§ 338 (272). **Implied Power to annex Pecuniary Penalties.** — Since an ordinance or by-law without a penalty would be nugatory,[1] municipal corporations have an implied power to provide for their enforcement by reasonable and proper fines against those who break them.[2] So the right to make by-laws gives to the corporation, without any express grant of power, the incidental right to enforce them by reasonable pecuniary penalties. What is reasonable depends upon the nature of the offence and the circumstances.[3]

§ 339 (273). **Charter Mode governs.** — Where the charter or organic act prescribes the *manner* in which by-laws are to be enforced, or the sanctions or *punishments* to be annexed to their violation, this constructively operates to negative the right of the corporation to proceed in any other manner or to inflict any other punishment. Thus, in the leading case[1] on this subject, the charter prescribed in what manner by-laws should be enforced, namely, by *fine* and *amerciament*, or either, and it was decided that the corporation was precluded from declaring a *forfeiture* of property, or from inflicting any other punishment; and the doctrine of this case has been everywhere followed in the courts of this country.

It was held in *New Jersey*, where the charter authorized the council to enforce their ordinances by a penalty not exceeding fifty dollars, that the council must prescribe a precise penalty for each offence, and therefore an ordinance declaring a penalty for its violation not exceeding fifty dollars was void. State *v.* Zeigler, 3 Vroom (32 N. J. L.), 262; followed in Melick *v.* Washington, 47 N. J. L. (18 Vroom) 254. In *North Carolina* the law is that fines imposed by ordinances *must be fixed in amount* and cannot be left to the discretion of the court. Ordinances prescribing a fine of "*not more* than" a sum specified are therefore void for uncertainty and vagueness. State *v.* Worth, 95 N. C. 615; State *v.* Crenshaw, 94 N. C. 877; State *v.* Cainan, 94 N. C. 883. The provision for a fine not exceeding $500 for such trivial offences as most of those covered by the ordinance before the court (one prohibiting processions without the consent of the mayor, *ante*, sec. 319, note), the council exercising no discretion, but turning this great power over to the courts, without any classification, held void. How far a sliding scale of penalties is allowable not decided, but the court said they must be reasonable whether sliding or fixed. *Per Campbell*, C. J., *In re* Frazee, 63 Mich. 396 (1886); s. c. 30 N. W. Rep. 72; 35 Alb. L. J. 6, citing Grand Rapids *v.* Hughes, 15 Mich. 54; see *post*, secs. 340, 341, 410; Harr. Munic. Man. 360.

[1] State *v.* Cleaveland, 3 R. I. 117. But no penalty can be enforced for an illegal exaction. Mayor *v.* Third Avenue Railroad Co., 33 N. Y. 42; Mayor *v.* Second Avenue Railroad Co., 32 N. Y. 261. "*Municipal fine*," as used in the Constitution of *California*, means a fine imposed by local laws of particular places, such as incorporated towns and cities, and not a fine imposed by the general laws of the State. People *v.* Johnson, 30 Cal. 98 (1866).

[2] Fisher *v.* Harrisburg, 2 Grant (Pa.) Cas. 291 (1854); Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253; Trigally *v.* Memphis, 6 Coldw. (Tenn.) 382 (1869). The amount must be reasonable. Zylstra *v.* Charleston, 1 Bay (S. C.), 382. The penalty, says Mr. Willcock, must be imposed on the person who violates the by-law. Thus, if goods be sold by an unauthorized person within the city, the penalty must be imposed on the seller, and not on the buyer; for how can he distinguish between those authorized to sell and those who are not? Willc. on Corp. 154, pl. 369, 370; Cuddon *v.* Eastwick, 1 Salk. 143, 192; s. c. 6 Mod. 124; and see, also, Fazakerly *v.* Wiltshire, 1 Stra. 469. The rule stated above, as to the person on whom penalties must be imposed, may be extended or enlarged by express provisions of the organic act of the corporation.

[3] Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137 (1841). A penalty, although small, fixed on every stroke of the hammer which an unauthorized person uses in his trade of a goldsmith, is unreasonable. Willc. 154, pl. 368. Same principle, Mayor, &c. of New York *v.* Ordrenan, 12 Johns. (N. Y.) 122 (1815). See, *ante*, chap. x., Municipal Courts.



