch M. F. Insurance Co., 6 Gray, 596; Warren *v.* Charlestown, 2 Gray, 84; Shelton *v.* Mobile (market ordinance), 30 Ala. 540 (1857); Rogers *v.* Jones, 1 Wend. (N. Y.) 237; Thomas *v.* Mount Vernon, 9 Ohio, 290; 1 Stra. 469; Sir T. Raym. 288, 294; Sayer, 256; 1 B. & Ad. 95; 7 Term R. 549; Staats *v.* Washington, 45 N. J. L. (16 Vroom) 318; Piqua *v.* Zimmerlin, 35 Ohio St. 507; State *v.* Kantler, 33 Minn. 69. Where a charter authorized the penalty of fine and imprisonment, an ordinance imposing in addition thereto "costs of prosecution" was declared void as to such addition, but valid as to the remainder. State *v.* Cantieny, 34 Minn. 1. "If a by-law be entire, each part having a general influence over the rest, and one part of it be void, the entire by-law is void." Willcock on Corp. 160, pl. 384; approved, Municipality *v.* Morgan, 1 La. An. 111, 116 (1846); *Ex parte* Mayor, &c. of Florence, 78 Ala. 419; Rau *v.* Little Rock, 34 Ark. 303. "But if a by-law consist of several distinct and independent parts, although one or more of them may be void, the rest are equally valid as though the void clauses had been omitted." Willcock, 161, pl. 389; Fitzacherly *v.* Wiltshire, 11 Mod. 353; Lee *v.* Walis, 1 Kenyon, 295. In a leading case, Rex *v.* Faversham Fishermen's Co., 8 D. &