(*b*) the property, occupation or thing in respect of which, the sum is claimed, and shall also give notice of—

[3](i) the liability incurred in default of payment, and of

[6](ii) the time within which an appeal may be preferred as hereinafter provided against such claim.

[1](3) If the sum for which any bill has been presented as aforesaid is not paid into the municipal office, or to a person authorised by any rule in that behalf to receive such payments, within fifteen [9]days from the presentation thereof, the municipality may cause to be served upon the person liable for the payment of the said sum a notice of demand in the form of [5]Schedule B, or to the like effect.

[4]If bill not paid within fifteen days, notice of demand to issue.

* **Recovery of municipal claims.**—The provisions of this chapter are designed to provide a speedier and simpler method of recovery of municipal taxes than the old one of resorting to a prosecution before a Magistrate. Past experience has shown that in many of the larger municipalities arrears of taxes have accumulated to an astonishing extent, and large sums of taxes have remained every year uncollected, owing to the procedure of recovery by prosecutions not being resorted to till frequently the very last day allowed for limitation. Sec. 164 gives an alternative or additional recovery by civil suit.

When, however, Government in the exercise of the power under sec. 88 suspends in any municipality, the power to recover by distress and sale, the old procedure will have to be resorted to under sec. 161; and in that case also there is apparently a right to an alternative or additional procedure by civil suit.

The Bombay City Act provides only for recovery by civil suit as an alternative to or in addition to distress and sale.

The Madras Act (see note 4 to sec. 83) goes futher and gives in addition to the direct recovery by the municipality, a right to subsequent resort to Magisterial process, besides the alternative and additional procedure by civil suit.

Under the present Act, the right to resort to Magisterial proceedings is neither alternative nor additional.

The Bengal Act gives the right of direct recovery, also alternative or additional recovery by civil suit, but no recovery through a Magistrate.

The Panjab Act provides for recovery through a Magistrate, and in the case of taxes payable by the *owner of any property*, it may be recovered as an arrear of land revenue through the Collector.

Summary proceedings.—The Bombay City Act, sec. 210, provides for summary proceedings being taken against persons about to leave the City and who have not paid their taxes.

1. **Origin of section.**—Sub-sec. (1) and (2) are taken from the Bombay City Act, sec. 200, amplified; and sub-sec. (3) from sec. 202.

Sec. 200 applies to "any property tax or tax on vehicles and animals other than public conveyances and the animals used therefor, or any instalment of any such tax."

The Madras Act, sec. 102, contains very similar provisions to clauses (1) and (2), except that the bill is to be *served* not merely presented.

2 **With the least practical delay.**—This is taken from the Bom. City Act. No limitation, except in so far as these words may be construed to create one, is by the Act fixed within which the bill must be presented, or the notice of demand (sub-sec. 3) served, or the warrant for distress (sec. 83) issued. If resort be had to a Civil suit under section 164, the ordinary law of limitation which in this case is six years from the time when the right to sue accrues (Art. 120, Schedule 2, Act XV of 1877), will apply.

The Bengal Act provides that the bill must be presented "at any time within 6 months after the sum has become due," but the notice of demand can be served at any subseqnent period.

Under the Madras Act, sec. 269-A, no distrant is to be made, suit instituted or prosecution commenced in respect of any sum due to the municipality under the Act, after the expiration of 3 years from date when distrant, suit or prosecution might first have been made, instituted or commenced.

Query.—If delay is excessive would this deprive the municipality of powers under this section? See 16 Bom. L. R. 749 noted below.

3 **Contents of bill.**—This is sec. 200 of the Bombay City Act which however does not include clause (*b*) (i) which is taken from sec. 102 (2) (ii) of the Madras Act.

Liability incurred.—This will depend on whether the provisions of sections 83 and 84 are suspended or not in the particular municipality. If not suspended then the liability is that set forth in these sections; otherwise, it is that of a prosecution before a Magistrate under sec. 88 and 161.

If all there contents are not stated in the bill any distraint effected in respect thereof will be illegal. The right conferred by the Act depends on the strict fulfilment of the statutory requirements. Hence where the bill omitted to state the time within which the appeal might be preferred. *Held* that the tax so recovered should be refunded. (*Surat Municipality* v. *Chabildas* (1914) 16 Bom. L R. 749.)

4 **Notice of demand.**—This is to allow time for a written application to be made disputing the claim, sec. 86 (*b*) (i). If this is not made the right to appeal is lost. Under the Madras Act, sec. 103, if the tax is not paid within 15 days from the service of the bill, and the person has not shown good cause why he should not pay, the municipality may recover by distraint and sale. No issue of notice of demand is necessary (which is limited therein only to taxes payable by the owner of any property)

Under the Panjab Act, sec. 64, it must be paid within 10 days from delivery of the bill, if not, a notice to issue and if not paid within 7 days from service of the notice, it, with the notice fee, 4 annas, becomes an arrear, which besides being recoverable on application to a Magistrate and by distress and sale, may be recovered as an arrear of land revenue on application to the Collector.

"*Or to a person, &c.*"—This sentence has been introduced to authorise payments to municipal tapadars or munshis who go round to collect these taxes.

5 **Schedule B.**—This is almost exactly the same as Schedule I to the Bombay City Act.

To the like effect.—The last sentence of the form will have to be altered in the case of those municipalities whose powers to use the provisions of sec. 83 and 84 are suspended, and instead a sentence substituted to the effect that a prosecution will be instituted before a Magistrate for recovery of the same.

With costs.—These words will also, in that case, have to be omitted apparently, for section 88 refers only to the "amount due on account of any tax theretofore recoverable under the said sections" 83 and 84.

Costs of recovery (see note sec. 83) cannot therefore be recovered under a Magisterial prosecution. The result is that now such municipalities are in a worse position than before with regard to the recovery of taxes, for under the old section 84 of Bom. VI of 1873, it was discreational with the Magistrate to levy, in addition to the tax, a penalty not exceeding ¼ of the amount of the tax on arrear. This penalty not only went towards payment of costs, but its avoidance was an inducement to a defaulter to pay up as soon as possible. Now, however, as a defaulter loses nothing by paying up until he is forced to do so by a Magistrate, it is obvious that such municipalities will have more difficulty than ever in making recoveries of taxes.

Absconding to avoid service of such notice is punishable under sec. 172, Indian Penal Code, with sanction.

Preventing the service on himself, or on any other person, of such notice is punishable under sec. 173, Penal Code, with sanction.

83. (1) If the person liable for the payment of the said sum does not, within fifteen days from the service of such notice of demand, either—

[1]In what cases warrant may issue.

(*a*) pay the sum demanded in the notice, or

(*b*) show cause to the satisfaction of the municipality, or of such officer as the municipality by rule may appoint in this

behalf, or in a City Municipality of the Chief Officer, if any, why he should not pay the same, or

(*c*) prefer an appeal in accordance with the provisions of section 86 against the demand,

such sum with all costs of the recovery may be levied under a warrant caused to be issued by the municipality in the form of Schedule C or to the like effect, by [2]distress and sale of the moveable property of the defaulter.

[3]Warrant by whom to be signed.

(2) Every warrant issued under this section shall be signed by the president of the municipality causing the same to be issued, or by the Municipal Commissioner, if any, or in the case of a City Municipality by the chairman of the managing committee, or by an officer to whom the municipality have delegated their powers under section 37 or by the Chief Officer, if any.

[4]To whom warrant should be addressed.

(2A) Where the property is in the municipal district the warrant shall be addressed to an officer of the municipality. Where the property is in another municipal district, or is not in a municipal district, the warrant shall be addressed to the vice-president of the municipality in such other municipal district or to a Government officer not lower in rank than a Mahalkari as the case may be: provided that such vice-president or Government officer may endorse such warrant to a subordinate officer. Where the property is in the City of Bombay, the warrant shall be addrssed to the Municipal Commissioner for the City of Bombay.

[5]Power of entry under special order.

(3) It shall be lawful for any officer to whom a warrant issued under sub-sec. (2) is addressed, if the warrant contains a special order authorising him in this behalf, but not otherwise, to break open, at any time between sunrise and sunset, any outer or inner door or window of a building, in order to make the distress directed in the warrant, if he has reasonable grounds for believing that such building contains property which is liable to seizure under the warrant, and if after notifying his authority, and purpose and duly demanding admittance, he cannot otherwise obtain admittance: provided that such officer shall not enter or break open the door of any apartment appropriated for women, until he has given three hours notice of his intention, and has given such women an opportunity to remove.

(4) It shall also be lawful for such officer to distrain, wherever it may be found, any movable property of the person therein named as defaulter, subject to the following conditions, exceptions and exemptions, namely:

[a]Warrant how to be executed.

(*a*) The following property shall not be distrain:—

(i) the necessary wearing apparel and bedding of the defaulter, his wife and children,

(ii) the tools of artizans,

(iii) when the defaulter is an agriculturist, his implements of husbandry, seed-grain, and such cattle as may be necessary to enable the defaulter to earn his livelihood.

(*b*) The distress shall not be excessive, that is to say, the property distrained shall be as nearly as possible proportionate in value to the amount recoverable under the warrant, and if any articles have been distrained which, in the opinion of a person authorised by or under sub-section (2) to sign a warrant, should not have been so distrained, they shall forthwith be returned.

(*c*) The officer shall on seizing the property forthwith make an inventory thereof, and shall before removing the same give to the person in possession thereof at the time of seizure, a written notice in the form of Schedule D that the said property will be sold as shall be specified in such notice.

1 **Origin of section.**—This is taken from sec. 203 of the Bombay City Act and is on the lines of secs. 103 and 104 of the Madras Act. Sub-sec. (3) is on the lines of Bengal Act III of 1899, sec. 217.

As it was considered that it might be desirable not to invest some municipalities, especially very small ones, beyond the reach of public opinion, with the exercise of such extensive powers, which being ordinarily left to persons of the class of bailiffs or peons, might, if not supervised by a vigorous officer, be abused, sec. 88 gives power to Government to suspend the provisions of this and the next section in any municipal District which is not a City Municipality.

"*Cost of recovery.*"—See note 5 sec. 82. These include the fees under sec. 85.

Some petty verbal alterations have been made in this section by the Amending Act of 1914.

2 **Distress and sale.**—By sec. 103 (2) of the Madras Act, if for any reason the distraint, or a sufficient distraint is impracticable, the municipality may prosecute the defaulters before a Magistrate or (3) also sue in a Civil Court.

In the case of *O'Shanghnesey*, I. L. R. 9 Mad. 429, it was held that under sec. 103 (1) of that Act a prosecution can only be instituted if the tax cannot be recovered by distress and sale of the moveable property of the defaulter.

Suit for damages for wrong distress.—Held that in the Bombay City, the Municipal Commissioner being under sec. 11 of Bom. Act II of 1865 vested with the entire executive power and responsibility for the purposes of the Act and he having levied the rate and signed the warrant for distress, the Justices of the Peace could not be held liable. They had no control over him to prevent him from levying the rate. Though the rate went to the munici-

pal fund that did not create the liability. The Municipal Commissioner himself or the actual tortfeasor was the proper defendant.

It is just possible that the Justices might render themselves liable for a tort committed by the Commissioner by interfering personally in the collection of the rate. Otherwise the Commissioner was not their agent so as to fix them with liability for torts committed by him in the general course of his business. (*Shivshankar* v. *Justices of the Peace Bombay*, (1868) 5 Bom. H. C. R. O. C. J. 145.)

3 **Warrant by whom signed.**—The words "or by the Municipal Commissioner if any" were inserted by the Amending Act of 1914.

4 **Warrant to whom addressed.**—This sub-sec. was inserted by the Amending Act of 1914. This with sec. 84-A meets the omission from the Act of any provision for collecting dues from defaulters absent from or living out side of the municipal limits.

The last clause was added by the Select Committee as it "could be useful to municipalities near Bombay, such as the Bandra Municipality."

5 **Power of entry.**—This is taken from the Bengal Act of 1899, sec. 217. See the Bengal Act of 1884, sec. 123.

6 **Executions of warrant.**—Sub-sec. (4) (*a*) is taken from sec. 106 of the Madras Act, which provides also that the "seizure, distraint and sale shall be effected subject to the provisions of sec. 271 of the Code of Civil Procedure" as well as the condition, exceptions and exemptions herein mentioned.

The fact that such articles are exempt from attachment does not justify a resistance by the defaulter to the distraint, and accordingly he would be guilty of offences under Penal Code, secs. 156 and 353. (*Queen Empress* v. *Poomalai Udayan*, I. L. R. 21 Mad. 296.)

Wherever found.—This follows the Bombay City Act, sec. 204, but under Madras Act, sec. 109, it is "wherever found *within the municipality*." Under the Panjab Act, sec. 20, it is within the limits of the municipality or in any other place where the person may, for the time being, be resident.

[1]Sale of goods distrained.

84. (1) When the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody together with the amount to be levied is likely to exceed its value, the president or chairman or officer by whom the warrant was signed shall at once give notice to the person in whose possession the property was when seized, to the effect that it will be sold at once, and shall sell it accordingly unless the amount named in the warrant be forthwith paid.

Application of proceeds of sale.

(2) If not sold at once under sub-section (1), the property seized or a sufficient portion thereof may, unless the warrant is suspended by the person who signed it, or the sum due by the defaulter together with all costs incidental to the notice, warrant, and distress and detention of the property, is paid, be, on [3]the expiry of the time specified in the notice served by the officer executing the warrant, sold by public auction under the orders of the municipality, and the proceeds, or such part thereof as shall be requisite, shall be applied in discharge of the sum due and of all such incidental costs as aforesaid.

Surplus, if any, how dealt with.

(3) The surplus, if any, shall be forthwith credited to the municipal fund, [2]notice of such credit being given at the same time to the person from whose possession the property was taken, but if the same be

claimed by written application to the municipality within one year from the date of the notice, a refund thereof shall be made to such person. Any sum not claimed within one year from the date of such notice shall be the property of the municipality.

1 **Origin of section.**—This is somewhat on the lines of sec. 107 of the Madras Act. And the latter part of sub-sec. (2) is on the lines of Bom. Act, sec. 206 (1). Sub-sec. 3 is from the Bom. City Act, sec. 206 (2).