§ 340 (274). **Same subject.** — A charter of a city specifically enumerated various powers, which the council was expressly authorized to enforce by a penalty not exceeding one hundred dollars for their violation; and the same charter empowered the council to prevent and remove encroachments upon the streets, but was silent as to the imposition of penalties for a violation of its provisions. The council passed an ordinance *imposing a continuing penalty of ten dollars a day for every day's failure* to remove an encroachment, after notice; and it was held, and properly so, that it possessed no

[1] Kirk *v.* Nowill, 1 Term R. 118, 124 (1786), *per Mansfield* and *Buller:* followed in Hart *v.* Mayor, &c. 9 Wend. (N. Y.) 571, 588, 606 (1832); Cotter *v.* Doty, 5 Ohio, 393 (1832); Heise *v.* Town Council, 6 Rich. (S. C.) Law, 404 (1853); Miles *v.* Chamberlain, 17 Wis. 446 (1863). In Hart *v.* Mayor, *supra*, it was accordingly decided that a corporation having authority "to inflict penalties for the violation of any by-law, not exceeding $25 for any one offence," could not pass a by-law subjecting property to *seizure* and *sale*, or *forfeiting* it, even though it was used contrary to the by-law, which was in other respects valid, the remedy for enforcing their by-laws having been specified. Hart *v.* Mayor, 9 Wend. (N. Y.) 571; *ante*, sec. 248; *post*, sec. 818.

Where *specific modes* of procedure and penalties are prescribed against persons failing to take out license for keeping drinking-houses, as fines, suits, and prosecutions, a municipal corporation, in the absence of express grant, has no right to close the doors of a drinking-house *summarily*, because the keeper has failed to take out a license. Bolte *v.* New Orleans, 10 La. An. 321 (1855). That a municipal corporation *cannot annex other or greater penalties* than those authorized in its organic act, that power to punish by "fine" is exclusive, and that it is not competent to order a forfeiture in addition, see Schroder *v.* City Council, 2 Const. Rep. (S. C.) 726; s. c. 3 Brev. 533 (1815); McMullen *v.* City Council, 1 Bay (S. C.), 46; Zylstra *v.* Charleston, *Ib.* 382; New Orleans *v.* Costello, 14 La. An. 37; Columbia *v.* Hunt, 5 Rich. (S. C.) 550, 558; Kennedy *v.* Sowden, 1 McMullan (S. C.), 328; compare Crosby *v.* Warren, 1 Rich. (S. C.) Law, 385. An ordinance treated as wholly void because it fixed the minimum fine for an offence at five dollars when the law required it to be three dollars. Petersburg *v.* Metzker, 21 Ill. 205 (1859). A party cannot enjoin the collection of a fine and costs imposed for the violation of a city ordinance, on the ground of there being no offence charged or cause of action stated before the mayor. The remedy in *Indiana* in such case is by appeal. Schwab *v.* Madison, 49 Ind. 329 (1874). The city of *New Orleans* has power to inflict fines and imprisonment under its police power only, and cannot apply them to violators of ordinances for the raising of a revenue, — as for selling vegetables without paying for the privilege. State *v.* Patamia, 34 La. An. 750.

power to impose such a penalty; but the decision was put upon the ground that the specific enumeration of the powers which might be rendered effectual by penal provisions *was an implied exclusion* of the right to impose any penalties whatever in other cases.[1]

§ 341 (275). **Penalty may be within Fixed Limits.** — A municipal corporation, with power to pass by-laws and to affix penalties, may, if not prohibited by the charter, or if the penalty is not fixed by the charter, make it *discretionary, within fixed reasonable limits*, for example, "not exceeding fifty dollars." The maximum limit must of course be reasonable. This enables the tribunal to adjust the penalty to the circumstances of the particular case, and is just and reasonable. The older English authorities, so far as they hold such a by-law void for uncertainty, are regarded as not sound in principle, and ought not to be followed.[2]

§ 342 (276). **Single Offence cannot be made Double.** — As the power to pass ordinances and to punish for their violation must be reasonably exercised, *the corporation cannot multiply one offence into many*, and punish for each. Thus, where an authorized ordinance prohibited "any person from cutting down and making use of cedar and other trees," within a specified locality, a complaint, charging the defendant "with having cut down a cedar tree at various times,

