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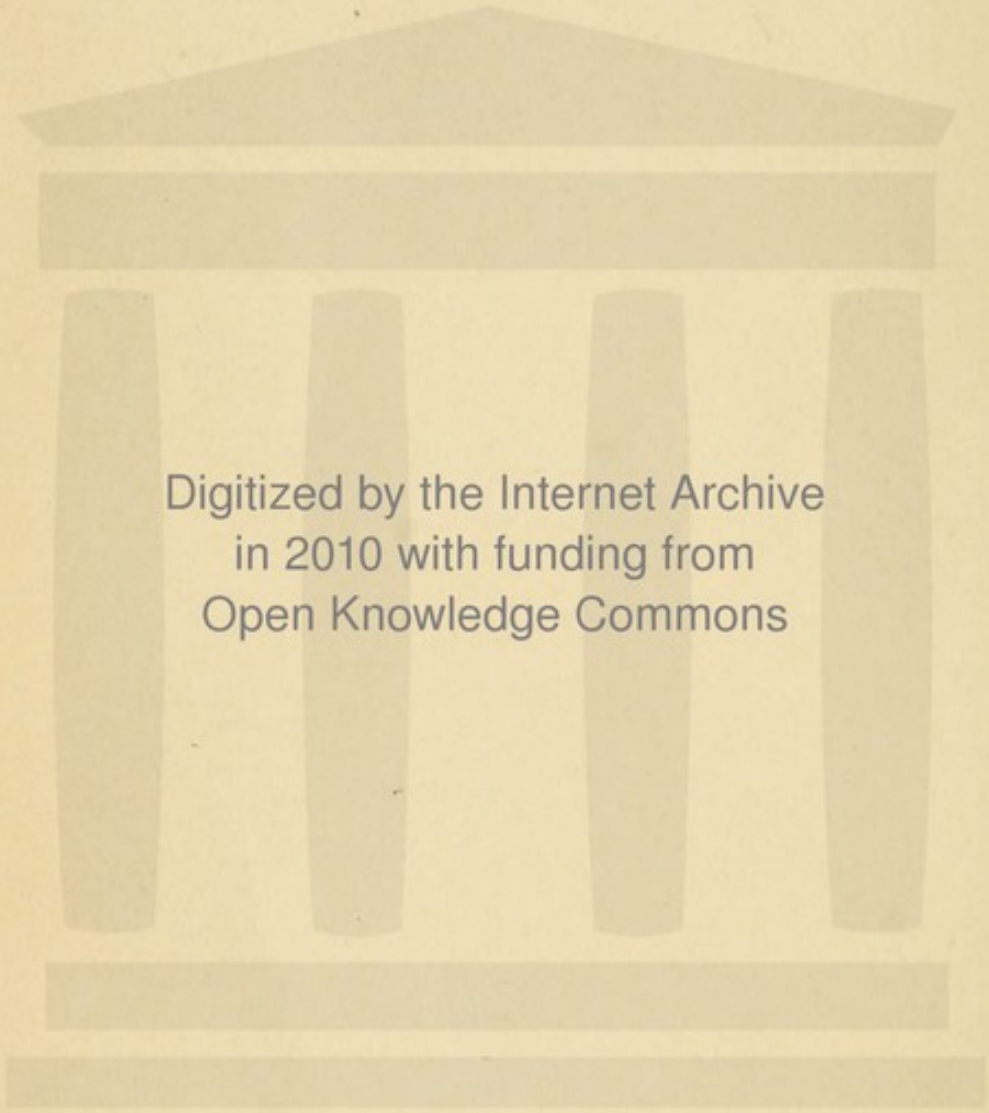

THE LAW

OF

PUBLIC HEALTH AND SAFETY,

AND THE

POWERS AND DUTIES

OF

BOARDS OF HEALTH.

BY

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"Salus populi est suprema lex."

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INTRODUCTORY.

If the remark attributed to Lord Beaconsfield be true, that "the health of the public ought to be one of the chief considerations of the statesman," a proper presentation of the law relating to public health and safety should be of the highest interest both to those who interpret and apply that law in the courts, and to those who are intrusted with its execution. The consideration of measures for the preservation of health and the prevention of disease, has engaged the attention of law givers from the earliest period of recorded history.

The ten commands of God respecting moral and civil obligations, written on the tablets of stone, and given by Moses to the children of Israel, are not older in time, than that code of sanitary regulations for the preservation of the health and safety of the people, minute and particular in every detail, wherein God, through Moses, commanded His people to observe frequent purifications and cleansings; to isolate those suffering from communicable diseases; to disinfect houses where the plague had prevailed; to destroy infected articles; to avoid the use of unwholesome foods, and to protect the roofs of their dwellings by battlements, "that thou bring not blood upon thine house, if any man fall from thence."[1]

From the time of Moses to the present day, the necessity of compelling mankind, by law, to observe the rules of health and safety has been recognized by every civilized

[1] Deuteronomy xxii, 8.

government. This necessity has found expression in those statutes which have had for their object the prevention of disease, and the result has been that those people who have most carefully protected themselves by strict legislation, and who have most rigidly enforced the observance of health laws, have enjoyed the greatest immunity from the ravages of plagues and pestilence; while a neglect of proper precautionary measures has usually resulted in periodical decimation of the population by the scourge of communicable disease.

It needs no argument to prove that the highest welfare of the State is subserved by protecting the life and health of its citizens by laws which will compel the ignorant, the selfish, the careless and the vicious, to so regulate their lives and use their property, as not to be a source of danger to others. If this be so, then the State has the right to enact such laws as shall best accomplish this purpose, even if their effect is to interfere with individual freedom and the untrammelled enjoyment of property. Such right in the State has been universally recognized by the courts, when called on to uphold the validity of laws which, for the more efficient prevention of diseases dangerous to the public health, or for the prevention of injuries in dangerous places, or from dangerous structures, curtail the liberty of action of the individual in respect to the manner in which he may live, or use the things belonging to him.

The principle which forms the basis of this right is, that every man owes a duty to do or maintain nothing that shall imperil the life or health of his fellow man. That the interest of no man is higher than the interests of his fellows; that no right, which is inherent in the individual, can be exercised to the injury of the community; that a man may live and die as he pleases, so long as in his life or death he does not endanger the life or well-being of others.

Following out this principle, States have, from time to time, made laws which regulate the intercourse of man with man; which prescribe certain duties, and restrain certain acts, because thereby the health and safety of the community is preserved. In earliest times these regulations were simple, and confined mainly to prescribing personal cleanliness and abstention from unwholesome food, but the complexities of modern living have made it necessary to meet every possible danger arising from new conditions with a regulation for its prevention. The introduction of steam as a motive power made it necessary to enact laws for the inspection of boilers, and, generally, for regulating its use. The application of electricity to mechanical purposes required special regulations for its employment, in order to protect the public from the dangers incident to its use. The massing together of people in hotels, tenements, factories and other buildings has made it necessary to adopt regulations compelling the owners to build safely, and to provide fire-escapes, protected hoistways, sanitary plumbing and other life-saving appliances.

The extension of commerce between all countries, and the emigration of large numbers of people from one country to another, with the attendant possibility of conveying diseases dangerous to the public health, in cargoes, or in the persons of those travelling, has made necessary the establishment of quarantine regulations, which rigidly debar from entry into our country, either across its borders or into its seaports, all persons or goods, or vessels carrying cargoes and passengers from countries where communicable diseases prevail.

The enforcement of these quarantine regulations often causes serious annoyance to travellers, and injury to transportation companies and the shippers of merchandise.

It is a grievous interference with commerce. Grave questions have arisen respecting the right of a State to

enforce its own quarantine laws, where the effect is to interfere with commerce, which is supposed to be wholly within the control and jurisdiction of the Federal government — questions which, fortunately, have been settled in favor of the preservation of health rather than of non-interference with commerce.

The extensive building of railroads throughout the country has made necessary the enactment of laws regulating their operation, so that the safety of the people shall be most amply secured. The law regulates the rate of speed in dangerous places; the elevation or depression of the tracks; the giving of signals, the erection of warning signs and many other devices for lessening the dangers attending such powerful agencies for evil.

The adulteration of foods and drink; the contamination of water; exposure to fire, etc., are all under the ban of law. Business pursuits and professions are so regulated that the least possible harm shall come to the public from their practice; and, when life is ended, the disposal of the dead must be so conducted that the least possible offense shall be given to the living. The preservation of the public health is thus largely regulated and enforced by law. Each State has its statutes relating to the prevention of diseases and the preservation of public health and safety,— the execution of which is chiefly intrusted to minor municipal bodies or boards of health. The powers conferred on such boards are usually full and often arbitrary. In the exercise of such powers, personal rights often appear to be assailed, and the freedom of individual action restricted. But the maxim: *Salus populi est suprema lex*, applies, and individual rights must yield to the higher demand of public safety.

To what extent and under what circumstances may the rights of the individual and his freedom of action be lawfully interfered with in the interest of public health and safety? This is determined by the law-making power,

acting within constitutional limits, and by the courts when construing, applying and enforcing the statutes, ordinances and regulations relating to public health and safety.

A person wishing to know the law relating to public health and safety will find it in numerous enactments of the Federal and State legislatures; in a multitude of municipal ordinances; in the rules and regulations of boards of health, which now, by law, exist in almost every city, village and town in the land; and in the reported decisions of cases, where the constitutionality of such legislation is determined, where the powers of boards of health and health officers are defined, and their orders and regulations enforced. But in no single work is this law to be found.

No work treating solely of the law of public health and safety has been published in this country, and it is believed that a book which condenses that law into a reasonably small space; which shows what powers exist in the legislatures to enact such laws; what powers may be exercised by boards of health and health officers and what are the rights and obligations of the public as affected by health laws, will be a valuable aid to boards of health and health officers, whose duty it is to administer such laws, as also to members of the legal profession, who are so frequently called upon to interpret and enforce them in the courts.

The questions that are presented to officers of boards of health, respecting their duties, are often complex, especially when they are required to restrain persons affected with contagious diseases from contact with others, or to enter upon and use, or possibly destroy private property to prevent the spread of disease. How far they may lawfully act in such cases; what their rights are and their liability to those affected by the enforcement of the laws under which they are acting, can only be accurately determined by reference to the law as it has been settled by the courts.

The object of the present work is to afford a safe guide to health officers in the administration of the duties of their office; to physicians, from whom certain observances in the interest of public health are required, but especially has it been our aim to present to the legal profession a treatise on the law governing municipal bodies and individuals in their relation to public health and safety, which shall aid the practitioner in determining what the law is in any case which he may have under his consideration, and concerning which his counsel is sought.

As this book goes to press, the country is passing through an experience in dealing with the dreaded scourge of cholera, which has been brought to our doors by vessels, bringing cargoes and passengers from European countries where the disease prevails. An emergency has arisen that tests to the fullest extent the efficacy of our quarantine and public health laws, and which demands the most intelligent understanding and judicious application of those laws. Serious complications have already arisen respecting the relative control of the State and Federal authorities over the matter of quarantine, and acrimonious differences prevail between the health authorities and the people of particular localities, as to the establishment of quarantine stations for the reception of passengers coming to our shores from infected foreign ports. The law governing such cases will be found stated in the following pages, as it has been determined by the courts.

BUFFALO, *September* 12, 1892.

CHAPTER I.

THE POLICE POWER OF THE STATE.

SEC. 1. Nature and extent of the power.
2. Power of the State exclusive.
3. Illustrations.
4. Extent of legislative and judicial authority.
5. Rule for determining validity of statute.
6. Invalidity must appear on face of statute.
7. Further illustration of the rule.
8. Contrary doctrine criticised.
9. Police power inalienable.
10. Corporations subject to police regulation.
11. Illustrations.
12. Private rights subordinate to police power

Nature and extent of the power.

SEC. 1. One of the legitimate and most important functions of civil government is acknowledged to be that of providing for the general welfare of the people by making and enforcing laws to preserve and promote the public health and the public safety. Civil society cannot exist without such laws; they are, therefore, justified by necessity and sanctioned by the right of self-preservation. The power to enact and enforce them is lodged by the people with the government of the State, qualified only by such conditions as to the manner of its exercise as are necessary to secure the individual citizen from unjust and arbitrary interference. But even under these restrictions, the power exists in ample measure to enable government to make all needful regulations touching the well-being of society. It is, therefore, made to extend, by a system of legislative precaution, to the protection of the life and health of all persons within the jurisdiction of the State,[1]

[1] Beer Co. v. Massachusetts, 97 U. S. 25; Munn v. Illinois, 94 id. 113; *Ex parte* Shrader, 33 Cal. 279; Railroad Co. v. Bowers, 4 Houst. (Del.) 506; Davis v. Central R. Co., 17 Ga. 323; Toledo, etc., Ry. Co. v. Jacksonville, 67 Ill. 37; Lake View v. Rose Hill Cem. Co., 70 id. 191; Hackett v. State, 105 Ind. 250; Comm. v. Alger, 7 Cush. 53; People v. King, 110 N. Y. 427; State v. Moore, 104 N. C. 714.

and no just exception can be taken to its exercise in any way that is reasonably necessary and proper for the promotion of the public good and for the protection of society from things hurtful to its comfort, security and welfare. It is easy, then, to find the sources of the power, and to perceive and realize its existence, yet the power itself is incapable of any very exact definition or limitation. It is difficult to mark its bounds and to prescribe limits to its exercise. In other words, it is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which shall in all respects be accurate. A strict definition, however, is not essential to the purposes of this treatise, since it is beyond controversy that the power of police regulation extends to all matters affecting the public health and the public safety.[1]

Power of the State exclusive.

SEC. 2. In respect of its internal police, the authority of each of the States is supreme and exclusive. By the act of Union, the separate and independent States surrendered to the general government, thereby established, such powers, and such only, as were deemed to be necessary to enable it to provide for the common defense and to promote the general welfare of all the people of the United States. But the States reserved to themselves complete and sovereign control over their own internal affairs. The States are, therefore, exempt from all interference on the part of the national government in the management

[1] Gibbons v. Ogden, 9 Wheat. 203; Stone v. Mississippi, 101 U. S. 818. In speaking of the nature of the police power, Andrews, J., in People v. Budd, 117 N. Y. 1, 14, says of the term itself, that "it is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the State, and necessary for the public welfare." And in the course of his dissenting opinion in the case of Leisy v. Hardin, 135 U. S. 127, Mr. Justice Gray says, that among the powers reserved to the several States is "what is commonly called the police power—that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime."

of those affairs.[1] Accordingly, the Supreme Court of the United States has stated as "impregnable positions," that a State of the Union has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated; that all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive; and that, among these powers, are inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the State, and to prevent the introduction or enforce the removal of prohibited articles of commerce.[2]

Illustrations.

SEC. 3. The doctrine just stated is illustrated, and its soundness is well attested by many adjudications of the court in which it was pronounced. A striking instance is where a law of Congress, making it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell petroleum for illuminating purposes below a certain fire-test, was declared to be invalid, except as applied to places within the

[1] Gibbons v. Ogden, 9 Wheat. 203; Story, J., Prigg v. Pennsylvania, 16 Pet. 539; Moore v. People, 14 How. 13; Slaughter-House Cases, 16 Wall. 36; Railroad Co. v. Fuller, 17 id. 560; Bartemeyer v. Iowa, 18 id. 29; Soon Hing v. Crowley, 113 U. S. 703; *In re* Rahrer, 140 id. 545; Harmon v. Chicago, 110 Ill. 400; Metro. Bd. of Excise v. Barrie, 34 N. Y. 666.

[2] City of New York v. Miln, 11 Pet. 102, 139.

United States but without the limits of any State.[1] The right of Congress, in any case, to enact laws for the suppression of crime within the States, upon territory or in respect to matters not expressly committed to the jurisdiction of Congress, has been denied; and it is held that even the legislation authorized to be adopted by Congress for enforcing the provisions of the Fourteenth Amendment is not *direct* legislation on the matters respecting which the States are prohibited from making or enforcing certain laws, or doing certain acts, but is *corrective* legislation merely, such as may be necessary or proper for counteracting and redressing the effects of such laws or acts.[2] It is also decided that the States have exclusive control of all matters affecting their internal commerce. Congress has no concern with the operations of commerce which are confined exclusively to the territory of a State, and do not extend to foreign nations, or other States, or Indian tribes.[3] So, the traffic in articles of merchandise of domestic production or manufacture, and in articles imported, after they have left the hands of the importer or after the original packages have been broken, is a matter subject only to State regulation, with which Congress has no power to interfere.[4] And it is further held that the rights conferred by the patent laws of the United States do not remove the tangible property in which an invention may take form from the operation of the laws of the State, nor restrict the power of the latter to protect the community from direct danger inherent in particular articles.[5] It has also been adjudged, in the light of the same doctrine, that neither the grant of a license to sell intoxicating liquors, nor the payment of a tax on such liquors, under the internal revenue laws of

[1] United States v. DeWitt, 9 Wall. 41; Patterson v. Kentucky, 97 U. S. 501.

[2] Civil Rights Cases, 109 U. S. 3; Miller on the Constitution, 659.

[3] Telegraph Co. v. Texas, 105 U. S. 460; Lord v. Steamship Co., 102 id. 541.

[4] Pervear v. Massachusetts, 5 Wall. 475.

[5] Patterson v. Kentucky, 97 U. S. 501; Webber v. Virginia, 103 id. 344.

the United States, affords any defense to an indictment by a State for selling the same liquors contrary to its statutes.[1]

Extent of legislative and judicial authority.

SEC. 4. In virtue of its right and duty to provide for the public welfare, the legislative branch of government possesses a vast and indefinable power, and a large discretion as to the manner in which it shall be exercised. It may determine primarily upon the necessity or expediency of legislation, in respect of any particular matter, and as to the legislative means which shall be adopted to accomplish any legitimate object. But when any particular act has been adopted, there is devolved upon the judiciary a supervisory function, to decide, when properly called upon to do so, whether that act, passed for an ostensible or declared purpose, is a reasonable exercise of the legislative power, that is, whether it is properly related to and appropriate to accomplish that purpose. As to the necessity or the expediency of the legislation, the legislature has a discretion which will not be reviewed by the courts; for it is not a part of the judicial functions to criticise the propriety of legislative action in matters which are within the authority of the legislative body.[2] "The making of laws is committed to the general assembly; it is the judge of the wisdom and policy of all its enactments, and no court has the right to overrule its judgment, even as to the extent of its own powers, unless it has clearly and beyond doubt exceeded the legislative functions with which it is vested by the Constitution. This is so generally recognized as true as to be regarded as axiomatic upon all questions as to the power of a legislature to enact a

[1] License Tax Cases, 5 Wall. 462; Pervear v. Massachusetts, ib. 475.

[2] Mugler v. Kansas, 123 U. S. 623; Patterson v. Kentucky, 97 id. 501; Munn v. Illinois, 94 id. 113; State v. Allmond, 2 Houst. (Del.) 612; Daniels v. Hilgard, 77 Ill. 640; Lake View v. Rose Hill Cem. Co., 70 id. 191, Toledo, etc., Ry. Co. v. Jacksonville, 67 id. 37; Bozant v. Campbell, 9 Rob. (La.) 411; Taunton v. Taylor, 116 Mass. 254; Watertown v. Mayo, 109 id. 315; People v. Phippin, 70 Mich. 6; People v. Gillson, 109 N. Y. 389; Matter of Jacobs, 98 id. 98; People v. Albertson, 55 id. 59.

given law."[1] Every intendment, therefore, is in favor of the entire validity of statutes, and no motive, purpose or intent can be imputed to the legislature, in the enactment of a law, other than such as is apparent upon the face and to be gathered from the terms of the law itself. A proper respect for a co-ordinate branch of the government requires the courts to give effect to the presumption that the legislature will pass no act not within its constitutional powers. This presumption should prevail, unless the lack of constitutional authority to pass the act in question is clearly demonstrated.[2]

Rule for determining validity of statute.

SEC. 5. While, however, it is for the legislature to determine what laws or regulations are needed to protect the public health and to secure the public safety, and the exercise of its discretion in this respect is not the subject of judicial review; yet a statute, to be upheld as a valid exercise of the police power, must have some relation to those ends; the rights of citizens may not be invaded under the guise of a police regulation, for the protection of health or the promotion of the general security, where it is manifest, upon the face of the law, that such is not the true object of the legislation.[3] And in whatever language the statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question, whether or not, by its necessary or natural operation, it impairs or destroys rights secured by the fundamental law. It is the duty of the court to

[1] Minshall, J., Adler v. Whitbeck, 44 Ohio St. 539, 562.

[2] United States v. Harris, 106 U. S. 629.

[3] Brimmer v. Rebman, 138 U. S. 78; Mugler v. Kansas, 123 id. 623; Soon Hing v. Crowley, 113 id. 783; Hawthorn v. People, 109 Ill. 302; Lake View v. Rose Hill Cem. Co., 70 id. 191; Bozant v. Campbell, 9 Rob. (La.) 411; Watertown v. Mayo, 109 Mass. 315; People v. Gillson, 109 N. Y. 389; Matter of Jacobs, 98 id. 98; Matter of Paul, 94 id. 497; People v. Albertson, 55 id. 59; State v. Moore, 104 N. C. 714. *See* People v. Jackson, 9 Mich. 285.

inquire whether there is a real and substantial relation between its avowed objects and the means devised for obtaining those objects.[1] In pursuing this inquiry the courts are not concluded by recitals in the statute, as to its purposes or the reasons leading to its enactment.[2] Accordingly, it has been held in a very recent case, that a statute is void which requires that all tenement-houses in the city of New York "shall have Croton or other water furnished at one or more places on each floor, occupied or intended to be occupied by one or more families, and all tenement-houses shall be provided with a like supply of water by the owners thereof whenever they shall be directed so to do by the board of health."[3] In another case, it was declared that an act prohibiting the sale of any article of food, or any offer or attempt to do so, upon any representation or inducement that any thing else will be delivered as a gift, prize, premium or reward to the purchaser, is not, in any proper sense, a health law, or a regulation of trade in articles of food to prevent their adulteration.[4] And an act of the legislature of New York, purporting to be an act to improve the public health, by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement-houses, but which, in its provisions, manifestly did not relate to and was inappropriate for the ostensible and declared purpose, was pronounced to be invalid.[5]

Invalidity must appear on face of statute.

SEC. 6. The general rule for testing the validity of laws

[1] Minnesota v. Barber, 136 U.S. 313.

[2] Stockton Laundry Case, 26 Fed. Rep'r, 611; Matter of Jacobs, 98 N. Y. 98; Minnesota v. Barber, 136 U. S. 313.

[3] Health Department v. Trinity Church, 45 Alb. L. J. 192 (N. Y. Com. Pleas). The decision in this case is rested on several grounds; but it was held that an application of the criterion, expressed in the text, to the statute in question, made it "evident beyond dispute that the statute is not a legitimate exercise of the police power of the State." It is by no means certain, however, that the appellate court, if required to pass upon this question, will fail to find a legitimate relation between the requirements of the statute and the promotion of the public health.

[4] People v. Gillson, 109 N. Y. 389.

[5] Matter of Jacobs, 98 N. Y. 98.

enacted in the exercise of the police power is simply stated in the preceding paragraph, and accurately defines the limits of the legislative and judicial authority with reference to such laws. But perplexing difficulties frequently arise in the application of the principle. Such difficulties have presented themselves, for instance, in cases where the courts have been called upon to consider the validity of legislation designed to regulate various kinds of traffic and business. It is undeniably true that the legislature cannot arbitrarily declare a certain kind of traffic or business to be injurious in its effects upon the community, and prohibit it, when, as a matter of fact, it is innocent and harmless. And if it be beyond the just powers of government to impose police regulations upon a business which involves no threatening danger to the public, it must also be beyond those powers to place any business under police restraint beyond what is necessary to guard against its injurious consequences. The legislature has the choice of means to prevent injury to the public, but the means selected must not go beyond the necessities of the case, and prohibit what does not in fact threaten such injury.[1] But what tribunal is to determine whether given legislation upon this subject does go beyond the necessities of the case? Is the finding of the legislative body upon this question conclusive, or may it be scrutinized, reviewed, and sustained or reversed by the judiciary? An act of the legislature of New York, which absolutely prohibited the manufacture or sale of any article designed to take the place of pure dairy butter, was declared to be unconstitutional. The highest court of that State held that the act was not legitimate health legislation, but was clearly intended to protect persons engaged in the manufacture of dairy products against the competition of cheaper substances or compounds capable

[1] Greensboro v. Ehrenreich, 80 Ala. 579; River Rendering Co. v. Behr, 77 Mo. 91; People v. Gillson, 109 N. Y. 389; Tiedeman's Lims. Pol. Pow., § 85.

of being applied to the same lawful uses, as articles of food.[1] On the other hand, the Supreme Court of the United States declared, in a case involving the consideration of a similar statute, that unless it appears upon the face of the statute, or from facts of which the court may take judicial notice, that the statute infringes rights secured by the fundamental law, the legislative determination as to the necessity for the legislation, and as to the expediency of the means taken to secure the public welfare, is conclusive upon the courts and cannot be reviewed judicially. The courts will not, it was said, for the purposes of determining the validity of legislation, institute and conduct investigations of facts entering into questions of public policy, and sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove the legislative determination of such questions. In the case under consideration, therefore, the court declined to entertain any appeal from the legislative decision, that the sale of wholesome oleomargarine as an article of food was detrimental to public interests, and remitted the complainants to the legislature itself or to the forum of public opinion, through which, as expressed at the ballot-box, the legislation complained of might be corrected, if unduly oppressive.[2]

[1] People v. Marx, 99 N. Y. 377.

[2] Powell v. Pennsylvania, 127 U. S. 678. "If it cannot be made to appear that a law is in conflict with the Constitution by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand. The testimony of experts or other witnesses is not admissible to show that in carrying out a law enacted by the legislature, some provision of the Constitution may possibly be violated. If the act upon its face is not in conflict with the Constitution, then extraneous proof cannot be used to condemn it. The history and origin of the enactment * * * may very properly be referred to, to test its validity, and ascertain its true intent and proper interpretation. It has been said that courts will place themselves in the situation of the legislature, and by ascertaining the necessity and probable objects of the passage of a law, give effect to it, if possible, according to the intention of the law-makers, when that can be done without violating any constitutional provision." O'Brien, J., People v. Durston, 119 N. Y. 569, 578; *In re* Kemmler, 136 U. S. 436. "If a fact, alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice." Minnesota v. Barber, 136 U. S. 313, 321; Brown v. Piper, 91 id. 37, 42; Phillips v. Detroit, 111 id. 604, 606.

Further illustration of the rule.

SEC. 7. Again, in an important case, presenting for review the prohibitory legislation of Kansas respecting the liquor traffic, it was contended on the part of the complainants that the legislative act went beyond the necessities of the case, and prevented the manufacture of liquors not intended for public sale or consumption but for the personal use of the maker, and thus transcended the powers of the State, by treating as an injury to the public and as such condemning what was, in fact, not a public evil. But to this objection the court replied: "By whom, or by what authority is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. It does not at all follow, however, that every statute enacted for the promotion of these ends is to be accepted as a legitimate exertion of the police power of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. Every intendment is in favor of the validity of statutes. * * * The statute is to receive in every case a reasonable construction, and, if possible, without doing violence to its terms, disturbing the general scheme of the act, or perverting it from its ostensible purpose, is to be construed in such a way as to sustain rather than impair its validity. Never-

theless, the courts are under a solemn duty to look at the substance of things, not being bound by mere forms, nor misled by mere pretenses, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. * * * If, therefore, a statute purporting to have been enacted to protect public interests, has no real or substantial relation to those objects, which is apparent upon its face or to be gathered from its terms, or if it is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." In the case considered, the court declined to interfere with the decision of the legislative body, that, in order effectually to guard the community against the evils attending the use of intoxicating liquors, it is necessary to prohibit the manufacture of the liquors altogether.[1]

Contrary doctrine.

SEC. 8. A somewhat different doctrine has been strongly insisted upon by some very respectable authorities. The authority of the legislature has been said not to be absolute in all cases in which the Constitution fails to impose a restriction, and the power of the judiciary to review and reverse the determination of the legislature in regard to the prohibition or restriction of pursuits or the uses of property, as nuisances, has been asserted and frequently exercised. Those who hold this doctrine to be sound, deny that it is competent for the legislature, whenever it shall deem proper, to declare the existence of any property and any pursuit, in their opinion injurious to the public, to be a nuisance, and to destroy or prohibit it as such; and they assert that such action of the legislature is subject to be reviewed by the courts. They deny that the legislature can at will enlarge its power over property or pursuits by declaring them to be nuisances, or by

[1] Mugler v. Kansas, 123 U. S. 623, 660; State v. Addington, 12 Mo. App. 214; 77 Mo. 110; *In re* Hoover, 30 Fed. Rep'r, 51.

enacting a definition of a nuisance that will cover them.[1] But it would seem that the better doctrine is that declared in the cases above referred to, namely, that while the State may not prohibit a business innocent in itself, when it is pursued in a lawful way not injurious to the community, and while the police regulation of pursuits and of the employment and uses of property must be limited to such restrictions as are reasonably necessary to protect legitimate public interests, and to secure, as far as possible, the largest freedom and the greatest good of all members of the community, it is not within the authority of judicial tribunals to set aside laws enacted ostensibly to promote the public welfare, unless it is perfectly clear upon the face of the statutes or from their terms, that they have no real or substantial relation to the objects to which they purport to be directed, or that they infringe upon and impair fundamental rights secured by constitutional guaranties. For it must now be considered as an established principle of law in this country, that there are no limits whatever to the legislative powers of the States, except such as are prescribed in their own Constitutions or in that of the United States; consequently, that the courts, in the performance of their duty to confine the legislative department within the constitutional limits of its power, cannot nullify and avoid a law, simply because it conflicts with the judicial notions of natural right or morality or abstract justice.[2]

Police power inalienable.

SEC. 9. The police power is so clearly essential to the

[1] *See* Tiedeman's Lims. Pol. Pow., §§ 2, 85; Beebe v. State, 26 Ind. 501.

[2] *See* Tiedeman's Lims. Pol. Pow., § 2; Cooley's Const. Lims. 177, 201; Davis v. State, 68 Ala. 58; Dorman v. State, 34 id. 216; Stein v. Mayor, 24 id. 614; State v. Wheeler, 25 Conn. 290; State v. Allmond, 2 Houst. (Del.) 612; Boston v. Cummings, 16 Ga. 102; Macon, etc., Railroad Co. v. Littel, 45 id. 270; State v. Clotter, 33 Ind. 409; Wilkins v. State, 113 id. 514; Lutz v. Crawfordsville, 109 id. 466; Eastman v. State, ib. 278; Hedderich v. State, 101 id. 564; Bennett v. Baggs, 1 Baldw. 74; Humes v. Miss. Pac. Railroad Co., 82 Mo. 221; Hamilton v. St. Louis Co., 15 id. 23; Bertholf v. O'Reilly, 74 N. Y. 509; Wynehamer v. People, 13 id. 378; Cochran v. Van Surly, 20 Wend. 380; People v. New York Gas-Light Co., 64 Barb. 55; Stratton claimants v. Morris claimants, 89 Tenn. 497.

well-being of the State, that the legislature cannot, by any act or contract whatever, divest itself of the power, nor fetter its discretion in the exercise of the power. The discretion can no more be bargained away than the power itself. In other words, the right to exercise the police power cannot be alienated, surrendered, or abridged, by a State legislature, by any act, grant, charter, contract, or delegation whatsoever, because, it is said, it is a governmental function without which the legislature would be powerless to protect those rights which it was especially designed to secure. So that the legislature cannot, even by charter granted to a corporation, confer any irrepealable right to continue the exercise of franchises in a way that may have become injurious to the public.[1] Much less can it do so in the case of private individuals. And it follows that one legislature can not only not control or limit, in any of the ways mentioned, its own subsequent legislative action, but it cannot thus interfere with the legislative action of its successors.[2]

Corporations subject to police regulation.

SEC. 10. These principles were applied in an important case coming before the Federal Supreme Court. The Boston Beer Co. was incorporated under the laws of Massachusetts in 1828, "for the purpose of manufacturing malt liquors in all their varieties." Under the pro-

[1] Stone v. Mississippi, 101 U. S. 814; Butchers' Union Co. v. Crescent City Co., 111 id. 746; Boyd v. Alabama, 94 id. 645; Toledo, etc., Ry. Co. v. Jacksonville, 67 Ill. 37; New Orleans v. Stafford, 27 La. Ann. 417; People v. Squires, 107 N. Y. 593; Coates v. Mayor of New York, 7 Cow. 585; Presbyterian Church v. New York, 5 id. 538; Justice v. Comm., 81 Va. 212. Indeed, it may be said that corporations are subject to the same legislative control that natural persons are under like circumstances; Ward v. Farwell, 97 Ill. 593; Ruggles v. People, 91 id. 256; Thorpe v. Rutland, etc., Railroad Co., 27 Vt. 140; Louisville, etc., Railroad Co. v. Railroad Comm'n of Tennessee, 19 Fed. Rep'r, 679, 689; *In re* Tiburcio Parrott, 1 id. 481; and that all legislative charters to private corporations are subordinate to the police power in all cases whatsoever. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Fertilizing Co. v. Hyde Park, 97 id. 659; Butchers' Union Co. v. Crescent City Co., 111 id. 746; Stone v. Mississippi, 101 id. 814; Beer Co. v. Massachusetts, 97 id. 25.

[2] Cases cited in last preceding note; Buffalo Railroad Co. v. Buffalo Street Railroad Co., 111 N. Y. 132; Metro. Bd. of Excise v. Barrie, 34 id. 666; Moore v. State, 48 Mass. 147.

hibitory liquor law of 1869, certain malt liquors belonging to the company were seized as they were being transported within the State for purposes of sale, and were declared to be forfeited under the law. The question at issue and presented to the court was, whether the charter of the company, authorizing it to manufacture malt liquors, and, as incidental thereto, to dispose of the liquors manufactured, constituted a contract, protected against subsequent legislation prohibiting the manufacture of liquors within the State. The company took the ground that it had a right, by contract, to manufacture and sell beer without limit as to time, notwithstanding and in spite of any exigencies which might occur in the morals or the health of the community, requiring such business to cease. The court held that the legislature of the Commonwealth had, in this case, reserved complete power to pass any law it might deem proper, which might affect the powers of the company, but that irrespective of such reservation of power, it could, without infringing any constitutional rights of the company, limit and restrain the exercise of the corporate powers. It was further decided that, while the company acquired, under its charter, a right or capacity, granted in the most unqualified form, to engage in the manufacture of malt liquors, its business was at all times subject to the same governmental control as like business conducted by individuals; and that the legislature could not divest itself of the power, by such appropriate means, applicable alike to corporations and individuals, as its discretion might devise, to protect the lives, health and property of the people, or to preserve good order and the public morals. The prohibitory enactment of which the company complained was held to be a mere police regulation, applicable to the company as to individuals, which the State could establish without violating any contract contained in the charter of the corporation, within the meaning of the constitutional provisions in that behalf.[1]

[1] Beer Co. v. Massachusetts, 97 U. S. 25.

Illustration.

SEC. 11. Another illustration of the same principle is afforded by a recent decision of the same court in a case where rights granted to a corporation came in conflict with municipal ordinances designed to affect the corporation in the conduct of its business. An act of the legislature of Illinois incorporated a company and authorized it to establish and maintain, within a certain area south of a designated line in Cook county, in that State, chemical and other works for the purpose of manufacturing and converting animal matter into an agricultural fertilizer and other chemical products, and to establish and maintain depots in Chicago, in the same county, for the purpose of receiving and carrying away from that city such animal matter as it might there obtain. The works had been located and maintained in the village of Hyde Park, in Cook county, and the depots in Chicago, before the proprietors were so incorporated. Thereafter the legislature granted to the village of Hyde Park large powers of police and local government, among them, "to define and abate nuisances which are or may be injurious to the public health," and "to regulate, prohibit, or license (certain) trades or callings, and all establishments or places where nauseous, offensive, or unwholesome business was carried on." In pursuance of such powers, the village authorities adopted an ordinance, with proper penalties, providing that no person should convey any offal or other unwholesome or offensive matter into or through the village, and for violations of this ordinance employes of the company were arrested and convicted. Thereupon the company filed a bill to restrain further prosecutions and for general relief. The company claimed that its charter constituted a contract, the obligation of which was impaired by the ordinance in question. The court said: "That a nuisance of flagrant character existed, as found by the court below, is not controverted. We cannot

doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the State when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances, is one of its ordinary functions. * * * In the case before us it does not appear that the factory could not be removed to some other place south of the designated line, where it could be operated, and where offal could be conveyed to it from the city by some other railroad; both without rightful objection. The company had the choice of any point within the designated limits. In that respect there is no restriction. The charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and we think the charter did not give it to them." The decision, therefore, was, that the State, under its power to protect the public health, could, either directly or through the village authorities, abate the nuisance created by the company in its business, and that the charter did not constitute a license legalizing such nuisance, nor did any prescriptive right to maintain the nuisance arise from the circumstance that the business had been carried on in the same manner, in the same place, without objection, for a period of years.[1]

Private rights subordinate to the police power.

SEC. 12. The exercise of the police power, being for

[1] Fertilizing Co. v. Hyde Park, 97 U. S. 659.

the promotion of the public good, is superior to all considerations of private right or interest, and by virtue of it the State may lawfully impose upon the exercise of private rights such burdens and restraints as may be necessary and proper to secure the general health and safety. Where public interests require the discontinuance or restriction of any manufacture or traffic or business of any kind, the hand of the legislature cannot be stayed from providing therefor by any incidental inconvenience which individuals or corporations may suffer. Every one is obliged so to conduct himself and so to use his property as not to interfere unreasonably with others in the enjoyment of equal rights; and this principle may be given practical effect by proper legislation. Private rights must be deemed to be subordinate to the general interest of the public.[1] In respect of property, it is a well-settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied condition that his use of it shall not be injurious to the rights of others in the enjoyment of their property, nor injurious to the rights of the community.[2] Moreover, the holder of property is bound to know that through agencies other than his own, his property may become an occasion of injury to the public, and that in such event it is subject to reasonable regulation in the interest of the public.[3] Any other doctrine would strike at the root of all police regulations. And in respect of personal rights, every citizen is bound to conform his conduct and the pursuit of his calling to such general rules as are adopted by society, from time to time, for the common welfare.

[1] Munn v. Illinois, 94 U. S. 124; Mugler v. Kansas, 123 id. 623; Slaughter-House Cases, 16 Wall. 36; Green v. Savannah, 6 Ga. 1; New Orleans v. Stafford, 27 La. Ann. 417; Taunton v. Taylor, 116 Mass. 254; Watertown v. Mayo, 109 id. 315; Comm. v. Alger, 7 Cush. 53; Matter of Cheesebrough, 78 N. Y. 232; Brown v. Keever, 74 N. C. 714; Pool v. Trexler, 76 id. 297; Baker v. Boston, 12 Pick. 184; Bertholf v. O'Reilly, 74 N. Y. 509.

[2] Comm. v. Alger, 7 Cush. 53, Shaw, C. J.

[3] Coates v. Mayor of New York, 7 Cow. 585.

CHAPTER II.

LIMITATIONS ON THE POLICE POWER.

SEC. 13. Constitutional limitations.
15. Constitutional guaranties.
16. Fourteenth Amendment.
17. The liquor traffic.
18. Eminent domain.
19. Prohibitory liquor laws.
20. Destruction of property to avert calamity.
21. Property cannot be taken under police power.
22. Public uses for which property may be taken.
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24. Co-ordinate jurisdiction over commerce.
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28. Right of exclusion; as to things.
32. Inspection laws.
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Constitutional limitations.

SEC. 13. It now becomes necessary to consider the effect upon the exercise of the police power by the legislature of those provisions in the various Constitutions, designed to secure the rights of persons and property from arbitrary and unjust governmental interference. The constitutional inhibition of State laws impairing the obligation of contracts has been incidentally touched upon in the preceding chapter,[1] and the authorities there referred to sufficiently show that the constitutional provisions in that regard can have no application to laws which are in their nature legitimate police regulations. Such regulations do not in fact ever violate the sanctity of contract obligations, since all such engagements are made and entered into subject to the right of the State at any time to enact such laws as the public interests may require. And this is true even of the most solemn engagements of the

[1] *Ante*, secs. 10, 11. *See* New Orleans Water-Works Co. v. Rivers, 115 U. S. 674.

State itself. In short, all rights, franchises and privileges whatever, however derived or secured, are held subject to the police power of the State. The constitutional provision in question affords no protection against the exercise of this power.

SEC. 14. Upon the general subject of the constitutional limitations, the language of an eminent judge, expressing the opinion of the New York Court of Appeals in a very recent case, may profitably be quoted at some length.[1] "The ascertainment," he said, "of the exact boundaries of legislative power under the rigid constitutional systems of the American States is in many cases attended with great perplexity and difficulty. The people have placed in the Constitution a variety of restrictions upon legislative power, and chief among them is that which ordains that no person shall be deprived of life, liberty or property without due process of law. There is but little difficulty in determining the validity of a statute under this constitutional principle, in cases where the statute assumes to divest the owner of property of his title and possession, or to actually deprive him of his personal liberty. The difficulty in the application of the constitutional principle arises in the main in respect of that class of legislation, not infrequent, which, while it does not, in a strict sense, deprive an individual of his property or liberty, does, nevertheless, in many cases, by the imposition of burdens and restrictions upon the use and enjoyment of property, and by restraints put upon personal conduct, seriously impair the value of property and abridge freedom of action. The validity of legislation of this kind, to some extent, and within certain limits, is questioned by none. But such legislation may overpass the boundaries of legislative power, and violate the constitutional guaranty, for it is now an established principle, that this guaranty protects property and liberty, not merely from confiscation or de-

[1] Andrews, J., People v. Budd, 117 N. Y. 1, 6.

struction by legislative edicts, but also from any essential impairment or abridgment not justified by the principles of free government. * * * But the very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all. This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all.[1] This power of government, the power, as expressed by Taney, C. J.,[2] 'inherent in every sovereignty, the power to govern men and things,' is not, however, an uncontrollable or despotic authority, subject to no limitation, exercisable with or without reason in the discretion or at the whim or caprice of the legislative body. But within its legitimate domain the power is original, absolute, and indefeasible. It vested in the legislative department of the government at its creation, without affirmative grant or definition,[3] as an essential political power and attribute of government, and personal rights and rights of property are subordinate to this supreme power acting within its appropriate sphere. It may be exercised so as to impair the value of property, or limit or restrict the uses of property, yet in this there is no infringement of the constitutional guaranty, because *that guaranty is not to be construed as liberating persons or property from the just con-*

[1] The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority essential to the safety, health, peace and good order of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same rights by others. It is then liberty regulated by law. Crowley v. Christensen, 137 U. S. 86; Field, J., Soon Hing v. Crowley, 113 id. 703; McPherson v. Village of Chebause, 114 Ill. 46.

[2] 5 How. 583.

[3] Village of Carthage v. Frederick, 122 N. Y. 268.

trol of the laws. It was designed for the protection of personal and private rights against encroachments by the legislative body, not sanctioned by the principles of civil liberty as held and understood when the Constitution was adopted.[1] The boundary of legislative power in the enactment of laws in the assumed exercise of this power of sovereignty, which injuriously affects persons or property, is indistinct, and no rule or definition can be formulated under which, in all cases, it can be readily determined whether a statute does or does not transgress the fundamental law. But the great landmarks of civil liberty, embodied in our State Constitutions, were established by our English ancestors, and upon questions such as the one now before us we may study with profit the principles and practice of the law of England. When a statute is challenged as overstepping the boundaries of legislative power, the object sought to be obtained by the legislature, the nature and functions of government, the principles of the common law, the practice of legislation and legal adjudications are pertinent and important considerations and elements in the determination of the controversy."

Constitutional guaranties.

SEC. 15. The chief limitations upon legislative interference with personal rights are expressed summarily in the Fourteenth Amendment to the Constitution of the United States. Similar provisions have been incorporated into the Bill of Rights of the several State Constitutions, with but little and unimportant change of phraseology. It is declared, in the words of that amendment, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the

[1] People v. Gillson, 109 N. Y. 389; Slaughter-House Cases, 16 Wall. 36; Soon Hing v. Crowley, 113 U. S. 703; Goddard v. Jacksonville, 15 Ill. 588.

laws." It has frequently been adjudged to be the settled doctrine of the Supreme Court of the United States, that this amendment was not designed to interfere with or in any degree to abridge or impair the exercise of the police power of the States.[1] It does not limit the subjects upon which the States can legislate. Upon any matter in relation to which, previous to its adoption, they could have acted, they may still act. They can now, as then, legislate to promote health, good order and peace, to develop their resources, enlarge their industries, and advance their prosperity. It only inhibits discriminating and partial enactments, favoring some to the impairment of the rights of others. The principal, if not the sole purpose of its prohibitions, is to prevent any arbitrary invasion by State authority of the rights of persons and property, and to secure to every one the right to pursue his happiness unrestrained, except by just, equal and impartial laws.[2]

Fourteenth Amendment.

SEC. 16. That is to say, the common business and callings of life, the ordinary trades and occupations, which are innocent in themselves, and have been followed in all communities from time immemorial, must be free in this country to all alike upon the same conditions; and the right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is secured to each individual as a distinguishing privilege of citizenship. The Amendment has received thorough interpretation by the Supreme Court, and the results have been stated more at large. By it, it is said, is undoubtedly intended not only that there shall be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security shall be given to all, under like circumstances, in the enjoy-

[1] *In re* Rahrer, 140 U. S. 545; Powell v. Pennsylvania, 127 id. 678; Mugler v. Kansas, 123 id. 623; Barbier v. Connolly, 113 id. 27; Yick Wo v. Hopkins, 118 id. 356; *In re* Hoover, 30 Fed. Rep'r, 51; Woodruff v. New York, etc., R. Co., 59 Conn. 63; State v. Moore, 104 N. C. 714.

[2] Field, J., Butchers' Union Co. v. Crescent City Co., 111 U. S. 746.

ment of their personal and civil rights; that all persons shall be equally entitled to pursue their happiness and acquire and enjoy property; that they shall have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment shall be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens shall be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment shall be imposed upon one than such as is prescribed to all for like offenses. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.[1]

The liquor traffic.

SEC. 17. The police power extends not only to things intrinsically dangerous to the public health, such as infected rags and diseased meat, but to things which, when used in a lawful manner, are subjects of property and of commerce, and yet may be so used as to be injurious or dangerous to the life, the health or the morals of the people. The State may regulate the manufacture, keeping and sale of all such things, without infringing the constitutional rights of citizens. Intoxicating liquors, for instance, belong to the class of things that are thus subject to regu-

[1] Matthews, J., Yick Wo v. Hopkins, 118 U. S. 356; Field, J., Dent v. West Virginia, 129 id. 114; Barbier v. Connolly, 113 id. 27. *See, also*, the following cases illustrating the construction of the Amendment: Slaughter-House Cases, 16 Wall. 36; Crowley v. Christensen, 137 U. S. 86; Powell v. Pennsylvania, 127 id. 678; Eilenbacker v. Plymouth County Court, 134 id. 31; Miss. Pac. Ry. Co. v. Mackey, 127 id. 205; Mugler v. Kansas, 123 id. 623; Presser v. Illinois, 116 id. 252; Strauder v. West Virginia, 100 id. 303; Walker v. Sauvinet, 92 id. 90; Stockton Laundry Case, 36 Fed. Rep'r, 611; *In re* Ah Jon, 29 id. 181; *In re* Lee Tong, 18 id. 253.

lation. The State may deal with the matter as it chooses, and its action raises no question of Federal law. The police power of the State is fully competent to regulate the business, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to make or sell intoxicating liquors. Inasmuch as it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. Consequently, statutes prohibiting the manufacture or sale, or keeping for sale, of intoxicating liquors as a beverage, and declaring all places where such liquors are manufactured or kept for sale in violation of the statute, to be common nuisances, and forbidding their future use for the purpose, and authorizing courts to restrain violations of the law by injunction, and to punish the disregard of their injunctions as a contempt, by fine or imprisonment, or both,— do not infringe any right, privilege or immunity of the citizen secured by the Constitution of the United States. They do not deny to the citizens whom they affect, the equal protection of the laws, nor deprive them of property without due process of law. The fact that the statutes may prohibit the manufacture or sale of such liquors in buildings which were erected, equipped with machinery and used for that purpose prior to the enactment of the prohibitory law, and at a time when, under the laws of the State, it was legal so to do, does not, in any regard, alter the case.[1] Intoxicating liquors are but an example of a class of things that may be made subject to State regulations such as those just mentioned.

[1] *In re* Rahrer, 140 U. S. 545; Crowley v. Christensen, 137 id. 86; Eilenbacker v. Plymouth County Court, 134 id. 31; Kidd v. Pearson, 128 id. 1; Mugler v. Kansas, 123 id. 623; Foster v. Kansas, 112 id. 201; Tiernan v. Rinker, 102 id. 123; Beer Co. v. Massachusetts, 97 id. 25; Bartemeyer v. Iowa, 18 Wall. 129; Pervear v. Massachusetts, 5 id. 475; License Tax Cases, 5 How. 504.

Eminent domain.

SEC. 18. Another very important provision contained in the Constitutions or Bills of Rights of all the States, in substantially the same language, is, that private property shall not be taken for public use, without just compensation. Even under the police power, private property cannot be taken for a public purpose, without compensation paid or secured, however essential it may be for the public health or safety.[1] This can only be done in the exercise of the power of *eminent domain.* The distinction between the police power and that of eminent domain is radical; "under the one, the public welfare is promoted by regulating and restricting the use and enjoyment of property by the owner; under the other, the public welfare is promoted by taking the property from the owner and appropriating it to some particular use."[2] The distinction is well stated by the leading authority on the subject, in the course of his discussion of the statutes providing for the construction of drains, ditches and levees, for improving wet and overflowed lands. He refers all such improvements to the eminent domain power. All the statutes provide for constructing the necessary drains or levees across the lands of those unwilling to have them. "Private property is thus devoted to a particular use, permanent in its nature, against the will of its owner. The rights of exclusion, of user and of disposition are interfered with or entirely destroyed. The question is, whether this can be done without the exercise of the power of eminent domain. It is not a question of advantage or disadvantage to the owner, but of constitutional right. The police power, so far as it relates to property,

[1] Markham v. Brown, 37 Ga. 277; Chicago v. O'Brien, 111 Ill. 532; Jacksonville v. Lambert, 62 id. 519; Fleming v. Hull, 73 Iowa, 598; New Orleans Water-Works Co. v. St. Tammany Water-Works Co., 120 U. S. 64.

[2] Lewis on Em. Domain, § 6, and notes.

is a power *to regulate its use*,[1] and is negative or inhibitory in its character. A man cannot be compelled, under the police power, to devote his property to any particular use, however advantageous to himself or beneficial to the public; but he may be compelled to refrain from any use which is detrimental to the public. This is the beginning and the end of the police power over private property."[2] In regulating or restricting the uses of private property, there is, in fact, no appropriation of it whatever. The owner is not deprived of his property for any public or private use. He may suffer some injury, in that he is disturbed in the enjoyment of his rights, but for this he is compensated, in the theory of the law, by sharing in the general benefits which the regulations are intended and calculated to secure.[3]

Prohibitory liquor laws.

SEC. 19. These principles have been applied in the cases which sustain the validity of State laws prohibiting the manufacture and sale of intoxicating liquors, and declaring that places kept and maintained for the illegal manufacture or sale of such liquors shall be deemed common nuisances, and shall be summarily abated. In such a case, the court said: "A prohibition upon the use of property for purposes that are declared, by valid legisla-

[1] "The use of property may be regulated as the public welfare demands. A public nuisance may be abated, and private property interfered with or destroyed for that purpose. The conduct of any business detrimental to the public interests may be prohibited. Property made or kept in violation of law may be destroyed. Railroad corporations, and others invested with the power of eminent domain, because their business is of public utility, may be subjected to such regulations in regard to their charges, and the conduct of their business as the legislature deem wise and proper for the general good. They may be compelled to adopt such appliances and execute such additions or changes in their works or property, and take such precautions as are necessary to the public safety. Beyond this, private property cannot be interfered with under the police power, but resort must be had to the power of eminent domain and compensation made." Lewis on Em. Domain, § 156.

[2] Lewis on Em. Domain, § 187; Cooley's Const. Lims., chap. 16; Dillon's Mun. Corp., § 93, *et seq.*; Sedgwick's Const. Law, 435-441.

[3] Dillon's Mun. Corp., § 141; Bancroft v. Cambridge, 126 Mass. 38; Watertown v. Mayo, 109 id. 315; Green v. Savannah, 6 Ga. 1

tion, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property, for the public benefit. Such legislation does not disturb the owner in the control and use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. * * * The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not, and consistently with the existence and safety of organized society cannot be, burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power, by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent man."[1]

Destruction of property to avert calamity.

SEC. 20. There is a seeming exception to the rule forbidding the taking of private property without compensation. By the common law, every one has the right, in cases of emergency, to damage or destroy property, in order to avert a public calamity. Thus, buildings may be demolished, to stay the progress of a conflagration, or the ravages of a pestilence, or the advance of a hostile

[1] Harlan, J., Mugler v. Kansas, 123 U. S. 623; Comm. v. Intoxicating Liquors, 115 Mass. 153.

army.[1] The act, in all such cases, is justified on the ground of necessity; the actors incur no responsibility, and the owner of the property has no remedy. The danger, however, must be imminent, admitting of no delay; and the act must be one justified by a reasonable necessity. If a person has acted in good faith, and has exercised a reasonable judgment, under all the circumstances of the case, he will not be liable, even though it should turn out that the act was, in fact, unnecessary.[2] The right is often regulated by statute, but this does not change its character, nor bring its exercise under the power of eminent domain. Neither individuals nor the community can be held liable to make compensation, unless the statutes expressly so provide. The statutes are simply designed to give a remedy where there was none before, or to designate public officers who shall have power, and whose duty it shall be, to determine upon the necessity calling for the destruction of property and to order and supervise such destruction. But there is, even when the matter is thus regulated by statute, a plain distinction between the taking, using, or destroying of property, in cases of necessity, in order to avert public calamity, and the taking of private property for public use, which is forbidden by the constitutional provisions, unless compensation be made.[3]

[1] "The best elementary writers lay down the principle, and adjudications upon adjudications have for centuries sustained, sanctioned and upheld it, that in a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, or any other great public calamity, the private property of any individual may be lawfully destroyed, for the relief, protection, or safety of the many, without subjecting the actors to personal responsibility for the damages which the owner has sustained." Sherman, Senator, Russell v. Mayor of New York, 2 Denio, 461, 474.

[2] Dewey v. White, M. & M. 56; Surocco v. Geary, 3 Cal. 69; Dunbar v. Alcalde of San Francisco, 1 id. 355; Bishop v. Macon, 7 Ga. 200; Conwell v. Imrie, 2 Ind. 35; Field v. Des Moines, 39 Iowa, 575; McDonald v. Red Wing, 13 Minn. 38.

[3] Bowditch v. Boston, 4 Cliff. 323; Taylor v. Inhabts. of Plymouth, 8 Metc. 462; Parsons v. Pettingill, 11 Allen, 507; People v. Buffalo, 76 N. Y. 558; Mayor of New York v. Stone, 20 Wend. 139; Mayor of New York v. Lord, 17 id. 285; 18 id. 126; Mayor of New York v. Pentz, 24 id. 668; American Print Works v. Lawrence, 21 N. J. L. 248, 714; 23 id. 590; Klopp v. Live-Stock Assn., 1 Woodw. (Pa.) 445; Keller v. Corpus Christi, 50 Tex. 614. Stimson Am. Stat. Law, § 1149.

Property cannot be taken under police power.

SEC. 21. With the exception of the cases mentioned in the preceding paragraph, there can be no necessity which will justify the permanent appropriation or use of private property by the public without compensation. There may be a necessity for temporary interference with the property, in the exercise of the police power, and the necessity will furnish the justification; but when the necessity is past, the right ceases. So, it has been held that there cannot, under the police power, be a permanent appropriation of land without compensation for the purpose of constructing drains through the same, without the owner's consent.[1] And it is said that a statute will be unconstitutional which permits one land-owner, for his own personal benefit and without any consideration of the public good, to construct an underground drain through the lands of another person, thus taking private property for a private use.[2] It has also been held that, without the authority of a legislative act, giving the right of eminent domain, or making provision for proper compensation, neither a board of health nor a city council has any power to erect a dam on private property, without the owner's consent, for the purpose of abating a nuisance existing on adjacent land.[3]

Public uses for which property may be taken.

SEC. 22. On the ground, however, that the public health, convenience and welfare will be thereby subserved and promoted, the legislature may authorize the taking of private property, in the regular proceedings, and upon compensation being made therefor, for the purpose of using the same for public parks or pleasure drives;[4] or for

[1] Matter of Cheesebrough, 78 N. Y. 232; Butler v. Thomasville, 74 Ga. 570; Stondinger v. Newark, 1 Stew. Eq. 446.

[2] Fleming v. Hull, 73 Iowa, 598.

[3] Cavanagh v. Boston, 139 Mass. 426; Vick v. Rochester, 46 Hun, 607.

[4] Bank of Sonoma Co. v. Fairbanks, 52 Cal. 196; Mayor v. Park Commissioners, 44 Mich. 602; State v. Hennepin Co., 33 Minn. 235; County Court v. Griswold, 58 Mo. 175; Brooklyn Park Co. v. Armstrong, 45 N. Y. 234; Application of Mayor of New York, 99 id. 569; Owners, etc. v. Albany, 15 Wend. 374.

public squares;[1] or for public sewers;[2] or for markets;[3] or for cemeteries;[4] or for the construction of water-works or securing a supply of pure water;[5] or for public baths;[6] or for the construction of sewers, drains, or levees, to reclaim wet or overflowed lands.[7] The power of eminent domain may also undoubtedly be exercised for the purpose of acquiring lands and rendering them more salubrious, by drainage or other means. Low grounds in the neighborhood of populous districts may thus be taken and filled up or drained to abate a nuisance.[8]

Regulation of commerce.

SEC. 23. Another limitation upon the exercise of legislative powers of the States is, that these powers shall not be applied to subjects which are confided exclusively to Congress by the Federal Constitution. The States are barred from any invasion of the domain ceded to the National government. They are not permitted, in the exercise of the police power, for any purpose whatever to encroach upon the powers of the general government or rights granted or secured by the supreme law of the land.[9]

[1] Owners, etc. v. Albany, 15 Wend. 374.

[2] Hildreth v. Lowell, 11 Gray, 345.

[3] Matter of Cooper, 28 Hun, 515. *See* Twelfth St. Market Co. v. Railroad Co., 142 Penn. St. 580.

[4] Evergreen Cem, Assn. v. Beecher, 53 Conn. 551; Evergreen Cem. Assn. v. New Haven, 43 id. 234, 241; Balch v. Co. Commrs. of Essex, 103 Mass. 166; *In re* Deansville Cem. Assn., 66 N. Y. 569.

[5] Burden v. Stein, 27 Ala. 104, 116; St. Helena Water Co. v. Forbes, 62 Cal. 182; Reddall v. Ryan, 14 Md. 444; Kane v. Baltimore, 15 id. 240; Riche v. Bar Harbor Water Co., 75 Me. 91; Ham v. Salem, 10 Mass. 350; Rochester Water Commrs., 66 N. Y. 413; Stamford Water Co. v. Stanley, 39 Hun, 424; *In re* New Rochelle Water Co., 46 id. 525; Olmstead v. Proprietors of Morris Aq. Co., 46 N. J. L. 495; 47 id. 311; Thorn v. Sweeney, 12 Nev. 251; State v. Eau Claire, 40 Wis. 533.

[6] Poillon v. Brooklyn, 101 N. Y. 132.

[7] Lewis on Em. Domain, § 188; Mills on Em. Domain, §§ 16, 354; New Orleans Draining Co., 11 La. Ann. 338; Bancroft v. Cambridge, 126 Mass. 438; Dingley v. Boston, 100 id. 544; Matter of Ryers, 72 N. Y. 1; Burk v. Ayers, 19 Hun, 17; People v. Nearing, 27 N. Y. 306; Winslow v. Winslow, 95 N. C. 24.

[8] *Post*, sec. 154, and cases in preceding note. It has been held in Massachusetts that the cultivation of fish is an industry connected with the public good in such a way that lands may be flowed to make ponds for this purpose, provided compensation be paid to the owner of the lands. Turner v. Nye, 45 Alb. L. J. 25.

[9] Harlan, J., New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650.

One of the most important powers delegated to Congress is that of regulating commerce with foreign nations, and among the several States, and with the Indian tribes.[1] There has been for many years a great deal of controversy over the meaning of these terms. But it is now settled doctrine that commerce is trade and traffic, not merely transportation; that to regulate commerce is to prescribe the rules by which it is to be governed, and according to which it is to be conducted; that the power to regulate extends to the persons who conduct navigation, and those who are engaged in the business of transportation, as well as to the instruments used; that the power also includes the right to determine what is a regulation of commerce, and what are and what are not the subjects of commerce.[2] The power is said to be co-extensive with the subject on which it acts, so that it cannot be stopped at the external boundary of a State, but must enter into its interior, and must be capable of authorizing the disposition of those articles which it introduces, in order that they may become mingled with the common mass of property within the territory entered.[3]

Co-ordinate jurisdiction over the subject.

SEC. 24. It has been a much vexed question whether there may not exist in the States a co-ordinate power to regulate commerce of certain kinds in the absence of any action by Congress on the subject; but it seems now to be accepted doctrine that there is a class of subjects more or less intimately connected with commerce, foreign, domestic and interstate, which may be acted on, and in regard to which rules may be prescribed by the States, so long as Congress does not choose to occupy the field and pass laws upon the same subject. The doctrine has been briefly and clearly stated as follows: That the power to regulate

[1] U. S. Constitution, art. I, sec. 8, par. 3. *See* on this subject, Miller on the Constitution, Lect. IX.

[2] Gibbons v. Ogden, 9 Wheat. 1; Cooley v. Port Wardens, 12 How. 299; Leisy v. Hardin, 135 U. S. 100.

[3] Leisy v. Hardin, 135 U. S. 100.

commerce is one which includes many subjects various and quite unlike in their nature; that whenever subjects of this power are in their nature national, or require one uniform system or plan of regulation, they may justly be held to belong to that class over which Congress has the exclusive power of legislation; but that local and limited matters, not national in their character, which are most likely to be wisely provided for by such diverse rules as the localities and the authorities of the different States may deem applicable, may be regulated by the legislatures of those States in the absence of any act of Congress upon the same subject. When Congress does legislate, that excludes the legislation of the States and renders it void so far[1] as it may interfere or conflict with the statutes of the United States.[2] In other words, to adopt the language of the Supreme Court in a recent case, the power to pass laws in respect to internal commerce, inspection laws, quarantine laws, and health laws, belongs to that class of powers pertaining to locality, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power over commerce.[3]

Quarantine laws.

SEC. 25. In the summary statement of the conclusions of the Supreme Court in the Passenger Cases, the following language is used:[4] "That the States of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce pre-

[1] Henderson v. Spofford, 59 N. Y. 131.
[2] Miller on the Constitution, 455.
[3] Cooley v. Port Wardens, 12 How. 299; Leisy v. Hardin, 135 U. S. 100, 108.
[4] Mr. Justice Wayne, Passenger Cases, 7 How. 414.

scribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound; and that the States may, in the exercise of such police power, without any violation of the power in Congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the State the cost of their detention, and of the purification of the vessel, cargo and apparel of the persons on board."

The system of quarantine in operation in all important seaports of the world to which commerce is admitted, does undoubtedly in some sense regulate that commerce. It arrests a vessel before her voyage is completed, and the interruption of the voyage may be for days or for weeks. It restrains the liberty of the passengers; it operates on the ship, which is the instrument of commerce, and its officers and crew, the agents of navigation; and all these are subjected to an examination, as to their sanitary condition, at the expense of the vessel. Yet the ordinary system of quarantine laws established by a State is a rightful exercise of the police power for the protection of health. Such of its rules as amount to a regulation of commerce, belong to that class of laws which are valid until displaced or contravened by some legislation of Congress. But Congress, so far from interposing by legislation over this subject, or forbidding the State laws, has recognized and adopted the laws of the States on the subject, and forbidden all interference with their enforcement.[1]

The requirement that each vessel passing a quarantine station shall pay a fee fixed by the statute, for the port officer's services in making examination as to her sanitary condition, and the ports from which she came, is a part

[1] U. S. Rev. Stat., §§ 4792–4794; Act of April 29, 1878, 20 Stat. L. 37; Gibbons v. Ogden, 9 Wheat. 1, 205; Morgan v. Louisiana, 118 U. S. 455.

of all quarantine systems, and is not to be condemned as imposing a tonnage tax or duty within the meaning of the constitutional provisions on that subject.[1] It is otherwise, however, where the contribution exacted is measured by the tonnage of the vessel in express terms; or where the fee is made payable to the port wardens by every vessel entering the port, whether it receives any service or not, and where it is imposed for the mere privilege of entering and anchoring in the port.[2]

Right of exclusion; as to persons.

SEC. 26. An act of Congress passed in March, 1891,[3] provides that alien persons suffering from a loathsome or a dangerous contagious disease shall not be admitted into the United States; and that all such aliens who seek to come into the country shall be sent back, if practicable, in the same vessel by which they were brought, at the expense of the vessel; otherwise, at the earliest opportunity. By the same act provision is made for the inspection of all immigrants, and for their examination by surgeons of the Marine Hospital Service. The validity of this act has been affirmed, upon the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, and it is to be exercised either through treaties or statutes, the latter being sanctioned by the power to regulate commerce.[4] But independently of any action of

[1] Morgan v. Louisiana, 118 U.S. 455.

[2] State Tonnage Tax, 12 Wall. 204; Peete v. Morgan, 19 id. 581; Cannon v. New Orleans, 20 id. 577; Inman Steamship Co. v. Tinker, 94 U. S. 238; Steamship Co. v. Port Wardens, 6 Wall. 31.

[3] 26 Stat. L. 1084; R. S. Supplt. 934.

[4] Nishimura Ekiu v. United States, 142 U. S. 651; Chae Chan Ping v. United States, 130 id. 581.

Congress on this subject, it is undoubtedly within the power of the States to establish precautionary measures against the spread of communicable diseases by persons coming from foreign countries or from other States. To this end they may entirely exclude persons afflicted with incurable diseases, and may isolate those who are temporarily diseased until the danger of contagion is removed. The extent of the power of the State to exclude foreigners from its territory is limited only by the right of self-defense, which no power granted to Congress can restrain or annul.[1] Such means may be used as are necessary to render the power effectual. Reasonable inspection laws constitute such means; and the master of every vessel arriving in the port of a State from a foreign country or from another State, and carrying passengers, may be required to report in writing, under oath, to the State authorities, the name, place of birth, last legal settlement, age and occupation of every passenger in the vessel.[2] But whatever, outside of the legitimate exercise of the right of self-protection, affects the intercourse of foreigners with this country, or their immigration, is exclusively within the jurisdiction of the general government and is not subject to State interference.[3] So that a State may not impose a tax on alien passengers coming by vessel from a foreign country, and hold the vessel liable for the tax.[4] This right belongs to Congress, exclusively.[5] The statute is not relieved from this objection by declaring in its title that it is to raise money for the execution of the inspection laws of the State, which require that passengers shall be inspected, to determine who are likely to become a public charge, as that fact is not to be ascertained by inspection alone, and because the words "inspection laws,"

[1] *In re* Ah Fong, 3 Sawy. 144.
[2] City of New York v. Miln, 11 Pet. 102.
[3] *In re* Ah Fong, 3 Sawy. 144.
[4] Henderson v. New York, 92 U. S. 259; Chy Lung v. Freeman, ib. 275.
[5] Head Money Cases, 112 U. S. 580.

"imports" and "exports," as used in the Constitution, have exclusive reference to property.[1]

SEC. 27. The statutes in regard to immigration may authorize the courts to investigate and ascertain the facts on which the right of foreigners to land depends. But, on the other hand, the final determination of those facts may be intrusted to executive officers; "and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." Nor will the case be different if it is not shown that the officer took or recorded any evidence at all upon which to base his decision.[2]

Right of exclusion; as to things.

SEC. 28. In virtue of the same right of self-defense that sanctions the exercise of the police power of a State to prevent the entry into its territory of persons having dangerous communicable diseases, the State may prohibit the introduction within its borders of animals suffering with contagious or infectious diseases and of articles of prop-

[1] People v. Compagnie Gén. Transatlantique, 107 U. S. 59; Passenger Cases, 7 How. 283.

[2] Gray, J., Nishimura Ekiu v. United States, 142 U. S. 651.

erty which are of such a nature or in such a condition as to be dangerous to the health or safety of the people. The terms of exclusion may be either absolute or qualified; and for the purpose of carrying them into effect quarantine and inspections may be established. To such laws there can be no just exception, even on constitutional grounds, so long as they are directed against the proper objects and are confined to the use of means necessary for self-protection. Any thing beyond this, however, will be an unwarranted interference with commerce, foreign or interstate, and an encroachment upon the jurisdiction of Congress over the subject.[1]

SEC. 29. The prohibited things must be such as do not properly belong to commerce. If, from their nature, they do not belong to commerce, or if their condition, from infection, putrescence or other cause, is such when they are about to enter a State that they no longer belong to commerce, or, in other words, are not commercial articles, then the State power may rightfully exclude their introduction. As an incident to this power, a State may use means to ascertain the fact. Here is the limit between the sovereign power of the State and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States. To this limit, it is believed, all the general views come that have been suggested in the reasoning of the Supreme Court in the leading adjudications upon the subject.[2]

The final determination of the question whether a particular State law is directed against or necessarily operates

[1] In the recent case of Jamieson v. Nat. Gas & Oil Co., 28 N. E. Rep'r, 76, an act prohibiting the transportation of natural gas through pipes at a greater pressure than three hundred pounds per square inch, or otherwise than by its natural flow, was held to be a valid exercise of the police power and a mere regulation of the use of a species of property intrinsically dangerous. The objection that the act operated as an unlawful restriction upon interstate commerce, was not sustained.

[2] *See In re* Rahrer, 140 U. S. 545, 557.

upon subjects of commerce properly within the jurisdiction of the State, is to be made by the courts; and the test to be applied in each case is the known commercial usages of the world, the laws of Congress, and the decisions of courts. Applying this test, the self-protecting power of the State may rightfully be exerted against the introduction of animals having contagious or infectious diseases, the meats of such animals slaughtered without the State, other articles intended for food or drink, but unfit or unsafe for such use, and articles tainted with infection or for any other cause likely to occasion disease. None of these things are recognized by the usages of the commercial world as merchantable,—as legitimate subjects of trade and traffic. As to other things, the right to determine whether they shall belong to commerce is vested in Congress. It is accepted doctrine that the omission of Congress to make any express declaration on the subject is not to be regarded as significant of its intention to submit to the several States the decision of the matter for their respective localities; but the absence of regulations as to interstate or foreign commerce with reference to any particular subject is rather to be taken as equivalent to a declaration by Congress that the importation of that article into the States shall be untrammeled and unrestricted by any local regulations whatever. So that, it is only after the importation is completed, and the property imported has left the hands of the importer, or mingled with and become a part of the general mass of property in the State, that the local regulations can operate upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled. Accordingly, it has been adjudged, that a statute of a State, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under a license from a County Court of the State, is, as applied to a sale by the importer, and

in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States.[1]

SEC. 30. There is, however, no reason why, if Congress chooses to provide that certain designated subjects of commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.[2] Accordingly, the act of Congress, known as the "Wilson law,"[3] which enacts, "that all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in

[1] Leisy v. Hardin, 135 U. S. 100, head-note quoted. Referring to Leisy v. Hardin, Shiras, J., in *Re* Spickler, 43 Fed. Rep'r, 653, 655, said: "The three points decided in that case are: (1) That the commercial clause of the Federal Constitution prevents the States from forbidding the importation of any article commonly recognized as property, and not harmful or dangerous in the condition in which it is imported. (2) That the right of importation thus secured protects the property from the operation of State laws until the importer has caused the same to become intermingled with the common mass of the property in the State, which ordinarily is affected by a sale in the original packages. (3) That it is for the Congress of the United States to determine whether such imported property should or should not be rendered subject to the police laws of the State at and from any time prior to a sale by the importer in the original packages." Lyng v. Michigan, 135 U. S. 161; State v. Blackwell, 65 Me. 556; Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465, 507; Nathan v. Louisiana, 8 How. 73; *In re* Beine, 42 Fed. Rep'r, 545; Minnesota v. Gooch, 44 id. 276; State v. Allmond, 2 Houst. (Del.) 612, 635; State v. Winters, 44 Kans. 723; State v. Robinson, 49 Me. 285; Bradford v. Stevens, 10 Gray, 379; Lincoln v. Smith, 27 Vt. 328; Collins v. Hills, 77 Iowa, 181; Hopkins v. Lewis, 51 N. W. Rep'r, 255; Keith v. State, 91 Ala. 2; Harrison v. State, ib. 62; Smith v. State, 54 Ark. 248; Comm. v. Gagne, 153 Mass. 205; State v. Kibling, 63 Vt. 636.

[2] Fuller, C. J., *In re* Rahrer, 140 U. S. 545, 562. *See* U. S. Rev. Stat., §§ 4252–4289, provisions as to transportation of passengers and merchandise between different States, impliedly authorizing the several States and incorporated places within the States to regulate or prohibit the traffic in or transportation of certain articles, such as nitro-glycerine and similar explosives, between persons or places lying or being within their respective territorial limits, or to prohibit the introduction of such articles into such limits for sale, use, or consumption therein.

[3] Act of August 8, 1890. 26 Stat. L. 313.

such State or Territory be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise," is a valid and constitutional exercise of the legislative power conferred upon Congress; and, after that act took effect, such liquors or liquids, introduced into a State or Territory from another State, whether in original packages or otherwise, became subject to the operation of such of its then existing laws as had been properly enacted in the exercise of its police powers.[1]

SEC. 31. Other adjudications may be cited to exemplify the general rules above indicated in reference to the regulation of commerce. It is to be noted that in some of the following cases the statutes in question might have been sustained had they not made unfair discrimination between citizens of different States. State laws have been declared to be invalid so far as they have the effect of forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first obtaining a certificate from a county officer that the consignee is authorized by the laws of the State to sell such liquors;[2] prohibiting the driving or conveying of any Texas, Mexican or Indian cattle, *whether sound or diseased*, into the State between the first day of March and the first day of November in each year;[3] imposing a tax upon freight transported from State to State;[4] regulating or taxing, or imposing any other restriction upon the transmission of persons or property, or telegraphic mes-

[1] *In re* Rahrer, 140 U. S. 545, headnote.

[2] Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465, 507.

[3] Railroad Co. v. Husen, 95 U. S. 465; Urton v. Sherlock, 75 Mo. 247; Gilmore v. Hannibal, etc., R. Co., 67 id. 323. *See* Kimmish v. Ball, 129 U. S. 217; Jarvis v. Riggin, 94 Ill. 164; Salzenstein v. Mavis, 91 id. 391.

[4] Case of State Freight Tax, 15 Wall. 232.

sages from one State to another;[1] requiring every auctioneer to collect and pay into the State treasury a tax on his sales, when applied to imported goods, in the original packages, by him sold for the importer;[2] imposing a license tax upon persons, not residing or having their principal place of business in the State, but whose business is that of selling intoxicating liquors, to be shipped into the State from without, a similar tax not being imposed in respect of the sale of such liquors manufactured in the State;[3] levying a tax upon non-resident drummers offering for sale or selling goods, by sample, manufactured in or belonging to citizens of other States;[4] requiring payment of a license tax from persons dealing in goods and merchandise which are not the growth, produce or manufacture of the State, without requiring such a license from persons selling in a similar way goods and merchandise which are the growth, produce or manufacture of the State.[5]

Inspection laws.

SEC. 32. A law providing for the inspection of goods or animals before they shall be admitted into the State, must not prescribe a test of inspection which, in view of the nature of the things, is either unusual or unreasonable, or which, by its necessary operation, will discriminate against the products of any particular locality. If the law prescribes a mode of inspection to which citizens of other States, having products which they desire to bring to the markets of the State for sale, cannot reasonably conform, it will undoubtedly be held to be an unauthorized burden upon interstate commerce. A law, for instance, providing for the inspection of animals whose meats are

[1] Wabash, etc., Ry. Co. v. Illinois, 118 U. S. 557.

[2] Cook v. Pennsylvania, 97 U. S. 566.

[3] Walling v. Michigan, 116 U. S. 446.

[4] Robbins v. Shelby Taxing District, 120 U. S. 489. *See* Hinson v. Lott, 8 Wall. 148; Woodruff v. Parham, ib. 123.

[5] Welton v. Missouri, 91 U. S. 275. *See* Machine Co. v. Gage, 100 id. 676; Tiernan v. Rinker, 102 id. 123.

designed for human food, cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State of sound meats, the product of animals slaughtered in other States. This would be an example of the evils of discriminating State legislation, favorable to the interests of one State, and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, and which it was the design of the framers of that instrument to remove and make impossible for the future, by taking away from the separate States all control over matters affecting commerce and vesting it in the Congress of the United States. Nor will such an inspection law as the one supposed be any the less open to objection because it requires an inspection of the animals from which the meats are to be taken, and is applicable alike to all owners of such animals, whether citizens of the State or citizens of other States. A statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute; for the people of the latter State have as much right to protection against its enactments, interfering with the freedom of commerce, as have the people of other States.[1]

SEC. 33. Upon these principles, the statutes of several States, ostensibly designed for the protection of the public health by providing for inspection, before slaughtering, of animals intended for slaughter for human food, have

[1] Opinion of the court, delivered by Harlan, J., in Minnesota v. Barber, 136 U. S. 313.

been adjudged to be unconstitutional and void so far as they require as a condition of sales in those States, of fresh meats for human food, that the animals, from which such meats are taken, shall have been inspected in the State before being slaughtered. It was held that the true purpose of the statutes in question was to be determined by their natural and reasonable effect, and that the presumption that they were enacted in good faith, for the purpose expressed in their titles, could not control the determination of the question whether they were, or were not, repugnant to the Constitution of the United States.[1] The Virginia statute relating to this subject was condemned for the reason that it operated as a restraint of commerce, and for the further reason that it imposed a discriminating tax. It declared it to be unlawful to offer for sale within the limits of the State any meats taken from animals slaughtered one hundred miles or more from the place at which they were offered for sale, unless they had previously been inspected and approved by certain local inspectors, whose compensation was fixed at one cent per pound, to be paid by the owner of the meats. As the law did not require the inspection of fresh meats from animals slaughtered within one hundred miles from the place in Virginia at which such meats were offered for sale, there was clearly such a discrimination in favor of home products and against the products of other States as to make the statute repugnant to those principles of the fundamental law upon which it was condemned.[2]

[1] Minnesota v. Barber, 136 U. S. 313; State v. Klein, 126 Ind. 68; *Ex parte* Kieffer, 40 Fed. Rep'r, 399; Swift v. Sutphin, 39 id. 630; *In re* Christian, ib. 636; *In re* Barber, ib. 641; Harvey v. Hoffman ib. 646.

[2] Brimmer v. Rebman, 138 U. S. 78. The citizens of each State have the right to compete in the markets of all other States, upon terms of equality with the citizens of those States. Any local regulation which in terms or by its necessary operation denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void. *Ex parte* Kinnebrew, 35 Fed. Rep'r, 52; McCreary v. State, 73 Ala. 480; Vines v. State, 67 id. 73; State v. Marsh, 37 Ark. 356; State v. Deschamp, 53 id. 490.

Navigation laws.

SEC. 34. Under the constitutional grant to Congress of power to regulate commerce is included the right to make regulations concerning the persons engaged in navigation, as well as the instruments used.[1] In pursuance of this view, Congress has passed laws to secure the safety of passengers and crews in vessels navigating the interior waters of the United States, and to provide generally against the dangers to human life incident to the business of navigation. The laws prescribe the number of passengers that each vessel may carry in proportion to the space afforded for their accommodation; and require that the vessels shall have on board certain life-saving implements and apparatus, and that they shall be inspected to ascertain whether they have fully complied with the law, in regard to their structure and equipments. The statutes also contain regulations for preventing collisions at sea, to be followed by all public and private vessels of the United States, both upon the high seas and in all waters connected therewith, navigable by sea-going vessels.[2] They relate to the lights which must be carried, the fog-signals that must be used, and the steering rules that must be observed under all circumstances. The regulations are founded in the main upon rules long since well established by custom and now adopted in substantially the same form by the principal maritime States of the world. They are regarded everywhere as entitled to judicial notice.[3] But it is expressly provided in the statutes that nothing in these rules shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any harbor, river, or inland waters.

Pilotage; Harbor regulations.

SEC. 35. The propriety of local regulations concerning

[1] Cooley v. Port Wardens, 12 How. 299. For a review of U. S. Statutes relating to carriers of passengers by water, *see* Thompson on Carriers, 475 *et seq.;* Hutchinson on Carriers, §§ 618, 625.

[2] U. S. Rev. Stat., § 4233; amended Aug., 1890, 26 Stat. L. 320.

[3] The Scotia, 14 Wall. 170 The Sylvester Hale, 6 Ben. 523.

the navigation of inland waters and the harbors of the United States is recognized in the provision just cited of the general statutes. The matter being one peculiarly of local concern, the right of the several States to regulate it according to local policy, as they did before the formation of the Union, is admitted, so long as Congress does not see fit to assume the control.[1] The exercise by Congress of its power of legislation upon a subject already regulated by the State, will, of course, have the effect of abrogating the local law; it will not repeal that law, but will suspend its operation.[2] But Congress has not interfered with the system of local regulation of pilotage, excepting so far as to provide that in small steam launches, one person, if duly qualified, may serve in the double capacity of pilot and engineer.[3]

The States have also been left free by Congress to regulate their harbors and the conduct and management of vessels in the harbors. So that a State may rightfully provide for the improvement of harbors within her limits;[4] may extend her sanitary laws over them;[5] and may prescribe where a vessel may lie in harbor, how long she may remain there, what light she must show at night, and other like things.[6]

[1] Cooley v. Port Wardens, 12 How. 299; *Ex parte* McNeil, 13 Wall. 236; Wilson v. McNamee, 102 U. S. 572. *See* U. S. Rev. Stat., § 4235; Spraigue v. Thompson, 118 U. S. 90; Steamship Co. v. Joliffe, 2 Wall. 450; Freeman v. The Undaunted, 37 Fed. Rep'r, 662; The Alameda v. Neal, 32 id. 331; The Alcalde, 30 id. 133; The South Cambria, 27 id. 525; The William Law, 14 id. 792; The Chase, ib. 854; Comm'rs of Pilotage v. Steamboat Cuba, 28 Ala. 185; 22 How. 227, 244; Cribb v. State, 9 Fla. 409; Low v. Comm'rs, R. M. C. (Ga.) 302; Barnaby v. State, 21 Md. 450; Stilwell v. Raynor, 1 Daly (N. Y.), 47; Cisco v. Roberts, 6 Bosw. (N. Y.) 494; Edwards v. Steamer Panama, 1 Oreg. 418; Collins v. Relief Soc., 73 Penn. St. 194; State v. Penny, 19 S. C. 218.

[2] Henderson v. Spofford, 59 N. Y. 131.

[3] 26 Stat. L. 692. *See* U. S. Rev. Stat., §§ 4237, 4444.

[4] Escanaba Co. v. Chicago, 107 U. S. 678; Vanderbilt v. Adams, 7 Cow. 349.

[5] Mayor v. Furgueson, 23 Hun, 594; Ogdensburgh v. Lyon, 7 Lans. 215; Harmon v. Chicago, 110 Ill. 400; Lister v. Newark Plankroad Co., 9 Stew. Eq. 477.

[6] Mobile v. Kimball, 102 U. S. 691; Escanaba Co. v. Chicago, 107 id. 678; The James Gray v. The John Fraser, 21 How. 184.

CHAPTER III.

MUNICIPAL CORPORATIONS; POWERS AND DUTIES.

SEC. 36. Ordinary powers.
37. Discretionary powers.
38. Extent of legislative discretion.
39. Liability for failure to exercise powers.
40. No liability where powers are discretionary.
41. Municipal police powers.
42. How derived.
43. Limitations upon the powers.
44. Control over nuisances; general powers.
45. Special powers.
46. Special legislation not permissible.
48. Extent of authority over nuisances.

Ordinary powers.

SEC. 36. Municipal corporations are created for a double purpose, and, therefore, have a two-fold character. They may be regarded either as State agencies, in carrying on the general government of the State, or as local corporations vested with certain legislative and administrative powers for the management of the private affairs and local interests of the corporate community.[1] In either character "they can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. This principle is derived from the nature of corporations, the mode in which they are exercised, and in which their affairs must be conducted."[2] In other words, municipal corporations possess and can exercise only the powers which are expressly granted to them, such implied powers as are necessary and proper to carry into effect the powers expressly granted, and such incidental powers as pertain to the declared objects and purposes for which the corpora-

[1] Park Commissioners v. Detroit, 28 Mich. 228.

[2] Shaw, C. J., Spaulding v. Lowell, 23 Pick. 71.

tions were created; and these last must be not simply convenient, but indispensable.[1] Any fair, reasonable doubt as to the powers of a municipal body, in a particular case, is to be resolved in favor of the State, or general public, and against the local government.[2]

Discretionary powers.

SEC. 37. Where the power to legislate is granted to municipal corporations in general terms, and the manner of exercising it is not specified, there must be a reasonable use of such power, or the legislative act will be declared to be invalid by the courts.[3] "In such cases," it is said, "the common council or governing body, necessarily have, to a greater or less extent, a discretion as to the manner in which the power shall be used. This discretion, where it is conferred or exists, cannot be judicially interfered with or questioned, except where the power is exceeded or fraud is imputed and shown, or there is a manifest invasion of private rights. Thus, where the law or charter confers upon the city council, or local legislature, power to determine upon the expediency or necessity of measures relating to the local government, their judg-

[1] Dillon's Mun. Corp., § 89; Intendant of Livingston v. Pippin, 31 Ala. 542; Chicago v. Rumpff, 45 Ill. 90; City of Anderson v. O'Conner, 98 Ind. 168; Hanger v. Des Moines, 52 Iowa, 193; Park Commissioners v. Detroit, 28 Mich. 228; St. Louis v. Bell Telephone Co., 96 Mo. 623; Wells v. Salina, 119 N. Y. 280; Village of Carthage v. Frederick, 122 id. 268; Tucker v. City of Virginia, 4 Nev. 20.

[2] Dillon's Mun. Corp., §§ 89–91.

[3] *See post*, sec. 59. *Ex parte* Chin Yan, 60 Cal. 78; Lake View v. Tate, 130 Ill. 247; People v. Armstrong, 73 Mich. 288; Theilan v. Porter, 14 Lea (Tenn.), 622. Indeed, all powers granted in general terms, as for example, the power "to abate nuisances," must be reasonably exercised; and although power be given to be exercised in any manner the corporate authorities may deem expedient, it is not an unlimited power, and such means only are intended as are reasonably necessary for the public good; wanton or unnecessary injury to private property and private rights is not thereby authorized. Babcock v. Buffalo, 56 N. Y 268; Welch v. Stowell, 2 Doug. (Mich.) 332; River Rendering Co. v. Behr, 77 Mo. 91; Rodwell v. Newark, 34 N. J. L. 264. So, too, the grant of a general power to municipal corporations, for example, to build drains, must be regarded as subject to a just limitation forbidding the exercise of the power in such a manner as to create a private nuisance, where that is not a *necessary* result of exercising the power. Jacksonville v. Lambert, 62 Ill. 519; Morse v. Worcester, 139 Mass. 389; Edmondson v. City of Moberly, 98 Mo. 523; Seifert v. Brooklyn, 101 N. Y. 136.

ment upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the courts. In such case, the decision of the proper corporate body is, in the absence of fraud, final and conclusive, unless they transcend their powers."[1] For example, a power "to remove or confine persons having infectious or pestilential diseases," confers authority to select the means of carrying it out, and the city may, under such a a power, rent a house to be used as a small-pox hospital. The corporate authorities, by such a grant of power, are clothed with a reasonable discretion to determine the manner in which the authorized acts shall be done.[2]

Extent of legislative discretion.

SEC. 38. The same principle is frequently expressed as follows: Where a power to do a thing is conferred, or a duty is imposed, upon a corporation, and the manner of executing the power or discharging the duty is not pointed out, the corporation may employ all the means necessary to that end.[3] So far as the powers conferred are *discretionary* in their nature, they are to be exercised accord-

[1] Dillon's Mun. Corp., § 94; Henkel v. Detroit, 49 Mich. 249.

[2] City of Anderson v. O'Conner, 98 Ind. 168; *Ex parte* Shrader, 33 Cal. 279. So, under power to pass ordinances "respecting the *police* of the city, and to preserve the public health," city authorities may contract to secure a supply of water, by boring an artesian well on the public square, or otherwise; they being the judges as to the mode best adapted to accomplish the object. Intendant of Livingston v. Pippin, 31 Ala. 542; Rome v. Cabot, 28 Ga. 50. And under power "to regulate, by ordinance, the erection, use, and continuance of slaughter-houses," the council may determine and fix the limits and localities within which new slaughter-houses may be erected, and from which they shall be excluded, and may prohibit the continuance of slaughter-houses whenever and wherever they endanger the health of the city. Cronin v. People, 82 N. Y. 318. And where a legislative act confers power to enact all laws "necessary to preserve the health of the city, prevent and remove nuisances, and prevent the introduction of contagious diseases within the city," this clothes the corporation with all the powers which the legislature could have exerted in respect of those objects, and makes the corporate authorities the exclusive judges of the necessity for legislation in regard to those subjects specified, and commits to their sound discretion the selection of the means and manner (contributory to the end) of exercising the powers as they may deem requisite to the accomplishment of the objects of which they are made the guardians. Harrison v. Baltimore, 1 Gill. (Md.) 264.

[3] Babcock v. Buffalo, 56 N. Y. 268; Mason v. Shawneetown, 77 Ill. 533.

ing to the judgment of the governing body,[1] as to the necessity or expediency of any particular measure;[2] and the discretion of such body, within the scope of its powers, is as wide as that possessed by the government of the State.[3] The courts will presume that the discretion has been exercised in a proper manner, and that there were good and sufficient reasons for any act passed in the exercise of such power. They will not seek to control the conduct of those who make the laws, nor inquire whether any particular act was a prudent exercise of their powers.[4] And so it has been said that "where it is made the *duty* of a municipal corporation to act in respect to preservation of public health, the courts, unless the power is transcended, cannot ordinarily interfere to control the manner in which the act shall be done."[5]

Liability for failure to exercise powers.

SEC. 39. It is sometimes said that where authority to legislate in respect of nuisances is conferred upon municipal corporations, they are liable for all injuries that result from a failure to exercise the delegated powers. But this is strictly true only in cases where the powers conferred are imperative and so create a positive duty. Where authority is delegated in permissive language, it should

[1] Ordinarily, discretionary powers cannot be delegated by the governing body to which they are committed, but can be exercised only by that body. Dillon's Mun. Corp., § 96; Chilson v. Wilson, 38 Mich. 267; Tappan v. Young, 9 Daly (N. Y.), 357. So, where power to license traffic in spirituous liquors is, by municipal charter, expressly conferred upon the city council, the power cannot be delegated, by an ordinance, to the mayor of the city. Kinmundy v. Mahan, 72 Ill. 462; Matter of Frazee, 63 Mich. 396; Winants v. Bayonne, 44 N. J. L. 114.

[2] Harvey v. Dewoody, 18 Ark. 252; Des Moines Gas Co. v. Des Moines, 44 Iowa, 505; Kelley v. Milwaukee, 18 Wis. 83.

[3] Cape May, etc., R. Co. v. Cape May, 8 Stew. Eq. 419.

[4] *Ex parte* Shrader, 33 Cal. 279; Bozant v. Campbell, 9 Rob. (La.) 411; Des Moines Gas Co. v. Des Moines, 44 Iowa, 505; City of Anderson v. O'Conner, 98 Ind. 168; New Orleans v. Stafford, 27 La. Ann. 417; Railroad Co. v. New York, 1 Hilt. (N. Y.) 562; Soon Hing v. Crowley, 113 U. S. 703.

[5] Dillon's Mun. Corp., § 95; Greensboro v. Ehrenreich, 80 Ala. 579; *Ex parte* Shrader, 33 Cal. 279; Goodrich v. Chicago, 20 Ill. 445; Baker v. Boston, 12 Pick. 184; Ferrenbach v. Turner, 86 Mo. 416; Cape May, etc., R. Co. v. Cape May, 8 Stew. Eq. 419; Kelley v. Milwaukee, 18 Wis. 83.

not be construed to be imperative, even where the public have an interest in its exercise, if it can fairly and reasonably be construed to be discretionary. So, in a case where, by municipal charter, the council were empowered, "by resolution, to compel the owners or occupants of any wall or building within the city, which may be in an unsafe or ruinous condition, to render the same safe, or to take down or remove the same," it was held that the power conferred was discretionary, and that the city was not liable for failure to compel, by resolution, the removal of a dangerous wall which fell and injured the complainant. It was said that the test which makes permissive words absolute and a command is applicable only to solve a doubt, and determine between a ministerial and judicial duty when such duty may possibly belong to either class; but will not serve to make a duty, which is inherently and inevitably discretionary, nevertheless ministerial because the public have an interest in its exercise or the rights of individuals may be affected by it. The test is useful in a doubtful case, but cannot change the nature of a power when fairly ascertained.[1]

No liability where powers are discretionary.

SEC. 40. The question as to the liability of municipal corporations for failure to exercise delegated powers was fairly presented in the following case:[2] The corporate authorities of a city were authorized by its charter to cause the removal of any nuisance, and to limit or prohibit altogether the manufacture, sale or exposure of fire-works, within the corporate limits, and to provide such safeguards for the security of the citizens as in their judgment might be necessary. A fire occurred in a manufactory of fire-works, operated in the city on private premises, and the plaintiff was injured while assisting to extinguish the fire. In an action against the city for the

[1] Cain v. Syracuse, 95 N. Y. 83.

[2] McDade v. Chester City, 117 Penn. St. 414.

recovery of damages, it was held that the authority given to the city was essentially discretionary, not giving rise to an absolute duty, and that the plaintiff was not entitled to recover. The court, in delivering the judgment, laid down the principles applicable in such cases in terms that may be accepted as accurate. "Where a duty has been imposed by statute upon a municipal corporation, it is undoubtedly liable for injuries resulting from a neglect of that duty; in such case it stands on the same footing in respect to negligence as a purely private corporation or an individual.[1] But the duty imposed must be absolute or imperative, not such as, under a grant of authority, is intrusted to the judgment and discretion of the municipal authorities; for it is a well-settled doctrine that a municipal corporation is not liable to an action for damages, either for the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character.[2] It is likewise true that when a power is given to do an act which concerns the public interest, the execution of the power, when applied to a public officer or body, may be insisted upon as a duty, although the phraseology of the statute be permissive only; especially is this so when there is nothing in the act, save the permissive form of expression, to denote that the legislature designed to lodge a discretionary power merely. But where the power is lodged with persons exercising, or to exercise, legislative or judicial functions, and the subject-matter of the statute and its phraseology concur in showing that the authority is essentially discretionary, no absolute duty is imposed. The true rule is very correctly stated in our own case of Carr v. Northern Liberties,[3] as follows: 'Where any person has the right to demand the exercise of a public function, and there is

[1] Erie City v. Schwingle, 22 Penn. St. 384; Shearm. & Redf. on Neg. § 167; Dillon's Mun. Corp., §§ 961–965.

[2] Dillon's Mun. Corp., § 949.

[3] 35 Penn. St. 330.

an officer or set of officers authorized to exercise that function, then the right and the authority give rise to the duty; but where the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed.' "[1]

Municipal police powers.

SEC. 41. It has been suggested that municipal corporations, in their character of governmental agencies, are to be regarded as miniature States, limited in power by their charters, as the State legislatures are limited in their powers by the State Constitutions.[2] The comparison is not, perhaps, in all respects just, but, at all events, it is clear that, as such State agencies, municipal corporations must be allowed to exercise all the governmental powers that are essential or pertinent to the purposes of their organization. Consequently, in construing charters, the legislative intent must be taken to be that the corporations shall possess and may exercise such powers as are essential to their existence, or necessary and proper for their good government.[3] Among the most important of such powers, often expressly granted in the municipal charters, or by the general acts under which the corporations are organized, and otherwise impliedly conferred upon them, are those known as the *police powers*, in pursuance of which the public health and safety are secured and promoted. The preservation of the lives and health

[1] No right of action against a municipal corporation can arise from an act of legislation, or from failure in duties of a political nature, such as the enforcement of police regulations, or from failure to exercise any governmental powers. Hewison v. New Haven, 37 Conn. 475; Parker v. Macon, 39 Ga. 725; Goodrich v. Chicago, 20 Ill. 445; City of Anderson v. East, 117 Ind. 126; Kistner v. Indianapolis, 100 id. 210; Wheeler v. Plymouth, 116 id. 158; Lafayette v. Timberlake, 88 id. 330; Grove v. Fort Wayne, 45 id. 429; Brinkmeyer v. Evansville, 29 id. 187; Vanhorn v. Des Moines, 63 Iowa, 447; Taylor v. Cumberland, 64 Md. 68; Henkel v. Detroit, 49 Mich. 249; Detroit v. Blackeby, 21 id. 84; Burford v. Grand Rapids, 53 id. 98; Keating v. City of Kansas, 84 Mo. 415; Armstrong v. Brunswick, 79 id. 319; Heller v. Sedalia, 53 id. 159; Bond v. Newark, 4 C. E. Green, 376; Kelley v. Milwaukee, 18 Wis. 83.

[2] Park Commissioners v. Detroit, 28 Mich. 228.

[3] Bridgeport v. Housatonic R. Co., 15 Conn. 475, 501.

of the people being one of the chief purposes of local government, reasonable regulations in relation thereto have always been sustained as within the authority of municipal corporations to ordain.[1]

How derived.

SEC. 42. The State having all the powers necessary for the protection of the health and safety of the people, unquestionably may delegate to corporations organized for local self-government, the power of legislating in respect of those matters, since they are properly within the objects of the corporate association, and may grant the powers in such measure as may be deemed desirable and for the best interest of the local community. The powers remain, of course, at all times subject to the control of the State, and may be resumed or cut down in part by the legislature in its discretion.[2] Authority to confer them may be found in that part of the State Constitution which provides for the organization of cities and villages.[3] But it may be affirmed upon the highest authority, that the right of the legislature, in the entire absence of authorization or prohibition, to create municipal corporations, and to confer upon them all proper powers of local government, and especially the most ample powers of police regulation, would always pass unchallenged.[4]

Limitations upon the powers.

