

Present: Mr. Justice Middleton and Mr. Justice Wood Renton.

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ELIZABETH THELIS *et al.* v. THE MUNICIPAL COUNCIL
OF COLOMBO.

D. C., Colombo, 22,329.

Section 190 of Ordinance No. 7 of 1887 enacts: "The Government or the Municipal Council may from time to time cause to be made such main or other sewers, drains, and water-courses as may be judged necessary for the effectual draining of the Municipality, and, if needful, the Government or Municipal Council may carry them through, across, or under any street or any place laid out as or intended for a street, or any cellar or vault which may be under any of the streets, and (after reasonable notice in writing in that behalf) into, through, or under any enclosed or other lands whatsoever, doing as little damage as may be, and making full compensation for any damage done; and if any dispute shall arise touching the amount or apportionment of compensation, the same shall be settled in the manner hereinafter provided for the settlement of disputes respecting damages and expenses."

And section 281 of the same Ordinance enacts: "Except as herein otherwise provided, in all cases when compensation, damages, costs, or expenses are by this Ordinance directed to be paid, the amount, and, if necessary, the apportionment of the same in case of dispute, shall be summarily ascertained and determined by the Magistrate or Municipal Magistrate."

Held, that the effect of section 281 was to take away the right of action at common law, and that a party injured by the exercise of the statutory powers conferred by section 190 is confined to the remedy given by section 281.

The Governor and Company of the British Cast Plate Manufacturers v. Meredith (4 Term. Reports, p. 794) and *Stevens v. Jeacocke*, (11 Q. B. 731) followed.

THE plaintiffs, who were the owners of premises 15 and 59 Temple road, Colombo, sued the Municipal Council of Colombo for Rs. 2,000 damages, alleging that "between the 12th day of June, 1905, and 15th day of July, 1905, the defendant corporation caused to be cut a drain across the plaintiffs' said premises and directed the water from the public drain into the said drain, whereby plaintiffs' said premises suffered considerable damage by reason of the water which overflowed the said drain cut as aforesaid and by the silting of grass which forms part of the said premises No. 59 and by depreciation in value of the said premises by reason of the existence of the said drain." The defendant Council objected to the jurisdiction of the District Court and pleaded that the plaintiffs should have proceeded under sections 190 and 281 of the Municipal Councils Ordinance (No. 7 of 1887).

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The District Judge (J. R. Weinman, Esq.) held as follows:—

“ The Municipal Council of Colombo, acting under the provisions of section 190 of The Municipal Councils Ordinance, 1887, on the 12th June, and the 15th July, 1905, cut a drain across the plaintiffs' land. Their right to cut the drain is not questioned. For the consequential damage the Council offered Rs. 197 as compensation, which the plaintiffs refused to accept. They claim Rs. 2,000. Section 190 authorizes the Council to cut such a drain 'causing as little damage as may be, and making full compensation for any damage done, and if any dispute shall arise such dispute shall be settled in the manner hereinafter provided;' section 287 provides that compensation, costs, &c., 'shall be summarily ascertained and determined by the Magistrate or Municipal Magistrate.'

“ In the face of these sections it is contended that this Court has no jurisdiction to entertain the claim. It was contended for the plaintiff that the jurisdiction of any Court could not be ousted except by express enactment. For instance, section 34 of Ordinance No. 24 of 1889, which ousts the Gansabhawa jurisdiction of Police Courts and Courts of Requests in certain matters runs as follows:— 'The jurisdiction conferred on the tribunals hereby created shall be exclusive, and shall not be exercised by any other tribunal or any plea or pretext whatever.'

“ I quite agree that where there exists jurisdiction or jurisdiction has been expressly conferred such jurisdiction cannot be taken away except by express enactment. That is not so in the present case. Here the Council was given a certain right, and it was also enacted that the Council should make compensation for damage done, and the mode in which the amount of the compensation is to be ascertained is set down. I doubt whether given the right the Council is liable to compensation without express provision. The enactment takes away the jurisdiction of no Court. It invades no right. It simply says: 'You are entitled to compensation. If you cannot agree, there is a procedure provided for you.' It gives you a right to recover compensation, but says that for its ascertainment you must go to the Police Court.

