1893 is not at all consistent with the fact that Cama prior to that had a complete understanding with the Municipality direct. The fact that Cama then tried to make better terms with the Municipality than he had agreed to through Hirji is in no way inconsistent with an agreement through Hirji. The Municipality had thrown their broker over and were ignoring all that had been done by him, and Cama was quite justified in then trying to make his own terms, but it is quite evident that he had Hirji in his mind all the time because in the final agreement with the Municipality he stipulates for the payment by them of the amount of brokerage which he had agreed to pay in the beginning of 1892. Consequently I am of opinion that Hirji is entitled to recover his brokerage from the Municipality on this transaction also I have not noticed in this judgment all the exhibits nor every piece of evidence which has been given. This is not because I have not considered that which I have not mentioned. I have done this, but I did not desire to extend a necessary long judgment, to an inordinate length. The last point to be decided is the rate of brokerage. It is admitted by Mr. Acworth that the ordinary rate is 2 per cent., and no agreement, express or implied, on the part of Hirji has been shown to take less than 2 per cent. in such cases as those in respect of which the present suits are brought; consequently I must hold that the plaintiffs are entitled to brokerage at that rate. There must, therefore, be a decree for the plaintiffs in suit No. 403 of 1893 for Rs. 18,412-4-2 and costs and interest on judgment at 6 per cent., and in suit No. 403 a decree for plaintiffs for Rs. 14,949-12-5 and costs, and interest on judgment at 6 per cent.—*Times of India, 9th October*, 1894.

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# LAND FOR NEW MUNICIPAL OFFICES. COUNSEL'S OPINION THEREON.

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***EX-PARTE*** THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY.

*RE*

SITE ALLOTTED BY GOVERNMENT FOR NEW MUNICIPAL OFFICE.

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CASE FOR OPINION OF COUNSEL.

In the year 1883 it was determined that Government should be asked for a piece of land, measuring 6,000 square yards, opposite to the G. I. P. Railway Terminus at Bori

Bunder, as a site for the new Municipal Hall and Offices. The Municipal Commissioner accordingly applied to Government for the refusal of the plot, and inquired whether the land could be given to the Corporation, and what might be regarded as its selling value per square yard.

Government by a resolution of the 14th August 1883, (marked No. 1), stated that the plot in question "may be allotted to the Municipality as a site for the proposed Municipal Hall," that the land was valued at Rs. 80 per square yard, but that, as it was required for a purely public purpose, the Government of India would be asked whether they would authorize its being given to the Municipality without charge or at a lower price.

The Corporation by their resolution of the 21st September 1883, (No. 2), recorded the Government resolution last referred to, and tendered its thanks to Government "for the intimation contained therein of the proposal made by Government for granting a free site or one at a nominal rate for the new Municipal Hall," and a copy of this resolution of the Corporation was forwarded to Government.

The Government of India by their letter of the 4th October 1883, stated that they were unable to sanction the grant of the site free of charge, but, in deference to the recommendation of the Government of Bombay agreed to the land being made over to the Municipality on payment at the reduced rate of Rs. 15 per square yard. Accordingly the Bombay Government by their resolution of the 18th October 1883, (No. 3), directed that the Municipal Commissioner be informed "that the land is allotted to the Municipality as a site for a Municipal Hall on payment of Rs. 15 per square yard, or Rs. 90,000 in all."

This resolution was placed in due course before the Corporation who by their resolution of the 31st January 1884, (No. 4), resolved "that the site be accepted, and that a further representation be made to Government with a view to securing the land on more favourable terms."

A memorial was thereupon submitted to Government on behalf of the Corporation, (No. 5), urging the claims of the latter to special consideration in this matter, and this was forwarded by the Bombay Government for the favourable consideration of the Government of India, who, however, regretted that they were unable to comply with the application, and their decision was communicated to the Municipal Commissioner by Government resolution of the 2nd July 1884, (No. 6).

On the 12th July 1884, the Commissioner by his letter to Government, (No. 7), reported that it had been decided to proceed at once with the erection of the new Municipal Offices and Hall on the site granted, and that a notice would be published immediately, inviting architects to submit designs and offering

premia to the three most successful competitors—that it had been determined to spend a sum not exceeding five lakhs on the building, but requesting that the Government of India might be moved "to allow payment for the land (Rs. 90,000) to be deferred until after the completion of the building—say, until the year 1888-89."

By Government resolution of the 19th July 1884, (No. 8), it was decided that the Government of India should be addressed on this point, and that the Government resolutions above referred to, of the 18th October 1883 and 2nd July 1884, (Nos, 3 and 6), should be communicated to the Solicitor to Government, and that the usual lease for the site should be prepared.

On the 27th August 1884, the Bombay Government by their resolution of that date, (No. 9), communicated to the Commissioner the sanction of the Government of India to defer until the year 1888-89 the payment of Rs. 90,000 for the land.

On the 13th October 1884, this last mentioned Government resolution was recorded by the Corporation, and it was resolved, (No. 10), "that the thanks of the Corporation be tendered to Government for the same," and this resolution of the Corporation was communicated to Government by the Commissioner's letter of the 30th October 1884, (No. 11).

After this the ground which, when staked out and measured, was found to contain 6,007·65 square yards, was handed over to the Municipality by the Public Works Department on the 1st November 1884.

On the 19th December 1884, the foundation-stone of the new building was laid by Lord Ripon just before leaving India.

The land thus made over to the charge of the Municipality was duly railed in by them, and, subject to some alterations which have since been made in the configuration thereof by Government, (and the last of which was made in October 1885), the site has ever since continued to be in the possession of the Municipality notwithstanding that, as will presently be seen, they were afterwards invited by Government to consider, and did for a time entertain and even accept, a different site altogether, near the Sailor's Home.

On the 3rd November 1885, (No. 12), the Municipal Commissioner received from the Solicitor to Government a draft agreement for a lease of this ground for approval, and on the 23rd January, 23rd February, and 17th April 1886, he received reminders asking that the approval of this document might be expedited. A copy of this draft agreement is sent herewith, (No. 13).

On the 21st April 1886, (No. 14), the Municipal Commissioner explained to the Government Solicitor that, before approving of the draft and the boundary line shown on the plan attached to it, he had to consult the architect as to space, &c., but could not do this until the Corporation finally decided what sum was to be spent

on the buildings, and promised to lose no time in returning the draft agreement as soon as the Corporation decided this.

Shortly after this it was suggested by Government that the oval between the Prince of Wales' Statue and the Sailor's Home would be a better site for the new Municipal Offices and Hall, and some demi-official correspondence passed, which, on the 20th July 1886, resulted in Government offering, (No. 15), to hand over a site on this ground at the same rate per square yard, as was to be charged for the site opposite the G. I. P. Railway Terminus, and on the 13th August 1886, the Corporation determined, (No. 16), to accept this new site. This of course necessitated some changes in the designs, and Government moreover stipulated that nothing short of a very imposing building should be here erected. A good deal of time was taken up in negotiations with Government as to the precise alignment of the building on this site, and as to design, and at length on the 7th May 1887, the Municipal Commissioner received a letter (No. 17), from the Acting Under-Secretary to Government, Public Works Department, stating that Government awaited the report of a committee then sitting for the purpose of advising Government, in regard to the extension of the City before passing any orders on the disposal of the crescent (the ground opposite the Sailor's Home), and the alignment of the building and the space to be allotted to the Municipal Offices.

On the 9th May 1887, the Corporation appointed a committee consisting of ten of its members to consider and report, in consultation with the Commissioner, on the subject of the modified design together with plans suitable to the site near the Sailor's Home offered by Government, and generally on the subject.

This committee recommended on the 25th May 1887, (No. 18), that another suggestion which had meanwhile been made to take over the Town Hall for the purposes of the Municipal Offices should be abandoned, and further that the site opposite the Sailor's Home should be adhered to, and the Municipal Commissioner be authorized to call for designs for a building, providing for the present requirements of the Municipality and meeting with the approval of Government, to be erected at an immediate cost of five lakhs of rupees. The building to be one of such design and arrangement as to be capable of extension.

On the 13th June 1887, this report was approved and adopted by the Corporation, (No. 19), and the Commissioner was authorized to call upon Mr. Chisholm (who had been awarded the first prize for the designs invited for the site opposite the G. I. P. Railway Terminus) to prepare a fresh design.

This decision of the Corporation was communicated to Government by the Commissioner's letter of the 28th June 1887, (No. 20), in which he asked for an expression of the views of Government in regard to the style of architecture to enable Mr. Chisholm more satisfactorily to modify his designs, and after a further letter

on the 11th August 1887, asking for an early reply, the Commissioner received a letter from the Acting Under-Secretary, Public Works Department, dated 17th August 1887, (No. 21), stating that, until Government were in possession of the report of the Extension Committee before referred to, and of the views of the Municipality as to any suggestions that might be made regarding the matter in question, "Government are unable to move further in the question of site, and would prefer not to offer any opinion on the style of architecture to be adopted." About this time a proposal was made to the Corporation that they should purchase the Cathedral High School and add to it, and on the 7th November 1887 this proposal was brought before the Corporation, and another committee of that body was appointed to report on the plans and elevations, and on the configuration of the site. This committee on the 27th March 1888 made their report, (No. 22), in which they unanimously recommended the rejection of the Cathedral High School scheme, and advised the Corporation to adhere to the site on the crescent, opposite the Sailor's Home.

On the 19th April 1888, the Corporation considered this report, but determined, (No. 23), to revert to the site opposite the G. I. P. Railway Terminus at Bori Bunder, resolving "that the Acting Municipal Commissioner be instructed to proceed forthwith with the work of arranging for the building of Municipal Offices on the site at Bori Bunder already selected by the Corporation."

On the 20th April 1888, (No. 24), the Commissioner reported this decision to Government, and enquired whether they were still willing to grant the Bori Bunder site at the price originally marked, *viz.*, Rs. 90,000, and on the 2nd July 1888 he received a reply, (No. 25), from the Public Works Department that "Government are still willing to grant the site opposite the Victoria Terminus for the new Municipal Offices in the terms of the rough agreement forwarded to you for approval in November 1885."

On the 12th November 1888, Government issued a resolution, (No. 26), that the land was allotted to the Municipality in October 1883, the charge being fixed at Rs. 90,000, that the Government of India on a special representation consented to payment being deferred until 1888-89, and that the Municipality should now be called upon to complete the lease and pay in the purchase money.

This was accordingly arranged, the money was paid, and the draft agreement for lease of the land was forwarded to the Municipal Solicitors for approval, the Commissioner at the same time (18th December 1888), (No. 27), writing to the Secretary to Government, Public Works Department, drawing attention to the fact that by the draft agreement it was provided amongst other things that the Corporation should pay a yearly rent of one anna per square yard for the term of 999 years, though no allusion to such a condition was made in the original Government resolution under which the land was allotted, and adding that he (the

Commissioner) was under the impression that for the sum of Rs. 90,000 the site was to be purchased by the Corporation outright.

On the 4th February 1889, (No. 28), the Municipal Solicitors wrote to the Government Solicitor, drawing attention to the original Government resolutions, and suggesting that the document to be executed should be a conveyance, not a lease; pointing out that the resolutions contained no provision for payment of an annual rent over and above the payment at the rate of Rs. 15 per square yard, submitting that there was in any case no necessity for such a preliminary agreement as had been proposed, and that the terms and conditions of that form of agreement (which is apparently merely a copy of some form in use in ordinary cases of leases by Government of building sites to private individuals) were many of them wholly inappropriate and unsuitable to the circumstances, and they asked that the form of document might be entirely reconsidered and remodelled.

With reference to these suggestions, Counsel's attention is particularly drawn to the form of agreement, (No. 18), which, it is thought, he will perceive, at once, to be wholly inappropriate.

On the 13th March 1889, (No. 29), the Corporation passed a resolution approving new designs which had been prepared, and on which it was estimated the building would cost about 9¾ lakhs, giving instructions that the necessary steps be taken forthwith for carrying out the work; so that, if possible, the foundations might be put in before the rains, and approving of an application being made to Government for permission to project the porch and for a grant of an additional area of 560 square yards, or thereabouts, to admit of a slight improvement contemplated in the design. This was forwarded by the Commissioner with his letter, dated the 14th March 1889, (No. 30), to the Secretary to Government, Public Works Department, and on the 4th April, (No. 31), in continuation of this letter, the Commissioner wrote again to the Secretary to Government, Public Works Department, forwarding 5 tracings with explanatory remarks "as it appears that some doubts exist as to the precise demarcation of the site granted by Government", requesting immediate orders on the subject as a contract had already been let for putting in the foundations, and it was of the greatest importance that this part of the work should be completed by the beginning of the monsoon, and asking the approval of Government to tracing No. 5.

The matter of the foundations was one of such urgent importance, that on the 8th April 1889, (No. 32), the Commissioner again addressed the Secretary to Government, Public Works Department, pressing for a very early reply to his letter of the 4th idem.

Every day lost before giving orders to the contractors, who had taken the contract for the foundations, to begin their work,

was now a serious matter, and getting no answer the Commissioner wrote again to the Secretary to Government on the 12th April 1889, (No. 33), asking for the very early orders of Government "for otherwise the project of commencing operations before the monsoon must be abandoned," and he also at the time wrote demi-officially to Mr. Hughes, the Secretary to Government, Public Works Department. Some other demi-official correspondence, (Nos. 34-37), then passed, to which Counsel's attention is drawn, and particularly to Mr. Ollivant's letter to Captain Oliver, dated the 15th April 1889, which very clearly shows how matters stood at that time.

At length on 21st April 1889, (No. 38), an official reply was sent by Secretary to Government, Public Works Department, to the Commissioner's letters of the 18th December 1888, and 14th March and 4th April 1889, and by this letter the Commissioner was informed "that the allotting of a site did not imply a grant in fee simple only a grant on the usual terms;" that, under the special circumstances the usual preliminary agreement might be dispensed with, and that Government were prepared to grant a lease of the area required, as per plan No. 5, sent with the Commissioner's letter of the 4th April 1889, with one very slight modification of the boundary on the modified conditions therein stated, of which the only ones which need be specially noted are as follows:—"That the lease be for 999 years, and reserve the usual annual ground rent of 1 anna per square yard; that, for 6,000 square yards out of the total area, payment be made at the rate of Rs. 15 per square yard as originally agreed upon, and, for any additional land in excess of that area, payment be made at the rate of Rs. 40 per square yard."

On the 6th May 1889 the Corporation passed a resolution, (No. 39), accepting the terms stated in this letter, but regretting that Government had found it necessary to make any deviation as regards rate or ground rent from the terms of the original grant, and expressing a hope that the acceptance of the terms now laid down will not prevent Government from giving a favorable consideration to such further representation on the subject as the Corporation might think fit to make, and that the President be requested in communication with the Commissioner to submit the representation to Government forthwith.

Pursuant to this resolution, the President of the Corporation addressed Government on the subject on the 29th May 1889, (No. 40), and on the 19th July 1889 a reply was sent to his letter in which, for reasons assigned, the Governor in Council regretted that he was unable to comply with the requests made by the Corporation.

This reply was considered by the Corporation on the 15th August 1889, when the following resolution was passed:—

"That the consideration of letter No. 2831, dated 19th ultimo, rom Government on the subject of the terms for the additional

ground taken for the site of the new Municipal Office be deferred. That, before any further land be purchased, the Municipal Commissioner be requested to instruct the Solicitors to obtain the opinion of Counsel, as to whether the Corporation is, in the circumstances that have happened, bound to take a lease in the ordinary Esplanade form, or whether they are not entitled to a lease in the ordinary form or even to a grant."

It will be seen from the foregoing statement of facts that the Bombay Government, when the site was first asked for in 1883, were in favor of its being given to the Municipality altogether free of charge, and made a recommendation to the Government of India to that effect; that it was by direction of the Government of India that it was "allotted," to the Corporation, "on payment of Rs. 15 per square yard, or Rs. 90,000 *in all*," not a word being said or a suggestion being made by the Government of India, much less by the Bombay Government, that the Corporation should be charged any ground rent for it in addition; that these terms were accepted by the Corporation and were confirmed by Government and the Corporation in the following year (1884), when the payment of Rs. 90,000 for the land was permitted to be deferred until 1888-89; that the land was handed over to the Corporation upon these terms in November 1884 and that, subject to alterations which were afterwards made by Government in the configuration of the site, the Corporation have been ever since in possession of it; that, though the Government resolution of 19th July 1884 directed that the usual *lease* should be prepared, it is evident from that resolution that the document was to be on the basis of the terms so arranged; that, though the draft agreement for lease which for the first time introduced the stipulation as to ground rent was sent to the Commissioner in November 1885, the reason why it was not looked into, and objection taken until December 1888, was that Government had themselves in the meanwhile proposed to hand over to the Corporation another site in lieu of the original one at the same rate per square yard, but were unable after much delay to make up their minds as to the details in connection with such other site, and this it was, apparently, that was the main cause, or, at any rate, one of the main causes of the Corporation eventually reverting to the original Bori Bunder site; that this decision having been arrived at and the Municipality called upon to carry out the original terms, objection was at once taken to the stipulation as to the ground rent, and to the form of agreement generally, that, without answering these objections in any way, Government suffered the Municipality to make their arrangements for proceeding with the work, and that it was, only under stress of the risk of heavy claims for damages by their contractor and of losing the working season for putting in their foundations, that the Municipality were obliged to accede to the stipulation as to ground rent and accepting a lease.

The action of Government in thus seeking to go behind and add to the clear terms of the original bargain, and then in taking advantage of their own delay in answering the application for additional ground, and of the dilemma in which the Municipality were placed in consequence, were, it is submitted, such as would in the case of a private individual, undoubtedly, have deserved to be characterized as close dealing if nothing stronger.