The Madsas Act, sec. 107 (3), allows objections to be made, and considered, to the sale, within this period; and also that if the property or its sale proceeds has to be returned to the party objecting, any defaulter, who wilfully permits the distraint of property which he knows is not liable to distraint, shall be made to pay all the fees and expenses of such distraint, and fresh warrant may be taken out against his property.

2 **Notice of surplus.**—This is to meet the case of an illiterate defaulter who might not know what surplus remains to his credit with the municipality. The word 'notice' where it occurs for the 2nd time in this sub-section was here substituted for the word 'sale' by sec. 6 of Bom. Act IV of 1904.

Bengal Act, sec. 125, provides "All officers and servants of the Commissioners, and all chaukidars, constables, and other officers of Police, are prohibited from purchasing any property at any such sale."

Distraint and sale outside the district.

84-A. Where the warrant is addressed outside the municipal district the authority issuing the warrant may by endorsement direct the officer to whom the warrant is addressed to sell the property distrained and in such case it shall be lawful for such officer to sell the property and to do all things incidental to the sale and the foregoing provisions shall be modified accordingly.

Origin of section.—This was inserted by section 20 of the Amending Act of 1914, as it was said that the sale by the authority executing the warrant would "save delay and expense and is necessary in the case of perishable articles."

[1]Fees and costs chargeable.

85. Fees for—

(*a*) every notice issued under sub-section (3) of section 82,

(*b*) every distress made under sub-section (4) of section 83, and

(*c*) the costs of maintaining any live-stock seized under the said sub-section,

shall be chargeable at the rates respectively specified in such behalf in the rules of the municipality, and shall be included in the costs of recovery to be levied under section 83.

1 **Fees chargeable.**—Under the Madras Act, sec. 108, distraint fees are to be levied at maximum rates given in a Schedule; these do not include the expenses incidental to detention of property.

The following fees charged by the municipality of Karachi under this section are given as an example.

(*a*) For every notice under section 82 (3)—

For amounts up to Rs. 25	...	...	...	... 2 annas.
For amounts above Rs. 25	...	...	...	... 4 annas.

(*b*) For every distress under Section 83 (4)—

(Sanctioned by G. R. 2984 of 28 May 1901, Gen. Dep.)

Sums distrained for.	Fee.
	Rs. a. p.
Under Rs. 5	0 4 0
Rs. 5 and under Rs. 10	0 8 0
And so on every sum of Rs. 5; 4 annas more up to under Rs. 50, thereafter.	
For 50 and under 60	3 0 0
„ 60 „ „ 80	3 12 0
„ 80 „ „ 100	4 8 0
Above Rs. 100	5 0 0

The above fees include all expenses, except when peons are kept in charge of property distrained, in which case four annas must be paid daily for each peon so employed.

(*c*) For the cost of maintaining any live-stock seized (under the same sub-section)—

Description of live-stock.	Fee.	Per.
	Rs. a. p.	
(1) Horses, bullocks and cows	0 3 0	Each per diem.
(2) Camels and buffaloes	0 4 0	Do.
(3) Calves, young buffaloes and donkeys	0 2 0	Do.
(4) Goats and sheep	0 1 6	Do.

By sec. 202 (2) of the Bom. City Act, the fee is to be "of such amount not exceeding one rupee as shall, in each case, be fixed by the Commissioner."

In the Madras Act there is no notice fee, but instead, a fee of 2 annas per each warrant issued under sec. 83 (1).

[1]Appeals to Magistrates.

86. Appeals against any notice of demand issued under sub-section (3) of section 82 [2]may be made to any Magistrate or Bench of Magistrates by whom, under the directions of the Governor in Council, or of the District Magistrate, such class of cases is to be tried.

But no such appeal shall be heard and determined unless—

(*a*) the appeal is brought within fifteen days next after service of the notice of demand complained of; and

(*b*) an application in writing, stating the grounds on which the claim of the municipality is disputed, has been made to the municipality as follows, that is to say :—

(i) in the case of a rate on buildings or lands, within the time fixed in the notice given under section 65 or 66 of the assessment or alteration thereof, according to which the bill is prepared,

(ii) in the case of any other claim for which a bill has been presented under sub-section (1) of section 82 [3]within fifteen days next after the presentation of such bill; and

(*c*) the amount claimed from the appellant has been deposited by him in the municipal office.

1 **Origin of section.**—The provisions of this section are borrowed considerably from section 217 of the Bombay City Act, where however, such appeals are to the Chief Judge of the Small Cause Court.

An appeal against a municipal tax is exempted from payment of Court fees (Act VII of 1870, section 19.) See note 2 to section 62.

Form of appeal.—The Madras Act provides that it shall be in writing and shall set forth concisely and distinctly the heads of ground of objection.

Form of procedure in appeals.—The Act does not prescribe this, but obviously the Magistrate on admitting the appeal, should give notice to the municipality and fix a day for hearing.

The Magistrate must decide all questions arising out of the appeal, because he is the tribunal appointed for the purpose. See I. L. R. 14 Mad. 140, noted section 161.

No appeal against Magistrate's decision.—Magistrates, in respect of orders passed under this section, are no more subject to the appellate jurisdiction of the High Court than the District Judge or other authority acting under sec. 22. See note thereto.

In Halsbury's Laws of England Vol. 9 it is said "Many bodies are not Courts, although they have to decide questions and in so doing have to act judicially, in the sense that the proceedings must be conducted with fairness and impartiability. The authorities show that when *quasi-judicial* functions are delegated to an officer whose decisions are ordinarily subject to the revisional powers of the High Court, he is not, with reference to the delegated powers, necessarily subject to its appellate or revisional authority.

The Magistrate acting under this section is merely an appellate authority having jurisdiction given by the Act to deal with the question of a civil liability. He is therefore not an inferior Criminal Court so as to be subject to the revisional jurisdiction of the High Court under sec. 435 Criminal Pro. Code and so no appeal can lie to the High Court against his decision. (In *re Dalsukhram* (1907) 9 Bom. L. R. 1347.)

Under the Bengal Act the appeal is to a body of not less than 3 councillors appointed by the municipality and their decision is final. Under the Calcutta Act the appeal is to the Judge of the Small Cause Court whose decision is final, subject to the provisions of sec. 6 of the Presidency S. C. Courts Act, 1882 or sec. 25 of the Provincial S. C. Courts Act, 1887 as the case may be. This gives the High Court jurisdiction "for the purpose of satisfying itself that the order was *according to law.*" As to the meaning of this see Cumming's annotated edition of the Provincial S. C. Courts Act.

Under the Bombay City Act the High Court is not given this jurisdiction, as the Judge's decision is 'final,' but nevertheless it would probably be held that if the Magistrate acted *ultra vires* in disregard of the provisions of the Act, the High Court could step in to set matters right. See note 6 sec. 22 and note sec. 161.

High Court can only interfere if order ultra vires.—The Small Cause Court had jurisdiction to deal with the entire valuation and to set it aside and so long as the procedure laid down in the Act as to the filing of objections to the valuations &c. is followed correctly, the High Court cannot interfere either under s. 672 of the Civil Pro. Code or sec. 15 of the charter; but the S. C. Court had no jurisdiction to declare that the assessments under the previous valuation were still in operation and should remain in force for a period of years, and having so far acted *ultra vires* the order could be set aside. (*The Corporation of Calcutta* v. *Cohen*, (1901) 6 C. W. N. 480.)

Or if Court exceeds jurisdiction.—*Held* that the Small C. Court could only deal with the question of valuation and could not go into the question as to the manner in which the land was to be assessed after the valuation had been settled or whether it was or was not to be assessed as vacant land. I. L. R. 26 Cal. 74; 3 C. W. N. 70 followed (*Corporation of Calcutta* v. *Peary Mohan Roy*. 75 Ind. Cas. 452)

2 **Appeal may be made.**—These words show that the appeal is permission, not obligatory, and the party may resort to a civil suit to obtain a refund if paid or for an injunction against the municipality to restrain it from levying the tax. But in such case it is not open to

the party to go into questions which would be allowable before the Magistrate, as the Civil Court would be bound by the provisions of sec. 65 (6).

All the High Courts have held that where a special tribunal is provided for the decision of certain matters, failure to resort to that tribunal bars the right to bring a civil suit to contest a question which should have been brought before the Special Court. (See note 2 section 36.) Moreover section 65 (6) expressly provides that these matters are "conclusive" except for the result of the appeal. If a party uses the machinery provided he may raise the points thereby allowed, but if he neglects to do so he cannot claim to be in the same position by bringing a civil suit. The fact that the appeal is permissive does not effect the question, it only bears on the point that he is not necessarily debarred from bringing a civil suit, he cannot however in that suit raise the points which the legislature says are "conclusive" against him.

Civil suit for injunction may be brought in lieu of appeal, but injunction to be granted only in very clear cases.—The Surat City Municipality served, under section 82, clause (3), a notice of demand upon plaintiff for house-tax due by him. The plaintiff who denied his liability, instead of proceeding under sec. 86 of the Act, instituted a suit in the Civil Court for an injunction to restrain the municipality from recovering the house-tax from him. The lower Court rejected the claim on the ground that, as the plaintiff had omitted to appeal to a Magistrate under section 86 of the Act, his suit was premature.

Held, that section 86 was permissive merely, and that it did not make it incumbent in every case upon a party complaining of an illegal levy of a tax by a municipality to appeal against the action of the municipality to a Magistrate before suing in a Civil Court. But *Held* also (confirming the decree) that the injunction prayed for in this case could not be granted. By sec. 56 of the Specific Relief Act an injunction cannot be granted where efficacious relief can be obtained by any other usual mode of proceeding. Sec. 86 gave a remedy to the plaintiff, but instead of resorting to it he filed this suit for an injunction. It was open to plaintiff to pay the tax and then sue the municipality for a refund; on the other hand, it is open to the municipality to recover the amount by a distress warrant and sale. In either case, it cannot be said that there was no standard for ascertaining the actual damage likely to be caused to plaintiff or that pecuniary compensation could not be given for the invasion of his rights. It was discretionary for a Court to grant an injunction and that discretion must be exercised judicially with extreme caution and only in very clear cases. This was not a case of that kind. (*Chunilal* v. *Surat City Municipality*, I. L. R. (1903) 27 Bom. 403; (1902) 5 Bom. L. R. 267.) I. L. R. 22 Bom. 384 (*vide* note s. 36 p. 100) was referred to but distinguished as the wording of the rule showed it was to be construed as permisive and not mandatory.

7 Bom. H. C. (A. C. J.) 33 was also referred to and distinguished as the words in the section in that case were "shall in the first instance" which are imparative, whereas here the word is "may" which is only directory.

The following ruling is applicable to this subject except that while under the Madras Act *no question whatever* could be raised that the tax was not leviable, under this Bombay Act the questions that are precluded from being raised are those referred to in sec. 65 (6) (b).

Liability to tax conclusive where remedy given by Act not taken.—The Madras City Municipal Act (III of 1904) provides that when a person has been assessed to any tax or toll (section 172) "all complaints against and all applications for revision of classifications in respect of any tax or toll leviable under Part IV *shall* be heard and decided by the President and two Commissioners." Section 175 provides an appeal against the order of the President and two Commissioners to Magistrates. Section 176 authorises a reference by the Magistrates to the High Court. Section 177 declares the finality of the decision of the respective authorities in the following terms:—"The assessment, revision or demand of any tax or toll, when no complaint, application or objection is made as hereinbefore provided, and the adjudication of an appeal by the Magistrates shall be final."

Held, that neither in a prosecution under section 125 for non-payment, nor in a distress brought under section 180, nor in a civil suit under section 188 (1), can any defence be allowed to be raised that the tax was not leviable. The Act having provided a special mode of appeal against the tax, and the party not having complied with that, was precluded from doing so afterwards.

Petitioner's name appeared in the classification made under section 121 of the Act and he was served with a notice to pay profession tax under section 125. He did not pay nor did he apply for revision within 15 days of the notice. He contended that he was not liable to pay. *Held*, that under section 177 the assessment was final, and the Magistrate was right in declining to go into the question of non-liability. I. L. R. 14 Mad 140 (noted section 161) not followed. I. L. R. 24 Mad. 205 (noted section 65, p. 227) distinguished as being under the old Act the wording of which was different. I. L. R. 7 Cal. 332 dissented from. (*Veeraraghavulu* v. *The President, Corporation of Madras*. I. L. R. (1910) 34 Mad. 130; 1 M. W. N. 583; 8 M. L. T. 305; 20 M. L. J. 773; 1910, 7 Ind. Cas. 743.)

Liability of land, buildings, &c., for rates.

87. All sums due on account of any tax imposed in the form of a rate on lands or buildings or on both, mentioned in section 68, shall, subject to the prior payment of land revenue, if any, due to His Majesty thereupon, be a first charge upon the building or land, in respect of which such tax is leviable, and upon the moveable property, if any, found within or upon such building or land, and belonging to the person liable for such tax or taxes:

provided that no arrear of any such tax shall be recovered from any occupier who is not the owner, if it has been due for more than one year or for a period during which such occupier was not in occupation.

Origin of section.—The first part of this is from the Bom. City Act, sec. 212, and the proviso from sec. 209 (3).

Bengal Act II of 1888, sec. 146, and Mad. Act I of 1884, contain similar provisions.

This, except the proviso, follows the Calcutta Act sec. 228, and the proviso follows sec. 222 (3) which includes a sub-tenant. Sec. 223 limits the liability of a purchaser of the building or land to any period not exceeding one year prior to the purchase.

Held, that the liability under sec. 223 is a personal one, whereas that under sec. 228 is as to the premises—the two being quite distinct.

The property in question was sold by public auction in January 1903 to defendant No. 1; subsequently the mortgagee became full owner in 1904 and in February 1907 sold to the other defendants. The municipality filed a suit in August 1908 against all the defendants to enforce the charge for arrears of tax which had accrued during years from 1st April 1903 to 31 March 1906. Defendant No. 1 said that as she was not the owner in possession there could be no personal decree against her. The other defendants contended that there was no statutory charge against the property in their hands and no personal decree could be passed against them as the arrears became due more than a year before they became owners.