“ If it is alleged that the Council acted *ultra vires* of the Ordinance, acted in any way wrongly, then I quite admit that an action will lie in the District Court. But there is no such allegation, and in my opinion this Court has no jurisdiction to entertain the claim.

“ The plaintiffs' claim is dismissed with costs.”

The plaintiffs appealed.

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Walter Pereira, K.C., S.-G., for the appellants.—The only question in this case submitted to the Court below for decision was whether the Court had jurisdiction in respect of the plaintiffs' claim. The claim is for damage sustained by the plaintiffs by reason of the defendants (the Municipal Council of Colombo) having cut a drain across their land. The Municipal Council was empowered by section 190 of the Municipal Councils' Ordinance to cut such drains. If the provision of the section ended there, it might be said that plaintiffs had no cause of action. The section further provided that the damage done was to be assessed by the Police Court. If that was all that there was in the section regarding damage, it might be said that the special tribunal referred to, and that only, had jurisdiction. But after giving the power to the Council to cut drains across private property, the section provided in plain terms that the Council should "make full compensation for any damage done." This provision gave the landowner a cause of action, and there was nothing in the Ordinance to oust the ordinary jurisdiction of the District Court. True, it was further provided that if any dispute arose touching the amount of compensation, the same was to be settled by the Police Court. These words did not take away the jurisdiction of the District Court. It could be taken away by express terms only *Byrne v. Byrne* (1). Suppose the Municipal Council simply refused to pay any damage at all, would not the District Court have jurisdiction to award damage? It is submitted it would, because the section, without reference to any Court, provides that full compensation should be made. And if the District Court would have the power to award damage, it would have the power to fix the amount to be paid. The Courts' Ordinance was enacted after the Municipal Councils' Ordinance, and therein (see sections 64 and 65) District Courts were given jurisdiction in all civil matters and full power to hear, &c., all pleas, suits, and actions in which a party defendant resided within its jurisdiction, &c., and although exceptions were made in favour of certain enactments, the Municipal Councils' Ordinance was not referred to. Where exclusive jurisdiction is intended to be given to a Court, the law plainly says so. The Gansabawas, for instance, are given exclusive jurisdiction and appropriate words are used for the purpose. The jurisdiction of a Court of unlimited jurisdiction is not taken away by limited statutory jurisdiction being given to another Court, *Troup v. Ricardo* (2).

Sampayo, K.C., for the Council.—There is no authority for the proposition that the ordinary civil Court has jurisdiction if there is no express provision in the statute to the contrary. Under section 190

(1) *Fl. and K.*: 425.

(2) 34 *L. J. Ch.* 91.

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of the Municipal Councils' Ordinance the act complained of is expressly authorized and is therefore lawful, and if the Ordinance itself had not provided a remedy, the plaintiffs would have had no right of action whatever. It is submitted that where injury is caused by the exercise of statutory powers, if the mode of redressing it is pointed out by the statute, the ordinary jurisdiction of the civil courts is ousted. *Wolverhampton Waterworks Co. v. Hawkesford* (1); *Bailey v. Bailey* (2); *Bentley v. Manchester Railway Co.* (3); *The Governor and Company of the British Cast Plate Manufacturers v. Meredith* (4); *Stevens v. Jeacocke* (5); *Ram Chunder v. Secretary of State* (6).

Walter Pereira, K.C., S.-G. in reply.—The cases cited by the counsel on the other side have no application at all. We are not now dealing with a case in which statutory powers are conferred by a legislative enactment, and the enactment itself did no more than provide a remedy in case of damage caused by the exercise of those powers. Here, the enactment distinctly provided that full compensation should be made for any damage done, and this provision had no reference to any Court. If we shut our eyes to this provision, the respondent's counsel is right and his authorities are relevant. But, why shut our eyes to it? Suppose, as suggested before, the Municipal Council unreasonably refused to pay any damage at all, would not the District Court have jurisdiction under this provision? If it would, how could the subsequent provision dependent upon other conditions be deemed to have the effect of taking away any such jurisdiction?

16th July, 1906. WOOD RENTON J.—

In my opinion this appeal should be dismissed.

The plaintiffs-appellants have sued the Municipal Council for certain damage alleged to have been done by the Council in cutting a drain into their land by virtue of section 190 of the Municipal Councils' Ordinance, No. 7 of 1887.

