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Recommended Citation
Alvin E. Evans, Municipal Councils Compared with State Legislatures, 17 Mo. L. Rev. (1952)
Available at: https://scholarship.law.missouri.edu/mlr/vol17/iss2/2

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MUNICIPAL COUNCILS COMPARED WITH STATE LEGISLATURES

ALVIN E. EVANS*

It was observed by the present writer in a former paper\(^1\) that there were certain recognized distinctions between inferior and superior legislatures with respect to their legislative powers and activities. One, at the outset, is that in contrast with a legislature, a council does not represent a sovereign,\(^2\) as a consequence of which the statute of limitations is applicable to the claims of the inferior body.\(^3\) Another is to be remembered as a primary observation that usually legislative acts have general application (save that some statutes may be purely private), while municipal acts are local.

We come then to a consideration of distinctions, which are not so obvious but are significant respecting the activities of city councils.

I. THE COUNCIL AS A CONTINUOUS BODY

A council is a continuous body and does not adjourn sine die. This fact has important consequences. Thus, three readings of an ordinance being required, the first one may take place before a body composed of a membership which is wholly changed in personnel by an election before the readings are completed. Thereafter, the next two may be made before the new membership created by the election. The ordinance so passed is valid.\(^4\) In a New York case an ordinance was sustained under the following circumstances: in 1851 the governing Board consisted of two houses, one called the Board of Aldermen and the other Assistant Aldermen. These two had concurrent powers, met in separate sessions and often at different times, and did not operate with joint committees. In November, 1851, the Board of

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3. It is not always easy to avoid comparisons which to some extent identify the council with the city and the legislature with the state. With this understanding that there is not always a complete correspondence, this paper will not always avoid such identifications. See State ex rel. Board v. Clark, 4 Ind. 315 (1855) (in legal contemplation the Board of Commissioners is the county); Valparaiso v. Gardner, 97 Ind. 1 (1884) (it is the inhabitants and not the officers who constitute the public corporations).

Aldermen granted the right to an applicant to construct a certain pier. In April, 1852, the other branch adopted a concurring resolution which was shortly thereafter approved by the mayor. Each body had the power to concur, reject or amend any ordinance or resolution of the other. In an action brought to test the validity of the grant, it was contended that this ordinance was ineffective because it was not finally concurred in during the very year of its original passage by the first body. The earlier view had been that an ordinance must be approved by both branches of the Board during the same year in order to be valid. It was thought that there was an universally recognized principle of legislative bodies that a legislative act requiring the assent of two bodies must be adopted during the same year by each; that there was a strict analogy between the procedure of a common council of two municipal houses and that of a national or state legislature.

So, in McGraw v. Whitson a question was raised as to the validity of an ordinance under which the city marshall had impounded the plaintiff's cow. The first two readings had been before the annual election. Thereafter, a new mayor and four new aldermen came into office and adopted the ordinance after the third reading. One-half of the aldermen held over. The ordinance was held valid. In Massachusetts a petition had been presented to the council to fix building lines on a certain street. This was referred to a committee. Twenty-one months after the referral, action was taken on the petition and this was valid.

5. In re Mayor, 193 N. Y. 503, 87 N.E. 759 (1908).
7. McGraw v. Whitson, 69 Iowa 348, 28 N.W. 632 (1886). In Biddeford v. Yates, 104 Me. 506, 72 Atl. 335 (1908), the earlier council had renewed a lease of a city building for a three year term to take effect in the future at the end of the existing lease. The term of office of the councilmen who renewed the lease expired between the date of the execution of the renewal lease and the date of the termination of the old lease. The new council membership considered itself not bound by the new lease which, as observed, did not begin until the new regime was installed. It was held, however, that the council as later constituted was bound, since a council is a continuous body. See also Karpark Corp. v. Town of Graham, 99 F. Supp. 124 (D.C. of N.C. 1951); Ambrozich v. Eveleth, 200 Minn. 473, 274 N. W. 635 (1937).
9. Cf. McGrain v. Daugherty, 273 U. S. 135 (1927). A witness had been summoned to give testimony before a committee of the Senate. That Congress expired before he was required to appear. He was arrested for refusing to appear before the same committee of the next Congress. The committee had made no final report nor had it been discharged. It was held that there was such continuity in the Senate as a body that it was possible for the committee to be revived by a motion so that a recalcitrant witness was punishable for refusing to appear. See West Virginia Water Service Co. v. Beckley, 114 West Va. v. 720, 173.
II. Separation of Powers Not Applied

It has occasionally been urged that the separation of governmental powers into legislative, executive and judicial departments should be maintained in city government. Thus, in *La Guardia v. Smith* the mayor of New York, when subpoenaed by an investigating committee of the city council and required to deliver to it a report of a similar investigation made at the mayor's instigation, refused to comply on the ground that this demand overstepped the bounds separating the legislative from the executive departments of the government. He was overruled on the point. In a Washington case the offices of mayor and council had been abolished by the legislature and a board of five commissioners was constituted with all existing municipal powers. This arrangement was held not to violate any existing principle of separation. So, in Florida, it has been decided that these three functions are not separated in municipal government.

Courts do not ordinarily interfere with state legislative activity. Thus, in *Fergus v. Marks* mandamus was sought to compel the General Assembly to meet and apportion the state into senatorial districts in accordance with a mandate of the state constitution. It was denied on the ground that one department of government could not control another. So the court will not entertain mandamus to compel the state senate to readmit petitioners who had been expelled from the body.

There are, however, occasional intimations that the court may enjoin the passing of ordinances. Thus, in *International Trading Stamp Co. v.*

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S.E. 785 (1934) (the successors of the former council members have the power to sign a bill of exceptions incorporating evidence taken in a proceeding before their predecessors).