[1] Grand Rapids *v.* Hughes, 15 Mich. 54 (1866). Whether there is such an implied exclusion must depend in each case upon the supposed intention of the legislature, to be gathered from a survey of the whole charter. The authority to adopt an ordinance implies the right to enforce it by proper pecuniary penalties, and this right exists unless excluded by other provisions of the charter. *Supra*, sec. 338. In *Maryland* it is held when a municipal corporation is seeking *to enforce an ordinance which is void, that a court of equity* has jurisdiction, at the suit of any person who is injuriously affected thereby, to stay its execution by injunction. Baltimore *v.* Radecke, 49 Md. 217; s. c. 21 Alb. Law Jour. 117; but see Index, tit. *Injunction*.

[2] Mayor, &c. *v.* Phelps, 27 Ala. 55 (1855), overruling, on this point, Mayor, &c. *v.* Yuille, 3 Ala. 137; compare Comm'rs *v.* Harris, 7 Jones (Law), 281. See, also, Piper *v.* Chappell, 14 Mees. & W. 624, 649 (1845); Butchers' Co. *v.* Bullock, 3 B. & Pul. 434; Grant on Corp. 84; Fennell, *In re*, 24 Upper Can. Q. B. 238; State *v.* Cantieny, 34 Minn. 1. A by-law fixing one penalty for the first offence, and a larger for the second, and a still larger one for every subsequent offence, does not appear to be bad for uncertainty. Butchers' Co. *v.* Bullock, *supra*. Where the penalty is fixed by by-law, it can only be changed by the same authority which affixed it. Rex *v.* Ashwell, 12 East, 29; Scarning *v.* Cryer, 3 Leon. 7; Moore, 75; Bendl. 159; Davies *v.* Lowden, Carter, 29. A penalty fixed either by the charter or by-law is essential. Bowman *v.* St. John, 43 Ill. 337; Ashton *v.* Ellsworth, 43 Ill. 299; *supra*, secs. 337, 338; *infra*, sec. 343. The old English rule stated in the text was followed in *New Jersey* (State *v.* Zeigler, 3 Vroom (32 N. J. L.), 262; Mellick *v.* Washington, 47 N. J. L. (18 Vroom) 254); but the reason of the matter and the general practice in this country is otherwise, and the text states correctly, we think, the American doctrine. See cases in note to sec. 337, *supra*.



and that he continued to do so, from time to time, until he had committed one hundred violations of the ordinance, by cutting down one hundred cedar trees," was held to set forth but a *single* offence; for, said the court, "the matter charged is a trespass with a *continuando*, which in law is but one offence, and it may well be that every tree cut by the defendant was cut on *one* day, and, under the ordinance, the cutting of more trees than one, at *one time*, would be but one offence." [1]

§ 343 (277). **Limitation of Amount of Penalties.** — Where there is a limitation upon the corporation as to the *amount of penalties* to be imposed for the infraction of by-laws, they cannot exceed the limit directly, nor can they do so indirectly by multiplying what is in substance one offence into several, or subdividing one transaction or violation into a number of offences, and annexing a penalty to each.[2] But where each offence is distinct, and the punishment for each is within the power of the corporation to impose, the punishment is not made illegal, though the separate fines in the aggregate exceed the limit allowed by the charter, and are imposed by the same magistrate or tribunal at one sitting.[3]

§ 344 (278). **Same subject.** — By its charter, the *power of a city corporation to impose fines* for breaches of its ordinances was limited to one hundred dollars. By the charter the city had also the power to regulate the inspection of flour, and it passed an ordinance by which any person selling flour without inspection should be fined "five dollars for each barrel so sold." It was held that this ordinance, as to the penalty, was valid so far as to authorize a fine not exceeding one hundred dollars; that if a single sale exceeded twenty barrels, the fine could be but one hundred dollars, while if it was less than twenty barrels, the fine would be five dollars on each barrel. The court observed that a recovery on a single transaction where more than twenty barrels were sold would bar any future proceeding for the balance.[4]

[1] State *v.* Moultrieville, Rice (S. C.) Law, 158 (1839); Harr. Munic. Man. 361.

