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CARIMJEE JAFFERJEE *et al. v.* THE COLOMBO MUNICIPALITY.

D. C., Colombo, 18,079.

Action to restrain the Municipal Council from wrongfully paying money—Notice—Creation of offices—By-law—Resolution of Council—Ultra vires—Ordinance No. 7 of 1887, ss. 47, 50, 59, 122, and 278—Ordinances Nos. 16 of 1881 and 21 of 1901.

Section 278 of the Municipal Councils' Ordinance (No. 7 of 1887) relating to notice of action does not apply to an action for an injunction to restrain the Council from wrongfully paying money out of its funds.

Section 278 applies to all actions for damages in respect of acts done or purported to be done under the provisions of the said Ordinance, even though such acts be *ultra vires* and not justifiable under the provisions of the Ordinance.

It is lawful for the Municipal Council to create new offices other than those mentioned in sections 49 and 50 of "The Municipal Councils' Ordinance of 1887" without the sanction of the Governor, and such offices may be created not only by by-law by also by resolution of Council.

APPEAL from a judgment of the District Judge of Colombo.

The facts are fully stated in the judgment of Layard, C.J.

Walter Pereira, K.C., and *Dornhorst, K.C.* (*F. M. de Saram* with them), for plaintiffs, appellants.

Sampayo, K.C. (*H. J. C. Pereira*, with him), for the defendant, respondent.

Cur. adv. vult.

19th December, 1905. LAYARDS, C.J.—

This is the second appeal in this case. The plaintiffs, alleging that they are taxpayers and ratepayers of the Colombo Municipality, seek to have the appointment of the third defendant as Assistant Sanitary Officer declared illegal, and pray for an injunction to prevent misapplication of Municipal funds by the payment therefrom of moneys as salary to the third defendant, and they further seek to have moneys already paid to third defendant refunded to the Municipal funds.

When the case first came on for trial in the District Court the parties confined themselves to the legal issue as to whether the plaintiffs were eititled in law to maintain such an action. The District Judge ruled against the plaintiffs, but the Court held that it was

competent for the plaintiffs as ratepayers to seek the intervention of the Court against the misappropriation or misapplication of trust funds by corporate bodies, and the case was sent back for trial. At the second trial the District Judge dismissed the plaintiffs' claim. The appellants' counsel, in opening the case, mentioned that a considerable portion of the judgment of the District Judge dealt with the question as to whether the suit was a *bonâ fide* one, or whether it was vexatious and harassing and not for the public benefit. We suggested to counsel that we thought it desirable that we should decide the case on the main issues, and counsel for the respondent, whilst stating he was prepared to support the ruling of the District Judge on the issue above mentioned, acquiesced in the view taken by this Court. The first issue that was argued, and which we have now to decide, is as to whether the plaintiffs' action ought to be dismissed for want of notice. Section 278 of the Municipal Councils' Ordinance provides as follows:—"No action shall be instituted against the municipal council or any councillor or chairman, or any officers of the council or any person acting under their or his direction, for anything done or intended to be done under the provisions of this Ordinance until the expiration of one month next after notice in writing shall have been given to the defendant, stating with reasonable certainty the cause of such action, and the name and the place of abode of the intended plaintiff and of his attorney or agent in the cause; and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action except such as is stated in the notice so delivered; and unless such notice be proved, the court shall find for the defendant; and every such action shall be commenced within three months next after the accrual of the cause of action and not afterwards; and if any person to whom such notice of action is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover in any such action when brought, and the defendant shall be entitled to be paid his costs by the plaintiff; and if no such tender shall have been made, it shall be lawful to the defendant in such action, by leave of the court where such action shall be pending, at any time before issue framed, to pay into court such sum of money as he shall think fit, and thereupon such proceedings shall be had as in other cases where defendants are allowed to pay money into court."

It is argued for the appellants that as the acts alleged to have been done by the Municipal Council were *ultra vires* of the Ordinance, the Municipal Council were entitled to no notice. It appears to me that if the provisions of this section are applicable to an action such as this, which I shall subsequently discuss, then the Municipal Council

