OPINION.—*contd.*

The terms of Sub-section (b) are wide enough to embrace Municipal buildings and lands, and, if such buildings or lands were held by some lessee, directly from the Corporation, assessment would be leviable from him in respect of his occupation [see Section 146 (1)]. I do not think however, that so long as such buildings and lands remain in the occupation of the Corporation the assessment would be leviable. As I have said above, I think there is an a *priori* improbability in this theory that the legislature intended the Corporation to tax itself and such taxation would be useless for revenue purposes; it would merely relieve one class of rate payers at the expense of another. I think moreover that the Sections 143, 146 and 148 indicate that the Corporation is intended to be exempt from payment of property taxes. In Section 143 the general tax is made leviable in respect of all buildings and lands but the Corporation property is expressly exempt. This so far as the general tax is concerned puts an end to any question of the liability of the Corporation. Sections 146 and 148 need therefore only be considered with regard to the other property taxes, *i.e.*, water and halalkhor. The persons from whom property taxes can be levied are persons occupying immediately from the Government, Corporation or a Fazendar [Section 146 (I)] and persons not so occupying. I do not think the Corporation falls under either category. Section 148 shows that the person primarily liable is entitled to credit for the sum leviable from his landlord, except in the case of Government and the Corporation.

This is another indication of the intention to exempt the Corporation from liability.

I understand that the greater part of the sum of Rs. 4,38,000 is attributable to a calculation of the amount of water used in flushing sewers and watering streets. The cost of this water could in no case be estimated as revenue since underground sewers and streets would not be assessable if the water were supplied by an outside Corporation with powers of taxation. As authority for this I may refer to the Erith case, 1893 A. C., at page 598, as establishing the non-assessability of underground sewers and Lambeth *i.e.* London County Council, 1897, A. C. page 625 and the Putney Bridge case, 7

	Opinion—contd.
	Q. B. D., 223, as establishing the non-assessability of premises dedicated to the public—A category in which the streets in Bombay City must be included.
2. Whether the estimate of Revenue from water can under the circumstances be fixed at a higher aggregate figure than Rs. 16,24,000.	2. It follows from the above remark that in my opinion this question must be answered in the negative.
3. Whether deficits of previous years amounting, since 1885, to some 35 lakhs of Rupees, can be taken into account and recouped to some extent in subsequent years.	3. In my opinion they cannot be taken into account as they have actually been paid out of the Municipal Fund.
4. Whether in determining the rate on the basis of Revenue and expenses the income for water sold outside the City or within the City, but not for the purposes of or in connection with any particular buildings or lands, should be excluded ; And to advise generally.	4. I do not think this is necessary since in my opinion the rate may be fixed so as to cover all expenses incident to the provision of a water supply. (Sd.) BASIL SCOTT. Bombay, 18th February 1901. *Amended on* 14th March 1901.

AMENDED OPINION OF MR. INVERARITY TO THE SAME QUERIES AS SUBMITTED TO COUNSEL (MR. SCOTT), RE WATER TAX.

This question raises the point whether under the Municipal Act, buildings and lands belonging to the Municipality are assessable to water tax.

Any lands or buildings that are let are assessable and the tax is payable by the occupier (Section 146) who cannot recover the same from the Municipality (Section 148).

As to lands and buildings in the occupation of the Municipality, I am of opinion that Section 141, clause *b*, would include any such property of the Municipality within the areas affected by clause *b*, but it does not follow that the water tax can be levied, for I find that under Section 146 property taxes can only be levied on (1) the occupier when he holds from Government, the Corporation or a fazindar and in other cases only from the individuals mentioned in 146 (2) *a*, *b* and *c*; *a* and *b* do not apply to the Municipality for if they let the occupier pays and *c* only remains, *viz.*, "a person in whom the right to let the property in question vests."

* See Proceedings of the Standing Committee dated 14th March 1901.

In my opinion the Municipality has not the right to let a great portion of the property vested in them, *e.g.*, the streets, the sewers, and buildings connected with the drainage system. It follows that water-tax cannot be levied from them in respect of such property but only from property in their occupation which they have the right to let.

I therefore think that the Rs. 4,38,000, or at any rate so much thereof as is not applicable to property which the Municipality have a right to let ought not to be taken into account in estimating the water revenue.

Before any property can be rated some person must be found who can be called on to pay the rate in respect of it because the rate is on the person and not on the property, the property being only the standard by which the person is to be rated (see Boyle on rating p. 60). As I have shown above unless you can find a person who fills one of the descriptions given in Section 146 the property cannot be rated. My opinion has been given entirely on the special wording of the Municipal Act, but I may add that according to the English cases where the poor rates are levied from *the occupier* underground sewers are held not rateable, though above-ground sewer works are rateable, it being held that underground sewers are not capable of beneficial occupation. This practice the House of Lords refused to disturb though they evidently thought that on principle underground sewers ought to be rated. *See London County Council* v. *Erith*, &c., *App. Ca.* 1893, *p.* 562.

Highways also cannot be rated in England as they are not in the exclusive occupation of any one.

2. Under Section 115 no more than Rs. 16,24,000 can be spent for supplying water, for this sum I understand has been adopted by the Corporation and has become a budget grant under Section 130, as no more can be spent, I think the Corporation are not justified in taxing at a rate which will produce a higher revenue except for such additional sum as they estimate will be required to meet possible expenditure in respect of the water supply which might be spent under Section 115, Clause 2.

3. I think they cannot be taken into account. These deficits have been paid, and consequently it is not necessary to raise any monies to pay these expenses.

4. I think such items need not be taken into account, they would no doubt have to be taken into account, if the Municipality were under any duty to treat what I will call their water property as a distinct asset as to which a separate account must be kept to which all receipts and expenditure should be credited and debited, but the Municipal Act does not appear to me to impose any such duty. On the contrary, under Section 111 all monies go to the credit of "the Municipal Fund"

and under Section 118 such monies are directed to be applied in payment of all expenditure under Sections 61, 62 and 63. It therefore seems to me that these monies as well as the water tax itself when paid into the Municipal fund lose their identity and could be applied for other purposes than the water supply of the City. I think money received for water sold as stated is "proceeds of disposal of property by the Corporation" within Section, 111, Clause 1.

Generally. I think that the Corporation can fix on any water tax they think is reasonable with reference to the expenses of providing a water supply for the City. That no Court would interfere with a proper exercise of the discretion given to them and if they *bonâ fide* came to the conclusion that the expenditure would amount to 20 lacs they could tax so as to raise that amount, and no one would be allowed to say that in his opinion 16 lacs expenditure was all that was required. But if the Corporation adopt the budget estimate of 16 lacs which in effect is expressing their opinion that that is the expenditure required and then proceed to raise a revenue by taxation of 19 lacs, I think they would exceed their powers. I may point out that there is no duty to estimate the expenditure exactly. It would be impossible to do so. Section 132 contemplates less expenditure than the estimated expenditure in which case the balance of money unexpended can either be taken into account in the opening balance of the Municipal fund of the next year or expended on the object originally intended. So that if a balance of revenue raised by water tax remains in hand the Act authorizes it being placed to the Municipal fund generally and it need not be carried over to the next year.

(Sd.) J. D. INVERARITY.
(Amended on 11th March 1901.)

February 7th, 1901. *

RE TRUST DEED IN RELATION TO THE NUSSERWANJI MANECKJI PETIT PUBLIC HALL.

EX-PARTE.—THE MUNICIPAL CORPORATION *RE* TRUST DEED IN RELATION TO THE NUSSERWANJI MANECKJI PETIT PUBLIC HALL.

INSTRUCTIONS TO COUNSEL TO ADVISE.

Herewith marked No. 1 is a print of the proceedings of the Municipal Corporation at their Meeting held on the 6th September

* See Proceedings of the Standing Committee dated 14th March 1901.

1894. Counsel will please peruse the portion of these proceedings which refer to the subject matter of the present instructions from page 292 to page 300.

The conditions on which Bai Dinbai, widow and executrix of the late Nusserwanji Maneckji Petit, offered to make over to the Municipal Corporation two sums of Rs. 5,00,000 and Rs. 2,50,000, the former for the erection and establishment of a Public Hall to perpetuate the memory of her late husband, and the latter for the establishment of a Free Library in the same Hall, will be found fully set forth in the two statements which accompanied her letter of 20th January 1894 to the Municipal Commissioner (pp. 294-297). The motion of Mr. P. M. Mehta (p. 298) to the effect that the Corporation, while appreciating the public spirited liberality of the offer, were unable for reasons stated to accept it in the terms in which it was made, was carried at this meeting.

Bai Dinbai then, by a letter to the President of the Corporation, dated 6th November 1894, to some extent modified her conditions in regard to the site for the Hall, and by another letter of the 3rd December 1894 made it clear that she placed before the Corporation two distinct offers, one of Rs. 5 lakhs for the Hall and the other of 2½ lakhs to be added to the 5 lakhs as a further sum for the accommodation and provision of a Free Library, and that it was optional for the Corporation to accept both these offers or the 1st only.

These letters were considered by the Corporation at their meeting of the 3rd December 1894, when a Resolution was passed accepting the offer of 5 lakhs for the building of a Public Hall, provided terms for a site could be arranged with Government, and appointing a Committee for settling the particulars and details in conference with Bai Dinbai (see printed copy of Proceedings marked No. 2).

The matter next came before the Corporation on the 10th August 1896, when the report of the Committee, dated the 20th July 1896, was considered, as also letter from Bai Dinbai, dated the 3rd August 1896, approving of that report, subject to a trifling amendment, and a resolution was passed detailing and formally accepting the terms as thus arranged between Bai Dinbai and the Committee, the Municipal Commissioner being requested to take the necessary measures to carry out that resolution bearing in mind that in no case should the cost of the building and the furnishing of the Hall exceed 5 lakhs (see copy of Proceedings of the Corporation of 10th August 1896 herewith marked No. 3).

On the 6th January 1898 the Corporation referred the plans and estimates for the new Hall (which in the meanwhile had been prepared by the Executive Engineer, Municipality,) to a Committee for report (see print Proceedings No. 4).

On the 14th March 1898 the Corporation resolved that the report of the committee of the Corporation on the question of plans and estimates of the proposed Nusserwanji Maneckji Petit Public Hall be approved subject to such modification in the design estimates as might be necessary to restrict the cost to the 5 lakhs to be given by Bai Dinbai Nusserwanji Maneckji Petit (copy Resolution No. 5).

On the 23rd March 1898 the Standing Committee resolved that a Trust Deed be prepared as soon as possible by the Solicitors for the Municipality on the one part and the Solicitors for Bai Dinbai on the other part, and that it should provide for the deposit in the joint names of Bai Dinbai and the Municipal Commissioner of Rupee Paper or other approved security of the actual value of 5 lakhs.

On the 10th May 1898 the Municipal Solicitors wrote to Bai Dinbai, but owing to that lady's death it was not until the 7th November 1898 that they received a reply from Messrs. Craigie, Lynch and Owen, on behalf of Bai Awabai Framji Petit, the daughter and sole executrix of the will of the late Bai Dinbai (copies of the letter to Bai Dinbai and subsequent correspondence between the respective Solicitors is sent herewith, No. 6).

Messrs. Craigie, Lynch and Owen's letter of the 7th November 1898 was forwarded in due course to the Municipality, and on the 3rd January 1899, the Commissioner addressed them further and they replied on the 11th idem, and on the 22nd February 1899 the Standing Committee approved of the acceptance of the terms stated in the Commissioner's No. 26398, dated the 21st January 1899, and its accompaniments regarding the payment of the 5 lakhs, and on the 18th March 1899 Messrs. Craigie, Lynch and Owen, on behalf of Bai Awabai, consented that the Trust Deed should provide for the payment of the 5 lakhs by the instalments mentioned in their letter to the Municipal Solicitors of the 7th November 1898 upon the certificate of the Municipal Engineer, but that any extra instalment referred to in Messrs. Craigie, Lynch and Owen's letter of the 11th January should only be paid after Bai Awabai's Engineer had certified that the state of the building required that such extra instalment be paid (see accompaniment No. 7).

Messrs. Craigie, Lynch and Owen further stated that their client wished that the Trust Deed should provide that Rs. 25,000 last instalment should not be payable until the building had been certified by the Municipal Engineer to have been completed.

These terms were thus finally arranged and eventually a draft Trust Deed was prepared and forwarded by the Municipal Solicitors on the 14th August 1899 to Messrs. Craigie, Lynch and Owen for approval on behalf of Bai Awabai Framji Petit. This draft is sent herewith marked No. 8.

Counsel's advice is now sought upon a question which has arisen in connection with condition 4 at page 10 of this draft.

This clause, it will be observed as originally drafted in black ink, is a verbatim copy of clause 5 of the report of the sub-committee of the Corporation appointed to confer and settle details with the late Bai Dinbai (see printed proceedings No. 3 p. 250), and that report (as will be seen from page 251) was approved by Bai Dinbai in a letter to the President of the 3rd August 1896, and on the 10th August 1896, the Corporation, by their Resolution of that date, in which the terms of the sub-committee's report are fully set out (see p. 252, para. 5), accepted this condition in that form.

Bai Awabai, although her attention has been specially drawn to the facts and to Bai Dinbai's letter of 3rd August 1896, insists on the alteration of this clause as shown in red ink, and the Corporation objects to this. We will now refer Counsel to the correspondence which has taken place on the subject (see No. 9).

On the 19th October 1899, Messrs. Craigie, Lynch and Owen returned the draft with their red ink alterations, and stated with reference to these that most of these alterations are not important and we hope you will "see your way to accept them."

This letter together with the draft deed were then forwarded by the Municipal Solicitor for the Commissioner's instructions as to the alterations in red ink.

The Municipal Solicitors were instructed to object to some of the alterations, but that others need not be objected to, while as to others again they were instructed to accept them subject to a reference which might possibly have to be made to the Standing Committee. Amongst the alterations which the Solicitors were instructed need not be objected were the red ink alterations in clause 4, p. 10.

On the 17th November 1899, the draft was accordingly returned re-approved by the Municipal Solicitors as altered in green ink and subject to the marginal notes in green ink of *that* date. the alteration in red ink in Condition 4 being in accordance with instructions as abovementioned practically accepted at the time; thus it is that the green ink marginal note opposite this clause bears a later date.

On the 27th November 1899, Messrs. Craigie, Lynch and Owen sent back the draft, which they stated was approved on behalf of the donor with a few unimportant alterations to which they referred in their letter, and as regards the marginal notes at pp. 9 and 10 they suggested the advisability of laying the draft before the Corporation, or the Standing Committee after it was finally approved by the parties.

A copy of their letter was then sent by the Municipal Solicitors for instructions along with the draft and on the 21st December they received it back with a copy of a resolution of the Corporation, No. 9867, dated the 18th of December 1899. This resolu-

tion, it will be observed, adopts the draft subject to two changes :—

The 1st has reference to Condition 1 and the alterations which had been made therein, and need not be further noticed, as the point discussed has, it will presently be seen, since been arranged, the donor's wishes being acceded to.

The 2nd change in the draft which the Corporation Resolution called for was the omission of the red ink alterations in Condition 4 and its adoption in the form in which it was originally drafted.

The correspondence on the subject will be found in No. 9, and the result of it is that Bai Awabai, on the other hand, insists on the red ink alterations in Clause 4, and the matter is thus at the present moment at a dead-lock, as Bai Awabai will not pay the money till the Deed is completed, and she will not accept the Deed otherwise than in the form she insists on. The Resolution of the Corporation No. 9176, dated the 12th November 1900, at which Bai Awabai's final letter of the 2nd October 1900 was considered, shews that the Corporation desire to be advised upon their legal position under the circumstances above stated.

We have already drawn particular attention to the distinct approval by Bai Dinbai of the condition as originally drafted and its formal acceptance by the Corporation, but going back even to an earlier time it will be evident that Condition 4 of the draft as originally prepared is in strict accord with the original conditions which Bai Dinbai herself in the first instance stipulated for, in so far as it prescribes that the Hall is to be available for all public meetings convened for any lawful purpose (see 6th condition on p. 295 of No. 1). This is now the only point of difference between the parties, and the question seems to be whether Bai Awabai, acting as she is as the executrix of the late Bai Dinbai, is not bound by the condition in the form in which it was deliberately and formally accepted by the latter and accepted as the Corporation Resolution of the 23rd April 1900 shews "after careful discussion and deliberation particularly of the proposal now set forth by Bai Awabai and which thereupon she (Bai Dinbai) gave up."

The Corporation, as further appears from the last mentioned resolution, have purchased from Government the land required for the hall on the faith of Bai Dinbai's acceptance of the terms. The actual deed has not, we believe, been executed, but the terms are arranged with Government.

Counsel is requested to advise the Corporation as to their legal position and rights in the matter, and whether in the event of Counsel considering the Corporation are entitled to have the Condition 4 of the Trust Deed in the form originally drafted any steps can be taken to compel Bai Awabai to accept it in that form or to carry out the grant.

And to advise generally.

OPINION.

This does not appear to be a case of a gift pure and simple. A gift is a transfer of property without consideration. The arrangement with Dinbai as evidenced by the Committee's report and Dinbai's letter of the 3rd August 1896 appears to me to amount to an agreement for good consideration. Dinbai promises to pay 5 lakhs of Rupees on condition of the Corporation agreeing to undertake certain obligations, *e.g.*, the providing a site, the maintenance of the hall, &c. I therefore think that when Dinbai died, the Corporation could have enforced the payment of the 5 lakhs of rupees by her estate.

The draft Trust Deed and subsequent correspondence go rather on the lines that there was an incomplete gift which the intended donor's executrix was willing to complete; in fact she is styled the donor in the draft. If this latter view was correct, the legal position of the Corporation would be that the gift is not one that they would even now enforce, if the donor chose to withdraw, but I think the correct view is that there is an agreement binding on the donor's estate which could be enforced by suit. It follows that Awabai cannot insist on the alteration she wishes to make in the agreement arrived at with Dinbai as evidenced in para. 5 of the Committee's report. This is all I am asked to advise on, but I cannot refrain from adding that the point in dispute appears not to be of sufficient importance for the Corporation to insist on their strict rights. It would be too ridiculous if the matter was to be thrown into litigation over such a point.