11. Walker v. Spokane, 62 Wash. 312, 113 Pac. 775 (1911). One should recall the holding in *Calder v. Bull*, 3 Dall. 386 (U. S. 1798), where the court refused to hold that the legislature of Connecticut could not constitutionally exercise judicial powers to the extent of setting aside a court's judgment. This was a political issue. Historically, the House of Lords long exercised both legislative and judicial functions, and now the House of Commons exercises legislative power, and through the prime minister full executive and administrative power.
Memphis\textsuperscript{15} the council was enjoined from passing an ordinance which proposed to impose a privilege tax upon each merchant engaging in the "trading stamp business" and making the violation of the ordinance a misdemeanor. The court ruled that the council had no such power as that about to be exercised. An injunction was granted to avoid the multiplicity of suits by many merchants which would follow. In State \textit{ex rel. Abel v. Gates},\textsuperscript{10} when the circuit judge proposed to entertain a petition to enjoin the council of a city from passing an ordinance which allegedly was a fraud on the public, the Missouri Supreme Court refused to grant a writ of prohibition to prevent the issuing of the injunction.\textsuperscript{17}

It was also decided in an early New York case that the passing of an ordinance, the effect of which would be the creation of a nuisance, could be enjoined. The court said that it would not be an act of legislation, but would be instead a conditional grant. It involved the giving of a railroad right-of-way on Broadway.\textsuperscript{18} There is also a federal court dictum that the court may enjoin the adoption of an ordinance in case it is unconstitutional and will cause irreparable injury.\textsuperscript{10}

There is authority contra, however, and it seems rather persuasive, but the cases are probably distinguishable. Thus, in one case,\textsuperscript{20} the plaintiff complained that the adoption of a certain ordinance would violate a contract he had with the city, but he had other remedies. So a bill will not lie to  

\textsuperscript{15} 101 Tenn. 181, 47 S.W. 136 (1898).
\textsuperscript{16} 190 Mo. 540, 89 S.W. 881 (1905).
\textsuperscript{17} But see State \textit{ex rel. Vogel v. Bersh}, 83 Mo. App. 657 (1900) (Mandamus to compel the House of Delegates of the Municipal Assembly of St. Louis to compel them to seat the petitioner who had been expelled denied. St. Louis has a home rule charter and it was pointed out that the council was now of the same dignity as a legislature to the extent of its competency); Pitman \textit{v. Drabelle}, 267 Mo. 78, 183 S.W. 1055 (1916) (An injunction to prevent the electorate from voting on an ordinance by initiative which was allegedly unconstitutional was denied. Home rule charter involved). But mandamus will lie to compel the president of the council to sign an ordinance which had been passed by the council—a ministerial act, State \textit{ex rel. North and South Ry. v. Meier}, 143 Mo. 439, 45 S.W. 306 (1898).
\textsuperscript{18} People \textit{ex rel. Davis v. Sturtevant}, 9 N. Y. 263 (1853). \textit{But see contra}, Chicago \textit{v. Evans}, 24 Ill. 52 (1860) (The grant is harmless until steps are taken in pursuance of it, and the mere passage confers no right).
\textsuperscript{19} Spring Valley Water Works \textit{v. Mayor}, 16 Fed. 615 (D. Cal. 1883).
prevent the council from ordering an election, the proper remedy being quo warranto after the election. A legislative act of the council cannot be reviewed on certiorari, though many other activities may be so reviewed. Mandamus, however, will lie to compel the levy of a tax in a proper case. The application of mandamus to other purely legislative acts seldom arises if, indeed, tax levying is legislative in nature.

III. Municipal Government Not Republican In Form

It would seem to follow from the proposition that municipal powers are not separated, that a city does not, and from the exigencies of the case, should not have a republican form of government. The New England town meeting was a pure democracy. In our earlier history imitations by municipalities of state and federal practices, however, were plentiful. One of the most conspicuous imitations was that of the bicameral council. Fewer than a dozen continue this form today.

Another imitation is that cities are not held liable for their torts; that is, those committed in a governmental capacity. However, the "king can do no wrong" doctrine breaks down when it comes to torts committed in the capacity of a so-called proprietor. There is no such distinction with respect to the acts of a state legislature. It was noted above that in New York it was once believed that the two houses must act on an ordinance within the same year in order for it to be valid, but eventually it was held otherwise for the reason that rules treating the constitutionality of statutes in this particular are not generally applied to ordinances.

Ordinances also are usually passed with three readings, two of which may be by title. The style also largely follows that of statutes as to form,

22. In re Wilson, 32 Minn. 145, 19 N.W. 723 (1884).
24. Eckerson v. Des Moines 137 Iowa 452, 115 N.W. 177 (1908); People ex rel. City of Springfield v. Edmonds, 252 Ill. 108, 96 N.E. 914 (1911) (Commission form of government does not violate the constitution. Court speaks of the pure democracy practiced in New England as another example of non-republican rule of municipalities); People ex rel. Tate v. Prevost, 55 Colo. 199, 134 Pac. 129 (1913) (Same question raised as to whether commission form of government is republican and quo warranto denied because it is a political question).
27. The pocket veto was applicable in New York at least at one time. See In re Mayor, 193 N.Y. 503, 87 N.E. 759 (1908).
though the requirements of form are not so stringent nor is their validity for that reason often questioned. Thus, in Prince v. Cothrun & Co.,28 it was said that the provision that the title shall embrace the subject was not essential. Nor is the objection that the ordinance states a double purpose sound. Such observances, whether essential or not, do indeed tend toward orderliness and good form.

