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Edited by BENJ. F. SHAMBAUGH

Invalidation of Municipal Ordinances by the Supreme Court of Iowa

By

ETHAN P. ALLEN

PUBLISHED AT IOWA CITY IOWA IN 1933 BY
THE STATE HISTORICAL SOCIETY OF IOWA

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EDITOR'S PREFACE

The scope of this monograph is precisely what its title implies — *The Invalidation of Municipal Ordinances by the Supreme Court of Iowa.* It is true that some of the judicially determined limitations upon the ordinance-making power of municipalities have subsequently been removed by legislation; but such statutory definitions of authority are not included in these pages. This study is confined to an analytical description of cases in which the Supreme Court of Iowa has declared municipal legislative action void.

From his analysis of cases examined, the author has drawn a number of fundamental principles regarding the ordinance-making power of municipal corporations in Iowa (See pages 108-113). This synthesis may help laymen who occupy the important position of public trust as city councilmen to understand and appreciate more fully the scope as well as the limitations of their legal authority.

For a comprehensive discussion of municipal government and administration in Iowa, the reader is referred to Vols. V aud VI of the *Iowa Applied History Series,* published by the State Historical Society of Iowa.

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BENJ. F. SHAMBAUGH

OFFICE OF THE SUPERINTENDENT AND EDITOR
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CONTENTS

INTRODUCTION

The American system of jurisprudence recognizes the existence of two general classes of corporations — public and private. Their powers, in either case, are derived from the state under whose suffrance or by whose command they come into being. These corporations exist only in legal contemplation and possess only the powers conferred upon them by their creator. Corporations, public or private, are legal group-persons possessing an existence quite apart from that of the individuals of which they are composed. In short, corporations are legal persons, perfectly distinct from the members which compose them, possessing special names, and having such powers, and only such powers, as the law prescribes.

A municipal corporation is a *body politic and corporate* whose primary function is the government of a particular group of persons residing in a particular area. The incorporation of the inhabitants of a particular place or district is, on the whole, a voluntary act. By this act of incorporation certain duties are placed upon the people in their corporate capacity, and certain powers are given to them in that same capacity to aid in the execution of the imposed duties. The people of the locality are authorized "in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concern."

The legislative power of all municipal corporations in Iowa is vested in the city or town council, which exercises its legislative authority through the enactment of resolutions, by-laws, and ordinances. From a purely political point of view, it may be said that the council is the central and responsible governing body of the municipality: it is the law-making body of the city.

In the American system of government, the political position of the municipality is definitely fixed. Our hierarchy of laws places municipal ordinances at the foot of the list. Municipal ordinances must conform to applicable provisions established by the Constitution of the United States, acts of Congress, treaties made by the United States, the State Constitution, State statutes, the Common Law of the State, and State executive rules and orders. These various grades of laws are applied by the courts as limitations upon the law-making powers of municipalities. The doctrine of limited governmental powers is carried to its logical conclusion in city government. Thus it can be seen that the draftsman of municipal ordinances must possess a wide and thorough knowledge of our political and legal systems; he must be better equipped than the draftsman of State or Federal legislation; his field is that of the entire domain of our constitutional system.

In the pages following, it is the purpose of the writer to show the limitations placed upon the ordinance-making power of Iowa municipalities as illustrated in decisions rendered by the Supreme Court of the Commonwealth. All the volumes of the *Iowa Reports* were examined and the cases in which the Court declared municipal legislation invalid were selected for examination and classification. These cases show the limitations placed upon the legislative authority of Iowa municipalities by the Constitution of Iowa, the State statutes, and the Common Law of the State of Iowa. The study is, then, an inquiry into the constitutional law of the State. It is hoped that the inquiry will serve as a practical guide to the local councilman seeking to draft into law a desirable and wholesome legislative program. It is an attempt to aid in securing valid legal form for socially desirable legislation. It must be noted, however, that a change in the Constitution or in the statutes

may remove objections cited by the Court and that the interpretation in a particular case is not always final.

No municipal ordinance is valid unless it is enacted in the proper manner; for this reason the opening chapter is entitled "Procedure and Content". It is of great importance to any city that it possess an adequate source of revenue; the second chapter, therefore, deals with the general aspects of, and limitations upon, the taxing powers of Iowa municipalities. A special phase of the taxing power is considered in the following chapter under the title of "Special Assessments". Chapter four is devoted to the important problems of a city's control over the streets and sidewalks within its corporate limits. The authority of the city to enact legislation to protect the health, welfare, morals, and safety of its inhabitants is considered in chapter five entitled "Police Power of Municipalities". The concluding chapter presents a group of fundamental principles, based on the preceding court decisions, which will guide municipal ordinance-makers wishing to enact measures which will stand the scrutiny of the highest court of the Commonwealth.

While there is, in strict legal practice, a clear distinction between municipal ordinances, by-laws, and resolutions, the writer has elected to use the term "municipal ordinance" to include the entire legislative procedure of the municipal law-making agency. The terms "municipality", "municipal corporation", "city", and "town" are also used interchangeably, as a matter of common use, and not in their strict legal sense. These terms are used in this manner, not in a desire to befuddle or mislead the student desiring to discover the proper sphere of municipal action, but in the hope that the layman who fills the important post of councilman will more readily grasp the significance of his legal domain.

PROCEDURE AND CONTENT

THAT the authority given to the legislature to enact laws can not be delegated by that body to any other agent or agency is one of the settled maxims of American jurisprudence. "The legislative", said Locke, "neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have".[1]

An equally well established principle of law is that the granting of ordinance-making power to municipalities is not a delegation of legislative power on the part of the State legislature. In the words of the United States Supreme Court: "It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity."[2] This exception to the general principle of the non-delegation of

[1] Cooley's *Constitutional Limitations* (Seventh Edition), pp. 163-165; Dillon's *Municipal Corporations,* Vol. II, Sec. 573; McQuillin's *Municipal Corporations,* Vol. II, Sec. 644; Mathews's *American Constitutional System,* pp. 114-116; Willoughby's *The Constitutional Law of the United States* (Second Edition) Vol. I, pp. 451-545; Stoutenburgh *v.* Hennick, 129 U. S. 141; Locke's *Civil Government,* Sec. 142.

[2] Stoutenburgh *v.* Hennick, 129 U. S. 141, at 147. See also Cooley's *Constitutional Limitations* (Seventh Edition), pp. 165, 166; Morford *v.* Unger, 8 Iowa 82; Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505; Starr *v.* Burlington, 45 Iowa 87; I Blackstone's *Commentaries,* Sec. 476.

legislative authority in America is apparently based on the inherited practice of local self-government.

PROCEDURE

An ordinance, if passed in due form and if not in conflict with any higher law, becomes the most authoritative act of a city council, and it has the same force as State law within the limits of the city. Considerable care must be exercised that the correct procedure in enacting an ordinance is followed, since the courts are generally inclined to construe strictly all municipal actions. Iowa statutory requirements for the correct enactment of ordinances are numerous and detailed, and it behooves the local councilman to consider carefully the Code sections dealing with the subject. For while one part of an ordinance may be valid,[3] and another part invalid, the doctrine of strict construction serves as an ever ready weapon in the hands of the jurists.[4] Desirable legislation is likely to be declared invalid, not because the content is unconstitutional, but because of irregularities in procedure or form. Indeed, this is a relatively common occurrence. Out of the 474 cases examined in this study, 182 involved ordinances which were declared invalid because of failure to comply with the statutory requirements as to form and procedure.

When an Ordinance Is Necessary. — According to Chapter 290 of the *Code of 1931,* Iowa municipalities are given the authority to enact "from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties" of the city.

If the statutes require that an ordinance be passed in a certain prescribed manner, that mode of enactment must

[3] Ebert *v.* Short, 199 Iowa 147.

[4] Shaver *v.* Turner Co., 155 Iowa 492.

be followed.[5] Moreover, when the statutes require an ordinance, a resolution will not be held sufficient compliance with the law.[6] Even if it is not explicitly required that an ordinance be used, it may, nevertheless, be necessary that the action of the council take the form of an ordinance. In other words, it may, in some cases, be clearly implied from the statutes that the legislative intent was that the city should draw up its legislative program in the form of an ordinance, not in the form of a resolution.[7] As a general rule, legislative acts of a municipality must be enacted in the form of ordinances, while ministerial functions or acts of a temporary nature are put in the form of resolutions.[8]

Title. — According to the statutes, an ordinance may contain but one subject and that subject must be clearly expressed in the title.[9] In Trout *v.* Minneapolis & St. Louis Railroad Company[10] Mr. Justice Sherwin said: "The purpose of the requirement . . . . is to prevent the practice of presenting in a single act subjects diverse in their nature

[5] Horner *v.* Rowley, 51 Iowa 620; McGlow *v.* Whitson, 69 Iowa 248; State *v.* Omaha & Council Bluffs Bridge Co., 113 Iowa 30; Griffin *v.* Messenger, 114 Iowa 99; Dillon's *Municipal Corporations,* Vol. II, Sec. 576; Marion Water Co. *v.* Marion, 121 Iowa 306.

[6] Des Moines City Ry. Co. *v.* Des Moines, 90 Iowa 770. The grade of a street can not be established or changed without an ordinance or resolution authorizing such establishment. — Eckert *v.* Walnut, 117 Iowa 629; Caldwell *v.* Nashua, 122 Iowa 179. The creation or changing of the boundary of wards must be by ordinance and can not be by resolution. — Cascaden *v.* Waterloo, 106 Iowa 673.

[7] Cascaden *v.* Waterloo, 106 Iowa 673.

[8] Traschel's *The City Council* in *Applied History,* Vol. V, pp. 173, 174; City of Burlington *v.* Putnam Insurance Co., 31 Iowa 102; Cascaden *v.* Waterloo, 106 Iowa 673; Martin *v.* Oskaloosa, 126 Iowa 680; Sawyer *v.* Lorenzen & Weise, 149 Iowa 87; Murphy *v.* Gilman, 204 Iowa 58; McQuillin's *Municipal Corporations,* Vol. II, Sec. 633; Anderson's *American City Government,* pp. 376, 377; Cooley's *Handbook on the Law of Municipal Corporations,* p. 164.

[9] *Code of 1931,* Sec. 5715.

[10] 148 Iowa 135.

with a view to effect a combination, 'and thus secure the passage of several measures, no one of which would succeed upon its own merits'."[11] But this mandatory requirement[12] does not forbid the enactment, in a single ordinance, of all the legislation which may be necessary to the accomplishment of a single purpose. In Van Horn *v.* Des Moines, the Iowa Supreme Court said:

> We have quoted the title in full, and have carefully examined all of the provisions of the ordinance. The title is full and comprehensive, and, in so far as the various provisions of the ordinance relate or are germane to the subject and the purpose thereof, they are certainly valid. There is, perhaps, no precise test for determining in every instance whether a given provision is germane or not. Reasonable and liberal rules of interpretation must be adopted and followed. Many matters more or less remote are mentioned in the ordinance; but, when it is considered as a whole, they appear to be germane to the subject and general purpose thereof. The title is not deceptive or misleading, and it seems to us to meet the requirements of the statute.[13]

If the subject matter of the ordinance is germane to the general purposes expressed in the title, the Supreme Court is generally inclined to view the ordinance as valid.[14] The reason for this is rather clearly expressed by Chief Justice Stevens in the following words: "Even if we do not apply the liberal rule of the Constitution to city ordinances, it is practically universally held that the titles affixed to statutes

[11] 148 Iowa 135, at 138.

[12] Dempsey *v.* Burlington, 66 Iowa 687; Marion Water Co. *v.* Marion, 121 Iowa 306.

[13] Van Horn *v.* Des Moines, 195 Iowa 840, at 848, 849. See also Dempsey *v.* Burlington, 66 Iowa 687; State *v.* Wells, 46 Iowa 662; Hanson *v.* Hunter, 86 Iowa 722; Lovilia *v.* Cobb, 126 Iowa 557; Tomlin *v.* Chicago, Rock Island and Pacific Ry. Co., 141 Iowa 599.

[14] Van Horn *v.* Des Moines, 195 Iowa 840; Des Moines *v.* Keller, 116 Iowa 648; State *v.* Nebraska Tel. Co., 127 Iowa 194; Healy *v.* Johnson, 127 Iowa 221; Withey *v.* Fowler Co., 164 Iowa 377.

or ordinances must be given a reasonable and liberal construction.''[15]

In Cantril *v.* Sainer[16] the ordinance involved bore the title, ''Regulating the use and sale of intoxicating liquors''. In fact, the subject of the ordinance was entirely prohibitory, and it was held to be invalid as violating the statutory requirement. In the case of Dempsey *v.* Burlington,[17] however, the ordinance involved first vacated an alley and then granted the vacated land to a private person. It was held that the ordinance did not relate to more than one subject, since its object was the transfer of the title.[18] Another example is to be found in State *v.* Wells.[19] Here the title of the ordinance involved read: ''An ordinance describing and defining punishment for certain offences.'' The ordinance defined and prescribed punishment for twenty-six offences, and the claim was made that it had as many subjects. In refuting this contention, Mr. Justice Beck said: ''This is clearly a mistake. The subject of the ordinance is *offences* against the city. The one subject is composed of many parts.''[20] On the other hand, proposed ordinances dealing with various subjects may not be bunched together and enacted *en masse*.[21]

Reading and Vote. — The Iowa law requires that ordinances ''of a permanent nature and those for the appro-

15 Van Horn *v.* Des Moines, 195 Iowa 840, at 848; Dillon's *Municipal Corporations*, Vol. II, Sec. 577; McQuillin's *Municipal Corporations*, Vol. II, Secs. 681-686.

16 59 Iowa 26.

17 66 Iowa 687.

18 See also Tomlin *v.* C.R.&I.C.R.&L. Co., 141 Iowa 599.

19 46 Iowa 662.

20 46 Iowa 662, at 663, 664. Practically the same question is determined in the case of Lovilia *v.* Cobb, 126 Iowa 557.

21 State *v.* Livermore, 192 Iowa 626.

priation of money'' shall be read on three different days.[22] This provision, it was held in Strohm *v.* Iowa City[23], applies only to ordinances and not to resolutions, but where it does apply the terms of the law are mandatory in nature and any ordinance passed without compliance with this section is fatally defective.[24] Proposed ordinances may, however, be passed at a single meeting if the council, by a three-fourths vote dispenses with the rule.[25] Each ordinance must be read and passed upon as a single act. It is not legal for the council to group several ordinances under one motion and enact them *en bloc*.[26]

The rule requiring three readings on three separate days may be suspended by a three-fourths vote of the council. Three-fourths of the council has been interpreted to mean three-fourths of the entire membership, not three-fourths of the quorum present and able to do business.[27]

The statutes further provide that a ''majority of the whole number of members elected to the council, by call of the yeas and nays, which shall be recorded'' is necessary for the valid enactment of municipal legislation in the following cases: (1) to pass or adopt any by-law or ordinance; (2) to pass or adopt any resolution or order to enter into a contract; (3) to pass or adopt any ordinance or resolution for the appropriation of money; (4) to direct the opening, straightening, or widening of any street, avenue, highway, or alley; (5) to direct the making of any improvement which will require proceedings to condemn private

22 *Code of 1931*, Sec. 5716.

23 47 Iowa 42.

24 State *v.* Livermore, 192 Iowa 626.

25 Collins *v.* Iowa Falls, 146 Iowa 305; City of Bloomfield *v.* Blakely, 192 Iowa 310.

26 State *v.* Livermore, 192 Iowa 626; Markham *v.* Anamosa, 122 Iowa 689.

27 Trachsel's *The City Council* in *Applied History*, Vol. V, pp. 178, 179.

property; and (6) to direct the repair of any street improvement or sewer, the cost of which is to be assessed upon property or against the owners thereof.[28]

Court decisions have firmly established the doctrine that this provision is mandatory and that failure to comply with the requirement renders the ordinance void. An ordinance, falling in the classifications given above, is not considered to be legally enacted unless the yeas and nays are called for and recorded.[29] This vote must be entered at length upon the minutes of the council.[30] Where the record of the adoption of the ordinance gives the names of the members of the council present and shows that there was a corresponding number of votes in favor of the passage of an ordinance, and none against it, it is not essential that there be an express record of the names of those voting in favor of it.[31]

In the case of Iowa *v.* Alexander[32] strict compliance with the yea and nay vote was demanded. On a vote by a city council to appoint a certain person as street commissioner, three members voted yea, two did not vote, and one voted for another person. The last three were recorded as voting no. The mayor, declaring there was a tie, voted yea and declared the motion carried. Section 493 of the *Code of 1873*, the Court held, required that all appointments of city officers by a city council be made by a majority of the whole

[28] *Code of 1931*, Sec. 5717.

[29] City of Bloomfield *v.* Blakely, 192 Iowa 310; Town of Olin *v.* Meyers, 55 Iowa 209; Markham *v.* City of Anamosa, 122 Iowa 689; Cook *v.* City of Independence, 133 Iowa 582; Farmers Tel. Co. *v.* Town of Washta, 157 Iowa 447; Laughlin *v.* City of Washington, 63 Iowa 652; Marion Water Co. *v.* Marion, 121 Iowa 306; Sutton *v.* Mentzer, 154 Iowa 1.

[30] Cook *v.* Independence, 133 Iowa 582; Bennett *v.* Emmetsburg, 138 Iowa 57; Sutton *v.* Mentzer, 154 Iowa 1.

[31] State *v.* Nebraska Tel. Co., 127 Iowa 184; Sutton *v.* Mentzer, 154 Iowa 1.

[32] 107 Iowa 177.

number elected to the council, and also required that the records show for whom each man voted. For these reasons, the court held this appointment invalid.

In another case the Court decided that the record of the passage of an ordinance, showing simply that the mayor and all members of the council were present and that the ordinance was put upon its passage by a third reading and adopted, was not a compliance with the statute.[33] Where the record shows the affirmative, and only the affirmative vote, by name, of the majority of the council, the Court has ruled that this is sufficient to indicate that the yeas and nays were, in fact, called.[34]

Recording and Publication. — The General Assembly of Iowa has required the recording and publication of all ordinances of a city council.[35] Failure to comply with these stipulations renders an ordinance void.[36]

It is presumed that the essential steps in the enactment of an ordinance have been complied with by the city council.[37] Indeed, the court has allowed parol evidence in the matters of votes involving contracts,[38] as to publication,[39]

[33] Sutton *v.* Mentzer, 154 Iowa 1.

[34] Sutton *v.* Mentzer, 154 Iowa 1.

[35] *Code of 1931*, Secs. 5719-5725.

[36] Peairs *v.* Des Moines, 196 Iowa 1222. "The requirement that certain enumerated ordinances and resolutions shall remain on file in the office of the city clerk for one week, for public inspection, complete in the form in which they may be finally passed, is mandatory".—State *v.* Omaha and Council Bluffs Bridge Co., 113 Iowa 30; Town of Hancock *v.* McCarthy, 145 Iowa 51; Dubuque *v.* Wooton, 28 Iowa 571; Starr *v.* Burlington, 45 Iowa 87; Allen *v.* Davenport, 107 Iowa 90.

[37] Brewster *v.* Davenport, 51 Iowa 427; German Insurance Co. *v.* Manning, 95 Fed. 597; Taylor *v.* McFadden, 84 Iowa 262; Town of Hancock *v.* McCarthy, 145 Iowa 51; Barrett *v.* C.M.&St.P. Ry. Co., 190 Iowa 509.

[38] Indianola *v.* Jones, 29 Iowa 282; Duncombe *v.* Fort Dodge, 38 Iowa 281.

[39] Bayard *v.* Baker, 76 Iowa 220; State *v.* King, 37 Iowa 462; Eldora *v.*

as to recording,[40] and as to the signature of the mayor.[41] It is, generally speaking, the burden of the objector to show that the essential steps in the passage have been ignored, omitted, or violated.[42]

Signature of the Mayor. — All resolutions and ordinances, before they become operative, must receive the signature of the mayor unless they are passed over his veto or he fails to return them to the council within a specified time. If the mayor wishes to veto a measure, he must do so within fourteen days. Before the expiration of this period, he must return the bill to the council, together with the reasons for his veto, for reconsideration. If he fails to return the bill within the fourteen days or does not call the council meeting, the measure becomes law without his signature. The council may, by a two-thirds vote, override the mayor's veto.[43]

While these measures seem clear and explicit, some litigation has been brought before the Supreme Court of Iowa involving this section. In Heins *v.* Lincoln[44] it was held that the provisions under discussion were mandatory, and bonds issued by authority of an unsigned resolution were declared to be void.[45] In Town of Hancock *v.* McCarthy[46], however, the Iowa Court held that the mayor was not required to sign the original draft of the ordinance, as passed

Burlingame, 62 Iowa 32; Larkin *v.* B.C.R.&N.R. Co., 91 Iowa 654; Des Moines *v.* Casady, 21 Iowa 570.