J. D. INVERARITY.

January 21st, 1901.

RE REVISION OF THE MUNICIPAL ACT.

30, ESPLANADE ROAD,
BOMBAY, *8th June* 1900.

To THE MUNICIPAL COMMISSIONER.

SIR,—We have the honour to forward herewith 10 prints of the Act as now revised by us.

2. We have had explanatory notes pasted in their appropriate places opposite the different parts of the proposed amendments to which they refer, and these, we think, will be found of considerable assistance when considering the draft, but while they pro-

bably refer more or less briefly to the more important points, it will be understood they are by no means exhaustive. To have attempted to discuss in detail all the alterations (which run through almost every section) would not, we think, have been attended with any advantage commensurate with the additional labour and expense which it would have involved.

3. Again it would have been extremely difficult and indeed premature, until the amendments have been fully considered by yourself and the Heads of Departments, to attempt to indicate alterations and additions by italicised printing. It will therefore of course be necessary for the several Heads of Departments to compare each section carefully with corresponding parts of the present Act, and that there may be no difficulty about this, we have adhered as closely as possible to the numbering of the Sections in the present Act, and where new sections have been introduced or existing sections have been brought into new places, we have given them the number of the Sections of the Act immediately preceding, but adding the letters A, B, C, &c., on the other hand, where sections have been omitted or transferred to other places, we have dropped their numbers.

4. It will no doubt be convenient eventually to have the whole compilation together with the existing Act printed in three columns containing (1) the provisions of the existing Act, (2) those of the draft amendments, and (3) our explanatory notes side by side; but as there will no doubt be many alterations and very probably additions suggested whilst the matter is being considered by Heads of Departments, it would be premature to do this at present.

5. Some of our verbal alterations may at first sight appear to be fanciful. Our object, however, has been to endeavour to be consistent in using the same words and terms of expression when it has been intended in different parts of the Act to express the same meaning. In this it will no doubt be found that we have only partially succeeded.

6. The printing of the draft is not so satisfactory as we should have wished. This is due to the fact that it had to be done piecemeal and that after parts had already been printed the necessity for alterations and amendments in other parts on which we were working often necessitated numerous alterations in the former. Notably this was the case in regard to the adoption of the definition of "a property" which now almost throughout the draft takes the place of the very unsatisfactory and ambiguous expression "premises."

7. The earlier part of the Act (upto Section 68) is that which will be found to have undergone least change; the definitions of course are only tentative and will be properly arranged when finally determined on; there were no suggestions for substantial alteration of the provisions in regard to the Municipal constitution, and though we found it desirable to rearrange and alter the

form of many of the sections and sub-sections and redraft some of them, only point in Chapter II to which we need specially refer is the new section 31 A, which, with its corresponding alterations in other sections noted against it, goes as far as we are at present disposed to advise in the direction of dealing with the personation which has been so common at the elections. This section, however, and the fact that all Municipal servants are public servants (see our note to Section 521 of the draft) should enable most offences at elections to be dealt with.

8. The contract provisions in the draft (sections 69 to 73 of the Act) are we think much improved in arrangement and form, while in substance they embody an amendment which experience has shown was very desirable.

9. In Chapter IV the alterations are chiefly in matters of form and arrangement, with some few new provisions or omissions, which are noted,

10. Chapter V calls for no special remark beyond what will be found noted—sections 93 to 105 have been left over, for the reasons stated—but any alteration of these which may hereafter be found to be necessary will we think be purely formal.

11. Chapter VI contains important new provisions in regard to Municipal Securities held on joint account.

12. Chapter VII we have left over for the reasons stated. If amendments are found necessary they will not hinge upon or necessitate alterations in other parts of the draft.

13. Chapter VIII (Municipal Taxation), besides numerous alterations in form, will be found to comprise several more or less important changes (and as we believe improvements) in substance ; probably the most important of these is the introduction of provisions to enable the charge on properties for property taxes which the Act already creates to be enforced in a summary way without recourse in each case to the costly proceedings in the High Court which are at present the only way of making that charge actually productive. We do not doubt that these amendments, if adopted, will very greatly facilitate the recovery of the Municipal Revenue, and we do not for a moment believe that in practice it will ever really be necessary to resort to a sale. The mere fact that the power exists and can be and if necessary will be exercised will suffice.

14. Chapter IX (Drainage) contains many alterations in drafting and form, and as will be seen from a glance at the notes embodies some amendments of great importance.

15. Chapter X.—The alterations in this Chapter are for the most part in matters of form and drafting.

16. One of the most important of all the amendments suggested is in Chapter XI (Regulations of Streets). We refer to the proposed abolition of the distinction which exists in the present Act between "Public Streets" and "Private Streets"

and the proposed vesting of all streets in the Municipality. We would refer you to our notes against Section 289. Other amendments of considerable importance in connection with streets are also embodied.

17. In Chapter XII (Building Regulations) we have embodied many changes in form and arrangement and some in substance. All will we hope be improvements. In regard, however, to detailed regulations as to height of buildings, their ventilation, &c., &c., we have felt constrained, for reasons noted, to recommend that these be dealt with in a series of more systematic and perhaps more up-to date by-laws than we have at present. We understand this is a subject which is now engaging the attention of yourself and of the Executive Engineer that matters to which we refer are in our opinion clearly more appropriate to by-laws than to the Act itself. In particular we have made much alteration in Section 348 which as it now stands in the Act is far from satisfactory.

18. Chapters XIII and XIV call for no special remark; indeed as regards the latter we have not thought it worth while to have it reprinted.

19. Chapter XV (Sanitary Provisions) contains important alterations both in form and substance. It embodies the amendments of the Act contained in the "Bombay Prevention of Adulteration Act, 1899" as well as (so far as seems desirable) such of the provisions of that Act as under its terms can be, but have not yet been, brought into force in Bombay.

20. Chapter XVI (Vital Satistics) contains important alterations on the lines of those proposed in 1899, but in an improved form. (See our note at section 442.)

21. In Chapter XVII some important additions have been made in the powers of making by-laws.

22. The additions suggested in Chapter XVIII—Penalties—are not very extensive but are of some importance.

23. The amendments proposed in Chapter XIX, XX and XXI sufficiently speak for themselves and are more or less incidental.

24. The only Schedules we have had reprinted are schedule R of the Act (which we have called Schedule A, as it is, in our draft, brought into operation by S. 2A) and Schedule P.

We have carefully altered and adapted Schedule R to meet the conditions required to be provided for during the interregnum there must be between the passing of the new Act and the time when it comes fully into operation, namely, the time when the first Corporation to be constituted under the new Act, is completed.

Schedule P is designed to harmonise with the provisions proposed in regard to vital statistics.

25. We return herewith the various compilations and documents noted in the list at foot, which we have from time to time received in connection with the amendment of the Act.

26. We must confess that when we were asked to undertake the work of preparing the amendments, we did not fully appreciate the magnitude of the task that was before us ; it was, as it turned out, nothing short of a revision of the Act, from beginning to end, involving very extensive re-drafting and amendments with very numerous additions to be worked in. When we realized this it became evident that having regard to the exigencies of our business it would be absolutely impossible for Mr. Crawford to carry out the work without efficient assistance, he accordingly, as you are aware, placed the work of preliminary drafting in the hands of Mr. Jardine, but it soon became manifest that, while the former could not afford the time to do all the work himself, the latter had not, on the papers which were before us, sufficient material, nor had he indeed the experience of the practical working of the Act, and of the requirements to be provided for, which were essentially, necessary. To supplement this latter deficiency by way of satisfactory written instructions would have meant a vast amount of labour which even then could not possibly have sufficed, so in the result Mr. Jardine and Mr. Crawford had to work to a great extent together, and in this way the work was got through in much shorter time than it would have been in the hands of one person alone. We regret that owing to the other business arrangements of both it has only been possible to make much satisfactory progress during vacations or times when we have been able to devote ourselves exclusively to the work, but this could not under the circumstances be helped.

27. Mr. Jardine's fees in terms of a special arrangement come to with him (based on the time he has been engaged) amount to Rs. 11,280. Our charges must also depend on the time Mr. Crawford has had to devote to the work ; he has been exclusively engaged on it for 68 days which we charge for at the rate of Rs. 200 a day (the rate at which Mr. Crawford informed Mr. Snow he would have to charge). In addition to this we have incurred actual expenses on printing, &c., to the aggregate amount of Rs. 1,253-3-0, thus making a total of Rs. 26,133-3-0.

We enclose a formal statement of the charges and would add that we treat them as inclusive of correspondence, attendance and innumerable odd hours and half hours which have been given up by Mr. Crawford to this work outside the days charged for, and also as inclusive of clerk's work of which in one way and another there has been a great deal.

28. We understand a grant of Rs. 10,000 has been made towards these costs, and we shall feel obliged if you will kindly favour us with a Cheque for that amount as early as convenient and ask the Corporation to sanction a special grant for the balance.

We have, etc.,

CRAWFORD, BROWN & Co.

GAS ILLUMINATIONS.

BOMBAY, 22*nd July* 1896.

To P. C. H. SNOW, Esq., Municipal Commissioner.

SIR,—We have the honor to return the accompanying papers which were forwarded to us for attention under your No. 6743, dated the 11th instant, the Executive Engineer having suggested (in para. 1 of his No. 4766, dated 10th instant) that a form of application should be prepared to be submitted by the Gas Company for permission for illuminations on the basis of the Corporation's Resolution No. 2955 of the 25th ultimo.

The resolution of the Corporation, as we understand it, proposes that, instead of the general indemnity, of which we sent a form with our letter of the 15th May 1895, there shall in each individual case be embodied in the permit the condition as to the Company being liable for damage by fire.

Whatever plan is adopted, the object to be attained in each case presumably is, that the whole responsibility shall fall on the Gas Company, and that the Municipality shall be indemnified against any consequences for this purpose. A contract or instrument of indemnity is required, and, though such a contract may be perfectly validly embodied (as we understand) is proposed in the application and permit, we are inclined to think that in each separate transaction the application will have to be stamped as an indemnity bond—that is to say, with a stamp of Rupees 5, unless there is also such a general indemnity agreement as we suggested.

Our proposal was, as you know, that a *general* agreement of indemnity should be executed on a five-rupees stamp, and that this should be merely referred to in each individual application, a course which would not, we think, have necessitated a stamp on the individual applications, but if in each case the application is to embody a separate contract of indemnity, we do not see how this stamp duty can be avoided.

In accordance, however, with the instructions received, we have prepared, and send herewith a form of application prepared, so as to contain in itself the terms of the indemnity and to be independent of any other document.—We have, &c.,

CRAWFORD, BURDER & Co.

Ex parte the Municipal Corporation of the City of Bombay re Question of Liability of the Gas Company resulting from Gas Illuminations.

CASE FOR THE OPINION OF COUNSEL.

The following resolution has been submitted to us by the Municipality, *viz*:—

"That the joint opinion of Counsel be taken as to the liability, if any, the Corporation incur for damage or loss to life or proper-

ty arising or resulting from gas illuminations put up by the Gas Company under a permit issued by the Municipal Commissioner."

It appears that it has been the custom since the passing of the Municipal Act to grant permits in the form sent herewith, marked A, to the Gas Company to erect arches over streets and by the side of streets on the occasions of marriage and other ceremonies when illuminations are required, this being done under section 313 of the Act.

Hitherto no damage or accident has occurred by reason of such permit being given to the Company, but in the month of February 1895 a notice was received by the Municipal Commissioner from one of the inhabitants of a street, in which permission had been given, informing the Commissioner that he would be held liable for any damage that might occur by reason of such permit being given. This notice for the first time raised the question in the mind of the Municipal Commissioner as to the extent of the liability that the Corporation might be incurring by granting these permits, and the matter was referred to us for our opinion, and we then advised that, as under section 289 of the Act public streets are vested in the Corporation and expressly placed under the control of the Commissioner, if in the exercise of that control he permits lights to be put up which, if insufficiently protected or carelessly used, might become a source of danger, he undertook, we thought, for the Municipality the same responsibility for their safe conduct and proper use as attaches to a private individual who permits fire or any other dangerous thing to be kept or used on his premises, and the same responsibility, we thought, would attach to the case of private streets, though in this case the Commissioner would have no power to give or withhold permission in respect of lights to be attached or suspended from a greater height than 12 feet; and we then suggested that permission should only be accorded on the terms of the Gas Company accepting all responsibility by agreeing to indemnify the Municipality in respect of it.

Our opinion applied only to the erection or fixing of lights upon or over streets as, of course, the Commissioner has no power to give permission or prevent the erection of lights alongside streets on or over private property.

Upon this opinion being received, notice was given to the Gas Company that no further permits would be given unless the Gas Company were prepared to accept all responsibility and agree to indemnify the Municipality in respect of any claim which might be set up by any person for loss or damage to life or property owing to the lights, and the Manager of the Gas Company in reply on the 29th of April 1895 stated that it had been the custom for the last thirty years to erect these lights on the occasions of weddings and rejoicings and no claim had ever been made, the Gas Company having hitherto "tacitly accepted all responsibility, and we now at your request do so in writing."

Upon this letter being referred to us, we thought it desirable that there should be a more formal and explicit document, and we drafted a short general agreement (copy herewith marked B) which we thought suitable to be signed in each individual case together with a form of permit which we suggested. These documents were in due course submitted to the Gas Company, who suggested that it would be sufficient if after the words "the erection of the necessary fittings and gas lights upon or over the street" the following words were added "provided that the Company shall not be relieved by reason of the permits of the Municipality from any liability otherwise falling upon them at common law." We, however, were of opinion that this suggestion could not be accepted as a claim established against the Municipality, might, or might not, give them a sufficient ground for seeking to throw the burden on the Gas Company, but assuming it did, it was evident that the liability falling on the Gas Company at common law might fall far short of the liability and expenses the Municipality might actually be called upon to meet. We are not in a position to point out the actual risk that is involved in permitting these illuminations, but it is conceivable that many accidents might happen where temporary erections of this nature are allowed over and along a street and where, moreover an explosive and inflammable substance like gas is used in great quantities, and that there is some risk is apparent from the fact that the Gas Company have a fitter present the whole time at all illuminations as a protection against accidents.

The Gas Company having refused to give the indemnity asked for, a Sub-Committee of the Corporation was appointed to consider the matter, and, upon their recommendation, a further reference was made to us as to whether the admission of liability in the Gas Company's letter of the 29th of April 1895 was sufficient to render the Company liable, but we felt that, having regard to the unwillingness of the Company to give a practical legal expression to their acceptance of responsibility, together with the correspondence that had taken place with them since the date of that letter, indicated that, on further consideration, they had come to the conclusion that the risk was one of a more serious importance than they supposed, we were therefore of opinion that a proper indemnity should be insisted upon. As matters then stood, the Municipality might, according to our views, be held responsible for damage, while the Gas Company and the persons on whose behalf the illuminations were undertaken alone derived any tangible advantage from them—the former by an increase to their revenue and the latter by having their houses illuminated. The risk, whatever it might be, under these circumstances it appeared to us should be borne by the Company or their customers, and, so far as the Municipality were concerned, it was the Gas Company they should look to for indemnity, leaving the Company in their turn, if they thought necessary to protect

themselves by obtaining a covering guarantee or indemnity from the persons for whom the illuminations were provided.

The Gas Company were again informed that the Commissioner must insist upon their giving the indemnity demanded, and in reply the Company informed the Commissioner that, if the decision was adhered to, they would cease supplying gas illuminations to the public, except in a few places where premises do not abut on the public road, and stated that, as many native house-owners now insured, if a house was burnt down by reason of the illuminations, the Insurance Company would pay, and, if a neighbouring house was burnt down, the owner would have no claim against the owner whose house first caught fire, his remedy being to insure and, if they failed to do so, they must take the consequences.

The matter was then brought before the Corporation who resolved that "it was advisable that in future such permits for gas illuminations should be issued to the Gas Company alone, and that a clause be inserted therein that all liability for damage or loss by fire arising from such illuminations should attach to the Gas Company."

This resolution amounted to a proposal that, instead of a general indemnity as suggested by us, there should in each individual case be embodied in the permit the condition as to the Company being liable for damages. We pointed out that this would necessitate a stamp of Rs. 5 being affixed to each permit as an Indemnity Bond, whereas, if one general indemnity agreement had been prepared as suggested by us, such agreement could be referred to in each case. We, however, prepared a draft form of application embodying the conditions which might be accepted by the Municipality, and, in accordance with the resolution, a copy of this application is sent herewith marked C.

A copy of this together with the resolution of the Corporation was forwarded to the Gas Company, who refused to accept it and proposed an alternative, one copy of which is sent herewith and marked D.

The matter then reached a dead lock; either the permits must be given as heretofore or the Gas Company would discontinue the illuminations, and, pending the opinion of Counsel, permits have been given in the form used hitherto.

We have thought it better to give a sketch of the history of the matter in order that Counsel may understand the position taken up by the Gas Company as well as the Corporation.

As we have already advised we can conceive of cases in which the liability might be established, and we can conceive of others in which claims might be strenuously pressed against the Corporation, but successfully resisted after more or less expensive litigation, the costs of which might or might not be recoverable partly (but certainly would not be recoverable wholly) from the persons making the claims, and it is against such claims that we consider the Municipality are entitled to look for an indemnity.