[2] Mayor, &c. of New York *v.* Ordrenan, 12 Johns. (N. Y.) 122 (1815) (penalty for illegally keeping powder), citing and approving opinion of Lord *Mansfield* in Crepps *v.* Durden, Cowp. 640. See also, Hart *v.* Mayor, &c., 9 Wend. 571, 588, 606 (1832); Zylstra *v.* Charleston, 1 Bay (S. C.), 382 1794); *vide* Stokes *v.* Corporation of New York, 14 Wend. (N. Y.) 87. *Continuing offence.* Marshall *v.* Smith, L. R. 8 C. P. 416. *Supra*, secs. 337, 341.

[3] Heise *v.* Town Council, 6 Rich. (S. C.) Law, 404 (fines for violating liquor ordinance); compare State *v.* Moultrieville, *supra*.

[4] Chicago *v.* Quimby, 38 Ill. 274 (1865).

§ 345 (279). **Power of Forfeiture must be Expressly Conferred.** — A corporation, under a general power to make by-laws, cannot make a by-law ordaining a *forfeiture of property*. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that it must be *plainly*, if not, indeed, *expressly* conferred by the legislature.[1] And even if the power to declare a forfeiture is conferred, still no person can, by ordinance, be deprived of his property by forfeiture without notice or without legal investigation or adjudication; an ordinance in violation of this principle is void, as "contrary to the genius of our laws and institutions."[2] In England the power of municipal corporations to impose a forfeiture for offences created by ordinances or by-laws has been, in many cases, sanctioned by *usage*, without any express power in the charter to impose the forfeiture. But in this country, inasmuch as corporations derive all their power from charter or act of the legislature, the right to inflict a forfeiture must be plainly given, and cannot be derived from usage.[3]

§ 346 (280). **Power to Fine does not include Power to Forfeit.** — How strictly the courts hold that municipal corporations *cannot, in the absence of clear statute authority, pass by-laws ordaining a forfeiture*, is strikingly illustrated by the case of Heise *v.* The Town Council of Columbia. The town council had power to enforce obedience to their ordinances "*by fine*, not exceeding fifty dollars." Special authority was given to municipal corporations to grant licenses to retail liquor. The council passed an ordinance relating to this subject, the penalty for violating which was a "fine of not more than fifty dollars for each offence, and also a *forfeiture of the license*." It was

[1] Kirk *v.* Nowill, 1 Term R. 118, 124, *per Mansfield* and *Buller*, followed by Court of Errors of New York, in Hart *v.* Mayor, &c. of Albany, 9 Wend. (N. Y.) 571, 588, *per Sutherland*, J.; p. 605, *per Edmonds*, Senator; 2 Kyd on Corp. 110; Willcock on Municipal Corporations, 180, pl. 449; Angell & Ames on Corp. sec. 360; Cotter *v.* Doty, 5 Ohio, 394 (1832); White *v.* Tallman, 2 Dutch. (N. J.) 67 (1856); Clerk *v.* Tucket, 3 Lev. 281; Lee *v.* Wallis, 1 Kenyon, 292; Adley *v.* Reeves, 2 Maule & S. 60; Phillips *v.* Allen, 41 Pa. St. 481. In further illustration see Mayor, &c. *v.* Ordrenan, 12 Johns. (N. Y.) 122; Dunham *v.* Rochester, 5 Cowen (N. Y.), 462 (1826); Baxter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253; Bergen *v.* Clarkson, 1 Halst. (N. J.) 352; Taylor *v.* Carondelet (forfeiture of lease), 22 Mo. 105, 112; Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137 (1841); Miles *v.* Chamberlain, 17 Wis. 446; Donovan *v.* Vicksburg, 29 Miss. 247; Cincinnati *v.* Buckingham, 10 Ohio, 257; Wilcox *v.* Hemming, 58 Wis. 144; *post*, sec. 348; Harr. Munic. Man. 311, 313.

[2] Cotter *v.* Doty, 5 Ohio, 393, 398; Rosebaugh *v.* Saffin, 10 Ohio, 32 (1840); Slessman *v.* Crozier, 80 Ind. 487.