IV. JUDICIAL NOTICE OF ORDINANCES

In Orose v. Hodge Drive-It-Yourself Co., Inc.,29 the plaintiff sued the defendant in a municipal court for damages for personal injuries. The court took judicial notice of the ordinance alleged to have been violated and the evidence of its contents was not presented. On appeal to the Ohio Court of Common Pleas, the latter also took judicial notice of it because it came up by appeal from the municipal court and this determination was sustained on appeal. In Illinois,30 the supreme court refused to take judicial notice of a Chicago ordinance, although the case was on appeal from a Chicago Municipal Court which latter court was required by statute to take notice of Chicago ordinances. The Illinois Supreme Court declared that in order for the ordinance to come before the court it must be made a part of the record; that if the statute were construed to mean that the court must take judicial notice of all general ordinances of the city it would be unconstitutional. The conviction of the appellant was sustained because the error assigned was upon a matter not contained in the record. The statute may, however, mislead the litigant. Thus in Fryear v. Kentucky Terminal Ry. Co.31 the plaintiff was injured by the collision of her automobile with the defendant's engine. She alleged the negligence of the defendant in failing to give timely warnings apparently required by city ordinance as the proximate cause of the injury. The Kentucky statute provides in part: "The courts shall take

31. 310 Ky. 250, 254, 220 S.W. 2d 546 (1949). See KY. REV. STAT. § 83.080 (1948); the Missouri statute is similar: see MO. REV. STAT. § 490.240 (1949).
judicial notice of the ordinances of cities of the first class and the printed copy officially published by the city may be read as evidence without proof of the passage of the ordinances."

It is not clear what the provision of the City of Louisville's ordinances was which affected the matter for the ordinance is not reproduced. The court, however, said with respect to that matter that this statutory requirement does not extend to the substance of the ordinance so as to relieve the litigant relying on it of the obligation to introduce it in evidence. It merely recognizes the official publication of the ordinances by the city as proof that it was duly passed. Here the plaintiff evidently relied upon the ordinance and assumed that the court knew the law of the state and also the city ordinance as it affected the case and that the ordinance was applicable.

It appears that a court of general jurisdiction will take such notice only under the circumstance just mentioned save where a statute may provide otherwise.

Wigmore32 states that a court will take judicial notice of public or general statutes only and that ordinances and resolutions of local government boards and councils are usually not noticed.33 It has been suggested to the writer that as a matter of tactics it may be advantageous to the one relying upon the ordinance that he must prove it. This gives him an opportunity to read it to the jury and impress the members with the significance of its contents. If the court should take judicial notice of it such party would presumably not be allowed to read it, the ordinance being a matter of law which the court already knows. He would thus not have an opportunity to impress the jury respecting his claim.

V. DELEGATION OF LEGISLATIVE AUTHORITY

The great exception to the principle that legislative power may not be delegated is found in the transfer of such power by the state legislature to municipal councils.34 In other cases of delegation there must be such a standard or declaration of policy stated that only the details of perform-

32. Wigmore on Evidence § 2572 (3d ed. 1940).
ance are assigned. With respect to city councils, it seems often to be held also that even delegation by them is not freely permitted. On occasions when the so-called delegation is sustained, it will be justified rather as a directive involving administrative rather than legislative discretion. This points in another direction and deserves a separate discussion. There is far less need of such a principle for city councils.

Illustrations of legislative powers, however, held to be non-delegable are not infrequent. Thus, in In re Williams, an ordinance regulated the sale of liquors, forbidding it in certain areas of the city without a license, and commissioned the mayor to designate those areas. The court said this authority of the mayor was legislative and the ordinance was void. It would seem to be rather a simple matter for the mayor to recommend certain areas to the council and for the council to adopt them as its own act. There was no issue about arbitrary action by him and nothing was gained by such a regulation. In Bolton v. Gilleran it was decided that a city could not delegate to an officer the duty to determine the necessity or extent of a given improvement or the manner of its performance.

VI. JUDICIAL REVIEW OF COUNCIL FACT-FINDING

There are certain other aspects of the activity of municipal legislatures which in some courts are treated differently from the same type of activity of a legislature. One raises the question whether a fact found by a council is any more subject to judicial review than facts found by a superior legislature. One type of fact-finding that frequently arises for a court test is that an emergency exists which justifies a variation from the normal pro-

35. See Biddleford v. Yates, 104 Me. 506, 27 Atl. 335 (1908).
36. In re Wilson, 32 Minn. 145, 19 N.W. 723 (1884). See also Shreveport v. Herndon, 159 La., 113, 105 So. 244 (1925).
37. 105 Cal. 244, 28 Pac. 881 (1894).
38. A distinction between ordinances passed with express authorization of the legislature and those enacted under general authority is made in Stubbe v. Adamson, 220 N. Y. 459, 116 N.E. 372 (1917). It is there stated that ordinances having express sanction are to be treated like statutes and as a general proposition evidence is not admissible to show they are unreasonable and so unconstitutional. But ordinances enacted under general authority may be freely attacked for their unreasonableness. See also Montgomery v. Orpheum Taxi Co., 203 Ala. 103, 82 So. 117 (1919); Dangel v. Williams, 11 Del. Ch. 213 (1916); Catholic Bishop of Chicago v. Village of Palos Park, 286 Ill. 400, 121 N.E. 561 (1918). In Phillips v. Denver, 19 Colo. 179, 34 Pac. 902 (1893), an ordinance enacted under a general power is bad which denies a permit for a livery stable in any block in which a school is situated or in any block opposite to such block. So in Ex parte McCarver, 46 S.W. 936 (Tex Crim. App. 1898) an ordinance passed under a general power prohibiting persons under 21 from the streets after 9 P.M. is bad.
procedure which would be illegal were it not for the emergency. Thus, in *San Christina v. City and County of San Francisco,* the city charter provided that taxes should not exceed a certain rate except in cases of great necessity and emergency, and then the limitation might be suspended. It was required that the ordinance suspending the limitation recite the character of the necessity. After the earthquake of 1906, the board of Supervisors determined that a tax emergency existed. The finding in the principal case in 1910, however, being the same as that made in 1906, the court declared that an emergency did not last so long. An emergency was defined as an unforeseen occurrence calling for immediate action. To the argument that a legislative finding is conclusive, the court said that a finding by a state legislature was conclusive upon the courts, but that this reasoning does not apply to the acts of inferior legislative bodies. The issue had been raised by a taxpayer and his claim that the tax so levied was illegal was sustained.