It is admitted that the Council have a right to cut drains of this character, and it is not suggested in the plaint that, in the course of the proceedings, they have acted otherwise than in the exercise of their statutory powers.

If section 190 of the Ordinance of 1887 had merely empowered the Council to execute works of this kind, it is clear that the appellants would have no remedy, if any damage were caused thereby, in a

(1) 5 *Jur. (N. S.) Pt. 1*, 1, 104.

(2) 13 *Q. B. D.* 859.

(3) (1891) 3 *Ch.* 222.

(4) 4 *Term. Rep.* 794.

(5) 11 *Q. B.* 731.

(6) 1. *L. R.* 12 *Mad.* 105.

Court of law. But the section referred to, after imposing on the Council the duty of doing as little damage as possible in the execution of the authorized works, goes on to require them to make full compensation for any damage done, and provides that, if any dispute should arise in regard to either the amount or apportionment of compensation, it shall be settled in accordance with later sections, by proceedings before the Police or Municipal Magistrate.

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The question which we have to decide in this case is, whether the effect of the provisions which I have quoted is to take away the appellants' right of action at common law. It is admitted on the part of the appellants that up to a certain point the Council have acted in conformity with section 190 of the Ordinance of 1887. They provisionally assessed the compensation which, in their opinion, was due, and tendered it to the appellants, and all that can be urged against them in this connection is that they did not themselves take the initiative in bringing the dispute before the Police Court or the Municipal Magistrate.

So far as I can see, the Ordinance of 1887 imposes no special obligation on the Council to take the initiative. In such proceedings it is open to either party to apply to the constituted tribunal, and I do not think that the failure of the Council to do so in the first instance in any way deprives them of whatever protection is conferred on them by statute.

The case therefore stands thus. Section 190 has conferred on the Council an express statutory power; it has imposed on them an express obligation as regards the payment of compensation; and in conjunction with the later provisions it has indicated a special tribunal by which any dispute as to the amount or apportionment of such compensation is to be settled.

It appears to me to be certain on the authority of a number of decisions, of which *The Governor and Company of the British Cast Plate Manufacturers v. Meredith* (1) and *Stevens v. Jeacocke* (2) may be given as typical examples, that under such circumstances a party injured by the exercise of statutory powers is confined to the remedy which the statute has created. In support of this view I would further refer to the later case of *Saunby v. The Water Commissioners of the City of London and the Corporation of the City of London, Ontario* (3), in which it seems to me to result directly from the decision of the Judicial Committee that the plaintiff's remedy in an action for trespass which he brought in the Canadian Courts would have been held to be barred by the provision for arbitration in

(1) (1792) 4 Term. Reports, 794. (2) (1848) 11 Q. B. 731.

(3) (1906) A. C. 110.

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section 5 of 36 Victoria, cap. 102 (Ontario) if the Commissioners had pursued the procedure which the statute indicated.

Our attention has been called by the learned Solicitor-General to the fact that the exclusive jurisdiction which is conferred on District Courts in actions for damages by sections 64 and 65 of the Courts' Ordinance is a power of later creation than that conferred by section 190 of the Municipal Ordinance of 1887. But it appears to me that the terms of section 190 of that Ordinance exclude the jurisdiction of District Courts in such a case as the present by necessary implication, and it has been held in *The Wolverhampton New Waterworks Company v. Hawkesford* (1) that necessary implication is sufficient for such a purpose. Under these circumstances I do not think that section 190 of Ordinance No. 7 of 1887 is affected in the way in which the learned Solicitor-General contends it is, by section 64 of the Courts' Ordinance.

I would order that the appeal be dismissed with costs.

MIDDLETON J.—

I agree. In my opinion section 190 gives the Municipality statutory powers against which there would be no remedy unless it had been provided under the Ordinance, and I think that, in the words of Lord Tenterden C.J. in *Doe dem Murray, The Bishop of Rochester v. Bridges* (2), "where an act creates an obligation and enforces the performance in a specified manner, we take it to be the general rule that performance cannot be enforced in any other manner."

It is not alleged here that anything has been done in the exercise of that statutory power by the Council which is *ultra vires*.

I think that this section 190 should be construed as giving a special remedy which must be followed to the exclusion of the common law right of action.

(1) (1859) 5 *Jur. (N. S.)* Pt. 1, 1, 104. (2) (1831) 1 *B. and Ad.* 847, at p. 859.