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are entitled to the notice of action required by section 278, on the ground that the Council intended and purported to act under the provisions of the Ordinance No. 7 of 1887. The provision contained in section 278 is framed to protest the Council from the consequence of committing illegal acts, which are intended to be done under the authority of the Ordinance No. 7 of 1887, but which are not justified by its terms and cannot be defended by its provisions. The appellants contend that the Council was not acting under the provisions of the Ordinance No. 7 of 1887, and that consequently they were not entitled to the notice of action allowed thereby. If a person knows that he has under the Ordinance authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out the provisions of the Ordinance. It does not appear in this case that the Municipal Council, when they made the appointment in question, knew that it was not allowed by the Ordinance under which they were constituted. It is manifest that the Council intended to act according to the powers vested in them, although they may have mistaken the legal mode of carrying out their intention. The Council are entitled to notice of action even if they had made a mistake with regard to the law (*Selmes v. Judge*, *L. R.* 6, *Q. B.* 724). Council for the appellants invited our attention to the case of *Cassim v. Liesching* (2 *S. C. C.* 6). It is true in that case that this Court held, where a Fiscal had seized and sold plaintiff's goods under a writ directed against a third person, that section 20 of the Fiscals' Ordinance, No. 4 of 1867, did not apply. That section ran as follows:—

" Every fiscal shall, during the time he acts as such in the execution of any process within his province, be civilly responsible in damages to any person who may be aggrieved in consequence of any fraud, gross negligence, or gross irregularity of proceeding, or gross want of ordinary diligence or abuse of authority (but not otherwise) on the part of such fiscal, his deputy, or other officers, in the execution of such process; provided that where such damages shall be claimed by reason of the act or omission of any deputy or other officer, the fiscal shall be entitled to move the court to add such deputy or other officer as a party to the suit; and if the court shall find that such deputy or other officer is responsible for the act or omission owing to which damages are claimed, he shall be primarily responsible to satisfy such judgment, and the security given by him for the due performance of his office shall be available to satisfy the same without any new action being brought on the bond, unless the court shall so expressly direct. The fiscal shall only be liable to satisfy the judgment, if such deputy or other officer shall not be able to satisfy the

same; and any payment made by the fiscal in such case shall be deemed a debt due to the fiscal which may be enforced at any time by process of execution in the said case on the application of the fiscal without a new suit. Provided further that nothing therein contained shall preclude any person aggrieved by the act or omission of the deputy fiscal or other officer from giving up his remedy against the fiscal and suing only the immediate wrong-doer civilly or criminally, according to the nature and circumstances of the case."

As properly pointed out by Phear, C.J., it is plain that this section related solely to the conduct of the Fiscal and his officer within the scope of his authority. The wording of section 20 is very different to the one now under consideration, which applies not only to acts done under the provisions of the Ordinance No. 2 of 1887, but to those intended, *i.e.*, purported to be done under the provisions of that Ordinance. The question, however, remains to be decided as to whether this section is applicable to an action of this nature. It was held in the case of *Flower v. Local Board of Low Leyton* (*L. R.* 5, *Ch. D.* 347) that, where the principal object of an action against a Local Board of Health was an injunction to restrain an immediate injury, it is not necessary to give a month's notice of the cause of action under 244 of "The Public Health Act, 1875." The reasons given by Jessel, M.R., in his judgment, with which James, L.J., and Bagallay, L.J., concurred, appear to me to be applicable to the case now under our consideration. I do not think we could hold that section 278 of the Municipal Councils' Ordinance applied to an action for an injunction to restrain the Municipal Council from wrongfully paying away its fund. The section, from the wording of it, appears to me to apply to an action for damages, and its object was to give an opportunity to the Council to "tender sufficient amends to the plaintiff," *i.e.*, to make payment or tender of compensation for the damages sustained. To enable the Council to take advantage of the section it must be shown that this action is one for damages, and not for an injunction to restrain the Municipal Council from continuing to pay the third defendant and from making future misappropriations of Municipal funds. It is impossible for the Council to make tender or compensation for damages when no damages are claimed. Consequently section 278 does not apply to an action of the nature of the present one. The question as to whether the provisions of the similar section in the Ordinance No. 7 of 1865 applied to suits for injunctions was decided in *Jayasundara v. Municipal Council, Galle* (5 *S. C. C.* 174), in the negative by this Court so far back as 1888.