Counsel is, therefore, requested to advise :—

Queries.	*Opinion.*
(1) Whether the Corporation incur any, and, if so, what, liability for damage or loss to life or property arising or resulting from Gas illuminations put up by the Gas Company under a permit issued by the Municipal Commissioner.	(1) We think that the Corporation and the Commissioner, by giving permits under section 313 for gas illuminations, are in the position of persons, who expose others, and the property of others, to exceptional risk, and are therefore liable, as insurers of such others, against consequent harm, not due to a cause beyond human foresight and control (Pollock, Tort Edition, 1895, p. 438), and this liability exists, although there may be no negligence on the part of the Corporation or of the Commissioner, and although the damage may have been caused by disregard or disobedience of the conditions upon which the permit has been granted. See Black *versus* Christchurch, &c., Appeal Cases (1894), p. 48. In fact the liability extends, upon the authorities, to any damage arising naturally out of the grant of the permit and which reasonable care would have prevented.
(2) If they incur any liability, in what manner they can best protect themselves.	(2) We think that the agreement and permit (Exhibit B to these instructions) adequately protect the Corporation and Commissioner, and we do not think that any of the other suggested documents do so. There can be no reason why the Corporation or Commissioner should incur any liability whatsoever in regard to illuminations of public or private street for the gratification of individual, and the Gas Company can, in each case, protect itself, by agreement with the individual who is employing them.
And to advise generally.	

16*th December* 1896.

BASIL LANG.
JOHN MACPHERSON.

RE THE GRANTING OF LEAVE TO MUNICIPAL OFFICERS AND EXTENT OF SUCH LEAVE.

BOMBAY, 6*th May* 1890.

To THE MUNICIPAL COMMISSIONER.

SIR,—We have the honour to inform you that we have considered the application for leave made by Mr. Brunton, and the minute of the Municipal Commissioner upon it, together with the

resolution of the Standing Committee of the 30th of April last, and are of opinion that the Standing Committee have power to sanction the special leave and allowance applied for, for the following reasons :—

Section 84 of the Act gives the Commissioner power to grant leave of absence, subject to the regulations at the time being in force under section 81, to any Municipal officer or servant, the power of appointing whom is vested in him, and by section 81 the Standing Committee shall from time to time frame regulations in consonance with any resolution that may be passed by the Corporation *inter alia* regulating the grant of leave to Municipal officers and servants and authorizing the payment of allowances to the said municipal officers and servants or *to certain of them* whilst absent on leave.

No regulations appear to have been framed under this section, and therefore the by-laws framed under section 267 of the Bombay Municipal Act, 1872, confirmed by the Municipal Corporation on the 10th of May 1878, and by Government Resolution No. 733 of the 4th of June 1878, are, under section 2 of the present Act, still in force. If therefore, the leave applied for was leave contemplated by the Uncovenanted Service Rules of Government, the allowance provided by those rules only could be sanctioned.

The application made by Mr. Brunton, however, is for extraordinary leave for 6 months, on full pay, under special circumstances, and such leave, not being contemplated by the rules of the Uncovenanted Service Rules of Government, does not, in our opinion, come under the powers given to the Commissioner under section 84. The Standing Committee, however, if they are of opinion that Mr. Brunton has made out a good case for the leave asked for, can, under section 81*b*, grant the leave applied for, and authorize the payment of a special allowance to him subject to the same being confirmed by the Corporation. The fact that the Municipal Commissioner has power to grant certain leave within specified limits and at fixed allowances, does not, in our opinion, deprive the Standing Committee of the power given to them under section 81, of from time to time regulating the grant of leave and authorizing payment of allowances to Municipal Officers and servants *or certain of them.*

For the reasons above stated, we consider the Standing Committee have power to pass a resolution to the following effect, subject to confirmation as before stated.

Resolved : "That, regarding the application of Mr. Brunton for special leave for 6 months on full pay, having regard to the facts stated in the application, the same be granted in substitution for such portion of his furlough as would be equivalent at the full rate of furlough pay to the amount of leave now applied for and as a special case."—We have, &c., CRAWFORD, BURDER & Co.

(*Note.*—The leave was granted by the Corporation.)

PENSION REGULATIONS—SOLICITORS OPINION ON THE SUBJECT OF WITHDRAWAL OF RESIGNATION BY Mr. RIENZI WALTON.

BOMBAY, 17*th April* 1893.

To H.A. ACWORTH, Esq.,
Municipal Commissioner.

SIR,—With reference to recent interview which Mr. Crawford had with you when you desired us to take Counsel's opinion on the question of the Pension Regulations as bearing upon Mr. Walton's case, we have the honor to forward herewith copy of a case which we submitted to Mr. inverarity and of his opinion, from which you will observe that he agrees with us in thinking that retrospective effect cannot be given to the new regulations and that any special regulation of the kind proposed would be *ultra vires*, but that he does not see any reason why the Municipality should not allow Mr. Walton to withdraw his resignation and cancel their acceptance of it, so as to enable him now to elect under the new rules and obtain his pension under them.—We have, &c., CRAWFORD, BURDER & Co.

1. Whether under the circumstances stated Mr. Walton's pension rights must be governed by the old rules or by the new regulations and whether the latter are capable of retrospective application?

1. I am of opinion that, as matters stand, Mr. Walton has no legal right to pension under the new rules. Nor do I think that the Municipality can give retrospective effect to those rules or have any power to frame a rule to give the benefit of the new rules to Mr. Walton.

2. Whether such a special regulation as has been suggested (*see* annexed draft) would, if framed by the Standing Committee and duly confirmed, be *intra vires* and valid?

2. I think it would be *ultra vires*.

3. If not, whether Counsel can suggest any other means by which Mr. Walton can now be legally placed upon the same footing as regards pension as if he had remained in the Municipal service until the new regulations came in force and to advise generally?

3. I don't see any reason why the Municipality should not allow Mr. Walton to withdraw his resignation of his position as a Municipal servant and cancel their acceptance of it. Mr. Walton would then be able to elect under the new rules and send in his resignation.

It may be worth while to look at Mr. Walton's letter of resignation and see if it is a resignation of his post of Executive Engineer or of his post as a Municipal servant. If the latter, it might, by consent of the Corporation, be treated as a resignation of the post of Executive Engineer and withdrawn as to the latter.

If this is not done, I see no way of giving Mr. Walton the benefit of the new pension rules short of an Act of the legislature empowering the Corporation to give retired servants increased pensions.

April 17*th* 1893. J. D. INVERARITY.

18*th April* 1893.

H. A. ACWORTH, Esq.,
Municipal Commissioner.

SIR,—With reference to your No. 1134, dated this day, (herewith returned), we have the honour to state that we understand Mr. Inverarity's suggestion in reply to query 3 of the accompanying case to be that Mr. Walton's resignation might be treated as a resignation merely of his post of Executive Engineer, but that he might be treated as continuing in municipal service without pay until such time as a fresh application can be received for permission to retire from that service under the new regulations; in other words, if (as presumably was the case) Mr. Walton's resignation was in terms a resignation of his position as a Municipal servant, then that such resignation and its acceptance might respectively, by consent of the Corporation, be allowed to be withdrawn and treated as cancelled *except* in so far as the resignation of the appointment of Executive Engineer is concerned and that Mr. Walton might be permitted to send in a fresh application to retire from municipal service.

This would, of course, be at the best only a device by which it might be legally possible for the Corporation (if under the circumstances they desire to do so) to enable Mr. Walton to have the benefit of the new pension regulations.—We have, &c.,
CRAWFORD, BURDER & Co.

Exparte.—The Municipality.

RE GENERAL CONDITION TO BE PRESCRIBED BY THE STANDING COMMITTEE IN RESPECT OF DRAWBACKS.

Counsel's attention is particularly drawn to section 158 of the City of Bombay Municipal Act, 1888, which provides, sub-section (1), that in the case of a building or land "let to two or more persons holding in severalty" the Commissioner may, for assessment purposes, "either treat the whole thereof as one property or with the written consent of the owner of such building or land treat each several holding therein or any two or more of such several holdings together, or each floor or flat as a separate property," and by sub-section (2) further provides that "when the Commissioner has determined to treat all the several

holdings comprised within any one building or land under this section as one property, he may, subject to any general conditions which may from time to time be prescribed by the Standing Committee in this behalf at any time not later than seven days before the first day of any half-year for which an instalment of general tax will be leviable in respect of the said property, sanction a drawback of one-fifth part of the general tax so leviable."

The High Court, as Counsel is no doubt aware, upon a reference from the Chief Judge of the Small Cause Court, in the case of Goverdhandas Goculdas Tezpal, has held that "may" in sub-section (2) of this section must be read as "shall" (*see* copy notes of this decision sent herewith).

The position of matters, therefore, seems to be this: Every property which fulfils the conditions of sub-section (1), that is to say, which "is let to two or more persons holding in severalty," must be treated, for assessment purposes, as one property, unless the owner consents in writing to the several holdings, or some of them, being treated as separate properties, and in respect of every such property which is treated as one, the Commissioner is obliged, "subject to any general conditions which may from time to time be prescribed by the Standing Committee in this behalf," to sanction a drawback of one-fifth of the general tax leviable thereon.

The question has now arisen whether, by the general conditions to be from time to time prescribed by the Standing Committee as contemplated in this section, they (the Standing Committee) have the power to prescribe certain classes of cases in which drawback is to be sanctioned, and limit the right to claim such drawback to cases falling within those classes. Besides, and independently of, the provision for drawback, the Act, it will be seen, contains (sections 174 to 179) provisions for refund of a proportion of certain of the taxes in respect of vacancies, according to the duration of such vacancies, but stipulates (section 178) that "no refund of general tax shall be claimable in any case in which the Commissioner has sanctioned a drawback under sub-section (2) of section 158."

The provisions above quoted, in regard to properties held in severalty, differ somewhat from those in the former Municipal Acts (the Acts of 1872 and 1878). By section 76, clause 1, of these last mentioned Acts, it was provided that—"In the case of houses or buildings let in flats, or sets of apartments so constructed as to form distinct dwelling places and let as separate tenements, it shall be lawful for the Municipal Commissioner to treat such flats or sets of apartments as separate property for the purpose of the said rates, provided that if any portion of such flat or set of apartments is occupied, the said rates shall be leviable on the valuation of the whole tenement."

As to these cases a right to refund for vacancy was given by a subsequent section of the same Acts (section 82).

By clause 2 of section 76 it was enacted that, "In the case of any chawl or building let out for hire in single rooms, either as lodgings or godowns for the storage of goods, the said rates shall be levied on the annual value of each floor, and the landlord of any such chawl or building shall, if he apply to the Commissioner for such remission on account of the half-year then commencing, at any time within fourteen days after the first day of January or the first day of July, and furnish full particulars of the situation of such chawl or building, and of the number of the rooms and godowns therein, be entitled to a remission of one-fifth part of the consolidated rate leviable thereon under the provisions of section sixty-nine of this Act. Provided that no landlord of any chawl or building shall be entitled to such remission for any floor on which any trade or manufacture is carried on or any goods sold."

Thus by the former Act itself the right to drawback, or "remission" as it is there called, was limited to a particular class of properties, namely, chawls or buildings let out for hire in single rooms either as lodgings or godowns for the storage of goods, and no power was given to any Municipal authorities to prescribe conditions. Whereas from the present Act, as we have seen, this limitation of the right was omitted, but a power to prescribe general conditions was reserved to the Standing Committee and the right of the Commissioner to sanction drawback was made subject to such general conditions when prescribed.

On the 17th December 1890, the Standing Committee, by their resolution of that date, purported to prescribe certain general conditions, as contemplated by section 158 (2) of the present Act (see copy resolution sent herewith).

By this resolution they directed that drawback should be granted—(1) "in every case in which it would have been allowed under the Acts of 1872 and 1878 [section 76 (2)]"; and (2) "in every case in which the property concerned has remained generally, wholly or partially, vacant for more than thirty and less than sixty days"; and they further provided that "all claims for drawback must be submitted not less than thirty days previous to the half-year to which the claim relates."

By the 2nd clause the Standing Committee intended to extend the right to certain cases in which it would not have accrued under the old Acts, but they did also undoubtedly *intend* to limit it to the classes of cases mentioned in their resolution. Inasmuch, however, as this limit was not expressly provided, it was doubted whether the general conditions could have that effect, and they were consequently revised and again placed before the Standing Committee recently for reconsideration (see copy revised general conditions herewith). In effect these revised conditions differ very little from the former ones except in so far as they purport in express terms to the right to draw back, to the classes of cases mentioned in them.

The question has now been raised in the Standing Committee as to whether they have power at all by the general conditions contemplated by section 158 (2) to limit in any way the right to drawback of one-fifth of general tax, which (apart from any such general conditions) would, as we have seen, apparently exist in respect of *every* property "let to two or more persons holding in severalty."

It is contended, on the one hand, that it could never have been intended that the Standing Committee should have the power to cut down the right which the Act itself confers upon every owner of property let to two or more persons holding in severalty; that if it were otherwise they might render the provisions of the Act in that respect nugatory; that the very fact of the omission from the present Act of the express limit of that right to a specified class of cases, shows that the right was intended in the present Act to be unlimited; that the general conditions contemplated were merely for the purpose of regulating (as for instance, by prescribing the time within which application should be made to the Commissioner to sanction the drawback), and not for the purpose of limiting the right; and that even if the intention was to reserve a power of limitation to the Standing Committee, the Act has failed to give effect to it.

On the other hand, it is said that there can be no reason to suppose that the intention was to introduce into the present Act such a radical change as the extension, without any limitation whatever, of the right to drawback, to the enormous proportion of the property in Bombay which fall within the description of properties "let to two or more persons holding in severalty;" that to do so would be tantamount to giving up one-fifth of the general tax leviable on the very large majority of properties so let in Bombay, without (as to very many of them) any adequate reason for doing so, and would thus throw on the small minority of properties not so let, an undue proportion of the burden of the tax; that the intention was merely to get rid of the hard-and-fast line prescribed by the old Acts, and enable the Standing Committee to exercise a discretion from time to time, as experience might dictate, so as to include any classes of cases to which it might appear to them that the principle might properly be applied; and that the Act itself limits the right by coupling it as it does with the provision that it should be *subject* to such general conditions as the Standing Committee might from time to time prescribe in that behalf.

It is urged in support of the view that the Standing Committee cannot limit the right, that there are many cases of property let to two or more persons holding in severalty, portions of which are frequently vacant, but that, the whole property being treated as one, such vacancy (being only partial) does not give a right to refund under sections 174 *et seq.*, and that it was probably for the purpose of affording some relief in such cases that the limitation prescribed by the old Acts was advisedly omitted.

In answer to this argument it is said that possibly the legislature may have had such cases in view, and consequently thought it better to substitute for the hard-and-fast line, the more elastic discretion which would admit of the principle of drawback being extended and adjusted from time to time so as to meet any class of cases to which it might appear equitable to apply it. Functions of a somewhat analogous kind are, it is pointed out, vested in the Standing Committee under section 169 of the Act; moreover, it is pointed out that it is apparently in the option of the owner to have his whole property treated as one or each several holding treated as a separate property, according, as he may, find it suits him best.

It was eventually determined to obtain the opinion of Counsel.

Counsel is therefore requested to advise the Standing Committee on the following points:—

1. Have the Standing Committee the power by the general conditions contemplated by section 158 (2) to prescribe certain classes of cases in which the sanction of the Commissioner to drawback is to be given, and to exclude from sanction cases not falling within those classes?

2. If not, what is the nature of the general conditions contemplated?

3. Are the general conditions which purported to be prescribed by the Standing Committee resolution of the 17th December 1890, *intra vires* and valid.

4. Would it be competent to the Standing Committee to prescribe the revised general conditions which were recently submitted to them for consideration?

And to advise generally.

1. I am of opinion that the Standing Committee has power to frame valid general conditions of the kind suggested in the query. There is nothing in the section to limit the nature of the general conditions to which the sanction must be subject.

3 & 4. I think both sets of general conditions in question are *intra vires* and valid.

J. JARDINE.

7*th March* 1892.

SALE OF FISH AT CHAOPATI.

BOMBAY, 13*th November* 1894.

TO SURGEON LIEUT.-COL. T. S. WEIR,
Acting Municipal Commissioner.

SIR,—With reference to the Municipal Commissioner's No. 10144, dated the 31st July last, we have the honour to state that, though the question how far the nuisance caused by the fish and vegetable sellers, who resort to the foreshore of Back Bay

at Chowpati, can effectively be dealt with under the Municipal Act, is by no means free from difficulty, we think that nuisance may probably be checked by putting in force the provisions of section 410 of the Municipal Act.

No doubt sub-section (2) of that section excludes from the operation of sub-section (1) the case of "fresh fish sold from, or exposed for sale in a vessel in which it has been brought direct to the seashore after being caught at sea," but this, we gather, is not quite or rather is only part of what is complained of as taking place on the foreshore in question; there, we understand that women and others, after having bought fish direct from the fishing boats, proceed to squat with their purchases on the sands and retail their fish to buyers, who resort there for the purpose. The original sales from the boats would no doubt be protected by sub-section (2), but the squatting on the sands and reselling the fresh fish there, and of course the selling of dried fish do, we think, fall within the prohibition of sub-section (1).

Practically it will apparently be necessary, in order to put in force section 410, to station Inspectors, for some time at any rate, constantly on the spot at the hours when the buying and selling usually takes place to warn people that they cannot be permitted to sell fish or purchase fish on the sands, and we presume other measures will be adopted some days at least before the time from which it is determined to put the law in force, in view to making it known that such is the intention.

Section 410 does not touch the question of the sale of vegetables, and we must confess we feel a difficulty in advising how these can be dealt with unless it be under section 404, the applicability of which seems doubtful.

The word "Market" is not defined in the Municipal Act, nor is it an easy word to define satisfactorily. Taking it however to signify, as Webster in one place expresses it "an appointed place for selling and buying at private sale as distinguished from an auction," then the place in question and the concourse of persons who go there to buy and sell do apparently constitute a market, and if so, a "private Market," as it certainly is not a 'Municipal Market,' (section 398). It would be difficult to obtain a conviction under section 404, as the state of knowledge of the person charged is an essential element of the offence. Probably, however, the presence of Inspectors or Police would be sufficient to deter the vegetable sellers, particularly if they found the fish sellers disappearing.