40 Allen *v.* Davenport, 107 Iowa 90.

41 Powers *v.* Iowa Central Ry. Co., 157 Iowa 347.

42 Barrett *v.* C.M.&St.P. Ry. Co., 190 Iowa 509.

43 *Code of 1931,* Sec. 5718.

44 102 Iowa 69.

45 See also Moore *v.* City of Perry, 119 Iowa 427; Waltman *v.* City of Dubuque, 111 Iowa 105.

46 145 Iowa 51.

by the council, but that his signature in the ordinance book was sufficient compliance with the law. Failure of the mayor of a city to sign an ordinance rendered the act invalid under Chapter 192 of the *Acts of the Twentieth General Assembly.*[47] His failure to sign will not, of itself, keep an ordinance from becoming effective. If he wishes to prevent the enactment, he must veto it and return it to the council within fourteen days. Otherwise the ordinance becomes effective without his signature.[48]

It is the mayor who must sign the ordinance, not the temporary officers of the council. Thus, in Moore *v.* Perry[49] the Court held that a resolution in relation to an election on the question of the extension of the city limits, passed in the absence of the mayor and not presented to him for his signature or veto, but immediately published over the signatures of the temporary officers of the council, was invalid. The Court said, "The temporary chairman is simply the presiding officer for the time being, and is not vested with all the powers of the mayor."[50]

In the case of Messer *v.* Marsh,[51] however, the Court held that a resolution ordering the construction of a paving improvement was valid even though not signed by the mayor, since it appeared that he was the prime mover in the enterprise and that he had full knowledge of the passage of the resolution.

The signature of the mayor apparently may be omitted without invalidating a resolution. But his signature seems essential to the valid enactment of an ordinance, except in

47 Chicago, Rock Island and Pacific Ry. Co. *v.* Council Bluffs, 109 Iowa 425.

48 This change in the law is clearly brought out in Hancock *v.* McCarthy, 145 Iowa 51.

49 119 Iowa 423.

50 119 Iowa 423, at 429.

51 191 Iowa 1144.

cases of failure to veto and return the bill to the council. In matters purely ministerial in nature, it is possible, though not advisable, to omit the signature of the mayor without invalidating the act of the council. Where his signature is clearly an expression of approval or disapproval of legislative policy, however, the signature is essential to the validity of the ordinance.[52] This distinction arises out of the difference between the permanent character of an ordinance and the temporary, ministerial character of a resolution.

Repeal or Amendment. — It is clearly provided in the statutes that no ordinance or section of an ordinance can be revised or amended unless the new ordinance or section contains the entire ordinance or section in its amended form.[53] Mr. Justice Evans, speaking for the Court in Rocho *v.* Boone Electric Company & City of Boone[54] said: "The intent is that the amending ordinance or section shall be complete in itself, and that the former ordinance or section shall be repealed. The purpose of this statute is to avoid the confusion and the frequent contradiction which results from amendments which purport to add to or take from an existing ordinance mere words or phrases."[55]

Ordinances may be amended, repealed, or suspended by ordinance only, not by resolution, the Court has held.[56] Mr. Justice Given, in the case just referred to, said: "Surely, when the statute requires that the power conferred must be exercised by ordinance, and it has been thus exercised, the ordinance can only be amended, repealed, or suspended by

[52] Moore *v.* City of Perry, 119 Iowa 423.

[53] *Code of 1931*, Sec. 5717.

[54] 160 Iowa 94.

[55] 160 Iowa 94, at 97.

[56] Cascaden *v.* Waterloo, 106 Iowa 673, at 682.

ordinance. . . . Another potent reason is that ordinances of a general or permanent nature are required to be published in a certain manner, and thereafter stand as the law, of which all must take notice. Resolutions are not required to be so published, and, therefore, the public would not be informed of amendments, repeals, or suspensions of ordinances made by resolution."[57]

Where only one section of an ordinance is to be amended, that particular section and not the entire ordinance must be incorporated into the amendment.[58] Moreover, where a new ordinance does not attempt to amend the old by adding to or taking from one of its sections, "but contains in full the section as it was designed to be when amended", sufficient compliance with the statutory requirement is had.[59]

Curative Acts. — "It is inevitable", stated Mr. Justice Weaver in Burroughs *v.* City of Keokuk[60], "that proceedings of this nature by officers, boards or councils, made up, as they often are, or perhaps generally are, of men unfamiliar with legal forms or requirements, will be marked with more or less informality and irregularity; and to hold every such departure fatal to the validity of the action taken . . . . would be to paralyze the work of municipal" corporations.[61]

These irregularities are corrected, in the case of assessments, by a relevy of the tax by the city council itself. In other cases, the correction is secured through action on the part of the General Assembly of Iowa. Curative acts are enacted by that body for the relief of municipal corpora-

[57] 106 Iowa 673, at 681, 682.

[58] Decorah *v.* Dunstan, 38 Iowa 96.

[59] Larkin *v.* B.,C.R.&N. Ry. Co., 85 Iowa 492.

[60] 181 Iowa 660.

[61] 181 Iowa 660, at 666.

tions and if not special in nature are declared to be constitutional.[62] The term, special, as applied to legalizing acts, appears to be used in the sense that the act does not grant a special power. An appeal to the General Assembly, however, should be the last resort of the city council.

CONTENT OF ORDINANCES

Should the proposed ordinance successfully clear the many obstacles as to procedure, there are other and, from many points of view, more dangerous impediments to be surmounted. Here, as in the case of the implied limitations upon the taxing powers, the courts find refuge in the Common Law and in the political experience of the nation when seeking limitations upon municipal legislative authority. In this connection, the doctrines of limited governmental power and inherent personal rights play an important rôle.

A municipality is the creature of the State, with powers always subservient to the powers and policies of the State. No city possesses the power to forbid or punish that which the State law or policy either expressly or impliedly permits. All municipal ordinances must be consistent with the statutes of the State on the same subjects.[63]

Generally speaking, it is vital to any and every municipal legislative act that the enactment be based upon some public benefit.[64] Public policy demands the absence of fraud or suspicion of fraud for the valid enactment of a municipal

[62] Marion Water Co. *v.* Marion, 121 Iowa 306; Windsor *v.* Des Moines, 101 Iowa 343; Stange *v.* Dubuque, 62 Iowa 303. See also School District *v.* Burlington, 60 Iowa 500.

[63] Hedrick *v.* Lanz, 170 Iowa 437; Town of Sibley *v.* Lastrico, 122 Iowa 211; Incorporated Town of Avoca *v.* Heller & Heller, 129 Iowa 227; Iowa City *v.* McInnerny, 114 Iowa 586; Town of Neola *v.* Reichart, 131 Iowa 492; City of Mt. Pleasant *v.* Breeze, 11 Iowa 399; City of Chariton *v.* Barber, 54 Iowa 360; Town of New Hampton *v.* Conroy, 56 Iowa 498; Town of Nevada *v.* Hutchins, 59 Iowa 506; City of Centerville *v.* Miller, 57 Iowa 56.

[64] Love *v.* Des Moines, 210 Iowa 90, and cases there cited.

ordinance or resolution. Thus, in Hartley *v.* Floete Lumber Company[65] the Court held that it was contrary to sound public policy for a city to contract for supplies from a company whose manager, director, and chief stockholder was also a member of the city council.[66] In Brooks *v.* City of Brooklyn[67] the Court ruled that a municipal contract made to promote some private purpose, even though clothed with an apparent public purpose, was totally void.[68]

Ordinarily the judgment of the city council as to the public good will be considered decisive,[69] but the courts will always entertain objections to the council's interpretation of that which constitutes the public good. In such cases, however, the burden of proof lies with the objector,[70] but the city is at a disadvantage, since the courts resolve all doubts as to the existence of a power against the municipal corporation and in favor of the public.[71]

Even though the public good be satisfactorily demonstrated and though the absence of fraud is clearly shown, the ordinance may still fall if it is unreasonable in terms or operation. It is impossible to define abstractly this term unreasonable: each case presented to the Court brings its own peculiar problems, circumstances, and difficulties. As Mr. Justice Gaynor said in Blackmore *v.* City of Council

[65] 185 Iowa 861.

[66] In this particular case, however, no fraud was shown and recovery was granted the company against the city's action in cancelling the warrants issued in payment for the merchandise.

[67] 146 Iowa 136.

[68] See Strahan *v.* Malvern, 77 Iowa 454; and Walker *v.* Des Moines, 161 Iowa 215; Ryce *v.* Town of Osage, 88 Iowa 558.

[69] Williams *v.* Carey, 73 Iowa 194.

[70] Burlington *v.* Unterkircher, 99 Iowa 401; Iowa City *v.* Glassman, 155 Iowa 671; Iowa City *v.* Newell, 115 Iowa 55.

[71] Logan *v.* Pyne, 43 Iowa 524; Erickson *v.* Cedar Rapids, 193 Iowa 109.

Bluffs[72]: "What is reasonable . . . . depends upon many circumstances and conditions . . . . what is reasonable . . . . must be measured by the exigencies of the particular case."[73]

Examples of unreasonable ordinances may be found in the creation of a monopoly, an excessive license fee, arbitrary health inspection ordinances, confiscatory rates for public utilities, discriminations in letting bids, oppressive police measures, and unjust paving demands.[74]

[72] 189 Iowa 157.

[73] 189 Iowa 157, at 165. For a definition of reasonableness in ordinances, see Hume *v.* Des Moines, 146 Iowa 624, and cases there cited. See also, Town of Woodward *v.* Iowa Ry. & Lt. Co., 189 Iowa 518, and cases there cited.

[74] Des Moines City Ry. Co. *v.* Des Moines, 90 Iowa 770; Muscatine *v.* Chicago, Rock Island and Pacific Ry. Co., 88 Iowa 291; Cedar Rapids Water Co. *v.* Cedar Rapids, 118 Iowa 234 (199 U. S. 600); Swan *v.* Indianola, 142 Iowa 731, and cases there cited; Miller *v.* Des Moines, 143 Iowa 409; Iowa City *v.* Glassman, 155 Iowa 671, and cases there cited; Town of Woodward *v.* Iowa Ry. & Lt. Co., 189 Iowa 518, and cases cited therein; Dillon's *Municipal Corporations*, Vol. II, Secs. 589-601; Marshalltown *v.* Blum, 58 Iowa 184; Pacific Junction *v.* Dyer, 64 Iowa 38; McQuillin's *Municipal Corporations*, Vol. II, Secs. 724-739; Meyers *v.* Chicago, Rock Island and Pacific Ry. Co., 57 Iowa 555; State Center *v.* Barenstein, 66 Iowa 249; Burg *v.* Chicago, Rock Island and Pacific Ry. Co., 90 Iowa 106; Des Moines *v.* Des Moines Waterworks Co., 95 Iowa 348; Ottumwa *v.* Zekind, 95 Iowa 622; Star Trans. Co. *v.* Mason City, 195 Iowa 930; Keckevoet *v.* Dubuque, 158 Iowa 631; Gilcrest *v.* Des Moines, 128 Iowa 49; State *v.* Smith, 31 Iowa 493.

MUNICIPAL TAXATION

No governmental area can maintain an energetic existence (indeed it may hardly maintain any existence at all) without an adequate system of raising revenue. The power to levy taxes is to the political organism what oxygen is to the human organism. Without oxygen the human organism ceases to function as an active and living entity. Without adequate revenue a political organism withers and dies, its usefulness is lost, and its vitality is destroyed.

THE POWER TO TAX

Taxes have been defined as burdens or charges levied by any legislative body upon persons or property in order to raise money for public purposes.[75] Cooley says "the power to tax rests upon necessity, and is inherent in every sovereignty."[76] This power of taxation, possessed by the State, granted to the State legislature, and delegated by it to the municipality, is one of the more important (if not the most important) fields of municipal activity.[77] Taxation is the power nearest the people, for that agent or agency which touches the purse of the American public is of vital interest to the citizenry. In the American constitutional system, we have attempted to guard against excessive exercise of the taxing power by the municipalities.

Inherent Power to Tax. — No municipality in Iowa possesses any inherent power to tax; this authority comes only through a legislative grant. And this power can be ex-

[75] Cooley's *Constitutional Limitations* (Seventh Edition), p. 678.

[76] Cooley's *Constitutional Limitations* (Seventh Edition), p. 678.

[77] Out of the 474 cases examined, 165 dealt with or had a direct connection bearing upon this aspect of the taxing powers of Iowa municipalities.

ercised only when it is expressly conferred upon the municipality by the legislative body — the General Assembly of Iowa. The Supreme Court of Iowa, speaking through Mr. Justice Baldwin, in the case of Clark, Dodge and Company *v.* Davenport[78], said: "It is a well settled principle that a municipal corporation . . . . cannot exercise the power or right of taxation unless such power is expressly given to it by the Legislature."[79] The Court continued: "Any doubt or ambiguity arising out of the terms used by the Legislature in making a grant of powers to a municipal corporation must be resolved in favor of the public; and a power cannot be exercised where it is not clearly comprehended within the words of the act, or derived therefrom by necessary implication." In a case decided the following year, the Court said, "the truth is, taxation is a great governmental attribute, emanating alone from the controlling power of the State, and cannot be interfered with by the local authorities."[80] Similar statements to this effect are cited in the references below.[81]

Taxation of State and Federal Property. — A municipality, even though it has authority to tax railroad property

[78] 14 Iowa 494.

[79] 14 Iowa 494, at 498.

[80] Davenport *v.* Mississippi and Missouri Railroad Co., 16 Iowa 348, at 356.

[81] Jeffries *v.* Lawrence, 42 Iowa 298; Burlington *v.* Putnam Insurance Co., 31 Iowa 102; Dubuque *v.* Northwestern Life Insurance Co., 29 Iowa 9; Chamberlain *v.* Burlington, 19 Iowa 395; Illinois Central Ry. Co., *v.* Hamilton Co., 73 Iowa 313; Chicago, Milwaukee and St. Paul Ry. Co. *v.* Phillips, 111 Iowa 377; Chicago, Rock Island and Pacific Ry. Co. *v.* Reinbeck, 201 Iowa 126; Chicago, Rock Island and Pacific Ry. Co., *v.* Ottumwa, 112 Iowa 300; Williamson *v.* Keokuk, 44 Iowa 88; Dubuque *v.* C.D.&M.R. Co., 47 Iowa 196; Davenport *v.* Chicago, Rock Island and Pacific Ry. Co., 38 Iowa 633; Dunlieth and Dubuque Bridge Co *v.* Dubuque, 32 Iowa 427; Dubuque and Sioux City Ry. Co. *v.* Dubuque, 17 Iowa 120; State *v.* Smith, 31 Iowa 493; Reed *v.* Cedar Rapids, 136 Iowa 191; Muscatine Lighting Co. *v.* Muscatine, 205 Iowa 82; Clark *v.* Des Moines, 19 Iowa 199.

situated within its corporate limits, may not tax a bridge owned by the Federal government but used by a railroad. "It cannot be claimed that plaintiff owns any part of the bridge, nor an interest in it that attaches to the bridge itself. Its property is limited to the right to use the bridge. The bridge itself is wholly owned by the United States. . . . It follows that the bridge cannot be taxed as property of plaintiff. Neither can it be taxed as property of the United States, for such property is not subject to taxation by the States. . . . If plaintiff may be taxed at all on account of the bridge the taxation must be imposed upon the property owned by plaintiff connected with the bridge. This property . . . . consists of plaintiff's right to use the bridge."[82] Thus did the Supreme Court of Iowa announce its adherence to the well-established doctrine of American constitutional law — the maintenance of Federal supremacy through the freedom of Federal agencies from interference or control by taxation or otherwise by the States.[83] Neither may a municipality tax State property.[84]

Jurisdiction. — No city possesses the authority to tax property situated beyond the corporate limits of the municipality. In Turner *v.* Cobb[85], Mr. Justice Faville said: "That a municipality has no extraterritorial jurisdiction to levy taxes unless specially authorized by statute is well

[82] Chicago, Rock Island and Pacific Ry. Co. *v.* Davenport, 51 Iowa 451.

[83] McCulloch *v.* Maryland, 4 Wheaton 316; Osborn *v.* Bank of the United States, 9 Wheaton 738; Smith *v.* Kansas City Title and Trust Co., 255 U. S. 180; First National Bank *v.* Fellows, 244 U. S. 416; California *v.* Central Pacific Ry. Co., 127 U. S. 1. See Willoughby's *The Constitutional Law of the United States* (Second Edition), Vol. I, Ch. V, pp. 144-182, for further discussion of this question.

[84] Savings Bank *v.* Iowa, 69 Iowa 24. Chapter 162 of the *Laws of Iowa,* 1878, does not confer upon cities the power to assess a sewer tax upon property owned by the State and used for governmental purposes.

[85] 195 Iowa 831.

established. Appellants' lots, not being within the corporate limits of the incorporated town of Odebolt, are not subject to assessment by said town for municipal purposes."[86]

Municipalities have often attempted to enlarge their corporate limits so as to increase the amount of property subject to taxation. Such enlargement, of course, results in increased revenues for the municipalities. The principle to be deduced from the Iowa cases, says Cooley, seems to be this: "The legislature cannot arbitrarily include within the limits of a village, borough, or city, property and persons not properly chargeable with its burdens, and for the sole purpose of increasing the corporate revenues by the exaction of taxes."[87]

The case of Fulton *v.* Davenport[88] is the basis for the statement that while the courts will not interpose to prevent the extension of the boundaries of a municipal corporation, they will limit the exercise of the taxing power, as nearly as practicable, to the line where it ceases to be for purposes beneficial to the proprietor. "The powers conferred upon the municipal governments must .... be construed as confined in their exercise to the territorial limits embraced within the municipality; and the fact that these powers are conferred in general terms will not warrant their exercise except within those limits."[89]

Agricultural Lands. — All the real estate situated within the corporate limits of an Iowa city is not, however, subject to general taxation for municipal purposes. "The mere fact that lands are included within the limits of a municipal corporation does not authorize their taxation for general city purposes", stated Mr. Chief Justice Beck in Durant *v.* Kauffman. "Under certain conditions, they are exempt therefrom". He continued:

> These conditions are such that the property proposed to be taxed derives no benefits from being within the city limits. This is the rule recognized by the various decisions of this court upon this subject. . . .
>
> To enable us correctly to apply the rule above stated, we must consider and determine the character of the benefits which will render lands within a city liable to general municipal taxation. These are not such as attach to all lands near to a city or large town, whereby they are rendered more valuable, but are such as accrue to the lands considered as city property. Lands lying contiguous or near to a city, though incapable of any use except for agricultural purposes, are, nevertheless, of greater value on account of their location than those more remotely situated. Convenience to a market, &., adds to their value. Therefore lands within a city kept and alone used for agriculture, and not capable of being used as city property, and not demanded for that purpose, nor possessing a value based upon their adaptation for the purposes of dwellings or business, cannot be considered directly benefited by the fact of their being within the city limits. Such lands should not be taxed for general municipal purposes. In determining the benefits accruing to such lands, a controlling fact to be considered is the purpose for which they are held. If held as city property, to be brought upon the market as such, whenever they reach a value corresponding with the views of the owner, they ought to be taxed as other city property. There would neither be reason nor justice in permitting a proprietor of a large tract of land within a city to hold it for an opportunity to bring it into the market as city lots, and for no other purpose, under the pretense that it is agricultural lands, thus escaping taxation for the general improvement of the city, the very thing which will bring his lands into market, and thus add greatly to their value — a direct benefit to the owner.

[86] 195 Iowa 831, at 833. "Plaintiff's property is not within the limits of the town, and he was not amenable to the order and direction of the city council". — Baker *v.* Akron, 145 Iowa 485. See also Tackaberry *v.* Keokuk, 32 Iowa 155.

[87] Cooley's *Constitutional Limitations* (Seventh Edition), p. 726.

[88] 17 Iowa 404.

[89] Cooley's *Constitutional Limitations* (Seventh Edition), p. 312; Dillon's *Municipal Corporations,* Vol. IV, Secs. 1388, 1389; McQuillin's *Municipal Corporations,* Vol. V, Secs. 2388, 2390; Hayzlett *v.* Mount Vernon, 33 Iowa 229.

In such a case, the general improvement of the city; the building of streets near or in the direction of the lands so held; the construction of water-works, public buildings, &., by which the prosperity of a city is advanced and an invitation to population is held out, all bestow direct benefits upon the owner of such property. The lands, being a part of the city in fact, and held by their owner for the increase in value which he expects, because they are city lots, are benefited by the municipal government, and share in the benefits derived by the expenditure of revenue raised by taxation. If property be so held, within a city, whether it be subdivided into lots and streets thereon, or dedicated to public use, or be inclosed and cultivated as agricultural lands, it ought to be subject to general municipal taxation. This result is directly deducible from the rule established by the decisions of this court.[90]

Agricultural lands wholly outside the platted portion of a city (even though within the corporate limits of that city) were held to be exempt from taxation for general municipal purposes. Agricultural lands, not subdivided into parcels of ten acres or less, are likewise exempt from taxation for general city and town purposes.[91] Such classification and exemption, the Court has held, is not contrary to Article I, Section 6, of the State Constitution.[92]

This does not mean, however, that such land is totally exempt from any taxation by the city. This exemption from

[90] 34 Iowa 194.