SEC. 43. Where the general police powers, such as those to abate nuisances and to preserve the public health and the public safety, are not expressly granted, they are

[1] Horr and Bemis on Mun. Pol. Ordin's., § 8. Harvey v. Dewoody, 18 Ark. 252; Greensboro v. Ehrenreich, 80 Ala. 579; Chicago v. Rumpff, 45 Ill. 90; Weil v. Ricord, 24 N. J. Eq. 169; Patterson v. Kentucky, 97 U. S. 501; Soon Hing v. Crowley, 113 id. 703; Baker v. Boston, 12 Pick. 184.

[2] Chicago v. Phœnix Ins. Co., 126 Ill. 276; State v. Hunter, 38 Kans. 578.

[3] Houghton v. Austin, 47 Cal. 646; St. Paul v. Colter, 12 Minn. 41; Clarke v. Rochester, 28 N. Y. 605; People v. Acton, 48 Barb. 524; Bliss v. Kraus, 16 Ohio St. 55.

[4] Cooley Const. Lims. (5th ed.) 228; Houghton v. Austin, 47 Cal. 646; Paul v. Gloucester County Court, 50 N. J. L. 585.

usually regarded as necessarily vested in municipal corporations;[1] and what has been said, in a previous chapter with respect to the extent and the limitations of such powers, in their exercise by the State, will apply equally to their exercise by such corporations, within their local jurisdiction. Particularly it is to be observed, that ordinances passed in the exercise of these powers are not obnoxious to constitutional provisions merely because they do not provide compensation to the individual who is inconvenienced by them. He is presumed to be rewarded by the common benefits secured. Pronounced instances are found in all quarantine and health regulations and in all laws for the abatement of existing and the prevention of threatened nuisances. If the public safety or the public morals require the discontinuance of any existing condition of property, manufacture or traffic, the council may provide for its discontinuance, notwithstanding that individuals or corporations may thereby suffer inconvenience.[2] Indeed, it is an unavoidable consequence of municipal regulations, that they must in some degree interfere with the unlimited and unrestrained exercise of private rights;[3] but this does not render them invalid, unless they do so unnecessarily.[4] The rule is, that the power of municipal governments, in respect of sanitary regulations, quarantine, and the like, being conferred for

[1] Endlich on Interpr'n. of Stats., § 418; Harmon v. Chicago, 110 Ill. 400; Kennedy v. Phelps, 10 La. Ann. 227; Village of Carthage v. Frederick, 122 N. Y. 268.

[2] Mugler v. Kansas, 123 U. S. 623; Beer Co. v. Massachusetts, 97 id. 25; McKibbin v. Fort Smith, 35 Ark. 352; *Ex parte* Shrader, 33 Cal. 279; Green v. Savannah, 6 Ga. 1; King v. Davenport, 98 Ill. 305; State v. Holcomb, 68 Iowa, 107; New Orleans v. Stafford, 27 La. Ann. 417; Bancroft v. Cambridge, 126 Mass. 438; Baker v. Boston, 12 Pick. 184; Theilan v. Porter, 14 Lea (Tenn.), 622.

[3] "Even though the enforcement of an ordinance may operate to destroy a business theretofore lawful, and seriously to impair the value of property acquired under the sanction of a special law or charter, these considerations do not render the ordinance invalid or prevent its enforcement, when the protection of the public health or the promotion of the general welfare requires it." Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667.

[4] Chicago v. Rumpff, 45 Ill. 90; Wreford v. People, 14 Mich. 41; River Rendering Co. v. Behr, 77 Mo. 91.

self-defensive purposes, must not be carried beyond what is necessary for protection.[1]

Control over nuisances; general powers.

SEC. 44. Under a general delegation of police powers, and even without direct legislative authority, municipal corporations undoubtedly may protect the health and safety of their inhabitants by suppressing every nuisance within the corporate limits.[2] It is both their right and their duty to do this; it is one of the chief purposes of their organization. They may even exercise their powers in this behalf in a summary manner, without reference to ordinances or resort to formal judicial proceedings.[3] In this respect, the right of such corporations is precisely the same as that of private individuals, and is limited in the same way and to the same extent.[4] That is to say, it can be exerted only in respect of those things which are nuisances in fact, things actually hurtful to the health or imminently threatening to the security of the public.[5] The corporation can abate or suppress as a common nuisance any condition of things or any acts clearly injurious to the public health and safety. This is simply an allowable exercise of the inherent, essential right of self-protection. So, too, even without express legislative sanction, municipal corporations may provide, by the enactment of suitable ordinances, such means as are necessary and proper

[1] Greensboro v. Ehrenreich, 80 Ala. 579; Weil v. Ricord, 24 N. J. Eq. 169; Railroad Co. v. Husen, 95 U. S. 465. "And a by-law which assumes to be a police regulation, but deprives a party of the use of his property without regard to the public good, under the pretense of the preservation of health, when it is manifest that such is not the object and purpose of the regulation, will be set aside as a clear and direct infringement of the right of property, without compensating advantages." Cooley's Const. Lims. 247.

[2] State v. Heidenhain, 42 La. Ann. 483.

[3] Ferguson v. City of Selma, 43 Ala. 398; Harvey v. Dewoody, 18 Ark. 252; City of Denver v. Mullen, 7 Col. 345; King v. Davenport, 98 Ill. 305; Joyce v. Woods, 78 Ky. 386; Blair v. Forehand, 100 Mass. 136; Green v. Lake, 60 Miss. 451; Fields v. Stokley, 99 Penn. St. 306; State v. Knoxville, 12 Lea (Tenn.), 146.

[4] Cole v. Kegler, 64 Iowa, 59; Easton Pass. Ry. Co. v. Easton, 133 Penn. St. 505; Klingler v. Bickel, 117 id. 326.

[5] Mayor of New York v. Board of Health, 31 How. Pr. 385.

for the prevention and abatement of nuisances. This power, also, springs from and finds its sanction in the essential right of self-preservation; and may and ought to be exerted in the regulation of all things which are, in their nature, situation, or use, likely to become nuisances or to occasion the spread of disease in the community. But the exercise of this incidental or implied power of the corporation must clearly be reasonable and properly devised to accomplish, without unnecessary interference with private rights or property, the beneficent purposes of the legislation. For example, ordinances may properly and reasonably declare that wooden buildings, erected in violation of fire laws, shall be deemed to be nuisances, and may provide for their summary removal. Courts of equity will not restrain the enforcement of such ordinances. On the other hand, it would be very unreasonable, as a means of preventing the introduction and spread of contagion, to prohibit absolutely the importation of ordinary articles of commerce, such as rags, second-hand clothing, or the meat of animals slaughtered for food in other places, at the same time leaving the inhabitants free to buy and sell within the limits, rags, second-hand clothing, and dressed meats, not imported. For, things of the same character and in the same condition are not more likely to be harmful if imported than if they are the refuse of residents or the product of domestic industry. Any discrimination in such a case would be unreasonable.

Special powers.

SEC. 45. Authority, however, is usually conferred upon municipal corporations, in explicit terms, by their charters or organic acts, to declare what shall be nuisances, or to define them, and to prevent, and abate or remove the same. The precise limits of these powers cannot be accurately

defined,[1] but the authority certainly extends so far as to justify the summary suppression of every condition of things constituting a nuisance, and, generally, to warrant the enactment of ordinances to regulate the uses of property and the conduct of trades and business likely to occasion injury to the public. The power cannot be exercised so as to prohibit absolutely the prosecution of a trade or business, or any use of property whatever, which is in itself innocent, but must be confined to the regulation of it so far as may be necessary to guard against injurious consequences. It will not be presumed that the legislature intended to grant, in these general terms, any more extended authority, and any assumption of such authority by municipal bodies will constitute an unlawful usurpation or abuse of powers.

There are some things which are in themselves innocent and harmless which yet, under some circumstances and conditions, may become nuisances. So, there are trades and kinds of business, necessary in every large community, which in themselves are lawful and innocent, but which become nuisances when conducted in a certain manner or in particular localities. It is beyond the just powers of municipal authorities to declare in advance that such things or such trades or business are nuisances, and to condemn them as such, without regard to the circumstances under which they exist, are used, maintained, or prosecuted. Whether they constitute nuisances is ordi-

[1] Stone, J., in City of Denver v. Mullen, 7 Col. 345, said: "The proper construction of this language is, that the city is clothed with authority to declare, by general ordinance, what shall constitute a nuisance. That is to say, the city may, by such ordinance, define, classify and enact what things or class of things, and under what conditions and circumstances, such specified things are to constitute and be deemed nuisances. For instance, the city might, under such authority, declare by ordinance that slaughter-houses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes, and the like, piled up or remaining for a certain length of time on the sidewalks, should be deemed nuisances, not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance, which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination." Everett v. Council Bluffs, 46 Iowa, 66; State v. Street Comm'r. of Trenton, 36 N. J. L. 283.

narily a question of fact, to be determined in regular judicial proceedings. The power of municipal corporations extends only so far as the necessary regulation of such things. But as to things which are inherently and inevitably nuisances, the municipal powers are not so restricted; and they may be dealt with, under general ordinances, in such manner as the corporation may deem expedient.[1]

Special legislation not permissible.

SEC. 46. It is to be observed, with reference to the legislative grant to municipalities of the power to prevent and abate nuisances, that it will be implied that the legislature intended this power to be exercised in the enactment of laws of general application. The authority conferred in such terms is, of course, sufficient to warrant the suppression in a summary way of existing nuisances, but it will not justify interference with private rights or property, or any particular trade or business, by means of special legislation. The courts will not aid the municipal authorities in such interference, unless it appears by proofs, other than such as are furnished by the mere finding of the legislative body as expressed in the order or resolution of special application, that the act or thing to be suppressed or abated is in fact and in law a nuisance.[2] For, the power referred to is said to be in the nature of a franchise or privilege, and the extent to which the corporation wishes to exercise it must be defined by the enactment of general ordinances. The power is not what is termed "self-executing," but requires an ordinance to put it in force, and give it effect as local law. For example, it has been determined that, although a municipal charter empowers the mayor and selectmen "by ordinance to prevent and abate nuisances, and dangerous manufactories, and to

[1] State v. Mott, 61 Md. 297; St. Paul v. Gilfillan, 36 Minn. 298; *Ex parte* O'Leary, 65 Miss. 80; Quintini v. Bay St. Louis, 64 id. 483; State v. Jersey City, 29 N. J. L. 170; Mayor of New York v. Board of Health, 31 How. Pr. 385.

[2] Ward v. Little Rock, 41 Ark. 526; City of Denver v. Mullen, 7 Col. 345; Everett v. Marquette, 53 Mich. 450.

regulate the latter," they cannot, on a petition of citizens, deal thus with a particular flouring mill, unless it is shown to fall within some law or general ordinance previously passed.

In expressing the judgment of the court in the case just referred to, it was said:[1] "While the charter confers the power on the municipal authorities of the city to pass ordinances on the subject of nuisances, it does not confer the right to declare that a particular structure or business, not condemned by any law or ordinances, is a nuisance, and to have the structure removed or the business stopped or interfered with. Such a power is not to be tolerated. It would place 'all the property in the city at the uncontrolled will of the temporary local authorities.' The city may have such ordinances as its charter authorizes, and a structure erected or a business conducted, in violation of such ordinances, may be dealt with in accordance with such ordinance; but it is not allowable for one or more citizens to exhibit a bill of complaint, alleging that certain buildings or operations are a nuisance, not within any law or ordinance previously passed, and operating on all, but because of certain facts set forth in the petition; and to procure a decree to abate such alleged nuisance, not as being a violation of a precedent enactment, but by virtue of a decree of the mayor and selectmen that it is so in the given case. The property and pursuits of the citizen are not held by so frail and uncertain a tenure as the mere declaration of a body acquiring temporary control of the affairs of a city or town. There must be a law applicable to the subject, and it must be legally tried and determined whether the law has been violated."

SEC. 47. It is very certain that under legislative authority, conferred in general terms, a city council or other local governing body cannot declare any particular thing to be a nuisance, and condemn it to removal or destruction as

[1] Campbell, J., Lake v. Aberdeen, 57 Miss. 260, 263.

such, unless it comes within the legal notion of a nuisance, or unless, in its nature, situation, or use, it is a nuisance in fact.[1] The legislative determination and declaration is not final and conclusive upon the question as to the injurious character of the thing, but that is in every case to be proved by other evidence. For "it is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws, either of the city or the State, within which a given structure can be shown to be a nuisance, can by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities."[2]

Extent of authority over nuisances.

SEC. 48. In speaking of the authority of municipal corporations over nuisances, Judge Dillon sums up the matter as follows:[3] "Finally, it may be remarked that the extent of municipal authority over nuisances depends, of course, upon the powers conferred in this regard, upon the municipality. The authority to preserve the health and safety of the inhabitants and their property, as well as the authority to prevent and abate nuisances, is a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance. The authority *to declare* what is a nuisance is somewhat broader; but neither this nor the general authority mentioned in the last preceding sentence will justify the declaring of acts, avocations, or structures not injurious to health or

[1] Dillon's Mun. Corp., § 374; Ward v. Little Rock, 41 Ark. 526; City of Denver v. Mullen, 7 Col. 345; State v. Mott, 61 Md. 297.

[2] Miller, J., Yates v. Milwaukee, 10 Wall. 505; Chicago, etc., R. Co. v. Joliet, 79 Ill. 25; Des Plaines v. Poyer, 123 id. 348; North Chicago, etc., Ry. Co. v. Lake View, 105 id. 207; Everett v. Council Bluffs, 46 Iowa, 66; Cole v. Kegler, 64 id. 59; Everett v. Marquette, 53 Mich. 450; St. Paul v. Gilfillan, 36 Minn. 298; Hennessy v. St. Paul, 37 Fed. Rep'r, 565; Lake v. Aberdeen, 57 Miss. 260; Pieri v. Shieldsboro, 42 id. 493. *See* State v. Street Commr. of Trenton, 36 N. J. L. 283; Crosby v. Warren, 1 Rich. (S. C.) L. 385.

[3] Dillon's Mun. Corp., § 379.

property to be nuisances. Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights, or clearly transcend the powers granted to them ;[1] in which case the contemplated action may be prevented, or the injuries caused be redressed, by appropriate suit or proceedings. * * * It is not unusual to invest the municipal council with *special authority* in respect of particular avocations, trades, acts, omissions, and structures, with a view to conserve the public health and safety. The terms in which such authority is conferred measure its scope, but in view of the end for which it is given, it is not subjected to a hostile or even a narrow construction."

[1] *Citing* Kennedy v. Phelps, 10 La. Ann. 227; Milne v. Davidson, 5 Mart. (La.) N. S. 409; Potter v. Menasha, 30 Wis. 492. *See, also,* Roberts v. Ogle, 30 Ill. 459; North Chicago, etc., Ry. Co. v. Lake View, 105 id. 207; State v. Heidenhain, 42 La. Ann. 483; Hottinger v. New Orleans, ib. 629; State v. Cozzens, ib. 1069; Manhattan Manuf. & Fert. Co. v. Van Keuren, 23 N. J. Eq. 251; People v. Albany, 11 Wend. 539; Crosby v. Warren, 1 Rich. (S. C.) L. 385; Kennedy v. Sowden, 1 McMull. (S. C.) L. 323. In Mayor and Council of Monroe v. Gerspach, 33 La. Ann. 1011, defendant had been fined for failure to comply with an ordinance, after due notice, requiring him to fill up vaults or sinks of privies on his premises. On appeal, Levy, J., said: "In the case of Hart v. Mayor of Albany, 3 Paige, 218, the court said: 'The question of nuisance or no nuisance is always a question of fact, in relation to which the opinions of individuals will necessarily differ. It, therefore, becomes necessary, in all populous towns, to regulate such matters by police ordinances; and public policy requires that the corporation of the place should not be disturbed in the exercise of their powers, unless they have clearly transcended their authority.' The proper exercise of the police power and the efficient preservation of the public health could hardly be accomplished, if every individual or any set of individuals can determine what is properly to be regarded as a nuisance, and what are measures of salubrity. The various tastes and habits and the conflicting hygienic theories of different persons would, if it were necessary to be guided by them, prevent the municipal authorities from adopting any fixed and certain plan. It is, therefore, right and proper that they should be vested with the authority to decide what comes within the 'legal notion' in that regard." In State v. Street Commr. of Trenton, 36 N. J. L. 283, the court said: "The tribunal established by law to determine the question of nuisance or no nuisance is the legislative body of the city government. It is their prerogative to adopt such sanitary measures as will preserve the public health, and to remove every nuisance which may endanger it; and their determination will be conclusive, so long as they do not violate the Constitution or transcend the power conferred upon them. It is their clear right to restrain any occupation which proves detrimental to public health." Green v. Savannah, 6 Ga. 1; Town Council v. Pressley, 33 S. C. 56.

CHAPTER IV.

MUNICIPAL CORPORATIONS; ORDINANCES.

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Power to make ordinances.

SEC. 49. The legislature may delegate to municipal corporations the power to make by-laws or ordinances, with appropriate sanctions, and these regulations, when authorized, have the force, in favor of the municipality and against persons bound thereby, of laws passed by the legislature of the State.[1] In the absence of express grant, every municipality has the power, incidental to all corporations, to enact appropriate by-laws for its

[1] Dillon's Mun. Corp., §§ 307, 308; Mason v. Shawneetown, 77 Ill. 533; Jones v. Firemen's Fund Ins. Co., 51 N. Y. 318. A by-law or ordinance has been defined to be "the law of the inhabitants of the corporate place or district, made by themselves or the authorized body, in distinction from the general law of the country or the statute law of the particular State." *See* Willc. 73; 2 Kyd, 95, 98. It is a local law, general in its nature, and prescribing a permanent rule of conduct or government. Blanchard v. Bissell, 11 Ohio St. 96, 103. No ordinance is necessary, if there is a prohibition in the charter, fixing a penalty and prescribing the remedy. Town of Ashton v. Ellsworth, 48 Ill. 299.

own government.[1] The city council, or local governing body, may be regarded as a miniature legislature or general assembly, and its laws have the same effect within its jurisdiction as if passed by the legislature of the State.[2]

Ordinances and general regulations.

SEC. 50. The local regulations are general in their operation within the corporate limits. The fact, however, that an ordinance is made with especial reference to a particular person[3] does not affect its validity, where it is in itself reasonable, and made applicable alike to all persons whom it may affect.[4] Thus, where an ordinance prohibited the use of engines in a certain street by a certain railroad company, it was held that the ordinance was not special only, and, therefore, invalid, as it appeared that no other person or corporation had a right to use such engines in that particular street.[5] And a resolution of the council directing an officer to proceed to abate a particular nuisance, under a general ordinance, was declared to be legal. It was said that such a resolution could not be assimilated to an ordinance inflicting a penalty upon a particular individual.[6] If an ordinance, on the other hand, designates

[1] In some cases it has been held that a special grant of power to adopt ordinances on enumerated subjects, connected with municipal affairs, is in addition to the incidental power of the corporation. Des Moines Gas Co. v. Des Moines, 44 Iowa, 505; Comm. v. Turner, 1 Cush. 493; State v. Morristown, 33 N. J. L. 57.

[2] Wragg v. Penn Township, 94 Ill. 19; Heland v. Lowell, 3 Allen, 407; Bott v. Pratt, 33 Minn. 323; Taylor v. Carondelet, 22 Mo. 105; Village of Carthage v. Frederick, 122 N. Y. 268; Richmond v. Henrico County, 83 Va. 204. If a penalty be prescribed, for the doing of specified acts, that amounts to a prohibition, and the prescribed acts become thereby unlawful. Johnson v. Simonton, 43 Cal. 242. *See* Hedderich v. State, 101 Ind. 564.

[3] Evidence of this fact would properly be excluded. A very large part of the laws are suggested by some particular instances of public inconvenience or individual wrong-doing, known to the law-makers, and giving occasion for their action. But the motives of legislators cannot be inquired into judicially unless to aid in the interpretation of the law.

[4] Bloomington v. Wahl, 46 Ill. 489; Kennedy v. Phelps, 10 La. Ann. 227; First Municipality v. Blineau, 3 id. 688; Comm. v. Goodrich, 13 Allen, 546; Whyte v. Nashville, 2 Swan (Tenn.), 364.

[5] Richmond R. Co. v. Richmond, 96 U. S. 521.

[6] Kennedy v. Phelps, 10 La. Ann. 227.

one person and subjects him to a penalty, for violation of its provisions, it is against common right, and for that reason void.[1]

Upon whom binding.

SEC. 51. Valid ordinances are binding upon, not only the inhabitants of the corporation, but also strangers, or non-residents coming within its limits. These, for the time being, are regarded as inhabitants, and liable in the same manner for violations of the local laws.[2] And all persons upon whom these laws are binding are bound to take notice of them and are conclusively presumed to know them.[3] But the regulations, being local in their character, usually have no effect beyond the municipality by which they are adopted;[4] though it has been held that the legislature may, for police purposes, enlarge or contract the limits of municipal jurisdiction, and give to municipal corporations power to pass ordinances having effect within the limits so fixed.[5]

When they take effect.

SEC. 52. An ordinance takes effect from the time of its enactment, if no other time is therein prescribed, or designated in the charter. So, an ordinance passed by a city whose charter provides that such ordinances shall take

[1] First Municipality v. Blineau, 3 La. Ann. 688. *See* Board of Councilmen v. Crémonini, 36 id. 247; Hannibal v. Miss., etc., Tel. Co., 31 Mo. App. 23.

[2] Dillon's Mun. Corp., § 355; Pierce v. Bartrum, Cowp. 269; Horney v. Sloan, 1 Ind. 266; Gosselink v. Campbell, 4 Iowa, 296; Heland v. Lowell, 3 Allen, 407; Vandine, petitioner, 6 Pick. 187; Dunham v. Rochester, 5 Cow. 462; Whitfield v. Longest, 6 Ired. (N. C.) L. 268; Marietta v. Fearing, 4 Ohio, 427.

[3] Dillon's Mun. Corp., § 356; Mather v. City of Ottawa, 114 Ill. 659.

[4] Covington v. East St. Louis, 78 Ill. 548.

[5] Lutz v. Crawfordsville, 109 Ind. 466; Wiley v. Owens, 39 id. 429. In Chicago Packing & Prov'n. Co. v. Chicago, 88 Ill. 221, it was held that power was conferred by a statute of Illinois upon cities and villages to regulate packing establishments, and the like, "for the distance of one mile beyond their corporate limits, even if that should lap over and embrace a portion of territory included in the boundaries of another municipality. Each, to that extent, has the right to protect its inhabitants, and such establishments, located in such territory, are subject to the police power of both corporate bodies."

effect from the time therein specified, takes effect from the time of its enactment, if no time is specified, and there is nothing in the ordinance to show that it was not intended to take effect immediately.[1]

Recitals in ordinances.

SEC. 53. The courts, upon general principles, recognize judicially what municipal councils are competent to do, and hold that it is not necessary for them to recite in an ordinance all that is requisite to show that they have proceeded regularly in passing it. The ordinance need recite neither the authority under which it is passed, nor the necessity that induced the council to pass it. "The necessity will be presumed from its passage, and its passage will be referred to the authority from which it properly emanates, if any."[2] Neither in the ordinance itself, nor in any indictment founded upon it, is it necessary to allege or explain in any way the reasons for its enactment, or the exigency out of which it grew. It is of the nature of legislative bodies, it is said, to judge for themselves, and the exercise of that judgment is to be implied from the law itself.[3] Nor are the motives for adopting ordinances subject to judicial inquiry, unless to aid in the interpretation of the law.[4]

Void provisions; their effect.

SEC. 54. An unconstitutional provision in an ordinance does not vitiate the whole ordinance, if it is fairly separable from the other provisions without affecting the general scheme and purpose of the ordinance. In such case, it will be good in part and void for the rest.[5] So, if it be

[1] Comm. v. Brooks, 109 Mass. 355.
[2] Mayor of New York v. Slack, 3 Wheeler Cr. Cas. 237; Coates v. Mayor of New York, 7 Cow. 585.
[3] Martin v. Mott, 12 Wheat. 19; Young v. St. Louis, 47 Mo. 492; Cronin v. People, 82 N. Y. 318; Ogdensburgh v. Lyon, 7 Lans. 215.
[4] Richmond Railroad Co. v. Richmond, 96 U. S. 521; Patterson v. Kentucky, 97 id. 501; Soon Hing v. Crowley, 113 id. 703; Villavaso v. Barthet, 39 La. Ann. 247; Bozant v. Campbell, 9 Rob. (La.) 411; Cape May, etc., R. Co. v. Cape May, 8 Stew. Eq. 419.
[5] Shelton v. Mobile, 30 Ala. 540; Wilbur v. Springfield, 123 Ill. 395; Harbaugh v. Monmouth, 74 id. 367; City of Quincy v. Bull, 106 id. 337; Hershoff v. Beverly, 45 N. J. L. 288; Rogers v. Jones, 1 Wend. 237.

too comprehensive in its provisions, covering cases which the city has no power to control, it may be enforced as to those cases over which the power of the city is unquestionable.[1] And if there are several prohibitions in an ordinance, some of which are void and others valid, if a penalty is provided applying to each offense separately, the ordinance may be enforced as to offenses in respect of which it is valid, as if the void parts had been omitted; and a prosecution will be presumed to be under that part of the ordinance which is valid.[2]

Effect of repeal.

SEC. 55. The repeal of an ordinance cannot in general operate retrospectively to impair rights vested under it, unless the subject is shown to be a nuisance.[3] But the repeal will, of course, put an end to a pending prosecution under the repealed law, unless there be a saving clause;[4] and if it be amended, instead of repealed, the judgment pronounced in such proceedings must be according to the law as it then stands.[5] And as a party acquires no vested right in a penalty imposed by a statute, by merely suing for it, nor until it is reduced to judgment, the repeal of the statute, even after suit is brought to recover the penalty, extinguishes the right of action.[6]

Judicial interference.

SEC. 56. As a general rule, courts will not enjoin the

[1] Kettering v. Jacksonville, 50 Ill. 39; People v. Armstrong, 73 Mich. 288.

[2] Poyer v. Des Plaines, 123 Ill. 111.

[3] Richmond v. Henrico County, 83 Va. 204. *See* Salem v. Maynes, 123 Mass. 372. An ordinance may have the effect of impairing vested rights and may operate as a revocation of former grants or licenses of the corporation, where they come in conflict; yet the ordinance will not on that account be invalid. New Orleans v. Stafford, 27 La. Ann. 417; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Coates v. Mayor of New York, 7 Cow. 585; Davenport v. Richmond, 81 Va. 636.

[4] Bank of Hamilton v. Dudley's Lessee, 2 Pet. 492; Yeaton v. United States, 5 Cranch, 281; Higginbotham v. State, 19 Fla. 557; Menard County v. Kincaid, 71 Ill. 587; Wilson v. Ohio & Miss. R. Co., 64 id. 542; Musgrove v. Vicksburg, etc., R. Co., 50 Miss. 677; State v. Passaic, 36 N. J. L. 382; Ludlow v. Johnson, 3 Ohio, 553.

[5] Cooley's Const. Lims. 443.

[6] Endlich on Interpr'n. of Stat., §§ 257 n, 281; Mix v. Illinois Cent. R. Co., 116 Ill. 502; State v. Youmans, 5 Ind. 280; Thompson v. Bassett, ib. 535.

passage of ordinances on the ground that they are unauthorized, and will ordinarily act only when steps are taken to make the ordinances available.[1] The reason given for the refusal of courts of equity to interfere in such cases is, that such interference is unnecessary to protect private rights; for if the ordinance sought to be enjoined is void, no one can be injured by its passage. An unauthorized law is void, and is no law;[2] and the same thing is true of a municipal ordinance. The courts have undisputed jurisdiction to enjoin municipal authorities from passing an ordinance which is not within the scope of their powers, where the passage of such ordinance would work an irreparable injury. But where an ordinance would be void on its face and no irreparable injury could result from its mere passage, there being an ordinary remedy at law against any attempt to enforce it, a court of equity will not enjoin its enactment. Where, however, an ordinance would be void for want of authority to pass it, yet irreparable mischief would result from its mere enactment, or where there is the physical power to execute the void ordinance, notwithstanding its invalidity, by means of the instrumentalities provided, and the only adequate remedy against an irreparable injury from its actual enforcement is an injunction, the court may enjoin the passage of the ordinance. There appears to be no sound reason why the court should not interfere at one stage of the proceedings as well as at another. The test of jurisdiction should and would be the necessary tendency, and if carried out, the necessary result, of the void and unlawful act to work irreparable injury.[3]

Validity; how determined.

SEC. 57. The validity of ordinances is to be deter-

[1] Chicago v. Evans, 24 Ill. 52; Des Moines Gas Co. v. Des Moines, 44 Iowa, 505; Smith v. McCarthy, 56 Penn. St. 359. *See* People v. Sturteant, 9 N. Y. 264; State v. Paterson, 34 N. J. L. 163; State v. Jersey City, ib. 31, 390.

[2] Siebold's Case, 100 U. S. 376.

[3] Spring Valley Water-Works v. Barthet, 16 Fed. Rep'r, 619; Alpers v. San Francisco, 32 id. 503.

mined by the court as matter of law, and not by the jury. "Whether an ordinance be reasonable and consistent with the law or not, is for the court and not the jury, and evidence to the latter on this subject is inadmissible."[1] The contrary doctrine, declared in a very few cases would seem to have no good ground in reason.[2]

Ordinances must be reasonable.

SEC. 58. Ordinances must be reasonable,[3] and their reasonableness will be passed upon by the courts, and will be tested in general by the intention of the charter provisions, and the best interests of the corporation.[4] To render them reasonable, they should tend in some degree to the accomplishment of the objects for which the corporation was created, and its powers conferred;[5] and they should also be in some measure adapted and appropriate to secure the objects sought to be obtained.[6] It is also necessary to their validity that they should be certain,[7] and equal in their operation upon all persons affected by them.[8] If general in its scope, an ordinance may be adjudged reasonable as applied to one state of facts, and unreasonable when applied to circumstances of a different character.[9]

SEC. 59. The courts will inquire into the reasonableness

[1] Dillon's Mun. Corp., § 327; Greensboro v. Ehrenreich, 80 Ala. 579; Town of Marion v. Chandler, 6 id. 899; Hyde Park v. Carton, 132 Ill. 100; Lake View v. Tate, 130 id. 247; Boston v. Shaw, 1 Metc. 130; Comm. v. Stodder, 2 Cush. 562; Comm. v. Worcester, 3 Pick. 461; Evison v. Chicago, etc., Ry. Co., 45 Minn. 370; River Rendering Co. v. Behr, 77 Mo. 91; St. Louis v. Weber, 44 id. 547; Staats v. Washington, 45 N. J. L. 318; Dunham v. Rochester, 5 Cow. 462; Brooklyn v. Breslin, 57 N. Y. 591; Buffalo v. Webster, 10 Wend. 110; Commissioners v. Gas Co., 12 Penn. St. 318.

[2] Clason v. Milwaukee, 30 Wis. 316. *See* Corrigan v. Gage, 68 Mo. 541.

[3] Cooley's Const. Lims. 241; Chicago v. Rumpff, 45 Ill. 90; St. Louis v. Weber, 44 Mo. 547; State v. Freeman, 38 N. H. 426; Dunham v. Rochester, 5 Cow. 462; Comm. v. Worcester, 3 Pick. 461; Clason v. Milwaukee, 30 Wis. 316.

[4] Welch v. Stowell, 2 Doug. (Mich.) 332; Staats v. Washington, 45 N. J. L. 318.

[5] A Coal Float v. Jeffersonville, 112 Ind. 15; People v. Armstrong, 73 Mich. 288.

[6] Long v. Jersey City, 37 N. J. L. 348.

[7] Comm. v. Roy, 140 Mass. 432; Atkinson v. Goodrich Transp. Co., 60 Wis. 141.

[8] Tugman v. Chicago, 78 Ill. 405; Barling v. West, 29 Wis. 307.

[9] Pennsylvania R. Co. v. Jersey City, 47 N. J. L. 286; Nicoulin v. Lowery, 49 id. 391.

of ordinances passed by a municipal body under legislative authority, when the powers granted are expressed in terms which are general and indefinite. But where the legislature has defined the delegated powers and prescribed with precision the penalties that may be imposed, an ordinance within the powers granted, prescribing a penalty within the designated limits, cannot be set aside as unreasonable.[1] In such case the courts can only construe the extent of the grant, and have nothing to do with the reasonableness of the ordinance carrying it into effect.[2] The same doctrine has been stated by Judge Dillon, in a way that has received judicial approval. He says: "Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed in pursuance thereof cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable, or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid."[3]

Examples of reasonable ordinances.

SEC. 60. Many examples might easily be selected of ordinances which have been pronounced to be reasonable; but from the great number of adjudged cases the few following have been taken as fairly illustrative,— all pertaining to the public health or the public safety: — ordinances

[1] Haynes v. Cape May, 50 N. J. L. 55; River Rendering Co. v. Behr, 77 Mo. 91.

[2] District of Columbia v. Waggaman, 4 Mackey, 328.

[3] Dillon's Mun. Corp., § 329; *ante*, sec. 37.

providing that all gunpowder which may be brought to the city shall be conveyed to a public magazine, except where persons desire to retail the same in the city, and then that it shall not be kept in quantities over a certain number of pounds at any one time, and that it shall be kept in tin or copper canisters;[1] providing that no person shall keep combustible materials in large quantities, unless secured in a fire-proof structure;[2] prohibiting the sale of milk without a license;[3] prohibiting the adulteration of milk;[4] requiring all imitations of lacteal products to be plainly marked;[5] prohibiting the sale of meat except in specified places;[6] requiring butchers to be licensed;[7] declaring that private markets shall not be established, continued or kept open, within twelve squares of a public market;[8] prohibiting the slaughtering of animals within certain specified portions of the city,[9] or anywhere within the limits of the city;[10] restricting the slaughtering of animals to certain localities;[11] regulating the construction and management of new slaughter-houses;[12] prohibiting the making of soap and candles, contrary to the mode prescribed;[13] prohibiting hog-pens, and the keeping of hogs, except for temporary purposes;[14] providing that cattle shall not be permitted to go at large;[15] prohibiting the keeping of hogs within certain limits, and providing that they shall not be permitted to run at large;[16] prohibiting any person, not duly licensed, from removing

[1] Williams v. Augusta, 4 Ga. 509.
[2] Clark v. South Bend, 85 Ind. 276.
[3] Chicago v. Bartee, 100 Ill. 57; People v. Mulholland, 82 N. Y. 324.
[4] Polinsky v. People, 73 N. Y. 65.
[5] State v. Addington, 77 Mo. 110.
[6] Buffalo v. Webster, 10 Wend. 99.
[7] St. Paul v. Colter, 12 Minn. 41.
[8] New Orleans v. Stafford, 27 La. Ann. 417.
[9] *Ex parte* Shrader, 33 Cal. 279; Cronin v. People, 82 N. Y. 318; Metro. Bd. of Health v. Heister, 37 id. 661; Milwaukee v. Gross, 21 Wis. 241.
[10] Chicago v. Rumpff, 45 Ill. 90.
[11] Slaughter-House Cases, 16 Wall. 36; *Ex parte* Shrader, 33 Cal. 279; *Ex parte* Heilbron, 20 Cent. L. J. 183.
[12] Wreford v. People, 14 Mich. 41.
[13] Zylstra v. Charleston, 1 Bay (S. C.), 382.
[14] State v. Holcomb, 68 Iowa, 107. *But see* Heap v. Burnley Union, L. R., 12 Q. B. D. 617.
[15] Comm. v. Bean, 14 Gray, 52.
[16] Roberts v. Ogle, 30 Ill. 459; Gosselink v. Campbell, 4 Iowa, 296; Comm. v. Patch, 97 Mass. 221: Crosby v. Warren, 1 Rich. (S. C.) L. 385; Waco v. Powell, 32 Texas, 258.

refuse or contents of privies;[1] providing that garbage shall be removed in water-tight carts;[2] providing that intoxicating liquors shall not be used or kept in restaurants;[3] prohibiting the sale of liquors during certain hours of the night;[4] requiring the closing of saloons on Sundays;[5] prohibiting the deposit in the streets or on private premises of garbage and refuse;[6] prohibiting all persons, except undertakers, from removing dead bodies to the place of burial, and requiring bonds from undertakers;[7] prohibiting the establishing of new cemeteries;[8] prohibiting burials in certain localities;[9] prohibiting the obstruction of streets by railroad trains;[10] prohibiting persons, other than passengers, from getting on or off trains;[11] regulating the speed of railroad trains;[12] compelling boats laden with produce likely to become putrid to anchor until examined and passed by health officer;[13] declaring dense smoke from steamboats and chimneys of buildings a nuisance, and providing for abatement;[14] prohibiting public laundries, except in certain localities;[15] prescribing conditions under which laundries may be operated;[16] regulating the speed of carts and wagons in the streets;[17] prohibiting the driving or riding through the streets at a faster rate than six miles per hour, and requiring that speed shall be slackened at crossings, even in the case of ambulances;[18]

[1] Boehm v. Baltimore, 61 Md. 259; Vandine, petitioner, 6 Pick. 187.

[2] People v. Gordon, 81 Mich. 306.

[3] State v. Clark, 28 N. H. 176.

[4] State v. Welch, 36 Conn. 215; Baldwin v. Chicago, 68 Ill. 418; Staats v. Washington, 45 N. J. L. 318; Maxwell v. Jonesboro, 11 Heisk. 257; Smith v. Knoxville, 3 Head, 245; Platteville v. Bell, 43 Wis. 488.

[5] State v. Ludwig, 21 Minn. 202; Hudson v. Geary, 4 R. I. 485; Gobel v. Houston, 29 Texas, 335.

[6] *Ex parte* Casinello, 62 Cal. 538.

[7] Comm. v. Goodrich, 13 Allen, 546.

[8] City Council v. Baptist Church, 4 Strobh. (S. C.) 306.

[9] Coates v. Mayor of New York, 7 Cow. 585.

[10] McCoy v. Philadelphia, etc., R. Co., 5 Houst. (Del.) 599; Great Western Ry. Co. v. Decatur, 33 Ill. 381; City of Duluth v. Mallett, 43 Minn. 204; Long v. Jersey City, 37 N. J. L. 348; Pennsylvania R. Co. v. Jersey City, 47 id. 286.

[11] Bearden v. Madison, 73 Ga. 184.

[12] Whitson v. Franklin, 34 Ind. 392.

[13] Dubois v. Augusta, Dudley (Ga.), 30.

[14] Harmon v. Chicago, 110 Ill. 400.

[15] *In re* Hang Kie, 69 Cal. 149.

[16] *Ex parte* Moynier 65 Cal. 33; Soon Hing v. Crowley, 113 U. S. 703; Barbier v. Connolly, ib. 27.

[17] Comm. v. Worcester, 3 Pick. 461.

[18] People v. Little, 86 Mich. 125; State v. Cowan, 29 Mo. 330.

providing that hoistways shall be guarded by railings and supplied with trap-doors;[1] prohibiting the erection of livery-stables, except with the consent of adjoining property-owners;[2] prohibiting the playing of musical instruments in the streets without license.[3]

Examples of unreasonable ordinances.

SEC. 61. The following ordinances have been pronounced unreasonable, and, therefore, void: prohibiting the slaughtering of animals for food, except at a specified establishment, the owners of which were granted an exclusive right to have all slaughtering done there at certain fixed charges;[4] prohibiting the slaughtering of animals on one's own premises, unless in a regular slaughter-house;[5] compelling the removal of steam boilers, not in themselves nuisances, unless licensed by the mayor;[6] prohibiting gas companies from opening streets to make connections;[7] compelling the removal of property not a nuisance;[8] limiting the burial of the dead to one locality, the prohibited territory being unreasonably large;[9] subjecting private cemeteries to the control of the city sexton;[10] requiring the city sexton, as a condition of granting him a license, to expend $500 on the cemetery and to bury paupers free;[11] regulating the speed of railroad trains and the stopping of trains at places where the tracks do not cross public streets;[12] discriminating between railroads as to rate of speed allowed under like circumstances;[13] prohibiting cars laden with offensive substances from stopping, *for any length of time*, within the limits;[14] requiring huck-

[1] Mayor of New York v. Williams, 15 N. Y. 502.
[2] State v. Beattie, 16 Mo. App. 131.
[3] Comm. v. Plaisted, 148 Mass. 375.
[4] Chicago v. Rumpff, 45 Ill. 90. *But see* Slaughter-House Cases, 16 Wall. 36.
[5] Wreford v. People, 14 Mich. 41.
[6] Baltimore v. Radecke, 49 Md. 217.
[7] Commissioners v. Gas Co., 12 Penn. St. 318.
[8] Pieri v. Shieldsboro, 42 Miss. 493.
[9] Austin v. Murray, 16 Pick. 121.
[10] Bogert v. Indianapolis, 13 Ind. 134.
[11] Beroujohn v. Mobile, 27 Ala. 58.
[12] State v. Jersey City, 29 N. J. L. 170.
[13] Lake View v. Tate, 130 Ill. 247.
[14] Jamaica v. Long Island R. Co., 37 How. Pr. 379.

sterers having a license from commissioners of excise, under a State law, to take and pay for a license from town trustees;[1] conferring upon one person the exclusive right for a period of years, to have for his own use the carcasses of all animals not killed for food;[2] directing the proprietors of a particular soap factory to remove the same within a certain time, unless it be put in such condition as not to be a nuisance;[3] forbidding the erection of frame buildings in a rural village;[4] forbidding the circulating of hand-bills in the streets;[5] forbidding street parades with music, except by special permission;[6] discriminating as to licenses between dealers within and without the city;[7] requiring saloons and restaurants to be closed at night,[8] or on certain days;[9] prohibiting certain persons from carrying on a particular business and allowing others to carry on the same business, or imposing conditions on some not imposed on all;[10] requiring druggists to furnish the names of parties to whom they sell liquors;[11] abolishing the use of a certain kind of fire extinguisher within the limits of the city.[12]

Ordinances must not conflict with the Constitution or charter.

SEC. 62. The constitutional limitations upon the exercise of legislative powers by the State are equally applicable to the exercise of such powers by municipal corporations. These corporations have no other nor greater powers in respect of local legislation than are lawfully delegated either expressly or by necessary implication. Ordinances passed in the exercise of such powers are, therefore,

[1] Dunham v. Rochester, 5 Cow. 562.
[2] River Rendering Co. v. Behr, 77 Mo. 91.
[3] First Municipality v. Blineau, 3 La. Ann. 688.
[4] Kneedler v. Norristown, 100 Penn. St. 368.
[5] People v. Armstrong, 73 Mich. 288.
[6] Matter of Frazee, 63 Mich. 396; Anderson v. Wellington, 19 Pac. Rep'r, 719.
[7] *Ex parte* Frank, 52 Cal. 606; Nashville v. Althorp, 5 Cold. (Tenn.) 554.
[8] Ward v. Greenville, 8 Baxt. 228.
[9] Grills v. Jonesboro, 8 Baxt. 247.
[10] Mayor of Hudson v. Thorne, 7 Paige Ch. 261; Tugman v. Chicago, 78 Ill. 405.
[11] Clinton v. Phillips, 58 Ill. 102.
[12] Teutonia Ins. Co. v. O'Connor, 27 La. Ann. 371.

equally with State laws, subject to the constitutional restrictions. "Whatever the people, by the State Constitution, have prohibited the State government from doing, it cannot do indirectly through the local governments."[1]

For example, if an ordinance operates as a regulation of commerce, and is not in aid of any of the objects properly intrusted to the municipal government, it will be unconstitutional and void. So, a city ordinance prohibiting any railroad company from allowing the sale of fruits, vegetables, or perishable articles of freight, arriving in the city over its lines, from its cars, or at the depot of the company, is, where the merchandise affected chiefly comes from other States, an interference with interstate commerce. If such an ordinance is not based on considerations of the public health or intended to prevent the crowding and obstruction of streets and public places, but is designed solely to hinder competition between non-resident shippers and resident dealers in the same line, it falls within the class of unreasonable ordinances and is void.[2]

Ordinances must be consistent with charter.

SEC. 63. Moreover, in order to be valid, ordinances must be in harmony with the principles of the common law, recognized expressly or impliedly by the State Constitutions; they must not contravene common right.[3] They are also to be judged by the charter, which bears the same general relation to the ordinances of a municipal corporation that the Constitution of a State bears to its statutes; and the general rules and tests applicable to statutes may

[1] Cooley's Const. Lims. 239.

[2] Spellman v. New Orleans, 45 Fed. Rep'r, 3.

[3] Town of Marion v. Chandler, 6 Ala. 899; Hayden v. Noyes, 5 Conn. 391; Zanone v. Mound City, 103 Ill. 552; Chicago v. Rumpff, 45 id. 90; Austin v. Murray, 16 Pick. 161; Brownsville v. Cook, 4 Nebr. 101; Dunham v. Rochester, 5 Cow. 462; Marietta v. Fearing, 4 Ohio, 127; Barling v. West, 29 Wis. 307; Hayes v. Appleton, 24 id. 542. *See* State v. Medbury, 4 R. I. 138.

ordinarily be applied in construing ordinances.[1] They must not only be consistent with the charter, but they can never enlarge or in any way vary the corporate powers conferred by the charter.[2] And they are always to be interpreted with reference to the charter provisions or the legislative authority under which they are enacted, and can have no sanction or validity except as they tend in a reasonable way to promote the general purpose and intention of the grant of power.[3]

Ordinances must be general, impartial, and not oppressive.

SEC. 64. Ordinances must be general, impartial, and not discriminating in their operation. They may be made applicable to all persons residing within designated portions of a city, however, or residing in a certain street, without being invalid for that reason.[4] But an ordinance naming one person and directing him to do certain acts, and in default of compliance imposing a penalty, would be contrary to common right, grossly partial and special in its operation, and so void.[5] They must not discriminate in favor of particular individuals and against others, where no disparity of circumstances exists, nor make an act done by one person penal, and impose no penalty for the same act done, under like circumstances, by another, nor deny privileges to one class of persons while allowing them to others, under precisely similar conditions. Their burdens and their benefits should rest equally upon all.[6]

[1] Town of Marion v. Chandler, 6 Ala. 899; People v. Armstrong, 73 Mich. 288; Quinette v. St. Louis, 76 Mo. 402.

[2] Andrews v. Insurance Co., 37 Me. 256; Thompson v. Carroll's Lessee, 22 How. 422.

[3] City of Rochester v. Simpson, 57 Hun, 36; Cartmill v. City of Rochester, 44 id. 169.

[4] Goddard, petitioner, 16 Pick. 504; Comm. v. Patch, 97 Mass. 221; St. Louis v. Weber, 44 Mo. 547.

[5] First Municipality v. Blineau, 3 La. Ann. 688; *Ex parte* Chin Yan, 60 Cal. 78. *See* Board of Councilmen v. Crémonini, 36 La. Ann. 247.

[6] Shreveport v. Levy, 26 La. Ann. 671; Chicago v. Rumpff, 45 Ill. 90; Tugman v. Chicago, 78 id. 405; Lake View v. Tate, 130 id. 247; Zanone v. Mound City, 103 id. 552; City of Richmond v. Dudley, 28 N. E. Rep'r, 312; People v. Lewis, 86 Mich. 273; Mühlenbrinck v. Comm'rs, 42 N. J. L. 364; Mayor of Hudson v. Thorne, 7 Paige Ch. 261.

SEC. 65. Ordinances, again, must not operate with undue severity, nor be oppressive in their character, nor unnecessarily interfere with individuals in the exercise of their personal rights. This rule is very well illustrated by the following case: The common council of Baltimore, under a general grant of authority, passed an ordinance forbidding any person to erect or maintain, within the city, any steam engine or boiler, without authority from the mayor, and authorized the mayor, upon six months' notice, to revoke any permit to use a steam engine or boiler, and directed that thereupon the same should be removed, under a heavy penalty for non-compliance. The defendant had erected and used a steam engine, in the prosecution of his business as a box-maker, under a permit from the mayor, which contained a condition that the engine was "to be removed after six months' notice to that effect from the mayor." After such notice, and a refusal to conform to it, a suit was instituted to recover the penalty prescribed, and to restrain the prosecution of that action a bill was filed in equity. The court, holding the opinion that "there may be a case in which an ordinance, passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside, as a plain abuse of authority," proceed to consider the ordinance itself, and say: "It does not profess to prescribe *regulations* for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to

the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore, to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no *rules* by which its *impartial execution* can be secured or partiality and oppression prevented. In fact, an ordinance which clothes a single individual with such power hardly falls within the *domain of law*, and we are constrained to pronounce it inoperative and void." It is to be observed, that what the court declared to be void is only that part of the ordinance which gives to the mayor the power to *revoke* permits, and that the court disclaim any intention of expressing disapproval of that part of the ordinance which requires a permit for the erection of all such engines and boilers within the city.[1]

Ordinances must be consistent with legislative policy of the State.

SEC. 66. While municipal corporations cannot enact ordinances which are repugnant to the policy of the State as declared in its general legislation, they may, in some cases, consistently with the general law, *further regulate*, by ordinance, subjects already regulated by statute. For it is not always a valid objection to ordinances passed in pursuance of charter powers, that a general statute covers the same ground. But ordinarily a power vested by legislative act in a municipal corporation to make by-laws for

[1] Baltimore v. Radecke, 49 Md. 217; Yick Wo v. Hopkins, 118 U. S. 356; Field, J., Slaughter-House Cases, 16 Wall. 36; Laundry Ordinance Case, 13 Fed. Rep'r, 229; Zanone v. Mound City, 103 Ill. 552; Barthet v. New Orleans, 39 La. Ann. 563. *See* Watertown v. Mayo, 109 Mass. 315; Somerville v. O'Neill, 114 id. 353. It is said that it makes no difference that the arbitrary discretion is reserved to a *board*, instead of a single individual. *In re* Wo Lee, 26 Fed. Rep'r, 471.

its own government and the regulation of its internal police, is not to be construed as imparting to it the power to repeal the laws in force, or to supersede their operation by any of its ordinances. And such power, if not expressly granted, cannot arise by mere implication, unless the exercise of the power given be inconsistent with the previous law, and does necessarily operate as its repeal *pro tanto*. No presumption can be indulged that the legislature intended that an ordinance passed by a city council should be superior to and take the place of the general law of the State upon the same subject.[1]

Ordinances and general laws.

SEC. 67. This subject has been very thoroughly discussed in a recent treatise of marked excellence, on municipal police ordinances.[2] "If the State legislature," the writers say, "enacts a law whereby some act is forbidden, which, under a prior law, was expressly permitted, the courts hold that the subsequent law, as the latest expression of the legislative will, repeals the former law by implication; but municipalities have no power to repeal, directly or indirectly, the laws of the State. If the only measure of authority were the terms of the charter, there would often be ordinances plainly within the granted power, but irreconcilable with some State law, or contrary to the settled policy of the State; a result neither lawful nor intended. Some charters, by express language, restrict the ordinances that may be passed to such as are consistent with the laws of the State. Others are silent upon the subject, but the restriction exists, whether expressed or not, and becomes very important in its application."

Main conflict is as to minor offenses.

SEC. 68. "The class of legislation with which ordinances are most apt to come in conflict is that which declares

[1] Haywood v. Savannah, 12 Ga. 404; March v. Comm., 12 B. Monr. (Ky.) 25.

[2] Horr and Bemis on Mun. Pol. Ordins., § 88.

certain acts or occupations either absolutely unlawful, or lawful under certain restrictions. The police powers conferred upon municipalities cover the same class of acts governed by the State laws, and their execution must be effected in the same manner, by penalties. As a general rule, it is evident that ordinances are void whenever contrary to the laws of the State. The difficulty lies in determining the meaning of the phrase 'contrary to the laws of the State.' An ordinance that is expressly authorized by the charter or organic statute is not void because it differs from the State law on the same subject. The express grant of power to the municipality is considered to be an expression of the legislative intent to supersede the State law already existing within the limits of the corporation. Or, it is expressive of an intent to punish the same act by additional penalties when committed within certain territorial limits. But where no additional power of legislation is expressly conferred, it is doubtful whether the municipality may, by its ordinances, inflict additional penalties to those already prescribed by the State, or whether it may legislate at all upon matters covered by the general statutes. A wrongful act is, wherever committed, an injury to the public good, and contrary to the peace and dignity of the State. But the very foundation of the necessity of municipal government is the idea that the needs of certain localities, by reason of density of population, or other circumstances, are more extensive and urgent than those of the general public in the same particulars. * * * Some acts would be entirely innocent in one locality, and decidedly reprehensible in another. In this sense, then, it may be truly said that the same act may be a wrong to the public at large and an additional wrong to the community where committed. It would be an offense against the dignity of the State, and also an offense against the good order of the municipality. The act is single, its effect double; and for each offense there

may properly, and without working injustice to the rights of the offender, be a separate remedy or penalty. The offense is *per se* contrary to the good order of the State, and, therefore, a certain punishment is prescribed for it wherever committed; but the offense, if committed within the limits of a populous town or city, may work much greater injury to the local peace and good order, and it is proper that the town or city should have its remedy and a separate right to punish for the special and additional wrong done to it."

Tendency of authorities on the subject.

SEC. 69. "Perhaps on no subject connected with municipal corporations is there greater diversity of authority than upon the extent to which ordinances may lawfully trespass upon the territory covered by the laws of the State. * * * It is useless to attempt to reconcile the numerous decisions, but a careful consideration of the more recent holdings leads one to the belief that their tendency is to sustain the concurrent jurisdiction of State and municipality under their respective laws, and their varying punishments for the same offense. Especially is this so in the States whose courts have had frequent occasion to consider the question."[1] The same authors

[1] Horr and Bemis on Mun. Pol. Ordins., § 88; Bishop on Crim. Law, § 897a; Bishop on Stat. Crimes, §§ 23, 25; Cooley's Const. Lims. 199; Dillon's Mun. Corp., §§ 329, 330, 366–368.

The same act may constitute an offense against the State and against a municipality, and both may punish it. The great weight of authority is in favor of this view. Mobile v. Allaire, 14 Ala. 400; Mobile v. Rouse, 8 id. 515; People v. McDonnell, 80 Cal. 285; *In re* Sie, 73 id. 142; Hughes v. People, 8 Colo. 536; Deitz v. City of Central, 1 id. 323; State v. Welch, 36 Conn. 215; *cf.* Southport v. Ogden, 23 id. 128; Elkpoint v. Vaughn, 1 Dak. 108; Wragg v. Penn Township, 94 Ill. 11; Chicago Pkg. Co. v. Chicago, 88 id. 221; *cf.* Hawkins v. People, 106 id. 628; Loeb v. Attica, 82 Ind. 175; Williams v. Warsaw, 60 id. 457; Waldo v. Wallace, 12 id. 582; Ambrose v. State, 6 id. 351; *cf.* Lawrenceburg v. Wuest, 16 id. 337; Bloomfield v. Trimble, 54 Iowa, 398; Burlington v. Kellar, 18 id. 65; *cf.* Foster v. Brown, 55 id. 686; State v. Topeka, 36 Kans. 76; Franklin v. Westfall, 27 id. 614; State v. Young, 17 id. 414; Rice v. State, 3 id. 141; March v. Comm., 12 B. Monr. (Ky.) 25; Shafer v. Mumma, 17 Md. 331; Comm. v. Goodnow, 117 Mass. 114; *cf.* Comm. v. Turner, 1 Cush. 493; People v. Detroit White Lead Works, 82 Mich. 471; Fennell v. Bay City, 36 id. 186; State v. Lee, 29 Minn. 445; State v. Ludwig, 21 id. 202; State v. Crummey, 17 id. 72;

show that the better opinion is that in those States where double legislation is allowed, municipal ordinances may prescribe penalties and punishment proportionate to the offense, without regard to those prescribed by the State law; and that prosecution under either the general or local law is not a bar to proceedings under the other.[1]

cf. State v. Oleson, 26 id. 557; St. Louis v. Schoenbusch, 95 Mo. 618; St. Louis v. Cafferata, 24 id. 194; *Ex parte* Bourgeois, 66 id. 663; *cf.* St. Louis v. Bentz, 11 id. 61; State v. Clarke, 54 id. 17; Brownsville v. Cook, 4 Neb. 101; State v. Plunkett, 18 N. J. L. 5; Rogers v. Jones, 1 Wend. 261; *cf.* Blatchley v. Moser, 15 id. 215; Polinsky v. People, 11 Hun, 390; Wightman v. State, 10 Ohio, 452; State v. Sly, 4 Oreg. 277; State v. Bergman, 6 id. 341; *cf.* Wong v. Astoria, 13 id. 538; Heise v. Town Council, 6 Rich. (S. C.) L. 404; State v. Williams, 11 S. C. 238; City Council v. O'Donnell, 29 id. 355; Greenwood v. State, 6 Baxt. (Tenn.) 567; State v. Shelby Co., 16 Lea (Tenn.), 240; Hamilton v. State, 3 Tex. App. 643; *Ex parte* Douglass, 1 Utah, 108; *cf.* People v. Brown, 2 id. 462; Moore v. Illinois, 14 How. 13; Fox v. Ohio, 4 id. 510; McLaughlin v. Stephens, 2 Cranch, 148; Siebold's Case, 100 U. S. 371.

The following authorities sustain the doctrine that municipal corporations cannot legislate upon subjects made offenses and punishable by the laws of the State. Rothschild v. Darien, 69 Ga. 503; Menken v. Atlanta, 78 id. 668; Haywood v. Savannah, 12 id. 404; Jenkins v. Thomasville, 35 id. 145; *cf.* McRea v. Americus, 59 id. 168; Murphy v. Jacksonville, 18 Fla. 318; New Orleans v. Miller, 7 La. Ann. 651; State v. Keith, 94 N. C. 93; *cf.* State v. Brittain, 89 id. 574; Baxter, petitioner, 12 R. I. 13 (by statute); State v. Pollard, 6 id. 290.

[1] Mobile v. Rouse, 8 Ala. 515; Mobile v. Allaire, 14 id. 401; Van Buren v. Wells, 53 Ark. 368; Hughes v. People, 8 Colo. 536; Wragg v. Penn Township, 94 Ill. 11; Ambrose v. State, 6 Ind. 351; Waldo v. Wallace, 12 id. 582; Rice v. State, 3 Kans. 141; March v. Comm., 12 B. Monr. (Ky.) 25; Shafer v. Mumma, 17 Md. 331; State v. Lee, 29 Minn. 445; State v. Plunkett, 18 N. J. L. 5; People v. Stevens, 13 Wend. 341; State v. Sly, 4 Oreg. 277; State v. Bergman, 6 id. 341; Greenwood v. State, 6 Baxt. (Tenn.) 567; State v. Shelby Co., 16 Lea (Tenn.), 240; Hamilton v. State, 3 Tex. App. 643; Moore v. Illinois, 14 How. 13.

CHAPTER V.

BOARDS OF HEALTH; ORGANIZATION, POWERS AND DUTIES.

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National board of health.

SEC. 70. The act of Congress of March 3, 1879,[1] passed in the exercise of the power to regulate commerce, created a National board of health, to consist of seven members, to be appointed by the President, not more than one

[1] An act to prevent the introduction of infectious or contagious diseases into the United States, and to establish a National board of health. 20 St. L. 484; R. S. Supplt. 261.

of whom should be appointed from any one State, with one medical officer of the Army, one of the Navy, one of the Marine Hospital Service, and one officer from the Department of Justice, to be detailed by the secretaries of the several departments and the Attorney-General respectively. The board was required to meet in Washington, or elsewhere, from time to time, upon notice from its president; to frame such rules and regulations as might be necessary to carry out the purposes of the act; and to cause such investigations to be made within the United States or at foreign ports, as they might deem best, to aid in the execution of the act and the promotion of its objects. The duties of the board were to obtain information upon all matters affecting the public health, to advise the several departments of the government, the executives of the several States, and the Commissioners of the District of Columbia, on all questions submitted by them, or whenever in the opinion of the board such advice might tend to the preservation and improvement of the public health. It was also made the duty of the board, with the assistance of the Academy of Science, and after consultation with the principal sanitary organizations of the several States, to report to Congress a plan for a National public health organization, especial attention being given to the subject of quarantine, both maritime and inland, and especially as to regulations which should be established between State or local systems of quarantine and a National quarantine system.

SEC. 71. A temporary act,[1] to remain in force for a period of four years, passed June 2, 1879, enlarged the powers and duties of the National board of health in certain respects. It required the board to co-operate with and aid the State and municipal boards of health in the execution and enforcement of the rules and regulations of such boards to prevent the introduction of contagious

[1] 21 St. L. 5. *See* 21 St. L. 46.

or infectious diseases into the United States from foreign countries, and into one State from another; to report to the President facts in relation to the sufficiency of the quarantine regulations existing under State authority; to make such rules and regulations as are authorized by the laws of the United States and necessary to be observed by vessels at the port of departure and on the voyage, where such vessels sail from any foreign port at which contagious or infectious disease exists to any port in the United States, to secure the best sanitary condition of the vessel, her passengers, cargo and crew; to obtain, through consular officers, information of the sanitary condition of foreign ports, from which disease may be imported into the United States, and, from all accessible sources, reports as to the sanitary condition of domestic ports; to publish and distribute pertinent information received by the board; to procure information relating to the climatic and other conditions affecting the public health; and to make to the Secretary of the Treasury full reports of the operations of the board, with such recommendations as they might deem important to the public interests.

SEC. 72. By an act[1] passed in 1882, it was provided that the duties and investigations of the board should be confined to the diseases of cholera, small-pox and yellow-fever;[2] and finally,[3] in 1889, a special appropriation was made by Congress to pay for transportation and storage of books, records and furniture of the National board of health from September 1, 1886, to March 4, 1889, and the transportation of the same to the office of the Surgeon-General of the Army, "where they shall be hereafter stored." Congress having ceased, for several years past, to make appropriations for the current salaries and expenses of

[1] 22 St. L. 302; R. S. Supplt. 380.

[2] The board had no power to aid in suppressing yellow fever, except so far as required to prevent the disease from being imported into the United States, or from one State into another. 16 A. G. Op. 379.

[3] March 2, 1889; 25 St. L. 905; R. S. Supplt. 697.

the National board of health, it is no longer in active existence, though it has never expressly been abolished.[1]

State boards of health.

SEC. 73. State boards of health have been created by the legislatures of many of the States. The statutory provisions defining the powers and duties of these boards vary in the different States, but there is an apparent uniformity in the method of their organization and the purposes they are designed to subserve. The members are appointed by the governor,[2] some of them being selected from the medical profession. In some cases, certain State officers, the Comptroller and the State Engineer, are *ex officio* associate members, and often there is a representation in the board of the principal health officers attached to local sanitary organizations. As a rule the State boards of health are not invested with any enlarged executive duties, these being relegated usually to local boards, and their powers and duties are chiefly inquisitorial and advisory, both in relation to the government and the local boards. They have cognizance of all matters touching the interests of the health and lives of the citizens of the State, and are directed to make special study of vital statistics, the causes of disease, and especially of epidemics, the sources of mortality, and the effects of localities, employments, and other conditions upon the public health. They are authorized and required to make investigations, and to collect and preserve such information in regard to these matters as may be useful in the discharge of their duties, and contribute to the preservation and promotion of the health of the people. They frequently have gen-

[1] Note to R. S. Supplt. 261; Dunwoody v. United States, 22 Ct. Cl. 269; 23 id. 82; 143 U. S. 578.

[2] There would seem to be no good reason why women should not be eligible for membership of a State board of health. In Massachusetts it is said that the statute providing that the governor shall appoint nine "persons" who shall constitute the State board of health, is to be so construed as to permit the appointment of women. Opin. to Governor and Council, 136 Mass. 578.

eral supervision of the State system of registration of births, marriages and deaths; and sometimes have charge of all matters pertaining to quarantine, with authority to make and enforce proper quarantine regulations. It is their duty to make annual reports to the governor of their proceedings, and of such information concerning vital statistics as may be deemed useful for diffusion among the people, with recommendations and suggestions as to legislation for the improvement of the public health.

In some few States, the State board of health is invested with more enlarged powers and duties, having general supervision over the State charities, schools, hospitals, and asylums for the insane, and, in regard to many important matters, having concurrent jurisdiction with the local boards.

Local boards of health; in cities.

SEC. 74. Municipal corporations, in the exercise of the broad police powers usually conferred upon them by their charters or the general incorporation laws of the State, or under the specific power "to preserve the health of the inhabitants, and to prevent and remove nuisances," may lawfully pass ordinances establishing municipal boards of health, appointing health commissioners, with subordinate health officers and agents, and conferring upon them full powers of detailed supervision over all matters touching the interests of the public health.[1]

In nearly all of the States, however, there are general laws, relating to the preservation of the public health, which provide for the organization of local boards of health, or else require that the powers and duties usually conferred or imposed upon such bodies shall be exercised and performed by some one designated branch of the local government of every incorporated place. These statutes do not vary in essential points.[2]

[1] Boehm v. Baltimore, 61 Md. 259.

[2] A board of health is legally organized if there has been a substantial compliance with the requirements of the law. Hutchinson v. State, 39 N. J. Eq. 569.

SEC. 75. In some States, it is provided by statute that there shall be no boards of health in cities, but that the police commissioners shall exercise all the powers and perform all the duties usually belonging to boards of health. In other States, the mayor and aldermen of every city constitute the local board of health; or the common council of the city may appoint either branch of their body, or a joint or separate committee of their body, a board of health for the city, either for general or special purposes, and may prescribe the manner in which the powers and duties of such board shall be executed and carried into effect; and in default of such appointment, the council itself is invested with the powers and duties of a board of health to all intents and purposes. The most common method of providing for the creation of boards of health in cities is that by which it is made the duty of the common council of every city, respecting which no other provision is made by special laws or its charter, to appoint, upon the nomination of the mayor, a board of health for the city, to consist of a specified number of persons, who are not members of the council, and one of whom, at least, shall be a competent physician. The mayor is made *ex-officio* a member of the board, and its president, and vacancies are filled by him, with the approval of the council.

Local boards of health; in villages.

SEC. 76. The boards of health of villages sometimes consist of the president and council of the village or its board of trustees; but it is commonly made the duty of the trustees of every incorporated village to appoint, once in each year, a board of health of the village, to consist of a specified number of persons, who are not village trustees; and the board so constituted is required to elect a president.

Local boards of health; in towns.

SEC. 77. The local boards of health in townships are

constituted in various ways. In some States, the township board, consisting of the supervisor, two justices of the peace, and the town clerk, are designated as the board of health. The supervisor is made the president, and the town clerk is made the clerk of such board. By another plan it is provided, that the town, at the annual meeting, or at a meeting legally warned for the purpose, may choose a board of health by ballot, or may choose a health officer; and that, if no such board or officer is chosen, the selectmen shall constitute the board of health of the town. Again, in other States, it is made the duty of the supervisor, the justices of the peace, and the town clerk in each town, to meet in their respective towns, within a certain number of days after the town election in each year, and elect a citizen of the town, who, with them, shall constitute the board of health of the town for one year or until their successors are chosen. Vacancies in such board are filled by the same authorities, and in case of their inability, neglect or refusal to fill a vacancy, it is the duty of the county judge, upon being satisfied that the vacancy should be filled without delay, to appoint in writing a competent person to fill the vacancy for the unexpired term; such written appointment being filed in the office of the clerk of the county in which the board is located.[1]

Combined sanitary districts.

SEC. 78. In order to prevent conflict between village and town boards, it is provided, in the plan last mentioned, that any legally organized board of health in a village, which comprises parts of several towns, or less than a whole town, shall have full authority in regard to all matters relating to public health within the village, and that the village shall not be subject to the sanitary regulations or health officers of the township or towns within which the village is located; and that the taxable property of the

[1] Bd. of Health of Kortright v. Cease, 6 N. Y. Suppl. 790; S. C., 25 N. Y. State Rep'r, 303; Bd. of Health of Brighton v. City of Rochester, 1 N. Y. Suppl. 725.

village, while maintaining its own board of health, shall not be subject to taxation for maintaining any town board of health, or for any expenditures authorized by such town board; but that such expenditures of the town board shall be assessed exclusively on property in the town outside of the village. But boards of health of two or more towns adjacent to each other, or of towns and villages therein situated, may unite in a combined sanitary and registration district by the appointment of one health officer and registering officer for such district, whose authority in all matters of general application shall be derived from the several boards of health having jurisdiction within such district; and in special cases, not of general application, arising within the jurisdiction of any one of such boards, such officers derive their authority from such board alone. Such combined districts are formed, however, subject to the approval of the State board of health.[1]

Powers and duties of local boards of health.

SEC. 79. The powers and duties of boards of health legally organized in cities, villages and towns, or of the authorities designated to act as local boards of health, are prescribed by the statutes or municipal charters, under which they are constituted. The powers are conferred in ample measure to secure the preservation and promotion of the public health, by the enforcement of all necessary and proper sanitary regulations, and the summary suppression, amendment or removal of all conditions detrimental to the lives and health of the people. And in view of the importance of the interests confided to the care of the health authorities, the various laws conferring these powers receive a liberal construction in aid of the beneficial pur-

[1] See Wilson v. Bd. of Trustees, 133 Ill. 443; People v. Nelson, ib. 565; People v. Acton, 48 Barb. 524; Schuster v. Metro. Bd. of Health, 49 id. 450.

poses of their enactment.[1] The duties imposed upon the authorities are commensurate with their powers; but while much latitude of discretion is left them in the exercise of their powers, the strict and faithful performance of all ministerial duties, whether prescribed in general or specific terms, may be enforced by mandatory writs of the courts, at the suit of any citizen having an interest.

SEC. 80. The laws require local boards of health to take cognizance of the causes of injury or danger to the public health. Full power is given to them to make regulations and orders of *general application*, which shall be published and obeyed as laws; also to make *special orders*, to meet emergencies not provided for by regulations of general obligation, to be immediately enforced for the suppression of nuisances and of sources of contagious diseases or other great dangers to life and health. The boards have authority to employ any necessary aid to enforce the execution of their orders and regulations; to impose penalties for non-compliance, and to obtain judgment and fix liens for the cost of sanitary improvements made by them; and in proper cases, to procure or issue warrants to constables, or, if necessary, to the sheriff, to bring to their aid the power of the county.

The duties which commonly devolve upon the local boards may be enumerated as follows: 1. To make and preserve records of all official proceedings; 2. To define the powers and duties of the health officer; 3. To appoint agents and inspectors to carry into effect the sanitary laws; 4. To cause every case of infectious or contagious disease to be reported immedi-

[1] Gould v. City of Rochester, 105 N. Y. 46; Trenton Bd. of Health v. Hutchinson, 12 Stew. Eq. 218. The importance of sustaining local boards of health in all lawful measures tending to secure or promote the public health, should make the courts cautious in declaring any curtailment of their authority, except upon clear grounds. "On the contrary, powers conferred for so greatly needed and most useful purpose, should receive a liberal construction, for the advancement of the ends for which they were bestowed." Gregory v. New York, 40 N. Y. 273.

ately to the health officer, and to require him or the clerk of the board to report the same to the State board of health without delay; 5. To keep the State board of health informed concerning dangerous diseases in the local jurisdictions; 6. To establish the quarantine to be performed by vessels, goods, and persons arriving within the sanitary district from infected places, and to guard against the introduction of dangerous diseases; 7. To protect the community and every family against infectious and epidemic diseases, and to prevent the spread of contagion by providing for the regular isolation or domestic quarantine of every case of contagious disease which occurs in the community; 8. To discover and remove preventable causes of disease, and to this end, to maintain an efficient system of sanitary inspection and reports; 9. To provide the means for thorough and safe vaccination of those who may need it or who may be required by law to submit to it; 10. To receive and examine into the nature of complaints concerning nuisances and causes of danger and injury to the public health; 11. To cause such nuisances and all other things dangerous to the public health to be removed, suppressed and abated; 12. To supervise and make complete the registration of births, marriages and deaths, and to collect and preserve other vital statistics; 13. To designate persons who shall grant permits for burials of the dead.

It should also be considered an important duty of local boards of health to give information to all persons in the sanitary district, concerning their duties, under the laws, in regard to the registry of births, marriages and deaths, the burial of the dead, and the proper sanitary care of contagious diseases; and to notify all physicians, clergymen and magistrates of their duty relating to certified records for registration.

Meetings; Minutes; By-laws.

SEC. 81. Local boards of health, even if they are not

specially required to do so, should meet at stated intervals in their respective cities, villages and towns; also, whenever the State board of health shall have requested them to convene for the purpose of taking certain definite proceedings upon matters concerning which the State board is satisfied that the action recommended is necessary for the public good, and is within the jurisdiction of the local board.

A local board, at its first meeting, should organize by appointing a chairman and a clerk, unless these officers have been designated by law. The chairman is to preside at all meetings, but in his absence any member may be appointed to act as temporary presiding officer and to exercise the usual powers and duties of the chairman. A majority of the whole number of members forms a quorum for all business which requires the action of the board.[1]

The minutes of the board meetings are competent evidence for certain purposes in proceedings where the action of the board is in question,[2] and for that reason, as well as for the information of the board, they should be carefully kept, by the clerk or secretary. The minutes of each meeting may be confirmed and signed at the next subsequent meeting;[3] but minutes of committees should, according to custom, be entered at the time of meeting, and signed, if possible, at the time, by the chairman then presiding, and by all the members of the committee who are present.

It is proper and desirable that at the first meeting the local board should adopt a code of by-laws or standing orders for the guidance of the board in its business, and the performance of its duties. The rules adopted should be rigidly adhered to. They should be so framed as to

[1] *See* Dillon's Mun. Corp., §§ 276–283, 285–287. Cotton Mills v. Commissioners, 108 N. C. 678.

[2] Salem v. Eastern R. Co., 98 Mass. 431; Van Wormer v. Mayor of Albany, 15 Wend. 262; 18 id. 169: Meeker v. Van Rensselaer, 15 id. 397. *See* Denning v. Roome, 6 id. 651.

[3] As to amending the record of proceedings, *see* Dillon's Mun. Corp., §§ 294–297.

declare the times at which stated meetings are to be held, and the manner in which special meetings may be called; and should contain directions as to the conduct of meetings and the attendance of members, and provisions as to entering the minutes, as to the safe custody of books, documents and plans, and as to the authentication and signing of notices and permits. The rules should also prescribe the duties of officers, where the same are not defined by the general laws, and should fix the powers and duties of subordinate agents of the board.[1]

Health officer.

SEC. 82. Except where it is otherwise provided by law, it is the duty of every local board of health to appoint a competent physician, not a member of the board, to be health officer of the city, village or town, and to act as the sanitary adviser and executive officer of the board, during its pleasure, or for a certain term; to prescribe his powers and duties; to direct him, from time to time, in the performance of his duties; and to fix the compensation he shall receive. It is often provided by law that in cities where there is a city physician, he shall be *ex-officio* a member of the local board of health.[2]

In theory the health officer should be the director of a system of what may be called medical police. "That is,

[1] Powers or duties of a board of health delegated to a committee, are to be exercised and performed by them acting in concert; and it is not competent for the committee to apportion amongst themselves the powers and duties delegated to them; and one of them acting alone, pursuant to such apportionment, cannot justify his acts. Cook v. Ward, 2 C. P. D. 255. Where a statute imposes a duty or confers power upon a certain number of officials, to be performed when in their judgment expedient, it is the united judgment of the officers acting upon the exigency and determining the necessity, which is contemplated by the statute. It is a joint authority expressly given to the officers designated acting together, and cannot be exercised by a minority or by any one of them; as where authority is given by statute for the demolition of houses when it shall be judged necessary by three fire wardens. Ruggles v. Nantucket, 11 Cush. 433; Coffin v. Nantucket, 5 id. 269. A case is not removed from the operation of this principle by showing that it was impossible to procure the concurrent action of all the officers designated, however immediate and pressing the necessity for action may be. Parsons v. Pettingell, 11 Allen, 507.

[2] *See* Comm. v. Swasey, 133 Mass. 538.

he should know, by reports promptly sent to him by medical practitioners, of any case of infectious or contagious disease, especially when endemic or epidemic, occurring in his district. The register of deaths should be either under his control or always open to his inspection, and he should constantly supervise all the streets and buildings of his district, condemning the latter when unfit for human habitation, and reporting those requiring alterations and amendments, in order to prevent injury to health or life. He should dictate the conditions necessary to be observed in common lodging-houses, manufactories, slaughter-houses, or other buildings of public or quasi-public character. He will be expected periodically to report on the health and mortality of his district, to visit any places brought under his notice by the inspector of nuisances, to examine food supposed to be unwholesome, and take proceedings, or attend to give evidence before the magistrate when the owner or seller of unwholesome food is summoned for that offense. In general, although contrary to all right action in sanitary matters, in the present state of the law and public feeling on the subject, the less obtrusive the action of a medical officer of health, the better will his employers and the public be satisfied."[1]

The general duties of a medical officer of health are such as naturally pertain to the office of chief executive officer and adviser of the board of health. He should inform himself, as far as practicable, respecting all influences affecting or threatening to affect injuriously the public health within his district; he should inquire into and ascertain, by such means as are at his disposal, the causes, origin, and distribution of diseases within the district, and determine to what extent the same have depended on conditions capable of removal or mitigation; he must be prepared to advise the board of health on all matters affecting the health of the district, as to the means of preventing or removing

[1] Hart's Manual of Pub. Health, London, 1874, pp. 37, 38.

nuisances and causes of disease, and as to the propriety of adopting general sanitary regulations or special orders in particular cases; he must take all practicable means to secure early information of the occurrence of cases of communicable disease; and on receiving notice, or having good reason to believe that there is, within his district, a case of disease dangerous to the public health, he must investigate the subject without delay; advise the persons competent to act as to the measures required to prevent the extension of the disease; order the prompt isolation of those sick with the disease, and the vaccination or isolation of those who have been exposed to the disease; if necessary, furnish the means for proper medical care and nursing; give public notice of all infected places by placard on the premises, and otherwise, if necessary; notify teachers or superintendents of schools concerning families in which there are contagious diseases; supervise funerals of persons who die from diseases dangerous to the public health; disinfect rooms, clothing, and all articles likely to be infected, or direct their destruction, if necessary; and finally, he must keep the local board of health and the State board of health informed respecting all cases of contagious or infectious diseases which come to his knowledge and are likely to endanger the public health.

Agents and employes.

SEC. 83. Local boards of health may employ all such ward or district physicians,[1] sanitary officers and inspectors and other agents, as may be necessary to enable them to carry into effect the orders and regulations they shall have adopted, and the powers vested in them by law; and may fix their compensation. In cases of emergency, they may appoint agents to act for them with full powers.

Reports to the State board of health.

SEC. 84. Notice of the organization and membership of

[1] Schmidt v. Stearns Co., 34 Minn. 112.

all local boards, and of all changes that may from time to time occur therein, should be given forthwith to the State board of health; and at least once in each year the local board should cause its clerk or the health physician to report to the State board its proceedings, with a review of the sanitary condition of the district under its jurisdiction, and such other facts as may be deemed useful or as the State board may require. The annual reports should be made in strict accordance with instructions received from the State board. Special reports should also be made whenever requested by the State board. These reports should be made even though there is no provision of law directing them to be made. They are necessary to the efficient administration of the health laws in a systematic way. The State board must also be kept constantly informed concerning the outbreak, progress and treatment of diseases dangerous to the public health, and generally in regard to all matters relating to quarantine and the introduction of persons or articles into the sanitary district from places infected or believed to be so. It is especially important that reports be promptly made of facts which relate to malignant, contagious and epidemic diseases, and particularly of every case of small-pox or varioloid, occurring within the local sanitary districts.

Ordinances and regulations.

SEC. 85. Local boards of health have power, and it is their duty, to make, and from time to time to publish,[1] in such manner as to secure early and full publicity thereto, all such ordinances and regulations, of general obligation, as they shall think necessary or proper for the preservation and promotion of life and health, and the successful operation of the health laws of the State and of the local sanitary district. The constitutionality of this delegation

[1] Reed v. People, 1 Park. Cr. R. 481.

of legislative power over matters of local concern has been repeatedly affirmed, and cannot be regarded as an open question.[1] Indeed, it is difficult to perceive any reasonable ground for denying to the legislature authority to confer upon boards of health the power to enact sanitary by-laws and regulations, having the force of law within the districts over which their jurisdiction extends. It is an authority which for many years has been exercised by legislative bodies both in this country and in England, and it results from, and is incidental to, the power to create and maintain municipal corporations. The power to enact and enforce police ordinances has always formed an essential feature in the constitution of those corporations, and the State Constitutions contain nothing restricting its exercise to any particular part of the municipal body. It may be conferred upon the mayor and common council, or the latter body alone, or any other department of the municipal government, as may appear to be the most just and expedient in the judgment of the legislature. That is a necessary result of the plenary authority secured by the Constitution to the legislature. It has, therefore, long been the practice to invest with legislative powers not only the boards of health in cities, but the trustees of villages, and the local officers of towns. As the by-laws and ordinances of the local boards of health are, in this view, merely the exercise of municipal authority, through the intervention of those boards instead of the common councils, no well-founded objection can be taken to their validity, so long as they are confined to the subjects committed to the jurisdic-

[1] Polinsky v. People, 73 N. Y. 65; Health Department v. Knoll, 70 id. 530; Metro. Bd. of Health v. Heister, 37 id. 661; Clark v. City of Rochester, 28 id. 605; Cushing v. Board of Health, 13 N. Y. State Rep'r, 783; People v. Acton, 48 Barb. 524; Schuster v. Metro. Bd. of Health, 49 id. 450; Coe v. Schultz, 47 id. 64; Reynolds v. Schultz, 34 How. Pr. 147; Weil v. Schultz, 33 id. 7; Cooper v. Schultz, 32 id. 107; Raymond v. Fish, 51 Conn. 80; People v. Collins, 3 Mich. 415. *See* Tugman v. Chicago, 78 Ill. 405.

tion and control of the authorities by whom they are enacted.[1]

SEC. 86. It is necessary that the ordinances and regulations adopted by boards of health, in the exercise of their general powers of legislation, should be *reasonable*.[2] They must also be fair and impartial, in harmony with the fundamental law and the Constitution, and not inconsistent with the legislative policy or the general statutes of the State.[3] For it can never be permitted that, even for the sake of the public health, any local, inferior board or tribunal shall repeal statutes, suspend the operation of the Constitution, or infringe the natural rights of the citizens of the State.[4] The legislature having regulated any matter, it is not competent for a board of health to impose *further* restrictions. For example, if the legislature has prescribed the standard test of petroleum for illuminating purposes, and the mode of storage and conditions of the sale of that article, a board of health cannot further regulate the subject, as, by prescribing another

[1] People v. Special Sessions, 7 Hun, 214. The establishment by the legislature of general and local boards of health is not to be regarded as detracting from the general powers of municipal governments, unless that legislative intent clearly appears. The health laws may bring within the cognizance of their constituted boards offenses prohibited by the town ordinances, because they injure the public health, yet they are not necessarily antagonistic to the exercise by the municipality of power to regulate and repress noxious and offensive creations, within the statute. Nicoulin v. Lowery, 49 N. J. L. 391. Where one section of an act of the legislature conferred general power upon the board of health of the city to enact such by-laws, rules and regulations as they may deem advisable, to promote and preserve the health, safety and sanitary condition of the city; and another section of the same act provided that the common council should have power to regulate and control the *slaughtering of animals* in the city; it was *held*, that while the former section, taken by itself, was broad enough to confer power on the board of health to regulate the slaughtering of animals, yet, when considered in connection with the latter section, the power was in the common council and not in the board of health. Tugman v. Chicago, 78 Ill. 405.

[2] They will not be declared invalid unless *clearly* unreasonable, or beyond the power of the board to adopt. State v. Holcomb, 68 Iowa, 107; Cushing v. Board of Health, 13 N. Y. State Rep'r, 783. *See* Young v. Edwards, 11 L. T. 424; Brown v. Holyhead Loc. Bd., 1 H. & C. 601; Hattersley v. Barr, 4 id. 523.

[3] People v. Roff, 3 Park. Cr. R. 216.

[4] People v. Roff, 3 Park. Cr. R. 216.

and different test.[1] But if the general laws of the State do not, and are not intended to cover the whole subject to which they relate, then, in regard to subjects under their control, local boards may make additional regulations to those contained in the general acts.[2] The ordinances and regulations must, moreover, be appropriate to accomplish their purposes; they must have a clear and substantial relation to the subject to which they purport to relate. The acts creating boards of health invest them with powers and authority for the purpose of protecting life and health and preventing disease, and for no other purpose, and the powers and authority are to be exercised accordingly. The validity of their exercise in any case is to be judged by the test whether it fairly and reasonably tends to promote those purposes.[3] In all respects, the validity of the general orders and regulations adopted by the sanitary authorities will be tested by the same rules which are applied to the construction of municipal ordinances relating to like matters.[4]

Publication of general regulations.

SEC. 87. Notice must be given of general orders or regulations by publishing them in a newspaper, if there be one published in the place, and if not, then by posting them up in several conspicuous public places within the limits of the corporation or of the sanitary district, and such notice will be deemed "legal notice" to all persons.[5] The object of publishing *police* ordinances is to give notice to all who must obey them, and since this class of regulations operates to restrict the exercise of personal rights

[1] Metropolitan Bd. of Health v. Schmades, 3 Daly, 282.

[2] Polinsky v. People, 73 N. Y. 65.

[3] Mayor of New York v. Board of Health, 31 How. Pr. 385, Hubbard v. Paterson, 45 N. J. L. 310.

[4] *Ante*, secs. 58, 62, 64–69. It is impossible to urge too strongly on all local health authorities the necessity of adhering to the very *letter* of the acts from which they derive their powers, especially in framing their ordinances or general regulations. They must accept the caution given by Lord Justice Knight Bruce, and avoid every temptation to carry out the "*spirit*" of the acts. Tinkler v. Wandsworth Dist. Bd. of Wks., 2 DeG. & J. 274.

[5] This provision must be strictly complied with. Cushing v. Board of Health, 13 N. Y. State Rep'r, 783.

of the citizen, the law insists upon a strict and literal compliance with the terms of publication required. The element of notice is essential, and until notice is given in the manner prescribed, the ordinances do not go into effect, and, of course, no penalty can be enforced under them.[1] If no method of publication is prescribed, the publication need not be in a newspaper, but the old system of posting notices in public places may be adopted. A posting in five or six places in the corporation will be sufficient.[2] But publication is usually directed to be made in a newspaper of general circulation within the corporation. In such case, it need not be in a local paper, but any paper circulating generally in the community will suffice.[3] And when no particular paper is designated by the authorities, the clerk may lawfully make publication in any paper in the place;[4] preferably that in which legal notices and corporation proceedings usually appear. Where alternate modes of publication are allowed by statute, and the board of health or other designated authorities are required to direct which mode shall be adopted, a publication ordered by the clerk, of his own motion, is not valid; the authorities named in the statute must point out in which one of the permitted ways the publication shall be made.[5]

Special orders.

SEC. 88. Local boards of health may also make, without publication, such orders and regulations in special or individual cases, not of general application, as they may see fit, concerning the suppression and removal of nuisances, and concerning all other matters in their judgment detrimental to the public health. Authority to make such special orders is not merely convenient, it is indis-

[1] *See* Horr and Bemis on Mun. Pol. Ordins., §§ 52-54; Dillon's Mun. Corp., § 331.

[2] Queen v. Justices of Huntingdon, L. R., 4 Q. B. D. 522.

[3] Tisdale v. Minonk, 46 Ill. 9.

[4] *In re* Durkin, 10 Hun, 269.

[5] Higley v. Bunce, 10 Conn. 435, 567.

pensable. Without it, the local health authorities would be powerless to accomplish the purposes of their creation. And when the exercise of the power is surrounded by such safeguards against abuse as are contained in the constitutional provisions or the statutes, or interposed by the courts upon general principles of justice, there can be no valid reason for withholding the power itself. The nature of these safeguards will be considered in a later part of the present chapter,[1] in connection with the subject of the suppression of nuisances. But it may be remarked in this place, that the acts creating local boards of health, and authorizing them to make and enforce special orders concerning the matters above mentioned, are not to be impeached, as being in violation of that provision of the State Constitutions which secures the right of trial by jury; nor of that article which provides that no person shall be deprived of liberty or property without due process of law; nor of the inhibition in regard to the creation of inferior local courts.[2] Nor can it justly be said that the proceedings of the authorities, with respect to the special orders mentioned, do not constitute "due process of law," or that they violate "the law of the land," for any of the following reasons, namely: 1. That the functions of accuser and judge are blended in the same body; 2. That no process is served, or notice of the proceedings given to the parties interested; 3. That the judgment precedes the trial; 4. That the accused is not confronted with the witnesses against him; 5. That the testimony is not under oath; nor the ordinary rules of evidence observed; or, 6. That no means are afforded to the accused to compel the attendance of witnesses.[3]

Special orders; how served.

SEC. 89. Notice of special orders or regulations must

[1] *Post*, secs. 107–110.

[2] Metro. Bd. of Health v. Heister, 37 N. Y. 661; Coe v. Schultz, 47 Barb. 64; Cooper v. Schultz, 32 How. Pr. 107; 2 Hare Am. Const. Law, 864.

[3] Reynolds v. Schultz, 34 How. Pr. 147.

be given to the persons to whom or against whom they are directed. The manner of giving such notice is usually prescribed by statute, and in such case the terms of the statute must be literally and precisely complied with. In the absence of explicit directions in the statute, the orders must be served by delivering copies to the persons to whom they are directed, personally, or by leaving copies at the last known place of abode[1] of such persons, if they are known and reside within the State;[2] or, if personal service cannot be made, or if the premises to which the orders refer are unoccupied, and the residence of the owners or agents is unknown, by posting them in a conspicuous place on the premises and advertising in one or more public newspapers, in such manner, and for such length of time, as the board of health may direct. In the absence of any prescribed length of time, it must be such as to afford reasonable opportunity for compliance, or for demanding a hearing or a reconsideration of the matters to which the order relates.[3]

Method of enforcing orders and regulations.

SEC. 90. Boards of health may impose penalties for the violation of or non-compliance with their orders and regulations;[4] and may maintain actions in any court of competent jurisdiction to collect such penalties,[5] not exceeding, in any one case, the maximum amount prescribed by

[1] Or place of business, Mason v. Bibby, 2 H. & C. 881.

[2] Service may be made without the territorial jurisdiction of the board; Gould v. City of Rochester, 105 N. Y. 46; and may be made by any person of suitable age, even though he be a member of the board, Comm. v. Alden, 3 N. E. Rep'r, 211 (Mass.).

[3] Metro. Bd. of Health v. Heister, 37 N. Y. 661. *See* Swett v. Sprague, 55 Me. 190.

[4] *But see* Harbor Comm'rs v. Excelsior Redwood Co., 88 Cal. 491. Under Laws New York 1885, chap. 270, § 4, providing that penalties imposed by a board of health for the maintenance of a nuisance "may be sued for and recovered with costs by said board of health in the name of such board," such actions are properly brought in the name of the board, without naming the individual members. Board of Health v. Valentine, 57 Hun, 591.

[5] McNall v. Kales, 61 Hun, 231. The existence of a penalty for the violation of a special order is not essential; the board may enforce the order by its own officers, and collect the expenses from the person or property affected by it. Health Department v. Knoll, 70 N. Y. 530.

law; or may restrain such violations by injunction,[1] or otherwise enforce their orders and regulations as the case may require.[2]

The authority to maintain actions for injunctions, when conferred by statute, is auxiliary only; it is not a general power to maintain actions for the suppression or removal of nuisances. It is a right of action limited to the special purpose of enforcing orders made by the board, or to restrain their violation. It presupposes, therefore, as a condition of its exercise, the existence of a lawful order, duly made, which has been or is about to be violated or disregarded.[3]

Penalties.

SEC. 91. Without some *penalty* for the violation of an ordinance or general regulation, it is nugatory and a dead letter. Therefore, provision is usually made by the statute for the means that may be adopted to enforce the ordinances thereby authorized. The statutory provisions conferring limited powers of legislation upon boards of health often declare that violations of the ordinances or regulations of such boards shall constitute misdemeanors, and be punishable as such according to the Penal Code of the State. In such case, doubtless, further penalties would be unauthorized. But, when the violation of an ordinance is not made a criminal offense, by statute, and even in the absence of express legislative sanction, a board of health, under its authority to make general regulations, may annex penalties of a certain, fixed and rea-

[1] Bd. of Health of New Brighton v. Casey, 18 N. Y. State Rep'r, 251; Butterfoss v. State, 13 Stew. Eq. 325.

[2] The board may appoint an inspector of milk and authorize him to seize and examine all offered for sale. upon having reasonable cause to believe that the same is below the standard quality of pure and wholesome milk, and to destroy the same if found to be below the standard. Blazier v. Miller, 10 Hun, 435. The police of a city being charged with the duty of enforcing city ordinances relating to the public health, and orders of the board of health in pursuance thereof, may arrest, by direction of the board, and without other warrant, any one found violating health regulations of the city. Mitchell v. Lemon, 34 Md. 176.

[3] Gould v. City of Rochester, 105 N. Y. 46.

sonable character, usually called *fines*. The power to ordain necessarily implies power to do so effectively, by means of reasonable penalties suited to the nature of the case, and to be imposed on the person who violates the law.[1] So, the power to prevent nuisances implies the power to adopt proper means to accomplish the object intended, to provide for the abatement and removal of the nuisances themselves, and for the punishment of the offender by pecuniary penalties.[2]

Kind of penalty to be prescribed; Fines.

SEC. 92. Whenever the law prescribes the mode of enforcement of ordinances, that mode alone can be adopted, and must be strictly adhered to; the authorities are, by implication, precluded from adopting any other mode.[3] So, where the statute provides that a fine may be recovered for violation of an ordinance, this will not authorize the arrest and criminal prosecution of an offender.[4] But, where no other remedies are indicated, the usual remedies are to be resorted to;[5] that is to say, the remedy by fine, which was at common law the only lawful mode of punishing breaches of municipal regulations,[6] and is now the only lawful mode where there is no express power to adopt another.[7] The fine imposed must be reasonable in amount, in view of the character and effects of the prohibited acts;[8] but, when the limit is not prescribed by statute, the amount fixed by the authorities

[1] Mobile v. Yuille, 3 Ala. 137; Petersburg v. Metzger, 21 Ill. 205; Matter of Frazee, 63 Mich. 396; Grover v. Huckins, 26 id. 476; Tipton v. Norman, 72 Mo. 380; Egerman v. Blaksley, 78 id. 145; Leland v. Commissioners, 42 N. J. L. 375; State v. Crenshaw, 94 N. C. 887; Barton v. Comm., 3 P. & W. (Pa.) 253; Haynes v. Cape May, 52 N. J. L. 180; Winooski v. Gokey, 49 Vt. 282; London v. Vanacre, 12 Mod. 270.

[2] Louisville Ry. Co. v. Louisville, 8 Bush (Ky.), 405; Shreveport v. Roos, 35 La. Ann. 1010.

[3] See on this subject, generally, Horr and Bemis on Mun. Pol. Ordin's.

[4] Placquemines v. Ruff, 30 La. Ann. 497.

[5] Grover v. Huckins, 26 Mich. 478.

[6] Dillon's Mun. Corp., § 336; Hall v. Nixon, L. R., 10 Q. B. 159; Phillips v. Allen, 41 Penn. St. 481.

[7] Sedgwick's Stat. Law, 473.

[8] Mobile v. Yuille, 3 Ala. 137; State v. Carpenter, 60 Conn. 97; Frazee's Case, 63 Mich. 396; People v. Armstrong, 73 id. 296.

in the exercise of their discretion, is presumptively reasonable. If a limit, on the other hand, is prescribed by statute, it must be strictly observed, and no penalty for a single offense may exceed the maximum.[1] Fines must be not only reasonable, but *certain* in amount; though neither of these requirements should be construed to mean that the ordinance must name the exact amount.[2] An ordinance is both reasonable and definite in this regard, which fixes a maximum and a minimum limit.[3] That is, the fine may be made discretionary with the court within fixed limits, the maximum limit being reasonable. This enables the tribunal to adjust the penalties to the circumstances of each particular case, and is in this view both just and reasonable. The older English authorities, so far as they hold such a law void for uncertainty, are regarded as not sound, and they ought not to be followed.[4] There are, indeed, cases where, if the ordinances were penal statutes, the penalty might not be enforced, by reason of its uncertainty; but the very strict and rigid rules by which the validity of penal statutes, in that regard, is to be tested, are not to be applied to the regulations of local boards of health. The ordinances of very few municipal corporations could stand such a test.[5]

SEC. 93. Fines may, in proper cases, be *cumulative;* as where the prohibited acts are in their nature continuing, that is, have numerous consecutive results, each of which may be considered an offense. Thus, if a person erects a

[1] Greenfield v. Mook, 12 Ill. App. 281.

[2] Frese v. State, 22 Fla. 267, where it was *held*, that a statute which enacts that an offense shall be punished by fine is not rendered invalid by the fact that it does not even prescribe the *maximum* amount of fine which may be imposed. In this case, the fine was to be "not more than double the amount required for" the license, the failure to obtain which constituted the offense.

[3] McConville v. Jersey City, 39 N. J. L. 38.

[4] 1 Dillon's Mun. Corp., § 275; Huntsville v. Phelps, 27 Ala. 55; Leland v. Commissioners, 42 N. J. L. 375; McConville v. Jersey City, 39 id. 38. *See* Piper v. Chappell, 14 M. & W. 624.

[5] First Municipality v. Cutting, 4 La. Ann. 335.

nuisance, not only the primary erection but each day's continuance is a menace to public rights. In such cases, it is lawful to provide an initial fine for creating the nuisance, and an additional fine for each day's continuance.[1] But where there is a limitation as to the amount of penalties to be imposed, they cannot exceed the limit directly, nor can they do so indirectly by multiplying what is substantially one offense into several, or subdividing one transaction or violation into a number of offenses, and annexing a penalty to each.[2] Discrimination may properly be made, without express authority, between a first and subsequent offenses, by imposing a heavier fine for each repetition of the unlawful act. But the higher penalty in such case must be within the limit of the amount that the statute permits the authorities to impose.[3]

Imprisonment; Forfeitures.

SEC. 94. An offender cannot be imprisoned for default in payment of a fine, unless this mode of enforcing fines is expressly authorized. Nor can imprisonment be prescribed *as a penalty* for violation of regulations or ordinances, unless authority to do so is conferred in very clear terms. The power can never arise by implication,[4] and when such a penalty is lawfully prescribed, it cannot be enforced until there has been a judicial ascertainment

[1] Chicago v. Quimby, 38 Ill. 274; Columbia v. Harrison, 2 C. C. (S. C.) 215; Heise v. Town Council, 6 Rich. (S. C.) L. 404.