Act XI of 1853 (an act to facilitate the removal of nuisances and encroachments below high watermark in the Islands of Bombay and Colaba) empowered the Collector to require the removal of nuisances, obstructions or encroachments below high watermark, but this Act, so far as it relates to the removal of any obstruction, impediment or public nuisance affecting or likely to affect the navigation of the Port of Bombay, is abrogated by

section 2 of Act 22 of 1855 (The Port and Port Dues Act) as to any port, river or channel in which it was previously in force, from the time when such port river or channel shall be declared to be subject to the latter act. We cannot, however, find whether there have been any such declarations, and are, therefore, not prepared to say whether or to what extent the Act of 1853 has ceased to be in force, but in any case the procedure thereby prescribed for enabling the Collector to deal with nuisances, &c., is not very suitable or applicable to such a case as the present, and, moreover, the point upon which we understand we are consulted, is rather as to the powers of the Municipal Commissioner under the Municipal Act.

We have perused the further papers on this subject, forwarded to us under your No. 18781 dated the 12th instant—We have, &c.,

CRAWFORD BURDER & Co.,

THE EPIDEMIC DISEASES ACT.

"That, with reference to subjoined Counsel's opinion in regard to Government Notification No. 1204—702-P, General Department, dated Bombay Castle, 5th March 1897, the President be requested to submit the same to Government with a request that His Excellency the Governor in Council will be pleased to provide the necessary machinery with the view to make paras. 3 and 4 of the said Notification operative and effective.

"That meanwhile copies of the said opinion be forwarded for the information of the Standing Committee, the Municipal Commissioner, and the Plague Committee."

QUERIES.	ANSWERS.
(1) Whether para. 1 of Government Notification No. 1204—702-P, dated 5th March 1897, is operative, specially having regard to sections 57 (1) and 2 (*b*), 79, 80 and 82 of Bombay Municipal Act, III of 1888, and whether the appointment of Mr. Snow, the Municipal Commissioner, and Mr. James require the approval of the Corporation or the Standing Committee ?,	The general rule is that where there are two Acts of the Legislature and they cannot co-exist without the object of the latter Act being defeated by the earlier one, the earlier one is *pro tanto* repealed by implication, and the question therefore is whether the Epidemic Diseases Act, 1897, gives authority to the local Government to issue the notification in question. If it does, I don't think it matters what the provisions of the Municipal Act are, as they would be repealed by implication. The notification purports to be issued under section 2, sub-section 1, of Act III of 1897, and I see no objection to paras. 1 and 2 of that Notification.

QUERIES.	ANSWERS.
(2) Whether, having regard to section 68 of the Municipal Act and sections 422, 423, 424, 425, 426, 427, and 429 of the same, is para. 2 of the same Notification operative?	As to para. 3, it is very badly drawn, and, according to the literal meaning, directs that *any* measure which the Committee may order shall be at once carried into effect by the different persons or classes of persons mentioned in that para., *e.g.*, if the Committee ordered a house to be pulled down, the Municipal Corporation, all officers and servants of the Company (*qy.* Corporation), all public servants, and all persons employed by the Committee would have to hurry off and pull that house down. Para. 3 also does not confine the operation of that para. to such measures as the Committee are empowered to take under para. 2, but refers to any measures whatever—*e.g.*, if the Committee ordered the Municipal Hall to be blown up as a means of preventing the plague, para. 3 would apparently apply to such an order. I suppose what was meant by para. 3 was that any measures ordered by the Committee within their powers under para. 2 should be carried out by such of the persons as are mentioned in para. 3 that might be ordered by the Committee to carry them out and, if that is the meaning, I should be of opinion that the para. 3 is valid as drawn, however, I consider it to go beyond the powers given by Act III of 1897 to Government. The person to decide upon what measures are necessary to prevent plague is the Governor in Council or local Government when authorised under subsection 3, section 2, and this duty cannot be delegated to the Committee or any one else. Having decided on the measures which are necessary, I think the Committee could be appointed to carry out the details of such measures,—*e.g.*, if Government decided that all insanitary houses should be pulled down, I think the Committee could decide what houses were insanitary.
(3) Whether having regard to sections 77, 78, 79, 80, 82, and 86 of the Municipal Act, is para. 3 of the said Notification operative?	I think this answers questions 1, 2, 3.
(4) Whether para. 4 of the Notification is operative having regard to sections 111 to 118 of the Municipal Act; and whether, under section 116 of the Act, the Standing Committee and the Secretary will be justified in refusing to pass cheques for expenses incurred under para. 4 of the Notification?	I think the Notification para. 4 is not authorised by Act III of 1897, section 2, sub-section 1. It is badly drawn as it does not mention any person by whom the expenses are to be paid. It merely says out of the Municipal Fund. I was inclined to think that this perhaps might be sufficient as to the manner in which the expenses were to be paid; but, on further consideration, I think this is not so. The machinery and conditions for drawing on the Municipal Fund provided by the Bombay Municipal Act are not interfered with, and I think they are still in force, and that no cheques

QUERIES.	ANSWERS.
	need be signed except in accordance with those provisions. I think the Trustees of the Municipal Fund, *viz*, the Corporation (section 111) could be ordered to pay the expenses incurred in carrying out the measures mentioned in para. 2, but not *any* measures beyond those mentioned in para. 2. I presume para 4 meant that the Corporation should pay out of the Municipal Fund; but it does not say so, and no machinery is provided for the making of such payments or for drawing on the Municipal Fund for the purpose.
(5) Under what sections of the Municipal Act and the Epidemic Diseases Act of 1897 can paras. 1, 2, 3 and 4 of the Notification be considered to be operative and legal?	See previous answers. The Notification is only valid under the Epidemic Diseases Act, and there was no force from anything in the Municipal Act.
(6) What is the "control" referred to in Chapter XX of the Municipal Act, and whether such "control" can be exercised by the issue of Notification No. 1204, General Department, dated 5th March 1897?	This Chapter XX has nothing to do with the Notification. It applies only in cases where the Corporation fail in their duty and the Government take steps under that chapter which they have not done. "Control," I understand, to be the right given to the Government to intervene upon complaints made in case the Corporation do not carry out their duties under the section mentioned in section 518.
(7) Whether it is necessary to amend the Municipal Act in order to legalise the operation of the Notification in question.	No, except in the case of the making of payments out of the Municipal Fund: assuming para. 4 to be valid, it may be necessary to provide for the necessary machinery to draw on the Municipal Fund if such expenditure is not entered in the Budget grant.
(8) To state the position of the Corporation in regard to the Notification in question.	The position of the Corporation is sufficiently indicated in the previous answers. As Government have the power to make the Corporation pay the expenses alluded to, the objection to para. 4 is a technical one and could be got over by a further notification. Although para. 3 is open to the objections pointed out, yet, if it really was intended to mean what I have supposed was intended, there seems no objection to it.
(9) And generally.	Under section 1, sub-section 3, of General Clauses Act, 1868, the term "person" includes a Corporation.

March 25th 1897.

(Sd.) J. D. INVERARITY.

ERECTION OF BUILDINGS CONTRARY TO SECTION 347 OF ACT III OF 1888.

BOMBAY, 18*th May* 1893.

FROM CRAWFORD, BURDER, BUCKLAND AND BAYLEY,
TO THE MUNICIPAL COMMISSIONER.

SIR,—We have the honour to return the correspondence forwarded under your No. 3137, dated the 15th instant, and also the original agreement received under your No. 3383, dated the 17th instant. This agreement, after reciting that Mr. DeSouza has done work in contravention of section 347 of the Municipal Act within the regular line of the street, and has thereby rendered himself liable to have such unauthorized work demolished and to have his house set-back, purports to provide that in consideration of the Commissioner agreeing to forego his present right to insist on such demolition and set-back, he (Mr. DeSouza) shall not, in case of the set-back being thereafter required, claim or be entitled to receive any compensation for the unauthorised work. The document further contains a covenant by Mr. DeSouza, that in case of his selling the property he will make it a condition of such sale that the purchaser shall, at his own expense, enter into a similar covenant with the Corporation. We think that the consideration stated, namely, the forbearance to enforce at present the admitted right of demolition and set-back is sufficient to support the covenant by DeSouza that he shall not claim or be entitled to compensation for the unauthorized work in case the set-back is hereafter required, and that so long as DeSouza continues to be the owner of the property effect can be given to this provision, should the circumstances arise which will render it necessary to do so; but that in case of his selling the property and failing to fulfil his undertaking to procure a similar covenant from the purchaser, the agreement could not be enforced as against such purchaser, and the only remedy in that case would be in damages against DeSouza personally. This point we explained fully to the Commissioner in our letter of the 16th November 1882 in connection with the deed of covenant then prepared with one Hormusjee Jamsetjee Chinai in respect of the deferred set-back of his property No. 69, Lawrence DeLima Street. The following is an extract from our letter:—"We think it right to point out that covenants of this kind do not to use a technical expression run with the land, that is to say they are not binding, and cannot be made binding, on a purchaser from the covenantor, unless such purchaser himself enter into a similar convenant at the time of purchase. To secure, as far as possible, the desired object, we have added a convenant that in case of Hormusjee selling to another person, before the option of purchase is exercised by the Municipality, he shall make it a condition of the sale that the purchaser shall

enter into similar covenants with the Municipality, but in case of a breach of this undertaking the remedy would be against Hormusjee or his estate, and not against the purchaser, and would be in damages only." In the case just mentioned (Hormusjee Jamsetjee Chinai's case) the arrangement was that in consideration of the Commissioner, refraining at the time from enforcing demolition and set-back, he should, for a period of five years, have an option of purchase of the whole property at a fixed price; in other cases the right of set-back is foregone until the happening of certain specified events (as, for instance, the set-back of other neighbouring houses or the re-building of the property itself), after which it is provided that the land shall be acquired at a fixed price. In all such cases the express terms of the agreement, it seems to us, preclude the possibility of the owner successfully contending that the possession of the set-back land which he is allowed to retain for the time or pending the happening of the events contemplated, can, until after such time or the happening of such events, become adverse possession, such as would, after the lapse of twelve years, bar the right to acquire the land at the price agreed to. We are therefore of opinion that subject to what we have said regarding the effect of a sale of the property by the covenanting party, the Corporation would be able to enforce such an agreement at the time or on the happening of the event contemplated by the agreement for its performance notwithstanding that this might be more than twelve years after the date of the agreement.—We have, &c.,

CRAWFORD, BURDER & Co.

DRAINAGE.

In the High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction, Suit No. 5 of 1890. Serafina deGa, plaintiff, *vs.* E. C. K. Ollivant, defendant. Coram Parsons, J.

Judgment delivered on 20th June 1890.—The decision of this case depends upon the construction to be placed on sections 230, 231 and 260 of the Bombay Municipal Act of 1888. The short facts are these:

In obedience to a notice, dated the 11th October 1886, issued under sections 174 and 185 of Bombay Acts 3 of 1872 and 4 of 1878, the plaintiff, in that year, drained her premises into the Municipal drain in Churney Road by a drain which ran on the north side of her compound. In July of 1889 the defendant, without giving her any notice of any kind whatever, entered her premises and constructed a new drain along the whole of the south side of her compound, he disconnected her nahani (bath-room) from her old

drain and connected it with the new one, and he also prolonged and made a side-connection into the new drain, so that it extended into the premises of her neighbour DeSouza and carried off across her land the drainage from the whole of that side of his premises. Justification for this procedure is set up under section 260 of the Act. For the defendant it is argued that, as under section 231 the Commissioner could enforce drainage according to his opinion, and as under section 230 he could authorize drains being carried through lands belonging to other persons, so under section 260 he could execute both these works himself and therefore plaintiff had no cause for complaint or suit. It has been further argued, though not pleaded, that as in this case the Commissioner executed these works at Municipal expense, so now under section 242 the drain in question belongs to the Corporation, and the plaintiff has no right at all to it. Section 260 is as follows:—(* * *) I construe this to mean that, if on a proper application of the provisions of the section therein mentioned and after adopting the procedure directed in them to be observed in respect of persons other than those by whom the work would otherwise have to be executed, the Commissioner thinks fit he may execute the work. Whether however if he chooses to execute it at the expense of the Municipal Fund he can appropriate it under section 242 is, I think extremely doubtful. The drafting of this part of the Act is bad, Section 242 appears out of place where it stands in the Act, and it cannot, I think, have been intended to apply to all the works done under section 260. Equitably at any rate it would be only a work for the expenses of which the owner was bound to pay, but has refused to pay that ought to belong to the Corporation. Whether this is so or not is not, however, a point that has to be determined in the present suit. We have only here first to consider how far the defendant was justified under section 231 in requiring the plaintiff to make the drain in question, for under my above stated rule of construction of the section he could not himself cause the work to be executed under section 260 unless he could have required the plaintiff to make it under section 231. Section 231 is as follows:—(* * *) By the plain words of that section the Commissioner must be of opinion that the premises are without sufficient means of effectual drainage before he can do anything at all. No such state of mind is proved in the present case. We have evidence only that in 1885 a general scheme for the drainage of this locality was proposed by the Commissioner, and it may be that it was then sanctioned by him and by the Town Council and by the Corporation, and it may also be that this particular drain was shown in the plan then drawn up Ex. 5, as one to be constructed. We have no evidence that in 1889 the Commissioner was of opinion that plaintiff's premises were without sufficient means of effectual drainage. It would be strange if there was such evidence since the scheme was drawn up in 1885, and the premises of the plaintiff were drained according to his notice in 1886. The plan does not and could not show the drain that the plaintiff cons-

tructed, so that unless it could be shown that after 1886 fresh orders were passed by the Commissioner in respect of this drain, it is plain that he could have come to no opinion at all respecting it. The Inspector, Fern, admits that he had only the plan to work by, and that he received no other orders on the subject. He also admits that the only objection to the drain of 1886 was that a part of it crossed a yard, which thing might be objectionable if it was sought to build over that yard in the future. Whatever opinion, therefore, the Commissioner might arrive at with reference to the drainage of the plaintiff's premises as it existed after 1886 (and I have no desire to say anything that may influence him in the future), it is plain that he has yet formed no opinion thereon, and his sanction to a certain scheme of drainage given in 1885 for a whole district cannot be held to be his opinion of what in 1889 was necessary for the effectual drainage of certain premises in that district which had already been drained by his orders in 1886. The opinion required by section 231 must mean one that has been formed after due consideration of the premises and at the time at which the works are ordered to be done. It may be that now the provisions of section 233 might be found to be the proper ones to put in force in a case like the present. Be this, however, as it may be, I have no hesistation in holding that the very first requirement of section 231 is not shown to have been satisfied in the present case, and that therefore the defendant does not justify his action under that section read along with section 260.

We have next to consider whether the defendant was justified under section 230 in carrying a drain from DeSouza's premises across the plaintiff's land. Section 230, sub-section A, runs as follows:—(* * *) It plainly requires the preliminaries (1) that a certain state of things shall appear to the Commissioner, (2) that a notice shall be given to the owner of the land, (3) that the Standing Committee shall approve, and (4) that the owner shall be authorized. Section 260 can order unnecessary the latter of these only. The three first requirements relate not to the person by whom the work would otherwise have to be executed, but to the owner of the land, and these therefore have to be strictly observed. In the present case not one of these conditions is shown to exist or to have been done. Admittedly, no notice was given to the plaintiff and the approval of the Standing Committee was never even asked for. The sanction of the Commissioner to the general scheme in 1885 cannot be held to be evidence of what appeared to the Commissioner in 1889. It is difficult to suppose (though here again I speak without wishing to bind the Commissioner in any way in the future) that the Commissioner with a true knowledge of the state of affairs as they existed in 1889 would have ordered a second drain to be made in the plaintiff's compound or been of opinion that the only means or the most convenient means of draining DeSouza's house was by carrying a drain through plaintiff's land. The map shows that DeSouza's premises could be, as, if not more conveniently drained, through his own

land. However, I need not go into this point. The requirements of section 230 not having been satisfied, the action of the defendant cannot be justified under that section read along with section 260. There is one other section which I must allude to, though it has not been mentioned in argument, and that is section 238. Under that section, taken with section 260, the Commissioner may connect the drain of one person with the drain of another, but then notice must be given and the approval of the Standing Committee obtained. As neither of these things were done in the present case, that section can afford no justification for the acts of the defendant, and has not therefore, I presume, been relied on. I find on issue 1, that the suit is not barred by limitation. The time allowed is 6 months under section 527, and suit has been filed within that time.

2. Notice has been given in which the cause of action is clearly set forth. The work was done between the 9th and 20th July, but the words in the notice, "on or about the 6th July," state, in my opinion, with resonable particularity, the time, the cause of action accrued, if such time needs to be stated.

3. Trees were taken up, a creeper cut back and a hole made under the wall; the allegations, therefore, in para. 3 of the plaint, though somewhat exaggerated, are in the main correct.

4. Drainage of the house to the south of plaintiff's property was made to flow across plaintiff's land through this drain as alleged in para 3. How long it so flowed is, I consider, a point of no importance, but I see no reason to doubt Fern's evidence that he stopped the flow on July 29th.

5. Defendant's action is not justified by section 260.

6. Plaintiff is entitled to recover the sum claimed as damages, *viz.* Rs. 100, which sum has been paid into Court.

7. Plaintiff is entitled to the order asked for in para (a) of the prayer of the plaint, but not that asked for in para (b), since the future action of the Municipal authority cannot be so controlled.

8. Decree that defendant remove drain and restore land to its former condition and pay plaintiff Rs. 100 damages and the costs of this suit. True Copy.—L. A. WATKINS, Judge's Clerk.

HIGH COURT, *2nd July* 1890.

ALLEGED NUISANCE AT FORAS ROAD.

EX PARTE.

THE MUNICIPAL COMMISSIONER OF THE CITY OF BOMBAY.

Re complaint filed by Mr. Merwanji Kaikhushroo, under section 515 of the

Municipal Act, 1888, with reference to an alleged nuisance at Foras Road.