[91] Hauge *v.* City of Des Moines, 197 Iowa 907; Deeds *v.* Sanborn, 26 Iowa 419; Deeds *v.* Sanborn, 22 Iowa 214; Huddleston *v.* Webster City, 185 Iowa 706; La Grange *v.* Skiff, 171 Iowa 143; Taylor *v.* Waverly, 94 Iowa 661; Winzer *v.* Burlington, 68 Iowa 279; Durant *v.* Kauffman, 34 Iowa 192; Deiman *v.* City of Fort Madison, 30 Iowa 542; O'Hare *v.* Dubuque, 22 Iowa 144; Buell *v.* Ball, 20 Iowa 282; Langworthy *v.* Dubuque, 16 Iowa 271; Morford *v.* Unger, 8 Iowa 82; Davis *v.* Dubuque, 20 Iowa 458; Fulton *v.* Davenport, 17 Iowa 404; *Supplemental Supplement of 1915,* Sec. 751; *Code Supplement, 1913,* Sec. 616; *Laws of Iowa,* 1876, Ch. 4, Sec. 4, 1878, Ch. 169, Sec. 5.

[92] Leicht *v.* Burlington, 73 Iowa 29. The section reads: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

taxation applies only to taxes levied for general municipal purposes. For example, in the case of Sears *v.* Iowa Midland Railroad Company,[93] the Court held that farming lands within the corporate limits of a town were liable for taxation to aid in the construction of a railroad. The Court argued that such a tax was not for municipal purposes within the meaning of that phrase as used either in the statutes or by the courts.

Benefits. — It seems that the theory of benefits received is at least a partial basis for municipal taxation in Iowa. But this basis forces upon the courts a considerable number of border-line cases, making it difficult for that body to draw a definite line of adjudication. They have held, for example, that property of a suburban character, remote from the center of the city, "embracing several acres occupied for residential purposes and improved with gardens, vineyards, etc.", is subject to municipal taxation.[94]

In one case, a part of a tract of land inside the city limits was used for farming, another part for a lumber yard, still another for a stone quarry, a fourth for an ice house, part was rented as a pasture, and another section was used for a nursery. The Court ruled that such lands "which are adjacent to, or have upon them municipal conveniences, such as lights, patrol boxes, and the like", are not used in good faith for agricultural purposes and are liable for taxation for city purposes.[95]

In the case of Taylor *v.* Waverly,[96] the Court said, speaking through its Chief Justice, Josiah Given: "The land [some ninety acres] has always been occupied and used for

[93] 39 Iowa 417.

[94] Durant *v.* Kauffmann, 34 Iowa 194.

[95] Allen *v.* Davenport, 107 Iowa 90.

[96] 94 Iowa 661.

agricultural purposes only, except that for a time the dwelling house, outbuildings, and ground used therewith were rented for residence purposes to one who was not engaged in farming the land. The land is not adjoining the platted portion of the defendant city, but is remote therefrom, with other unplatted farm lands lying between. None of this land has ever been laid out or platted into city lots, nor does it appear to have been held for future speculation as city property. . . . The fact is that this land, remote as it is, is not available as city property for either residence or business purposes, under the present demands of the defendant city.''[97]

On the other hand, the case of O'Hare *v.* Dubuque[98] is authority for the statement that ''a city out-lot situated within the extended limits of the city, and which is benefited by the improvements and current expenditures of the corporation as well as permanently enhanced in value, is liable to taxation for general municipal purposes.''

Farming lands are taxable, then, when the tax will benefit the property,[99] when the lands are not used in good faith for agricultural purposes,[100] or when they are held as investments to be put on the market at a later date.[101]

Railroad Terminals. — It is within the authority of the General Assembly of the State of Iowa to fix the *situs* of property for taxation purposes.[102] A clear example of this

[97] 94 Iowa 661, at 663, 664.

[98] 22 Iowa 144.

[99] Fulton *v.* Davenport, 17 Iowa 404.

[100] See the cases cited above in footnote 18.

[101] Sears *v.* Iowa Midland Ry. Co., 39 Iowa 417; Durant *v.* Kauffman, 34 Iowa 194.

[102] ''That it is within the power of the legislature to fix the *situs* of property for the purpose of taxation, we have no doubt.'' — Dubuque *v.* C.D.& M. Ry. Co., 47 Iowa 196. See also Dillon's *Municipal Corporations,* Vol. IV, Sec. 1389; McQuillin's *Municipal Corporations,* Vol. V, Sec. 2390.

authority is to be found in tracing the development of municipal taxation of real property of a railroad as revealed in the municipal tax measures which have been invalidated.

For a considerable length of time this power was in dispute. In two cases the Court was equally divided. The first of these was the City of Davenport *v.* Mississippi and Missouri Railroad Company[103] in which the Court (being equally divided) upheld the decision of the lower court granting the city of Davenport the power to levy and collect a tax upon the real property, except the rolling stock, of the railroad. An equally divided Court in the case of Dubuque and Sioux City Railroad Company *v.* Dubuque[104] resulted in a denial of this power to the city of Dubuque.

Uncertainty bred litigation, and in the year 1871, in the case of Dunlieth & Dubuque Bridge Company *v.* the City of Dubuque,[105] the Court held that a municipality did have the authority to tax the real property of a railroad corporation, arguing that the act of 1868[106] had no reference to municipal taxes, but merely applied to State and county taxes. The views of the court were set forth by Mr. Justice Beck in the following words:

> To regulate or prohibit the taxation of the property of railroads by cities, is not the object of the statute. The rules of construction will not permit us to apply the law to an object not within its scope. We therefore conclude that it cannot be extended to operate as a prohibition of the taxation of the property of railroads by the cities of the State.
>
> The language of the limitation in the statute, that the taxes therein authorized ''shall be in lieu of all taxes for any and all pur-

[103] 16 Iowa 348.

[104] 17 Iowa 120.

[105] 32 Iowa 427.

[106] *Laws of Iowa,* 1868, Ch. 196, amending *Laws of Iowa,* 1862, Ch. 173.

poses,'' while broad and general, must be confined to the object of the statute which, as we have seen, is the regulation of taxation for State and county purposes. . . . Separate levies of different rates are made, to be paid into distinct funds, which are expended for different objects. The tax authorized in this case is intended to be in lieu of the taxes authorized for these purposes. This is the evident meaning of the language of the law in question . . . . The property of railroads being taxable, the city of Dubuque, under the express power to assess all taxable property, is lawfully empowered to levy taxes thereon . . . . The cities of the State through which railroads pass, or in which they terminate, have imposed upon them the burden of providing for the protection of railroad property. Expenditures of money are necessary, in the exercise of their police jurisdiction, to insure the protection thus imposed as a duty upon these municipalities. It is not at all reasonable that the legislature intended to take from the cities all power to raise revenue from this very property, the protection of which is duly charged upon them, and to require that the expenses incident to the discharge of this duty should be paid in the way of taxes by the holders of other property. Such unjust legislation, discriminating in favor of one class to the oppression of another, could never have been intended by the legislature.

Mr. Justice Cole, however, dissented, holding that the one per cent on gross earnings was plainly in lieu of all other taxes.[107]

Within a few months (from December, 1871, to April 9, 1872) after the decision granting municipalities the right to tax the real property of railroads for municipal purposes, the General Assembly of Iowa enacted a statute altering the tax basis and the situs, for purposes of taxation, of railroad property.[108] This new law withdrew from the cities a considerable source of revenue. ''It is thus apparent'', said J. E. Brindley, ''that under the law of 1872 and its judicial interpretation the cities of Iowa lost a substantial right which they would have enjoyed under the court's final interpretation of the gross receipts law. Under that law (the gross receipts law) and the decisions already outlined, the cities did have a complete legal right to tax their terminals while under the new law put into operation in 1872 they have a right to tax only a small fractional part of the same.''[109]

In the case of City of Dubuque *v.* the C., D., & N. R. Co.[110] the Supreme Court held that the city had the right to levy municipal rates upon railroad property. This right, it was explained, applied only to the actual mileage of main track within the corporate limits of the town and under the so-called unitary system of valuation. ''The two most important points to be noted in a judicial study of railway taxation are: first, after much litigation, the cities finally secured the right to tax railway terminals under the gross receipts system; and second, this right was immediately lost by the creation of an ad valorem system whereby railroad property is taxed on the basis of the 'unit rule'.''[111] Some little solace, however, is gleaned from the fact that a city may levy a tax upon all the mileage within its corporate limits. ''It makes no difference that a portion of the main track so included traverses agricultural lands which are not taxable for general city purposes.''[112]

CONSTITUTIONAL DEBT LIMIT

''The craze to go in debt'', said Mr. Justice McPherson

107 For the dissenting opinion and this comment on the question involved see 32 Iowa 427, at 432.

108 *Laws of Iowa,* 1872, Ch. 26.

109 ''This condition of affairs has caused and is still causing dissatisfaction in some of the cities of Iowa. The idea prevails that the amount received by cities from railway corporations does not compensate for the expense actually occasioned by the terminal facilities within the various municipalities.'' — Brindley's *History of Taxation in Iowa,* Vol. II, p. 108.

110 47 Iowa 196.

111 Brindley's *History of Taxation in Iowa,* Vol. II, p. 114.

112 Illinois Central Ry. Co. *v.* Hamilton, 73 Iowa 313.

of the United States Circuit Court, "with the stock argument for the next generation to help pay the debts, as if they will not have enough of their own creation, is and has been ever present. Seldom is any scheme to be followed by a debt for any purpose voted down. The convention of 1857 knew this. Counties and cities in Eastern Iowa had then gone into debt in extravagantly large amounts for different things, for the supposed public good. Those schemes were supported by the same zeal and enthusiasm as are the schemes of paternalism of the present day. Music, and banners, and processions, and sidewalk oratory, were known and practiced then, as well as at the present day. Debts created by Eastern Iowa counties and cities, before the adoption of the Constitution more than 50 years ago, are still being paid for by the future generations — the present tax payers of many Eastern Iowa counties and cities. These were the evils that the Constitution was to strike down, if the proposed debts, all told, exceed 5 per cent."[113]

To remedy such a situation as that described, the Constitution of 1857 prohibits a municipality from incurring an aggregate indebtedness exceeding five per cent of the value of the taxable property within its corporate limit.[114] The section reads: "No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation — to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness." Of the 474 cases examined in this study, 48 dealt directly with or were indirectly concerned with an interpretation of the meaning of this restriction.

[113] C. B. Nash Co. *v.* Council Bluffs, 174 Fed. 182, at 185.

[114] Article XI, Section 3.

This article has occasioned a considerable amount of litigation. Nor is this surprising in view of the terms used by the framers. What is the meaning of the term "indebted"? What constitutes a "municipal debt", within the meaning of this section? What is meant by "aggregate indebtedness"? The elusive term "value" has also required definition, particularly when considered in connection with the expression "value of the taxable property".

The original charter of the city of Davenport authorized unlimited taxation.[115] This grant of power, the Iowa Supreme Court held in Scott *v.* Davenport,[116] was inconsistent with the provision of the Constitution of 1857, quoted above, and must, therefore, yield to the superior law.[117] The fact that the indebtedness of the city at the time of the adoption of the new Constitution exceeded the maximum allowed did not change the rule. Prior indebtedness was not impaired, held the Court, by this change in municipal powers,[118] but the Constitution prohibited the city from adding to its debt load.

The Five Per Cent Clause. — What is the meaning of the words "value of the taxable property", five per cent of which forms the maximum allowed for a city's indebted-

[115] The charter gave the city council the power "to borrow money on the credit of the city, to be used for such purposes as they may think conducive to the welfare thereof."

[116] 34 Iowa 208.

[117] "This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The general assembly shall pass all laws necessary to carry this constiution into effect." — Article XII, Section 1. "All laws now in force and not inconsistent with this constitution shall remain in force until they shall expire or be repealed." — Article XII, Section 2.

[118] Scott *v.* Davenport, 34 Iowa 208. The constitutional debt limit for cities does not apply to obligations contracted for prior to the adoption of the present Constitution. — Davenport Gas, Light and Coke Co. *v.* Davenport, 13 Iowa 229.

ness? In the case of Miller *v.* City of Glenwood [119] the Court held that this meant five per cent of the actual value of all property, real and personal, returned by the assessor for taxation purposes and not five per cent on one-fourth of such valuation, the basis upon which the tax levies were computed down to 1933. In another decision the Supreme Court said:

> From such sources we learn that when the present Constitution came to be written the cry had already gone up against the reckless and profligate expenditure of public money, whereby many of the municipalities of the State, while yet in swaddling clothes, had become overburdened with debt. The situation in such respect then existing and to be apprehended for the future was regarded as sufficiently grave by the makers of the instrument to demand the inclusion of a municipal debt limitation clause as part of the supreme law of the State. . . . Now, at the time of the adoption of the Constitution, and for that matter continuing down to the appearance of the present Code [Code of 1897], the law of making property assessments for the purposes of taxation recognized no other basis than that of full values. This was known to, and we must assume was in the minds of, the makers of the Constitution. And from this it is an easy step to the conclusion that in accepting property valuations as the basis from which computation for limitation purposes was to be made no more was intended than the meaning conveyed by the literal reading of the provision. If this view be sound, then an observance of such provision involves, first, an inspection of the tax list to ascertain the amount of the taxable property, in value, in the city; and, second, avoidance of debt beyond the limit of five per cent. of such value.[120]

Another aspect of the possibility of evading the five per cent limitation is found in the following paragraph:

> Since Iowa municipalities usually assess property at from thirty

[119] 188 Iowa 514.

[120] Halsey *v.* Belle Plaine, 128 Iowa 467, at 471-473. See also Erbe's *Constitutional Limitations on Indebtedness in Iowa* in *The Iowa Journal of History and Politics,* Vol. XXII, pp. 363-417.

> to sixty per cent of its actual value, the constitutional provision. . . . gives really a greater protection to the taxpayer than the constitutional convention contemplated. It has no doubt had a salutary effect in preventing the incurring of unreasonable debts, but a city administration desirous of increasing indebtedness can usually raise the valuation of property enough to enable them to incur the indebtedness they desire. The property lying within a municipality may, however, be subject to indebtedness up to five per cent of its valuation for each separate governmental unit imposed upon it — that is for the county, municipal corporation, and school district.[121]

The constitutional restriction on indebtedness has been much discussed in judicial decisions. In the case of Windsor *v.* Des Moines[122] the Iowa Court held that Article XI, Section 3, of the Constitution of Iowa does not limit the indebtedness of a city to five per cent of the value of the property subject to taxation for city purposes, but the valuation is based on the State and county tax lists.[123]

A city may not escape the payment of an indebtedness arising upon torts on the plea that the constitutional limit on municipal indebtedness has been reached;[124] but where the ordinary expenses of carrying on the government of a municipal corporation require all of the proceeds of a tax, and where that municipality is indebted to the full constitutional limit, the city can not be compelled to apply part of the general fund to a payment of a judgment held against

[121] Gallaher's *The Administration of Municipal Finance* in *Applied History,* Vol. VI, pp. 128, 129.

[122] 110 Iowa 175.

[123] The constitutional provision provides that the value shall be ascertained on the basis of the "last state and county tax lists, previous to the incurring of such indebtedness." These tax lists may be easily changed, however, since they seldom represent actual value.

[124] Thomas *v.* Burlington, 69 Iowa 140; Bartle *v.* Des Moines, 38 Iowa 414; "It is no defense, in an action against a city for damages resulting from a defective sidewalk, that it is indebted beyond the constitutional limit." — Rice *v.* Des Moines, 40 Iowa 638.

it by a creditor of the city. If a court, however, is convinced that the assessment is purposely low, so as to avoid payment of the judgment, it may issue a writ of mandamus to compel a fair assessment of the property.[125] Where no other method exists for the payment of a judgment against a municipal corporation, the authorities have the duty placed upon them of levying a special tax sufficient to discharge the same. Even this remedy, however, fails if the city has not been given the power to levy such taxes.[126]

Municipal Indebtedness. — Even after some agreement as to the basis for measuring the indebtedness of a city is reached, there still remains the perplexing problem of defining the meaning of "municipal indebtedness". In defining these terms the Supreme Court has declared that the language of the Constitution is exceedingly broad and should not be used in a narrow or strained manner; that these words should be given their legitimate meaning.[127]

In Swanson *v.* Ottumwa[128] Mr. Justice Weaver said:

> Given in its plainest and most literal signification, the word "indebtedness" includes every obligation by which one person is bound to pay money, goods, or services to another. . . . Such is undoubtedly the meaning of the word in the common usage of English-speaking people, and there are not wanting authorities which extend it to mere moral obligations arising from contracts unenforceable at law. . . . As applied to a municipal corporation, "debt," if given its broadest signification, would include not only obligations for extraordinary expenditures but every outstanding warrant upon the treasury, the accruing salaries of officers, and expenses daily arising for water supply, street lighting, street repairs, and

[125] Coffin *v.* Davenport, 26 Iowa 515.

[126] Oswald *v.* Thedinga, 17 Iowa 13; Porter *v.* Thomson, 22 Iowa 391; Iowa Railroad Land Co. *v.* Sac County, 39 Iowa 135.

[127] Grant *v.* Davenport, 36 Iowa 396, at 401; French *v.* Burlington, 42 Iowa 614.

[128] 118 Iowa 161.

> other like legitimate purposes. It can be readily seen that such rigid literal interpretation of the word in construing the constitutional provision would completely paralyze municipal power in every city whose debt has reached the prescribed limit, and, while courts have propounded the general proposition that the language of the constitution in this respect is "exceedingly broad, and should have no narrow or strained construction" . . . . and must be given "its fair and legitimate meaning and general acceptation" . . . . a careful examination of the decisions discloses the fact that in substantially every jurisdiction the word "debt" or "indebtedness," as used in the limitation placed upon municipal power, is given a meaning much less broad and comprehensive than it bears in general usage. This tendency has been more marked in some states than in others, with the result that the decisions are sufficiently at variance to fairly justify the statement of an eminent court that, "in view of the warring among the adjudged cases, it is not easy to affirm that the word 'debt' has a firmly settled meaning."[129]

By a process of exclusion and inclusion, however, it is possible to clarify somewhat the meaning of the term. Indebtedness beyond the five per cent limit is prohibited. This is clear from the terms of the Constitution. The provision includes "indebtedness incurred in any manner, or for any purpose". It is not limited to bonded indebtedness alone,[130] but it applies equally to the floating debt of the municipality. Thus it would seem that the Supreme Court has construed the provision to include, as evidence of municipal indebtedness, warrants issued for current city expenses.

In Grant *v.* City of Davenport,[131] however, the Court made this statement: "It matters not how or for what purpose the indebtedness is incurred, it is prohibited unless it can be shown to be reasonably certain such indebtedness can

[129] 118 Iowa 161, at 170.

[130] Council Bluffs *v.* Stewart, 51 Iowa 385; Scott *v.* Davenport, 34 Iowa 208; Grant *v.* Davenport, 36 Iowa 396; French *v.* Burlington, 42 Iowa 614.

[131] 36 Iowa 396.

be liquidated and paid from the ordinary current revenues of the city.''[132]

The issuance of warrants in a sum which exceeds five per cent of its taxable property will not be a violation of the Constitution if the city has the means in its treasury to meet its indebtedness. In such a case the city does not become indebted within the meaning of the Constitution.[133] A city, although indebted up to the constitutional limit, may enter into a contract with a water company for the rental of a certain number of hydrants for a period of twenty-five years, the rent to be paid annually out of the current revenues which the city is authorized to raise, without violating the constitutional restriction.[134] But a city may not acquire a waterworks plant and evade the debt limit provision by putting the payments by the city in the form of hydrant rentals.[135]

The issuance of bonds by a city for the purpose of raising money to erect improvements, from which it is expected the city will derive a revenue, is the creation of an indebtedness within the meaning of the constitutional clause.[136] Indebtedness is also created when a city borrows money on property already belonging to the city. The Supreme Court argued that the property of the city might be taken in payment of the debt, even though no general liability on the city

[132] 36 Iowa 396, at 401.

[133] Dively *v.* City of Cedar Falls, 27 Iowa 227.

[134] Grant *v.* City of Davenport, 36 Iowa 396.