In Indiana the rule announced in California was approved. In a charter city, however, such a finding by the council is as conclusive as a legislature's finding, and was upheld even though it practically nullified the statute requiring competitive bidding. In Massachusetts it was decided that the finding of an emergency as a fact by the aldermen is not even presumptive evidence of its existence. The city had failed to provide in its budget sufficient funds for the removal of an unusually heavy snowfall. The statute required expenditures to be budgeted save in cases of emergency.

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40. See Morgan v. City of Long Beach, 207 Pac. 53 (Cal. App. 1922) (the mere statement of a city council declaring in an ordinance that an emergency exists will not render it immediately operative). In Los Angeles Dredging Co. v. Long Beach, 210 Cal. 348, 291 Pac. 839, 71 A.L.R. 161 (1930) the finding of an emergency in order to avoid competitive bidding was said to be prima facie evidence of the fact.
41. See State ex rel. Kautz v. Board, 204 Ind. 484, 184 N.E. 78 (1933) (emergency for construction of new court house denied); First Nat. Bank v. Van Buren Twp., 93 N.E. 863 (Ind. App. 1910) (emergency to borrow money to pay teachers' salaries denied). Cf. Mallon v. Water Comrs., 128 S.W. 764 (Mo. App. 1910) (need for municipal supplies could be anticipated); Green v. Okanogan Co., 60 Wash. 309, 111 Pac. 226, 114 Pac. 457 (1910) (construction of a bridge, the need for which was due to increase in population, not an emergency). See note on the conclusiveness of declaration in ordinance of emergency in 55 A.L.R. 779. See State v. Small, 126 Me. 235, 137 Atl. 398, 400 (1927). "While a different rule prevails as to legislative acts, the power of the court to declare a municipal by-law, enacted under general authority, invalid, if unreasonable, is unquestioned."
42. Stern v. Spokane, 60 Wash. 325, 111 Pac. 231 (1910).
There is some conflict whether even a declaration of emergency by a state legislature is binding on the courts. This matter is developed in a comparatively recent case in Ohio. Prior to 1937 when a vacancy occurred in the board of county commissioners, it was filled by the judge, the auditor and the recorder of the county acting jointly. In that year this provision for appointment was altered whereby any such vacancy in any given county was to be filled by the remaining commissioners acting with the county engineer. In the amendment an emergency was declared to exist so that the new provision should become operative at once on its passage. In State ex rel. Schorr v. Kennedy44 the plaintiff alleged that the amendment involved no emergency in any proper sense and so was insufficient to defeat a referendum of it. In passing upon the issue whether an emergency did or did not exist, the court noted a conflict in the decisions but held that in Ohio a determination by the legislature that an emergency existed would not be reviewed by the court even though the declaration was a subterfuge to avoid a referendum. In an earlier case it was noted that such a declaration had been held to be inconclusive, but in a subsequent case the finality of the legislative finding had been sustained by a divided court. Still later another case held the same way by a unanimous court. There is no indication here whether the court would have held the same way if the declaration had been made by a city council. The result might be affected by home rule provisions. It is difficult to think that so bold an effort to avoid a referendum would succeed where the legislation is on the municipal level unless the matter were controlled by a home rule charter or else by express legislative authorization, both of which are unlikely to exist.

There are findings of fact by councils which do not involve emergencies. Thus, where a council finds that the carrying on of a certain business is under the circumstances a nuisance, the finding will be reviewed.45 Such a regula-

44. State ex rel. Schorr v. Kennedy, 132 Ohio St. 510, 9 N.E. 2d 278 (1937). In a case where express authority had been granted by the legislature to the municipality to enact certain ordinances reducing municipal salaries in a time of depression it was held that the council's declaration of emergency was not reviewable. It is not clear what the holding would have been had there been no express legislative authority. See Halcomb v. State ex rel. Conely, 126 Ohio St. 496, 186 N.E. 99 (1933). Missouri [State ex rel. Schmill v. Carr, 203 S.W. 2d 670 (Mo. App. 1947)] and New Mexico [Todd v. Tierney, 38 N.M. 15, 27 P. 2d 991 (1933)] clearly hold such a finding to be reviewable. The courts here however applied no clear limitation of the doctrine to municipal legislation. In this respect there is no distinction between a declaration of emergency by a home rule city from that of a state legislature; Joplin v. Ten Brook, 124 Ore. 36, 263 Pac. 893 (1928).

45. Oklahoma City v. Dolese, 48 F. 2d 734 (10th Cir. 1931); see also Yates v.
tion is probably not legislative. The question, however, whether a council’s finding is conclusive in the same sense that legislature’s finding is, arises most often in the case of emergencies.

