

The following opinion of Judge Clayton, with some few alterations, was given in June last, and what is a little remarkable, about the same time Judge Cobb was, perhaps, making a similar decision, in the case of the city of Augusta—neither Judge having any knowledge that the point was before the other.

Opinion upon the Ordinance of the town of Salem, passed for the purpose of "regulating the Exhibition of Shows" in said town.

All corporations derive their power from the Legislature, and that power must be strictly pursued,—they may decline a part or the whole of it, but they cannot enlarge the power granted. The Legislature never intends to, indeed, they cannot, grant unconstitutional powers. Whenever, therefore, the power given is either unconstitutional or transcended by the party to whom it is given, the act is illegal and void. What is the power given to the town of Salem? "Full power and authority to make such bye-laws and regulations, and to inflict such pains, penalties and forfeitures, and do all other incorporate acts as in their judgement shall be most conducive to the good order and government of the said village of Salem: *Provided*, that such bye-laws and regulations be not repugnant to the laws and constitution of this state."

Under this power an ordinance has been passed, declaring "that all Shows of Men, Animals, or things exhibited within the limits of the corporation, shall be subject to a tax or fine," &c. And under this ordinance a man by the name of Bessenta Florus has been taken for showing himself as a Dwarf in the said town of Salem. The subject will be considered, 1st, under the right to Tax, and 2dly, under the right to Fine.

First. Taxes have a legal well known definition, they are never used for punishments; they are intended for revenue, imposed equally upon, and exacted from the community where they are to be employed, or upon such things as are brought within the community, which are there liable to taxes and actually taxed. I speak now of corporations within a state, and the meaning of the word tax, as distinguished from the word fine, which is a penalty always used to prevent or punish the commission of an act which may be injurious to the society having power to impose it. This distinction must be preserved, especially in the power granted to corporations, or else they might become a source of intolerable grievance to the citizens. If they can tax either men or property, not within their limits, and different from the tax which they impose upon themselves and their own property, who would be safe? If they can tax a man for showing himself, as a mere tax for revenue, who may happen to come within their limits, they may tax him for any thing else: it is impossible to draw the distinction. And if they can tax property carried there, which is not intended to remain and be employed there, and upon which there is not a similar tax upon like property within their jurisdiction, who does not perceive that the moment a citizen, living out of one of these corporations, rides into it, he is liable to be taxed, without his consent, (for he has had nothing to do in making the law,) perhaps for the mere fact of riding (because it is immaterial what the act is, one is as liable to taxation as another;) and his horse may also be taken and subjected to a tax to produce a revenue, the benefits of which he does not share. The exercise of such a power would enable corporations to support themselves and their town regulations alone from foreign taxes, and without imposing a cent upon themselves. This power the Legislature does not give to corporations, and the citizens are protected from its exercise by that provision which requires all corporate acts to be consistent with state laws. When therefore, a citizen who does not reside, or has not property upon the same footing as other property within a corporation, is taxed by that corporation, it is contrary to law; because he does not belong to their government; he does not fall within their powers; he has no agency in the law that demands the tax, and he is only liable, in common with the other citizens, to the state for his contributions. This is the government and the one alone which he is bound to support. The commissioners of the town of Salem, therefore, as a revenue law, could not pass the said ordinance. But if they intended it as a penalty to prevent the commission of an act which they, in "their judgement," thought proper for "the good order and government" of their village, then it was unnecessary to employ the term "tax," especially as they had used the word fine, which more properly and legally belongs to that object; and this brings us to the consideration of the 2d thing proposed, to wit: What jurisdictions have a right to Fine.

The word Fine, always implies a criminal act, and is certainly used as a penalty or punishment for an act committed or omitted, in violation of some law. The right to punish unquestionably involves the right to try the offence which incurs the punishment. Let us now see where this jurisdiction belongs.

According to the 1st sect. of the 3d art. of the Constitution of the state, "the Superior Courts shall have exclusive and final jurisdiction in all criminal cases."

This is the section as it originally came from the hands of the framers of the Constitution. It was soon found by various decisions of the Superior Court, on certain laws imposing fines for obstructing water courses, &c. that certain exceptions to this broad power were necessary, and accordingly in 1811, the following amendment was adopted, to wit: "except as relates to people of colour, and fines for neglect of duty, and for contempt of Court, for violation against road laws, and for obstructing water courses, which shall be vested in such judicature or tribunal, as shall be, or may have been pointed out by law." These were the first exceptions to the "exclusive jurisdiction" given to the Superior Courts in "all criminal cases" and which prove beyond all question that before this amendment the power contended for by the town of Salem, could not be granted by the Legislature, or else there would have been no necessity for the amendment. Now let us see whether the power is granted in any of these exceptions. It is not in the one that "relates to people of colour," nor for "contempt of Court," for violations "against road laws," for obstructing "water courses;" then if it is not in the one relating to "fines for neglect of duty" it is no where. Now every one must perceive, and such has been the construction, that this refers obviously to neglect of duties imposed by the state laws, such as patrol and militia duties, and not to the right of the Legislature to vest powers in corporate bodies to punish offences by fine. It must be apparent to all, that the neglect of lawful duty is very different from the commission of an act prohibited, not only by a state law, but by an ordinance of an incorporated village?

Besides, powers are never suffered to be drawn from doubtful expressions, and the above is too vague to vest corporate bodies with the right to impose fines at pleasure, and to divest the Superior Court of a jurisdiction in the grant of which there is nothing equivocal or obscure, especially as will presently be seen; this same power is expressly given to certain corporations by a subsequent amendment of the Constitution in 1818. If the foregoing expression gave the power to any one corporation to impose fines for neglect of duty, it did to all, and there could be no necessity for this last amendment which is as follows: "and except in all other minor offences committed by free white persons, and which do not subject the offender or offenders to loss of life, limb or member, or to confinement in the Penitentiary; in all such cases, corporation Courts, such as now exist, or may hereafter be constituted in any incorporated city, being a sea-port town and port of entry, may be vested with jurisdiction, under such rules and regulations as the Legislature may hereafter by law direct! It is hardly necessary to say that this exception does not confer the power to village corporations, and these being all the exceptions to that broad grant of the power to the Superior court, no corporation can impose the punishment of fine on a citizen, unless it be an "incorporated city, being a sea-port town, and port of entry." The constitution being the supreme law of the state, and to which all other laws within its sphere must yield, I cannot feel, say I ought not to feel, any hesitation in saying the ordinance aforesaid is inoperative.

A. S. CLAYTON, Judge
Superior Court, Western Circuit, Georgia.