

1897.
June 14 and
24.

NICHOLAS v. HAPPAWANA TERUNNANSE.

P. C., Galle, 4,134/24,761.

*By-law—Municipal Council—Overhanging tree—Private nuisance—
Ultra vires—Ordinances Nos. 17 of 1865 and 7 of 1887—Ob-
struction.*

A by-law authorizing the Municipal Council to cut down trees overhanging, and likely to prove dangerous to, private property is *ultra vires*; and a person who resists a Municipal officer in the execution of such a by-law is not liable to conviction.

THE facts sufficiently appear in the judgment.

Jayawardana, for accused, appellant.

Wendt, A. S.-G. (*Bawa* with him), for the Municipal Council.

24th June, 1897. WITHERS, J.—

The accused has been found guilty of obstructing two officers of the Municipality while engaged in their duty under the authority of by-law No. 2, chapter XXIV.

They had come to cut down a cocoanut tree which grew on his premises and threatened to fall on a house in the next garden. The two lands are private premises over which the public has no right of way.

If that by-law is valid the conviction will stand, if not, the accused must be acquitted. The by-law is in these terms:—

If any fruit tree or any part of a tree within the limits of the Municipality be deemed by the Council to be likely to fall upon any house or building or to endanger the occupiers thereof, or if the same be near any road or street and likely to affect the safety of passengers going along or using such road or street, it shall be lawful for the Municipal Council to cause notice in writing to be given to the owner or to the occupier of the ground upon which the tree stands to remove the said fruit, limb, or tree; and if such owner or occupier do not begin to take down the same within twenty-four hours after such notice and complete the work with the due diligence, the Council shall cause the work to be done; and upon the Chairman of the said Council certifying to the Bench of Magistrates of the Municipality of Galle the costs which have been *bonâ fide* incurred in effecting such removal, such Court shall summon the owner and occupier aforesaid to appear before it on a certain day, then and there to make payment of the costs which shall appear to such Court to have been properly incurred in that behalf, and upon failure to pay the amount of such costs, the same may be recovered as if it were a fine imposed by the said Bench of Magistrates.

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WITHERS, J.

This by-law was made upon the authority of the 35th section of the Ordinance No. 17 of 1865, which enacts that it shall be lawful for each Municipal Council to make such Municipal by-laws as it may deem expedient for any of the following purposes. Thirteen are mentioned, but it was conceded that the first part of this by-law could only be brought within the last purpose, namely, for "every other purpose which may by the councillors be deemed necessary for the duly carrying out of the provisions of this Ordinance."

This Ordinance was repealed by Ordinance No. 7 of 1887, which kept alive the by-laws of the late Councils in force at the coming into operation of this Ordinance not inconsistent with its own provisions. We must then see what the provisions of Ordinance No. 7 of 1887 are.

This Ordinance contains the provisions of many old by-laws. It is significant that no regulation of a similar character to the by-law in question is to be found in it.

The provisions of the Ordinance No. 7 of 1887 relate to the purposes for which the Council may spend funds, which may be summed up in the words of sub-section (e), section 46: "All matters necessary for, or conducive to, public safety, health, or convenience." Then it provides for them powers and duties under section 80, and then powers to make by-laws under section 122. The objects then, if analysed, are all found to be of a public character. The prevention or abatement of public nuisances is specially provided for. I can find no hint of dealing with what may be called "private nuisances." There is always a clear line between what concerns individuals and what concerns the public.

The Ordinance sanctions, and properly sanctions, the entrance on private grounds of Municipal officers, but in every case with the object of conserving the public good or preventing harm of any sort from affecting the public. If the Municipality may step in to prevent my tree from falling on my neighbour's house in the next garden it may step in to prevent my own tree falling on my own house, or to prevent some accident to myself from the ruinous condition of my own house. Legislature aimed to protect one person from the consequence of what may be a nuisance on the part of his neighbour, but which does not affect or concern the general public in the least degree, was not intended, I imagine, by the Municipal Councils' Ordinance. The person who is threatened by his neighbour's overhanging tree has a simple remedy in his own hands.

Hence, in my opinion, that part of the by-law in question which relates to overhanging trees in purely private places is invalid. I, therefore, set aside the conviction and acquit the accused.