[2] City of New York v. Ordrenan, 12 Johns. 122. So, where a statute confers power to pass by-laws with penalties not exceeding $20 for one offense, a by-law which prescribes a penalty of "not less than $1, nor more than $5 for every hour" that a person keeps his wagon within market limits, after notice to remove the same, is void. The offense thus punished is single and continuous; and the by-law affixes a penalty, which, computed according to its terms, may exceed $20 for a single offense upon one and the same day. Comm. v. Wilkins, 121 Mass. 356.

[3] Staats v. Washington, 45 N. J. L. 318; Butchers' Co. v. Bullock, 3 B. & P. 434. In computing the amount of fine, the costs of prosecution may be added, but are not to be considered as a part of the penalty. People v. Sacramento, 6 Cal. 442; Bayonne v. Herdt, 40 N. J. L. 264. *Contra*, State v. Cantieny, 34 Minn. 1.

[4] Kinmundy v. Mahan, 72 Ill. 462; Burlington v. Kellar, 18 Iowa, 59; New Orleans v. Costello, 14 La. Ann. 37.

of the guilt of the offender by a competent tribunal.[1] The remedy is a severe one, and the terms of the power given to inflict it must be strictly construed and literally followed. The same remarks apply to *forfeitures*, to secure the payment of fines or as a separate penalty. The power to prescribe such punishment is of an extraordinary kind, only to be exerted in extreme cases, and the authorities should not be permitted to exercise it, except under express and explicit grant of the right.[2] And when forfeiture of property is authorized, there must usually be judicial proceedings of some kind, on proper notice to the owner. For, even where the legislature expressly confers power to direct the summary seizure and sale of the property of a citizen, the act falls within the condemnation of those constitutional provisions which secure to the citizen his property unless he is deprived of the same by due process of law, and this implies at least notice, and an opportunity to contest the propriety of the seizure or to redeem the property from the forfeiture.[3]

SEC. 95. A distinction must be observed between measures properly in abatement of nuisances, and forfeiture as punishment for violation of the law. In the former case, trial and judicial decree of condemnation is not necessary; in the latter case it is.[4] Proceedings for the abatement of

[1] *In re* Burnett, 30 Ala. 461; Brieswick v. Brunswick, 51 Ga. 639; Low v. Evans, 16 Ind. 486; Mayor and Council v. Mener, 35 La. Ann. 1192; Thomas v. Ashland, 12 Ohio St. 124.

[2] Friday v. Floyd, 63 Ill. 50; Clark v. Lewis, 35 id. 437; Sherman v. Crozier, 80 Ind. 487; Henke v. McCord, 55 Iowa, 375; New Hampton v. Conroy, 56 id. 498; Varden v. Mount, 78 Ky. 86; Donovan v. Vicksburg, 29 Miss. 247; Taylor v. Carondelet, 22 Mo. 105; White v. Tallman, 26 N. J. L. 67; Cotter v. Doty, 5 Ohio, 394; Rosebaugh v. Saffin, 10 id. 31; Hart v. Mayor of Albany, 9 Wend. 571; Phillips v. Allen, 41 Penn. St. 481; Kneedler v. Norristown, 100 id. 368; Heise v. Town Council, 6 Rich. (S. C.) L. 404; State v. Snow, 4 R. I. 64; Wilcox v. Hemming, 58 Wis. 144; Miles v. Chamberlain, 17 id. 446; Kirk v. Nowill, 1 T. R. 118.

[3] Teck v. Anderson, 57 Cal. 251; Fisher v. McGirr, 1 Gray, 1; Donovan v. Vicksburg, 29 Miss. 247; Coonley v. City of Albany, 57 Hun, 327; Rosebaugh v. Saffin, 10 Ohio, 31; State v. Snow, 4 R. I. 64; Lincoln v. Gray, 27 Vt. 355.

[4] Gosselink v. Campbell, 4 Iowa, 296; Lawton v. Steele, 119 N. Y. 226; Wilcox v. Hemming, 58 Wis. 144.

nuisances are of a more summary nature than actions, from the necessity of the case. Formal legal proceedings and trial by jury are not appropriate to and have never been used in such cases. Where the thing prohibited by an ordinance or regulation is of itself dangerous to the health and a menace to the security of the community, provision may, no doubt, be made to abate the nuisance by such means as may be necessary, — even by destruction of the thing itself. But this does not amount to confiscation or forfeiture; it is the ordinary common-law remedy for this kind of public grievance.[1] If, on the other hand, the offense is of a purely personal nature, the remedy must be directed solely against the individual; and the offense may not be punished by the forfeiture of property. Such a procedure would amount to a distress, and is contrary to common right.[2]

SEC. 96. In respect of notice to the owner, it may be said, that in no case should he be deprived of his property, for violation of law, without having an opportunity to contest the fact of the violation, and, when the fact of the violation is determined, of saving the property, by paying such fines as have been imposed, by compensating the public for its outlay, and by making such alteration or removal of the property, if necessary, as may serve to abate the condition of things giving occasion for complaint.[3] So, too, when property is directed to be seized and sold, for violation of law by the owner, it is essential that he should have fair notice of the time and place of

[1] Grover v. Huckins, 26 Mich. 476.

[2] Sullivan v. Oneida, 61 Ill. 242; Henke v. McCord, 55 Iowa, 378; Bolte v. New Orleans, 10 La Ann. 321; Robinson v. Miner, 68 Mich. 549; Beyer v. Clarkson, 6 N. J. L. 352; White v. Tallman, 26 id. 67; Ryan v. Jacob, 6 W. Bull. (O.) 139; Heise v. Town Council, 6 Rich. (S. C.) L. 404. *But see* Schwuchow v. Chicago, 68 Ill. 444; Hurter v. Baugh, 43 Iowa, 574; City of Ottumwa v. Schaub, 52 id. 515.

[3] *Ex parte* Burnett, 30 Ala. 461; Folmar v. Curtis, 86 id. 354; Darst v. Illinois, 51 Ill. 286; Willis v. Legris, 45 id. 289; Varden v. Mount, 78 Ky. 86; Baumgard v. Mayor, 9 La. 119; Rost v. Mayor, 15 id. 129; Slessman v. Crozier, 80 Ind. 487; Donovan v. Vicksburg, 29 Miss. 247; Rosebaugh v. Saffin, 10 Ohio, 32.

sale. This cannot be dispensed with, except where there is express legislative authority.[1] The notice need not, however, be personal, but may be by advertisement; that, and the notice given by the very fact of distress, is sufficient. Such notice has been declared to be sufficient to bring the owner of property into court, as in other cases of proceedings *in rem*.[2]

Power to issue warrants.

SEC. 97. It is sometimes provided that boards of health shall have power to issue warrants to any constable or the police of their respective cities, villages or towns, to apprehend and remove such persons as cannot otherwise be subjected to their lawful orders and regulations; and, whenever it shall be necessary to do so, to issue their warrant to the sheriff of their respective counties, to bring to their aid the power of the county. All such warrants must forthwith be executed by the officers to whom they are directed, who possess the like powers and are subject to the like duties in the execution thereof, as if the warrants had been duly issued out of any court of record in the State.

Justice's warrant for assistance.

SEC. 98. It is also, and even more generally provided, that when admittance of the board, or its officers or servants, to any building, vessel, or other place, for the purpose of inspection, or of removing nuisances, or causes of sickness, or for any other lawful purpose, is refused or resisted, the board may, upon complaint to any justice of the peace of the county, have his warrant directing the sheriff or constable, taking the necessary

[1] Fort Smith v. Dodson, 51 Ark. 447; Clark v. Lewis, 35 Ill. 417; Gilchrist v. Schmidling, 12 Kans. 263; McKee v. McKee, 8 B. Monr. (Ky.) 433; Morse v. Reed, 28 Me. 481; Coffin v. Vincent, 12 Cush. 98; State v. Snow, 4 R. I. 64; Whitfield v. Longest, 6 Ired. (N. C.) L. 268.

[2] Hellen v. Noe, 3 Ired. (N. C.) L. 493. But actual knowledge by the owner is not equivalent to the written or published notice required by statute. Dillon's Mun. Corp., § 216; Coffin v. Field, 7 Cush. 355.

force, and under the direction of the board, to enter such building, vessel, or other place, and accomplish the purpose for which the board, its officers or servants, sought and were refused admittance. It is perhaps not necessary, but it is always advisable, that notice should be served on the parties refusing or resisting entry of the officers, to the effect that application will be made to a justice, to procure his warrant, and an order under his hand requiring the persons having custody of the premises to admit the sanitary authorities, or their officer or agent. The justice having heard oral testimony, or taken evidence in the form of affidavits, showing that there is reasonable ground for believing a nuisance to exist in or upon the premises, or that for any other reason there is a right of entry on the part of the sanitary authorities, and that the entry is resisted, can then grant his order and issue his warrant; and opportunity for a regular hearing having been duly afforded the parties, there can be no valid objection to the entry.

Compelling attendance of witnesses.

SEC. 99. In order to facilitate the proceedings of local boards of health in special cases and to provide for obtaining information as the basis for general or special regulations, the same power is sometimes, though not in many instances, given them to issue subpœnas to compel the attendance of witnesses, and to administer oaths to witnesses, and compel them to testify under oath, as is possessed by justices of the peace. But safeguards against the abuse of such power are afforded by provisions that no subpœnas shall be served upon any person who, at the time of the service, is outside the jurisdiction of the board issuing the subpœna, and that no witness shall be questioned, nor be compelled to testify, upon matters not related to the interest of the public health. It is usual, also, when such power is vested in boards of health, to require them to designate by resolution one or more of

their members to sign and issue the subpœnas. It is probable that the power to compel the attendance of witnesses and to administer oaths to witnesses and to subject them to examination under oath, does not belong to boards of health, unless it is vested in them plainly and explicitly by the legislature. But the power is so useful and so clearly appropriate to bodies having the judicial as well as legislative functions of boards of health, that the policy of those statutes which confer it upon those bodies might with advantage be followed and adopted generally.

SEC. 100. The same remarks may justly be applied to provisions, in regard to the examination of witnesses, adopted in behalf of parties affected by the orders and proceedings of the sanitary authorities. By virtue of those provisions,[1] upon the application of any party in interest, in any matter pending examination before the health authorities, by affidavit, stating the grounds of the application, to any judge of a court of record, and asking that any person or persons therein named shall appear before such authorities, or any person taking or about to take such examination, at a time and place to be stated in the affidavit, it is the duty of the judge, if he shall discover reasonable cause so to do, to issue his order requiring the person or persons named, to appear and submit to such examination as, and to the extent that the order may prescribe, at a time and place to be named in the order. Such order, duly signed by the judge, may be served and is to be obeyed in all respects as a subpœna duly issued; and a refusal to submit to the proper examination may be punished by the judge who granted the order, or by any judge of the same court, upon the facts as to such refusal being brought before him by affidavit.

Enforcing performance of duties.

SEC. 101. A salutary provision in the laws of New

[1] Laws of New York, 1874, chap. 636, § 13.

York, relating to boards of health, declares that the performance of any duty prescribed or enjoined by those laws upon any local board of health, or any member or officer thereof, may be enforced by mandatory writ of a court of record, issued at the instance of the State board of health, its president, secretary, or any member thereof; and that any duty required by those laws to be performed by the common council of any city, or any member thereof, or by the board of trustees of any village, or any member thereof, or by any officer of any city, village or town, may be enforced in like manner.[1]

In the absence of any statutory provision on the subject, it may safely be affirmed as a general rule, that when a plain, imperative and immediate[2] duty is specifically imposed by law upon officers of a municipal corporation or upon a board of health, or any officers or members thereof, so that in its performance they act merely in a *ministerial* capacity, without being called upon to exercise their own judgment as to whether the duty shall or shall not be performed, the writ of *mandamus* is the only adequate means to set them in motion, the ordinary remedies at law being of no avail;[3] and the writ will be granted for the purpose of stimulating the officers to action, at the suit of the people, instituted in the name of any citizen who has an interest in the performance of the duty. As regards the degree of interest on the part of the relator, requisite to make him a proper party, on whose information the proceedings may be instituted, the general rule, supported by the best authorities, is: that, where the question is one of public right and the object of the *mandamus* is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator, at whose instigation the proceedings are instituted, need not show that he has any

[1] Laws of New York, 1885, chap. 270, § 8.

[2] *See* Reg. v. Godmanchester Bd. of Health, L. R., 1 Q. B. 328.

[3] Glossop v. Heston, etc., Loc. Bd., 12 Ch. D. 102.

legal or special interest in the result; it being sufficient to show that he is a citizen and as such interested in the execution of the laws.[1] It is, indeed, even in ordinary cases, a matter of very slight importance who the applicant or relator is, so long as he does not intermeddle officiously in a matter with which he has no concern. But every citizen has a vital and personal interest in the proper execution of those laws which are enacted to promote and preserve the well-being, good order and security of the community; and consequently, if any officer, appointed to carry out the provisions of those laws, designedly fails or intentionally omits to do his duty in that regard, every citizen has an inherent right to apply to the court and insist upon it that the writ of *mandamus* shall issue in such form as to secure the observance of that duty. Accordingly, where it is made the duty of village trustees to appoint a board of health for the village, any citizen of the village may apply to the court for a *mandamus* to compel the trustees to appoint and organize the board of health as required by the law.[2]

It is proper to observe, that in some of the States, the degree of interest necessary to make one a proper party to institute proceedings of this kind, is fixed by statute.

SEC. 102. The performance of duties which are in their nature purely *discretionary*, cannot be enforced. In matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, *mandamus* will not lie, either to control the exercise of that discretion, or to determine upon the decision which shall finally be given. And wherever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or if, in reaching a given result of official action they are required

[1] High on Extraord. Rems., § 431. *See* § 42. Compare Attorney-General v. Cockermouth Loc. Bd., 18 Eq. 172; Attorney-General v. Logan, 2 Q. B. D. 100.

[2] People v. Daley, 37 Hun, 461.

to exercise any degree of judgment, while it is proper, by *mandamus*, to set them in motion and to require their action upon matters intrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion, nor attempt by *mandamus* to control or dictate the judgment to be given. This rule is especially applicable where the official duty in question involves the necessity, upon the part of the officer, of making some investigation, and of examining evidence and forming his judgment thereon.[1]

SEC. 103. As illustrative of the application of the rules just stated to particular cases, it is admissible to affirm, that the writ of *mandamus* would be freely issued to compel the performance of any of the following duties enjoined upon local boards of health; to appoint a health officer and prescribe his duties; to receive and examine into the nature of complaints concerning nuisances; to make the required reports to the State board of health; to examine and register all certificates of death and returns of coroners; to designate persons who shall grant permits for burials; to issue licenses to plumbers who are duly qualified and who comply with all the requirements of the law and of the sanitary regulations; to provide the means for vaccination of those who need it; and to take charge of and provide for the proper quarantine of cases of contagious disease. All of these duties are absolute, and not discretionary; and the writ will be issued in proper cases to compel *some action* to be taken on the part of the authorities when they designedly omit to take any action at all. But the writ cannot be used for the purpose of controlling the *manner* in which the duties shall be observed; that is not the proper function of *mandamus*, and it is necessary to resort to other proceedings.

Restraint of municipal bodies by injunction.

SEC. 104. The jurisdiction of courts of equity to restrain

[1] High on Extraord. Rems., § 42.

the proceedings of municipal corporations, at the suit of citizens, where such proceedings, not being of a legislative or discretionary character, encroach upon private rights and are productive of irreparable injury, is to be regarded as well established.[1] The proper limitations and restrictions upon the exercise of this jurisdiction are equally well defined. In the first place, the courts will refuse the aid of their extraordinary powers in all cases where it is sought to interfere with or control the judgment or discretion of municipal bodies in respect of matters properly intrusted to them by law. And no principle of equity jurisprudence is better established than that courts of equity will not sit in review of the proceedings of municipal political tribunals, and that where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed. The fact that the court would have exercised the discretion in a different manner will not warrant it in departing from this rule.[2] "The restraining force of a court of equity," it is said, "should very rarely, in the absence of fraud or bad faith, set itself above the discretion and judgment of administrative officers to whom the law commits a decision. And this for the evident reason that a reversal of their judgment is but saying that the court judges differently upon what has been intrusted to another discretion and simply confronts that opinion with its own."[3] So, where, under a city charter, the mayor and common council, upon recommendation of the board of health, have full power in a summary manner to abate a nuisance, and it is for them to determine, upon the report of the board of health, whether a particular structure is a nuisance of such a character as to justify summary action, if they proceed in a summary manner to abate the structure, they do so at their peril, for if the owner can establish the fact

[1] High on Injunctions, § 1236.
[2] High on Injunctions, § 1240.
[3] Finch, J., Morgan v. City of Binghamton, 102 N. Y. 500.

that the structure was not a nuisance, he may recover the damages which he has sustained. But it would be improper to restrain the action of the authorities by an injunction.[1] While, however, equity will not enjoin the action of municipal authorities when proceeding within the limits of their conceded jurisdiction, it has undoubted right to restrain them from acting in excess of their authority, and from the commission of acts which are manifestly *ultra vires*. The right has frequently been exercised, to prevent the destruction of private property by municipal bodies proceeding in excess of their lawful powers.[2]

Again, it is to be observed, that courts of equity will never restrain the action of municipal authorities, when the persons aggrieved by such action have a full, adequate and complete remedy at law. The rule is unflinchingly applied, even in cases where it would appear to work unnecessary hardship. Thus, the fact that the council of a city has revoked a man's license to sell liquors, without cause, and without notice to him or opportunity being afforded him to be heard, and that he is threatened with arrest and consequent destruction of his business, will not warrant relief in equity by injunction, and the complainant will be remitted to his ordinary legal remedy.[3]

Officers acting ultra vires may be restrained.

SEC. 105. The preventive remedy afforded by courts of equity is peculiarly appropriate where public officers are proceeding unlawfully or improperly, although under color of office and a claim of right, to impair either public or private rights, or where their proceedings must result in serious injury to private citizens without any corresponding benefit to the public, or where the aid of equity is necessary to prevent a multiplicity of suits.[4] In all such cases relief by injunction will be freely granted. The deter-

[1] Americus v. Mitchell, 79 Ga. 807.
[2] Lord Auckland v. West. Loc. Bd. of Wks., L. R., 7 Ch. 597.
[3] Gaertner v. Fond du Lac, 34 Wis. 497.
[4] *Post*, sec. 111.

mining test of the right to invoke this equitable relief is whether the public officers are acting within the scope of their authority, or whether they are transcending that authority. For equity will not interfere to determine whether their action is good or bad, so long as the officers keep within the limits of their authority as fixed by law; yet if they assume powers over property and persons which do not belong to them, and infringe upon or violate the rights of citizens, under an assumed authority, equity has an undoubted jurisdiction to interpose its powers for the protection of the citizen.[1] The writ of injunction is, therefore, a proper remedy against public officers who are wrongfully proceeding to abate an alleged nuisance, or to injure or destroy private property as a nuisance, when it is not so in fact or law, or when any other interference with private property or business is threatened, in the alleged interest of the public health or safety, and the threatened action is in fact unnecessary or not fairly adapted to accomplish the declared purpose. And it may be affirmed that, as a general rule, when any proceedings in such behalf are unwarranted, unreasonable, or oppressive, or clearly transcend the powers conferred upon the officers, injunction is an appropriate means of relief.[2]

Ministerial acts only may be enjoined.

SEC. 106. The public officers who may thus be restrained are those who exercise ministerial and not judicial functions;[3] those constituting inferior *quasi*-judicial tribunals cannot be controlled by injunction while acting on matters properly pertaining to their jurisdiction, un-

[1] High on Injunctions, §§ 1308–1309; Mohawk & Hudson R. Co. v. Artcher, 6 Paige Ch. 83; People v. Canal Board, 55 N. Y. 390; Upjohn v. Richland Township, 46 Mich. 542; Rogers v. Barker, 31 Barb. 447; Lake View v. Rose Hill Cem. Co., 70 Ill. 191; Babcock v. Buffalo, 56 N. Y. 268; Davis v. Am. Soc. Prev. Cruelty to Animals, 75 id. 362.

[2] Dillon's Mun. Corp., § 379; Yates v. Milwaukee, 10 Wall. 497; Seguine v. Schultz, 31 How. Pr. 398.

[3] Western R. Co. v. Nolan, 48 N. Y. 513.

less their action is purely arbitrary.[1] A court of equity is not the proper tribunal for the review and correction of errors in the proceedings of such officers, but resort must be had to courts of law, and the remedy, if any, is by writ of *certiorari*. So, where commissioners of roads and highways are by law intrusted with full jurisdiction over matters relating to changes in the roads, a court of equity will not interfere with the exercise of their discretion, unless a strong case of fraud or irreparable injury be shown. When they have exercised their discretion and made their decision, in good faith, and without malice, an injunction will not be allowed to restrain their action.[2]

Boards of health, building departments, and their officers and agents, exercise functions that are judicial in their nature, and other functions that are merely ministerial. While their action cannot be restrained or controlled, so far as it has a judicial character, and the exercise of purely discretionary powers cannot be interfered with, it is very well settled that their ministerial acts may be enjoined whenever they are in excess of the powers lawfully conferred.[3]

Restraining acts in abatement of statutory nuisances.

SEC. 107. The cases in which courts of equity are called upon to grant relief by injunction against the acts of public officers directed against private rights or property, in the alleged interest of the public health or safety, group themselves naturally into several distinct classes, and the effect of an adjudication of local authorities upon questions of fact involved in any particular case, and the

[1] Tribune Association v. The Sun, 7 Hun, 175. *See* Underwood v. Green, 42 N. Y. 140; *post*, secs. 110, 111.

[2] High on Injunctions, § 1311; Hotz v. Hoyt, 135 Ill. 388; Warfel v. Cochran, 34 Penn. St. 381.

[3] Glossop v. Heston, etc., Loc. Bd., 12 Ch. D. 102; Attorney-General v. Hackney Loc. Bd., L. R., 20 Eq. Cas. 626; Scarborough v. Rural San. Authy., 1 Exch. D. 344; Lamacraft v. St. Thomas San. Authy., 42 L. T. 365; Grand Junction, etc., Co. v. Shugar, L. R., 6 Ch. 483; Bidder v. Croydon Loc. Bd., 6 L. T. (N. S.) 778; Manhattan Iron Wks. Co. v. French, 12 Abb. N. C. 446; Slee v. Bradford, 8 L. T. (N. S.) 491. *See* Attorney-General v. Cockermouth Loc. Bd., 18 Eq. 172; Attorney-General v. Logan, 2 Q. B. 100 (1891).

finality of the official judgment as to the propriety of the proposed action, or the force of local ordinances in bar of the equitable relief, will be determined largely by the classification of the action.

1. Where a legislative act expressly or impliedly declares certain acts or things to be nuisances, and authorizes their summary suppression or destruction, either absolutely, or when, in the judgment of public officers, certain conditions of fact exist making them prejudicial to the public health or safety. In this class of cases, it is only necessary that it should appear that the act or thing constituting the alleged nuisance, against which the officers are proceeding, is of the character defined by statute; the question whether the particular act or thing is a nuisance in fact is immaterial.[1] That which is declared to be a nuisance, by valid legislative act, is, in legal contemplation, necessarily and indisputably a nuisance. The principal question of fact is whether the character of the alleged nuisance is precisely that specified in the statute. Upon this question, an adjudication of local authorities is *prima facie* sufficient proof, but is not necessarily final and conclusive. The principle guiding the courts is that the complainant must make out a clear case in order to warrant the issue of an injunction. If this principal question of fact, then, is left in doubt, the presumption being in favor of the propriety and fairness of the official judgment, equity will not restrain the threatened acts, but will remit the complainant to his remedy at law, if he has one; and if he has no adequate remedy at law, still, it is better that the relief should be denied, on the ground that private interests should suffer rather than the public health or safety should be placed in jeopardy. If it is necessary that certain conditions of fact should, in the judgment of the public officers, exist, in order to justify their action, it must appear as a fact that, in their judgment, exercised in good faith upon reasonable grounds,

[1] Rea v. Hampton, 101 N. C. 51.

the specified conditions existed upon which their right to exercise the statutory remedies depends. This fact being established, courts of equity will not review the judgment nor interfere with the officers in the exercise of discretionary powers.[1]

Restraining acts in enforcement of ordinances.

SEC. 108. 2. When public officers are about to interfere with private rights or property, under authority conferred by an ordinance or general regulation of local authorities. If the ordinance or regulation is authorized expressly by legislative act, the local legislation has in all respects the character and effect of a statute, within the local jurisdiction, and is to be treated accordingly. If the ordinance or regulation, on the other hand, is not expressly authorized by legislative act, a court of equity will, in a proper case, interfere to prevent the summary enforcement of its provisions by acts infringing upon private rights or property, if the local legislation appears to be an unreasonable, unwarranted or oppressive exercise of powers granted by the legislature in general terms. In such case, the ordinance or regulation would be entirely void, and so could not rightfully be enforced.[2] Thus, if a body of commissioners, acting as a board of health, having no authority for exercising the powers of local legislation, attempt by an ordinance to abate as a nuisance that which is not a nuisance in fact or by the common law, their proceedings may properly be enjoined.[3] On the other hand, the stretching of electric wires over and upon the roofs of buildings may be prohibited by an ordinance for the prevention of fires and to provide for their extinguishment; and the enforcement of such an ordinance, by removing wires placed in violation of its provisions, will not be restrained.[4] And in a suit to prevent a board of health

[1] Wertheimer v. Schultz, 33 How. Pr. 11.

[2] Baltimore v. Radecke, 49 Md. 217.

[3] Schuster v. Metropolitan Bd. of Health, 49 Barb. 450.

[4] Electric Imp. Co. v. San Francisco, 45 Fed. Rep'r, 593.

from enforcing their general ordinance prohibiting the driving and slaughtering of cattle in a certain thickly-populated portion of a city, an injunction was denied, the court holding, that upon general principles of law, independently of statute, the regulation of the use of streets by droves of cattle, and the removing of places for their slaughter from particular localities, was within the general powers of the board of health over the matter of nuisances.[1]

It may safely be affirmed, that while any illegal acts, under color of authority conferred by local legislation, will be enjoined, yet, as a general rule, when ordinances or regulations have been enacted by the proper authorities, proceedings on the part of public officers for their enforcement will not be restrained merely because of the alleged illegality of the ordinances or regulations, or for the purpose of awaiting a determination of the question of their validity, when the person aggrieved may have a full and adequate remedy at law.[2]

Restraining enforcement of special orders.

SEC. 109. 3. Where public officers are about to interfere with private rights or property, in the enforcement of a special order of local authorities, a court of equity will not review the adjudication or reverse the judgment of the authorities upon the facts involved, if their proceedings have been regular, according to the provisions of the statute applicable thereto, or if the judgment has been reached by a procedure consistent with due process of law.[3] On the other hand, the court will interpose its restraining powers if there has not been a substantial compliance with the requirements of the statute, or if the proceedings were contrary to fundamental notions of justice, and rights of the complainant have been, or are

[1] Metro. Bd. of Health v. Heister, 37 N. Y. 661.

[2] High on Injunctions, § 1243.

[3] Ford v. Thralkill, 84 Ga. 169; Cook v. City of Buffalo, 16 Week. Dig. (N. Y.) 8.

about to be, materially prejudiced by reason of the irregularity.[1]

In a suit to prevent a board of health from enforcing their special order forbidding the slaughtering of cattle at a place to which the order referred, it appeared that complainant was engaged in slaughtering cattle in a densely populated part of New York city. The board, upon proof taken, found as a fact and declared that the use of complainant's slaughter-house in the pursuit of his business was a nuisance dangerous to the public health, and thereupon ordered the business to be discontinued at that place and the nuisance to be abated. The complainant had due notice of this proceeding and was offered an opportunity to be heard in the matter. He refused to litigate before the board the question whether his pursuit was dangerous to the public health and placed his case upon their want of power over the subject. A final order was in due course made by the board and execution thereof was begun by the police. An injunction to restrain the enforcement of the order was applied for and refused, the court holding the adjudication of the board, upon the question as to the nuisance, to be final and conclusive upon the facts, and observing that the complainant, having had due notice of the proceedings before the board and having refused to take advantage of the opportunity to contest their finding, could not complain that the judgment should be held conclusive against him upon the facts.[2]

When the officers rely upon the special order of local authorities as a bar to complainant's right to an injunction, it must clearly appear that the order is regular in all respects, and that it was made after proceedings instituted and conducted in precise conformity to the requirements of the statute. So, if the statute prescribes that notice

[1] Belcher v. Farrar, 8 Allen, 325; Taunton v. Taylor, 116 Mass. 254; Comm. v. Young, 135 id. 526; Sawyer v. State Board of Health, 125 id. 182; People v. Board of Health, 33 Barb. 344.

[2] Metro. Bd. of Health v. Heister, 34 How Pr. 147; Reynolds v. Schultz, 37 N. Y. 661.

shall be given to the party proceeded against, it must be shown that a proper notice was given in the manner prescribed.[1] The order must state what the nuisance is, with the precision and particularity of a judgment, or so that there may be no doubt as to what is the act or thing complained of, and which is required to be removed, discontinued or abated.[2] And if the order is founded upon an adjudication as to the violation of an ordinance or regulation of general application, it must state what ordinance or regulation has been violated, the time when, and the manner in which the same was violated.[3]

Restraining the exercise of general powers.

SEC. 110. 4. Finally, where public officers are about to interfere with private rights or property, in the exercise of their general powers and the performance of their general duties, in respect of the subject-matter, a court of equity will refuse its protection against their acts, if it appears that they have, in the exercise of sound discretion, upon reasonable grounds, adjudged the proposed action to be necessary to accomplish the purposes for which the authority was conferred. Their judgment, in matters so confided to their care and control, will not be reviewed by the courts, and will be regarded as final and conclusive, so far as these proceedings are concerned, when they are acting in good faith and within the scope of their authority.[4] And even in cases where they are acting in excess of their powers, as, for instance, in abating an alleged nuisance, the court will not exert its restraining powers, if the complainant has a complete and adequate remedy by the ordinary process at law.[5]

[1] Cushing v. Board of Health, 13 N. Y. State Rep'r, 783; People v. Bd. of Health of Seneca Falls, 58 Hun, 595.

[2] Rogers v. Barker, 31 Barb. 447.

[3] State v. Street Comm'r of Trenton, 36 N. J. L. 283.

[4] Upjohn v. Richland Township, 46 Mich. 542; Kennedy v. Board of Health, 2 Penn. St. 366; Baugh v. Sheriff, 7 Phila. 82; Matter of Wissels, 13 Week. Dig. (N. Y.) 185.

[5] Greenville v. Seymour, 22 N. J. Eq. 458; Manh. Mfg. & Fert. Co. v. Van Keuren, 23 N. J. Eq. 251; Sickles v. New Rochelle Board of Health, 41 Hun, 408; Wistar v. Addicks, 9 Phila. 145.

Accordingly, where officers, acting under authority to abate all nuisances and to protect the public health, were proceeding to remove certain filthy tenements, and it was not denied that the tenements were a nuisance, such as the corporate authorities had a right to remove, the prayer for an injunction was denied, and the bill dismissed for want of equity.[1] And, as a general rule, equity will not interfere, at the instance of one who has erected or is maintaining a structure in violation of law, to prevent the removal of the structure by the authorities. In such cases, the court will not undertake to decide the question whether there is lawful occasion for the exercise of summary measures by the executive authorities; that being a question to be determined by themselves, in their discretion and at their peril.[2]

A board of health has authority to do or cause to be done whatever may be necessary for the preservation of the public health; and if the board come to the conclusion that any particular action should be taken for that purpose, it is certainly a matter upon which they may fairly exercise their judgment, and with the fair exercise of it no judicial tribunal should interfere.[3]

SEC. 111. The courts, however, will not withhold their restraining powers in cases where it is clear that the authorities are proceeding in an arbitrary and high-handed way to do what is entirely beyond the scope of their just powers. And the courts will readily interfere to check any unnecessary and excessive proceedings on the part of the authorities in doing what they have a right to do. Under a general authority to prevent and abate nuisances, or to remove nuisances, the authorities cannot declare any thing to be a nuisance and proceed to con-

[1] Ferguson v. City of Selma, 43 Ala. 398.

[2] *Post*, sec. 152. McKibbin v. Fort Smith, 35 Ark. 352; Potter v. Des Plaines, 123 Ill. 111; State v. City of Kearney, 25 Neb. 262; Aronheimer v. Stokley, 11 Phila. 283.

[3] Cooper v. Schultz, 32 How. Pr. 107.

demn, remove or destroy it as such, when it is not in fact a nuisance. They will be enjoined if it appears clearly that the thing proceeded against is not a nuisance, for, if allowed to proceed, they would be doing what is entirely *ultra vires*. A board of health, for example, cannot interfere with stands or stalls attached to public markets in a city, on the ground that they are obstructions to traffic in the streets, and so, public nuisances; the matter of street obstructions is not within the jurisdiction of a board of health.[1] Again, a board of health is invested with authority to abate nuisances, and may, therefore, order privies, which are in such condition as to be dangerous to health, to be cleansed and purified, and may even cause it to be done at the expense of the owner if he refuses to do the work himself; but, the enforcement of an order of the board that *new water-closets* shall be constructed in the place of the privies condemned, will be restrained.[2] Nor will the authorities be permitted to expel tenants from their homes and to close up the latter, for alleged sanitary reasons, when all that is really necessary is to cause the tenements to be disinfected, cleansed and purified, and rendered fit for habitation.[3]

For similar reasons, an adjudication of local authorities going to the extent of depriving a person absolutely of the use of his premises, in the prosecution of a lawful business in a lawful way, will be invalid, and an order founded thereon cannot be enforced. The authorities will be confined, in their interference with the lawful business of a citizen, to such interruptions as may reasonably be necessary to enable them to abate any nuisance he may create in conducting it.[4] Their adjudication that the necessity of the case calls for the entire suppression of the business will be void, unless made upon notice to

[1] Mayor of New York v. Board of Health, 31 How. Pr. 385.

[2] Philadelphia v. Trust Co., 132 Penn. St. 224.

[3] Eddy v. Board of Health, 10 Phila. 94.

[4] Weil v. Ricord, 24 N. J. Eq. 169.

the party to be affected, and after opportunity afforded him to be heard upon the matter. The point was so adjudged in a case where a board of health declared complainant's business of receiving green hides and rough fat to be a nuisance, and through the health inspector notified him of their decision, and directed him to discontinue the business, and threatened that, in case of his failure so to do, by a certain day, he would be prevented from receiving hides or fat on his premises, and that any there found would be seized and removed by the board. An injunction was promptly granted to enjoin the enforcement of the threat and of the order made to carry it into effect.

Expenses of local boards of health.

SEC. 112. All expenses incurred by local boards of health, in the execution and performance of the duties imposed upon them by law, are properly a charge only on their respective cities, villages and towns;[1] and are to be audited, levied, collected and paid in the same manner as other city, village and town charges are audited, levied, collected and paid. The matter may, however, be regulated otherwise by special provisions of law. The expenses referred to are such only as are not otherwise provided for. The cost of suppressing nuisances on private premises is not a charge against the corporation, if, by law, it is made a charge upon the owner and a lien upon the premises.[2] Nor is the corporation liable, except in the first instance, for the expense of caring for persons infected with contagious diseases, if they themselves have ability to pay, or for the charges of disinfecting vessels, premises, goods or persons. As a general

[1] Suits to recover expenses incurred by a board of health must be brought by the real parties in interest. The trustees and clerk of a township cannot maintain an action against the county for expenses of the township board of health. In such case, the action should be brought by the township or its board of health. Sanderson v. Cerro Gordo Co., 80 Iowa, 89. It is the duty of the county commissioners or supervisors to assess and levy a tax at the request of the board of health. State v. Rose, 26 Fla. 117.

[2] Prendergast v. Village of Schaghticoke, 42 Hun, 317.

rule, all these expenses are made a charge against the persons benefited.[1]

Where the statutes under which boards of health are constituted are silent upon the question by whom the expenses incurred are to be paid, and the contracts made by the boards are to be performed, it is necessarily implied, that when expenses are incurred or contracts made, within the scope of their authority, the cities, villages or towns to which the boards respectively belong are liable therefor. These boards are official bodies, having no interest in the matters before them, and no funds in their possession for the performance of the manifold important duties with which they are charged, and, unless they might charge the corporation on behalf of which they act, they would be, for the want of means, absolutely powerless. There can be no doubt that for the expenses lawfully incurred, or contracts lawfully entered into by boards of health, in the performance of their duties, the members of the boards are not, as such, responsible;[2] and, therefore, their respective cities, villages and towns are responsible.

SEC. 113. It must always appear, however, that the acts of the board of health, upon which is based the responsibility of the corporation, were within the scope of the lawful authority of the board, for municipal corporations can never be held liable for unauthorized or unlawful acts of public officers, though done *colore officii*, nor for any costs or expenses incurred by such acts.[3] So, a city is not responsible for the unauthorized act of its board of health in appointing a sanitary commission;[4] or in erecting a permanent hospital or pest-house;[5] or in employing one of its own members as a physician to vaccinate the

[1] *See post*, secs. 127, 129, 132.

[2] Malloy v. Bd. of Health of Mamaroneck, 60 Hun, 422.

[3] Spring v. Hyde Park, 137 Mass. 554; Brown v. Murdock, 140 id. 314.

[4] Barton v. New Orleans, 16 La. Ann. 317.

[5] People v. Supervisors of Monroe, 18 Barb. 567.

poor;[1] or in furnishing medical attendance and necessaries to persons who are not paupers, at their own homes.[2] Nor is a city responsible for costs incurred in executing a void ordinance, as, for instance, in the execution of an ordinance establishing quarantine, when the corporation had no authority to establish such quarantine.[3] And, where the board of health of a city passed a resolution authorizing the city inspector to employ a certain person "to remove temporarily, or until further ordered by the board or the common council, all the contents of the sinks and privies of" the city, and a contract was accordingly made, binding the persons named in the resolution "to do and perform the work aforesaid," it was held, that as the board had exceeded its powers in authorizing the contract to be made, the city could not be held liable to pay the stipulated compensation for any work performed under the contract. The court carefully reviewed the powers conferred upon the board of health, and concluded that, while the board had power to act upon any particular matter or thing dangerous to the public health, and cause it to be removed, they had not the power to assume in advance that all the sinks and privies in the city were or would become nuisances or dangerous to the public health, and contract for the removal of their contents, indefinitely, until they or the common council ordered otherwise, and bind the city to pay therefor.[4]

[1] Fort Wayne v. Rosenthal, 75 Ind. 156.

[2] McIntire v. Pembroke, 53 N. H. 462; Wilkinson v. Albany, 28 id. 9.

[3] New Decatur v. Berry, 90 Ala. 432.

[4] Gregory v. City of New York, 40 N. Y. 273.

CHAPTER VI.

BOARDS OF HEALTH; SPECIAL POWERS AND DUTIES.

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Contagious and infectious diseases.

SEC. 114. Local boards of health everywhere have ample statutory powers, and it is their chief function and most imperative duty, to guard against the introduction

of contagious and infectious diseases, by the exercise of proper and vigilant medical inspection and control of all persons and things arriving within the jurisdiction of the boards, from infected places, or which, for any cause, are liable to communicate contagion. It is their duty to require the isolation of all persons and things infected with, or exposed to, infectious or contagious diseases, and to provide suitable places for their reception ;[1] to furnish, if necessary, medical treatment[2] and care[3] for sick persons who cannot otherwise be provided for ;[4] to prohibit and prevent all intercourse and communication with or use of infected premises, places and things, and to require, and, if necessary, to provide for the thorough purification and cleansing of the same, before general intercourse therewith, or use thereof, shall be allowed.

Domestic quarantine or removal of the sick.

SEC. 115. When any person coming from abroad or residing in the State is found to be infected with the smallpox, or other disease dangerous to the public health, it is the duty of the board of health of the place where such person may be to make effectual provision, in the manner which they shall judge best, for the safety of the inhabit-

[1] This provision does not authorize boards of health to purchase and hold real estate. It gives them authority to procure suitable places of reception for persons under quarantine and sick, and is satisfied by allowing them to lease such places for the time being and as occasion may require; or, in case they are not able to do that, to erect temporary establishments for the purpose. The object in conferring this power is to enable the boards to meet temporary emergencies, and not to enable them to incorporate permanent hospitals. People v. Supervisors of Monroe, 18 Barb. 567 ; Aull v. Lexington, 18 Mo. 401 ; City of Anderson v. O'Conner, 98 Ind. 168.

[2] Schmidt v. County of Stearns, 34 Minn. 112; Fort Wayne v. Rosenthal, 75 Ind. 156; Wilkinson v. Long Rapids, 74 Mich. 63.

[3] Labrie v. Manchester, 59 N. H. 120; Gill v. Appanoose County, 68 Iowa, 20; City of Clinton v. County of Clinton, 61 id. 205; Rae v. Flint, 51 Mich. 526; People v. Supervisors of Macomb County, 3 id. 475; Inhabitants of Kennebunk v. Inhabitants of Alfred, 19 Me. 221.

[4] The power to relieve the *indigent sick* is inherent in every municipality; Vionet v. First Municipality, 4 La. Ann. 42; and indigent cases of infectious or contagious diseases may be required to be sent either to a public or a private hospital, to be there treated at the public expense. State v. New Orleans, 27 La. Ann. 521 ; Tucker v. City of Virginia, 4 Nev. 20.

ants, by removing the infected person to a separate house,[1] if it can be done without danger to his health, and by providing medical treatment and all other necessaries. But if the sick person cannot be removed without danger to his health, the like provision may be made for his care and treatment in the house where he may be; and in such case, domestic quarantine may be strictly enforced, persons in the neighborhood may be removed, and all such other measures may be taken as are necessary for the public safety.

Warrant to remove patients.

SEC. 116. It may be that in attempting to carry out the provision in regard to removal of patients, the authorities will in some cases meet with opposition on the part of the patients, or their relatives or friends; or, owing to the lack of public hospitals, or other places specially designed for the reception of such patients, there may be difficulty in securing a proper place to which the patients may be removed and where they may be isolated. Provision is made by law for such exigencies, and, upon application to certain magistrates by the health authorities, warrants may be obtained, directed to the sheriff or any constable of the county, requiring him, under the direction of the health authorities, to remove any person infected with contagious disease, or to take possession of convenient houses and lodgings, and to provide nurses, attendants and other necessaries for the accommodation, security and relief of the sick.[2]

SEC. 117. The power of removal, as conferred by the statutes, is unconditional and unqualified. The issuing of the warrant of magistrates, directing the removal, is not

[1] But a person sick with an infectious disease in his own house, or in suitable apartments at a hotel or boarding-house, cannot be removed, without his consent, under the authority conferred by a city charter "to abate and remove nuisances." Such sick person is not a public nuisance. Boom v. Utica, 2 Barb. 104.

[2] *See* Spring v. Hyde Park, 137 Mass. 554; Brown v. Murdock, 140 id. 314; Lynde v. Rockland, 66 Me. 309.

a condition upon which, but a means by which, the removal may be effected whenever a resort to the aid of a warrant becomes necessary. The provision as to obtaining a warrant is designed, not to cripple and impair the powers conferred upon the authorities, but to make such powers more effectual. It gives the health officers extra means wherewith to execute the authority intrusted to them. It enables them to command the services of others. It might be difficult to obtain the necessary assistance, in an undertaking so hazardous to health. But, by means of a warrant, they can compel executive officers to act. They can remove a sick person without the aid of a warrant, or they can use that instrumentality to enforce obedience to their commands, if a resort to such means of assistance becomes necessary. It is difficult to perceive how it can be of importance to a sick man, whether a warrant is obtained or not. It would be the merest form in the world, so far as he is concerned. There is, in the statutes, no provision for any examination by the magistrates, nor for notice to any parties to be heard, nor can any appeal be taken. It is for the health authorities to decide upon the necessity or propriety of a removal, and the warrant simply gives them the means to overcome opposition or to secure necessary aid, in case they deem it a measure required for the safety of the public to cause the removal of a sick person to a suitable place for treatment.[1]

Procedure when contagious disease breaks out.

SEC. 118. When the small-pox, or any other malignant and dangerous disease, breaks out in any place, it is the duty of the local health authorities to use all possible care to prevent the spreading of infection, and to give public notice and warning of infected places to travelers, by placards, and by displaying red flags at proper distances, and by all other means which, in their judgment,

[1] Haverty v. Bass, 66 Me. 71.

shall be most effectual for the common safety. They must also provide such hospitals or places of reception for the sick and infected, as they shall judge best for their accommodation and the safety of the inhabitants; and such hospitals and places of reception, the physicians attending them, the persons sick therein, the nurses, attendants, and all persons who may approach or come within the limits of the same, and all furniture and other articles used or brought there, are subject to such regulations as may be prescribed by the health authorities, or their committee appointed for that purpose.[1] The authorities, as already stated, may cause sick or infected persons to be removed to such hospitals or places of reception, for isolation and treatment, unless the condition of the sick persons is such as not to admit of their removal without danger to life. In such case, the houses or places in which the sick shall remain are to be considered as hospitals, for every purpose just mentioned; and all persons residing in, or in any way concerned within the same are subject to the regulations of the authorities. It is permissible to cause persons residing in the neighborhood of such places, who may be exposed to contagion, to be removed; and the authorities may, in general, take any measures of precaution, however stringent, which they may deem necessary or prudent for the health of the inhabitants.

Precautionary measures.

SEC. 119. The law requires the use of *all possible care* to prevent the spread of contagious diseases, and while

[1] Ordinarily, the municipal power extends only over *public* hospitals, but, in its exercise, the establishment of private hospitals may be prohibited. Milne v. Davidson, 5 Mart. (La.) N. S. 409; and reasonable rules and regulations may be prescribed for the drainage of the lands of private hospitals, the purification and ventilation of its buildings, the removal therefrom of persons suffering from infectious or contagious diseases, and for the general sanitary government and management of such institutions. Bessonies v. Indianapolis, 71 Ind. 189.

the medical profession and sanitary experts are divided in opinion as to the necessity of using any particular precautionary measures, a physician, or the health authorities, or any person having the care of patients sick with such diseases, will be justified in adopting those measures. Within the operation of this rule, articles of clothing, used by the patients or those coming in contact with them,[1] and furniture and bed-clothing which may be tainted with infection, may be, not merely disinfected by chemical processes, but if necessary, absolutely destroyed by burning or otherwise, and even the paper may be removed from the walls of rooms in which the patients have been confined.[2] The owners of the articles destroyed will have no right of action against persons advising or executing the necessary measures of precaution. For, "when the small-pox or any other contagious disease exists in any town or city, the law demands the utmost vigilance to prevent its spread. 'All possible care,' are the words of the statute. To accomplish this purpose, persons may be seized and restrained of their liberty or ordered to leave the State; private houses may be converted into hospitals and made subject to hospital regulations; buildings may be broken open and infected articles seized and destroyed, and many other things done, which, under ordinary circumstances, would be considered a gross outrage upon the rights of persons and property. This is allowed upon the same principle that houses are allowed to be torn down to stop a conflagration. *Salus populi est suprema lex*,—the safety of the people is the supreme law,—is the governing principle in such cases. When the public health and human life are concerned, the law requires the highest degree of care. *It will not allow of experiments to see if a less degree of care will not answer.*"[3]

[1] City of Clinton v. County of Clinton, 61 Iowa, 205.

[2] Seavey v. Preble, 64 Me. 120.

[3] Walton, J., Seavey v. Preble, 64 Me. 120. *See, also,* Labrie v. Manchester, 59 N. H. 120; Farmington v. Jones, 36 id. 271; Inhabitants of Kennebunk v. Inhabitants of Alfred, 19 Me. 221.

Proper procedure in a particular case of contagious disease.

SEC. 120. It may be advisable to point out specifically the different and distinct duties and powers of the health authorities in cases where a person, afflicted with an infectious disease, is found in a house, so sick that he cannot be removed, and those cases where he is not so sick but that he may be removed with safety. In the latter case, the board of health may make provision, in the manner it judges best for the safety of the inhabitants, by removing the person to a separate house and there providing medical aid, nurses, and other assistance and necessaries. Should he object to a removal, a warrant authorizing the removal may be obtained from the proper magistrate; and a suitable place to which he can be removed may, if necessary, be secured either by contract or by the statutory proceedings, for taking up and impressing a house or lodgings for reception of the sick. The authorities may exercise their discretion, however, and permit or require the sick person to remain and be cared for where he is. If, in such case, the sick person is able, he is at liberty, of course, to make such arrangement for his care as he may choose, and at his own expense, and the authority and duty of the board of health is limited to taking precautions in behalf of the public against the spread of infection. If the sick person is confined in his own house, but is unable[1] or unwilling to arrange for his own proper care and attendance, the authorities should take charge of the case and furnish all necessaries, and adopt precautions as in the case last mentioned. But if a person is sick in a hotel, boarding-house, or hired lodgings, and may safely be removed, but the authorities require him to remain there and to be taken care of, the statutes contemplate that this will be done by virtue of some contract that he shall be thus provided for. The board of health and its officers have no authority in such case to take possession of, occupy, use and control the

[1] Board of Commissioners v. Wright, 22 Ind. 187.

place, or any part of it, as a hospital, without the consent of the proprietor, owner or occupant. They cannot quarter sick persons upon unwilling strangers in that way. If they do so, and proceed to establish regulations and meddle with private property, although with the best motives, and cause annoyance, inconvenience, or detriment to others in so doing, they will be personally liable for the consequences of their unlawful actions. Accordingly, in a case where a member of a board of health was sued in tort for taking possession of a boarding-house, in which a contagious disease existed, and of the furniture therein, against the will and to the exclusion of the owner, and for carrying away and destroying portions of the furniture, and for stationing a person on the premises with instructions to prevent ingress to and egress from the same, and for nailing red flags on the front and back doors of the house, the plaintiff had a verdict, and it was not disturbed upon appeal.[1]

SEC. 121. Again, where a person is infected with a sickness dangerous to the public health, and he cannot be removed with safety, the board of health must make provision for his care in the house where he may happen to be, in which case the house is to be deemed a hospital, and all persons residing in it, or in any way concerned within it, are subject to the regulations of the board. The statutory provision to this effect is intended to meet the case which arises where a person cannot be removed, not by establishing the place where he is found as a hospital, and thus excluding those entitled to possession, but, by treating it as such, to subject these and all other persons there residing to the regulations of the board. That is, "the physician, nurses, attendants, the persons sick therein, and all persons approaching or coming within the limits thereof, and all furniture or other articles used or brought there," are subjected to such regulations as the

[1] Brown v. Murdock, 140 Mass. 314.

board of health may prescribe. It by no means follows that, because the place may be subjected to such regulations, it may be seized and occupied against the will and to the exclusion of the owner. The consent of the owner must be obtained to the use and appropriation of his property by the board of health, and provision made for his compensation. This is to be effected by means of a regular contract. Or else the property must be appropriated to the use of the board by proceedings regularly had for its impressment to the public use. Such impressment is provided for by the statutes in many States, and it is accompanied in every case by suitable safeguards. For it is only by virtue of warrants regularly issued and served by executive officers, who, while they are to act under the direction of the board of health, are still to obey the precepts contained in their warrants, that the property is seized and just compensation is provided for. Independently of such a proceeding, there is no authority in a board of health to take possession of and use any place as a hospital.[1]

SEC. 122. It is important to determine how far the authority of the board of health extends, with regard to making regulations, in a case where a person is too sick to be removed, and yet the board has not acquired any right to use the house where he is confined *as a hospital*, or otherwise to exercise control over it and the furniture and other things in it, to the exclusion of the owner. They are to use all possible care in preventing the spread of infection and may adopt all the "means which in their judgment shall be most effectual for the common safety;" but this care is to be exercised in the mode prescribed by law, and with that regard to the rights of others in their persons and property which is shown by the various provisions of the statute to be required. They have, in short,

[1] Lynde v. Rockland, 66 Me. 309, Devens, J., Spring v. Hyde Park, 137 Mass. 554.

even under the power to take such measures as are deemed necessary for the safety of the inhabitants, no unlimited or arbitrary authority to control persons or property at their discretion. But there can be little doubt that, whenever they deem it prudent to do so, they may cause red flags to be put upon a house where an infected person is, and cause public placards and notices to be put up or published, or oral proclamations to be made, warning all persons off the place where the infection exists; they may station persons near the premises to give warning to others and may forbid ingress and egress, except under reasonable restrictions; they may cause persons in the neighborhood to remove temporarily, until danger of infection is passed; they may fumigate and disinfect such part of the premises as the infected persons have occupied, or such parts as are liable, by reason of their occupation, to infection; and they may subject all persons who are in attendance upon the sick persons to such regulations as will reduce to a minimum the danger of their carrying away and disseminating the infection. Where there are infected articles that should be cleansed or destroyed, provision is made in the statutes for the issuing of a warrant, to be executed by a sheriff or constable, under the direction of the board of health, by virtue of which such articles may be seized and destroyed, under the usual safeguards which attend the execution of legal process.[1] The proceeding by warrant may be resorted to in cases where the owner of the premises where the infected things are, or the occupant or person in charge has been advised as to the necessity and the method of cleansing and purifying the dangerous articles, and has neglected or refused to comply with the directions given. The authorities may require that the disinfecting shall be done in a manner and to an extent which will meet their approval, but they should not, in the first in-

[1] Devens, J., Brown v. Murdock, 140 Mass. 314, 324. *See*, *also*, Mitchell v. Rockland, 41 Me. 363; 45 id. 496; 52 id. 118.

stance, undertake to do the work themselves, against the will or without the consent of the owner. It is always advisable that a notice be given that the infected places or things are to be disinfected within a certain time, or forthwith, and it is well that the notice should be accompanied by a description of the way in which satisfactory disinfection may be effected. If the person to whom the notice is given fails to comply within the time specified in the notice, the authorities will be fully justified in taking summary measures, at the expense of the defaulter.

Compulsory vaccination.

SEC. 123. It is sometimes provided by law that persons who may have been exposed to contagion, or who came from places believed to be infected, and particularly children attending the public schools,[1] shall submit to vaccination, under the direction of the health authorities. This requirement is a constitutional exercise of the police power of the State, which can be sustained as a precautionary measure in the interest of the public health. But, as incidental to their general powers relating to the prevention of contagious diseases, the health authorities have the right to prescribe regulations with reference to vaccination, and they may require vaccination whenever, in their judgment, the interest of the public health will be thereby subserved. To this end, they are authorized, and even directed, to provide a suitable supply of fresh vaccine virus, of a quality and from sources either approved by the State board of health, or in their own judgment proper and reliable, and to furnish the means of thorough and safe vaccination to all persons who may need the same, and without charge to such persons as are unable to pay for the same. This does not mean that the health authorities must, themselves, attend to the vaccination of those who need it, but that they must provide the means

[1] Abeel v. Clark, 84 Cal. 226.

of vaccination, by furnishing supplies of vaccine virus and employing competent physicians.[1]

Duty of giving notice of dangerous diseases.

SEC. 124. It is everywhere required by strict and positive provisions of law, that whenever any householder, hotel-keeper, proprietor of a boarding-house, or tenant or occupant of any building whatever, shall know, or shall be informed by a physician, or shall have reason to believe that any person in his family, or in or upon the premises under his control, is taken sick with small-pox, cholera, diphtheria, scarlet fever, or any other disease dangerous to the public health, he shall immediately report the fact to the board of health, or to the health officer, or other health authorities of the place in which he resides. The notice must state, if possible, the name of the person sick, the nature of the disease, if known, the name of the person giving the report, and the precise location of the place where the sick person may be. A refusal or willful neglect to give the notice required constitutes a misdemeanor and is punishable by severe penalties, unless a physician in attendance has reported the facts. Every physician having a patient sick with any of the diseases mentioned is also required, under heavy penalties, to give notice of the fact to the health authorities, specifying the particulars above mentioned and such other facts in connection with the subject as may be required by local regulations. For giving such notice, the physician is not entitled to compensation, unless it is allowed by statute or the local regulations; nevertheless, a strict performance of the requirements in regard to the reporting of cases of dangerous disease may be enforced.

Removal of infected persons and articles.

SEC. 125. No person who is sick or infected with a disease dangerous to the public health may depart or be

[1] Hayzen v. Strong, 2 Vt. 427; Fort Wayne v. Rosenthal, 75 Ind. 156.

removed from the house in which he shall first have become sick or infected, without the permission of the health authorities; nor may any infected article be removed from one place to another, without like permission. Every person who, being sick or infected with any contagious disease, shall depart from, and every person who shall remove,[1] or cause to be removed, or assist in removing, any person so sick or infected, or any infected articles, from any house or building, except by special permission of the health authorities and with proper precautions against spreading the infection, is guilty of committing a common nuisance, punishable as a misdemeanor at common law, and expressly made a punishable offense by statute[2] in many of the States, or by regulations having the force of statutes in local jurisdictions.

Warrants to aid in disinfection of goods.

SEC. 126. Although, in the exercise of their general powers, boards of health may cause goods of any kind which are believed to be tainted with infection to be purified and cleansed, their powers in this regard are sometimes enlarged and made more effectual by special provisions of law. So that whenever, on application of a board of health, it shall be made to appear to any justice of the peace, that there is just cause to suspect that any baggage, clothing, goods or articles of personal property of any kind, found within his jurisdiction, are infected with any disease which may be dangerous to the public health, the justice may issue a warrant to the sheriff or any constable of the county, requiring him to impress men to aid him, if necessary, and to secure such infected things wherever they may be; and, if necessary, to break into any

[1] Without permission from the health authorities a private person has no right to place a family infected with small-pox in an unoccupied house belonging to another, without the consent of the owner, although such removal of the family may be necessary to prevent the spread of the disease. Beckwith v. Sturtevant, 42 Conn. 158; Boom v. Utica, 2 Barb. 104.

[2] Tunbridge Wells. Loc. Bd. v. Bisshopp, 2 C. P. D. 187.

building or other place where they may be, and to place a guard over them, to prevent persons from removing or coming near to such things, until due inquiry be made into the circumstances. By the same warrant, the justice may, if necessary, require the officer, under the direction of the board of health, to impress and take up convenient houses or stores for the safe-keeping of the infected things; and the board of health may cause the removal of the things to such places, and there detain them until they shall, in the opinion of the board, be thoroughly disinfected.

The charges for securing such infected things and for transporting and purifying them must be paid by the owners. But where the sheriff or other officer impresses or takes up any houses, stores, or other necessaries, or impresses men, the several parties interested are entitled to a just compensation therefor, to be paid by the corporation of the place where such persons or property are impressed.[1]

Expense for treatment, nursing and necessaries.

SEC. 127. The expenses of removing sick persons, and of providing medical attendance, nurses and other necessaries, are chargeable, by law, in every case to the person himself, his parents, or those who may be liable for his support, if able;[2] otherwise, to the county to which he belongs,[3] or the town in which he has a legal settlement; and if he has no legal settlement, and belongs to no county, then to the State. The matter is variously regulated by the statutes of the several States, but the usual

[1] *See* Spring v. Hyde Park, 137 Mass. 554; Brown v. Murdock, 140 id. 314.

[2] A person infected with a disease dangerous to the public health who is removed to a separate house by the health officer and provided by them with nurses, and medicines and other necessaries, is not chargeable for the expenses incurred for these purposes, it is said, unless he is able to pay *all* the expenses thus incurred. This puts upon the statute a very strict construction. Inhabts. of Orono v. Peavey, 66 Me. 60.

[3] The phrase "at the charge of the town to which he *belongs*," means the town in which he has a legal settlement, and not the town where he may happen to reside at the time. Inhabts. of Hampden v. Inhabts. of Newburgh, 67 Me. 370.

provisions are those just stated. And where houses, lodgings, or necessaries of any kind, are impressed or taken up, or where private property is injured or destroyed, under the direction of the health authorities, *in the interest of the public health*, the several parties interested are entitled to a just compensation therefor, to be paid by the city, village or town in which the property is impressed, injured or destroyed.[1]

It is said that, "in providing that what is done shall be at the charge of individuals, it is not intended to exempt the public from immediate liability. It would be impossible under such a regulation to effectuate the general object. Individuals would not be willing to provide necessaries and serve as nurses and assistants at the instance of the public, if compelled to collect their pay of the patients or their relatives. The public is first and immediately responsible, and the intent of the statute is to enable the public to obtain reimbursement from those who ought to sustain the expense.[2]

SEC. 128. The liability of the corporation or county is based upon contract, either expressly made or to be implied. So, a town is not liable for the compensation of physicians for their services in attending upon persons sick with contagious diseases, who have ability to make payment themselves, unless in fact the physicians were employed by the proper authorities of the town, although the authorities have taken measures to isolate the sick persons and appointed persons to superintend the place where the sick persons are confined and to take care of them. To make the town liable, the physicians must

[1] But a *mandamus* to compel a board of supervisors to allow compensation for the use of relator's house for a small-pox patient, was refused, where the house was already infected before the patient was taken there. Farnsworth v. Kalkaska County, 56 Mich. 640.

[2] Rae v. Flint, 51 Mich. 526; Wilkinson v. Long Rapids, 74 id. 63. *See*, however, City of Clinton v. County of Clinton, 61 Iowa, 205; Gill v. Appanoose County, 68 id. 20.

actually be employed by the authorities; their mere knowledge of and acquiescence in the performance of the services is not enough.[1] But the health officers of a town have no authority to make the town liable for medical attendance upon persons *who are not paupers* and who are visited and treated *at their own homes* by the physicians.[2]

On the other hand, the corporation or county, as the case may be, under the statutes, is liable for the value of lumber furnished at the request of the board of health, and used in building a pest-house necessary for the proper care of certain persons found in the corporation afflicted with the small-pox;[3] and is also responsible for the compensation of physicians employed by the board of health during the prevalence of a contagious disease;[4] and for the compensation of nurses and other attendants;[5] and, generally, for the cost of all sanitary and remedial agencies necessarily employed, the value of property unavoidably destroyed, and the incidental expenses of carrying the sanitary regulations into effect during the prevalence of dangerous diseases.[6]

SEC. 129. Municipalities are also liable for the reasonable care, nursing and support of infected persons who are *involuntarily* confined by the proper authorities in a pest-house or small-pox hospital, lawfully provided for the purpose of preventing the spread of malignant or pestilential diseases. So where the health officers of a city employed a young woman, for what her services

[1] Kellogg v. St. George, 28 Me. 255; Miller v. Somerset, 14 Mass. 396; Mitchell v. Cornville, 12 id. 333; Childs v. Phillips, 45 Me. 408.

[2] Gill v. Appanoose County, 68 Iowa, 20; McIntire v. Pembroke, 53 N. H. 462; Albany v. Wilkinson, 28 id. 9. But both these cases decide that, where the law provides that the health authorities may appoint agents to vaccinate all persons at the expense of the town, a physician may recover from the town for services as such an agent, whether or not the services were rendered in vaccinating *paupers*. *See* Fort Wayne v. Rosenthal, 75 Ind. 156.

[3] Staples v. Plymouth County, 62 Iowa, 364.

[4] Wilkinson v. Long Rapids, 74 Mich. 63.

[5] Rae v. Flint, 51 Mich. 526; Elliott v. Supervisors, 58 id. 452; People v. Supervisors of Macomb County, 3 id. 475.

[6] Schmidt v. County of Stearns, 34 Minn. 112.

should be worth, to nurse and care for several members of her father's family, confined with the small-pox at the city pest-house on the order of those officers, the city was held liable for her reasonable compensation. The court said:[1] "The statute authorized the health officers to remove to their pest-house provided for the purpose the persons infected with the small-pox. The reason of the law, and of the defendant's action under it, was not because the victims of the disease were paupers in need of assistance, nor because the defendants or their health officers owed them the duty of caring for or curing them, but because the public required protection against the spread of an infectious disease.[2] The authority to provide a suitable house, confine infected persons within it, and make reasonable regulations to prevent communication with the occupants, carried with it the authority to take necessary measures for carrying into effect the regulations established by them, and to make the defendants liable for the necessary expense. Having power to compel the confinement of infected persons and prevent their communication with others, and having exercised that power, it became their duty to provide for the wants of those confined there. They could not shut them out from communication with their friends and with the world, and deprive them of any means of obtaining assistance, and at the same time lawfully withhold necessary support and care. They could not establish a hospital without ordinary hospital accommodations, and they could not make the hospital a place of involuntary confinement, and escape the duty of supplying the reasonable wants of those who, by confinement and seclusion, were prevented from applying to any one else for relief. *They could not furnish relief against the will of those confined, and afterward recover the expense of them, or of those liable in law to sup-*

[1] Allen, J., Labrie v. Manchester, 59 N. H. 120.

[2] Farmington v. Jones, 36 N. H. 271.

port them.[1] If the health officers were obliged by law to confine persons infected with dangerous diseases, and it was their duty to nurse and support them, and they could not recover the reasonable expense from them, or from their guardians, they would be remediless, unless they could charge the expense upon the city. The law does not require the performance of a duty, and at the same time withhold the means reasonably necessary for its performance."

SEC. 130. Accordingly, where the minor daughter of defendant was residing, with his consent, at the house of a friend, and was there taken sick with the small-pox, and the health officers of the town established the house where she was as a pest-house, and detained her there with other patients, the town was not permitted to maintain an action against the father for the medical attendance, board and other necessaries furnished his daughter while so detained. In that case, the seclusion of the patient was not for her own benefit, but for the public object of preventing the spread of the disease in the town; the action of the authorities was taken solely for the general public security against the dissemination of contagion.[1] So, too, the cost of "moving a house" for the residence of the family of a person sick with a contagious disease, is a proper charge against the town.[2] And where the board of health of a city adopts the plan of providing for infected persons in the family where they happen to be, and isolates the family for protection of the inhabitants, the county is liable to the city, not only for the food furnished the infected persons, but also for that supplied to the isolated family; and for the expense of new clothing furnished the family in the place of clothes taken from them and burned as a precautionary measure; and for the reasonable compensation of the attending physician.[3]

[1] Farmington v. Jones, 36 N. H. 271.
[2] Kennebunk v. Alfred, 19 Me. 221.
[3] City of Clinton v. County of Clinton, 61 Iowa, 205.

Inspection and restraint of travelers.

SEC. 131. In addition to other measures already mentioned which local boards of health may lawfully take to prevent the introduction of diseases dangerous to the public health, the local board of any incorporated place or sanitary district near to a neighboring State may appoint suitable persons to attend any places, within its jurisdiction, by which travelers may pass into the State from infected places in other States; and the persons so appointed may be authorized to examine such passengers and travelers as they may suspect of bringing with them any infection which may be dangerous to the public health; and, if need be, may restrain them from traveling until licensed to do so by the board of health of the place to which they come. A penalty may be imposed upon persons coming from any infected place who shall, without such license, travel within the State; unless it be to travel by the most direct way from the State, after they shall have been cautioned to depart by the examiners.[1]

Quarantine regulations.

SEC. 132. A general jurisdiction is often conferred upon local boards of health over matters pertaining to quarantine. Power is given them, and it is made their duty, from time to time, to fix, determine, and establish the quarantine to be performed by vessels, vehicles, and persons arriving within the limits of the sanitary district; to reduce the period of quarantine in particular cases; to make such regulations, not inconsistent with the laws of the State[2] or of the United States, as they may deem necessary and proper, concerning the mode of quarantine; the examination, disinfection and purification of vessels, vehicles, and goods; the apprehension, separation and treatment of immigrants and other persons who are found to be sick with contagious diseases or who may have been exposed to infection; and the intercourse with infected

[1] *See In re* Ah Fong, 3 Sawy. 144. [2] People v. Roff, 3 Park. Cr. 216.

places. The regulations may be made to extend to all persons, and all goods and effects, arriving in vessels or vehicles, from any place, and to all persons who may visit or go on board of such vessels after their arrival. The board of health may cause any vessel, when it or its cargo is in their opinion so foul or infected as to endanger the public health, to be removed to the established quarantine ground and to be thoroughly purified and disinfected; and also may cause all persons arriving in or going on board of infected vessels, or handling the infected cargo, to be taken to any hospital, or other place designed for the reception of such persons, under the care of the board, and to be kept there under their orders. The master of the vessel, or any seaman or passenger, may be examined under oath, by the board or its appointed officer, as to matters touching the health of the crew and passengers and the sanitary condition of the vessel and her cargo. A refusal to answer proper questions upon such examination is punishable.

All expenses incurred on account of any person, vessel, vehicle or goods, under any quarantine regulations, are chargeable to and to be paid by such person, or by the owner of the vessel, vehicle or goods, respectively;[1] provided, the charges do not amount to a tonnage tax or duty,[2] and provided, further, that they are incurred under the direction, sanction and responsibility of the proper officials, in the due administration of the quarantine laws and regulations.[3]

[1] Peete v. Morgan, 19 Wall. 582; Morgan Steamship Co. v. Louisiana, 118 U. S. 455; Train v. Boston Disinfecting Co., 144 Mass. 523; Provincetown v. Smith, 120 id. 96; Board of Health v. Loyd, 1 Phila. 20. But it is said that, if during a voyage, a contagious disease breaks out on a vessel, and on her arrival in port the city authorities find it necessary, in order to prevent the spread of contagion, to send the sick passengers to a hospital for treatment, the owners of the vessel cannot be made liable for the expenses thereby incurred. New Orleans v. Ship Windermere, 12 La. Ann. 84. Compare, however, Harrison v. Baltimore, 1 Gill (Md.), 264.

[2] Ferari v. Board of Health of Escambia County, 24 Fla. 390.

[3] Lockwood v. Bartlett, 130 N. Y. 340. *See* Harrison v. Baltimore, 1 Gill (Md.), 264.

Health officer.

SEC. 133. To secure an efficient administration of the quarantine laws of the State and of local regulations, at places where vessels arrive from foreign countries, it is quite proper that there should be a health officer specially appointed for every such port, who should be an experienced physician, practically familiar with the diseases subject by law to quarantine. If no provision is made in the general laws for the appointment of such an officer, it can hardly be doubted, that the local board of health would have authority to appoint the officer and prescribe his powers and duties. It should be made the duty of the health officer of the port, and he should have power, to exercise a general supervision and control over the quarantine establishment and the enforcement of the quarantine regulations of the port; to reside at a convenient place for the boarding of vessels; to go on board every vessel, subject to his visitation, as soon as practicable after her arrival, between sunrise and sunset; to inquire as to the health of all persons on board and the condition of the vessel and cargo; to examine on oath as many persons on board as he may think expedient to enable him to determine the period of quarantine and the regulations to which the vessel and her cargo should be made subject; and to report the facts and his conclusions, and especially to report the number of persons sick and the nature of the diseases with which they are afflicted, to the board of health, or to quarantine commissioners, or other proper officers, as the law may provide. It should be the duty of the health officer of the port to cause all persons found on board any vessel, afflicted with diseases dangerous to the public health, to be removed promptly to the quarantine hospital, if there is one, or to some convenient place provided for their reception, or, if necessary, to make provision for the care of such persons without removal; to cause every infected vessel or cargo to be thoroughly

purified without delay, and for this purpose to require the vessel to go to the quarantine ground, and to cause the cargo to be removed to warehouses where it may be conveniently disinfected; to detain both vessel and cargo under quarantine until all danger of infection shall, in his judgment, be removed; to prohibit all communication with persons and vessels undergoing quarantine, except under such restrictions as he may impose; and to keep the board of health informed of the number of vessels in quarantine, and of the number of persons sick in the quarantine hospital and of the diseases with which they are afflicted.

Regulations not an interference with powers of Congress.

SEC. 134. The precautionary measures authorized by a delegation of the powers mentioned in the two preceding paragraphs are a part of and inherent in every system of quarantine. They must necessarily, to some extent, in their exercise, operate as a regulation of commerce, but they are not, on that account, open to impeachment on constitutional grounds. Congress has, under the Constitution, the exclusive right to regulate interstate and foreign commerce; but Congress has expressly provided, that no vessel or vehicle coming from any foreign port where contagious or infectious diseases may exist, or carrying any infected merchandise, or any persons or animals afflicted with dangerous diseases, shall enter any port of the United States, or pass the boundary line between the United States and any foreign country, contrary to the quarantine laws of the State into or through the jurisdiction of which the vessel or vehicle may pass, or to which it is destined.[1] Congress has further provided, that the quarantines and other restraints, established by the health laws of any State, respecting vessels arriving in or bound to any port thereof, shall be duly observed by the officers of the customs revenue of the United States,

[1] Act April 29, 1878; 20 Stat. L. 37; R. S. Supplt. 157.

and that all officers of the United States shall faithfully aid in the execution of such quarantines and health laws, according to their respective powers and in their respective districts;[1] and that "there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under State laws." These provisions show very clearly the intention of Congress to adopt the laws referred to, or to recognize the power of the States to pass them. But, aside from this consideration, quarantine laws belong to that class of State legislation which is admittedly valid until displaced or contravened by some legislation of Congress. The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more prudently established by the local authorities.[2]

Extent of the powers of local authorities.

SEC. 135. A very large discretion is necessarily intrusted to boards of health, or port officers, in the administration of quarantine regulations; but it is not unlimited, nor is it to be exercised arbitrarily. The authorities may exert their powers, to avert substantial danger to the public health, to the very limits of that right of self-protection belonging to the State, from which the powers are derived and by which they are sanctioned.[3] So, as a measure of mere precaution, they may require all vessels

[1] U. S. Rev. Stat., § 4792.

[2] Miller, J., Morgan v. Louisiana, 118 U. S. 455; Passenger Cases, 7 How. 283; *In re* Ah Fong, 3 Sawy. 144; City of New York v. Milne, 11 Pet. 102. *See* 25 Am. L. Rev. 45.

[3] *See* Harrison v. Baltimore, 1 Gill (Md.), 264; Train v. Boston Disinfecting Co., 144 Mass. 523, where a regulation of a board of health was sustained, which ordered "that all rags arriving at the port from any foreign port shall, before being discharged, be disinfected under the supervision of an officer" of the board, and in a manner satisfactory to the board. There may be articles of commerce so capable of carrying or transmitting infection, that they cannot be admitted in any case into a city or town without danger, and should, therefore, always be subject to examination and to more or less purification. There would seem to be no doubt that as certain things may be pronounced to be nuisances *per se*, certain articles also may be held to be always properly subject to quarantine regulations.

coming into port from places where dangerous diseases may exist, to anchor in the harbor, and there remain, with all the crew and passengers on board, until examined by the health officer;[1] or they may cause the detention of an infected vessel for a reasonable period in quarantine.[2] But when it is ascertained, by inspection, that the vessel is not infected,[3] or when the process of disinfection and purification is completed, and there is no longer any reasonable ground to apprehend the existence of infection upon the vessel, she cannot rightfully be prevented from proceeding on her way. Any further detention of her is an invasion of the owner's property, for which he is entitled to compensation.[4] An infected vessel cannot be detained forcibly and required by the health officers to go into quarantine, if the master refuses to submit to the quarantine and elects to take his vessel out of the port. Nor can the health officers take a quarantined vessel, or any part thereof, into their own possession and control, and appropriate it to the use of a hospital, against the will and to the exclusion of the owner, or those whom he has put in charge. They can only exercise a limited control as to those things that may tend to facilitate the spread of infection.[5]

Any of the passengers or crew of an infected vessel may be detained in quarantine, and if not too sick to be removed, should be sent to a hospital or other suitable place; but if they cannot be removed from the vessel without danger, and are there detained, the law contemplates that this shall be done in accordance with some contract or arrangement made with the owner of the vessel. In such case, the authorities have no right to take possession, and prevent ingress and egress, and

[1] Dubois v. Augusta, Dudley (Ga.), 30; Rudolphe v. New Orleans, 11 La. Ann. 242; Harrison v. Baltimore, 1 Gill (Md.), 264.

[2] St. Louis v. McCoy, 18 Mo. 238; St. Louis v. Boffinger, 19 id. 13; Metcalf v. St. Louis, 11 id. 102.

[3] *Ex parte* O'Donovan, 24 Fla. 281.

[4] Sumner v. Philadelphia, 9 Phila. 408.

[5] Mitchell v. Rockland, 41 Me. 363; 45 id. 496; 52 id. 118. *See ante*, secs. 120–122.

fumigate and disinfect the entire vessel, or any part of it, or destroy articles of furniture or other things, as being infected; their power is confined to making reasonable regulations for the care of the sick on board of the vessel and for the prevention of the spread of the disease. If any further control is necessary, and if articles are to be disinfected or destroyed, the regular statutory proceedings must be taken for the impressment of the property, and compensation must be provided.

Registration of vital statistics.

SEC. 136. One of the important duties committed to local boards of health is that relating to the registration of vital statistics. In the performance of that duty they are required, among other things, to supervise the local system of registration of all births, marriages and deaths occurring within their jurisdiction, in accordance with the methods and forms prescribed either by the law itself, or by the State board of health; to cause the health officer or other appointed person, to receive, examine and see to the proper registration of all certificates and records of deaths, and causes of death, and findings of coroners' juries; to secure the prompt forwarding of certificates of births, marriages and deaths to the proper State officers after local registration; and to provide for obtaining copies of the registered records and for the amount of fees payable for such copies.

Registers of births, marriages and deaths, made under the sanction of law and official duty, are competent evidence in the courts of the facts therein recited. Unless there be an enabling statute, copies are inadmissible as evidence, when the original certificates can be produced. When the originals cannot be had, exemplifications are admissible, for the reason that they are the best evidence obtainable. By statute in many of the States, the contents of the official records may be proved by an immediate copy duly verified. These records are recognized

by law because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office, or at least under that of official duty.[1] On account, then, of the importance attaching to the records, as evidence of the facts they recite, it is essential that they should be kept with all possible care and accuracy, and, whenever practicable to do so, the health officer or registrar should satisfy himself of the truth of certificates, before causing them to be actually registered.

Reports of births, deaths and marriages.

SEC. 137. The physician, or whoever attends professionally at a birth, is required to make out and forward to the local registering officer, within a specified time after the event, a certificate stating distinctly the date and place of birth, the sex of the child, the names of the parents, and such other facts within his knowledge, as may be required by law or the local authorities. The "given" name of the child should be certified and registered as soon as practicable. It is the duty of every clergyman, magistrate or other person who performs any marriage ceremony, forthwith to report the fact in writing to the registering officer, stating such particulars as may be required by law or the local regulations. He must certify his official act, in the prescribed form, after which it is his duty to make sure that the record and certificate are placed in the hands of the local registering officer within the time fixed by law.

Immediately after a death, it is required, that the householder, or some other person present and best acquainted with the record of the deceased, shall present to the health

[1] 1 Greenl. Ev., § 484; 1 Whart. Ev., §§ 649-660; Earle, J., Doe v. Andrews, 15 Q. B. 759; Kennedy v. Doyle, 10 Allen, 161; Milford v. Worcester, 7 Mass. 48; Comm. v. Littlejohn, 15 id. 163; Sumner v. Sebec, 3 Greenl. 223; Wedgewood's Case, 8 id. 75; Jackson v. Boneham, 15 Johns. 226; Richmond v. Patterson, 3 Ohio, 368. *See*, however, Tucker v. People, 117 Ill. 88; Buffalo Loan, Trust & Safe Dep. Co. v. Knights Templar, etc., Ass'n, 126 N. Y. 450. It was held, in the latter case, that a certificate of a physician filed with the board of health, stating the cause of death, was not a public record in such sense as to make it evidence between private parties of the facts recorded.

officer, or to some member of the local board of health, a certificate of the death, in the form prescribed by law, and shall, as soon as practicable, receive from such officer the required permit for burial, so that there may be no needless delay in the interment of the dead. It is the duty of the physician attending a person during his last illness or present at his death, or of the coroner of the district, when the case comes under his notice and jurisdiction, to furnish and deliver to the undertaker or other person superintending the burial of the deceased, or to file directly in the office of the registrar, a certificate, setting forth the name of the deceased, the date and place of death, and the cause of death, if ascertained, and such other particulars, within his knowledge, as may be required. If the certificate is delivered to the undertaker, he should add to it his own certificate as to the date and place of burial, and file the same with the registrar within the time fixed by law.

Any person who violates or refuses to comply with any of the provisions or requirements just mentioned, or who willfully makes a false statement in regard to the matters referred to, is liable to a penalty; and a compliance with the requirements may in proper cases be enforced by appropriate proceedings. It is not a valid excuse for failure or refusal to comply with the law in respect of making report of births, deaths and marriages, that no provision is made for the compensation of those who are required to make the reports. It is within the power of the State to compel the performance of these duties, without compensation, in the interest of the general welfare.[1]

Duty of registering officers.

SEC. 138. The proper registry of records and certificates of births, deaths and marriages, in accordance with law, is a matter of interest and importance, not alone to the public, but also to the families and relatives whom they concern.

[1] Laws of U. S. 1888, chap. 309. The statutes of most of the States make similar provisions for the collection of vital statistics.

A strict compliance with the law on the part of registering officers, and local health authorities, charged with the registration of vital statistics, may, therefore, be enforced by *mandamus* at the suit of parties interested.

Provision is sometimes made for correcting the records, or for the recording, in a special manner, of births, deaths and marriages which, through the neglect of physicians, clergymen or parents, have not been properly certified or recorded within the time fixed by law. For such purpose, an application is to be made to the authorities having supervision of the local registration of vital statistics, accompanied by proofs of the facts upon which the request for relief is based. The authorities are bound to receive, examine and pass upon such an application and the proofs offered in its support; and their refusal to do so will not be excused upon the ground that the relief demanded is in contravention of some rule or regulation adopted in regard to registration. The duty is obligatory upon the authorities, although the language of the remedial statute may be merely permissive. The authorities may, of course, examine into the truth of the facts alleged and may adopt such procedure for the purpose as they think expedient. They may require the proofs to be submitted in the form of affidavits, or may require the applicants to attend before them personally for examination.[1]

Powers and duties relating to nuisances.

SEC. 139. It is usually made the duty of local boards of health to receive and examine into the nature of complaints made by any citizens concerning nuisances, or causes of danger or injury to life and health within the corporation or sanitary district; to enter upon or within any vessel, place or premises where nuisances or conditions dangerous to life and health are known or reported, or believed to exist, and, by appointed members or agents, to inspect and examine the same; to furnish the owner, agent or occupant

[1] Matter of Lauterjung, 48 N. Y. Super. Ct. 308.

of the vessel or premises a written statement of the results or conclusions of such examinations; and to order or cause the suppression and removal of all nuisances and conditions detrimental to life and health found to exist within the territorial limits of their jurisdiction. The local boards have power to make and publish general orders, ordinances or regulations relating to nuisances and other matters prejudicial to life and health; and to make, without publication thereof, such orders and regulations, in special or individual cases, not of general application, as they may see fit, concerning the suppression and removal of nuisances and concerning all other matters in their judgment detrimental to public health. In case of non-compliance with any such special order or regulation, after due notice thereof, they may enter upon any premises to which the order or regulation relates, and by appointed members or agents,[1] suppress and remove the nuisance or other matters mentioned in the order or regulation, or any other nuisance or matter of like description found there existing. The expenses of such proceedings are a charge upon the owner or occupant of the premises, or upon the persons who caused or maintained the nuisance or other objectionable matter, and may be sued for and recovered by the board, or by the corporation paying such expenses in the first instance, in any court of competent jurisdiction. The judgment recovered in such suit is a preferred lien upon the premises, enforceable, like a lien for taxes and assessments, by a sale or lease of the premises.[2]

Kind of nuisances cognizable by local boards of health.

SEC. 140. At the common law, according to the definition of Blackstone, every thing can be reckoned as a com-

[1] Grace v. Newton Board of Health, 135 Mass. 490; Hitchcock v. Galveston, 96 U. S. 341.

[2] Joyce v. Woods, 78 Ky. 386; City of Salem v. Eastern R. Co., 98 Mass. 431; Train v. Boston Disinfecting Co., 144 id. 523; City of Hannibal v. Richards, 82 Mo. 330; Hutton v. City of Camden, 39 N. J. L. 129; People v. Board of Health of Seneca Falls, 58 Hun, 595; Kennedy v. Board of Health, 2 Penn. St. 366; Philadelphia v. Trust Co., 132 id. 224.

mon nuisance which is an offense against the public order and economical regimen of the State, being either the doing of a thing to the annoyance of all the citizens, or the neglecting to do a thing which the common good requires. But under the sanitary laws, the word "nuisance" has a more restricted meaning, being confined to those acts or omissions which are injurious to the public health or dangerous to life. The laws require the local health authorities to have cognizance of the causes of injury or danger to the public health; they are authorized and directed to take measures for the suppression and removal of nuisances and all other matters detrimental to the life and health of the citizens. The large class of nuisances, therefore, which is made up of acts and things that merely occasion discomfort, inconvenience or annoyance to individuals or the community, or that merely depreciates the value of property, is outside the jurisdiction of the sanitary authorities. Again, a nuisance may be so limited in its effects as to interfere only with individuals in the exercise of their personal and private rights; the remedy is then a private one, by action at law for damages, and in equity for an injunction to restrain the continuance of the objectionable acts. With such private nuisances the authorities have no concern. The jurisdiction of local boards of health, as a general rule, is confined strictly to nuisances that are of a purely public or of a mixed character, and to such unwarranted acts and such omissions of legal duty only as are dangerous to life or health. Every thing is deemed to endanger life and health which either causes actual present danger thereto, or which must do so in the absence of a degree of prudence and care, the continual exercise of which cannot reasonably be expected.[1]

SEC. 141. The nuisances over which local boards of health are to exercise control, by regulations of a general

[1] Stephen's Dig. Crim. L. 127; Lister's Case, 1 Dearsley & Bell Crown Cases, 209.

character or by summary proceedings and special orders, are those that come within the common-law notion of things detrimental to life and health, and those enumerated in the acts under which the boards obtain their powers. They will fairly include whatever is dangerous to human life, and whatever renders the air, or food and water, or drink unwholesome; any premises in such a state for want of a privy or drain or sufficient means of ventilation, or so dilapidated or so filthy, as to be a nuisance injurious to the lives or health of the inmates or of persons in the vicinity; any pool, ditch, gutter, water-course, privy, urinal, cesspool, drain or ashpit, so foul or in such a state as to be injurious to health; any animal so kept as to be injurious to health; any accumulation or deposit which is injurious to health;[1] any house or part of a house so overcrowded as to be dangerous or injurious to the health of the inmates; any factory, workshop, or workplace not kept in a cleanly state, or not ventilated in such a manner as to render harmless, as far as practicable, any gases, vapors, dust or other impurities generated in the course of the work carried on therein, that are injurious or dangerous to health, or so overcrowded while work is carried on as to be dangerous or prejudicial to the health of those employed therein; any premises used for the purpose of carrying on what are known as the "noxious" trades, or any manufactory, building or place used for any trade, business, process or manufacture, causing effluvium which is injurious to the health of the inhabitants of the neighborhood;[2] and any persons and any clothing or articles of personal property that have been exposed to infection.

General ordinances or regulations.

SEC. 142. The powers usually conferred upon local boards of health, to adopt ordinances and regulations of

[1] *See* Bishop Auckland Loc. Bd. v. Bishop Auckland Iron Co., 10 Q. B. D. 138; Great Western R. Co. v. Bishop, L. R., 7 Q. B. 550; Malton Bd. of Health v. Malton Manure Co., 4 Exch. D. 302; Banbury San. Authy. v. Page, 8 Q. B. D. 97.

[2] *See* 38 and 39 Vict., c. 55, s. 91.

general application, are sufficient to authorize legislation concerning any of the matters mentioned in the last preceding paragraph. Such legislation will be valid, if it is designed to regulate those matters in the interest of the public health and is appropriate to accomplish that purpose. The limitations and restrictions upon the legislative powers of boards of health are the same which are applicable to the like powers when exercised for similar purposes by the ordinary legislative bodies of municipal corporations. In whatever terms the legislature may have delegated to the local health authorities their powers in respect of nuisances, it is not admissible to suppose that the legislature intended to give those authorities the power to declare, in their discretion, what is or what is not a nuisance, or to define the acts or things which shall be deemed to be nuisances. Indeed, "it may well be doubted whether the legislature can delegate to any body of men the power to declare what is or what is not a nuisance. Such power would be equal to a power to declare what should be a criminal act; because it is a crime to maintain a public nuisance, and if the legislature can delegate to individuals the power to define a nuisance, they can delegate to them the power to make acts criminal which are not so by law. Such power cannot be delegated by the legislature. They may authorize boards of health to pass ordinances necessary for the objects of their creation, but they cannot delegate to them the power to define what shall be a nuisance, or make acts criminal which the law holds to be innocent."[1] Legislation of boards of health concerning nuisances must not attempt to re-define nuisances, nor to bring under the category of nuisances any things which are not recognized as such at the common law, or which are not necessarily, in their nature, situation or use, detrimental to the public health and safety. But those things that come within the legal notion of nuisances,

[1] Ingraham, J., Mayor of New York v. Board of Health, 31 How. Pr. 385; Rogers v. Barker, 31 Barb. 447; Coe v. Schultz, 47 id. 64.

and that require and justify regulation, may be regulated so far as may be necessary to protect the life and health of the community.

Inspection of nuisances.

SEC. 143. It is the duty of the local sanitary authorities, personally, or by their appointed agents, to enter upon or within any vessel, place or premises where nuisances or conditions dangerous to life and health are known, or reported, or believed to exist, for the purpose of inspecting and examining the same. In large cities there should always be regularly appointed sanitary inspectors to perform this duty, and to investigate all complaints of nuisances and of infractions of the sanitary ordinances. It should be made the duty of the inspectors to inspect their several districts regularly and systematically, and to keep themselves informed in respect of nuisances existing therein that require abatement; to inquire into all alleged nuisances and infractions of the sanitary laws, and to report thereon to the board of health; to visit markets and places where meats and provisions are sold and inspect the articles exposed for sale, and to seize such articles as appear to be unfit for food and take such proceedings as may be necessary in order to have the same properly dealt with as nuisances; to procure and submit for analysis samples of food, drink and drugs suspected to be adulterated; to superintend and see to the due execution of all works which may be undertaken, under direction of the authorities, for the suppression or removal of nuisances; and, generally, to observe and execute all the lawful orders and directions of the sanitary authorities, concerning the inspection, prevention and abatement of nuisances.

SEC. 144. In places where there are no regular sanitary inspectors, it is the duty of every member of the local board of health, on receiving notice, from any source, of the existence of conditions dangerous to health, to visit

the locality personally, or cause that to be done by an agent of the board, for the purpose of inspection and examination. In practice, the person who makes the inspection, whether a sanitary inspector or not, on finding that an undoubted nuisance exists, should at once give a verbal notice to the owner or occupier of the premises to remove the nuisance forthwith, indicating, in ordinary cases, the best way in which this may be done. If, on visiting the place a few days afterward, he finds that the notice has not been complied with, the matter should be reported to the clerk of the board, or other proper officer, so that it may be entered in the books; and thereafter the proceedings should be conducted in the customary formal manner.[1]

If right of entry to premises for the purpose of inspection is refused, a warrant may be issued by the board or by a magistrate, as the statute provides, directing the sheriff or constable, taking such force as may be necessary, and under the direction of the sanitary authorities, to effect an entry and accomplish the purpose for which entry was required.

Ordinary procedure against nuisances.

SEC. 145. It is the duty of the local healtn authorities to receive and examine into the nature of complaints concerning nuisances, or causes of danger or injury to life and health, within the limits of their jurisdiction. The notice or complaint in regard to a nuisance may be given by the sanitary inspector,[2] or by any other person. Any form of notice is sufficient, if expressed with such distinctness as to enable the authorities to discover the location and character of the nuisance. It is not necessary that the name of the owner or occupier of the premises should be mentioned in the notice; and the notice may be given

[1] Hart's Manual of Public Health, 190–192. It is not necessary that there shall be a *complaint;* the board and agents may act upon their own knowledge or information. Swett v. Sprague, 55 Me. 190.

[2] Comm. v. Alden, 143 Mass. 113.

orally or in writing. It should at once be entered in a presentment book or docket of complaints. It will then be necessary to examine into the complaint, and for this purpose the health officer, sanitary inspector, or other qualified person, may demand to enter and inspect the premises. This should be done at a reasonable hour during the day. If entry is refused or resisted, the inspecting officer should make an application at once and without notice and get a warrant requiring the person having charge of the premises to admit the sanitary authorities or their officer. The warrant will be directed to the constable or the sheriff and will be executed by him under the direction of the sanitary officer.

Complaint; preliminary notice.

SEC. 146. Having inquired into and ascertained the existence of a nuisance and its character, the inspecting officer should at once make his report to the board of health and cause a notification as to the results of the investigation, accompanied by official advice, and a summary or informal order, to be served on the person who causes the nuisance, or upon whose premises it exists. The order must require him to abate the nuisance within a specified time, and to execute such work and do such things as may be necessary for that purpose. If the time expires and the nuisance continues, the board of health must then make a formal order, stating that the offense is in violation of a specified[1] ordinance or regulation of the board, or that it is dangerous to life and detrimental to health, or, being on or near a route of public travel, is noisome and detrimental to the public health. The order must require the person to whom it is directed to abate, remove or discontinue the nuisance within a specified time, or show cause before the board of health, at a time and place named, why summary measures should not be taken in the premises. The statutes do not require that notice of

[1] State v. Street Comm'r of Trenton, 36 N. J. L. 283.

a complaint shall be served on the person charged with causing or maintaining a nuisance, but reasonable notice to abate the nuisance complained of must be given before summary measures are taken, so that he may be heard in his own behalf upon the charges made against him and upon all the questions involved.[1]

Notice; how served.

SEC. 147. Such notice is essential; and in order to be effectual, it must be served upon the proper party, and in precise conformity to the requirements of the statute.[2] It is to be served upon the party who is responsible for the nuisance,[3] that is, the person by whose act, default or sufferance it arises or continues, and if such person cannot be found, then on the owner or occupier of the premises. Where the nuisance is of a temporary nature, as where noxious articles and refuse are deposited on premises, or premises are being used in such a way as to cause a nuisance, the notice should be served on the occupier or person by whose act, default or sufferance the nuisance exists or continues. But where it arises from the defective condition of any structural convenience, as from the defective construction or arrangement of a water-closet and of the pipes leading therefrom and to the sink drains, the notice should be served on the owner. In the latter case, it would obviously be extremely hard to compel the abatement to be made by the occupier, who possibly could not abate the nuisance, or could only do so by incurring greater expense than he ought as a tenant to be called upon to incur. If, however, the owner himself is absolutely precluded by the terms of the lease from entering to make the required alterations to abate the nuisance and is unable to get per-

[1] Watuppa Reservoir v. Mackenzie, 132 Mass. 71; Davis v. Howell, 47 N. J. L. 280; Rogers v. Barker, 31 Barb. 447; Metro. Bd. of Health v. Heister, 37 N. Y. 661; People v. Bd. of Health of Seneca Falls, 58 Hun, 595; People v. Wood, 62 Hun, 131; Cooper v. Wandsworth Dist. Bd. Wks., 14 C. B. (N. S.) 180; Vestry of St. James v. Feary, 24 Q. B. D. 703.

[2] *Ante*, sec. 89.

[3] *Post*, secs. 196, *et seq.*

mission from the tenant to do so, after using due diligence to obey the order and notice of the board, he should be excused, and the work should be done by the authorities at his expense.[1]

Contents of notice; Order.

SEC. 148. The notice and order, specifying with precision the cause of complaint,[2] must require the person to whom it is directed to remedy or remove the nuisance. It should not require him to do this in any *specified* way, but should be in general terms, allowing him to adopt any means that may be effectual.[3] If, in order to abate the nuisance, it is necessary to alter or remove any structural works, the order cannot direct that new works shall be constructed in the place of those condemned. So, if the nuisance arises from a water-closet or privy, the order may direct its removal to a place where it will not be a nuisance;[4] or it may direct amendments to be made in the existing arrangement, sufficient to abate the nuisance; but it cannot require the construction of a new closet.[5]

Nature of the order.

SEC. 149. The order may, however, in many cases, be made *advisory* as to the method of abatement that will meet the approval of the board of health. This may be accomplished by directing the abatement in general terms, *or*, at the election of the party, certain alterations or improvements. Thus, if the order have reference to a nuisance arising from any of the common causes above mentioned as instances of public nuisances, the order may require the offender to remove the nuisance, *or* to provide

[1] Parker v. Inge, 17 Q. B. D. 584.

[2] Rogers v. Barker, 31 Barb. 447.

[3] Comm. v. Alden, 143 Mass. 113; Watuppa Reservoir v. Mackenzie, 132 id. 71; Bliss v. Kraus, 16 Ohio St. 55. Compare, Queen v. Wheatley, 16 Q. B. D. 34; also, Hargreaves v. Taylor, 3 B. & S. 613, where it is held, that discretion is vested in the board to determine what works are necessary to be done, and that their determination is not subject to review.

[4] *Ex parte* Saunders, 11 Q. B. D. 191.

[5] Queen v. Llewellyn, 13 Q. B. D. 681; Philadelphia v. Trust Co., 132 Penn. St. 224. Compare, *Ex parte* Whitchurch, 6 Q. B. D. 545.

sufficient privy accommodation, means of drainage, or ventilation, or to make safe or habitable, or to cleanse, disinfect, or purify the premises which are a nuisance injurious to health, or any part of the premises; or to drain, empty, cleanse, fill up, amend or remove the injurious pool, ditch, gutter, water-course, privy, urinal, cesspool, drain or ashpit which is a nuisance injurious to health, or to provide a substitute for any of these; or to carry away the accumulation or deposit which is a nuisance injurious to health; or to provide for cleanly and wholesome keeping of any animal, or to remove the animal if it be impossible to keep it without creating a nuisance; or to cleanse, disinfect and purify the infected clothing or articles which are dangerous to the public health.[1]

Hearing; final order.

SEC. 150. If, at the time and place named in the notice and order, the party appears before the board and demands a hearing upon the complaint lodged against him, the board must proceed to examine into the matter upon such proofs as are submitted. They may receive affidavits in evidence, and examine witnesses orally, and should comply with the request of any parties interested to be heard by counsel. The strict methods of procedure used in judicial tribunals need not be observed, but all the proceedings should be marked by fairness and impartiality. The proof having been taken, the board is then to make its adjudication, and thereupon to enter its final order in the matter.