One may note some illustrations where state or federal findings were regarded conclusive except in exhibitions of arbitrariness and unreasonableness. Thus a legislative finding that certain lands within an assessment district will be benefitted is conclusive.\textsuperscript{46} A statutory declaration that an airport operation by a city was a governmental function, and so there would arise from it no liability for tort, was held conclusive contrary to the usual rule.\textsuperscript{47} So also the finding that a slum clearance is a necessity will not be disputed.\textsuperscript{48} Indeed much of the New Deal legislation is based upon the presumption that such findings are not reviewable. Thus, a finding that a certain type of labor within the night hours in restaurants was especially detrimental to women was finally sustained.\textsuperscript{49}

There is indeed some conflict as to the conclusiveness both of state and federal legislative findings and a court may in one instance declare the finding arbitrary and in a similar case to another court, the finding may not appear to be arbitrary. There is a difference of opinion whether a distinction exists in this respect between superior and inferior legislatures,\textsuperscript{50} but in many states there is this distinction.

VII. The Extent of Municipal Law Making

While the state legislature has general law making power under the constitution, municipal legislatures are limited in this respect not only by the constitution and by legislation, but also by the basic proposition that they can enact only local law. To what extent can their legislative activity be extended so that their acts may have general effect or at least an effect not purely local? Presumably a statute granting wider power to a city

\textsuperscript{47} Stocker v. Nashville, 174 Tenn. 483, 126 S.W. 2d 339 (1939).
\textsuperscript{48} Marvin v. Housing Authority, 133 Fla. 590, 183 So. 145 (1938).
\textsuperscript{49} Radice v. People, 264 U. S. 292 (1924).
\textsuperscript{50} See notes in 7 A.L.R. 549, 552 (1920); 55 A.L.R. 779 (1928); 110 A.L.R. 1435 (1937); 37 AM. Jur., Evidence § 153, p. 765. Cases are cited from Arkansas, Colorado, Illinois, Indiana, Oklahoma, Oregon, Texas and Virginia to the effect that state legislative findings are conclusive. See Stevenson v. Colgan, 91 Cal. 649, 27 Pac. 1089 (1891); People \textit{ex rel.} Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207 (1909). The contrary view is noted in Maine, Maryland, Michigan, South Dakota and Washington.
would be unconstitutional since the delegation of legislative matters is limited to local affairs. It is not always easy to decide between things local and those to some extent general in their impact.

There are certain powers belonging to municipalities which do not involve lawmaking strictly, yet are akin to it. Thus, a city may incorporate a sanitary district in another state just across the border though there is no explicit authority therefor.\textsuperscript{51} A city may build, own and lease a railroad system though it could not have subscribed for stock in a company organized for that purpose.\textsuperscript{52} The cases relate a fascinating story of an amazingly successful railroad enterprise undertaken and completed by the city of Cincinnati.\textsuperscript{53} In these cases, among other matters, we find the terms of the lease by the city, an account of large profits accruing to it from the enterprise and the requirement that the city pay income taxes to a foreign state by virtue of having productive property there.

Like a legislature, a council may require the attendance of witnesses to assist it in framing legislation; at least a home rule city may do so.\textsuperscript{54} It can be subjected to an action by the state of its creation.\textsuperscript{55} A home rule city, at any rate, has been held to have the capacity to fix utility rates within its confines without express authority therefor.\textsuperscript{56} It has been held, however, that a non-home rule city could not fix maximum and minimum rates for barbering and for dry cleaning even if it had express authority for such an ordinance.\textsuperscript{57} This result might be due to the view that the effect is not local. At that time, probably, a state legislature also could not have done so. A city, as presumably also a state, may not sue for libel\textsuperscript{58} though this is probably due to a general policy rather than to lack of delegation of power.

Can a municipality alter the common law by ordinance? Naturally, it is bound by state statutes, but it may commonly add to them in police matters where the addition does not conflict with the statutes and where it has purely local application.

\begin{itemize}
\item 52. Walker v. Cincinnati, 21 Ohio St. 14 (1871).
\item 53. See Walker v. Cincinnati, 21 Ohio St. 14 (1871), and also Forscheimer v. Le Blond, 108 Ohio St. 41, 140 N.E. 491 (1923) and Cincinnati v. Com. ex rel. Reeves, 292 Ky. 597, 167 S.W. 2d 709 (1942).
\item 54. \textit{Ex parte} Holman, 191 S.W. 1109 (Mo. App. 1917).
\item 55. Trenton v. State, 262 U. S. 182 (1923).
\item 56. City and County of Denver v. Mountain State Tel. Co., 67 Colo. 225, 184 Pac. 604 (1919).
\item 57. Mobile v. Rouse, 233 Ala. 622, 173 So. 266 (1937).
\end{itemize}
Can a city under a home-rule charter change the common law requirement for consideration in the making of a contract? Can it pay out public money in case of a tort where there is no common law liability? A somewhat parallel issue arose in New York, a charter city. A policeman while seeking to arrest certain bandits, shot and wounded a bystander. An ordinance had been passed permitting compensation to be made to the injured person in such cases. The resolution authorizing the comptroller to pay the damages was resisted until the court should pass upon it. The court observed that the ordinance (which could also be sustained by a state statute) changes the common law liability of cities for policemen’s torts committed in the discharge of governmental functions. This liability is imposed even though the officer may have been without fault. It was further said that the extent to which moral claims should be recognized is primarily for the city itself to determine. Such liability may even be retroactive.\(^6^0\) The fact of home rule was emphasized, and the case was decided on the basis of the ordinance rather than on the statute but the question still remains whether this is purely a local matter.