CASE FOR THE OPINION OF COUNSEL.

On the 4th September 1900, an information was filed before the 2nd Presidency Magistrate by Mr. Merwanjee Kaikhushroo; a partner in the firm of Messrs Bicknell, Merwanjee and Motilal, Solicitors, and residing at 2, Foras Road, near Grant Road Station, complaining of the existence of a nuisance, alleged to be caused by the Municipality, locating in Foras Road empty carts used by them for the removal of refuse; the file of the papers containing a copy of the information is sent herewith and also a copy of the complainant's evidence which was taken at the first hearing of this case, on the 12th instant, when the matter was adjourned to the 10th October for further evidence.

This information is filed under the provisions of Section 515 whereby any person who resides in the City may complain to a Presidency Magistrate of the existence of any nuisance or that in the exercise of any power conferred by Sections 224, 244, 245, 246, or 367 more than the least practicable nuisance has been created.

The powers conferred by Sections 224, 244, and 245 are in respect of the alteration, ventilation and emptying of drains while Sections 246 and 367 are in respect of the disposal of sewage and refuse respectively.

The nuisance complained of does not arise in the exercise of the powers conferred by any of the last mentioned Sections but arises in the execution of powers conferred by Section 365.

There is no dispute, as will be seen from the file of papers, that carts used by the Municipality for the collection of refuse are stored in Foras Road (although it is not admitted that they create the nuisance complained of by the complainant nor that they are brought so close to the complainant's residence as he alleges) and if the complainant by his evidence satisfies the Magistrate that he is inconvenienced by the act complained of, the Magistrate will probably hold that there is a nuisance.

It is suggested for Counsel's consideration that possibly Section 515 does not apply to such a case as this, because (1) what is complained of is an alleged improper performance of duties under Section 365 which would oblige the Magistrate to sit in judgment on the mode in which the Commissioner carries out the Act; (2) this proceeding is in effect equivalent to a civil action for an injunction; (3) no proper order could be made on this proceeding, (*a*) the carts must be kept as they are required, (*b*) the Commissioner has nowhere else to keep them, (*c*) the order could not authorize the Commissioner to place the carts on any one else's land, (*d*) the Magistrate cannot make an order that the Commissioner should acquire land which would involve (1) compulsory powers and (2) funds.

The Commissioner has neither.

No doubt the basis of the complaint is that putting the carts on the public road is in itself an illegal act, if it were not for this, it would be almost impossible to find any place within the inhabited part of the City in which to store the carts since they would be as near to some one as they now are to the complainant's house.

The questions on which Counsel's advice is requested are :—

1. Whether this case falls within Section 515 and what line of defence should be taken in defending this prosecution.

2. Whether in the event of the Magistrate holding that nuisance does exist and directing the Commissioner under Section 515 (2) (*a*) to put in force any of the provisions of the Act or to take measures to prevent, abate, diminish, or remedy such nuisance what proceedings if any, could be taken to enforce compliance with such directions as although Section 515 (3) provides that it shall be incumbent on the Commissioner to obey every order made by the Magistrate, no penalty is provided for disobedience of such orders, and

3. To advise generally.

1. In my opinion the case falls within Section 515, I think it should be pointed out that the storing of carts on the roadway *per se* cannot be dealt with under this Section and that the complaint must make out a clear case of nuisance proceeding from the carts. Such a nuisance can only arise in one of two ways, (1) by leaving refuse and manure in the carts when they are stored at Foras Road for the night, (2) by providing a shelter under which people may be encouraged to commit nuisance. Both of these nuisances are easily preventible and I think the Magistrate would be justified in passing an order for abatements of such nuisances. I think the complainant must define his nuisance. If he ascribes it to an intolerant smell in the carts I should think he will be disbelieved.

2. Any disobedience of an order which may be passed will be punishable under Section 188 of the Penal Code by fine or imprisonment.

BASIL SCOTT,

3rd October 1900.

BUILDINGS WITHIN THE REGULAR LINE OF THE STREET.

In the High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction.—Appeal No. 670, under section 3 of Act XII of 1888, against decision passed by the Chief Judge of the Court of Small Causes of Bombay.—Municipal Commissioner, Appellant, *vs.* Patell Hajee Mahomed Ahmed Jann & others, Respondents. (Appeal Court Judgment.—Coram the Chief Justice & Mr. Justice Bayley.)

Judgment.—The question we have to determine turns upon the language of section 163 of the Municipal Act of 1872. That section contemplates the re-building of a house or building which has been taken down, burned down or has fallen down, and enables the Commissioner on the house being rebuilt to require the same to be set back, and provides that the portion of land so added to the street shall thenceforth be deemed part of the public street and be vested in the Corporation; and that on taking possession of the ground the Corporation shall make full compensation to the owner of any such house for any damage he may thereby sustain. The Judge of the Small Cause Court has calculated the amount on the basis of the value of the strip round the three sides of the Mosque treating it as frontage land. He held that "the circumstance that the petitioners had not lost their frontage was of no importance, as it resulted only from the use to which the Municipality have as yet put the land they have taken, and that it was a fallacy to argue that the Municipality should pay less than a frontage price, because after taking it they have now applied it to bring the road which they may hereafter narrow again nearer to the petitioner's back land." This view of the Municipality ability* appears to us to ignore the true nature of the power of the Municipality to insist on the set back. It is only for the purpose of bringing the buildings in question into line with the public street that the power can be exercised, or in other words, the owner retains all the advantages of frontage which he had previously possessed. It is true that by section 154 the Commissioner, with the sanction of the Corporation, may "discontinue or stop up any public street or road," and by section 155 sell the land, but this is a contingency to which the property before the set-back was liable to and cannot have any bearing on the question as to the damage which the owner sustains by reason of the set-back. It was contended, however, by the Advocate General for the applicant that the circumstance that the applicant will retain his frontage cannot be taken into consideration on the same ground as the Court of Exchequer, in Senior *vs.* Metropolitan Railway Company, 32

* Note by the Municipal Solicitors—so in the original.

L. J. Exch. 223, in assessing compensation for "injuriously affecting" under the Land Clauses Consolidation Act 8 and 9, Vic. ch. 20, refused to take into consideration the benefit the owner would ultimately derive from the Railway for which the land had been taken up. The above ruling would doubtless be applicable if the Municipality were contending that the applicant had sustained little or no damage owing to the ultimate improvement to the property which might be expected to result from the widening of the roads and increasing the traffic. In the present case, however, the question is not as to "a benefit likely to accrue," but one which necessarily and immediately results from the exercise of the power, and we cannot doubt that it was intended it should be taken into consideration in determining the damage sustained by the owner. The effect of its being so taken into consideration is to exclude any claim for "damage" arising from depreciation in value of the applicant's land to the back of the set-off, which under ordinary circumstances would result if the set-back had become the property of the Corporation, subject to no consideration as to the use of it.

What, then, is the damage which the owner sustains by the set-off? Mr. Hewson, who acted as surveyor for the applicant, has assessed its value on the basis of the shop rents derived from the land of which it was a part. Mr. Morris, who acted for the Municipality, at clause 9 of his report, says: "That, as it appears to me, it will be apparent that the set-back of the Trustees' building has merely deprived it of some of the land upon which it was proposed to construct rear rooms for the shops, and that consequently the only loss they can have sustained is represented by the rent which they would have received had these rooms been available, and that the estimate of compensation should be framed on this basis." This method of assessing the damage makes it depend on the particular circumstances of the applicant's property and the course he may adopt in view of the Commissioner's decision. Indeed, Mr. Morris admits that if the whole of the Paidhoni shop had been taken, and it was not possible to build others at the back of the set-back, he would have taken the whole of the set-back as frontage. The question is not without difficulty. The language of section 163 shows that the compensation becomes due as soon as the Corporation takes possession, which is when the owner begins to build, and there being no words in the section to show a contrary intention, the compensation must, we think, be assessed according to the state of things then existing, and not upon the basis of what the owner may have it in his power to do, by appropriating other property at the back, towards diminishing the damage which would otherwise result to him. The expression "any damage he may sustain" is intended, we think, to insure compensation to the owner for every sort of damage, and not to restrict it to compensation for such damage as he may, by his own arrangements, contrive to reduce it to.

If this be the true construction of the section, and we are informed that such has been the construction placed on it in practice, the damage consists in the loss of a strip of land forming part of land having a frontage value, and a proportionate part of which must, according to the ordinary mode of valuation, be appropriated to the strip in question, and, we think, that Mr. Hewson's view is, therefore, more in accordance with the intention of the section as the frontage values fixed by Mr. Hewson are not disputed, nor the extent of the set-off, the compensation fixed by Mr. Hewson and adopted by the Judge of the Small Cause Court independently of the question of the 15 per cent. must stand. As to the 15 per cent., it is expressly directed to be allowed in addition to the compensation by section 42 of the Land Acquisition Act 1870, in consideration of the compulsory nature of the acquisition, but no such provision is to be found in the Municipal Act passed subsequently in 1872. It constitutes no part of the compensation properly so called for the owner's loss and cannot, therefore, without an express provision for the purpose be allowed by the Court. The 15 per cent. must, therefore, be disallowed which will reduce the compensation to Rs. 13,821·74.* Parties to pay their own costs of this appeal. True copy of the original M.S. Judgment.—L. A. WATKINS, Judge's Clerk.

High Court, 23rd June 1890.

ALTERATIONS IN LINES OF STREETS.

EX PARTE—THE MUNICIPAL CORPORATION *RE* IMPROVEMENT OF PYDHOWNI ROAD AND COMBAD STREET

INSTRUCTIONS FOR COUNSEL TO ADVISE.

Herewith are sent, for Counsel's information, certified copy of judgments of the Chief Justice and Mr. Justice Russell in an Appeal No. 694 of 1899 against a Decree of the Lower Court (Mr. Justice Crowe) in a suit by one Essa Jacob Haji Jamal against the Municipal Commissioner, also certified copy of the Appeal Court's Decree of 31st August 1900, following the above judgments. The point in that case was, whether the Commissioner having, shortly after the present Municipal Act came into force in 1888, prescribed the regular line of a public street under

* *Note by the Municipal Solicitors.*—This amount is obviously wrong: it ought to be Rs. 10,300 as per decree, dated 2nd May 1890.

Section 297 (1), he or his successor for the time being could, in consequence of the exigencies of traffic and altered conditions, afterwards prescribe a fresh line for the same street so as to give a wider and better alignment. Mr. Justice Crowe decided that the Commissioner was justified in doing this, but the Appeal Court has reversed that decision, and it must now be taken to be authoritatively laid down that as the Act now stands, the regular line once prescribed by the Commissioner under Section 297 cannot afterwards be altered.

This decision affects many cases, as it has been by no means an unusual thing for the Commissioner in later years to improve on the lines which in 1888 were considered suitable, with the result that in some cases set-backs have been obtained in accordance with the new lines and in some arrangements have been come to with the parties under which the set-back land has been conveyed to the Municipality, but the parties have been permitted to retain their buildings on it until the happening of a certain event, *e.g.*, the set-back of the adjoining house on either side, the land with the structure on it being in the meanwhile leased to them by the Municipality.

Essa Jacob's case was the first in which the right to alter the regular line was ever seriously disputed, but several other persons, while that case was pending or after its decision, took the same point.

Amongst these latter were Valee Mahomed Peer Mahomed and Dost Mahomed Peer Mahomed, the owners of a property at the junction of Pydhowni Road and Combad Street, who, on the 25th January 1900, gave notice, pursuant to Section 337 of the Municipal Act, of their intention to build on this property; and on the 24th February 1900, were called on to set-back to regular lines of these streets, which purported to have been prescribed under Section 297—but which were new lines and not those originally prescribed for those streets after the Act came in force.

A plan is sent herewith which shows in red the original lines, and in blue the revised new lines— the former of course must now be taken to be the only regular lines duly prescribed and now in force under Section 297.

The accompanying copy, correspondence marked **A**, will now be intelligible:—It will be seen from it that Mr. Dost Mahomed Peer Mahomed in his letter of the 7th September last (written after the appeal in Essa Jacob's case had been decided) takes the points as to whether the requisition for set-back to the blue lines is justified by the Act. The Executive Engineer having regard to that decision and to the importance, notwithstanding it, of having these particular streets widened as opportunity should occur in accordance with the blue lines, suggested that Section 289 (2), of the Act should be resorted to and that to avoid frequent references to the

Corporation their general sanction should be obtained under that section to all future buildings being set-back to the new lines; the Commissioner agreeing with the Executive Engineer, accordingly applied to the Corporation, who by their Resolution No. 9186, dated the 12th November 1900, postponed the consideration of the matter, requesting the Commissioner "to take Counsel's "opinion as to the legality of the course for which he asks the "sanction of the Corporation."

It is of course obvious that no Resolution of the Corporation could avail to authorise the Commissioner to treat these cases under the ordinary set-back Sections (Sections 297 and the following) on any footing other than that on which he can of his own authority deal with them, namely, on the footing of the regular lines originally prescribed; but there seems to be no apparent legal objection to a general scheme of widening being sanctioned by the Corporation *under Section 289* so as to attain to the widths of street which were contemplated when the regular lines were sought to be altered, nor, it is suggested, would the fact that such scheme is proposed to be carried out gradually (as for instance when the houses are proposed to be rebuilt, &c.) constitute any legal difficulty or objection to it.

Recourse to Section 289 would of course entail the consequence that under the joint effect of Section 296 and Section 91 the land required would, in the absence of agreement, have to be acquired under the Land Acquisition Act, which would involve the further consequence that the Municipality would probably have in each case to acquire the whole property and could not, as under the set-back sections, limit their acquisition to the particular portion actually needed for the street improvement; this of course would mean a considerably larger initial outlay, though the difference might be to a considerable extent and possibly fully made up by re-sale of the portions not thrown into the street.

Counsel is requested to advise the Corporation and Commissioner :—

1. Whether under the circumstances appearing in the instructions and having regard to the decision of the Appeal Court in the case of Essa Jacob, there is any legal objection to the Corporation sanctioning under Section 289 (2) of the Municipal Act the proposal made by the Commissioner in his No. 18021, dated the 12th October 1900, for widening the two streets (Pydhowni Road and Combad Street) to the extent shown in blue lines on the plan ?

And to advise generally.

1. I think the resolution in the form proposed is objectionable. I see no objection to the Corporation sanctioning the widening of the streets in question to the widths proposed, but what is suggested is that they should sanction a particular set-back and set-backs in all future cases which is not quite the same thing as sanctioning the widening of the street, the Corporation in my opinion should sanction the widening and improvement of the streets to the proposed widths in general terms. It will then be for the Commissioner to carry out the undertaking in the way he considers most feasible, and I do not see any objection to his doing the work gradually from time to time.

J. D. INVERARITY.

January 23rd, 1901.

ACQUISITION OF LAND UNDER THE LAND ACQUISITION ACT.

BOMBAY, 17*th December* 1892.

To H. A. ACWORTH, Esq.,
Municipal Commissioner.

SIR,—In acknowledging the receipt of your letter No. 19887, dated the 15th instant, we have the honor to state that we consider there is no use whatever in disputing and that we cannot appeal against the refusal of the District Judge of Thana to retain and hold the compensation awarded in respect of the Pawai Land.

Although, as stated in our letter of the 22nd ultimo, it seems to have been customary in such cases to pay the money through the Court, it is, we think, evident that where this is objected to, it cannot be insisted on.

The Land Acquisition Act does not provide for or recognize any payment by the Collector except to the persons interested. In fact, section 40 expressly directs that "Payment of the compensation shall be made by the Collector according to the award to "the persons named therein, or, in the case of an appeal, under "section 39 (that is to say, an appeal from the decision as to the "apportionment) according to the decision on such appeal."

All that the Court has done is to decide that, in the face of the objection taken to the payment into Court, it cannot retain the money. The Court has not made any direction in regard to interest, but section 42 of the Act provides that the amount awarded and the percentage for compulsory acquisition shall be paid by the Collector with interest at 6 per cent. per annum "from the time of so taking possession," subject to the proviso that, "where the decision of the Court under "Part III "or Part IV. (the apportionment provisions) of this Act is "liable to appeal, the Collector *shall not* pay the amount of "the compensation or the percentage or any part thereof until "the time for appealing against such decision has expired and no "appeal shall have been presented against such decision, or until "any such appeal shall have been disposed of."

The question of the apportionment between the claimants and counter-claimants has now to be determined under section 39 by the Judge sitting alone (*i.e.*, without Assessors), and any of the parties will have a right of appeal against his decision; there can, therefore, be no doubt but that the time for payment which the Act prescribes will not arrive until the appeal (if there be any) has been disposed of, or, if no appeal is presented until the time for appealing has expired. And the only question is, whether

the interest runs until that time arrives. The Advocate-General of Bengal, we find, has expressed the opinion that, where proceedings are pending under the apportionment provisions, interest is payable up to the date of decision, and we cannot feel any doubt but that that opinion is correct.

It certainly is extremely unsatisfactory that the Municipality should be obliged to retain the money and pay interest thereon during the pendency of proceedings in which they are not interested, and over which they have no control, and which consequently may (so far as their power to prevent it is concerned) be protracted almost indefinitely.

We fear, however, that, as the Act stands, there is no escape from this position.—We have, &c.,

CRAWFORD, BURDER & Co.

RE SET-BACKS.

EX PARTE THE MUNICIPAL CORPORATION *RE* DEFERRING SET-BACKS.

Case for the Opinion of Counsel.