The Corporation, however, no doubt *have* by their resolution of the 6th May last accepted the fresh conditions, and the only legal question arising in connection with them would, therefore, seem to be whether the original terms having been definitely and unconditionally accepted by the Corporation, and the land made over to and held by them for so many years upon those terms, it was open to Government to impose fresh terms on them, and whether such fresh terms, even though accepted under pressure as aforesaid, are binding on the Corporation or are supported by any sufficient legal consideration. In this connection, it will be noticed that the additional area asked for to admit of the improved design was a matter wholly unconnected with the questions of ground rent or form of document in respect of the original site, but that, none the less, it enabled Government to bring great pressure to bear on the Municipality by delaying the reply to their application for such additional area, for, though the land was in the possession of the Municipality and work might have proceeded within the original area had it been possible to finally fix the design, this could not be done till the answer from Government was received, and it was known what design would have to be followed.

As regards the form of lease, if the Corporation must be held legally bound by their resolution of 6th May, they have apparently by it accepted the conditions of the lease as laid down in the Government letter of the 21st April 1889; in other respects, however, it is submitted that there is no valid reason why the Corporation should accept a lease containing conditions unnecessary, inappropriate, and even absurd, as some of them are such as are indicated in the draft agreement forwarded by the Government Solicitor on the 3rd November 1885; such, for instance, as the deposit with Government of Rs. 1,000 (*see* recital on page 2 of the draft), the limit of 2 years' time for the commencement and completion of work, and the stipulations as to approval of materials by the Government Surveyor, and amount to be expended in each year (paras. 1. 3, and 4 of draft), the condition as to fencing, lighting and watching the premises to the satisfaction of the Government Surveyor (para. 2), the condition as to mode of pitching the public footpaths where it became necessary to cut through them (para. 6), (these footpaths are in fact by the Municipal Act vested in and under the control of the Municipality), the provision as to submitting plans and sections showing provision for drainage to the Executive Engineer, Municipality, for approval,

and to the Architectural Executive Engineer and Surveyor (para. 9), and the inquisitorial provisions of para. 11 under which the Architect employed by the Corporation might be subjected to constant interference by the Government Surveyor.

Counsel is requested to advise on behalf of the Municipal Corporation.

1. Whether, having regard to the questionable manner in which Government have seized the opportunity to take advantage of the Municipality, and under all the circumstances that have happened, the Corporation are strictly bound by the new terms laid down by Government, and, if not, whether they are entitled to have a grant of the site on the original terms.

2. Whether the Corporation are bound to take a lease in any other than the ordinary form of long building lease, except in so far as varied by any special conditions which they have accepted by their resolution of the 6th May 1889.

And to advise generally.

OPINION.

1. It appears to me that the letter of the Municipal Commissioner, dated the 28th April 1888, (No. 24), must be looked upon as the opening of new negotiations for acquiring the site in question, and that both parties treated the prior negotiations as having resulted in nothing which legally bound either the Government or the Municipality. I do not think therefore that the Corporation is legally entitled to a grant on the original terms.

In reply to the letter (No. 26) above referred to, the Government expressed its willingness to grant the site in the terms of the rough agreement forwarded in November 1885. This amounts to a proposal on the part of Government open for acceptance by the Corporation. Negotiations then ensue, and the Government proposal is modified and embodied in the letter of 21st April 1889, (No. 38), which proposal is accepted by the Corporation. Under ordinary circumstances this, of course, constitutes a contract binding upon both parties, and after consideration of all the circumstances placed before me, I fail to see that there are any, which can affect the legal position or rights of the parties. I am, then, of opinion that the Corporation is strictly bound by the new terms laid down by Government, and accepted by the Corporation.

2. The form of lease is another matter. No one can read the draft, (No. 13), without seeing that it is singularly inappropriate in the present case. That, however, would not be a reason for its rejection, if the Corporation can be held to have agreed to accept its terms. I think that the Corporation has not so agreed. I think that, having regard to the letters which passed prior to the letter from Government of the 21st April 1889, their said letter, (though the same is not at all clearly

expressed), is intended to, and does, supersede that portion of the letter, (No. 27), which says that the grant is to be in terms of the rough agreement. I am of opinion that the Corporation has only agreed and is only bound to accept a lease containing ordinary provisions and embodying the special provisions contained in the Government letter of the 21st April 1889.

J. JARDINE.

20*th December* 1889.

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## BY-LAWS *RE* ELECTION OF MEMBERS OF THE STANDING COMMITTEE.

BOMBAY, 21*st November* 1891.

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

SIR,—We have the honour to return the papers forwarded under your No. 8896, dated the 13th instant.

The draft by-laws which have been proposed may, we think, be shortened and simplified and certainly ought, we think, in some respects to be amended. The alterations which we suggest will be found in red-ink in the print which was sent to us.

We would, in the first place, explain that our proposal to omit altogether the proposed by-laws 1 and 9 is founded upon one of the well-known rules which should be observed in the making of by-laws, namely, that a by-law must provide something in addition to the existing law and therefore must not re-enact it. Now it seems to us that the proposed By-laws Nos. 1 and 9 really, if carefully considered, purport to do no more than re-enact what has been already sufficiently clearly and on greater authority enacted by the Act itself.

Sections 43 (1) and 46 (1) expressly direct at what meetings members of the Standing Committee are to be appointed by the Corporation. Those meetings must of course be called in the manner provided by the Act, and a by-law (such as By-law 1), which merely purports to say that they shall be so called, carries matters no further and is objectionable as purporting to re-enact what the law has already provided. Similarly as regards By-law 9, the Act itself prescribes how, in the absence of any by-laws on the subject, the Standing Committee may delegate their powers or duties to Sub-Committees, so that a by-law saying that in so delegating they shall follow the provisions of the Act is, we think, for the same reason as in the first case superfluous and objectionable.

With reference to by-law 3 it seems to us that if the principle of nomination of candidates is accepted, it almost necessarily follows, that when the number of valid nominations is the same as, or less than, the number of vacancies, the nominees must be appointed. Government having therefore, as we understand, accepted the principle, will not we think see any objection to the form of By-law 3 as now proposed by us.

The few remaining alterations we have suggested in red-ink will we think speak for themselves.—We have, &c., CRAWFORD, BURDER & Co.

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## OMISSION OF THE PRESIDENT TO INITIAL THE BALLOT PAPERS &c., FOR ELECTION OF A MEMBER OF THE STANDING COMMITTEE.

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| QUESTIONS. | OPINION. |
|---|---|
| 1. Whether assuming the President did omit to initial each ballot-paper, such omission would be held sufficient to invalidate the appointment of member of the Standing Committee then made. | 1. I think the omission of the President to initial each ballot-paper is not such an irregularity as would invalidate the election, as there is no suggestion that this omission affected the result of the election. The duty of the President to initial the ballot-papers was merely a ministerial and not a judicial duty. See the Queen *versus* Lofthouse, L. R. 1, Q. B., 433. |
| 2. Whether the fact that the examination of the ballot-papers by the Municipal Secretary and scrutineers was not held in the actual immediate presence of the President, would be held sufficient to invalidate such appointment. | 2. I am also inclined to think that the omission of the President to be present when the ballot-papers were examined would also not invalidate the election for the same reason. I am further of opinion that, as it is not suggested that the result of the elections was affected by these omissions and there was no bad faith, the High Court would not interfere with the elections (see the Queen *versus* Ward, L. R. 8, Q. B. 210). |
| 3. Whether any, and if so, what, steps can now be taken to remedy the irregularities? | 3. I think no steps can now be taken to rectify the irregularities, and that Section 525 does not apply to a case like this. |

BASIL LANG.

3rd *May* 1892.

# ABSENCE OF MEMBERS FROM MEETING OF THE CORPORATION.

BOMBAY, 1*st March* 1892.

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

SIR,—We have the honour to report that pursuant to the instructions contained in your No. 23,976, dated the 18th ultimo, we submitted for the joint opinion of the Advocate General and Mr. Jardine a case upon the question which had arisen as to the construction of section 17 of the Municipal Act.

We herewith forward a copy of the case and of the joint opinion of Counsel thereon.—We have, &c., CRAWFORD, BURDER & Co.

*Ex-parte.*—The Municipal Corporation for the City of Bombay. *Re* Vacancy in the Corporation by reason of absence of a Councillor from meeting.

CASE FOR THE JOINT OPINION OF COUNSEL.

Section 16 of the City of Bombay Municipal Act, 1888, prescribes certain matters which disqualify a person for being a Councillor and section 17 enacts as follows :—

"Any Councillor who—

"(*a*) becomes disqualified for being a Councillor for any reason "mentioned in the last preceding section ;

"or,

"(*b*) absents himself during three successive months from the "meetings of the Corporation except from temporary "illness or other cause to be approved by the Corpora-"tion, shall cease to be a Councillor and his office shall "thereupon be vacant."

The question has recently been raised whether the approval of the Corporation to the cause of absence must be given within the three months spoken of, or whether it is sufficient if such approval be accorded afterwards.

It is contended, on the one hand, that the approval of the Corporation must be given within the three months, and that otherwise there is apparently no limit whatever to the period during which a Councillor may absent himself in anticipation of approval, that he might in fact leave his place vacant for two years or more, and then get the absence condoned. That the

section clearly provides that absence for three months without approval vacates the seat, and consequently that if the Corporation possess the power of subsequent condonation, they practically possess the power of re-election to their own body, the seat having *ex hypothesi* been vacant from the expiration of the three months upto the date when the resolution approving the cause of absence is passed, and further that during this period of vacancy there would apparently be a contravention of section 5 of the Act, which prescribes that the Corporation *shall* consist of 72 Councillors.

It is contended, on the other hand, that the words "to be approved" imply that approval need only be asked for, and need only be given, after the necessity for such approval, namely, absence for three months has arisen; and it was argued in the Corporation that, inasmuch as illness might prevent a Councillor from making any application within the prescribed three months, the section must be read as if the application might be made and approval accorded at any time.

The Corporation have resolved that the joint opinion of Counsel be obtained upon the question which has been raised.

Counsel are therefore requested to advise:—

1. Whether the Corporation can legally and effectually grant approval to the absence of a member of their body from his duties when the application for absence is made more than 3 months after the date of the last attendance of the member applying.

And to advise generally.

OPINION.

1. We are of opinion that the approval of the Corporation referred to in section 18, clause B, need not be given during the three successive months of absence of a Councillor from the meetings of the Corporation, but that the *ex post facto* approval of the Corporation would prevent the disqualification of such Councillor.

Generally.—The wording of the sections bearing upon this matter are very inapt, but it seems to us that the reasonable construction to put upon sections 17, 18—22 (3), is that a Councillor absent for three successive months must take steps to show that he is not thereby disqualified under section 17 (that is, that he comes within the exceptions of section 17) before the election of a new Councillor has taken place. We think that the announcement of an election to fill the vacancy presumably caused by his absence would be an allegation that he had become disqualified for office within the terms of section 18, and that his inaction thereupon would be tantamount to a non-denial of such allegation, and that any action taken by him after such new election would be held to be too late.

F. L. LATHAM.
JAMES JARDINE.

29*th February* 1892.

# ABSENCE OF MEMBERS OF THE STANDING COMMITTEE &c.

BOMBAY, 5*th May* 1893.

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

SIR,—We have the honor to acknowledge the receipt of your No. 1147, dated this day.

We understand that since despatching that letter you have received the resignation of Mr. Dharmsi of his seat as a member of the Standing Committee, and this disposes of one of the main question raised, in so far as the particular case of Mr. Dharamsi is concerned; but in view of the possibility of a similar question arising in future, we will presently reply to the question put to us on the footing of such resignation *not* having been received.

We will first, however, deal with the only question which now, in fact, remains as regards the present vacancy, namely, the question whether the meeting convened for Monday next, on notice given *before* the resignation was actually received, can legally be held. We think the meeting may proceed and that the filling up of the vacancy at such meeting will be valid. The notice, it is true, states that the vacancy occurred "by the departure from India of Mr. Dharamsi," instead of "by the resignation of Mr. Dharamsi;" but that is not, we think, material, inasmuch as the business to be transacted, namely, the filling up the vacancy, is sufficiently stated within the meaning of section 36 (*j*) of the Act.

Mr. Dharamsi's resignation, it seems, is dated 22nd April 1893, and was left by him apparently with a clerk who through oversight omitted to send it on to you until to-day. The fact remains that (though it was not known to you at the time) Mr. Dharamsi did resign before the notice for the meeting was issued and a vacancy had accordingly occured. It might be possible, no doubt, to contend that the letter of resignation constituted no resignation at all until it was delivered, but we do not think such an argument should prevail, and we are of opinion that the validity of the meeting and of the appointment which may be made thereat could not be successfully impugned.

We will now consider the question raised in your letter on the footing of the position of matters when that letter was written. Mr. Dharamsi was known to have left India by a certain steamer, but no intimation had been received as to where he was going and for how long. Under such circumstances, we do not think it could be legally assumed that his seat was vacant. He might have changed his mind and returned from Aden, or, so far as was officially known, might have been back in Bombay long before

the expiration of the three months mentioned in section 17 (*b*). In this respect it will be noticed his case differed materially from the cases of Sir Henry Morland and Dr. Cowasjee Hormusjee—the subject of our letters of the 15th April 1890 and 2nd June 1891,—in each of which cases there was an intention (officially or demi-officially communicated as we understand) to be absent from India for a prolonged period—in the former case six months and in the latter three months—such avowal being, we think, equivalent to an intimation that the member of the Standing Committee in question would be incapable of acting as such during the period mentioned.

We consider, therefore, that if Mr. Dharamsi had not, in fact, resigned, it would not have been correct to treat his seat on the Standing Committee as vacant until the expiration of the three months contemplated by section 17 (*b*).—We have, &c.,

CRAWFORD, BURDER & Co.

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## ELECTION OF COUNCILLOR.

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BOMBAY, *4th April* 1892.

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

SIR,—We have the honor to acknowledge the receipt of your No. 5, dated this day, and to state that the information before us is hardly sufficient to enable us to give a definite answer to the question submitted to us.

We would in the first place point out that the last day on which the Corporation can appoint to the vacancy in question will, in our opinion, be the 16th instant, *not* the 12th instant as suggested in the concluding portion of your letter. We arrive at this conclusion thus:—It is to the *new* Corporation, "so far as it is constituted," that, under section 34 (2) of the Municipal Act, the Municipal Commissioner had to give information of the circumstances which have given rise to the necessity for the appointment of a duly qualified person to fill the vacancy (see our letter to the Commissioner, dated 23rd February 1892, written after consultation with counsel); but as the new Corporation did not come into existence as such until the first instant, they could not receive information of the circumstances before that day; the 15 days time contemplated by section 34 (2) could only

run, therefore, from that date (1st April), and, having regard to section 528 (1), will expire at the end of the 16th April. The Commissioner's intimation, however, to you as Municipal Secretary must, we think (notwithstanding that it was received on 28th ultimo), be taken as communicating such information to the new Corporation as on 1st April.

You state that on receipt of the Commissioner's intimation, the President gave notice that at the meeting called for the 6th instant he would move that the Corporation do proceed to fill the vacancy. You refer, no doubt, to the President of the *late* Corporation, as the new Corporation has not as yet got a President [Section 37 (1)]; if the notice so given by him was given before 1st April, it was premature, for, as we have seen the Corporation (*i.e.*, the *new* Corporation) could not receive the information before that date, it would, however, have been quite competent to the President of the late Corporation (assuming he is, as we believe he is, member of the new Corporation), to give such notice in that capacity *on* or *after* the 1st instant, and if the notice was so given by him and has been specified in the notice of business for the meeting of the 6th instant, under section 36 (*j*), or in a supplementary notice under Section 36 (*k*), then there is no objection to the appointment being proceeded with at that meeting; if, on the other hand, the notice of the (late) President was given *before* the 1st April, or if given on or after that date, has not been duly notified under Section 36 (j) or (*k*), then it will not be competent to the Corporation to make the appointment at their meeting of the 6th instant, but a fresh meeting (not necessarily a meeting of urgency, as the time does not expire till 16th instant) will have to be called for the purpose.

It may at first sight seem to be an anomaly that, while the Commissioner's intimation, though dated and received before, should be taken to have effect on the 1st April, yet the (late) President's notice should not have similar prospective effect, but a little reflection will, we think, show that the latter is on an entirely different footing from the former. The intimation from the Commissioner to you, a permanent officer of the Corporation, might well be given in anticipation of the new Corporation coming into existence, so as to have effect from the commencement of their tenure of office, but no notice based on such intimation could, we think, be valid unless given after such intimation was effective, nor we think could a member of the Corporation who was about to retire from office give valid notice of a motion which he would bring forward on a date subsequent to such retirement, and in another capacity, namely, as a member of the new Corporation.—

We have, &c., CRAWFORD, BURDER, & Co.

# *Re* RIGHTS OF THE STANDING COMMITTEE TO CALL FOR REPORTS.

30, ESPLANADE ROAD,
BOMBAY, 22*nd October* 1892.

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

SIR,—Referring to your No. 6717, dated the 27th June last, and subsequent correspondence on the subject of the case for Counsel's opinion on the questions as to the legal position of the Standing Committee as regards calling for reports, we have the honor to forward herewith a copy of the case submitted by us to the Advocate-General, Mr. Lang, and of his opinion thereon, dated the 19th instant.—We have, &c.,

CRAWFORD, BURDER & Co.

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BOMBAY MUNICIPALITY *ex-parte* THE STANDING COMMITTEE.