Held that the Act creates a charge on the property. Further, it could not be enforced against the property in the hands of a *bona fide* purchaser for value without notice, but defendants did not plead that they had no notice. They were personally liable under s. 223 for arrears of the year immediately prior to their purchase and they admit they had paid these arrears. If they had notice of the arrears at the time of their purchase, still though they could shelter themselves under the title of the sellers, the latter it is clear from the facts knew full well of the arrears. Defendants are in no better position as they might have ascertained from the municipality what the arrears were. Not being entitled to protection as purchasers for value without notice, the decree against them was confirmed. (*Akhoy K. Banerjee* v. *Corporation of Calcutta*, I. L. R. (1914) 42 Cal. 625.)

[1]Suspension of power to recover by distress and sale.

88. The Governor in Council may at any time by notification suspend the operation of sections 83 and 84 in any municipal district, in which there is not a City Municipality, and from such date as shall be fixed in this behalf in the notification, every amount due on account of any tax theretofore recoverable under the said sections, shall be recoverable on application to a Magistrate, in the manner provided in sub-section (2) of section 161 for the recovery of such fines as are therein referred to, and not otherwise.

1 **Origin of section.**—This now makes the old procedure applicable in the cases specified. See note 16 sec. 161.

No limitation as to when application may be made.

2 **Governor-in-Council.**—This in Sind means the Commissioner in Sind. (Sec. 3 (3).)

89. For all sums paid on account of any tax under this Act, a receipt stating the amount, and the tax on account of which it has been paid, shall be tendered by the person receiving the same.

[1]Receipts to be given for all payments.

1 This is taken from Panjab Act, sec. 51, except that the last sentence in that Act is "shall be given by the person receiving the same, on request by the person making the payment."

Liable to Stamp Duty — Is a receipt by a municipality acknowledging payment of house tax exceeding Rs. 20, liable to stamp duty?

"We think the question must be answered in the affirmative. The receipt is one for the payment of money "the amount of which exceeds 20 rupees." It is, therefore, an instrument requiring a stamp under Act I, 1879, schedule I, Article 52, unless it comes under schedule II-Article 15 (*b*). That article exempts from stamp duty a receipt for payment of money, "without consideration." That exemption was intended apparently to apply to receipts for, "voluntary" payments, which in the ordinary legal acception of the term, are payments without consideration, such as payments made merely in consideration of natural love or affection or mere gifts. The receipt in question is one for payment of house rate due to the municipality under the Act constituting the municipality. The payment is not gratuitous, but one in satisfaction or discharge of a legal obligation imposed by the Act, and in order to relieve the payer from the consequences which would ensue in case of his committing default, and is, therefore, not one without "consideration." (I. L. R. 12 Bom. 103, *In re Karachi Municipality.*)

Receipts passed by municipalities on account of house tax, cesses, &c., for sums exceeding Rs. 20 are not exempt from stamp duty. But although prosecutions might be instituted against the offending bodies or their agents for contravening the Stamp Act, Government cannot legally enforce a claim against any of the them for the loss of revenue occasioned by their infractions of the law. (G. R. 1721 of 19 March 1887, Rev. Dep.)

CHAPTER IX.—MUNICIPAL POWERS AND OFFENCES.

(*1*) *Powers in respect of Streets.*

90. (1) It shall be lawful for the municipality to [2]lay out and make new public streets, and to construct tunnels and other works subsidiary to the same, and to widen, open, enlarge, or otherwise improve any such streets, and to turn, divert, discontinue, or [3]stop up any such streets, and, subject to the provisions of sub-section (2) of sec. 40, to [4]sell any such land, theretofore used or acquired by the municipality for the purposes of such streets, as may not be required for any public street or for any other purposes of this Act.

[1]Power regarding streets, &c.

(2) In laying out or making, or in turning, diverting, widening, opening, enlarging, or otherwise improving any public street, in addition to the land required for the carriage-way and foot-ways and drains thereof, the municipality may [5]purchase the land necessary for the houses and buildings to form the said street, and, subject to the provisions contained in sub-section (2) of section 40, may [6]sell and dispose of the same in perpetuity or on lease for a term of years, with such stipulations as to the class and description of houses or buildings to be erected thereon as they may think fit.

[7]Power to require repair of streets,

(3) When the municipality consider that in any street, not being a public street, or in any part of such street, within the municipal district, it is necessary for the public health, convenience or safety that any work should be done for the levelling, paving, metalling, flagging, channelling, draining, lighting or cleaning thereof, the municipality may by written notice require the [8]respective owners of the lands or buildings fronting, adjoining or abutting upon such street or part thereof, to carry out such work in a manner and within a time to be specified in such notice.

[9]and to declare such streets public.

(4) After such work has been carried out by such owners or, as provided in section 156, by the municipality at the expense of such owners, the street or part thereof in which such work has been done may, and on the joint requisition of a majority of the said owners shall, be declared by a public notice, put up therein by the municipality, to be a public street.

[10]Power to declare any street a public street subject to objections by the owners.

(5) A municipality may, at any time, by notice fixed up in any street or part of a street not maintainable by the municipality, give intimation of their intention to declare the same a public street, and unless within one month next after such notice has been so put up, the owner or the majority of several owners of such street or such part of a street lodges or lodge objections thereto at the municipal office, the municipality may, by notice in writing put up in such street, or such part, declare the same to be a public street.

1 **Origin of section.**—Sub-section (1) is re-enacted from clause 1 of sec. 28 of the old Act of 1873, with some slight verbal alterations.

The Madras Act, sec. 188; the Panjab Act, sec. 86; and the Bom. City Act, sec. 289 (2) and 291 (*a*), contain similar provisions.

Street—Public street.—For definition see sec. 3 (12) and (13).

Railway may be constructed across public street without permission of municipality.—The Great Indian Peninsula Railway, in constructing a line of railway known as the Harbour Branch Railway in the Island of Bombay, laid down the lines of rails in a level-crossing across a public street known as Sewri-Koliwada Road, vested in the Municipal Corporation of Bombay under section 289 of the City of Bombay Municipal Act, without permission granted by the Municipal Corporation. The Municipal Corporation sued to obtain a declaration that the Railway Company could not lawfully maintain their lines of railway across the street in question without either obtaining permission granted by the Corporation and confirmed by the Government under section 293 of the City of Bombay Municipal Act or acquiring the land required for the level-crossing under the land Acquisition Act, 1894.

Held that the statutory authority under sec. 7 of the Indian Railways Act was established and that the application of sec. 293 of the City of Bombay Municipal Act was excluded by the words "notwithstanding anything in any other enactment for the time being in force" in the first-mentioned section.

Held, further, that where a railway company wished to lay a line of railway upon and across a street it was neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land, because if the Government under sec. 7 of the Act were to direct the Collector to take order for the acquisition of the land he would make his

award and take possession and the land would then vest absolutely in Government for the railway company free from incumbrances and would then cease to be a portion of the street and the railway company would be unable to exercise the power given to it of constructing the railways upon and across the "street."

Held, further, that the effect of sec. 289 of the City of Bombay Municipal Act vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner was only to vest in that body such property as was necessary for the control, protection and maintenance of the street as a highway for public use. (*G. I. P. Railway Company* v. *Municipal Corporation of the City of Bombay* (1913) 38 Bom. 565; 23 Ind. Cas. 765, 16 Bom. L. R. 104.)

2 **Lay out and make new public streets.**—See sec. 48 (1) (o) which provides for by-laws for the proper laying out and location of streets; sec. 54 (1) (*i*) makes it an obligatory duty to "construct, alter and maintain public streets," and sec. 56 (*a*) makes it discretional to provide funds for "laying out new public streets and acquiring the land for that purpose."

Civil Courts cannot restrain acquisition for widening street.—A Civil Court has no jurisdiction to entertain a suit for an injunction to restrain a municipality from acquiring, through Government, a piece of land for widening a street way. 2 Bom. L. R. 395, noted sec. 41.

3 **"Stop up such Street."**—The Bom. City Act, sec. 289 (3), provides that at least one month before this can be done, a notice is put up and objections received and considered. Sec. 290 provides that the land of such permanently closed street may be disposed of as land vesting in the municipality.

Temporary closing of a street.—The Act does not appear to provide for this.

The Panjab Act, sec. 86, gives power to temporarily close a public street for repairs, construction of sewers, &c., or any other public purposes.

The Madras Act, sec. 159 adds that the street must be "re-opened with all reasonable speed."

See sec. 319 of the Bom. City Act which provides for wholly or partially closing of a street for traffic, and setting up of a notice and of bars, chains, &c.

4 **"Sell any such land."**—See Part II. Appendix B as to rules and orders under the Land Acquisition Act for the purposes for which such sales can be made, para. 15 (7).

See note 12 to section 50 as to rights of 3rd persons in public streets, &c.

Power to sell land no longer required for public street.—(Opinion of the Advocate-General January 1908.) "The fact that the street has been used by the public is no reason for preventing the exercise by the municipality of any power given them by the District Municipal Act of discontinuing the street and selling the land. If the municipality have the power claimed by them the legislative authority conferred upon them overrides the rights of the public.

I think they have the power claimed because in my opinion the words of section 90 (1) which succeed the words "and to sell" have reference to "any public street" and are not confined to "new public streets."

The Legal Remembrancer says this is an accord with the opinion expressed in G. R. 447 of 28 January 1903. It is clear that a municipality has power to sell, subject to the Commissioner's sanction, any land, which is part of public street, provided it is no longer required for use as a public street or for any other purposes of the Act. This is not inconsistant with G. R. 7119 of 22 December 1905 (noted section 110) which refers only to cases where the public street is *to remain vested in the municipality as such.*

This sub-section gives no power to *lease*, but only to *sell*. (G. R. 3461 of 11 May 1908, Gen. Dep.)

Municipality bound to make proper provision for access.—"Bengal Act, section 34, empowers a municipality to purchase or take on lease any land for the purposes of this Act, and to sell, let, exchange, or otherwise dispose of any land not required for such purposes."

It was held that this provision for the sale of land must be held to be subject to any public or private rights which may exist with regard to the land in question. For instance the Commissioners would have no power to sell a public road and thereby deprive the public of their right of way over it.

"While certain land formed part of a certain public thoroughfare, F had immediate access to such thoroughfare and the use of a certain drain. The Municipal Committee sold such land to M, and constructed a new thoroughfare. M used and occupied such land so as to obstruct F's access to the new thoroughfare and his use of the drain. F, therefore, sued

him to establish a right of access to the new thoroughfare over such land and a right to the use of such drain. *Held*, that having suffered special damage from M's acts, F had a right of action against him and that such right was not effected by the circumstances that M had acquired his title to the land from the Municipal Committee, inasmuch as the Municipal Committee could not have dealt with the old thoroughfare to the special injury of F, and, had it closed the same, would have been bound to provide adequately for his access to the new thoroughfare and for his drainage." (*Fazal Hak* v. *Maha Chand and another.* I. L. R., 1 All. 557.)

Conviction for removing obstruction to access bad.—"A municipality having acquired under Act X of 1870, certain pieces of land, one of which belonged to the father of the accused, subsequently came to the conclusion that the road, for widening which the land had been acquired, was wide enough and accordingly resolved to sell it, and with that view barricaded it with rafter-posts, thereby practically barring all reasonable access to the premises of the accused from the public road. For removing this barricade, accused was convicted by a Magistrate under sec. 434 of the Indian Penal Code, and fined Rs. 20, and sentenced, in default, to undergo simple imprisonment for twenty days. *Held*, reversing the conviction and sentence, that as the mischievous intent described in sec. 425 of the Indian Penal Code was not found by the trying Magistrate, and could not reasonably be inferred from the evidence by the High Court, and as, moreover, the accused appeared to have thought he was simply abating a nuisance, the conviction was bad. *King* v. *Russel*, 6 B. and C., 566, referred to (*Imp.* v. *Abdul Aziz Nazirudin*, Bom. H. C Crim. Ruling No. 10 of 1895.)

5 **Purchase of land.**—Sub-sec. (2) is a re-enactment of clause 2, sec. 28, of the old Act of 1873.

Sec. 85 of the Panjab Act, and sec. 158 (2) of the Madras Act contain similar provisions; see also the Bom. City Act, sec. 296.

See sec. 56 (*a*) which empowers municipalities to provide funds for laying out new public streets and purchasing the land, &c.

The Bom. City Act also provides for the municipality agreeing with a person to make a new public street partly or wholly at his expense.

This sub-secion should have the following marginal note "Purchase of land for public streets."

See Part II, Appendix B Land Acquisition Rules, &c. It is illegal for a municipality to invest the municipal fund in the purchase of house sites with a view to speculative profits on re-sale.

The *purchase of the buildings on the land* to be acquired is not expressly stated, but may be assumed to have been intended. The corresponding section of the Bom. City Act, sec. 296 states "and the buildings, if any, standing upon such land."

6 **Sale and lease of land.**—See note 4 as to sales.

The Bom. City Act, sec. 296 (c), provides for the "lease, sale or otherwise disposal of any land *or building*" so purchased as aforesaid; and the conditions of conveyance are "as to removal of the existing building, the description of the new building to be erected, the period within which such new building shall be completed and other such matters."

7 **Repair of streets.**—This and the succeeding sub-sections are taken from 38 and 39 Vic. C. 55, secs. 150 and 152; also 53 and 54 Vic. C. 59, sec. 41. See note 4 to sec. 99.

These provisions are intended to clear up forever the doubt as to the powers of a municipality to enforce cleanliness and sanitation in 'pols' and courts. If the owners cannot, or will not, combine to do the work, the municipality will do it for them, and when the work has been done, the municipality may declare the street a public street.

Sub-sec (3) follows sec. 305 of the Bom. City Act, sec. 248, of Madras Act I of 1884, and sec. 162 of Madras Act IV of 1884, with this important distinction however, that this sub-section applies to "any street, not being a public street, *in which the municipality consider it is necessary for the public health, &c.*, that any work should be done," whereas the Acts quoted relate to *any* private street. Provision for this is however made the sub-sec. (5).

8 **Respective "owners of the lands or buildings, &c."**—In the Bom. City Act s. 308 the corresponding words are "owners of the several premises," &c.

The owner of a large plot of land sub-divided it into a number of building sites, which he arranged on either side of a private street which was projected to run through the plot. Those building sites were let to lessees (of whom the applicant was one) for a period of thirty years; at the end of the period the lessee was to remove the building put up by him unless the lessor purchased it. Under the terms of the lease the lessee was to contribute rateably to the expenses of making, repairing, etc., all ways, roads, etc. The applicant was one of those

lessees. He built a house upon one of those sites, and let it to tenants from whom he received rent. The Municipal Commissioner of Bombay issued a notice to the applicant, under section 305 of the City of Bombay Act, calling upon him to level, metal, drain and light the *public* street in front of his building. The applicant failed to comply with the notice, for which he was prosecuted under section 471 of the Act. He contended that he was not the owner of the premises within the meaning of section 305 of the Act. The Magistrate overruled the contention and convicted him.