In speed regulation cases the question arises whether a city by ordinance can alter the common law standard of reasonable care or add to the statutory requirement concerning it. In *Schell v. Dubois*\(^6^0\) the statute declared it to be unlawful to operate a motor vehicle at a speed greater than eight miles per hour in the built-up portion of a city. The defendant violated this statute and drove past a street car while it was loading and unloading passengers. An ordinance made it wrongful to drive past a streetcar so engaged. In an action for wrongful death both violations were proved. The trial court instructed the jury that it was prima facie negligent to violate the statute, but the violation of the ordinance was no evidence of negligence. It is probable that the statute violation was not the proximate cause of the harm, whereas the ordinance violation was. On appeal it was held that each violation was negligence per se.

\(^{59}\) Evans v. Berry, 262 N. Y. 61, 186 N.E. 203 (1933). See notes in 19 CORN. L. Q. 77 (1934); 33 MICH. L. REV. 131 (1935); 18 MINN. L. REV. 360 (1934); 10 N.Y.U.L.Q. REV. 407 (1933); 7 So. CALIF. L. REV. 341 (1934), and the dissenting opinion of Carter, J., in Raisch v. Myers, 167 P.2d 198 (Calif. 1946).

\(^{60}\) Schell v. Du Bois, 94 Ohio St. 93, 113 N.E. 664 (1916). Since an ordinance involves local law making, it does not come within the terms of the judicial code (28 U.S.C.A. § 380). The code provides for a three judge court in cases where an interlocutory injunction is sought to restrain the enforcement of state statutes. See Rorick v. Board, 307 U. S. 208 (1939), noted in 8 GEO. WASH. L. REV. 231 (1940). See also FORDHAM, CASES ON LOCAL GOVERNMENT LAW 367 (1949).
There are decisions, however, which distinguish violations of statutes from violations of ordinances. In Kentucky for many years and until recently it was held that the violation of an ordinance was no evidence of negligence.61 Prosster62 remarks that the weight of authority is that the violation of a statute is negligence per se, but that some courts hold the violation of an ordinance is only evidence for the jury. He cites for the latter view cases from Arkansas, Michigan and New York. Such an ordinance, when adding to but not conflicting with a statute, would seem to be local in its bearing and to be a police regulation.

In Nashville C. & St. L. Ry. Co. v. White63 it was held that a violation by the railway of an ordinance requiring the latter to give warning of approaching trains at street crossings by keeping a flagman there waving a flag when trains were approaching was negligence per se. An electric signal had been installed in lieu of the flagman, but conceivably the presence of a flagman might have avoided the accident that occurred, though the electric signal would generally be a better safeguard. While this ordinance alters the common law standard of due care, it seems to be a purely local police regulation.

Undoubtedly, municipalities can enact legislation which may have an indirect impact of great force in the area of private law—as witness ordinances establishing maximum hours of labor in the case of public works and zoning restrictions on the use of property. Thus, in Lois v. Cleveland Ry. Co.,64 the ordinance fixed a standard of care for the operation of street cars as a police regulation. The injured plaintiff was permitted a recovery which was impossible under the common law. It was held on the other hand in Wilson v. East Cleveland65 that not even a home rule city could require notice of claims arising out of failure to maintain streets properly, to be

61. See 38 Ky. L. J. 479 (1950).
63. 278 U. S. 456 (1929).
64. 101 Ohio St. 162, 128 N.E. 73 (1920). See also Sloder v. Transit Co., 189 Mo. 107, 88 S.W. 648 (1905). McHugh v. St. Louis Transit Co., 190 Mo. 85, 96, 88 S.W. 451 (1905) (cannot join a common law claim and one based on an ordinance in same count, but can do so in same complaint). See Brannock v. Elmore, 114 Mo. 55, 59, 21 S.W. 451 (1893). See Philadelphia & Reading Ry. v. Erwin, 89 Pa. 71 (1879) (where there is no negligence by the defendant at common law, the ordinance cannot create a liability). An ordinance adds nothing to the existing common law liability which requires a railing to be maintained around a hatchway. See Windler v. People's House Furnishing Co., 165 Mo. 527, 65 S.W. 737 (1901); but cf. Hirst v. Ringen Real Estate Co., 169 Mo. 194, 69 S.W. 368 (1902).
65. 121 Ohio St. 253, 167 N.E. 892 (1929).
given within thirty days after the accident.\textsuperscript{66} May a city throw the burden of freeing sidewalks from snow and ice upon the owner of the premises and impose a penalty for his failure? There is a pretty square conflict in the authorities.\textsuperscript{67} While such an ordinance has only an immediate local application, it may involve a general principle of considerable significance in the law of property. In practice it seems highly beneficial.

The question of the power of a council to assess additional criminal penalties is associated with the question of power to enact law. If express statutory authority were granted, the question of delegation of power may arise. In a home rule city a wider power may be found than in a non-home rule city. The question may still remain whether such an enactment is merely local.

With respect to fines and penalties, the late Professor Freund\textsuperscript{68} says: "The general rule is that in the absence of specific provisions, prosecutions for fines and suits for penalties are brought in behalf of and in the name of the state by the prosecuting officials. There are, however, probably in every state statutory provisions under which penalties for the violation of ordinances are recovered in proceedings brought by the municipal corporation."