*Re* QUESTIONS AS TO RIGHT OF THE STANDING COMMITTEE TO CALL FOR REPORTS.

By a resolution of the Standing Committee, dated 22nd June 1892, it was resolved: "That the Municipal Commissioner be "requested to obtain and submit to the Committee as early as "practicable the opinion of the Advocate-General on the follow-"ing question, *viz.*: Whether the Standing Committee has the "right to call for reports from the Commissioner and through "him from other Municipal officers (1) on matters falling within "the powers and functions of the Committee; (2) on matters "which come before the Committee for consideration, disposal or "report either on reference to the Corporation or at the instance "of the Commissioner; and (3) generally as to the right of the "Standing Committee to call for reports, information, returns, "&c., from the Commissioner and other Municipal officers."

Sections 42 to 48 inclusive of the City of Bombay Municipal Act, 1888, deal with the constitution and appointment of the Standing Committee, the appointment of their Chairman, the retirement of the members by rotation, the replacing of members so retiring, the filling up of casual vacancies in the Committee and the duration of their office.

Section 49 contains provisions regulating the proceedings of the Standing Committee and empowers them (*inter alia*) to make such regulations as they think fit "with respect to the scrutiny of the "Municipal accounts," and provides [sub-clause (*n*)] that the Commissioner shall have the same right of being present at

a meeting of the Standing Committee and of taking part in the discussions thereat as a member of the said Committee, but that he shall not be at liberty to vote upon or make any proposition at such meeting.

Section 64 provides [sub-section (1)] that "the respective "functions of the several Municipal authorities shall be such as "are specifically prescribed in or under this Act," and by sub-"section (2) declares that "except as in this Act otherwise ex-"pressly provided, the Municipal Government of the City vests "in the Corporation."

Sub-section (3) provides as follows :—"Subject, whenever it is "in this Act expressly so directed, to the approval or sanction of "the Corporation or the Standing Committee, and subject also to "all other restrictions, limitations and conditions imposed by this "Act, the entire executive power for the purpose of carrying out "the provisions of this Act vests in the Commissioner," who shall also perform and exercise certain special duties, powers and functions therein specified, and amongst others he is required [clause (*c*)] on the occurrence or threatened occurrence of any sudden accident or unforeseen event involving or likely to involve extensive damage to any property of the Corporation or danger to human life to take immediate action, "reporting forthwith to "the Standing Committee and to the Corporation when he has "done so."

By section 65 the Corporation are expressly authorized to call for extracts from proceedings of the Standing Committee and for any return, statement, account or report connected with any matter with which the Standing Committee is empowered to deal.

Section 66 also expressly authorizes the Corporation to call on the Commissioner (*a*) to produce records and documents, (*b*) to furnish returns, statements, &c., and (*c*) "to furnish a report by "himself, or to obtain from any head of a department subordinate "to him and furnish with his own remarks thereon, a report "upon any subject concerning or connected with the administra-"tion of this Act, or the Municipal Government of the City."

The functions, duties and powers of the Standing Committee specifically prescribed by the Act, are (stated briefly) as follows :—

Section 21 (4).—Approval of fees prescribed by Commissioner for copies of Municipal Election Roll.

Section 28.—Approval of remuneration to polling officers, &c.

Section 59 (1) (*a*).—Assenting to grant of leave of absence to Commissioner.

Section 64 (3) (*c*).—Receiving reports of special measures and expenditure taken and incurred by the Commissioner in emergency.

Section 69 (*c*).—Approval of contracts involving more than Rs. 5,000.

(*d*).—Contracts for less to be reported to them.

Section 70 (2).—Common seal to be affixed in presence of two members.

Section 72 (3).—Authorizing contracts without inviting tenders.

Section 77.—Appointment of Municipal Secretary.

Section 78.— Do. of Secretary's subordinate staff.

Section 79.—Sanctioning schedule of designations of officers and their salaries, &c.

Section 81.—Framing regulations for grant of leave to officers, &c., &c.

Section 83 (2) (*a*) & (*b*).—Approval of dismissal and suspension of certain officers.

Section 84 (2).—Granting leave to officers not appointed by Commissioner.

Section 90.—Approval of rates or prices of contracts for acquisition of immoveable property.

Section 91.—Approval of applications to Government to acquire under Land Acquisition Act.

Section 92 (*a*).—Leases of property of Corporation for not more than a year to be reported to them.

(*b*).—Sanctioning sales of property for less than Rs. 5,000 and leases for more than one but not more than 3 years.

Section 113.—All cheques to be signed by one member at least.

Section 114.—Approval of deposit of Municipal money at Banks or Agencies outside Bombay.

Section 116.—Members signing cheques under Section 113 to satisfy themselves that payment duly authorised.

Section 117.—Special expenditure by Commissioner for certain purposes to be communicated to them forthwith.

Section 122.—Sanctioning investment and disposal of surplus monies.

Section 123.—Prescribing manner and form of keeping accounts.

Section 124 (3).—Examination and review of Commissioner's Annual Report and Statements of Accounts.

Section 125.—Commissioner's estimates of expenditure, income, &c., to be laid before them.

Section 126.—Consideration of such estimates and power to require further detailed information from Commissioner.

*Framing Budget Estimate.*

Section 131.—Power to recommend increased or additional grants during an official year.

Section 132.—Sanction for expenditure of unexpended portions of grants.

Section 133.—Power during official year to reduce or transfer budget grants:

Section 134.—To represent to Corporation when circumstances show the necessity for re-adjusting or providing additional funds during an official year.

Section 135 (1).—To conduct weekly scrutiny of Municipal accounts: (2) for this purpose to have access to all accounts, &c., and Commissioner to furnish them any explanation they may call for.

Section 137.—Auditors to report and furnish information to them.

Section 158 (2).—Power to prescribe general conditions in regard to allowance of 1/5th drawback of general tax in certain cases.

Section 161 (2)—Power to prescribe fee for inspection and extracts from assessment book.

Section 169.—Power (*a*) to regulate cases in which water to be paid for by measurement instead of the water tax, (*b*) to approve composition of water tax, (2) to prescribe conditions in regard to use of water.

Section 170.—Power to prescribe rate at which water to be charged for to Government and Port Trust.

Section 172 (1).—Approval of special rates for levy of halalkhor tax in certain cases.

Section 185.—Approval of composition with livery stable keepers, &c., in respect of tax on vehicles and animals.

Section 186.—Approval of fees to be prescribed by Commissioner for inspection and extracts from vehicles and animal tax book.

Section 195.—Approval of rules in respect of refund of town duties.

Section 213.—Approval of mode of management and control of collection, &c., of tolls and town duties.

Section 216.—Approval to writing off of irrecoverable taxes.

Section 223.—Approval to removal of buildings, &c., erected over Municipal drains.

Section 226 (2).—Approval to requisition for taking order for drains in alongside of or under streets.

Section 227 (*b*).—Approval of mode of connecting private street drains with Municipal drains.

Section 229.—Approval of demolition of drain connections made in contravention of the Act.

Section 230 (1).—Approval or authority to carry private drain through land of another.

(5).—Approval of requisition to divert such drain when land required for building.

Section 233.—Approval to the closing or limiting the use of existing private drains.

Section 238.—Approval of authority to person other than owner to use a drain.

Section 240.—Prescribing conditions in respect to drains passing beneath buildings.
Section 254.—Approval to opening or removal, &c., of parts of buildings for purposing of inspection of drains, &c.
Section 268.—Approval to removal of buildings, &c., over a Municipal water main.
Section 276.—Prescribing rent to be charged for use of Municipal water meters.
Section 279.—Approval to cutting off private water supply in certain cases.
Section 300.—Approval of requisitions to set forward buildings.
Section 303.—Approval of levels, direction, &c., fixed by Commissioner for new private streets.
Section 305.—Sanctioning requisitions to owners of premises adjoining private streets to level, metal, &c., such streets.
Section 335.—Approval of removal, &c., of buildings over Municipal gas pipes.
Section 344 (1).—Approval of fees prescribed by Commissioner for forms of building notices.
Section 348 (1) (*b*).—Assent to disapproval of new buildings inconsistent with provision of proper streets, position and direction of which not yet determined.
Section 351 (2).—Approval of buildings erected contrary to Act.
Section 352 (1).—Approval of requisition to open or pull down building work to ascertain if Act contravened.
Section 355 (2).—Approval of refusal to grant license as licensed surveyor.
Section 356.—Approval of regulations for guidance of licensed Surveyors.
Section 357.—Prescribing fees to be paid to licensed surveyors.
Section 364.—Receiving weekly return of fires from Municipal Commissioner.
Section 377 (1).—Approval of requisition to take order with neglected private premises.
Section 381.—Approval of requisition to cleanse, fill up, &c., quarry-holes, &c.
Section 382.—Approval of requisition to discontinue, &c., dangerous quarrying.
Section 397 (2).—Approval of fees to be determined by Commissioner for use of washing places.
Section 403 (1) (*d*).—Approval to suspension of licenses for private markets.
Section 406.—Approval of market regulations.
Section 407(*a*).—Approval of stallages, &c., in Municipal markets.
(*b*).—Approval of farming, do. do.
(*c*).—Approval of private sale of right of using stall, &c.

Section 427 (1).—Approval of fees for disinfecting articles.
Section 493.—Approval of agreements for accepting expenses of works done for private persons by instalments.
Section 501.—Approval of payment of compensation not otherwise provided for on account of damage by reason of exercise of powers given by Act.
Section 517 (1) (*f*).—Approval of withdrawal or compromise of claims exceeding Rs. 500 for penalties under contracts.
(*h*).—Approval of admission or compromise of claims, suits, &c., against Corporation or Municipal officers.
(*j*).—Approval of institution of or withdrawal from or compromise of suits, &c., by Corporation or Municipal officers.
(*k*).—Obtain legal advice or assistance.

The functions of the Standing Committee is thus prescribed may apparently be summarized somewhat as follows:—

The scrutiny of Municipal accounts; the appointment of certain officers; assent to grant of leave to the Commissioner; the exercise of a control and supervision over Municipal contracts; over expenses of Municipal establishments; over acquisition of immoveable property; over disposal of Municipal property; over allowance of drawback of general tax; over certain fees; over remuneration to polling officers; over charges for water and Halalkhor and vehicle and animal taxes in special cases; over the cutting off of water-supply in certain cases; over collection of certain toll; over refund of town duties; over the writing off of irrecoverable taxes; over certain matters in connection with Municipal and private drains and removal of buildings over certain drains, water mains and gas-pipes and of buildings erected in contravention of the Act and of portions of buildings for inspection of drains; over licensed surveyors; over mode of dealing with neglected and dangerous premises in certain cases; over private and Municipal markets in certain matters; over payment of compensation not otherwise provided for; over mode of recovery of certain expenses; and over certain legal proceedings.

*Primarily*, it would seem the Standing Committee is a Finance Committee for the purpose of scrutinising and controlling the Municipal accounts, or of checking the Municipal revenue and expenditure and reporting thereon to the Corporation.

*Secondly*, the Standing Committee's duties are administrative within certain limits (see sections 77, 78, 81, 83 (2) (*b*), 84, 158, 169, 243, 357), and it has, it will be noticed, in some cases the power of initiating action, *e.g.*, the Standing Committee may suspend an officer (sec. 83) (*b*), it may recommend that a budget grant may be increased, or an additional budget grant made (sec.

131), it may reduce a budget grant (sec. 133), it may represent to the Corporation that the income of the year will not suffice to meet expenditure (sec. 134), and so on.

*Thirdly*, it is a Committee of control over the Commissioner by giving or withholding approval or sanction in respect of certain matters as to which in carrying on the duties and powers imposed and conferred on him by the Act, it would be impossible or inconvenient for him to refer to the Corporation as a body, to decide on such matters. In regard to some of their functions, the Act, it will have been noticed, requires the Commissioner to report "or communicate" or give "detailed information" or "explanation" or furnish "weekly returns" to the Standing Committee, see sections 64 (3)(*c*), 69 (*d*), 92 (*a*), 117, 126 (1), 136 (2) and 364, and in so far as he is thus expressly directed to report, there can, of course, be no question as to the legal right of the Standing Committee to call on him to do so. As a matter of course, the Commissioner always in such cases does report, and indeed in other matters coming before the Standing Committee in regard to which there is no such direction in the Act, he has always been ready to afford to the Standing Committee, whether in the shape of reports or otherwise, any information which they desire. There is no instance on record of the Commissioner having refused to furnish any report called for by the Standing Committee, and Counsel will understand that the present questions are submitted for his opinion not in consequence of any particular instance or case, but because it has been deemed desirable to ascertain the legal position of matters. But outside its distinct statutory functions, the Standing Committee also sometimes has to deal with a number of questions which arise either on references made by the Commissioner or references made by the Corporation. The second question is, whether in dealing with these, they have any legal right to call for reports.

*Lastly*, individual members of the Standing Committee often give notices of motion which either directly call for a report from the Commissioner or indirectly involve one. The third question is, whether there is any legal right in the Standing Committee to call for, or obligation on the Commissioner to furnish, such reports.

Section 66 (1)(*c*) of the Act, as has already been noticed, gives in distinct and express terms to the Corporation the power to call on the Commissioner to furnish a report "by himself or any head "of a department subordinate to him upon any subject concern- "ing or connected with the administration of this Act or the "Municipal government of the city," and this provision, coupled with the absence of any statutory provision expressly assigning a similar general power to the Standing Committee, has hitherto been regarded by the Commissioner as indicating that such power is not to be inferred from the general provisions of the Act determining the powers and functions of the Corporation or Standing

Committee respectively; if this is not so, it has been suggested there would have been no need for the express enactment embodied in section 66 (1) (*c*) or for the express provisions already noticed, requiring the Commissioner to report, &c., to the Standing Committee in respect of certain specified matters.

Counsel is requested to advise whether the Standing Committee has the legal right to call for reports from the Commissioner and through him from other Municipal officers :—

1. On matters falling within the powers and functions of the Committee other than those in respect of which reports are by the Act expressly provided for,

2. On matters which come before the Committee for consideration, disposal or report, either on reference by the Corporation or at the instance of the Commissioner, and

3. Generally as to the right of the Standing Committee to call for reports, information, returns, &c., from the Commissioner and other Municipal officers.

OPINION.

I think the Standing Committee has not the legal right to require the Commissioner to furnish a report either by himself or by one of his subordinates in any case in which it is not expressly provided by the Act that a report is to be furnished to it. The power of requiring the Commissioner to furnish a report is given by section 66 (*c*) to the Corporation, and if a report is required by the Standing Committee, which the Commissioner declines to furnish, the only course for the Standing Committee to adopt is to request the Corporation to call for it.

BASIL LANG.

19*th October* 1892.

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## *RE* APPORTION OF SAVINGS ON LOANS SANCTIONED FOR SPECIFIC OBJECTS TO CHARGES FOR LOAN WORKS ARISING ON OTHER HEADS.

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### CASE FOR COUNSEL'S OPINION.

Prior to the passing of the present Municipal Act (Bombay Act III of 1888), loans were granted to the Municipality under special Acts, *viz.*, Bombay Act III of 1870 (an Act to secure the payment to Government of certain sums of money by the Corporation of the Justices of the Peace for the City of Bombay), Bombay

Act II of 1872 (an act to secure the payment to Government of certain additional sums of money by the Corporation of the Justices, &c.), Bombay Act II of 1880 (the Bombay Municipality's Consolidated Loan Act, 1880), and the Local Authorities Loan Act XI of 1879, amended by Act XV of 1885. Expenditure on account of such loans did not appear in the Annual Budget, but the amounts thereof were expended on works, &c., sanctioned by the Corporation and Government. In 1880 Mr. (now Sir) Charles Farran advised the Corporation that the consolidated loan under Act II of 1880 could be temporarily appropriated for ordinary expenses of the Municipality, and subsequently restored from ordinary municipal revenue, but they could not be permanently applied for other than the purposes for which the funds were borrowed without the approval of the Government of India, though, in the absence of an "express "contract binding the Municipality to use the money borrowed "in a particular way, a Court of Law might not perhaps inter-"fere to restrain such an application." Under the then Town Council's resolution No. 1360 of 12th October 1887, the Municipal Commissioner was requested for the first time to append in the Budget for 1888-89, then under preparation, "roughly ap-"proximate estimates of income and expenditure on account of "loan works under construction for the same period." Since the passing of Act III of 1888, under which the Corporation was granted special borrowing powers, the income and expenditure on loan works have been regularly budgetted for separately from the ordinary income and expenditure. The unexpended balances of the ordinary expenditure grants, as well as those of loan works expenditure, have been renewed by the Standing Committee every year under section 132, and since 1894-95, when the Commissioner was advised that such expended grants, if required to be renewed beyond the following year, should be sanctioned by the Corporation, this has always been done. The savings on the different loan works have, with the sanction of the Corporation, been from time to time appropriated under sections 131 and 133, either for meeting excesses on works sanctioned out of one and the same or other loans, or for meeting the cost of new permanent works costing over Rs. 20,000 each, for which fresh loans would have otherwise been required to be raised.