Held, confirming the Magistrate's order, that the mere owner of the land who had let it out under a building scheme for building purposes was not the owner of the property, because the property contemplated by section 305 necessarily embraced buildings, whether erected or to be erected; and the legislature regarded him as the owner of the premises who had the right to receive rent in respect of that property.

The word "premises" occurring in section 305 of the Act must be presumed to have been used by the legislature in its legal sense, as referring to the particular kind of property which forms the subject-matter of the group of immediately preceding sections of the Act. That group (sections 302—307) has reference to streets made for the use of buildings or building sites. The dominant idea running through the sections 302–304 is that of buildings either erected or projected. That is the kind of property dealt with in what has gone before section 305; and therefore that is its "*præmissa*."

It is a primary rule of interpretation that a word having a popular meaning ought to be construed in that sense. One exception to that rule is that, unless there is something to the contrary in the context, words of known legal import are to be considered as having been used in their technical sense, where the law has attached that sense to them. (*Emperor v. Ramchandra Bhaskar Mantri*, (1910) 34 Bom. 593; (1910) 12 Bom. L. Rep. 669; 7 Ind. Cas. 935.)

9 **Declaration of public street.**—This sub-section follows sec. 163 of the Madras Act, sec. 249 of the Madras Act I of 1884, and sec. 306 of the Bom. City Act, with the difference pointed out in note 8. Under the Madras Act, a private street can be declared a public street only "on the requisition of the owners." Under the Bom. City Act, a private street shall be declared a public street on such requisition, and may be without such requisition "unless within one month after the notice of intention to declare, the owner of the street or the greater part thereof shall, by notice in writing, object."

Thus the present Act goes further in that *any* private street may be declared a public street even against the wishes of the owners thereof provided it is a street in which the municipality consider that it is necessary for the public health, convenience, or safety that repairs should be done, and further the municipality may enforce the repairs at the expense of the owner before declaring it a public street.

If the street is not such a street, then the municipality cannot either have it repaired, &c., at the owner's or its own expense, nor can declare it a public street, if the majority of the owners object.

"*Majority of such owners.*"—The Bom. City Act says "upon the request of the owner or of any of the owners of such street" and leaves it open to any owner or owner of greater part to prevent the acquisition by making a written objection. The Madras Act says "on the requisition of the owners," apparently requiring the requisition to be unanimous.

Private street when may become a public street.—The municipalities issued a notice to accused to level, pave &c his private street, and on noncompliance he was prosecuted but the Magistrate acquitted him on the ground that as the public had acquired a right of way over the street it was no longer a private street and the notice was not a valied one. *Held* that under the special provisions of sec. 416 of the Calcutta Act (as to streets in *bustees*) the street did not cease to be a private street; *also* that in order to create a public right of way there must be a dedication by the owner. (*The Corporation of Calcutta* v. *Sremutty M. Devi*, (1913) 17 C. W. N. 1250).

Street partly public and partly private.—Sec. 307 of the Bom. City Act provides that for the purpose of sub-sec. (3) (4) and (5) of this sec. 90, if a portion only of a street is a public street, the other portion may be deemed to be a private street.

"*Shall be declared a public street*".—The municipality have no option. Hence under this Act the owner of a private street who wants to be relieved of the liability to repair &c., the street has only to neglect it so as to force the municipality to take action under this sub-section. In England if a private owner wishes to dedicate the road to the public this can be refused by the public authority only on the ground that the road is not of sufficient utility to justify its being kept in repair at the public expense. (Sec. 23 Highways Act, 1835.)

10 **Private streets declared public**—Under this sub-section, any private street may be declared a public street, if no objection is lodged, without going through the preliminary of first requiring such street to be repaired by the owner or by the municipality at the expense of the owners.

The Madras Act provides that by agreement "with the person or persons in whom the property in any street is vested" it may be taken over by the municipality.

"*Majority of several owners*".—Under the Madras Act, the *unanimous consent* of the owners is essential (see note 11); under the Bom. City Act, the objection of "the owner of such street or of the greater part thereof" is fatal to the acquisition (see note 10). Under this sub-section, if the major number of owners object, the street cannot be acquired even though such majority may not be owners of the greater part of the street. The provisions of the Bom. City Act on this point seem more equitable.

91. (1) Every person intending to lay out or make any new street, shall give notice in writing thereof to the municipality, and shall furnish plans and sections showing the intended level, means of drainage, direction and width of such street, if required by the municipality to do so, and the level, means of drainage, direction and width of every such street shall be fixed or approved by the municipality.

[1]New streets.

Power of municipality to pass orders.

(2) Before passing orders under sub-sec. (1), the municipality may either issue,

(*a*) a provisional order directing that, for a period therein specified, which shall not be longer than one month from the date of such order, the intended work shall not be proceeded with, or

(*b*) a demand for further particulars.

(3) If

(*a*) within one month from the receipt of the notice given under sub-section (1), the municipality have neither

[2]Right to proceed in certain cases.

(i) passed orders and served notice thereof either fixing or disapproving the proposals submitted under sub-section (1) with regard to level, means of drainage, direction and width of the street, nor

(ii) under sub-section (2), issued any provisional order or demand for further particulars, or if

(*b*) the municipality, having issued such demand for, and having received, in accordance with the demand and with the by-laws in force in this behalf, such further particulars, have issued no further orders within one month from the receipt of such particulars,

then the street may be laid out and made, in such manner as may have been specified in the notice, and as is not inconsistent with any provision of this Act or of any by-law for the time being in force thereunder.

(4) Whoever lays out, makes or builds upon any such street, either without giving the notice required by sub-section (1), or, except in accordance with the provisions of sub-section (3), without awaiting, or otherwise than in accordance with, the instructions issued by the municipality, or in any manner contrary to the provisions of this Act or of any by-law in force thereunder, shall be punished with fine which may extend to two hundered and fifty rupees, and the municipality may cause any street so laid out or made to be altered, and any building erected in such street contrary to their directions to be altered or removed, and the expense thereby incurred shall be paid to them by the offender, and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under Chapter VIII.

Penalty.

1 **Origin of section.**—Sub-sec. (1) is a re-enactment of the first part of sec. 29 of the old Act Bom. VI of 1873, and corresponds with sec. 161 (1) and (2) of the Madras Act, and sec. 302 of the Bombay City Act; the former requires also, "the height and dimensions of the buildings to be erected on each side;" the latter, "the height and means of drainage of the buildings to be erected on each side." Section 294 provides a minimum width of 40 feet for carriage traffic or 20 feet for foot traffic only, but in the varying conditions of mofussil municipalities, it was considered impracticable to fix any such minimum.

Notice in writing.—An application or petition when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy, or improvement, is liable to a Court fee stamp of one anna (Court Fees Act, 1870, Schedule II, Article 1 (*a*).

By sec. 48 (*s*) by-laws may be made determining the information and plans to be required under this section.

2 **Sub-section (3).**—This is the last clause of the old sec. 29 but its provisions have been very considerably amplified. Under the Madras Act, sec. 161 (3) and (4), the period is 2 months, under the Bombay City Act, 30 days.

By-laws in force.—See sec. 48 (8).

91 A. (1) It shall be the duty of every municipality to prescribe a line on each side of every public street within the municipal district and the municipality may from time to time prescribe a fresh line in substitution for any line so prescribed, or for any part thereof:

The regular line of a public street.

provided that—

(*a*) at least one month previous to prescribing such line or such fresh line, as the case may be, the municipality shall give public notice of the proposal and they shall put up [2]special notice thereof in the street or part of the street for which such line or such fresh line is proposed to be prescribed, and

(*b*) the municipality shall consider any written objection or suggestion in regard to such proposal delivered at the office of the municipality within such time as they may specify in such public or special notice.

(2) The line for the time being so prescribed shall be called 'the regular line of the public street.'

(3) Except under the provisions of section 113, no person shall construct, or without the permission of the municipality under section 96 reconstruct, any portion of any building within the regular line of the public street.

(4) Whoever contravenes the provisions of sub-section (3) shall be punished with fine which may extend to one thousand rupees; and the municipality may—

(*a*) direct that the building be stopped, and

(*b*) by written notice require such building or portion thereof to be altered or demolished as they may deem necessary.

Origin of section.—This is new and was inserted by sec. 23 of the Amending Act of 1914. See the Bom. City Act 1888 sec. 297 and the Madras Act of 1884 s. 164 which contain somewhat similar provisions.

It was proposed to add after the word "municipality" in line two, the words "with the approval of the Commissioner" as it was feared that municipalities would often not take a sufficiently liberal view of the requirements of the public and so the municipality would suffer.

The Select Committee in proposing this section say:—

"9. It has been made the duty of municipalities to prescribe the regular line of every public street. Unless the line is authoritatively prescribed, the risk of encroachments on public streets will continue unabated and it will be difficult to dispose of applications for building in the vicinity of public streets on uniform or satisfactory principles. Although by section 297 (3) of the City of Bombay Municipal Act, 1888, a Municipal Commissioner is empowered to permit a person in special circumstances to construct a portion of a building within the regular line of a street, we think it would be better to give no authority even to the municipality to do so in mofussil municipalities, following in this respect, section 164 of the Madras District Municipalities Act, 1884. Cases of hardship can be avoided by the power of the municipality to prescribe a fresh line in substitution of a line previously prescribed. If the municipality make default in performing this duty, the necessary action can be taken by Government under section 178 to enforce its performance."

2 **Special notice.**—It was proposed in Council that this should be "served on the owner (if known) or on the occupier of every house in the street," but this was negatived.

(2) *Power to regulate buildings, &c.*

92. (1) If any part of a building projects beyond [2]the regular line of a public street either as existing or as determined upon for the future, or beyond the front of the building on either side thereof, the municipality may,—

[1]Setting back projecting buildings.

[3](*a*) if the projecting part thereof is a verandah, step or some other structure external to the main building, then at any time, or

(*b*) if the projecting part is not such external structure as aforesaid, then, whenever the greater portion of such building or whenever any material portion of such projecting part has been taken down or burned down or has fallen down,

require by written notice either that the part, or some portion of the part, projecting beyond the said regular line or beyond the said front of the adjoining building on either side thereof, shall be removed, or that such building when being rebuilt shall be set back to or towards the said regular line or the front of such building. And the portion of land added to the street by such setting back or removal shall thenceforth be deemed part of the public street and be vested in the municipality.

[4]Acquisition of land which is within the regular line of a street and open or occupied only by platforms, &c.

(2) If any land, not vested in the municipality, whether open or enclosed, lies within the regular line of a public street, and is not occupied by a building other than a platform, verandah, step or other such external structure, the municipality after giving the owner of the land not less than fifteen clear days' written notice of their intention, or if the land is vested in His Majesty, then with the premission in writing of the Collector, may take possession of the said land with its enclosing wall, hedge or fence, if any, and, if necessary, clear the same: and the land so acquired, shall thenceforward be deemed a part of the public street, and be vested in the municipality.

[5]Compensation payable by the municipality.

(3) Compensation, the amount of which shall in case of dispute be ascertained and determined in the manner provided in section 160, shall be paid by the municipality to the owner of any land added to a street under sub-section (1) or acquired under sub-section (2), for the value of the said land, and to the owner of any building for any loss, damage or expense incurred by such owner in consequence of any action taken by the municipality under either of the said sub-sections, provided that no such compensation shall be payable in cases to which section 119 applies.

1 **Origin of section.**—See sec. 48 (*n*) (*o*) (*p*) and notes.

Sub-sec. (1) is a reproduction of sec. 30 of the old Act VI of 1873, but put in a somewhat different form. The City of Bom. Act, sec. 298, contains somewhat similar provisions; so also the Madras Act, sec. 165, and the Panjab Act, sec. 91.

Sec. 54 (1) (*f*) makes it one of the obligatory duties of a municipality to make provision for "removing obstructions and projections in public streets and places."

This section applies only to authorised projections and projections existing before the birth of the municipality. The latter kind of projections or obstructions may be removed at any time under section 113, and also all unauthorised projections, &c. See also sec. 112.

2 **Regular line of street.**—See section 91-A.

Where none such existing notice held legal.—A notice under section 30 of the old Act was issued to the plaintiff to set back his ota. Both the lower Courts found that no regular line for the street in which the ota was being built had either existed or had been determined upon by the municipality and that the ota of the plaintiff did not project beyond the front of the house on the north side, or beyond the house on the south, if the steps of the latter house which the municipality had allowed to be erected, on condition that they were to be removed on demand, were included in it.

Held, that under the circumstances, the notice was not justified by sec. 30.

The word "building" in the section includes an ota, as well as the steps of a house, though they be erected on condition that they be removed on demand, and the words "on either side" mean on the one side or the other and not both. (*The Dhulia Municipality* v. *Kisandas Jankidas*, 1886, P. J. p. 781.) See I. L. R. 38 Bom. 597 note 12 s. 96.

3 **External projections.**—These if in or over a public street may also be dealt with under section 113. If an aerial one and its retention unobjectionable, instead of being removed, it may be permitted under sec. 113 (1) to remain. If the aerial projection is objectionable or if it is a surface projection or encroachment, it may also be directed to be removed under sec. 113 (3).

An ota does not come under clause (a).—In *Hasan Ali* v. *the Bundra Municipality*, P. J. 1894, p. 427, it was held that an *ota*, being a solid part of a house, and standing on the land of the owner of the house, and projecting beyond the regular line of a public street, came within the definition of building and not a mere projection into a public street contemplated by section 42, Act VI of 1873 (now section 113) and that therefore to acquire it, the municipality should proceed under section 25 (now 41). It could not be dealt with under section 30 (now section 92) as that applied to a house being taken down, or burnt or fallen down.

4 **Sub-section (2).**—This is new, and is taken from section 299 of the City of Bombay Municipal Act, 1888. As to Government land, see notes 11 & 12, section 50, and rule 35 Land Revenue Code noted at p. 156.