[135] Hall *v.* Cedar Rapids, 115 Iowa 199. ''Where fifty dollars is shown to be a reasonable charge, but an ordinance required the city to pay ninety-five dollars a hydrant for twenty-three years, the hydrant contract will be held invalid where it appears that it was made to evade the provision as to limit of municipal indebtedness so as to acquire the plant of a water-works in consideration of hydrant rentals.'' — McQuillin's *Municipal Corporations*, Vol. II, Sec. 1719. See also Dillon's *Municipal Corporations*, Vol. I, Sec. 196.

[136] Scott *v.* Davenport, 34 Iowa 208.

fund was created.[137] Even though a city possesses municipal property whose value is greater than its outstanding indebtedness, it may not issue warrants in excess of the constitutional limit.[138]

The necessity of any public improvement, the construction of which is optional with the municipal authorities, where such construction would increase the city's indebtedness beyond five per cent of the value of its taxable property, constitutes no excuse or justification for the construction of such public improvement with its consequent indebtedness. Where a city, to provide for the payment of the consideration of a contract, agrees to issue warrants and to levy a tax for their payment, and also pledges its future revenues therefor, it creates an indebtedness within the constitutional prohibition.[139] More recent laws have removed certain utilities from the limitations as to municipal indebtedness.

When it is entirely optional with the city whether it shall pay anything further on a contract, such contract does not create a debt, to be considered in determining whether a city has exceeded the maximum limit of its constitutional indebtedness.[140]

''It may properly be said that the general current expenses of . . . . municipalities should be paid out of taxes levied for that purpose, and it is not the policy of the law

[137] Swanson *v.* Ottumwa, 118 Iowa 161. ''This does not, however, apply to purchase money mortgages, which are not, apparently, considered as a general liability.'' — Gallaher's *The Administration of Municipal Finance* in *Applied History*, Vol. VI, p. 129.

[138] Such warrants are invalid under the decision in Rankin *v.* Chariton, 160 Iowa 265.

[139] Windsor *v.* Des Moines, 110 Iowa 175. The agreement of a city to pay the costs of sewerage from its own funds, where such action would raise the city's indebtedness beyond the constitutional limit, is invalid. — Citizen's Bank *v.* Spencer, 126 Iowa 101.

[140] Windsor *v.* Des Moines, 110 Iowa 175.

to permit a long time bonded debt to be created therefor, which shall be a burden upon posterity.''[141] A city may, apparently, refund its bonded indebtedness without increasing its debt, even though that debt be far in excess of the constitutional limit of five per cent of the value of the taxable property within its jurisdiction.[142]

As a general rule, a city may not anticipate its general revenues to be derived from general taxation without incurring a debt within the limitation of the constitutional prohibition. In the case of Windsor *v.* Des Moines,[143] the Supreme Court quoted approvingly from City of Council Bluffs *v.* Stewart[144] as follows: ''If the bonds in question should be issued upon the faith of the uncollected taxes and the levy for the current year, there is no power which could prevent the city authorities from absorbing the taxes as collected in payment of ordinary current expenses. Indeed, such a course might be absolutely necessary to maintain the city government. It is plain that, if bonds should be issued in anticipation of uncollected taxes, the constitutional limitation might, and probably would, be transcended.''[145]

Exceptions to this rule, however, establish the doctrine that special taxes and assessments may be anticipated under specified conditions. Another decision permitted that future revenues be anticipated to meet contracts for current expenditures without violating the constitutional debt limit. Such an exception is absolutely necessary to the life of

141 Heins *v.* Lincoln, 102 Iowa 69. Under the decision of this case, the city of Cedar Rapids was not allowed to issue bonds to pay certain outstanding warrants.

142 Heins *v.* Lincoln, 102 Iowa 69.

143 110 Iowa 175.

144 51 Iowa 385.

145 110 Iowa 175, at 189.

the city, and to the successful accomplishment of its purposes.[146]

The constitutional limitation on municipal indebtedness applies to indebtedness in the form of ''bond, note, or any other kind of obligation, whether it be in writing or by parol, express or implied.'' In another case the Supreme Court declared: ''The constitutional provision in question, it will be observed, prohibits the creation of indebtedness beyond the prescribed limit. It is an inhibition upon such indebtedness, however its creation may be attempted. It will cover the case of implied contract, as well as express contract by bond or otherwise. It is aimed at the indebtedness, not its form.''[147]

While the decisions of the Supreme Court seem to indicate a rather strict interpretation of municipal indebtedness, the General Assembly has shown a tendency to exclude certain forms of debt from the general indebtedness contemplated by the Constitution. Recent laws, for example, have authorized cities to purchase or construct certain public utilities, which are self-liquidating, and to issue bonds secured by the property and earnings of the utility without having such bonds considered as a part of the municipality's indebtedness.[148]

IMPLIED LIMITATIONS ON MUNICIPAL TAXING POWER

In addition to the express limitations upon the taxing authority of Iowa municipalities just described, the cases examined draw our attention to a group of implied limitations which are as potent in their results as the express

146 Windsor *v.* City of Des Moines, 110 Iowa 175, at 190, 194.

147 Windsor *v.* City of Des Moines, 110 Iowa 175, at 187, 188; McPherson *v.* Foster, 43 Iowa 48, at 71; Mosher *v.* School District, 44 Iowa 122; City of Litchfield *v.* Ballou, 114 U. S. 192.

148 *Code of 1931*, Secs. 6161-6172, 6787; *Laws of Iowa*, 1933, Ch. 122.

limitations, if not more so. It is in this field that we see the Common Law limitations upon the ordinance-making power of municipalities.

Mr. Justice Dillon, in the case of Hanson *v.* Vernon,[149] and Chief Justice Kinne, in the case of Iowa *v.* Des Moines,[150] join hands, through a span of over a quarter of a century, to give us a clear interpretation of the implied limitations upon the taxing powers of municipalities. Both opinions rest upon a philosophy of government closely bound up with the development of the Common Law.

Under the Constitution of Iowa, the power of taxation has been vested in the legislature — the General Assembly of the State of Iowa.[151] It is within the authority of the legislature to delegate this taxing power to a municipality and there is no restriction expressly placed upon the legislature in this connection. Nevertheless, the power of the legislature to confer the right of taxation is limited by the implications of the Common Law and by the political experiences of the nation. The case of Iowa *v.* Des Moines[152] may be cited as an example in point here.

An action for *mandamus* was begun to compel the city council of Des Moines to levy a tax for the creation of a sinking fund to build and maintain a library. The statute, as originally enacted, placed the library under the direct control and management of the city council which was elected by the people, and it authorized the council to levy a tax. The people of the city by vote accepted the provisions of the law. Under subsequent acts of the legislature, a board of trustees was established and the control and manage-

149 27 Iowa 28.

150 103 Iowa 76.

151 Article III, Section 1; City of Davenport *v.* Chicago, Rock Island and Pacific Railroad Co., 38 Iowa 633.

152 103 Iowa 76.

ment of the library were vested in this board with absolute power of determining the amount of taxes to be levied. It was held that under the rule that the legislature can not, without the consent of the people, delegate the power of taxation for municipal purposes to a body or persons not elected by, or immediately responsible to, the people, the delegation of the authority to levy a tax to the board of trustees was unconstitutional. The fact that the mayor appointed the library board with the consent of the council did not make such library board an elective body responsible to the people within this principle.

Mr. Justice Kinne, who delivered the opinion of the Court, said:

> Under our constitution, the power of taxation has been vested by the people in the legislature. There is no express constitutional restriction or limitation upon the power of the legislature in this state, and that body may, for proper and legitimate purposes, confer the taxing power upon municipalities. Nevertheless, in the absence of such constitutional restriction, the power of the legislature to confer the right of taxation is limited by implication. . . . There is an implied limitation upon the power of the legislature to delegate the power of taxation. This, of necessity, must be so, otherwise the legislature might clothe any person with the power to levy taxes, regardless of the will of those upon whom such burdens would be cast, and such person might be directly responsible to no one. . . . Now, the uses to which this tax is to be put are local, and the benefits to be derived from such library must necessarily inure mostly to the people of the city of Des Moines. Such being the case, we think that the legislature had no power to vest the levying of this tax in a body not directly responsible to the people of the city. The levy and collection of a tax is a taking of the property of the taxpayer against his will, and such a necessary, arbitrary and far-reaching power ought not to be conferred upon a body of persons who are not the direct representatives of the people, who are not elected by them, and who, therefore, are not directly responsible to them, unless the people assent thereto. . . . We hold that no officer and no board not elected by and immediately

responsible to the people can be made the repository of such power. If this power was given to the city council, and it was abused, the people could, at least, prevent a recurrence of the wrong at the polls; but if it be reposed in a body not elected by the people, a remedy is uncertain, indirect, and likely to be long delayed. The absolutely unlimited power of taxation, as to duration, attempted to be conferred by the act under consideration, is of itself a forcible reminder that the power to fix, determine, and levy a tax for local purposes should be conferred upon some body which stands as the direct representative of the people, to the end that an abuse of such power may be speedily and directly corrected by those whose property must bear the burden. The act in question is unconstitutional in so far as it undertakes to confer the arbitrary power upon the board of library trustees to fix and determine the amount of the tax to be levied for the purposes therein mentioned, and the city council cannot be compelled to levy (regardless of any discretion) the amounts fixed by the library board, and certified to said council.

Such reasoning, it is to be observed, contains the fundamental postulate that while the State can do anything it wills to do, its servant, the Government, is bound by certain fundamental notions of justice. The Common Law, but more particularly the political history and philosophy of the frontier, places certain restraints upon a government theoretically free to do anything not expressly denied to it by the Constitution of the State. The municipalities can not be clothed with taxing powers which the State government itself is unable to exercise. "The stream can not rise higher than its source."

A second limitation upon the taxing powers of municipalities is that, even after the power to tax has been conferred, the municipality must use it for some public purpose. Indeed, the courts are well agreed that a public purpose or use is of the essence of a tax. "There can be", says Dillon, "no legitimate taxation to raise money unless it be destined for the uses or benefits of the government or some

of its municipalities, or divisions, invested with the power of auxiliary or local administration."[153]

The opinion of Mr. Justice Miller is the ablest and most satisfactory discussion of this point to be found in the literature on the subject. With characteristic force, he says: "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."[154]

This implied (one might justifiably say, this inherent) restriction upon the taxing power of a municipality is strikingly presented by Mr. Justice Dillon in the case of Hanson *v.* Vernon.[155] A petition in equity, by resident property owners and taxpayers against the township trustees and clerk to enjoin their proceeding under a State law authorizing local aid to railroads,[156] was presented to the Supreme Court of Iowa. The Court held that the act was unconstitutional because taxation for the aid of railroads was not taxation for a public purpose.

Mr. Justice Dillon, then Chief Justice, who wrote the opinion of the Court said:

> Is the power of the legislature so transcendent, and is its arm so strong, that it may put it forth and grasp every man's property, and declare that it will sequestrate five per cent thereof, or one

[153] Dillon's *Municipal Corporations*, Vol. II, Sec. 1351; Hanson *v.* Vernon, 27 Iowa 28; Warren *v.* Henly, 31 Iowa 31; Parkersburg *v.* Brown, 106 U. S. 487, at 501; Cole *v.* La Grange, 113 U. S. 1; Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112; Jones *v.* Portland, 245 U. S. 217; Green *v.* Frazier, 253 U. S. 233; Willoughby's *The Constitutional Law of The United States* (Second Edition), Vol. III, pp. 1874-1898; McQuillin's *Municipal Corporations*, Vol. IV, Sec. 2372.

[154] Loan Association *v.* Topeka, 20 Wallace 655, at 664.

[155] 27 Iowa 28.

[156] *Laws of Iowa*, 1868, Ch. 48 (March 22, 1868).

hundred per cent thereof, and donate it to any railroad corporation that will locate its road in the district in which the property is situated . . . . Many unwise laws, and many laws unjust in their operation, are, nevertheless, no infractions of the Constitution. The wisdom of the legislature does not measure the power of the legislature. Natural equity, as Cicero happily observes, is "the reason of God," made so plain, let me add, that sooner or later all can understand it. Justice has her imperial seat in the bosom of every man — on these, and not on specific constitutional provisions, must reliance be had in many cases of indefensible legislation. . . . The Supreme Court of the United States have correctly said that there is no limitation (in the absence of express provisions of the State Constitutions) upon the legislative power of the States, as to the *amount* (rate) or *objects* (the property subject to be taxed) of *taxation*. . . . But no court has ever said that there is no limitation upon the legislatures as to the *purposes* for which a tax could be authorized. . . . If the legislature could abolish railroad corporations, restrict their chartered powers, and control their rights and property, the same as they can do with respect to municipal or civil corporations, there would be some ground for holding that they were not essentially private. If these corporations are not private, then they are *public*, and, if public, they are subject to the unlimited control of the legislature, which may enlarge or restrict . . . . at its pleasure, a doctrine, the correctness of which these corporations would, in any other case, be the last to admit. . . . Because the legislature does not, and indeed cannot, compulsorily organize persons into a railway corporation, but their action in forming such a corporation is, and must be, purely voluntary; because the State cannot compel a railway company, in the absence of a contract on its part, to build its road, but it may abandon its enterprise at pleasure; because the State does not own the stock, but the same is the private property of the stock-holders; because the State is not liable for the torts or the contracts of railway companies; because it derives no dividends or profits from the operation of the roads, but the same belong wholly to the stockholders, it follows that railway corporations are purely private, and their undertakings can no more be aided by taxation than can the private undertakings of any other corporation, or of an individual . . . . The court cannot uphold the tax in question without sanctioning

the following principle, viz.: *That it is competent for the legislature, because of the incidental advantage which would result to the community from the carrying out of the objects of a voluntary private railway corporation, organized for pecuniary profit, to authorize a tax to be levied on the citizen and his property, to be given as a bounty to such private corporation, to be used in aid of its undertaking, without any pecuniary compensation to the tax payer being contemplated or provided.* Such a doctrine would unsettle the foundation of private rights. The citizen would no longer own his property in fee simple, but hold it as a tenant at the will of the majority of the local community in which it is situated.[157]

[157] "A tax for a private purpose", says Mr. Justice Lowe in State *v.* Wapello County (13 Iowa 388, at 405), "is a solecism in language."

SPECIAL ASSESSMENTS

While special assessments represent an exercise of the taxing power,[158] they also exhibit characteristics which warrant placing a discussion of their position in a separate section. Special assessments, unlike taxes, are levied when the local situation demands a revenue for a particular improvement or governmental project. Special assessments do not secure for the city (as do taxes) a steady source of income for general municipal expenses. General taxes (unlike special assessments) are levied upon the general body of citizens, or more properly, upon the general body of property owners. Special assessments, on the other hand, are levied upon a particular group — a special or limited class of persons. "Special assessments proceed upon the theory that when a local improvement enhances the value of neighboring property, it is reasonable and competent for the legislature to provide that such property should pay for the improvement."[159] To the particular taxpayer, the benefit derived from a general tax is often an indirect and almost intangible factor — certainly less obvious than the benefit secured from the taxing power represented by a special assessment.

TECHNICAL PROCEDURE

In the absence of an express grant of power, municipalities have no authority to impose the cost of local improvements upon property specially benefited thereby.[160] Sub-

158 Yeomans *v.* Riddle, 84 Iowa 147; Chicago, Rock Island and Pacific Railroad Co. *v.* Ottumwa, 112 Iowa 300; Hackworth *v.* Ottumwa, 114 Iowa 467.

159 Dillon's *Municipal Corporations,* Vol. IV, Sec. 1430.

160 Bennett *v.* Emmetsburg, 138 Iowa 67; Fairfield *v.* Ratcliff, 20 Iowa 396.

ject to constitutional restriction, the General Assembly possesses the power to delegate to local corporate authorities the right to provide for improvements and to levy special assessments or taxes therefor on abutting property.[161] If it is delegated to the local authorities, this power to levy special assessments must be exercised in good faith, substantially in the manner prescribed, and subject to all constitutional limitations, express and implied.[162] Municipalities in Iowa are, therefore, strictly limited in their authority to levy special assessments.[163]

"In addition to such semi-penal charges as those for weed cutting, ice or snow removal, and the drainage of stagnant water, the Iowa Code makes provision for the levy of special assessments for the following purposes: the construction, reconstruction and repair of sidewalks, catch basins, purifying plants, and sewers; the prevention of floods; the lighting of certain streets; the extension of water mains; and the extension, repair, and improvement of streets, alleys, avenues, and other public grounds. Improvements include grading, parking, curbing, shaling, paving, oiling, chloriding, gravelling, macadamizing, guttering, and the construction of light fixtures along the streets. Repairs on improvements may also be taxed as special assessments."[164] Municipal legislative action setting forth a special assessment for any of the above purposes must conform to the technical requirements as to procedure, content, and form laid down by the General Assembly.

It is needless to say that if the municipality has no author-

161 Warren *v.* Henly, 31 Iowa 31.

162 Durst *v.* Des Moines, 164 Iowa 82.

163 Burlington *v.* Palmer, 67 Iowa 681; Shaver *v.* Turner Co., 155 Iowa 492.

164 Gallaher's *The Administration of Municipal Finance* in *Applied History,* Vol. VI, pp. 39, 40; *Code of 1931,* Secs. 4817, 4824, 5751, 5938, 5940, 5950, 5975, 5977, 5978, 5984, 5985, 6080-6103, 6190-a1, 6190-a13, 6899.

ity to make an improvement, an assessment for that improvement is void. If, in making an improvement which is legally sanctioned, the "municipality includes work it is not authorised to charge against the property owner, and the expenses thereof cannot be separated from the expense of the work it may properly charge against the property, an assessment therefor is void *in toto*".[165] If a city makes an invalid contract for a duly authorized improvement, the assessment can not be collected.[166] It has been held, however, that a tax, although assessed without authority of law, may be legalized through a curative act enacted by the State legislature.[167]

Notice and Hearing. — The procedure required by law for the levying of special assessments varies with the type of the improvement. Due notice of, and opportunity for, a fair hearing on an assessment seem to be generally required for street improvements.[168] This general terminology includes sewers,[169] paving,[170] extension of public streets where it is proposed to assess the cost thereof upon abutting and adjacent property,[171] and grading and macadamizing a street.[172]

[165] McQuillin's *Municipal Corporations,* Vol. V, Sec. 2027; Gallagher *v.* Garland, 126 Iowa 206; Bennett *v.* Emmetsburg, 138 Iowa 67.

[166] Allen *v.* Davenport, 107 Iowa 90; Bennett *v.* Emmetsburg, 138 Iowa 67.

[167] Boardman *v.* Beckwith, 18 Iowa 292; Clinton *v.* Walliker, 98 Iowa 655; State *v.* Squires, 26 Iowa 340; Richman *v.* Supervisors, 77 Iowa 517; Tuttle *v.* Polk, 84 Iowa 12; Windsor *v.* Des Moines, 101 Iowa 343.

[168] *Code of 1931,* Chs. 307, 308.

[169] Sanborn *v.* Mason City, 114 Iowa 189; Toben *v.* Town of Manson, 192 Iowa 1127; Gatch *v.* City of Des Moines, 63 Iowa 718.

[170] Chicago, Great Western Ry. Co. *v.* Council Bluffs, 176 Iowa 247; Coggeshall *v.* Des Moines, 78 Iowa 235.

[171] Peterson *v.* Stratford, 190 Iowa 45.

[172] Dubuque *v.* Wooton, and Dubuque *v.* Hennesey, 28 Iowa 571.

Mr. Justice Rothrock, in the case of Gatch *v.* City of Des Moines[173] discussed this point in the decision in which he said:

> We now come to the consideration of what appears to us to be the controlling question in the case. It is this: Was it necessary to the validity of the tax that the plaintiff should have had notice and an opportunity to be heard upon the question as to the assessment of the tax against him or his property? No such notice is required by chapter 162 of the Acts of the Seventeenth General Assembly, under which the city assumed to act. . . . And no such notice is provided for in any ordinance or resolution of the city council. The plaintiff . . . . in no manner waived the right to appear and be heard in opposition to the assessment. . . .
>
> The tax laws of this state, and of the territory of Iowa, have from the beginning made provision and fixed a time within which the tax payer may appear and object to the assessment of his property. . . . In all these statutory provisions, the notice is given by the law itself fixing the time when the objections must be made. It is true that, because the tax laws have always contained these provisions, it does not necessarily follow that the right to have notice and appear and object is an absolute right of the citizen. But it unmistakably shows that the legislative branch of the government regarded the right to notice, and to appear and be heard in such cases, to be of controlling importance to the owners of property, as securing them against oppressive and unjust exactions. We have examined the arguments and authorities cited . . . . and our conclusion is that, because of the want of any provision for notice in either the statute of the state or ordinances or resolutions of the council, and the want of any opportunity for a hearing, the assessment must be held to be invalid.[174]

Sidewalks, on the other hand, are not street improvements within the meaning of the sections just cited.[175] The procedure to be followed in the levy of a special assessment

[173] 63 Iowa 718.