In accordance with the above practice it was the Municipal Commissioner's intention to utilize the savings that had since accrued on different loan works, or other new works of a permanent character; consequently in the introductory remarks to the Budget Estimate for the ensuing year submitted by the Commissioner to the Standing Committee he stated as under: "It will "be observed that in the Loan Works Statement I have only in-"cluded works authorized to be carried out of already sanctioned "loans. I do not propose to carry out any more loan works "during the ensuing year by raising a fresh loan. I shall sub-

"mit separate proposals to carry out specially urgent works at a "cost of rupees three lakhs out of savings already accrued on the "different loan works." In continuation of the above budget remarks, the Commissioner submitted proposals for carrying out certain works as per his No. 19,077, dated 19th December 1895, a printed copy whereof is herewith forwarded for Counsel's information. From the attached printed copy of the proceedings of the Corporation, dated the 6th February 1896, it will be observed that they have sanctioned all the drainage items detailed in list B submitted with the Commissioner's No. 19,077 quoted above, and that the consideration of the water works item of Rs 57,000 has been deferred until the adjourned meeting pending the receipt of certain information required by them on the subject. While coming to the item of Rs. 50,000 for the purchase of new pattern hydrants, they postponed the consideration of that and the remaining three items as per their resolutions Nos. 12,923 and 12,924 forwarded herewith until the joint opinion of Counsel was obtained as to the right of the Corporation to appropriate saving on loans sanctioned for specific objects to charges for loan works arising on other heads. From the accompanying copy of the case laid before Mr. Farran in 1880, it will be observed that he was there advising mainly in reference to the diversion of monies borrowed and secured under the Bombay Municipality's Consolidated Loan Act, 1880, though the question was also put to him with reference to loans raised from the public with the sanction of Government (see query 3), and his reply to that query was that such loans could be legally diverted to purposes other than those for which they were raised when no condition to the contrary was imposed by the lender, but that it would be a breach of good faith towards the latter. As regards loans raised from the Government of India, Mr. Farran seems to have thought that the difficulty could be got over by getting a Government Resolution approving of the diversion, but, where the public are the lenders, it is not very clear that he considered, the approval of the Government of India would sufficiently cure the defect though the loans in that case also would have to have been with the Government of India's sanction. It would not, however, for obvious reasons be practicable in such a case to obtain the express approval of each lender. The points on which the Corporation now wish to be advised have reference only to loans raised (with the sanction of the Government of India) from the public. It is submitted that, so far as the question of good faith is concerned, there is a wide distinction between a diversion which involves an abandonment of the original object and the substitution for it of another and the mere utilization for another purpose of any saving or excess remaining over *after* the original object has been carried out and satisfied. Assuming, however, that Counsel concur in Sir Charles Farran's views as expressed in that opinion, it is presumed they would be of opinion here, as he apparently was there, that, whether the money be

borrowed from the Government of India or from the public with the sanction of the Government of India, it would not be proper to permanently divert and apply money borrowed for a specific object for other than the purposes for which such money was borrowed without the approval of the Government of India. There is, however, a distinction between the circumstances obtaining now and those under which Mr. Farran was asked to advise, namely, that here the borrowing is expressly and avowedly under and for the purposes of the Act, and presumably, therefore, the monies borrowed must, as regards their expenditure, be subject to the provisions of the Act and, amongst others, to the provisions of Section 133 as to reduction and transfer of budget grants. The lenders must, therefore, it is submitted, be taken to have lent with full knowledge that the money might thus be transferred and could hardly therefore complain of a breach of faith if unexpended savings were appropriated to other purposes.

Counsel are now requested to advise the Corporation.

| QUERIES. | ANSWERS. |
|---|---|
| 1. Whether, where money has been borrowed by the Corporation from the public under the borrowing powers contained in the present Municipal Act, and the amount so borrowed is found to be more than is actually required for the specific purpose for which the borrowing was sanctioned, the appropriation by the Corporation of the saving or excess for meeting charges for loan works arising on other heads would involve a breach of faith towards the lenders if made (*a*) with or (*b*) without the sanction of the Government of India. | 1. When the money has been borrowed *bona fide* with the intention of expending it on the object for which the loan is raised and more has been borrowed than is required, we are of opinion that there is no breach of faith in spending the savings on some capital account. The money is the Municipality's, and they are entitled to spend it. There might be possible cases where a breach of faith might be committed in cases where the borrowing was not *bona fide* for the purpose stated, but with the intention of using the money for some other purpose. |
| 2. Whether assuming Counsel think such appropriation can be made, but only *with* such sanction, the Corporation can now properly resolve to so appropriate such savings temporarily and "subject to "refund and adjustment hereafter "in case the Government of India "on application to be made to them "for that purpose shall not approve "of such appropriation." | 2. We don't think the sanction of the Government of India is necessary. We think Government have nothing to do with the expenditure of the money after it has been borrowed, and no legal right to interfere. No doubt if the Municipality got the Government sanction for a loan for object A and spend it on B, the Government might refuse their sanction on the next occasion the Municipality wanted a loan, but they would, in our opinion, have no right to interfere with the expenditure of a loan once obtained. |

3. In case Counsel should be of opinion that such appropriation (even with the approval of the Government of India) would be a breach of faith towards the public from whom the money was borrowed how should such saving or excess be applied or disposed of? Should it be invested or set apart as a sinking fund or additional sinking fund to secure repayment of the loan in respect of which the excess occurred?

3. Not necessary to answer this.

4. Should the approval of the Government of India be obtained in respect of the appropriations already made as stated in these instructions of savings on loan works?

4. We are of opinion that it should not. As long as the Municipality act *bona fide* in the exercise of their borrowing powers, we think they are entitled to spend the surplus of a loan as they choose, but we should advise, as a matter of precaution, that such expenditure be made on permanent or capital account and not to meet charges properly debitable to revenue.

And to advise generally.

*23rd April* 1896.

BASIL LANG.
J. D. INVERARITY.

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## TRANSFERS OF BUDGET GRANTS:—RE CHARGES INCURRED IN ONE YEAR DEBITABLE TO THE GRANT FOR THE FOLLOWING YEAR.

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CASE FOR OPINION OF COUNSEL.

In the annual budget estimate of the Municipality for the official year from 1st April 1894 to 31st March 1895 is a "budget grant" of Rs. 3,000 for "Repairs to water-posts, Persian wheels, &c."

By the 1st November 1894 the greater part of this sum, namely, Rs. 2,810-12-2, had been expended; in December there were further bills for Rs. 341-1-6 on the same account, and on the 1st February 1895 it was estimated that a further sum of Rs. 1,000 would be required up to 31st March 1895. The total of these figures (Rs. 4,151-13-8) thus shows an anticipated excess of Rs. 1,151-13-8, which it was proposed should be met from

savings on the "Road-watering" grant for the year. The Standing Committee were therefore asked to sanction, and on the 13th March [purporting to act under section 133 (2) of the Municipal Act] did sanction, subject to the approval of the Corporation, the transfer of Rs. 1,152 from savings in the grant for "Road-watering," and their resolution to that effect (copy herewith) explains that the excess was due to (1) Rs. 751-2-1 of the expenditure for 1893-94 being debited to the grant for 1894-95 and (2) increase of repairs to water-posts, &c.

The Standing Committee's Resolution came before the Corporation on the 8th April 1895, and the Corporation (see copy of Resolution) referred it back to the Standing Committee for report as to whether their recommendation was legal and valid. The Commissioner then called for a report on the subject from the Acting Chief Accountant, who, on the 6th May 1895, reported as follows :—"It has been the practice in the Municipality to debit past year's charges to current year's grants with the sanction of the Commissioner when there has been no balance in the past year's grants to meet the same. It seems, however, to me that this practice is contrary to the provisions of section 115 of the Municipal Act quoted in the margin. No section corresponding in its provisions to section 115 above quoted existed in the old Municipal Act.

Section 115.—"Except as hereinafter provided, no payment of any sum shall be made by the Commissioner out of the Municipal Fund unless the expenditure of the same is covered by a current budget grant."

2. This is, however, a legal question, and I would therefore suggest that the Municipal Solicitor's opinion be obtained on the point."

The matter was then referred to us, and on the 18th May we advised (copy herewith) to the effect that the proposed transfer was a legitimate and a proper one, and that the grant as thus supplemented would be properly applicable as well to the payment of charges incurred in the past as of those incurred in the ensuing or current year.

This letter was forwarded to the Corporation with reference to their resolution of the 8th April, and they on the 8th July resolved (copy herewith) that the Commissioner be requested to obtain the opinion of Counsel on the points therein referred to. We will now refer Counsel to the provisions of the Municipal Act which appear to bear upon the question.

By section 125 the Commissioner is required on or before the 10th November in each year to lay before the Standing Committee—

"(*a*) An estimate of the expenditure which must or should in his opinion be incurred by the Corporation in the next ensuing official year.

"(*b*) An estimate of all balances, if any, which will be available for re-appropriation or expenditure at the commencement of the next ensuing official year.

"(c) A statement of proposals as to the taxation which it will in his opinion be necessary or expedient to impose under the provisions of this Act in the said year."

Under section 126 the Standing Committee are to consider the estimates and proposals of the Commissioner and, having regard to all the requirements of the Act [amongst others the obligation to provide for the lighting, watering, and cleaning of public streets, section 61 (*n*)], are to frame therefrom, subject to such modification and additions as they think fit, a budget estimate of the income and expenditure of the Corporation for the next official year. This budget estimate is to propose rates at which Municipal taxes are to be levied and the articles on which town duties are to be charged, to provide for loans and to allow for a cash balance of at least a lakh of rupees at the end of the year. The budget estimate as finally approved by the Standing Committee has then to be printed and a copy sent to each Councillor.

The budget estimate (section 127) is to be laid before the Corporation at a Meeting in January not later than the 10th.

Section 128 deals with the fixing of rates of taxes by the Corporation and section 129 with the final adoption of the budget estimate.

Section 130 provides that "any sum entered on the expenditure "side of a budget estimate which has been adopted by the "Corporation shall be termed a budget grant."

Sections 131 and 132 do not seem to be material to the present question; the former authorizes the Corporation during an official year to increase a budget grant or make an additional budget grant for a special or unforeseen requirement, and the latter, in the case of unexpended balances of budget grants, authorizes the Standing Committee to sanction their expenditure in the following year for the completion of the object for which the grants were made.

Section 133 provides that—

"(1) The Standing Committee may, if they think necessary "at any time during the official year,"—

* * * *

"(*b*) transfer and add the amount or a portion of the "amount of one budget grant to the amount of any "other budget grant in the budget estimates."

"Provided that—

"(*c*) due regard be had when making any such * * * "transfer to all the requirements of this Act.

"(*d*) the aggregate sum of the budget grants contained in "the budget estimate adopted by the Corporation "shall not be increased, except by the Corporation "under section 131;

"(*e*) every such * * * transfer shall be brought "to the notice of the Corporation at their next "meeting.

"(2) If any such * * * transfer is of an amount exceed-
"ing Rs. 500, the Corporation may pass, with regard
"thereto, such order as they think fit, and it
"shall be incumbent on the Standing Committee and
"the Commissioner to give effect to the said order."

The doubt in regard to the transfer in question expressed by the Chief Accountant in his report of the 6th May 1895 seems to have arisen from the fact that expenditure for 1893-94 has been debited to and paid out of the budget grant for 1894-95, and might not therefore perhaps be properly regarded as expenditure covered by a "current budget grant" within the meaning of section 115. It seemed to us, however, that a liability incurred in 1893-94 and which would have to be met in 1894-95 was an expenditure which must or should be incurred in the latter year, and consequently that the estimate of expenditure prepared by the Commissioner under section 125 (*a*) for the year 1894-95 should include under the head of "Repairs to water-posts, Persian wheels, &c.," not only expenditure for which liability was expected to be incurred on that account during the year 1894-95, but also, so far as was then (early in November 1893) practicable, expenditure for which it was probable the liability would have been incurred, though the expenditure itself would not actually have been disbursed, by the end of the year 1893-94, and that, when such estimate of the Commissioner was embodied by the Standing Committee in their budget estimate framed under section 126 and the amount of such budget estimate under this head was adopted by the Corporation, the sum so adopted became a "budget grant" for the year 1894-95 and as such properly applicable to liabilities under that head, whether incurred in 1894-95 or the previous year; in other words, that the expression "*current* budget grant" (section 115) means the budget grant current at the time of the actual expenditure without reference to the time when the liability for such expenditure was incurred.

Counsel is requested to advise the Corporation.

## OPINION.

| QUESTIONS. | ANSWERS. |
|---|---|
| (1) Whether charges incurred (but not paid) during a particular year in excess of a budget grant for that year can properly be debited to (*i. e.*, paid out of) the budget grant under the same head for the next official year. | (1) I am of opinion that it cannot be so debited. The intention of the Act is that the Corporation decides how much expenditure shall be incurred on a particular object in the year, and I think that expenditure is incurred when you become liable to pay, although the date of payment is postponed. I therefore think the Commissioner has no power to have more work done than is provided for by the budget grant for a year in that particular year. I don't gather from these instructions whether in fact there was any |

agreement to postpone payment for the extra work done in 1893-94 until 1894-95, or whether the bills merely remained unpaid during the former year. In the former case it might perhaps be argued that the expenditure was expenditure which should be incurred in 1894-95, as I notice that apparently payment of interest on loans which fall due in a particular year is treated as expenditure incurred in that year, although the liability for it is determined by a previous agreement. The meaning of "incur" given in the dictionaries is to "render liable to"—literally "to run into."

(2) Whether in the particular case referred to in the above instructions the liability, amounting to Rs. 751-2-1 (see Standing Committee Resolution of 13th March 1895), incurred but not paid in 1893-94 was properly paid in 1894-95 out of the budget grant for this latter year and was when so paid expenditure covered by a "current budget grant."

(2) I am of opinion it was not, as I consider the expenditure covered by a current budget grant in an item like this means expenditure in respect of liability incurred in the year covered by the budget for work done in that year.

(3) Whether, on its being found that, in consequence of such payment and of the increased expenditure on repairs found necessary in 1894-95, the budget grant for the year would be insufficient, the Standing Committee were legally justified, under section 138 (1) (*a*), in sanctioning the transfer (subject to the approval of the Corporation) of Rs. 1,152 from the budget grant for "Road watering" to the budget grant for "Repairs to waterposts, Persian wheels, &c."

(3) I am of opinion they could not provide for the payment of the excess expenditure incurred in 1893-94 in this way.

And to advise generally.

I think my view of these sections is supported by section 131, which shows that, if the budget grant for a particular year is found too little, the proper course is to ask the Corporation in that year to increase the budget grant. It seems to me quite contrary to the spirit of the Act for the Commissioner to execute extra works and pay for them out of the budget grant for next year, as I think those who vote for the grant would naturally think they are voting for the expenditure be incurred (in the sense I put on that word) in that year. It may be of course that the Commissioner

mentions in his estimate that a portion is required to meet expenditure of the previous year, and, if he does so, I think the Corporation would have power to sanction it, but, apart from that, I think the budget grant only covers work contracted to be done in the year covered by it.

J. D. INVERARITY.

27*th July* 1895.

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18*th May* 1895.

To P. C. H. SNOW, Esq., I.C.S.,
*Acting* Municipal Commissioner.

SIR,—The question appears to be whether charges incurred during a particular official year in excess of a budget grant for that year can properly be debited to (*i.e.*, paid out of) the budget grant under the same head for the next official year. The Commissioner's estimate of expenditure on which the budget is based is "an estimate of the expenditure which must or should, in his opinion, be incurred by the Corporation in the next ensuing official year" [section 125 (*a*), Municipal Act]. Now it seems to us clear that a charge incurred, but not paid, or, in other words the expenditure for it, "must or should be incurred" in the next ensuing year and that such expenditure consequently may properly be, and indeed should be, budgetted for in the budget estimate for such ensuing year. The budget grant for the ensuing year should, that is to say, provide for the expenditure, not only of sums the liability for which is to be incurred in the ensuing year, but also for those the liability (but not the expenditure) which has been incurred in the current or previous year. In the case of the particular budget grant in question, as the amount of it was found to be insufficient to cover all this expenditure, it was legitimately and properly supplemented by a transfer under section 133, and such grant as so supplemented appears to us to be properly applicable, as well to the payment of charges incurred in the past, as of those incurred in the ensuing or current year.—We have, &c.,

CRAWFORD, BURDER, AND BAYLEY.

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## TIME BARRED CLAIMS.

30, ESPLANADE ROAD,
*Bombay, 11th July 1894.*

TO THE MUNICIPAL COMMISSIONER,
*Re* Claim for compensation by the SCOTTISH ORPHANAGE SOCIETY.

SIR,—We have the honour to forward herewith copy case and opinion of Counsel (Mr. Inverarity) upon this and the limitation

question, and also as to the legal power of the Corporation to pay claims barred by limitation.

It will be noticed that the practical effect of counsel's opinion is that section 527 does not apply to cases of compensation, and that the ordinary limitation of 3 years applies. This is in distinct opposition to the opinion of the Advocate General, dated the 23rd day of April 1894 (a copy of which we sent to you with our letter of the 25th April 1894), and of the ruling of the Chief Justice Sir Michael Westropp and Mr. Justice Green in Sorabji Nusserwanji Dandas *vs.* the Justices of the Peace for the City of Bombay, and also of the 2nd Judge of the Small Cause Court in Suit No. 7888 of 1894, Sewji Hema *v.* the Municipality, a copy of the Judgment in which case was sent to the Executive Engineer with our letter of the 12th May 1894.

We may mention that in discussing the opinion unofficially with counsel, he stated that the claim of the Scottish Orphanage Society was not one for "compensation" so as to bring it within the decision of Sorabji Nusserwanji Dundas *vs.* the Justices of the Peace, &c., but was one for damages for breach of contract to pay a certain agreed sum of money upon the performance of certain conditions by the Society which they had peformed, and that, consequently, such breach of contract could not be said to be an "act done in pursuance or execution or intended execution "of the act or in respect of any alleged neglect or default in the "execution of the act" within the meaning of section 527 (1) of the Act.