5 **Sub-section (3).**—This is a re-enactment of the proviso to the old section 30 of Bombay Act VI of 1873, but the provisions have been amplified as required, and are mainly in accordance with section 301 (1) of the City of Bombay Municipal Act. See 14 Bom. 292 note 1 sec. 160.

Under the old Act, the compensation was to be 'full;' and for any damage he may sustain. This was held not to include the value of the land acquired, but now this is expressly included. Under the Madras Act, section 165 (2), it is to be "reasonable."

Setting forward to regular lines of street.

93. The municipality may, upon such terms as they think fit, allow any building to be set forward for improving the line of any public street in which such building is situated.

Setting forward.—This is a reproduction of clause 2 to the proviso to sec. 30 of the old Act of 1873, and of sec. 165-A of the Madras Act.

The Bom. City Act, sec. 380, provides for requiring a building to be set forward to the regular line of the street, and that for this purpose, a wall separating any premises from a public street, shall be deemed to be a building, and the setting forward of such wall of such materials, &c., as the municipality approve, shall be deemed to be a compliance with the section. See also sec. 301 (3) of that Act as to conveyance of the land so included if belonging to the municipality.

Sec. 301 (4) provides for a reference to the Chief Judge, Small Cause Court, if party dissatisfied with the terms of conveyance.

Sale of road-side strips of land.—"The question is whether municipalities can, under this section, by allowing a house or building to be set forward for improving the line of any public street in which such house or building is situated, dispose of road-side strips of land without obtaining the previous sanction of the Commissioner under the proviso to sec. 15 of Bombay II of 1884. (Now sec. 40 (2).)

"2. 'Set forwards' as well as 'set backs' are unquestionably immoveable property vested in the municipalities within which they are situated. Therefore after Bom. Act II of 1884 came into force, no sale or transfer by a municipality for a term exceeding seven years, would be valid without the previous sanction of the Commissioner of Division. The section would not, without express words, have a retro-active effect so as to invalidate past sales, transfers, or leases, but would govern all subsequent transactions.

Maxwell on Interpretation of Statutes 191—192.

"3. The object and scope of the Acts must necessarily be considered in interpreting the restriction. Public streets within the municipal limits are vested in the municipality, and are under their management and control as trustees for the purposes of the Act, (secion 50) but as dedicated to the use of the public and as portions of the general system of communication which is primarily vested in His Majesty. Their powers are therefore not unlimited (I. L. R. 2 Calc. 425), but confined by the nature of the trust. They cannot so deal with the portion of that system which is under their control and management as to endanger the utility

of the rest of the system. The Legislature has therefore deemed it necessary to impose certain restrictions on the exercise of their powers which may ensure a consideration of interests wider than those of the local limits within which municipalities may use their powers. The principle on which higher sanction is rendered necessary by section 15 (now sec. 40 (2)) to any permanent alienation of public property, seems to be fully as appropriate when applied to the disposal of road side strips, which might interfere with the traffic of an entire district, as to any other immoveable property placed under the management and control of municipalities." (G. R. 1106 of 19 March 1889, Gen. Dep.)

On the question arising whether municipalities have the power to sell land for building steps or benches before houses at the side of public road-ways, Government under G. R. 5965 of 20 August 1886, Rev. Dep. concurred in the opinion on which G. R. 905 of 30 March 1880, was based that the only case in which a municipality could sell or grant any portion of a public street to an individual house-holder is under this section. See note 4 sec. 90.

94. (1) The external roofs and walls of buildings erected or renewed after the coming into force of this Act, shall not be made of grass, wood, cloth, canvas, leaves, mats or other inflammable materials, except with the written consent of the municipality, which may be given either specially in individual cases, or generally in respect of any area specified therein.

[1]Roofs and external walls of buildings not to be made of inflammable materials.

(2) The municipality may at any time, by written notice, require the owner of any building which has an external roof or wall made of any such material as aforesaid, to remove such roof or wall within such reasonable time as shall be specified in the notice, whether such roof or wall was or was not made before the time at which this Act came into force, and whether it was made with or without the consent of the municipality.

[2]Power to require removal of roof & wall, if inflammable.

(3) Whoever without such consent as is required by sub-section (1) makes, or causes to be made, or in disobedience to the requirements of a notice given under sub-section (2) suffers to remain, any roof or wall of such material as aforesaid, shall be punished with a fine which may extend to twenty-five rupees, and with a further fine which may extend to ten rupees for every day on which the offence is continued, after the date of the first conviction.

[3]Penalty.

1 **Origin of section.**—The word 'combustible' in the old Act is now substituted by the word "inflammable."

This section is sec. 31 of the old Act, Bombay VI of 1873, considerably amplified. It follows the Bombay City Act, section 349, and Panjab Act, section 90. See Madras Act I of 1884, section 264.

Section 48 (1) provides for by-laws "(*a*) regulating the structure and dimensions of plinths, walls, foundations, roofs and chimneys of new buildings, for prevention of fires."

The Panjab Act, section 103, provides for the prohibition of stacking inflammable material and lighting fires in any specified place or limits; also section 104 of lighting fires in top storeys and of placing lamps, &c., in dangerous places.

See the Explosives Act as to storage of petroleum, &c.

A by-law made by a municipality in exercise of authority vested in it by section 63 of the Bengal District Municipal Act (Ben. III of 1864,) which forbids the erection or renewal

of the external roof and walls of buildings with inflammable materials, was construed to forbid the renewal even of a portion of the roof-wall with such material. (*Imp.* v. *Montanee Bewah*, 24 W. R. 70.)

Sub-section (1) is very similar to section 179 of the Madras Act. *Held* that the word "renewed" in that section includes 'repairing.'" (*Queen Emp.* v. *Subborna*, I. L. R. 19 Mad. 241.)

2 **Removal of inflammable roof, &c.**—The application of this sub section to a roof, &c., made after the Act came into force, and whether with or without the consent of the municipality was not in the old Act.

Held that the hedge of an enclosure surrounding a house is not the external wall of a building which a municipality can require to be removed under this sub-section. (*Emperor* v. *Verho*, Sind Sadar Court Criminal Ruling No. 3 of July 1902).

3 **Penalty.**—This must be imposed even if no notice has issued.

Continuing offence.—Held, (under the corresponding sec. of the Bom. City Act), that the section requires a separate prosecution for a distinct offence, a prosecution in which a charge must be laid for a specific contravention for a specific number of days, and for which charge, if proved, the Magistrate is to impose a daily fine of an amount which is left to his discretion to determine. (*Impx* v. *Limbaji Tulsiram*. I. L. R. 22, Bom. 766.) Bom. H. C. G. R. No. 67 of 1896. See also *Imp.* v. *William Phumner*, Bom. H. C. Cr. R. No. 6 of 1897.

Under section 248 of Bengal Act IV of 1876, a milkman who has been convicted and fined for keeping an animal without a license, cannot again be prosecuted for the continuance of the same offence before conviction, nor can he be separately prosecuted for the same offence for each day the offence is continued as a separate and distinct offence under that section before conviction. In a summons taken out on the 27th of March against a milkman for an offence under section 248, Bengal Act IV of 1876, the offence was stated to have been committed on the 16th March; the case was fixed for the 8th April, and when the defendant was convicted and fined by the Magistrate, another summons had been taken out against him on the same day (27 March), for a similar offence stated to have been committed on the 25th March; *held* that he could not be convicted on the second charge. (*In the mattter of the Corporation of the town of Calcutta* v. *Matto Bewah*, I. L. R., 13 Cal., 108).

Though the section may prescribe a further fine for every day the offence is continued, it cannot be imposed prospectively. The proper course is to institute a fresh prosecution and allow accused an opportunity of defending himself before the further fine can be imposed. (*Queen-Empress* v. *Viramal* I. L. R. 16, Mad. 230).

An order for payment of a daily fine is illegal in as much as it is an adjudication in respect of an offence which has not been committed when such order is passed. *Sagar Dutt In re W. N. Love.* 9 B. L. R., App. 35 (1868) I. B. L. R., O. Cr., 41; (1872) 18 W. R., Cr., 44 and *Kristodhone Dutt* v. *Chairman, Municipal Commissioners, Calcutta*, (1876) 25 W. R., Cr. 6 referred to (*Ram Krishna* v. *Mohendra Nath Mozumdar*, I. L. R., 27 Cal. 565. *Emperor* v. *Wazir Ahmed*, I. L. R. 24, All. 309).

Accused was convicted of a nuisance under sec. 67 of Bengal Act III of 1864 and fined Rs. 20 and further fined Rs. 2 a day, for every day the nuisance continued unabated. The High Court, Calcutta (following a precedent cited) set aside only so much of the order as inflicted the fine prospectively. (*Imp.* v. *Aneesuddin Meah*, 20, W. R. 64; 12, B. L. R., Ap. 2.)

Under sec. 122 of the C. P. Municipal Act, 18 of 1889, a Magistrate convicting a person of disobedience of a written notice issued by the municipailty, cannot legally direct that he shall obey the notice within a certain time and in default pay a daily fine. (*Impx.* v. *Dadu Hulnai*, 7 C. P. 4.)

First conviction cannot be questioned on subsequent prosecution.—After a conviction under section 147 of the U. P. Act for refusing to pull down a building which was in a ruinous and dangerous condition, the person convicted cannot be permitted to challenge the correctness of that conviction as often as he is prosecuted for continued disobedience of the order of the Board. (*Sital Prasad* v. *The Municipal Board of Cawnpore*, I. L. R., 36 All. 430).

Level of buildings.

95. No building shall hereafter be built upon a lower level than will allow of the drainage thereof being led into some public sewer or drain either then existing or projected by the municipality, or into some stream or river, or into the sea, or some cesspool, or other suitable place which may be approved of by the municipality.

This is an exact reproduction of sec. 32 of the old Act, Bom. VI of 1873.

By sec. 96 (5) a building constructed contrary to this provision makes the builder liable to a penalty.

96. (1) Before beginning to erect any building, or [2]to alter externally or add to any existing building, or to re-construct any projecting portion of a building in respect of which the municipality is empowered by section 92 to enforce a removal or set back, or is empowered by section 91 A to give permission to reconstruct it, [3]the person intending so to build, alter, or add shall give to the municipality [4]notice thereof in writing, and shall furnish to them, at the same time if required [5]by a by-law or by a special order to do so,

[1]Notice of new buildings.

[6](*a*) the sanad, if any, in force relating to the site of such proposed building, issued under section 10 of Bombay Act IV of 1868 or received under section 133 of the Bombay Land Revenue Code, 1879, or other enactment relating to the survey of lands in towns and cities, and

[7](*b*) a plan showing the levels, at which the foundation and lowest floor of such building are proposed to be laid, by reference to some level known to the municipality, and all information they may require regarding the limits, design, ventilation and materials of the proposed building, and the intended situation and construction of the drains, sewers, privies, water-closets and cesspools, if any, to be used in connection therewith, and the location of the building with reference to any existing or projected streets.

(2) The municipality may issue such [9]orders not inconsistent with this Act as they think proper with reference to the work proposed in such notice, and [10]may either give permission to erect or alter or add to the building according to the plan and information furnished, or may impose in writing such conditions as to level, drainage, sanitation, materials, or to the dimensions and cubical contents of rooms, doors, windows and [11]apertures for ventilation, or with reference to the [12]location of the building in relation to any street existing or projected, as they think proper, or may direct that the work shall not be proceeded with [13]unless and until all questions connected with the respective location of the building and any such street have been decided to their satisfaction.

[8]Power of municipality to pass orders.

(3) Before issuing any orders under sub-section (2) the municipality may, within one month from the receipt of such notice, either issue,

[14]Or to suspend the work or to require further particulars.

(*a*) a provisional order directing that for a period, which shall not be longer than one month from the date of such order, the intended work shall not be proceeded with, or

(*b*) may demand further particulars.

Right to proceed in certain cases.

[15](4) A building proposed in a notice given under sub-section (1) may be proceeded with in such manner, as may have been specified in such notice, as is not inconsistent with any provision of this Act or of any by-law for the time being in force thereunder in the following cases, that is to say :—

(*a*) in case the municipality, within one month from the receipt of the notice given under sub-section (1), have neither

(*i*) passed orders under sub-section (2) and served notice thereof in respect of the intended work; nor

(*ii*) issued under sub-section (3) any provisional order or any demand for further particulars;

(*b*) in case the municipality having issued such demand for and having received in accordance with the by-laws in force in this behalf, such further particulars, have issued no further orders within one month from the receipt of such particulars:

[16]Provided that no person, who becomes entitled under this sub-section to proceed with any intended work of which notice is required by sub-section (1), shall commence such work after the expiry of the period of one year from the date on which he first becomes entitled so to proceed therewith.

[17](5) Whoever begins or makes any building or alteration or addition without giving the notice required by sub-section (1), or without furnishing the documents or affording the information above prescribed, or except as provided in sub-section (4), without awaiting, or in any manner contrary to, such legal orders of the municipality as may be issued under this section, or in any other respect contrary to the provisions of this Act or of any by-law in force thereunder, [18]shall be punished with fine which may extend to one thousand rupees: and the municipality may

[19](*a*) direct that the building, alteration, or addition be stopped, and

[20](*b*) by written notice, require such building, alteration or addition to be altered or demolished, as they may deem necessary.

[21](6) The municipality or any officer deputed by them may at any time inspect the erection of any building without giving notice of their or his intention to do so, and at any time during the erection of a building or the execution of any such work as aforesaid, or at any time not later than one month after being informed in writing by the person responsible for giving a notice under sub-section (1) that the erection of the building, or the execution of any such work as aforesaid, has been completed, may by written notice specify any matter in respect of which the erection of such building, or the execution of such work, may be in contravention of any provision of this Act or of any by-law made under this Act at the time in force, and require the person erecting or executing, or who has erected or executed, such building or work, or, if the person who has erected or executed such building or work is not at the time of notice the owner thereof, then the owner of such building or work, to cause anything done contrary to any such provision or by-law to be amended, or to do anything which by any such provision or by-law he may be required to do but which has been omitted.

[22]EXPLANATION.—The expression "to erect a building" throughout this chapter includes

(*a*) any material alteration, enlargement or re-construction of any building,

(*b*) the conversion into a place for human habitation of any building not originally constructed for human habitation,

(*c*) the conversion into more than one place for human habitation of a building originally constructed as one such place,

(*d*) the conversion of two or more places of human habitation into a greater number of such places,

(*e*) such alterations of the internal arrangements of a building as affect its drainage, ventilation or other sanitary arrangements, or its security or stability, and

(*f*) the addition of any rooms, buildings or other structures to any building,

and a building so altered, enlarged, re-constructed, converted, or added to, is, throughout this chapter, included under the expression "a new building."