But if the preliminary notice and order are disregarded, and the nuisance continues when the time specified for the abatement has expired, the board may proceed forthwith to take the case into consideration, and having reached a conclusion must embody it in a final order. Even in such case, however, it is necessary that an order,

[1] Hart's Manual of Public Health, 129.

finding the fact of the nuisance and directing summary measures for its suppression, must be based upon *some evidence* as to the injurious character of the thing complained of; if the order lacks such support, it may be attacked in any collateral proceeding.[1] The board must also find all facts upon which its authority to act is made by statute to depend. Thus, it may be a jurisdictional fact that the thing complained of is a source of disease, or that the public health will be promoted by its removal; and in such case, these facts must be explicitly adjudicated.[2] Moreover, it must appear that the board has reached the conclusions expressed in the final order upon the evidence offered in that particular case; the order will be void, if it is based upon a previous determination to make such an order in all cases of similar complaint. So, where a board of works made an *ex parte* order, requiring a certain person to convert into water-closets the privies attached to cottages on his lands, and, on his failing to do so, they proceeded to enter upon the premises for the purpose of doing the work themselves, and it appeared that the order was made, not with regard to the state of this particular property, but in consequence of a previous determination to substitute water-closets for privies throughout the district, it was held, that the board were exceeding their statutory powers and ought to be restrained from entry on the premises for the purpose of making the alteration. It was said that, even if the board had power to require such an alteration in a particular case, still the board was bound to exercise its discretion in each particular case, and was acting *ultra vires* if, without exercising such discretion, it proceeded to make the alteration in pursuance of a determination to require it to be made in all cases.[3]

Final order conclusive.

SEC. 151. The final order regularly made upon default

[1] People v. D'Oench, 44 Hun, 33.
[2] Hull v. Baird, 73 Iowa, 528.
[3] Tinkler v. Wandsworth Dist. Bd. Wks., 2 DeG. & J. 261.

of the party notified, or after a hearing, is conclusive upon the facts involved, and cannot be reviewed or reversed in any collateral proceedings. Its validity, it would seem, could not even be impeached on the ground that it was made by a board *de facto* merely, and not *de jure*.[1] The directions of the order may be at once executed by the authorities, and all expenses of abatement, including the necessary cost of structural works, may be charged to the owner or occupier of the premises, according to the terms of the order, and may be collected in the manner prescribed by law.

Summary abatement.

SEC. 152. The procedure just described is appropriate in all ordinary cases of nuisance, where the danger to life or health is not so imminent and pressing as to require more summary treatment. This orderly and deliberate method of proceeding upon notice and a hearing constitutes due process of law, and the final judgment rendered is just as effectual, to all intents and purposes, as if it had been delivered in a regularly constituted judicial tribunal. It is a fundamental principle that no person can justly be deprived of his property, by proceedings of a judicial nature, without notice and a fair opportunity to defend against the proposed action. But, in proceedings by boards of health for the suppression of nuisances affecting life and health, the notice may be given in either one of two ways; notice may be given that the nuisance exists and that it must be removed within a specified time, or cause be shown by the party why the work should not be done by the authorities, at his expense; or, a peremptory order may be made, in the first instance, requiring the party to abate the nuisance within a given time, and notifying him that upon his default the necessary work will be

[1] *See In re* Manning, 139 U. S. 504; Harding v. People, 10 Col. 387; Brown v. People, 11 id. 109; Smith v. Treasurer of Cuyahoga, 29 Ohio, 261; Bedford v. Rice, 58 N. H. 446. Dillon's Mun. Corp., § 276.

done at his expense without further notice.[1] The latter kind of notice is suited to cases where prompt measures are advisable. But, in requiring that notice shall be given of the intended action, the law does not intend to deprive the sanitary authorities of their right to proceed summarily against nuisances in cases where the public exigency is such as not to admit of notice or of any delay at all. There may be occasions calling for the immediate action of the authorities, and then it is not only their right but it is their duty to act with the utmost promptness. This kind of action against nuisances is called *summary abatement;* the *right* to resort to it belongs to every individual who is specially and peculiarly injured by the nuisance; the *duty* to resort to it is cast by law upon the sanitary authorities whenever, in their judgment, it is rendered absolutely necessary for the protection of the health of the community. In other words, that which private individuals *may* do in self-defense, the local boards of health, under analogous conditions, *must* do in the defense of the public.

Cleansing or draining of unwholesome places.

SEC. 153. Local health authorities, when satisfied upon due examination that any place or building within their jurisdiction, occupied as a dwelling, has become, by reason of the number of occupants, want of cleanliness, or other cause, unfit or unsafe for habitation, and a cause of nuisance or sickness to the occupants or the public, may issue a notice in writing to the occupants, or any of them, requiring that the premises shall be put into a proper condition as to cleanliness, or, if the authorities see fit, and the occasion demands such action, requiring the occupants to quit the premises within such time as the authorities

[1] *See* Raymond v. Fish, 51 Conn. 80; Davis v. Howell, 47 N. J. L. 280; Weil v. Ricord, 24 N. J. Eq. 169; Manh. Mfg. & Fert. Co. v. Van Keuren, 23 id. 251; Coe v. Schultz, 47 Barb. 64; Cooper v. Wandsworth Dist. Bd Wks., 14 C. B. (N. S.) 180; Vestry of St. James v. Feary, 24 Q. B. D. 703.

may deem reasonable. If the persons so notified, or any of them, neglect or refuse to comply with the terms of the notice, the authorities may cause the premises to be properly cleansed,[1] or put in repair, at the expense of the owners, or may remove the occupants forcibly and close up the premises and forbid further occupation of them as a dwelling without the consent in writing of the board of health.

A like authority[2] of the board extends over all other places which are unclean, offensive or unhealthy; so that, if any cellar, vault, lot, sewer, drain, or other part of any premises, be damp, or foul, or unwholesome, or be covered with stagnant or impure water, or be in such condition as to produce unwholesome exhalations, the board of health may cause the same to be drained, filled up, cleaned and purified, as the case may require, or may order the owner, occupant, or person in charge to perform that duty.[3]

Drainage laws.

SEC. 154. It is said that the power conferred by the last-mentioned provisions of law, as well as the general power over nuisances, is intended to furnish a summary and speedy remedy for the ordinary case of a local nuisance occasioned by the negligence or mismanagement of an individual upon his own land, which could be removed or abated by him personally; but that it is questionable, at least, whether it is competent for a board of health, in the exercise of such authority, to pass an order requiring a numerous body of land-owners, taken collectively, to abate a nuisance upon the land of all of them, produced

[1] *See* Philadelphia v. Trust Co., 132 Penn. St. 224. But unless the statute expressly so provides, or during the existence of a pestilence, or in a case of overruling public necessity, the power of the authorities does not extend, it is said, to removal of the occupants, and closing up the premises. Eddy v. Board of Health, 10 Phila. 94.

[2] *Ante*, sec. 20, note 9.

[3] Where the construction of drains is confided to the control of a board of health, a violation of directions given by the board in constructing drains will be restrained by injunction. Health Department v. Lalor, 38 Hun, 542.

by a cause affecting all of them, or whether the order should not be addressed to the proprietors severally, and by name, requiring each to provide for the removal of the nuisance from his own land.[1]

In the public statutes of Massachusetts,[2] there are provisions which contemplate the prevention or abatement of nuisances *upon a general system*,[3] applicable to lots of land belonging to any number of proprietors; and there are probably similar provisions in the general laws of other States.[4] By these provisions, lands which are wet, rotten, or spongy, or covered with stagnant water, so as to be offensive to persons residing in the vicinity, or injurious to health, are declared to be nuisances, which may be abated as follows: Any person claiming to be injuriously affected by such a nuisance may, by petition, apply to the board of health for its abatement; whereupon, the board shall proceed to view the premises and examine into the nature and cause of the nuisance. If the board are of opinion, after such examination, that the prayer of the petition, or any part of it, should be granted, they must appoint a time and place for a hearing, and cause notice thereof to be served on the petitioners, persons whose lands it may be necessary to enter upon to abate the nuisance, and any other persons who may be affected

[1] Cambridge v. Munroe, 126 Mass. 496.

[2] Mass. Stat. of 1868, chap. 160. Compare Mass. Gen. Stats., chap. 26.

[3] Grace v. Newton Board of Health, 135 Mass. 490; Nickerson v. Boston, 131 id. 306; Bancroft v. Cambridge, 126 id. 438; Cambridge v. Munroe, ib. 496; Farnsworth v. Boston, ib. 1; Leavitt v. Cambridge, 120 id. 157; Cobb v. Boston, 109 id. 438; 112 id. 181; Dingley v. Boston, 100 id. 544.

[4] Davidson v. New Orleans, 96 U. S. 97; Hadgar v. Supervisors, 47 Cal. 222; Dean v. Davis, 51 id. 406; Wilson v. Board of Trustees, 133 Ill. 443; People v. Nelson, id. 565; Reynolds v. Drainage District, 134 id. 268; Comm'rs of Drain. Dist. v. Griffin, ib. 330; Elmore v. Drainage Comm'rs, 135 id. 269; Hosmer v. Hunt Drainage District, ib. 51; Anderson v. Kerns Draining Co., 14 Ind. 199; O'Reilley v. Kankakee Val. Drain. Co., 32 id. 169; New Orleans Draining Co. Cases, 11 La. Ann. 338; Williams v. Detroit, 2 Mich. 560; Woodruff v. Fisher, 17 Barb. 224; Hartwell v. Armstrong, 19 id. 166; Norfleet v. Cromwell, 70 N. C. 634; Reeves v. Treas. Wood Co., 8 Ohio St. 333; Thompson v. Treas. Wood Co., 11 id. 678; Sessions v. Crunkilton, 20 id. 349; Donnelly v. Decker, 58 Wis. 461; State v. Stewart, 74 id. 620. *See, also*, Kingman, petitioner, 153 Mass. 566.

by the proceedings. After the hearing, the board may cause the nuisance to be abated according to their discretion, and for that purpose may enter and make excavations, embankments and drains upon any lands, and under and across any streets and ways, as may be necessary for such abatement. They must also determine in what manner and at whose expense the improvements made shall be kept in repair, and must estimate and award the amount of damages sustained by and benefits accruing to any person by reason of such improvements, and what proportion of the expense of making and keeping them in repair shall be borne by the city or town, and by any persons benefited thereby. The damages so awarded are to be paid by the city or town; and it is required that there shall be assessed to the several persons benefited by the improvements their proportionate part of the expense, which then becomes a lien upon the real estate benefited, collectible in the same manner as other taxes upon real estate. The board must make return to the city or town clerk of their doings in the premises. Any person aggrieved by the decision of the board in their estimate and award of damages may make complaint to the county commissioners, at any time within one year after the return to the city or town clerk, whereupon the same proceedings are to be had as are provided by law in cases where persons are aggrieved by the award of damages by selectmen for land taken for a town way.

Dangerous structures.

SEC. 155. Local sanitary authorities are often empowered and directed to require the owners and occupants of any buildings or other structures which may be ruinous or liable to fall and injure persons or property, to pull down and remove the same, or to repair and strengthen them in such manner as to make them safe; or, the authorities may cause such work to be done at the expense

of the owners or occupants.[1] Buildings and other structures in such dangerous condition are public nuisances in fact, and may be dealt with as such by the local authorities under their general powers in relation to nuisances affecting the lives of the citizens.

Offensive or dangerous trades and employments.

SEC. 156. In addition to their general powers in respect of nuisances, local boards of health are frequently invested with authority, by special provisions of law, to assign, by general regulations, certain places for the exercise of trades or employments which are offensive to the inhabitants or dangerous to the public health; to forbid the exercise thereof in places not so assigned; to change or revoke such assignments at pleasure; and, whenever a business carried on in any place so assigned, or in any other place, becomes hurtful or a menace to the health or security of the neighborhood, to prohibit the further exercise of such business at that place. Such regulations may be sustained, in the absence of express authority to make them, as within the usual legislative powers of local authorities.[2]

SEC. 157. In the statutory enactments of some of the older States, containing many thickly populated cities and towns, it is provided that the local authorities may even absolutely prohibit[3] the exercise of any offensive or dangerous trade or employment[4] within the limits of incorporated places. In such case, the order of prohibition is required to be served upon the occupant or person having

[1] Cheetham v. Mayor of Manchester, 10 C. P. 249. As to what expenses may be charged to the owner if he obeys the order, Metro. Bd. of Works v. Flight, L. R., 9 Q. B. 58.

[2] Metro. Bd. of Health v. Heister, 37 N. Y. 661. It is no defense to an indictment for maintaining a public nuisance, by carrying on a noxious trade in a public place, that the authorities have not assigned any place for the exercise of the trade. State v. Hart, 34 Me. 36.

[3] This involves the right to permit the exercise of a trade *conditionally*, or to forbid it "without a permit in writing first obtained from the board." Quincy v. Kennard, 151 Mass. 563. But the board cannot license a nuisance. Garrett v. State, 49 N. J. L. 94, 693.

[4] Braintree Local Board v. Boyton, 52 L. T. 98.

charge of the premises where the trade or employment is exercised. If he refuses or neglects to obey the order, the authorities may take all necessary measures to prevent such exercise, and to carry the order into effect. But any person aggrieved by the passage of such order may appeal therefrom and, in Massachusetts, may apply to a court of record for a jury.[1] During the pendency of the appeal, the trade or employment must not be carried on contrary to the order;[2] and upon any violation of the order the appeal will be dismissed. The verdict of the jury, which may either alter the order, or affirm or annul it in full, must be returned to the court for acceptance, and when accepted it has the authority and effect of an original order from which no appeal has been taken.

SEC. 158. The fact that under this procedure the owner of property may be deprived of the use of it pending his appeal is immaterial. Such a temporary suspension of the right to the free use of property is not only not inconsistent with the principles of natural justice, but is in accordance with the well-settled course of judicial proceedings in analogous cases. This provision of the statute is necessary to secure its effective operation.[3]

SEC. 159. Preliminary notice of an intention to pass a prohibitory regulation is not required. The proceedings of the authorities are not final and conclusive, but are merely of an initiatory character, and ample provision is made in the statute by which an owner of property, who may be affected by any order the authorities may pass, can obtain a revision of their adjudication, and its modification or reversal if it is unjust or erroneous. But after the order has been passed, it must be served upon the persons against whom it is directed. The purpose of requiring

[1] Taunton v. Taylor, 116 Mass. 254; Belcher v. Farrar, 8 Allen, 325.

[2] Sawyer v. State Bd. of Health, 125 Mass. 182.

[3] Belcher v. Farrar, 8 Allen, 325.

such service is to give those who are affected by the order an opportunity to appeal to a jury; and, where notice of the order has not been given, a prosecution for violation of the order is unauthorized, and the order cannot lawfully be enforced.[1] Where, however, the order has been properly served, the proceedings of the authorities and their adjudication can be reviewed only in the manner provided by statute, that is, by appeal to a jury; the question whether the prohibited trade or employment is in fact a nuisance, cannot be raised collaterally or in a suit to restrain the further prosecution of the business.[2]

The right of appeal is absolute; it cannot be taken away by any intentional act of the authorities, nor will it be forfeited by any honest mistake of the party or his counsel.[3] Notice of appeal must be given to the board of health. The statute may not expressly require it; but "in the absence of any thing in the statute to indicate that appeals from orders of the board are to be taken in any other way than that which has become familiar in analogous cases before other tribunals, it must be held that they are to be taken in substantially the same way with such appeals; and that the right to appeal can be preserved only by informing the board in some definite and distinct manner that an appeal is taken."[4]

[1] Comm. v. Young, 135 Mass. 526. *See, also,* last preceding notes.

[2] Taunton v. Taylor, 116 Mass. 255, *and last note.*

[3] Winthrop v. Farrar, 11 Allen, 398.

[4] Pebbles v. Boston, 131 Mass. 197. As to when the time for taking the appeal begins to run, Queen v. Barnet Rur. San. Authy., 1 Q. B. D. 558.

CHAPTER VII.

BOARDS OF HEALTH; RESPONSIBILITY FOR THEIR ACTS.

SEC. 160. Municipal responsibility.
163. Liability of boards of health.
164. Liability of officers and members.
165. Extent of liability.
166. Liability for suppressing nuisances.
167. Justifying under statute.
168. Justifying exercise of discretionary powers.
170. Justifying under ordinance.
171. Justifying under special order.
172. Justifying summary proceedings.
173. Rule as to liability.
174. How far protected as *quasi*-judicial officers.
176. Statutory exemption from liability.

Municipal responsibility for acts of board of health.

SEC. 160. The powers, privileges and franchises of municipal corporations belong to them either in their character of State agencies, exercising locally the governmental and political functions of the State, or in their character of private corporations, to be exercised in the management of the private affairs and local interests of the corporate community. The two kinds of functions may conveniently be distinguished as *governmental* and *corporate*. In legal contemplation, governmental and political duties are performed for the benefit of the State, but corporate duties solely for the benefit of the local community.

It is perfectly well-settled law that a municipal corporation is not responsible for the acts or negligence of its officers, agents or servants, in the performance of governmental duties; the doctrine of *respondeat superior* is not applicable. The reason of the law is, that if these agents are elected or appointed by the corporation, in obedience to a statute, to perform a public service not peculiarly local or corporate, because this mode has been deemed

expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation, as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or State officers, with such powers and duties as *the statute* confers upon them.[1]

SEC. 161. Accordingly, a municipal corporation cannot be held liable for the wrongful or negligent acts of any public officers, or their employes, whose duties are prescribed by statute, who are not under the supervision nor subject to the control of the corporation, and whose functions do not inure to the corporate benefit; although they be elected or appointed by the corporation. This rule operates to shield the corporation from responsibility for the acts of members and employes of the fire[2] and police[3] departments; of the departments of buildings,[4] or of public instruction,[5] or of charities and correction,[6] and of the board of public works,[7] as well as of the local board of health.

As illustrating the application of the doctrine, a municipal corporation cannot be held responsible for the consequences of wrongful acts of the board of health, its

[1] 2 Dillon's Mun. Corp., § 974 (4th ed.); Bigelow, C. J., Walcott v. Swampscott, 1 Allen, 101; Dixon, C. J., Hayes v. Oshkosh, 33 Wis. 314; Maxmilian v. New York, 62 N. Y. 160. *See* Taylor v. Board of Health, 31 Penn. St. 73.

[2] Howard v. San Francisco, 51 Cal. 52; Jewett v. New Haven, 38 Conn. 368; Brinkmeyer v. Evansville, 29 Ind. 187; Fisher v. Boston, 104 Mass. 87; Hafford v. New Bedford, 16 Gray, 297; Smith v. City of Rochester, 76 N. Y. 506; Welsh v. Rutland, 56 Vt. 228.

[3] Dargan v. Mobile, 31 Ala. 469; Culver v. City of Streator, 130 Ill. 238; Calwell v. City of Boone, 51 Iowa, 687; Peters v. City of Lindsboro, 40 Kans. 654; Sinclair v. Baltimore, 59 Md. 592; Buttrick v. City of Lowell, 1 Allen, 172; Kunz v. Troy, 36 Hun, 615; McKay v. Buffalo, 9 id. 401; 74 N. Y. 619; Elliott v. Philadelphia, 75 Penn. St. 347.

[4] Connors v. New York, 11 Hun, 439.

[5] Ham v. New York, 70 N. Y. 459; Finch v. Board of Education, 30 Ohio St. 37.

[6] Maxmilian v. New York, 62 N. Y. 160; Haight v. New York, 24 Fed. Rep'r, 93.

[7] Barney v. City of Lowell, 98 Mass. 570; Condict v. Jersey City, 46 N. J. L. 157.

agents or employes, in destroying a quantity of rags, as being infected;[1] or in leaving a privy vault open and unprotected after removing its contents;[2] or in seizing, taking possession, and assuming control of a house or vessel and destroying furniture and articles therein, against the will and to the exclusion of the owner or those lawfully in charge;[3] or in erecting a dam on private premises, without the owner's consent, for the purpose of abating a nuisance on adjacent lands;[4] or in refusing to take proper care of and provide for a person sick with a disease dangerous to the community;[5] or in carrying a well person to a small-pox hospital and confining him there, so that he contracts the disease;[6] or in treating a patient at a hospital carelessly and unskillfully.[7]

SEC. 162. The same doctrine was sustained in a case where suit was instituted against a city for the negligence of its officers or agents in executing sanitary regulations adopted to prevent the spread of small-pox. A statute of the State provided that the city council should have power to establish a board of health and to invest it with powers and duties necessary to secure the people of the city against contagious and malignant diseases. It was alleged that the agents and employes of the city requested and directed plaintiff to assist in taking a coffin, in which the corpse of a person who had died of small-pox was deposited, without informing him of this fact, and without having cleansed the house in which the coffin lay; and that plaintiff went to his home, and soon after had small-pox, and from him several of his children contracted the disease and died. On demurrer it was held that the city

[1] Bamber v. City of Rochester, 26 Hun, 587; 97 N. Y. 625.

[2] Bryant v. St. Paul, 33 Minn. 289.

[3] Lynde v. Rockland, 66 Me. 309; Mitchell v. Rockland, 41 id. 363; 45 id. 496; 52 id. 118; Brown v. Murdock, 140 Mass. 314.

[4] Cavanagh v. Boston, 139 Mass. 426; Lemon v. Newton, 134 id. 176.

[5] White v. Marshfield, 48 Vt. 20.

[6] Barbour v. City of Ellsworth, 67 Me. 294. Compare, however, Tormey v. Mayor of New York, 12 Hun, 542.

[7] Murtagh v. St. Louis, 44 Mo. 479.

was not liable.[1] In another case, it appeared that one Conway was employed as a nurse in a pest-house by order of the selectmen of the town. He remained there several weeks, and was then allowed by them to depart, infected in person and in clothing, and to return to his own home; in consequence of which the plaintiff, an inmate of the house, caught the infection, lost the sight of one eye, became much disfigured and suffered other damage; yet it was held that the town was not liable, the statute giving no remedy against the town to any one injured by reason of the negligence, ignorance or inefficiency of the town officers or those employed by them in these matters.[2]

Responsibility of board of health.

SEC. 163. The liability of a board of health, *as a corporation*, to persons injured by the acts of its officers and agents, depends upon the statute under which it is constituted. The extent of the liability, if any, is wholly within the discretion of the sovereign power.[3] A consideration of the various statutory provisions in reference to the creation, duties and powers of boards of health, as corporations, leaves little room to doubt that the powers conferred upon them are a part of the police power of the State, and, therefore, governmental in character, and that their functions are to be exercised exclusively for public purposes. The sole object of the legislature in creating these corporate boards is to protect the people of the State from contagious and infectious diseases, by their instrumentality, and to preserve and promote the public health. Such powers and duties are of a purely public nature; they cannot be exercised for any private advantage or emolument of the corporation. These boards are exempt, then, from liability in tort for the same reason which secures immu-

[1] Ogg v. City of Lansing, 35 Iowa, 495.

[2] Brown v. Vinalhaven, 65 Me. 402. *See, also*, City of Richmond v. Long's Admrs., 17 Gratt. 375.

[3] Barnes v. Dist. Columbia, 91 U. S. 540. *See* Bridge Co. v. Board of Health, 8 El. & Bl. 801.

nity to municipal corporations, in so far as they are governmental agencies of the State. There is no remedy against them for wrongs, unless a remedy has been provided by statute. "And the mere fact that the boards of health are created corporations with power to sue and be sued does not, of itself, authorize a suit against them for every thing, but this must be taken to mean that such artificial bodies may be sued, like individuals, for all those matters and things for which they are legally liable. To determine the liability, we must look to the principles of law applicable to such matters."[1] The governing principle is,[2] that where a corporate body, whether of a municipal or private character, owes a specific duty to an individual, an action will lie for a breach or neglect of that duty, whenever such breach or neglect has occasioned an injury to that individual; but if such corporation owes a duty to *the public*, and either neglects it or performs it in a wrongful manner, although every individual composing that public is injured, one more, another less, yet no one can have a private remedy, at the common law.

Individual liability of members.

SEC. 164. It is a familiar principle of the law that a judicial officer is never responsible in damages for any errors or mistakes he may make in his judicial capacity, in any case, at least, where he has jurisdiction to act.[3] And a like immunity is extended to all persons who execute any judicial process which is regularly issued upon the judgment or order of a court or judicial officer having jurisdiction of the subject-matter.[4] This exemption from

[1] Forbes v. Board of Health of Escambia Co., 44 Alb. L. J. 349, (Fla.); Jones v. New Haven, 34 Conn. 1; Finch v. Board of Education, 30 Ohio St. 37; Hill v. Boston, 122 Mass. 344; McDonald v. Mass. Gen. Hospital, 120 id. 432; Benton v. Trustees Boston City Hospital, 140 id. 13; Summers v. County of Daviess, 103 Ind. 262; Sherbourne v. Yuba County, 21 Cal. 113. Compare, Carrington v. St. Louis, 89 Mo. 208.

[2] Freeholders of Sussex v. Strader, 3 Harr. (N. J.) 108; Throop on Pub. Officers, § 708.

[3] 1 Chitty Pl. 78; 2 Hill on Torts, 174.

[4] Field on Damages, § 762.

liability is further extended to all persons exercising legislative functions, under statutes, and to those upon whom a duty is imposed by law accompanied by a discretionary power; so that they are not responsible in damages for any act in the exercise of those functions or the performance of that duty, if they act in good faith and within the general scope of the powers conferred.[1] These principles, in many cases, will protect the members of the constituent body of a municipal corporation, and of a board of health, from individual liability for errors and mistakes in the discharge of official duty, at least where they act within the general scope of the authority conferred upon them.

Extent of liability.

SEC. 165. The principles just stated are applicable only to such acts of public officers as are done in the performance of *quasi*-judicial functions. But the functions of boards of health and their officers are chiefly of an administrative or ministerial character; and it is to be noted, that neither the principles cited nor any other principles of law will afford protection to public officers, who proceed improperly, in excess of their just authority, although under color of office and a claim of right, to invade and impair either public or private rights.[2] Nor do such public officers possess any special immunity from responsibility for positive wrongful acts, as in creating or maintaining nuisances,[3] or in performing their duties in a grossly negligent manner,[4] or with reckless disregard of the rights of private individuals. An officer discharging a public duty imposed by law is only exempted from liability for inevitable injuries resulting from his acts done in the line of his duty; he is responsible for all the

[1] 24 Am. L. Rev. 569, 570. *See* Wilson v. Mayor of New York, 1 Den. 595; Mills v. Brooklyn, 32 N. Y. 489.

[2] Mill v. Hawker L. R., 9 Exch. 309; Brown v. Murdock, 140 Mass. 314; Cavanagh v. Boston, 139 id. 426; Lemon v. Newton, 134 id. 476; Cushing v. Bedford, 125 id. 526. *See* Atwater v. Trustees of Canandaigua, 37 N. Y. State Rep'r, 234.

[3] Hoag v. Bd. of Commissioners, 60 Ind. 511.

[4] Aaron v. Broiles, 64 Tex. 316.

consequences of inexcusable negligence.[1] The same rule of exemption applies to persons employed by public officers to execute their orders. If the orders are lawful, those executing them are not liable for incidental injuries occasioned, if they act in good faith. To show bad faith, it must be proved that the employes willfully and intentionally did unnecessary injury, or that they did necessary acts in an improper manner for the purpose of causing injury.[2]

It is also to be remarked, as a general rule, that public officers and agents, such as the members of boards of health, are not responsible for the misfeasances, or positive wrongs, or for the non-feasances, or negligences or omissions of duty, of the sub-agents, or servants or other persons, properly employed by and under them, in the discharge of their official duties. They do not employ agents, clerks or servants for their own benefit, but for that of the community at large.[3] It is their duty, however, to use care in the selection of subordinates, to retain control over them in the discharge of their duties, and to enforce such measures of care and vigilance as will insure the highest practicable degree of efficiency in the service.

Liability for suppressing alleged nuisances.

SEC. 166. The *quasi*-judicial and the purely administrative or ministerial functions of boards of health are often so intimately blended in their official acts, that it becomes a matter of very serious difficulty to determine the precise degree of responsibility attaching to the individual members and officers. This difficulty most frequently arises in those cases where the authorities take action against nuisances and other matters detrimental to the public health.

It is well-settled law, that the legislature cannot dele-

[1] Am. Print Works v. Lawrence, 1 Zabr. 248.

[2] Conway v. Russell, 151 Mass. 581.

[3] Murphy v. Comm rs. of Emigration, 28 N. Y. 134; Sawyer v. Corse, 17 Gratt. (Va.) 230; City of Richmond v. Long's Admrs., ib. 375.

gate to municipal authorities or to any body of men the power to declare what is or what is not a nuisance, or to define the acts or things which shall be deemed to be nuisances; and that, consequently, a grant of power to municipal authorities or to boards health "to prevent and remove" nuisances, or "to define nuisances," or "to declare what shall be nuisances," will not authorize the summary condemnation by such authorities of any act or thing as a nuisance which has not in fact that character, or which is not recognized as such at the common law. Therefore, in the exercise of the general power conferred upon them in respect of the suppression of nuisances, the municipal and other local authorities act always at their peril, and if they condemn any act or thing as a nuisance, they must be prepared to justify their acts by establishing such facts as will prove the nuisance. Their acts and their determinations, however formal, are subject, in one way or another, to judicial review, and may always be challenged in the proper judicial proceedings. The *extent of proof* necessary to establish justification varies according to the nature and character of the proceedings in which the justification is pleaded. It will be convenient now to consider that class of cases where the public officers have actually removed an alleged nuisance, or otherwise interfered with private property in the interest of the public health or safety, and suit is brought against them for damages sustained by reason of their acts in that behalf. Some difficulties may, perhaps, be removed by classifying these cases and treating them accordingly. In this way, too, some of the apparent discrepancies in the judicial decisions may be reconciled.

Justifying under statute.

SEC. 167. 1. Where a legislative act declares any act or thing to be a nuisance, and authorizes its summary suppression, proof that the act or thing was of the character prescribed in the statute is sufficient to justify the

public officers in an action for damages, irrespective of the question whether the particular act or thing was in fact a nuisance. That which the legislature has declared to be a nuisance, *is* a nuisance, and evidence to the contrary is inadmissible. The only question of law is whether the statute itself is constitutional.[1]

But, in all such cases, the public officers must show, in order to establish a defense, that they acted strictly within the scope of the authority given by the statute, and that the character of the thing acted against was precisely that specified in the statute. There is no room for the exercise of judgment or discretion on the part of the officers, and for any act not expressly authorized by the statute they are responsible. The finding or adjudication of any municipal authorities or local board of health will be no protection, if made *ex parte*, without notice to the party charged with the nuisance, and opportunity afforded him to be heard; and if the statute attempts to make such finding or adjudication final and conclusive against the party, it will be unconstitutional, unless it has secured to him such right of appeal, or such right to a hearing before judgment passes against him, or such right to a revision of the findings by a jury in the ordinary judicial tribunals, as will constitute what is recognized as "due process of law."[2] But it can never be necessary to construe the statute in a way that will render it unconstitutional for denying the right to a hearing or to a trial by jury; if it authorizes summary proceedings, without notice, against the thing declared to be a nuisance, the hearing and the trial, upon all the facts,

[1] Powell v. Pennsylvania, 127 U. S. 678; Mugler v. Kansas, 123 id. 623; Fisher v. McGirr, 1 Gray, 1; Blair v. Forehand, 100 Mass. 136; Miller v. Horton, 125 id. 540; State v. Addington, 77 Mo. 110; Carleton v. Rugg, 149 Mass. 450; Weller v. Snover, 42 N. J. L. 341; Shivers v. Newton, 45 id. 469; Lawton v. Steele, 119 N. Y. 226.

[2] Cases in last preceding note. Belcher v. Farrar, 8 Allen, 325, 328; Newark Horse R. Co. v. Hunt, 50 N. J. L. 308; Davis v. Howell, 47 id. 280; Hutton v. City of Camden, 39 id. 122; Cooper v. Wandsworth Dist. Bd. Wks., 14 C. B. N. S. 180; Vestry of St. James v. Feary, 24 Q. B. D. 703.

may be had in an action subsequently brought by the owner for alleged trespass. Yet, if the statute provides for notice to the owner of the property before judgment passes against him declaring his property to be a nuisance, within the terms of the statute, or if he has in fact due notice, and he refuses to take advantage of an opportunity afforded him to contest the question of nuisance, he cannot thereafter complain that the judgment is to be held conclusive against him upon the facts adjudicated.[1]

Justifying exercise of discretionary power.

SEC. 168. 2. But where the legislative act authorizes and directs executive officers to suppress and abate certain specified things whenever, in the judgment of those officers, those things are or may become dangerous to the public health, the question as to the existence of the condition upon which the authority to act depends is not open to be determined by the court in an action to recover damages sustained by the official exercise of the statutory authority. In other words, the act of the public officer, in abating the supposed nuisance, will be excused upon proof merely that the thing abated or destroyed was of the character defined in the statute, and that in his judgment, exercised in good faith and upon reasonable grounds, the condition existed upon which his authority to act depended.

Thus, in an action of trespass for killing plaintiff's horses, defendants justified as assistants of the State board of health, averring that, under the laws of the State, whenever any contagious disease should break out among animals in any locality, and it should appear, in their judgment, that such disease was not likely to yield to any remedial treatment, and, whenever any horses should be affected with the disease known as glanders, and it

[1] Metropolitan Board of Health v. Heister, 37 N. Y. 661; Van Wormer v. Mayor of Albany, 15 Wend. 262; 18 id. 169. Explained in Reynolds v. Schultz, 34 How. Pr. 147, 156.

should appear, in the judgment of the board of health, or its assistants, that such disease was likely to spread to other animals, it was their duty to cause the animals afflicted with such disease to be slaughtered. The defendants further averred, that the horses in question were affected with glanders, that, in the judgment of the defendants, the disease was not likely to yield to any remedial treatment, and threatened to spread among other animals, and that, therefore, they caused the horses to be killed. A general demurrer to the pleas was overruled, and the justification was held to be good. The court decided that the statutes in question, which declared horses afflicted with glanders to be common nuisances, were not unconstitutional, as operating to deprive persons of property without due process of law, because, although they authorized the abatement of such nuisances in advance of a judicial adjudication of the fact of nuisance, yet they did not make the determination of the officials, *as to that fact*, conclusive, and only permitted their acts in abating the nuisance to be justified by proof of the actual existence of such nuisance. The effect of this decision of the court was, that the judgment of the officials, exercised in good faith, upon the existence of the other conditions upon which their authority depended, that is to say, upon the question whether the disease was likely to yield to remedial treatment and was likely to spread, was final and conclusive.[1]

The court said: "It was within the power of the legislature to authorize such officials to abate such nuisance, without other prerequisites to the exercise of such authority save the existence of the prescribed disease, of which they must, of course, primarily form a judgment. * * * The judgment of the officials in respect to the virulence of the disease, or its threatened spread, is not an adjudication upon the existence of a

[1] Newark Horse Ry. Co. v. Hunt, 50 N. J. L. 308. *See* Miller v. Horton, 152 Mass. 540.

nuisance, for that the law has declared to exist whenever a disease of the specified kind exists. The requirement that the officials, before proceeding to abate, shall form a judgment or opinion respecting the probabilities of cure, or the likelihood of the disease spreading, is in the nature of a limitation on the officials' power in ease of the property-owner, and to afford him an opportunity, under certain circumstances, to retain property, which is, in fact, a common nuisance, and which might fairly be required to be abated. * * * If the legislature by these acts has made the determination of these officials, as to the existence of the common nuisance, a conclusive adjudication upon the rights of the property-owner, then it is perfectly obvious that this legislation cannot be supported."[1]

So, too, it has been held that the decision of surveyors of highways, acting within the scope of their authority, that a structure in a highway is an obstruction to public travel, is conclusive; and that evidence is not admissible to show that a particular structure was not in fact an obstruction, or even to show that the surveyors did not act in good faith in deciding that it was an obstruction to public travel. In such cases, the courts will not review the judgment of the surveyors.[2]

SEC. 169. But the proper limitations upon this doctrine are suggested in the following case:[3] An action was brought for the value of hogs carried away by the defendant. The defense was that the hogs were dead and were removed under direction of the city inspector by virtue of ordinances, relating to that officer's department,—the one relied upon providing that "he shall cause all putrid and unsound beef, pork, fish, hides or skins, *all dead animals*, and every putrid, offensive, unsound or un-

[1] Citing Hutton v. City of Camden, 39 N. J. L. 122.

[2] Benjamin v. Wheeler, 8 Gray, 409; 15 id. 486; Heald v. Lang, 98 Mass. 581; Bay State Brick Co. v. Foster, 115 id. 431; Morrison v. Howe, 120 id. 565; Denniston v. Clark, 125 id. 216; Johnson v. Dunn, 134 id. 522.

[3] Underwood v. Green, 42 N. Y. 140.

wholesome substance found in any street or other place in the city, to be forthwith removed or disposed of by removal beyond the limits of the city, or otherwise, *so as most effectually to secure the public health.*" The defendant was the offal contractor for the city. The hogs were taken away by his direction, in the presence of plaintiff's agent, who was ready to receive the hogs from the cars in which they had arrived, and who forbade the cartman taking them. The court, deciding in favor of plaintiff's right to recover, placed the decision upon the ground that the ordinance should receive a reasonable construction. "This ordinance, so far as it relates to '*dead animals*,' cannot be literally construed, because if it should be, a city inspector might with impunity remove dead animals provided for food. The connection in which the terms are used, and the object of the ordinance, render it quite manifest that only such dead animals were meant as were nuisances or dangerous or deleterious to public health. The objects mentioned in the ordinance were required to be removed and disposed of "so as most effectually to secure the public health;" and it seems to follow, that it is only when the public health is in some way endangered, or is likely to be, that the removal is authorized or that the inspector has jurisdiction. * * * While it must be conceded that the inspector, in the discharge of his duties under this ordinance, is clothed with a judicial discretion, yet he is an officer of a limited and special jurisdiction and when in any given case his power is challenged, he must prove some facts invoking or tending to invoke the exercise of his discretion. For instance, he could not go into a store and arbitrarily confiscate a stock of hides merely upon the allegation that they were dangerous to public health. He would have to show that they were putrid or in some way dangerous to public health, and when he had shown this, then he would have made a case calling for the exercise of his discretion. In

this case, the defendant should have shown that these hogs emitted an offensive odor, or that the plaintiff had abandoned, or neglected or refused to take care of or remove them, or some fact tending to show that they were likely to become dangerous to the public health. In the absence of any proof showing any of these facts, and while the plaintiff's agent was there ready and willing to take care of the hogs, there certainly was nothing calling for the exercise of any judicial discretion under the ordinance in question."

Justifying under ordinance.

SEC. 170. 3. Where an executive officer justifies under an ordinance, or general regulation of a board of health, declaring certain things to be nuisances and authorizing their summary abatement, and it appears that the thing removed or destroyed was of the character defined in the ordinance or regulation, the plea is good, first, where it appears that the ordinance or regulation is expressly authorized by legislative act, or, secondly, where it appears that the ordinance or regulation is a *reasonable exercise* of powers granted by the legislature in general terms. In such case, it is only necessary to show that the particular thing was of the character specified in the ordinance or regulation, and it is not necessary to show further that it was in fact a nuisance; nor will evidence be admissible to show, on the other hand, that it was not in fact a nuisance, if it clearly falls within the terms of the law.

In either of these two cases, the local law has the force of a statute and is to be treated as such. The thing prohibited is as much a nuisance, as if it had been declared to be such by statute. The remedy of abatement would exist in such case just as in analogous cases of common-law nuisances. The reason for it is equally strong; there may be no other adequate remedy, no other that can meet the necessities of the case. On this ground the familiar laws forbidding the erection of wooden buildings within fire

limits and authorizing summary proceedings against buildings erected in violation of the laws, are sustained.[1] The questions chiefly litigated in this class of cases are the constitutionality of the act of the legislature, and whether the ordinance or regulation is expressly or impliedly authorized by the act, or whether the local legislation is a reasonable exercise of the authority granted. The principles upon which these questions are resolved have been elsewhere explained. It is only necessary here to observe that, when the validity of the ordinance or regulation is established, as matter of law, evidence is inadmissible to show that the particular thing in question, although within the letter of the law, had not in fact the character defined in the law as constituting a nuisance, or as authorizing summary proceedings.

Justifying under special order.

§ 171. 4. Where executive officers seek to justify their acts by showing that the acts were done in pursuance of a special order made by local authorities, the plea will be of no avail, unless it clearly appears that the authorities had jurisdiction to make the order, and that the proceedings upon which the order is founded were in all respects regular. If the proceedings were had under statutory authority, it is essential to the validity of any order made therein that they should have been instituted and conducted in precise conformity to the requirements of the statute. The order must have been made upon notice to the party affected, and after opportunity given him to be heard. In short, the order will afford no protection to those who execute it, unless made by competent authority, having jurisdiction of the subject-matter and of the parties, and after proceedings such as constitute, within

[1] Harvey v. Dewoody, 18 Ark. 252; Green v. Savannah, 6 Ga. 1; King v. Davenport, 98 Ill. 305; Baumgartner v. Hasty, 100 Ind. 575; Cole v. Kegler, 64 Iowa, 59; Train v. Boston Disinfecting Co., 144 Mass. 523; Hennessy v. St. Paul, 37 Fed. Rep. 565; Metro. Bd. of Health v. Heister, 37 N. Y. 661; Fields v. Stokley, 99 Penn. St. 306.

accepted definitions, "due process of law." If it should appear that the order directed the abatement of a particular thing as a nuisance; that the authorities carefully inspected and examined the supposed cause of the nuisance, and in the exercise of their best judgment, on reasonable grounds, condemned it; but that, for one reason or another, it was impracticable to give notice to the party responsible for the objectionable conditions; it is not to be supposed that officers are perfectly shielded from responsibility in executing the order, because of the careful manner in which the proceedings were conducted. The more careful the preliminary proceedings, the less the risk in enforcing the order, but if, in fact, the thing condemned was not a nuisance, the owner will have been deprived of his property without due process of law. The right of summary abatement must be understood to be the right to abate, without formal legal proceedings first taken, any thing that constitutes a *nuisance*, but not any thing that is innocent. He who resorts to this remedy, does so at his peril. If this shall seem a harsh doctrine, as applied to the cases now under consideration, its effect may be much softened by legislation which shall cast upon the owner the burden of proving affirmatively that his property, condemned and destroyed by direction of a board of health, after *ex parte* proceedings or no proceedings at all, was not in fact the cause of any nuisance; and which shall also provide for compensation to the owner, in case judgment goes against the public officers in an action of trespass for destroying the property.

Justifying summary proceedings.

SEC. 172. 5. Another class of cases is where power is conferred and a duty imposed upon the local authorities to prevent and remove nuisances, and to abate the sources of disease and nuisances injurious to the public health. It is impossible to frame regulations which will reach all such cases, and it, therefore, frequently becomes necessary

for the authorities to take action in particular cases not governed by any such regulations. For example, there may be prevalent in a city or town a pestilential disease, and it becomes the immediate duty of the authorities to locate, if possible, the source of the disease and to remove it promptly and summarily, and also to remove such things as furnish conditions favorable to the spread or continuance of the disease. Having made an examination, and in the exercise of a fair and reasonable judgment having located the source of the disease or conditions contributing to its continuance, or likely to prove favorable to its spread, may the authorities abate the supposed evil, without incurring liability, or, in other words, is their finding and judgment upon the fact of the nuisance final and conclusive?

It is to be noted that any thing is a common nuisance, and summarily abatable as such, which endangers the public health; and that every thing is deemed to endanger the public health, which either puts it in immediate and actual peril, or which must do so in the absence of a degree of care and prudence the continual exercise of which cannot reasonably be expected or required.[1] And it is to be further noted, that there is a strong presumption, favored by the law, that what has been done under the sanction of official duty, in the discharge of public functions, in good faith, for the public benefit and without private advantage, has been rightly done. Any doubt as to the necessity or propriety of the official action, provided it be within the general scope of the official authority, must be resolved against him who impeaches it, and in favor of the public officer.[2]

Rule as to liability.

SEC. 173. It may, then, safely be affirmed, that the health authorities are liable in trespass for property in-

[1] Stephen's Dig. Crim. Law, 127.

[2] *See* Rudolphe v. New Orleans, 11 La. Ann. 242.

jured or destroyed by them or by their direction, in the discharge of their duty to remove summarily every thing detrimental to the public health, if it clearly appears that the property removed did not in fact in any way endanger the public health; for in such case their act was without authority. But they will not be liable, if they acted in good faith and with reasonable and probable cause to believe that the thing proceeded against did endanger the public health, if, upon all the evidence, there is any doubt as to the necessity and propriety of their action.[1] It would seem that the doctrine embodied in this rule is as favorable to public officers as any that can be framed, in view of the constitutional guaranties securing the inviolability of private rights of property.

The objection most strenuously urged against every rule that would charge the health officials with liability in the class of cases now under consideration is, that officers and members of boards of health are *quasi*-judicial officers, who are, as a general rule, exempt from civil liability for official acts. Like judicial officers, as to whom such rule is without qualification, *quasi*-judicial officers cannot, as a general proposition, be called upon to respond in damages to a private individual for the honest exercise of their judgment upon matters within their jurisdiction, however erroneous or misguided the judgment may be. But, in

[1] Applying this rule to the often cited case of Raymond v. Fish, 51 Conn. 80, it will appear that the case was correctly decided, although on erroneous principles. The material facts were; that diseases of a malignant character were raging in a small village; that the town board concluded, after examination, that certain brush in the river near by, with the oysters thereon, belonging to plaintiff, was the probable source of the diseases or at least furnished conditions favorable to its continuance; that the board declared the brush and the oysters to be a nuisance, and directed the plaintiff to remove them; and that, upon his failure to do so, they were removed by the board. In the case certified it was found, that "neither the brush, nor oysters, nor both combined, were the origin or producing cause of the diseases," *but the case leaves it undetermined "whether they may or may not have furnished conditions favorable to the spread and continuance of the diseases, and making them more malignant than they otherwise would have been."* It was held that plaintiff could not recover the value of the brush and oysters destroyed, from the members of the board.

order to render the *quasi*-judicial officer exempt, he must, like the judicial officer, keep within the fixed limits of his jurisdiction. For if he exceeds his jurisdiction, except as the result of a mistake of fact, he will be liable to the party injured. But, inasmuch as the law quite universally protects private property from appropriation to the public use without compensation, the judgment or discretion of the *quasi*-judicial officer, although exercised honestly and in good faith, will not protect him where, by virtue of it, he undertakes to invade the private property rights of others to whom no redress is given other than an action against the officer.[1]

How far protected as quasi-judicial officers.

SEC. 174. *Quasi*-judicial functions are defined to be "those which lie midway between the judicial and the ministerial ones. The lines separating them from such as are wholly judicial or wholly ministerial are necessarily indistinct; but in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi*-judicial."[2] Admitting, then, that boards of health are clothed with *quasi*-judicial functions which are to be exercised in suppressing matters detrimental to public health, by what test is it to be determined whether in discharging those functions in a given case they have acted within their jurisdiction, so as to be exempt from liability for error of judgment? The test is the question whether fair notice was given to the owner before depriving him of his property; if notice was not given, and no opportunity for a hearing was offered, the proceedings resulting in the judgment condemning the property, however formal or carefully conducted in other respects, lacked the character of judicial proceedings, were not

[1] *See* Miller v. Horton, 152 Mass. 540; 32 Cent. L. J. 250, with note; McCord v. High, 24 Iowa, 336.

[2] Bishop Non-Contr. Law, §§ 785, 786.

according to due process of law, and are not conclusive against the party affected upon the questions of fact involved.[1] But if due notice was given, and judgment passed against him, upon his default, or after a hearing, the proceedings being authorized by statute, the final determination is conclusive upon the facts adjudicated. It cannot be impeached or set aside for error or mistake of judgment nor reviewed in the light of new or additional facts. No court will enjoin its being carried into effect. The officer or board to whom such determination is confided, and all those employed to carry it into effect, or who may have occasion to act upon it, are protected by it, and may safely rely upon its validity for their defense. In this sense, the determination by the health officials has a judicial character, and it is because of their ability to make such a determination, in proceedings not conducted in a regular judicial forum, nor in the strict and formal manner suited to such a tribunal, that these officials are so often and properly said to be clothed with *extraordiary* powers.

SEC. 175. It must not be inferred that the board of health is required, in every instance, to proceed upon notice and a hearing in abating nuisances, or that they will necessarily be liable for damages if they do not so proceed. In respect to particular nuisances, it is intended that their action shall be prompt and summary.[2] They are thus clothed with an extraordinary power and a most important duty. It is their right and duty to abate every nuisance injurious to the public health by summary measures. This cannot be done by any other agency, except that of an individual who may happen to be specially and peculiarly injured by the nuisance; and even

[1] *See* Miller v. Horton, 152 Mass. 540; Hutton v. City of Camden, 39 N. J. L. 125. *See* Upjohn v. Richland Township, 46 Mich. 542; People v. Wood, 62 Hun, 131; Hochstrasser v. Martin, ib. 165; Health Department v. Trinity Church, 45 Alb. L. J. 192, N. Y. Comm. Pleas.

[2] *See* Salem v. Eastern R. Co., 98 Mass. 431.

he can only abate it to the extent necessary to protect his own rights. In exerting the remedy, however, the authorities assume the burden of showing that the character of the nuisance is such as to justify their action, but they are aided in this by the presumption that their acts are rightly done, and this presumption is sufficient to resolve in their favor every doubt as to the necessity or propriety of their action.[1]

Statutory exemption from liability.

SEC. 176. It has been thought that if boards of health, in taking action to remove matters detrimental to the public health, are to decide at their peril, they will not decide at all. They have no greater interest in such matters than other individuals have, further than to do their duty; but duty hampered by liability for damages for errors committed in its discharge is said to be a motive of very little power. Accordingly it is provided by statute in at least one State, that no suit shall be maintained to recover damages against a board of health, its officers or agents, founded on their proceedings in the abatement of nuisances and causes of disease, dangerous to the public health, unless it can be shown in such suit that the alleged nuisance and cause of disease did not in fact exist, or that it was not hazardous and prejudicial to the public health, and unless it be further shown that the board acted without reasonable and probable cause to believe that such nuisance did exist, and that it was in fact hazardous and prejudicial to the public health.[2] A provision in the act[3] creating a board of health in the city of New York exempts the members, officers and agents of the board from all personal liability for any act done or omitted by either of them, in good faith, and in the exer-

[1] The act creating a board of health for the city of New York provides, that "the actions, proceedings, authority and orders of said board shall at all times be regarded as in their nature judicial, and be treated as *prima facie* just and legal." New York Laws 1882, chap. 410, § 620.

[2] New Jersey Pub. Laws 1887, p. 80; State v. Neidt, 19 Atl. Rep'r, 318.

[3] New York Laws 1882, chap. 410, § 599.

cise of ordinary discretion, on behalf of the board, or pursuant to its regulations or the health laws. And any person whose property may have been unjustly or illegally destroyed or injured, pursuant to any order, regulation, or action of the board of health, or its agents, for which no personal liability may exist, by reason of the exemption just mentioned, may maintain a proper action against the board for the recovery of suitable compensation or damages, to be paid by and from the funds of the board. Every such suit must, however, be brought within six months after the cause of action arose, and the recovery is to be limited to the damages actually suffered.

CHAPTER VIII.

NUISANCES.

SEC. 177. Definition.
178. Scope of the law of nuisances.
179. Tests to determine question of nuisance.
180. Locality.
181. What is a convenient place.
182. Extent of annoyance.
185. Character of the act or thing itself.
187. Examples of nuisances.

Definition.

SEC. 177. It is impracticable to give a precise technical definition of what constitutes a nuisance at common law, but the term itself is sufficiently well understood and means, literally, "annoyance, any thing that worketh hurt, inconvenience or damage."[1] And although it is always a question of fact whether a nuisance exists, in a particular case,[2] under all the circumstances, it may be said, generally, that any thing which is detrimental to health, or which threatens danger to persons or property, may be regarded and dealt with as a nuisance. If it affects the rights of the community in general, and not merely of a few persons, if it damages or menaces all persons who come within the sphere of its operation, though it may vary in its effects on individuals, it amounts to a common or public nuisance.[3] An eminent writer and jurist has defined a common nuisance as an act not warranted by law, or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all citizens. Every person commits a common nuisance, within

[1] Rex v. White, 1 Burr. 333; Rex v. Davey, 5 Esp. 217.

[2] Hart v. Mayor of Albany, 3 Pai. Ch. 218; People v. Carpenter, 1 Mich. 273.

[3] Soltau v. DeHeld, 2 Sim. (N. S.) 133; King v. Morris & Essex R. Co., 18 N. J. Eq. 397; Westcott v. Middleton, 43 id. 478; Lansing v. Smith, 8 Cow. 146; Comm. v. Miller, 139 Penn. St. 77.

this definition, who does any thing which endangers the health, life or property of the public, or any considerable part of it; and every thing is deemed to endanger health, life or property, which either causes actual danger thereto, or which must do so in the absence of a degree of prudence and care, the continual exercise of which cannot reasonably be expected.[1]

Scope of the law of nuisances.

SEC. 178. The definition just given furnishes an exact criterion by which to determine whether a particular thing, act, or omission, constitutes a nuisance within the scope of the criminal law. If the unwarranted act or thing complained of does in fact operate injuriously upon the rights of the public, it is a common nuisance, irrespective of any motive or intent, wrongful or innocent, on the part of the person charged.[2] No excuse or defense is possible. The fact being established, that the act or thing endangers the life, health or property of the public, or any considerable part of it, the offense is proved, and there can be no justification. Every person is absolutely bound so to conduct himself, and so to exercise what are regarded as his natural or personal rights, as not to interfere unnecessarily or unreasonably with other persons in the exercise of rights common to all citizens. Every breach of this obligation constitutes a nuisance. Such has always been the law; the principle has been invariable. The whole

[1] Stephen's Digest Crim. Law, 127; Pollock on Torts, 324.

[2] But an act otherwise innocent may be a nuisance, if done maliciously. Rideout v. Knox, 148 Mass. 368; Flaherty v. Moran, 81 Mich. 52; Medford v. Levy, 31 W. Va. 649. That generally the motive or intent is immaterial, *see* Fletcher v. Rylands, L. R., 1 Exch. 263; Ashby v. White, 1 Smith's L. C. 472; Bonnell v. Smith, 53 Iowa, 281; Mohan v. Brown, 13 Wend. 261; Radcliff v. Mayor of New York, 4 N. Y. 195; Olmsted v. Rich, 6 N. Y. Suppl. 826; S. C., 25 N. Y. State Rep'r, 271; South Royalton Bank v. Suffolk Bank, 27 Vt. 505. *See, also*, Pickard v. Collins, 23 Barb. 444. It has even been said that if the use to which property is put or the condition in which it is kept does not in fact constitute a nuisance, liability for maintaining it does not depend on the question whether such use by the owner is reasonable or otherwise, but simply on the question of injury to others. Ray on Negligence, 9; Reinhardt v. Mentasti, L. R., 42 C. D. 685; Hurlbert v. McCune, 55 Conn. 31.

doctrine of nuisances, as it now exists, may, therefore, fairly be said to be a development of the maxim, that every person is bound so to conduct himself, and so to use and enjoy his own property, as not to cause unnecessary annoyance or obstruction to others. In this view, society is based upon a system of reciprocal rights and duties among the members composing it; the rights of each individual being conditioned by the equal rights of all other persons, to the extent that may be necessary to secure the largest measure of freedom to all. The law of nuisances is that branch of jurisprudence which is designed to determine, enforce and maintain the proper adjustment of these reciprocal rights and duties, particularly in respect of the uses of property. It ascertains and fixes the limits of ownership, applying the principle, that one may not use his own so that he injure another, or so that he violate a duty, relative or absolute, to which he himself is subject: but that he may turn or apply his own to every use or purpose which is not inconsistent with that general or vague restriction.[1]

Tests to determine the question of nuisance.

SEC. 179. Precisely what is a reasonable use of one's property cannot be determined by any useful general rules, but must depend upon the circumstances of each case. A use of property in one locality or under some circumstances may be reasonable and lawful, which, under other conditions, would be unreasonable and a nuisance.[2] So that the question whether a particular act or thing constitutes a nuisance depends for its determination upon a consideration of all the circumstances of the case, and the most important and influential circumstances to be considered are locality, the extent of the annoyance, and the nature of the act or thing itself. For example, the continuance of a business, which is admitted or proved to be

[1] Austin, Lect. XLVII.

[2] Campbell v. Seaman, 63 N. Y. 568; Fertilizer Co. v. Malone, 73 Md. 268.

a public nuisance, cannot be justified by the length of time it has been carried on, or the amount of capital invested in it, or its influence upon the prosperity of the community; yet, where the fact of the public nuisance is controverted, all these matters are proper to be considered by the jury. The defendant is entitled to have the character of the business determined, not by the application of any abstract principles, but in the light of all the conditions peculiar to the business, and in view of its locality and the presence of other similar establishments in that locality, the length of time it has been there conducted, and its importance to the public.[1]

Locality.

SEC. 180. As to locality,[2] it is obvious that, in order that the act or thing should constitute a public nuisance, it must be in a public place, or in a place where it is calculated to become an offense to all persons of ordinary sensibilities who, in the exercise of a legal right, come

[1] Comm. v. Miller, 139 Penn. St. 77; Ballentine v. Webb, 84 Mich. 38.

[2] Another view of the doctrine expressed in the text is afforded by the cases in which the owners of premises are held responsible for injuries occasioned by acts done upon the premises, but so near to public places or highways, as to constitute unlawful impediments to the free and convenient use of such places and highways by the public. In Beck v. Carter, 68 N. Y. 283, it was held, that one who makes an excavation on his own land, adjoining a public way, and leaves it unprotected, is liable for an injury to a person who, in passing along the way, falls into the excavation. If the excavation is adjacent to the highway, or so near thereto as to make the use of the highway unsafe or dangerous, the person making it will be answerable to a traveler who, while using ordinary care, falls into it and is injured, although the excavation is wholly on the land of the defendant. So, too, while temporary obstructions in a street, which are necessary during the erection of a building upon an adjacent lot, do not constitute a nuisance, if they are not kept there an unreasonable length of time; yet the owner will not be justified in leaving an excavation, made by him, without proper barriers and safeguards to prevent accidents; nor will the fact that there is a good sidewalk on the opposite side of the street be a defense for such neglect. Stuart v. Havens, 17 Neb. 211. *But see* Bond v. Smith *et al.*, 113 N. Y. 378.

In Barnes v. Ward, 9 C. B. 392, it was decided, after much consideration, that the proprietor and occupier of land making an excavation on his own land, but adjoining a public highway, rendering the way unsafe to those who used it with ordinary care, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road, and liable to an action for damages to any one

within the sphere of its operation.[1] That which in itself may be useful or necessary in a large community may become a nuisance in view of the circumstances of the locality in which it exists. On the other hand, that which in itself is likely to cause annoyance, may be innocuous if in a convenient place, as, if it be in a place far removed from habitations and public roads and navigable streams.[2] In such case, as it produces no injurious or offensive effects to any persons, except such as may pass it casually or from curiosity, it is not in a legal sense a nuisance. Certain uses of property, some trades and occupations, the law characterizes as *prima facie* nuisances; that is, the courts take judicial cognizance of the fact, which is, indeed, a matter of notoriety or common knowledge, that such uses of property and such trades and occupa-

injured by reason thereof. The danger thus created may reasonably deter prudent persons from using the way, and so the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance in a highway. This doctrine has always since been recognized in England. Hardcastle v. South Yorkshire Ry. Co., 4 H. & N. 67; Hounsell v. Smyth, 7 C. B. (N. S.) 731; Binks v. South Yorkshire Ry. Co., 3 B. & S. 244; Hadley v. Taylor, L. R., 1 C. P. 53; Wetter v. Dunk, 4 F. & F. 298. It is also followed generally in this country. Norwich v. Breed, 30 Conn. 535; Crogan v. Schiele, 53 id. 186; Young v. Harvey, 16 Ind. 314; Stratton v. Staples, 59 Me. 94; Baltimore & O. R. Co. v. Boteler, 38 Md. 568; Coggswell v. Lexington, 4 Cush. 307; Homan v. Stanley, 66 Penn. St. 464. *But see* an apparent exception in Howland v. Vincent, 10 Metc. 371.

"The enforcement of this rule in regard to excavations made by proprietors of lots adjacent to streets and public grounds in cities and towns, in the prosecution of building enterprises, and in the construction of permanent areas for cellarways, is universally recognized as an obvious and salutary exercise of the common police powers of municipal government; and the omission to provide barriers and signals prescribed by ordinance in such cases for the safety of individuals in the use of thoroughfares, is a failure of duty, charged with all the consequences of negligence, including that of liability for personal injuries of which it is the responsible cause. The true test is, as said by Hoar, J., in Alger v. City of Lowell, 3 Allen, 402, 'not whether the dangerous place is outside of the way, or whether some small slip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk of a traveler, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient.'" Matthews, J., Hayes v. Michigan Central R. Co., 111 U. S. 228, 235.

[1] Ray v. Lynes, 10 Ala. 63; Ellis v. State, 7 Blackf. (Ind.) 534; Comm. v. Perry, 139 Mass. 198; Greene v. Nunnemacher, 36 Wis. 50; Rex v. Pierce, 2 Shower, 327.

[2] State v. St. Louis Bd. of Health, 16 Mo. App. 8.

tions, in a public place, are usually followed by injurious consequences, and they will be declared to be common nuisances, unless clearly shown by the facts and peculiar conditions of the particular case to be of a different character. The very fact that such uses are made of property or such trades and occupations are carried on and prosecuted, in a public place, is, therefore, *prima facie*, sufficient to establish their character as common nuisances. It is not necessary to allege or prove any actual damage or injury flowing from such causes; the injurious effects will be presumed.[1] Formerly, the cases in which this presumption of nuisance would be indulged were very numerous, but so marked has been the improvement in the methods of conducting the so-called offensive trades in recent times that the number of cases in which the presumption may fairly be invoked is constantly diminishing. The question of locality is still of so much importance, however, that it is essential in every case, to determine whether the act or thing, harmful or innocent in itself, is located in such a way as to endanger the life, health or property of persons lawfully within the range of its effects. If it is so situated, or if it is prosecuted in such a place, it is a nuisance, and there can be no excuse for continuing it.[2]

What is a convenient place.

SEC. 181. The question as to what is a convenient place, for the exercise of a noxious trade, for instance, is to be determined by the single test, whether it is prosecuted in a locality where no injurious consequences ensue to persons or property in the vicinity. If injurious consequences do in fact result from prosecuting the trade in that locality, such as amount to an actionable injury to

[1] State v. Taylor, 29 Ind. 517; Hackney v. State, 8 id. 494; Bushnell v. Robeson, 62 Iowa, 540; Green v. Lake, 54 Miss. 540; Attorney-General v. Steward, 20 N. J. Eq. 415; Peck v. Elder, 3 Sandf. (N. Y.) 126; Howard v. Lee, ib. 281; Catlin v. Valentine, 9 Pai. Ch. 375; State v. Atkinson, 23 Vt. 92.

[2] *See* Whitney v. Bartholomew, 21 Conn. 213.

individuals, or such as affect all persons lawfully living or coming near it, it is not a convenient place, and the business is a nuisance.[1] It matters nothing how long the trade may have been prosecuted in that locality. The law is, that no length of time can legalize a public nuisance of any description. Pursuit of a noxious trade in any place is lawful only so long as it does not interfere with the rights of the public, but when it does interfere with those superior rights, it becomes illegal, and no length of time, it is said, can sanctify it, as its exercise is a daily renewal of the offense.[2] Nor is it any justification that when the business was established it was in a convenient place, that is, remote from any neighborhood where it could be offensive or injurious, and that the public has voluntarily come within the reach of the nuisance. "If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it."[3] And it is well-settled law, upon principles already discussed,[4] that even in a case where a business, offensive in its character, has been established in a certain locality by legislative authority, if it afterward becomes a nuisance, by reason of the growth of the neighborhood, or for any other reason, the authority may be withdrawn,

[1] Wood on Nuisances, § 489; Moses v. State, 58 Ind. 185; Ellis v. State, 7 Blackf. (Ind.) 534; Fertilizer Co. v. Malone, 73 Md. 268; People v. Detroit White Lead Works, 82 Mich. 471; Taylor v. People, 6 Park. Cr. 347.

[2] Seacord v. People, 121 Ill. 623; State v. Close, 35 Iowa, 570; Ashbrook v. Comm., 1 Bush (Ky.), 139; Woodyear v. Schaefer, 57 Md. 1; Comm. v. Upton, 6 Gray, 473; New Salem v. Eagle Mill Co., 138 Mass. 8; Cleveland v. Citizens' Gas-light Co., 20 N. J. Eq. 201; Mills v. Hall, 9 Wend. 315; Campbell v. Seaman, 63 N. Y. 368; Fertilizing Co. v. Hyde Park, 98 U. S. 759; Wharton's Crim. Law, § 2367.

[3] Brady v. Weeks, 3 Barb. 159; Bliss v. Hall, 5 Scott, 500; Carey v. Ledbeter, 13 C. B. (N. S.) 470; Barwell v. Brooks, 1 L. T. (N. S.) 454; Elliotson v. Feetham, 2 Bing. N. C. 134; Bamford v. Turnley, 3 B. & S. 66; Shotts Iron Co. v. Inglis, 7 Sc. App. Cas. 528; Tipping v. St. Helen's S. Co., L. R., 1 Ch. 66; Hurlbert v. McCune, 55 Conn. 31; Laflin & Rand Powd. Co. v. Tearney, 131 Ill. 322; Bushwell v. Robeson, 62 Iowa, 540; Ashbrook v. Comm., 1 Bush (Ky.), 139; Villavaso v. Barthet, 39 La. Ann. 237; Fertilizer Co. v. Malone, 73 Md. 268; People v Detroit White Lead Works, 82 Mich. 471; Perrine v. Taylor, 43 N. J. Eq. 128; Sherman v. Langham, 13 S. W. Rep'r, 1042; Smith v. Phillips, 8 Phila. 10; Wier's Appeal, 74 Penn. St. 230; Fertilizing Co. v. Hyde Park, 97 U. S. 759.

[4] *Ante*, sec. 11.

and the further prosecution of the business in that locality may be prohibited.[1] But, in the absence of legislation on the subject, the uses to which the locality is devoted, the presence of other nuisances, their character and extent, are all to be considered, and the injury complained of must be directly or clearly traceable to the business of the person charged. The mere fact that other nuisances exist in that locality, which produce similar results, is no defense, however, if the thing complained of adds to the nuisance already existing to such a degree that the injury in question is measurably traceable thereto.[2]

Extent of the annoyance.

SEC. 182. Public nuisances are, strictly, such as result from the violation of public rights, have a common effect, and produce a common damage.[3] There must be an injury to the community in general, or to some part of it, however small. So, it is sufficient if there be an annoyance to those persons who, in the exercise of rights common to all citizens, come necessarily within the range of the effects of the act or thing complained of.[4] It is certainly not necessary, to constitute a common nuisance, that an act or thing should affect all persons in the same degree, but it is essential that it should be calculated in its effects to prove detrimental, in some degree, to all persons who may ordinarily come in contact with it or within the sphere of its operation. For example, all persons have a right to pass over the public highways, and any unreasonable act or omission of duty that endangers the safety of

[1] Fertilizing Co. v. Hyde Park, 97 U. S. 759; Villavaso v. Barthet, 39 La. Ann. 247.

[2] Wood on Nuisances, § 491; Wood v. Wand, 3 Exch. 748; Crossly v. Lightowler, L. R., 2 Ch. 478; Walter v. Selfe, 4 DeG. & S. 315; Hurlbert v. McCune, 55 Conn. 31; Dennis v. State, 91 Ind. 291; Robinson v. Baugh, 31 Mich. 290; Cleveland v. Citizens' Gas-light Co., 20 N. J. Eq. 201; Meigs v. Lister, 24 id. 199; Mulligan v. Elias, 12 Abb. Pr. (N. S.) 259. *See* Gallagher v. Kemmerer, 144 Penn. St. 509.

[3] Wood on Nuis., § 14; Rex v. White, 1 Burr. 333; Rex v. Lloyd, 4 Esp. 200; People v. Jackson, 7 Mich. 432; Comm. v. Ferris, 5 Rand. (Va.) 691.

[4] Hackney v. State, 6 Ind. 494; Comm. v. Smith, 6 Cush. 80; Westcott v. Middleton, 43 N. J. Eq. 478; Lansing v. Smith, 8 Cow. 146.

such persons as exercise this right is a common nuisance. So, a railroad company is indictable for neglect to provide suitable safeguards at road crossings or at the side of a highway, so as to secure those passing along the highway from the dangers incident to the operation of a railroad.[1] There being an omission of a legal duty, in such cases, having regard to a public place, the liability of the guilty party becomes fixed, irrespective of the question whether other persons have actually been injured or endangered by reason of the negligence. And if any act or thing, of an injurious character, having a tendency to annoy or obstruct those coming within reach of its effects, be in a public place, it is to be characterized as a public nuisance, although only one person or nobody at all be actually damaged.[2]

SEC. 183. It is not necessary to prove that the ill effects are applicable to an entire community, or that the effects are the same upon all who experience them, or that the same amount or degree of damage is done to each person affected, for in the very nature of things this would be impossible.[3] Those persons in the immediate vicinity of the thing complained of might sustain a special damage for which they could maintain private suits, while others, more remote, might sustain no damage apart from the rest of the community, and so would have no redress, except through the proceeding by public prosecution. There is, however, no difficulty whatever in showing the public or common character of the injury, if the act or thing be in a public place; "for any thing which is calculated to produce or can produce a nuisance that extends over such a public place, where people pass

[1] Pease's Case, 4 B. & Ad. 30; Cincinnati, etc., R. Co. v. Comm., 80 Ky. 137; Louisville, etc., R. Co. v. Comm., ib. 143; 13 Bush (Ky.), 388; Paducah, etc., R. Co. v. Comm., ib. 147; Comm. v. Lowell, etc., R. Co., 2 Gray, 54; People v. New York Central, etc., R. Co., 74 N. Y. 302. *See* Lapsley v. Union Pacific R. Co., 50 Fed. Rep'r, 172.

[2] *See* Comm. v. Oaks, 113 Mass. 8.

[3] Comm. v. Sweeney, 131 Mass. 579.

and repass and have a lawful right to be, is a public nuisance and punishable as such."[1] So, with respect to those things which are designated nuisances *per se* and *prima facie* nuisances, such as noxious trades, the storage of dangerous articles, the omission to provide necessary safeguards, stagnant water, filthy and dilapidated houses, and the like, if it be shown that the offense is in a public place, this is enough to establish the nuisance as one affecting the public at large.[2]

SEC. 184. Extent of the annoyance, as a test for determining whether a nuisance is public or merely private in character, was discussed by Vice-Chancellor Kindersley in an important case, very often referred to, in the following language:[3] "I conceive, that to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance, an injury or a damage to all persons who come within the sphere of its operation, though it may be so in a greater degree to some than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of noxious smoke or of poisonous effluvia are emitted. To all persons who are at all within the reach of those operations, it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that, to those who are nearer to it, it may be a greater nuisance, a greater inconvenience than it is to those who are more remote from it; but still, to all who are at all within the reach of it, it is more or less a nuisance or an inconvenience. Take another ordinary case, perhaps the most ordinary case of a public nuisance, the stopping of

[1] Wood on Nuisances, § 20.

[2] Wood on Nuisances, § 23; Rex v. Pappineau, 1 Stra. 686; Michael v. Alestree, 2 Lev. 172; Hammond v. Pearson, 3 Cowp. 396; Dixon v. Bell, 5 M. & S. 198; Rex v. Neill, 2 C. & P. 483; Comm. v. Sweeney, 131 Mass. 579; Attorney-General v. Steward, 20 N. J. Eq. 415; Peck v. Elder, 3 Sandf. (N. Y.) 126; Howard v. Lee, ib. 281; Catlin v. Valentine, 9 Pai. Ch. 375; State v. Atkinson, 23 Vt. 92.

[3] Soltau v. De Held, 2 Sim. (N. S.) 133, 142.

the king's highway; this is a nuisance to all who may have occasion to travel that highway. It may be a much greater nuisance to a person who has to travel that road every day of his life, than it is to a person who has to travel it only once a year, or once in five years; but it is more or less a nuisance to every one who has occasion to use it. If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations, but is no nuisance or inconvenience whatever, or is even advantageous or pleasurable to those who are more removed from it, then, I conceive, it does not come within the meaning of the term "public nuisance."

The case before me is a case in point. A peal of bells may be, and no doubt is, an extreme nuisance, and, perhaps, an intolerable nuisance to a person who lives within a very few feet or yards of them; but to a person who lives at a distance from them, although he is within the reach of their sound, so far from its being a nuisance or an inconvenience, it may be a positive pleasure; for I cannot assent to the proposition that in all circumstances and under all conditions, the sound of the bells must be a nuisance, and, therefore, my opinion is that the nuisance complained of in this case could not be indicted as a public nuisance. * * * I may further make this observation, that it does not follow, because a thing complained of is a nuisance to several individuals, that, therefore, it is a public nuisance. One may illustrate that very simply, by supposing the case of a man building up a wall which has the effect of darkening the ancient lights of half a dozen different dwelling-houses. It does not follow, because half a dozen persons or a dozen persons are suffering by the darkening of their ancient lights by the one act, that, therefore, it is a public nuisance which can be indicted at the suit of the crown, or for which the attorney-general can file an

injunction in this court. It is a private nuisance to each of the several individuals aggrieved."

Character of the act or thing itself.

SEC. 185. Formerly, certain uses of property, and certain trades and occupations, were regarded as nuisances *per se*, that is to say, naturally and inevitably nuisances, when such property was located, or such trades and occupations were prosecuted in a public place, as in the midst of crowded towns and cities, or near public highways or navigable streams. A short list of such nuisances would embrace any use of property in which, by artificial means, noxious gases, offensive odors, vapors, smoke, cinders, or disturbing noises were produced; powder magazines, and places for the manufacture or sale or storage of dangerous articles, as explosives and combustibles; slaughter-houses, tallow factories, rendering works, soap and bone boileries, tanneries, gas works, oil refineries, hog-styes and cattle-yards, stagnant water in trenches or pools, filthy, dilapidated and infected houses, and the like.[1] In respect of these things, when in a public place, there was always a presumption that they were detrimental to the health, safety or comfort of the community, and consequently that they were, in the legal sense, public nuisances. No proof was required, beyond the mere fact of their existence, to establish the nuisance. No actual ill effects were required to be shown. Consequently, if an indictment averred that any of these things existed in or near a public place, it set forth sufficiently a public offense. And upon application being made to courts of equity to interfere by injunction to restrain and abate such things, it was customary to enjoin their continuance pending the trial of the questions of fact as to the nuisance. But as before remarked,[2] the manner and method of conducting

[1] A long list of such nuisances is given in Rhodes v. Dunbar, 57 Penn. St. 274.

[2] *Ante*, sec. 180.

the so-called "offensive trades" has been so much improved, with respect to obviating their noxious and deleterious influences upon persons or property, that, generally, they are no longer regarded as necessarily and unavoidably nuisances, even though conducted in the midst of dense masses of population, as in the crowded parts of towns and cities, but at most are considered as *prima facie* nuisances, that is to say, there is always a presumption of fact that they are nuisances, noxious, offensive and injurious to the community and to persons and property in their vicinity, when they are shown to be carried on in public places. And unless this presumption is removed by denial of all the material facts upon which it is founded, an injunction may be obtained to stay the nuisance. But the question as to the character of the thing complained of remains one of fact, to be determined by evidence, the burden of proof being upon the complainant.

SEC. 186. In general terms, it may be said that any thing which endangers the health or the safety of the public, or of any considerable part of it, is a common nuisance.[1] It is no defense to an indictment for maintaining such a nuisance, that the business, trade or occupation which occasions it is a useful one, or that it is really a public benefit, contributing largely to the enhancement of the wealth, prosperity or commercial importance of the community;[2] or that it furnishes upon the whole, a convenience to the public which more than counter-balances the detri-

[1] Comm. v. Holmes, 17 Mass. 326. "Any acts or omissions which, in the regular course of events, without the interposition of human agency, or of some extraordinary natural condition, are likely to generate disease, or communicate infection, expose the persons so acting or omitting to act to an indictment for nuisance. It is not necessary that the result should *certainly* flow from the cause. In view of the great stakes involved, and of the anxiety of which the defendant's misconduct is certainly productive, a high probability of disease is sufficient." Wharton's Cr. Law, § 2386, and cases cited.

[2] Rex v. Russell, 6 B. & C. 566; Rex v. Tindal, 6 Ad. & El. 143; Rex v. Ward, 4 id. 384; Reg. v. Barry, 9 L. R. 122; Weeks v. Junction R. Co., 5 McLean, 425; People v. Detroit White Lead Works, 82 Mich. 471; Rhodes v. Dunbar, 57 Penn. St. 274; Respublica v. Caldwell, 1 Dallas, 150; Cushing v. Board of Health, 13 N. Y. State Rep'r, 783.

ment it occasions.[1] For if it is in reality a nuisance or operates as such upon the public, no measure of necessity, usefulness or public benefit will afford a justification for maintaining it. Nor is it any defense to show, "that the business is carried on in the most prudent and careful manner possible; that the most approved appliances known to science have been adopted to prevent injury (except where the legislature or other competent authority has authorized a certain act). The question of care is not an element in this class of wrongs; it is merely a question of results, and the fact that injurious results proceed from the business, under such circumstances, would have a tendency to show the business a nuisance *per se*, rather than to operate as an excuse or defense, and the courts would feel compelled to say that, under such circumstances, the business is intolerable, except when so far removed from residences and places of business as to be beyond the power of visiting its ill results upon individuals or the public."[2]

Examples of nuisances.

SEC. 187. It is manifestly impossible to give a complete list of the things which constitute public nuisances. Any thing may be so haracterized, if it be not expressly warranted by law, and if it affects injuriously the health or safety of the community or any considerable part of it. On the other hand, nothing may be so characterized, unless it be shown as matter of fact that it is productive of

[1] Roscoe Cr. Ev. 794-798; Attorney-General v. Leeds, 39 L. J. Ch. 254; Seacord v. People, 121 Ill. 623; Weeks v. Junction Railroad Co., 5 McLean, 425; State v. Koster, 35 Iowa, 221; State v. Bell, 5 Port. (Ala.) 365; City of Duluth v. Mallett, 43 Minn. 204; Campbell v. Seaman, 63 N. Y. 368, Wharton's Cr. Law, § 2368.

[2] Wood on Nuisances, § 27; Fletcher v. Rylands, L. R., 1 Exch. 285; Tenant v. Goldwin, 2 Ld. Raym. 1089; Sutton v. Clark, 6 Taunt. 29; Cox v. Burbridge, 32 L. J. C. P. 89; Moses v. State, 58 Md. 185; Seacord v. People, 121 Ill. 623; Laflin & Rand. Powd. Co. v. Tearney, 131 id. 322; Fertilizer Co. v. Malone, 73 Md. 268; Wilkinson v. Steel Spring Works, 73 Mich. 405; Cahill v. Eastman, 18 Minn. 324; McAndrew v. Collerd, 42 N. J. Eq. 189; Tremain v. Cohoes Co., 2 N. Y. 162; Cogswell v. New York, etc., R. Co., 103 id. 10.

such injurious effects. The adjudged cases are, therefore, of little value as precedents. But reference to a few of them may perhaps be made with advantage, for the purpose of illustrating what is vaguely termed "the legal notion of a nuisance." The cases cited in the note will be equally serviceable for this purpose, whether they involve the question of public or of private nuisance, since a particular act or thing will fall under the one or the other, or both of these classes, according to the extent and character of its noxious effects.[1]

[1] The following acts and things are peculiarly calculated to be or to become public nuisances, most of them being fairly regarded as *prima facie* nuisances; for a person afflicted with contagious or infectious disease to expose himself in a public place, Rex v. Vantadillo, 4 M. & S. 73; or to be exposed there by another, Rex v. Burnett, 4 M. & S. 472; Rex v. Sutton, 4 Burr. 2116; taking a horse afflicted with glanders, or other infectious disease, into public places, and, particularly, watering it at a public watering place, Rex v. Henson, 1 Dean C. C. 24; Barnum v. Van Dusen, 16 Conn. 200; Mills v. Railroad Co., 2 Rob. (N. Y.) 326; establishing in a public place a hospital for reception and treatment of patients having contagious diseases, Rex v. Vantadillo, 4 M. & S. 73; Bessonies v. Indianapolis, 71 Md. 189; or a babies' hospital, Gifford v. Babies' Hospital, 21 Abb. N. C. 159; or a depot for landing immigrants, Brower v. New York, 3 Barb. 234; selling or offering for sale, or bringing to market for the purpose of selling, diseased or corrupted meats, or unwholesome or adulterated articles of food of any kind, Rex v. Dixon, 3 M. & S. 11; State v. Smith, 3 Hawks, 376; Goodrich v. People, 2 Park. Cr. 622; Daly v. Webb, 4 Ired. (N. C.) L. 309; State v. Norton, 2 id. 40; keeping gunpowder, nitro-glycerine, or other explosive, combustible, or dangerous materials in or near a public place, Wharton's Crim. Law, § 2390; 2 Burns' Justice, 667, 668; Rex v. Taylor, 2 Stra. 1168; Briggs v. Mitchell, 31 L. J. M. C. 163; Crowder v. Tinkler, 19 Ves. Jr. 617; Hepburn v. Lordon, 2 H. & M. Ch. 345; 13 L. T. (N. S.) 59; Reg. v. Lister, 3 Jur. 570; Vaughan v. Newlove, 3 Bing. N. C. 468; Anonymous, 12 Mod. 342; Williams v. East India Co., 3 East, 192; Cook v. Anderson, 85 Ala. 99; Laflin & Rand. Powd. Co. v. Tearney, 131 Ill. 322; Chicago, etc., Coal Co. v. Glass, 34 Ill. App. 364; Cuff v. Newark, etc., Railroad Co., 35 N. J. L. 17; Malcolm v. Myers, 6 Hill, 292; Bradley v. People, 56 Barb. 72; People v. Sands, 1 Johns. 78; Fillo v. Jones, 2 Abb. Ct. App. Dec. 121; Heeg v. Licht, 80 N. Y. 579; Rhodes v. Dunbar, 57 Penn. St. 274; Wier's Appeal, 74 id. 230; Dilworth's Appeal, 91 id. 247; Ryan v. Copes, 11 Rich. (S. C.) L. 217; Cheatham v. Shearon, 1 Swan (Tenn.), 213; Comminge v. Stevenson, 76 Texas, 642; keeping dangerous or ferocious animals, 4 Burns' Justice, 578; Kelly v. Tilton, 2 Keyes, 263; prosecuting noxious and offensive trades in or near public places, Rex v. Pappineau, 1 Stra. 686; Rex v. Neill, 2 C. & P. 483; Rex v. Wilcox, 2 Salk. 458; Comm. v. Mason, 4 Gray, 213; Comm. v. Kidder, 107 Mass. 188; constructing and maintaining a railroad track across a public highway in such manner as to be a dangerous obstruction to travel over the highway, Northern Cent. R. Co. v. Comm., 90 Penn. St. 300; Paducah, etc., R. Co. v. Comm., 80 Ky. 147; People v. New York Cent., etc., R. Co., 74 N. Y. 302; placing any thing likely to frighten horses near a highway, Judd v. Fargo, 107 Mass.

294; fast driving in the streets of a city, United States v. Hart, Peters C. C. 390; or coasting there, Jackson v. Castle, 80 Me. 119; leaving excavations near public highway unguarded, State v. Soc. for Establg. Useful Mfg., 42 N. J. L. 504; Irvine v. Wood, 51 N. Y. 224; penning back the water of a stream so as to render it stagnant and unfit for use or deleterious to health, Beach v. People, 11 Mich. 106; Munson v. People, 5 Park. Cr. 16; Comm. v. Webb, 6 Rand. (Va.) 726; State v. Stoughton, 5 Wis. 291; Douglass v. State, 4 id. 387; polluting streams, Moore v. Webb, 1 C. B. (N. S.) 673; Rex v. Medley, 6 C. & P. 292; Morton v. Moore, 15 Gray, 573, 576; Martin v. Gleason, 139 Mass. 183; Brookline v. Mackintosh, 133 id. 215, 225; Smiths v. McConathy, 11 Mo. 331; Barton v. Union Cattle Co., 28 Nebr. 350; Babcock v. New Jersey Stock Yard Co., 20 N. J. Eq. 296; Attorney-General v. Steward, ib. 415; Carhart v. Auburn Gas-light Co., 22 Barb. 297; Howell v. McCoy, 3 Rawle (Penn.), 256; Keiser v. Gas Co., 143 Penn. St. 276; State v. Smith, 48 N. W. R. 727; fouling wells, Ottawa Gas-light and Coke Co. v. Graham, 28 Ill. 73; Haugh's Appeal, 102 Penn. St. 42; draining privies into a stream which flows through a village, New Brighton v. Kasey, 3 N. Y. Suppl. 399; 18 N. Y. State Rep. 251; Board of Health v. Hutchinson, 12 Stew. Eq. 218. *See* State v. Freeholders of Bergen, 46 N. J. Eq. 173; depositing in or conveying through public places, or exposing there, filth, refuse or other offensive matter, Meigs v. Lister, 23 N. J. Eq. 199; Lippincott v. Lasher, 44 id. 20; Fertilizing Co. v. Hyde Park, 97 U. S. 759; depositing such matter in public places or on private premises, *Ex parte* Casinello, 62 Cal. 538; City of Rochester v. Collins, 12 Barb. 559; People v. Board of Health, 23 id. 344; using steam in operating railways along streets of a city, Chicago, etc., Railroad Co. v. Joliet, 79 Ill. 43; North Chicago City Ry. Co. v. Lake View, 105 id. 207; Buffalo, etc., Railroad Co. v. Buffalo, 5 Hill, 209; State v. Tupper, Dudley (S. C.), 135; Richmond Railroad Co. v. Richmond, 96 U. S. 521; buildings likely, from defective construction, dilapidated condition, occupation by persons afflicted with contagious diseases, or by filthy tenants, to endanger life, health or property of the community or of persons in the vicinity, Reg. v. Watts, 1 Salk. 357; Ferguson v. City of Selma, 43 Ala. 398; Harvey v. Dewoody, 18 Ark. 252; Baumgartner v. Hasty, 100 Ind. 575; Meeker v. Van Rensselaer, 15 Wend. 377; Jarvis v. Baxter, 52 Super. Ct. (N. Y.) 109; State v. Purse, 4 McCord (S. C.), 472; Rhodes v. Dunbar, 57 Penn. St. 224; dense smoke from steamboats in the harbors of cities, or from the chimneys of buildings in cities, Harmon v. Chicago, 110 Ill. 400; Sampson v. Smith, 8 Sim. 272; Savile v. Kilner, 26 L. T. (N. S.) 277; Higgins v. Guardians, 22 id. 753; Reg. v. Waterhouse, L. R., 7 Q. B. 545; Rich v. Basterfield, 2 C. & K. 257; Whitney v. Bartholomew, 21 Conn. 213; Whalen v. Keith, 35 Mo. 87; Hutchins v. Smith, 63 Barb. 252; Hyatt v. Myers, 71 N. C. 271; carrying on any trade or business so as to cause annoyance or discomfort to persons living in the vicinity, by smoke, cinders, dust, noises, noxious gases, or offensive odors, Rex v. White, 1 Burr. 337; Rex v. Neill, 2 C. & P. 488; St. Helen's Smelting Co. v. Tipping, 11 H. L. C. 642; Houghton v. Bankard, 3 L. T. (N. S.) 266; Roberts v. Clarke, 18 id. 49; Luscombe v. Steer, 17 id. 229; Savile v. Kilner, 26 id. 277; Morris v. Barnes, ib. 622; Tennant v. Hamilton, 7 C. & F. 122; Pentland v. Henderson, 27 Jur. 241; Ward v. Lang, 35 id. 408; Weeks v. King, 53 L. T. 31; Watson v. Gas-light Co., U. C., 5 Q. B. 523; Cartwright v. Gray, 12 Grant Ch. (Ont.) 400; Galbraith v. Oliver, 3 Pitts. (Pa.) 79; Wylie v. Elwood, 134 Ill. 281; People v. Detroit White Lead Works, 82 Mich. 471; Coe v. Schultz, 47 Barb. 64; blacksmiths' shops, Whitney v. Bartholomew, 21 Conn. 213; Fancher v. Gross, 60 Iowa, 505; Doellner v. Tynan, 38 How. Pr. 176; breweries, Jones v. Powell, Hutton (1656); Jones v. Williams, 11 M. & W. 176; Dittman v. Repp, 50 Md.

516; brick-burning, Pollock v. Lester, 11 Hare, 266; Walter v. Selfe, 4 De G. & S. 315; Beardmore v. Tredwell, 31 L. T. (N. S.) Ch. 893; Bamford v. Turnley, 31 L. T. (N. S.) Q. B. 286; Carey v. Ledbeter, 13 C. B. (N. S.) 470; Bareham v. Hall, 22 L. T. (N. S.) 116; White v. Jameson, L. R., 18 Eq. 303; Donald v. Humphrey, 14 F. (Sc.) 1206; Fuselier v. Spalding, 2 La. Ann. 773; Campbell v. Seaman, 63 N. Y. 368; Huckenstine's Appeal, 70 Penn. St. 102; candle factories, Tayhole's Case, Cro. Car. 510; Rankett's Case, Pasch. 3; cattle-yards and pig-styes, Aldred's Case, 9 Coke, 59; Rex v. Wigg, 2 Ld. Raym. 1163; Bishop v. Bourk, 33 Conn. 34; Lutterloh v. Cedar Keys, 15 Fla. 306; Railroad Co. v. Grobel, 50 Ill. 241; Ohio, etc., Railroad Co. v. Simon, 40 Ind. 278; State v. Koster, 35 Iowa, 221; Baker v. Bohannan, 69 id. 60; Trulock v. Merte, 72 id. 510; Ashbrook v. Comm., 1 Bush (Ky.), 139; Smith v. Payson, 37 Me. 361; Comm. v. Perry, 139 Mass. 198; Smiths v. McConathy, 11 Mo. 331; Barton v. Union Cattle Co., 28 Nebr. 350; Babcock v. New Jersey Stock Yard Co., 20 N. J. Eq. 296; Dubois v. Budlong, 15 Abb. Pr. 445; Comm. v. Hutz, Bright (Pa.), 75, n.; Comm. v. Van Sickle, ib. 69; chemical or fertilizer works, Rex v. Ward, 1 Burr. 333; State v. Luce, 6 Cent. Rep. 862; Ward v. Lang, 35 Jur. 408; Fertilizer Co. v. Malone, 73 Md. 268; Comm. v. Rumford Chemical Works, 14 Gray, 231; Mulligan v. Elias, 12 Abb. Pr. (N. S.) 259; distilleries, Smiths v. McConathy, 11 Mo. 331; gas-works, Broadbent v. Imperial Gas Co., 7 DeG., M. & G. 436; Brown v. Illius, 27 Conn. 84; Pensacola Gas Co. v. Pebley, 25 Fla. 381; Ottawa Gaslight & Coke Co. v. Thompson, 39 Ill. 598; Baldwin v. Oskaloosa Gas-light Co., 57 Iowa, 51; Hunt v. Lowell Gas-light Co., 8 Allen, 69; Cleveland v. Citizens' Gas-light Co., 20 N. J. Eq. 201; People v. New York Gas-light Co., 64 Barb. 55; Carhart v. Auburn Gas-light Co., 22 id. 297; Man. Gas-light Co. v. Barker, 36 How. Pr. 238; Bohan v. Port Jervis Gas-light Co., 122 N. Y. 18; Columbus Gas-light Co. v. Freeland, 12 Ohio St. 392; Keiser v. Gas Co., 143 Penn. St. 246; glue works, Colville v. Middletown, 19 F. C. (Sc.) 339; Scott v. Leith Commrs. Police, 4 F. (Sc.) 1068; Charity v. Biddle, 14 F. C. (Sc.) 237; lime-kilns, Aldred's Case, 9 Coke, 59; Bamford v. Turnley, 3 B. & S. 81; State v. Mott, 61 Md. 297; Hutchins v. Smith, 63 Barb. 251; Slight v. Gutzlaff, 25 Wisc. 676; markets on public streets, Henkel v. Detroit, 49 Mich. 249; mills and manufactories containing heavy machinery, furnaces and steam boilers, Sampson v. Smith, 8 Sim. 272; Scott v. Firth, 10 L. T. (N. S.) 241; Burroughs v. Housatonic, etc., Railroad Co., 15 Conn. 124; Thiebaut v. Canova, 11 Fla. 143; Davidson v. Isham, 1 Stockt. (N. J.) 156; Wolcott v. Melick, 3 id. 204; Duncan v. Hayes, 22 N. J. Eq. 25; Fish v. Dodge, 4 Denio, 311; McKeon v. See, 51 N. Y. 300; Beir v. Cooke, 37 Hun, 38; Rhodes v. Dunbar, 57 Penn. St. 274; Hoyt v. Jeffers, 30 Mich. 111; Ryan v. Copes, 11 Rich. (S. C.) L. 217; livery-stables and barns, St. James Church v. Arrington, 36 Ala. 548; Shivery v. Streeper, 24 Fla. 103; Harrison v. Brooks, 20 Ga. 537; Coker v. Birge, 9 id. 425; 10 id. 336; Rounsville v. Kohlheim, 68 id. 668; Keiser v. Lovett, 85 Ind. 210; Flint v. Russell, 5 Dill. C. C. 151; Shiras v. Olinger, 50 Iowa, 571; Hastings v. Aiken, 1 Gray, 163; Robinson v. Smith, 7 N. Y. Suppl. 38; Filson v. Crawford, 5 id. 882; Dorgan v. Waddill, 9 Ired. (N. C.) L. 244; Aldrich v. Howard, 8 R. I. 246; Kirkman v. Handy, 11 Humph. (Tenn.) 406; Burditt v. Swenson, 17 Texas, 489; Gifford v. Hulett, 62 Vt. 343; oil refineries, Comm. v. Brown, 13 Metc. 365; Comm. v. Kidder, 107 Mass. 188; places where intoxicating liquors are kept for sale contrary to law, McLaughlin v. State, 45 Ind. 338; State v. Salto, 77 Iowa, 193; Comm. v. McDonough, 13 Allen, 581; Meyer v. State, 42 N. J. L. 145; privies, Stynam v. Hutchinson, 1 Selw. 1047; Rex v. Pedley, 1 Ad. & El. 822; Jones v. Powell, Hutton (1656); Norton v. Scholefield, 9 M. & W. 665; Wormersley v. Church, 17 L. T. (N. S.) 190; Gordon v. Vestry of St. James, 13 id. 511; Cook v. Montagu, 26 id. 471; Mackey v. Greenhill, 30 Jur.

746; Wahle v. Reinbach, 76 Ill. 322; Marshall v. Cohen, 44 Ga. 489; Ball v. Nye, 99 Mass. 582; People v. Reed, 2 Park. Cr. 160; Perrine v. Taylor, 16 Stew. Eq. 128; Haugh's Appeal, 102 Penn. St. 42; Wunder v. M'Lean, 134 id. 334; Ford v. Roberts, 108 id. 489; Knauss v. Bruce, 107 id. 85; potteries, Ross v. Butler, 19 N. J. Eq. 294; rendering works, Seacord v. People, 121 Ill. 623; Winslow v. Bloomington, 24 Ill. App. 647; Dana v. Valentine, 5 Metc. 8; Babcock v. New Jersey Stock Yard Co., 20 N. J. Eq. 296; Prescott's Case, 2 City Hall R. 161; Dubois v. Budlong, 15 Abb. Pr. 445; Peck v. Elder, 3 Sandf. (N. Y.) 126; Blunt v. Hay, 4 Sandf. Ch. 363; Czarniecke's Appeal, 11 Atl. Rep'r, 660; State v. Neidt, 19 id. 318; Trotter v. Farnie, 5 W. S. (S. C.) 649; Allen v. State, 34 Texas, 230; Rodenhurst v. Coate, 6 Grant Ch. (Ont.) 140; rolling mills, forges, foundries, iron works, Crump v. Lambert, L. R., 3 Eq. C. 409; Scott v. Firth, 10 L. T. (N. S.) 241; McMenomy v. Band, 87 Cal. 134; Norcross v. Thoms, 51 Me. 503; Wesson v. Washburn Iron Co., 13 Allen, 95; Robinson v. Baugh, 51 Mich. 290; Dennis v. Eckhardt, 3 Grant (Penn,), 390; smelting works, Poynton v. Gill, 2 Rolle Abr. 140; St. Helen's Smelting Co. v. Tipping, 11 H. L. C. 642; David v. Grenfell, 6 C. & P. 607; soap boileries, Rex v. Pierce, 2 Shower, 327; Howard v. Lee, 3 Sandf. (N. Y.) 281; Smith v. Cummings, 2 Pars. Eq. C. (Penn.) 92; slaughter-houses, Pentland v. Henderson, 27 Jur. 241; Rex v. Cross, 2 C. & P. 288; Rex v. Neill, ib. 483; Bishop v. Banks, 33 Conn. 118; Hackney v. State, 8 Ind. 494; Dennis v. State, 91 id. 291; Reichart v. Geers, 98 id. 73; Bushnell v. Robeson, 62 Iowa, 540; Seifried v. Hays, 81 Ky. 377; Woodyear v. Schaefer, 57 Md. 1; Fay v. Whitman, 100 Mass. 76; Comm. v. Upton, 14 Gray, 231; Comm. v. Gallagher, 1 Allen, 592; Ballentine v. Webb, 84 Mich. 38; State v. McConathy, 9 Miss. 517; State v. Wilson, 48 N. H. 415; Attorney-General v. Steward, 20 N. J. Eq. 415; Brady v. Weeks, 3 Barb. 156; Catlin v. Valentine, 9 Pai. Ch. 575; Taylor v. People, 6 Park. Cr. 347; Dubois v. Budlong, 15 Abb. Pr. 445; Cropsey v. Murphy, 1 Hilt. (N. Y.) 126; State v. Shelbyville, 4 Sneed (Tenn.), 176; Pruner v. Pendleton, 75 Vt. 516; stagnant water, Shaw v. Cummiskey, 7 Pick. 76; Beach v. People, 11 Mich. 106; Harris v. Thompson, 9 Barb. 350; Comm. v. Reed, 34 Penn. St. 275; Rhodes v. Whitehead, 27 Texas, 304; Stephen's Case, 2 Leigh (Va.), 759; Comm. v. Webb, 6 Rand. (Va.) 726; Rooker v. Perkins, 14 Wis. 79; tallow factories, Smith v. Cummings, 2 Pars. Eq. C. 92; Allen v. State, 34 Texas, 230; tanneries, Rex v. Pappineau, 1 Stra. 686; Bliss v. Hall, 4 Bing. N. C. 183; Pinckney v. Ewens, 4 L. T. (N. S.) 741; Moore v. Webb, 1 C. B. (N. S.) 673; Ellis v. State, 7 Blackf. (Ind.) 534; State v. Street Comm'rs., 36 N. J. L. 283; Thomas v. Brackney, 17 Barb. 654; Fisher v. Clark, 41 id. 332; Francis v. Schoellkopff, 53 N. Y. 152; Howell v. McCoy, 3 Rawle (Penn.), 256; Pennoyer v. Allen, 56 Wis. 502; varnish making, Rex v. Neill, 2 C. & P. 483; vaults or tombs on private premises, Kingsbury v. Flowers, 65 Ala. 479; Barnes v. Hathorn, 54 Me. 154; Ellison v. Commissioners, 5 Jones Eq. (N. C.) 57.