The Nebraska court, without assigning a reason, denied the power of a city to enforce by ordinance an occupation tax by a penal provision, which ordinance, apart from the penal clause, it had authority to pass.\textsuperscript{69} In \textit{Kalamazoo v. Kalamazoo Co. Judge},\textsuperscript{70} the city had established a gas rate. Sub-

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  \item 66. In 11 U. of CIN. L. Rev. 113 (1937) it is observed that in such a case, Ohio and Oklahoma differ from the rule in most states. See an excellent note in 10 Ohio Sr. L. J. 152 (1948) on the power of Ohio Municipalities to enact private law.
  \item 67. For the affirmative see Goddard, Petitioner, 33 Mass. (16 Pick.) 504 (1835); Helena v. Kent, 32 Mont. 279, 80 Pac. 258 (1905); Village of Carthage v. Frederick, 122 N. Y. 268, 25 N.E. 489 (1890); State v. Small, 126 Mo. 235, 157 Atl. 398 (1927); Kansas City v. Holmes 274 Mo. 159, 202 S.W. 392 (1918); Lincoln v. Janesch, 63 Neb. 707, 89 N.E. 280 (1902); State v. McMahon, 76 Conn. 97, 55 Atl. 591 (1903). See for the negative, McGuire v. D.C., 24 App. D.C. 22 (1904); Chicago v. O'Brien, 111 Ill. 352 (1884); State v. Jackman, 69 N.H. 318, 41 Atl. 347 (1898). There is no doubt, however, that the city cannot impose a direct liability on the property owner to the person injured. See St. Louis v. The Connecticut Mut. Life Ins. Co., 107 Mo. 92, 17 S.W. 637 (1891); Heeney v. Sprague, 11 R. I. 456 (1877).
  \item 68. Legislative Regulation § 81, p. 325 (1932).
  \item 69. Magneau v. Fremont, 30 Neb. 843, 47 N.W. 280 (1890)—same result as in Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146, 166 N.W. 998 (1918), on penal provision to enforce an ordinance. This case shows the imitation of state practice in reading ordinances three times.
  \item 70. Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146, 166 N. W. 998 (1918). See also \textit{In re Wilson}, 32 Minn. 145, 19 N.W. 723 (1884). A good discussion of the validity of ordinances prescribing penalties in addition to statutory penalties is found in 20 U. of CIN. L. Rev. 400 (1941).
\end{itemize}
sequently, another ordinance set up a new rate and imposed a fine upon the
gas company in case it should violate the new rate. The imposition of a fine
was held to be invalid for the reason that in granting the use of its streets
and alleys to the company it was acting in a proprietary capacity and as a
proprietor it could have no contractual advantage over other private con-
tractors, though the fixing of rates in and of itself was a valid governmental
act.

Attempts have been made by municipalities at one time and another
to create rights and duties between their citizens which did not grow directly
out of the police power. Examples are an attempt to change the standard
of negligence by giving a mail carrier the right-of-way over street cars;
requiring a water company to repair private service pipes of consumers;
providing a fine as punishment for injuries to shade trees; and requiring re-
sta urants to serve food without discrimination.\textsuperscript{71}

If there is a common law liability it has been said that an ordinance
may prescribe the manner of its discharge. Thus an ordinance requiring any
person who makes an excavation in or adjoining a public street to erect a
three foot fence is valid inasmuch as there is a duty at common law to guard
the excavation.\textsuperscript{72}

Professor Freund suggests that a municipality has a certain indirect
advantages over private persons in such matters, in that it can often fore-
stall adverse interpretations of ordinances by stipulations. Thus, a regu-
lation that the owner of premises must connect them with the sewer and cause
the rent to be paid (failure to do which is punishable by a fine) is void, but
it can cut off the water on failure to pay, though it could not collect the fine
by suit. "It is the general law which establishes the civil consequences of an
act of violation of an ordinance."\textsuperscript{73}

A home rule city at least, has the power to enforce a summons by bodily
attachment when the witness refuses to attend for the purpose of assisting

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\item \textsuperscript{71} Bain v. Ft. Smith Light & Traction Co., 116 Ark. 125, 172 S.W. 843
\textsuperscript{(1915)}; Joplin v. Wheeler, 158 S.W. 924 (Mo. App. 1913); Goshen v. Crary, 58 Ind.
\textsuperscript{268} (1877); Nance v. Mayflower Tavern, Inc., 106 Utah 517, 150 P. 2d 773 (1944).
\item \textsuperscript{72} Jelly v. Pieper, 44 Mo. App. 380 (1891).
\item \textsuperscript{73} See Etheredge v. Norfolk, 148 Va. 795, 139 S.E. 508, 55 A.L.R. 781 (1927);
O'Connell v. Sanford, 256 Ill. 62, 99 N.E. 885 (1912); State v. Deckenbaugh, 117 Ohio
St. 227, 157 N.E. 758 (1927) (city cannot impose a liability directly but may re-
quire a liability bond as a condition for issuing a license). Freund thinks that
perhaps the regulation of the use of party walls by a municipality may be, in a
sense, an exception to the rule that the latter cannot in general regulate private
rights.
\end{itemize}
the council in framing legislation; in particular the fixing of an occupation
tax rate.74 In Wisconsin a statute was enacted permitting municipalities to
establish local rules which should be in conformity with state statutes. It
declared a penalty for drunken driving, consisting of a fine or imprisonment
or both. An ordinance was also passed by the municipality which seems to
have differed from the statute (though that is not made clear), in that no
 provision was made for a jury trial. It seems that the prosecution of the
accused in State ex rel Keef v. Schmiege75 was had under the ordinance
rather than under the statute for that reason. It was held that both the
statute and the ordinance were invalid, the former because it purported to
authorize an inferior legislature to create a crime, and the latter because it
created a crime.

The Nebraska case above seems to follow Professor Freund's rule. The
Michigan case reaches much the same result through a highly technical dis-
tinction between governmental and proprietary legislation.

In the penalty cases it is not altogether clear whether the failure of
power arises from a lack of specific grant of it or whether it embraces some-
ting more than a mere local regulation, or is a mere general historical rule
as stated by Professor Freund.