1 **Notice of buildings.**—For definition of building, see section 3 (7).

This section is an amplification of the provisions of section 33 of the old Act of 1873, except clause (*a*) which is new.

See the Bombay City Act, section 348, as to provisions regarding buildings to be newly erected.

This is a very important section, and is the point at which a municipality often comes into collision with the people, and no amount of care spent in giving it clear and reasonable expression would be misplaced. It is not wise to impede little improvements, such as painting and petty repairs, or to encourage underlings to harras, but at the same time it must not be forgotten that the average householder is keen on using every little alteration as a cover for encroachment. He will not loose the chance, if he can get it, of filching an extra six inches of gable or door step. The main difficulty, in framing this clause, was to make it clear when notice is necessary and when it is not. The real *crux* is explanation (*a*), which it is feared will give rise to another series of Court decisions as to what are 'material' and what not. For instance, must a man give notice if he means to make a door-way, or if he means to exchange an existing door of junglewood for one of teak? It may be said, that in the former case, he ought to give notice, and in the latter he need not, but they would both apparently come under explanation (*a*), for a change of one wood for another is nothing, if not a *material* alteration. Again the substitution of a tiled for a corrugated iron roof may be said to have nothing to do with the municipality, but yet it should come under this section as the ordinary householder, if uncontrolled, could not resist the temptation to push the new eaves for an extra foot over the public road.

See section 123 as to license to be obtained in certain cases. Also section 101 (2) as to drains.

Madras Act, section 180 (corresponding with this section), applies also to wells, but not to "a mere well," and provides that the municipality may exempt any hut or group of huts from operation of this section.

See also the corresponding section 92 of the Panjab Act, and the Bombay City Act Chapter XII, sections 337—348.

The Government of India ruled that reasonable notice should always be given to municipalities of all works which the Railway authorities propose to construct within municipal limits. (G. R. 4202 of 17 July 1906 G. D. with reference to G. R. 1377 of 11 March 1901.)

Section 48 (1) provides for by-laws; "(*n*) regulating the structure and dimensions of plinths, walls, foundations, roofs and chimneys, of new buildings, for the purpose of securing stability and the prevention of fires, and for purposes of health; (*o*) for preventing erection of buildings without adequate provision for laying out, &c., streets; (*p*) for ensuring ventilation."

The Panjab Act, sec. 93, provides that with the sanction of Government, a municipality may make by-laws as to mode of construction of buildings, but this section applies only to municipalities to which this is specially extended by Government at the request of the municipality.

Government buildings.—See Part III, of the previous eddition of this Mannual for the Government Buildings Act, 1899, which exempts Government buildings from the operation of this section.

Before beginning to erect—a beginning however little is punishable.—Accused applied under sec. 180 of the Madras Act for permission to build a house but before getting the permission he raised a wall at least one foot high. *Held* that this was a 'building' within the meaning of s. 180 (5) and was therefore liable to the penalty. A wall erected in the course of erection of a building is not a "mere wall," (*Public Prosecutor* v. *Kalia Perumal*, 1 M. W. N. 740; 8 M. L. T. 431; 1910, 8 Ind. Cas. 139.)

Municipal discretion—Civil Court's power to interfere.—The section is perfectly general in its terms. Any one beginning to a erect building, or alter externally, or add to an existing building, *any where*, must give the municipality notice, and the municipality is given a discretion to issue such orders as it thinks proper with reference to the building, &c.

Civil Courts cannot interfere with that discretion, unless, it is exercised in a capricious, wanton, and oppressive manner. Public functionaries acting within the limits prescribed by the statute which gave them authority, are not subject to a suit for thus discharging their duties according to their judgment. *Vide Leader* v. *Moxen* 2 W. Bl., 924 approved by *Gibbs C. J. in Sutton* v. *Clarke* 6 Taunt, at p. 43. A public body must keep within its powers, and must use them considerately. *Vide per Lord Blackburn in Geddis* v. *Proprietors of Baun Reservoir* L. R., 3 App. Ca. at p. 455; but so acting it is safe, *Dixon* v. *the Metropoliton Board of Works* L. R., 7 Q. B. Div., 418. See also *Clark* v. *School Board for London* L. R., 9 Ch. App. Ca. 122; *Duke of Bedford* v. *Dawson* L. R. 20 Eq.

There is a further principle of great importance laid down by Lord Selbourne, L. C. in *Clarke* v. *School Board for London* L. R., 9 Ch. Ap. Cas. 122. His Lordship says "it seems to me that the legislature in authorising the School Board, for important public purposes, to exercise these large powers.....meant to give them a discretion suitable to the nature and importance of the duties to be discharged by them." The late Sir G. Jessel, M. R., citing

this dictum in *Duke of Bedford* v. *Dawson* adds that "the public body.....are to be the Judges, subject to this, that if they are manifestly abusing their powers.....the Court will say it is not a fair and honest judgment, and will not allow it."

The plaintiff was the owner of two houses on each side of the passage of a *khidki*, or open square, containing three or four houses. He proposed to connect the two houses by building a storey across the passage at such a height as not to interfere with the passage of those who were entitled to go to and fro. He applied to the local municipality for permission to build in the manner he proposed. The municipality forbade the work, on the ground that it was likely to interfere with the access of light and air to the neighbouring houses. The plaintiff thereupon sued the municipality to establish his right to build the proposed structure.

It was contended for the plaintiff that the municipality ought not to have refused permission in the interests of the neighbouring house holders, who were able to protect their own rights in case of injury.

Held, that the suit would not lie, as the order of the municipality refusing permission was not an unreasonable one under the circumstances of the case.

Held, further, that the authority of the municipality was not in any way affected by the circumstance that the proposed erection might be an encroachment on private rights subjecting the plaintiff to an action by the persons injured. (*Nagar Narsi* v. *the Municipality of Dhandhuka* I. L. R. 12 Bom. 490). This was followed in I. L. R. 27 Bom. 221 note 8.

See further on this subject note 9 sec. 65 and note sec. 161.

New buildings on private vacant sites.—G. R. No. 109 of 11 January 1894, Gen. Dep., discusses the question whether a municipality could under sec. 33 of the old Act prohibit, on sanitary grounds, the erection of new buildings on vacant sites belonging to private persons. The Advocate General states "I think there is nothing in sec. 33 * * * which gives a municipality power to prevent a private owner from building upon his own land, merely because it is considered that the new building would over-crowd the neighbourhood, and would be objectionable for that reason on sanitary ground. * * * Municipalities have the power to compel the observance of certain requirements as laid down in the section, but they have no power to require that the spaces proposed to be built on should be kept vacant."

This however can now be done under the special provisions of sec. 149.

Municipal power to prohibit erection on private property.—From the various rulings quoted in these notes it will probably be held that the law as it now stands is that a municipality has very wide powers in this respect and that though it cannot absolutely prohibit any proposed erection on private land except under section 149, it can refuse to sanction the erection except on the conditions named by it, and that the Civil Courts cannot interfere with the discretion of the municipality in this matter so long as the orders are, looking to the object of municipal administration, reasonable and not inconsistent with the Act; it is not necessary for the municipality to establish that they are acting in accordance with any specific authority given by the Act. See I. L. R. 27 Bom. 221, *supra*.

Government control as to buildings.—See I. L. R. 31 All. 371 (noted section 174) where the Collector cancelled the permission given by the municipality for erection of a temple.

Right of access from private land to a public street.—A person proposed to build on his private land a line of shops along the street frontage. The municipality considered it was undesirable to have shops along the principal approach to the Railway Station, and because the roadway outside the proposed line of shops was the only stand for public conveyances convenient to the Railway Station; and also objected to the proposal on sanitary grounds as the compound was already over-crowded with buildings. The municipality asked that, if they could not under sec. 33 of Bom. Act VI of 1873 prevent the erection of these shops, they might lawfully check such frontages by putting up a barrier along the whole length of the wall, so as to prevent ingress and egress from and to the public road. G. R. 109 of 11 January 1894, Gen. Dep., concurred in the opinion of the Advocate General that "Municipalities have no power to prevent an owner having access from buildings erected on his own land to a public street. The right of access from private to a public throughfare is a right recognised by law as incidental to the ownership of property the erection of the barrier proposed would not therefore be legal." (See Cripps on Compensation, p. 151; also 1 All. 557 note 4 s. 90.)

Permission not to be withheld because part of land required for street.—*Held* that sec. 150, Madras Act (corresponding with sec. 96), did not confer any power on a municipality of depriving owners of the legitimate use of their land. The object of the section is no other than to ensure the safety and sanitation of buildings to be erected. Therefore where a landlord applied for permission to build on his land, and the municipality required a portion of the land for widening a public street, *held* the municipality had no power to refuse per-

mission to build on that part; if they required the land they should acquire it in the manner prescribed by Act X of 1870, (*vide* sec. 41, page 72). (*Emp.* v. *Viramma.* I. L. R. 16 Madras 230.) This was followed in I. L. R. 38 Bom. 597 (vide note 12.)

If the land is "within the regular line of a public street" it may be acquired under sec. 92 (2).

Building affecting access of light and air.—See I. L. R. 12 Bom. 490 *supra.*

Rights of 3rd parties in regard to objectionable buildings.—A person aggrieved by the erection of a building in a public thoroughfare or on the waste land of a town or village, whether in a municipal district or not, may institute a suit for its removal, provided he is injured by it, and he is not bound to wait till the municipality or other local authority moves in the matter. (*Jina Ranchod* v. *Jodha Ghella* (1863) 1 Bom. H. C. R. A. C. 1.)

Where a building erected is a nuisance the fact that it was erected under the sanction of the municipality does not preclude a person aggrieved bringing a suit as for a nuisance. (*Bhagwan Das* v. *Rash B. Mullick*, 14 C. W. N. 637; 1910, 6 Ind. Cas. 595.) I. L. R. 38 Cal. 296 (vide note page 11) refers to this ruling.

2 **To alter externally or add to any existing building.**—See the explanation at end of this section, but the following decisions under the old Acts are instructive.

Opening a door-way.—Opening a new external door is an "external alteration" of the building in which the door is opened, and such act done, without the notice to the municipality contemplated by this section, is punishable.

Narrowing a door-way.—Where the owner of the door of a street alters it by narrowing the door-way, he is not bound to give notiee thereof to the municipality under section 33. (*Umreth Municipality* v. *Somnath.* 2 Bom. L. R. 218.)

Where such an act does not cause any inconvenience to any person, a slight nominal fine is an adequate punishment. (*Imp.* v. *Gujria wd. Annaji*, I. L. R. 9 Bom. 568, Bom. H. C. Crim. Ruling of 8 July 1885.)

See section 342 of the Bombay City Act as to the cases in which notice has to be given of additions, alterations, &c. to a building and form of notice giving particulars wanted.

3 **"Or is empowered to reconstruct it."**—These words were inserted by section 21 (2) of the Amending Act of 1914.

4 **Notice by person intending to build.**—The Bombay City Act, section 344, provides for printed forms of such notices being supplied to the public on payment of 8 annas a form.

The notice is not chargeable as an application under Article 1 (*a*) Schedule III of the Court Fees Act.

The fact that the original owner who intended to build gave the notice would not exonerate the purchaser who actually built from also giving notice, and he would be liable to all the penalties, &c.

5 **By-laws.**—This is taken from section 92, Panjab Act.

Section 48 (1) (*n*) provides for by-laws regulating structures and buildings, and (1) (5) for determining the information and plans to be required under this section. See also clauses (*o*) and (*p*).

The Bombay City Act, section 341, provides that if requisition not complied with, the nocice required by this section shall be deemed not to have been given.

6 **Sanad.**—This clause overrules the decision in *re Jumnadas* v. *Gulabdas.* I. L. R. 15 Bom. 516. Apparently the municipality would not be justified in calling for other title deeds, but see note 14 *infra.*

7 **Plan.**—*Held* that the municipality were justified in demolishing a wall regarding which the plaintiff had not furnished the plan called for, and that the fact that the municipality had also called for his title deeds did not justify non-compliance with the requisition for the plan. (*Dave Harishankar* v. *The Municipality of Umreth.* I. L. R. 19 Bom. 27.)

Under the Bombay City Act a plan may be declined unless signed by a licensed surveyor. See section 48 (1), (*n*), (*p*) and (*q*).

Doors opening outwards into or over streets, municipality can prevent erection of.—Plaintiff was given permission to erect a new building on condition that "windows and doors will not be permitted to project on or overhang any public street etc." The plan showed certain doors as opening inwards; when the building was erected it was found that these doors opened outwards, and each door, instead of consisting of two pieces only, was formed

of 4 pieces. Each half door could be folded back against the wall so that no portion of it projected on the street, but if fully extended during the process of opening or of shutting, each half, when at right angles with the building, projected 14 inches over the street. If not properly secured against the wall the doors may at times swing open and cause some obstruction to the passage of people using the footway on to which the building abuts. The municipality called upon plaintiff to alter the doors so as to close inwards, and that in default they would cause the alteration to be made. Plaintiff applied for an injunction to restrain the municipality from so doing. The lower Court held (*Mahomedali* v. *Karachi Municipality* 7 S. L. R. 31.) that the municipality could not legally order that doors should be made so that there never might be a possibility of their projecting over the street.

Sub-section (2) sec. 96 said nothing as to the manner in which the doors and windows are to be opened. All that the municipality could legally do was to warn intending builders that if windows and doors when opened, project over the street, the owner would be liable to prosecution. It was not alleged that the doors did actually cause an obstruction. Sec. 113 had no application to a case where it is merely apprehended that there may be an obstruction. Under sec. 122 the municipality had no power to compel any person to take such measures with regard to any particular thing as will render it impracticable for such thing to ever constitute an obstruction or encroachment.