[3] Taylor *v.* Carondelet, 22 Mo. 105, 112; Kirk *v.* Nowill, 1 Term R. 118; Adley *v.* Reeves, 1 Maule & Sel. 60; Varden *v.* Mount, 78 Ky. 86, citing text.



held that the license which was granted and paid for was essentially *property*; that the council could only impose *fines*, and that it had no power to ordain a forfeiture of the license, there being (in the opinion of the court) no difference between the forfeiture of a license and of goods and chattels.[1]

§ 347 (281). **Judicial Procedure necessary in some Instances.** — An ordinance of the city of New Orleans *authorizing* without any prior judicial proceedings, *a sale, under the orders of the mayor, of all property suffered to remain on the levee beyond a specified period*, is invalid, since it makes the corporation judges and parties in the same cause, and enforces a forfeiture, and divests the owner of his property without a trial in due course of law. Such a power is not similar to that exercised by a corporation in removing nuisances, as that power arises from necessity and ceases with that necessity. It would be competent for the corporation to ordain that the property should be removed at the expense of the proprietor, and to recover these expenses, and any fine which might be imposed, by judicial proceedings.[2]

§ 348 (282). **Forfeiture of Animals at Large; Notice; Legal Proceedings.** — The right to denounce a *forfeiture against animals running at large* in a town or city, contrary to the provisions of ordinances forbidding it, must be plainly conferred or it will not be held to

[1] Heise *v.* Town Council, &c., 6 Rich. (S. C.) Law, 404 (1853). As to revocation of unexpired license for sale of intoxicating liquors, State *v.* Cook, 24 Minn. 247 (1877). License to sell liquor under the laws of the State is not a contract, and may be terminated by a repeal of the law. Fell *v.* State, 42 Md. 71 (1875); s. c. 20 Am. Rep. 83. State *v.* Bonnell (Sup. Ct. Ind.), 21 N. E. Rep. 1101 (1889). The revocation by a municipal corporation of a license to sell intoxicating liquors upon certain specified conditions, a violation of which, according to the terms of the license, should have the effect to revoke it, is not a *forfeiture* beyond the powers of the corporation. Hurber *v.* Baugh, 43 Iowa, 514 (1876).

[2] Lanfear *v.* Mayor, 4 La. 97 (1831). Compare with Guillotte *v.* New Orleans, 12 La. An. 432 (1857), in which it was held that an ordinance providing a forfeiture, for the use of the city workhouse, of bread illegally baked in violation of an authorized by-law of the corporation, is not contrary to a constitutional provision declaring that vested rights shall not be divested unless for purposes of public utility and for adequate compensation previously made. It may be observed that the court, without any special discussion, assumed that power "to regulate everything which relates to bakers" gave authority to denounce a forfeiture of bread baked contrary to the provisions of the ordinance of the city. See, on this point, Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137 (1841). Assize of bread has been deemed necessary from an early period in England. Burn's Justice, title "Bread." Construction of English statute regulating sale of bread. Queen *v.* Wood, L. R. 4 Q. B. 559; Queen *v.* Kennett, L. R. 4 Q. B. 567; Aerated Bread Co. *v.* Gregg, L. R. 8 Q. B. 355.

exist.[1] This is in accordance with the rule of the English courts, that a statute will not be taken to invest, by implication, a municipal corporation with the extraordinary powers of forfeiting the property of the subject, and that, if it be intended that any such power shall be given, it must be by express words to that effect. The cases agree in holding that when the power to denounce the forfeiture against such animals is given, *there should be notice, either actual or constructive, or prior legal proceedings.* The view of the courts will be best understood by referring to some of the cases upon the subject. In Mississippi, an ordinance authorizing the seizure and sale of hogs running at large, without notice or trial, or opportunity for trial, and providing that one half of the proceeds of the sales should go to the hospital and the other half to the city marshal, was held to be in violation of the constitutional provision that no person "can be deprived of his property but by due course of law," and securing right to a jury trial.[2]

§ 349 (283). **Same subject.** — In a similar case in Ohio, Grimke, J., delivering opinion of the court, observes: "The ordinance commands the marshal to seize and impound the hogs, and then, without any reserve, *without any notice*, by means of which the owner might be able to exculpate himself, directs them to be sold and the proceeds placed in the city treasury. Such an ordinance is as contrary to the spirit of the charter (Cincinnati) as it is alien from the general genius of our institutions."[3]

[1] Varden *v.* Mount, 78 Ky. 86; Wilcox *v.* Hemming, 58 Wis. 144; Knoxville *v.* King, 7 Lea (Tenn.), 441, approving the text.