With regard to counsel's opinion that the Corporation can legally pay debts due by them although barred, he unfortunately cites no authorities, merely stating that the Limitation Act is intended to be a defence against stale claims. That, no doubt, is the case, and the 2nd Schedule to the Limitation Act specifies the periods when various claims are to be considered stale. In like manner, section 527 (1) (*b*) of the Municipal Act, specifies the time when claims under that section are to be considered stale, and we imagine that there is a very substantial reason for providing a special limitation in Municipal cases, partly, no doubt, owing to the necessity for providing each year in the budget for all liabilities, and partly to the difficulty that would be entailed if a Corporation like the Bombay Municipality, dealing with the innumerable matters that arise yearly, were liable to have claims made beyond the period provided. It is true that there is no law that requires a debtor to plead the statute, but the difficulty we have in accepting the opinion is that the Corporation are not in the position of ordinary debtors dealing with their own money with no one to account to for it. They are trustees for the public of the Municipal funds for particular purposes. If counsel is right, where are the Corporation to draw the line at 2 years or 5 years or 10 years. It may

equally be an admitted debt at the end of 10 years, and, of course, Limitation does not extinguish the debt, it only bars the remedy.

The legal members of the Standing Committee will appreciate our difficulty in accepting an opinion upon such an important matter without any substantial authority being brought forward by counsel to support their opinion. As to whether or not section 527 applies in cases like that of the Scottish Orphanage, we would suggest that, if there is any claim pending in which the amount in question is over Rs. 1,000, the same should be disputed so that the opinion of the High Court, on revision from the Small Cause Court, may be obtained and thus settle the question for ever.

We return the papers.—We have, &c.,

CRAWFORD BURDER & Co.

*Re* the SCOTTISH ORPHANAGE SOCIETY.

1. Whether upon the facts as above stated the claim of the Scottish Orphanage Society is or is not barred by limitation.

1. I am of opinion it is not barred. Sections 527 and 504, in my opinion, do not apply where there is an agreement as to sum to be paid. I am of opinion that where there is an agreement to pay and receive a sum as compensation the ordinary limitation of three years applies. Here the agreement was to pay when title was shown. That title was shown in April 1894. I am of opinion time runs from that date.

2. If not so barred, could the Society file a suit for the amount of the compensation under section 527 of the Act, and, if so, when would the "cause of action" within section 527 (1) (*b*) be deemed to have arisen?

2. I think they can sue independently of section 527 on the contract. The cause of action, in my opinion, arose in April 1894 when the condition was performed on which the promise to pay was made.

3. When a claim for compensation is barred by limitation have the Corporation any legal power under section 501 or under any other circumstances to pay such claim, and, if so, under what circumstances?

3. I am of opinion the Corporation can legally pay debts due by them although barred. The Limitation Act is intended to be defence against stale claims, but if the debt is an admitted one, there is no law which requires the debtor to plead the statute. I think section 501 would cover such a payment but apart from that section I think it is no breach of trust to pay a barred debt in a proper case out of Municipal funds.

4. Generally upon any point which may occur to counsel on the above facts.

*July 6th* 1894. J. D. INVERARITY.

# TANSA LOAN.

BOMBAY, 22*nd December* 1891.

To SORABJI NAVAROJI COOPER, Esq.,
Chief Accountant, Municipality.

SIR,—With reference to the papers which your clerk left with us a few days ago and to the interview which Mr. Crawford had with you on the 19th instant on the subject of the arrangements to be made in connection with the 6th instalment of the Tansa Loan, and the Municipal Building Fund Loan, we have now the honour to express in writing our views upon the several questions which have suggested themselves and which were discussed between us.

As to the time within which the loans must be raised, it appears that, in accordance with the rules prescribed by Government the time at which it was proposed to raise the money was duly specified in the applications for sanction, namely, in each case "between July and December 1891." The sanction of Government has been accorded on the footing of these applications and is therefore a sanction to the raising of the money during the period specified and no other, and, this being so, we think it is essential that the loans be raised and the debentures issued as of some date before the close of December* 1891, otherwise fresh applications, fresh publication and fresh sanction would be necessary. We do not, however, (after the explanation you have given us as to how matters stand) consider that there need be any difficulty in fulfilling this condition as to time.

As regards the sixth instalment Tansa Loan, the case we believe stands thus: some 21 lakhs out of the whole amount of this instalment (25 lakhs) have already been provided out of surplus funds and the actual balance to be provided for the work, so far as this loan is concerned, is therefore only about 4 lakhs, and this sum we understand it is proposed to provide from time to time as required from surplus cash balance or, if necessary, by sale of debentures.

We can see no objection whatever under these circumstances to the debentures for the whole amount (25 lakhs) being issued as of date 24th December 1891. The Tansa Works will then be credited as of that date with the full amount of the sixth instalment, while the new debentures bearing interest from 1st January 1892 will take the place of the moneys withdrawn for Tansa in anticipation, from surplus cash balance and will also represent an additional reserve of surplus funds to the extent of the undrawn and unexpended balance of the 25 lakhs, the whole being thus held in the form of debentures available for

* At a personal interview the Solicitors suggested 24th December.

disposal in the market gradually as occasion offers and as necessity requires, and by this means a more favourable rate will necessarily be procurable than if the whole of the debentures were placed in the public market together. The transaction as thus effected will practically amount to nothing more or less than this, that the sixth instalment of the Tansa Loan will be duly raised within the time limited while the amount previously borrowed from surplus funds will be made good, and, together with the balance necessary to make up the 25 lakhs, will, as such surplus funds, be invested in public securities bearing the interest which, in terms of the Government sanction, will be properly chargeable against the Tansa Loan. Such interest being thus in the result saved to the Corporation in addition to the loss which would otherwise accrue from placing a large loan in the public market all at once. This arrangement, while giving effect to the conditions of the Government sanction as regards the time of raising the loan, will also, we consider, be in complete accord not only with the spirit but with the letter of the Standing Committee's Resolution No. 3639, dated the 8th July 1891, for that Resolution merely sanctions the Commissioner's proposal "not to raise for the present any loan in the public market.

The only possible objection which it occurs to us might be suggested is, that the application and consequently the sanction was for the raising of the loan from the *public*, but when it is borne in mind that the surplus moneys are in reality the moneys of the public and that section 122 of the Municipal Act gives express power to invest such surplus moneys (*inter alia*) in "any Bombay Municipal Debentures," we think it would be held that the transaction does not in fact involve any contravention of the terms of the sanction.

The above remarks apply with equal force to the Municipal Buildings Loan, the debentures in respect of which may, we think, in like manner be issued as of date 24th December 1891, the loan being treated as raised on that date, and the proceeds being invested as surplus moneys.

We have altered in red ink and returned herewith *two forms* of the debentures in use in respect of the Sinking Fund, one of them adopted for the investment in the Tansa Loan and the other in the Municipal Building Loan. We think that, as thus altered, they will serve respectively as the forms to be adopted in respect of the investment of surplus moneys in the Tansa Loan (6th instalment) and Municipal Building Loan.

We return the papers left with us.

We have, &c.,

CRAWFORD, BURDER & Co.

OPINION.

By section 111 of the Municipal Act all the moneys of the Corporation from whatever source derived constitute the Municipal fund and by section 118 it is lawful for the Corporation to expend the same (subject to the conditions imposed by other sections of the Act) on any of the purposes mentioned in sections 61 62 and 63, which include the construction and maintenance of water works (section 61, clause *b*), and I am therefore of opinion there is nothing illegal in the Corporation spending the portion of the Municipal Fund on the Tansa Water Works, and I don't think this conclusion is affected by section 121 which only requires that no sum shall be credited or debited to the accounts opened under that section with a separate or special heading. The moneys standing to the credit of such special accounts still form a portion of the Municipal Fund. The surplus moneys at any one date to the credit of the Municipal Fund is apparently composed of the balances appearing to the credit of all the special and general account kept of the Municipal Fund, less such portion of the Municipal Fund as may happen to have been expended on other Municipal works and which, in the ordinary course, would be debited to the special account of the work (if such account had been opened), or if not, to the general account. Should such expenditure have been made, it is clear that the account would not show from what particular special accounts surplus balance the money had been taken to expend upon another work, for by section 121 no debit entry could be made in that special account, debiting it with a sum withdrawn for another purpose, but nevertheless the accounts of the Municipal Fund as a whole would be correct and, if at any time it became necessary to provide money for the special account whose surplus money had been used as part of the Municipal Fund if not forthcoming from the Municipal Fund, would, no doubt, be replaced by borrowing money on the account of the work for which the money had at the earlier date been expended. I therefore see no objection in law to the Corporation using any portion of the Municipal Fund for the purposes authorized by the Act quite independent of any headings of account which have been opened for the sake of convenience, bearing in mind that no credit or debit entry can be made in any special account contrary to section 121. Such special account will, therefore, always show what sum stands to its credit and what ought to be forthcoming when required for the purpose of that special account, and, if in fact it is not available by reason of the money having been used for another account, that other account would have to be debited with the loan necessary to make good what is required. There may be some difficulty in adjusting what interest is to be credited or debited in these matters, but that cannot affect legality or illegality of the use by the Corporation of the Municipal fund.

2. In the view I take of the matter the Corporation here have used a portion of the municipal fund on works authorized by the

Act, and they have used moneys which originally were intended for another purpose, but which were not immediately required. When the money is required for carrying out that other purpose, they can replace it either by borrowing it or from the funds in hand if sufficient.

3. I am of opinion that the Corporation have not, in respect of this particular expenditure, exercised their borrowing powers at all, and that the loan they intended to raise and asked the sanction of Government for has never been raised, nor were they bound to raise the loan if they found, as they did, that the moneys to the credit of the municipal fund rendered such loan unnecessary.

4. The attempt to make it appear there was in fact a loan from the Municipal Commissioner to the Corporation in my opinion is a nullity.

5. The municipal fund is held *by the Corporation* by the terms of section 111 in trust for the purposes of the Act. How the Municipal Commissioner can lend a portion of that fund to the Corporation passes my comprehension; he has no power to do so. The Corporation cannot borrow from itself a portion of the municipal fund which is already vested in and held by it. Such a transaction in my opinion is not in exercise of the borrowing powers given by chapter 6 of the Act at all. It is obvious that, by such a transaction, the liability of the Corporation is in no way increased. If they choose to pay interest on their own moneys, it only goes out of one pocket into another; the total of the municipal fund is not affected by such payment or receipt of interest.

6. The Corporation have no power to issue debentures except for money *borrowed under chapter* 6 of the Act, section 108, clause 2. I consider the debenture in question of no effect.

7. The view that I take of this question is one which could not be put conveniently in separate answers to the questions propounded, which are framed from quite a different point of view, and I have therefore not answered the questions separately.

J. D. INVERARITY.

*January 28th*, 1893.

Subsequently on 21st April 1893 the joint opinion of Counsel was obtained as under :—

1. Whether the municipal debentures now representing sinking fund and insurance fund investments which have *not* been purchased in the market but purport to have been issued at par direct in favour of those funds respectively are legally valid and effectual. Has there been in fact any borrowing within the meaning of chapter VI of the Municipal Act of the moneys which those debentures purport to represent ?

1. We are of opinion that there has been no borrowing of the sums which the debentures in question purport to represent and that in consequence the said debentures are invalid.

2. If not, can any steps be now taken to validate the debentures, and what having regard to section 109 (*d*) and (*f*) of the Municipal Act is the proper course to adopt in regard to the sinking fund, and what in regard to the fire insurance fund?

2. There debentures can only in our opinion be validated by legislation.

3. What is the legal effect of the purchase by the Corporation of their own debentures in the exercise of their powers of investing in their own securities? Does this extinguish *Pro tanto* the the municipal debt and thus in effect cancel the debentures so purchased and render them incapable of being thereafter negotiated or sold, or are they capable of being again placed in the market by the Corporation as valuable securities for the amounts which they purport to represent?

3. We are of opinion that the purchase by the Corporation of one of its own debentures causes an extinguishment or cancelment of the same and that such debenture thenceforth is no longer a security capable of being negotiated.

4. If Counsel should consider that recourse to special legislation is necessary or desirable, Counsel are requested to indicate the points to which such legislation should be directed and the form in which it should be framed. (It is suggested that, in case of such legislation being adopted, it might validate all the debentures heretofore taken over direct, whether for surplus moneys, sinking fund, insurance fund, or on any other account and in connection with the exercise of the powers of investing in public securities given by section 109 (*d*), and section 122 might expressly authorize the Corporation for the future to reserve for themselves and to take up at par, either in the name of the Commissioner or otherwise on their behalf as may be deemed best any portion or portions which they may require for their own investments of any future loans which under their borrowing powers they may obtain for. It might also, if Counsel should consider that necessary and possible, provide that the debentures so invested in shall be kept alive and that such investments shall *not* operate to extinguish the debt which such debentures represent).

4. The state of affairs if our opinion be correct is as follows :—

The Corporation can invest "surplus" moneys and "sinking fund" moneys in public securities and can therefore legally invest in Bombay municipal debentures. Such debentures, when purchased, are extinguished, so that the practical result of a purchase by the Corporation is a payment of so much of its debt as is represented by such debentures. The Corporation has, however, not invested in municipal debentures, inasmuch as the debentures issued to the Corporation not being issued against moneys borrowed are invalid.

It thus becomes necessary in our opinion to make provision by legislation for three things :—

(*a*) To provide that, in respect of any moneys which the Commissioner on behalf of the Corporation is empowered to invest in public securities, the said Corporation may issue debentures in the name of on behalf of the Corporation and that such debentures so issued shall be valid and negotiable in all respects in the same manner as though issued to or in the name of any other person.

(*b*) To provide that the purchase by, or the transfer, assignment or endorsement to, the Bombay Municipal Corporation or any person on behalf of the said Corporation shall not operate as a cancelment or extinguishment of any municipal debenture issued by the said Corporation, but the same shall be valid and negotiable in the same manner and to the same extent as though held by, or transferred, assigned or endorsed to, any other person.

(c) To provide that all debentures hitherto issued by the Corporation to on behalf of the Corporation (a schedule of which should be annexed) are to be deemed valid and negotiable in all respects and in the same manner as though the same had been issued against moneys borrowed from the Secretary of State or any other person.

And Counsel are requested to advise generally.

Generally we think that legislation on the lines above indicated will solve the difficulties past and future.

BASIL LANG.
J. D. INVERARITY.
J. JARDINE.

21*st April* 1893.

**A Bill to supplement the provisions of the City of Bombay Municipal Act, 1888, with respect to the Investment of Sinking Funds and Surplus Moneys, and to validate certain Debentures.**

WHEREAS it is expedient to supplement the provisions of the City of Bombay Municipal Act, 1888, with respect to the investment in public securities of Sinking funds and surplus moneys of the Municipal Corporation of the City of Bombay; AND WHEREAS it is also expedient to remove doubts which have arisen with respect to the validity of certain debentures of the Corporation, in which portions of their Sinking funds and surplus moneys purport to have been heretofore invested, and to obviate the extinction of such debentures of the Corporation as have been, or may hereafter be, issued in or transferred to the name of the Corporation, or to the name of the Municipal Commissioner for the City of Bombay on behalf of the Corporation in respect of any such investment.

It is hereby enacted as follows:—

1. This Act may be cited as "The City of Bombay Municipal Investments Act, 1896."

2. In respect of any Sinking funds which, by the City of Bombay Municipal Act, 1888, the Corporation are directed or empowered to invest in public securities, and in respect of any surplus moneys which, by the same Act (as amended by the City of Bombay Municipal Act Amendment Act, 1893), the Municipal Commissioner on behalf of the Corporation is empowered to invest in like securities, it shall be lawful for the Corporation to reserve and set apart for the purposes of any such investment any debentures to be issued on account of any loan for which the sanction of the Governor-General of India in Council shall have been duly obtained under section 106 of the City of Bombay Municipal Act, 1888, and the issue of any such debentures direct to and in the name of "The Municipal Commissioner for the City of Bombay" on behalf of the Corporation shall not operate to extinguish or cancel such debentures, but

every debenture so issued shall be valid in all respects as if issued to and in the name of any other person.

3. The purchase by, or the transfer, assignment or endorsement to, the Corporation or to the Municipal Commissioner on behalf of the Corporation of any debenture issued by the Corporation shall not operate to extinguish or cancel any such debenture, but the same shall be valid and negotiable in the same manner and to the same extent as if held by, or transferred, assigned or endorsed to, any other person.

4. All the several debentures of the Corporation heretofore issued, transferred, assigned or endorsed in the name of the Corporation or in the name of the Municipal Commissioner on behalf of the Corporation as specified in schedule A, and all debentures heretofore issued by way of renewal, consolidation or subdivision of any of the said debentures shall be deemed to be and to have always been valid and negotiable in all respects and in the same manner as if the same had been issued against moneys borrowed from the Secretary of State or any other person.

5. The signature of the person for the time being holding the office of the Municipal Commissioner for the City of Bombay to a transfer of any debenture standing in the name of the Corporation or of the Municipal Commissioner on behalf of the Corporation shall be valid and sufficient, notwithstanding that such person may not have held the said office at the time when such debenture was issued, transferred, assigned or endorsed to the name of the Corporation or the Municipal Commissioner as aforesaid.

Bombay Act I of 1898 was thereupon passed.

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## GRANT IN AID TO THE BOMBAY NATURAL HISTORY SOCIETY.