Held, on appeal reversing the order and dismissing plaintiff's suit, that (1) the condition made by the municipality was a condition in a license to build and should be construed as such. It was a condition regulating the construction of the door and not the user of it. No door opening outward could project into the street until it was opened. If the owner of the house made his door so that when opened it practically blocked the street, it would be no defence for him to say "I mean to keep the door shut" or "I shall never open it at a greater angle than 40." The municipality are entitled to say "You shall not build your door in such a way that it can project into the street." (2) the municipality were entitled to make the order, not only under the general power given by sec. 96 (2) to issue orders not inconsistant with the Act, but also under the particular power given to impose conditions as to the location of the door (since a door is included in the definition of building) in relation to the street. I. L. R. 12 Bom. 490; 21 Bom. 588; 27 Bom. 221 and 3 Bom. L. R. 842 referred to and approved. I. L. R. 38 Bom. 597 distinguished. (*The Municipality of Karachi* v. *Mahomedali Essajee.*)

The Bombay City Act sec. 311 provides "The Commissioner may at any time by written notice require the owner of any premises on the ground floor of which any door, gate, bar, or window opens outwards upon a street or upon any land required for the improvement of a street, in such manner, as in the opinion of the municipality to obstruct the safe of convenient passage of the public along such street, to have the said door, gate, bar or window altered so as not to open outwards."

8 **Pass orders.**—The section does not expressly empower the municipality to refuse to permit the building from the outset. Every person is entitled to erect a building, but on such conditions as the municipality may order consistent with the Act, and until those conditions are complied with the building cannot be erected. In the case of a re-construction on a site in respect of which the municipality may enforce a set-back, the municipality should proceed by giving a notice under sec. 92.

Under the Bombay City Act section 346 the Commissioner may at any time within the month intimate by written notice to what extent he disapproves of the building, with reasons therefore, and may permit erection subject to terms.

Refusal to sanction.—Under sec. 92 of the Panjab Act, the municipality may "refuse to sanction the said building"; and may, among, other things, require (*a*) free passage or way in front of the building; (*b*) space to be left about the building to secure free circulation of air and facilitate scavenging and for the prevention of fire."

Appeal from order.—The Panjab Act, see 150, provides that any person aggrieved—(*a*) by the prohibition by the municipality of the erection or re-erection of a building, (*b*) by a notice requiring the alteration or demolition of a building, or (*c*) by any order made under sec. 101, as to closing any burial or burning ground, under sec 132 as to prohibiting use for human habitation of buildings unfit for such use, or under sec. 136 prohibiting the use of any place for the purposes of any of the offensive and dangerous trades specified in sec. 135, may appeal within 30 days of such prohibition, notice or order to such officer as Government may appoint for the purpose; "and no such prohibition notice or order shall be liable to be called in question otherwise than by such appeal."

The effect of such a provision would be, on the authority of *Rama Chandra* v. *The Secretary of State*, I. L. R. 12 Mad. 105, (note p. 101) to oust the ordinary jurisdiction of the Civil Courts, as regards such orders.

The U. P. Act contains identical provisions. Under that Act, in respect of a "new building or addition to an old one" it is entirely in the discretion of the municipality to grant or refuse permission, and a Civil Court cannot interfere with that discretion. When a person is aggrieved by an order of the municipality refusing leave to re-pair and re-erect his gallery and arches, his remedy is an appeal as provided by the Act. As he had not done so he was not entitled to sue for an injunction against the municipality and for damages. (*Abdul Samad* v. *Municipal Board Meerut*, I. L. R. 36 All. 329; (1914) 25 Ind. Cas. 207.) See also I. L. R. 26 All. 386 note 13 *infra*, and I. L. R. 37 All. 220 note 14.

"The committee is not bound by law to set forth its reasons for prohibiting the erection of a building. Its opinion as to the injuriousness of the proposed building is conclusive and is not liable to be set aside because it might be proved to be an incorrect opinion. The Courts cannot interfere with the discretion of the committee if exercised *bona fide*. (No. 24 P. R. 1890 Crim.)

The Panjab Act provides for the municipality making full compensation for "prohibition of the re-rection of any building, or of its requiring any land belonging to the owner to be added to the street."

It is not a condition precedent to the exercise of its powers by the committee that compensation should be paid. (No. 24 P. R. 1890 Crim.)

In England the discretion of the local authority to refuse plans of new buildings is absolute if *bona fide* and reasonably exercised under reasonable by-laws.

If not so exercised, a mandamus will lie (*Smith* v. *Chorley District Council* (1897) 1 Q. B. 678; *R.* v. *Tynmority District Rural Council* (1896) 2 Q. B. 451.)

As to what may be unreasonable see *Cook* v. *Harrisworth* (1896) 2 Q. B. 85 and *Crow* v. *Redhouse* (1895) 59 J. P. 663.

Building plans, refusal of sanction of.—Where plans for building have been rejected by the Chairman and the General Committee of the Calcutta Municipal Corporation, no suit is maintainable to have the plans approved or for damages. If the Chairman and General Committee have acted honestly and within their authority, their decision cannot be reviewed by any Court. If the plans have been rejected *mala fide*, the only remedy is by an application under s. 45 of the Specific Relief Act, or an order to compel the Chairman and the General Committee to hear the matter in the manner provided by law. *Davis* v. *Bromley Corporation*, [1908] 1 K. B. 170; and *Smith* v. *Chorley Rural Council*, [1897] 1 Q. B. 678 followed. *London and North Western Railway* v. *Westminister Corporation*, [1904] 1 Ch. 759, referred to. (*Prosad Chunder Dev* v. *Corporation of Calcutta* (1913) I. L. R. 40 Cal. 836. 22 Ind. Cas. 388; 17 C. W. N. 929.)

Orders inconsistent and incapable of performance.—Where the municipality authorised the construction of a building on a space measuring 10 feet by 8 feet from given boundaries and also directed that it should not extend beyond a certain limit, which, according to their own contention and the facts found, was within the measured space to which their permission in terms extended. *Held* that their orders being inconsistent and incapable of performance, the municipality could not contend that the building erected in compliance with the permission, was in contravention thereof because it did not also conform to a direction utterly irreconcilable under that permission. (*Municipality of Para* v. *Laxmandas* 2 Bom. L. R. 857, I. L. R. Bom. 142.) This was followed in 6 Bom. L. R. 1028, note 20 *infra*.

Refusal to permit roof of erection over private land.—"The municipality refused permission to plaintiff to roof over the outer pyal in front of his house bordering on a public street, on the ground that it was built on land which was part of the street. *Held* that the pyal was plaintiff's private property and the municipality could not prevent the roofing as sec. 169 of the Act of 1884 does not authorise interference with private property provided no inconvenience to the public or interference with any sanitary regulation is caused. The power to interfere arises only when the building projects beyond the limits of the private property. (*Krishnaya* v. *Bellary Municipality*. I. L. R. 15, Madras 292). See I. L. R. 31 Mad. 31 note 2 sec. 113.

Permission in such a case would however, appear to be necessary under this section, see *infra*.

9 **Orders not inconsistent with Act.**—*A gally may be required to be made.*—Accused having applied for permission to rebuild a house on its old site, the municipality granted the requisite permission subject among others to the condition that he should leave a space on the north side of the building of a foot and-a-half as a gully. The accused having failed to comply with this condition, he was prosecuted before a Magistrate who acquitted him, holding that there was nothing in section 96 authorising the municipality to impose such a condition. The municipality applied to the High Court for revision of this order.

Held, setting aside the order of acquittal, that under section 33 of the Bombay Act of 1873, it was open to the municipality to issue orders in writing with reference to the erection of buildings not inconsistent with the Act. Though the Act does not expressly say that the municipality is authorised to require a space to be left, still there is nothing in the Act to forbid such a thing. The intention of the Legislature was to make the municipality trustees for the public specially in all sanitary matters which include light and air. And so long as the direction for the house-gully is not said or shown to be extravagant or arbitrary in its terms, this order issued by the municipality cannot be deemed to be illegal. (3 Bom. 142. Bom. H. C. Cr. R. 18 of 1901. *The Municipality of Thana* v. *Fazal Karim.*)

Control of balcony over private land.—See I. L. R. 2 Bom. 572, note 20.

Control of balconies projecting over private streets.—Under sec. 33 (2) of the old Act, (now sec. 96) plaintiff was given permission to construct a projection from his house over a private street with the condition that he left a space of 5 feet from the adjacent house. Having constructed the projection without leaving such space in contravention of these orders he was required under clause 3 to remove the same. He then applied to the High Court for an injunction restraining the municipality from removing the projection, as the municipality had no right to make the restriction, as the space on which the projection abutted was not a public street. For the municipality it was contended that they were empowered to issue such orders not inconsistent with the Act as they thought proper in respect of such building and the projection was erected in a manner contrary to such legal orders. Hence the question came whether the orders were legal and not inconsistant with the Act. *Held* in the affirmative by Chandavarkar and Aston J. J. (Batty J. dissenting.)

Chandavarkar J.—Reading the whole of this section by itself, and having regards to its general terms, it is clear that the legislature has given to every municipality the power to regulate the construction of buildings, whether they abut on a public or a private street. The power may be exercised as the municipality "think proper," which means that it should be exercised, not capriciously or arbitrarily, but reasonably (*Reg.* v. *Wilkes*, *Marshall* v. *Pitman*,) provided that the order is "not inconsistent with the provisions" of the Act.

If the action of the municipality taken under the section is not inconsistent with the provisions of the Act, it will be legal provided it is reasonable. The question what is a reasonable exercise of such power must depend upon the character of the body acting on the delegated authority of the Legislature upon the subject matter of such legislation, and the nature and extent of authority given to deal with matters which concern it.

It is neither unreasonable nor against common justice to infer that the Legislature in the interests of public health and sanitation intended to alter the law that no man should be hindered in the exercise of his private rights unless the Legislation has by any enactment taken away the right or put a limit to its exercise by empowering the municipality to control the erection of buildings in a reasonable manner. The terms of the section are wide enough to justify that inference. The only limit to the power given in such cases by section 33 is that prescribed, firstly, by the general law that all such power should be exercised reasonably not capriciously, and, secondly, by the section itself that it should not be inconsistent with or contrary to the provisions of the Act itself.

Because sec. 42 expressly provides against encroachments on public streets, it must not be taken that the Legislature has denied similar power as to encroachments on streets which are not public. The two sections are not inconsistent for the reason that they do not deal with the same subject matter.

In construing the Acts relating to a municipality we must have regard to their object and policy and construe the sections so as to effectuate the intention of the Legislature to better provide for public health and sanitation. If the language of a section of the Act may fairly apply to many different cases and only some cases are specified in other sections, it is not straining the language and meaning of the Act if bearing in mind its object we infer that the cases specified are by way of example only and not as excluding others of a similar nature.

The Municipal Act gives the municipality the power to regulate the erection of buildings; the main purpose, then, is their control by the municipality. The power has, according to the Act, to be exercised in a manner not inconsistent with its provisions or in a manner not contrary to them, *i. e.* in the spirit of those provisions. The words used by the Legislature indicate that the power includes something which is not expressly mentioned in the provisions of the Act. Had the Legislature intended to confine the powers given to a municipality in respect of buildings to those specifically mentioned in the Act, the language used in clauses 2 and 3 of section 33 could have been different from that actually employed by the Legislature. In that case the Legislature would have taken care to say that the municipality shall issue orders "in accordance with the provisions of this Act," instead of saying that they shall not be inconsistent with or contrary to them. Impliedly, therefore, the Act

authorises the municipality to regulate the erection of buildings, beyond controlling them in the manner specially provided by sections 36, 37, and 41. Plaintiff has failed to show that the action of the municipality of which he complains is illegal or *ultra vires*. 3 Bom. L. R. 142 folowed. (*Tribuwan* v. *Ahmedabad Municipality* (1902) 5 Bom. L. R. 48; T. L. R. (1902) 27 Bom. 221).

10 **May give permission.**—*Permission given cannot be withdrawn; Municipality liable in damages for preventing erection.*—A sanction to build, given by the Municipal Corporation of Calcutta under 247 of the Calcutta Act, is absolute and when such sanction is once given there is nothing in the Act, which enables the Corporation to revoke it.

The Corporation having granted sanction to the plaintiff, after the site had been duly inspected and approved of by its officer, to erect a mill on his giving an undertaking, is not entitled, in an action for damages caused by the withdrawal of the sanction, to plead in defence that the officer made a mistake, and that the sanction is not binding.

The Corporation after granting sanction under section 247 of the Act, withdrew it on the ground that the plaintiff had not complied with what it believed to be his undertaking:

Held, that the withdrawal of the sanction was not done, nor did it purport to have been done under the Act; and that the suit for damages having been based upon such withdrawal, the special limitation of three months as provided by s. 427 of the Act did not apply to it.

Held, further that the municipality was not in the circumstances justified in taking the various steps they did to prevent plaintiff from going on with the erection, and were therefore liable in damages. (I. L. R. (1903) 30 Cal. 317.)

If permission given ultra vires injunction may issue to prevent erection.—In *Attorney General* v. *Barker* (1900) 83 L. J. 245 it was held that the local authorities had no power to give the consent they had given to defendant, and finding that as a fact defendant's work across the highway was a public nuisance, granted a mandatory injunction as sought. There it was not pretended that the authorities had any power to forbid or grant the concession to defendant. They had mistaken the limits of their statutory authority and had allowed under reservation that to be done which with the reservation they were not competent to allow.

See note at page 173 of 12 Bom. L. R. 274 where it was held that a building erected under a sanction even if *ultra vires* could not be required to be demolished though in contravention of the Act it not being a public nuisance but only a nuisance at law. This case differs from the above in that the permission complained of was given under a section of this Act without any qualification and defendant had every reason to believe that he was right in acting up to it, and so it was not a public nuisance.

11 **Apertures for ventilations.**—"*Held* that this sub-section does not authorise a municipality to prohibit the opening of apertures for ventilation on any particular side of a building, unless the question of sanitation is involved. The sub-section allows the municipality to impose conditions only in respect of the dimensions and cubical contents of such apertures, and the discretion of the municipality is limited accordingly. (*Imp.* v. *Muhammad Baksh*, Sind S. C. C. Ruling No. 13 of 1902.)

12 **Location of building in relation to any street.**—*Condition not valid where no regular line of street fixed.*—The plaintiff applied to the municipality for permission to rebuild her house. The municipality granted the permission on the condition, among others, that she should, in rebuilding the house, keep a specified space vacant and unbuilt upon for the improvement of the street by widening it. The plaintiff disregarded the condition and built upon the specified space. Thereupon the municipality having threatened the demolition of the house, the plaintiff brought the present suit for an injunction restraining the municipality from doing so.

