

§ 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; *Taylor of Ipswich*, 11 Rep. 54a; *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; *Willc. Mun. Corp.*, 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. 333), 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. Barthelet*, 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); *Ec 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. &

§ 422 (355). **Proof of Ordinances.**—When not specially regulated by charter or statute, the *proof of ordinances* must be by the production of the originals or the books in which they are registered, as these are the primary evidence.¹ Printed copies, or authenticated copies, are often made competent evidence by the legislature.

§ 423. **Presumption of Validity.**—Where authority to pass an ordinance on a given subject was conditioned that it should be first

E. T. R. 356, Lord *Kenyon* said: "With regard to the form of the by-law indeed, though a by-law may be good in part and bad in part, yet it can be so only when the two parts are entire and distinct from each other." Approved, *Municipality v. Morgan*, 1 La. An. 111, 116 (1846). The fact that certain provisions of an ordinance are void does not authorize the court to declare void those provisions which relate to the subject-matter of the ordinance, when they are distinct and separate from those which are void and useless. *State v. Hardy*, 7 Neb. 377. It is stated in *Grant on Corporations*, 88, that it is "now fully settled that a by-law that is void in part is void wholly; e. g. if the penalty be unreasonable the rest of the by-law is vitiated thereby, and becomes wholly inoperative and null." Citing *Com. Dig. By-Law*, chap. vii.; *Colchester v. Godwin*, *Carter*, 121; *Elwood v. Bullock*, 6 Q. B. 383; *Clarke v. Tucket*, 2 Vent. 182; *Rex v. Atwood*, 4 B. & Ad. 481. But the rule in the text is well sustained, and is reasonable; and it is not true that the void part of a by-law will make null complete and independent parts of the same by-law which would otherwise be good. *State v. Clarke*, 54 Mo. 17, 36 (1873). The act authorizing a sewerage system being unconstitutional in part, so that the scheme adopted could not be made available, the undertaking was arrested. *State v. Chamberlin*, 8 Vroom (37 N. J. L.), 388.

¹ *Lumbard v. Aldrich*, 8 N. H. 31; *Stevens v. Chicago*, 48 Ill. 498; *Moor v. Newfield*, 4 Greenl. (Me.) 44; *Hallowell Bank v. Hamlin*, 14 Mass. 178; *Case of Thetford*, 12 Vin. Abr. 90; *ante*, sec. 300, note; *infra*, sec. 423. *Stewart v. Clinton*, 79 Mo. 603; *Tipton v. Norman*, 72 Mo. 380. In *Information against Oliver*, 21

S. C. 319, *McGowan, J.*, said, that in a municipal court, "it was no more necessary to offer proof of a public ordinance, under the seal of the city council, than in the courts of the State to prove a public act of the legislature. Municipal ordinances are private laws when brought before the superior judiciary of a State, but not when brought before a city court." See chapter on Corporate Records and Documents, *ante*, sec. 293 *et seq.* Proof may be made by the clerk that he posted up copies of an ordinance appearing on the records, without producing such copies or accounting for their absence. *Teft v. Size*, 5 Gilm. (10 Ill.) 432. As to promulgation and publication of ordinance. *Charleston v. Chur*, 2 Bailey (S. C.), 164; *Kittering v. Jacksonville*, 50 Ill. 39; *Napa v. Easterby* (Cal.), 18 Pac. Rep. 253; *Nevin v. Roach* (Ky.), 5 Southwest. Rep. 546; *Downing v. Miltonvale* (record of ayes and nays) (Kan.), 14 Pac. Rep. 281; *Brophy v. Hyatt* (Col.) (record of ayes and nays), 15 Pac. Rep. 399; *Sullivan v. Leadville*, 11 Col. 483; s. c. 18 Pac. Rep. 736; *State v. Irvington* (what is sufficient publication), 50 N. J. L. 361; *supra*, secs. 331-335; *infra*, sec. 423; *Chicago & A. R. Co. v. Engle*, 76 Ill. 317 (1875).

Where the charter provides that the printed volume of City Ordinances shall be evidence in all courts, the ordinances printed therein will be judicially noticed the same as public statutes. *Napman v. People*, 19 Mich. 352 (1869); *St. Louis v. St. Louis Railroad Co.*, 89 Mo. 44. In *Kansas* the appellate court, upon the trial of an appeal from a conviction under an ordinance, will take *judicial notice* of the existence and substance of the ordinance. *Downing v. Miltonvale*, 36 Kan. 740; *ante*, sec. 83.

submitted to the voters of the municipality and adopted by a majority vote, in a prosecution for a breach thereof it was held that the further provision of the charter, that an ordinance might be proved by a copy thereof duly certified, &c., did not dispense with the necessity of proving that the ordinance was submitted to the voters and adopted, and that it had been published as required by law, the only effect of the charter provision being to dispense with the production of the original ordinance by making the certified copy evidence.¹

¹ *Schott v. The People*, 89 Ill. 195 (1878). *Scholfield, J.*, adds: "Municipal corporations exercise only delegated and limited powers, and, in the absence of express statutory provisions to that effect, courts are authorized to indulge in no presumptions in favor of the validity of their ordinances. If in conformity with the express or necessarily implied grant of the charter, they are valid; otherwise not."