### Opinion.

"In acknowledging receipt of your No. 7718 dated the 7th ultimo, we have the honour to state, that having regard to the provisions of sections 136 and 137 of the present Municipal Acts we are of opinion that it is not legally competent to the Corporation to grant money to the Natural History Society for the purposes of the Society, but we can see no objection whatever to such a grant being made under section 63 (*d*) of the New Act when it becomes law, and further we do not see that the proposal of the Natural History Society to charge fees for entrance to their proposed garden will in any way affect the right

of the Municipality to make such grant provided of course that the garden and the Zoological collection of the Natural History Society are made public (as no doubt they will be) in the sense that the public will have access to them by payment. As regards the present Zoological collection of the Municipality it appears to us that strictly speaking the Corporation were not legally justified in expending municipal moneys upon procuring or maintaining them. Having done so, however the collection no doubt is the property of the Corporation, and as such can, we think, be disposed of in such manner as the Corporation shall deem proper.

The result it will therefore be seen, is that, in our opinion the collection may be transferred to the Natural History Society, and that when the New Act has become law, but not until then, it will be legally competent to the Corporation to grant a sum to the Society for maintaining the garden and zoological collection which the latter propose to establish.

(Sd.) CRAWFORD AND BUCKLAND."

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## *RE* MUNICIPAL SERVANTS BEING AMENABLE TO PROSECUTION (SECTIONS 521 AND 528).

*Re*-Question whether and how far, Municipal officers and servants are "public servants" under the Indian Penal Code?

CASE.

Section 521 of the City of Bombay Municipal Act, 1888 provides that "the Commissioner and Deputy Commissioner and every Councillor and every Municipal officer or servant appointed under this Act, and every Contractor or Agent for the collection of any Municipal tax, and every servant or other person employed by any such Contractor or Agent, shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code."

Section 528 enacts that "the provisions contained in Schedule R for regulating the constitution of the Corporation and other matters until this Act is brought fully into operation shall be of the same effect as if they were enacted in the body of this Act."

Schedule R (section 6) provides that the "Commissioner and the Deputy Commissioner, if any, and all Municipal officers and servants holding office on the day before this Act comes into force, shall be deemed to have been appointed under this Act, and until an order to the contrary is passed by competent authority under this Act, shall continue to hold respectively the same or the corresponding offices under this Act and to receive the same emoluments."

Sections 74 to 78 inclusive provide for the appointment of the Executive Engineer, the Executive Health Officer, the Municipal Secretary, the clerks and servants to be immediately subordinate to the Municipal Secretary.

Section 79 is as follows :—"(1) The Commissioner shall, as soon as may be after this Act comes into force and afterwards from time to time, prepare and bring before the Standing Committee a schedule setting forth the designations and grades of the other officers and servants who should, in his opinion, be maintained, and the amount and nature of the salaries, fees and allowances which he proposes should be paid to each.

"(2). The Standing Committee shall sanction such schedule either as it stands or subject to such modifications as they deem expedient. Provided that no new office, of which the aggregate emoluments exceed Rs. 200 per month, shall be created without the sanction of the Corporation."

In accordance with the last mentioned section the Commissioner has, since the Act came into operation, prepared the schedule therein contemplated, and such schedule has been duly sanctioned by the Standing Committee.

Prior to the Act coming into operation, one Enoch Solomon was employed as a Sub-Inspector of Markets and Slaughter Houses, and subsequently thereto he continued to be so employed, his appointment being included in the schedule submitted to the Standing Committee as aforesaid under section 79 of the Act.

A charge was recently brought against Enoch Solomon under section 161 of the Penal Code for receiving an illegal gratification, and Counsel for the defence contended that the accused was not a public servant :—

(1) because he was employed before the present Municipal Act came into force, and the Act only applied to Municipal officers and servants appointed under the Act and after it came into force; and (2) because a Sub-Inspector of Municipal Markets does not fall within either of the descriptions of persons specified in section 21 of the Indian Penal Code, and consequently to read the Indian Penal Code (when treating of public servants) as including Municipal officers and servants generally and amongst them such a Sub-Inspector would amount to extending by virtue of a Local Act the scope of an Act of the Imperial Government.

Section 137 of the Indian Railways Act IX of 1890 provides that every Railway servant shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code.

Section 79 of the Bombay Port Trust Act VI of 1879 enacts that "any person employed under this Act, not being a public servant within the meaning of section 21 of the Indian Penal Code, who shall accept or obtain or agree to accept or attempt to obtain from any person, for himself or for any other person, any

of the Municipality to make such grant provided of course that the garden and the Zoological collection of the Natural History Society are made public (as no doubt they will be) in the sense that the public will have access to them by payment. As regards the present Zoological collection of the Municipality it appears to us that strictly speaking the Corporation were not legally justified in expending municipal moneys upon procuring or maintaining them. Having done so, however the collection no doubt is the property of the Corporation, and as such can, we think, be disposed of in such manner as the Corporation shall deem proper.

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(Sd.) CRAWFORD AND BUCKLAND."

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Schedule R (section 6) provides that the "Commissioner and the Deputy Commissioner, if any, and all Municipal officers and servants holding office on the day before this Act comes into force, shall be deemed to have been appointed under this Act, and until an order to the contrary is passed by competent authority under this Act, shall continue to hold respectively the same or the corresponding offices under this Act and to receive the same emoluments."

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" (2). The Standing Committee shall sanction such schedule either as it stands or subject to such modifications as they deem expedient. Provided that no new office, of which the aggregate emoluments exceed Rs. 200 per month, shall be created without the sanction of the Corporation."

In accordance with the last mentioned section the Commissioner has, since the Act came into operation, prepared the schedule therein contemplated, and such schedule has been duly sanctioned by the Standing Committee.

Prior to the Act coming into operation, one Enoch Solomon was employed as a Sub-Inspector of Markets and Slaughter Houses, and subsequently thereto he continued to be so employed, his appointment being included in the schedule submitted to the Standing Committee as aforesaid under section 79 of the Act.

A charge was recently brought against Enoch Solomon under section 161 of the Penal Code for receiving an illegal gratification, and Counsel for the defence contended that the accused was not a public servant :—

(1) because he was employed before the present Municipal Act came into force, and the Act only applied to Municipal officers and servants appointed under the Act and after it came into force; and (2) because a Sub-Inspector of Municipal Markets does not fall within either of the descriptions of persons specified in section 21 of the Indian Penal Code, and consequently to read the Indian Penal Code (when treating of public servants) as including Municipal officers and servants generally and amongst them such a Sub-Inspector would amount to extending by virtue of a Local Act the scope of an Act of the Imperial Government.

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Section 79 of the Bombay Port Trust Act VI of 1879 enacts that "any person employed under this Act, not being a public servant within the meaning of section 21 of the Indian Penal Code, who shall accept or obtain or agree to accept or attempt to obtain from any person, for himself or for any other person, any

gratification whatever, other than legal remuneration as a reward for doing, or forbearing to do any official act, or for showing or forbearing to show in the exercise of his official functions favor or disfavor to any person, or for rendering or attempting to render any service or disservice to any person with the Board or with any public servant as such or with the Government, shall be liable to the same punishment as is provided by the Indian Penal Code in the case of the like offence committed by a public servant."

It was argued upon the strength of the language of this last mentioned Act that, in the absence of similar provision in section 521 of the Municipal Act, the accused could not possibly, for the purposes of a prosecution under section 161 of the Indian Penal Code, be held to be a public servant, and in further support of such argument the illustration to clause 10 of section 21 of the Indian Penal Code was pointed to as showing that certain Municipal officers, whose duties came clearly within those described, would be held to fall within the meaning of section 21; but that other Municipal officers or servants whose duties did not come within the terms of those described, could not be held to be public servants.

Counsel is requested to advise:—

(1) Whether the provisions of section 521 of the Municipal Act apply to or include Municipal officers and servants employed as such before and continued in such employment after the Act came in force, or only those appointed since the Act came into operation?

(2). What is the precise legal effect of section 521 as regards those Municipal officers to whom it does apply. Are they amenable to prosecution in respect of offences by public servants under the Indian Penal Code, irrespective of whether their duties fall within either of the descriptions set out in section 21 of the Code?

(3). Is it advisable or necessary to amend the Municipal Act in order to render Municipal servants amenable to prosecution in respect of offences by public servants as defined in the Indian Penal Code; and if so, should the amendment be by substituting for section 521—a section similar to section 137* of the Port Trust Act—or in what other way?

And to advise generally.

1. The section 521 refers to Municipal officers and servants appointed under the Act, schedule R, section 6, which is of same effect as of the body of the Act says, that all Municipal officers and servants holding office on the day before the Act came into force shall be deemed to have been appointed thereunder. I am accordingly of opinion that section 521 applies to officers and servants employed as such before and continued in such employment after the Act came into operation.

2. I think section 21 of the Indian Penal Code must be looked to alone for the definition of public servant, and that a Municipal officer is not liable to prosecution as such unless he comes within the definition therein contained. I do not think that the provisions of section 21, Indian Penal Code, can be extended by section 521, Bombay Municipal Act.

3. I should say that a section similar to section 137* of the Port Trust Act would be a desirable substitute for section 521, Bombay Municipal Act.

(Sd.) JAMES JARDINE.

30*th March* 1892.

* This should be section 79 and not section 137.

No. 2687 OF 1892.

GENERAL DEPARTMENT,

BOMBAY CASTLE, *3rd August* 1892.

To JAVERILAL UMIASHANKAR YAJNIK, Esq.,

President, Municipal Corporation of the City of Bombay.

SIR,—In acknowledging receipt of your letter No. 1898, dated 8th June 1892, in which you ask, on behalf of the Corporation, that, in order to render Municipal servants amenable to prosecutions in respect of offences by them as public servants as defined in the Indian Penal Code, Government may be pleased, whenever the amendment of the City of Bombay Municipal Act, 1888, may be under consideration, to strike out therefrom section 521, and insert in place thereof the section drafted in your letter; I am desired to ask you whether in practice, section 521 of the Act has been found unsuitable, and what advantage it is considered that the proposed change will have over the existing law.—I have, &c.,

D. MACKENZIE,
Chief Secretary to Government.

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No. 4931 OF 1892-93.

BOMBAY, *16th August* 1892.

Forwarded to the Commissioner for favour of report.

JAVERILAL U. YAJNIK, President.

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No. 11008 OF 19TH AUGUST 1892.

Forwarded to the Solicitors for favour of report with special reference to the case of Enoch Solomon, in which the question first arose.—H. A. ACWORTH, Commissioner.

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BOMBAY, *19th August* 1892.

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

*Re* Section 521 of the Municipal Act.

SIR,—In returning the letter from the Chief Secretary to Government which was forwarded to us for report, under your No. 11008, dated the 19th instant, we have the honor to state with reference to the provisions of section 521 of the Municipal Act, that practical difficulty has already been experienced in the prosecution of a Municipal servant for accepting a gratification and thereby committing an offence punishable under section 161 of the Indian Penal Code.

Municipal servants amenable to prosecution.

The case in which this difficulty arose was that in which Enoch Solomon, late Sub-Inspector on the Market establishment, was in November last prosecuted for receiving a bribe of Rs. 5 from a woman, who was interested in a meat stall at one of the markets. In that case counsel for the accused contended that section 521 of the Municipal Act notwithstanding, he (accused) was not a public servant within the meaning of the Indian Penal

Code, and consequently was not amenable to prosecution under section 161 of that Code, and though eventually the accused was discharged on other grounds, the Chief Presidency Magistrate was inclined to think this contention was well founded. The expression "public servants" is defined by section 21 of the Penal Code, and it is that definition, and that definition alone, which must be looked to in construing the expression wherever used in the Code consequently, unless any Municipal servant falls under one or other of the descriptions set out in section 21, Indian Penal Code, he cannot for the purposes of that Code become a public servant merely because the Municipal Act says he is to be deemed to be one.

Consequent on the point having been thus raised, you will recollect that the opinion of counsel (Mr. Jardine) was taken and that he advised as follows :—

"I think section 21 of the Indian Penal Code must be looked "to alone for the definition of 'public servant' and that a "Municipal officer is not liable to prosecution as such unless he "comes within the definition therein contained. I do not think "that the provisions of section 21, Indian Penal Code, can "be extended by section 521, Bombay Municipal Act.

"I should say that a section similar to section 137* of the "Port Trust Act would be a desirable substitute for section 521 "Bombay Municipal Act."

For our own part we can feel no doubt but that is the correct view of the matter.

There are undoubtedly numerous Municipal servants whose functions are not covered by either of the descriptions contained in section 21, Indian Penal Code, but whose position and duties render it particularly desirable that they should be amenable to prosecution for accepting bribes; as matters stand they can only be dismissed.—We have, &c.

CRAWFORD, BURDER & Co.

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No. 11461 OF 1892-93.

BOMBAY, 23*rd August* 1892.

Forwarded to the President, Municipal Corporation, with reference to his No. 4931, dated the 16th instant.

H. A. ACWORTH,
Commissioner.

Proposed by K. M. Shroff, Esq., seconded by D. A. D'Monte, Esq.—

No. 6235.

"That, with reference to Mr. Chief Secretary Mackenzie's letter No. 2687, General Department, dated 3rd August 1892, on the subject of Municipal servants being made amenable to prosecution,

* Qy. Section.

in respect of offences by them as public servants, the President be requested to address Government in terms of the Municipal Solicitors' letter, dated 19th August 1892."

*Carried.*

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No. 4459 of 1892.

BOMBAY CASTLE, *5th December* 1898.

To the President of the Municipal Corporation for the city of Bombay.

SIR,—With reference to the correspondence ending with your letter No. 6287 dated 13th September 1892, on the subject of the amendment of Section 521 of the city of Bombay Municipal Act III of 1888, I am directed to forward herewith copy of a letter No. 1278 dated 17th ultimo, from the Chief Presidency Magistrate, and to remark that the result, of the prosecutions in the cases referred to therein scarcely seems to show that the Section quoted has proved ineffectual for the purposes for which it is enacted. I am to add that under these circumstances it appears to His Excellency the Governor-in-Council that sufficient cause has not yet been shown for the amendment asked for.

W. L. HARVEY,
Under Secretary to Government.

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No 1278 of 1892.

CHIEF PRESIDENCY MAGISTRATES COURT.

BOMBAY, *17th November* 1892.

To the Acting under Secretary to Government, General Department.

SIR,—In acknowledging the receipt of your letter No. 3534 dated 30th September I have the honor to state for the information of Government that I discharged the accused in the case referred to on the following grounds :—

(1). That he had served in the Municipality for 12 years and had during that period often been promoted and had borne a good character.

(2). That for the last three years he had nothing at all to do with the stalls in the Crawford Markets.

(3). That two of the principal witnesses made conflicting statements and also denied having known one Syed Esmael, who had to do with the stalls in the Crawford Markets for several years.

(4). That it was probable the accused had, in carrying out his duties, caused ill feeling towards himself among certain persons with whom he had to deal.

5. During the hearing of the case the question was raised before me as to whether the accused was a public servant, and I stated that I had considerable doubt as to whether the provisions of section 521 of the Municipal Act were sufficient to alter section 21 of the Indian Penal Code, the Municipal Act being a local Act.

6. Besides this case against Enoch Solomon, there were, during the past 5 years, two other cases against Municipal servants. In one a Municipal Sub-Inspector (Shurfoodin Dadoomeya) was charged with taking an illegal gratification and was convicted by the late Mr. Ryan and sentenced to 6 months' rigorous imprisonment in the House of correction. In the other case, a Municipal Muccadum (Ruttonshah Sultanshah) was convicted by me of receiving an illegal gratification and sentenced to six month's rigorous imprisonment in the Common Jail *

C. P. COOPER,
Chief Presidency Magistrate
and Revenue Judge, Bombay.

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# LIGHTING OF PRIVATE STREETS.

## *EX PARTE* THE MUNICIPAL CORPORATION FOR THE CITY OF BOMBAY *RE* LIGHTING OF PRIVATE STREETS AND OF LANES AND OARTS NOT BEING STREETS.

CASE FOR THE JOINT OPINION OF COUNSEL.

The accompanying printed copy of the proceedings of the Standing Committee relative to certain petitions from house-owners and residents in Kandawady Lane and Nawee Wady Lane respectively, in regard to the proposed removal of the Municipal gas lamps, by which such lanes have for many years past been lighted at the public expense, speak for themselves. The facts regarding these lanes or oarts and the consideration which have led to the proposal to leave the owners and residents to make their own arrangements for lighting them in future will be found fully set out in the Executive Engineer's report of the 6th May 1895, which is printed as part of those proceedings. The opinion of the Standing Committee on the subject was nearly equally divided, but eventually by the vote of the Chairman they passed a resolution "That, in the opinion of "the Standing Committee, the lighting of the Nawee Wady and "Kanda Wady lanes should be continued as heretofore." The

* See page 837 Vol. XVI Part I Corporation record for 1892-93.

question came before the Corporation on the 15th July 1895, and Counsel's attention is particularly drawn to the accompanying printed copy of the proceedings of the Corporation, from which it will be seen that, a resolution having been proposed to the effect that the lanes in question should continue to be lighted in future at the public cost, the President's ruling was asked for as a point of order "as to whether, after it had been brought to the notice of the " Corporation that expenditure such as that proposed in the Stand- " ing Committee's resolution was not warranted under the terms " of the Municipal Act, it was competent for the Corporation to " pass such a resolution as that now before them." The President, after stating his reason for doing so, ruled that the motion was one which, if carried, would be illegal inasmuch as it would commit the Corporation to expenditure that was not authorized by the Act. He therefore considered he could not allow the motion to be placed before the meeting. Attention is invited to the ruling of the President and his reasons for it as set forth in the accompanying printed copy of the proceedings of the Corporation. The validity of this ruling was called in question at a subsequent meeting of the Corporation held on the 12th August 1895, and the power of the President to rule on any question of order other than a question of procedure as distinguished from a question of principle was denied, and it was resolved that Counsel's opinion should be taken. A copy of this last-mentioned resolution is also sent herewith.