CHAPTER IX.

LEGALIZED AND STATUTORY NUISANCES.

SEC. 188. Effect of legislative sanction.
189. Sanction must be expressed or necessarily implied.
190. Applies only to acts strictly necessary.
191. Extent of the power to sanction nuisances.
192. Statutory nuisances.
193. Extent of the power to declare nuisances.
195. Exercise of legislative discretion conclusive.

Legalized nuisances; effect of legislative sanction.

SEC. 188. There is a class of nuisances designated "legalized." These are cases which rest for their sanction upon the intent of the law under which they are created, the paramount power of the legislature, the principle of "the greatest good of the greatest number," and the importance of the public benefit and convenience involved in their continuance.[1] The legislature may undoubtedly authorize acts which otherwise would be nuisances, and particularly when they affect or relate to matters in which the public have an especial interest, or over which the public have control, such as highways and navigable streams, and works of internal improvement undertaken for the benefit of the people generally.[2] In such cases, the legislative authorization exempts from liability to suits, civil or criminal, at the instance of the State, on account of the acts authorized.[3]

This authorization, however, does not affect any claim of a private citizen for damages for any *special* injury, inconvenience or discomfort not experienced by the public at

[1] Fertilizing Co. v. Hyde Park, 97 U. S. 659.

[2] Tiedeman's Lims. Pol. Pow., § 122; Wood on Nuisances, § 750; Fiero on Special Actions, 296; Baltimore & Pot. R. Co. v. Baptist Church, 108 U. S. 317; Sinnickson v. Johnson, 17 N. J. L. 151; Easton v. New York R. Co., 24 N. J. Eq. 49; Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18; Danville R. Co. v. Comm., 73 Penn. St. 29; Comm. v. Reed, 34 id. 275.

[3] *Preceding note.* The legislative act legalizing a nuisance puts an end to suits pending on account of the nuisance. Endlich on Interpr'n. of Stats., § 283.

large. The grant of a license to individuals, or of powers and privileges to corporations, to do certain things, does not carry with it any guaranty of immunity from claims for private injuries which may result directly from the exercise of the license, powers or privileges.[1] For the legislature cannot authorize any acts or use of property that will create a private nuisance, by actual invasion of one's premises, or that will amount to making an appropriation of private property, without compensation. The legislative grant of corporate powers, for instance, will not furnish any immunity from liability for damages caused by an exercise of the corporate franchises that fairly amounts to a taking of property;[2] nor will it justify, generally, acts which would otherwise amount to private nuisances. So, authority to a railroad company to bring its tracks within municipal limits, and to construct shops and engine-houses there, does not confer authority to establish and maintain a private nuisance.[3]

The sanction must be expressed or necessarily implied.

SEC. 189. The rule is now firmly established that the statutory authority which will justify any the least injury to private property and afford immunity from liability for acts which otherwise would be a nuisance, must be expressed, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasions the injury. "This," said the court in a recent case, "is but an application of

[1] McAndrews v. Collerd, 42 N. J. Eq. 189; Cogswell v. New York Central, etc., R. Co., 103 N. Y. 10.

[2] Sullivan v. Royer, 72 Cal. 248; McAndrews v. Collerd, 42 N. J. Eq. 189; Pennsylvania R. Co. v. Angel, 14 Stew. Eq. 316; Pottstown Gas Co. v. Murphy, 39 Penn. St. 257; Cooley's Const. Lims. 666; 16 Am. & Eng. Encyc. Law, 1003.

[3] Cooley's Const. Lims. 668; Baltimore & Pot. R. Co. v. Baptist Church, 108 U. S. 317; Cogswell v. New York Central, etc., R. Co., 103 N. Y. 10. *See* Carroll v. Wisconsin Cent. R. Co., 40 Minn. 168; Beseman v. Pennsylvania R. Co., 50 N. J. L. 235.

the reasonable rule, that statutes in derogation of private rights, or which may result in imposing burdens upon private property, must be strictly construed. For it cannot be presumed, from a general grant of authority, that the legislature intended to authorize acts to the injury of third persons, where no compensation is provided, except upon condition of obtaining their consent. This construction of statutory powers applies with peculiar force to grants of corporate powers to private corporations, which are set up as a justification of corporate acts to the detriment of private property."[1] In the case referred to, therefore, the court declined to presume a statutory sanction for injurious acts, from a general grant of authority to a corporation, where the terms of the statute were not imperative, but merely permissive, and held that the statute in question did not confer a license to commit a nuisance, although what was contemplated by the statute could not be done without committing a nuisance. The same doctrine has been affirmed and unflinchingly applied by the Supreme Court of the United States. That court has declared that where a right or privilege is claimed under a charter of a corporation, "nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."[2]

Legislative sanction applies only to acts strictly necessary.

SEC. 190. Hence, it is only when the nuisance complained of is a *strictly necessary and probable* result of the act done in pursuance of legislative authority, that the grant operates as a protection against indictment or civil suit. Otherwise, it cannot be said to have been contem-

[1] Cogswell v. New York Central, etc., R. Co., 103 N. Y. 10.

[2] Fertilizing Co. v. Hyde Park, 97 U. S. 659.

plated by the grant, and, therefore, is not authorized by it.[1] And as it is only against such consequences as are fairly within the contemplation of the legislature, in conferring the authority, and such results as are necessarily incident to the exercise of the authority, that the grant operates as a protection, any excess in the exercise of the power conferred may be *pro tanto* a nuisance, cognizable as such in courts of civil or criminal jurisdiction.[2] The license or authority granted may at any time be revoked, in the discretion of the legislature. Thus, corporate franchises are at most a sufficient license to do acts which would amount to a nuisance, only until revoked. In this respect, they are always under the control of the legislature.[3] In all cases, too, where immunity is claimed, under grant of a license or authority to do the acts complained of, it is essential that every practicable means shall have been adopted to avert injurious consequences, and the best and

[1] Attorney-General v. Bradford Navign. Co., 6 B. & S. 631; Village of Pine City v. Munch, 42 Minn. 342; People v. New York Gas Light Co., 64 Barb. 55; Richardson v. Vermont Central R. Co., 25 Vt. 465. So it has been held that statutory authority given to commissioners of emigration to lease or purchase docks where emigrants may be landed, will not justify them in leasing for that purpose property situated in a thickly populated part of a city, where the contemplated use of the premises would be a serious menace to the health of the community. Brower v. Mayor of New York, 3 Barb. 254. So, too, a grant to a municipal corporation of general powers, in respect of public improvements or of legislation in the interest of the general welfare, must be regarded as subject to the condition that such powers shall not be exercised so as to create a nuisance to private persons or property, where such a consequence is not a strictly necessary result of the exercise of the powers. Edmondson v. City of Moberly, 98 Mo. 523; Seifert v. Brooklyn, 101 N. Y. 136; Morse v. Worcester, 139 Mass. 389; Jacksonville v. Lambert, 62 Ill. 519. And a license from a board of health to manufacture fertilizers will be no defense to an indictment for creating a nuisance in carrying on the business. Garrett v. State, 49 N. J. L. 94. *See, also*, Smith v. Midland Ry. Co., 37 L. T. (N. S.) 224; Davis v. Sacramento, 59 Cal 596; Cain v. Chicago, etc., R. Co., 54 Iowa, 255; Quinn v. Lowell Electric Light Co., 140 Mass. 106; Comm. v. Kidder, 107 id. 188; State v. St. Louis Bd. of Health, 16 Mo. App. 8; Miss. Riv. Packet Co. v. Hannibal, etc., R. Co., 79 Mo. 478; Frankle v. Jackson, 30 Fed. Rep'r, 398; Thompson v. Pennsylvania R. Co., 51 N. J. L. 42; Delaware & Hud. Canal Co. v. Commissioners, 60 Penn. St. 367; Waterman v. Connecticut, etc., R. Co., 30 Vt. 610.

[2] Wood on Nuisances, § 750; Renwick v. Morris, 7 Hill, 575.

[3] Beer Co. v. Massachusetts, 97 U. S. 25; Fertilizing Co. v. Hyde Park, ib. 659.

most approved devices must be used that skill and science have devised, careful servants must be employed, and the processes and buildings used must be the best of their kind, having regard always to the nature of the business.[1]

Extent of legislative power to sanction nuisances.

SEC. 191. It is manifest, therefore, that the legislature has not an unlimited power in respect of legalizing nuisances; it may not arbitrarily violate rights of private persons, and the legislative act must always have reference to the general welfare and be an appropriate means of securing, though, perhaps, at some sacrifice of individual comfort and convenience, a public benefit, according to the maxim, that the greatest good of the greatest number is, so far as individuals are concerned, the paramount law of the land. It will be a matter addressing itself to the legislative discretion to determine whether the legalization of a nuisance is required or justified by public convenience or necessity. But the legislative interference, it has justly been remarked,[2] must be designed to promote some public good, and will be exercised under the same supervision of the judiciary which is exerted in reference to all acts of the legislature affecting large public interests, or invading in any degree the domain of private and personal rights, so as to operate upon them as a restriction or interdiction.

Statutory nuisances.

SEC. 192. It is now perfectly well-settled law, that the legislature, by statute, may declare, or may authorize local governing bodies to declare, acts, practices or things to be nuisances, which otherwise would not be such in law. It may thus directly or indirectly prohibit as nuisances

[1] Chicago v. Quaintance, 58 Ill. 389; Burton v. Philadelphia R. Co., 4 Harr. (Del.) 452; King v. Morris & Essex R. Co., 3 C. E. Green, 277; People v. New York Gas Light Co., 6 Lans. 467; Costello v. Syracuse R. Co., 65 Barb. 92; Bell v. Railroad Co., 25 Penn. St. 161; Sparhawk v. Railroad Co., 54 id. 401; Spalding v. Chicago, etc., R. Co., 30 Wis. 110.

[2] Tiedman's Lims. Pol. Pow., § 122; Lake View v. Rose Hill Cem. Co., 70 Ill. 191.

what were not considered such at common law, and may classify under that category places and property used to the detriment of the public health or the public safety, and may condemn and suppress them as such. The proscribed acts and things thus become, for all legal purposes, nuisances *in fact*. The legislative declaration excludes all evidence to the contrary.[1]

Extent of legislative power to declare nuisances.

SEC. 193. The doctrine is stated and discussed in a very satisfactory manner in a recent case decided by the Court of Appeals of New York.[2] The court there affirmed the constitutionality of an act of the legislature to the effect that nets or other devices for taking fish, found set in any of the waters of the State, in violation of any statute for the protection of fish, should be regarded as nuisances. The act authorized the summary destruction of such nets and devices, by any person, and made it the duty of certain public officers to seize, remove and destroy the same. The court said: "The legislature may not declare that to be a crime which in its nature is and must be under all circumstances innocent, nor can it in defining crimes, or in declaring their punishment, take away or impair any inalienable right secured by the Constitution. But it may, acting within these limits, make acts criminal which before were innocent, and ordain punishment in future cases where before none could have been inflicted. This, in its nature, is a legislative power, which, by the Constitution of the State, is committed to the discretion of the

[1] Mugler v. Kansas, 123 U. S. 623; Powell v. Pennsylvania, 127 id. 678; 114 Penn. St. 265; Beer Co. v. Massachusetts, 97 U. S. 25; License Cases, 5 How. 504; Bepley v. State, 4 Ind. 264; Comm. v. Alger, 7 Cush. 53; Carleton v. Rugg, 149 Mass. 550; Train v. Boston Disinfecting Co., 144 id. 523; Fisher v. McGirr, 1 Gray, 1; State v. Salto, 77 Iowa, 193; Weller v. Snover, 42 N. J. L. 341; Shivers v. Newton, 45 id. 469; Miller v. Horton, 152 Mass. 540; Newark Horse Railroad Co. v. Hunt, 50 N. J. L. 308; Blair v. Forehand, 100 Mass. 136; Vanderbilt v. Adams, 7 Cow. 349; Lawton v. Steele, 119 N. Y. 226; Rea v. Hampton, 101 N. C. 51; Weeks v. King, 53 L. T. 31. *But see* Teck v. Anderson, 57 Cal. 251.

[2] Lawton v. Steele, 119 N. Y. 226.

legislative body.[1] The act in question declares that nets set in certain waters are public nuisances, and authorizes their summary destruction. The statute declares and defines a new species of public nuisance, not known to the common law, nor declared to be such by any prior statute. But we know of no limitation of legislative power which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests, or to the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the statute is a mere evasion, or was passed for the purpose of individual oppression, it will set it aside as unconstitutional, but not otherwise."[2]

SEC. 194. "There are numerous examples in recent legislation of the exercise of legislative power to declare property held or used in violation of a particular statute, a public nuisance, although such possession and use before the statute was lawful. The prohibitory legislation relative to the manufacture or sale of intoxicating liquors, in various States, has in many cases been accompanied by provisions declaring the place where liquor is unlawfully kept for sale, as well as the liquor itself, a common or public nuisance, and while the validity of prohibitory statutes in their operation upon liquors lawfully acquired or held before their passage, and in respect of the procedure authorized thereby, has been the subject of much contention in the courts, the right of the legislature by a new statute to impose upon property, held or used in the

[1] Barker v. People, 3 Cow. 686; People v. West, 106 N. Y. 293.

[2] *In re* Jacobs, 98 N. Y. 98; Mugler v. Kansas, 123 U. S. 623.

violation of law, the character of a public nuisance, is generally admitted.[1] The legislative power to regulate fishing in public waters has been exercised from the earliest period of the common law. * * * We think it was competent for the legislature, in exercising the power of regulation of this common and public right, to prohibit the taking of fish with nets in specified waters, and by its declaration to make the setting of nets for that purpose a public nuisance. The general definition of a nuisance given by Blackstone is, 'any thing that worketh hurt, inconvenience, or damage.' It is generally true, as stated by a recent writer,[2] that nuisances arise from violations of the common law, and not from the violation of a public statute. But this, we conceive, is true only where the statute creating a right or imposing an obligation affixes a penalty for its violation, or gives a specific remedy which by the terms of the statute or by construction is exclusive.[3] But the principle stated has no application where the statute itself prescribes that a particular act or the property used for a noxious purpose shall be deemed a nuisance. The legislature, in the act in question, acting upon the theory and upon the fact (for so it must be assumed), that fishing with nets in prohibited waters is a public injury, have applied the doctrine of the common law to a case new in instance, but not in principle, and made the doing of the prohibited act a nuisance. This we think it could lawfully do."

Exercise of legislative discretion conclusive upon the court.

SEC. 195. A distinguished writer, speaking of the limitations to the power of the legislature in respect of declaring nuisances, says,[4] that "the legislature can deter-

[1] Wynehamer v. People, 13 N. Y. 378; Fisher v. McGirr, 1 Gray, 1; Mugler v. Kansas, 123 U. S. 623. *See* Cooley's Const. Lims. 719; Kaufman v. Dostal, 73 Iowa, 691; Whitney v. Township Board, 39 N. W. Rep'r, 40; Tanner v. Alliance, 39 Fed. Rep'r, 196; Menken v. Atlanta, 78 Ga. 658.

[2] Wood on Nuisances, § 11.

[3] *See* Bulbrook v. Goodere, 2 Burr. 1770.

[4] Tiedeman's Lims. Pol. Pow., § 122 *a*.

mine whether it will permit or prohibit the doing of a thing which is harmful to others, in the proper consideration of the public welfare; but it cannot prohibit as a nuisance an act which inflicts no injury upon the health or property of others. If the harmful or innocent character of the prohibited use of lands furnishes the test for determining the constitutionality of the legislative prohibition, *it is clearly a judicial question, and is certainly not within the legislative discretion, whether the prohibited acts work an injury to others.* If they do not cause injury or annoyance to others, the attempted legislative interference is unwarranted by the Constitution, and it is the duty of the court to declare it to be unconstitutional."

The doctrine involved in that part of the statement indicated by italics is not to be accepted without qualification. It is true that the legislature may not rightfully declare that to be a crime which in its nature is and must be, under all circumstances, innocent; it may not declare that to be a nuisance which does not in fact endanger the life, health or property of the public, or some part of it. But the legislative determination upon the character of prohibited acts is conclusive upon the courts, unless it appears upon the face of the statute or from facts of which the courts may take notice, that the legislative act infringes rights secured by the fundamental law or protected by the Constitution. It is not a part of the functions of the courts "to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such facts."[1] The responsibility of determining whether the character of proscribed acts is such as to justify their classification as nuisances rests with the legislative body. If the legislature goes beyond its authority, this is to be corrected by the people, the original source of all legislative power, in

[1] Harlan, J., Powell v. Pennsylvania, 127 U. S. 678.

the regular mode of reversing legislative decisions. The judiciary is strictly limited in its function of passing upon the constitutionality of legislative acts; in doing so it is bound to respect and affirm the exercise of the legislative discretion, unless it clearly appears, in the light of common knowledge or of facts properly within the judicial cognizance, that the acts in question are within the constitutional inhibitions.[1]

[1] Cooley's Const. Lims. 197–201; Stevenson v. Colgan, 91 Cal. 649; People v. Richmond, 16 Col. 274; People v. Moore, 104 N. C. 714; Demoville v. Davidson County, 87 Tenn. 214. *Ante*, secs. 4, 5, 6.

CHAPTER X.

RESPONSIBILITY FOR NUISANCES.

SEC. 196. Responsibility is based on fault.
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Responsibility is based on fault.

SEC. 196. Any person is guilty of committing a nuisance whose unwarranted act or omission of legal duty causes the injury complained of. In other words, he is responsible for a nuisance who either creates it or continues it. So there may be several parties distinctly liable in respect of the same nuisance; those who create it, and those who fail to abate it, when it is their legal duty to do so. The liability of one who creates a nuisance is due to his positive fault or *delictum*, in creating the nuisance, and not merely to his neglect to abate it.[1] Consequently, it is no excuse that he is pecuniarily unable to abate it;[2] or that the nuisance was created and is continued upon lands belonging to another, and he cannot lawfully enter upon

[1] People v. Monteverde, 43 Hun, 447; Martin v. Pettit, 117 N. Y. 118; Wolf v. Kilpatrick, 101 id. 146; Edwards v. New York, etc., R. Co., 98 id. 245; Hannem v. Pence, 40 Minn. 127; State v. Holman, 104 N. C. 861.

[2] Baltimore, etc., Turnpike Co. v. State, 60 Md. 573.

the land to abate it.[1] At the same time, the occupier of the lands, upon which the nuisance is continued, may also be liable for the injurious consequences.

Joint and several liability.

SEC. 197. When a nuisance exists upon lands, it is the general rule that it is the occupier of the lands, and he alone, to whom responsibility for the nuisance *prima facie* attaches; but the owner of the lands is responsible if he has created or maintains the nuisance.[2] And for the purpose of determining the responsibility in such case, a trustee holding the legal title,[3] or a receiver or other officer or bailiff appointed by a court,[4] will be regarded as the owner of the lands. The owner is answerable for his own acts, in this regard, and for those of his servants, agents, and employes, if their acts are done in the course of their employment. This is true even if the acts constitute a positive malfeasance or misconduct. It makes no difference that the principal or master did not actually authorize or even know of the act or omission of his servant or agent, for even if he disapproved of or forbade it, he will be liable in a civil suit if the act or omission occur in the course of his employment and service.[5] It does not matter at all that the

[1] Roswell v. Prior, 12 Mod. 625; 2 Salk. 460; Thompson v. Gibson, 7 M. & W. 456; Rex v. Pedly, 1 Ad. & El. 822; Todd v. Flight, 9 C. B. (N. S.) 377; Chenango Bridge Co. v. Lewis, 63 Barb. 111; Fish v. Dodge, 4 Denio, 311; Swords v. Edgar, 59 N. Y. 28; Smith v. Elliott, 9 Penn. St. 345; Delaware Division Canal Co. v. Comm., 60 id. 367.

[2] Silvers v. Nerdlinger, 30 Ind. 53; Dalay v. Savage, 145 Mass. 38; Heeg v. Licht, 80 N. Y. 579; Jennings v. Van Schaick, 108 id. 530.

[3] People v. Townsend, 3 Hill, 479; Schwab v. Cleveland, 28 Hun, 458.

[4] Earl, J., Ahern v. Steele, 115 N. Y. 203, 237.

[5] Smith's Mast. & Serv. *322; Rex v. Medley, 6 C. & P. 292; Reg. v. Stephens, L. R., 1 Q. B. 701; Marshall v. Cohen, 44 Ga. 488; Quarman v. Burnett, 6 M. & W. 497. Bartley, C. J., in Clark v. Fry, 8 Ohio St. 353, 378, says: "Where the relation of master and servant, as that of principal and agent, exists, there is no difficulty in ascertaining the rule of liability, and the ground upon which it rests, in case of an injury done by the servant or agent while in the exercise of his employment. The liability of the master to answer for the conduct of his servant, or that of the principal for the conduct of his agent, is founded on the superintendence and control which the master is supposed to exercise over his servant, or the principal over his agent. 1 Blackstone's Comm. 431. By the civil law, that liability was confined to the person standing in the relation of *paterfamilias* to the person doing the injury. And although by

principal or master has nothing to do *personally* with the nuisance. It is both common sense and law, that if a man for his own advantage employs servants or agents, he must be answerable for what is done by them in the course and within the scope of the employment.[1] If the act or neglect amounts to a public nuisance, he will be liable to indictment even though he has specially forbidden the act or cautioned against the neglect.[2] To the same extent, and for the same reasons, a corporation is liable for the acts of its officers, agents and employes.[3] And as in all cases all who contribute to a nuisance are jointly, as well as severally liable, though each be guilty of doing but a part, agents, servants and employes, who aid either in the creation or maintenance of a nuisance, may be sued or indicted jointly with the principal or master.[4] So, if a

the common law, the rule of liability has been extended to cases where the agent is not a mere domestic, yet the principle and the reason upon which it rests is the same. This rule of *respondeat superior*, as its terms import, arises out of the relation of *superior* and *subordinate*, and is applicable to that relation wherever it exists, whether between principal and agent or master and servant, and is co-extensive with it, and ceases when the relation itself ceases to exist. It is founded on the power of control and direction which the superior has a right to exercise, and which, for the safety of other persons, he is bound to exercise over the acts of his subordinates, and in strict analogy to the liability *ex contractu*, upon the maxim *qui facit per alium facit per se*. The direct coincidence and co-existence of the rule of *respondeat superior* with the relation to which it belongs, is an unvarying test of its application."

[1] Reg. v. Stephens, L. R., 1 Q. B. 701; Jennings v. Van Schaick, 108 N. Y. 530. *See* Rich v. Basterfield, 4 C. B. 783. An occupier of lands is responsible for the acts of every person to whom he has granted license to do certain acts on his lands, and who in doing them commits a nuisance. White v. Jameson, L. R., 18 Eq. 303.

[2] Reg. v. Stephens, L. R., 1 Q. B. 701; Turberville v. Stampe, 1 Ld. Raym. 264; Hall's Case, 1 Mod. 76; Rex v. Cross, 3 Camp. 224; Reedie v. London, etc., Ry. Co., 4 Exch. 244; Wharton's Cr. Law, § 2374. Endlich on Interprn. Stats., § 135; Comm. v. Park, 1 Gray, 153.

[3] Ellis v. Sheffield Gas Cons. Co., 2 E. & B. 767; 23 L. J. (Q. B.) 42; Hilsdorf v. St. Louis, 45 Mo. 94; People v. Detroit White Lead Works, 82 Mich. 471; Delaware Division Canal Co. v. Comm., 60 Penn. St. 367.

[4] Rex v. Pease, 4 B. & Ad. 30; Rex v. Medley, 6 C. & P. 292; Losee v. Buchanan, 51 N. Y. 476; Chenango Bridge Co. v. Lewis, 63 Barb. 111. Thus, where a building has been erected in such a way and of such poor materials that it falls and injures adjoining property, all parties concerned in its construction are liable—the owner, the architect, and the builder. Jarvis v. Baxter, 52 Super. Ct. (N. Y.) 109. The rule is, that in misdemeanors all are principals. Wharton's Cr. Law, § 2374; Comm. v. Kimball, 105 Mass. 465; Comm. v. Tryon, 99 id. 442; Comm. v. Gannett, 1 Allen, 7. Conse-

nuisance is created by a corporation, the corporation itself and such of its officers as have direction and control of its business, as well as its agents and employes who contributed to the nuisance, may be jointly or severally sued or indicted therefor.[1] But, as no legal responsibility attaches to one who is guilty of no actual or imputed wrong, and who has personally done no wrongful act or been guilty of any personal negligence, a mere agent or servant is not liable for continuing a nuisance upon the land of his employer, when he has no such control as would authorize him to change or remove the condition of things constituting the nuisance.[2]

Liability for fault of contractor.

SEC. 198. It is said to be a settled rule of law, that "in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants, or by contractors or their servants. The injuries done upon land and buildings are in the nature of nuisances, for which the occupier ought to be chargeable, when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others."[3] One to whom

quently, it may be stated as a general proposition that where several persons have contributed to the creation or maintenance of the same nuisance, they may be sued jointly, under the rule applicable to joint tortfeasors, or each may be sued separately, and in such case it will be no defense that defendant only contributed in a slight degree to the nuisance, and that others, not parties, are chiefly responsible. Duke of Buccleugh v. Cowan, 5 Macph. 214; Thorpe v. Brumfitt, L. R., 8 Ch. 650; Blair v. Deakin, 57 L. T. 522; Grogan v. Pope Iron Co., 87 Mo. 323; Chipman v. Palmer, 9 Hun, 517; Anderson v. Dickie, 26 How. Pr. 105; Comminge v. Stevenson, 76 Texas, 652; Rogers v. Stewart, 5 Vt. 215.

[1] Wood on Nuisances, § 824.

[2] Stone v. Cartwright, 6 T. R. 411; Bell v. Joslyn, 3 Gray, 309; Wamesit Power Co. v. Allen, 120 Mass. 352; Brown Paper Co. v. Dean, 123 id. 267. *See* Brown v. Lent, 20 Vt. 529.

[3] Littledale, J., Laugher v. Pointer, 5 B. & C. 547, 560; White v. Jameson, L. R., 18 Eq. 303; Quarman v. Burnett, 6 M. & W. 499; Rich v. Basterfield, 4 C. B. 783; Cooley on Torts, 547; Ewell's Evans on Agency, *503.

such legal responsibility attaches cannot relieve himself of the responsibility by any contract or arrangement with others, short of an absolute transfer of the property by which he parts with all his rights in it, and reserves to himself no interest or control whatever. While it is generally true that if one on whose behalf certain work is done has intrusted the doing of the work to persons whose calling it is to do work of that kind, and who are masters of the workmen employed, having control over them, he is not liable for injuries resulting from the negligent manner of executing the work; this rule is, however, subject to exceptions. Thus where work is intrusted to the independent control of another which involves the performance of a duty that is incumbent upon the employer, the latter will remain responsible for negligence in execution of the work.[1] And where a person is in possession of fixed property which is so managed or dealt with that injury results to others, the occupier will not escape liability by reason of the fact that he has employed independent and competent contractors.[2]

Liability for letting premises with a nuisance thereon.

SEC. 199. The owner of lands is responsible if he creates a nuisance and then demises the premises with the nuisance thereon, although he is out of possession,[3] and

[1] Silvers v. Nerdlinger, 30 Ind. 53; Detroit v. Carey, 9 Mich. 165; Darmstaetter v. Moynahan, 27 id. 188; Engel v. Eureka Club, 59 Hun, 593.

[2] Chicago v. Robbins, 2 Black, 418; Clark v. Fry, 8 Ohio St. 353; Hale v. Sittingbourne, etc., Ry. Co., 30 L. J. Exch. 81. "If one employs a contractor to do a work not in its nature a nuisance, but when completed it is so by reason of the manner in which the contractor has done it, and he accepts the work in that condition, he becomes at once responsible for the creation of the nuisance, upon a principle very similar to that which makes a principal responsible by ratifying unauthorized wrongs committed by his agent. Boswell v. Laird, 8 Cal. 49." Earl, J., Vogel v. Mayor of New York, 92 N. Y. 10, 19. *See* McIlvaine v. Wood, 2 Ham. (O.) 166. The mere fact that a city has contracted for the removal of nuisances of a certain character, *e. g.*, dead hogs, does not exempt the owner or occupant of premises on which such a nuisance exists or of the property constituting the nuisance, from responsibility in regard to the nuisance. Hilsdorf v. St. Louis, 45 Mo. 94.

[3] Rosewell v. Prior, 12 Mod. 635; 2 Salk. 460; Grady v. Wolsner, 46 Ala. 381; Vason v. Augusta, 38 Ga. 542; Tomle v. Hampton, 129 Ill. 379; Heling v. Jordan, 53 Ind. 21; Lorne

even though the tenant's wrong contributes to the injurious results.[1] The ground of this liability is often said to be the receipt of rent, but it may fairly be observed that "it has never been held in any case that the receipt of rent imposes responsibility upon a landlord for a nuisance for which he is not otherwise responsible. Landlords always are entitled to rent; and if the mere receipt of rent would make them responsible for a nuisance upon the demised premises, then they would always be responsible, irrespective of other circumstances which have always been deemed necessary to create the responsibility."[2] The liability ought rather to be referred to a breach upon the part of the owner of a duty, which is imposed by the law, upon general principles of public policy. Where the owner of premises knows, or by the exercise of reasonable care can ascertain that they have upon them a nuisance, it is his duty to abate it before leasing the property; if he leases without doing this, he is liable to respond in damages to any one injured in consequence of the nuisance. This is so, although he did not himself create the nuisance.[3] For, by the letting of the premises, with the nuisance thereon, he impliedly authorizes the continuance of

v. Farren Hotel Co., 116 Mass. 67; Ingwersen v. Rankin, 47 N. J. L. 18; 49 id. 481; Edwards v. New York, etc., Railroad Co., 98 N. Y. 245; Brady v. Weeks, 3 Barb. 157; Bellows v. Sackett, 15 id. 96; Fish v. Dodge, 4 Denio, 311; Walsh v. Mead, 8 Hun, 387; Wunder v. McLean, 134 Penn. St. 334. Thus, one who keeps a heavy lamp suspended in front of his house on a public highway, is bound to keep it in a safe and secure condition, and he is not protected from the consequences of neglect, in this regard, by the fact that he has employed an experienced gas-fitter to examine the lamp and put it in thorough repair. Torrey v. Ashton, L. R., 1 Q. B. D. 314.

[1] Grady v. Wolsner, 46 Ala. 381; Walsh v. Mead, 8 Hun, 387.

[2] Earl, J., Ahern v. Steele, 115 N. Y. 203, 222.

[3] Gandy v. Jubber, 5 B. & S. 76, 485; Todd v. Flight, 9 C. B. (N. S.) 377; Nelson v. Liverpool Brew. Co., L. R., 2 C. P. 311; Albert v. State, 66 Md. 325; Owing v. Jones, 9 id. 108; Durant v. Palmer, 5 Dutch. 544; Timlin v. Standard Oil Co., 126 N. Y. 514; Swords v. Edgar, 59 id. 28; Ahern v. Steele, 115 id. 203; Irvine v. Wood, 51 id. 224; Woodfall's L. & Ten. 735. The owner cannot escape this liability by requiring from the tenant a covenant to keep the premises in repair. Shearm. & Redf. on Neg., § 502; Rex v. Pedley, 1 Ad. & El. 822; Nugent v. Boston, etc., Railroad Co., 80 Me. 62; Ingwersen v. Rankin, 47 N. J. L. 18; 49 id. 481; Swords v. Edgar, 59 N. Y. 28.

the nuisance.[1] It would be absurd to say that one who is liable for all consequential damages of a nuisance can relieve himself from that liability by merely demising the premises.[2] But in order to fix responsibility upon the owner, in such cases, it must appear that he had notice of the existence of the nuisance, or of the condition of things likely to occasion a nuisance, in their ordinary use, or else that he might have ascertained these facts in the exercise of a reasonable care;[3] and that at some time during the continuance of the nuisance he had a right of entry or the power to abate.[4]

If, instead of demising the premises, the owner conveys them with a warranty for their continued enjoyment as used at the time, he is liable for a continuance of the nuisance;[5]

[1] Grady v. Wolsner, 46 Ala. 382; Tomle v. Hampton, 129 Ill. 379; Helwig v. Jordan, 53 Ind. 21; Nugent v. Boston, etc., Railroad Co., 80 Me. 62; Dalay v. Savage, 145 Mass. 38; Jackman v. Arlington Mills, 137 id. 277; Brady v. Weeks, 3 Barb. 157; Walsh v. Mead, 8 Hun, 387. If a person, with knowledge of the existence of a nuisance, purchases the reversionary interest in demised premises, and receives rent from the tenant, he assumes responsibility for the nuisance, and is liable for all subsequently accruing damages. Pierce v. German Savings & Loan Society, 72 Cal. 180; Rex v. Pedley, 1 Ad. & El. 822.

[2] Rosewell v. Prior, 12 Mod. 635; 2 Salk. 460; Ingwersen v. Rankin, 47 N. J. L. 18; 49 id. 481; Swords v. Edgar, 59 N. Y. 28; Wunder v. McLean, 134 Penn. St. 334.

[3] Earl, J., Ahern v. Steele, 115 N. Y. 203; Rosewell v. Prior, 12 Mod. 635; 2 Salk. 460; Albert v. State, 66 Md. 325; Ingwersen v. Rankin, 47 N. J. L. 18; 49 id. 481; Dalay v. Savage, 145 Mass. 38; Conhocton Stone Road Co. v. Buffalo, etc., Railroad Co., 51 N. Y. 573; Swords v. Edgar, 59 id. 28; Davenport v. Ruckman, 37 id. 568; Edwards v. New York, etc., Railroad Co., 98 id. 245; Irvine v. Wood, 51 id. 224; Anderson v. Dickie, 26 How. Pr. 105; Carson v. Godley, 26 Penn. St. 111; Godley v. Hagerty, 20 id. 387.

[4] A landlord, whose tenant during the term has erected a nuisance on the demised premises, is not liable therefor so long as he has no right of entry or power to abate; but when the term expires, his right of entry and power to abate at once arise, and for that reason a liability commences. If he declines to re-enter and abate the nuisance, and re-lets the premises, the liability which arose at the end of the first term of the tenancy will be neither discharged nor evaded. The test of his liability in such case is his power to have remedied the wrong. If he has, but fails to exercise such power, the liability remains. Ingwersen v. Rankin, 47 N. J. L. 18; 49 id. 481; Swords v. Edgar, 59 N. Y. 28. *See* Irvine v. Wood, 51 id. 224. The renewal of the lease during the continuance of the nuisance amounts to a ratification. Gandy v. Jubber, 5 B. & S. 76, 485; Whalen v. Gloucester, 4 Hun, 24; State v. Williams, 1 Vroom, 112; Taylor Landl. & Ten., § 175; Bigelow Lead. Cas. in Torts, 475.

[5] Helwig v. Jordan, 53 Ind. 21; Prentiss v. Wood, 132 Mass. 486; Plumer v. Harper, 3 N. H. 88; Waggoner v. Jermaine, 3 Denio, 310; Walsh v. Mead, 8 Hun, 387; Mayor of Albany v. Cunliff, 2 N. Y. 165.

but not, it is said, if he simply conveys by quit-claim deed, for this is not regarded as conferring any right upon the grantee, in respect of the premises, which the grantor did not himself possess, nor as authorizing any act which the grantor could not himself lawfully exercise.[1]

Liability for the continuance of a nuisance.

SEC. 200. The owner of lands is also responsible, if a nuisance was erected on the premises by a prior owner or occupant, or by a stranger, and he knowingly maintains it. But "a grantee or devisee of premises upon which there is a nuisance, at the time the title passes, is not responsible for the nuisance until he has had notice thereof, and in some cases until he has been requested to abate the same. The authorities to this effect are so numerous and uniform that the rule which they establish ought no longer to be open to question."[2] The cases holding a party liable for the continuance of a nuisance created by another on his land, without any notice to remove the same, are generally cases where there has been, on the part of such party, some active participation in its continuance, or some positive act evidencing its adoption, or, in the case of a structure, some use of it, like the operation of a factory which occasions unwholesome smells. In the latter case, every act of using is a new nuisance, for which an injured party has his remedy for damages, and the public their remedy by indictment.[3]

[1] House v. Corning, 1 Lans. 288; Blunt v. Aiken, 15 Wend. 522. On the same principle, it is said that a tenant who assigns his entire interest, without reserving rent, and without covenant for quiet enjoyment, does not authorize and will not be responsible for a continuance of an existing nuisance. Brady v. Weeks, 3 Barb. 157; Blunt v. Aiken, 15 Wend. 522.

[2] Earl, J., Ahern v. Steele, 115 N. Y. 203; Penruddock's Case, 5 Coke 100 B.; Noyes v. Stillman, 24 Conn. 15; Bonner v. Welborn, 7 Ga. 296; Graff v. Ankenbrandt, 124 Ill. 51; Pillsbury v. Moore, 44 Me. 154; Walter v. Co. Commrs., 35 Md. 385; Sloggy v. Dilworth, 38 Minn. 179; Pinney v. Berry, 61 Mo. 359; Plumer v. Harper, 3 N. H. 88; Woodman v. Tufts, 9 id. 88; Carleton v. Redington, 21 id. 291; Eastman v. Amoskeag Mfg. Co., 44 id. 144; Beavers v. Trimmer, 29 N. J. L. 97; Pierson v. Glean, 14 id. 37; Miller v. Church, 2 T. & C. (N. Y.) 259; Hubbard v. Russell, 24 Barb. 404; Woram v. Noble, 41 Hun, 398; Wenzlick v. McCotter, 87 N. Y. 122.

[3] *See* last preceding note.

What constitutes a continuance of a nuisance.

SEC. 201. Ordinarily, the use of premises in the same manner in which they were constantly used by the grantor, is lawful, until there is some notice of encroachment upon the rights of others.[1] The mere sufferance of that which constitutes a nuisance, without the use of it, is not technically a continuance of it,[2] unless it be of a kind for which an occupant of premises is absolutely responsible, as a nuisance to the public health. And so, a party has no right to enter upon the land of another, in order to abate a nuisance, without a previous notice or request to the occupant of the land to abate the nuisance, unless it appears that the latter was the original wrong-doer by placing it there, or that he is knowingly maintaining it, or that it arises from a default in the performance of some duty cast upon the occupant by law, or that the nuisance is immediately dangerous to life or health.[3]

Restricted liability for continuing a nuisance.

SEC. 202. Indeed, before responsibility can be cast upon a person who has acquired the ownership of premises, by devolution of law or otherwise, and whether subject to an outstanding lien or not, he must have notice of the nuisance and a reasonable time to abate it. The notice must have been actual, or time enough must have elapsed in which knowledge of the existence of the nuisance could have been obtained by the exercise of reasonable diligence.[4] There must be some fault, some *delictum* of the occupier, and his liability can have no other basis. So, it has been held that persons who become owners of premises by the

[1] Noyes v. Stillman, 24 Conn. 15; Pillsbury v. Moore, 44 Me. 154.

[2] McDonough v. Gilman, 3 Allen, 264; Morris Canal & B. Co. v. Ryerson, 27 N. J. L. 457.

[3] Jones v. Williams, 11 M. & W. 176; Earl of Lonsdale v. Nelson, 2 B. & C. 302; Lorne v. Farren Hotel Co., 116 Mass. 67; Jennings v. Van Schaick, 13 Daly, 438; Irvine v. Wood, 51 N. Y. 224; Schwab v. Cleveland, 28 Hun, 458.

[4] Peckham, J., Timlin v. Standard Oil Co., 126 N. Y. 514, 527. No particular form of notice is required. It may be either written or oral, or it may be by acts alone, clearly informing the party to whom it is directed of the fact of the nuisance, and of the desire of the party injured for its removal or abatement. Carleton v. Redington, 21 N. H. 291; Snow v. Cowles, 26 id. 277.

terms of a will, upon the expiration of a precedent life estate, subject to a valid outstanding lease, are not responsible for a nuisance on the premises, consisting of defects in a pier, during the existence of the precedent estate, nor until notice thereof, after acquiring the title and right of possession.[1] And even in cases where the owner is personally in possession of premises, if the nuisance thereon consists in a dangerous building, originally constructed properly, the condition of which has been changed so as to render it dangerous by *vis major*, as by fire or by the act of a stranger, which the owner had no reason to anticipate, he cannot be held liable or responsible for failure to make the structure safe, until he has had time, after it has so become dangerous, to take the necessary precautions, nor even then, if he has had no actual notice of the dangerous condition of his property, and could not have ascertained it in the exercise of reasonable care.[2]

Liability through covenants to repair.

SEC. 203. The owner of premises is also responsible if he has demised them and covenanted to keep them in repair, and omits to make necessary repairs, so that the premises become a nuisance.[3] By the common law, it is said, the occupier, and not the landlord, is bound, as between himself and the public, so far to keep buildings in repair, that they may be safe for the public; and such occupier is *prima facie* liable to third persons for damages arising from any defect. If, indeed, there be an express agreement between landlord and tenant that the former shall keep the premises in repair, so that in case of a recovery against the tenant he would have his remedy over, then, to avoid circuity of action, the party injured

[1] Ahern v. Steele, 115 N. Y. 203; Woram v. Noble, 41 Hun, 398. *See* Conhocton Stone Road Co. v. Buffalo, etc., R. Co., 51 N. Y. 573.

[2] Nichols v. Marsland, L. R., 10 Exch. 255; 2 Exch. Div. 1; Earl of Lonsdale v. Nelson, 2 B. & C. 302; Mahoney v. Libbey, 123 Mass. 20.

[3] Woodfall's Landlord and Tenant, 735; Nelson v. Liverpool Brew. Co., L. R., 2 C. P. 311; Fow v. Roberts, 108 Penn. St. 407.

by the defect and want of repair may have his action in the first instance against the landlord. But such express agreement must be distinctly proved.[1]

SEC. 204. The fact that the landlord has reserved a right to go upon the premises for the purpose of making repairs is immaterial, where it is sought to fix responsibility upon him for damages arising from want of repairs. "Even where an owner demises premises and covenants to repair, the covenant cannot inure directly to the benefit of a third person, not a party thereto. But in such case the person injured because, for want of repairs, the demised premises have become a nuisance, has a cause of action primarily against the tenant. But because the tenant, in case of a recovery against him, could sue his landlord for indemnity upon the covenant, to prevent circuity of action, the person injured may bring his action against the landlord, not because the landlord owed him any duty to repair, but because he owed that duty to his tenant. It would have been wholly immaterial if these defendants, owners of the pier, had let it without reserving any right to go upon it for repairs, and even if they could not have gone upon it for repairs, without being trespassers.[2] There is no case which holds that whether the landlord can or cannot go upon the demised premises to make repairs is a material circumstance affecting his liability for a nuisance existing thereon. It was held that a lessee who has covenanted with his landlord to repair is not responsible to a stranger for a nuisance upon the demised premises while in the possession of a sub-tenant to whom he had let them.[3] As he had made no covenant to repair with his tenant, and was not bound to indemnify him, the person injured could not maintain an action against him, although he had covenanted with his landlord

[1] Shaw, C. J., Lowell v. Spaulding, 4 Cush. 277.

[2] Fish v. Dodge, 4 Denio, 311; Swords v. Edgar, 59 N. Y. 28.

[3] Clancy v. Byrne, 56 N. Y. 129.

to repair. In cases where it is said that a landlord bound to make repairs upon demised premises is responsible for a nuisance thereon, the obligation to make the repairs was one existing between him and the tenant.[1] The whole argument upon this point is summed up in the statement that, as there was no breach by the defendants of any duty due from them to the tenant [they having merely reserved a right to make repairs and not covenanted to make them], the stipulations in the lease do not concern a stranger thereto."[2]

When a landlord is responsible for the use of premises.

SEC. 205. The owner of premises is responsible if he demises them to be used as a nuisance, or for a business or in a way so that they will necessarily become a nuisance. He is liable for every nuisance which is a necessary, contemplated or probable result of using the premises for the purposes for which they were leased.[3] If,

[1] Russell v. Shenton, 2 Gale & D. 573.

[2] Earl, J., Ahern v. Steele, 115 N. Y. 203; *but see* dissenting opinion of Danforth, J.; Copeland v. Hardringham, 3 Campb. 398; Irwin v. Sprigg, 6 Gill. 200.

[3] Jensen v. Sweigers, 66 Cal. 182; Kalis v. Shattuck, 69 id. 593; Hussey v. Ryan, 64 Md. 426; Mullen v. St. John, 57 N. Y. 569; Cesar v. Karutz, 60 id. 229; Rector v. Burkhardt, 3 Hill, 193; Shindlebeck v. Moon, 32 Ohio St. 264. *See* Gilliland v. Chicago, etc., R. Co., 19 Mo. App. 411. This is certainly the case if the landlord can be said to have assented to the use, or in any way contributed to the condition of things constituting the nuisance. Riley v. Simpson, 83 Cal. 217. And the landlord will be liable, although the nuisance was created by the tenant, if, when he let the premises, he knew the purposes to which they were to be devoted, or had reason to know that they were to be used in a way that would occasion a nuisance. Marshall v. Cohen, 44 Ga. 488; Helwig v. Jordan, 53 Ind. 21; Jackman v. Arlington Mills, 137 Mass. 277; Fish v. Dodge, 4 Denio, 311; Pickard v. Collins, 23 Barb. 444; Chenango Bridge Co. v. Lewis, 63 id. 111; Wunder v. McLean, 134 Penn. St. 334. It is said, however, that it must appear that in the particular case the facts are such as to warrant an inference that the use was contemplated or licensed; for it is on the ground of implied authorization or ratification of the use that the owner is held responsible. Burgess v. Gray, 1 C. B. 591; Ellis v. Sheffield Gas Cons. Co., L. J., 25 Q. B. 42. For the same reason, when a tenant devotes premises to uses other than those for which they are let, and injuries occur in consequence of such unauthorized use, the landlord is shielded from responsibility. Ryan v. Wilson, 87 N. Y. 471; Edwards v. New York, etc., R. Co., 98 id. 245. It has been held that a landlord is not responsible for injuries occasioned by the explosion of a steam-boiler, due to defects therein arising subsequent to the letting, where the tenant has undertaken to make repairs, even though the boiler be in such condition at the time of the letting that it will probably become dangerous if the tenant fails to make repairs. Deller v. Hofferberth, 127 Ind. 415.

however, the premises are not themselves a nuisance, though they may or may not, in their use, become a nuisance, and it is entirely at the option of the tenant so to use them or not, the landlord receiving the same benefit whether they are so used or not, the landlord cannot be held responsible for the acts of the tenant.[1] Accordingly, when the letting is for a purpose lawful in itself and the premises can only become a nuisance under special and unusual circumstances, the landlord is not liable unless he knew or had reason to believe that the premises would be used in a way to render them a nuisance.[2]

Landlord is not liable for tenant's fault.

SEC. 206. If demised premises were in all respects safely and properly constructed and in good repair and condition when the tenant took possession, the landlord ought not to be held responsible for consequences of the tenant's carelessness or neglect in their use. The liability in such case should especially be confined to the tenant, if the injury complained of is due to defects in such things as are usually under his control and in his use as appurtenances of the demised premises and necessary for their full enjoyment.[3] The landlord will not be responsible in such cases, if he has not expressly agreed to make repairs, although in fact he does habitually look to the repairs.[4] On the other hand, if the property was defectively constructed, or was out of repair or in bad condition when the tenant was put in possession, the mere fact of the tenant's occupancy,

[1] Rich v. Basterfield, 4 C. B. 183; Vason v. Augusta, 38 Ga. 542; Tomle v. Hampton, 129 Ill. 379; Saltonstall v. Banker, 8 Gray, 195; Lowell v. Spaulding, 4 Cush. 277. *See* Portland v. Richardson, 54 Me. 46; Congreve v. Morgan, 18 N. Y. 84; Davenport v. Ruckman, 10 Bosw. 20; Irvine v. Wood, 51 N. Y. 224; Swords v. Edgar, 59 id. 28.

[2] Fish v. Dodge, 4 Denio, 311; Pickard v. Collins, 23 Barb. 444.

[3] Rich v. Basterfield, 4 C. B. 784; Deller v. Hofferberth, 127 Ind. 415; Lorne v. Farren Hotel Co., 116 Mass. 67; Pope v. Boyle, 98 Mo. 527; Johnson v. McMillan, 69 Mich. 36; Fisher v. Thirkell, 21 id. 1; Boston v. Gray, 144 Mass. 53; Jennings v. Van Schaick, 108 N. Y. 530; Irvine v. Wood, 51 id. 224; Wolf v. Kilpatrick, 101 id. 146; Woram v. Noble, 41 Hun, 398; Wunder v. McLean, 134 Penn. St. 334; Ford v. Roberts, 108 id. 489; Knauss v. Brua, 107 id. 85.

[4] Nelson v. Liverpool Brew. Co., L. R., 2 C. P. 311.

when the injury occurs, will not relieve the landlord from the consequences of his own negligence.[1] He is liable because of the defective construction or bad condition of the property at the time when the tenancy began, and this liability continues notwithstanding the possession by the tenant. He cannot escape liability for an existing nuisance by leasing the property to a tenant and putting him in possession. The tenant using the premises in such condition would be liable because of his use, but such liability would not take the place of, nor in any manner affect, that of the landlord.[2]

Liability of a tenant.

SEC. 207. As a general rule, it is not the owner of premises, but the occupier, and he alone, who is responsible for a nuisance thereon; for as to the public he has control and is primarily bound to keep the premises in safe and proper condition.[3] Nor will the fact that the person who created the nuisance remains responsible, excuse one actually in possession and control. The continuance and every use of that which is in its erection a nuisance, is a new nuisance.[4] And a tenant is liable if he

[1] If, in such case, the tenant himself suffers injury, the landlord will be liable; as, if he lets a dwelling-house, knowing that it is infected, without notifying the tenant, and the tenant suffers from the exposure. Cesar v. Karutz, 60 N. Y. 229. The right of action rests upon the duty of the landlord to disclose to the tenant defects in the premises amounting to a nuisance likely to impair health. Minor v. Sharon, 112 Mass. 477; Maywood v. Logan, 78 Mich. 135; Kern v. Myle, 80 id. 525; Scott v. Simons, 54 N. H. 426.

[2] Jennings v. Van Schaick, 108 N. Y. 530; Edwards v. New York, etc., Railroad Co., 98 id. 245. *See* Machen v. Hooper, 73 Md. 342, and cases in last note.

[3] Petty v. Bickmore, L. R., 8 C. P. 401; Kalis v. Shattuck, 69 Cal. 593; Russell v. Shenton, 3 Q. B. 449; Tomle v. Hampton, 129 Ill. 379; King v. Boylston Mkt. Assn., 14 Gray, 249; Oakham v. Holbrook, 11 Cush. 299; Lowell v. Spaulding, 4 id. 277; Cunningham v. Cambridge Sav. Bank, 138 Mass. 480; Boston v. Gray, 144 id. 53; Samuelson v. Cleveland, etc., Co., 49 Mich. 164; Gilliland v. Chicago, etc., R. Co., 19 Mo. App. 411; Wasmer v. Delaware, etc., R. Co., 80 N. Y. 212; Texas, etc., R. Co. v. Mangum, 68 Texas, 342.

[4] Pillsbury v. Moore, 44 Me. 154; Staple v. Spring, 10 Mass. 72; Nichols v. Boston, 98 id. 39; McDonough v. Gilman, 3 Allen, 264; Morris Canal & B. Co. v. Ryerson, 27 N. J. L. 457; Plumer v. Harper, 3 N. H. 88; Brady v. Weeks, 3 Barb. 157; Irvine v. Wood, 51 N. Y. 224; Joyce v. Martin, 15 R. I. 558.

sublets premises knowing or being chargeable with notice that they are in such condition as to constitute or become a nuisance.[1] But the responsibility for nuisances is not imposed upon a tenant simply by acceptance of a lease; to establish liability on his part it must be shown that he had notice of the existence of the nuisance or that time enough had elapsed in which he could have ascertained the fact in the exercise of a proper care.[2]

Municipal responsibility for nuisances; governmental action.

SEC. 208. In considering the responsibility of municipal corporations for committing or suffering nuisances, regard must be had to their two-fold character, as governmental agencies and as corporate communities organized for local purposes. In the former character, their powers and duties are merely political, and, so far as individuals are concerned, purely discretionary. They are conferred and imposed, not for the advantage of the citizens composing the local community, but for the benefit of the people of the State. In exercising these powers and performing these duties, that is, "for taking or neglecting to take strictly governmental action, municipal corporations are under no responsibility whatever, except the political responsibility to their corporators or to the State. The reason is, that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion, for the public good; and there can be no appeal from the judgment of the

[1] Sandford v. Clarke, L. R., 21 Q. B. 398; Rosewell v. Prior, 12 Mod. 635; 2 Salk. 460; Brady v. Weeks, 3 Barb. 157; Timlin v. Standard Oil Co., 126 N. Y. 514, 525; Clancy v. Byrne, 56 id. 129.

[2] As to the rule of liability in cases where one has possession of but a part of a structure and the nuisance consists in the dangerous or defective condition of the main body of the structure, or a part of the premises of which the landlord retains control, though the tenants may have the use of it, *see* Timlin v. Standard Oil Co., 126 N. Y. 514; Jennings v. Van Schaick, 108 id. 530; Irvine v. Wood, 51 id. 224; Shipley v. Fifty Associates, 106 Mass. 194.

proper municipal authorities to the judgment of courts and juries."[1]

It is, therefore, stated as a well-established doctrine, that a municipal corporation, in its political character, is not responsible, nor are its authorities responsible, for the non-exercise or for the manner in which, in good faith, they have exercised their governmental powers. In other words, a private individual has no cause of action whatever, in the absence of a statute expressly giving it, against the corporations or their authorities, for injuries occasioned by nuisances arising from the fault of the municipal authorities in exercising or neglecting to exercise their legislative or discretionary powers.[2]

Illustrations.

SEC. 209. As illustrating the application of the doctrine just expressed, cases may be cited where it is held that an individual has no ground of action against a municipal corporation or its authorities because of a failure to afford sufficient protection from fires; or because of the negligent or wrongful manner in which firemen have performed their duties;[3] or because ordinances have not been made

[1] Cooley on Torts, 660; Campbell v. City of Montgomery, 53 Ala. 527; McCutcheon v. Homer, 43 Mich. 483; Burford v. Grand Rapids, 53 id. 98. In Weightman v. Washington, 1 Black 39, 49, it was said: "Municipal corporations undoubtedly are invested with powers which from their nature are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because in their nature they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation at the suit of an individual for the failure on their part to perform such a duty."

[2] *See ante*, secs. 39, 40.

[3] Davis v. Montgomery, 51 Ala. 139; Howard v. San Francisco, 51 Cal. 52; Wright v. Augusta, 78 Ga. 241; Forsyth v. Atlanta, 45 id. 152; Brinkmeyer v. Evansville, 29 Ind. 187; Van Horn v. Des Moines, 63 Iowa, 447; Greenwood v. Louisville, 13 Bush (Ky.), 226; Patch v. Covington, 17 B. Monr. (Ky.) 722; Fisher v. Boston, 104 Mass. 87; Tainter v. Worcester, 123 id. 311; Hafford v. New Bedford, 16 Gray, 297; Alexander v. Vicksburg, 68 Miss. 564; Russell v. Mayor of New York, 2 Denio, 461; O'Meara v. Mayor of New York, 1 Daly (N. Y.), 425; Wheeler v. Cincinnati, 19 Ohio St. 19; Grant v. City of Erie, 69 Penn. St. 420; Black v. Columbia, 19 S. C. 412; Hayes v. Oshkosh, 33 Wis. 314.

or enforced to regulate or prevent the explosion of fireworks within the corporation ;[1] or because necessary public drains or sewers are not provided, or that those provided do not properly carry off the surface-water, or because they, or any other public works, designed for the convenience of the citizens, were constructed according to such a faulty or defective plan, that they do not provide against accidental injury to persons or property as well as they might have done ;[2] or because of a failure to make proper regulations as to the use of public streets, as, for instance, by causing them to be well lighted,[3] or by requiring railroad companies using them to provide and maintain suitable safeguards against injury to persons or property,[4] or by causing the removal of dangerous obstructions, or by preventing "coasting" thereon,[5] or the running at large of cattle and swine.[6] There is no corporate responsibility for the alleged inconvenient location or the bad management of a public market-house ;[7] nor is the corporation liable for a neglect to take measures for the removal of buildings, walls, overhanging structures of any kind, or of

[1] Wheeler v. Plymouth, 116 Ind. 158; Ball v. Woodbine, 61 Iowa, 83; Hill v. Charlotte, 72 N. C. 55; McDade v. Chester City, 117 Penn. St. 414.

[2] Roberts v. Chicago, 26 Ill. 249; Delphi v. Evans, 36 Ind. 90; Terre Haute v. Hudnut, 112 id. 542; Evansville v. Decker, 84 id. 324; Cotes v. Davenport, 9 Iowa, 227; Bennett v. New Orleans, 14 La. Ann. 120; Detroit v. Beckman, 34 Mich. 125; Pontiac v. Carter, 32 id. 164; White v. Yazoo, 27 Miss. 327; Lambar v. St. Louis, 15 Mo. 610; Wilson v. Mayor of New York, 1 Denio, 595; Mills v. Brooklyn, 32 N. Y. 489; Carr v. Northern Liberties, 35 Penn. St. 324; Fair v. Philadelphia, 88 id. 309; Wakefield v. Newell, 12 R. I. 75; Hoyt v. Hudson, 27 Wis. 756. The rule that a municipal corporation is not liable for an omission to supply drainage or sewerage does not apply when the necessity for the drainage is caused by the act of the corporation itself. Byrnes v. Cohoes, 67 N. Y. 204; Seifert v. Brooklyn, 101 id. 136; Phinizy v. Augusta, 47 Ga. 260.

[3] Freeport v. Isbell, 83 Ill. 440.

[4] Kistner v. Indianapolis, 100 Ind. 210.

[5] Faulkner v. Aurora, 85 Ind. 130; Lafayette v. Timberlake, 88 id. 330; Altwater v. Baltimore, 31 Md. 462; Taylor v. Cumberland, 64 id. 68; Cole v. Newburyport, 129 Mass. 594; Steele v. Boston, 128 id. 583; Shepherd v. Chelsea, 4 Allen, 113; Burford v. Grand Rapids, 53 Mich. 98; Ray v. Manchester, 46 N. H. 59; Toomey v. City of Albany, 38 N. Y. State Rep'r, 91; 14 N. Y. Supplt. 572; Hutchinson v Concord, 41 Vt. 271; Schultz v. Milwaukee, 49 Wis. 254.

[6] Rivers v. Augusta, 65 Ga. 376; Kelley v. Milwaukee, 18 Wis. 83.

[7] Baker v. State, 27 Ind. 485; Walker v. Hallock, 32 id. 239. *But see* Suffolk v. Parker, 79 Va. 660. *See, also, post*, sec. 211.

awnings, trees, poles or signs, located in such manner as to constitute nuisances, dangerous to the lives or health of the citizens, if such nuisances exist on private premises.[1] It may be said, generally, that the corporation is not liable for the failure to abate nuisances of any kind, when they exist upon private premises and are not referable to any fault on the part of its own agents.[2]

Acts done under legislative sanction.

SEC. 210. It is not to be supposed, however, that municipal corporations possess immunity from liability for nuisances occasioned by the exercise of statutory powers or the performance of statutory duties, not extended to other corporations or to individuals. Their liability extends to all cases where there is a careless or negligent execution of the corporate powers or duties, which results in a nuisance to persons or property, if a private corporation would have been liable under the same conditions and circumstances.[3] It is a general rule, that neither municipal nor other corporations nor private individuals, acting under the authority of a statute, can be subjected to a liability for damages arising from the exercise of the authority so conferred.[4] This rule, however, is confined to such consequences as are the usual and necessary result of

[1] *See*, *ante*, sec. 39. Smoot v. Wetumpka, 24 Ala. 112; City of Anderson v. East, 117 Ind. 126; Howe v. New Orleans, 12 La. Ann. 481; Cain v. Syracuse, 95 N. Y. 83; Connors v. Mayor of New York, 11 Hun, 439. It was held, in Hewison v. New Haven, 37 Conn. 475, that the corporation was not liable for an injury received by the falling of a weight used in suspending a flag over a street.

[2] Davis v. Montgomery, 51 Ala. 139; Dooley v. Town of Sullivan, 112 Ind. 451; James' Admr. v. Trustees of Harrodsburg, 85 Ky. 191; Howe v. New Orleans, 12 La. Ann. 481; Armstrong v. Brunswick, 79 Mo. 319; Coonley v. City of Albany, 57 Hun, 327; Crowell v. Bristol, 5 Lea (Tenn.), 685; State v. Burlington, 36 Vt. 521. *But see* State v. Shelbyville, 4 Sneed (Tenn.), 176.

[3] Bailey v. Mayor of New York, 3 Hill, 531; 2 Denio, 433; Fort Worth v. Crawford, 64 Texas, 202; 74 id. 404. *See* Pittsburgh v. Grier, 22 Penn. St. 54; Oliver v. Worcester, 102 Mass. 489; Donohue v. Brookga, 119 N. Y. 241.

[4] For example, a city is not liable because measures taken to suppress nuisances necessarily cause a temporary inconvenience or annoyance to citizens. The point was so decided in a case where the city of Knoxville was indicted for causing a nuisance by burning infected articles of clothing and bedding. State v. Knoxville, 12 Lea (Tenn.), 146.

the proper exercise of the authority. It does not shield a corporation nor an individual, where injury results solely from the defective manner in which the authority was originally exercised and from continuing in wrong after notice of the injury. The proposition is stated very strongly by an eminent judge, in a recent case, in this language: "The immunity," he says, "which extends to the consequences, following the exercise of judicial or discretionary power by a municipal body or other functionary, presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. When such power can be exercised so as not to create a nuisance, and does not require the appropriation of private property to effectuate it, the power to make such an appropriation or create such nuisance will not be inferred from the grant. Where, however, the acts done are of such a nature as to constitute a positive invasion of rights guaranteed by the constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences."[1]

Liability of municipality as owner of property.

SEC. 211. Municipalities, regarded as local corporations, owning and managing property for their own benefit

[1] Ruger, C. J., Seifert v. Brooklyn, 101 N. Y. 136, 144. It is to be noted that it is not always the corporation itself which is liable for the wrongful or negligent exercise of the corporate powers. The rule on this point has been stated by Shaw, C. J., in Thayer v. Boston, 19 Pick. 511, in a way that has met with approval. In substance he says that, as a general rule, a municipal corporation is not responsible for unauthorized and unlawful acts of officers, though done *colore officii*; it must further appear, that the officers were expressly authorized to do the acts by the corporation, or that they were done *bona fide*, in pursuance of a general authority to act for the corporation on the subject to which they relate, or that, in either case, they were adopted and ratified by the corporation. A municipality may be liable in an action of the case, for an act which would warrant a like action against an individual, provided that such act is done by the authority of the corporation, or by a branch of its government invested with jurisdiction to act for the corporation upon the subject to which the particular act relates, or that after the act has been done it has been ratified by the corporation by any similar action of its officers. Lee v. Village of Sandy Hill, 40 N. Y. 442; Clark v. Peckham, 9 R. I. 455.

and the private corporate purposes, are chargeable with duties and obligations like other owners of property, and they must respond in damages for creating or suffering nuisances, in respect of their own property, under the same circumstances and rules which govern the responsibility of private persons.[1] It is a general rule of law, that such corporations have no more right to erect or maintain a nuisance than a private individual possesses, and that actions may be maintained against them for injuries occasioned by nuisances for which they are responsible in any cases in which, under like circumstances, an action could be maintained against an individual.[2] So, for example, it has been held, that a municipal corporation is liable for casting refuse, sewage or filth into streams or upon the shores of streams,[3] or upon private premises;[4] and for suffering defective wells, trees, poles, awnings, or any kind of a structure in an unsafe condition, to stand or remain upon or near public streets, squares or highways, or other public places, so as to endanger the safety of citizens lawfully in or about those places.[5] The corporation is also liable for nuisances created by erecting a pest-house near a private dwelling, so that the latter becomes a dangerous habitation,[6] or by erecting gas reservoirs on public premises so as to foul the wells on private premises in the vicinity;[7] or by suffering the privy-vaults connected with public school-houses to be in such defective

[1] Dillon's Mun. Corp., § 985; Cumberland, etc., Co. v. Portland, 62 Me. 504; Moulton v. Scarborough, 71 id. 267; Pennoyer v. Saginaw, 8 Mich. 534; Briegel v. Philadelphia, 135 Penn. St. 451; Shuter v. The City, 3 Phila. 228; Clark v. Peckham, 9 R. I. 55.

[2] Mootry v. Danbury, 45 Conn. 550; Harper v. Milwaukee, 30 Wis. 364.

[3] Franklin Wharf v. Portland, 67 Me. 46; Haskell v. New Bedford, 108 Mass. 208; Chapman v. Rochester, 110 N. Y. 273; Spokes v. Banbury Board of Health, L. R., 1 Eq. 42; Goldsmid v. Tunbridge Wells, etc., Commissioners, ib. 161.

[4] Jacksonville v. Lambert, 62 Ill. 590; Burton v. Chattanooga, 7 Lea (Tenn.), 739.

[5] Jones v. New Haven, 34 Conn. 1; Parker v. Macon, 39 Ga. 725, Grove v. Fort Wayne, 45 Ind. 429; Grogan v. Broadway Foundry Co., 87 Mo. 321; Kiley v. City of Kansas, ib. 103; Morristown v. Moyer, 67 Penn. St. 355.

[6] Niblett v. Nashville, 12 Heisk. 684.

[7] Shuter v. The City, 3 Phila. 228.

condition as to menace the health of people in the neighborhood or those obliged to resort to them.[1] A city is also responsible for the mismanagement of the municipal court-house;[2] or of a public market-house;[3] for the exercise of due care in the execution of any public work ordered by it;[4] and, it is said, for damages occasioned by the defective condition or the mismanagement of its sewers and drains;[5] and for the negligence of its officers in keeping the city prison in such filthy and unwholesome condition as to endanger the health of persons confined there.[6] In all these cases, it will be observed, the liability of the corporation is based upon some fault in the execution of purely corporate duties, or the negligent manner in which the corporate powers are exercised in reference to the corporate property.

Liability based upon an implied contract.

SEC. 212. The municipal liability is further extended to another class of cases, upon a different doctrine. "The grant by the State to the municipality," it is said, "of a portion of its sovereign powers, and their acceptance for these beneficial purposes, is regarded as raising an implied promise on the part of the corporation to perform the corporate duties; and this implied contract made with the sovereign power inures to the benefit of every individual interested in its performance. In this respect these corporations are looked upon as occupying the same position as private corporations, which, having accepted a valuable franchise, on condition of the performance of certain

[1] Briegel v. Philadelphia, 135 Penn. St. 331.

[2] Galvin v. Mayor of New York, 112 N. Y. 223.

[3] Suffolk v. Parker, 79 Va. 660.

[4] Birmingham v. McCary, 84 Ala. 469; Village of Jefferson v. Chapman, 127 Ill. 438; Covington v. Bryant, 7 Bush (Ky.), 248; Detroit v. Carey, 9 Mich. 165; Hannon v. St. Louis, 62 Mo. 313; Semple v. Vicksburg, 62 Miss. 63; Smith v. Alexandria, 33 Gratt. (Va.) 208; Harper v. Milwaukee, 30 Wis. 365. *See* St. Paul v. Seitz, 3 Minn. 297.

[5] Brayton v. Fall River, 113 Mass. 218; Wendell v. City of Troy, 4 Keyes (N. Y.), 261.

[6] Edwards v. Town of Pocahontas, 47 Fed. Rep'r, 268; City of New Kiowa v. Craven, 46 Kans. 114. *See* Moffitt v. Asheville, 103 N. C. 237; Lewis v. Raleigh, 77 id. 229; Threadgill v. Commissioners, 99 id. 352.

public duties, are held to contract by the acceptance for the performance of these duties. In the case of public corporations, however, the liability is contingent on the law affording the means of performing the duty, which in some cases, by reason of restrictions upon the power of taxation, they might not possess. But, assuming the corporations to be clothed with sufficient power by the charter to that end, the liability of a city or village vested with control of its streets, for any neglect to keep them in repair, or for any improper construction, has been determined in many cases. And a similar liability would exist in other cases, where the same reasons would be applicable."[1]

So, where the public streets, squares, sidewalks and passage-ways of a city are, by virtue of legislative grant, express or implied, placed under the exclusive care and control of the corporation, it is bound absolutely to keep them in a condition of repair and free from obstructions, so that they may safely and conveniently be used in a lawful manner by the citizens.[2] The corporation is also bound to keep proper guards, barriers and lights around

[1] Cooley's Const. Lims. 247, 248.

[2] The authorities sustaining this proposition are very numerous, but it is beyond the scope of this treatise to cite more than will suffice to illustrate the doctrine stated in the text. City of Lacon v. Page, 48 Ill. 499; Joliet v. Verley, 35 id. 58; Mendersheid v. Dubuque, 25 Iowa, 108; Comm. v. Hopkinsville, 7 B. Monr. (Ky.) 494; Kansas City v. Bradbury, 45 Kans. 381; City of Atchison v. King, 9 id. 550; Davis v. Bangor, 42 Me. 522; Alger v. City of Lowell, 3 Allen, 402; Day v. Milford, 5 id. 98; Drake v. City of Lowell, 12 Metc. 292; Pedrick v. Bailey, 12 Gray, 161; Bassett v. St. Joseph, 53 Mo. 290; Welsh v. St. Louis, 73 id. 71; Russell v. Columbia, 74 id. 490; Hume v. Mayor of New York, 74 N. Y. 264; McSherry v. Canandaigua, 129 id. 612; Norristown v. Moyer, 67 Penn. St. 355; Knoxville v. Bell, 12 Lea (Tenn.), 157; Hill v. State, 4 Sneed (Tenn.), 443; Klein v. City of Dallas, 71 Texas, 280.

If an object calculated to frighten horses is left or thrown in a street or highway, and, after reasonable notice, is negligently permitted to remain there, by the city or town charged with the care of the street or highway, the corporation is liable for injuries and damages sustained by one whose horse is frightened by the object and runs away. Dimmock v. Suffield, 30 Conn. 129; Ayer v. Norwich, 39 id. 376; Young v. New Haven, ib. 435; Stanley v. City of Davenport, 54 Iowa, 463; Winship v. Enfield, 42 N. H. 197; Chamberlain v. Enfield, 43 id. 356; Bartlett v. Hooksett, 48 id. 18; Bennett v. Fifield, 13 R. I. 139; Morse v. Richmond, 41 Vt. 435; Foshay v. Glen Haven, 25 Wis. 288.

any dangerous excavations made in the streets.[1] These duties and responsibilities cannot be shifted or avoided by the corporation by any contract with another to assume them; they are absolute and unavoidable.[2] Again, while it is discretionary with the local legislature to decide whether sewers or drains shall be constructed, in what places, to what extent, and upon what plans, and for their action in regard to these things the municipality is not liable; yet, if the authorities direct the construction of these, or like public works, the duty of proper care in the construction, and afterward of necessary repair, becomes an absolute duty of the corporation, for any breach of which it is liable.[3] So, too, a city is absolutely bound to keep in repair a public wharf or pier or bridge, and maintain it in a safe condition for use, and to make such examinations and renewals, from time to time, as will render it fit and safe for the purpose designed, and for which they know it is to be applied.[4]

[1] Logansport v. Dick, 70 Ind. 65; Springfield v. Le Claire, 49 Ill. 476; Baltimore v. O'Donnell, 53 Md. 110; Baltimore v. Pendleton, 15 id. 10; Detroit v. Corey, 9 Mich. 165; Mayor of New York v. Furze, 3 Hill, 612; 5 Seld. 168; Lockwood v. Mayor of New York, 2 Hilt. (N. Y.) 66; West v. Trustees of Brockport, 16 N. Y. 161; Wilson v. City of Wheeling, 19 W. Va. 323; Wightman v. Washington, 1 Black, 39; Nebraska v. Campbell, 2 id. 590; Chicago v. Robbins, ib. 418.

[2] *See* cases cited in preceding note. Jacksonville v. Drew, 19 Fla. 106.

[3] Imperfect Drainage and Sewerage, 1 So. L. Rev. (N. S.) 210; Attorney-General v. Birmingham, 4 K. & J. 528; Richardson v. Boston, 19 How. 263; 24 id. 188; Hamilton v. Columbus, 52 Ga. 435; Emery v. Lowell, 104 Mass. 13; Brayton v. Fall River, 113 id. 218; Breed v. Lynn, 126 id. 367; O'Brien v. St. Paul, 18 Minn. 176; Kobs v. Minneapolis, 22 id. 159; Thurston v. St. Joseph, 51 Mo. 510; Barton v. Syracuse, 36 N. Y. 54; Rochester White Lead Co. v. Rochester, 3 id. 463; Bradt v. City of Albany, 5 Hun, 591; Jersey City v. Kiernan, 50 N. J. L. 246.

If a corporation by its system of constructing sewers renders an outlet necessary, it must provide one. It incurs a duty, having created the necessity for an outlet and having the power to secure one, of adopting and executing such measures as will prevent nuisances and avoid damage to private property. Aurora v. Love, 93 Ill. 521; Fort Wayne v. Coombs, 107 Ind. 75; Crawfordsville v. Bond, 96 id. 236; Evansville v. Decker, 84 id. 325; McGregor v. Boyle, 34 Iowa, 268; Ellis v. Iowa City, 29 id. 229.

[4] Philadelphia, etc., R. Co. v. Mayor of New York, 38 Fed. Rep'r, 159; Heissenbuttel v. Mayor of New York, 30 id. 456; Kennedy v. Mayor of New York, 73 N. Y. 365; Macauley v. Mayor of New York, 67 id. 602; Gluck v. Ridgewood Ice Co., 31 N. Y. State Rep'r, 99; 9 N. Y. Supp. 254; Mechanicsburg v. Meredith, 54 Ill. 84.

SEC. 213. Where a city is invested with control over adjacent navigable waters, or has the power to direct the excavating, deepening or cleansing of the same, it is bound to exercise its powers to prevent them from becoming sources of nuisances, and to remove therefrom such nuisances as are created. The corporation is not bound for this purpose to take other than ordinary measures. It would not be justified in actually invading private property for the purpose of abating such nuisances, unless there be special authority and a provision for compensation to the owners of the property invaded. Without some express authority, and such a provision for compensation, it is no more bound to perform an act of summary abatement, in the destruction of private property, by any supposed law of necessity for the protection of the public health, than any individual citizen. While it might be protected in so doing in case, under the same circumstances, an individual would be protected, it is not indictable, nor liable to a private action for failing to exercise any extraordinary power in that regard.[1]

[1] People v. Albany, 11 Wend. 539; Goodrich v. Chicago, 20 Ill. 445.

CHAPTER XI.

REMEDIES FOR NUISANCES; INDICTMENT AND CIVIL SUIT.

SEC. 214. Classification of nuisances.
215. Public remedies.
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Classification of nuisances.

SEC. 214. Nuisances are properly classified, according to their character and effects, as public, private, or mixed. A *public* nuisance is an unlawful act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all citizens. In the theory of the law, it consists in an act or omission in derogation of and inconsistent with the public or common right. Its effects are theoretically injurious to all citizens, although not necessarily injurious to all in like degree. In this respect it is similar in general character to other public wrongs commonly called *misdemeanors*.[1] The only methods of redress are by indictment and punishment of the offender, or information in equity, at the suit of the people, by the proper law officer of the government. A *private* nuisance is one by which the rights of individuals only, and not those of the public in general, are injuriously affected. Such a wrong constitutes a trespass, for which the remedy is by private action at law or suit in equity, as in other cases of private injury, actual or threatened. A

[1] Wharton's Cr. Law, § 2362.

nuisance is of a *mixed* character when it constitutes an offense against the common rights of all citizens, and at the same time amounts to a private nuisance because its effects are specially and peculiarly injurious to the persons or property of individuals.[1] A person committing such a nuisance is liable to indictment and suit in equity for the public offense, and to a civil action or suit in equity for the redress of the private wrong.[2]

Public remedies.

SEC. 215. Certain acts and omissions of duty of which the law takes cognizance, as constituting common nuisances or public wrongs, are generally defined in the penal code of the State, or by local police regulations, or fall within the class of wrongs known as undefined misdemeanors, and are visited with some species of penalty. The penalties imposed are enforced by means of indictment and prosecution of the offender, according to the ordinary forms of criminal procedure in use in the State, or, if they consist of pecuniary fines, may be exacted in a civil suit prosecuted in the name of the people. In cases where the offense consists in the violation of local police regulations, and the penalty may be pecuniary fine or imprisonment, or both, it is usual to confer jurisdiction upon local magistrates. The judgment of conviction, in any case, may, under the law of the State, provide for the abatement of the nuisance, either by the defendant or, in case of his failing to do so, by the sheriff or other proper executive officer.[3] The practice in this regard varies in the different States, and as it is properly a mat-

[1] A familiar illustration, taken from an ancient case, is this: Where one makes a ditch across a highway and I am traveling in the night and with my horse fall into the ditch and so have great damage and inconvenience, I may have an action against him who made the ditch; though for the mere obstruction caused by the ditch there is no right of action, this being an inconvenience common to all. Fitzherbert, J., Year Book, 27 Henry VIII. 27, pl. 10; Holt, C. J., Paine v. Patrick, 3 Mod. 289.

Littleton v. Fritz, 65 Iowa, 488; Richards v. Holt, 61 id. 529; Story v. Hammond, 4 Ohio, 376.

[3] Wharton's Cr. Law, § 2377.

ter of procedure, it is not within the scope of this treatise. In some cases the aid of a court of equity may be invoked at the suit of the people to interfere by injunction to prevent or abate public nuisances,[1] but these courts have but a very narrow and restricted jurisdiction in such cases and do not often assume to aid in the administration of the criminal law. The circumstances of the case would be extraordinary, involving danger to public health, which would move the court to put forth its powers in aid of the remedy by criminal proceedings. The cases in which such interference may properly be invoked will be considered in connection with the subject of remedies for nuisance in equity.[2]

Private remedies.

SEC. 216. When the act or omission of duty, which constitutes a public wrong, is specially and peculiarly injurious to an individual, and obstructs him in the exercise or enjoyment of some right which the law has undertaken to assure, the offender may be subject to a double liability; he may be punished by the State, and he may also be compelled to compensate the individual. The rule is well settled, that no person can maintain an action for damages from a purely common nuisance.[3] "The general rule is that individuals are not entitled to redress against

[1] Attorney-General v. Cleaver, 18 Ves. 211; Soltau v. De Held, 2 Sim. (N. S.) 150; Ware v. Regents' Canal Co., 3 D. & J. 228. *See* Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 382; Rome v. Granite Bridge Co., 21 Pick. 344.

[2] Thus, where proceedings have been commenced in equity upon information by the attorney-general to abate a public nuisance, an individual may also file a bill on the ground of special damages from the same nuisance. Crowder v. Tinkler, 19 Ves. 617; Soltau v. De Held, 2 Sim. (N. S.) 150; Hamilton v. Whitridge, 11 Md. 128; Skiller v. Grandy, 13 Mich. 540; Milhau v. Sharp, 27 N. Y. 625. *See* Story v. Hammond, 4 Ohio, 376.

[3] Where the injury is common to all and special to none, redress must be sought by a criminal prosecution in behalf of all. Soltau v. De Held, 2 Sim. (N. S.) 150; 9 El. & Bl. 104; De Vaughn v. Minor, 77 Ga. 809; School District No. 1 v. Neil, 36 Kans. 617; Wesson v. Washburn Iron Co., 13 Allen, 95; Stetson v. Faxson, 19 Pick. 147; Shambert v. St. Paul, etc., Railroad Co., 21 Minn. 502; Francis v. Schoellkopff, 53 N. Y. 152; Milhau v. Sharp, 27 id. 611; Pierce v. Dart, 7 Cow. 609; Lansing v. Smith, 4 Wend. 9.

a public nuisance. The private injury is merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private persons."[1] The authorities are unanimous in support of this proposition.

It is equally well established that for damages resulting from a private nuisance, or from one of a mixed character, where they are special or different in kind from those sustained by the public in general, the individual who suffers them may have his private action for compensation. For example, if an offensive trade be set up in a building located on a public street in a thickly-settled town or city, this will constitute a public nuisance, because the effects are injurious to all who come lawfully within the range of their influence and because it is necessarily attended by circumstances disturbing to the good order, comfort and convenience of the community. At the same time, to those living upon the street and within the immediate sphere of the noxious influences it is both a public and a private nuisance. Those individuals, therefore, to whom the injury is real and substantial, as, for example, if it consists in impaired health of the individual or members of his family,[2] are entitled to a private remedy for the damages sustained and for the protection of their special interests.[3] But in such cases the courts adhere rigidly to the rule that the individual must make out a very clear case of damages special and peculiar to himself, apart from the rest of the public, and of such a different character that they cannot fairly be said to be a

[1] Ray on Negligence, 75.

[2] Seifried v. Hays, 81 Ky. 377; Jarvis v. St. Louis, etc., R. Co., 26 Mo. App. 253; Pierce v. Wagner, 29 Minn. 355; Ellis v. Kansas City, etc., R. Co., 63 Mo. 131.

[3] He has the same remedy, and *none other*, which he would have had if the injury had proceeded from a private nuisance. Welton v. Edwards, 7 Mo. 307. As to who is entitled to bring an action for injury to property by a nuisance, besides the real owner, *see* Martin v. Rector, 101 N. Y. 77; Lansing v. Smith, 4 Wend. 9.

part of the common injuries resulting therefrom.[1] It matters not, however, how slight the special injury may be. The same rule applies in this regard which is applicable in ordinary cases of trespass; the insignificance of the injury goes to the extent of the recovery and not to the right of action. And private actions may be brought by as many individuals separately as may have sustained the special and peculiar injury which is the foundation of the right of action. The cases upon this point are not, it is true, uniform in sustaining this rule, but "the idea, that if by a wrongful act a serious injury is inflicted upon a single individual a recovery may be had therefor against the wrong-doer, and that if by the same act numbers are so injured no recovery can be had by any one, is absurd. It is objected that holding the wrong-doer liable to respond in an action to each one injured will lead to a multiplicity of actions. This is true, but it is no defense to a wrong-doer, when called upon to compensate for the damages sustained from his wrongful act, to show that he by the same act inflicted the like injury upon numerous other persons. The position is not sustained by any authority. No matter how numerous the persons may be who have sustained a peculiar damage, each is entitled to compensation for his injury."[2]

The remedy in equity.

SEC. 217. In cases of public nuisances, properly so called, an information lies in equity to redress the grievance by way of injunction. The ground of this jurisdiction is the ability of courts of equity to give a more

[1] It is said, that "though the consequence is of a sort likely to ensue in many individual cases, it must be a distinct and specific one in the particular case. Where this test fails there can be no particular damage in a legal sense." And again, "to support an action the damage must differ in kind as well as in degree from that suffered in common. That the plaintiff suffers more inconvenience than others from his proximity to the nuisance is not enough." These propositions are supported by authorities cited in 16 Am. & Eng. Ency. of Law, 976.

[2] Francis v. Schoellkopff, 53 N. Y. 152; De Vaughn v. Minor, 77 Ga. 809; Wylie v. Elwood, 134 Ill. 281.

speedy, effectual and permanent remedy than can be had at law. If, therefore, the remedy at law is plain, adequate and complete, the party seeking redress must pursue it there. In such case, the adverse party has a constitutional right to have the issues tried by a jury, and a jury trial cannot be had as a matter of right in a court of equity.[1] The remedy in courts of equity is more effectual and complete than that at law because "they can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate them in progress, and, by perpetual injunction, protect the public against them in the future; whereas, courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."[2]

Procedure in equity.

SEC. 218. The ordinary and proper proceeding in equity to prevent or abate a public nuisance is by bill for injunction filed by the attorney-general, or other proper law officer of the government, in the name of the people.[3] But the proceeding may be brought in the name of the inhabitants of the place within whose corporate limits the alleged nuisance is threatened or maintained.[4] Or they may be instituted by a board of health or other local authority or any person or class of persons, acting under

[1] Parker v. Winnepiseogee, etc., Co., 2 Black, 545; Morris Canal & B. Co. v. Fagin, 7 C. E. Green, 430.

[2] Harlan, J., Mugler v. Kansas, 123 U. S. 661; Georgetown v. Alexandria Canal Co., 12 Peters, 93; Hoole v. Attorney-General, 22 Ala. 190; People v. St. Louis, 10 Ill. 351; Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361; District Attorney v. Lynn, etc., Railroad Co., 16 Gray, 242.

[3] District Attorney v. Lynn, etc., Railroad Co., 16 Gray, 242; Attorney-General v. Steward, 20 N. J. Eq. 415; Newark Aqueduct Board v. Passaic, 45 id. 293; People v. Vanderbilt, 26 N. Y. 527.

[4] Watertown v. Mayo, 109 Mass. 315; Township of Hutchinson v. Filk, 44 Minn. 536; Village of Pine City v. Munch, 42 id. 342.

statutory authority.[1] The attorney-general, however, has no authority, by virtue of his office, except, perhaps, in extraordinary cases, to proceed at his own instance as relator for the State.[2]

Private suits to abate public nuisances.

SEC. 219. Where a private individual sustains special injuries from a public nuisance he thereby gains a standing in court which enables him to maintain a suit for such injuries. In a suit so brought, the complainant acts on behalf of all others who are or may be injured, as a public prosecutor, rather than on his own account. The court in deciding such suit has regard to the interests of the public, as well as to those of the complainant. This appears to be the doctrine of the Supreme Court of the United States. That court has said: "A bill in equity to abate a public nuisance filed by one who has sustained special damages has succeeded to the former mode in England of an information in chancery prosecuted on behalf of the crown to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard. He seeks redress of a continuing trespass and wrong against himself, and acts in behalf of all others who are or may be injured."[3] So, any number of persons may join in a suit to restrain a public nuisance which is common to all and affects each in the same way, the injury being special and peculiar to them apart from the public in general.[4]

[1] Littleton v. Fritz, 65 Iowa, 488; Newton Bd. of Health v. Hutchinson, 39 N. J. Eq. 218; Atchinson v. State, ib. 569; Bd. of Health of New Brighton v. Casey, 18 N. Y. State Rep'r, 251. *See* Bd. of Health v. New York H. M. Co., 47 N. J. Eq. 1; Wallasey Loc. Bd. v. Gracey, 36 C. D. C. 593.

[2] Attorney-General v. Hume, 50 Mich. 447. *But see* Attorney-General v. Logan, L. R., 2 Q. B. D. 100; Attorney-General v. Cockermouth Loc. Bd., L. R., 18 Eq. 172.

[3] Catron, J., Miss. & Mo. R. Co. v. Ward, 2 Black, 492; Woodruff v. North Bloomfield G. M. Co., 18 Fed. Rep'r, 753; Hamilton v. Whitridge, 11 Md. 128; Milhau v. Sharpe, 27 N. Y. 625.

[4] Story's Eq. Pl. (10th ed.), §§ 285, 286, *b*, *notes*; Bushnell v. Robeson,

Special injury must be shown.

SEC. 220. The remedy by indictment for public nuisances is generally so efficacious that courts of equity entertain jurisdiction over them with some reluctance, whether the intervention of the court is invoked at the instance of the attorney-general or of a private individual who suffers some injury therefrom distinct from that experienced by the public.[1] In the case of a private bill, therefore, to restrain a public nuisance, it must very clearly appear from the proofs, that the complainant will sustain a special, immediate and substantial damage therefrom, beyond and distinct from that suffered by the public at large, and that the injury will be irreparable if relief be denied in equity.[2] Yet, if these facts are made to appear, the court will not hesitate to grant relief; and it will do so the more readily if it further appears that the acts or condition of things complained of constitute a nuisance threatening the health or safety of the community or any considerable portion of it.[3]

62 Iowa, 540; Seifried v. Hays, 81 Ky. 377; Robinson v. Baugh, 31 Mich. 290; Demarest v. Hardham, 7 Stew. Eq. 489; Rambotham v. Jones, 47 N. J. Eq. 337; Peck v. Elder, 3 Sandf. 126; Brown v. Manning, 6 Ohio, 298.

[1] Attorney-General v. Brown, 24 N. J. Eq. 89; Morris & Essex R. Co. v. Prudden, 20 id. 530; Higbee v. Camden & Amboy R. Co., 19 id. 276; Attorney-General v. New Jersey R. Co., 17 id. 136; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 378. In City of Ottumwa v. Chinn, 75 Iowa, 405, an injunction was denied to a city on the ground that the public rights can be fully protected by the ordinary criminal proceedings. It was said that as the city had the power to effect an abatement of the nuisance complained of by its own direct action, or through the medium of an ordinance, equitable proceedings were not warranted.

[2] Bigelow v. Hartford Bridge Co., 14 Conn. 565; Vail v. Mix, 74 Ill. 127; Van Wagener v. Cooney, 45 N. J. Eq. 24; Lippincott v. Lesher, 44 id. 120; Zabriskie v. Jersey City R. Co., 13 id. 314; Hinchman v. Paterson Horse Rd. Co., 17 id. 75; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; Parrish v. Stevens, 1 Oreg. 72; Sparhawk v. Union Pass. Ry. Co., 54 Penn. St. 401.

[3] De Vaughn v. Minor, 77 Ga. 809; Wahle v. Reinbach, 76 Ill. 322; Bushnell v. Robeson, 62 Iowa, 540; Seifried v. Hays, 81 Ky. 377; Louisville Coffin Co. v. Warren, 78 id. 400; Woodyear v. Schaefer, 57 Md. 1; Robinson v. Baugh, 31 Mich. 290; Thomas v. Calhoun, 58 Miss. 80; Holsman v. Boiling Spring B. Co., 1 McCarter Eq. 335; Butterfoss v. State, 18 Stew. Eq. 325; Newton Bd. of Health v. Hutchinson, 39 N. J. Eq. 218, 569; Board of Health of New Brighton v. Casey, 18 N. Y. State Rep'r, 251; New Castle v. Raney, 130 Penn. St. 546; Comm. v. Rush, 14 id. 186; Bell v. Blount, 4 Hawks (N. C.), 384; Attorney-General v. Hunter, 1 Dev. Eq. (N. C.) 12. *See* Village of Pine City v.

Fact of nuisance must be clearly proved.

SEC. 221. The *fact* of the nuisance must always be made out upon satisfactory evidence, so that there may be no reasonable doubt as to the existence of the nuisance itself and its noxious character; and where the interposition of the court is sought to restrain that which, *it is apprehended*, will create a nuisance, the proofs must show that the apprehension of material and irreparable injury is well grounded upon a state of facts which show the danger to be real and immediate.[1] In other words, there must be a clear case to warrant the interference of equity with the exercise of private rights or the uses of private property.[2] The general rule, applicable to public as well as private nuisances, is, that where the act or thing complained of is not unavoidably and inherently noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court where an action could not be framed so as to meet the question.[3]

Munch, 42 Minn. 342, where a municipality successfully invoked the aid of a court of equity for the suppression of a nuisance seriously affecting the public health.

[1] Bisph. Eq., § 440; Brookline v. Mackintosh, 133 Mass. 215; Newark Aqueduct Bd. v. Passaic, 45 N. J. Eq. 393; 46 id. 552; State v. Freeholders of Bergen, 46 id. 173; Westcott v. Middleton, 16 Stew. Eq. 478; Rhodes v. Dunbar, 57 Penn. St. 274.

[2] Clowes v. Potteries Co., L. R., 8 Ch. 125; Wolcott v. Melick, 3 Stockt. 204; New Boston Coal Co. v. Pottsville Water Co., 54 Penn. St. 154. "It is not every violation of the rights of another which may be ranked under the general head of nuisance, which will authorize the interposition of this court by means of an injunction. *It must be a case of strong and imperious necessity*, or the right must have been previously established at law, or it must have been long enjoyed without any interruption." Jordan v. Woodward, 38 Me. 424. "The plaintiffs should of course show by their proof *a case of strong and clear injustice, of pressing necessity and imminent danger of great and irreparable damage*, and not of that nature for which an action at law would furnish a full and adequate remedy." Eastman v. Amoskeag Mfg. Co., 47 N. H. 78. *See* Hill v. Mayor of New York, 15 N. Y. Suppl. 393.

[3] Brougham, Ld. Ch., Earl of Ripon v. Hobart, 3 M. & K. 169; Dunning v. Aurora, 40 Ill. 481; Lake View v. Letz, 44 id. 81; Harris v. Mackintosh, 133 Mass. 228; Ross v. Butler, 19 N. J. Eq. 294; Del. & Hud. Canal Co. v. Erie Railroad Co., 9 Pai. 323; Huckenstine's Appeal, 70 Penn. St. 102; Rhodes v. Dunbar, 57 id. 274.

The injury must be certain.

SEC. 222. In accordance with the principles declared in the last paragraph, an injunction was denied in a case where a local board of health sought to restrain defendants from selling certain adulterated teas, alleged to be injurious to health.[1] Such remedy was not shown to be imperatively necessary. The court said: "The fact that the teas, the sale of which this action was brought to restrain, were adulterated, and that their possession for the purpose of sale to the general public was a nuisance subjecting the offenders to an indictment, and, in case of sale, to actions for penalties for selling adulterated goods, cannot be successfully controverted; and yet this fact alone is insufficient to support the action. The plaintiffs have thereby established but one of the elements necessary to entitle them to the relief demanded. Courts will not in all cases interfere, by way of injunction, to restrain the continuance of an illegal trade, the abatement of a nuisance, or the prosecution of a dangerous employment.[2] Its power, however, to do so in case of the exercise of any trade or business which is either illegal or dangerous to public life, detrimental to health, or the occasion of great public inconvenience, is not only conferred by the provisions of the statute, but belongs to the general powers possessed by courts of equity to prevent irreparable mischief and obviate damages for which no adequate remedy exists at law. Whatever source of jurisdiction is appealed to, the rule governing its exercise is the same, and the courts will inquire, not alone as to the unlawfulness or offensiveness of the act complained of, but also as to its extent, the circumstances surrounding its exercise, and the degree of danger to be apprehended from its continuance."

[1] Health Dept. of New York v. Purdon, 99 N. Y. 238.

[2] Wolcott v. Melick, 3 Stockt. 204; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 371.

Equity will not aid enforcement of criminal law.

SEC. 223. A strong reason for the reluctance of courts of equity to exercise jurisdiction over public nuisances is that such offenses are indictable, and, if the laws be framed with proper penalties, the measure of redress at law will be adequate, effectual and complete, so far as the public is concerned.[1] It is not, indeed, properly a part of equity jurisdiction to aid in administering the criminal law, except incidentally in a few well-defined classes of cases, and even in such cases the courts entertain the jurisdiction with great reluctance.[2] They have never exercised a general jurisdiction even to enjoin common nuisances, upon informations presented in behalf of the public, but the jurisdiction has been exercised within such narrow limits that it may well be regarded as "a very special and exceptional jurisdiction."[3] The reason for this is, that to extend the jurisdiction of courts of chancery to such cases, and to support and enforce that jurisdiction by process of contempt, which proceeds without

[1] St. Johns v. McFarlan, 33 Mich. 72. So, if the act or thing be contrary to law, the remedy provided by the law must be followed. Sparhawk v. Union Pass. Ry. Co., 54 Penn. St. 401. An injunction was refused to restrain a violation by defendant of the law forbidding the storing of dangerous fluids, as naphtha, in hazardous proximity to the property of others, the penalties attached to the offense being considered ample for safety and protection. Anderson v. Savannah, 69 Ga. 472.

[2] Earl of Ripon v. Hobart, 3 M. & K. 169; Cope v. Fair Association of Flora, 99 Ill. 489; Attorney-General v. Brown, 24 N. J. Eq. 89. In Carleton v. Rugg, 149 Mass. 550, it was held, that a statute was constitutional which conferred jurisdiction in equity to restrain or abate by injunction, as common nuisances, any building, place or tenement, used for illegal keeping or sale of intoxicating liquors, upon an information by the district attorney, or upon petition of legal voters of the town or city. Eilenbacker v. Plymouth County Ct., 134 U. S. In the same case it was held, that the fact that the keeping a nuisance is a crime, does not deprive a court of equity of power to abate the nuisance. Attorney-General v. Hunter, 1 Dev. Eq. (N. C.) 12; Ewell v. Greenwood, 26 Iowa, 377; People v. St. Louis, 5 Gilm. 351; Minke v. Hopeman, 87 Ill. 450. In Massachusetts, the right to proceed in equity to abate public nuisances, and to destroy private property in the exercise of the police power, when necessary for the protection of the public, has been recognized in many cases. District Attorney v. Lynn, etc., Railroad Co., 16 Gray, 242; Belcher v. Farrar, 8 Allen, 325; Winthrop v. Farrar, 11 id. 398; Attorney-General v. Tudor Ice Co., 104 Mass. 239; Watertown v. Mayo, 109 id. 315; Bancroft v. Cambridge, 126 id. 438.

[3] State v. Uhrig, 14 Mo. App. 413. *See* 24 Am. L. Rev. 685; 18 id. 599.

trial by jury, is regarded as an abridgment of the right of trial by jury secured by constitutional guaranties." It may, therefore, safely be affirmed that equity will not interfere in the case of public nuisances, at the suit of the people, except to restrain threatened nuisances dangerous to the health or safety of the community;[1] and that the jurisdiction will not be exercised in favor of individuals, unless it be shown that the act or thing complained of is, as to them, a private nuisance, an actual infringement upon their private rights, and not merely a nuisance within the meaning of a statutory enactment or municipal ordinance or other local regulation.[2]

SEC. 224. The fact tha. a suit is brought for an injunction to restrain the acts alleged to be a nuisance, is evidence that no public exigency exists calling for summary measures. There is, then, no good reason why a court of equity should not dispose of the case according to its merits. The mere fact that the act sought to be suppressed has been condemned by local authorities is no reason for the interference of the court. The question in such case will be, whether the ordinance or regulation of the authorities sought to be enforced by injunction is, when applied to the particular case, directed against that which constitutes a nuisance to the community. The same remarks are true when applied to a case where the aid of an injunction is invoked in the enforcement of a special

[1] State v. Uhrig, 14 Mo. App. 413; Bell v. Blount, 4 Hawks (N. C.), 384; Attorney-General v. Hunter, 1 Dev. Eq. (N. C.) 12.