[2] Donovan *v.* Vicksburg, 29 Miss. (7 Cush.) 247 (1855); Poppen *v.* Holmes, 44 Ill. 362; Darst *v.* People, 51 Ill. 286; Heise *v.* Columbia, 6 Rich. 404; Whitfield *v.* Longest, 6 Ire. (N. C. Law) 268; McKee *v.* McKee, 8 B. Mon. (Ky.) 433; Jarman *v.* Patterson, 7 Mon. (Ky.), 647; Varden *v.* Mount, 78 Ky. 86 (1879); s. c. 10 C. L. J. 73. Power to impose *penalties* on the owners of animals running at large excludes, by implication, the power to enforce a by-law upon the subject in any other way; as, for example, by a sale of the animals found at large. Miles *v.* Chamberlain, 17 Wis. 446 (1863); *supra*, secs. 338, 339; Brophy *v.* Hyatt, 10 Col. 223; Cartersville *v.* Lanham, 67 Ga. 753. An ordinance directing the *impounding and sale of animals* for costs and expenses, but not imposing a penalty, held valid under a charter authorizing the impounding and sale "for any penalty imposed by any ordinance or regulation, and all costs." Fort Smith *v.* Dodson, 46 Ark. 296. Such an ordinance is valid, and takes effect whether the owner resides in the town or not. Rose *v.* Hardie, 98 N. C. 44; *infra*, sec. 355, note.

[3] Rosebaugh *v.* Saffin, 10 Ohio, 32, 37 (1840). However it may be when the power to forfeit without notice or prior legal proceedings is *explicitly conferred*, it is clear that the power, unless plainly and expressly given, cannot be exercised without such notice and previous adjudication; but with these the remedy may, if needful, be "prompt and strong." Cincinnati *v.* Buckingham, 10 Ohio, 257, 262, *per Lane*, C. J. What is a *running at large*. Kinder *v.* Gillespie, 63 Ill. 88 (1872): Case *v.* Hall, 21 Ill. 632.



§ 350 (284). **Same subject. Notice.** — In North Carolina the general principle was declared that an ordinance of an incorporated town which authorizes the property of one man to be taken from him and given to another, without any *notice* to the owner or trial of his rights, was unlawful. The town authorities, under power given to make ordinances for the removal of nuisances and for the good government of the town, passed an ordinance to this effect: "That every hog at large in the said town shall be taken up and penned, and advertised to be sold on the third day; and unless the owner should pay the charges (specified in the ordinance) for taking up and keeping such hog, and a sale is effected, the money arising therefrom, after paying the charges, shall be paid over to the *owner* of the said hog." The validity of this ordinance was drawn in question, and two points were ruled by the Supreme Court: 1. That the ordinance was reasonable, and the corporation, under the power above referred to, had authority to pass it; 2. That it sufficiently provided for notice to the owner by the impounding of the animal, and the three days' public advertisement, and that personal notice was not necessary.[1] In a subsequent case in the same court a similar ordinance was sustained. It was objected that it was invalid, because it provided for no judicial decision condemning the property to be sold. This objection the court regarded as insufficient, "since the owner may, if he choose, have a full investigation of the case by bringing an action of replevin, as in any other case of distress."[2]

§ 351 (285). **Same subject.** — In South Carolina it has been held that under authority *to enforce by-laws by fine*, an ordinance, otherwise legal, which authorized the marshal to kill hogs running at large, contrary to the ordinance, and appropriate them to his own use, was void.[3]

[1] Shaw *v.* Kennedy (N. C.), Term R. 158 (1817); Hellen *v.* Noe, 3 Ire. (N. C. Law) 493 (1843). Same principle. Spitler *v.* Young, 63 Mo. 42 (1876), holding that such an ordinance was unauthorized as a sanitary or police regulation under power to abate nuisances.