Counsel's attention is called to section 3 (*w*), (*x*) and (*g*) of the City of Bombay Municipal Act, 1888, as to the meaning of the expressions "street," "public street" and "private street" as used in the Act. Section 61 makes it incumbent on the Corporation to make adequate provisions for (*inter alia*) "the lighting, watering " and cleansing of public streets" [cl. (n)], and section 330 directs " that the Commissioner shall take measures for lighting in a " suitable manner the public streets and Municipal markets and " all buildings vesting in the Corporation." As to "private streets," section 305 empowers the Commissioner, with the sanction of the Standing Committee, to require the owners of adjoining premises to (*inter alia*) light such streets in such manner as he shall direct, and section 306 contains provision under which, after a private street has been levelled, metalled, &c., to the Commissioner's satisfaction, he may, and, if lamps, lamp posts and other apparatus necessary for lighting have been provided to his satisfaction, he must, if requested by any of the owners of the street, declare it to be a public street.

Apart from these sections ( 305 and 306 ), there is no express provision in the Act regarding the lighting of private streets, nor is there any such provision in regard to the lighting of places other than streets, Municipal markets and buildings vesting in the Corporation. It is quite certain that Nawee Wady and Kanda Wady lanes are neither of them public streets, nor probably are

they streets at all within the meaning of the Act. In support of the view that the Corporation have the power under the Act to provide for the lighting of streets and places other than public streets, it has been suggested that section 63 (*k*) is sufficiently comprehensive, while, in support of the contrary view, it was contended at the meetings of the Standing Committee and Corporation above referred to, that, inasmuch as the Act expressly provides for lighting of public streets (section 330) and gives power to the Commissioner (section 305) to call upon owners of private streets to light them, it must be held that section 63 (*k*) could not be held to intend to apply to any matter which, as in the case of lighting, was provided for by the Act. This was the view taken by the President. The question as to lighting places not falling within the definition of public or private streets was not really debated at the Corporation. It is one, however, which may well be considered in the present connection.

As regards the President's ruling and the limits to which his powers extend, Counsel are referred to rule 9 of the accompanying copy of the rules for the conduct and regulation of business at meetings of the Corporation, which provides that "The Chairman "(President) shall decide summarily all points of order or "procedure."

The question on which advice is now sought is what is included within the words "points of order or procedure." Does the phrase mean only the conduct of a debate, or does it mean what can be the subject of debate? To put an extreme case would the President be compelled to submit to the meeting a proposition either obviously illegal or disloyal as distinguished from one upon which, as in the present instance, there may be two opinions.

The answer to the third question is apparently involved in the answer to the second, and it is not necessary, therefore, to further refer to it.

Counsel are requested to advise the Municipal Corporation.

| QUESTIONS. | ANSWERS. |
|---|---|
| 1. Whether the Corporation have power under the Municipal Act to provide at their discretion for the lighting (*a*) of private streets and (*b*) of carts, lanes, or other places not being "streets" and not vested in the Corporation. | 1. If the Corporation is of opinion that lighting in cases (*a*) and (*b*) is likely to promote public safety or convenience, we are of opinion that section 63, clause *k*, authorizes expenditure on such lighting. Such discretion is not in our opinion taken away by section 305, which authorizes *the Commissioner with the sanction of the Standing Committee* to require the lighting to be done in a different manner. It is to be noticed that the power in section 305 is given to the Commissioner with the sanction of the Standing Committee. The powers under section 63 are exercised by *the Corporation*, and we fail to see how such powers can |

be limited by a special power given to another person. It is also to our mind very doubtful whether on the true construction of section 305 the Commissioner can require any one to light a private street unless at the same time he requires them to level, metal or pave and drain by the same requisition. If he cannot call on them only to light, section 305 has a very limited application, and this would afford our view additional support.

2. Whether the President of the Corporation has power to rule that a motion or proposition, otherwise in order, shall not be submitted to the Corporation on the ground that it is *ultra vires* or not within the authority of the Corporation to pass.

2. We are of opinion that the President can rule whether a particular proposition is in order and we think that a proposition *ultra vires* of the Corporation is not a proposition which is in order, *e. g.*, suppose an extreme case, that it was proposed to pass a resolution abolishing the office of Municipal Commissioner, we think the President could prevent it being put.

Regarding the Ruling of the Presidents on point of order.

3. Whether the Corporation are concluded by such ruling or not.

3. The Corporation are not concluded by such ruling if it is incorrect. Application could be made to the High Court under section 45 of the Specific Relief Act for an order compelling the President to perform his duty and put the proposition if it was in fact a proper one.

And to advise generally.

*September 2nd*, 1895.

JOHN MACPHERSON.
J. D. INVERARITY.

# DEPUTATION TO CALCUTTA. PAYMENT OF EXPENSES OUT OF MUNICIPAL FUND.

BOMBAY, *20th December* 1890.

To

H. W. BARROW Esq.,
Municipal Secretary.

SIR,—At the interview which you had with us to day, you requested us to advise you upon the question, whether the expenses to be incurred in connection with the proposed deputation to Calcutta of a Special Committee of the Corporation for the purpose of interviewing the Viceroy in view to obtaining sanction to an extended period for repayment of future instalments of the Loan for the Tansa Water Works, can legally be defrayed out of the Municipal Fund. We have carefully considered the matter,

and are clearly of opinion that such expenses can legally be so defrayed. By section 61 of the Municipal Act it is declared to be "incumbent to the Corporation to make adequate provision, by any "means or measures which it is lawfully competent to them to "use or to take for (*inter alia*) the construction and maintenance "of works and means for providing a supply of water for public "and private purposes." By section 106, the Corporation are authorized to borrow with the sanction of the Governor-General in Council "any sum necessary for the purpose of defraying any costs charges, or expenses incurred or to be incurred by them in the execution of this Act," and by section 109 it is declared that the exercise of the power of borrowing so conferred shall be subject to the following provision, among others, namely:—"That the money may be borrowed for such time not exceeding 60 years as the Corporation with the sanction of the Governor General-in-Council determine in each case." And lastly by section 118 it is provided that "the moneys from time to time credited to the Municipal Fund shall be applied in payment of all sums, charges and costs necessary for the purposes specified in sections 61, 62 and 63 or for otherwise carrying this Act into effect." The object of the proposed measure, as we understand it is, to endeavour by direct personal representation (other means having failed) to obtain the sanction necessary for fixing the full period permitted by the Act, as the period for repayment of the Tansa Loan that such a measure is a perfectly legitimate one, is not we think open to any reasonable doubt, having regard to the provisions which we have quoted from sections 61, 106 and 109, nor do we think it could be held that the payment out of the Municipal Fund of all expenses incident to that measure would not be a perfectly legal and proper application of Municipal money under section 118.—We have &c.,

(Sd). CRAWFORD BURDER & Co.

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## HOUSE CONNECTIONS.

*Memo. for the Municipal Solicitors.*

(1) Has the Corporation resolution No. 12429, dated the 29th January 1896, any retrospective meaning or effect?

This question has arisen owing to the inclination of house-owners who have already done house-connection work at their own expense to claim a refund of cost from the Municipality (*vide* letter from the Secretary, Boys' Cathedral High School, to the Municipal Commissioner).

(2) Does the Corporation resolution No 12429, dated the 29th January 1896, refer to any house-connection work outside the sewered districts of the City?

Many parts of the City are at present unsewered. I maintain that the resolution does not refer to these parts

and that it is still the work of the house-owner to carry out his house-connection to cesspools or old storm-water drains; if this was not the case, the Corporation would have to do much work twice, and that surely is not intended.

(3) Regarding the word "inside" used in the Corporation resolution No 2268, dated the 3rd November 1882, does this mean that all the fittings of nahani traps and waterclosets must be undertaken at Municipal expense and does it mean that drains inside stables of party-walled houses are also to be laid and constructed in the same way?

It appears that for the meaning of the word "inside" referred to, it should be considered what actual work has been performed by the Corporation in the past under this resolution. In no case has the Corporation done more in the past than fix the nahani discharge pipe with a grating in the nahani, and there is no case on record where a drain has been laid under a house for the benefit of that house-owner.

I maintain that it was never contemplated to do the inside drainage of houses or stables at Corporation's expense.

(4) Under the Corporation resolution No. 12429, dated the 29th January, is the Municipality bound to replace any fittings that from time to time may be removed from houses by unknown persons?

The words used in the resolution No. 2268, dated the 3rd November 1882, are "maintain all fittings outside the four walls of the house in good order hereafter." This would appear to mean fair wear and tear for fittings and not replacing of pipes, &c., wilfully removed. This is a point where the Municipality must be protected.

(5) Are the connections of water-closets contemplated in the word "house-connections"?

It would appear that water-closets might be considered a luxury in this country, and not a necessity.

(6) Is it correct, as stated in my No. D-11093, dated the 17th February, in reference to the Health Officer's query in his No. 35885, dated the 15th February, para. 3, that section 231 of the Municipal Act will be more or less inoperative under the aforesaid Corporation Resolution except for inside work, and that section 232 and so far as sections 234 and 257 refer to section 232, will still continue to be used?

It is understood in answering this question that the Municipal Commissioner has given instructions that the Corporation resolution No. 12429, dated the 29th Janu-

ary 1896, shall have full force and that the Municipal Commissioner does not exercise the power conferred on him under the Act which cannot be over-ridden by any resolution of the Corporation.

(7) What does the word "*outside*" mean as used in the Corporation resolution No. 2268, dated the 3rd November 1882?

Here again the practice of the Corporation has to be considered. In the past all the outside fittings, including down-take cast-iron pipes, gully-traps, pipe-drains, &c., have been undertaken by the Municipality. It is presumed that the same procedure will remain in force.

(8) Does the word "house-connection" include the paving of a gully where an open drain has not been constructed in a gully? Can a house-owner ask for the paving as insisted on around stand-pipes to be done at municipal expense?

(9) Does the Corporation resolution No. 12429, dated the 29th January 1896, include the house-connection of Government or Port Trust buildings?

The resolution No. 2268, dated the 3rd November 1882, did not contemplate the connection of any Government or Port Trust buildings, as it is stated that it "shall not apply either as regards construction or maintenance to any property on which the consolidated rate is not charged."

The Presidency Executive Engineer has stated to the Municipal Commissioner that an opinion has been taken on this point and given in favour of Government.

(10) What is the liability of the Municipality regarding the large stock of fitting which some of the plumbers of this city have? Have they any claim for damages or loss against the Municipality?

*EX PARTE*

THE MUNICIPALITY *RE* HOUSE-CONNECTIONS.

Counsel is referred to the accompanying case and opinion dated 9th October 1895 on the subject of House-connections for the First Drainage Section.

The motion therein referred to, of which Mr. P. M. Mehta had given notice, was not carried, but on the contrary the Corporation, at their meeting of the 29th January 1896, not only affirmed the principle embodied in their previous resolution of 1882, but extended the application of it to cases expressly excluded from it and to *all* districts of the City.

Copies of the resolutions of 3rd November 1882 referred to in the previous case and of the recent resolution of 29th January 1896 are sent herewith together so that Counsel can judge to what extent the former is extended by the latter. The resolution of 29th January 1896 is very far reaching in its effect, much more so probably than the Corporation realized at the time it was passed; but, however this may be, various questions have arisen and doubts have suggested themselves to the Executive Officers in regard to its application. These can perhaps best be illustrated by a number of queries which have been stated in a "Memo. for the Municipal Solicitors" which has been submitted by Mr. C. C. James, Drainage Engineer, with whose department rests the duty of carrying out the practical working of the orders of the Corporation. A copy of this memo. will be found at the foot of the copy of resolutions of 1882 and 1896.

As the Commissioner is desirous of having an authoritative opinion to guide the Drainage Engineer in future in dealing with these question as they arise, we have recommended that the opinion of Counsel be obtained, and this has been authorized.

With regard to Mr. James' first query as to whether the resolution of 29th January 1896 has retrospective effect, though there may (from the way in which the resolution has been framed) be room for argument in favour of the contrary view, we imagine that counsel will probably advise, as we have done (verbally), that the resolution of 29th January 1896 has *not* retrospective effect. We take it that the closing words of that resolution, namely, "should be made applicable *in the future* to all the districts of the city," must, notwithstanding the previous somewhat ambiguous declaration that "the Corporation still adheres to that resolution (the "resolution of 1882), including in its scope all houses and out-"houses and all new houses which were formerly excluded," be taken to indicate that the resolution was not intended to be applied retrospectively.

Mr. James' second query we have also (though perhaps with a little more hesitation) answered in the negative.

It is true that the resolution of January 1896 says the former resolution is to be made applicable in future to *all* the districts of the city, but from the context, and from the circumstances under which both resolutions were passed, it seems to us that this must be read to mean all the sewered districts including of course those hereafter to be sewered. The resolution of 1882 had reference only to "*house-connections*" *and those only in the first section* of the new main Drainage Works. That this is so, is evident from the minutes of the proceedings of the Corporation of that date, which run as follows:—

"Considered the report of the Committee appointed by the "Corporation on the 21st December last to inquire into the "question of the payment of the cost of making house-connections "on the first section of the new main Drainage Works, including

" Kamathipura districts "—and then follow the several resolutions which were proposed including that which was actually passed. The resolution of January 1896 in extending that resolution is still dealing only with " house-connection." The expression " house-connections," is not defined, but, taken in conjunction with the circumstances, it is quite evident that these were the connections between the houses and the sewers as distinguished from the cases contemplated by section 232 of the Municipal Act, where, in the absence of a municipal sewer or drain in the neighbourhood, premises might have to be drained into a cesspool. The sewerage system is intended to be gradually extended into all the districts of the city, but in those districts or places which are not as yet within reach of the sewers it is submitted that, until such sewers are laid and the connections between them and the houses become practically completed as contemplated by section 231 of the Municipal Act, the resolutions of the Corporation now under consideration can have no application, as there are no " house-connections" within the contemplation of those resolutions ; it is submitted in fact that matters remain as before as regards the power of the Commissioner to compel the owners of properties in such cases to carry out suitable drainage works themselves.

With regard to Mr. James' third query, we have felt unable to agree in his contention that the resolution of January 1896 did not contemplate the inside drainage of houses or stables at the expense of the Corporation. His remarks on the subject can best be illustrated and understood by a reference to a very complete model which, if Counsel considers desirable, he will be prepared to bring with him and explain personally in conference.

The Corporation have expressly, by their resolution of 1882, undertaken the construction of the house-connections " both inside and outside the house," and we take it this means the actual pipe or other connection from the place to be drained (whether nahani, privy, water-closet, or horse's stall) to the sewer and should therefore include a masonry drain (where one is necessary) under a party-walled house or the various tributary drains from each part of a large stable to the entrance to such stable as well as from thence to the sewer.

As to Mr. James' fourth query, it has appeared to us that the Corporation having, by their resolution of 1882, expressly undertaken " to maintain all fittings outside the four walls of the house in good " order hereafter," have deliberately taken upon themselves the risk of robbery or removal of such fittings.

With reference to his fifth query, the answer must apparently be in the affirmative if the view we have suggested as to the meaning of " house-connections " is correct. The Corporation do not appear to have undertaken responsibility for the fittings of a water-closet, but they have apparently undertaken to make the actual connections from water-closets to the sewers.

To sixth query, the answer must apparently be in the affirmative. Section 231 (*a*) of the Municipal Act will apparently become practically a dead letter, as the only place legally set apart for the discharge of drainage is, in sewered districts, the sewer; in other words, though, in deference to the decision of the Corporation, the Commissioner will refrain from exercising the powers conferred by section 231, that section will still remain in force.

There seems to be no doubt that the answer suggested by Mr. James to his seventh query is correct.

As to eighth query we are aware of no reasons for holdings that the paving of a gully, where such paving does not in itself constitute part of the connection (as it does in the case of some V-shaped gully floors) is included in the work for which the Corporation have undertaken the responsibility, nor does there seem to be any good reason why owners of property should not be under the same responsibilities as before in regard to the provision of paving around water stand-pipes which appear to be rather in the nature of "appliances necessary for the purpose of gathering the drainage "from and conveying the same off the premises" [section 231 (*b*)] than in the nature of "house-connections" as we understand that expression.

As to query No. 9 there seems to be no reason to doubt that the opinion which, it appears, has already been taken on behalf of Government is correct. The resolution of January 1896 is so very comprehensive that we can see no room for suggesting that the house-connection of Government or Port Trust buildings is excluded from its operation.

A further query has been suggested by Mr. James since his "Memo. for the Municipal Solicitor" was prepared, namely, whether the Municipality will be under any liabilility to local plumbers and others who have brought out large stocks of fittings, &c., but who, now that all house-connection work is to be done by the Municipality themselves, may have considerable difficulty in utilizing or disposing of such stocks; it is presumed these persons must be taken to have acted entirely on their own responsibility and that they can establish no legal claim against the Municipality.

Counsel is requested to advise—

1. Whether the Corporation's resolution No. 12429, dated the 29th January 1896, has any retrospective effect.

1. I am of opinion the resolution has not a retrospective effect.

2. Whether the Corporation resolution No. 12429, dated the 29th January 1896, affects in any way the position and responsibilities of owners of properties in portions of the city outside the sewered districts, to carry out at their own expense such works as may be necessary for the proper drainage of their premises into cesspools or otherwise as contemplated in section 232 of the Municipal Act.

2. I am of opinion that the resolution only refer to sewered districts.

3. Whether under the Corporation resolution No 2268, dated the 3rd November 1882, the Municipality are responsible for the *fittings* of nahani traps and water-closets or only for the actual drain connection from the main or water-closet as the case may be to the sewer. And are the Corporation under that resolution responsible for (*a*) inside drainage work of stables, such as the tributary drains from the several stalls or parts of the stable into the comparatively larger drain from the stable to the sewer; and (*b*) for the laying of masonry drains under houses where [redacted] means of connection with the sewers are found to be necessary.