[174] 63 Iowa 718, at 721, 722; Stuart *v.* Palmer, 74 New York 183; Griswold College *v.* Davenport, 65 Iowa 633.

[175] Northern Light Lodge *v.* Town of Monona, 180 Iowa 62.

for sidewalks is rather vague and indefinite,[176] and no statutory requirement of notice seems to exist in Iowa. If notice is necessary in such assessments, its justification apparently must be found in the "due process" clauses of our Federal and State Constitutions,[177] or in a requirement established by a city ordinance. If notice is required by ordinance, the levying of such an assessment without giving the notice renders the entire levy void.[178]

A distinction seems to be made, so far as the necessity for notice is concerned, between permanent and temporary sidewalks. In the absence of a city ordinance requiring such notice, a notice is, apparently, not required for the levying of an assessment for a temporary sidewalk. At least, the plea of lack of notice will not of itself be sufficient to invalidate the assessment so levied.[179] It might be inferred from the Code sections dealing with the repair of sidewalks that notice is required for assessments to pay for the construction or reconstruction of sidewalks.[180]

In reaching the conclusion that notice was not required in the matter of assessments for sidewalks improved at the order of the city, the reasoning of the Court is interesting as giving us some light upon the general outlook regarding the necessity of notice. The decision said, in part:

[176] *Code of 1931*, Secs. 5962-5968.

[177] Constitution of the United States, Amendment XIV; Constitution of Iowa, Article I, Section 9; Gatch *v.* City of Des Moines, 63 Iowa 718; Zalesky *v.* Cedar Rapids, 118 Iowa 714; Burget *v.* Greenfield, 120 Iowa 432; Clark *v.* Martin, 182 Iowa 811; Waterbury *v.* Morphew, 146 Iowa 313.

[178] Starr *v.* Burlington, 45 Iowa 87; Roche *v.* Dubuque, 42 Iowa 250; Zelic *v.* Webster City, 94 Iowa 393; Cedar Rapids & Marion City Ry. Co. *v.* Redmond, 120 Iowa 601; Peterson *v.* Stratford, 190 Iowa 45; Dubuque *v.* Wooton, 28 Iowa 571; Hawley *v.* Fort Dodge, 103 Iowa 573.

[179] Monroe *v.* Pearson, 176 Iowa 283.

[180] *Code of 1931*, Sec. 5969 gives a city council the power to levy assessments for the repair of sidewalks without notice to the property owners affected. See also Farraher *v.* Keokuk, 111 Iowa 310; Clark *v.* Martin, 182 Iowa 811.

> It is manifest . . . . that, in the very nature of the situation, there is practical need of distinctions being made and recognized between the formalities to be observed and safeguards to be thrown around transactions involving large public expenditure and placing heavy burdens upon the public treasury or upon private property, and those minor expenditures the need of which is arising daily, or minor improvements pertaining particularly to the convenience of restricted localities. A paving project or a system of sewerage contemplates, as a rule, large cost and heavy burdens upon the property. They are improvements of a permanent character, rendering it quite impracticable to remove them if found unsatisfactory. . . . It is, of course, quite essential to guard, so far as possible, against extravagance, incompetence, waste and graft, by keeping the exercise of the taxing or assessing power within well defined limits and maintaining intact effective safeguards of public interests. In our cities, and especially in our smaller cities and towns, the ordering and constructing of a sidewalk is often a matter affecting no more than a single lot or block, and it is but seldom that it is a matter of general interest. . . . It is, in nearly all cases, an improvement of comparatively little cost, and, in so far as it promotes public convenience, the sooner the work is done and the walk open to travel, the better. Moreover, it is important to note that the expense of publishing the various notices and complying with the various formalities . . . . amounts to a very considerable aggregate, which, in the matter of paving and sewering, is distributed over many pieces of property, imposing but a slight expense on each, but, in the matter of a small sidewalk job, would materially increase the lot owner's assessment. Then, too, there seems to be no apparent reason why any ordinary sidewalk improvement may not be initiated and completed with all due protection to public and private interests, while the ponderous, slow-moving machinery of municipal legislation is dragging its way through the initiatory steps to the letting of a contract for an improvement of the other class.[181]

Before a contract can be let for the construction of any public improvement costing five thousand dollars or more, a notice must be published in at least one newspaper of

[181] Northern Light Lodge *v.* Town of Monona, 180 Iowa 62, at 68-70.

general circulation in the municipality at least ten days before the date of the hearing on the proposed project. Notice of the assessment levied against each piece of property must be given to the property owners.[182]

Petition. — If the property owners desire the construction, reconstruction, or repair of a street improvement, such as paving, grading, curbing, graveling, guttering, macadamizing, or oiling of the public streets upon which their property is situated, they may present a petition for the same to the city council.[183] The council may, however, order the construction, reconstruction, or repair of a street improvement or sewer without waiting for a petition from a majority of the property owners affected. In either case, a resolution of necessity must be passed by the city council before the contract may be let.

Resolution of Necessity. — If a petition signed by a majority of the property owners is presented, a mere majority of the council is necessary for the enactment of the resolution of necessity. Without a petition, however, a three-fourths vote of the city council is required for the proper passage of such a resolution.[184] The publication of a resolution of necessity is jurisdictional, and failure to publish the same in conformity with the statute renders the assessment invalid.[185] This resolution of necessity must describe

[182] *Code of 1931,* Ch. 23. A public improvement is defined by the Code to be "any building or other construction work to be paid for in whole or in part by the use of funds of any municipality."— *Code of 1931,* Secs. 6018, 6026, 6029; Gilcrest *v.* Des Moines, 157 Iowa 525. The procedure to be followed in such cases is clearly presented by Dr. Ruth A. Gallaher in her chapter on municipal finance, in *Applied History,* Vol. VI, pp. 52-57.

[183] *Code of 1931,* Secs. 5999, 5942-b4, 5974-5975, 5977, 5975 (2), 5943, 6026, 5714 (4), 6553, 6657.

[184] *Code of 1931,* Sec. 5999.

[185] Gilcrest *v.* City of Des Moines, 157 Iowa 525. "The special assessment certificates issued pursuant to the levy were thereby rendered invalid; but this

the property to be assessed. Failure to do so renders a contract for the work invalid.[186] In Peterson *v.* Stratford,[187] it was held that a resolution of necessity was jurisdictional when it was proposed to extend a public street, the cost of the extension to be assessed against abutting and adjacent property. It is not proper for a city to attempt to levy an assessment for grading a street when the resolution of necessity made no provision for bringing the street up to grade.[188] If these formal steps are not closely followed the assessment for the improvement will be invalidated for lack of jurisdiction.[189]

BASIS FOR ASSESSMENTS

Benefits. — "It is upon the theory of special benefit that a special assessment is allowable."[190] Thus did the Supreme Court of Iowa state one of the basic principles of all special assessments for public improvements.[191]

Prior to the legislative establishment of our present basis for assessment, it was held by the Supreme Court of Iowa that the front foot rule of assessment was constitutional even though a special benefit was not taken into consideration.[192] In the case of Morrison *v.* Hershire[193] the Court

court held that the city of Des Moines could lawfully take further proceedings leading to an assessment, by taking the necessary jurisdictional steps."— Barber Asphalt Paving Co. *v.* City of Des Moines, 191 Iowa 762, at 764.

[186] Dunker *v.* Des Moines, 156 Iowa 292; *Code of 1907,* Sec. 810.

[187] 190 Iowa 45.

[188] The resolution of necessity merely provided for the "opening of said street" for public purposes. — Guenther *v.* Des Moines, 197 Iowa 414.

[189] Tallant *v.* Burlington, 39 Iowa 543.

[190] Robinson *v.* Burlington, 50 Iowa 240; Smith *v.* Marshalltown, 197 Iowa 85.

[191] McQuillin's *Municipal Corporations,* Vol. V, Sec. 2043.

[192] Allen *v.* Davenport, 107 Iowa 90.

[193] 32 Iowa 271.

stated its earlier stand rather clearly: "The power of the city to perform the work", it said, "does not depend upon benefits to be derived by property owners. . . . The work is done for the benefit of the public; the assessment for its payment is levied upon the abutting lots, not because of any special benefits their owners derive from the improvement, but because the public good demands it, and the law authorizes special taxation for such objects."[194]

The decision of the Supreme Court of the United States in the case of Norwood *v.* Baker[195] caused some confusion in the Iowa law by apparently invalidating the front foot rule of levying special assessments. Subsequent modifications of the opinion, however, seemed to point to the principle that the Federal Court would accept the front foot rule so long as the assessment levied did not result in confiscation of property or in a complete disregard of benefits.[196]

Since the Norwood case the Iowa statutory requirements for special assessments have been changed. Section 6021 of the *Code of 1931* reads as follows: "When any city council levies any special assessment for any public improvement against any lot, such special assessment shall be in proportion to the special benefits conferred upon the property thereby and not in excess of such benefits. Such assessments shall not exceed twenty-five per cent of the actual value of the lot at the time of levy, and the last preceding assessment roll shall be taken as prima facie evidence of

[194] Mr. Justice Beck, pages 276, 277. See also Warren *v.* Henly, 31 Iowa 31; Stutsman *v.* Burlington, 127 Iowa 563; Diver *v.* Keokuk Savings Bank, 126 Iowa 691; C. M. & St. P. Ry. Co. *v.* Phillips, 111 Iowa 377; Dewey *v.* Des Moines, 101 Iowa 416; Gatch *v.* Des Moines, 63 Iowa 718; Muscatine *v.* C., R. I. & P. Ry. Co., 88 Iowa 291.

[195] 172 U. S. 269.

[196] French *v.* Barber Asphalt Paving Co., 181 U. S. 324; Iowa Pipe and Tile Co. *v.* Callanan, 125 Iowa 358.

such value." Section 6022 adds the limitation that no special assessment against any lot shall be "more than ten per cent in excess of the estimated cost."

It seems to be within the scope of municipal legislative authority to determine the basis for special assessments — subject, of course, to the statutory requirements. Cases examined seem to indicate a willingness on the part of the Iowa Court to accept a combination of the four major bases — the front foot rule, the total area, the depth of the lot, and the special benefit — if the assessment as levied is reasonable, not arbitrary or confiscatory in nature.[197] But in no case may the assessment on property (regardless of how correctly the levy is measured) amount to more than twenty-five per cent of the actual value of the property to be burdened with the tax.

The Twenty-five Per Cent Limitation. — The twenty-five per cent limitation applies to each separate improvement project. Thus, a piece of property may be assessed up to twenty-five per cent of its value for a sewer, another twenty-five per cent for paving, and, if the lot touches two or more streets, may be assessed another twenty-five per cent for paving on a second street. A city can not legally evade the limitation by considering guttering, curbing, and paving a street as three separate improvements. The Iowa Supreme Court has held that these projects are one improvement within the meaning of the statute, and this decision limits the council in levying assessments to a tax not in excess of twenty-five per cent of the actual value of the property.[198]

[197] Hackworth *v.* Ottumwa, 114 Iowa 467; Fort Dodge Electric Light and Power Co. *v.* Fort Dodge, 115 Iowa 568; Minneapolis and Saint Paul Ry. Co. *v.* Lindquist, 119 Iowa 144; Benshoof *v.* Iowa Falls, 175 Iowa 30; Rawson *v.* Des Moines, 133 Iowa 514; Kneebs *v.* Sioux City, 156 Iowa 607; Smith *v.* Marshalltown, 197 Iowa 85.

[198] Bailey *v.* Des Moines, 158 Iowa 747; Warren *v.* Henly, 31 Iowa 31; Downing *v.* Des Moines, 124 Iowa 289; Miller *v.* City of Sheldon, 198 Iowa

A special assessment, however, is not binding on a property owner merely because it is not in excess of the benefits conferred. He is entitled to have the assessment ratably and proportionately distributed over all the property in the district.[199] It seems quite apparent that the Supreme Court of the Commonwealth is seeking to secure an equitable basis for assessments.[200]

Value of the Property. — Here, as in the case of the constitutional restriction regarding municipal indebtedness, the words "actual value of the property" have caused much litigation. What is meant by the statutory phrase "actual value"?

The statutory provision that special assessments against property shall not exceed twenty-five per cent of its actual value at the time of levy means, the Court has held, that the assessment shall not exceed twenty-five per cent of that value which the property may have after the improvement is fully completed.[201] Such a principle seems to be the direct result of the ruling in Sanborn *v.* Mason City[202] in which the Court held that a special assessment for the construction of a sewer could not be levied and collected in advance of the completion thereof.

The actual value of the property, the State Court has decided, means only the value of the real estate; personal

855; Harris *v.* Evans, 196 Iowa 799; Durst *v.* City of Des Moines, 164 Iowa 82; Morrison *v.* Hershire, 32 Iowa 271.

[199] Early *v.* Fort Dodge, 136 Iowa 187.

[200] Iowa Pipe and Tile Co. *v.* Callanan, 125 Iowa 358; Rawson *v.* Des Moines, 133 Iowa 514; Early *v.* Fort Dodge, 136 Iowa 187; Camp *v.* Davenport, 151 Iowa 33; In re Appeal of Hahn, 197 Iowa 292; Belknap *v.* City of Onawa, 192 Iowa 1383; Chicago, Great Western Ry. Co. *v.* Council Bluffs, 176 Iowa 247.

[201] Belknap *v.* City of Onawa, 192 Iowa 1383; Waterloo, Cedar Falls and Northern Ry. Co. *v.* Town of Cedar Heights, 198 Iowa 350.

[202] 114 Iowa 189.

property located thereon seems not to enter into the valuation for the purposes of special assessments.[203] This, of course, is reasonable since only the real property is made more valuable.

Reasonable future expectations as to the increase in the value of the land, resulting from the improvement, may be included in the basis for computing the assessment.[204] But it is not competent for the city to levy an assessment against agricultural lands on the basis of the value of the land if it were abandoned for agricultural purposes and platted into city lots.[205] On the other hand, it has been held that "the amount of assessments for benefits is not of necessity limited to the present use to which the owner devotes the property."[206] In any event, the assessment as made by the city council is presumed to be legal, equitable, and just.[207] This presumption as to the equity of the council's valuation of the property, however, does not prevent a property owner from objecting to the assessment as levied.[208] If the valuation of the property, for purposes of levying the assessment, is found to be fraudulent, unfair, or

[203] Chicago, Rock Island and Pacific Ry. Co. *v.* City of Centerville, 172 Iowa 444; Chicago, Rock Island and Pacific Ry. Co. *v.* Reinbeck, 201 Iowa 126.

[204] Riepe Estate *v.* City of Burlington, 199 Iowa 373; In re Appeal of Hahn, 197 Iowa 292; Chicago, Rock Island and Pacific Ry. Co. *v.* City of Centerville, 172 Iowa 444; Des Moines City Ry. Co. *v.* City of Des Moines, 183 Iowa 1261.

[205] Toben *v.* Town of Manson, 193 Iowa 750.

[206] Tjaden *v.* Town of Wellsburg, 197 Iowa 1292, at 1296; In re Appeal of Gilcrest Co., 198 Iowa 162; In re Jefferson Street Sewer, 179 Iowa 975.

[207] Jones *v.* City of Sheldon, 172 Iowa 406; Dickinson *v.* Incorporated town of Guthrie Center, 185 Iowa 541; Illinois Central Ry. Co. *v.* Incorporated Town of Pomeroy, 196 Iowa 504; Chicago, Rock Island and Pacific Ry. Co. *v.* City of Centerville, 172 Iowa 444.

[208] Camp *v.* Davenport, 151 Iowa 33; Durst *v.* City of Des Moines, 150 Iowa 370;Hubbell *v.* City of Des Moines, 168 Iowa 418; Harris *v.* Evans, 196 Iowa 799; Benshoof *v.* City of Iowa Falls, 175 Iowa 30; In re Appeal of McLain, 189 Iowa 264.

excessive, the assessment, quite obviously, is void and the taxes are not collectible.[209]

These precautions, on the part of the Court, seem unnecessary in view of the statutory provision that the value of the property shall be determined by "the last preceding assessment roll".[210] But, as Dr. Gallaher aptly points out, these two provisions (the actual value of the lot at the time of levy and the last preceding assessment roll) are inconsistent. The levy is made after the improvement is in place; while the assessment roll, of course, would not include the improvement. "Moreover, both councils and the courts are well aware that the assessment roll is no bona fide proof of actual value."[211]

COLLECTION OF ASSESSMENTS

Statutory requirements place the city council under the necessity of assessing each lot separately.[212] It is therefore improper for a city to assess platted lots collectively.[213]

Section 6037 of the Iowa Code expressly grants to Iowa municipalities the power to sell property delinquent in the payment of special assessments in the same manner and under the same procedure as if the property were delinquent in ordinary taxes; but unless the legislature provides specifically for the sale of property for the non-payment of special assessments, the city possesses no power to sell the property in default.[214] In the case of Ham *v.* Miller[215] the

209 See the cases cited in the previous footnote.

210 The section reads as follows: "and the last preceding assessment roll shall be taken as prima-facie evidence of such value."

211 Gallaher's *The Administration of Municipal Finance,* in *Applied History,* Vol. VI, p. 44.

212 *Code of 1931,* Sec. 6023.

213 Gill *v.* Patton, 118 Iowa 88; Stutsman *v.* Burlington, 127 Iowa 563; Cavanagh *v.* Des Moines, 179 Iowa 739.

214 Ham *v.* Miller, 20 Iowa 450; McInerny *v.* Reed, 23 Iowa 410; Merriam *v.* Moody's Executors, 25 Iowa 163; Lathrop *v.* Rowley, 50 Iowa 39; Ankeny *v.* Henningsen, 54 Iowa 29; Snouffer & Ford *v.* Grove & Grove, 139 Iowa 466.

215 20 Iowa 450.

Court held that the power "to provide for the assessment of all taxable property" or to "collect taxes" granted by the charter of a municipal corporation did not include the right to sell and convey property in the case of non-payment of assessments. The Court based its decision upon the statement: "We need not say that this power, sovereign in its nature, must not depend for its existence upon mere inference, but must always be created by express grant."[216]

This principle is drawn from the distinction which the Court makes between taxes and special assessments. In the case of Ankeny *v.* Henningsen[217] the Supreme Court said: "A general tax is a general burden imposed at stated intervals. A special assessment is a special burden; it may be imposed unexpectedly; and the amount is often large as compared with the ability of the person to pay it." Mr. Justice Dillon voiced the same principle when he said in Merriam *v.* Moody's Executors,[218] "Again, there is a difference between general taxes and special assessments, a reason why the legislature should, with respect to the one have conferred the power to sell, and not with respect to the other."

It is not competent for a municipality to "farm out" its authority to collect special assessments. "The amount is assessed", said the State Supreme Court in McInerny *v.* Reed,[219] "by virtue of the sovereign power in the State to levy taxes and assessments, which power is, by the charter, delegated to the municipality. . . . It would not do to hold

216 20 Iowa 450, at 453.

217 54 Iowa 29.

218 25 Iowa 163.

219 23 Iowa 410.

that a city could delegate or 'farm out' either its taxing power or its power to enforce the collection of taxes. Why not? The legal answer is, that these powers are conferred upon the municipality to be *exercised by it,* not to be delegated by it to others.''[220]

In an early case, the Supreme Court of the State held that the city must make its assessments and its efforts to collect them within a reasonable time after the construction of the improvement. Otherwise the municipality becomes liable to the contractor for the costs of the improvement.[221] This problem of time is now taken care of by statutory requirements that special assessments are payable thirty days after the date of the levy.[222] The levy is made, usually, upon completion of the contract.[223]

If the property is sold for general taxes and a tax deed is duly issued thereon, the sale extinguishes the lien of all existing special assessments for paving or sewer improvements.[224] It is a general principle that the power to levy special assessments is not exhausted by virtue of having once been used. Such power is continuing and may be exercised whenever the public good requires.[225]

Statutory requirements regarding the levying, alteration, and collection of assessments must be strictly complied with or the action will be declared void.[226]

220 23 Iowa 410, at 415, 416.

221 See Morgan *v.* City of Dubuque, 28 Iowa 575.

222 *Code of 1931,* Sec. 6031.

223 *Code of 1931,* Sec. 6031.

224 Western Securities Co. *v.* Black Hawk National Bank, 211 Iowa 1304; Iowa Securities Company *v.* Barrett, 210 Iowa 53.

225 Koons *v.* Lucas, 52 Iowa 177.

226 Collins *v.* Davis, 57 Iowa 256; Goold *v.* Lyon Co., 74 Iowa 95 (ten other cases under one action); Cedar Rapids & Marion City Ry. Co. *v.* Redmond, 120 Iowa 601.