Section 297 of the Municipal Act provides for the Commissioner prescribing a line on each side of any public street within which buildings are not to be constructed, and section 298 empowers the Commissioner in cases of proposed rebuilding, removal, or alteration of buildings within that line to require their set-back for street improvement. It frequently happens that, under these provisions, a right of requiring a set-back arises, which however, by reason of adjoining houses not having yet become amenable to the set-back provisions, or otherwise, can without detriment, and, indeed in some cases, with positive and advantage to public interests, be deferred until the happening of some future contingency, as, for instance, until one or other, or perhaps both of the adjoining, houses are set back; the liability to set-back having however arisen, it is important not to waive it altogether, but to secure the set-back on the happening of the contingency contemplated; it is usually too, in such cases, a matter of advantage to the owner of the house to get the set-back deferred, and it generally happens that it is he (the owner) who begs as a concession that the set-back of his house and the taking up of his

land may be postponed. It often happens also that persons, either in ignorance or disregard of the provisions of the Act, proceed with the execution of work within the set-back line without giving the notice which the Act requires before commencing, and then, when required to remove such work and provide the set-back, they apply to the Commissioner to allow them to retain their buildings on the ground (*inter alia*) that the immediate set-back can be of no advantage to the Municipality. In all these cases, if the Commissioner considered the set-back might properly, and without detriment to public interest, be deferred, it was for some time the practice to take agreements from the owners by which they undertook that, in consideration of the Commissioner foregoing the immediate right of set-back, they would on the happening of a future contingency, such as the set-back of the adjoining building, give up their land to the Corporation at a rate fixed in the agreement and remove all unauthorized work at their own expense and without claiming any compensation for it from the Municipality; and also that, in case of their selling before the happening of the contingency, they would procure their purchaser to enter into similar covenants with the Municipality. This practice continued up to May 1893, when an agreement of the nature just mentioned having been referred to the Municipal Solicitors for opinion, the latter wrote to the Municipal Commissioner the letter of the 18th May 1893, which will be found printed at pages 56 and 57 of the accompanying volume (vol. XVII, part II) of the Record of Proceedings of the Municipal Corporation and the Standing Committee. The matter came up for consideration before the Standing Committee on the 25th May 1893, when that body resolved "That, in "future, all agreements relating to set-backs should only be "agreed to upon the basis of the Municipality taking over pos- "session of the land and the unauthorized erections thereon at "such price for the land as may be agreed on between the "Municipality and the reputed owner, and leasing such land "and erections at a rental to be fixed by the Municipal Commissioner." By thus taking an immediate conveyance from the owner of the set-back land, coupled with an agreement for his continued occupation of it as a tenant of the Municipality, the object seemed to be better secured than by the old system which, amongst other objections, was open to the serious objection that, in case of the owner selling his property, his covenant to give up the land upon the happening of the contingencies contemplated could not be made to run with the land so as to bind it in the hands of the purchaser; and the remedy of the Municipality in case of the purchaser not entering into a similar agreement with them and refusing to act on the vendor's agreement would, consequently, have been in an action for damages only against the vendor as the person who had contracted with them. In accordance with the decision of the Standing Committee thus arrived at, a form of conveyance and agreement for tenancy was

prepared for general use, and a print of this is sent herewith for Counsel's perusal. The question then arose, whether it was competent to the Commissioner or the Standing Committee, without the sanction of the Corporation, to enter into such arrangements which, it will be noted, involve a letting for what *may* be an indefinite period. Counsel (Mr. Macpherson and Mr. Inverarity) jointly advised the Corporation in August 1895 that sections 90 and 289 of the Municipal Act do not refer to cases under sections 298 and 299, and that the Act prescribes no limit to expenditure, upon and imposes no necessity for special sanction either by the Corporation or the Standing Committee in respect of set-backs other than the general restriction (section 115) that no outlay can be incurred unless it is covered by "a current budget grant." Thus for cases of set-backs, pure and simple, under the provisions of the Act, the Municipal Commissioner alone is competent to act, and to fix the compensation; but directly the strict procedure prescribed by the Act for set-backs is departed from and it is proposed, in lieu of such procedure, to *purchase* the land and then let it out to the person from whom it is purchased, the transaction apparently becomes one which must be regulated by the provisions of the Act in regard to "acquisition of property" (sections 87, &c.,) and "disposal of property" (section 92) respectively, and, if the price to be paid exceeds Rs. 1,000, requires the approval of the Corporation, or, if it is less than Rs. 1,000, the approval of the Standing Committee (section 90). So far as the leasing element in the transaction is concerned, the matter, it will be seen, stands thus as regards necessity for sanction:—By section 92 (*a*) the Commissioner may in his discretion grant a lease of any immoveable property belonging to the Corporation for any period not exceeding 12 months at a time provided that every such lease shall be reported by the Commissioner to the Standing Committee within 15 days after the same has been granted; and under clause (*b*) of the same section he may, *with the sanction of the Standing Committee*, grant a lease of any immoveable property belonging to the Corporation for any period not exceeding 3 years at a time, while under clause (*c*) he may, *with the sanction of the Corporation*, lease for any period any such property belonging to the Corporation. The question then seems to turn on whether the letting contemplated by the printed instrument involves a letting for a period exceeding 12 months or 3 years as the case may be. It obviously confers the present right to occupy for one year certain and no more, but it does no doubt also confer a prospective possible right of remaining in occupation for a further period which may extend to more than one year or to more than 3 years In Hand *vs.* Hall (L. R. Q. Exch., Div. 355) it was held that a letting for a year with right at the end of that term for the tenant by a month's previous notice, to remain on for 3½ years more constituted an agreement which was divisible and contained merely an actual demise for the shorter term, with a superadded

stipulation that the lessee at his option should have a renewal of the tenancy, and that as to the actual demise it was not subject to legal conditions affecting a letting for 3 years. It was thought advisable under the circumstances to bring such cases before the Corporation for sanction, and the Standing Committee accordingly resolved on the 15th January 1896 that a letter of the Commissioner, by which he had placed several pending cases before them, should be forwarded to the Corporation, with the recommendation that sanction be given to agreements being entered into with the respective owners of the several properties referred to on the basis of the Standing Committee's resolution of the 25th May 1893, "allowing the several "persons whose names were included in the list, or other the "respective owners for the time being of the several properties, "the temporary use and occupation of the several pieces of "ground therein mentioned as having been built over within the "regular lines of the several streets on which such properties "respectively abut, on conditions to be contained and set forth "in the said respective agreements, and on the further condi-"tion that, on the happening of the event or events respectively "mentioned, the said owners should give up to the Corporation "the said respective pieces of land which are to be fully des-"cribed and set forth in the said agreements and shown on the "tracings to be attached thereto. That the said owners shall "also pay annually, in advance to the Corporation for the "several pieces of land so to be leased to them respectively, a "yearly rental calculated at 6 per cent. on the amounts which "they respectively will receive from the Municipality for the "sale to it of the said several set-back lands as provided in the "said agreements." The Corporation on the matter coming before them resolved on the 6th February 1896, "That, with "reference to resolution of the Standing Committee, No. 11624 "of the 15th January last, the joint opinion of Counsel be taken "by the Acting Commissioner as to the power of the Commis-"sioner and the Standing Committee to enter into agreements of the character referred to in such resolution."

Counsel are therefore requested to advise the Corporation.

QUERIES.	ANSWERS.
1. Whether the provisions of the Municipal Act as to "acquisition of property" apply to such set-back cases as are mentioned in the instructions when taken out of the strict procedure prescribed by the Act in respect of set-backs.	1. We are of opinion they do not, the printed form of the purchase and lease shows that what really is done is for an agreement to be made in order to prevent the Commissioner enforcing the set-back sections. To such an agreement for purchase of land we think the provisions of section 90 apply and that the sanction of the Corporation is necessary in cases of the price being over Rs. 1,000, and the sanction of the Standing Committee under that amount.

2. Whether, as regards the agreement for allowing the owner to retain his building in his own occupation as a tenant pending enforcement of the set-back, such agreement, if made in the form proposed, necessitates the sanction of the Standing Committee or Corporation as creating a lease for more than a year or more than three years.

3. Whether the Commissioner or the Standing Committee have power (except with the sanction of the Corporation) to enter into arrangements, such as are contemplated by the printed form of deed sent herewith, (*a*) where the amount to be paid as purchase money exceeds, and (*b*) where it is less than Rs. 1000.

And to advise generally.

23*rd April* 1896.

2. We are of opinion that the sanction of the Standing Committee is not necessary. A lease from year to year is determinable at the end of the first as well as any subsequent year by notice (*Dord. Clerke* vs. *Smaridge*, 7 Q. B. 957). The lease is therefore for not more than twelve months.

3. See answer 1.

BASIL LANG.
J. D. INVERARITY.

EX-PARTE THE MUNICIPAL CORPORATION *RE* SET-BACK PROVISIONS OF THE MUNICIPAL ACT.

CASE FOR THE OPINION OF COUNSEL.

Counsel's attention is drawn to sections 297, 298 and 299 of the City of Bombay Municipal Act, 1888.

Section 297 directs that the Commissioner "shall prescribe a "line on each side of any public street within which, except "under the provisions of section 310, no portion of any building "abutting on the said street shall, after such line has been pres-"cribed, be constructed." Such line is called "the regular line of the street," Section 298 enables the Commissioner when it is proposed to re-build, &c., any building, any part of which is within the regular line, to require, in any order which he issues concerning the re-building, &c., under section 345 or 346, that such building be set-back to that line; and section 299 enables the Commissioner, in the case of *land* within the regular line not occupied by a building, whether such land be open or enclosed, to take possession on behalf of the Corporation after due notice as therein prescribed. Section 301 provides for compensation to the owner of any building or land acquired under section 298 or 299, and section 504 directs that the amount and apportionment of such compensation may, in case of dispute, be determined by the Chief Judge of the Small Cause Court.

A regular line has been prescribed under section 297 for improvement of the Altamont Road and notices, under section 299,

were some time ago served on the owners of several of the properties adjoining that Road, with a view to the acquisition of portions thereof for the proposed improvements.

A printed copy of a report on the subject made by the Acting Commissioner for the information of the Corporation, and dated 4th June 1895, is sent herewith.

It should be explained that shortly after the present Municipal Act came in force, the then Commissioner Mr. (now Sir Charles) Ollivant found it desirable, having regard to the changes introduced by the new Act on the subject of street improvements, to draw up a memorandum expressing his views regarding the effect of the provisions of the Act contained in the two first sub-heads of Chapter XI, namely, "construction maintenance "and improvement of public streets" and "preservation of re- "gular line in public streets." He forwarded this memo. (a copy of which is sent here-with) to the Solicitors with instructions that, after discussing the several questions dealt with in it, with him, they should obtain the opinion of Counsel on certain points as to which he was in doubt. This was done, and a copy of the case laid before Counsel (Mr. Inverarity) and of his opinion thereon, dated 28th February 1889, is sent herewith. The quotation given by the Acting Commissioner in his report of the 4th June 1895, as to what the Solicitors wrote on 1st March 1889, is a quotation from the case so submitted to Mr. Inverarity.

The correctness or otherwise of the view of Sir Charles Ollivant in which the Solicitors thus concurred, namely, that the Act does not prescribed any limit to expenditure upon "set-backs" other than the general restriction (section 115) that no outlay can be incurred unless it is covered by a "current budget" was not a question directly submitted to Mr. Inverarity on that occasion.

The Municipal Corporation having, on the 18th July 1895, taken into consideration the Acting Municipal Commissioner's report of the 4th June 1895, determined that the joint opinion of Counsel be taken on the points raised and as to whether section 90 of the Municipal Act, does not control sections 298 and 299 as regards any agreement for the acquisition of immoveable property, the price of which exceeds Rs. 1,000.

In cases where it is desired to obtain a "set-back" under section 298, it will be found, from a reference to sections 345 and 346, that the Commissioner's order (in which, under section 298, his requisition for set-back must be made) has to be intimated in writing to the owner within 30 days after receipt of the notice of the intended work under section 337 or 342 as the case may be, or of the plan, section, description or further information if any called for under sections 338, 340 or 343 and, as the necessary plans, sections and description are, as a matter of fact,

usually submitted *with* the notice, it practically becomes necessary, in most cases, to decide definitely and intimate to the party within 30 days from the first receipt of the notice, if a set-back is to be called for.

Under these circumstances if the specific sanction of the Corporation is necessary before the Commissioner can call for the set-back, this, as will presently be shown, will often render it extremely difficult, and in some cases practically impossible, to obtain a set-back at all.

The Act only renders one meeting of the Corporation in a month obligatory, and, except that the March meeting must be held not later than the 20th, and that the April meeting after General Elections (*i.e.* every three years) is to be held as early as conveniently may be in that month [*vide* section 36 (*a*), (*b*) and (*c*)], there is nothing to prevent the monthly meeting of any one month being fixed for a date in that month more than 30 days after the date on which the preceding month's meeting was held; it is therefore obvious that cases might arise in which it might be impossible to obtain any decision by the Corporation within the 30 days prescribed by section 345 or 346; moreover, when it is remembered that the departmental officers have to examine the plans, to visit the premises, and to report, and that 7 clear days' notice of business to be brought before a meeting must be given [clauses (*h*) and (*j*), section 36], it will be evident that, even assuming an interval of 30 days was never allowed to elapse between two meetings, it would be practically very difficult in any case to obtain the specific sanction of the Corporation to a particular set-back in time to admit of the requisition being made within the prescribed time. Again, it by no means follows, of course, that the business of a meeting can be all got through on the first day for which such meeting is summoned, it frequently happens that the meetings have to be adjourned for want of time.

It would seem that, if the sanction of the Corporation is necessary, it would not do for the Commissioner, in order to prevent time running against him, to make a back requisition in anticipation of such set-back being sanctioned, for, when such a requisition is once made, it would appear that it cannot be withdrawn, but that an action for damages, if not for specific performance, would lie against him if it were not acted on (Rex *v.* Hungerford Market) Company, 4 B & A, 327; and see also L. R. 3 C., P. 553; and L. R. 4 C., P. 97). These are all considerations which do not, of course, apply to cases under section 299 (of which the Altamont Road case is one), as under that section the Commissioner is not limited as to time in giving his notice, but it is conceived that, so far as the necessity or otherwise for the specific sanction of the Corporation is concerned, either under section 90 or under

section 289, these two sections 298 and 299 must be on the same footing.

Counsel's attention is particularly requested to sections 90 and 289.

Section 90 refers throughout to the acquisition of immoveable property *by agreement*.

In support of the view that this section controls the Commissioner's powers under sections 298 and 299, it may no doubt be contended that it is as comprehensive in its terms as it can be, and applies to every case of *acquiring* immoveable property under the Act by agreement, and therefore comprises agreements as to the compensation to be paid under section 301 in cases of acquisition under both section 298 and section 299 (in both these sections the land, it will be observed, is spoken of as "acquired").

But assuming that section 90 does apply to such agreements, it does not apparently restrict the exercise of the Commissioner's power to require a set-back under section 298, or to give notice of intention to take possession under section 299, and would not necessitate his obtaining the previous sanction of the Corporation to either the one or the other. The effect of the section from that point of view would seem to be to render it obligatory on the Commissioner *if* he *agrees* on the amount of compensation to do so with the approval prescribed—if, on the other hand, he does not come to an agreement with the owner, or has to bring a proposed agreement before the Corporation for approval, and the owner does not choose to wait for such approval, he (the owner), can apparently apply to the Chief Judge of the Small Cause Court under section 504 and get the amount fixed in that way.

As regards section 289, however, the case is different—if that section applies to the cases of widening or improvement contemplated by sections 298 and 299, then it seems evident that before making a requition for set-back under the former, or giving notice of intention to take possession under the latter, the Commissioner must (where the aggregate cost will exceed Rs. 5,000) obtain the authority of the Corporation. The considerations which led Sir Charles Ollivant to the conclusion that neither section 90 nor 289 applies to cases under sections 298 and 299 are very clearly expressed in his memorandum.

Section 289 he seems to have thought referred to comprehensive schemes for widening and improvement of a public street as a whole as distinguished from the gradual and necessarily piecemeal enforcement of the "regular line" under sections 298 and 299. It will, of course, be noticed too, that a set-back under either of these two sections may be estimated to cost less than Rs. 5,000, but that the actual cost being dependent for the most part on the judgment of the Chief Judge of the Small Cause Court in regard to the compensation to be paid to the owner of the land taken cannot beforehand be gauged with any certainty.

Counsel are requested to advise the Municipal Corporation—

QUERIES.	OPINION.
1. Whether, and, if so, to what extent section 90 controls sections 298 and 299, or either of them.	1. We are of oipnion that section 90 does not refer to cases under sections 298 and 299, at all. Section 90 applies only to land acquired by agreement. Land acquired under sections 289 and 299 is acquired without any agreement and vests in the Corporation before any payment is made for it. After acquisition, compensation has to be paid by the Commissioner under section 301. Such payment is a statutory duty and we are of opinion that there is no agreement for acquisition nor price paid for such property within the meaning of section 90 in cases under sections 298 and 299.
2. Whether, and, if so, to what extent section 289 controls the Commissioner's powers under sections 298 and 299, or either of them.	2. We are of opinion that section 289 does not refer to cases under sections 298 and 299. Section 289 in our opinion refers to a scheme for street improvement by widening it at one undertaking and not to the gradual widening provided for by the set-back sections.
3. Whether the Municipal Act prescribes any limit to expenditure upon, or imposes any necessity for, special sanction either by the Corporation or the Standing Committee, in respect of set-backs other than the general restriction (section 115) that no outlay can be incurred unless it is covered by "a current budget grant." And to advise generally.	3. We are of opinion that it does not.

27th August 1895.

JOHN MACPHERSON.
J. D. INVERARITY.

PAY OF THE MUNICIPAL COMMISSIONER AS JOINING ALLOWANCE.

BOMBAY, *27th April* 1895.

To H. W. BARROW, ESQ., Municipal Secretary.