VIII. IS AN ORDINANCE LAW?

Whether an ordinance is law depends upon the meaning of the term law
in the context in which it is used. Generically an ordinance may be called
law. Thus in U. S. Fidelity & Guar. Co. v. Guenther76 an action was brought
in the federal court by an auto liability policy holder against the insurance
company on its policy for loss by accident. The policy stipulated against
liability where the auto was operated by one under the age fixed "by law."
An ordinance of the city where the accident occurred made it "unlawful" for
an owner to permit a minor under the age of 18 to operate an auto in the
city. The defense was that the auto was being operated by the plaintiff's son
who was under that age. It was held below that the term "by law" was
ambiguous and should be construed as not including ordinances. This hold-

74. Ex parte Holman, 191 S.W. 2d 1109 (Mo. App. 1917).
75. 251 Wis. 79, 28 N.W. 2d 345 (1947), criticized in [1948] Wis. L. Rev. 96
on the ground that the offense charged was only a misdemeanor and at common
law the defendant in a misdemeanor prosecution was not entitled to a jury trial.
76. 281 U. S. 34 (1930), noted in 29 Col. L. Rev. 1022 (1929) (circuit court
ing was reversed on appeal, it being declared that an ordinance is law in the generic sense in this case.

In Pennsylvania at least there are cases holding that an ordinance is not a law but is a mere police regulation at least for certain purposes within the state constitution. The Pennsylvania constitution declares that no law shall be passed which extends the term of office or increases or diminishes the salary of an officer during his term. A burgess's (used in the sense of mayor) salary was both decreased and then increased by an ordinance during his term. Held this is not a law but a local regulation and does not conflict with the constitution\textsuperscript{77} In \textit{Taylor v. Philadelphia}\textsuperscript{78} an ordinance required that in letting a contract for the cutting of the stone for a new library, the work must be required to be done in Philadelphia. It was held that if such a requirement had been by statute it would have constituted special legislation and so unconstitutional, but as an ordinance it was not unconstitutional. In \textit{East St. Louis Ry. v. East St. Louis}\textsuperscript{79} it was held that where a rate confiscatory ordinance had been adopted by the city its operation could not be enjoined in the federal court if the city had no statutory power to enact it inasmuch as this would not be state action and the court's jurisdiction is limited to cases where the enactment sought to be prohibited is state action under the Fourteenth Amendment.

Whether thus an ordinance is a law in a specific or in a generic sense depends upon the context in which it is used showing the intention of the user, whether he is a law maker or a party to some legal transaction.

\textbf{Summary}\textsuperscript{80}.

The business of a municipality would be greatly hampered if municipal councils adjourned sine die in imitation of legislatures. The separation of powers and the republican form of government would be highly impractical. Accordingly, since the separation of powers concept does not exist, there is no sufficient reason why courts should feel bound by the council's findings of fact to the same extent that they feel obligated to respect such findings by

\textsuperscript{78} 261 Pa. 458, 104 Atl. 766 (1918).
\textsuperscript{79} 13 Fed. 2d 852; cf. also note 60 \textit{supra}.
\textsuperscript{80} As to the distinction on the question of personal liability for unauthorized acts, between councilmen and state legislators, some states affording the same immunity to the former as to the latter while others do not, see [1951] \textit{Wash. L. Q.} 205, \textit{supra} n. 1.
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a legislature. It probably contributes to good local government for the courts to examine these findings freely.

So also the general practice against judicial notice of ordinances in the trial of cases, where ordinances and resolutions are involved, seems justified. Municipal records are not too accurately made nor carefully kept. The ordinance may be invoked in a case heard far from the location of the municipality enacting it, and the court may well have serious difficulty in knowing its contents without proof properly made.

As for the delegation of legislative powers by the council, good local government may be enhanced by not insisting too sharply upon the laying down of clearly defined standards for the application of the policy of the ordinance. The members of the council are likely not to be skilled in such matters, though the ordinance will perhaps be drawn with competent advice. Many police policies defy the laying down of anything like standards of application and on-the-spot decisions are often necessary. In street improvements many hazards and obstacles are not foreseeable. After all, non-delegation is based in part upon separation of powers which as we have seen does not exist for municipalities, and the matter should be decided by the exigencies of the case, good sense and sound judgment.

It may be a question, however, how far a court should go in preventing action by the council. It is remembered that the court is not a part of the legislative machinery and there are usually other adequate remedies. As for law-making by councils—we must assume that their functions are and should be locally limited. Protection of the citizens requires police regulations which have genuine social impact in many cases. It would be embarrassing however to pass ordinances or alter private common law which had general application. It would be at least impractical to have problems of the conflict of laws arise within the boundaries of a single jurisdiction.

Briefly then, the following are some important contrasts between state legislatures and municipal councils: (a) The council is a continuous body. (b) The municipal government is not republican in form. (c) The same degree of separation of powers does not exist. (d) Generally the courts of the state of the municipality do not recognize the ordinances of the latter as law and ordinances must be put in evidence when reliance is put upon them. (e) The state may delegate legislative power to a municipal corporation and this is an exceptional delegation. As for the council, it has or should have freer power of delegation than a legislature has perhaps under the heading of
administrative regulations. (f) Judicial review of fact finding by the council is likely to be more extensive than in the case of legislatures. (g) Councils are limited in their lawmaking to matters of local import; and have no general law making power. (h) Some courts hold that councilmen may be personally liable for damages for unpermitted legislation. (i) Statutes are presumed to be valid unless they are arbitrary or unreasonable, but it seems that there is no such presumption respecting ordinances except where they are expressly authorized either by statute or by the constitution. (j) An ordinance may also be distinguished from a statute in that it may not in a particular instance be regarded as law generically. Presumably in those cases if the same act had been passed by a state legislature it would be law.