[2] Whitfield *v.* Longest, 6 Ire. (Law) 268 (1846). In *Iowa* a similiar ordinance was sustained. Gosselink *v.* Campbell, 4 Iowa, 296 (1856); Gilchrist *v.* Schmidling, 12 Kan. 263 (1873). *Contra*, Willis *v.* Legris, 45 Ill. 289 (1867); Bullock *v.* Geomble, *Ib.* 218; Poppen *v.* Holmes, 44 Ill. 360. But see Hart *v.* Mayor, &c. of Albany, 9 Wend. (N. Y.) 571 (1832); White *v.* Tallman, 2 Dutch. (N. J.) 67 (1856); Phillips *v.* Allen, 41 Pa. St. 481; Moore *v.* State, 11 Lea, 35; Knoxville *v.* King, 7 Lea, 441. Power must be strictly pursued, or the sale will be void, and the officer a trespasser. Clark *v.* Lewis, 35 Ill. 417. See Friday *v.* Floyd, 63 Ill. 50 (1872), three judges dissenting. Sale is void where two animals belonging to different owners are sold at once. *Ib.*

[3] McRae *v.* O'Lain, cited Kennedy *v.* Sowden, 1 McMullan (S. C.) Law, 328. But authority to impose "*fines and penalties*" authorizes a fine against those who

§ 352 (286). **Equity will not ordinarily relieve against Valid Forfeitures.** — A forfeiture imposed by a municipal corporation, under legislative authority, for a violation of a valid by-law, and inflicted as a penalty for such violation, *cannot be relieved against in equity*, unless, perhaps, where peculiar circumstances furnish grounds for equitable interposition, the general doctrine being that equity may relieve against forfeitures declared by contract, but not against those expressly declared or authorized by statute.[1]

§ 353 (287). **Power to enforce by Imprisonment must be expressly given.** — In this country it is not unusual to provide, in the organic act of municipal corporations, that if fines for violation of by-laws or ordinances are not paid, *the offender may be committed to prison* for a limited period. And in respect to some offences public in their character, the power to imprison in the first instance is often conferred.[2] It is scarcely necessary to add that unless the authority be plainly given, it does not exist; and when given, before it can be exercised there must be a judicial ascertainment by a competent tribunal or magistrate of the guilt of the party.[3]

violate the ordinance forbidding hogs running at large, and the seizure, impounding, and sale (upon notice) of the animals to pay the fine, whether they belong to residents or non-residents. Kennedy *v.* Sowden, *supra*; s. p. Crosby *v.* Warren, 1 Rich. (S. C.) Law, 385 (1845), *Wardlaw*, J., dissenting; McKee *v.* McKee, 8 B. Mon. (Ky.) 433 (1848); see Kinder *v.* Gillespie, 63 Ill. 88 (1872). But it seems doubtful, upon the principles adopted in the construction of powers of this character, whether authority to impose fines and penalties extends any further than to the imposition of *pecuniary fines and penalties*. See Mayor of Mobile *v.* Yuille, 3 Ala. 137; White *v.* Tallman, 2 Dutch. (N. J.) 67 (1856). The power to forfeit, like the power to tax, should be given either expressly, or, at all events, by *necessary* implication. And it has been held that it cannot be implied from the power "to impose reasonable fines," and to cause "all such fines and all such forfeitures and penalties as may be incurred under the laws and ordinances of the corporation, to be assessed, levied, and collected." Cotter *v.* Doty, 5 Ohio, 395 (1832).

[1] Taylor *v.* Carondelet, 22 Mo. 105 (forfeiture clause in lease); Peachy *v.* Somerset, 1 Str. 447; Gorman *v.* Low, 2 Edw. Ch. 324; Keating *v.* Sparrow, 1 Ball & Beat. 367; State *v.* Railroad Co., 3 How. (U. S.) 534.

[2] Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253 (1831); New Orleans *v.* Costello, 14 La. An. 37; Burlington *v.* Kellar, 18 Iowa, 59; London *v.* Wood, 12 Mod. 686; Bab *v.* Clerk, F. Moore, 411; Clarke's Case, 5 Co. 64; 1 Roll. Abr. 364; Com. Dig. By-Law, E. 1; Chilton *v.* Railway Co., 16 M. & W. 212; King *v.* Merchant Taylors' Co., 2 Lev. 200.