STREETS AND SIDEWALKS

Streets are of primary importance to a municipality for they determine to a considerable extent the direction and character of a city's development. ''They are the rivers of present-day urban traffic; over their surface flows an ever increasing volume of vehicular and pedestrian traffic. Below their surface are laid mains and pipes of every description — for water, gas, sewage. Electric wires may be strung on poles above ground, or carried in conduits below. . . . The streets are not only traffic arteries; they are a means of supplying light and air to the city's homes, stores and factories. Often they become playgrounds for the city's children. Their appearance . . . . may make the city a thing of beauty, or quite the reverse.''[227]

No satisfactory definition for a street — at least, no definition of general acceptance — has been given by the courts. Broadly speaking, it is permissible to define a street as ''a public highway within an incorporated municipality.''[228] All land lying between the lot-lines is generally considered to be a part of the street. Thus, the ''parking'' is usually a part of the street. So, likewise, a park-way, down the center of a street, has been held to be a part of the street. In Iowa, sidewalks are also considered to be a part of the street.[229]

PUBLIC NATURE OF STREETS

The public nature of a street is apparent even to the lay-

227 MacDonald's *American City Government and Administration,* p. 505.

228 Sachs *v.* Sioux City, 109 Iowa 224; Bell *v.* Foutch, 21 Iowa 119; Barrett *v.* Brooks, 21 Iowa 144; Dillon's *Municipal Corporations,* Vol. III, Sec. 1121; Chamberlain *v.* Iowa Tel. Co., 119 Iowa 619; McQuillin's *Municipal Corporations,* Vol. III, Sec. 1284.

229 McQuillin's *Municipal Corporations,* Vol. III, Secs. 1280-1283.

man and this characteristic is clearly recognized by the courts. In the early case of Mullarky *v.* Cedar Falls[230] the Iowa Supreme Court held that a municipal corporation possessed no authority to execute a deed of trust, conveying a bridge erected by the city to trustees, authorizing the charging of tolls thereon, and pledging the bridge and the tolls thereon for the payment of the debt created for its construction. Mr. Justice Lowe, in delivering the opinion of the Court said: "There is a marked difference between the building of a bridge as a necessary improvement of a street, and dedicating it to the public as a common highway .... and the erection of a toll bridge on the same street for the purposes of pecuniary profit. The one is legitimate, the other outside of the corporate powers. Not so distinctly, perhaps, as the establishment of a foundry, or the erection of a mill .... yet somewhat similar in principle, and embarking in a business which does not fall within the necessary objects of a municipal corporation, and which had better be left to private enterprise."[231] Surely, no better illustration of the public character of streets can be found. Furthermore, in Bennett *v.* Mount Vernon,[232] it was expressly held that municipal corporations have neither statutory nor implied power to grant the use of streets for private purposes.

This public character is further emphasized by the demands of the courts that a city must not act arbitrarily in vacating streets,[233] must use diligence and care in keeping

230 19 Iowa 21.

231 19 Iowa 21, at 25. Cities, however, are now authorized by statute to erect toll bridges under certain conditions.—*Code of 1931*, Secs. 5882-5893. A toll bridge at Burlington furnishes a considerable income for the use of the municipality.

232 124 Iowa 537.

233 Lerch *v.* Short, 192 Iowa 576; Walker *v.* Des Moines, 161 Iowa 215; Williams *v.* Corey, 73 Iowa 194.

its streets free from obstructions,[234] must exercise needful prudence and care in the construction and maintenance of sewers,[235] must not contract away its power to improve the streets, where the public convenience and safety forbid,[236] must not act arbitrarily or inequitably exercise its power to widen streets,[237] and must exercise reasonable care and prudence in bringing a street to grade.[238]

Source of Authority. — As in the case of all other municipal powers, the source of municipal authority over streets is to be found in the Constitution, the statutes of the State, or in the charter of the city. In the case of East Boyer Telephone Company *v.* Vail[239] the Court held that the legislature of the State possessed the power to regulate the use of highways. This authority over highways within the limits of a city may be delegated to municipal corporations. Precisely this same point was emphatically repeated in the cases of Huston *v.* Des Moines[240] and Central Life Assurance Society *v.* Des Moines.[241] But in the exercise of this grant of powers, the municipal corporation is held to a strict compliance with the law.[242]

What provisions, then, has the legislature made for municipal acquisition of land to be used for public streets? And to what extent has the legislature invested cities with

234 Frazee *v.* City of Cedar Rapids, 151 Iowa 251.

235 Hines *v.* Nevada, 150 Iowa 620; Blackmore *v.* Council Bluffs 189 Iowa 157; Muscatine *v.* Chicago, Rock Island and Pacific Ry. Co., 88 Iowa 291.

236 Snouffer *v.* Cedar Rapids and Marion City Ry. Co., 118 Iowa 287.

237 Williams *v.* Carey, 73 Iowa 194.

238 Hume *v.* Des Moines, 146 Iowa 624, and cases there cited.

239 166 Iowa 226.

240 176 Iowa 455.

241 185 Iowa 573.

242 East Boyer Telephone Co. *v.* Vail, 166 Iowa 226.

authority over such streets? Does the city have any responsibility to its inhabitants who use the streets? Answers to these questions may be secured through a careful study of the *Code of Iowa* and the decisions of the Supreme Court of the Commonwealth.

ACQUISITION OF LAND

Land may be acquired for street purposes by Iowa municipalities by dedication, by purchase, or by condemnation and purchase.[243]

No street, dedicated to public use, is deemed by Iowa law to be a public street unless the dedication is accepted and confirmed by a resolution of the council specifically enacted for such purpose. The process of dedication provided for by the statutes of Iowa passes the title to the land to the city in "fee simple".[244] Mr. Justice Lowe, speaking for the Supreme Court of Iowa in Des Moines *v.* Hall,[245] said: "The true view is, that, when the land has been dedicated .... without reservation .... the dedicator or his grantee has no special rights in the soil composing the streets, but the dominion of the streets passes to the public authorities."[246] Such a view, the Court admitted, varies from the Common Law doctrine.[247] An example of the Common Law rule is to be found in the case of Dubuque *v.* Maloney[248] in

[243] *Code of 1931,* Chs. 307, 308; Swisher's *Municipal Administration of Public Works* in *Applied History,* Vol. VI, pp. 316-318; McQuillin's *Municipal Corporations,* Vol. III, Sec. 1294, Vol. IV, Secs. 1518-1522; Dillon's *Municipal Corporations,* Vol. III, Chs. XXII-XXV.

[244] Des Moines *v.* Hall, 24 Iowa 234, at 245, 246; Lake City *v.* Fulkerson, 122 Iowa 269.

[245] 24 Iowa 234.

[246] 24 Iowa 234, at 245, 246.

[247] For a general discussion of this subject see McQuillin's *Municipal Corporations,* Vol. IV, Secs. 1518-1522, Vol. III, Sec. 1306.

[248] 9 Iowa 450.

which the Court refused to allow the city to construct a cistern in the street without the consent of the adjoining lot owner, holding that only a public easement existed and that the fee of the streets was in the owner of the adjoining lots.

But where a town or an addition is laid out under statutory provisions, a different situation arises. Even so, the Court has consistently held to the principle that the municipality holds the fee in trust for the general public, not merely for the inhabitants of the local community. Thus, "the final and ultimate control of the fee in the street in case of such dedication rests in the legislature and not in the council."[249]

The acquisition of property for street purposes is commonly secured by purchase. Such a purchase may be the result of a voluntary sale, or it may be the result of condemnation proceedings under the right of eminent domain. If the property is secured through voluntary sale, the city may secure either an easement or a title in fee depending upon the terms of the purchase contract, but the city does not possess authority to secure more land than is necessary for the purposes intended even if the owner wishes to sell more land.

No general statute in Iowa declares that in cases of condemnation for city streets the title vests in the municipality. Nor does it appear that this question has ever been presented to the Supreme Court of the State. It seems probable, then, according to the Common Law rule stated above, that the city acquires by condemnation only an easement in the land, unless, indeed, a fee is necessary for the pur-

[249] Swisher's *The Municipal Administration of Public Works* in *Applied History,* Vol. VI, p. 317; Clinton *v.* Cedar Rapids & Missouri River Ry. Co., 24 Iowa 455; Lerch *v.* Short, 192 Iowa 576. See also Des Moines *v.* Hall, 24 Iowa 234.

poses designated in the condemnation proceedings. In such event, a resolution of necessity stating the actual need of securing such fee will adequately secure the title for the city. Such a proceeding, however, is not required by the State statutes. It is, rather, a precautionary measure calculated to protect the city's actions in acquiring land needed for street purposes.[250]

"That a street may be established by public use for a fixed period of time admits of no controversy at present, irrespective of the question whether there has been any dedication."[251] In Martin *v.* Town of St. Ansgar[252] the Court held that where the original construction of a sidewalk by an abutting property owner was in compliance with an order of the town council and for a period of thirty years it had remained in that place without objection on the part of the municipality, the abutting property owner having occupied and improved the property up to the walk, before the city can dispossess the owner of his property on the claim that he is occupying part of the street, the public right thereto must be established by clear and unequivocal testimony.[253]

While possession may not always amount to "nine points of the law", uninterrupted, undisputed, and unchallenged possession of a strip of ground abutting upon a street, for a long period of years, followed by the making of improvements thereon, with reference to a given line, casts the burden upon a town or city in showing that the line thus claimed

[250] McQuillin's *Municipal Corporations,* Vol. III, Secs. 1305-1309; Dillon's *Municipal Corporations,* Vol. III, Secs. 1073, 1123-1127.

[251] McQuillin's *Municipal Corporations,* Vol. III, Sec. 1298.

[252] 165 Iowa 560.

[253] Weber *v.* Iowa City, 119 Iowa 633; Corey *v.* Fort Dodge, 118 Iowa 742; State *v.* Welpton, 34 Iowa 144; Mt. Vernon *v.* Young, 124 Iowa 517; Shea *v.* Ottumwa, 67 Iowa 41; Byerly *v.* Anamosa, 79 Iowa 204; Bridges *v.* Town of Grand View, 158 Iowa 402.

is not the true one.[254] Where a city permitted the owner of a building to construct, and for a long period of years to maintain, a cellar-way from the street to his basement, the owner becomes more than a mere licensee. Until such permission was revoked, the city was bound to use ordinary care in grading and guttering the street so as not to dam up the surface water and cast it upon the property of the owner.[255] Again, in Bradley *v.* Centerville,[256] the State Court held that continued use of an alley way by the public and subsequent proceeding ordering it to be paved were not sufficient to effect a rededication of the land.

In case the land has been once dedicated to the town but the town never formally accepted the dedication, and the grantor has used and occupied and paid taxes on such land for a period of ten years without objections on the part of municipal officials, such land may not, under the former dedication, be claimed by the city as public property for the use of streets.[257] This seems to have been consistently followed, even though the statute of limitations will not run against a municipal corporation.[258]

Under the Iowa statute, title by prescription can not be acquired by mere use for a specified time. Adverse pos-

[254] Corey *v.* Fort Dodge, 118 Iowa 742; Mt. Vernon *v.* Young, 124 Iowa 517; Johnson *v.* City, 153 Iowa 493; Sutton *v.* Mentzer, 154 Iowa 1; McElroy *v.* Hite, 154 Iowa 453; Eldora *v.* Edgington, 130 Iowa 151; Sioux City *v.* Railroad Co., 129 Iowa 694; Brown *v.* City, 117 Iowa 302; Biglow *v.* Ritter, 131 Iowa 213; Quinn *v.* Baage 138 Iowa 426; Baker *v.* Railroad Co., 154 Iowa 228; McClenehan *v.* Jesup, 144 Iowa 352.

[255] Wendt *v.* Akron, 161 Iowa 338.

[256] 139 Iowa 599.

[257] Uptagraff *v.* Smith, 106 Iowa 385.

[258] Davenport *v.* Boyd, 109 Iowa 248; City of Waterloo *v.* Union Mill Co., 72 Iowa 437; Taraldson *v.* Town of Lime Springs, 92 Iowa 187; Smith *v.* City of Osage, 80 Iowa 84; Smith *v.* Gorrell, 81 Iowa 218; Orr *v.* O'Brien, 77 Iowa 253; Davies *v.* Huebner, 45 Iowa 574; Beim *v.* Carlson, 209 Iowa 1001, and cases there cited.

cil and grant the relief which should have been granted by it'."

According to these later decisions, the Court now holds that the failure to lay the improvement on the established grade will not defeat the jurisdiction of the city council over the subject matter: slight variances, resulting in no prejudice to the property owner, will not be deemed material. On the other hand, if a substantial departure from the established grade, resulting in a substantial prejudice to the proper owner, is shown, it can not be ignored as immaterial.[267]

Once a grade is established, it may not be substantially altered without the city's incurring liability for the damages sustained by the abutting property owners. "The intent of the law", said Mr. Justice Kinne in Chase *v.* Sioux City[268], "was, that the owner of property in a city or town which had regularly established a grade might rely thereon, and proceed to build upon or otherwise improve his property, knowing that if the municipality should afterwards legally change such grade, he could recover any damages he might sustain by reason thereof."[269]

The statutes of Iowa provide a method whereby the damage to the abutting property may be determined and paid. This need not be repeated here since it is concisely and clearly described by Dr. Jacob A. Swisher in *Applied History,* Vol. VI.[270]

When Council Action Is Void. — If a town alters the established grade of its streets without substantially following the procedure established by statutes and making provision for damages, such action is unlawful and the owner of the adjoining property may maintain an action at law to recover damages sustained.[271]

267 Scofield *v.* City of Council Bluffs, 68 Iowa 695; McManus *v.* Hornaday, 99 Iowa 507; Allen *v.* Davenport, 107 Iowa 90.

268 86 Iowa 603.

269 86 Iowa 603, at 607, 608.

270 Swisher's *The Municipal Administration of Public Works* in *Applied History,* Vol. VI, pp. 321-323.

It is obvious that an ordinance altering a grade, or vacating a street, passed by the vote of a councilman who is personally to benefit by such action, is void.[272] In Bay *v.* Davidson[273] the Supreme Court of Iowa held that the purpose of this principle, enacted into law by the General Assembly,[274] was to prevent councilmen, directly or indirectly, from making profits out of their relationship with the city. Again, in Krueger *v.* Ramsey[275] the Court said: "This ordinance could not have passed without the vote of Ramsey. Ramsey was interested in having it pass. Its passage gave him this strip of land, covered by this road, or, at least, it was his understanding and agreement, that upon the passage of the ordinance vacating this road, the town would deed this land to him; and it did. We must hold the effort .... therefore, void."[276]

If the statutes require free competitive bids for street improvements, failure on the part of the city council to provide for such bids, renders its action void, and, of course, precludes the city's right to assess property for the cost thereof.[277]

271 Noyes *v.* Mason City, 53 Iowa 418.

272 Krueger *v.* Ramsey, 188 Iowa 861; Bay *v.* Davidson, 133 Iowa 688; James *v.* City of Hamburg, 174 Iowa 301.

273 133 Iowa 688.

274 *Code of 1931,* Secs. 180, 275, 3922, 4685, 4755-b10, 5324, 5361, 5673, 5828, 6534, 6710, 13324, 13327.

275 188 Iowa 861.

276 188 Iowa 861, at 868.

277 Jackson *v.* City of Creston (and 15 other cases), 206 Iowa 244; Zalesky *v.* Cedar Rapids, 118 Iowa 714; Bennett *v.* Emmetsburg, 138 Iowa 67; Manning *v.* City of Ames, 192 Iowa 1324; Johnson County Savings Bank *v.* City of

It is almost needless to say that any ordinance, resolution, or any other legislative act of a city council, if secured through bribery, is invalid.[278]

SIDEWALKS

The sidewalk is usually spoken of as that part of the street intended for the use of pedestrians, and for the use of pedestrians only. "Broadly speaking", says McQuillin, "*The sidewalk includes everything between the curbing and the lot line*, but even if it should be held to include only the part actually intended to be used by the public and not the space between the walk and the curb or beyond the curb, yet if the portion intended for foot passengers becomes unsuitable for that purpose, and the public makes constant use of another part of the street, between the curb line and the lot line, for foot passage, the portion thus used in a sidewalk within the usual meaning of that term."[279] At any rate, the authorities are well agreed on the proposition that the term "street" includes sidewalks unless the statute clearly uses the term in a restricted sense. This distinction is not uncommon, particularly in those statutes relating to street improvements, as distinguished from sidewalk improvements.[280]

Since the term "street" includes sidewalks, an authorization to improve the streets usually carries with it a corresponding authorization to build and repair sidewalks. The Iowa law, however, explicitly grants municipal cor-

Creston, 212 Iowa 929; McQuillin's *Municipal Corporations*, Vol. III, Sec. 1186. See also Gjellefald *v.* Hunt, 202 Iowa 212, and cases there cited; Busch *v.* Joint Drainage District, 198 Iowa 398, and the cases there cited.

278 Lee *v.* City of Ames, 199 Iowa 1342, and the cases there cited by Mr. Justice Arthur.

279 McQuillin's *Municipal Corporations*, Vol. III, Sec. 1286.

280 McQuillin's *Municipal Corporations*, Vol. III, Sec. 1286, especially citations and quotations found in the footnotes to this section.

porations the authority to construct, reconstruct, or repair permanent sidewalks. Power to assess the cost of such work against the adjoining property is also given to the city.[281] But this grant of power does not give the city authority to levy the costs of constructing, reconstructing, or repairing cross-walks against the adjoining property.[282] Nor do these statutes give the city council authority to invest its officers with power to go out over the city and construct or reconstruct such permanent sidewalks as it may see fit.[283]

An ordinance must be passed by the council before the city may require the construction of a permanent sidewalk.[284] An ordinance establishing a street grade is also an essential prerequisite to the work of excavating for a sidewalk.[285] Thus, in Bowman *v.* Waverly[286] the Court held that where a city ordinance made it the duty of a city to bring the bed of sidewalks to grade, it must do so in time to permit the owner to build the walk within the time specified before the city had the right to construct the walk at the owner's expense.[287] Again, in Caldwell *v.* Nashua[288] the Court specifically held that a city had no authority to change the grade of a sidewalk except upon the adoption of an ordinance fixing the grade, and of a resolution directing the

281 *Code of 1931*, Sec. 5962; McQuillin's *Municipal Corporations*, Vol. IV, Secs. 1829, 2029, 2790.

282 Kaynor *v.* District Court, 178 Iowa 1055; Mann *v.* City of Onawa, 199 Iowa 430; Kaynor *v.* City of Cedar Falls, 156 Iowa 161.

283 Clark *v.* Martin, 182 Iowa 811.

284 Zalesky *v.* Cedar Rapids, 118 Iowa 714; Caldwell *v.* Nashua, 122 Iowa 179.

285 Gallaher *v.* Jefferson, 125 Iowa 324; Burget *v.* Greenfield, 120 Iowa 432.

286 155 Iowa 745.

287 Burget *v.* Greenfield, 120 Iowa 432, and cases there cited.

288 122 Iowa 179.

alteration. In the absence of the ordinance and resolution, the city is liable for damages for any change.

Generally speaking, the liabilities attaching to the city in case of irregular assessments on, or failure to secure jurisdictional rights over, street improvements, apply also in the case of sidewalks.[289]

[289] Carbon Coal Co. *v.* Des Moines, 198 Iowa 371; Eckert *v.* Walnut, 117 Iowa 629; Sioux City *v.* Weare, 59 Iowa 95; Bowman *v.* Waverly, 155 Iowa 745. As to special charter cities, see Zalesky *v.* Cedar Rapids, 118 Iowa 714, and cases there cited; Blanden *v.* Fort Dodge, 102 Iowa 441.

POLICE POWER OF MUNICIPALITIES

INHERENT in every Commonwealth of the United States is the sovereign authority to enact laws designated to promote the general welfare and to protect the health, safety, and morals of the citizens and inhabitants of these several political units. It is in this field of the police power that the conflict between personal interests and social policy, the struggle between those who wish to maintain the *status quo* and those who desire to experiment with newer principles is most clearly presented. In this field, likewise, there is present a political struggle of no little magnitude for it represents the growth of a new political philosophy. This conflict necessitates the rearrangement of our present political outlook or the development of a new political philosophy. Signs of either movement are clearly presented in the stream of modern life, and the future alone holds the answer to this divergence of opinion regarding the fundamental sphere of governmental action.

In the broad and vague field of the proper exercise of the police power, it is not surprising to find many conflicts and a great variety of subject matter. Considered from the general social point of view, a study of the police power of cities affords layman and student alike an opportunity to develop a wider appreciation of the real powers of a municipality. Under this general subject are presented such varying topics as health regulations, fire ordinances, licenses and taxation, interstate commerce regulations, abatement of nuisances, use of the streets, zoning regulations, control of public utilities, granting of franchises, and protection of contract obligations. Through all of these topics one can feel the throb of the city pulsating through

the arteries of commerce, industry, and business, and flowing out into the multitudinous channels of social life from which the individual members of the *body politic* draw their attitudes toward things political.