3. I am of opinion that the resolution refers only to the connections between the sewer and the place of deposit from which the matter deposited is to be conveyed to the sewer and does not include the maintenance or construction of the place of deposit. I think they are responsible for the drains mentioned in A and B.

4. Whether under the Corporation resolution No. 12429, dated the 29th January 1896, the Municipality would be bound to replace from time to time any external pipes or fittings forming part of the house-connection which might be stolen or removed without default of the owners of the premises.

4. I am of opinion they would be bound.

5. Whether the Municipality are, under the resolutions of 1882 and 1896, responsible for making the connections between water-closets and the sewers.

5. I am of opinion they are responsible.

6. Whether, having regard to the resolutions in question, the provisions of section 231 of the Municipal Act will not, as long as those resolutions are acted upon, become inoperative except as regards the provision of appliances andfittings as distinguished from the actual house-connection.

6. I think so.

7. Whether the provisions of section 232 of the Municipal Act will still be applicable in cases outside the sewered districts *i. e.*, where there is no municipal drain or place legally set apart, &c., within 100 feet from some part of the premises.

7. I think it will still be applicable in these cases.

8. Whether, having regard to the resolution No. 2268, dated the 3rd November 1882, the Municipality will have to undertake all the outside fittings including down-take cast iron pipes gully-traps, pipe-drains, &c., necessary for the purpose of the house-connection.

8. I am of opinion that they will.

9. Whether the expression "house-connection" for the purpose of these resolution should be held to include the paving of a gully, where such gully does not constitute a part of the connection proper between the parts of the premises to be drained and the sewer, and whether house-owners could still be required, as they have been heretofore, to provide the proper paving around water stand-pipes.

9. I am of opinion that the paving of such gullies is not within the resolutions and that the house-owners are liable, as heretofore, in respect thereof.

10. Whether the Corporation resolution No. 12429, dated the 29th January 1896, applies to house-connection of Government and Port Trust Buildings.

10. I am of opinion that it does apply.

11. Whether the Municipality, in giving effect to the resolutions in question, would be under any liability to plumbers or others who have brought out large stocks of fittings which they may have difficulty in disposing of.

11. They would, in my opinion, be under no liability.

And to advise generally.

I should say it was doubtful whether the Municipality intended to include in their resolution Government and Port Trust buildings and stables, and I should advise that those cases should be submitted to the Corporation for an expression of their opinion as to whether they were included and, if they were not intended to be, the resolution could be amended so as to give effect to the real intention.

March 10th, 1896.

J. D. INVERARITY.

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# HOUSE CONNECTIONS IN 1ST DRAINAGE SECTION.

## *EX PARTE.*—THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY RE HOUSE CONNECTIONS FOR 1ST DRAINAGE SECTION.

CASE FOR THE OPINION OF COUNSEL.

Shortly after the present system of sewerage in Bombay was commenced, a question arose as to whether the cost of making the house connections with the new sewers should be thrown on the house-owners [which the provisions of the Municipal Acts of 1872 and 1873 (then in force,) would have allowed], or should be borne by the Municipality.

On the 21st December 1881 the Corporation passed a resolution as follows:—"(1) that the Corporation are of opinion that the Municipality should undertake the work of making house connections in the 1st Section of the new main drainage works, (2) that the cost of making the said house connections be defrayed by the Municipality."

On the 3rd of November of the following year (1882) the Corporation passed a further resolution as follows:—"That the

"Municipality undertake to pay for the entire cost of the con-
"struction of house connections both inside and outside the house
"and to maintain all fittings outside the four walls of the house
"hereafter, provided that this undertaking on the part of the
"Municipality shall not apply to houses to be built hereafter
"except so far as the maintenance is concerned and that it shall
"not apply either as regards construction or maintenance to any
"property on which the consolidated rate is not charged in full
"(except in the case of charitable and religious institutions).
"That in the case of any building standing in its own compound
"the question of the payment of the cost of constructing and
"maintaining the connections be referred by the Commissioner
"to the Corporation as he may deem necessary."

And on the 3rd of June 1887 it was further resolved by the Corporation as follows :—"That in the opinion of the Corporation the work of making house connections to mills and trading concerns as well as to private buildings in the first drainage section should be undertaken by the Municipality at Municipal expense in accordance with the terms of the Corporation's resolution No. 2268, dated 3rd November 1882," It will thus be seen that from the commencement the Corporation have been inclined to hold that in the first drainage section the house connection should be made at Municipal expense. In order to defray the cost, the Corporation have raised Rs. 5,75,000 (portion of a loan of 44 lakhs known as the Sanitary Works Loan) for the express purpose of providing the funds necessary for making the house connections in this section. Out of that loan 2¼ lakhs have already been spent on the work, and there is still a balance of about 3½ lakhs available and unspent. The Commissioner's letter to the Municipal Secretary, dated the 23rd September 1895 (print sent herewith), shows what has been done so far in the matter of making connections, and from that it will be seen that there are a very large number of houses in the 1st drainage section still remaining to be connected. It will also be seen that the cost of completing the connections in this 1st drainage section will very largely exceed the amount raised and budgetted for the purpose. Under these circumstances Mr. Pherozeshah M. Mehta has given notice of his intention, at the meeting of the Corporation on the 10th instant, to move for the rescission by the Corporation of their previous resolution of November 1882, Copy of his notice of motion is sent herewith. The result of this, if carried, will, of course, be that house-owners will be called on to bear the expense of connecting their own houses just as they have been and will be called on to do so in portions of the city other than the first drainage section, and if they fail to do so, the provisions of the Act to compel them will have to be put in force. One complication which may arise is that in most cases notices have already been served long ago on all house-owners in this district to the effect shown in the printed form sent herewith.

No. 555.

Counsel's attention is drawn to section 260 of the Municipal Act. In the Acts of 1872 and 1878 (which were in force when the resolution of November 1882 was passed) there was no corresponding section, and the Acts apparently contemplated that all works for drainage, &c., of private properties should be done at the expense of the owners as they provided that such expense should be "recoverable" from such owners. The resolution of November 1882, it will be noticed, not only purports to undertake the cost of construction, but also maintenance of all external fittings, and in this connection Counsel is referred to section 242 of the present Municipal Act under which such fittings vest in the Corporation unless they have otherwise determined.

Counsel is requested to advise :—

QUERIES

1. Whether, under the circumstances stated, the Corporation can legally rescind their resolution of 3rd November 1882, or whether house-owners in the 1st drainage section whose houses have not yet been connected could establish any legal obligation on the part of the Municipality in their favour and could compel the Municipality to carry out that resolution in its entirety.

2. Whether the fact that the loan has been raised for the purpose of carrying out these works and that a considerable balance of that loan still remains unspent affects the question raised in the last query.

3. Whether in that event there would be any advantage in exhausting the loan in the manner determined on prior to deciding for the future that house-owners are to be called on themselves to bear the cost of the works.

4. In the event of the Municipality being in Counsel's opinion legally committed to proceeding with the house connections in the first drainage section in accordance with the resolution of November 1882, either to the full extent of houses remaining unconnected or the extent of the unexpended balance of the loan, does the fact of their having undertaken and being bound to carry on such work create or give rise to any legal right on the part of owners elsewhere than in the first drainage section to have their houses connected on similar terms.

OPINION.

1. I am of opinion that they can rescind the resolution. They have resolved to pay for what they were not bound to pay for, and can decide now not to do so. They have entered into no contract or incurred any legal liability to any one *unless* there is any particular house-holder who has acted on the representation contained in the resolution, in which case the querists would be estopped in that particular instance from declining to pay for what they represented they would pay for.

2. I think this does not affect the question.

5. Where house connections have been put up at Municipal expense, are the Municipality liable (*a*) by virtue of the Resolution of 3rd November 1882, or (*b*) apart from that Resolution, to maintain and keep such connection and the incidental fittings in repair?

5. I think they are apart from the resolution as these fittings are vested in the Municipality by section 242 having been made at the charge of the Municipal Fund. If the Corporation determine that they shall not vest under section 242, it may be that they would not, after such resolution, be bound to maintain, but I confess I am not at all clear as to what is meant by "*or* shall *at any time* otherwise determine" in section 242. Whether this gives a right of *divesting* after the property has vested is doubtful. It seems to me that wherever the Municipality have already done the work they cannot recover the cost from the owner. The owner might fairly say; "If you had not sent me the notice that, if I did not do the work, you would do it at your own expense, I would have done the work myself. If I had known I would have to pay, in any case, I should have done it myself.

In cases where the work has not been done, the notice sent, I think, can be withdrawn and a fresh notice sent under section 231 giving notice that, if the work is not done, the Commissioner will do it at the owner's expense under section 489.

And to advise generally.

J. D. INVERARITY.

*October 9th*, 1895.

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# PUBLIC STREETS.

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BOMBAY, *26th June* 1893.

To M. C. MURZBAN, Esq., Executive Engineer.

SIR,—We have the honour to return herewith the correspondence and papers on the subject of repairs to Moolchat Cross Lane, upon which you consulted us on the 19th instant.

The first question as pointed out in the Commissioner's No. 4722, dated 6th instant, is whether the lane in question is a street at all. The evidence available on this point appears to us to be inconclusive and meagre.

It seems to be certain that the lane has been open to access for some years and probable that this has been the case for upwards of 20 years, but, in the absence of satisfactory evidence of residents of the neighbourhood (which apparently cannot be counted on), we do not see how the facts in this respect could be established, as Colonel Laughton's plan is not of itself evidence. But even if uninterrupted public passage and access over the lane for 20 years could be proved, we should still probably be confronted with the same difficulty which was met with in the Bhoiwada-Parel case (Hari Dwarkaji), namely, the difficulty that, albeit a right of passage and access was established, such right is limited to the passage and access over portions only of the passage, acts of ownership of a more or less vague and shadowy description having, as it is alleged, been exercised at intervals by the owners of the houses in the lane over other somewhat undefined portions abutting on their respective houses. We refer to the construction of *otlas* or raised spaces at Devali time and the making of temporary erections at the time of marriages, &c., both of which, it will be remembered, formed prominent features in the evidence in the Bhoiwada case. Enquiries, we understand, show that the custom of reserving the use of portions of the passage for such purposes as above mentioned has in fact prevailed in the present case, and this being so, it seems to us that, bearing that decision in mind, the limits of the street (assuming the lane in question to be a "street") might be held to be so restricted and undefined as to render it practically impossible to recover the expenses which have been incurred from the owners of the houses abutting on the lane.

We notice it is stated that the masonry side drain alongside the lane was not made till January 1866; if so, even assuming the lane to have then been a street, this drain did not become vested in the Corporation of Justices by section 149 of the Municipal Act of 1865, nor consequently did it pass by section 62 of the Act of 1872 and section 88 of the present Act to the Corporation as constituted by those Acts respectively. The lane therefore was not, by reason of its existence before the present Act came in force, a public street, nor did the pipe sewering operations render it such, they being subsequent in date to the present Act. A further question suggests itself, namely, whether, the lane, having now, as we presume, been levelled, metalled, &c., to the satisfaction of the Commissioner, can be declared a public street under section 306; this again depends (1) on whether it is a street at all, and (2) on whether the owners would object. The first point we have already considered, but it seems to us that, if a notice were put up under that section and

the owners acquiesced or did not object, this would go far to get over the insufficiency of evidence of access for 20 years and also difficulty as to the alleged reservation of rights of ownership over portions. The conclusions therefore at which we have arrived upon a consideration of all the circumstances before us are—

(1). That the lane in question may be, and probably is, a "street," but that the evidence at present is not sufficient to establish this and that, even if it were, the actual limits of the street might be restricted to an almost indefinite extent by evidence of reservation of rights of ownership over portions adjoining the respective houses.

(2). That it is not a public street.

(3). That, under the circumstances, it would not be advisable to proceed against the owners for recovery of the expenses which have been incurred in repairing the lane.

(4). That, with the acquiescence of the owners (whose views on the subject might first be ascertained), the lane might now be declared and made a public street if that course be deemed desirable. The present case is illustrative of the many difficulties which arise in regard to so-called street, and though each case must of course depend upon the particular circumstances affecting it, we are disposed to think that in doubtful cases it may be wiser not to attempt to interfere. If the Fazendars and the owners of property in such localities desire the Municipality to undertake the responsibility of maintaining in good repair the present ill-kept and inconvenient approaches to their premises, they must be prepared to comply with the conditions under which alone the Municipality can take them over and declare them public street.—We have, &c.,*

CRAWFORD, BURDER & Co.

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# RECOVERY OF TAXES.

BOMBAY, *4th July* 1898.

To R. P. BRUNTON, ESQ., ASSESSOR and Collector.

SIR,—With reference to an interview which Mr. Michael had with us a day or two ago on the subject of taxes due by Mr. H. A. Wadia, we have the honour to state that the claim proposed to be made under the supplemental bill No. 7514 for the differ-

* See Proceedings of the S. C. and Corporation for 1893-94.

ence between the value of water charged for by meter measurement and the minimum sought to be applied under the proviso (2) to rules 1 and 2, part I of the Standing Committee's revised Resolution No. 1751, dated 3rd June last, cannot possibly, in our opinion, be supported.

This case affords an illustration of the difficulties, which it seems to us must attend any attempt to give effect to the provisoes as to the minimum prescribed in rules 1, 2 and 4, and shows that the doubts we have expressed in previous correspondence as to the validity of those provisoes and the suggestion we made for their omission when recently revising the form of Resolution were well founded.

Here we have two properties adjoining each other, one belonging to A and the other to B, but both let to the same tenants who are supplied with water through metered connections situate on B's ground, there being no available site for a connection on A's ground, which is a quarry. You have satisfied yourself that the water consumed in the quarry on A's ground is drawn from the metered connections on B's land and cannot be drawn from any other source.

Under these circumstances you have rightly charged the tenants (the actual consumers) for the quantity of water supplied and they have paid the charge. This charge is of necessity a charge in arrear, that is to say, a charge, the amount of which is calculated when the actual consumption of the half-year is ascertained, and so long as the amount so charged is equal to or exceeds (as it apparently did for the second half of 1897-98) the amount which would be realised by a water-tax based on the aggregate rateable value of both premises, the Standing Committee's Resolution gives rise to no difficulty, but when (as is the case for the first half of 1897-98) it is less than that amount, the question arises, how is the difference to be recovered?

The Municipal Act says [S. 162 (3)] "That a person who is charged for water by measurement shall not be liable for payment of the water-tax, &c.," consequently it is quite clear that the tenants who are charged for the water by measurement cannot be held liable for any further charge based on the water-tax on rateable value. But to attempt to levy the difference from the owners, (A and B) would involve the issue of a supplemental property tax-bill for the half-year and for this there is no warrant in the Municipal Act. Moreover, it would involve a fresh assessment to the water-tax and an alteration in the Assessment Book, which, under Section 156 (*f*), no doubt properly shows the tenants as the persons chargeable for water, but which, in order to support such a claim, would have to show instead the owners (*both* of them) as assessable jointly in respect of both properties. Such an alteration would not, in our opinion, be justified by Section 167, and moreover the properties being the subject of separate ownership there seems to be no such unity of interest as to make their respective owners jointly liable.

We consider the bill No. 7514 should be cancelled; the bills No. 3095 and 3198 should be recovered from the tenants and the bills No. 7513 and 847 only from Mr. Wadia.

Similar difficulties must, it seems to us, arise in every case in which it is sought to apply the provisoes in question, and whereas we were before constrained to express the opinion that those provisoes were of very doubtfull validity, the present practical attempt to apply them forces us now to the positive conclusion that they are altogether *ultra vires* and we strongly advise that they be reconsidered and withdrawn.*

We return all the papers—We have, &c.,

CRAWFORD, BROWN & Co.
Municipal Solicitors.

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## *RE* WATER TAX.

*Queries.*

Water Tax Counsel's opinion thereon.

1. Whether in determining under Section 128, the rate at which the water tax shall be levied for the year 1901-1902, the Corporation should or can exclude from consideration as part of the proceeds of the tax, the item of Rs. 4,38,000 estimated as the aggregate of the sums to be debited to Municipal Departments in respect of their consumption of water during the year; in other words, whether that sum having been treated for budget purposes as Revenue from water, the Corporation can determine a rate, which, added to that sum, is estimated to result in a total amount exceeding the estimate of "the expenses of providing a water supply for the City, *viz.*, Rs. 16,24,000.

*Opinion.*

1. In my opinion the Corporation can and should exclude from consideration the item of Rs. 4,38,000.

Section 140 (*a*) in my opinion means that the water tax must, as far as is reasonable, be fixed to produce a sum which will be sufficient to meet the annual expenses incident to the provision of a water supply for the City. It is clear that no revenue is received from water rates levied on lands vesting in the Corporation and the sum of Rs. 4,38,000 must be disregarded in estimating the actual receipts which can be set against the water expenditure.

Section 140 and the following Sections deal with the levy or recovery of taxes, and I think very express words would be necessary to establish that the legislature intended the taxing body to recover taxes from itself. The words "buildings and lands in the City" in Section 140 do not necessarily mean "*all* buildings and lands" and it is clear from Section 141 that they were not intended to have that meaning.

Section 141 provides that the water tax is to be levied *only* in respect of premises—

(*a*) with a private water supply or capable of getting a private supply, or

(*b*) situated in a part of the city in which the Commissioner has given notice that the Corporation can provide all premises with a reasonable supply of water.

* See Record of Proceedings for 1898-99.