[2] "Equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation restraining a certain act, unless the act is shown to be a nuisance *per se*." High on Injunctions, §§ 748, 1248; City of Denver v. Mullen, 7 Colo. 345, Ward v. Little Rock, 41 Ark. 526; Mayor of Manchester v. Smyth, 64 N. H. 380; Waupum v. Moore, 34 Wis. 450; Stilwell v. Buffalo Riding Academy, 21 Abb. N. C. 472; Anderson v. Doty, 23 Hun, 160; Ogden v. Welden, 61 id. 621; Moore v. Gadsden, 93 N. Y. 12, where it was held that a city police regulation was not of itself sufficient to give a cause of action to a party injured by an act or omission in violation of its terms. North Birmingham Ry. Co. v. Calderwood, 89 Ala. 247; Flynn v. Canton Co., 40 Md. 312; Kirby v. Boylston Mkt. Assn., 14 Gray, 249; Heeney v. Sprague, 11 R. I. 456.

order, not of general application, made by local authorities. The court will not, however, in such case, look into all the facts, where, by statute, the decision of the authorities upon which the order is based, is made final and conclusive, when founded upon proceedings regularly instituted and conducted. If the proceedings were regular, the order will be enforced by injunction, in a proper case; if the proceedings were irregular, the court will dismiss the case, unless it is shown by undisputed evidence that the interposition of the court is absolutely necessary in the interest of the public health or safety.

Grounds of equity jurisdiction.

SEC. 225. The ground of the jurisdiction of courts of equity over private nuisances is the necessity of preserving and protecting property from irreparable, or, at least, very substantial and material damage, pending the trial of the right. If the injury is of such a character that it may fairly be compensated in an action at law, no foundation is laid for the interference of equity. But if the injury is such that pecuniary compensation will not afford adequate redress, or if it be of a continuous or frequently recurring nature, so that a multiplicity of actions would be necessary, a foundation is laid for the exertion of equitable remedies. The jurisdiction does not, therefore, arise from the fact that a nuisance exists — that there is a violation of legal rights constituting an actionable wrong — but results from the circumstance that the peculiar equitable powers of the court are absolutely necessary to protect property from an injury for which no adequate redress can be obtained by an action at law, or to suppress the interminable litigation by which alone such redress could be secured.[1] And though the courts more readily grant the necessary relief now than formerly, it is still requisite that the character of the injury should be established by

[1] Woodyear v. Schaefer, 57 Md. 1; Carlisle v. Cooper, 6 C. E. Green, 576; Paddock v. Somes, 102 Mo. 227.

uncontroverted proofs to be such as will warrant the interposition of the court to prevent it. If this fact be in any doubt, the relief will be denied, and the complainant remitted to his remedy at law.[1]

On the other hand, the court will interfere to restrain injurious acts amounting to a nuisance, where the question of nuisance has been established at law, and the injury is of a recurring character;[2] or even when the question has not been determined in an action, if it be clearly shown that the injury is of a recurring kind for which no adequate relief could be had at law;[3] or where the acts complained of threaten the life, health or safety of the complainant when, of course, the remedy at law would be ineffectual.[4]

Extent of relief in equity.

SEC. 226. The relief afforded in courts of equity in cases of nuisance will be measured strictly by the necessities of each particular case, and may be granted absolutely or conditionally. Thus, the relief may be made conditional upon the fulfillment by either or both of the parties of such undertakings as appear just in the premises; as, for example, in a case where a private individual complains of a public nuisance from which he suffers special damage, an interlocutory injunction may be granted on condition that complainant cause an indictment to be brought.[5] So, where a building or works are being erected for business purposes, equity will not restrain

[1] Demarest v. Hardham, 7 Stew. Eq. 489; Monday v. Moore, 133 Penn. St. 598; Mirkil v. Morgan, 134 id. 144; Rhodes v. Dunbar, 57 id. 274.

[2] Paddock v. Somes, 102 Mo. 226.

[3] Butler v. Thomasville, 74 Ga. 570; Barton v. Union Cattle Co., 38 Neb. 350; Attorney-General v. Steward, 20 N. J. Eq. 415; Pennsylvania Lead Co.'s Appeal, 96 Penn. St. 116; Logan v. McLaughlin, 33 Vt. 423; Webb v. Portland Mfg. Co., 3 Sumn. 189.

[4] Story's Eq. Jur., §§ 926, 927; De Vaughn v. Minor, 77 Ga. 809; Wahle v. Reinbach, 76 Ill. 322; Bushnell v. Robeson, 62 Iowa, 540; Seifried v. Hays, 81 Ky. 377; Louisville Coffin Co. v. Warren, 78 id. 400; Robinson v. Baugh, 31 Mich. 290; Holsman v. Boiling Spring B. Co., 1 McCart. Eq. 330; Pennsylvania Lead Co.'s Appeal, 96 Penn. St. 116; Gifford v. Hulett, 62 Vt. 343.

[5] Hepburn v. Lardon, 2 H. & M. 345.

the erection upon the mere allegations that such business will be a nuisance; but it must appear that the business cannot possibly be carried on in such a way as not to be a nuisance. Otherwise, the defendant will be allowed to go on with the erection of the building, at the risk of being restrained in the use of it if a nuisance is in fact created.[1] And in such case it will be proper to enjoin the defendant in advance from using the building in the objectionable manner.[2] Where the business is so carried on as to cause specific injury, an injunction may be granted to relieve against that injury, but the carrying on of the business should not be stopped; the defendant should be left at liberty to prosecute his business, if he can, and elects to do so, in such a manner as to remove the cause of complaint, and prevent further injury.[3] So, too, if one is using his premises in such a way as to injure property adjoining or in the vicinity, or if such injury is caused by reason of the defective construction or lack of repair of any part or appurtenance of those premises, the owner should be restrained in such use,[4] either absolutely or until the defects are properly repaired;[5] but he cannot be required to make the repairs.

SEC. 227. But if the defendant, who has been doing what amounts to a nuisance, disclaims all intention to continue it, and is proceeding with diligence to remedy the nuisance, the court may, if satisfied that the cause of complaint will be removed as speedily as possible, refuse an injunction.[6] And in the exercise of its discretion, with a

[1] Duncan v. Hayes, 7 C. E. Green, 25; Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201; Attorney-General v. Steward, ib. 415.

[2] Rhodes v. Dunbar, 57 Penn. St. 274; Weir v. Kirk, 74 id. 230.

[3] McMenomy v. Bond, 87 Cal. 134, 139; Richards v. Holt, 61 Iowa, 529; Bushnell v. Robeson, 62 id. 540; Seifried v. Hays, 81 Ky. 377.

[4] Gifford v. Hulett, 62 Vt. 343.

[5] Perrine v. Taylor, 16 Stew. Eq. 128; Haugh's Appeal, 102 Penn. St 42.

[6] King v. Railroad Co., 3 C. E. Green, 397. The injunction should be limited to the offense at the time of the hearing, and if the nuisance has been removed after the commencement of the proceedings, the injunction should not be continued. Trulock v. Merte, 72 Iowa, 510. *See* Smith v. State, 22 Ohio St. 539.

view to making its relief proportionate to the necessities of the case, without causing unreasonable trouble to the defendant, the court may, where an injunction is granted against a municipal corporation to restrain the continuance of a nuisance, postpone its operation for a reasonable time, in order to enable the authorities to take adequate measures to remedy the nuisance, without unnecessary injury to the public health or to the public interests.[1] And where the protection of the public requires the violation of private rights, which can be compensated by damages, an injunction may be denied, and the party left to his remedy at law.[2]

Injunctions against criminal proceedings.

SEC. 228. "The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. * * * And in the American courts * * * the same doctrine has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the States, or under municipal ordinances."[3]

SEC. 229. Municipal regulations designed for the protection of persons and property, the preservation of the public health and peace, and proceedings under them, are *quasi*-criminal in character. So, where a bill was filed to restrain the prosecution of seven suits pending and others threatened for penalties prescribed by an ordinance, the

[1] Spokes v. Banbury, L. R., 1 Eq. 141; Attorney-General v. Birmingham, 4 K. & J. 528; Breed v. Lynes, 126 Mass. 367; Haskell v. New Bedford, 108 id. 208.

[2] Thornton v. Roll, 118 Ill. 350; Vick v. Rochester, 46 Hun, 607. As to restraining a public work which threatens injury to private property, *see* Traphagen v. Jersey City, 2 Stew. Eq. 206, 650; Dodge v. Pennsylvania Railroad Co., 16 id. 351.

[3] Gray, J., *In re* Sawyer, 124 U. S. 200, 211; Kerr v. Preston, 6 Ch. D. 463.

court, in refusing an injunction, said:[1] "Courts of equity will not, as a general rule, interfere to restrain criminal or *quasi*-criminal prosecutions, or take jurisdiction of any case or matter not strictly of a civil nature. * * * The questions arising in the prosecutions sought to be enjoined can be determined in the tribunal in which they are pending, or in that to which they may be taken by appeal. The legality or illegality of the ordinance is purely a question of law, which the common law court is competent to decide.[2] If the defendant is not guilty of violating this provision, as alleged, the determination of that fact is peculiarly within the province of that court. In either event, appellant had a full and complete defense at law. * * * When ordinances have been enacted by the proper authority, a court of equity will not interfere, by injunction, to restrain their enforcement in the appropriate courts, upon the ground that such ordinances are alleged to be illegal, or because of the alleged innocence of the party charged.[3] Nor will that court enjoin such proceedings under the ordinance for the purpose of determining the validity of the ordinance in a court of law, when, as in this case, the defendant has an adequate remedy at law.[4] If the ordinances are invalid, they furnish no warrant for prosecutions, or the imposition of fines, or the recovery of penalties under them, and would be no shield in an action at law against those responsible for the injuries inflicted upon the complainant by such prosecutions. If the authorities of this village can be enjoined from prosecuting under an ordinance preservative of the peace (as this one certainly is), so they might be restrained from

[1] Sharpe, J., Potter v. Des Plaines, 123 Ill. 111.

[2] Toledo Co. v. Borough of Clarendon, 17 Fed. Rep'r, 231. *See* Wardens v. Washington, 109 N. C. 21.

[3] Eldridge v. Hill, 2 Johns. Ch. 281; West v. Mayor, 10 Pai. Ch. 539; Wallace v. Society, etc., 67 N. Y. 23; Hottinger v. New Orleans, 42 La. Ann. 629.

[4] Moses v. Mayor, 52 Ala. 198; Burnett v. Craig, 30 id. 135; Yates v. Batavia, 79 Ill. 500; Hamilton v. Stewart, 59 id. 330; Devon v. First Municipality, 4 La. Ann. 11; West v. Mayor, 10 Pai. Ch. 539; Davis v. American Society, 6 Daly, 81; 75 N. Y. 362; Cohen v. Goldsboro, 77 N. C. 2.

the enforcement of any other ordinance of the village. Their effort to discharge their duty to the public would be unavailing, and the community left at the mercy of the lawless and vicious elements of society until such time as the question could be settled in the courts of equity. If it should at last be determined that the ordinance was valid, that court would be powerless to enforce its provisions, or impose the penalties denounced against its violation, but must remit the cases to the courts of law, which before the assumption of jurisdiction by the courts of equity, had the right to determine every question submitted to and determined in the equity jurisdiction."

SEC. 230. "There are two exceptions," the court further said, "clearly recognized, to the rule that courts of equity will not interfere to restrain trespasses, whether committed under the forms of law or not, which are, first, to prevent irreparable injury, and, secondly, to prevent a multiplicity of suits. Before a court of equity will interfere to prevent a trespass or an illegal prosecution under an ordinance upon the ground of an irreparable injury, facts and circumstances must be alleged from which it may be seen that irreparable mischief will be the result of the act complained of, and that the law can afford the party no adequate remedy. A general allegation to that effect will not suffice.[1] To entitle a party to maintain a bill of peace, or bill to prevent multiplicity of suits at law, there must be a right claimed affecting many persons. If the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will not lie, unless the complainant's right has been established at law."[2]

SEC. 231. But it is said that where a multiplicity of suits is prosecuted or threatened, for violations of an

[1] Goodell v. Lawson, 69 Ill. 145; Farcheimer v. Port of Mobile, 84 Ala. 127.

[2] Wood v. Brooklyn, 14 Barb. 425; Davis v. American Society, 75 N. Y. 362.

ordinance, and the right to maintain them is plausibly denied, upon the ground that the ordinance is without validity, the proper course is to restrain every suit but one, and to allow that one to proceed to trial and final determination, for the purpose of testing the authority upon which the actions are legally dependent.[1]

[1] Third Avenue Railroad Co. v. Mayor of New York, 54 N. Y. 159; Marvin Safe Co. v. Mayor of New York, 38 Hun, 146.

CHAPTER XII.

REMEDIES FOR NUISANCES; SUMMARY ABATEMENT.

SEC. 232. Summary abatement a common law remedy.
233. Applicable to common law and statutory nuisances.
234. Limitations upon legislative power.
235. When remedy may be resorted to.
237. By whom may be exercised.
238. When private person may resort to it.
240. Extent of remedy.
241. Limited by necessities of case.
242. Other limitations.
243. Expenses of abatement.
244. Suit for expenses; what must be proved.
245. What facts may be controverted.
249. Legislative declaration of nuisance conclusive.

Summary abatement is a common law remedy.

SEC. 232. Nuisances may always be abated. The fact that a thing is a nuisance having been established, the thing may be destroyed, removed, or so regulated that it will cease to be a nuisance. The right of summary abatement of nuisances existed at common law. It has never anywhere been abrogated. There is nothing in the Constitution of the United States or in the Constitution of any State, that takes away or impairs this remedy. Indeed, all constitutions presuppose the existence of this right; their provisions for the protection of liberty and property from arbitrary invasion, were framed with reference to the right, and are to be construed accordingly.[1] The private rights secured by constitutional guaranties are such as existed at common law. They have always been held and exercised in subordination to the general law that the public health, the public morals, and the public safety are of paramount importance, according to the maxim, *salus populi suprema est lex.* The objection, therefore, that by this summary proceeding a person may

[1] Village of Carthage v. Frederick, 122 N. Y. 268.

be deprived of liberty or property without due process of law, or trial by jury, has no force nor application. Formal legal proceedings and trial by jury are not appropriate to and have never been used in such cases.[1]

Remedy applicable to common law and statutory nuisances.

SEC. 233. These remarks are equally applicable to the abatement of common law nuisances and statutory nuisances.[2] As the legislature may declare nuisances, "it may also, where the nuisance is physical and tangible, direct its summary abatement by executive officers, without the intervention of judicial proceedings, in cases analogous to those where the remedy by summary abatement existed at common law. * * * Where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation, the legislature may authorize its summary abatement by executive agencies without resort to judicial proceedings, and any injury or destruction of the property, necessarily incident to the exercise of the summary jurisdiction, interferes with no legal right of the owner. But the legislature cannot go further. *It cannot decree the forfeiture of property, used so as to constitute a nuisance, as a punishment of the wrong, nor even to prevent a future illegal use of the property, it not being a nuisance per se,* and appoint officers to execute its mandate. The plain reason is, that due process of law requires a hearing and trial, before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the legislature of judicial powers, and

[1] King v. Davenport, 98 Ill. 305; Littleton v. Fritz, 65 Iowa, 488; Steele v. Crawford, 28 Kans. 726; Fisher v. McGirr, 1 Gray, 1; Carleton v. Rugg, 149 Mass. 550; Manhattan Mfg. & Fert. Co. v. Van Keuren, 23 N. J. Eq. 251; Lawton v. Steele, 119 N. Y. 226; People v. Gillson, 109 id. 309; Coe v. Schultz, 47 Barb. 64; Weil v. Schultz, 33 How. Pr. 7; Hart v. Mayor of Albany, 9 Wend. 590; Theilan v. Porter, 14 Lea (Tenn.), 622; License Tax Cases, 5 How. (U. S.) 504; Soon Hing v. Crowley, 113 U. S. 703; Mugler v. Kansas, 123 id. 623.

[2] States Attorney v. Selectmen of Bramford, 59 Conn. 402; Woodruff v. New York, etc., Railroad Co., ib. 63; Williams v. Blackwall, 2 H. & C. 33.

under guise of exercising the power of summary abatement of nuisances, the legislature cannot take into its own hands the enforcement of the criminal or *quasi*-criminal law."[1]

Limitations upon legislative power.

SEC. 234. There can be no doubt that it is competent for the legislature to declare the possession of certain articles of property, either absolutely, or when held in particular places or under particular circumstances, to be unlawful, because they would be injurious, dangerous or noxious; and, by due process of law, by proceedings *in rem*, to provide for the abatement of the nuisance, by the seizure, confiscation, removal or destruction of the noxious articles.[2] This right has been exercised by the legislature in respect of the places where intoxicating liquors are manufactured or sold in violation of law, and of all the articles and appliances used in or about the manufacture or sale of such liquors;[3] and in respect of adulterated or unwholesome articles of food, and impure and adulterated milk and dairy products;[4] and in respect of various other kinds of personal property in possession or use in violation of quarantine or health laws, or of a character likely to prove noxious to the public.[5]

The law-making power is the sole judge of the necessity for the summary abatement of nuisances and of the expediency of enacting laws to that end.[6] But this power is subject to the same limitations which bound the right of the legislature in respect of all legislation affecting the liberty or property of the citizen; it must not be ex-

[1] Andrews, J., Lawton v. Steele, 119 N. Y. 226; Fisher v. McGirr, 1 Gray, 1; Brown v. Perkins, 12 id. 89; Weller v. Snover, 42 N. J. L. 341; Mugler v. Kansas, 123 U. S. 623; Williams v. Blackwall, 2 H. & C. 33. *But see* Teck v. Anderson, 57 Cal. 251.

[2] Fisher v. McGirr, 1 Gray, 1.

[3] Darst v. People, 51 Ill. 286; Ward v. State, 48 Md. 294; State v. Salto, 77 Iowa, 193; Carleton v. Rugg, 149 Mass. 550; Wynehamer v. People, 13 N. Y. 378; Mugler v. Kansas, 123 U. S. 623.

[4] Shivers v. Newton, 45 N. J. L. 469; Blazier v. Miller, 10 Hun, 435.

[5] Gilman v. Philadelphia, 3 Wall. 713.

[6] Harvey v. Dewoody, 18 Ark. 252; King v. Davenport, 78 Ill. 305

ercised arbitrarily, nor will it pass unchallenged if it operates with unnecessary harshness or unreasonable severity. Thus, it would be beyond the legitimate scope of legislative authority to declare that to be a nuisance which is clearly not of that character, and by this mere declaration to devote the thing to destruction.[1] So, too, it would be unreasonable to declare all liquors kept within the limits of a city or town, for the purpose of being sold or given away, to be used as a beverage within such limits, a nuisance, and thereupon to direct the police officers of the municipality to abate such nuisance, by seizing and carrying away beyond the limits such liquors found within the city or town. For it is necessary, in such a case, that the fact should first be judicially ascertained and determined that the law has been violated. A man's property cannot be seized and confiscated, except for violation of law; and whether he has been guilty of such violation can only be determined by a tribunal having competent jurisdiction. A police officer is not such a tribunal.[2]

When the remedy may be resorted to.

SEC. 235. In order to authorize the exercise of this extraordinary remedy, the thing or act must in itself be a nuisance. Nothing can be abated upon mere apprehension of damage or nuisance, nor before it actually becomes a nuisance; but at the very time when the thing is abated, it must be a nuisance, and operating injuriously to the public or to the person abating it, or have previously so operated, and it must be of such a nature that it will, in the very nature of things, without the intervention of human agency produce similar injurious results again. The law is thus accurately stated by Mr. Wood.[3]

SEC. 236. When a thing actually is a nuisance, or when it has lawfully been declared to be a nuisance, either by

[1] Railroad Co. v. Joliet, 79 Ill. 25. Fisher v. McGirr, 1 id. 1. *See* State v. O'Neil, 58 Vt. 140.

[2] Darst v. People, 51 Ill. 286; Brown v. Perkins, 12 Gray, 89;

[3] Wood on Nuisances, § 834.

legislative enactment or by the judgment of a competent judicial tribunal, its character being ascertained, it may properly be abated. On the other hand, if the thing is not inherently and inevitably a nuisance, or actually operating as such, or declared to be a nuisance by statute or the judgment of a competent tribunal, it cannot lawfully be removed or destroyed. Courts of equity often will interfere by injunction to restrain unlawful attempts at abatement in such cases. And an action will lie against a municipal corporation for unlawful invasion of private property where forcible entry is made upon premises in private occupancy for the purpose of abating any thing in or upon them as a nuisance, before proceedings have been had in which the fact of nuisance has been established, and where the entry is made in pursuance of and reliance upon the mere decision of the local authorities that the nuisance exists. A municipal board cannot decide this question, so as to conclude the occupier of the premises, and acts at its peril in attempting to enforce its own adjudication. In such case it occupies no better position than would a private individual.[1]

In effect, then, the remedy of abatement is never properly resorted to except in cases where the fact of nuisance has been established, or in cases of pressing emergency and of real public necessity. If the thing or act is in violation of a statute or municipal regulation, or if its character has been fixed in judicial proceedings, or in case of a great or overruling public exigency, the remedy may be put in motion, but in other cases it cannot rightfully be resorted to.[2]

By whom the remedy may be exercised.

SEC. 237. Ordinarily, a public nuisance is only abatable in criminal proceedings after a verdict upon an indictment, or under a decree of a court of equity, or in civil pro-

[1] Sheldon v. Kalamazoo, 24 Mich. 383.

[2] Van Horn v. People, 26 Mich. 221.

ceedings, as the court may provide. Yet it has frequently been said, and the general proposition has been asserted in text-books and in judicial opinions, that any person may abate a public nuisance, that is, remove or suppress it in a summary way. It is submitted that this proposition cannot be sustained in reason or by authority to its full extent. It would seem now to be perfectly well established that no one has a right to abate a public nuisance, properly and strictly so called, that is, a nuisance affecting public rights merely, and not causing special or peculiar damage to any individual.[1] For example, the keeping of a building for the sale of intoxicating liquors in violation of law, if a nuisance at all, is exclusively a public nuisance, and no person would be justified in breaking into the building or tearing it down, and demolishing the furniture, fixtures, articles and appliances used therein and destroying the liquors found there. Much less could this be done by mob violence.[2] Such a nuisance could only be abated in judicial proceedings, or, in the case of a statutory nuisance, in the manner prescribed by the law, and ordinarily by the executive officers having general or special authority, and upon whom it is imposed as a duty, to remove and abate nuisances.[3]

[1] This seems to be the opinion of Mr. Wood (Wood on Nuis., § 732 *et seq.*) and of Judge Cooley (Cooley on Torts, 46). *See, also,* Ray on Neglig., sec. 11, a. On the other hand, it is said that this rule is too strict, and is not to be admitted without qualifications. (1 Hilliard on Torts, 605; 1 Bish. Cr. Law, § 828.) A rule which is supposed to reconcile the apparent differences of these authorities is offered in 16 Am. & Eng. Ency. of Law, 994. It is there said: "The true rule we believe to be this, that, speaking generally, an individual has not the right to abate a public nuisance from which he sustains no special injury, but that circumstances may arise to secure the judicial recognition of such right, limited by the rule that his act must not be such as to create a breach of the peace, and by the further rule that nothing must be done in excess of that demanded by the exigency of the special case." Meeker v. Van Rensselaer, 15 Wend. 397, is the leading case cited in support of this rule. *See* Williams v. Blackwall, 2 H. & C. 33.

[2] Earp v. Lee, 71 Ill. 193; Brightman v. Bristol, 65 Me. 456; Brown v. Perkins, 12 Gray, 89.

[3] Harvey v. Dewoody, 18 Ark. 252; Ferguson v. Selma, 43 Ala. 398; Green v. Savannah, 6 Ga. 1; Roberts v. Ogle, 30 Ill. 459; Turner v. Holzman, 54 Md. 148.

When a private person may exercise the remedy.

SEC. 238. But if the nuisance be of such a character as to cause special and peculiar damage to an individual, even though it be at the same time indictable as a public offense, so that the person injured would be entitled to maintain a private action for the damage suffered by him, he may abate the nuisance by his own motion, as in the case of a nuisance strictly private.[1] The private right of action must always exist, however, as a condition precedent to an abatement at the hands of a private person. He can only justify his act in this regard on the ground that he is directly, specially and materially injured by the thing abated or the acts suppressed.[2]

The injury which will warrant such an interference cannot be defined precisely; but it must be real, tangible and substantial, and such as would, if it were of a purely private character, justify and be a sufficient foundation for a private action for damages. It is not enough that it diminishes merely the value or usefulness of property; but it will be sufficient if the alleged nuisance endangers

[1] "The true theory of abatement of nuisances is, that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing." Shaw, C. J., Brown v. Perkins, 12 Gray, 101; Hopkins v. Crombie, 4 N. H. 520; Griffith v. McCollum, 46 Barb. 561; Brown v. De Groff, 50 N. J. L. 409. But an individual has no right to injure or destroy the property of another, because it is so situated as to be a public nuisance, unless he is in the exercise of a public right which is obstructed by it; and not even then if he can reasonably avoid it. Borden v. Lewis, 13 R. I. 189. A sheriff, however, or his deputy, may lawfully abate a public nuisance in a highway. Turner v. Holzman, 54 Md. 148.

[2] Dimes v. Petley, 15 Q. B. 276; Arnold v. Holbrook, L. R., 8 Q. B. 96; Mayor v. Rural Cem. Assn., L. R., 1 E. D. 344; Morris v. Nugent, 7 C. & P. 572; Davies v. Mann, 10 M. & W. 546; Colchester v. Brooke, 7 C. B. 377; Moore v. Langdon, 2 Mackey 127; Billard v. Erhart, 35 Kans. 611; School Dist. No. 1 v. Neill, 36 id. 617; Blanc v. Murray, 36 La. Ann. 162; Tissot v. Great So. Tel., etc., Co., 39 id. 996; Brown v. Perkins, 12 Gray, 89; Clark v. Ice Co., 24 Mich. 508; Brown v. De Graff, 50 N. J. L. 409; Manhattan Mfg. & Fert. Co. v. Van Keuren, 23 N. J. Eq. 251; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; Lawton v. Steele, 119 id. 226; Lansing v. Smith, 8 Cow. 146; Harrower v. Ritson, 37 Barb. 301; State v. Parrott, 71 N. C. 311; Price v. Grantz, 118 Penn. St. 402; Selmar v. Wolfe, 27 Tex. 68.

the lives or health of occupants of property in the vicinity or obstruct or materially interfere with the reasonably necessary exercise of a common right.

SEC. 239. The preceding remarks apply as well to purely private as to public nuisances; and the former may be abated by any one injured thereby to such an extent as to give him a right of action.[1] But, of course, a person who undertakes to abate a nuisance proceeds at his peril; he takes the risk of being able to show that the thing complained of was in fact a nuisance. If he errs in judgment, he is answerable in damages; and if a breach of the peace is involved, he is liable to indictment.[2]

Extent of the remedy.

SEC. 240. That which is an actual nuisance can be suppressed just so far as it is noxious in its effects; and its noxious character is the test of its wrongfulness. When an act or thing is ascertained to be harmful in its effects upon the public or individuals, it may lawfully be regulated or even prohibited to the extent that may be necessary to protect the rights of the public or of the individuals so affected, and to prevent any recurrence of damage from the same cause. The extent of the remedy is measured by the necessities of the case. In many cases, a nuisance can only be abated by the destruction of the property in which it consists. The cases of infected cargo or clothing or of impure and unwholesome food are

[1] Cases cited in preceding note. 1 Bish. Cr. Law, § 829; Cooley on Torts, 46; Hilliard on Torts, 605; Wood on Nuis., § 844; Baten's Case, 9 Coke, 55; Penruddock's Case, 5 id. 101; Perry v. Fitzhowe, 8 A. & E. (N. S.) 757; Roberts v. Rose, L. R., 1 Ex. 82; Earl of Lonsdale v. Nelson, 2 B. & C. 311; Morrice v. Baker, 3 Bulstr. 198; Hubbard v. Deming, 21 Conn. 356; Coley v. Thomas, 81 Ill. 478; Earp v. Lee, 71 id. 193; Mayhew v. Burns, 103 Ind. 328; Reed v. Cheney, 12 N. E. Rep'r, 717; Welch v. Stowell, 2 Doug. (Mich.) 332; Romayne v. Loranger, 63 Mich. 373; Amoskeag Co. v. Goodale, 46 N. H. 56; Groves v. Shattuck, 35 id. 257; Gateswood v. Blincoe, 2 Dana (Ky.), 158; Wetmore v. Tracey, 14 Wend. 250; Rhea v. Forsyth, 37 Penn. St. 503; Barclay v. Comm., 25 id. 503; Adams v. Barney, 25 Vt. 225; Amick v. Thorp, 13 Gratt. (Va.) 564.

[2] Tissot v. Great So. Tel., etc., Co., 39 La. Ann. 996; Crosland v. Pottsville Borough, 126 Penn. St. 511.

plainly of this description. They are nuisances *per se*, and their abatement is their destruction. So, also, implements and articles of personal property, capable only of an illegal use, may be destroyed as a part of the process of abating the nuisance they create, if this be directed by statute. In short, in every case, the thing itself, or the condition of things constituting or creating the nuisance, whatever the nature or description of the property, whether a building or other structure, growing crops, deleterious articles of food or drink, things infected with germs of disease, or things applied to illegal use and incapable of lawful use, may be seized and destroyed, or so dealt with, according to the nature of the case, as to do away with their injurious effects.[1]

But where the nuisance arises from unlawful acts, or the use of things innocent in themselves, the case does not call for their destruction, in order to effect an abatement, but for the discontinuance of the objectionable method of using them, and for the suppression of the unlawful acts. This would be the only mode of abatement in such cases known to the common law, and any other mode would have no sanction in that law or in precedent.[2]

So, too, if a person who is entitled to a limited right, exercises it in excess, so as to produce a nuisance, it may be abated to the extent of the excess. Or, if the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be entirely stopped, until means have been taken to reduce it within its proper limits.[3]

[1] Jones v. Williams, 11 M. & W. 176; Ferguson v. Selma, 43 Ala. 398; Harvey v. Dewoody, 18 Ark. 252; Woolf v. Chalker, 31 Conn. 121; Green v. Savannah, 6 Ga. 1; Brightman v. Bristol, 65 Me. 426; Blair v. Forehand, 100 Mass. 136; Matter of Frazee, 63 Mich. 396; Morey v. Brown, 42 N. H. 373; Lawton v. Steele, 119 N. Y. 226; Meeker v. Van Rensselaer, 14 Wend. 397; Carter v. Dow, 16 Wis. 298.

[2] Messersmidt v. People, 46 Mich. 437; Crippen v. People, 8 id. 117; Welch v. Stowell, 2 Doug. (Mich.) 332; Babcock v. Buffalo, 56 N. Y. 268; Ely v. Bd. of Supervisors, 36 id. 297; Chenango Bridge Co. v. Paige, 83 id. 178; Moody v. Supervisors, 46 Barb. 659; Barclay v. Comm., 25 Penn. St. 503.

[3] Addison on Torts, 269; Cawkell v. Russell, L. J., 26 Exch. 34; Radwell v. Newark, 5 Vroom, 264; Taggart v. Comm., 21 Penn. St. 527; Crosland v. Pottsville Borough, 126 id. 511; Beard v. Murphy, 37 Vt. 99.

Limited by the necessities of the case.

SEC. 241. The principle applicable in all cases is, that the remedy is to be confined to the evil sought to be remedied; that the means adopted, whether preventive or destructive, are to be adapted to meet the necessities of the case, and must not go beyond them; and that the nuisance is to be abated in such a way as to do the least possible injury to private rights. Any thing more than this will amount to an unreasonable, unnecessary and unconstitutional invasion of private rights, and will, therefore, be unlawful.[1] All willful or unnecessary injury, even to wrong-doers, or to their property, is itself a wrong, and no man can set up a public or a private wrong, committed by another, as an excuse for such injury to him or his property.[2]

Other limitations upon the remedy.

SEC. 242. Other restrictions upon the exercise of this summary method of redress are, that the party resorting to it must be guilty of no excess of abatement beyond that necessary to protect *his own* rights;[3] and that the right must not be exercised to the prejudice of the public peace. If the abatement is resisted, it becomes necessary to seek in the courts the ordinary legal remedies.[4] This is the rule as to abatement by private individuals of either a public or a private nuisance. But where a statute or

[1] Cooper v. Marshall, 1 Burr. 260; Rex v. Pappineau, 1 Stra. 688; Bloomhoff v. State, 8 Blackf. (Ind.) 205; State v. Koster, 35 Iowa, 221; Heath v. Williams, 25 Me. 209; Shepard v. People, 40 Mich. 487; Harrower v. Ritson, 36 Barb. 201; State v. Keeran, 5 R. I. 497; Miller v. Burch, 32 Tex. 208. Thus, to abate a nuisance arising from a pond of water, one injured thereby has no right to fill up the bed of the pond, but should remove the cause rendering the water impure. Finley v. Hershey, 41 Iowa, 389.

[2] Clark v. Ice Co., 24 Mich. 509; Brown v. De Graff, 21 Vroom, 489.

[3] Perry v. Fitzhowe, 8 A. & E. (N. S.) 757; Wright v. Moore, 38 Ala. 593; State v. Moffatt, 1 Greene (Iowa), 247; Gateswood v. Blincoe, 2 Dana (Ky.), 158; Jewell v. Gardiner, 12 Mass. 311; Hutchinson v. Granger, 13 Vt. 394.

[4] Rosewell v. Prior, 12 Mod. 635; 2 Salk. 460; Perry v. Fitzhowe, 8 A. & E. (N. S.) 757; Baldwin v. Smith, 82 Ill. 162; Earp v. Lee, 71 id. 193; Day v. Day, 4 Md. 262; Groves v. Shattuck, 35 N. H. 257; Miller v. Burch, 32 Tex. 208; Mohr v. Gaull, 10 Wis. 513.

local regulation expressly makes it the duty of an officer to abate nuisances, it may be supposed that the remedy is to be executed even at the risk of a breach of the peace and in spite of resistance. The law in such case would justify the officer in using such measure of force as might be necessary to overcome opposition and to accomplish the abatement.

Again, as a general rule, before resorting to extreme measures, the party responsible for the nuisance should be notified of its existence and requested to remove it;[1] and the forcible abatement would only be justified when, after the lapse of reasonable time, the request has not been complied with.[2] It is, however, by no means a universal rule that notice is first to be given. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call upon the person on whose premises the mischief has arisen to remove it. In such cases, an individual would be justified in abating a nuisance arising either from an act of commission or from an omission of legal duty, without notice. In all other cases of nuisance arising from such omissions persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice.[3]

It would, therefore, seem that notice is not essential when the grievance has arisen from the positive wrongful act or gross negligence of the party responsible for its continuance, or where it threatens such immediate injury to life or health that the allowance of time for its removal, beyond what is absolutely essential, could not reasonably be demanded.[4]

[1] *Ante*, secs. 199, 200; Fisher v. McGirr, 1 Gray, 1; Lincoln v. Gray, 27 Vt. 355.

[2] Burling v. Reed, 11 Q. B. 904; Davies v. Williams, 16 id. 546; Ocean Co. v. Sprague Co., 34 Conn. 529; Pruden v. Lowe, 67 Ga. 190; State v. Parrott, 71 N. C. 311.

[3] Best, J., Earl of Lonsdale v. Nelson, 2 B. & C. 302, 311; Jones v. Williams, 11 M. & W. 176.

[4] Wade on Notice, §§ 480g, 480h, 480k; Cooley on Torts, 48.

Expenses of abatement.

SEC. 243. The expenses incurred in effecting the abatement of a nuisance are properly a charge upon the owner or occupant of the premises where the nuisance existed, or upon the persons who caused or maintained the nuisance, and may be sued for and recovered by the board of health or the municipal corporation, causing the abatement and paying such expenses in the first instance, in any court of competent jurisdiction. The matter is regulated by statute, as a rule, in respect of abatements effected under direction of sanitary officers, and the judgment recovered is declared to be a preferred lien upon the premises, enforceable in like manner as the payment of taxes by sale or lease of the premises. But in the absence of statute on the subject, there would seem to be no reason to doubt that the expenses of abatement are at least a personal charge against the owner or occupant of the premises, and recoverable by an ordinary civil suit, in the name of the corporation within whose jurisdiction the nuisance existed and under whose authority and by whose officers it was suppressed. In removing the nuisance the public authorities do no more than the owner or occupant of the premises himself was bound to do, and therefore the law implies a promise to pay the proper costs and charges of the work. The remedy is enforced in an action of *assumpsit* predicated upon this implied promise.

Suit for expenses; what must be proved.

SEC. 244. But in an action brought to recover the expenses of suppressing an alleged nuisance or of other work done by public officers on private premises, in the interest of the public health or safety, the defendant may contest all the facts upon which his liability is sought to be established. If the determination by the authorities upon the questions as to the existence of the nuisance or the necessity of the work, and as to his liability, was made without notice to him, and without opportunity being af-

forded to him to appear in the proceedings and be heard upon those questions, it is settled law that the findings and adjudication of the authorities are not to be regarded as final and conclusive, but may be reviewed in any action in which it is sought to fix a personal liability for the cost of removing the alleged nuisance or of doing the work.

What facts may be controverted.

SEC. 245. The general statutes of Massachusetts, relating to the preservation of the public health, contain provisions authorizing local boards of health to make special orders concerning the suppression and removal of nuisances upon private premises, and in case of non-compliance with any such special order, to enter upon the premises to which the order relates, and suppress and remove the nuisance there existing, at the expense of the owner or occupant. In an action by the city of Salem, to recover the cost of removing an alleged nuisance from defendants' premises, it appeared by the record of proceedings of the local board of health, that the board, acting upon a complaint preferred, had found and determined, after due examination, that defendants had created and were continuing a nuisance upon their premises, which was detrimental to the health of the inhabitants of the city; and that the board thereupon made an order, reciting the facts, and requiring defendants to remove the nuisance. It was proved that notice of the order was properly served, and that defendants had neglected to comply with it. The record also showed that thereafter the nuisance was abated by the city with the approval and to the satisfaction of the board of health. Upon the trial, plaintiff contended that the proceedings of the board were conclusive as to the existence of the nuisance, and that defendants could not controvert the propriety of the method of removal adopted by the board. On the other hand, defendants insisted that plaintiff could not recover without proving, as facts, that the nuisance existed, that it was

caused or maintained by defendants, and that the measures adopted for its removal had been effectual. The court decided that the record of the proceedings of the board of health was competent evidence in the case for certain purposes. "It proves," said the court, "the fact that such proceedings were had, which is a necessary preliminary step. So far as the proceedings were within and in accordance with the authority and duties of the board, they are entitled to the presumption that whatever was done was rightly done; and may be held as *prima facie* evidence of the existence of a nuisance, which warranted the board of health in taking action and incurring expense for its removal. *But it is not evidence that the nuisance was caused by the defendants*, in the manner stated, or in any manner; and all the facts, upon which it is sought to charge the defendants with liability, are opened to be tried and determined by the proofs in the case."[1]

SEC. 246. The most important and difficult question presented in the case just referred to, related to the effect of the orders of the board of health by which the existence of the nuisance was "found and determined," and that it was created and maintained by defendants; and which also directed its removal by defendants. Plaintiff insisted that the proceedings of the board were *quasi*-judicial, and that the determination and orders made by the board were, therefore, adjudications conclusive against defendants upon all the facts involved in those determinations. "If this be so," the court said, "the defendants are precluded from denying the existence and alleged cause of the nuisance, and their duty to remove it." But the court expressed the opinion, that in a suit to recover expenses incurred in removing a nuisance, when prosecuted against a party on the ground that he caused the same, but who was not heard, and had no opportunity to be heard, upon the question, before the board of health,

[1] Wells, J., Salem v. Eastern R. Co., 98 Mass. 431.

such party is not concluded by the findings or adjudications of that board, and may contest all the facts upon which his liability is sought to be established.

SEC. 247. The grounds upon which this conclusion was reached are these: The defendant is neither party nor privy to those adjudications; he has no right of appeal, and no other means by which to revise the proceedings, or to correct errors, either of law or fact therein. "Parties similarly situated in respect to judgments in courts of law, may impeach them collaterally. * * * Where there appears to have been no notice to the parties to be affected, and no opportunity afforded them to be heard in defense of their rights, whatever operation the adjudication may have upon the *res*, and however conclusive it may be held for the protection of those who act, or derive rights under it, the adjudication itself can have no valid operation against parties who may be named in the proceedings. If it proceed to declare any obligation or impose any liability upon such parties, they may, in any subsequent suit to enforce it, deny the validity of the judgment, and controvert the facts upon which it was based. * * * We think that these principles apply to the proceedings of a board of health. Their determination of questions of discretion and judgment, in the discharge of their duties, is undoubtedly in the nature of a judicial decision; and, within the scope of the power conferred, and for the purposes for which the determination is required to be made, it is conclusive. It is not to be impeached or set aside for error or mistake of judgment; nor to be reviewed in the light of new or additional facts. The officer or board to whom such determination is confided, and all those employed to carry it into effect, or who may have occasion to act upon it, are protected by it, and may safely rely upon its validity for their defense. It is in this sense that such adjudications are often said

to be conclusive against all the world; and they are so, so far as the *res* is concerned. The statute and the public exigency are sufficient to justify the omission of previous notice, hearing and appeal. But this exigency is met and satisfied by the removal of the nuisance. As a matter of police regulation, the proceedings and the authority of the board end here. When the city comes to seek its remedy over; to throw upon some individual, supposed to have caused the nuisance, the expense of removal which it has incurred, in the first instance, as the representative of the public; *there seems to be no reason, founded either in the public exigency, or in the justice of the case, that requires or warrants the holding of such ex parte adjudications as final and conclusive to establish the facts upon which the claim rests.*"[1]

SEC. 248. All that the law requires is, that judgment shall not pass against the owner of property, condemning him to pay the cost of suppressing or abating an alleged nuisance existing upon his premises, or the cost of doing any other work on his premises for the benefit of the public health or safety, without a hearing upon the question as to the existence of the nuisance, and the necessity of the work, as well as upon the other questions involved. It is not necessary that such hearing should be in a regularly constituted tribunal of law, but the proceeding must be such as will constitute, within accepted definitions, "due process of law." And the hearing may come before or after the alleged nuisance is abated or the work is done, as circumstances may require. The matter is governed by the necessities of the case.[2]

[1] Wells, J., Salem v. Eastern R. Co., 98 Mass. 431; Joyce v. Woods, 78 Ky. 386; Hutton v. Camden, 39 N. J. L. 129; Hannibal v. Richards, 82 Mo. 330; Philadelphia v. Trust Co., 132 Penn. St. 224; Kennedy v. Board of Health, 2 id. 366; Brigham v. Fayerweather, 140 Mass. 411.

[2] Joyce v. Woods, 78 Ky. 386; Salem v. Eastern R. Co., 98 Mass. 431; People v. Bd. of Health of Seneca Falls, 58 Hun, 595. *See* D'Antignac, 31 Ga. 700; Bonsall v. Lebanon, 17 Ohio, 418; Davidson v. New Orleans, 96 U. S. 97.

Legislative declaration of nuisance conclusive.

SEC. 249. But it is important to observe, that where a valid legislative act has declared certain things to be nuisances and has provided for their destruction as such, at the expense of the owner; or where valid legislation provides that all expenses incurred on account of goods under quarantine or general health laws, shall be paid by the owner; it is not competent for the owner, as a defense to the claim for such expenses, to show in the one case that the thing destroyed was not in fact a nuisance nor in the other case that the goods in question did not require the disinfection, inspection or other precautionary measures prescribed by the laws, if they were of the class concerning which the regulations had been made.[1] That which, by valid legislation, is declared to be a nuisance is, to all intents and purposes, a nuisance in fact, and evidence to the contrary is inadmissible; and that class of things which the law properly subjects to sanitary and precautionary regulations, in law *requires* such regulations, and evidence that particular things belonging to the class do not need such treatment cannot be received.

[1] Lawton v. Steele, 119 N. Y. 226; Train v. Boston Disinfecting Co., 144 Mass. 523; Miller v. Horton, 152 id. 540. But the *amount* of the expense may be disputed, Hannibal v. Richards, 82 Mo. 330; or the *reasonableness* of the expense, with a view to determining whether the work ought to have been done at all, Train v. Boston Disinfecting Co., 144 Mass. 523; or the propriety of the method adopted, Philadelphia v. Trust Co., 132 Penn. St. 224.

CHAPTER XIII.

REGULATION OF BUSINESS PURSUITS AND PROFESSIONS.

SEC. 250. Application of police power to the subject.
251. Extent of regulation permissible.
252. Illustration.
253. Restrictions upon certain kinds of business.
255. Regulations must be reasonable.
256. Licenses, as means of regulation.
257. Exclusive licenses.
258. License not a contract.
259. Municipal licenses.
260. Regulations affecting certain classes of persons.
261. Regulation of dangerous occupations.
262. Regulation of skilled trades.

Application of police power to the subject.

SEC. 250. No proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may choose.[1] The State can neither compel him to pursue any particular calling nor prevent him engaging in any lawful business, provided he does so in a lawful manner. But the exercise and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority essential to the health, safety and morals of the community. It is, therefore, regarded as beyond dispute, that the State, in the exercise of its police power, may subject all occupations to such degree of regulation as may fairly be required for the protection of public interests and for the promotion of the public welfare. The limitations upon the power of the State in this regard — the general limitations upon the police power — have already been discussed. They are con-

[1] Rapallo, J., People v. Marx, 99 N. Y. 377; Matter of Jacobs, 98 id. 98; Corfield v. Coryell, 4 Wash. C. C. 380; Slaughter-House Cases, 16 Wall. 36; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746; Crowley v. Christensen, 137 id. 86.

tained in those constitutional provisions which are designed to secure impartiality in the operation of the laws, and the immunity of persons and property from the arbitrary exercise of governmental authority. Subject to these beneficial restraints, the power of the State over all trades, employments, occupations and professions is admittedly supreme.[1]

And so broad and liberal is the interpretation now given to constitutional guaranties, that there can be no violation of the fundamental rights of individuals, in respect of the choice and pursuit of a calling or employment, which will not fall within the express or implied prohibition and restraints of the Constitution, so that it is unnecessary to seek for principles outside of the Constitution under which legislation may be condemned.[2]

Extent of regulation permissible.

SEC. 251. Speaking generally, the police power is limited in its exercise to the enforcement of the maxim, that each individual must so conduct himself, so pursue his calling and so use his property, as not to injure or unnecessarily annoy others. In other words, the rights of each individual are conditioned by the equal rights of all other persons to the extent that may be necessary to secure the largest measure of freedom to all. Whenever, therefore, the prosecution of a particular calling threatens injurious consequences to the public or to individuals, it is a legitimate subject for police regulation, *to the extent of preventing the evil.* It is always within the discretion of the legislature to institute such regulations when a proper case arises, and to determine upon the character of the regulations. It will be no objection to such regulations that they disturb rights granted by the legislature itself, as by charter to a corporation, or that, in operating as a prohibition of the use of property in a particular

[1] Austin v. State, 10 Mo. 591; Metro. Bd. of Excise v. Barrie, 34 N. Y. 666; Cooley on Torts, 277.

[2] Bertholf v. O'Reilly, 74 N. Y. 509.

way, they virtually destroy the property, or cause serious depreciation in its value, without compensation to the owner.

Illustration.

SEC. 252. Where power was conferred upon a municipal corporation, for example, "to pass and enforce all ordinances deemed necessary or proper to prevent the introduction of infectious or contagious disease, and to preserve the health of the inhabitants," it was held, that this would not confer authority to enact an ordinance making it unlawful for any person "to import, sell or otherwise deal in second-hand or cast-off garments, blankets, bedding or bed-clothes," with a *proviso*, excepting the sale of such articles when not imported, or which had not been used by persons having infectious disease. The ordinance was pronounced invalid, the court saying: "The operation of the ordinance reaches beyond the scope of necessary protection and prevention, into the domain of restraint of lawful trade, by permanently prohibiting the importation, selling or otherwise dealing in the enumerated articles, though they may have been used by persons or in districts infected with such diseases. Municipal authorities having powers to abate nuisances, cannot absolutely prohibit a lawful business, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. If they can declare it unlawful to import, sell or otherwise deal in second-hand or cast-off garments, blankets, bedding and bed-clothes, without regard to the circumstances or necessity, they may, under the same power, declare it unlawful to import or sell meat because, at some times and in some places, it is infected with trichina, or other kind of food because it is liable to adulteration. That the ordinance is founded on the fear and apprehension of possible

danger, and not on its existence, is shown by the unequal discrimination between articles imported and not imported. We cannot regard it as a legitimate exercise of the power conferred by the act of incorporation."[1]

Restrictions upon certain kinds of business.

SEC. 253. Any occupation or business whatever, which inherently and inevitably is harmful to the community, may be absolutely interdicted.[2] The most familiar application of this principle is in the case of the traffic in spirituous or intoxicating liquors. Prohibitory liquor laws, as such legislation is termed, have uniformly been sustained, the courts taking judicial cognizance of the fact that the manufacture and sale of such liquors, to be used as beverages, is a business attended with such danger to the community as to require and justify State regulation. The manner and extent of regulation rest in the discretion of the governing authority. The business may be entirely prohibited, or may be permitted under such conditions as will limit and abridge to the utmost its evil results.[3]

[1] Clapton, J., Greensboro v. Ehrenreich, 80 Ala. 579; Town of Kosciusko v. Slomberg, 68 Miss. 469. In State v. Fisher, 52 Mo. 174, 177, Wagner, J., says: "A law which unnecessarily and oppressively restrains a citizen from engaging in any traffic, or disposing of his property as he may see fit, although passed under the specious pretext of a preservation of the health of the inhabitants, would be void. Such a law would be unreasonable, and would deprive the people of the rights guaranteed to them by the organic law of the land. But if the regulation or prohibition contains nothing more than the necessary limitations, and is passed in good faith for the purpose of preserving the public health, and abating nuisances, it is not liable to objection. No man has an inalienable right to produce disease, or trade in that which is noxious, and in every society some minor rights are surrendered for the general good."

[2] "No one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society, provided that it does not interfere with vested rights of property. When such rights stand in the way of the public good, they can be removed by awarding compensation to the owner. When they are not in question, the claim of a right to sell a prohibited article can never be deemed one of the privileges and immunities of the citizen." Bradley, J., Bartemeyer v. Iowa, 18 Wall. 129; *Ex parte* Kennedy, 3 S. W. Rep'r, 114.

[3] License Cases, 5 How. 504; Donnham v. Alexandria Council, 10 Wall. 173; Bartemeyer v. Iowa, 18 id. 129; Tiernan v. Rinker, 102 U. S. 123; Foster v. Kansas, 112 id.

On the same principle, legislation having for its purpose the prohibition or restriction of the manufacture and sale of oleomargarine has been sustained. It is true that much of this last kind of legislation has been directed to the prevention of fraud and deceit in the sale of counterfeit substances for genuine dairy products, but its primary object was to guard the public health by prohibiting the sale of deleterious substances as articles of food.

So, too, legislation has been held to be valid which prohibits the sale of oils for illuminating purposes, unless they shall conform to the test or standard prescribed;[1] or the sale of any pistols, except such as are used in the army or navy of the United States;[2] or the sale of pistols, guns, or ammunition for the same, to minors or children under a prescribed age; or the sale of drugs and poisons, except by licensed druggists and upon the prescription of a physician.[3] Other like applications of the police power to the regulation of business in the interest of the public health or safety may be found in the statute books of the several States. The validity of such legislation seems now to be placed beyond the reach of just criticism.

SEC. 254. Where the occupation or business is not necessarily nor in itself harmful, prohibition usually is not required; yet there may be such restrictions placed upon it, as to manner and place of its prosecution, as will insure

201; Beer Co. v. Massachusetts, 97 id. 25; Mugler v. Kansas, 123 id. 623; Kidd v. Pearson, 128 id. 1; Eilenbacker v. Plymouth County Court, 134 id. 31; Crowley v. Christensen, 137 id. 86; State v. Wheeler, 25 Conn. 290; Reynolds v. Feary, 26 id. 179; State v. Allmond, 2 Houst. (Del.) 612; State v. Brown, 19 Fla. 563; Perdue v. Ellis, 18 Ga. 586; *In re* Hoover, 30 Fed. Rep'r, 51; Kaufman v. Dostal, 73 Iowa, 691; Littleton v. Fritz, 65 id. 488; Anderson v. Comm., 13 Bush (Ky.), 485; Comm. v. Intoxicating Liquors, 115 Mass. 153; Carleton v. Rugg, 149 id. 550; Rohrbacker v. City of Jackson, 51 Miss. 735; Hudson v. State, 78 Mo. 302; Austin v. State, 10 id. 591; Paul v. Gloucester Co., 50 N. J. L. 585; Metro. Bd. of Excise v. Barrie, 34 N. Y. 666; State v. Ludington, 33 Wis. 107.

[1] Patterson v. Kentucky, 97 U. S. 501; United States v. De Witt, 76 id. 593; Holmes v. Jamieson, 39 id. 617. *See* State v. White, 75 Mo. 465.

[2] Dobbs v. State, 39 Ark. 353.

[3] State v. Ah Chew, 16 Nev. 50; *Ex parte* Yung Jow, 28 Fed. Rep'r, 308. *See In re* Ah Lung, 45 id. 684.

the public against evil consequences.[1] Ordinarily, the regulation of such matters is a subject of local concern, and ample authority in that regard is commonly conferred upon the local authorities, either the governing authorities of municipalities, or local boards of health. The regulations, if within the scope of the power conferred, will have the same force and effect within the local jurisdiction as general laws of the State, and as the rules for determining their validity have already been discussed, it will be convenient, in treating of their particular subject-matter, to make no distinction between them and the statutes of the State.

The prosecution of certain trades and occupations, which are, in their nature, offensive or dangerous to the community may, then, reasonably be restricted to certain localities and prohibited elsewhere. Regulations of this character have commonly been imposed upon the business of conducting, within the limits of cities and towns, slaughter-houses, soap-boiling establishments and candleries, rendering works,[2] in short, all those occupations known as "offensive trades," and the retail traffic in spirituous or intoxicating liquors.[3] So, too, regulations are valid which prescribe certain days,[4] or hours of the day or night,[5] during which the places where such trades or occupations are carried on may not be kept open. But the power of the governing authorities, even in

[1] For example, proprietors of butter and cheese factories, conducted on the co-operative plan, may be required to give bonds for the faithful accounting for moneys received, and to make and file in a public office periodical reports of the business transacted. Hartshorn v. People, 109 Ill. 382.

[2] State v. Fisher, 52 Mo. 174.

[3] Dorman v. State, 34 Ala. 246; *Ex parte* Campbell, 74 Cal. 20; *Ex parte* McClain, 61 id. 436; Whitney v. Township Board, 71 Mich. 234.

[4] The sale of intoxicating liquors by retail on Sundays, election days and public holidays may be prohibited. *Ex parte* Newman, 9 Cal. 502; Thomasson v. State, 15 Md. 449; Canton v. Trist, 9 Ohio St. 439; Richardson v. Goddard, 23 How. Pr. 41; Portland v. Schmidt, 13 Oreg. 7; Hiller v. English, 4 Strobh. (S. C.) 486.

[5] City of Eureka v. Diaz, 89 Cal. 467; State v. Welch, 36 Conn. 215; State v. Hellman, 56 id. 190; Morris v. Rome, 10 Ga. 532; Hedderich v. State, 101 Md. 564; *Ex parte* Wolfe, 14 Neb. 24; Staats v. Washington, 45 N. J. L. 318; Hudson v. Geary, 4 R. I. 485; Platteville v. Bell, 43 Wis. 488. *See Ex parte* Byrd, 84 Ala. 17; *In re* Wilson, 32 Minn. 145.

respect of noxious and offensive trades, extends further than such means of regulating them; they may be entirely prohibited within the corporate limits,[1] though it is doubtful if such entire prohibition would be permissible under an authority merely to "regulate," unless the trades or occupations constitute nuisances in fact.[2] There is no doubt, however, that even under such a grant of authority, it would be a reasonable and proper *regulation* to prohibit the carrying on, *without the consent of the proper local authorities*, of any trade or occupation which, however lawful and innocuous in itself, may become in its ordinary exercise a public nuisance.[3]

Regulations must be reasonable

SEC. 255. The police power extends only to the *regulation* of necessary pursuits, so that they shall not become in their exercise detrimental to the community. This is the general rule. The power does not extend to the destruction or driving to inconvenient localities of necessary and useful occupations and trades, carried on in such manner as to be harmless.[4] Accordingly, an ordinance making it an offense to carry on a public laundry at any place within the habitable portion of a city, would not be

[1] 2 Kent's Comm. 340; Fertilizing Co. v. Hyde Park, 97 U. S. 659; *Ex parte* Campbell, 74 Cal. 30.

[2] State v. Mott, 61 Md. 297; Cronin v. People, 82 N. Y. 318.

[3] Watertown v. Mayo, 109 Mass. 315; Braintree Local Board v. Boyton, 52 L. T. 98. *Local option laws:* The legislature may lawfully confer upon local authorities, or the inhabitants of municipalities, the *option* of permitting or prohibiting a harmful traffic, as that in spirituous or intoxicating liquors. The great weight of authority and the better reasons are in favor of the constitutionality of such laws. State v. Wilcox, 42 Conn. 364; Perdue v. Ellis, 18 Ga. 586; Menken v. Atlanta, 78 id. 668; Anderson v. Comm., 13 Bush (Ky.), 485; Fell v. Maryland, 42 Md. 71; Comm. v. Bennett, 108 Mass. 27; Comm. v. Dean, 110 id. 357; *Ex parte* Swann, 96 Mo. 44; State v. Pond, 93 id. 606; State v. Noyes, 10 Fost. (N. H.) 279; State v. Court of Comm. Pleas, 36 N. J. L. 72; Paul v. Gloucester County, 50 id. 585; Gloversville v. Howell, 70 N. Y. 287; Gordon v. State, 46 Ohio St. 607; Locke's Appeal, 72 Penn. St. 491; State v. O'Neill, 24 Wis. 149; Comm. v. Kimball, 35 Am. Dec. 337, *n; contra*, Rice v. Foster, 4 Harr. (Del.) 479; Meshmeier v. State, 11 Ind. 482; Maize v. State, 4 id. 342; State v. Weir, 33 Iowa, 134; State v. Swisher, 17 Texas, 441.

[4] Badkins v. Robinson, 53 Ga. 613; People v. Gillson, 109 N. Y. 389; Matter of Jacobs, 98 id. 98; Matter of Paul, 94 id. 497.

sustained as a legitimate exercise of the power;[1] nor would an ordinance, which confines that business within certain limits, excluding the larger part of the city, without regard to the character of the structure and appliances used in the business, or the manner in which the business is prosecuted;[2] nor would an ordinance which, in its necessary operation, *or in its practical administration*, makes an unfair discrimination, giving or withholding a license as to persons or places, without regard to the competency of the persons or the propriety of the places selected for carrying on the business.[3] The Bingham Ordinance, of San Francisco, was unjust and unreasonable, and amounted to an arbitrary confiscation of property, because it declared that it should be unlawful for Chinese to carry on business within the corporate limits, except in a designated district, and required all Chinese either to remove their business beyond the city limits or to the designated district.[4] But it may, in some cases, be reasonable to interdict even an innocent occupation, except within certain areas of the city,[5] and it is always proper to require such safeguards against possible danger or annoyance to the public, or to restrict the conduct of the business by such conditions, as will remove any reasonable apprehension on account of the public health or safety. For, the police power may be exerted as well to prevent as to remove public evils.[6] So, regulations as to times and places of prosecuting any kind of business are sustained if they appear to be reasonable under all the circumstances, and are fair, equal and impartial in their operation.[7] They must

[1] Stockton Laundry Case, 26 Fed. Rep'r, 611.

[2] *In re* Sam Kie, 31 Fed. Rep'r, 680.

[3] Yick Wo v. Hopkins, 118 U. S. 356. *See* Crowley v. Christensen, 137 id. 86.

[4] *In re* Lee Sing, 43 Fed. Rep'r, 359.

[5] *In re* Hang Kie, 69 Cal. 149.

[6] *Ex parte* Moynier, 65 Cal. 33; Barbier v. Connolly, 113 U. S. 27; Soon Hing v. Crowley, ib. 703.

[7] A statute providing a penalty for selling intoxicating liquors, and an additional penalty against *pharmacists* who violate the provisions of the act, is not obnoxious to the objections against class legislation. State v. Duggan, 15 R. I. 403. *See* Comm. v. Clapp, 5 Gray, 97, 100; Comm. v. Hitchings, ib. 482, 486. But it would be unreasonable to require pharmacists to furnish the names of those to whom they sell liquors. City of Clinton v. Phillips, 58 Ill. 102.

not amount to arbitrary and unnecessary interference with lawful pursuits, but must appear upon their face, or in the light of facts of which the courts may take judicial notice, to be directed at some evil which is sought to be removed or averted, and the means adopted must be appropriate to accomplish the ends in view.[1]

Licenses as a means of regulation.

SEC. 256. A very common method of regulating the various trades, employments and professions, is by requiring licenses to be taken out for the privilege of engaging in them. Legislation of this kind is within the powers of the State, provided it be uniform in its operation and not discriminating.[2] The same power may be delegated to municipal or other local authorities, to be exercised subject to the same conditions;[3] and in the absence of express grant of such authority, it may be implied from the power "to regulate," "to control" or "to restrain" the exercise of trades, employments and professions.[4]

[1] *Sunday laws*, prohibiting persons, with certain exceptions, from keeping open their places of business, or pursuing any secular employments, on Sunday, are uniformly sustained. The subject is thoroughly treated in the recent work of Ringgold on the Law of Sunday. *See, also*, remarks of Field, J., Soon Hing v. Crowley, 113 U. S. 703; *Ex parte* Andrews, 18 Cal. 678; Kormisch v. Atlanta, 44 Ga. 204; State v. Ambs, 20 Mo. 214; Neuendorf v. Duryea, 69 N. Y. 557; Lindemuller v. People, 33 Barb. 548, and cases there cited; Hudson v. Geary, 4 R. I. 485. As to whether a particular business is a "work of necessity," within the exceptions of the law, Ungericht v. State, 119 Ind. 379; Edgerton v. State, 67 id. 588; Mueller v. State, 76 id. 310. Such laws must not discriminate against particular kinds of business which are innocent in themselves, *Ex parte* Westerfield, 58 Cal. 550; nor against sects or classes of persons. Shreveport v. Levy, 26 La. Ann. 671. *See* Liberman v. State, 26 Neb. 464.

[2] Quantlebaum v. State, 79 Ala. 1; Fecheimer v. Louisville, 84 Ky. 306; Parish v. Cochran, 20 La. Ann. 373; St. Louis v. Spiegel, 90 Mo. 587; State v. Cohen, 84 N. C. 771; Warren Borough v. Geer, 117 Penn. St. 207.

[3] *Ex parte* Casinello, 62 Cal. 538; Perdue v. Ellis, 18 Ga. 586; Zanone v. Mound City, 103 Ill. 552; Lutz v. Crawfordsville, 109 Md. 466; Kniper v. Louisville, 7 Bush (Ky.), 599; Bullitt v. Paducah, 8 S. W. Rep'r, 802; St. Paul v. Byrnes, 36 N. W. Rep'r, 449; St. Louis v. Spiegel, 90 Mo. 587; Paul v. Gloucester County, 50 N. J. L. 585; Marmet v. State, 45 Ohio St. 63.

[4] License Tax Cases, 5 Wall. 570; Laundry License Case, 22 Fed. Rep'r, 701; *Ex parte* McNally, 73 Cal. 632; Perdue v. Ellis, 18 Ga. 586; Kinsley v. Chicago, 124 Ill. 359; Lutz v. Crawfordsville, 109 Ind. 466; Huntington v. Cheesebro, 57 id. 74; Keokuk v. Dressell, 47 Iowa, 597; State v. De Bar, 58 Mo. 395. *See Ex parte* Garza, 28 Tex. App. 381.

For, the purpose of requiring a license is to limit, regulate or restrain. By means of the license the persons and business to be regulated are located and identified, and brought within the supervision of the authorities, so that whatever regulations are made concerning them may be the more easily and certainly enforced. A license law also furnishes the means of ascertaining and requiring proof that persons proposing to engage in a particular pursuit are competent to do so, and that they have complied with all the provisions of the law. But a license law cannot be used as a means of *prohibiting* any of the vocations of life which are not detrimental to the health, safety or morals of the public.[1]

Exclusive licenses.

SEC. 257. In spite of the prejudice which the courts entertain against laws which have the effect of creating or tending to create monopoly rights, there is no doubt, that licenses may be granted to individuals which carry with them exclusive rights and privileges. The policy of granting such licenses is justified by the necessities of society. In most cases it will be found that these licenses are given as a means of securing the proper performance of duties

[1] Yick Wo v. Hopkins, 118 U. S. 356; *In re* Quang Woo, 13 Fed. Rep'r, 229; *In re* Wo Lee, 26 id. 471; Badkins v. Robinson, 53 Ga. 613. The power to license does not carry with it the power to prohibit, Sweet v. Wabash, 41 Ind. 7; but it does involve the power to forbid the sale of designated articles, except at licensed places, Vinson v. Monticello, 118 Ind. 103; Hershoff v. Beverly, 45 N. J. L. 288. And though it is permissible to exact a fee sufficient to cover the cost of issuing the license and the incidental expenses of regulating the business, Cooley on Taxation, 408-410; Dillon's Mun. Corp., § 358; Kinsley v. Chicago, 124 Ill. 359; Marmet v. State, 45 Ohio St. 63; if it appears that an excessive fee is charged for the purpose of giving the law a prohibitory effect, the law will be void. *Ex parte* Burnett, 30 Ala. 461; Craig v. Burnett, 32 id. 728; Sweet v. Wabash, 41 Ind. 7; Burlington v. Insurance Co., 31 Iowa, 102; City of Lyons v. Cooper, 39 Kans. 324; Kitson v. Mayor, 26 Mich. 325. *See* Laundry License Case, 22 Fed. Rep'r, 701; Cooley's Const. Lim. 243, n. But where an occupation, like hawking and peddling, is likely to become a public nuisance unless restrained, it is permissible to impose a license fee large enough to act as a restraint upon the number of persons who might otherwise engage in the occupation, and for this purpose the fee may be made greater than the expense of issuing the license and of police supervision of the business. City of Duluth v. Krupp, 46 Minn. 435.

which rest upon the corporation itself, and which concern the health, safety or convenience of the public. That which the corporation itself may lawfully do for this purpose, it may authorize others to do, adopting such agencies as it may find to be most effectual. There are numerous instances of the exercise of this power by municipalities. A few of the cases by which they are illustrated will be found in the note, and others are cited in various places in this treatise.[1]

It may, perhaps, be well to state one common instance, of an ordinance conferring exclusive rights upon an individual, in the interest of the public health. An ordinance of San Francisco granted to one Alpers, for twenty years, "the exclusive right and privilege of removing from the city limits all carcasses of such dead animals, not slain for human food, as shall not be removed and so disposed of as not in any manner to become a nuisance, within twenty-four hours next after the death of the same," by the owner, or the person in whose possession any such animal may be at the time of its death, or by the immediate servant or employe of such owner or person. The ordinance required the owner, if not intending to so remove a dead animal himself, to deposit a notice of the death in a box provided for that purpose by Alpers. It was held, that the ordinance was a valid exercise of the police power of the State, and that it was not open to the objection that it created a monopoly or deprived persons of their property without due process

[1] Slaughter-House Cases, 16 Wall. 36; Burlington, etc., Ferry Co. v. Davis, 48 Iowa, 133; Le Claire v. Davenport, 13 id. 210; City of Newport v. Newport Light Co., 84 Ky. 166; Crescent City Gas Light Co. v. New Orleans Gas Light Co., 27 La. Ann. 138; Scranton Electric Light & Heat Co.'s Appeal, 122 Penn. St. 154; Norwich Gas Co. v. Norwich City Gas Co., 25 Conn. 18; Indianapolis v. Gas Light Co., 66 Ind. 400; Richmond Co. Gas Light Co. v. Middletown, 59 N. Y. 231; Memphis v. Memphis Water Co., 5 Heisk. (Tenn.) 525; State v. Gas Co., 34 Ohio St. 572; Brenham v. Water Co., 67 Texas, 542; State v. Milwaukee Gas Co., 29 Wis. 460; Garrison v. City of Chicago, 7 Biss. 486; New Orleans v. Clark, 95 U. S. 644; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. v. Citizens' Gas Co., ib. 683; New Orleans Water-Works Co. v. Rivers, ib. 674.

of law.[1] The court quoted with approval the language of Mr. Justice Field in another case involving the question of the validity of the same ordinance.[2] "There is no doubt," he said, "that the contract between the plaintiff and the city and county of San Francisco is one within the competency of the municipality to make. It is within the power of all such bodies to provide for the health of their inhabitants by causing the removal from their limits of all dead animals, not slain for human food, which would otherwise soon decay, and, by corrupting the air, engender disease. And provisions for such removal may be made by contract, as well as the performance of any other duty touching the health and comfort of the city; its authorities always preserving such control over the matter as to secure an observance of proper sanitary regulations."

A license is not a contract.

SEC. 258. The license itself is not in any sense a contract;[3] it is a mere permit, which is taken subject to all the provisions of the law, and which may be revoked at any time or subjected to new conditions. It may be revoked for violation of the law under which it was granted.[4] And as the governing authority may impose

[1] National Fertilizer Co. v. Lambert, 48 Fed. Rep'r, 458.

[2] Alpers v. City and County of San Francisco, 32 Fed. Rep'r, 503. *See, also*, State v. Fisher, 52 Mo. 174; Louisville v. Wible, 84 Ky. 290. But an ordinance conferring upon one person the exclusive right to remove all carcasses of dead animals, not slain for food, found within the city limits, will be void, if it authorizes him to take and convert to his own use such carcasses, to the exclusion of the right of the owners to remove and use them in a proper way before they become nuisances. River Rendering Co. v. Behr, 77 Mo. 91.

[3] A license is variously defined. It is said to be "permission granted by some competent authority to do an act which, without such permission, would be illegal." Okey, J., State v. Hipp, 38 Ohio St. 206; Home Ins. Co. v. Augusta, 50 Ga. 530; Pleuler v. State, 11 Neb. 547. "The object of a license is to confer a right that does not exist without a license." Chilvers v. People, 11 Mich. 43. "The popular understanding of the word 'license' undoubtedly is, a permission to do something which without the license would not be allowed; this is also the legal meaning." Cooley, J., Youngblood v. Sexton, 32 Mich. 406.

[4] Laundry License Case, 22 Fed. Rep'r, 701; La Croix v. Co. Commrs. 50 Conn. 321; Brown v. State, 82 Ga. 224; Schronchow v. Chicago,

such conditions upon business of a harmful tendency as it thinks fit, so it may license such business upon any conditions it may choose to impose, for the purpose of securing the public welfare.[1]

Municipal licenses.

SEC. 259. Where power is expressly given to municipal authorities to license and regulate trades and callings generally, or certain specified trades and callings, or where power to enact licenses is implied, it will be found that such authorities have very commonly prohibited certain employments which affect closely the public health or safety, except the persons engaged therein take out licenses to prosecute such employments. This restriction is usually applied to the business or employment of architects ;[2] bakers ;[3] dealers in old rags,[4] or in meats and provisions,[5] or in milk,[6] or in spirituous liquors,[7] or in dangerous articles, such as explosives,[8] or in patent medicines ; hawkers and peddlers ;[9] itinerant medical practitioners ;[10] marketmen ;[11] plumbers ;[12] privy cleaners;[13] scavengers ;[14] street musicians ;[15] and undertakers.[16] Licenses are

68 Ill. 444; Moore v. Indianapolis, 120 Ind. 483; Columbus City v. Cutcomp, 61 Iowa, 672; City of Ottumwa v. Schaub, 52 id. 515; Burnside v. Lincoln Co. Court, 86 Ky. 423; Tell v. State, 42 Md. 71; Young v. Blaisdell, 138 Mass. 344; Pleuler v. State, 11 Neb. 547; Martin v. State, 23 id. 371. *See* Baldwin v. Smith, 82 Ill. 162; Greene v. James, 2 Cush. 187; State v. Low, 3 R. I. 64.

[1] Crowley v. Christensen, 137 U. S. 86; State v. Thomas, 47 Conn. 546; Whitter v. City of Covington, 43 Ga. 421; *In re* Hoover, 30 Fed. Rep'r, 51; City of Kansas v. Flanders, 71 Mo. 281; State v. Ludington, 33 Wis. 107.

[2] St. Louis v. Herthel, 88 Mo. 128.

[3] Mobile v. Yuille, 3 Ala. 137.

[4] City Council v. Goldsmith, 12 Rich. (S. C.) L. 470.

[5] Savannah v. Fesley, 66 Ga. 31; Davis v. Macon, 64 id. 128; Badkins v. Robinson, 53 id. 613; Kinsley v. Chicago, 124 Ill. 359; St. Louis v. Spiegel, 90 Mo. 587; 75 id. 145; State v. Yearby, 82 N. C. 561; Benton v. Mavis, 10 Phila. 360; Vosse v. Memphis, 9 Lea (Tenn.), 294; Shedd v. Comm., 19 Gratt. (Va.) 813.

[6] Chicago v. Bartee, 100 Ill. 57; People v. Mulholland, 82 N. Y. 324.

[7] Perdue v. Ellis, 18 Ga. 506; City of Kansas v. Flanders, 71 Mo. 281.

[8] Mayor of New York v. Miller, 12 Daly, 496.

[9] Huntington v. Cheesebro, 57 Ind. 74; Smith v. Madison, 7 id. 6.

[10] State v. Ragland, 31 W. Va. 453.

[11] Hatch v. Pendergast, 15 Md. 251; Cincinnati v. Buckingham, 10 Ohio, 257.

[12] Singer v. State, 72 Md. 464.

[13] Boehm v. Baltimore, 61 Md. 259; Nicolini v. Lowery, 49 N. J. L. 391.

[14] Vandine, petitioner, 6 Pick. 187.

[15] Comm. v. Plaisted, 148 Mass. 375.

[16] Comm. v. Goodrich, 13 Allen, 546.

often required from persons engaged in what are known as "offensive trades,"[1] and usually from the owners of dogs.[2]

Regulations affecting certain classes of persons.

SEC. 260. The State may forbid certain classes of persons being employed in occupations which their age, sex or health renders unsuitable for them, as women and young children are sometimes forbidden to be employed in mines and certain kinds of factories.[3] And statutes are perfectly valid which provide that women or minors shall not be employed in laboring, by any person, in any manufacturing establishment, more than a certain number of hours in any one day, with reasonable exceptions. Of such laws it has been said, that they do not violate any constitutional rights. They do not prohibit any person from working as many hours of the day as he chooses. They merely provide that in an employment, which the legislature deems to some extent detrimental to health, no person shall be engaged in labor more than the prescribed number of hours per day. There can be no doubt that such legislation may be sustained as proper health regulation.[4] But such legislation cannot be sustained if it discriminates against any class of persons or against

[1] St. Paul v. Smith, 25 Minn. 372.

[2] Dillon's Mun. Corp., § 358; Cranston v. Augusta, 61 Ga. 572; Cole v. Hall, 103 Ill. 30; Mitchell v. Williams, 27 Ind. 62; Harrington v. Miles, 11 Kans. 480; Comm. v. Steffe, 7 Bush (Ky.), 161; Comm. v. Markham, ib. 480; Blair v. Forehand, 100 Mass. 436; Van Horn v. People, 46 Mich. 183; Faribault v. Wilson, 25 N. W. Rep'r, 449; Carthage v. Rhodes, 101 Mo. 175; State v. Lyons, 26 Ohio St. 400; Holst v. Roe, 39 id. 34; *Ex parte* Cooper, 3 Tex. App. 489; Tenney v. Lenz, 16 Wis. 566; Washington v. Meigs, 1 McArthur, 53.

[3] Cooley's Const. Law, 231; Comm. v. Bonnell, 8 Phila. 534; Laws of New York, 1876, chap. 122; 39 & 40 Vict., chap. 75, § 6; 46 & 47 Vict., chap. 53, § 18.

[4] Comm. v. Hamilton Manufg. Co., 120 Mass. 383. *See Ex parte* Kuback, 85 Cal. 274. Upon this subject, Mr. Tiedeman says (Lims. Pol. Pow., § 86): "In so far as the employment of a certain class in a particular occupation may threaten or inflict damage upon the public or third persons, there can be no doubt as to the constitutionality of any statute which prohibits their prosecution of that trade. But it is questionable, except in the case of minors, whether the prohibition can rest upon the claim that the employment will prove hurtful to them. Minors are under the guardianship of the State, and their actions can be controlled so that they may not injure themselves. But when they have arrived at majority they pass out of the state of tutelage, and

persons of any particular race, sect or nation. Accordingly, an article in the Constitution of California, and the act of the legislature passed to enforce it, providing that no corporation formed under the laws of the State, should employ, directly or indirectly, in any capacity, any Chinese or Mongolians, was held to be repugnant to the Constitution of the United States and, therefore, void.[1]

Regulation of dangerous occupations.

SEC. 261. Laws are quite commonly enacted to provide for the health and safety of persons employed in manufacturing establishments, mines,[2] and dangerous occupa-

stand before the law free from all restraint, except that which may be necessary to prevent the infliction by them of injury upon others. It may be, and probably is, permissible for the State to prohibit pregnant women from engaging in certain employments, which would be likely to prove injurious to the unborn child, but there can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the State to prohibit men from working in the manufacture of white lead, because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron smelting works, because the lives of the men so engaged are materially shortened." *But see* Territory v. Ah Lim, 1 Wash. St. 156, where it is held, that a statute making it a misdemeanor to smoke or inhale opium is not unconstitutional as being in violation of the right to liberty in the pursuit of happiness.

[1] *In re* Tiburcio Parrott, 6 Sawy. C. C. 349.

[2] The Pennsylvania statute, providing for the health and security of persons employed in coal mines, has been sustained as constitutional in all respects. Comm. v. Bonnell, 8 Phila. 534. Some of the provisions of the act are as follows: 1. Requiring maps and plans of the mines and collieries to be made and filed in a public office (Daniels v. Hilgard, 77 Ill. 640). 2. Requiring adequate means of ingress and egress, always available for persons at work (Cambria Iron Co. v. Shaffer, 6 Cent. Rep'r, 608). 3. Prescribing methods of ventilation (Brough v. Homfray, L. R., 3 Q. B. 771; Hall v. Hopwood, 49 L. J. M. C. 17; Knowles v. Dickenson, 2 E. & E. 705; People v. Petheram, 64 Mich. 252; Haddock v. Comm., 103 Penn. St. 243). 4. Requiring owners to keep constant and careful watch over the ventilating apparatus and, generally, for the health and security of employes. 5. Requiring safety lamps to be used, and providing for their proper care. 6. Requiring that all shafts shall be properly guarded and furnished with speaking tubes, that there shall be safety catches on cages used for hoisting and lowering employes, and that the cages shall be constructed in a certain manner (Litchfield Coal Co. v. Taylor, 81 Ill. 590; Durant v. Lexington Coal M. Co., 97 Mo. 62). 7. Providing for regular and periodical inspection and reports (Comm. v. Conyngham, 66 Penn. St. 99). 8. Forbidding employment of children. *See* generally, Sangamon Coal M. Co. v. Wiggerhaus, 122 Ill. 279; Niantic Coal, etc., Co. v. Leonard, 126 id. 216; Bartlett Coal, etc., Co. v. Roach, 68 id. 174; Sholl v. People, 93 id. 129; Hamilton v. State, 102 id. 369; Loose v. People, 11 Ill. App. 445; Claxton's Admr. v. Lexington, etc., R. Co., 13 Bush (Ky.), 636.

tions, with penalties for their violation, and with proper provisions to secure their enforcement by inspectors and other officials. Legislation of this kind generally passes unchallenged. The effect of it ordinarily is to enlarge the duties and responsibilities of proprietors and employers; but it is competent for the legislature to forbid persons to undertake any dangerous occupation, except at their own risk, in this way restricting the application of common law principles, and to some extent lessening the responsibilities of employers.[1]

It is the general rule, that "where individuals or corporations are engaged in occupations which are from their nature fraught with unusual danger to the health or security of others, they must be presumed to take notice of the injuries likely to ensue from the employment of the means necessary to the business, so far as to impose upon them the duty of care proportioned to the hazard, and for want of such care will be held liable to those injured in consequence of the owner's negligence."[2] On the other hand, when one engages in a hazardous, though lawful occupation, as an employe, he is presumed to take notice of the incidental risks of the business in which he engages, and cannot hold the master liable for injuries naturally resulting therefrom by accident.[3] It is important to observe, that these rules are not changed by force of statutes

[1] Kirby v. Pennsylvania R. Co., 76 Penn. St. 506; Christman v. Philadelphia, etc., R. Co., 141 id. 604. *See* Employers' Liability Act, 43 & 44 Vict., chap. 42; Mass. Stat. 1887, chap. 270. The latter act construed and applied in Ryalls v. Mechanics' Mills, 150 Mass. 190; Millar v. Merchants' Man. Co., ib. 362; Lothrop v. Fitchburg R. Co., ib. 423; Coughlin v. Boston Tow-boat Co., 151 id. 92; Boyle v. New York, etc., R. Co., ib. 102; Clark v. Merchants' Man. Co., ib. 345; Ashley v. Hart, 147 id. 573; Drommie v. Hogan, 153 id. 29. *See ib.* 112, 118, 281, 356, 366, 380, 391, 468.

[2] Wade on Notice, § 480, k; Illinois Central R. Co. v. McClelland, 42 Ill. 355; Hugh v. Jeffers, 30 Mich. 181; Anderson v. Cape Fear Co., 64 N. C. 399; Frankfort, etc., Co. v. Philadelphia, etc., R. Co., 54 Penn. St. 345; Spalding v. Chicago, etc., R. Co., 30 Wis. 10.

[3] Cooley on Torts, 541. *See* Farwell v. Boston & Albany R. Co., 4 Metc. 49, a leading case on assumption of ordinary risks of service, including risk of injury through negligence of fellow-servant in same common employment.

regulating the use of dangerous machines and appliances, in a lawful business, even in respect of minors employed in such business contrary to law, and injured in consequence of accident or through defects in the machines or appliances.[1] But a failure on the part of an employer to perform a positive duty imposed by law, or his violation of law, is proper evidence of negligence in favor of one injured in consequence of such act or omission.[2]

Regulation of skilled trades.

SEC. 262. Where the successful prosecution of a trade or calling requires a certain amount of technical knowledge or skill, and a lack of them may result in damage to the employer or to the public, it is a legitimate exercise of the police power to prohibit persons from engaging or being employed in such trade or calling whose competency has not been approved, and who have not been examined by lawfully constituted authorities, and received certificates as to their qualifications. The right of the State to exert this control over skilled trades has always been upheld when brought into question. So, it is quite common for the State to provide by law that no person shall be employed as an engineer by a railroad company who cannot read the printed time tables and ordinary handwriting;[3] and to require that all incorporated companies, engaged in conveying passengers, especially railroad, steamboat and ferry companies, shall refuse employment to all persons who, on good and sufficient proof, shall be shown to indulge in the intemperate use of intoxicating liquors; and companies retaining in their employ any such person, whose neglect of duty would increase the

[1] Hayes v. Bush & D. Man. Co., 102 N. Y. 648; Hickey v. Taaffe, 105 id. 26; 113 id. 540; White v. Witteman Litho. Co., 12 N. Y. Supplt. 188; 45 Alb. L. J. 385. *See* Lovell v. De Bardelaben, etc., Co., 90 Ala. 13.

[2] Litchfield Coal Co. v. Taylor, 81 Ill. 590; Durant v. Lexington Coal M. Co., 97 Mo. 62; McRickard v. Flint, 114 N. Y. 122; Jetter v. New York, etc., R. Co., 2 Abb. Ct. App. Dec. 458; 2 Keyes, 154.

[3] For example, Laws of New York, 1870, chap. 636.

ordinary risks of travel, are made liable to punishment.[1] Persons serving on railroad or steamboat lines in the capacity of engineers, or in any position which requires the use or discrimination of form or color signals, may be disqualified from such service, unless they shall have passed examinations as to their general fitness or as to color blindness and defect of visual organs, and received licenses or certificates as to their qualifications from the board of examiners. Laws enacted for this purpose have been sustained even as applied to cases of persons engaged in interstate commerce, and although they imposed upon the companies the expenses of the prescribed examinations.[2] Congress has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam vessels, engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the States.[3] So, in matters of local concern, and as an essential feature of local sanitary systems, the competency of persons engaged in trades closely affecting the health or safety of the public, may be insured by a system of compulsory examinations and licenses. For example, as the public health largely depends upon the manner in which plumbing work is executed, it may be said to be the universal custom to require that persons proposing to engage in the business of plumbing shall prove their qualifications and have the same attested by a certificate from designated authorities, before undertaking the business.[4]

[1] For example, Laws of New York, 1857, chap. 628.

[2] McDonald v. State, 81 Ala. 279; Smith v. State, 85 id. 341; 124 U. S. 465; Nashville, etc., Ry. Co. v. Alabama, 128 id. 96.

[3] U. S. Rev. Stat., tit. 52, §§ 4399-4500.

[4] Singer v. State, 72 Md. 464.

CHAPTER XIV.

REGULATION OF THE PRACTICE OF MEDICINE AND OTHER PROFESSIONS.

SEC. 263. The Medical Practice Acts.
264. Their constitutionality.
265. Construction and application of the acts.
266. The acts apply to persons in practice.
267. The practice of pharmacy and dentistry.
268. The sale of drugs and medicines.
269. Issue of licenses to practice.
270. The revocation of licenses.
271. Grounds for revoking licenses.
274. Special regulations affecting physicians.

The Practice Acts.

SEC. 263. In most of the States, there are general regulations, forming properly a part of the legislation for the preservation and promotion of the public health, affecting the practice of medicine, surgery, dentistry and pharmacy.[1] There can be no doubt of the validity of such legislation, so far as it requires of persons desiring to practice these professions that they shall possess certain reasonable qualifications, and that they shall register their names in a public office and take out licenses.[2] Statutes making it unlawful for a person to practice any of these professions without possessing certain special qualifications, and without being a graduate of a legally authorized college or technical school,[3] unless he shall have practiced regularly, within the State, for a certain number of years before the enactment of the law, have uniformly been sustained as constitutional Their validity has never been denied

[1] Medical Education, Medical Colleges, and the Regulation of the Practice of Medicine in the United States and Canada, 1765–1891. A report issued under the direction of the Illinois State Board of Health by John H. Rauch, M. D., Secretary.

[2] The rule requiring physicians to possess learning and skill is a very ancient one. Bonham's Case, 8 Coke, 227; College of Physicians, 1 Ld. Raym. 42.

[3] The institution must be one legally authorized to grant a diploma. People v. Fulda, 52 Hun, 65; Townshend v. Gray, 62 Vt. 373.

judicially, and in many cases has been assumed without question. They have repeatedly been enforced, in cases involving a consideration of all the provisions relating to the qualifications required of practitioners and the method of determining the same, by examination or otherwise.[1]

Their constitutionality.

SEC. 264. A statute of this character recently received the consideration of the Supreme Court of the United States. The statute made it a misdemeanor for any person to practice medicine in the State of West Virginia without first obtaining a certificate from the State board of health to the effect that he possessed certain prescribed qualifications, or that he had practiced in the State continuously for *ten years* prior to March 1, 1881. It was held, that the statute, when enforced against a person who did not possess the required certificate, but who had been a practicing physician in the State for *five years* before the date named, did not deprive him of his estate or interest in the profession without due process of law. The court said, upon the general subject: "Such legislation is not open to the charge of depriving one of his right without due process of law, if it be general in its operation, upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters,

[1] Brooks v. State, 88 Ala. 122; Stough v. State, ib. 234; Richardson v. Dorman, 28 id. 679; Richardson v. State, 47 Ark. 562; *Ex parte* McNulty, 77 Cal. 164; *Ex parte* Johnson, 62 id. 263; *Ex parte* Frazer, 54 id. 94; Harding v. People, 10 Col. 387; Williams v. People, 121 Ill. 84; State v. Green, 112 Ind. 462; Orr v. Meek, 111 id. 40; Eastman v. State, 109 id. 278; State v. Mosher, 78 Iowa, 321; Hildreth v. Crawford, 68 id. 339; Bibber v. Simpson, 59 Me. 181; Doge v. State, 17 Neb. 140; Wright v. Lanckton, 19 Pick. 288; Hewitt v. Charier, 16 id. 353; People v. Phippin, 70 Mich. 6; People v. Moorman, 86 id. 433; State v. Med. Examg. Board, 34 Minn. 387; State v. Med. Examg. Board, 32 id. 324; State v. Fleischer, 41 id. 69; State v. Gregory, 83 Mo. 123; State v. Hale, 15 id. 607; *Ex parte* Spinney, 10 Nev. 328; Gage v. Censors, 63 N. H. 92; Finch v. Gridley, 25 Wend. 469; Thompson v. Staats, 15 id. 395; Timmerman v. Morrison, 14 Johns. 369; Sheldon v. Clark, 1 id. 513; Wert v. Clutter, 37 Ohio St. 348; Robbs v. Talley, 28 S. C. 589; State v. Golman, 44 Texas, 104; Antle v. State, 6 Texas App. 202; Logan v. State, 5 id. 306; Dent v. West Virginia, 129 U. S. 114.

that is, by process or proceedings adapted to the nature of the case. The great purpose of the [constitutional] requirement is to exclude every thing that is arbitrary and capricious in legislation affecting the rights of the citizen. * * * It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific or otherwise, with which such persons have to deal. The nature and extent of the qualifications required must depend

primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation. * * * Few professions require more careful preparation by one who seeks to enter it than medicine. * * * Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license or who are found upon examination not to be fully qualified."[1]

Construction and application of the acts.

SEC. 265. The qualifications required are usually defined clearly enough in the statutes. When they are not, the statute should receive a reasonable construction in favor of the applicant, so as to make the requirements as light as may be, consistently with a proper regard to the protection of society. Where the meaning of the words used, in view of the tenor and scope of legislation on the general subject, is not clear, the statute should be given such construction as will not deprive the persons interested of any substantial right.[2] Accordingly it was rightly held that an act requiring a board of supervisors to appoint "some suitable graduate in medicine" to attend indigent sick and dependent poor persons, does not require that the county physician should have received a degree from a medical college or university, but authorizes the appointment of one who has passed a satisfactory examination before the board of examiners of the State Medical Society, and who is duly licensed to prac-

[1] Field, J., Dent v. West Virginia, 129 U. S. 114.

[2] Brooks v. State, 88 Ala. 122; Stough v. State, ib. 234.

tice medicine and surgery under the laws of the State.[1] And where a statute provided, that "a person coming into the State" might be licensed to practice physic and surgery, if he had a diploma which was approved by the faculty of some incorporated medical college or the medical board of the State, and that this approval should operate as a license to practice, upon the applicant registering in the clerk's office, as required by the act, it was held, that the phrase did not apply to a citizen returning home from another State with a diploma, but only to non-residents. So that such citizen was not required to exhibit his diploma to the faculty of any medical college or to the medical board of the State for their approval, but upon complying with the requirements as to registry was entitled to practice.[2]

On the other hand, one who styles himself a doctor and holds himself out to the world as a physician, and advertises that he treats and cures persons afflicted with the "opium habit," is properly required to obtain a license, under an act regulating the practice of medicine and surgery, without regard to the question whether the "opium habit" is a disease or merely a vice.[3]

So, too, the terms of the act requiring a license apply to one who administers patent medicine, even though he does this as assignee of a patentee;[4] and to one who gives electric treatment;[5] and to one who practices bone-setting and reducing sprains, swellings, and contractions of the sinews, by friction and fomentation, although he practices no other branch of the healing art;[6] but, the act does not apply, it would seem, to one who professes to be a nurse, rather than a physician or surgeon, and who administers

[1] People v. Eichelroth, 78 Cal. 141. *See* Norwood v. Hardy, 17 Ga. 595.
[2] State v. Talley, 28 S. C. 589.
[3] Benham v. State, 116 Ind. 112.
[4] Thompson v. Staats, 15 Wend. 395; Jordan v. Overseers of Dayton, 4 Ohio, 294.
[5] Davidson v. Bohlman, 37 Mo. App. 576.
[6] Hewitt v. Charier, 16 Pick. 353.

massage treatment, but neither gives nor applies drugs or medicines, nor uses surgical instruments.[1]

In general, the requirements of the act are to be strictly complied with, so far as they appear to be essential in the general scheme of the legislation. So, where the statute prescribes the necessary qualifications and requires *registration*, one must not only possess those qualifications, but must allege the fact in his written statement filed for registration; and he must also actually register; it is not enough that he is entitled to do so.[2] On the trial of an information against a physician for practicing without a license, evidence offered to show that he was entitled to a license under the law, and that the board of examiners refused it, is inadmissible.[3]

The acts apply to persons in practice.

SEC. 266. It has been intimated, that a statute prescribing qualifications for the practice of either of the professions mentioned, and excluding all persons who do not possess such qualifications from the right to practice, must contain a saving clause in favor of those who at the time of its passage may lawfully be engaged in practice; otherwise, that it will be, as to them, *ex post facto* and void.[4] But such a doctrine clearly is unsound when tested by the purposes of the law, and it is declared to be untenable by the Supreme Court, in the case above referred to, where the very question was considered and decided.[5] It has been held, that a medical practice act is obnoxious to the objection that it makes an unlawful discrimination, in exempting from its provisions, so far as they require a preliminary examination and the procuring a certificate or license, those persons who have resided and practiced

1 Smith v. Lane, 24 Hun, 632.
2 Doge v. State, 17 Neb. 140.
3 State v. Mosher, 78 Iowa, 321.
4 State v. Hinman, 65 N. H. 103; State v. Pennoyer, ib. 113; Comm. v. Wasson, 12 Pitts. L. J. 434; Byrne v. Stewart, 3 Desau. 466; Fox v. Washington Territory, 2 Wash. Ter. 297.
5 Dent v. West Virginia, 129 U. S. 114; People v. Fulda, 52 Hun, 65; State v. Creditor, 44 Kans. 565.

their profession, in the place of their present residence, during all the time since a specified date.[1] But this decision is contrary to the great weight of authority, is wrong in principle, and ought not to be followed.[2]

The practice of pharmacy and dentistry.

SEC. 267. For reasons similar to those expressed in the opinion of the Supreme Court above quoted,[3] it has been held, that a law which requires *pharmacists*, apothecaries or retailers of drugs and medicines to submit to an examination and take out a license, is within the police power of the State, and neither operates as a tax on the business nor deprives persons of property without due process of law, within the meaning of those terms as used in a State Constitution.[4] And statutes regulating the practice of *dentistry* have been declared, upon the same principles, to be constitutional and valid.[5] It has further been held, for reasons applicable to statutes relating to the practice of any of these professions, that an act creating a board of pharmacy and conferring upon the board power to make necessary by-laws for their guidance in the performance of their duties under the act, and imposing upon the board the duty of enforcing the provisions of the act with respect to the practice of pharmacy, is not unconstitutional, as an attempt to delegate legislative or judicial powers.[6]

[1] State v. Pennoyer, 65 N. H. 113. Compare, State v. Hinman, 65 N. H. 103.

[2] *Ante*, sec. 263, note 4.

[3] *Ante*, sec. 263, note 4.

[4] State v. Donaldson, 41 Minn. 74; State v. Forcier, 65 N. H. 42; People v. Moorman, 86 Mich. 433; State Board of Pharmacy v. White, 84 Ky. 606. A license is forfeited by abandonment for two years of business at the place designated in the certificate of registration, even though the licensee during the two years is engaged in the same business in another part of the State. Braniff v. Weaver, 72 Iowa, 641. *See* Martino v. Kirk, 55 Hun, 474.

[5] Gasnell v. State, 52 Ark. 228; Wilkins v. State, 113 Ind. 514; State v. Creditor, 44 Kans. 565; State v. Vanderslins, 42 Minn. 129. But it has been held, that if the act exempts from its provisions, requiring an examination and certificate, persons who have resided and practiced their profession in the place of their present residence during all the time since a fixed date, it discriminates unlawfully against citizens of other States, and so far is void. State v. Hinman, 65 N. H. 103

[6] Hildreth v. Crawford, 68 Iowa, 339. *See* Eastman v. State, 109 Ind. 278.

The sale of drugs and medicines.

SEC. 268. It would unquestionably be perfectly proper, as a measure designed to prevent injury to the public health, to prohibit the sale of drugs and medicines,[1] proprietary articles and patent medicines,[2] except by licensed persons, and particularly to guard against danger to the health of the people by providing that no shop-keeper, other than a pharmacist, and no itinerant vender shall be permitted to sell drugs, nostrums, ointments, or surgical appliances of any kind, without a license.[3] Restrictions are even placed upon licensed pharmacists in the dispensing of dangerous drugs, and particularly poisons.[4] They are required to keep accurate record of every sale of poisons, specifying the time, quantity sold, name of the purchaser, and prescription of the physician ordering the drug.[5] They are forbidden to retail poisons without labeling them "poisons."[6]

It is often made unlawful to sell or give away opium, or any preparation of which opium is the principal medicinal agent, to any person, excepting druggists and practicing

[1] People v. Blue Mountain Joe, 129 Ill. 370; State v. Ah Chew, 16 Nev. 60. Even a physician has no vested right to compound or sell drugs and medicines to one not his patient, contrary to the acts regulating the practice of pharmacy. People v. Moorman, 86 Mich. 233; Underwood v. Scott, 43 Kans. 714; State v. Ching Gang, 16 Nev. 62. It has been held in New York, that the act is aimed to prevent the incompetency of proprietors as well as clerks, and makes it necessary that proprietors of drug stores should possess the requisite qualifications as well as those actually engaged in the business of dispensing drugs and medicines. People v. Rontey, 21 N. Y. State Rep'r, 174; 4 N. Y. Supplt. 235; 117 N. Y. 624. On the other hand, it has been held, that the owner of a drug store who takes no part in conducting the same himself, but employs a duly licensed pharmacist, is not subject to indictment, for engaging as a manager in the business of an apothecary or pharmacist without having obtained the certificate of competency required by the statute. Comm. v. Johnson, 144 Penn. St. 377.

[2] Laffer's Appeal, 13 Phila. 499.

[3] People v. Blue Mountain Joe, 129 Ill. 370; State v. Ragland, 31 W. Va. 453.