SOURCE AND EXTENT OF MUNICIPAL POLICE POWER

In the constitutional system of the United States, the authority to enact laws under the police power resides in the various States. Since no municipality in Iowa is presumed to possess any inherent powers, it follows that all authority to enact police regulations must be conferred upon the municipality either by the General Assembly or by the State Constitution.[290]

Even the plea of an emergency will not justify the exercise of an ungranted police power.[291] It is also true that an amendment to a State law by which a grant of police power was made limits the exercise of the police power by the municipality.[292] And it is likewise fundamental that the police power must be exercised so as not to infringe arbitrarily or unnecessarily upon private rights.[293] But a regulation is not invalidated by the mere fact that private rights are restricted, or that loss will result to individuals from its enforcement.[294] In general, an ordinance enacted

290 Keokuk *v.* Scroggs, 39 Iowa 447; Des Moines *v.* Gilchrist, 67 Iowa 210; Heins *v.* Lincoln, 102 Iowa 69; Aldrich *v.* Paine, 106 Iowa 461; Burroughs *v.* City of Cherokee, 134 Iowa 429; Bear *v.* City of Cedar Rapids, 147 Iowa 341; Town of Akron *v.* McElligott, 166 Iowa 297; 43 *Corpus Juris,* 206, and case cited in Note 55; Downey *v.* Sioux City, 208 Iowa 1273; *Code of 1931,* Sec. 5714.

291 Downey *v.* Sioux City, 208 Iowa 1273.

292 Keokuk *v.* Scroggs, 39 Iowa 447.

293 City of Centerville *v.* Miller, 57 Iowa 56; Bush *v.* City of Dubuque, 69 Iowa 233; City of Hawarden *v.* Betz, 182 Iowa 808; 43 *Corpus Juris,* 230, Sec. 230.

294 City of Shenandoah *v.* Replogle, 198 Iowa 423; Rehmann *v.* City of Des Moines, 200 Iowa 286.

under the police power is considered unreasonable if it be partial, unfair, or oppressive in its effects, or if it imposes a serious burden without an adequate reason.[295] This is true even though the courts are slow to condemn an ordinance expressly authorized by statute. But if the ordinance is enacted under the general welfare clause or under some implied power, less hesitancy on the part of the courts in declaring the law unconstitutional is evident.[296]

It is possible, moreover, for a portion of an ordinance to be valid and another part to be held in-valid. Mr. Justice Beck, speaking for the Iowa Supreme Court in Eldora *v.* Burlingame[297] remarked that "the ordinance will be supported and enforced so far as it is within the lawful authority of the town, and will be held for naught in so far as it attempts to exercise power not conferred by the state."[298]

It is elementary that the municipality's jurisdiction over police regulations is coterminous with the corporate boundaries.[299] Some exceptions to the principle (as of any general proposition in constitutional law) exist, of course, as in the case of city airports located outside the corporation's limits or in the case of extraterritorial parks.[300] The general proposition, however, is laid down specifically in the early case of Gallaher *v.* Head[301] and has been consistently followed since that time.

Once the police power has been granted to a municipality,

295 Des Moines City Ry. Co. *v.* Des Moines, 90 Iowa 770.

296 Swan *v.* Indianola, 142 Iowa 731; Mart & Son *v.* City of Grinnell, 194 Iowa 499.

297 62 Iowa 32.

298 See also Davenport Gas and Electric Co. *v.* Davenport, 124 Iowa 22; Ebert *v.* Short, 199 Iowa 147.

299 Warner *v.* Stebbins, 111 Iowa 86.

300 *Code of 1931,* Secs. 5360, 5805, 5872, 5889, 5896-5899, 5903-c9, 6141, 6161.

301 72 Iowa 173.

the city may not bargain it away. Mr. Justice De Graff, speaking for the Court in Mart & Son *v.* City of Grinnell[302] said:

> It is further contended by appellants that an agreement or understanding was had with the members of the city council of the defendant city, and that in conformity to said understanding the council passed a resolution in August 1919 that plaintiffs might operate their moving picture theaters on Sunday. For this reason it is urged that the defendant city is now estopped from exercising its police power by virtue of the ordinance in question. It is quite evident that a city may not bargain away its police power. If a repeal of the ordinance was intended it was not repealed. An ordinance is not affected by resolution, nor may it be amended or changed in this manner.[303]

HEALTH AND FIRE PROTECTION

Health. — It is difficult to distinguish between a rule of a local board of health and an ordinance of the city council regulating the public health, but since the board of health (except in special charter cities) includes the council, the distinction is relatively unimportant. The council in enacting ordinances must follow a certain formal mode of procedure, but the board of health is not so restricted in passing its rules. As a matter of practice, an ordinance is usually used for those legislative enactments which are formal and permanent in nature or which are not purely health measures in the popular conception of that term. For example, in matters of sanitation, garbage disposal, and sewage the council usually enacts ordinances. But it generally passes rules in its capacity as a board of health to establish general quarantine or to require vaccination. Ordinances of the council and rules or orders of the local board of health

[302] 194 Iowa 499, at 503.

[303] Cascaden *v.* Waterloo, 106 Iowa 673; Bradley *v.* City of Centerville, 139 Iowa 599; Sawyer *v.* Lorensen & Weise, 149 Iowa 87.

have equal force before the law and may be enforced by the same officers. Both represent an exercise of the police power. And in both cases the action is subject to the same limitations as any other enactment carried out under the authority of the police power.

Present statutory provisions give the municipalities of this State the authority to regulate dairy herds and milk distribution.[304] In Bear *v.* City of Cedar Rapids[305], decided in 1910, the Supreme Court reviewed the statutes of Iowa and the orders of the State Board of Health and came to the conclusion that there was nothing in either upon which the city could stand in defence of its ordinance requiring local milk dealers to secure a municipal license as a prerequisite to carrying on their business. The power to regulate the milk business did not, it was held, necessarily imply the power to license milk dealers. The Court remarked that while the statutes relied upon by the city were very general in their terms, they did "not give the city power to do more than impose fines. Thereunder it cannot license or provide any other remedy than that authorized by the statute itself." Nor have subsequent enactments of the General Assembly of Iowa given municipalities this power.[306] This power to license (to be described in a later section) must be expressly granted, or no such power exists. Moreover, this licensing authority is but one aspect of the police power in conflict with the power to tax.

Fire. — Fire regulations are carried out through regular municipal legislative action. State statutes specifically

[304] *Code of 1931*, Secs. 5747, 5748.

[305] 147 Iowa 341.

[306] Des Moines *v.* Gilchrist, 67 Iowa 212; Foster *v.* Brown, 55 Iowa 686; Henke *v.* McCord, 55 Iowa 378; City of Mt. Pleasant *v.* Breeze, 11 Iowa 399; Burlington *v.* Kellar, 18 Iowa 59; City of Burlington *v.* Bumgardner, 42 Iowa 673; City of Chariton *v.* Barber, 54 Iowa 360; Keokuk *v.* Scroggs, 39 Iowa 447.

grant municipal corporations power to enact ordinances providing protection against danger from fire.[307] A great many powers, exercised by municipalities under their authority to enact housing and building regulations, are directly and indirectly connected with fire protection and fire prevention.

In the case of Town of Akron *v.* McElligott[308] the Supreme Court of Iowa held that Section 5760 of the Iowa Code did not authorize a town to require a workman to procure a license and to give a bond indemnifying the town and its superintendent of public works against liability for injury resulting from negligence in doing his work. "He could as well be required", said the Court, "to give bond to keep the peace".[309]

Any fire regulation attempted, therefore, must be either expressly granted, or must arise by necessary implication, or must be indispensable to the purpose for which the municipality was created. The municipality can not do by indirection that which it does not possess the power to do directly. It is, likewise, clear that a municipality can not by ordinance exceed or go beyond the authority given to it by statute. In other words, if the statute grants a municipality certain designated rights, the city may not by ordinance exceed these designated powers.[310]

These principles, as related to fire ordinances, are clearly exemplified in the cases of Boehner *v.* Williams[311] and Edwards & Browne Coal Co. *v.* Sioux City.[312] In the Boehner

[307] *Code of 1931*, Secs. 5738, 5740, 5760, 5766.

[308] 166 Iowa 297.

[309] 166 Iowa 297, at 302.

[310] Ebert *v.* Short, 199 Iowa 147; Van Eaton *v.* Town of Sidney, 211 Iowa 986; City of Burlington *v.* Kellar, 18 Iowa 59; 43 *Corpus Juris*, 215, Sec. 219.

[311] 213 Iowa 578.

[312] 213 Iowa 1027.

case, the Court held that statutory authority granted to municipalities to prohibit the erection of buildings unless the outer walls be made of "brick, iron, stone, mortar, or other noncombustible materials", did not authorize an ordinance which prohibited the erection of outer walls unless made of "brick, and mortar or of iron and stone and mortar". In other words, the ordinance did not permit (as did the statute) "other noncombustible materials" and, hence, the action of the council was invalid. The second action mentioned above relates essentially to classification and licensing and will be discussed in another section. It is sufficient for present purposes to point out that the city council may not enact arbitrary ordinances concerning building permits or fire protection. While public safety is paramount, private property must be given due consideration when the municipality is exercising its police power.

NUISANCES

According to the statutes of Iowa, municipal corporations are empowered to "cause any nuisance to be abated."[313] This authority may be exercised when necessary to prevent injury or annoyance from anything dangerous or offensive. But this power can be exercised only in accordance with ordinances regularly and legally adopted.[314]

In the case of Everett *v.* City of Council Bluffs[315] the Supreme Court held that a city council had no power to declare a thing a nuisance which was not such at Common Law or which had not been declared such by statute. Hence, they held that trees growing in a street or highway did not

[313] *Code of 1931*, Sec. 5739.

[314] City of Sioux City *v.* Simmons Hardware Co., 151 Iowa 334; Calwell *v.* City of Boone, 51 Iowa 687; McFadden *v.* Town of Jewell, 119 Iowa 321; Ogg *v.* City of Lansing, 35 Iowa 495; City of Ottumwa *v.* Chinn, 75 Iowa 405; Knostman & Peterson Furniture Co. *v.* City of Davenport, 99 Iowa 589.

[315] 46 Iowa 66.

constitute a nuisance unless they obstructed the traffic.[316] An ordinance of Sioux City declaring such trees to be nuisances and ordering their removal was held to be an illegal exercise of the police powers of the municipality. It was conceded in Cole *v.* Kegler[317] that cities and towns possessed the power to abate nuisances. But the Court insisted that the nuisance must in fact exist. If the thing abated, said the Court, was not in fact a nuisance, the declaration of the city council that it was a nuisance did not make it such. Nor was the action of the city council, in declaring something to be a nuisance, conclusive upon the owner of the property interfered with. Furthermore, in this same case, the Court held to the principle that the city must allow property owners affected an opportunity to be heard before the council may declare a thing to be a nuisance and, as such, subject to abatement through proper police power proceedings.[318]

It is possible that a thing may not be a nuisance *per se* and still be such in fact. In the case of Kent *v.* City of Harlan[319] the Iowa tribunal held that hitching posts, while not nuisances *per se,* may become such in fact if they are so placed as to interfere with the ingress and egress of parties to and from their private property. It was held to be within the power of the city to declare such hitching posts to be a nuisance and to provide for their abatement by proper injunction proceedings.

If a thing be a nuisance, it is the right and duty of the city to declare it to be such. But until the municipality so declares, it is not permissible for the city to abate such nuisances without incurring liability for the private in-

316 See also Nevada *v.* Hutchins, 59 Iowa 506.

317 64 Iowa 59.

318 See also Bush *v.* City of Dubuque, 69 Iowa 233.

319 170 Iowa 90.

terests injured. In the case of Davenport Gas, Light & Coke Co. *v.* City of Davenport[320] the Iowa Court said: "If the gas works referred to constituted a nuisance, then it was the right and duty of the city to so declare. But until this is done, and the fact found, we are not aware of any rule which would permit the city to appropriate to its own use the gas furnished, receive the benefit thereof, and then refuse to pay for it upon the ground that the place where the same was manufactured, was a nuisance. No individual consumer could certainly set up such a defense, nor can the city." The city ordinance involved in this case, directing the company to turn off the gas, was declared to be invalid. It is not a proper exercise of the police power, ruled the Court, for a city to attempt to evade obligations through its authority to abate nuisances.

After a municipality has declared the existence of a nuisance (conceding the city the authority to abate the nuisance), how far may the city go in its action to enforce obedience to its laws? The city of Knoxville possessed authority to abate nuisances. Stockyards, located near the railroad tracks, were declared to be a nuisance. A municipal ordinance provided the penalty of a fine for maintaining such a nuisance. The Supreme Court held that the city possessed the power, by specific grant, to abate the nuisance, but that no authority for imposing the fine was either explicitly or impliedly granted.

This principle was first presented in the case of City of Mt. Pleasant *v.* Breeze[321] and it has been consistently followed ever since. In that case, the Court, speaking through Mr. Justice Wright, said:

> In our opinion this provision does not confer the power claimed in this instance. The language employed seems to have been used

320 13 Iowa 229.

321 11 Iowa 399.

with care. . . . The power given is not to pass ordinances to *secure* the inhabitants against gambling, but to *suppress* gambling and riots. It is true that the *effect* of the *suppression* may be to *secure* the inhabitants against the evils named, but it is to be done by their *suppression* and not by laws providing for their punishment as misdemeanors. The use of the general language at the conclusion of the provision quoted, must be taken in connection with the special powers conferred and be limited by it. That is to say that the city is "to provide for the safety" &c., but not in a manner unwarranted by the charter. The city council cannot *punish* that which they are only authorized to *suppress* under this general power.[322]

In the case of the City of Chariton *v.* Barber[323] the Court held that the power to suppress and restrain disorderly houses and houses of ill fame did not authorize the passage of an ordinance declaring the keeping of such houses a misdemeanor and imposing a punishment therefor. Nor may a city enact similar provisions under the plea that they possess authority to improve the morals of the people. In the case just referred to, the Court ruled that there was "no express authority found in the section for the cities to punish in order to improve the morals of the people." The courts, in such cases, apparently attempt to limit control of nuisances to abatement.

Cities possess authority to abate nuisances, the suppression of which may improve the morals of the community. But municipalities apparently do not possess a general power to punish by fine the one who maintains a nuisance. It seems that the abatement is considered punishment enough without adding a criminal feature. Mr. Justice Rothrock, in upholding this general proposition, said: "There can be no great hardship in the limit thus placed upon the power of municipal corporations. The law of the

322 11 Iowa 399, at 400.

323 54 Iowa 360.

State prescribing and punishing the maintenance of nuisances is ample for the protection of the public."[324]

A municipal corporation may not enact an ordinance, even under a specific grant of authority, seeking to abate a nuisance, if the provisions of the city ordinance are contrary to the State laws on the same subject. In City of Iowa City *v.* McInnerny[325] the Court held that a city ordinance which prohibited the opening of a saloon on election days and prescribed a fine not exceeding fifty dollars for its violation was in conflict with State laws and, hence, void. No fine was provided by the State statutes on this question, and the Court held that the ordinance in question was "not for further regulating and controlling the liquor traffic." An ordinance of the city of Dubuque, prohibiting the keeping of unlicensed pool or billiard tables, and providing a penalty of five dollars for each game played on an unlicensed table, was declared invalid on the ground that the offence thus provided for was continuous and the penalty might well be larger than that provided by statute.[326]

In the case of City of Centerville *v.* Miller,[327] however, the Iowa Court ruled that the town had power to punish the keepers of disorderly houses because they were authorized to "prevent" riots, noises, disturbance, and disorderly assemblages. "An ordinance prohibiting these offences", said the Court, citing the Miller case, "is about the only preventative which we could conceive".

324 Incorporated Town of Nevada *v.* Hutchins, 59 Iowa 506, at 509.

325 114 Iowa 586.

326 State statutes provided that cities under special charters could not impose fines in excess of $100 for breach of an ordinance. — Iowa *v.* Babcock, 112 Iowa 250. See also Henke *v.* McCord, 55 Iowa 378, where the Court held that the city of Newton possessed no power to enact an ordinance authorizing the forfeiture or destruction of liquors kept for sale in violation of an ordinance of the city.

327 57 Iowa 56, and 57 Iowa 225.

In view of the cases just cited, it may be possible for a municipality to achieve the same result without relying upon its authority to abate nuisances if the State statutes do not declare the thing a nuisance and the city does not declare a nuisance to exist. That is to say, punishment by fine for operating or maintaining a nuisance may be accomplished under some legitimate police power, providing the city is able to point to an express grant of authority, such as that suggested in the City of Centerville *v.* Miller case.[328]

SAFETY

Speed of Trains. — Municipal corporations have the authority, as a police regulation, to enact ordinances regulating the speed of railway trains within their corporate limits. All such regulations, however, must be reasonable and proper. Furthermore, such regulations must not operate as a restraint upon interstate commerce. In Myers *v.* Chicago, Rock Island and Pacific Railway Company,[329] it was held that a city ordinance requiring a railroad to operate its trains at a speed of not more than four miles per hour was invalid as unreasonable and as a restraint upon commerce. The fact that the tracks passed through agricultural lands, fenced on both sides, for three miles after entering the limits of the city and before reaching the inhabited portion thereof, appears to have been the determining factor in this case.

In Larkin *v.* Burlington, Cedar Rapids and Northern Railway Company,[330] on the other hand, the Iowa Court held a municipal ordinance limiting the speed of trains to ten miles an hour to be reasonable. The ordinance in this

[328] 57 Iowa 56, and 57 Iowa 225.

[329] 57 Iowa 555.

[330] 85 Iowa 492.

particular case was held invalid because of failure on the part of the council to publish it as provided by law, not because the content was unreasonable.[331]

Automobiles. — The case of Town of Decatur *v.* Gould[332] is authority for the statement that in regulating the speed of automobiles upon its streets, and providing a penalty for violation of such ordinances, a city must comply with the statutes of the State. A sign, bearing the inscription "Decatur City, 10 miles per hour", of sufficient size and easily readable, was located at the proper place on all highways entering the town. The sign did not, however, display an arrow pointing in the direction toward which the speed was to be reduced. In declaring the ordinance, penalizing one convicted of speeding in violation of the sign, invalid, the Court said: "It may be said that the defendant was in no wise mislead by the failure of the officers . . . . to cause an arrow to be placed upon the sign . . . . but the law must be given general application. The placing of an arrow upon signs . . . . is as much a part of the legislative requirement as that same shall have certain words, of sufficient size to be easily readable, inscribed thereon. The validity of ordinances enacted by municipal corporations in exercise of the power conferred by the statute, depends upon a strict compliance with its requirements."[333]

TAXATION AND LICENSES BASED ON POLICE POWER

It is a common practice for the State legislature to delegate to municipal corporations the authority to levy and collect license taxes upon various trades, occupations, or callings carried on within the corporate limits. This power,

[331] Other ordinances dealing with the police power relating to streets are discussed on pages 102, 103.

[332] 185 Iowa 203.

[333] 185 Iowa 203, at 207.

unless forbidden by the State Constitution, may be delegated to cities by the legislature. The power to license may be exercised either as a police regulation or for the purpose of raising revenue. While the State may delegate this authority to municipalities, the power may be withdrawn at any time unless such action is forbidden by the State Constitution. "A license", says Cooley, "is not a contract between the state and the licensee, and is not property as that term is used in constitutions."[334] Moreover, it is permissible for both the State and the municipality to require licenses for the same business. In City of Fairfield *v.* Shallenberger[335] the Supreme Court held that the legislature might, in its exercise of the police power, require a State license for the practice of medicine, and at the same time authorize municipalities to require a license for the practice thereof within their boundaries.

This authority to license must either be expressly granted or it must be "absolutely necessary to carry into effect some other power expressly granted."[336] Any doubt as to whether a power has been conferred, or any ambiguity arising out of terms used by the legislature, will be resolved generally speaking, in favor of the public. In State *v.* Smith,[337] for example, an ordinance providing for licensing insurance agents was invalidated. The Court ruled that the charter provisions did not grant such power even though they did authorize the city "to license, tax and regulate auctioneers, peddlers and traveling merchants, grocers, merchants, retailers, hotel-keepers and keepers of livery stables, of eating-houses, boarding-houses, saloons and places of amusement, bankers, dealers in money, warrants,

334 Cooley's *Law of Taxation* (Fourth Edition), Vol. IV, Sec. 1800.

335 135 Iowa 615.

336 State *v.* Smith, 31 Iowa 493.

337 31 Iowa 493.

notes, and other evidences of indebtedness, and *works of all kinds.*" And in Cherokee *v.* Perkins[338] it was held that the statutes giving cities the authority to license and tax "itinerant doctors, itinerant physicians, and surgeons" did not include itinerant dentists.