SIR,—We have now the honor to state our opinion upon the points upon which we are asked to advise under your No. 1203, dated 25th instant. The salary of the Municipal Commissioner is limited by the Municipal Act, and as Mr. Acworth was (until he gave over charge) drawing the maximum salary permitted by the Act, it is evident that no other sum can for that period be paid from the Municipal Fund as *salary* of the Municipal Commissioner; but the appointment of Municipal Commissioner and

Acting Municipal Commissioner rests with Government, and it may well be that in making that appointment a short interval may occur between the time when the services of the officer selected as suitable become available and the precise time when the vacancy in the Municipal office arises, and the question is, whether, under such circumstances, when the officer selected is held in readiness, his salary during that interval is not a charge reasonably incidental to, and (within the meaning of section 118 of the Act) necessary for carrying the Act into effect, namely, in the matter of the appointment of a Municipal Commissioner or Acting Municipal Commissioner as the case may be. We think it is, and particularly where, as in the present case, the officer so selected is during that interval employed in picking up, as far as may be, the threads of the important matters with which he will have to do as Commissioner. If we are correct in the above view, it follows, we think, that, having regard to section 118, the liability in question is one which attaches to the Corporation, and that the charge can be debited to the Municipal Fund.

We return the papers forwarded with your letter, as also vol. XIV of the Record of Proceedings.—We have, &c.,

CRAWFORD, BURDER & BAYLEY.

RESPONSIBILITY OF THE MUNICIPALITY IN CASES OF FALLEN HOUSES.

EX PARTE THE MUNICIPAL CORPORATION *RE* RESPONSIBILITY OF MUNICIPALITY IN CASES OF FALLEN BUILDINGS.

CASE FOR COUNSEL'S OPINION.

A question has recently arisen in connection with several instances in which houses have collapsed in Bombay, as to how far (if at all) any legal responsibility or obligation attaches to the Corporation, or to the Municipal Commissioner, or any of the Municipal Officers, in regard to taking measures of any kind for the extrication of persons or bodies buried or supposed to be buried under the debris of such fallen buildings. Section 61 (1) of the Municipal Act makes it incumbent on the Corporation to make adequate provision by any means or measures which it is lawfully competent to them to use or to take for "the securing or removal of dangerous buildings and places." The only sections of the Act which contain *specific* provisions in relation to the carrying into effect of the obligatory duty thus imposed by the very general terms of section 61 are sections 329 and 354, but it seems quite clear that neither of these sections can have

any application to the case now under consideration of a building which has already collapsed, for, as to section 329, the danger therein referred to is expressly stated to be a danger "less to persons other than the owner or occupier," which, as to both sections (329 as well as 354), they contemplate a notice in writing being in the first instance issued to the owner or occupier—a procedure which in the nature of things might be, and almost certainly would be, quite impracticable in such an emergency as we are now considering. If therefore the obligation, expressed in general terms in section 61, of making adequate provision "for the securing or removal of dangerous buildings and places" is to be construed as limited to cases falling within the scope of section 329 or section 354, it seems impossible to hold that any responsibility at all can attach to the Municipality to interfere in the case of a collapsed building. *But* the duty imposed by section 61 (1) is not apparently limited to cases covered by these more specific provisions; it would seem, for instance, to extend to the very widely expressed obligations imposed on the Commissioner by section 64 (3) (*c*). The Commissioner is required by this last mentioned section, on the occurrence of any sudden accident involving danger to human life, to take such immediate action as the emergency shall appear to him to justify or to require, and the question is whether the sudden collapse of a house by which the inhabitants are buried under the debris is not such an emergency as is here contemplated. Again upon the point whether the general obligation imposed by section 61 (1) is limited to cases specifically provided for in other sections of the Act, the recent opinion of Counsel on the question of the power of the Corporation to light private streets seems by analogy to be in point. There was a general discretionary power under section 63 (*k*), just as here there is a general obligatory duty under section 61 (*l*) that general discretionary power Counsel held was not limited to cases specifically provided for in other sections of the Act. So here it would seem that the general obligatory duty is not necessarily so limited; indeed, as we have pointed out, section 64, which is also very general in its terms, would appear to extend it very materially. On the other hand can it properly be said that the removal and raising of the debris of a fallen house in order to extricate persons who have been buried under them, and who may still be living, or to remove their bodies, if dead, comes at all within the expression "the securing or removal of dangerous buildings and places?" A building, however dangerous it may have been before, can hardly be called a dangerous building after it has collapsed and come down altogether, and though the *place* may in a sense be dangerous (and no doubt is so to any unfortunate person buried under the debris but possibly still alive and requiring assistance), it may perhaps be nevertheless doubted whether it is not straining the language used to apply it to such a place under such circumstances. It has been pointed out moreover that, if

the Municipality are under any responsibility in the cases under consideration, they would be equally responsible in other cases also, as for instance, for the removal of bodies buried in earth by land slips or in trenches under excavation and that such responsibility might even extend to the rescue of drowning persons or persons in danger from other accidents too numerous to mention. At present the Municipality have no special establishments or tools at disposal to meet such cases. When a house falls, the Fire Brigade men, with their officer and the Police, are usually the first on the spot and render very valuable assistance; the services of the men of the Road, Drainage, and Health Departments of the Municipality are also called into requisition from the works in the neighbourhood of the accident, but it is not always possible to obtain the services of these men; they may be away for their meals during the day or may have left after the day's work is over. The Municipality have no special means for lighting the places of accident at night and have no special tools or appliances for the removal of heavy masses of timber or masonry. At present, when accidents occur, the best means available at the time are adopted with, as stated above, the aid of the Fire Brigade, the Police, and the various branches of the Municipality, and everything that can be done is done to minimize or remove danger, but, if the Municipality is to be held primarily responsible for saving life or for extricating bodies when accidents occur, it will be necessary to consider seriously and in details the question of keeping in reserve a staff of men and officers and also special tools and appliances for prosecuting works of this nature efficiently and expeditiously.

Counsel is now requested to advise:—

1. Whether, in the case of a house which has collapsed, any legal obligation or responsibility attaches to the Municipality in regard to taking measures to extricate persons who, or bodies, which there may be reason to believe, are buried under the debries.

2. If any such obligation or responsibility does attach, what is generally the extent of it? Is it limited to cases where there is reason to believe that human life is in danger? Does it involve a responsibility to provide and maintain a special staff and appliances to meet the exigencies of such cases—or is it sufficiently met by the present practice of rendering such assistance from the several departments or branches of the Municipality as in the circumstances of each case is found to be practicable?

1. I am of opinion that section 64, clause (c), does not impose the duty of doing so.

2. The obligation is imposed when the accident involve danger to human life, and if there is no such danger, I am of opinion there is no duty cast on the Commissioner by that section in the case which is put in these instructions. I think that it is not necessary to maintain a special staff to deal with such cases. The section contemplates the possibility of a budget grant for the purpose, but if the work can be satisfactorily done without a special staff, I see no reason why it should not be so done. The present practice appears a reasonable one. The section leaves it to the discretion of the Commissioner what action he is to take to meet the emergency, and if he thinks the present practice is reasonably sufficient, I think he has power to act on that opinion.

April 23rd, 1896. J. D. INVERARITY.

PROVISION OF BURIAL PLACES.

Letter, dated 14th December 1889, from Messrs. Crawford and Buckland, to E. C. K. Ollivant, Esq., Municipal Commissioner, as follows :—

SIR,—In returning the accompanying papers forwarded for opinion under your No. 8058, dated the 7th August last, we have now the honor to state our views upon the questions raised.

Section 61 (*c*) of the Municipal Act makes it *incumbent* on the Corporation to make adequate provision for the regulation of places for the disposal of the dead, and the provision of new places for the said purpose, and Section 436 requires that "if "the existing places for the disposal of the dead shall at any time

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"appear to be insufficient, the Commissioner shall, with the "sanction of the Corporation, provide other fit and convenient "places for the said purpose."

The considerations, therefore, by which the extent of the obligation thus imposed upon the Corporation and the Commissioner must be determined are—(1) the insufficiency or otherwise of existing places for disposal of the dead, and (2) the fitness and convenience of new places proposed to be provided.

It seems impossible to lay down any hard and fast rule for determining in all cases whether the obligation arises, and if so, to what extent, for the expressions "insufficient," "fit," "convenient" are so essentially relative expressions, that it is possible for different persons to place such very different interpretations upon them. Speaking generally, however, we are of opinion that regard must, so far as is reasonably practicable, be had to what is usual and consonant with the customs, and well recognized feelings and prejudices (religious or otherwise) of the different races and sections of the community. Thus to take the extreme case, which you put, we feel no hesitation whatever in saying that the obligation would not in our opinion be discharged by the mere provision of sufficient space in one or more public burial grounds (such as the one at Haines Road), for the burial of the dead of all classes without distinction. Nor again to attempt to apply the principle to the particular case which has given rise to this reference, do we feel any doubt, but that under the circumstances stated in the resolution of the Bombay Christian Burial Board, dated the 1st August last, the Corporation would not only be acting within the limits of their authority, but can only duly acquit themselves of their obligation, by providing additional burying space for Christians, either at Sewri, in the manner suggested by the Board, or elsewhere.

Under the law, as it stands, we conceive, that the community generally are entitled to have sufficient places for the disposal of their dead, provided for them at the public expense, and those places must, we think, be so ordered as that they shall not be repugnant to the feelings of the particular races or sections of that community for whom they are intended. The fact that provision has for the most part been heretofore made by each separate race or section for the disposal of its own dead, does not, we think, whenever the time arrives for extending the existing provision or making fresh provision, detract from their right of having this done for them by the Municipality.

We do not, of course, fail to recognize the difficulty which may be felt in applying the general principles above indicated to some individual cases, but we are not sufficiently acquainted with the circumstances of the particular cases cited by way of illustration in your memo. to judge how far the Corporation, might have been under an obligation to provide separate burial grounds in those instances.

With reference to the concluding para. of your memorandum we feel no doubt, but that the Corporation can, in the present case (the Sewri Christian Cemetry), instead of providing another fit and convenient place elsewhere, expend money in the manner proposed in view to developing the capacity of the existing place.—We have, &c., CRAWFORD & BUCKLAND.

RE JOINT SCHOOLS' COMMITTEE.

BOMBAY, 8*th December* 1890.

FROM CRAWFORD, BURDER, BUCKLAND & BAYLEY,
To H. W. BARROW, Esq., Municipal Secretary.

SIR,—We have the honour to acknowledge the receipt of your No. 8859, dated the 6th instant; and in returning the papers forwarded therewith, to express our opinion on the questions submitted to us.

The Joint Schools Committee are, by section 39 (7) of the Municipal Act, required to administer the School fund, which it is prescribed by section 120 shall comprise amongst other moneys "all sums made over to the Corporation by way of endowment or otherwise, for the promotion of primary education." The questions put to us seem to amount, therefore, practically to this: (1) Have the Corporation the power to take over the interest on the particular fund in question when such interest is "made over" to them by the Accountant General; and (2) if so, are they justified in so doing.

The Government Resolution (No. 1918, dated 9th September 1890) indeed apparently contemplates the payment of the interest by the Accountant General direct to the Joint Schools Committee, but this probably was merely an inaccurate way of stating the matter; for, it seems evident, having regard to the provisions of the Municipal Act, that it should be paid to the Municipal Fund and carried to the credit of "the School Fund" in the Municipal accounts. When placed to the credit of this latter fund, it devolves on the Joint Schools Committee to administer it in accordance with the By-laws passed by the Corporation and with rules made or approved by Government in that behalf. We can see no reason whatever to doubt the power of the Corporation to take over the interest from time to time in this way, for the purpose of being administered by the Joint Schools Committee in accordance with the By-laws and with the rules made Government, which latter apparently merely embody so far as the present case is concerned, the conditions indicated by the late Sir Mangaldas Nathubhoy, and are, if we correctly understand them, in no way inconsistent with the provisions of the Act. Nor do we think the fact that merely the interest is to be from time to time made over renders it in any degree less justifiable for the Corporation to take over the money "for the promotion of primary education."

The Joint Schools Committee,—a body appointed partly by Government and partly by the Corporation,—will be responsible for the observance of the conditions, and the Corporation, it seems to us, incur no more responsibility in the matter than in the case of any other endowment or money belonging to the school fund.—We have, &c., CRAWFORD, BURDER & Co.

JOINT SCHOOLS' COMMITTEE ESTABLISHMENT.

Letter, dated 18th February 1889, from Messrs. Crawford and Buckland, to the Municipal Commissioner :—

SIR,—At the recent interview which our Mr. Crawford had with you, you desired that we should consider and advise you as to the status generally of officers and servants subordinate to or to be appointed by the Joint Schools Committee, and particularly as to their position in reference to the retirement or pension fund.

The provisions of the present Municipal Act bearing upon this subject are to be found in Sections 39, 61 (*g*), 79, 80, 81, 82, 120, and 461.

The officers and servants whose status we have to consider fall under two classes, *viz.* :—

(*a.*) The Secretary to the Committee, and the clerks and messengers necessary to be employed in connection with its administrative work ; and

(*b.*) The masters, teachers, and other persons employed in the primary schools maintained out of the school fund.

Those under class (*a*) are, by the provisions of Sub-section (6) of Section 39, to be provided by the Corporation for the Joint Schools Committee, while the appointment and removal of those under class (*b*) are, by Sub-section (9) of the same section, expressly vested in the Committee itself, subject to by-laws duly made under Section 461, and to rules made or approved by Government.

The question then which arises is :—Are all or any of these persons, "Municipal officers or servants" within the meaning of Section 81 ?

The distinction drawn by sub-sections (6) and (9) of section 39 above referred to between the two classes is somewhat marked. There might have been some doubt on the language of sub-section (6), if read alone, as to whether the expression "provided" meant more than that the Corporation should provide for the pay of the officers and servants mentioned, but when read with Sub-section (9) it becomes evident, we think, that the appointment of officers and servants of class (*a*) is not intended like those of class (*b*) to rest with the Joint Schools Committee, but that the Corporation are to provide the actual officers and servants themselves. If this be so, it follows apparently that their appointment will rest with the Commissioner under Section 82 and their salaries will, we think, be payable out of the Municipal fund as distinguished from the school fund constituted under Section 120, they must in fact, in our opinion, be regarded in all respects as Municipal officers and servants, but we are inclined to think that their designations, &c., under the Joint Schools Committee need not necessarily be included in the Schedule to be brought before the Standing Committee for sanction under section 79 for, in so far as regards their services under the Joint Schools Committee, they can hardly be said to be permanent officers or servants "entertained in any departments of the Municipal administration" within the meaning of Section 80.

As regards officers and servants under class (*b*), on the other hand their appointment will rest so exclusively with the Joint Schools Committee and their salaries, &c., will be so exclusively payable out of the school fund to be administered by it that, having regard to the constitution of that Committee, we do not consider they can be held to be Municipal officers and servants at all, or that the provisions of Section 81 (*f*) can be held applicable to them. It is true, no doubt, that under clause (*w*) of

Section 461 the Corporation may make by-laws for (*inter-alia*) regulating the functions assigned to the Joint Schools Committee under Sub-section (9) of Section 39 (namely, in regard to the appointment and removal of persons coming within the class now under consideration), as well as for regulating the administration by the said Committee of the school fund under Sub-section (7) of the same Section, and can thus exercise a certain amount of control and supervision over the Committee in these matters; but such by-laws, if made, must be consistent with the Act, and though they may control, cannot, we think, deprive the Committee of the power of appointment and selection which is vested in them by Section 39 (9) and which is not, in our opinion, dependent on the existence of such by-laws, the power and duties with which the Joint Schools Committee may be invested, by by-law under Sub-section (10) of Section 39, coupled with Section 461, being powers and duties other than those already vested in such Committee by the Act.

To sum up therefore, it appears to us that the Secretary to the Joint Schools Committee and its clerks and messengers, provided under Sub-section (6) of Section 39 will be Municipal officers and servants, and will be subject to any regulations for the time being in force under Section 81, but that the masters, teachers and other persons employed in the primary schools and appointed under Sub-section (9) of Section 39 will not.—We have, &c.,

CRAWFORD & BUCKLAND.

PROPOSED BY LAW INVESTING THE JOINT SCHOOLS' COMMITTEE WITH POWER TO ENTER INTO LEASES.

EX-PARTE THE MUNICIPAL CORPORATION.

Re proposed by-law investing Joint Schools Committee with power to enter into leases.

Case for the opinion of Counsel.

The Joint Schools Committee is a body constituted under Section 39 of the City of Bombay Municipal Act, 1888. Four of the 8 members of whom it consists are appointed by the Corporation and the remaining 4 by Government.

By Sub-section (7) of Section 39 the Joint Schools Committee are to administer the school fund and to "provide thereout for the "accommodation and maintenance of primary schools which at any "time vest wholly or partly in the Corporation and for otherwise "aiding primary education in accordance with by-laws duly made "under Section 461."

Sub-section (10) of the same section runs as follows:—"The "Joint Schools Committee may by a by-law made under Section "461 be invested with the powers and duties of any authority "constituted under this Act in so far as shall be necessary or "expedient in order to the fulfilment of the functions imposed on "such Committee as contemplated in this Section and in Section "61, Clause (*q*); and to the extent to which such Committee is in- "vested as aforesaid, the powers and duties of the said authority "shall be in abeyance save as so vested and exercised accordingly."

Section 461 referred to in the last-quoted sub-section empowers the Corporation to make by-laws not in consistent with the Act with respect to certain matters, and amongst others, Clause (*u*) "assigning the functions of the Joint Schools Committee under "Sub-section (10) of section 39 regulating the exercise by the "said Committee of its functions so assigned and of the functions "assigned to it under Sub-section (9) of the said section, and re- "gulating the administration by the said Committee of the school "fund under Sub-section (7) of the said section."

Section 61 also referred to in Section 39 (10) prescribes the matters for which it is incumbent on the Corporation to make adequate provision, and Clause (*q*) is as follows:—Maintaining, aiding and suitably accommodating schools "for primary education."

By-laws have been duly made by the Corporation under Section 461 (*u*), purporting to assign the functions of the Joint Schools Committee under Section 39 (10) to regulate those functions and those assigned under Sub-section (9) of Section 39, and to regulate the administration by the Committee of the school fund; copy of these by-laws is sent. By-laws 10 and 11 showing how the Committee are to regulate the school fund in accordance with an annual Budget may be referred to, otherwise these by-laws do not seem to bear on the present question.