[4] Pharmaceutical Soc. v. Wheeldon, L. R., 24 Q. B. D. 683; Berry v. Henderson, L. R., 5 Q. B. 296. *See* the same cases as to liability for an illegal sale by an employe. *See, also,* Comm. v. Stevens, 153 Mass. 421.

[5] State v. Jones, 18 Oreg. 256.

[6] Fisher v. Golladay, 38 Mo. App. 531; Thomas v. Winchester, 6 N. Y. 397; Wohlfahrt v. Beckert, 92 id. 490; Osborne v. McMasters, 40 Minn. 103.

physicians, unless upon the prescription of a physician.[1] And the acts, generally, make every proprietor of a drug store responsible for the quality of all drugs, chemicals and medicines sold or dispensed by him, except those sold in the original package of the manufacturer, and except those articles or preparations known as "patent" or "proprietary" medicines.

A very common and judicious provision in the acts permits shop-keepers, not pharmacists, whose places of business are more than one mile from a drug store, to sell the commonly used medicines and even poisons, if put up by a registered pharmacist; but prohibits such sales within that distance. This provision is neither an arbitrary nor unreasonable discrimination, but is very reasonable in view of the necessities and convenience of those who live at a distance from a regular drug store.[2] The prohibition of the sale of *medicines*, except by pharmacists, will not ordinarily include patent or proprietary medicines. Such a provision is evidently aimed at articles used as medicines; and, in order to give it a reasonable construction, "its application must be confined to those articles whose primary and principal use is medicinal, or what are commonly understood as medicines; or at least, if it is to be extended to any other articles, it must be limited to cases where they are prepared and sold for medicinal purposes. Any other construction would lead to the most absurd consequences. It would restrict to pharmacists the sale of milk, sugar, chalk, charcoal, iron, sulphur, turpentine, camphor and a thousand other substances that are frequently used medicinally, or, at least, in compounding medicines, but the use of which also enters into the various, commonest, domestic, industrial or scientific pursuits of mankind."[3]

[1] *Ex parte* Yung Jon, 28 Fed. Rep'r, 308.

[2] State v. Donaldson, 41 Minn. 74.

[3] State v. Donaldson, 41 Minn. 74, where it was accordingly held that the act did not prohibit the sale of borax by one not a pharmacist. A provision that the act shall not apply to the making or vending of the *usual domestic remedies* by retail dealers does not, however, authorize the sale of *quinine* as one of the usual domestic remedies. Cook v. People, 125 Ill. 278.

Issue of licenses to practice.

SEC. 269. If a license be refused to one who has performed all the conditions prescribed by the law, and who possesses the requisite qualifications, it may be enforced by *mandamus;* especially if the board arbitrarily, from caprice or without just cause, refuse to grant the license or certificate.[1] In such case the action of the board is not judicial.[2] But where the board of examiners may refuse certificates to persons guilty of "unprofessional or dishonorable conduct," and in the exercise of this power they refuse an application, on the ground that the applicant has been guilty of such conduct, the remedy by *mandamus* cannot be invoked to secure a review of the correctness or a reversal of the determination of the board. The action of the board in such case is not merely ministerial, but partakes of a judicial character. The applicant has a right, however, to be heard by the board upon the investigation as to his conduct, and if this be denied him their proceedings will be irregular.[3] If an applicant for a license to practice is required to exhibit to the board of examiners a diploma issued by a legally chartered or "reputable" medical institution, in good standing, the granting of the license involves the exercise of judgment and discretion on the part of the board, and, therefore, cannot be enforced by *mandamus.*[4] But in such case the board cannot discriminate against any particular school of medicine.[5]

[1] Harding v. People, 10 Colo. 387; Dental Examiners v. People, 123 Ill. 227; People v. Bellevue College, 60 Hun, 107; State v. Fleischer, 41 Minn. 69.

[2] Eastman v. State, 109 Ind. 278; State v. Fleischer, 41 Minn. 69. A court will not compel the board to grant a license where it clearly appears that, if the license were granted, it might immediately be revoked for the same reasons which moved the board to refuse it originally. *Ex parte* Paine, 1 Hill, 665.

[3] State v. Med. Examg. Board, 32 Minn. 324; State v. Gregory, 83 Mo. 123; Hathaway v. State Bd. of Health, 103 id. 22, where it was said that "The board of health has no right to prescribe a code of medical ethics, and then declare a breach of that code unprofessional and dishonorable conduct; nor has it the right or power to deny to physicians the right to advertise their profession in the public press."

[4] *Ante*, sec. 263, note 3; People v. State Bd. Dental Examrs., 110 Ill. 180.

[5] State v. Gregory, 83 Mo. 123. The law does not recognize exclusively any particular system of med-

The revocation of licenses.

SEC. 270. While the license when once obtained is not, properly speaking, a *franchise*,[1] it constitutes a valuable right or "estate," of which the holder cannot lawfully be deprived without an opportunity, by timely notice, to defend against the charges preferred. "The license is in effect a certificate that the holder possesses the necessary medical and other qualifications. The license may be revoked when it was improperly obtained,[2] or when the holder has, by conviction for crime or from any other cause, ceased to be worthy of public confidence. Character, no less than medical education, skill and experience, is, within the meaning of the statute, a qualification for a competent physician or surgeon. One who does not possess the requisite qualifications cannot be worthy of public confidence. But a license, once granted, cannot be revoked, except upon due notice and a hearing. The holder is given an opportunity to meet charges and evidence tending to show his unfitness. The same considerations that forbid the revocation of a license, except upon notice and a hearing, also require that the applicant for a license who possesses the requisite medical qualifications shall not be denied a license without a hearing on the question whether he is in other respects worthy of public confidence."[3]

Grounds for revoking licenses.

SEC. 271. A state board of health, therefore, having power to revoke licenses issued to practice medicine, for the same reasons for which it might refuse to issue such licenses, cannot arbitrarily, from caprice, or without just cause, revoke licenses once issued upon sufficient proof of

icine or class of medical practitioners. The legal signification of the term *doctor* is, a practitioner of physic. The law does not recognize any system of practice, or declare that the practitioner who follows a particular system of treatment is a doctor, and that one who pursues a different method is not. Corsi v. Maretzek, 4 E. D. S. 1.

[1] State v. Green, 112 Ind. 462.

[2] *See* Fawcett v. Charles, 13 Wend. 473.

[3] Gage v. Censors, 63 N. H. 92, 94.

the applicant's qualifications.[1] It may do so, however, for unprofessional or dishonorable conduct, as, for instance, making statements or promises, by advertisement or otherwise, with reference to the treatment and cure of the sick, which are calculated to deceive or defraud the public.[2] And where an act regulating the practice of pharmacy declares that a certificate of registration shall be revoked for violation of the law relating to the sale of intoxicating liquors, the commissioners of pharmacy, established by the act, may revoke a pharmacist's certificate or license, and strike his name from the register, upon competent proof, at a regular hearing, of the violation of the law. If the statute prescribes that the penalty may be imposed upon proof of the violation of law by a certified transcript of the record of conviction of the party before a regular criminal tribunal, this will be the only competent evidence on the point, and the penalty cannot lawfully be imposed in the absence of such proof.[3] Independently of statutory provisions on the subject, the record of conviction is competent, and, as against the party, conclusive evidence of the violation of law; but it will by no means be exclusive. As the question depends simply upon whether a particular fact exists, any evidence which, under the ordinary rules of law, would be competent to establish that fact, will be admissible upon the investigation.[4]

[1] *See* Harding v. People, 10 Col. 387; Partridge v. General Council, L. R., 25 Q. B. D. 90.

[2] People v. McCoy, 125 Ill. 289; Hathaway v. State Board of Health, 103 Mo. 22; Matter of Smith, 10 Wend. 449.

[3] Hildreth v. Cramford, 65 Iowa, 339; Straight v. Cramford, 73 id. 676.

[4] Straight v. Cramford, 73 Iowa, 676. The trial and acquittal of a physician, in a court of criminal jurisdiction, upon the same charges exhibited against him before a board of examiners, for instance, for procuring an abortion, are no bar to an inquiry under the statute for the purpose of depriving him of his right to practice physic and surgery. "They are entirely distinct and independent proceedings, having different objects and results in view; the one having regard to the general welfare and criminal justice of the State; the other simply and exclusively to the respectability and character of the medical profession, and the consequences connected with or necessarily flowing from it. It is immaterial whether the offense mentioned in the charge was indictable or not, and whether the indictment was disposed of upon its merits, or upon some matter of form." In the Matter of Smith, 10 Wend. 449.

SEC. 272. When the statute provides that the board of examiners, or any other constituted council shall have power to revoke the license and erase the name of the practitioner from the register, if they shall, after due inquiry, find and adjudge him guilty of infamous conduct in his profession or of a violation of law, the decision of the board or council, made after due inquiry, is final and cannot be reviewed.[1]

SEC. 273. But where an act requires that every person practicing medicine shall have certain qualifications and shall procure a certificate from a board of examiners, which may be revoked for "unprofessional conduct," and makes it an offense to practice without first having obtained such a certificate, but does not expressly declare it to be an offense to practice after the certificate is revoked; it has been held, that the latter act cannot be punished as a misdemeanor. In the case referred to, the relator had advertised himself as a specialist in certain diseases, and his certificate was therefore revoked. He continued to practice, and was convicted of misdemeanor. This conviction was reversed on appeal, the court observing, *obiter*, that it is not within the police power of the State to enact a law punishing a physician, who has been decided to be competent to practice, for what is styled "unprofessional conduct" in advertising himself as a specialist. It was also said, *obiter*, that the legislature could not delegate to a board of medical examiners the power of declaring what acts shall constitute a misdemeanor, but if it could enable them to establish a crime, by rules and regulations declaring what shall constitute unprofessional conduct of a physician, no one could be convicted of such a crime in the absence of such rules and regulations.[2]

[1] *Ex parte* La Mert, L. J., 33 Q. B. 69; Allbutt v. Gen. Court Med. Educn. and Registrn., L. R., 23 Q. B. D. 400.

[2] *Ex parte* McNulty, 77 Cal. 164. *See* Hathaway v. State Board of Health, 103 Mo. 22.

That part of an act which provides that the board may revoke certificates for such conduct has, of course, no application to those persons who are licensed to practice by the act itself, by reason of their having practiced within the State for a specified number of years prior to the enactment of the law.[1] Nor will any irregularity in the appointment or organization of the board affect the validity of their certificate or of their proceedings in revoking a license.[2] A *de facto* board, acting under the provisions of the statute, can issue a license which will be perfect protection from prosecution under the statute, and it would seem that their revocation of a license should have the effect of rendering a person liable to prosecution who continues to practice in defiance of their act.[3]

Special regulations affecting physicians.

SEC. 274. There are certain regulations affecting physicians, which are included in the legislation of most of the States in substantially the same form. They relate generally to the preservation of the public health, and particularly to the registration of vital statistics.

Physicians are required to furnish for public registration a certificate or record of every birth which comes under their supervision, and of all deaths at which they are in attendance, specifying, among other things, the probable cause of death.[4] Until such proper certificate of death is obtained, there can be no burial without a coroner's inquest. It is also made the duty of every physician who may be called to attend a case of infectious disease, as soon as he discovers the nature of the disease, to make a written report to the proper health officer, specifying the name and residence of the patient, the nature of the disease, and such other facts as may be required.[5] "Such regulations," it is said, "are readily justifiable; that in

[1] Williams v. People, 121 Ill. 84.
[2] *See* Howard v. Parker, 49 Texas, 236.
[3] Harding v. People, 10 Col. 387; Brown v. People, 11 id. 109. *See In re* Manning, 139 U. S. 504.
[4] *See Ex parte* Keeney, 84 Cal. 304.
[5] McNall v. Kales, 61 Hun, 231.

regard to the certificate of death, because the physician's certificate assists in preventing, without proper investigation, the burial of those who have met with a wrongful or violent death; and the report as to infectious disease, because it enables the health officers to employ safeguards to prevent an epidemic."[1]

SEC. 275. Regulations of this character have been declared judicially to be constitutional and valid, on the ground that they require the collection of statistics pertaining to the population of the State, and the health of the people, which may impart information useful in the enactment of laws, and valuable to science and the medical profession; which objects may properly be obtained by the State in the exercise of its police power. The court in the case referred to refused to inquire whether the provisions of such enactments were oppressive and unjust, remarking that these were matters for the consideration of the legislative department of the government; but observed that it is difficult to discover oppression or injustice in requiring the medical profession to make known to the world statistics which may promote and are promoting the public health.[2]

A city ordinance, passed under proper grant of authority, provided that "every physician, or other person acting as such, who shall have any patient within the limits of the city sick with small-pox or varioloid or other infectious or pestilential disease, shall forthwith report the fact to the mayor, or to the clerk of the board of health, together with the name of such patient, and the street and number of the house where such patient is treated." It was objected on the part of a physician that the ordinance was invalid, in that it compelled him to perform services without compensation and thus deprived him of liberty and property without due process of law.

[1] Tiedeman's Lims. Pol. Pow., § 88.

[2] Robinson v. Hamilton, 60 Iowa, 134.

But the objection was overruled and the ordinance was sustained, the court deciding that it did not conflict with or abridge any rights of the individual secured by constitutional guaranties.[1]

SEC. 276. With regard to the responsibility attaching to the act of making report of infectious or contagious diseases, as required by the law, it has been decided, in a case where it was sought to fix responsibility upon a physician for removal of a patient to a small-pox hospital by the public authorities, to whom the physician had reported the case as one of contagious disease, that he was not responsible for such removal if he acted in good faith. If he has in fact an opinion that his patient may be suffering from a contagious disease, he is bound, under the statute, to report the case to the health authorities. They furnish skilled physicians peculiarly competent to pass upon such cases. Thereafter, the entire responsibility rests upon those public officers; and if there is any case for the inspector's judgment, or any symptoms fairly raising the question as to the contagious character of the disease, his determination is final and conclusive as to the propriety of isolating the patient or removing him to a hospital for treatment.[2]

The liability of a physician for making a report false in fact as to the character of his patient's disease, is not greater than in the analogous case where he makes a false certificate for commitment of a person to an asylum for the insane. The rule in such cases is, that physicians acting in the commitment of insane persons, and signing certificates to the effect that such persons are insane, are not, in theory of law, judicial officers, but medical experts; and they are not clothed with judicial immunity, but are chargeable for that neglect which, in the case of a professional expert, renders him liable for the failure to use the

[1] State v. Wordin, 56 Conn. 216.

[2] Brown v. Purdy, 8 N. Y. State Rep'r, 143; 22 N. Y. Super. Ct. 109.

degree of care and skill which his profession, *per se*, implies that he will bring to his professional work.[1] If, then, the physician has made a proper examination of the patient or of the supposed insane person, and has acted in good faith, with ordinary care and skill, he is not liable for errors of judgment or mistake in fact.[2]

[1] Ayers v. Russell, 50 Hun, 282.

[2] Hall v. Semple, 3 F. & F. 337; Williams v. Le Bar, 141 Penn. St. 149; Force v. Probasco, 43 N. J. L. 539.

CHAPTER XV.

REGULATION OF BUSINESS PURSUITS; SLAUGHTER-HOUSES.

SEC. 277. Regulation of the business of slaughtering.
278. The Slaughter-House Cases.
279. Public slaughter-houses may be established.
280. Restricting or prohibiting the business.
281. Extent of power of regulation.
283. Illustrations.

Regulation of the business of slaughtering.

SEC. 277. The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterward, is among the most necessary and frequent exercises of the police power. It is now beyond controversy that it is both the right and the duty of government, State or local, to prescribe and determine the localities where the business of slaughtering for great cities may be conducted. To do this effectually, it is indispensable that all persons who slaughter animals for food shall do it in those places, and *nowhere else.*

The Slaughter-House Cases.

SEC. 278. Accordingly, it has been decided by the Supreme Court of the United States, that a statute creating a corporation and granting to it the *exclusive right*, for twenty-five years, to have and maintain a slaughter-house, landings for cattle, and yards for inclosing cattle intended for sale or slaughter within a certain territory embracing more than eleven hundred square miles, and including the city of New Orleans; and prohibiting all other persons from having slaughter-houses, landings for cattle, and yards for cattle intended for sale or slaughter within those limits; and requiring that all animals intended for sale or

slaughter within that territory should be brought to the yards and slaughter-houses of the corporation; and authorizing the corporation to exact certain fees for the use of its wharves, and for each animal slaughtered; was, when guarded by proper limitation of the prices to be charged, and imposing the duty of providing ample conveniences, with permission to all owners of stock to land and to all butchers to slaughter at those places, a police regulation for the health of the people, within the power of the State legislature, unaffected by any of the provisions of the Constitution of the United States.[1]

It is to be observed that the right of the State to use *a private corporation* and confer upon it the necessary powers to carry into effect sanitary regulations, was thus distinctly affirmed; the broad principle being laid down, that "whenever a legislature has the right to accomplish a certain result, and that result is best obtained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose."[2]

Public slaughter-houses may be established.

SEC. 279. The right of the State to authorize a *municipality* to establish and maintain a public abattoir is also beyond controversy. A bill in equity was filed by a resident and tax payer of the city of Rock Island to enjoin the municipal authorities from maintaining an abattoir or public slaughter-house, and from appropriating the funds of the city for that purpose. An ordinance had been passed, the object and scope of which was to provide a place where all animals should be slaughtered within the city, under the care and management of a commissioner of health. The court held that the power conferred on the city of the general incorporation law, "to prohibit

[1] Slaughter-House Cases, 16 Wall. 36.

[2] Miller, J., Slaughter-House Cases, 16 Wall. 36; Davidson v. New Orleans, 96 U. S. 97.

slaughter-houses, or any unwholesome business or establishments, within the incorporation," did not authorize the erection and maintenance of a public slaughter-house, but distinctly stated that the court entertained no doubt that the legislature had ample power to confer authority to do so.[1]

The question was considered and passed upon by the courts of Wisconsin. The city council of Milwaukee directed the controller to procure from the owner of a certain slaughter-house in the city a license and privilege for all butchers to use the slaughter-house, free of charge; and all persons were prohibited from slaughtering animals at any other place within the city. Under the charter the council had authority to pass ordinances, "to direct the location and management of slaughter-houses and markets," and were empowered generally to pass laws for the benefit of the public health, as they might deem expedient. These provisions of the charter, it was held, gave the council sufficient authority to establish city slaughter-houses and to regulate the management thereof.[2]

Restricting or prohibiting the business.

SEC. 280. The business of slaughtering animals for food may, unquestionably, on account of its offensive character and for sanitary reasons, be restricted in populous towns and cities to certain localities and prohibited elsewhere.[3] And these localities may be changed from time to time, in the discretion of the legislative authorities.[4] But the power of government extends further than the mere regulation of this business within prescribed areas; it may be interdicted absolutely within the municipal limits.[5] And

[1] Huesing v. Rock Island, 125 Ill. 465.

[2] Milwaukee v. Gross, 21 Wis. 243.

[3] Slaughter-House Cases, 16 Wall. 36; *Ex parte* Shrader, 33 Cal. 279; Tugman v. Chicago, 78 Ill. 405; Chicago v. Rumpff, 45 id. 90; Villavaso v. Barthet, 39 La. Ann. 247; Cronin v. People, 82 N. Y. 318.

[4] Villavaso v. Barthet, 39 La. Ann. 347. *See* Barthet v. New Orleans, 24 Fed. Rep'r, 563.

[5] 2 Kent Comm. 340; Pierce v. Bartram, Cowp. 269; *Ex parte* Heilbron, 65 Cal. 609; Chicago v. Rumpff, 45 Ill. 90; Metro. Board of Health v. Heister, 37 N. Y. 661; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746.

this extensive power, as well as the right to regulate slaughtering within localities, may lawfully be conferred upon municipal authorities,[1] or upon local sanitary boards.[2] Such a delegation of power was declared to have been effected by a charter provision authorizing a city council to enact ordinances "to regulate the erection, use, and continuance of slaughter-houses." The judicial interpretation of the provision being that it gave the council the right "to fix and determine the limits and localities within which new slaughter-houses may be erected and the areas from which they shall be excluded; to direct and control the mode and manner of using those so erected and those already existing, as they may deem the health and cleanliness of the city requires; and to prohibit their continuance whenever and wherever they become sources of danger to the health or comfort of the community."[3]

Extent of the power of regulation.

SEC. 281. It has even been held, that the ordinary power conferred upon municipal corporations, by charter or the general law, to "regulate" the business of slaughtering cattle for food implies or involves the power to restrict and to prohibit the business either generally or in certain localities.[4] But a different construction of such a power has been suggested, upon reasoning which is generally accepted as satisfactory. It is said that the power *to regulate* the erecting and maintaining of slaughter-houses, when accompanied by a power to prevent and remove nuisances, will not authorize the entire prohibition of slaughtering within a city, unless it is a nuisance in fact. "The power delegated is simply *to regulate* the places where they (offensive trades) are carried on, and *not to forbid* their being carried on, or to destroy them altogether. It is assumed in the power granted that such trades will not be carried on under such condition of things as to

[1] *Ex parte* Heilbron, 65 Cal. 609.
[2] Metro. Board of Health v. Heister, 37 N. Y. 661.
[3] Cronin v. People, 82 N. Y. 318.
[4] Metro. Bd. of Health v. Heister, 37 N. Y. 661.

constitute them nuisances, and thus bring them within the scope of the general power to prevent or remove nuisances; but that they will be carried on at proper places, subject to the regulating power of the city. And such being the case, it is well settled that a power simply *to regulate* does not embrace a power to prohibit or destroy a trade or occupation."[1]

SEC. 282. But where a city charter gives the council the right by ordinance "to direct the location and management of slaughter-houses," and "to do all acts and make all regulations which may be necessary or expedient for the preservation of health," the council may enact an ordinance which provides that "no person shall kill, slaughter, dress or pack any cattle, sheep or swine, * * * within the limits of the city, without a permit from the city council; and any person desirous of obtaining such permit shall apply in writing to the common council, stating the business he is desirous to pursue and specifying the premises where the same is to be conducted." Under such an ordinance, however, there can be no conviction for the killing and dressing of a *single animal*, for that does not make a *business*, nor does it make the premises where it is done a *slaughter-house*.[2] The power of total prohibition or of restriction cannot be exercised under an authority to compel the owners and occupants of slaughter-houses to cleanse and abate them whenever necessary for the health of the community.[3]

Illustrations.

SEC. 283. The legislature, in the exercise of the police power, may prohibit the use of any building in cities or towns for carrying on, without permission from the local authorities, any trade, however necessary and lawful in itself, which in its ordinary exercise may become a nui-

[1] State v. Mott, 61 Md. 297.
[2] St. Paul v. Smith, 25 Minn. 372; Elias v. Nightingale, 8 El. & Bl. 698.
[3] Wreford v. People, 14 Mich. 41.

sance, and such legislation will apply to slaughter-houses. An act of the legislature of Massachusetts was therefore declared to be valid, which applied such a prohibition to cities and towns containing more than four thousand inhabitants, with a *proviso* that the terms of the act should not apply to any buildings or premises which at the time of the passage of the act were used or occupied for carrying on the trades or occupations specified.[1] On the other hand, it has been held that an ordinance providing that after a specified date no slaughter-house should be erected or put into operation, "*in any building not now used for such purpose*," within a certain part of the city of Chicago, is unjust and unreasonable, in so far as it imposes a penalty upon persons for doing an act which, under like circumstances, is permitted to be done by others, and because it prevents persons engaging in a particular kind of business in a certain locality, under penalty for violation, while others are allowed to carry on the same business in the same locality.[2]

Similar objections were held to be fatal to the validity of legislation having an analogous character, in Louisiana. Provisions in the Constitution of that State prohibit monopolies and invest the city of New Orleans with power to regulate the slaughtering of cattle within its limits, under certain restrictions. By several ordinances enacted in pursuance of the authority conferred, the city designated the places where the business of slaughtering might be carried on, and prescribed in detail the regulations under which the business should be conducted. One Barthet procured lands within the limits defined by the ordinances and proceeded to construct buildings thereon for the purpose of establishing his business of slaughtering animals for food. Then the city adopted amendments

[1] Watertown v. Mayo, 109 Mass. 315; Watertown v. Sawyer, id. 320; Somerville v. O'Neill, 114 id. 353; St. Paul v. Byrnes, 38 Minn. 176; Cattle Market Co. v. Hodson, L. R., 2 Q. B. 131.

[2] Tugman v. Chicago, 78 Ill. 405.

to the original ordinances making it *unlawful* to maintain slaughter-houses within the city limits and under the regulations prescribed in the original ordinances, "except permission be granted by the council" of the city. The amendment was declared to be unconstitutional for the reason that it makes a person's right to engage in a lawful business dependent upon the arbitrary will of an individual or body of men acting for the city. The argument of the court was that the city had no governmental or special power to prevent any one, who complied with the law regulating such business, from engaging in any lawful business he prefers. An ordinance which permits one person to carry on an occupation within the municipal limits, and prevents another who has an equal right from pursuing the same business, is void. The Constitution forbids monopolies, but if the city can refuse to permit Barthet to carry on his business, it can adopt the same course with others, and by giving permission to one and refusing it to all others, a monopoly would be established.[1]

SEC. 284. It is undoubtedly within the proper powers of municipal authorities to prescribe all necessary and proper regulations relating to the construction of slaughter-houses and the manner in which the business of slaughtering animals for food shall be conducted, with a view to securing, as far as possible, the health and comfort of the people living in localities where the offensive business is prosecuted. And if that business, from the manner in which it is conducted, or for any reason, is in fact a nuisance, or if it be prosecuted in a place where it is interdicted, it will be no excuse for the proprietor that proper care has been taken to minimize the bad effects. So, it was held, in a case where one was prosecuted for maintaining a common nuisance, in operating a slaughter-house,

[1] Barthet v. New Orleans, 24 Fed. Rep'r, 563.

killing cattle for food and boiling and rendering their entrails and offal, that it was no defense that the establishment was kept in good order, and in as cleanly condition as such places can reasonably be kept The best conducted slaughter-house in the wrong place may be a common nuisance.[1]

[1] Moses v. State, 58 Ind. 185.

CHAPTER XVI.

REGULATION OF BUSINESS PURSUITS; OLEOMARGARINE LAWS.

SEC. 285. Validity of prohibitory laws.
286. The laws sustained as health regulations
289. Regulation of the business.
291. History of legislation on the subject.
293. Constitutional objections.
294. Statutory penalties.

Validity of prohibitory laws.

SEC. 285. An act of the legislature of Pennsylvania, entitled "An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," was adjudged by the highest appellate court of that State to be constitutional and a valid exercise of the police power.[1] The case was carried to the Supreme Court of the United States, and that judgment was affirmed.[2] It was argued in that court, that the statute was void, in that it deprived all persons coming within its provisions of rights of liberty and property without due process of law, and denied to them the equal protection of the laws,—rights secured to them by the fourteenth amendment of the Constitution of the United States. The court decided that the statute was a legitimate exercise of the police power of the State, for the protection of the health of the people and for the prevention of fraud, and was not in any respect repugnant to that amendment, which was not designed to interfere with or in any manner abridge the exercise of the police power of the States.

The precise decision of the court was, that the prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced

[1] Powell v. Comm., 114 Penn. St. 265.

[2] Powell v. Pennsylvania, 127 U. S. 678.

from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk; or the prohibition of the manufacture of any imitation or adulterated butter or cheese, or of the selling or offering for sale, or having in possession with intent to sell, the same, as an article of food, is a lawful exercise by the State of the power to protect, by police regulations, the public health. The court declared itself to be unable to affirm that this legislation had no real or substantial relation to the public health, or to the adulteration of dairy products and fraud in the sale thereof.

An offer had been made upon the trial in the court below to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were in fact wholesome or nutritious articles of food. To this the court said: "It is certainly consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from any thing of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. * * * Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative de-

partment to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property; and while, according to the principles upon which our institutions rest, 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself;' yet, 'in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage.'[1]

"The case before us belongs to the latter class. The legislature of Pennsylvania upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from

[1] *Citing* Yick Wo v. Hopkins, 118 U. S. 370.

unadulterated milk, or cream from unadulterated milk, to take the place of butter produced from unadulterated milk, or cream from unadulterated milk, will promote the public health, and prevent fraud in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."[1]

The laws sustained as health regulations.

SEC. 286. Laws substantially like that enacted in Pennsylvania, and directed to the same objects, have been adopted in other States, as in Maryland,[2] Minnesota,[3] Missouri,[4] New Jersey[5] and Ohio;[6] and in each case, when their validity has been impeached on constitutional grounds, they have been sustained by the courts against the hostile criticism. But in New York a statutory provision, that "no person shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk, or cream of the same, or shall sell or offer to sell the same as an article of food," was declared to be unconstitutional. The reason assigned for this decision was, that the prohibition was not confined to unwholesome or simulated substances, but absolutely prevented the manufacture and sale of any compound designed to be used as a substitute for butter or cheese, however whole-

[1] Harlan, J., Powell v. Pennsylvania, 127 U. S. 678; State v. Addington, 10 Mo. App. 214; 77 Mo. 110.

[2] Pierce v. State, 63 Md. 596; McAllister v. State, 72 id. 390.

[3] Butler v. Chambers, 36 Minn. 69.

[4] State v. Addington, 12 Mo. App. 214; 77 Mo. 110.

[5] Waterbury v. Newton, 50 N. J. L. 534.

[6] Palmer v. State, 39 Ohio St. 236.

some or valuable, or however openly and fairly the character of the substitute might be avowed and published; and that the act could not, therefore, be regarded as a health law, nor as intended to prevent deception by the sale of a simulated article as genuine. Stress was laid in the opinion delivered by the court upon the fact that the prohibition was not of the manufacture or sale of an article designed as an *imitation* of dairy butter, but of any article designed *to take the place of* dairy butter, however dissimilar in color or appearance the artificial product might be to ordinary dairy butter.

The court declared, that in view of existing legislation on the subject and after consideration of the various statutes of the State against fraud and deception in the sale of dairy products, "it appears quite clear to us that the object and effect of the enactment under consideration were not to supplement the existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step, and by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products against the competition of cheaper substances, capable of being applied to the same uses, as articles of food."[1]

SEC. 287. In a subsequent case, arising under the same statute, after its amendment by the legislature, the court held, that in order to sustain an indictment under the provisions of the act as amended, prohibiting the manufacture or sale of any article, "not produced from pure, unadulterated milk or cream," which is "in imitation or semblance of or designed to take the place of butter," it

[1] People v. Marx, 99 N. Y. 377; Rapallo, J., People v. Arensberg, 105 id. 123.

must be made to appear that the article manufactured or sold was, by the use of ingredients not necessary or essential to the article itself, made in imitation or semblance of butter; the manufacture or sale of an article simply "designed to take the place of butter" not being an offense. Consequently, it was error upon the trial to submit to the jury simply the question whether the defendant had manufactured or sold *oleomargarine*, "an article not made from pure, unadulterated milk or cream."[1]

SEC. 288. The same statute was declared to be valid and constitutional, upon a second appeal after a new trial in the same case. The judgment of the court proceeded upon the ground, that the statutory prohibition was aimed at a designed and intentional imitation of dairy butter in manufacturing the new product, and not a resemblance in qualities inherent in the articles themselves and common to both. It was held that the producers of butter from animal fats or oils, although the product be wholesome, nutritious and suitable for food,—and so the manufacture and sale thereof may not lawfully be prohibited,—have no constitutional right to resort to devices for the purpose of making their product resemble dairy butter; and the legislature has power to enact such laws as it may deem necessary to prevent the simulated article being put upon the market in such form or manner as to be calculated to deceive. It was thus distinctly decided, that the sale of an article known to the vendor to be oleomargarine, to which a coloring matter, not injurious to health, had been added, which was not essential to the manufacture of the article, but resorted to solely for the purpose of making it resemble the most valuable kind of dairy butter, was a violation of the statute, and this although it was offered for sale and was sold *as oleomargarine*.[2]

[1] People v. Arensberg, 103 N. Y. 388.

[2] People v. Arensberg, 105 N. Y. 123.

Regulation of the business.

SEC. 289. It is clearly within the power of the legislature to enact a law which does not prohibit the manufacture or sale of oleomargarine, but merely provides that, when sold, it shall be sold in its true character *as oleomargarine*, that is, as an article made from the oils and fat of animals, and not from milk and cream; and such statutes have been judicially sustained.[1] So, it may be required that each package of the manufactured substance shall have distinctly and durably marked thereon the name of each article used in the composition of the substance.[2] In New Hampshire, the law forbids the sale or exposing for sale of any article or compound made in imitation of butter or as a substitute for it, and not made from milk or cream, unless it be colored *pink* to designate its true character and to distinguish it from the genuine article. As a regulation calculated to prevent fraud and deception, the law has been sustained.[3]

SEC. 290. A statute of Minnesota declared it to be a misdemeanor to manufacture for sale within the State, or to sell or offer for sale baking powder containing alum, unless a label bearing the words "this baking powder contains alum," should be affixed to each package of the article. The constitutionality of the statute was attacked, but without success, and the reasoning of the court in that case, is applicable to the similar acts relating to oleomargarine and like products.[4] The owner is not deprived

[1] Pierce v. State, 63 Md. 592.

[2] Palmer v. State, 39 Ohio St. 236; Butler v. Chambers, 36 Minn. 69. *See* Comm. v. Bean, 148 Mass. 172; Crane v. Lawrence, L. R., 25 Q. B. D. 152.

[3] State v. Marshall, 64 N. H. 549.

[4] Stolz v. Thompson, 44 Minn. 271. On the same principles, a statute of Iowa has been sustained, which prohibits the sale of any article intended for use as lard, if it contains any ingredient but the pure fat of healthy swine, unless it be labeled "compound lard," and the name and proportion of each ingredient contained in the article be designated. State v. Snow, 81 Iowa, 642. But in People v. Dold, 63 Hun, 583, it was held, that one could not be made liable to the penalty imposed by the statute, for manufacturing butterine or oleomargarine, unless it appears that he manufactured the article with an intent to sell it for natural butter; that it was not unlawful to manufacture the article and to sell it for what it was.

of his property, said the court, or denied the equal protection of the laws, by being required to disclose the real nature or ingredients of the commodity which he exposes for sale. No man has the right, protected by the Constitution from legislative interference, to keep secret the composition of such goods in order that others may be induced to purchase and use what they would consider to be hurtful, and what they would not knowingly purchase or use. The owner of such property may be legally required, as a matter of proper police regulation for the benefit of the people in general, to sell it for what it actually is, and upon its own merits, and is not entitled, as a matter of constitutional right, to the benefit of any additional market value which he may secure by concealing its true character.

History of legislation on the subject.

SEC. 291. The enforcement of the oleomargarine laws has been resisted vigorously in the courts. They have very naturally been regarded by those persons against whom they are directed as having the character of partial and discriminating legislation. At the same time, it has been urged that as they operate to exclude from the market a useful and valuable product, not in the least degree injurious to health, but on the contrary wholesome and nutritious as an article of food, they cannot fairly be considered as legislation in the interest of the public health. These objections usually have not been effective; the courts have generally refused to entertain the question of fact as one proper to be considered by the judiciary in passing upon the validity of the legislative acts, and have finally with perfect unanimity denied that the laws are in any respect within the constitutional inhibitions. They are upheld either as health laws or as safeguards against fraud and deception in the sale of articles designed for food. They are recognized and approved as belonging to a kind of legislation which applies familiar common law

doctrine to a class of cases new in instance, but not in principle.

SEC. 292. A recent writer on the subject has very clearly sketched the history of these laws;[1] "at first," he says, "a determined opposition to the enforcement of these laws was made on the ground that oleomargarine is not unwholesome as an article of food, and, therefore, not detrimental to the public health. Consequently, it was claimed, it is not a legitimate subject for the application of the police power, and the laws against its manufacture are no more than an arbitrary interference with a lawful business. The contention is at least plausible. And if the courts had conceded that it rested with them to determine the necessity or expediency of the laws in question, or to test the accuracy of the information on which the legislature acted, they would have had to investigate the hygienic qualities of the disputed product, and base their decisions on the result of their inquiries. This, however, they always refused to do. Either they held that the question was not for the judicial department, or that the validity of the statute could be sustained on other grounds. Thus the court in New Jersey observed, that if the sole basis for the statute in question were the preservation of the public health, the objection that oleomargarine, though colored with annotto, was a wholesome article of food, would be pertinent. In that case, they said, they might be required to consider the delicate questions whether and how far the judiciary could pass upon the adaptability of the means which the legislature had proposed for the accomplishment of its legitimate ends. But the provision in question, it was stated, was not aimed at the protection of the public health. Its object was to secure to dairymen and to the public at large a fuller and fairer enjoyment of their property, by excluding from the

[1] The Police Power and the Public Health, 25 Am. L. R. 170.

market a commodity prepared with a view to deceiving those purchasing it. It was not pretended, said the court, that annotto had any other function in the manufacture of oleomargarine than to make it a counterfeit of butter, which is more generally esteemed and commands a higher price. And that the legislature might repress such counterfeits did not appear to the court to admit of substantial question."[1] But the courts have usually refused to receive testimony to show that oleomargarine is in fact wholesome and nutritious as an article of food, holding that the constitutionality of the laws cannot be tested in that way.[2]

Constitutional objections to State laws.

SEC. 293. Another contention of the makers of oleomargarine was that a State law forbidding the manufacture and sale of that commodity was invalid, because the article was patented under the laws of the United States. But this proposition has been declared to be untenable. The sole object and purpose of the patent laws is to secure to the inventor a monopoly of what he has discovered. They confer upon him, therefore, an exclusive right to manufacture and sell the patented article. But the enjoyment of this right is subject to the State laws and is to be exercised in all cases, like other personal rights, in subordination to the police regulations of the State, with which neither the Constitution nor laws of the United States in any manner interfere.[3]

But it has been held, that statutes making it unlawful to sell oleomargarine within the State are unconstitutional so far as they prohibit the sale *in the original package* of oleomargarine imported from a foreign country or from

[1] Waterbury v. Newton, 50 N. J. L. 534; Comm. v. Huntley, Mass. (May, 1892), 46 Alb. L. J. 30.

[2] Powell v. Pennsylvania, 114 Penn. St. 265; 127 U. S. 678; State v. Addington, 12 Mo. App. 214; 77 Mo. 110.

[3] *In re* Brosnahan, Jr., 18 Fed. Rep'r, 62; Patterson v. Kentucky, 97 U. S. 501; People v. Russell, 49 Mich. 617; Palmer v. State, 39 Ohio St. 236.

another State, for this, it is said, is a direct interference with commerce, over which Congress has, under the Constitution, the exclusive control.[1]

The statutory penalties.

SEC. 294. Finally, it may be said, that when a statute prohibits the manufacture and sale of oleomargarine, or any other adulterated or unwholesome article or product, power may lawfully be conferred upon executive officers of government to seize and destroy all such articles manufactured and sold in violation of law.[2] And, generally, a fraudulent intent is not a necessary ingredient of the offense of selling such articles in violation of the law, so that, in an action to recover the penalty imposed for such violation, it is immaterial that the defendant was ignorant of the fact that the substance he sold was an article or compound coming within the statutory prohibitions, and that no deception was practiced to induce the purchase. The duty is absolutely imposed upon him of ascertaining and knowing the true character of the article he offers for sale.[3]

[1] Minnesota v. Gooch, 44 Fed. Rep'r, 276; Comm. v. Paul, Phila. O. S., Dec., 1890. *See* Leisy v. Hardin, 135 U. S. 100. The contrary doctrine is held, in Comm. v. Huntley, Mass. (May, 1892), 46 Alb. L. J. 30; Waterbury v. Newton, 50 N. J. L. 534. In those cases it was said that the State may protect itself against the introduction or sale within its borders of articles so prepared as to deceive the public.

[2] Mugler v. Kansas, 123 U. S. 661; Shivers v. Newton, 45 N. J. L. 469; Blazier v. Miller, 10 Hun, 435; Lawton v. Steele, 119 N. Y. 226.

[3] Allegheny Co. v. Weiss, 139 Penn. St. 247; Waterbury v. Newton, 50 N. J. L. 534. *Post*, secs. 300–303.

CHAPTER XVII.

REGULATIONS TO SECURE PURITY OF FOODS AND DRINKS.

SEC. 295. Sale of unwholesome food is a common law offense.
296. Also a statutory offense.
297. Not legitimate subject of traffic.
298. Purity of water supply.
299. Adulteration of dairy products.
300. Fraudulent intent not essential to the offense.
304. Miscellaneous regulations.

Sale of unwholesome food is a common law offense.

SEC. 295. At common law, it was an indictable offense to mix unwholesome ingredients in any thing made and supplied for food of man; and the publicly and wilfully exposing or causing to be exposed for sale, articles of food unfit for consumption, and knowingly permitting servants to mix unwholesome ingredients in articles of food, are acts endangering the health and lives of the public, and constitute a common nuisance.[1] So, it would unquestionably be an indictable offense at common law to expose in a public market for sale, or even to bring to the market for such purpose, any thing intended for food or drink, knowing the same to be unfit for that purpose, or that it would be deleterious to health if consumed for food or drink.[2]

Also a statutory offense.

SEC. 296. But the sale of diseased, corrupted, or unwholesome provisions of any kind, whether for meat or drink, without making the character of the same fully known to the buyer, or the fraudulent adulteration, for purposes of sale, of any substance intended for food, or of any liquors, drugs or medicines, is made a punishable

[1] Stephens' Dig. Crim. L., 127.

[2] Wharton's Crim. Law, § 2387; Reg. v. Stevenson, 3 F. & F. 106; Reg. v. Jarvis, ib. 108; Reg. v. Crawley, ib. 109; Shillito v. Thompson, L. R., 1 Q. B. D. 12; State v. Norton, 2 Ired. (N. C.) L. 240; State v. Smith, 3 Hawks, 376.

offense by statute in most, if not all, of the States. These laws are very precise in their definition of the several offenses, and are exceedingly stringent in their provisions.[1] They also, very generally, prescribe a severe punishment for mingling any poisonous substances with food, drink or medicines, with intent to kill or injure other persons.[2]

The acts and things so prohibited are in themselves common nuisances, and may be treated as such, and their summary suppression or destruction may be authorized and provided for, without infringing constitutional provisions designed to protect property.[3]

Not a legitimate subject of traffic.

SEC. 297. Food products or animals, in such condition as to be likely to occasion or spread disease or to be unfit for consumption as food, are not regarded as merchantable — are not legitimate subjects of trade and commerce — and the self-protecting power of the State, therefore, may rightfully be exerted against their introduction within the State, and such exercise of power will not be objectionable on any constitutional grounds.[4] The only limitation upon this power of exclusion is that the precautionary measures adopted shall be such only as are necessary for self-defense. The same power, subject to the same limitation, may be exercised by local governments or the authorities of sanitary districts. And to this end, so far as may be necessary to secure the public health, either the State or local authorities may establish and maintain reasonable quarantine and inspection regulations to pre-

[1] State v. Snow, 81 Iowa, 642; Schmidt v. State, 78 Ind. 41; Goodrich v. People, 19 N. Y. 574; People v. Parker, 38 id. 85.

[2] Comm. v. Hobbs, 140 Mass. 443; People v. Carmichael, 5 Mich. 10; People v. Adwards, ib. 22; Osborne v. State, 64 Miss. 318.

[3] Bradley, J., Bartemeyer v. Iowa, 18 Wall. 129; Guillotte v. New Orleans, 12 La. Ann. 432; Miller v. Horton, 152 Mass. 540; Newark Horse Ry. Co. v. Hunt, 50 N. J. L. 308; Page v. Fazakerly, 36 Barb. 392; White v. Redfern, L. R., 5 Q. B. D. 15; Mallinson v. Carr (1891), 1 Q. B. 48.

[4] *Ante*, secs. 28–32.

vent the introduction of objectionable articles.[1] Such regulations may to some extent and incidentally affect commerce among the States, but they will not be invalid on that account. They must, however, make a fair discrimination between the importation of sound and unsound articles, and not operate to exclude articles which are the legitimate subjects of commerce. They will not be sustained if they discriminate unjustly between foreign and domestic products, by subjecting the former to inspections and exactions from which the latter, when of the same character and in like condition, are free.

Purity of water supply.

SEC. 298. The sanitary condition of local communities being largely dependent upon the character of the public water supply, stringent regulations may be put in force to secure the purity and wholesomeness of water used for domestic purposes or in the manufacture of articles intended for food, and to prevent the pollution of or any other interference with the sources from which the public supply of water is taken.[2] It is proper to prohibit boat-

[1] Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Mugler v. Kansas, 123 id. 661; Railroad Co. v. Husen, 95 id. 465; Turner v. Maryland, 107 id. 38; Salzenstein v. Mavis, 91 Ill. 391; Higgins v. Casks of Lime, 130 Mass. 1; Urton v. Sherlock, 75 Mo. 247. *See* Voight v. Wright, 141 U. S. 62.

[2] State v. Wheeler, 44 N. J. L. 88. In this case a conviction was sustained under an indictment upon an act designed to prevent the willful pollution of the waters of any of the creeks, ponds, lakes or brooks of the State. The act provides that if any person shall throw or permit to be thrown into any reservoir or into the waters of any creek, pond or brook of the State, the waters of which are used to supply any aqueduct or reservoir for distribution for public use, any offensive matter whatever, calculated to render such waters impure, or to create noxious or offensive smells, or shall connect any water-closet with any sewer or other means whereby the contents thereof may be conveyed into such creek, pond or brook, or shall so deposit or permit to be deposited any such matters or things that the washing or waste therefrom shall or may be conveyed to and into any such waters, such person shall be deemed guilty of a misdemeanor.

The offense created by the act is committed when offensive matter is deposited in such waters calculated to make them impure *at the place of deposit*, although the impurity may not, in fact, appreciably affect the waters when arrived at the reservoir.

Under such a construction, the act is not within the prohibition of the Constitution against the appropriation of private property for public use without compensation. Although it may limit the beneficial use of private property, it is not an exercise of the right of eminent domain, but merely a police regula-

ing, sailing, or fishing on lakes from which the supply is drawn,[1] and to make it a punishable offense to poison any spring, well or reservoir of water. It is lawful to prevent the use of unwholesome well-water in the making of articles for public consumption as food or drink, by requiring the filling up of all wells on premises where such articles are prepared.[2] And, as a means of preventing the use of unwholesome water by the public, ordinances may provide that wells under public streets, having more than a specified amount of chlorine or of any deleterious substance to one gallon of water, shall be filled up; even though the wells are private property, made and maintained in pursuance of licenses from the public authorities.[3]

Adulteration of milk and dairy products.

SEC. 299. The most familiar instances of legislation designed to secure the purity of articles of food and drink, and to prevent fraud and deception in their sale, are found in the very stringent regulations that prohibit the adulteration of milk and dairy products. The enforcement of these regulations has met with vigorous and persistent opposition, but they, like the oleomargarine laws, which belong to the same kind or class of legislative acts, have been sustained by the courts, upon principles which would be equally applicable to sustain the validity of similar enactments directed to the prevention of adulteration and frauds in the manufacture and sale of any other articles of food or drink.

Accordingly, laws regulating the inspection and sale of *milk*, which prohibit the sale of adulterated milk, or milk

tion, forbidding or restricting certain specified uses of private property, because such uses tend to the common injury of the citizens of the State. The object of the legislation is to protect the public health. For that purpose the legislature may restrain any use of private property which tends to the injury of public interests. That the pollution of the sources of the public water supply does so tend, no one will deny. *See, also,* State v. American Forcite Powder M. Co., 50 N. J. L. 75.

[1] Dunham v. New Britain, 55 Conn. 378.

[2] State v. Schlemmer, 42 La. Ann. 1166.

[3] Ferrenbach v. Turner, 86 Mo. 416.

to which water or any foreign substance has been added, and provide for the analysis of milk by an authorized inspector, are declared to be constitutional, their object being to prevent fraud and deception, and to protect the health of the people.[1] It may, therefore, be made a criminal offense to sell skimmed milk colored with a substance designed to give it the appearance of fresh, unskimmed milk, although the coloring matter used be perfectly wholesome;[2] or even to sell pure milk mixed with pure water.[3]

Fraudulent intent not essential to the offense.

SEC. 300. It has been contended, that a law of the character last mentioned is in derogation of common right. "The substance of the argument," said the court to whom it was addressed, "is this: It is innocent and lawful to sell pure milk, and it is innocent and lawful to sell pure water; therefore, the legislature has no power to make the sale of milk and water, when mixed, a penal offense, unless it is done with a fraudulent intent. But it is notorious that the sale of milk adulterated with water is extensively practiced with a fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case. They have seen fit to require that every man who sells milk shall take the risk of selling a pure article. No man is obliged to go into the business; and by using proper precautions any dealer can ascertain whether the milk he offers for sale has been watered. The court can see no ground for pronouncing the law unreasonable, and has no authority to

[1] State v. Campbell, 64 N. H. 402; People v. West, 106 N. Y. 293; Polinsky v. People, 73 id. 65; People v. Cipperly, 101 id. 634; State v. Graves, 15 R. I. 208; Comm. v. Wetherbee, 153 Mass. 159.

[2] Comm. v. Wetherbee, 153 Mass. 159. The statute may be absolutely prohibitory, and prevent the sale of such milk either as pure or skimmed milk. Comm. v. Tobias, 153 Mass. 129.

[3] Comm. v. Waite, 11 Allen, 264; State v. Marshall, 64 N. H. 549.

judge as to its expediency."[1] A person may, therefore, be convicted of selling adulterated milk, under the statutes in that behalf, although he did not know it to be adulterated.[2]

SEC. 301. In some of the States, the statutes upon this subject provide, that in all prosecutions under the act, if it be shown upon analysis that the milk sold or offered for sale contained more than a certain percentage of watery fluids, or less than a certain percentage of milk solids, it shall be deemed for the purposes of the act to be adulterated. These provisions are valid, as they merely regulate and control the quality of an article of food, in the interest of the public health, and fix a standard of quality. The clause does not establish a rule of evidence to the prejudice of the accused, but creates and defines a new offense. It is the purpose of the statutes to prohibit not merely the dealing in milk which has been adulterated, but also the dealing in milk of such inferior quality as to fall below the standard prescribed.[3]

SEC. 302. Similar laws, designed "to prevent fraud in the sale of dairy products," and which forbid the selling or bringing of any milk diluted with water or adulterated to a butter or cheese factory to be manufactured, have frequently been declared to be valid.[4] And it is no ob-

[1] Chapman, J., Comm. v. Waite, 11 Allen, 264; Bayles v. Newton, 50 N. J. L. 549; 51 id. 553; Comm. v. Gray, 150 Mass. 327.

[2] Roberts v. Egerton, L. R., 9 Q. B. 494; Pain v. Boughtwood, L. R., 24 Q. B. D. 353; Comm. v. Farren, 9 Allen, 489; Comm. v. Evans, 132 Mass. 11; Allegheny Co. v. Weiss, 139 Penn. St. 247.

[3] Comm. v. Evans, 132 Mass. 11; Comm. v. Luscomb, 130 id. 42; Comm. v. Bowers, 140 id. 483; Shivers v. Newton, 45 N. J. L. 469; People v. Cipperly, 101 N. Y. 634; State v. Smythe, 14 R. I. 100; State v. Graves, 15 id. 208.

[4] Comm. v. Evans 132 Mass. 11; Comm. v. Waite, 11 Allen, 264; Butler v. Chambers, 36 Minn. 69; Shivers v. Newton, 45 N. J. L. 469; People v. West, 106 N. Y. 293. It has been held, that the words "bringing or supplying" to a butter or cheese factory, as used in such a statute, cannot be construed to include a "sale;" and further, that the statute does not apply to cases where milk is supplied to one engaged in making butter or cheese on his own account, but only where it is supplied to factories conducted on a joint or co-operative plan. Phillips v. Meade, 75 Ill. 334. *See* People v. West, 106 N. Y. 293.

jection to their validity that fraudulent intent is not made a necessary ingredient of the offense. The law may put upon any person bringing or supplying the milk the risk of ascertaining that the milk is pure.[1] And such legislation is said to be fully justified by experience and to find its sanction in necessity. "It is notorious that the adulteration of food products has grown to proportions so enormous as to menace the health and safety of the people. Ingenuity keeps pace with greed, and the careless and heedless consumers are exposed to increasing perils. To redress such evils is a plain duty but a difficult task. Experience has taught the lesson that repressive measures which depend for their efficiency upon proof of the dealer's knowledge and of his intent to deceive and defraud are of little use and rarely accomplish their purpose. Such an emergency may justify legislation which throws upon the seller the entire responsibility of the purity and soundness of what he sells and compels him to know and be certain."[2]

SEC. 303. The provisions in some laws, making the *mere possession* of adulterated milk, or of a prohibited article in the semblance of butter or cheese, conclusive evidence of an intent to sell the same, have been pronounced valid.[3] But it is still strenuously argued that reason and authority are against such a rule, unless it be taken with qualifications. It is said that the legislature may lawfully prohibit the possession of certain property, for instance, adulterated milk, if there is an intent to sell it;[4] but not in the absence of a wrong intent, unless the article is of

[1] Comm. v. Raymond, 97 Mass. 567; Comm. v. Wentworth, 118 id. 441; People v. West, 106 N. Y. 293; People v. Thompson, 38 N. Y. State Rep'r, 317; Allegheny Co. v. Weiss, 139 Penn. St. 247. *Contra:* Sanchez v. State, 27 Texas App. 14; Teague v. State, 25 id. 577.

[2] Finch, J., People v. Kibler, 106 N. Y. 321; Harrigan v. Nowell, 110 Mass. 470. *See* People v. Fulle, 12 Abb. N. C. 196. In Halsted v. State, 41 N. J. L. 552, it was held, that in regard to statutory offenses, the defendant's knowledge of all the physical facts which go to constitute the offense is not essential to guilt, unless made so by a proper construction of the statute itself.

[3] People v. Hill, 44 Hun, 472; Mallinson v. Carr (1891), 1 Q. B. 48.

[4] State v. Smythe, 14 R. I. 100.

such a character that it cannot be put to an unobjectionable use, and in such case only it is proper to infer a wrongful intent from the mere fact of possession.[1] The argument is certainly plausible, but it would seem to be unsound, in that it disregards the rule by which a penal statute is to be applied according to the spirit of its terms and with a view to its real purpose, and not always literally and strictly against the accused. Properly applied, then, the provision in question would not make the mere possession of the prohibited articles, *by one not a dealer in them*, conclusive evidence or any evidence at all of an intent to sell them, or of an intent to apply them to any unlawful use, if they are capable of being used for lawful purposes. But as against a dealer in the articles, the possession of them, under circumstances that would be any evidence at all of an intent to sell the articles, may be taken as conclusive evidence of such intent. And such, it is believed, has been the practical effect given to the provision in those cases where it has been applied to secure convictions for violation of the law; and with this restricted application it can hardly be said to be unjust or unreasonable.[2]

Miscellaneous regulations.

SEC. 304. Finally, it may be said, that all places where

[1] *See* Phelps v. Racey, 60 N. Y. 10; Sullivan v. Oneida, 61 Ill. 242.

[2] In delivering the opinion of the court in the recent case of Holy Trinity Church v. United States, 143 U. S. 457, Mr. Justice Brewer says: "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislature intended to include the particular act." The learned justice cites the apt language used upon this point in Stradling v. Morgan, Plow. 205, and the quotation from Lord Coke, in Pier Co. v. Hannam, 3 B. & Ald. 266, that "acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endangered."

dairy products are manufactured into articles of food may be subjected to regulations, with a view to securing the purity and wholesomeness of the articles; that provision may be made that no person shall keep cows for the production of milk for market or for manufacturing the same into articles of food, in a crowded or unhealthy condition, or feed the cows on food that is unwholesome or that produces milk not suitable for consumption; that the manufacture of such milk may be prohibited;[1] and that places where cows are kept may be required to be well ventilated and drained, and maintained in a thoroughly clean condition. Milk dealers may be required to supply, from time to time, samples of milk to health inspectors, for analysis, and the inspectors may be authorized to take samples for that purpose, and to condemn and pour upon the ground, or return to the person who supplied to the dealer, any milk which upon inspection he finds to be adulterated or below the prescribed standard.[2]

[1] Butler v. Chambers, 36 Minn. 69; Johnson v. Simonton, 43 Cal. 242.

[2] Shivers v. Newton, 45 N. J. L. 469; Blazier v. Miller, 10 Hun, 435.

CHAPTER XVIII.

REGULATION OF MARKETS.

SEC. 305. Right to establish public markets.
307. Right to prohibit private markets.
308. Localizing traffic in marketable articles.
309. Extent of the power to regulate markets.
310. Regulation of hawking and peddling.
311. Inspection laws.
312. Licenses.

The right to establish public markets.

SEC. 305. It is probable that the right to establish markets would not seriously be denied to a municipal corporation which is vested with power to enact by-laws and ordinances to promote the general welfare of the community.[1] It is unquestionable that such right may be delegated expressly, and it is safe to assume that every municipal corporation possesses the right, either through special grant or under a general delegation of police powers, since markets are regarded as essential to the public health.[2]

A municipal government "establishes" a market, when it purchases or takes under lease, or otherwise acquires, and dedicates to such public use, a proper place adapted and intended for the purpose of a market;[3] or, in other words, "to establish a public market is to designate and provide, by purchase or otherwise, a site or place for the purchase and sale of provisions and articles of daily consumption, by all who may desire to repair thither for that purpose, to erect thereon a suitable building adapted to

[1] City of Jacksonville v. Ledwith, 26 Fla. 163; Morris v. Mayor, etc., 2 La. 217; Spaulding v. City of Lowell, 23 Pick. 71; Gale v. Kalamazoo, 23 Mich. 344; Wartman v. Philadelphia, 33 Penn. St. 202; New Orleans v. Morris, 3 Woods C. C. 107.

[2] First Municipality v. Cutting, 4 La. Ann. 335; Wade v. Newburn, 77 N. C. 460; Smith v. Newburn, 70 id. 14.

[3] *See preceding notes.* Ketchum v. Buffalo, 14 N. Y. 356; *cf.* Foster v. Park Commissioners, 133 Mass. 321; Richmond v. Henrico County, 83 Va. 204.

the purpose, and to dedicate the same to such use, for the benefit of the public or the inhabitants of the municipality wherein it is located."[1] But instead of doing this, the municipality may authorize an individual to make use of his own premises for a public market, letting rooms or stalls therein for that purpose, and may declare such building to be the public market place, and may dictate the mode and manner of conducting the markets therein, protecting the proprietor in the exclusive privileges of such market, but subjecting it to the usual regulations.[2] This method of establishing markets seems to have been approved by custom in several States.[3]

The right to *establish* a market includes the right to shift it from place to place, as the convenience or the necessities of the people may demand,[4] and the exercise of this right will not, ordinarily, be stayed by considerations of private detriment or even because individuals may so be disturbed in the enjoyment of rights acquired under grant or license from the community.[5] But, as markets may become nuisances, they cannot be located along public streets, so as to cause an obstruction to the free use of the streets, or so as to become a menace to the health and comfort of individuals living in the neighborhood. Such a use of the streets of a city is unwarranted. The entire street is for the use of the public at large, and the appropriation of a part of it for a market is a common nuisance, which a court of equity will restrain at the suit of persons living and owning property near by, who are specially injured or annoyed by such use.[6] Such an appropriation of the streets cannot be

[1] St. Paul v. Traeger, 25 Minn. 248.

[2] Le Claire v. Davenport, 13 Iowa, 210; State v. Natal, 41 La. Ann. 887; Brookhaven v. Daggett, 61 Miss. 383; Palestine v. Barnes, 50 Texas, 539.

[3] Gale v. Kalamazoo, 23 Mich. 344; Harvey v. St. Louis, 90 Mo. 214.

[4] City of Jacksonville v. Ledwith, 26 Fla. 163; Wartman v. Philadelphia, 33 Penn. St. 202.

[5] New Orleans v. Stafford, 27 La. Ann. 417.

[6] State v. Mobile, 5 Porter (Ala.), 279; Columbus v. Jacques, 30 Ga. 506; McDonald v. Newark, 42 N. J. Eq. 136; State v. Laverack, 34 N. J. L. 201; St. John v. New York, 3 Bosw. (N. Y.) 483; Wartman v. Philadelphia, 33 Penn. St. 202.

made, even under the sanction of a legislative act, unless compensation be made to the owners of adjoining lands, who own to the center of the street.[1]

SEC. 306. On the other hand, it has been held, that a city has a right to establish and maintain a public market on premises duly condemned for that purpose, even though it be an incidental consequence that market wagons from which sales are made collect in the neighborhood and to some extent cause an obstruction of the streets; and that no private right of action arises against the city by reason of such obstruction, especially where it is under police regulation. The property having been condemned for public purposes, it will be presumed, in collateral proceedings, that persons affected thereby have been properly compensated in damages, if found entitled thereto. The court observed, in the case referred to, that if the establishment of such a market constitutes, in such case, any wrong on the part of the city, in the premises, it must arise from a failure to establish or enforce due regulations to protect and preserve the private rights of citizens, as, for example, the right of passage through the public streets. But this would be a failure in duty of a political nature, and could give no right of action. The municipal discretion in such cases, it was said, could not be reviewed by the courts, the right to exercise it being conferred by valid legislation.[2]

The right to prohibit private markets.

SEC. 307. The right to establish a public market would be of little avail if it were not accompanied by the right to prevent the establishment of private markets. Accordingly, in the exercise of the right to "regulate" markets, it has been held, the corporation can forbid the opening of any markets except at designated places, or it may for-

[1] State v. Mobile, 5 Porter (Ala.), 279; State v. Laverack, 34 N. J. L. 201; Cooley's Const. Lims. 685.

[2] Henkel v. Detroit, 49 Mich. 249.

bid markets within certain prescribed limits, and may impose a license on all who keep markets outside those limits. Private markets may thus be interdicted within certain distances of the public market, and such legislation, being regarded as in the nature of police regulation for sanitary purposes, will be valid, even though it interferes with the continuance of private markets theretofore duly licensed. The effect of such a regulation is to revoke or repeal all licenses to maintain private markets within the designated limits.[1]

Localizing traffic in marketable articles.

SEC. 308. After markets and market limits have been established, it becomes necessary to make regulations for their use, proper conduct and general police. It is certain that the power of the corporate authorities, in that regard, is *plenary*, within the limits prescribed by law.[2] It is usual to place all matters of detail or of a purely police nature under the supervision of the police authorities, or of some officer specially appointed for the purpose; but as to general matters, the regulations should be established by the ordinances of the municipality, or, in proper cases, of the local board of health.[3] Authority to pass the necessary and proper ordinances is usually conferred either upon the municipal council or the board of health in express terms and in ample measure. Under the ordinary grant of power to regulate markets, it is competent for the corporation so far to regulate the local commerce as to forbid sales and purchases of marketable commodities except at the designated market-places.[4] But in order

[1] City of Jacksonville v. Ledwith, 26 Fla. 163; State v. Gisch, 31 La. Ann. 544; New Orleans v. Stafford, 27 id. 417; State v. Schmidt, 41 id. 27; State v. Barthe, ib. 46; Natal v. Louisiana, 139 U. S. 621; Newson v. Galveston, 76 Texas, 559. As to the right of a private individual to establish a market-house and carry on the business of a market, *see* Twelfth St. Market Co. v. Railroad Co., 142 Penn. St. 580.

[2] Caldwell v. Alton, 33 Ill. 416.

[3] Horr & Bemis on Mun. Pol. Ordins., § 217; City of Jacksonville v. Ledwith, 26 Fla. 163.

[4] Dillon's Mun. Corp., § 380. In City of Jacksonville v. Ledwith, 26 Fla. 163, Raney, C. J., speaking on the general subject of the municipal

that such a sweeping restriction may be unquestionable, it must be accompanied by a designation of some localities where sales may lawfully be made, so that it may not be more general than a proper regard to the local market system would require.[1]

The object of thus localizing the traffic in marketable articles is to facilitate the enforcement of inspection laws and sanitary regulations. "The inspection of meats, vegetables, and other articles of provisions in order to prevent the sale and consumption of those that are unwholesome and also to preclude frauds and cheats in weights, measures, and by means of adulterations, is one of the most important of municipal duties. But to render inspection

powers in respect of markets, says: "A permit or license to a person to sell meats or fish, or other things, is not the grant of a right to maintain a market, within the meaning of the grant of power to establish and regulate markets. The establishment and regulation of a market means the right to establish and furnish certain places where the public may resort for selling and buying provisions or articles of immediate necessity, and where the owners of the articles may expose them for sale, and to regulate these places and the business done there, and includes also the right to make charges for the use of stalls and space used by those resorting there with their products to sell the same. Markets are public conveniences, and not a mere license or permit to sell his marketable property. Though the grant of authority to regulate the vending of meat, poultry, fish, fruits and vegetables will permit the legislative power of the city to ordain general regulations, applicable to all alike, as to when and where these articles may be sold, it is not one conferring the franchise of establishing a market, but it is a power to regulate the sale of articles which, but for it, could be sold anywhere and at all times. The power to establish markets cannot be used to create a monopoly of the right to sell. It is not intended for any such purpose. The right to sell at markets must be secured to all alike on the same conditions. The grant as to vending meats, etc., is one of the police powers, and it is to be exercised upon considerations, referable to the public health or welfare of the community, and not arbitrarily, nor to create a monopoly in one or several persons, nor to prohibit the trades to which it applies. [State v. Mahner, 43 La. Ann. 496.] Though under it the hours of the day, the places, and the mode or manner of and the rules for conducting the business may be designated and prescribed, and the establishment of fixed places for sale may be prohibited in localities from which their exclusion is dictated by sanitary considerations, and, as in the case of markets affording reasonably ample facilities for all who may desire to engage in vending such articles, the sales may be confined to specified places, yet all this must be done on principles of impartial and general regulation affording the same rights to all alike upon the same conditions, and not in the exercise of a partial and discretionary or arbitrary will of the law-making power or any part of it."

[1] Lamarque v. New Orleans, McGloin (La.), 28.

inexpensive and thorough, the proper officer must know where he may find the articles he is to examine, and if he must search the city through for the purpose, he would be certain, in the case of the most common articles, to perform the duty but imperfectly.

If inspection is to be complete and thorough, the articles to be inspected must be brought together in specified localities, at regular periods, or there must be other regulations that shall bring them to official notice."[1]

Extent of the power to regulate markets.

SEC. 309. The power of the legislature to delegate to municipal corporations the right to establish market limits, to regulate the sale of marketable articles, and to forbid such sales at other than the regular market-places during market hours, is perfectly well settled.[2] "The fixing the time and place at which markets shall be held and kept open, and the prohibition to sell at other times and places, is among the most ordinary regulations of a city or town police, and would naturally be included in the general power to pass laws relative to the public markets."[3]

Such regulations would also be permissible under the general welfare clause, usually embodied in municipal charters. Unless they are unreasonable or oppressive, it is the duty of the courts to enforce them.[4] They are to be construed liberally, in view of their character and purpose, and the strict rules of interpretation applicable to penal laws generally should not be permitted to interfere with their operation. It has been held, that where the public market belongs to the corporation it is competent for the city to make any regulations it may think fit,

[1] Cooley, J., Henkel v. Detroit, 49 Mich. 249.

[2] Badkins v. Robinson, 53 Ga. 613; Bowling Green v. Carson, 10 Bush (Ky.), 64; *cf.* St. Paul v. Colter, 12 Minn. 41.

[3] Bush v. Seabury, 8 Johns. 420.

[4] Davenport v. Kelly, 7 Iowa, 102; St. Louis v. Weber, 44 Mo. 547; Bowling Green v. Carson, 10 Bush (Ky.), 64; Bush v. Seabury, 8 Johns. 420; Wartman v. Philadelphia, 33 Penn. St. 202.

by way of contract with those who rent stalls for the purpose of transacting business in the markets.[1] But, generally, regulations enacted under the power to regulate markets, or under the general police powers, and whether directed to the proper internal police of markets, or to the conditions, method and times of conducting traffic in marketable articles outside the public market itself, in order to be valid, must be of a police or sanitary character in fact, and not merely an attempt to restrain trade under color of regulating it. The regulations must be reasonable and uniform in operation, calculated to promote the welfare of the community, not tending to create monopolies, nor unduly restraining trade.[2] They are not necessarily void because they operate *to some extent* as a restraint of trade. "Every regulation of trade is in some sense a restraint upon it; it is a clog or impediment; but it does not, therefore, follow that it is to be vacated."[3] It would not be an unreasonable regulation, for instance, nor unduly in restraint of trade, to prohibit the sale of marketable articles elsewhere than in the public market places, during market hours.[4] Though it has been held, that such a regulation is not authorized by a delegation of power "to establish and keep up markets,"[5] the decision has been much criticised, and certainly is not in harmony with recognized authorities. But, on the ground that, where the market limits are defined and embrace but a portion of the city in which the market is located, the

[1] Atlanta v. White, 33 Ga. 229.

[2] Caldwell v. Alton, 33 Ill. 416; Bloomington v. Wahl, 46 id. 489; Winnsboro v. Smart, 11 Rich. (S. C.) L. 551; State v. Mahner, 43 La. Ann. 496.

[3] Vandine, petitioner, 6 Pick. 187.

[4] *Ex parte* Byrd, 84 Ala. 17; Shelton v. Mobile, 30 id. 540; City of Jacksonville v. Ledwith, 9 So. Rep'r, 885; Badkins v. Robinson, 53 Ga. 613; Bloomington v. Wahl, 46 Ill. 489; Le Claire v. Davenport, 13 Iowa, 210; Davenport v. Kelly, 7 id. 102; Bowling Green v. Carson, 10 Bush (Ky.), 64; State v. Gisch, 31 La. Ann. 544; St. Louis v. Weber, 44 Mo. 547; Comm. v. Brooks, 109 Mass. 355; Dunham v. Rochester, 5 Cow. 462; Buffalo v. Webster, 10 Wend. 99; State v. Pendergrass, 106 N. C. 664; Winnsboro v. Smart, 11 Rich (S. C.) L. 551; *Ex parte* Canto, 21 Tex. App. 61; Newson v. Galveston, 76 Tex. 559. *But see* Bethune v. Hughes, 28 Ga. 560; St. Paul v. Laidler, 2 Minn. 190.

[5] Bethune v. Hughes, 28 Ga. 560.

regulations can only operate within the prescribed market limits and cannot, under the power "to regulate markets," be made to extend throughout the city, it has been held, that the city cannot restrain a merchant or dealer in family groceries from selling vegetables at his place of business *outside the market limits*, during market hours, or at any other time. Such a regulation, it was said, would clearly be unreasonable.[1]

If, however, an ordinance fixes a reasonable number of hours in each day during which the prohibition shall operate *within market limits*, leaving persons free to sell outside of market hours within those limits, and at all times without those limits, it would be reasonable and valid, beyond question.[2] On the other hand, it has been held, that an ordinance is valid which provides that no person shall retail fresh meats, except at the public market, *at any time*,[3] and equally valid if it excepts from a general prohibition of meat shops certain portions of the city.[4] It has also been decided, that an ordinance is reasonable and a regulation necessary for the support of the local market system, which confines the retail of fresh meats to the stalls of public markets in those parts of a city where such markets are accessible.[5]

Regulation of hawking and peddling.

SEC. 310. A city may prohibit all hawking and peddling about its streets of marketable articles, during certain hours of the day,[6] or at all times.[7] But such a regulation, if it excepts from its operation persons who shall have attended market, during market hours, on the market days, is partial in its operation, and on that account void.[8] And the ordinance must not make an arbitrary or unusual

[1] Caldwell v. Alton, 33 Ill. 416.
[2] Bloomington v. Wahl, 46 Ill. 489.
[3] Davenport v. Kelley, 7 Iowa, 102; St. Louis v. Weber, 44 Mo. 547; St. Louis v. Jackson, 25 id. 37; State v. Pendergrass, 106 N. C. 665; Newson v. Galveston, 76 Texas, 559.
[4] St. Louis v. Weber, 44 Mo. 547.
[5] Ash v. People, 11 Mich. 347; Davenport v. Kelley, 7 Iowa, 102; Bush v. Seabury, 8 Johns. 418.
[6] Milton v. Hoagland, 3 Penn. Co. Ct. R. 283.
[7] Shelton v. Mobile, 30 Ala. 540.
[8] Danville v. Peters, 8 Luz. L. Reg. (Pa.) 273.

definition of the terms "hucksters and peddlers," so as to include others than those who would naturally fall within the ordinary meaning of the terms.[1] It would seem, however, that hawking and peddling would usually more properly be dealt with under the powers applicable to the subject of nuisances, than under those pertaining to the regulation of markets; and so it has been held.[2]

A city has no right entirely to prevent the producers of fresh provisions from having convenient access to consumers; and a court of equity will in proper cases restrain proceedings to enforce an ordinance having that effect. The court thus interfered where an ordinance prohibited sales in the principal market, except from stalls or stands leased by the sellers, and confined farmers and gardeners, with their vehicles to the haymarket, where the accommodations were inadequate.[3] But a regulation prescribing the length of time that wagons containing perishable produce shall be permitted to remain in the streets within market limits, would be reasonable.[4]

Inspection laws.

SEC. 311. The city authorities may, if their action be not unreasonable, provide what articles shall or shall not be sold at the public markets. They may prohibit groceries from being sold there;[5] and may confine the sales to perishable articles such as are necessary for the daily support of the people, excluding all other articles.[6] And speaking generally, they may make such rules and regulations as are usual or necessary for the protection of markets against the sale of commodities unfit for commerce or consumption, as by establishing a system of inspection.[7] To this end, they may provide that a certain part of the

[1] Meays v. Cincinnati, 1 Ohio St. 268.

[2] Caldwell v. Alton, 33 Ill. 416.

[3] Hughes v. Recorder's Court, 75 Mich. 574.

[4] Comm. v. Brooks, 109 Mass. 355; People v. Keir, 78 Mich. 98.

[5] First Municipality v. Cutting, 4 La. Ann. 335; Morans v. Mayor, 2 La. 218.

Dillon's Mun. Corp., § 389.

[7] State v. Fosdick, 31 La. Ann. 256.

market shall be used exclusively for wholesale and impose penalties for selling there at retail.[1]

"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."[2] If, upon inspection, it be found that articles offered for sale in the markets as food commodities are unfit for use or consumption, they may unquestionably be seized and summarily destroyed by the proper authorities. Such articles are common nuisances, and are properly dealt with as such.

Licenses.

SEC. 312. If the power to *regulate* any particular traffic exists, then the city has power to designate limits within which it may be carried on without license, and to provide that if it be carried on elsewhere a license shall first be obtained.[3] A license may be exacted from keepers of private markets, although persons engaged in the same business in the public markets are not required to have licenses.[4] But the power "to establish and regulate markets" will not authorize an ordinance prohibiting "every farmer, gardener or person producing vegetables" from selling the same in and along the streets, without first procuring an annual license from the city authorities.[5]

[1] Strike v. Collins, 54 L. J. (N. S.) 152.

[2] Dillon's Mun. Corp., § 390; Guillotte v. New Orleans, 12 La. Ann. 432; People v. Wagner, 86 Mich. 194; Paige v. Fazackerly, 36 Barb. 392; Mayor v. Nichols, 4 Hill, 209; Rogers v. Jones, 1 Wend. 237; Yates v. Milwaukee, 12 Wis. 673.

[3] Atkins v. Phillips, 26 Fla. 281; Bloomington v. Wahl, 46 Ill. 489; Kinsley v. Chicago, 124 id. 359; Ash v. People, 11 Mich. 347; Brooklyn v. Cleves, Hill & D. 231. *See* Marmet v. State, 45 Ohio St. 63.

[4] New Orleans v. Dubarry, 33 La. Ann. 481.

[5] St. Paul v. Traeger, 25 Minn. 248. In Burlington v. Dankwordt, 73 Iowa, 170, it was held, that under the power to establish and regulate markets, a city cannot prohibit the peddling of fresh meat on the streets; certainly not, until the city has established a meat market, and not even then, unless it may be as a regulation of the market.

Nor will general power to make by-laws for the benefit of trade and for the health of the village, authorize a by-law prohibiting the sale, without license, at temporary stands or tables, of ice cream, lemonade, cakes, fruits, and such things.[1] Nor will power to pass ordinances restraining the sale of marketable articles, "during market hours," authorize the prohibition of such sales except by licensed venders.[2]

The law will not allow rights of property and the liberty to follow lawful callings to be invaded or abridged, under the guise of police regulations for the benefit of the public health, when it is manifest that such is not the real purpose of the legislative enactments. So, it will not allow excessive fees to be required for licenses,[3] where they would practically be prohibitory, and would operate to effect unjust discrimination. For example, an ordinance requiring the payment of a license fee of ten dollars per month for the privilege of selling fresh meats at retail on the streets of a village, where there was no public market, was declared to be invalid, and not a legitimate market regulation.[4]

The fee required for a license to sell outside the market limits is not a tax, but is reasonable compensation which the municipality is entitled to demand from those who do not sell in the public markets, for the additional labor of its officers and the expense occasioned thereby.[5] The amount of the fee must be reasonable, and it will be presumed to be so, unless the contrary appears on the face of the ordinance or is proved by competent evidence.[6]

[1] Barling v. West, 29 Wis. 307.
[2] State v. Mun. Ct. of St. Paul, 12 Minn. 329.
[3] *See* St. Paul v. Colter, 12 Minn. 41. *Ante*, sec. 256.
[4] Chaddock v. Day, 75 Mich. 527.
[5] City of Jacksonville v. Ledwith, 26 Fla. 163; Ash v. People, 11 Mich. 347; Marmet v. State, 45 Ohio St. 63. *See* Kinsley v. Chicago, 124 Ill. 359.
[6] Van Hook v. City of Selma, 70 Ala. 361; Atkins v. Phillips, 26 Fla. 281; Comm. v. Patch, 97 Mass. 221; Van Baalen v. People, 40 Mich. 258; St. Louis v. Weber, 44 Mo. 550.

CHAPTER XIX.

REGULATIONS TO PREVENT FIRES.

SEC. 313. Municipal powers over the subject.
314. Fire laws constitutional.
315. Extent of the power of regulation.
316. Fire laws, how construed.
317. Repair of wooden buildings.
318. Municipal license.
319. Removal of unlawful structures.
320. Summary removal is not confiscation.
321. Expenses of removal.
322. Injunctions to restrain removal.
323. Restraining violation of regulations.
324. Miscellaneous regulations.

Municipal powers over the subject.

SEC. 313. It is certainly within the scope of municipal authority, as a means of promoting the safety of the community, as well as of securing property against damages by fire, to establish fire limits, to forbid the erection of wooden buildings within such limits, and to make and enforce all other necessary and proper regulations, not inconsistent with the laws of the State, for the prevention of fires. Such regulations are permitted by a general grant of authority, in the absence of express and specific legislative grant, and are properly embraced in the ordinary police regulations of every community.[1] The opinion seems to be entertained in some jurisdictions that the power to establish regulations of this character is inherent

[1] Canepa v. Birmingham, 92 Ala. 358; McCloskey v. Kreling, 76 Cal. 511; *Ex parte* Fiske, 72 id. 125; Welch v. Hotchkiss, 39 Conn. 140; Ford v. Thralkill, 84 Ga. 169; King v. Davenport, 98 Ill. 305; First Nat. Bank v. Sarlls, 129 Ind. 201; Baumgartner v. Hasty, 100 Ind. 575; Clark v. South Bend, 85 id. 276; Monroe v. Hoffman, 29 La. Ann. 651; Wadleigh v. Gilman, 12 Me. 403; Commissioners of Easton v. Covey, 74 Md. 262; Brady v. Ins. Co., 11 Mich. 425; Alexander v. Greenville, 54 Miss. 659; Vanderbilt v. Adams, 7 Cow. 349; City of Troy v. Winters, 4 T. & C. (N. Y.) 256; Hubbard v. Town of Medford, 20 Oreg. 315; Klinger v. Bickel, 117 Penn. St. 326; Douglass v. Comm., 2 Rawle (Penn.), 262; Knoxville v. Bird, 12 Lea (Tenn.), 121; Charleston v. Reed, 27 W. Va. 681; City of Olympia v. Mann, 1 Wash. St. 389.

in every municipal corporation, indispensable for the accomplishment of the purposes for which the corporation is organized, and therefore existing entirely independent of legislative grant.[1]

Fire laws constitutional.

SEC. 314. Fire laws are to be construed strictly, in favor of individuals and against the public at large,[2] but they are not invalid merely because they operate to impair contracts for the erection of buildings, made before the enactment of the laws,[3] nor do they come within the range of constitutional inhibitions in other respects.[4] So, when an ordinance was impeached, which interdicted the alteration or repair of any wooden building, without permission in writing signed by a majority of the fire wardens, and approved by a majority of the council committee on fire department and by the mayor, it was held, that the ordinance was not unreasonable, oppressive, or special in its operation; that there was no unwarrantable delegation of power to the authorities specified; and that it did not deny to the owners of wooden buildings within the prescribed limits the equal protection of the laws, nor deprive them of liberty or property without due process of law.[5]

Extent of the power of regulation.

SEC. 315. There has been some question as to the extent to which the power to enact fire laws may be carried in practice. It has been suggested that the removal of

[1] Dillon's Mun. Corp., §§ 143, 405; Baumgartner v. Hasty, 100 Ind. 575; Clark v. South Bend, 85 id. 276; Monroe v. Hoffman, 29 La. Ann. 651. *But see* State v. Schuchardt, 42 La. Ann. 49; Des Moines v. Gilchrist, 67 Iowa, 210; Keokuk v. Scroggs, 39 id. 447; Kneedler v. Norristown, 100 Penn. St. 368; Respublica v. Duquet, 2 Yeates (Penn.), 493; Pye v. Peterson, 45 Tex. 312.

[2] Townsend v. Hoadley, 12 Conn. 451.

[3] Salem v. Maynes, 123 Mass. 372; Knoxville v. Bird, 12 Lea (Tenn.), 121. Compare City of Buffalo v. Chadeayne, N. E. Rep'r, vol. 5, page 431; N. Y. State Rep'r, vol. 45, page 765.

[4] *Ex parte* Fiske, 72 Cal. 125; Baumgartner v. Hasty, 100 Ind. 575; Monroe v. Hoffman, 29 La. Ann. 651; Wadleigh v. Gilman, 12 Me. 403; Brady v. Ins. Co., 11 Mich. 425; Klinger v. Bickel, 117 Penn. St. 326.

[5] *Ex parte* Fiske, 72 Cal. 125.

buildings existing at the time of the passage of an ordinance, forbidding the erection or maintenance of wooden buildings within the fire limits, would be giving a retroactive effect to the ordinance, and would be in excess of the power.[1] The mere fact, however, that the ordinance is to have a "retroactive" effect, so as to make the further maintenance of the structures of the prescribed class a violation of the law, will not render the ordinance invalid. The right to maintain a wooden building in any particular locality is not more sacred than other rights secured to individuals by constitutional guaranties. All such rights are held subject to the exercise of the police power in any way or to any extent that may reasonably be necessary in order to secure the safety of the community. As there can be no doubt of the constitutionality of an act authorizing such an ordinance in proper cases, the only remaining question will be, in cases where the ordinance is passed under a general grant of authority, whether the ordinance in itself is reasonable, and this is to be determined by the court, upon principles applicable to all ordinances, in the light of all the circumstances. Such an ordinance, for instance, might be reasonable if directed against the maintenance of wooden structures in a closely-built portion of a large city, which would clearly be unreasonable as applied to such structures in the outskirts of the city, or in a rural village. The ordinance would also be reasonable and valid so far as it applied to unoccupied wooden buildings, or such as, by reason of dilapidation, or the uses to which they are put, or partial destruction by fire or other causes, are in fact extra-hazardous and constitute common nuisances.[2]

[1] Horr & Bemis on Mun. Pol. Ords., § 223.

[2] *See* Harvey v. Dewoody, 18 Ark. 252; Salem v. Maynes, 123 Mass. 372; Brady v. Insurance Co., 11 Mich. 425; Green v. Lake, 60 Miss. 451; Knoxville v. Bird, 12 Lea (Tenn.), 121. As fire laws, like all others, must be reasonable, a prohibition against the erection of frame dwellings in a small rural borough would hardly be sustained. Kneedler v. Norristown, 100 Penn. St. 368.

How fire laws are to be construed.

SEC. 316. The terms of the regulations must not go beyond the authority conferred. Accordingly, where a common council, being authorized by legislative act to pass by-laws forbidding the erection of buildings of *wood*, within certain limits to be designated, ordained that the erection, within defined limits, of buildings other than those constructed of brick, stone, iron, or other incombustible materials, should be unlawful; the by-law was pronounced to be void. Furthermore, it was held, in the same case, that even if the by-law had followed the act, and been confined to a prohibition of buildings of wood, it would not have covered the case of a building of wood, thickly plastered, with the shingles laid in mortar, which was shown by the evidence to be, by reason of its location on the extreme limits of the fire district, and by reason of the materials used in construction, less liable to take fire than many brick buildings within the fire limits. A court of equity, therefore, refused to restrain the erection of such a building.[1] The case is an illustration of the rule of close construction as applied to fire laws.

Another example is afforded by a case where such laws provided that all buildings having a chimney, fire-place or stove, should have outer walls composed entirely of brick or stone and mortar, and it was held, that a barn erected in a manner conformable to law, and a shed adjoining it, the roof of which was formed by extending the roof of the barn, there being no communication between the two, were separate buildings, and the shed, though

[1] Attorney-General v. Campbell, 19 Grant Ch. (U. C.) 295. It has been held that a wooden building, originally used as a dwelling, but no longer so used, is within the prohibition of an act in regard to the erection of frame buildings within the fire limits, so as to prohibit its being raised, under a clause in the act permitting wooden dwelling-houses to be raised under certain circumstances. New York Fire Dept. v. Buhler, 35 N. Y. 177. And where power is given to a municipal corporation to establish fire limits, and prohibit the erection of wooden buildings within the same, *upon petition of owners of real estate*, the power cannot be exercised except upon such petition. Des Moines v. Gilchrist, 67 Iowa, 210.

built of wood, having no chimney, fire-place or stove, was not within the terms of the law.[1]

So it has been held, that a building constructed of wood, with its sides covered with sheet-iron, is not an iron building, within the meaning of an ordinance which permits the erection of iron buildings but prohibits the erection of wooden ones covered with sheet iron;[2] and that a building of wood, partly filled in with brick, is not an erection of wood;[3] and that erecting an addition to a wooden building and then putting up a chimney in the old part, for the use of the addition, is not an erection of "an addition having in it a chimney or fire-place;[4]" and that the removal of a building from a site within or without the fire limits to a place within such limits, constitutes a "new erection," within the meaning of a prohibitory regulation,[5] though the contrary has been held in respect of a house removed from one lot to another within the fire limits,[6] and of a wooden barn shifted from one part of the owner's lot to another part of the same lot.[7]

Regulations as to repair of wooden buildings.

SEC. 317. While the erection of wooden structures and buildings may lawfully be prohibited, the repairing of such as are already erected, if such repairs do not amount substantially to a new erection, cannot be prevented by

[1] Townsend v. Hoadley, 12 Conn. 541. *See* Reg. v. Howard, 4 Ont. 377. In an action to recover a penalty for violation of an ordinance making it unlawful for any person without consent of the warden and burgesses, to erect any building or addition to a building within certain specified limits, unless the outer wall and roof were made of some metallic or mineral non-combustible material, it appeared that a building was partially destroyed by fire; that the owner rebuilt one portion of it, and the same was immediately occupied by tenants; and that he then rebuilt the other portion; and it was held, that this was not the erection of an *addition*, within the meaning of the law, and that the owner had the right to rebuild in parts, and at his own convenience. Borough of Stamford v. Studwell, 60 Conn. 85.

[2] Charleston v. Reed, 27 W. Va. 681.

[3] Stewart v. Comm., 10 Watts (Penn.), 307. *See* Tuttle v. State, 4 Conn. 68.

[4] Daggett v. State, 4 Conn. 60.

[5] Wadleigh v. Gilman, 12 Me. 403. *But see* State v. Brown, 16 Conn. 54; State v. City of Kearney, 25 Neb. 262; Stewart v. Comm., 10 Watts (Penn.), 307.

[6] Cleveland v. Lenze, 27 Ohio St. 383.

[7] Brown v. Hunn, 27 Conn. 332.

municipal ordinance. An ordinance forbidding ordinary repairs to existing buildings would be unreasonable. If the buildings without such repairs are not in themselves nuisances, and are not, in such condition, so objectionable as to warrant legislation or proceedings for their removal, they certainly do not take on a more hazardous character by going through process of repair.[1] But an ordinance prohibiting the erection or *enlargement* of any building, except with brick or stone, and providing that no wooden building should be enlarged without permit from the local authorities, has been sustained.[2] So also has an ordinance providing that "no person shall repair any wooden building partially destroyed by fire, unless he shall have previously obtained permission from the common council to do so, and in no case where the proposed repairs or alterations will increase the fire risk shall such permission be granted."[3]

A material alteration or enlargement of a wooden building by additions to the height and extension of the sides, so as to convert a blacksmith's shop into a cabinet-maker's warehouse and shop, is within the prohibition of an ordinance against the erection of wooden buildings.[4] But entirely remodelling a meeting-house or joiner's shop and converting it into a dwelling is not, it is said, erecting a dwelling-house;[5] nor does the building of an addition of the same height and with the same slope of roof, to the rear of a structure having only one story, amount

[1] Brown v. Hunn, 27 Conn. 332; *Ex parte* Fiske, 72 Cal. 125; State v. Schuchardt, 42 La. Ann. 49; Brady v. Ins. Co., 11 Mich. 425; Stewart v. Comm., 10 Watts (Penn.), 307. An ordinance is invalid which arbitrarily attempts to take from the owner of a frame building all power to make repairs necessary for its preservation, or necessary for its enjoyment, regardless of the effects which such repairs may have upon the public, or upon the rights of others; and which applies with equal force to buildings detached and remote from all others as to those in immediate proximity to others; and which applies not only to repairs which would tend to create danger, but also to those which would serve to remove or diminish danger. First Nat. Bank v. Sarlls, 129 Ind. 202.

[2] *Ex parte* Fiske, 72 Cal. 125; McCloskey v. Kreling, 76 id. 511.

[3] Brady v. Ins. Co., 11 Mich. 425.

[4] Douglass v. Comm., 2 Rawle (Penn.), 262.

[5] Booth v. State, 4 Conn. 65.

to a new erection.[1] And reshingling an old roof is an ordinary repair.[2]

Municipal license.

SEC. 318. As it is clear that a literal compliance with a regulation prohibiting the erection or repair of a wooden building might work, in some instances, useless hardships to individuals without corresponding advantage to the community, it is proper to allow the erection or repair under license from the municipal authorities. In such case, the discretion as to granting or refusing the license is considered a sufficient safeguard. A system of this kind would doubtless be regarded as permissible, whenever authority is conferred to forbid the erection or repairs absolutely.[3] "The repair of a leaking roof or broken windows would be necessary to the comfort and health of a family, without enhancing the danger which the framers of the ordinance sought to provide against; and repairs of a more extensive character might be made to particular buildings standing in particular localities, without increasing the fire risks. It is equally clear that no general rule could be established beforehand that would meet the emergencies of individual cases. For this reason, the power to license or to give relief in particular instances is conferred usually upon certain authorities,"[4] and a reasonable fee may be charged for issuing the license.

Removal of structures unlawfully erected.

SEC. 319. When an ordinance has been passed prohibiting the erection of wooden buildings, the municipal authorities may promptly remove any buildings erected or in course of construction in violation of the law, without

[1] Tuttle v. State, 4 Conn. 68.
[2] Reg. v. Howard, 4 Ont. 377.
[3] Inhabitants of Quincy v. Kennard, 151 Mass. 563.
[4] *Ex parte* Fiske, 72 Cal. 125; Welch v. Hotchkiss, 39 Conn. 141; Hine v. New Haven, 40 id. 478; King v. Davenport, 98 Ill. 305. *See* Monroe v. Hoffman, 29 La. Ann. 651.

any preliminary proceedings whatever against the owner.[1] And if the authorities be empowered summarily to tear down and remove buildings constructed of combustible materials, or otherwise, in violation of the fire laws, the owner is without remedy;[2] unless he has not in fact violated the ordinances, in which case he may recover damages or enjoin the threatened removal.[3] "A satisfactory and lawful regulation may otherwise be defeated and rendered ineffectual. The removal is made to prevent the hazard of the continuance of the combustible matter in a dangerous position and not with the view to punish the wrong-doer and subject him to loss. If he thereby sustains a loss, it is the direct consequence of his unlawful act, of which he has no right to complain."[4] Nor will it avail him as an excuse, that other like buildings have been suffered to stand without complaint.[5]

But where the authorities are empowered to *direct* the removal of all buildings within the fire limits which may be damaged to a certain extent, they are not permitted in the first instance to tear down and remove such a building, or cause that to be done, but they are empowered only to *direct* the tearing down and removal, and the person to be directed is the owner. In such cases, stringent summary measures are not to be resorted to until the owner has first had opportunity to make the removal himself.[6] Indeed, reasonable time should always be given to the owner of the unlawful structure to remove or alter it so as to comply with the requirements of law, before a re-

[1] McKibbin v. Fort Smith, 35 Ark. 352; Ford v. Thralkill, 84 Ga. 169; King v. Davenport, 98 Ill. 305; Baumgartner v. Hasty, 100 Ind. 575; First Nat. Bank v. Sarlls, 129 id. 202; Monroe v. Hoffman, 29 La. Ann. 651; Wadleigh v. Gilman, 12 Me. 403; Salem v. Maynes, 123 Mass. 372; Aronheimer v. Stokley, 11 Phila. 283; Klinger v. Bickel, 117 Penn. St. 326; Knoxville v. Bird, 12 Lea (Tenn.), 121; Charleston v. Reed, 27 W. Va. 681.

[2] King v. Davenport, 98 Ill. 305; Baumgartner v. Hasty, 100 Md. 575.

[3] McKibbin v. Fort Smith, 35 Ark. 352.

[4] Wadleigh v. Gilman, 12 Me. 403; Monroe v. Hoffman, 29 La. Ann. 651.

[5] Charleston v. Reed, 27 W. Va. 681.

[6] Louisville v. Webster, 108 Ill. 414.

moval is undertaken by the corporate authorities;[1] unless the necessity is urgent, in which case a removal may be made without notice or any form of judicial proceeding.[2]

Summary removal is not confiscation.

SEC. 320. The summary destruction of buildings erected or maintained in violation of fire laws does not amount to a confiscation or forfeiture of property, in the legal sense, but is rather in the nature of an abatement of a common nuisance. The removal of the buildings or their demolition may cause a loss to the owner, but there is no forfeiture of them to the public or to any one else.[3] Yet, inasmuch as summary proceedings to enforce such local laws are manifestly in derogation of the rights of the individual citizen, the clauses in municipal charters conferring power to take such measures are to be strictly construed in favor of the owner of the property and against the municipality.[4]

Expenses of removal.

SEC. 321. "In all cases," it is said, "where it is necessary, in order that the remedy may be effectual to secure the purposes of the law, to tear down or remove the offending structure, considerable expense may be incurred by the municipality, and some doubt has been suggested as to whether this should be reimbursed by the owner. But it would seem to be settled law that, though the materials of the building removed still belong to the person who erected the building, or to his successors in interest, the corporation may lawfully have its remedy against them, if necessary, in order to secure compensation for the expenses incurred in their removal."[5] Accordingly, an ordinance has been held to be valid and enforceable which provided that any

[1] Hine v. New Haven, 40 Conn. 478.

[2] *Ante*, sec. 319, note 1.

[3] Baumgartner v. Hasty, 100 Ind. 575; Klinger v. Bickel, 117 Penn. St. 326.

[4] Louisville v. Webster, 108 Ill. 414. *See* Frank v. Atlanta, 72 Ga. 428; Kneedler v. Norristown, 100 Penn. St. 368.

[5] Horr & Bemis on Mun. Pol. Ordins., § 160; Mitchell v. Flammer, 53 N. Y. 413. *See* Kemper v. Burlington, 81 Iowa, 354.

person violating the same should be compelled to remove the prohibited structure, or pay the cost of removal by the city authorities, with the addition of twenty per centum, and also pay a penalty of fifty dollars for every day the structure should remain standing within certain defined limits.[1] It has also been held that such an ordinance does not restrict the municipality to the remedy by imposition of fine or penalty, but permits the demolition of a building in course of construction, after notice to the owner that the ordinance will be enforced.[2] It would, indeed, be proper as a part of the judgment in a suit for such penalties, to direct the police officers, if the building is in process of erection, to prevent further work upon the building,[3] and, if the building be already erected, it would probably be allowable, under the practice in some States, to insert in the judgment in such action a direction to the officers to remove it in case the owner refuses to do so.

Equity will not restrain removal.

SEC. 322. A court of equity will not interfere, at the instance of one who has erected or is maintaining a structure in violation of the fire laws, to restrain the removal of such structure by the municipal authorities, even though in making such removal they are acting in excess of their lawful powers. The complainant will be left to his remedy at law; for being himself a violator of the law, he is in such case in no proper position to invoke the assistance of a court of equity. Moreover, the court will not undertake to pass upon the question whether there is lawful occasion for the exercise of summary measures, by the executive authorities; that being a question to be decided by themselves, in the exercise of their discretion, and at their peril.[4] Nor will the case be any more favorable for

[1] Klinger v. Bickel, 117 Penn. St. 326. *See* Canepa v. Birmingham, 92 Ala. 358.

[2] Canepa v. Birmingham, 92 Ala. 358.

[3] Charleston v. Reed, 27 W. Va. 681.

[4] Ferguson v. City of Selma, 43 Ala. 398; Potter v. Des Plaines, 123 Ill. 111; State v. City of Kearney, 25 Neb. 262; Aronheimer v. Stokley, 11 Phila. 283.

the complainant if it appear that, pending the proceedings against him for violation of the law, the building, originally combustible, has been made substantially fire-proof.[1] But a bill in equity may be maintained against municipal authorities to prevent their interference with the erection and enlargement of buildings, either when the ordinance under which they assert the right to interfere is void, or when the complainant's structure is not within the terms of the ordinance,[2] provided the circumstances of the case render such interposition absolutely necessary to prevent irreparable damage, or to protect rights in which the public have an interest. It is to be observed that, ordinarily, a court of equity will refuse to entertain the question whether the ordinance is or is not valid, and, irrespective of its character, will deny an application for writ of injunction, where complainant has an adequate remedy at law.[3] But in some cases, where it appears that the authorities threaten to exercise their powers unnecessarily, so as to inflict damage beyond what is strictly warranted by the public exigency, the court will restrain the excessive exertion of the municipal powers and limit the remedial measures to the necessities of the case. Thus, for example, the entire removal of a building used as a blacksmith shop was forbidden, on condition that the occupant should not make further use of it for that purpose, nor run a forge therein.[4]

Restraining violation of regulations.