Again, in Keokuk *v.* Dressell[339] the Court, adhering to this principle of strict construction, held that the power to regulate does not of necessity confer the authority to license. It may be, however, that regulation may be effectively accomplished only by means of a license. Thus, in Burlington *v.* Lawrence[340] the Iowa Court held that the power to suppress or restrain billiard tables might be exercised only by way of a license. And in Iowa City *v.* Glassman[341] it was conceded that the authority granted to the city to regulate peddlers gave the municipality power to license such peddlers.

In the exercise of its power to regulate a business, a city may not impose a license fee which will in effect be prohibitive and thus "suppress the pursuit of a lawful calling." The exercise of this regulatory power will not be interfered with by the courts, however, unless the license charged is excessive and thus prohibits rather than regulates.[342] And the ordinance is assumed to be reasonable until the contrary is shown to be the case. This is true, of course, if it is an ordinance enacted under a legitimate power of the city.[343]

Whenever a city attempts to use the licensing power as a

338 118 Iowa 405.

339 47 Iowa 597.

340 42 Iowa 681.

341 155 Iowa 671.

342 Iowa City *v.* Glassman, 155 Iowa 671.

343 Burlington *v.* Putnam Insurance Co., 31 Iowa 102; State *v.* Herod, 29 Iowa 123.

source of revenue its authority for so doing must be clearly granted. When it is evident "that an act sought to be justified as an exercise of the police power is not in fact, intended as a regulation, and that its real purpose — no matter what verbiage is employed to conceal it — is to raise revenue or to accomplish some ulterior effect not within the legitimate province of legislation, the courts will hold it to be unauthorised and void.[344]

If the language used in the ordinance is not the controlling factor,[345] how is a court to determine whether the ordinance in question is a legitimate police power regulation or whether it is an attempt to tax indirectly that which the city had no authority to tax directly? Where the amount imposed by the license tax is substantially in excess of, and out of proportion to the expense incurred, the ordinance is generally regarded as a revenue measure.[346] This is particularly true where no provision is made for inspection or regulation.

Generally speaking, then, a license used for police regulation purposes will be held valid only if the revenue secured therefrom reasonably corresponds to the administrative costs involved in the police regulation. The following illustration is from a foreign jurisdiction: "The distinction between the power to license, as a police regulation, and the same power when conferred for revenue purposes, is of the utmost importance. If the power be granted with a wish of revenue, the amount of the tax, if not limited by the charter, is left to the discretion and judgment of the municipal authorities, but if it be given as a police power

344 State *v.* Osborne, 171 Iowa 678.

345 State *v.* Osborne, 171 Iowa 678; Keckevoet *v.* City of Dubuque, 158 Iowa 631; Star Transportation Co. *v.* City of Mason City, 195 Iowa 930; 37 *Corpus Juris* 170.

346 Solberg *v.* Davenport, 211 Iowa 612; State *v.* Osborne, 171 Iowa 678; City of Ottumwa *v.* Zekind, 95 Iowa 622.

for regulation merely, a much narrower construction is adopted; the power must then be exercised as a means of regulation, and cannot be used as a source of revenue."[347]

Again let us quote from a foreign court. "Where any imposition is laid upon persons or property under a general taxing ordinance, the only conclusion that can be drawn is that such tax is laid for revenue purposes alone, unless the contrary is made clearly to appear. To construct a general taxing ordinance as a police ordinance, it must be shown that the tax collected thereunder is devoted to the expense incident to carrying out its provisions. Otherwise there would be nothing to distinguish a revenue ordinance from a police ordinance."[348]

In other words, the power to tax for revenue will not ordinarily be implied from the general grant of authority, such as "the power to regulate" or "the power to regulate and license".[349] If, however, the city is expressly granted the power to license as a revenue measure, the courts are usually quite liberal in construing the authority granted.

The sound judicial view seems to be that where "under undoubted charter power, the tax is imposed for revenue alone, or for police regulation and revenue, the amount thereof is usually a matter for determination by the legislative branch of the municipal government."[350] In such cases the courts will usually not interfere because of the claim that the fee is oppressive or unreasonable. They are generally inclined to defer to the judgment and discretion of the council. But the general limits to the taxing power, as pointed out above, are applied to the licensing

347 North Hudson County Ry. Co. *v.* Hoboken, 41 N.J.L. 71, at 81.

348 Robinson *v.* Norfolk, 108 Va. 14.

349 Ottumwa *v.* Zekind, 95 Iowa 622; Burlington *v.* Putnam Insurance Co., 31 Iowa 102.

350 McQuillin's *Municipal Corporations,* Vol. III, Sec. 1002.

authority when it is used as a tax measure. Neither taxes nor license fees may be prohibitive.

In all tax ordinances, and in all legislative enactments covering licenses, the city is prohibited from interfering with interstate commerce. Thus it was held in Ottumwa *v.* Zekind[351] that an ordinance which discriminated between resident and transient merchants to such an extent as to prohibit transient merchants from operating in the city was void as a direct interference with interstate commerce. So, likewise, the Court, by dicta, suggested that a five dollar a day license fee for peddlers was an unreasonable interference with interstate commerce.[352]

POLICE POWER AND THE STREETS

The broad and general powers delegated to municipalities by statute, authorizing the exercise of control over streets, are subject to the general limitation that their ordinances must not be inconsistent with the laws of the State nor in contravention of the declared policy of the State, as found in its statutes. Because a statute required, until after a given date, the planking of bridges, culverts, and crossings before the passage over them of a traction engine, an ordinance requiring them to be so planked after that date was held void in Town of Hedrick *v.* Lanz,[353] as being in contravention of the policy of the State, as evidenced by the statute, to permit the passage of such vehicles over bridges, culverts, and crossings without planking after that date. Again, in Town of Randolph *v.* Gee[354] the Court declared: "It is plain that an ordinance which prohibits the use of

351 95 Iowa 622.

352 Iowa City *v.* Glassman, 155 Iowa 671.

353 170 Iowa 437.

354 199 Iowa 181; *Acts of the Thirty-third General Assembly,* Ch. 275, Secs. 27, 28; *Code of 1924,* Secs. 5068, 5069, 5714.

all traction engines, no matter how equipped, and without regard to weight, upon streets not improved with gravel or pavement, not only contravenes a declared policy of the state, as found in its legislation, but is in direct conflict with, and in violation of, the express provisions of the statute."

The control of a municipality over its streets is subject to a further restriction — a city may not grant to any individual the right to occupy permanently any portion of a street with a structure or devise for private use or profit.[355] Such obstructions are declared by statute to be nuisances which the city possesses the authority to abate.[356] Nor may a city grant to one person the sole and exclusive right to run omnibuses in the city, unless authority is expressly granted by the statutes or charter under which the municipality is incorporated.[357]

Closely connected with the city's control of its streets is that authority known as the power to enact zoning ordinances. Through a judicious use of these two powers, a comprehensive and farsighted policy of city planning may be successfully projected and consummated.

POLICE POWER AND ZONING

Comprehensive city planning involves the exercise of two fundamental powers of government — eminent domain and the police power. The exercise of either power is intended to promote the public health, safety, morals, and general welfare; the former involves the taking of property, while the latter places limitations upon property rights. While property taken under the power of eminent domain must be paid for, no compensation is afforded when limitations

355 Lacy v. Oskaloosa, 143 Iowa 704.

356 Nevada *v.* Hutchins, 59 Iowa 506.

357 Logan *v.* Pyne, 43 Iowa 524.

are imposed upon the use of property by the proper exercise of the police power. The expense and delay entailed in the exercise of the power of eminent domain makes that procedure largely impracticable from the standpoint of city planning, except, of course, in special cases.[358]

Through a zoning ordinance, regulating the height, area, use of buildings, and the use of land, definite limitations may be placed upon property rights. Because of these limitations, zoning ordinances have been attacked as the taking of property without due process of law. But it is now almost universally recognized that such ordinances are constitutional. The Supreme Court of the United States and most of the State courts are of the opinion that zoning is a valid and legal exercise of the police power.[359] But this authority (as in all cases in which the police power is exercised), is subject to the limitations of reasonableness and equity.

In the case of Des Moines *v.* Manhattan Oil Company[360] the Iowa Court decided that the erection and operation of a filling station in the residence district would endanger the lives and property of residents nearby. In concluding, the Court declared: "We find nothing in this statute, when properly and reasonably construed, which denies to the appellees the benefit of their constitutional rights, privileges, and immunities."[361] This authority to zone must find as a constitutional basis some definite justification in

358 Baker's *The Legal Aspects of Zoning,* p. 113; *Zoning: An Extension of the Police Power* in *Iowa Law Review,* Vol. XIII, p. 78.

359 Euclid *v.* Ambler Reality Co., 272 U. S. 365; Downey *v.* Sioux City, 208 Iowa 1273; Anderson *v.* Jester, 221 N. W. 354; Des Moines *v.* Manhattan Oil Co., 193 Iowa 1096; Rehmann *v.* Des Moines, 200 Iowa 286; Lane-Moore Lumber Co. *v.* Storm Lake, 151 Iowa 130; McQuillin's *Municipal Corporations,* Vol III, Secs. 948, 949, Vol. VII, Secs. 951, 1470, Vol. VIII, Sec. 2648.

360 193 Iowa 1096.

361 193 Iowa 1096, at 1117.

protecting the health, safety, morals, or general welfare of the community. It must, likewise, to be valid, be a reasonable exercise of the police power.[362] In Rehmann *v.* Des Moines[363] Mr. Justice Stevens said: "The limit imposed is that the requirements, whatever they may be, must be reasonable, and for the protection of property, the public morals, or the welfare of the inhabitants of the municipality."[364]

Nor may this authority be exercised unless such power is specifically granted or is granted by implication to the municipality.[365] Zoning ordinances are invalid when they are arbitrary, unreasonable, or discriminatory in nature.[366] Under the Iowa Code, an appeal may be taken to a zoning board whose function is mainly that of adjustment. Such a procedure makes it possible to correct inequalities in the application of zoning ordinances and remove unduly heavy burdens upon property resulting from them.[367]

FRANCHISES AND POLICE POWER

According to the Code of Iowa, municipalities may permit an individual or a corporation to erect and maintain certain public utilities. Such permission is given by means of a franchise. These franchises are, by the laws of Iowa, subject to three general limitations: first, no franchise can extend for more than twenty-five years; secondly, no exclusive franchise may be granted; and thirdly, no franchise or extension of a franchise is valid until it has been submitted

362 Rehmann *v.* Des Moines, 200 Iowa 286.

363 200 Iowa 286.

364 200 Iowa 286, at 290.

365 Downey *v.* Sioux City, 208 Iowa 1273, and cases cited there in the opinion written by Chief Justice Albert.

366 Anderson *v.* Jester, 221 N. W. 354.

367 *Code of 1931,* Ch. 324.

to, and ratified by the qualified voters at either a regular or a special election.

In Schnieders *v.* Pocahontas[368] the Supreme Court held that the approval, by a majority vote of the electors of a city or town, of a proposed franchise for the use of the streets by a private public utility, did not create a franchise. Such a franchise, it seems, comes into existence only when the city or town council so provides, but the council, before it may legally grant a franchise, must secure the consent of the electorate.

The franchise, moreover, is drawn up in the form of an ordinance, and all procedure required for the valid enactment of an ordinance must be closely followed in its adoption. Thus, the ballot used at an election to vote on a proposed franchise must have printed thereon the ordinance in full. A title, or catch line, will not suffice.[369] In Hall *v.* Cedar Rapids,[370] for example, a proposed franchise was held invalid because of irregularities in procedure.

With the authority to grant franchise rights to public utilities, municipal councils are granted power to fix rates. This "legislative power", the Iowa Court has held, "is a continuing one, and may not be abridged or bartered away by contract or otherwise."[371] The power thus conferred is subject to the constitutional limitation that the rates thus fixed shall not be confiscatory or unreasonable in nature. Rate levies set up by the council must provide reasonable compensation to the utility. No general definition for reasonable compensation can be secured from the opinions of the courts. Each case brings a peculiar set of facts, and

368 213 Iowa 807.

369 *Code Supplement, 1913,* Sec. 1106; McLaughlin *v.* City of Newton, 189 Iowa 556.

370 115 Iowa 199.

371 Town of Woodward *v.* Iowa Railway and Light Co. 189 Iowa 518.

each decision is dependent upon the particular conditions presented. But it is generally conceded that the utility must be allowed a fair return — usually set at around six per cent — on a fair value of the property used by the utility in rendering the public service.[372]

Rights and privileges granted to utilities by franchises are strictly construed against the grantees when these privileges are exclusive.[373] While the municipal corporation is thus placed in an advantageous position, public utilities always possess the right to appeal from municipal legislative action to the courts upon the grounds of unreasonableness, discrimination, or arbitrary action. All municipal control of franchise rights and privileges or utility duties and obligations must be reasonable, non-discriminatory, and impartial in nature. Otherwise, the action of the municipality is unconstitutional as being in conflict with the due process clause of the Fourteenth Amendment and as an improper exercise of the police power of the State and may be declared void by the courts.[374]

But such terms as reasonableness, fair value, fair return, and the like, are in their very nature vague and intangible. Such a condition leaves the municipal legislator at a complete loss. It is no wonder that municipal regulation of public utility corporations is often inadequate or ill-advised. A changing social and economic structure causes maladjustments, but a rigorous application of that really uncommon attribute of common sense may bring order out of chaos and system out of a hit-or-miss type of control.

372 Smyth *v.* Ames, 169 U. S. 466; The O'Fallon Case, 279 U. S. 461; Willoughby's *The Constitutional Law of the United States* (Second Edition), Vol. III, Secs. 1150-1167.

373 Iowa *v.* Des Moines City Ry. Co., 159 Iowa 259.

374 Davenport Gas and Electric Co. *v.* Davenport, 124 Iowa 22; Cedar Rapids Water Co. *v.* Cedar Rapids, 118 Iowa 234 (199 U. S. 600); Hanson *v.* Hunter, 86 Iowa 722; Burlington *v.* Burlington Street Ry. Co., 49 Iowa 144.

FUNDAMENTAL PRINCIPLES

From several points of view, one of the most important posts in public affairs is that of city councilman. Because the city council is the local representative body, its membership should be composed of men or women whose primary interests are those of the locality. Since the city council is the local legislative agency, its members should be men or women of broad and social outlook. The post of city councilman requires a delicate mixture of provincialism, nationalism, and internationalism, of freedom and restraint, of conservatism and progressivism. This is particularly true in the present age, when all around one finds changing principles and newer concepts. The city councilman must be essentially a policy determining officer, yet he or she must also possess a clear understanding and an appreciation of the detailed problems of local government. The position of councilman is of vast importance in our governmental system.

Considering the local political unit from the viewpoint of function, the importance and significance of the council's position is quite apparent. A review of the cases presented in the previous chapters discloses the wide range of activities in which the municipal corporation engages. Quite as important is the nature of the functions undertaken by the local political agent.

Then, too, it is the municipal corporation which acts, in most cases, most directly upon the citizen. The municipality is responsible for the enforcement of many laws. Generally speaking, the ordinary citizen, carrying on his day-by-day business, comes constantly in contact with the city officials, with a county official occasionally, with a State officer rare-

ly, and with the Federal officer only as a rather vague abstraction. Local — that is municipal — government is real, vital, and active to the layman. The higher branches of government are usually rather incomprehensible and vague to the ordinary citizen. And yet, it is a strange commentary upon American political life that we possess implicit faith in our national government and look upon the post of city councilman as being a rather insignificant trust. A study of his tax receipt should cause the city dweller to pause and study before casting an uninformed ballot at the municipal election.

Once in office, the councilman finds himself confronted with the very practical necessity of enacting ordinances or laws for the governance of the locality. This situation presents a host of difficulties for the layman seeking to put into legal form a program of community betterment. An examination of those cases in which the Supreme Court of the State has declared municipal legislation invalid discloses rather clearly the obstacles which the councilman must overcome in order to place his proposed program in valid form.

The doctrine of limited government is carried to its extreme conclusion in local government. Being creatures of the State, municipal corporations possess those powers and only those powers granted by their creator. Any concept of inherent powers of government seems to be lacking in the Iowa decisions regarding cities and towns. "In view of the fact that the authorities of many of our cities and towns seem to be of the opinion that there is no limit to municipal power", remarked Mr. Justice Rothrock in Bush *v.* Dubuque,[375] "it is well for the courts to keep them within the well-known rule, that they have no power except as is expressly conferred by statute, or necessarily implied there-

[375] 69 Iowa 233.

from." In its more comprehensive form, the rule, as stated by Mr. Justice Dillon, reads as follows: "A municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation — not simply convenient, but indispensible; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation — against the existence of the power."[376]

The first rule, then, which the municipal legislator must follow is to look in the city charter or State statutes for explicit or implied authority for the action contemplated. And he must remember that the courts have firmly established the further principle that any doubt as to the existence of the power sought will be resolved against the municipality.

Let us suppose that the councilman knows that the State has given certain powers to cities and towns. Is there any valid reason why the legislator should think that the city does not possess this authority? It is almost needless to say that in American constitutional law an unconstitutional statute can confer no authority upon a municipality. So the councilman must satisfy himself that the enactment of the General Assembly is in accordance with the powers of that body as defined by the State Constitution.

Should this requirement be satisfied, there still remain the provisions of the Federal Constitution to be complied with. A third principle to be clearly understood is that no municipal ordinance may run contrary to State law — statutory or common — the State Constitution, Federal law, or the Federal Constitution. The enactments of a city council

[376] Merriam *v.* Moody's Executors, 25 Iowa 163, at 170.

stand at the very bottom of our hierarchy of laws and they must stand the test of conformity to all superior law.

For purposes of further illustration of principles involved, a second supposition must be made. Suppose, for present purposes, that it is clearly evident that the municipality has enacted an ordinance which is, beyond doubt, in complete conformity to all superior law. Is there still any doubt as to its validity? Most emphatically, there is still considerable doubt as to its validity, if the cases invalidated give us tangible evidence of the obstacles to be surmounted in enacting legal ordinances. Of the cases investigated in which ordinances were declared invalid, thirty-five per cent were invalidated wholly or partially because of technical defects in procedure. And so it becomes essential that the councilman know thoroughly the procedural steps required by the Iowa statutes for the passage of legislative acts. These requirements are set forth in considerable detail in the Iowa Code, a copy of which should be the property of, or easily accessible to, each councilman. The courts, because of the general doctrine of strict construction, are definite and firm in their demand that the provisions of the law be not only substantially (though that has sometimes sufficed), but almost literally complied with. A further principle which must be borne in mind by the councilman is that all the procedural technique demanded by the law must be clearly understood and carefully followed if the legislation is to stand the scrutiny of the judicial branch.

Let us suppose that the ordinance has successfully met the principles just set forth. Are there still further difficulties which must be overcome? The political experience of the Commonwealth offers a formidable bulwark of personal rights which must be respected by the municipal legislator. Just what these rights are, and how far the city officials may go in altering or abolishing them is very largely a

matter of conjecture. This is amply illustrated in cases dealing with the proper exercise of the police power. It is in this field that the courts make frequent and liberal use of such terms as "unreasonable", "arbitrary", "fair value", "property rights", "freedom of contract", "personal liberties", and other similar terms. Nor is it surprising that the councilman finds this type of limitation uncertain and vague. Such terms grow out of the social life of a nation or Commonwealth. And in such a rapidly shifting age as the present, where old landmarks disappear and staunch authorities fail, where the old certainties give way to newer and more nebulous uncertainties, wherein the old absolute values are rapidly giving way to newer relative values, such terms are baffling.

They become all the more so when the general lag of our judicial branch is taken into consideration. But it behooves the councilman to do his best to understand the judicial point of view on such matters and to guide his actions accordingly. For such terms do form, despite their vagueness, a rather definite obstacle. Indeed, out of the 474 cases examined in this study, approximately fifteen per cent were declared invalid because they were an improper exercise of the police power. The majority of these cases clearly represented, in the eyes of the Iowa Supreme Court, an unreasonable exercise of legislative authority.

The councilman will do well to remember that in the traditions of our legal system there exists a profound respect for property rights. It is proper to set up the principle that the legislative branch must respect these rights if the council's enactments are to stand the test of judicial consideration. And it becomes all the more important in view of the fact that society's concept of personal property rights seems to be undergoing fundamental alteration.

Probably the most fundamental principle to be followed

is that the legislation enacted must be for the public good. The office of city councilman is a public trust of vital significance, and the legislation which he sponsors is fraught with vital public importance. It is within the power of the councilman to direct and lead in the development of a social consciousness. And if the local legislator assumes his responsibilities with a clear appreciation of the fundamental principles to be recognized, together with a sincere desire to enact legislation socially desirable in character, it is relatively certain that the ordinances will stand the tests presented by the highest court of the Commonwealth of Iowa.

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