The Joint Schools Committee were some time ago desirous of having a general form of lease prepared, under which they could take premises for the purposes of their several schools as favourable opportunity might offer.

The Solicitors in preparing the form pointed out that no by-law having been passed investing the Joint Schools Committee with the powers of the Corporation in regard to leasing of premises for the accommodation of schools for primary education, it was necessary that such leases be entered into by the Corporation themselves. The Joint Schools Committee thereupon requested that they might be invested by the Corporation with the necessary authority. The Commissioner consulted the Solicitors as to whether they saw any objection. The Solicitors replied that they saw none, and that the administration of the school fund being in the hands of the Joint Schools Committee under Section 39 (7) that Committee would seem to be obviously a proper authority to decide what premises are required for the schools and on what terms they should be taken and to take leases when those terms are arranged.

Eventually on the 3rd June 1897 the Corporation resolved that, pursuant to Section 465 of the Municipal Act, notice be given of the intention of the Corporation at a meeting to be held on 5th August 1897 to take into consideration a draft by-law which was then provisionally approved. A notification of such intention was accordingly duly published.

On the 24th July notice of objection to the proposed by-law was received from certain "Rate-payers, Electors, Residents and Citizens of Bombay."

On the 5th August 1897 the matter came on for consideration in view to the approval, or otherwise, of the draft by-law, and the objectors were heard by Counsel.

The question as to whether the Corporation could legally delegate its powers of leasing (*i.e.* taking leases) to the Joint Schools Committee or to anybody outside the Corporation was raised at this meeting, and it was determined that the draft should not be approved until the opinion of Counsel had been taken on the point. Copy of the proposed by-law and copies of the correspondence and papers so far as they are in any way material to the present question are sent herewith.

The powers of the Corporation in regard to the acquisition of property for the purposes of the Act are provided for in Sections 87 to 91. Section 87 gives them the power to acquire and to hold immoveable property, and this presumably would include the power to take leases of properties.

The notice of objection to the by-law of the 24th July last while laying down the proposition that the "Municipal Cor-"poration cannot now without proper authority and on the mere "representation of the Joint Schools Committee divest itself of responsibility" does not support that proposition by any arguments, nor does it suggest any reason for holding that the proposed by-law is not admissible under Sections 39 (10) and 461 (*u*), nor, so far as we are aware, was there any discussion at the Corporation meeting which throws any light on this point.

Counsel is requested to advise—

1. Whether it is legally competent to the Corporation to delegate its powers of acquiring property on lease to anybody outside of the Corporation.

1. Under Section 69 of the Municipal Act all contracts for any purpose of the Act have to be made on behalf of the Corporation by the Commissioner as the Commissioner is a Municipal authority. It seems clear that under Section 39 (10) the Joint Schools Committee could by by-law be invested with the powers of the Commissioner in entering into leases for accommodating primary schools, but they would simply be substituted for the Commissioner and would be subject to all the

provisions which bind the Commissioner in Sections 69, 70 and 71. The lease would have to be in the same form as present entered into on behalf of the Corporation by the Joint Schools Committee. I do not see any advantage to be derived by substituting the Joint Schools Committee for the Commissioner as the hand to execute the contract.

I am of opinion that the Corporation cannot delegate its powers to the extent of allowing the Joint Schools Committee to enter into leases on their own behalf although it can do so to the extent of allowing them to execute the leases on behalf of the Corporation.

2. Whether it is legally competent to the Corporation to make the proposed by-law.

2. The proposed by-law appears to me to be objectionable as it seems to contemplate that the Joint Schools Committee shall enter into leases of which they, and not the Corporation, shall be leases. Although the Corporation is a Municipal authority (see Sec 4), I do not think it has the powers to make contracts itself. No doubt its seal is affixed to certain contracts (Sec. 70), but I think that that seal cannot be affixed to any contract except as provided by Sec. 70, Cl. 2. The whole *modus operandi* of making contracts on behalf of the Corporation as provided for in Sec. 69 and following sections is in my opinion against any delegation of authority to make contracts, except to the extent mentioned in last para. of answer 1. I doubt also very much whether my opinion is correct even as to allowing the Joint Committee to execute leases on behalf of the Corporation, for Section 71 provides that no contract, not executed as provided in Section 70, shall bind the Corporation, and Section 70 requires the contract to be in the form such as would bind the Commissioner if such contract was on his behalf.

On the whole, I should advise the Municipality not to pass the by-law proposed.

J. D. INVERARITY.

RE MAJOR TULLOCHS' FEES.

CONTRACTS.

Case for Counsel's Opinion.

On the 11th November 1891 the Municipal Commissioner, with the sanction and on behalf of the Corporation, entered into a contract with Messrs. James Simpson and Co., Limited, under which the latter undertook to manufacture, ship to Bombay, and erect here for the Love Grove sewage outfall, four sets of Worthington Triple Expansion uncompensated steam engines and sewage pumps with fittings, &c., complete. The price was payable by instalments, and the last instalment was payable at the expiration of one year from the date of the completion of the erection of the machinery on the certificate of the Engineer that it had been duly performing the work for which it was guaranteed. The machinery was duly erected and the pumps started in 1893, but it soon became evident that, owing to the very large quantities of silt (such as road detritus, sand, &c.,) brought down by the sewers and taken up into the pumps, the wear and tear to certain parts of the pumping machinery was such as to necessitate frequent repairs and renewals. Numerous questions arose with the contractors as to how the cost of these repairs and renewals should be borne, but these in the result have all been since satisfactorily arranged, the machinery finally taken over and paid for and the contractors' deposit returned to them. Meanwhile, having in view the difficulties which had already been met with by reason of the large quantities of silt, it was proposed in 1893 that silt pits should be constructed on the main sewer for the purpose of intercepting as much as possible of the silt before it reached the pumps, and thus obviating to some extent the excessive wear and tear to the parts in question. Mr. James, the Drainage Engineer, accordingly prepared designs for these works, and on the 23rd September 1893 submitted them to the Commissioner through the Executive Engineer, Mr. Murzban. The Executive Engineer examined and reported very fully on Mr. James' proposals and, while agreeing with them in general principle, differed from them on several important points of detail, and Mr. James W. Smith, Special Drainage Engineer, Municipality, was then, at the suggestion of the Executive Engineer, asked to advise and did so ; in the result it appeared that there were several difficult questions of more or less importance and involving technical considerations upon which the Municipal Engineers were unable themselves to agree or to satisfy the Commissioner so as to enable him to come to any definite conclusion, and he therefore felt a reference to a Consulting Engineer to be inevitable. Major Tulloch, R. E., had for many years acted for the Municipality in England as

their representative in the matter of supervising the manufacture of, and testing pipes, machinery, &c., and had in fact as their representative superintended the manufacture and supply of the Worthington sewage pumps supplied by Messrs. James Simpson and Co., Limited, as above mentioned. The Commissioner had also on previous occasions referred to him for advice on difficult engineering matters and paid him fees within the compass of his (the Commissioner's) discretional allowance (an allowance usually budgetted for at Rs. 5,000 per annum). The Commissioner accordingly, after a meeting with the Municipal Engineers on the 21st December 1893, seems to have determined on a reference to Major Tulloch, for, though there is no copy of any such reference on record, it does appear, from a subsequent letter from Major Tulloch dated 16th March 1894, that he received from the Commissioner a letter of the 14th February with enclosures, and these enclosures were no doubt copies of several reports which had been made on the subject of the silt pits by the Executive Engineer, the Drainage Engineer, and the Special Drainage Engineer respectively. On receiving these papers, Major Tulloch on the 9th March 1894 telegraphed to the Commissioner in the following terms: "Catchpits in sewers will fail; don't attempt them; send plans, sections, and levels of works at outfall, and I will design necessary works". On the 15th March 1894 the Commissioner (Mr. Acworth) telegraphed in reply to Major Tulloch as follows: "Please write your views on silt pits; Engineers here can design anything required." To this Major Tulloch replied by wire on the 17th March 1894—"Very sorry indeed, but prefer having no responsibility for works not designed by myself; success in this case will depend on numerous details quite impossible to explain in writing; if works failed, blame would be attached to me by public; cannot afford to run risk; no Engineer with name to lose could accept such position." On the 19th March 1894 the Commissioner wired to Major Tulloch—"Plans, levels, sections will be sent next mail." And on the 31st March the Commissioner wrote him—"with reference to your telegram of the 17th instant, I have the honor to forward by to-day's mail three plans showing the levels and sections of the works at the Love Grove Pumping Station." On the 16th March 1894 Major Tulloch wrote to the Commissioner as follows:—

"16*th March* 1894.

"SIR,—In reply to your letter of the 14th February and enclosures, I sent you the following telegram on the 9th instant, when, being out of town, I could not write in time to catch the mail:—

"'Silt pits in sewers will fail. Don't attempt them. Send plans, sections, and levels, of works at outfall, and I will design necessary works.'

"It is not at all the right way of proceeding, and it is quite impossible to explain satisfactorily in writing how the sediment in

the sewage should be arrested. If the plans are sent, you may depend on my expediting the preparation of the designs of the necessary works to the very utmost, as I know how urgently they are required. If it has not already been included among the plans you have sent, a block plan showing the boundaries of the Municipal property at the outfall with all the levels marked on it would be useful.—I am, yours obediently.—A. TULLOCH."

"P. S.—I shall feel obliged if you will kindly send me the cost of the telegram, which was £5 16s (28 words) but one (Commissioner) charged as double, having more than nine letters in it—or 29 words at 4s. = £5 16s."

No. 102 OF 2*nd April* 1894.

£5 16s to be remitted to Major Tulloch. Debit to my discretional contingencies.—H. A. ACWORTH.

On the 20th April 1894 Major Tulloch acknowledged the receipt of the plans and stated that "the designs for the works for intercepting the sand at the sewage pumping station shall be prepared with all the despatch possible."

On the 16th July 1894 the Commissioner wrote to the Municipal Secretary for the purpose of obtaining an extra grant of Rs. 2,000 for repairs to machinery at Love Grove (copy letter herewith), and in connection with the necessity for such repairs said: "The question of intercepting the silt before it reaches the pumps has been by no means lost sight of, and I have had reports from, and discussions with, the Executive Engineer, the Special Drainage Engineer, and the Drainage Engineer, but all these officers differ to such an extent as to the remedy to be applied that I referred the question to Major Tulloch, R.E., who has a scheme under preparation which he informs me will fully meet the difficulty. He advised me last mail that we might expect it in two or three weeks."

The rupees 2,000 asked for was recommended by the Standing Committee and sanctioned by the Corporation and the Commissioner's letter of the 16th July 1894 just quoted was placed before both those bodies. On the 9th November 1894 Major Tulloch sent out his detailed plans and sections with an elaborate report explanatory of his designs, and on the 16th and 23rd November 1894 respectively he sent out detailed estimates. These designs comprised (stated briefly) four sets of double settling tanks into which the sewage, before reaching the pumps, was to be diverted by a new main sewer going off from the existing sewer, and these

tanks were to be fitted with penstocks, sludge chambers and ejectors worked by machinery. On the 11th January 1895 Major Tulloch wrote to the Commissioner demi-officially in reference to his scheme and, after discussing the question of his fee, fixed it at £750 (a copy of this letter is sent herewith). The Commissioner demi officially asked the opinion of Mr. Murzban, Executive Engineer, as to this fee, and a copy of his reply, dated 7th February 1895, is sent. Upon this the Commissioner endorsed "Put up when estimates for the silt pits at L. G. (Love Grove) come in; this will be part of them."

Major Tulloch's scheme and designs meanwhile had been referred to the Executive Engineer for consideration and report, and on the 7th May 1895 he reported :—"Major Tulloch's scheme is as perfect as it can possibly be made for the interception and disposal of silt," but he then went on to recommend that for financial reasons it should not be adopted and showed that it would be better to incur the heavy recurring expenditure which experience had shown would be necessary for the renewals and repairs of the pumping machinery than incur the very heavy capital expenditure (estimated out here at over 5 lakhs) which the adoption of Major Tulloch's scheme would involve, and moreover he drew attention to sanitary and other considerations which told against the scheme. On the 11th May 1895 the present Commissioner placed the papers before the Standing Committee for consideration with his letter to the Municipal Secretary of that date (copy herewith) in which he says :—"In conclusion I may say that, though such an important scheme demands the careful consideration of the Standing Committee, I cannot think that any good case has been made out for its adoption." Upon this, the Commissioner was asked to furnish the Committee with any further information there might be available on the subject together with any communication to the Corporation or the Committee by the Commissioner regarding a reference to Major Tulloch in this matter (a copy of the Commissioner's reply to this reference, dated 20th May 1895, is sent herewith). The Standing Committe eventually resolve :—"That the opinion of Counsel be taken for the the information of the Standing Committee, as to whether by the action of the Commissioner, whether or not such action was authorised by the Corporation or the Standing Committee, the Municipal Corporation are in law committed to the payment of the fees which may be found due to Major Tulloch for the plans and estimates prepared by him in the matter of the proposed silt pits at Love Grove Pumping Station." Mr. Acworth, it appears, had not the slightest idea of incurring such a heavy charge when he referred the matter to Major Tulloch. Had he supposed he was incurring an obligation beyond the limits of his grant for discretional contingencies, he would, of course, have gone to the Corporation and Standing Committee first for sanction. He was, in fact, quite as much startled as the Standing Committee when the fee was named.

Major Tulloch on the other hand, as will be seen from his telegrams, declined to undertake the responsibility of recommending a scheme except on his own designs and, having regard to what he has actually done, it does not seem to be seriously suggested that the fee he asks is excessive, and it is apparently agreed on all hands that his scheme, which must have involved much special labour, is an excellent one for the purpose for which it is designed. By the Commissioner's letter of the 16th July 1894, he no doubt brought to the notice of the Standing Committee and Corporation the fact that he had referred the matter to Major Tulloch, but he did this only incidentally and did not inform them—indeed, obviously, did not know himself the extent of the obligation he had incurred, nor did he ask sanction to the employment of Major Tulloch for the purpose. No payment, of course, could be made to Major Tulloch except in conformity with section 115 of the Municipal Act, and as there is no budget-grant which would cover such a payment, and it certainly is not one which falls under either of the excepted items mentioned in the proviso to that section, the sanction of the Corporation is of course necessary before the payment can be made. The question would seem to be whether the Corporation can be held legally liable to Major Tulloch for the value of his services rendered at the request of the Commissioner, whether in fact, in order to hold the Corporation responsible for his fees, it was incumbent on Major Tulloch under the circumstances to satisfy himself, before undertaking the work, that the Municipal Commissioner had received sanction to employ him. Major Tulloch, no doubt, naturally assumed that the Commissioner had sufficient authority, but it seems equally certain that as a matter of fact he had not. Under section 222 the Commissioner is required to maintain and keep in repair all Municipal drains and, when authorised by the Corporation, to construct such new drains as may be necessary. Under section 224 he may enlarge, arch over, or otherwise improve any Municipal drain. Under section 225 the Municipal drains are to be from time to time properly flushed, cleansed, and emptied, and for that purpose "the Commissioner may, when authorised by the Corporation in this behalf, construct or set up such reservoirs, sluices, engines or other works as he shall from time to time deem necessary."

Counsel's attention is drawn to the provisions of the Act in regard to the making of contracts (sections 69, 70 and 71). Section 69 provides [clause (b)] that no contract for any purpose which under the Act the Commissioner may not carry out without the approval or sanction of some other Municipal authority shall be made by him until or unless such approval or sanction has first of all been duly given. Clause (c) prohibits the Commissioner from entering into contracts (other than for acquisition of immovable property) which will involve expenditure exceeding Rs. 5,000, unless previously approved by the Standing Com-

mittee. Clause (a) requires that every contract involving more than Rs. 500 and not more than Rs. 5,000 shall be reported to the Standing Committee within 15 days. Section 70 (1) (b) requires that every contract "for the execution of any work" or the supply of any materials, &c., which will involve more than Rs. 500 shall be in writing and sealed with the Corporation's seal. Section 71 provides that no contract not executed as in section 70 provided shall be binding on the Corporation.

Counsel is requested to advise upon the question raised by the Standing Committee's resolution, namely :—

QUERIES.

Whether by the action of the Municipal Commissioner, whether or not such action was authorized by the Corporation or the Standing Committee, the Municipal Corporation are in law committed to the payment of the fees which may be found due to Major Tulloch for the plans and estimates prepared by him in the matter of the proposed silt pits at Love Grove Pumping Station.

And to advise generally.

OPINION.

Where a Corporation is created and its constitution is embodied in an Act of the Legislature and limits are imposed on the authority of the officers of the Corporation by its constitution, all persons dealing with the agents of the Corporation must be deemed to have notice of the limits set to their authority (Pollock on Contracts, p. 121). Major Tulloch therefore must be taken to have known that the Commissioner had no power to agree with him expressly or impliedly, to bind the Corporation to a payment in respect of work done by him beyond the statutory limit. I am of opinion that the Corporation are not bound legally. I see no evidence of ratification which is in law equivalent to a previous authority.

I also think that section 70 is imperative and that the absence of a contract in writing under the seal of the Corporation is fatal to the claim of Major Tulloch see *Hunt vs. The Wimbledon Local Board, L. R.* 4, C. P. Division, P. 48, a case very much on all fours with the present one (assuming a verbal order by the Corporation). That case I think also shows that Major Tulloch could not succeed on the ground that he was sueing on an executed consideration, and that the Corporation had enjoyed the benefit of his work. I am of opinion that in either case put in the question the claim of Major Tulloch cannot be enforced against the Corporation in Court, *see also Young vs. The Mayor of Leamington*, 8, *pp., Co., p.* 517). The case of *Eaton vs. Basker*, 7, *Q. B. Divn, p.* 529, I do not think is applicable to the present case, as the parties here must have contemplated that the value of the work was to be more than Rs. 500.

J. D. INVERARITY.

October 2nd, 1895.