SEC. 323. On the other hand, a court of equity will not restrain by injunction the threatened violation of laws forbidding the erection, repair or removal of wooden structures within fire limits, unless it is made to appear clearly that the threatened act will result in the creation of a common nuisance in fact, and not merely a nuisance

[1] Hine v. New Haven, 40 Conn. 478.

[2] Montgomery v. Louisville, etc., R. Co., 84 Ala. 127.

[3] Dunham v. New Britain, 55 Conn. 378; Burnett v. Craig, 30 Ala. 135; Garrison v. Atlanta, 68 Ga. 64.

[4] Dupree v. Brunswick, 82 Ga. 727.

within the meaning and intent of a statutory enactment or municipal police regulation.[1] For, it is said, if a proper ordinance is framed, with appropriate penalties, the remedy at law will be adequate.[2] The principle on which the court refuses to enjoin, at the instance of the municipality, even where the ordinance directs that a suit for injunction shall be brought against any person about to violate its provisions, has been declared to be, "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*."[3]

Miscellaneous regulations.

SEC. 324. Regulations for the prevention of fires are not restricted to the erection and repair of buildings, but may reasonably be extended to the prohibition of the erection of wooden fences or sidewalks or other structures;[4] or to the keeping of gunpowder, nitro-glycerine, petroleum, naphtha, benzine, gasoline, or any other highly inflammable or explosive substances within the fire limits, except by special permission, or otherwise than in quantities not exceeding a specified amount, in properly constructed inclosures or receptacles;[5] or to the manner of

[1] High on Injunctions, §§ 748, 1248. Mygatt v. Gœtchins, 20 Ga. 530; Blanc v. Murray, 36 La. Ann. 162; St. Johns v. McFarlan, 33 Mich. 72; Green v. Lake, 54 Miss. 540; Mayor of Manchester v. Smyth, 64 N. H. 380; Mayor of Hudson v. Thorne, 7 Pai. Ch. 261; Ogden v. Welden, 40 N. Y. State Rep'r, 235; 15 N. Y. Supplt. 790; Young v. Scheu, 56 Hun, 307; Stillwell v. Buffalo Riding Academy, 21 Abb. N. C. 472; Duncan v. Hayes, 22 N. J. Eq. 25; Dorsey v. Allen, 85 N. C. 358; Phillips v. Allen, 41 Penn. St. 481; Rhodes v. Dunbar, 57 id. 274; Horstman v. Young, 13 Phila. 19; Lancaster v. Shaub, 7 Lanc. L. R. (Penn.) 340; Waupun v. Moore, 34 Wis. 450; City of Janesville v. Carpenter, 77 id. 288. *But see* First Nat. Bank v. Sarlls, 129 Ind. 201.

[2] Master, J., St. Johns v. McFarlan, 33 Mich. 72.

[3] Lyon, J., Waupun v. Moore, 34 Wis. 450; Dunning v. Aurora, 40 Ill. 481; Clark v. Donaldson, 104 id. 369; Ogden v. Welden, 40 N. Y. State Rep'r, 235; 15 N. Y. Supplt. 790. A statute authorizing a court of equity to issue injunctions restraining nuisances, confers no new or additional powers on the court. Andover & K. R. Co. v. Andover R. Co., 49 Me. 392.

[4] Macon v. Patty, 37 Miss. 378; but not under the usual delegation of authority, to lumber yards. Des Moines v. Gilchrist, 67 Iowa, 210.

[5] Wharton's Cr. Law, § 2390. Harley v. Heyl, 2 Cal. 477; Williams v. Augusta, 4 Ga. 509; Clark v. South Bend, 85 Ind. 276; City of Richmond v. Dudley, 129 Ind. 112; Brady

storing or disposing of ashes.[1] The cleaning of chimneys may be made compulsory, though an ordinance would be void, it is said, which attempts to restrict the right of cleaning chimneys to an official inspector.[2]

v. Ins. Co., 11 Mich. 425; Cotter v. Doty, 5 Ohio, 393; Davenport v. Richmond, 81 W. Va. 636; Anderson v. Savannah, 69 id. 472.

[1] Holborn Union v. St. Leonards, 2 Q. B. D. 145; *Ex parte* Casinello, 62 Cal. 538.

[2] Horr & Bemis on Mun. Pol. Ordins., § 223; Reg. v. Johnston, 38 U. C. Q. B. 549.

CHAPTER XX.

BUILDING LAWS.

SEC. 325. Municipal powers.
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Municipal powers.

SEC. 325. Among the chief powers and duties of municipal corporations, enumerated in their charters or specified in the general incorporation laws, is that of regulating and controlling the construction of buildings and of prohibiting and preventing the erection or maintenance of any insecure or unsafe buildings or other structures, within the corporate limits. The general police powers extend over such matters, so far as they have relation to the public health and security, and the local laws made in the exercise of these powers find their sanction, like all other purely police regulations, in the right of self-protection which is inherent in every community. Provision is accordingly made either in the general statutes, in the municipal charters, or in the local laws enacted under the police powers, for the appointment of proper officers to

inspect the condition and supervise the construction of buildings;[1] or this duty is imposed upon some bureau of the local government, as its fire department. It is proper and is sometimes required that all building inspectors or officers of the bureau of inspection of buildings, except clerks and subordinate agents, shall be practical builders, or architects, or house carpenters, or masons; that they shall have served a regular apprenticeship as such, or hold certificates or licenses entitling them to pursue their calling as such; and that before their appointment to office, their competency shall have been certified upon an examination.

General features of building laws.

SEC. 326. The building laws usually provide, that no structure or building shall be constructed, altered or repaired in the city, except in conformity with the provisions of the laws or the regulations made in pursuance thereof. These laws or regulations have reference to the manner in which foundation walls shall be laid and their thickness; the thickness of the walls of dwelling-houses, proportioned to the height of the buildings; the strength of beams and girders and the method of resting and fixing them; the strength of sustaining columns and arches, and of floors; the location and construction of chimneys and flues, and the pipes of steam or hot air furnaces; the furnishing of business houses with fire-proof doors and shutters; the planking and sheathing of roofs; the height of buildings; and the kind and quality of the materials used in the building. Such regulations, being in derogation of private rights, must, on general principles, be construed strictly against the public and in favor of the individuals who are affected by them. Yet, so far as they are reasonable in their character, and adapted to accomplish the purpose for which they are designed, they usually pass

[1] *Re* Building Inspectors, 17 R. I.

unchallenged, and are uniformly sustained,[1] even as applied to buildings erected before their passage.[2]

Common form of a building ordinance.

SEC. 327. Building ordinances, in their usual form, the main features of which, in respect particularly of permits for erecting or repairing buildings, are indicated in a case cited in the notes,[3] provide for the appointment of a building inspector, and require every person desirous of erecting a building to apply to the inspector for a permit for the purpose, and to furnish him with a written statement of the proposed location, dimensions, and manner of construction, and the materials to be used, and a plan of the plumbing, draining, and ventilation, together with plans and specifications of the proposed building, which are to be delivered to and remain with the inspector a sufficient time to allow the necessary examination of the same; after which, if it shall appear to the inspector that the laws and ordinances are complied with, he shall give the permit asked for, upon the payment of a prescribed fee, the amount of which may be graduated according to the estimated cost of the proposed building. Blank forms for the detailed statement required by the ordinance are furnished to the applicant at the office of the inspector, which, when properly filled up, are to be signed by the applicant, and returned to the inspector, with an agreement that the building will be constructed according to the statement and the ordinances of the city. It is declared to be unlawful to construct a building without a permit, and a penalty is imposed for so doing;[4] or it is provided

[1] *Ex parte* White, 67 Cal. 102; St. Paul v. Dow, 37 Minn. 20; Hennessy v. St. Paul, 37 Fed. Rep'r, 565; Hubbard v. Paterson, 45 N. J. L. 310; People v. D'Oench, 111 N. Y. 359; 44 Hun, 33, Matter of Unsafe Building, 1 Abb. N. C. 464; Philadelphia v. Coulston, 13 Phila. 182.

[2] Fire Department v. Wendell, 13 Daly, 427.

[3] St. Paul v. Dow, 37 Minn. 20.

[4] Commrs. of Easton v. Covey, 74 Md. 262. Plans and specifications approved by the superintendent of buildings required that the chimney breasts in the party-walls of the buildings proposed to be erected should be twenty-eight inches in thickness. The buildings were erected in full compliance therewith, save that the chimney breasts were built twenty instead of

that the authorities may cause to be altered or pulled down any work began or done in contravention of the law. The inspector is required to keep a record of all permits issued, and a register of the number, size, etc., of all buildings erected. It is also made his duty to inspect, from time to time, all buildings in process of erection, to see that the foundations are adequate and secure; that the buildings are being constructed according to the provisions of the building laws; and that the materials are suitable and of sufficient strength and solidity to answer the purpose for which the buildings are designed. When a building is completed, the inspector is required, on application, to give the owner a certificate that the building is in all respects conformable to law and properly constructed. The same form of proceeding may be required when substantial repairs are to be made to a building already erected.

Fee for a building permit.

SEC. 328. No other fee is usually required of the owner than the fee for the permit. This is not a tax, nor is its exaction an exercise of the taxing power. It is simply a reasonable sum, collected of the party interested for the purpose of defraying, in part at least, the necessary expense attending the granting of the permit. Nor is there any valid objection to this fee being graduated according to the estimated cost of the building. And when the ordinance is not explicit as to who is to estimate the cost of a proposed building, it is held, that "the ordinance contemplates that in his statement the applicant shall furnish the inspector with the means of ascertaining and determining every fact necessary to be determined in connection with the issuing a permit, included in which should

twenty-eight inches thick. As the statute contained no provisions fixing the thickness of chimney breasts there was no liability to the penalty provided for erecting buildings in violation of the methods or construction required by the statute. A penalty must be expressly created and imposed by the statute; it cannot be raised by implication. Fire Department v. Braender, 14 Daly, 53.

be an estimate of the cost of the proposed building; and that this estimate, thus furnished, is the basis upon which the amount of the fee for the permit is to be computed, and is conclusive upon this point, at least, unless it is fraudulent."[1]

Discretionary powers of officers.

SEC. 329. The determination of the inspector, or of the board of examiners, or other officers charged with the duty of passing upon applications and issuing building permits, as to the mode of construction of a proposed building, or the kind of materials to be used, or as to any other matter in respect of which they are clothed with discretionary powers, is final and conclusive. It cannot be reviewed or reversed by the courts, if the requirements are not wholly impracticable, even if they are unreasonable. The point has been expressly adjudicated. The defendant filed in the office of the bureau of inspection of buildings, in the fire department of the city of New York, plans and specifications for the erection of a wooden shed on its pier, and made application for a permit to erect the same. The application was put before the board of examiners and was granted, upon certain conditions, among which was one that the interior of the building should be covered with iron wire netting, plastered with mortar. The defendant erected and occupied the building, but without complying with the condition mentioned. An action for the penalty prescribed by law and to restrain the defendant from further occupying and using the building, until the requirements of the permit for its erection should be complied with, was sustained. The court refused to review the determination of the board upon which the requirements were based.[2]

Purposes of the laws.

SEC. 330. Where authority to regulate the construction

[1] St. Paul v. Dow, 37 Minn. 20.

[2] Fire Department v. Atlas Steamship Co., 106 N. Y. 506.

of buildings is given expressly for the purpose of securing the health or safety of the community, all ordinances passed in pursuance of such authority must have reference to this purpose. So, where a city charter erected a health department, and empowered that department, among other things, to regulate and control the manner of erecting and constructing buildings in the city, but contained no "general welfare" clause, or clause conferring general police powers, it was held, that the power of regulation extended only to such matters as affect health in the sense of freedom from disease, and would not justify an ordinance requiring the outside walls of buildings to be of a specified thickness.[1]

How construed.

SEC. 331. The terms of an ordinance will never receive a strained construction to justify interference with private rights.[2] But the law will in every case be so construed as to give it a reasonable application with reference to the object sought to be effected.[3] So, an act prescribing that the height of dwelling-houses or houses used or intended to be used as dwellings for more than one family, thereafter to be erected in the city, should not exceed a certain number of feet, is not applicable to *hotels*, but simply to tenements and apartment houses.[4] So, too, while it is perfectly proper to require that persons who are about to erect any kind of building shall give the authorities notice of their intention and file plans of the proposed structure,[5] such a regulation will not apply to mere *temporary* structures.[6]

[1] Hubbard v. Paterson, 45 N. J. L. 310.

[2] Bowers v. Coulston, 11 Phila. 182. *See* Frank v. Atlanta, 72 Ga. 428.

[3] *See* Meadows v. Taylor, L. R., 24 Q. B. D. 717, Foot v. Hodgson, 25 id. 160, Hobbs v. Dance, L. R., 9 C. P. 30; Shiel v. Sunderland, 6 H. & N. 796.

[4] People v. D'Oench, 111 N. Y. 359.

[5] Hall v. Nixon, L. R., 10 Q. B. 152; Baker v. Portsmouth, 3 Exch. D. 157.

[6] Fielding v. Rhyl Improvement Commrs., L. R., 3 C. P. D. 272.

SEC. 332. The terms of a building ordinance must not go beyond the authority conferred. Thus, if there be authority to forbid the erection of buildings of *wood*, and the ordinance forbids the erection of buildings other than those of brick, stone, iron, or other incombustible material, the ordinance will be void.[1] And where a statute authorized municipal corporations to pass such ordinances regulating the construction and use of buildings as are reasonable and necessary "for the prevention of fire and the preservation of life," it was held, that an ordinance could not lawfully be passed which absolutely prohibited the erection or alteration of any building, except a dwelling-house, without a written permit from the board of aldermen. Of such an ordinance the court said: "It does not merely forbid the erection of any building which is hazardous, or which exposes other property or persons to danger. It does not require the board of aldermen to adjudge and determine that it is necessary to prohibit any proposed building, for the purpose of securing the prevention of fire or the preservation of life. On the contrary, it gives them the power, by refusing a permit, to prevent the erection of any building except a dwelling-house, for any reason which may be satisfactory to them. Under the ordinance, they may refuse or permit because, in their opinion, it is desirable that certain parts of the city shall be used only for handsome dwelling-houses, and that all buildings for the purposes of trade shall be excluded, though in no sense dangerous. Whatever may have been the intention of its framers, the ordinance is broader than the statute in its scope, and cannot be justified as a reasonable exercise of the authority conferred by the statute."[2]

Must be reasonable.

SEC. 333. Building laws are often enacted by municipal

[1] Attorney-General v. Campbell, 19 Grant Ch. (U. C.) 299.

[2] Newton v. Belger, 143 Mass. 598.

corporations under powers delegated in general terms. Indeed, the local regulations in most instances are the exercise of general powers. As they must necessarily interfere to some extent with rights of property, this is an additional reason why the rule should be carefully applied, that it is necessary to their validity that they should be *reasonable* and properly adapted to effect the desired result, namely, the security of the health and lives of the public. Accordingly, a by-law defining fire limits, requiring the roofs of buildings within those limits to be of certain materials, or laid in mortar, and providing that no roof already existing shall be re-laid or re-covered except in the manner and with the materials prescribed, is invalid, in so far as it refers to ordinary repairs to existing buildings; "for, if the by-law be valid to its full extent, it must practically prevent any repair, great or small, to the structure of a wooden house, except with the prescribed materials," which, in a particular case, might not be at all suitable.[1]

Special permits.

SEC. 334. In order to mitigate the hardships which would follow the application to particular cases, without exception, of general regulations prescribing the form of construction or the kind of materials to be employed, in the erection, alteration, or repair of a building, the building laws sometimes provide that the inspector or board of examiners shall permit an applicant to adopt another form of construction or employ other materials than those prescribed by law, when he shows that they will be equally good or more desirable in the specific case. Considerable latitude of discretion is permitted to the public officers by such a provision in the laws; but they will not be allowed to nullify the law, in the exercise of such discretion — they will not be authorized, for instance, to permit the use of wood as a material in the place of non-

[1] Reg. v. Howard, 4 Ont. 377.

combustible substances mentioned in the law. And it is said that their decision allowing a substitution of materials will be void for want of jurisdiction, if no evidence has been laid before them tending to show that the materials proposed to be used are equally as good as, or more desirable than, those mentioned in the law.[1]

Special regulations.

SEC. 335. If a building is to be erected for particular purposes, as for conducting a manufacturing business or other industrial pursuit therein, it is proper that the building laws should provide specifically for the manner of construction and the kind of materials that shall be used. So, an ordinance of San Francisco, prescribing the manner in which buildings designed for laundry purposes should be constructed and the materials which should be used, was declared to be valid.[2] And an act would unquestionably pass without challenge which should provide for the public security by requiring that in all buildings of a public character, such as hotels, churches, theaters and school-houses, the halls, doors and stairways should be so arranged as to facilitate egress in cases of fire and accident; and that in places of amusement and public worship all aisles and passage-ways should be kept free from obstructions during any performance or service. If such an act should require that the aisles in theaters should be kept free from chairs, and that no person should be permitted to occupy them, during a performance, it would so manifestly be in the interest of public security, that it would receive the most liberal judicial construction in aid of its beneficent purpose, and as so construed it would not give the manager or proprietor of a theater any discretion to allow persons to stand in the aisles, even though the number should not be so great as to prevent free exit of others in case of danger. Accordingly, it is

[1] People v. D'Oench, 44 Hun, 33.

[2] *Ex parte* White, 67 Cal. 102; Carroll v. Lynchburg, 84 Va. 803.

not necessary, in an action to recover the penalty for a violation of the act, to prove that the manager knew that any persons were standing in passage-ways at the time in question, or that he gave permission to any one to occupy the passage-ways. That a number of tickets for a performance were sold by the manager's agents after they knew that the seats in the house were filled, is sufficient proof to sustain a recovery, in the absence, at least, of evidence that such sale was in opposition to the manager's wishes.[1]

Unsafe structures.

SEC. 336. In the case of structures which have become dangerous from want of repairs, if the law prescribes the mode of proceeding to compel the owner or occupant to make the necessary repairs, the terms of the law must be literally and strictly followed.[2] This rule has been applied to the case of proceedings under the law on this subject in force in the city of New York. The statute provides that when it is reported to the inspector of buildings that a structure is in an unsafe or dangerous condition, the fact shall immediately be entered upon the docket of unsafe buildings; that the owner shall be served with notice requiring such things to be done as will remove the dangerous condition; that, upon his non-compliance or refusal to obey the order, a further notice shall be served, that a survey of the premises will be made at a specified time and place, by competent persons, and in case, under such survey, the premises shall be reported as unsafe or dangerous, the report will be placed before a court having jurisdiction, and that a trial upon the allegations and statements contained in the report will be had before the court, to determine whether the structure shall be repaired, or taken down and removed. A report of the survey reduced to writing constitutes the issue to be placed before

[1] Fire Department v. Stetson, 14 Daly, 125.

[2] Frank v. Atlanta, 72 Ga. 428.

the court for trial. The decision of the court is final. If the report is sustained, a precept issues, to the proper officers, commanding them to cause the premises to be repaired or removed, in accordance with the decision. At the same time judgment is rendered for the costs and expenses of the proceedings, which becomes a charge upon the premises. But it is provided, that upon the issuing of the precept, the owner of the premises, or any party interested, upon proper application to the officers, shall be allowed to perform the requirements of the precept, at his own expense, provided the same be done immediately and in accordance with the requirements of the precept, upon payment of all costs incurred up to that time.

SEC. 337. It has been held, with reference to this law, that the notice, specifying the particulars in which premises are alleged to be unsafe, and with a view to which a survey will be made, serves as the foundation and limitation of the jurisdiction of the courts to entertain litigation of the question, and the only matter which can be tried is the truth as to the defects mentioned in the notice. To compel repairs in other respects, a new survey upon proper notice must be had.[1] The notice will be sufficient if it states the particulars as to which complaint is made with such precision as to leave no reasonable doubt as to the alterations, repairs or additions required.[2] But where the surveyor reports that the causes of the dangerous condition of a building are structural defects which cannot be remedied by any alterations or improvements, or otherwise, but that the premises ought to be demolished, it seems that it is not necessary to specify in detail in what the structural defects consist.[3]

[1] Matter of Unsafe Building, 1 Abb. N. C. 464.

[2] Fire Department v. Williamson, 16 Abb. Pr. 402; Fire Department v. Buffum, 2 E. D. Smith, 511.

[3] Flight v. St. George the Martyr, 24 L. T. 24.

SEC. 338. In proceeding under the building laws to tear down or brace up a dangerous wall or building there must be no trespass upon adjoining premises, unless it be absolutely necessary in order to accomplish the end in view. While the legislature may undoubtedly confer power upon officers in proper cases to prevent the falling of a wall or building, or other structure, the continuance of which would be dangerous to property or lives, there is a qualification upon the use of such delegated power, and it is that an emergency shall exist such as renders an exercise of the power necessary. "When the contemplated emergency presents itself, the authorities are not only called upon to act, but should do so promptly, in the discharge of their duty to the public. If the thing to be done has a purely local situs, such, for example, as a wall to be taken down or sustained, and it cannot be done without invading the property of another, the exigency authorizes the invasion, and it must be submitted to. The sacrifice which is thus made, if any, is a contribution to the general good which every citizen is called upon to make, and upon which the fabric of society depends. Whether the emergency really exists, however, is a subject under the control of the courts, and their process may be invoked for protection, if protection should be necessary."

An officer of a building department, being merely a ministerial officer, cannot justify his acts, as being done in the exercise of discretionary powers, unless a case exists which calls for the exercise of his discretion, and this is not shown unless the *necessity* of the proposed action is proved.[1]

Enforcing the laws.

SEC. 339. It is not an unreasonable provision in building laws, that the authorities may cause to be altered or pulled down any work begun or done in contravention of

[1] Tribune Association v. The Sun, 7 Hun, 175. *See* Underwood v. Green. 42 N. Y. 100.

the law ;[1] but it would be contrary to fundamental justice to allow that course to be taken, in any case, without giving the owner notice and an opportunity to show cause against it.[2] And, certainly, where plans of a proposed building have once been approved, and the owner has proceeded to carry them into execution, the authorities cannot be permitted afterward to object to his building according to those plans, and set in motion the extreme remedies prescribed for a violation of the law, without affording the owner an opportunity of showing cause.[3]

Where the law provides for the repair of buildings in a dangerous condition by public officers, after notice to the owner or occupant to make the repairs, and his refusal to do so, he cannot be charged with the cost of the repairs, unless it be shown that they were necessary. The law will be unconstitutional, it is said, if it forbids him to prove in defense to an action for such costs that the repairs were not necessary, or that for any other reason he was not compelled to make them at his own cost, unless the law has provided some mode of proceeding, amounting to due process of law, by which the questions as to necessity of the repairs and the duty of the owner or occupant to make them can be determined, upon notice to him and after opportunity has been afforded him to be heard upon the question. The law must furnish some just form or mode in which the duty of the citizen shall be determined before he can be visited with a penalty for non-performance of the alleged duty. The proceeding must be in its nature judicial, although it is not necessary that it should be before one of the ordinary judicial tribunals of the State.

When the penalty is incurred.

SEC. 340. The penalty imposed by building laws for

[1] Hall v. Nixon, 10 Q. B. 152; Baker v. Portsmouth, 3 Exch. D. 157.
[2] Hopkins v. Southwick Loc. Bd. of Health, L. R., 24 Q. B. 712; Cooper v. Wandsworth Dist. Bd. of Works, 14 C. B. (N. S.) 180.
[3] Masters v. Pontypool Loc. Gov. Bd., 9 Ch. D. 677.

erecting a building, without having previously taken out a permit from the office of the inspector of buildings, is incurred the moment the building is begun without a permit, and it matters nothing how little may have been done in the process of construction. Nor is the penalty waived by acceptance of the fee for a permit and the granting of a permit after a suit has been commenced for the penalty. In such a case it was said: "There is no provision in the law that the penalty shall be remitted upon the subsequent taking out of a permit, nor have the inspectors any right to refuse the permit when applied for. The doing of a thing which a man is bound by law to do, and which he cannot lawfully refuse to do, cannot be said to be a waiver of any thing. Nor can public officials, without express authority, remit a penalty which has been incurred by an infraction of the law. The most that they can do is to refrain from suing for it."[1]

Fire-escapes.

SEC. 341. It is a common subject of legislation, either of the State or of municipal corporations, under their powers relating to the construction of buildings, or under the usual authority to take all measures necessary to secure persons and property from the dangers of fire, to require that all factories, hotels, theaters and buildings used for schools or public assemblies, shall be suitably supplied with fire apparatus and extinguishers, and shall be furnished with adequate means for the escape of persons therefrom in case of fire. The inspection of buildings with a view to the enforcement of these and like regulations is usually and properly intrusted to the local fire department, or to the health officers or building inspectors. The regulations, while of a highly penal character, and therefore to be strictly construed,[2] are justified by

[1] Philadelphia v. Coulston, 13 Phila. 182.

[2] Schott v. Harvey, 105 Penn. St. 222; Keely v. O'Conner, 106 id. 321; Maker v. Slater Mill & Power Co., 15 R. I. 112.

necessity, and cannot be said to interfere unreasonably with the use and enjoyment of private property.[1]

Where the law requires such safeguards to be supplied, it is the duty of the owner or proprietor of the building to comply with the directions of the law, subject to the approval of the proper officers, and not to wait for special instructions from the officers. The initial duty rests upon the owner or proprietor.[2] And the fact that he has once provided suitable fire escapes, to the satisfaction of the authorities, will not exempt him from the obligation of providing additional escapes when ordered to do so.[3]

Who must provide them.

SEC. 342. It has been doubted in some jurisdictions whether the duty of providing fire-escapes rests upon the *owner* of the building, when he is out of possession and the premises are actually occupied by a tenant;[4] and it has been held, that when the law is not explicit on this point, but its provisions are indefinite and uncertain, as, where it requires that "every building * * * shall be provided with fire-escapes * * * which shall be kept in good repair by the owner of the building," a criminal liability will not be imposed upon the actual owner, out of possession, for not providing such escapes "before the inspector of buildings required it."[5]

In other jurisdictions, the doubt has been resolved, and it is decided that the "owner" of a factory, whose duty it is, under the laws, to erect fire-escapes, is he who is in the actual occupancy and possession of the premises, who places the operatives in a position of danger and enjoys the benefit of their services. If, then, a tenant is in possession under a lease from the owner, the tenant and not

[1] Fire Department v. Chapman, 10 Daly, 377.

[2] Willy v. Mulledy, 78 N. Y. 310; McLaughlin v. Armfield, 58 Hun, 376. Compare Boehm v. Mace, 28 Abb. N. C. 138.

[3] Fire Department v. Chapman, 10 Daly, 377.

[4] Grant v. Slater Mill & Power Co., 14 R. I. 380.

[5] Maker v. Slater Mill & Power Co. 15 R. I. 112.

the landlord is responsible, under the laws.[1] For, it is said, "in the absence of all legislation on the subject, the common law, founded on principles of right and justice, implies, from the relation of master and servant, a duty on the former to provide reasonable means for the safety of the latter. Hence it is more reasonable to infer that the legislature intended to impose the duty required by this statute upon the owner of the factory, who assumes the relation of master to those employed therein, and for whose safety the duty imposed by this statute is enjoined, than to hold that it was intended to impose the duty upon the owner in fee of the factory building who may not sustain any relation to the employes in the factory, from which the duty to provide for their safety could be implied, and who may not even know that his building is being used as a factory or workshop."[2]

SEC. 343. On the other hand, it has been suggested that the scheme of the laws requiring fire-escapes is simply to secure safe structures, as a police measure, for the general safety of the community, and that it does not create any duty which can be made the subject of an action by individuals; and that, consequently, no remedy in favor of individuals, beyond or other than such remedy as may be given expressly, should be implied from mere neglect to perform the duties imposed by the law.[3] This latter view is not generally favored. By the statute, it is said, an absolute duty is imposed upon the owner to provide fire-escapes, and the duty is imposed for the benefit of the tenants of the building, so that they may have a proper mode of escape in case of fire. For a breach of this duty causing damage, it can hardly be doubted that the tenants have a remedy. It is a general rule, that whenever one owes another a duty, whether such duty be im-

[1] Schott v. Harvey, 105 Penn. St. 222; Keely v. O'Conner, 106 id. 321.
[2] Lee v. Smith, 42 Ohio St. 458.
[3] Grant v. Slater Mill & Power Co., 14 R. I. 380. *But see* Freeman v. Glens Falls Paper Co., 61 Hun, 125; Pauley v. Steam Gauge & Lantern Co., 131 N. Y. 90.

posed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are so far correlative; and where a duty is imposed, there must be a right to have it performed. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance of that duty may sue for a breach thereof, causing him damage; and the same is true of a duty imposed by statute upon any citizen.[1] And so it was long ago laid down as the rule that "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."[2]

SEC. 344. An instructive case upon the question just discussed, as well as upon other questions of importance in regard to private actions founded upon violation of these statutes, was where an action was brought to recover damages for the death of the wife of a tenant who occupied rooms in the rear of a house which was not provided with a fire-escape, as required by law, and which was destroyed by fire, causing the death of the wife. There was evidence showing that if a fire-escape had been placed at the rear of the house, the deceased could and

[1] Earl, J., Willey v. Mulledy, 78 N. Y. 310, 314; Pauley v. Steam Gauge & Lantern Co., 131 id. 90; Hoover v. Barkoff, 44 id. 113; Jetter v. New York, etc., R. Co., 2 Abb. C. A. D. 458; 2 Keyes, 154; Freeman v. Glens Falls Paper Co., 61 Hun, 125; Heeny v. Sprague, 11 R. I. 456; Couch v. Steele, 3 E. & B. 402. *See, also*, McRickard v. Flint, 114 N. Y. 222; Hickey v. Taaffe, 105 id. 26; 113 id. 54; Hayes v. Bush & D. Man. Co., 102 id. 648; Grand v. Railroad Co., 83 Mich. 564; Jackson v. Shawl, 29 Cal. 267; Owings v. Jones, 9 Md. 108; Flynn v. Canton Co., 40 id. 312; Parker v. Barnard, 135 Mass. 116; Hayes v. Mich. Cent. R. Co., 111 U. S. 228; Endlich on Interprn. Stats., § 469. In Osborne v. McMasters, 40 Minn. 103, 104, Mitchell, J., said: "It is now well settled, certainly in this State, that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designated to prevent, and which were proximately produced by such neglect." Bott v. Pratt, 33 Minn. 323.

[2] Comyn's Dig., Action upon Statute (F.)

probably would have escaped. There was no evidence as to where fire-escapes are usually placed, or as to whether the front or rear of this house would have been the most suitable place for one. It was held, that it was proper to assume, from the structure of the house and of fire-escapes, that one would probably have been attached to the rear of this house, if to any part of it, and that the jury were justified in finding that the deceased would have escaped had the landlord discharged his duty in regard to providing the means of escape. It was further held, that occupancy of the rooms for three days, before the occurrence of the fire, would not bar the right to recover damages, in the absence of any waiver by the tenant of the performance of the statutory duty, or of proof of an intention on his part to take and occupy the rooms without a fire-escape, or of evidence that he knew that there was none. The tenant owed no duty to the landlord to examine to see if there was a fire-escape, but had the right to assume that the statutory duty had been performed. Nor would actual knowledge of the absence of a fire-escape have absolved the landlord from the performance of that duty, or cleared him from liability; for the tenant was not bound at once to leave the house, but had a reasonable time to look for and move into other apartments, or to notify the landlord to furnish the fire-escape as required by law.[1]

Number and kind required.

SEC. 345. While the laws do not generally specify the *number* of fire-escapes to be attached to a building, the number required depends upon the size of the factory, the number of employes and the inflammable character of the materials in the factory.[2] And as to the nature of the protection required, it may be remarked generally, that the escapes must be such as would be considered safe by

[1] Willy v. Mulledy, 78 N. Y. 310.

[2] Pauley v. Steam Gauge & Lantern Co., 61 Hun, 254; 131 N. Y. 90.

men of ordinary reason and prudence, due consideration being given to the structure and uses of the building, and the location of the internal means of egress. The fire-escapes need not, however, be the very safest that have been or could be devised, nor need the entrances to them be located in different parts of the building from the internal stairways; and the owner will not be responsible if, having erected a reasonably safe fire-escape, a fire cuts off access thereto.[1]

The other fire apparatus required to be supplied must be of a kind approved by the authorities, but need not be the very best of the kind, provided it be suitable for the purposes to which it is to be applied. An ordinance forbidding the use of Babcock's fire extinguishers, under heavy penalties, would be unreasonable.[2]

Hoistways.

SEC. 346. On the same principles which justify fire laws prescribing regulations for the construction of buildings, an ordinance may be sustained which requires that hoistways in stores, factories or other buildings, shall be guarded by railings, and closed by trap-doors upon the completion of each day's business. Such regulations may be regarded as standing on the same footing, it has been intimated, as regulations prohibiting a well or cistern in a man's yard unprotected by curb or cover; the reasonableness of which could not be doubted.[3] And so, where one who has a license to enter a building is injured through failure of the owner or occupier to protect the elevator well, as required by law, he can maintain an action for damages.[4] Indeed, elevator shafts and similar openings are so dangerous, that the law, irrespective of statute, makes it the duty of those maintaining them to

[1] Keely v. O'Conner, 106 Penn. St. 321.

[2] Teutonia Ins. Co. v. O'Connor, 27 La. Ann. 371.

[3] Mayor of New York v. Williams, 15 N. Y. 502.

[4] Parker v. Barnard, 135 Mass. 116; Freeman v. Glens Falls Paper Co., 61 Hun, 125.

guard them effectively when open, and, where this cannot be done by means of railings, the owner is bound to give actual notice of the danger to every person lawfully approaching the place; and, in case of his default, he is liable for all injuries resulting therefrom.[1]

SEC. 347. Where the regulations require that the trap-doors of hoistways shall be kept closed, except when in use, "by the occupants of the building having the use and control of the same," the duty is imposed upon the one whose use of the elevator or hoistway requires the opening, and whose disuse permits the closing, of the trap-doors. No one occupant can be held responsible for the neglect of another to perform such duty.[2]

And, as in the case of fire-escapes, the owner of a building may not delay compliance with the law until he shall receive instructions from the authorities, but it is incumbent upon him to call upon the authorities for instructions and approval.[3]

[1] Engel v. Smith, 82 Mich. 1; Shearm. & Redf. on Neg., § 719, *and cases there cited.*

[2] Harris v. Perry, 89 N. Y. 308.

[3] McRickard v. Flint, 114 N. Y. 222. *But see* Boehm v. Mace, 28 Abb. N. C. 138.

CHAPTER XXI.

REGULATION OF USES OF BUILDINGS.

SEC. 348. Municipal regulations.
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Municipal regulations.

SEC. 348. There would seem to be no good reason for denying to municipal corporations the right, in the exercise of the police power, to ordain that buildings of a prescribed class or kind shall not be used for purposes which may render them dangerous to the community; or that they shall not be used for certain prescribed purposes, except under restrictions, as to the manner or times of such use; or that they shall not be used for such purposes at all, or not without special permission from the municipal authorities.[1] There are many familiar instances of such laws. In large cities the use of cellars of buildings as dwellings is restricted, and overcrowding of tenements is regarded as a nuisance and treated accordingly. Regulations of this kind are not often subject to interference by judicial tribunals, unless they are used as a cloak to the invasion of substantial rights, or unless they arbitrarily deprive persons of the reasonable use of their property. This is seldom the case; no such invasion or unlawful interference is ordinarily caused by the regulations, and they are, therefore, as a general rule, sustained by the courts.

Illustrations.

SEC. 349. Accordingly, a statute is not impeachable

[1] *Ex parte* White, 67 Cal. 102.

which prohibits the use of any building, in the larger cities and towns, for carrying on, without special permission of the local authorities, any noxious or offensive trade, excepting from its provisions any buildings or premises then actually occupied for such purposes, but forbidding their enlargement or extension. With reference to such a law it is said, that while the prohibited uses might be innocent and lawful in themselves, under some conditions, they are likely, in the ordinary exercise of the trades and occupations referred to, under the conditions contemplated by the law, to become public nuisances; and that the law wisely interferes for the protection of the public by preventing in advance the threatened public injury. Such a law will not have the effect, however, of prohibiting the erection of a new building in the place of one destroyed by fire or otherwise, if designed to be used for the accommodation of the same business in the same place; the plain intent of the law being to exempt the business of existing establishments, in the places where they are located, from the restrictions contained in its provisions, while at the same time limiting the future business to be carried on in them by the capacity of the buildings and premises devoted to the purpose at the time of the passage of the law. To this extent the act affords protection to such business without reference to the identity of the building which happens to be standing when the law is enacted.[1]

SEC. 350. But it is said that such legislation has a direct and necessary tendency to create monopolies. The judicial mind, in perfect harmony with the spirit of republican institutions, abhors monopolies, and regarding with jealous scrutiny all legislative acts having any tendency to protect or encourage them, is swift in expressing its disapproval and rigid in withholding its sanction This

[1] Watertown v. Mayo, 109 Mass. 315; Watertown v. Sawyer, ib. 320; Somerville v. O'Neill, 114 id. 353; St. Paul v. Byrnes, 38 Minn. 176; Cattle Market Co. v. Hodson, L. R., 2 Q. B. 131.

temper of mind, when duly restrained, is an efficient safeguard against much legislation that is both unjust and the object of express constitutional condemnation. But the temper is apt to create a prejudice which, if allowed to prevail, must render ineffectual a very considerable part of the legislation designed for the preservation of the public health and the promotion of the public security. License laws, limiting the number of licenses to be issued within fixed areas; market laws, conferring exclusive privileges to maintain public markets, and localizing the traffic in marketable commodities; charters to private corporations, granting exclusive rights to conduct the business of slaughtering animals, or of supplying the public with gas or water; sanitary regulations restricting certain employments, such as scavenging, to a few individuals; all these, and the like, legislative acts, must have the effect, to some extent, of creating monopoly rights; yet they are not invalid on that account, but are legitimate exertions of the police power of the State, in the interest of the public health. It may be that the Constitution of the United States, with its amendments, impliedly prohibits the creation of monopolies by State laws. There are those who vehemently insist upon such a proposition. And it is true that the Constitution, "and the laws of the United States which shall be made in pursuance thereof," are declared to be "the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."[1] Yet it is an accepted principle, governing the construction of both Federal and State Constitutions, that they shall not be held in any of their provisions to interfere with that law which derives its origin from and finds its sanction in the sacred right of self-preservation. That is to say, that no provision contained in any Constitution is to be construed by the courts as de-

[1] United States Constitution, Art. VI.

signed to interfere with or in any degree to abridge the right to preserve and promote the public health and safety by proper statutory enactments. The test of the validity of such enactments is, simply, whether they have fairly a tendency to promote the public welfare, without arbitrary sacrifice of the vested rights of individuals. If they stand this test, they are to be pronounced constitutional, notwithstanding the fact that their effect may be to protect or encourage monopolies.

SEC. 351. It would seem, then, that the courts of Illinois were misled by a prejudice against monopolies, in holding that an ordinance of a board of health is invalid, as being an unfair discrimination, which provides that, after a certain date, no distillery, slaughter-house, rendering establishment, or soap factory shall be erected or put into operation, "*in any building not now used for such purpose*," within a certain portion of a city. The court intimated, in the case referred to, that it would be lawful to interdict the use of any building for the purposes designated after a certain date, if the restrictive legislation were made general, so as to operate upon existing as well as future establishments, but declared that it was unjust and unreasonable to make it unlawful for persons to establish a business in the future which others were permitted to continue; the direct tendency being to create and foster monopolies.[1]

Particular uses which may be forbidden.

SEC. 352. It would undoubtedly be competent for the legislature or local authorities to make it unlawful to use buildings for certain purposes, without having first obtained a certificate from the proper health officers that the premises have been suitably drained, and that all proper arrangements have been made for putting the buildings to such use without endangering the sanitary condition of

[1] Tugman v. Chicago, 78 Ill. 405. *See* Mayor of Hudson v. Thorne, 7 Pai. Ch. 261.

the neighborhood; and also a certificate from officials of the fire department that precautions have been taken to comply with the fire laws, and to guard against danger from fire.[1] And it is now beyond question that legislation is valid which prohibits, under severe penalties, the use of buildings for any unlawful business, for example, the sale of opium,[2] or the manufacture and sale of intoxicating liquors,[3] and which declares the places so kept and used in violation of law to be common nuisances, and liable to summary abatement as such. So, too, it is competent for municipal authorities, under a grant of power "to prevent and remove nuisances," to forbid the use of wooden buildings for manufacturing purposes, with steam boilers and heavy machinery, in cases where such use would endanger the lives or property of persons in the vicinity.[4]

Buildings put to illegal uses cannot be destroyed.

SEC. 353. Where buildings are used for purposes or in a manner forbidden by law, or where they are used for certain purposes without the permit required by law, they cannot be destroyed or demolished, either for the violation of law or as constituting nuisances. The public can proceed by indictment to punish the offender, or the business unlawfully carried on in the buildings may be suppressed.[5] As it is the use of the buildings or the keeping of prohibited articles in them which generally constitutes the nuisance, if any, the abatement consists in putting a stop to such use. The tearing down of the building would not be justified although a statute should authorize such destruction as a part of the remedy. The nuisance really consists in the conduct of the owner or occupant of the building, in

[1] *Ex parte* Moynier, 65 Cal. 33.

[2] *Ex parte* Ah Lit, 26 Fed. Rep'r, 512; *In re* Ah Jow, 29 id. 181.

[3] Mugler v. Kansas, 123 U. S. 661; O'Kane v. State, 69 Ind. 183; Fletcher v. State, 54 id. 462; McLaughlin v. State, 45 id. 338; State v. Salto, 77 Iowa, 193; State v. Keeran, 5 R. I. 497; State v. Mellor, 13 id. 666.

[4] Green v. Lake, 60 Miss. 451.

[5] Welch v. Stowell, 2 Doug. (Mich.) 332; Clark v. Syracuse, 13 Barb. 32; Miller v. Burch, 32 Tex. 208.

using it or allowing it to be used for the illegal purpose, and the remedy would be to stop the use. This would, indeed, be the only mode of abatement in such case known to the common law, and the destruction of the building would have no sanction in the common law or precedent.[1]

Equity will aid in enforcing regulations.

SEC. 354. A court of equity will interfere by injunction to restrain the use of any building for a purpose prohibited by law, where such use will result in a nuisance, or to prevent a use of the building for any trade or occupation which, when carried on in the ordinary manner, is necessarily and inevitably a nuisance.[2] And the courts have entertained jurisdiction to restrain or abate by injunction, as a common nuisance, the use of buildings for the illegal keeping or sale of intoxicating liquors or other prohibited articles, when such jurisdiction has been conferred by express provisions of statutes; though this, it would seem, is contrary to the general rule, that courts of equity will not aid in the administration of the criminal law.[3] The cases where such jurisdiction has been exercised may perhaps be regarded as properly falling under one of the recognized heads of equity jurisdiction, namely, the prevention of nuisances affecting the health and security of the entire community; the retail traffic in spirituous and intoxicating liquors being admittedly such a nuisance, and judicially cognizable as such, generally throughout the United States.

But only when prohibited use is a nuisance.

SEC. 355. But courts of equity will not ordinarily inter-

[1] Earp v. Lee, 71 Ill. 193; Bushnell v. Robeson, 63 Iowa, 540; Brightman v. Bristol, 65 Me. 426; Brown v. Perkins, 12 Gray, 89; Lawton v. Steele, 115 N. Y. 203, 226.

[2] Carleton v. Rugg, 149 Mass. 550; Peck v. Elder, 3 Sandf. 126; Catlin v. Valentine, 9 Pai. Ch. 375; Dubois v. Budlong, 15 Abb. Pr. 445; Rhodes v. Dunbar, 57 Penn. St. 274; Sellers v. Pennsylvania R. Co., 10 Phila. 319.

[3] Carleton v. Rugg, 149 Mass. 550; Eilenbacker v. Plymouth Co. Court, 134 U. S. 31. *See* State v. Uhrig, 14 Mo. App. 413.

fere to prevent threatened or contingent nuisances; the evil sought to be prevented must be not merely probable, but certain and inevitable.[1] So, it is usual, where a building or works are being erected that can only be used for a purpose that is unlawful, to restrain the erection; but where it is not made to appear that the business for which the building is intended cannot possibly be carried on without becoming a nuisance, a court of equity will refuse the injunction and leave the defendant to proceed with the erection of his building, at the risk of being restrained in the use of it if a nuisance is ultimately created.[2]

The rule generally approved and followed, in this regard, is, that if a thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings, the injunction in the meantime being continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court where an action could not be framed so as to meet the question.[3]

Extent of judicial interference.

SEC. 356. Sometimes, before making an order upon a motion to continue an injunction restraining the erection

[1] Wood on Nuisances, § 789; Harrison v. Brooks, 20 Ga. 537; Mygatt v. Goetchins, ib. 530; Dunning v. Aurora, 40 Ill. 481.

[2] Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201; Attorney-General v. Steward, ib. 415; Duncan v. Hayes, 7 C. E. Green, 25; Peck v. Elder, 3 Sandf. 126; Catlin v. Valentine, 9 Pai. Ch. 575.

[3] Brougham, Ld. Ch., Earl of Ripon v. Hobart, 3 M. & K. 169; Shivery v. Streeper, 24 Fla. 103; Mygatt v. Goetchins, 20 Ga. 530; Gwin v. Melworth, 1 Freem. Ch. 505; Dunning v. Aurora, 40 Ill. 481; Clark v. Donaldson, 104 id. 639; Dubois v. Budlong, 15 Abb. Pr. 445.

of a building, the court will require plans of the proposed building to be filed with the court, allowing the *ad interim* injunction to stand until the plans have been examined and approved by the court. And if the defendants choose to go on and erect their building after an order has been made refusing to continue the injunction *pendente lite*, they do so at their own risk.[1]

In every case, the relief afforded will be measured by the necessities of the case; and for this reason, wherever it is the *use* of a structure in process of erection that will create the nuisance complained of, the erection of the structure, if it is capable of being put to any lawful use, will not be enjoined, but simply the unlawful use of it.[2]

[1] Sellers v. Pennsylvania R. Co., 10 Phila. 319.

[2] McMenomy v. Bond, 87 Cal. 134, 139; Minke v. Hopeman, 87 Ill. 450; Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201; Attorney-General v. Stewart, ib. 415; Rhodes v. Dunbar, 57 Penn. St. 274; Weir v. Kirk, 74 id. 230.

CHAPTER XXII.

REGULATION OF BURIAL.

SEC. 357. Right of regulation referable to power over nuisances.
358. Regulations must be reasonable.
359. Prohibiting further use of cemeteries.
361. Cemeteries are not nuisances *per se*.
362. Extent of the power to prohibit.
364. The power is discretionary.
365. Municipal powers.
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Right of regulation referable to power over nuisances.

SEC. 357. The evils resulting from a neglect of sanitary precautions, in the disposal of the remains of the dead, being chiefly to be apprehended in thickly populated towns and cities, the subject is one which peculiarly concerns the local municipal governments.[1] Legislation relating to the subject is strictly in the nature of sanitary regulation.[2] It is, therefore, settled law, that municipal corporations, in the exercise of their police power, may regulate the burial of the dead within the corporate limits, and even prohibit it in those localities where it is likely to prove injurious to the public health.[3] A by-law was accordingly declared to be valid which enacted that no person should deposit any dead body in any grave, vault, or tomb, within certain parts of the city, although it had the effect of preventing the further use as burying-grounds of cemeteries authorized by the municipality and the State, and divested rights which had been held and exercised for a long period of years.[4]

[1] City Council v. Baptist Church, 4 Strobh. (S. C.) 306.

[2] Comm. v. Fahey, 5 Cush. 408; Comm. v. Goodrich, 13 Allen, 546; *In re* Wong Yung Quy, 6 Sawy. 442; 2 Fed. Rep'r, 624.

[3] Cemetery Assn. v. Railroad Co., 121 Ill. 199; Woodlawn Cemetery v. Everett, 118 Mass. 354; Campbell v. City of Kansas, 102 Mo. 326; Presbyterian Church v. New York, 5 Cow. 638; Coates v. Mayor of New York, 7 id. 585; Kincaid's Appeal, 66 Penn. St. 411. *See* Reg. v. Justices, 5 E. & B. 702; Foster v. Dodd, L. R., 3 Q. B. 67.

[4] Coates v. Mayor of New York, 7 Cow. 585; City Council v. Baptist

It was further held, that the legislative act, under which the by-law was passed, was not unconstitutional, either as impairing the obligation of contracts, or as taking private property for public use without compensation. The act was sustained on the ground that it was an authority to make police regulations in respect of nuisances. The mere fact that the lands had been granted by the State or the municipality expressly for burial purposes, with covenants for quiet enjoyment, and had been for many years used for these purposes, was not allowed to prevent the use being treated as a nuisance; there being no prescriptive right nor irrevocable license to maintain a common nuisance.[1]

It was also held, in respect to the same by-law, that it was not invalid because it materially affected or even destroyed the value of the property affected by it, and that, being a valid regulation in the interest of the public health, it was not essential that it should provide for compensation.[2]

Regulations must be reasonable.

SEC. 358. On the other hand it has been held in Massachusetts, that where a statute authorizes the selectmen of a town to establish the police of burial-grounds, and, generally, to regulate the interment of the dead, the authority conferred is for the purpose of regulation and not of prohibition. A by-law having been passed, under such authority, ordaining that no person, without leave of a majority of the selectmen, should bring into town any dead body, or bury any dead body so brought into town in any place whatever within the town, it was held, that the by-law, as to the first part, was unauthorized and void, and so the entire by-law was void;

Church, 4 Strobh. (S. C.) 306; People v. Pratt, 129 N. Y. 68.

[1] Coates v. Mayor of New York, 7 Cow. 585; Presbyterian Church v. New York, 5 id. 538; Kincaid's Appeal, 66 Penn. St. 411. *See* Woodlawn Cemetery v. Everett, 118 Mass. 354.

[2] New York v. Slack, 3 Wheeler Cr. Cas. 237.

that, as to the latter part, it was not a regulation but a prohibition, and was, therefore, void; and that, even if it was not a prohibition, it was unreasonable, except when applied to a populous part of the town, and so could not be sustained; it being regarded as unreasonable because it practically prevented citizens of the neighboring city of Boston from taking their dead to a convenient place outside that crowded city for burial, and because it invaded the right of private property in certain established burying-grounds in the town, unnecessarily and without compensating damages.[1]

This case is not, however, to be taken as impairing the authority of the New York cases above referred to, since the by-law was construed strictly with reference to the legislative authority under which it was passed, and was clearly not within its sanction; and the circumstances under which the by-law was enacted were such as to permit no doubt that its purpose and effect were to make an unfair discrimination against non-residents and against the proprietors of the particular cemetery which they were accustomed to use. The court did not go so far as to hold, nor would the court have been warranted in holding, that reasonable regulations as to burial within the corporate limits, or even prohibition of such burial, as a sanitary measure, would not be sustained.

Prohibiting further use of cemeteries.

SEC. 359. As the further use of lands for burial purposes may be prohibited, for sanitary reasons, so, for like reasons, a sale of such lands and removal of the bodies there interred may be permitted or decreed by legislative authority. An act of the Massachusetts legislature authorized a church to sell the land upon which its edifice then stood and provided for compensation to the owners of rights in tombs, to be paid out of the proceeds of the sale. The act declared that the bodies deposited in the

[1] Austin v. Murray, 16 Pick. 121.

tombs had become dangerous to the public health, and directed that notice should be given for their removal within a certain time by the parties interested, and, in case of their non-compliance, that the removal should be made by the church-wardens, who, in such case, should deduct from the appraised value of the tombs so much as might be necessary to pay the expenses of such removal and for the purchase and preparation of suitable places for the reinterment of the bodies so removed. Upon a bill being filed in equity to restrain the removal of bodies deposited in the tombs and interference with further use of the tombs as places for the deposit of bodies, it was held, that the legislative act was a constitutional exercise of the police power of the State, and the relief prayed for was denied.[1] It may, therefore, safely be asserted that the sepulture of friends or relatives in a cemetery belonging to a religious society confers no right or title upon the survivors which will enable them to prevent a sale of such cemetery by the corporation, and a removal of the interred remains, when such removal is in all respects conducted according to law.[2]

SEC. 360. The grant of a right or license of interment is always impliedly restricted by the condition that whenever it shall become necessary, for the public health or welfare, that the grounds shall no longer be used for the purpose of interment, the right or license shall be deemed to be revoked or repealed; and, in such case, the only right of the grantee is to have the remains of the dead removed and properly deposited in a new place of sepulture.[3] So, if a place of burial be taken for a public use,

[1] Sohier v. Trinity Church, 109 Mass. 1.

[2] Windt v. German Reformed Church, 4 Sandf. Ch. 471; Craig v. First Presbyterian Church, 88 Penn. St. 42; Partridge v. First Independent Church, 39 Md. 631; Humphrey v. Methodist Church, 109 N. C. 132. *See* Rayner v. Nugent, 60 Md. 515.

[3] Campbell v. City of Kansas, 102 Mo. 326; Page v. Symonds, 63 N. H. 17; Windt v. German Reformed Church, 4 Sandf. Ch. 471; Richards v. Dutch Church, 32 Barb. 42; Kincaid's Appeal, 66 Penn. St. 411. *See* Rayner v. Nugent, 60 Md. 515.

the next of kin of persons buried there are entitled to be indemnified for the expense of removing and suitably re-interring the remains of the dead.[1] And monuments and other structures placed on burial lots, and capable of being removed, are regarded as the personal property of the lot-holder; and he has the right to remove them, when the lands are taken for public use, or the license to use the lots for burial purposes is revoked by a sale of the lands, or otherwise.[2]

Cemeteries not nuisances per se.

SEC. 361. It is very well settled, however, that neither cemeteries,[3] nor private burying-grounds,[4] nor tombs or vaults erected upon private premises,[5] are necessarily or in themselves nuisances, and that special circumstances are requisite to make them such. Neither a private individual nor a municipal corporation can restrain their use, unless such use be shown to be a nuisance in fact; and it is not enough for this purpose to show that such use of particular property occasions a depreciation of the marketable value of other property in its neighborhood.[6] Nor, when one seeks to enjoin the further use of a private burying-ground, is it enough to allege, in general terms, a probable injury to the health of his family, by the pollution of air and water, or other injurious consequences; but facts must be stated from which it clearly can be seen that such consequences are very likely to result.[7] A statute was declared to be unconstitutional which provided that lands, held by a city in trust for burial purposes,

[1] *In re* Beekman Street, 4 Bradf. (N. Y.) 503.

[2] Partridge v. First Independent Church, 39 Md. 631.

[3] Lake View v. Letz, 44 Ill. 81; Bezein v. City of Anderson, 28 Ind. 79; Musgrove v. St. Louis Church, 10 La. Ann. 431; New Orleans v. St. Louis Church, 11 id. 244.

[4] Kingsbury v. Flowers, 65 Ala. 479; Ellison v. Commissioners, 5 Jones' Eq. (N. C.) 57.

[5] Burnes v. Hathorne, 54 Me. 124.

[6] Musgrove v. St. Louis Church, 10 La. Ann. 431; New Orleans v. St. Louis Church, 11 id. 244; Dunn v. Austin, 77 Tex. 139.

[7] Kingsbury v. Flowers, 65 Ala. 479; Ellison v. Commissioners, 5 Jones' Eq. (N. C.) 57; Dunn v. City of Austin, 77 Tex. 139. *See* Jung v. Neraz, 71 Tex. 396.

might be aliened or devoted to other uses; and a court of equity interfered to prevent such alienation in a case where was not shown to be necessary, in the interest of the public health, and where the only nuisance existing was created by the city itself, in the use of the lands, and was readily removable.[1]

Extent of the power to prohibit further use.

SEC. 362. It has been declared, in a case decided in Pennsylvania, that there can be no doubt as to the power of the legislature to prohibit all future interments within the limits of towns and cities; and that the legislature may declare a particular burying-ground to be a nuisance, and authorize its sale, and direct the removal of the bodies therefrom.[2] And in a case in South Carolina it was held, that an ordinance of a city, passed under its charter powers, prohibiting the establishment of any new burial-grounds within the limits of the city, was constitutional and a reasonable exercise of the municipal powers, although there was no present occasion for their exercise, the act being valid as a precautionary measure providing against future emergencies.[3]

On the other hand, it has been held in Illinois, that where a cemetery company is chartered, with power to acquire lands for burial purposes, within a certain town, and it acquires the lands and expends large sums of money in preparing and ordering the same, an act of the legislature making it unlawful to use any of its lands outside of those then inclosed, and outside of the town as newly laid out, for cemetery purposes, without regard to the manner of the exercise of its franchise, is unconstitutional and void, as impairing the obligation of the contract contained in the charter. The court said: "A cemetery is

[1] Stockton v. Newark, 42 N. J. Eq. 531, *and note.*

[2] Kincaid's Appeal, 66 Penn. St. 411. *See* People v. Pratt, 129 N. Y. 68; Page v. Symonds, 63 N. H. 17.

[3] City Council v. Baptist Church, 4 Strobh. (S. C.) 306. *See* Cemetery Assn. v. Railroad Co., 121 Ill. 199; Woodlawn Cemetery v. Everett, 118 Mass. 354.

not a nuisance *per se*, and the subject of legislative prohibition. The legislature has the constitutional right to pass laws regulating the interment of the dead, so as to prevent injury to the health of the community, and this in respect to a private corporation acting under its charter, as well as with individuals. But the legislature cannot prohibit the burial of the dead in lands purchased and laid out at a great expense by a corporation chartered for the purpose. Such a statute is unconstitutional as impairing the obligation of the contract contained in the charter."[1]

SEC. 363. It is to be observed that in the case last referred to it was not made to appear that the use of the grounds for burial purposes was or could be detrimental to the public health. Indeed, the inference to be drawn from the facts of the case is rather that there was no present necessity for the legislation, and that there was not likely to be any danger to the public health from such use; for there was no prohibition against the further use for burial purposes of that part of the cemetery which lay within the corporate limits, but only against such use of adjoining lands, lying without those limits. Three of the seven judges taking part in the decision dissented from the judgment of the court, and their dissenting opinion proceeded upon the ground of the South Carolina case above referred to, that is to say, that the legislation, not being unconstitutional in other respects, could be sustained as a measure of sanitary precaution. It had been distinctly declared, in an earlier case decided by the same court,[2] that the preventive power of the State or of a municipal corporation could only be exercised with reference to such things as are necessarily and in themselves nuisances; and that a cemetery, not being in all cases nor inevitably a nuisance, could not be prohibited as such in advance. This language is to be interpreted with refer-

[1] Lake View v. Rose Hill Cem. Co., 70 Ill. 191.

[2] Lake View v. Letz, 44 Ill. 81.

ence to the points necessarily presented by the facts and actually decided by the court. It appeared that an ordinance forbade any cemetery to be opened in the town of Lake View without permission of the trustees. A bill in equity was filed in the name of the town to enjoin the opening of a new cemetery, and the court, refusing the relief prayed for, said: "The act of the legislature authorizing the board of trustees '*to abate and remove nuisances*,' gave them no power to pass an ordinance forbidding the establishment of a cemetery. Conceding that the power 'to abate and remove' should be construed as including the power to prevent, yet this preventive power could only be exercised in reference to those things that are nuisances in themselves, and necessarily so. There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances. Now, the town of Lake View is a rural township, containing about eleven sections or square miles of territory. It is, therefore, impossible to hold, that a cemetery, anywhere within the limits of the town, must be necessarily a nuisance, and can be prohibited in advance as such. * * * It may be conceded that the trustees had the right, under these grants of power, to pass an ordinance regulating or restraining the use of any specified cemetery within its limits, on the ground that it would be injurious to public health, and, therefore, a nuisance, and such an official determination on the part of the town authorities would be entitled to the respect that such municipal action always receives in courts of justice. All that we decide is, that the trustees had no power, under this grant, to prohibit in advance the establishment of any cemetery except as authorized by the trustees."[1]

[1] "Of late the advocates of cremation of dead bodies have been urging the unwholesomeness of burial as a reason why cremation should be adopted in its stead, as a means of disposing of corpses. If the burial of the dead does not cause or threaten injury to the public health, burial could not lawfully be prohibited; but if it is proven to

The power is discretionary.

SEC. 364. An acceptable doctrine in respect of this matter, not lacking the support of authorities, would seem to be this: that burial of the dead, in cemeteries located within the limits of towns and cities, cannot *arbitrarily* be prohibited, either by the State or municipalities, to any extent whatever, but may be forbidden in localities where it is in fact dangerous to the community, and may be interdicted entirely within corporate limits if, in the judgment of the legislative body, it is detrimental to the public health. The judgment of the legislature or municipal council, reasonably exercised in the premises, should, upon acknowledged general principles, be regarded as final and conclusive; the courts should not inquire into the necessity, expediency or wisdom of the legislative act, but merely determine whether it is reasonably adapted and appropriate to accomplish its purpose, that is, the preservation of the public health. The act should, therefore, be read in the light of its real character as a *sanitary* measure. While it is true that the legislature cannot arbitrarily adjudge all cemeteries to be nuisances, and condemn them as such, it may well determine, upon evidence satisfactory to itself, that cemeteries located within corporate limits are prejudicial to the public health, and in that regard, as a certain though perhaps not strictly necessary means of precaution, may prohibit their further use or establishment for interment of the dead. It is well known that the question as to the harmful character of burial, as a method of disposing of the remains of the dead, is one upon which there is difference of opinion among those competent to judge in the matter. It is also generally accepted as a principle of judicial decision, that in all doubtful cases,

be a fact that the interment of dead bodies does injure the public health, and is a fruitful source of the transmission of disease, as it is claimed to be by many scientists, it cannot be doubted that the State may prohibit burial, and compel the remains of the dead to be cremated or disposed of in some other harmless way." Tiedeman's Lims. of Pol. Pow., § 122 d.

depending upon a variety of circumstances, requiring judgment and discretion on the part of legislative bodies, in exercising their proper functions, their adjudication upon matters of fact and upon questions of public policy, is to be taken as final and conclusive.[1]

Municipal powers over subject.

SEC. 365. Whenever it is lawful to bury the dead inside of the corporate limits, all burials may be *regulated* by the municipal authorities. But the usual authority given to towns and cities in that regard does not extend so far as to empower them to prohibit the establishing of cemeteries beyond the corporate limits, nor give them any jurisdiction or control over such cemeteries when so established.[2] Nor, in the exercise of the powers ordinarily conferred, may the authorities so far assume to regulate the matter of burial in private cemeteries as to forbid the owners of lots in such cemeteries from entering the same to bury the dead without permission from the city sexton, to be obtained only upon payment of a fee.[3] Yet it has been held, that a board of health may properly make a regulation forbidding all persons, except the superintendent of the cemetery or other specially licensed person, to remove the dead body of any person from any house or place in the city to the place of burial. They may require bonds from every person appointed or licensed for that purpose,[4] but they cannot require as a condition of issuing the license that the sexton shall bury paupers free.[5] But the authority bestowed and the duty imposed upon boards of health to guard against the introduction of contagious and infectious diseases does not clothe such boards with power to arrest the burial of a dead body in any cemetery within their jurisdiction without a

[1] North Chicago, etc., Ry. Co. v. Lake View, 105 Ill. 207.

[2] Bezein v. City f Anderson, 28 Ind. 79.

[3] Bogert v. Indianapolis, 13 Ind. 134; Graves v. Bloomington, 17 Ill. App. 476.

[4] Comm. v. Goodrich, 13 Allen 546.

[5] Beroujohn v. Mobile, 27 Ala. 58.

burial permit, when the body is brought from without their jurisdiction under a proper transit permit. It is the duty of boards of health, generally, to designate persons who shall grant permits for burial of the dead and transit permits for burial beyond the limits of the county where death occurs. When either of such permits has been procured, the body may be buried in the county or transported and buried out of the county where death occurs, without further ceremony or permission.[1]

SEC. 366. Apart from considerations of health, and in the absence of any restraining statutes, an owner of land may bury his dead in his own soil, or permit others to do so, upon such terms or under such restrictions as he may choose to impose. But as all private property is held subject to the right of the legislature to pass any laws affecting its enjoyment which tend to protect the public health, or the public safety, the legislature may provide that no cemetery shall be located near any reservoir from which the inhabitants of any city or town are supplied with water, unless a designated court shall, upon application and proper notice, find that such cemetery will be of public necessity and convenience, and will not be detrimental to the public health. Upon such application to the court, it is proper to find that a cemetery will be of public necessity and convenience, within the meaning of such a statute, although it is not to be open to all the public, but is intended for the exclusive use of persons of a particular religious denomination.[2]

Municipal regulations.

SEC. 367. There can be no reasonable doubt that municipal authorities or local boards of health may fix the location of burying-grounds within the corporate limits,[3]

[1] Eickelberg v. Board of Health, 14 N. Y. State Rep'r, 509.

[2] Applicn. of St. Bernard Cem. Assn., 58 Conn. 91.

[3] Upjohn v. Richland Township, 46 Mich. 542.

and may lawfully provide by regulations that no new cemetery, burying-ground, tomb or vault shall be established without permission; that no burial of a deceased person shall be made within the corporate limits except in grounds already known and used as burying-grounds, or such as may by law be designated and authorized to be used for that purpose; that no interment or disinterment[1] shall be made, and that no grave or other receptacle of dead bodies shall be opened, exposed or in any way disturbed, without a permit therefor from the board of health, nor otherwise than in accordance with the terms of such permit; and that no sexton or other person shall assist in or allow to be made any such interment or disinterment until such permit shall have been obtained.[2] Such a regulation in regard to disinterment, however, will have no application to exhuming a body for the purpose of an autopsy by a physician at the grave of the deceased, under legal direction, and at the request of relatives, in order to ascertain whether a crime has probably been committed producing the death.[3]

The authorities mentioned may also prescribe the length of time that bodies of deceased persons may be retained before final burial or other disposition. The exposure of human remains, or neglect to inter the same by persons upon whom the duty is cast, is a misdemeanor at common law; and this is doubtless so, in part at least, upon sanitary considerations.[4] The authorities may also prescribe the manner of conducting funerals, and may fix the conditions under which the conveyance and removal of the remains of deceased persons beyond the limits may be made; or dead bodies be received within or transported through the corporate limits. It is usual also to prescribe

[1] *See* State v. McClure, 4 Blackf. (Ind.) 328; Wardens v. Washington, 109 N. C. 21.

[2] *In re* Wong Yung Quy, 6 Sawy. 442; 2 Fed. Rep'r, 624.

[3] Palmer v. Broder, 78 Wis. 483.

[4] *In re* Wong Yung Quy, 6 Sawy. 442; 2 Fed. Rep'r, 624; Ambrose v. Kerrison, 10 C. B. 776; Jenkins v. Tucker, 1 H. Blacks. 394; Reg. v. Stewart, 12 A. & E. 773; Chapple v. Cooper, 13 M. & W. 252.

the time of day at which interments may be made, the depth of burial, the distance between graves, and other like matters; and sextons and other persons having charge of cemeteries, tombs, or vaults, or conducting funerals or burials, are generally required to make periodical returns to the board of health concerning all such matters, in such form and specifying such particulars as the board may require. All such regulations, having for their purpose the security and preservation of the public health, or others pertaining to the proper police of burying-grounds, with appropriate penalties for their violation, would unquestionably be sustained everywhere as perfectly reasonable and within the ordinary police powers of local governments and sanitary boards.

CHAPTER XXIII.

REGULATION OF RAILROADS.

SEC. 367. Extent of the power of regulation.
368. Effect of the commerce clause in the Constitution.
369. Regulations enlarging obligations.
370. Regulations must be reasonable.
371. Requiring railroads to establish police.
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Extent of the power of regulation.

SEC. 367. On the ground that the franchises and property of railroad corporations are "affected with a public interest," that is, are devoted to a use in which the public necessarily have a large interest,[1] if not on the broader ground that the charters of such corporations are subordinate to the police power of the State in all cases whatsoever,[2] it is beyond question that the State, in the exercise of this power by appropriate legislation, may regulate and control the management of the property and business of such corporations, so far as may be necessary in order to secure the safety of the public. This must be done, however, in such a way that the regulation shall not destroy nor essentially modify the indispensable franchises of the corporations. The State cannot, in other words, under color of laws aimed at securing the public safety, destroy or impair the corporate franchise

[1] McCoy v. Cincinnati, etc., R. Co., 13 Fed. Rep'r, 3; Munn v. Illinois, 94 U. S. 126, 134; Railroad Commrs. v. Portland, etc., R. Co., 63 Me. 269; People v. Boston & Albany R. Co., 70 N. Y. 569; Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 Ohio St. 604.

[2] Philadelphia, etc., R. Co. v. Bowers, 4 Houst. (Del.) 506; Ohio & Miss. R. Co. v. McClelland, 25 Ill. 140; Galena, etc., R. Co. v. Loomis, 13 id. 548; Toledo, etc., R. Co. v. Jacksonville, 67 id. 37; Chicago, etc., R. Co. v. Haggerty, ib. 113; Illinois Cent. R. Co. v. Slater, 129 id. 91; New Albany, etc., R. Co. v. Tilton, 12 Ind. 3; Kansas Pacific R. Co. v. Mower, 16 Kans. 573; People v. Boston & Albany R. Co., 70 N. Y. 569; Pittsburgh, etc., R. Co. v. S. W. Penn. R. Co., 77 Penn. St. 173; Thorpe v. Rutland, etc., R. Co., 27 Vt. 140; Cooley's Const. Lims. 708.

itself, nor any of those rights and privileges which are necessary to the beneficial exercise of the franchise.[1] The rules prescribed and the power exerted must be within the police power, in fact, and not covert amendments to charters in curtailment of corporate franchises.[2] But subject to this reasonable limitation, railroad corporations may be compelled so to manage their property and business as not unnecessarily to injure or endanger private persons; and so far as the nature of that business is specially dangerous, the corporations may be required to establish efficient safeguards and to maintain a careful system of police.[3]

Effect of "commerce" clause in Constitution.

SEC. 368. State legislation of the character above described is not directed against *commerce*, and only affects it incidentally, and consequently cannot be called, within the meaning of the constitutional provisions, a regulation of commerce. "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employes and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and Federal courts, that wherever there is any business in which, either from the

[1] Philadelphia, etc., R. Co. v. Bowers, 4 Houst. (Del.) 506; Sloan v. Pacific R. Co., 61 Mo. 24.

[2] Cooley's Const. Lims., § 710; Louisville, etc., R. Co. v. Railroad Commn. of Tenn., 19 Fed. Rep'r, 679, 689.

[3] Cooley's Const. Lims. 711, 716. Thorpe v. Rutland, etc., R. Co., 27 Vt. 140. As to the duties of railroad companies toward their own employes, *see* Louisville, etc., R. Co. v. Hall, 87 Ala. 708; Railway Company v. Triplett, 54 Ark. 289; Wilson v. Louisville, etc., R. Co., 85 id. 269; Kansas City, etc., R. Co. v. Kier, 41 Kans. 661; Morton v. Railroad Co., 81 Mich. 423; Miller v. Southern Pac. R. Co., 20 Oreg. 285. As to the duties of carriers of passengers and their liability for failure to execute proper police regulations to secure the safety of passengers, *see* Hutchinson on Carriers, §§ 500-505; Thompson on Carriers, 295-305, 468 *et seq.*

products created, or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties to make provision against accidents, likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable."[1] A State may, therefore, lawfully prescribe regulations which will affect all railroad corporations using its territory for purposes of traffic; and this is so whether or not such corporations hold charters granted by that State.[2]

Regulations may enlarge common law obligations.

SEC. 369. It would certainly seem to be reasonable to hold, that the State has power to enforce by appropriate penal legislation the performance, on the part of corporations having in some respects a public character, of all those duties which are prescribed or imposed by the common law, for a neglect of which the corporations are, by the principles of that law, made responsible to persons injured thereby. For instance, it is the duty of railroad companies, in operating their roads, and in crossing highways, so to regulate the speed of trains, and to give such signals, that persons passing along the highways and approaching the tracks, may be warned of the danger of crossing the tracks and have opportunity to avoid it; and as the failure to observe these precautions is negligence, which subjects the companies, in the absence of statute, to liability for all damages and injuries inflicted and resulting from the omission,[3] so it would seem proper that the same duties, embraced in the common law obligations of railroads, should be enforced by penal enactments.[4]

[1] Field, J., Nashville, etc., Ry. Co. v. Alabama, 128 U. S. 98.

[2] People v. New York, etc., R. Co., 55 Hun, 409; Clark v. Boston, etc., R. Co., 64 N. H. 323.

[3] Rockford R. Co. v. Hillmer, 72 Ill. 235; Hinkle v. Richmond, etc., R. Co., 109 N. C. 472; Patton v. Railway Company, 89 Tenn. 370; Lapsley v. Union Pacific R. Co., 50 Fed. Rep'r, 172.

[4] Redfield on Railways, § 232; Hayes v. Michigan Cent. R. Co., 111 U. S. 228; Delaware, Lack. & W. R. Co. v. East Orange, 41 N. J. L. 127; Louisville, etc., R. Co. v. Comm., 80 Ky. 143; 13 Bush (Ky.), 388. The language of Mr. Justice

The State undoubtedly may *enlarge* the common law duties and liabilities of such corporations, or may *change* the common law rules in that regard, as, for example, by making the corporations liable for injuries to the person of an employe occasioned by the negligence or misconduct of other employes in the absence of contributory negligence.[1] "And it has even been intimated," observes Matthews, in Hayes v. Michigan Central R. Co., 111 U. S. 228, 235, is peculiarly appropriate to the point under discussion. Whenever, he says, a due consideration for the public safety requires that precautionary measures should be taken to prevent danger from the ordinary operations of a railroad, to strangers not themselves in fault, the omission to take such measures is negligence; and it is always a question of fact for a jury, whether the circumstances exist which create such a duty. This principle has been recognized and applied in cases of collisions at crossings of railroads and public highways, when injuries have occurred to persons necessarily passing upon and across railroad tracks in the use of an ordinary highway. "These cases," said the Supreme Court of Massachusetts, in Eaton v. Fitchburg R. Co., 129 Mass. 364, "all rest on the common law rule that when there are different public easements to be enjoyed by two parties at the same time and in the same place, each must use his privilege with due care, so as not to injure the other. The rule applies to grade crossings, because the traveler and the railroad each has common rights in the highway at those points. The fact that the legislature has seen fit, for the additional safety of travelers, imperatively to require the corporation to give certain warnings at such crossings, does not relieve it from the duty of doing whatever else may be reasonably necessary." It was accordingly held, in that case, that the jury might properly consider whether, under all the circumstances, the defendant company was guilty of negligence in not having a gate or flagman at the crossing, although not expressly required to do so by any statute or public authority invested with discretionary powers to establish such regulations.

[1] *Ante*, sec. 261. Highland Ave., etc., R. Co. v. Walters, 91 Ala. 435; Memphis, etc., R. Co. v. Askew, 90 id. 5; Mobile, etc., Ry. Co. v. Holborn, 84 id. 133; Georgia Railroad v. Ivey, 73 Ga. 499; Thompson v. Central R., etc., Co., 54 id. 509; Deppe v. Chicago, etc., R. Co., 36 Iowa, 52; Pierce v. Central, etc., R. Co., 73 id. 140; Rayburn v. Central, etc., R. Co., 74 id. 637; Miss. Pac. Ry. Co. v. Mackey, 33 Kans. 298; 127 U. S. 205; Miss. Pac. Ry. Co. v. Haley, 25 Kans. 35; Miss. Pac. Ry. Co. v. Harris, 33 id. 416; Smith v. St. Paul, etc., R. Co., 44 Minn. 17; Lavalle v. St. Paul, etc., Ry. Co., 40 id. 249; Johnson v. St. Paul, etc., R. Co., 43 id. 222; Trice v. Hannibal, etc., R. Co., 49 Mo. 438; Camden, etc., R. Co. v. Briggs, 22 N. J. L. 623; Kirby v. Pennsylvania R. Co., 76 Penn. St. 506; Christman v. Philadelphia, etc., R. Co., 141 id. 604; Ditberner v. Chicago, etc., Ry. Co., 47 Wis. 138. It is to be observed, that statutes or municipal ordinances prescribing certain duties to be fulfilled by railroad corporations, to secure the safety of the public, do not absolve the companies from the exercise of ordinary care in other particulars, not mentioned in those laws but required by the general law of the land. Wilkins v. St. Louis, etc., Ry. Co., 101 Mo. 93; Lapsley v. Union Pacific R. Co., 50 Fed. Rep'r, 172. So, in building a crossing, it is the duty of the company to observe carefully the rights of others, doing no more injury to them than is absolutely necessary. Roxbury v. Central Vermont R. Co., 60 Vt. 120.

Judge Cooley,[1] "that it might be competent for the State to make railway corporations liable as insurers for the safety of all persons carried by them in the same manner that they are by law liable as carriers of goods; though this would seem to be pushing the police power to an extreme. But those statutes which have recently become common, and which give an action to the representatives of persons killed by the wrongful act, neglect, or default of another, may unquestionably be made applicable to corporations previously chartered, and may be sustained as only giving a remedy for a wrong for which the common law had failed to make provision."[2]

On the other hand, it is not competent to make railroad corporations liable for injuries for which they are in no way responsible. So, a statute is void which undertakes to make those corporations liable for the expenses of coroners' inquests and of burial in the case of persons dying on the cars, or killed by collision, or other accident occurring to the cars, irrespective of any question of negligence on the part of the companies. Such legislation disregards the proper boundaries separating the legislative from the judicial duties, and involves an assumption by the legislature of a jurisdiction properly belonging to the courts.[3]

Regulations must be reasonable.

SEC. 370. Railroad corporations are subject to legislative control in the same particulars and to precisely the same extent as natural persons would be if engaged in the same business;[4] and the only restriction upon such control is, that the regulations must be reasonable in their character, that is, they must be necessary and adapted to prevent injury to persons or property by the corpora-

[1] Cooley's Const. Lims. 715.

[2] Coosa Riv. Steamboat Co. v. Barclay, 30 Ala. 120; Southwestern R. Co. v. Poulk, 24 Ga. 356; Comm. v. Boston, etc., R. Co., 134 Mass. 211; Merrill v. Eastern R. Co., 139 id. 252; Boston, etc., R. Co. v. State, 32 N. H. 215.

[3] Ohio, etc., R. Co. v. Lackey, 78 Ill. 55.

[4] Redfield on Railways, § 232.

tions against which they are directed. Whether a particular regulation is a reasonable exercise of the police power, is strictly a judicial question. The point has been expressly adjudicated.[1] "What are reasonable regulations," it is said, "and what are the subjects of police powers, must necessarily be judicial questions. The law-making power is the sole judge when the necessity exists and when, if at all, it will exercise the right to enact such laws. Like other powers of government, there are constitutional limitations to the exercise of the police power. The legislature cannot, under the pretense of exercising this power, enact laws not necessary to the preservation of the health and safety of the community, that will be oppressive and burdensome upon the citizen. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the court to declare such legislation void." For example, "an ordinance of a city which required a railroad to keep a flagman by day and a red lantern by night at a certain street crossing, where the company had only a single track, over which only its usual trains passed, and where it did not appear that the crossing was unusually dangerous, or more so than ordinary crossings," was held not to be a reasonable requirement, and, therefore, within the constitutional limitation on the exercise of the police power. "But a regulation that should require a railroad to place a flagman at places where danger to the public safety, in the judgment of prudent persons, might be apprehended at any time, would be a reasonable one."[2]

Railroads may be required to establish a system of police.

SEC. 371. So far as railroads are concerned, remarks an

[1] Toledo, etc., R. Co. v. Jacksonville, 67 Ill. 37.

[2] Philadelphia, etc., R. Co. v. Bowers, 4 Houst. (Del.) 506; Delaware, Lack. & W. R. Co. v. East Orange, 41 N. J. L. 127; Sloan v. Pacific R. Co., 61 Mo. 24.

eminent jurist, the police power of the State, which resides primarily and ultimately in the legislature, is twofold:

"1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes, or by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, *and in all doubtful cases their judgment is final*, require the several railroads in the State, to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all their railroads to come to a stand before passing draws in bridges; or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reason may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances. There would be no end of illustrations upon this subject, which, in the detail, are more familiar to others than to us. It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars,

employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be.

2. There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State, of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question."[1]

It may be remarked that the right to extend the police power over railways, about which "serious question" was raised in the case from which the foregoing language is quoted, was there expressly and emphatically affirmed, and has never since been doubted

Examples of ordinary regulations.

SEC. 372. It would be impracticable to give in detail all the police regulations to which railroad corporations are now subjected, in the interest of the public comfort and safety, by statutory enactments, but a few of the more general regulations, most of which have received judicial consideration and approval, may be cited to illustrate the principles and fix the rules above discussed. It is, then, decided to be perfectly competent for the legislature to enact general laws applicable as well to existing corporations as to those formed after the passage of the laws, to compel railroad companies to fence their tracks, as a regulation designed not merely to prevent injury to property

[1] Redfield, C. J., Thorpe v. Rutland, etc., R. Co., 27 Vt. 140; Illinois Cent. R. Co. v. Slater, 129 Ill. 91; People v. Railway Co., 79 Mich. 471.

but to secure the safety of passengers;[1] or to station and keep flagmen, gates or bridges at places where the track crosses highways or streets and to keep the crossings in repair ;[2] or to provide safety-guards, or suitable warning signals, at bridges, crossings and viaducts; regulating the grades of railways, generally, or at particular points where the tracks cross highways or streets or other railways, and providing for an apportionment of the expense of making the crossings;[3] or requiring that certain specified changes, rendered necessary to the public safety, shall be made in the level, grade and surface of the road-beds, and in their

[1] Bulkley v. New York, etc., R. Co., 27 Conn. 479; Ohio & Miss. R. Co. v. McClelland, 25 Ill. 140; New Albany, etc., R. Co. v. Tilton, 12 Ind. 3; Indianapolis, etc., R. Co. v. Kercheval, 16 id. 84; Indianapolis, etc., R. Co. v. Parker, 29 id. 471; Jones v. Galena, etc., R. Co., 16 Iowa, 6; Kansas Pac. R. Co. v. Mower, 16 Kans. 573; Miss. Pac. Ry. Co. v. Harrelson, 44 id. 253; Sawyer v. Vermont, etc., R. Co., 105 Mass. 196; Wilder v. Maine Cent. R. Co., 65 Me. 332; Winona, etc., R. Co. v. Waldron, 11 Minn. 575; Gorman v. Pacific R. Co., 26 Mo. 441; Blewett v. Wyandotte, etc., R. Co., 72 id. 583; Humes v. Miss. Pac. R. Co., 82 id. 221; Smith v. Eastern R. Co., 35 N. H. 356; Horn v. Atlantic, etc., R. Co., ib. 169; 36 id. 440; Pennsylvania R. Co. v. Riblet, 66 Penn. St. 164; Thorpe v. Rutland, etc., R. Co., 27 Vt. 140. As to the degree of care required of railroad companies in keeping up their fences, *see* Chicago, etc., R. Co. v. Barrie, 55 Ill. 226; Lemmon v. Chicago, etc., R. Co., 32 Iowa, 151; Antisdel v. Chicago, etc., R. Co., 26 Wis. 145.

[2] Western, etc., R. Co. v. Young, 81 Ga. 397; Toledo, etc., R. Co. v. Jacksonville, 67 Ill. 37, People v. Boston, etc., R. Co., 70 N. Y. 569; People v. New York, etc., R. Co., 74 id. 302; Paducah, etc., R. Co. v. Comm., 80 Ky. 147; People v. Long Island R. Co., 58 Hun, 412. But the companies cannot be compelled, it is said, to construct bridges over highways, instead of crossing at grade, where the highways are established *after* the railroads are built, Illinois Cent. R. Co. v. Bloomington, 76 Ill. 447; State v. Shardlow, 43 Minn. 524; Worcester, etc., R. Co. v. Nashua, 63 N. H. 593; Erie v. Erie Canal Co., 59 Penn. St. 174, *But see* Louisville, etc., Ry. Co. v. Smith, 91 Ind. 119; State v. Chicago, etc., R. Co., 29 Neb. 412, nor to erect and maintain *residence crossings* at their own expense, for the use and benefit of individuals, when no statute existed at the time of the construction of the railroads, requiring such crossings to be made; People v. Railway Co., 79 Mich. 471 (compare, Keefe v. Sullivan Co. Rd., 63 N. H. 271); nor is there any duty, on the part of the companies, when bridges have once been properly built, to maintain the highways in such condition as to prevent the bridges from interfering with public travel over the highways. Gray v. Danbury, 54 Conn. 574. *See* Louisville, etc., Ry. Co. v. Smith, 91 Ind. 119.

[3] Woodruff v. Catlin, 54 Conn. 295; Woodruff v. New York, etc., R. Co., 59 id. 63; State's Attorney v. Selectmen of Bramford, ib. 402; Town of Fairfield's Appeal, 57 id. 167. *See* Westbrook's Appeal, ib. 95; Fitchburg R. Co. v. Grand Junction R. Co., 1 Allen, 552; Pittsburgh, etc., R. Co. v. S. W. Penn. R. Co., 77 Penn. St. 173; *In re* Minneapolis, etc., Ry. Co., 36 Minn. 481; State v. Minneapolis, etc., Ry. Co., 39 id. 219.

crossings and connections with each other, and providing by whom, in what manner, and under whose supervision the work shall be done, and in what proportions, according to their respective interests, it shall be paid for by the parties affected;[1] or providing that engines, cars, and trains shall be brought to full stop before crossing other railroads, and regulating precedence in crossing;[2] or requiring that signal-boards, bearing the words, "Railroad crossing," or, "Look out for the locomotive," or the like, shall be placed conspicuously at highways or streets where the same are crossed by railroad tracks;[3] or regulating or prohibiting the use of any particular kind of locomotive power, for instance, *steam*;[4] or requiring that a bell and steam whistle shall be placed on every locomotive engine, and that they shall be sounded at every crossing;[5] or prescribing the rate of speed at which highways and other railroads may be crossed,[6] or the rate of speed within the corporate limits of cities and towns;[7] or requiring that such portion of the tracks as lies within city limits shall be lighted at night;[8] or regulating the manner of making up passenger trains, or the method of heating and lighting cars;[9] or requiring air brakes and automatic couplers upon passenger trains, or that closed cars in every passenger train shall be equipped with sets of tools for use in cases of accident; or providing that companies shall not

[1] Fitchburg, etc., R. Co. v. Grand Junction R. Co., 4 Allen, 198.

[2] Thorpe v. Rutland, etc., R. Co., 27 Vt. 140; Gulf, etc., Ry. Co. v. York, 74 Tex. 370.

[3] Texas, etc., R. Co. v. State, 41 Ark. 488; Mobile & Ohio R. Co. v. State, 51 Miss. 137, where it was held that the word "highway," as here used, means a public road in the country, and not a street in a town or city.

[4] State v. Tupper, Dudley (S. C.), 135.

[5] St. Louis, etc., Railway v. Hendricks, 53 Ark. 201; Galena, etc., R. Co. v. Loomis, 13 Ill. 548; Ohio & Miss. R. Co. v. McClelland, 25 id. 140; Illinois Cent. R. Co. v. Gillis. 68 id. 317; Toledo, etc., R. Co. v. Cline, 135 id. 41; Williams v. Chicago, etc., R. Co., ib. 491; Pittsburgh, etc., Ry. Co. v. Brown, 67 Ind. 45.

[6] Rockford, etc., R. Co. v. Hillmer, 72 Ill. 235; Mobile & Ohio R. Co. v. State, 51 Miss. 137; Clark v. Boston, etc., R. Co., 63 N. H. 323.

[7] *Last note.* Chicago, etc., R. Co. v. Reidy, 66 Ill. 43; Horn v. Chicago, etc., R. Co., 38 Wis. 463; Haas v. Chicago, etc., R. Co., 41 id. 44.

[8] Railroad Co. v. Sullivan, 32 Ohio St. 152.

[9] People v. New York, etc., R. Co., 55 Hun, 409.

employ persons in any capacity who use intoxicating liquors, nor until after examination by a board of examiners as to their general fitness, and upon certificate of such board, and requiring the companies to pay the fees allowed for such examination;[1] or disqualifying persons afflicted with color blindness and loss of visual power to a certain extent from serving in any position which requires the use or discrimination of form or color signals, and making it a misdemeanor for a person to serve, or for the companies to employ him, until certified by an examining board to be fit for such employment;[2] or disqualifying engineers and other employes who are unable to read printed time-tables and ordinary handwriting; or regulating the mode of carriage and the care during transportation of animals intended for food; or, for the prevention of the spread of disease, prescribing the mode of transporting the bodies of deceased persons; or providing that inflammable oils, or explosives, or other like dangerous articles, shall not be carried upon passenger trains; or prescribing precautions for saving life at accidents; or, generally, defining offenses by railroad companies, their officers, agents, or employes, and providing punishment for the same.

Municipal regulations.

SEC. 373. It is perfectly well settled, that authority may lawfully be conferred upon cities and towns to make regulations respecting railroads within their corporate limits, of the same character as those above indicated. Where such authority is granted in general terms, as, "to require railroad companies to provide protection against injury to persons and property," it confers plenary power in those respects over railroads within the corporate limits.[3] There is the highest authority, however, for saying that there

[1] Smith v. Alabama, 124 U. S. 465; Nashville, etc., Ry. Co. v. Alabama, 128 id. 96.

[2] Nashville, etc., Ry. Co. v. Alabama, 128 U. S. 96; Nashville, etc., Ry. Co. v. State, 83 Ala. 71.

[3] Hayes v. Michigan Cent. R. Co., 111 U. S. 228; Textor v. Baltimore & Ohio R. Co., 59 Md. 63.

can be no reasonable doubt of the right of municipal authorities to adopt proper regulations in respect of railroads, without any special legislative sanction, and by virtue of the general right of supervision which they have and are allowed to exercise over the police of their jurisdictions.[1]

Powers are usually conferred upon municipal corporations and exercised by them in respect of regulations providing for and changing the location and grade of street crossings by railroad tracks, and compelling railroad companies to conform their tracks to the established grade and to certain requirements designed to secure safe passage for vehicles over the tracks;[2] or compelling such companies to fence their tracks within the corporate limits;[3] or compelling them to keep watchmen or flagmen at all places where the tracks cross public streets, and to give warning of the approach and passage of trains thereat, and to light such crossings during the night;[4] or prescribing the rate of speed within corporate limits,[5] or at crossings;[6] or limit-

[1] Redfield on Railways, § 250; Whitson v. City of Franklin, 34 Ind. 392; Merz v. Miss. Pac. R. Co., 88 Mo. 672; Buffalo, etc., R. Co. v. City of Buffalo, 5 Hill, 209.

[2] North Chicago, etc., Ry. Co. v. Lake View, 105 Ill. 183, 207. *See* Louisville, etc., Ry. Co. v. Smith, 91 Md. 119.

[3] Hayes v. Michigan Cent. R. Co., 111 U. S. 228.

[4] Toledo, etc., R. Co. v. Jacksonville, 67 Ill. 37; Pennsylvania R. Co. v. Stegmeier, 118 Ind. 305; Wilkinson v. St. Louis, etc., Ry. Co., 101 Mo. 93; Delaware, Lack. & W. R. Co. v. East Orange, 41 N. J. L. 127. *But see* Ravenna v. Pennsylvania Co., 45 Ohio St. 118.

[5] Western, etc., R. Co. v. Young, 81 Ga. 397; Toledo, etc., Ry. Co. v. Deacon, 63 Ill. 91; Chicago, etc., R. Co. v. Haggerty, 67 id. 113; Whitson v. City of Franklin, 34 Ind. 392; Meyers v. Chicago, etc., R. Co., 57 Iowa, 555; Robertson v. Wabash, etc., R. Co., 84 Mo. 119. *See* Green v. Del. & Hud. Can. Co., 38 Hun, 51. The regulation may prescribe the speed even through inclosed lands belonging to the companies. Crowley v. Railroad Co., 65 Iowa, 658; Merz v. Miss. Pac. R. Co., 88 Mo. 672; Grube v. Miss. Pac. R. Co., 98 id. 330.

[6] Horn v. Chicago, etc., R. Co., 38 Wis. 463; but an ordinance limiting the speed of trains to *four* miles per hour within the corporate limits, when the road passes through agricultural lands, fenced on both sides, for three miles after entering those limits and before reaching the inhabited portion of the city, would be unreasonable and void. Meyers v. Chicago, etc., R. Co., 57 Iowa, 555; Evison v. Chicago, etc., Ry. Co., 45 Minn. 370. *But see* Knobloch v. Chicago, etc., R. Co., 31 Minn. 402; Weyl v. Chicago, etc., Ry. Co., 40 id. 350.

ing the time that trains may stand at crossings;[1] or prohibiting the use of locomotive engines on certain streets;[2] or entirely prohibiting the propelling of cars by steam through any part of the city;[3] or prohibiting the moving of cars, locomotives and trains, between sunset and sunrise, for any purpose whatever, "without having a headlight, lamp or lantern conspicuously placed in front of the same, facing the direction in which the same may be moving;"[4] or requiring street railroad companies to keep their tracks watered so as to lay the dust;[5] or prohibiting them from removing snow from their tracks without consent of the street commissioner;[6] or requiring that when trains or cars are moving, the bell of the engine shall be constantly sounded, within city limits;[7] or requiring that when freight cars are backing a man shall be stationed on the top of the rear car, to give danger signals;[8] or providing that the steam whistle of the locomotive shall in no case be sounded in giving the usual signal for starting trains;[9] or providing that street cars, "driven in the same direction, shall not approach each other within a distance of three hundred feet, except in case of accident, when it may be necessary to connect two cars together, and also except at stations;"[10] or making it a punishable offense for any persons, except passengers, to get on or off from engines or cars within the corporate limits.[11]

[1] McCoy v. Philadelphia, etc., R. Co., 5 Houst. (Del.) 599; Great Western, etc., R. Co. v. Decatur, 33 Ill. 381; City of Duluth v. Mallett, 43 Minn. 204; Merz v. Miss. Pac. R. Co., 88 Mo. 672; Rafferty v. Miss. Pac. R. Co., 91 id. 33; Pennsylvania R. Co. v. Jersey City, 47 N. J. L. 286; Long v. Jersey City, 37 id. 348. *But see* State v. Jersey City, 29 N. J. L. 170; Jamaica v. Long Island R. Co., 37 How. Pr. 379. *See* Cincinnati, etc., R. Co. v. Comm., 80 Ky. 137.

[2] Richmond R. Co. v. Richmond, 96 U. S. 521.

[3] Dannaher v. State, 8 Sm. & M. 629; Whitson v. City of Franklin, 34 Ind. 392; Buffalo, etc., R. Co. v. City of Buffalo, 5 Hill, 209.

[4] Grube v. Miss. Pac. R. Co., 98 Mo. 330.

[5] City & S. R. Co. v. Savannah, 77 Ga. 731.

[6] Union Ry. Co. v. Cambridge, 11 Allen, 287.

[7] Merz v. Miss. Pac. R. Co., 88 Mo. 672; Rafferty v. Miss. Pac. R. Co., 91 id. 33.

[8] *See preceding note;* also, Louisville, etc., R. Co. v. Webb, 90 Ala. 185.

[9] *See note, last but one.*

[10] Bishop v. Union R. Co., 14 R. I. 314.

[11] Beardon v. Madison, 73 Ga. 184.

State Commissioners of Railroads.

SEC. 374. The most complete legislation relating to railroad corporations is that which provides for their general supervision by boards or commissions, appointed by the State, with full powers to make inspection of the working and management of the railways. The constitutionality of this State supervision cannot well be doubted. It has been considered and affirmed by the courts; and such legislation is now an accepted and approved part of the policy of many of the States.[1] The whole system, it is said, "of legislative supervision through the railroad commissioners acting as a State police over railroads, is founded upon the theory that the public duties devolved upon railroad corporations by their charter are ministerial, and, therefore, liable to be thus enforced."[2]

The State Commissioners of Railroads are usually empowered, and it is made their duty, to examine into the condition and management of the business of railroads, so far as it affects or relates to the interests of the public, or the accommodation and security of persons doing business with such corporations within the respective States. For this purpose, they may be required to inspect the entire equipment of the railroads, and to test the machinery, apparatus, tracks, bridges and structures of the companies, with a view to ascertaining their sufficiency as regards the health, safety and convenience of the public. In certain contingencies, as, if it be discovered that any part of the equipment of a railroad is defective to such an extent as to be unsafe for use, the commissioners may be authorized to direct a discontinuance of such use, until the proper repairs have been made. They

[1] Georgia Railroad v. Railroad Commissioners, 70 Ga. 694; Railroad Commissioners v. Portland, etc., R. Co., 63 Me. 269; Stone v. Yazoo, etc., R. Co., 62 Miss. 607; Railroad Commission Cases, 116 U. S. 307. The State may even require the railroads to pay the salaries and expenses of the State board of commissioners. Charlotte, etc., R. Co. v. Gibbes, 142 U. S. 386.

[2] Railroad Commissioners v. Portland, etc., R. Co., 63 Me. 269.

may even prevent the running of trains, if, in their judgment, the track is dangerously out of repair, or they may limit the rate of speed at which trains shall be run, until the repairs are made. Authority is often given to them, and it is made their duty, to prescribe the kind of apparatus that shall be used upon the railroads, or the manner of constructing the roads or switches or structures, with a view to securing the highest attainable degree of safety.[1] And for a violation of any regulations or orders properly made by the commissioners, within their authority, the offending officers or employes of the railroad companies may be prosecuted and punished. One of the most important functions of the commissioners is that of investigating the causes of accidents which result in the loss of life or injuries to persons, and of reporting the results of such investigations to the legislature or the State authorities. The reports of the commissioners, upon all these matters, together with their recommendations and suggestions, often become the basis of important legislation, and the policy of establishing the commissions, with the ample powers usually conferred upon them, has already been demonstrated so satisfactorily, that they may now be regarded as one of the most effective instrumentalities in the use of the State for promoting and securing the safety of the public.

[1] The legislature may confer upon the commissioners, or upon other public boards, the power of determining upon what terms and conditions railroad and depot companies may obtain the use of the public streets and highways. Woodruff v. New York, etc., R. Co., 59 Conn. 63; State's Attorney v. Selectmen of Bramford, ib. 402; Union Depot Co. v. State Ry. Crossing Bd., 81 Mich. 248; and crossings not made according to the conditions and in the manner required by commissioners, may be regarded as nuisances. State v. Portland, etc., R. Co., 58 Me. 46. *See* Cambridge v. Railroad Commissioners, 153 Mass. 161.

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