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Now I come to the really important question in the case, viz., as to whether the appointment was illegal of the third defendant as Assistant Sanitary Officer by resolution of the Council of the 14th February, 1902. The appointments that may be made by the Governor are specially provided for by sections 47 to 52, whilst section 59 provides that the Municipal Council may create, as provided in section 122, such offices other than those mentioned in sections 49 and 50 as they may think necessary. There is no doubt, therefore, that the Council for the carrying out of the provisions of the Ordinance may create offices other than those above-mentioned. This is further made quite clear by the provisions of section 80, which defines the powers and duties of the Municipal Council, and which enacts by sub-section (*d*) that the Council may adopt, modify, or reject proposals for creating any new Municipal office. So far as these two sections go, it is quite clear that the Legislature intended to vest the power of creating offices in the Council quite independent of any restraint by the Governor. Appellants' counsel, however, argues that by insertion of the words " as provided in section 122 " the appointment could not be created by a resolution, but must be made by a by-law under section 122, with the sanction of the Governor in Executive Council, and that this was enacted to safeguard the interest of the taxpayers, because the Governor in Executive Council would be able to restrain the defendant Council from making improper appointments. I would here point out that in view of Ordinance No. 21 of 1901, intituled " An Ordinance for defining the meaning of certain terms and for shortening of the language used in Ordinances and other written laws and for other purposes," " the Governor in Executive Council " means no more than the Governor after consulting the Executive Council, and that the Governor can act entirely independently of the advice of his Council.

The contention then amounts to this, that the Legislature intended to vest the creation of offices entirely in the Governor. If that is sound, it seems to me a roundabout way of doing it, and to almost nullify, and certainly to stultify, the powers vested in the Council by section 80. However, it is necessary for us to look carefully into the provisions of section 122, particularly when we find, as it has been admitted in this case, that the Council has frequently exercised the right of creating new offices by resolution and without the sanction of any by-law. Section 122 has been repealed by Ordinance No. 8 of 1901, for by section 4 of that Ordinance a new section has been substituted for it. The section provides generally for the making of by-laws, and no mention is made in it of the particular purpose for which by-laws may be made. Section 5 of Ordinance No. 1 of

1901 enacts a section very similar to section 122 of the Ordinance No. 7 of 1887, which is substituted for section 123 of Ordinance No. 7 of 1887, and not for section 122. I think, however, it is clear that the Legislature must have intended when passing Ordinance No. 8 of 1901 that the provisions of section 5 should supply the place of section 122, though through inadvertence it escaped the attention of the framer of the Ordinance and of the Legislature to amend section 59 of Ordinance No. 7 of 1887 by inserting " 123 " in lieu of " 122 " in that section. The new section 123 (section 5 of Ordinance No. 8 of 1901) enacts the matters in respect of which by-laws may be made, but does not render it obligatory on the Municipal Council to make such by-laws. Amongst other things it provides that by-laws may be made for " the creation of offices other than those of Chairman, Assistant Chairman, and Municipal Magistrate, and the payment of salaries to the holders of such offices." I understand " creation " to mean in that section what it commonly means, viz., " the act of creating." The power then conferred by section 123 (Ordinance No. 8 of 1901) is to make by-laws providing for " the act of creating" such offices other than those above mentioned. The power of creating has been conferred on the Council by section 59, and the manner or act of creating them is to be laid down by a by-law. I asked during the course of the argument what by-laws are now in force in the Municipality of Colombo, and I am told that they are to be found in Ordinance No. 16 of 1881. I cannot find any special by-laws stating in what manner the Council should exercise its powers of creating offices or fixing salaries when created. The by-laws, however, provide generally with regard to the conduct of business by the Municipal Council, and there is no reason to think that the resolution passed by the Municipal Council was not duly passed in accordance with the by-laws of the Council.

I am not prepared to hold that the action of the Municipal Council was wrong, or that the resolution is *ultra vires* of the powers vested in the Council by the Ordinance. As pointed out by Lord Campbell in the case of the *Liverpool Borough Bank v. Turner* (30 *L. J. Ch.*, p. 379), " it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed. " The whole scope and the object of the Ordinance must be looked at, and then it will be seen that great inconvenience may be occasioned and great injury may be done, as pointed out by the District Judge, and the general object intended to be secured by the Ordinance would be defeated. Although the provisions of the Ordinance may not have been strictly obeyed in this case, yet they do not appear to me to be of such material importance

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that the Legislature could have intended that non-observance of them should invalidate the creation of a new office; it is to be noticed in this connection that the Legislature provides (section 4 of Ordinance No. 8 of 1901) that the only penalty to be imposed for the contravention of a by-law is a fine not exceeding twenty rupees. As very properly pointed out by the District Judge, to hold that only a by-law could create offices would lead to disastrous results. I do not think I would be justified in overlooking the whole scope and object of the Ordinance, and that great inconvenience may be occasioned and disastrous results might arise by holding that only a by-law could create an office.

I think the plaintiffs' appeal should be dismissed with costs.

WENDT, J.—I agree that the appeal should be dismissed.