[3] Burnett, *In re*, 30 Ala. 461 (1857). Charter power to punish violations of ordinances "by fines, imprisonment, labor, or other penalty prescribed by ordinance" will authorize the city council to prescribe as punishment either fine or imprisonment (not both), and not even imprisonment as means of enforcing payment of a fine. Brieswick *v.* Brunswick, 51 Ga. 639 (1874); s. c. 21 Am. Rep. 240. Fines for the violation of ordinances, held, under special charter provisions, collectible by commitment of the persons, or by *fieri facias*. Huddleson *v.* Ruffin, 6 Ohio St. 604. The power to punish offenders by fine *or* imprisonment, conferred upon a



*On whom Ordinances are binding, and who must notice them.*

§ 354 (288). **Who bound.** — In England the by-laws of a municipal corporation bind not only the members, but, if they are general in their nature and purposes, and not limited to any particular class or description, but intended to extend to all persons coming within the local jurisdiction of the corporation, *they bind all*, whether members or strangers, and *all must take notice of them* at their peril. And by-laws made by a municipal corporation with respect to a liberty or franchise granted them, with local jurisdiction beyond the limits of the municipality, are as binding upon persons going into the liberty, as the by-laws of the city upon those who come within its walls.[1]

§ 355 (289). **Same subject.** — So, also, *in this country* it is settled that valid ordinances bind not only the inhabitants of the corporation, but also strangers or non-residents coming within its limits. These, for the time being, are regarded as inhabitants, and liable in the same manner for violations of ordinances.[2] So far is plain. But suppose

municipal corporation, does not include the authority to coerce the payment of a fine by imprisonment. Brieswick *v.* Brunswick, 51 Ga. 639 (1874). Where an ordinance provided that a convicted person should forfeit a sum "not exceeding five hundred dollars, and may be imprisoned not exceeding sixty days, or both," a sentence to pay a fine of one hundred dollars *or* perform sixty days' work on the public streets, was held to be void, the latter clause being unauthorized by the ordinance, and the whole sentence being uncertain and in the alternative. *Ex parte* Martini, 23 Fla. 343 (1887). Authority to enforce penalties for violations of ordinances by "*distress and sale*" of property must be expressly or plainly granted. White *v.* Tallman, 2 Dutch. (N. J.) 67 (1856); Bergen *v.* Clarkson, 1 Halst. (N. J.) 352. A law authorizing a municipal corporation to recover a fine for breach of a police regulation does not, without express provision therefor, authorize the arrest and criminal prosecution of the offender. State *v.* Ruff, 30 La. An. 497. And in England, likewise, such a power cannot be conferred by the crown, and can only exist by authority of parliament or a special custom. Clerk *v.* Tucket, 3 Lev. 281; s. c. 2 Vent. 183; Lee *v.* Wallis, 1 Kenyon, 295; Sayer, 263; Adley *v.* Reeves, 2 Maule & Sel. 60; Willc. 179; Glover, 311. Verbal order of police magistrate will not justify police officer in holding a person in custody for the non-payment of a fine imposed for the breach of a municipal ordinance. Board of Trustees *v.* Schroeder, 58 Illinois, 353 (1871).

[1] Willc. 105, 107; Glover, 289, 290; London *v.* Vanacre, 1 Ld. Raym. 498; Salk. 143; Pierce *v.* Bartrum, Cowp. 270; Fazakerly *v.* Wiltshire, 1 Stra. 462; Kirk *v.* Nowill, 1 Term R. 118; Butchers' Co. *v.* Morey, 1 H. Bl. 370. Do not bind beyond limits of authorized jurisdiction. See 3 Mod. 158; T. Jones, 144; 2 Brownl. 177; Hob. 211; Hutt. 6; 11 Rep. 53; Godb. 252. An ordinance passed in 1834, prohibiting the erection of "stables, &c., in the interior of the city of New Orleans, or any of its incorporated suburbs," held not to extend to the city of Lafayette, subsequently added, by act of the legislature, to the city of New Orleans. New Orleans *v.* Anderson, 9 La. An. 323 (1854).

[2] Heland *v.* Lowell, 3 Allen (Mass.), 407 (1862); Whitfield *v.* Longest, 6 Ire.