

Present: Garvin J.

1928.

VANDERSMAGT v. JAYAWARDENE.

691—M. C. Colombo, 2,946.

*Municipal by-laws—Tree threatening to fall on house and injure occupants  
—Chairman's powers.*

Where a tree does not overhang a street, the Chairman of the Municipal Council has no power to order its removal, unless the Council deems it likely that the tree will fall upon a house or building and injure its occupants.

*Sourjah v. Hadjar*<sup>1</sup> not followed.

**A** PPEAL from a conviction by the Municipal Magistrate of Colombo.

H. V. Perera, for appellant.

Choksy, for respondent.

January 16, 1928. GARVIN J.—

The accused was convicted for "failing to remove a coconut tree deemed likely to fall upon the building bearing assessment No. 68, Baseline road, in breach of rule 47, chapter VIII. of the Municipal Council's by-laws."

He has appealed, and the ground upon which his appeal is based is that the Chairman had no power to call upon him to remove the tree inasmuch as the Council had not considered the matter or "deemed" the tree to be likely to fall upon and injure the occupiers of the building referred to.

By-law 47 empowers the Chairman to cause notice to be served on the owner or occupier of the ground upon which a tree stands requiring him to cut down or remove the said tree or branch or fruit thereof—

"(a) Whenever any tree or branch or fruit of a tree, within the limits of the Municipality, shall be deemed by the Council to be likely to fall upon any house or building and injure the occupiers thereof; or

"(b) Whenever the same shall overhang any street."

As a matter of interpretation I should have thought it plain that whereas in the case of a "tree or branch or fruit of a tree" which overhangs a street the Chairman was empowered to require its removal, he could only issue such a requisition in the case of such a

<sup>1</sup> (1914) 18 N. L. R. 31.

**1928.** tree or branch or fruit which did not overhang a street when it was deemed by the Council to be likely to fall upon a house or building and injure the occupier. In the one case his right to act proceeds from the circumstance that the tree as a fact overhangs the street; in the other case it comes into existence only if and when it is deemed by the Council that the tree or branch or fruit is likely to fall upon and injure the occupiers of a neighbouring building.

**GARVIN J.**  
*Vandersmagt*  
*v.*  
*Jayawardene*

There is a material difference between the case of a tree which overhangs a street and the case of a tree which does not do so. The by-law indicates that it was thought that in the latter case before an individual is compelled to cut down a tree upon which he may set great value the Council itself should decide whether or not it is a menace to his neighbours. It may well be that the discretion may with safety be left to the Chairman. I am not, however, concerned with the question of policy. The meaning of the by-law is unambiguous, and in a case such as this the Chairman can only require the removal of a tree if it is deemed by the Council to be likely to fall upon any house or building and injure the occupiers.

It is urged, however, that this is an executive act which the Council is authorized to do and might therefore by reason of section 46 of the Municipal Council's Ordinance be done by the Chairman. This contention was accepted in the case of *Sourjah v. Hadjiar*,<sup>1</sup> but I regret I am unable to take the same view. The part assigned to the Chairman by this by-law is undoubtedly executive. But in the case of a tree which does not overhang a street, his powers and duties only arise when the Council has decided that a particular tree is dangerous. The part assigned to the Council is deliberative, not executive.

The appeal is allowed, and the accused acquitted.

*Appeal allowed.*



<sup>1</sup> (1914) 18 N. L. R. 31.