Held, that the municipality in the present case had prescribed the location of the building in relation, not to the existing street, but to a street which might come into existence in the future. The public street at the time of the permit was only 8½ feet in width. There was no projected street 14 feet in width, for there was no regular line determined either for the existing street or for the future as contemplated in section 92. The object of the municipality in imposing the condition was not for the purposes of sanitation or ventilation, but to get a set-back which could not be obtained under section 92 of the Act.

If the condition of the permit were complied with, the plaintiff would have to give up or keep vacant or unproductive a considerable portion of her land and the municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so, which would be contrary to the provisions of section 92 which contemplates that when a set-back is determined upon compensation should be paid to the owner and that the plaintiff was entitled to an injunction as prayed. 16 Mad. 230, referred to. (*Bai Fatma* v. *Rander Municipality* (1914) 38 Bom 597; 25 Ind. Cas. 411; 16 Bom. L. R. 529.) See 1896, P. J. 781, note to section 92.

See the Bombay City Act section 348 for special provisions regarding buildings to be newly erected on sites previously unbuilt upon in respect of new streets, &c.

13 **Unless and until all questions &c.**—*Directions involving indefinite delay inconsistent with section.*—Plaintiff applied to the municipality for permission to re-construct his house, building balconies on 2 sides. The municipality gave written permission to re-build the house according to the plan submitted but no reference was made to the balconies except in a postscript "as regards balconies your application is before the Managing Committee for decision. Therefore until this permission is granted, you must not do any work in this respect." For about a year the municipality did nothing because the papers were lost or mislaid, in the meantime plaintiff built the balconies, and on this coming to the knowledge of the municipality they called upon him to remove them. Plaintiff then brought his suit for an injunction. *Held*, granting the injunction, that the order as to the balconies being an order directing an indefinite delay was not one which could have been made under sub-sec. (2), as sub-sec. (3) and (5) by providing for a limit of duration of one month of a provisional order during which a person who builds is penalised shows that one of the objects of the Legislature was to discountenance just the kind of unreasonable dilatoriness which this case illustrates.

The order must be referred to sub-sec. (3) (*a*), and as such, after the expiry of one month, it was spent, and under sub-sec. (4) plaintiff was entitled to proceed with the proposed work. In so far as the order directs a longer period than one month, it was inconsistent with the Act.

An applicant is not to be restrained from proceeding with his work merely because a provisional order, which is expressly limited to one month, may have been issued months, or even years, earlier. (*Ahmedabad Municipality* v. *Ramji Kuber*, I. L. R. (1912) 36 Bom. 61).

Prohibitory order as to building. If not ultra vires cannot be questioned if appeal allowed not resorted to.—Accused applied for premission to inclose a certain plot of land. This was refused and an order issued prohibiting him from making any construction on the land until the title thereto had been decided by a Civil Court. Accused nevertheless erected certain huts on the land which abutted on a public street and for which permission was necessary. The municipality gave notice under sec. 87 to remove the same. Accused made a petition to the District Magistrate who rejected it. The order not being obeyed, accused was prosecuted under sec. 147 N. W. P. and Oudh Municipal Act 1900 and fined. *Held* that no prohibition notice or order issued under sec. 87 was liable to be called in question otherwise than by means of an appeal under sec. 152 of the Act, and accused not having presented any such appeal, was rightly convicted (*Emperor* v. *Shadi* I. L. R. (1904) 26 All 386.)

Note.—The judgment shows that the High Court found that the order was *intra vires* and therefore held that it could not be called in question by a Court. The ruling does not mean that if the order had been *ultra vires* accused was still bound to appeal before he could question its legality. (See 22 Bom. 230 note 20 *infra*).

14 **Suspend work or demand particulars.**—This is in accordance with sec. 340, Bom. City Act.

Suit for damages for illegal stoppage.—One K. served the municipal board of Ajmere with notice of his intention to rebuild a certain wall. He received no reply to his notice within a month (the time fixed for the municipality to give a reply) and thereafter commenced to build. The municipal board then required him to stop the building and submit a fresh application. The applicant stopped the building, but did not present a fresh application, and some months later sued the board for damages on account of the stoppage of the building. *Held* that the board failed to prove that the notice first given by K. was not in accordance with law and having failed to give a reply within a month was not authorised to take any action under the 2nd notice.

Held further that section 14 of the Regulation, if it applied at all, did not oust the jurisdiction of the Civil Court to try the suit for damages for an illegal action. (*Municipal Board of Ajmere* v. *Kifayat-ullah*, I. L. R., 37 All. 220.)

Demand of further particulars requires suspension for a month.—The question whether a municipality has a right to call for information regarding ownership of the site on which a person asks permission to build, must be decided on the circumstances of each case. Where, however, he so produces his tittle deed and furnishes the information asked for, he is bound to wait for one month from the date of his notice for the orders of the municipality before he can proceed with the intended construction. Not having done so he was rightly convicted. (*Emperor* v. *Pranshanker* (1904) 6 Bom. L. R. 581.)

15 **When building may be proceeded with.**—Most of the provisions of this sub-section are taken from the Bombay City Act, section 345. The old section 33 merely

provided that on failure of the municipality to issue written orders within one month from receipt of notice, the person may proceed to erect building, provided it was in accordance with the Act. Clear and definite provisions of the law are necessary as persons habitually disregard altogether the law and orders of the municipality—hurry on with their building, in spite of orders to stop, and then when the building is completed or nearly so urge the great hardship it would be if the whole building has to be pulled down. It was suggested that the municipality should be empowered to apply to the Magistrate for a policeman to carry out their orders prohibiting the construction of the building being proceeded with, until the municipality had issued its final orders.

Held the effect of clause 2, section 33 (Bombay VI of 1873), which permits a person to erect a building of which he has given notice, if within the period prescribed, the municipality has failed to issue written orders, is by implication to prohibit the erection of any building within such period, unless in the meantime, such orders have been issued. (*Imp.* v. *Ganpatram*, Bom. H. C. C. R. No. 22 of 1893.)

Where the municipality failed to pass any orders within the period stated, and accused began the work according to the plans and specifications mentioned in his notice, *held* that the fact that he afterwards made certain alterations at the suggestion of the municipality did not make him forfeit his right to build without sanction. (*Sewnandan Rai Kayab* v. *Vice-Chairman, Darjeeling Municipality* (1900) 5 C. W N. 42.)

Where application for permission to build has been made to a Municipal Board and the period mentioned in sec. 87 (3) of the Municipalities Act, 1900, has expired, the applicant is in the same position as if the erection of the building specified in his application had been formally sanctioned by the Board. A sanction, express or implied, to the erection of a specified building necessarily carries with it a right to put up such ordinary scaffolding as would be necessary under ordinary circumstances for the execution of the work. (*Emperor* v. *Gokal* I. L. R. (1907) 29 All. 737.)

16. **Limit of period for commencing building.**—The Panjab Act, sec. 92 (6), provides that the sanction given "shall be available for one year from the date on which the notice shall have become valid and complete, and no longer;" and if the building so sanctioned is not begun within the year, fresh sanction must be obtained.

The Bombay City Act provides that if he fails to proceed with the building within the year, he may at any subsequent time, give a fresh notice which then operates as a first notice.

This section does not apparently provide a limit to the time within which the building must be *completed*. It only deals with its *commencement*.

Accused obtained permission to make some alterations in his house. The permission allowed a year to carry out his work. No by-law providing a period within which works are to be carried out under sec. 33 of Bom. VI of 1873 was relied on.

Held that the conviction was wrong, so far as it proceeded upon the period of one year having been exceeded, and that it was unnecessary to determine whether such a by-law would be *ultra vires*. (*Imp.* v. *Thakurdas*, Bom. H. C. C. Ruling No. 52 of 1893.)

17 **Penalty for building in contravention of section.**—This sub-section is a very considerable amplification of clause 3 of the old sec. 33. There should be a marginal note similar to the head line above.

Municipality cannot take proceedings in respect of erections the subject of a pending suit between the Municipality and the accused.—In a civil suit between B as plaintiff and the Municipal Board of Etawah as defendant, it was decided by the District Judge on appeal that B was not entitled to close a certain drain in front of his house, but that he might have the platform in front of his house connected with the public road by means of a stair case. The decree directed the Municipal Board to erect the stair case within two months, in default B was entitled to erect it himself and recover the cost of doing so from the Municipal Board. The Municipal Board took action, which they said complied with the decree. But B contended that the Board had not complied with the decree and he proceeded to enlarge the stair case which the Board had built and to cover over a large part of the drain along the front of the house and also to erect what has been described as a vertical buttress in front of his house projecting a foot or more from the original front of the building. Having done this he applied to the Civil Court for the costs incurred by him. An Amin was sent to the spot and reported that the constructions were in some respects in accordance with and in other respects contrary to the decree of the Civil Court. The Sub-Judge decided that some of the constructions should be removed and some should stand. While these proceedings were going on the Board required B to dismantle the buttress and certain portion of the staircase erected by him, and on his failing to do so he was prosecuted and convicted.

Held that it was not open to the Board to take proceedings pending the decision of the dispute by the Civil Court, and to continue the prosecution after the Civil Court had decided

the matter in favour of B. The Board as parties to the executive proceedings should have appealed against the Sub-Judge's order if they considered that it was erroneous. Municipal authorities cannot over-ride the decision of a competent Civil Court in a matter of this kind by means of a criminal prosecution. Conviction set aside. (*Baldeo Prasad* v. *Emperor*, I.L.R. 32, All. 620; 7 A. L. J. 735; 1910, 7 Ind. Cas. 258.)

18 **Shall be punished.**—The fine is now obligatory and not discretional.

In dealing with a case of non-compliance with a legal order made by a municipality under this clause, a Magistrate has no right to review the order from the stand point of its propriety, and to consider what kind of structure would be sufficient for the purpose in view. (Bom. H. C. C. R. No. 63 of 11 Nov. 1886. *Imp.* v. *Maru Bhanshet.*)

An acquittal in respect of a charge for building contrary to the provisions of the Act does not bar a prosecution for failure to comply with a notice to demolish the said building.

19. **Order to stop building &c.**—Disobedience of such an order will be punishable under this sub-section as being "contrary to such legal orders of the municipality as may be issued under this section."

An illegal order would lay the municipality open to a suit for damages, see note 14 *supra*.

20 **Notice to alter or demolish.**—Under section 154 (5) the notice should fix a reasonable time for compliance, and under (6) on non-compliance the municipality may take action and recover expenses, and section 155 requires that the offender should be punished if prosecuted.

Under the Bombay City Act, section 351, the notice is to show cause, and if sufficient cause not shown, then the building may be altered, demolished, &c., at expense of the person offending.

Acceptance of taxes not acquiescence in disobedience of order to demolish.—Where, after the passing of an order of demolition under section 449 of the Calcutta Act, negotiations have been going on between the person directed to demolish an unauthorised erection and the Corporation, the receipt of rates and taxes by the latter, on re-assessment of the whole premises, including the portions objected to, during the period of such negotiations, is not an acquiescence on their part in the continued disobedience to the order so as to disentitle them from proceeding with the prosecution for such disobedience after the failure of the negotiations. (*Lachmi Narayan Mahto* v. *Corporation of Calcutta* (1910) I. L. R. 37 Cal. 833.)

Accused built his house in deviation from the sanctioned plan. He was required to demolish it and on failure to comply was prosecuted before a Magistrate. Pending these proceedings and while negotiations were going on between him and the municipality, the latter received taxes and rates on a re-assessment of the whole premises including the portion objected to.

Held that the mere acceptance of the rates under the circumstances did not amount to an acquiescence by the municipality in continuous disobedience of the order for demolition (*Bholaram Chinduroy* v. *Corporation of Calcutta*) 37 C. 837 note; 1910, 8 Ind. Cas. 654.)

Order for demolition not to affect any other building.—Plaintiff had in existence a godown in one corner of his plot. He applied to erect other godowns on the plot and sent in plans but showed the said godown as a blank space in his plan. After the plan had been sanctioned it was found that owing to the existence of the godown the plan of the new building was in contravention of the by-laws as to leaving a space between the old and new building. Thereupon the municipality gave plaintiff a notice to demolish his building so as to leave the space. As he omitted to carry out this order, he was prosecuted, and the Magistrate directed him to demolish the old godown within 2 months. Plaintiff then filed a suit to restrain the municipality from carrying out the order. *Held* that section 449 of the Calcutta Act does not give authority to the Magistrate to direct the demolition of the whole or any part of a building which was in existence before the sanction was given, but only of the building erected in contravention of the plan submitted to and sanctioned by the Corporation. (*Hyam* v. *The Calcutta Corporation*, (I. L. R. (1906) 33 Cal. 646; (1906) 10 C. W. N. 1004.)

Building in excess of permission may be demolished.—An owner having applied for and obtained permission to build on one portion of his land, builds on other portions also, such part of the building as is outside the limits for which permission was granted, is built without notice, and can, in the discretion of the municipality, be demolished.

Parsons J. says:—"I cannot accept the argument that a notice of demolition is not justified where a building, erected without notice, otherwise conforms to the orders of the municipality as to materials, drains, sewers, &c., or can be altered so as to be made to conform to them. It may be that where a building is otherwise unobjectionable, the

municipality might allow it to remain even if built without notice, but the power of deciding this question is in the first instance, at any rate, given to the municipality, and a Civil Court should not interfere with their rightful exercise of this power. In the present case, the defendants have deemed the demolition necessary, and have taken action accordingly. I cannot hold that they are not perfectly within their legal rights in so doing.

It is not the practice of the Court to interfere with corporate bodies "unless they are manifestly abusing their powers" (*Duke of Bedford* v. *Dawson.*) It is possible to conceive a case in which the removal of an infinitesimally small excess building would involve the demolition of a large and expensive structure. I am not prepared to say that there may not be cases in which on the facts it would be clear that the municipality had acted *mala fide* and without the exercise of due discretion. But the present suit has not been brought on such allegations; and I think therefore, that it was rightly dismissed. (*Bhawanishankar* v. *The Surat Municipality.* I. L. R. 21 Bom. 187. P. J. 1895, p. 375.)

Projection erected in defiance of refusal may be removed even if on private land.—A applied to a municipality for permission to erect balconies (*nejwas*) to his house to project over a public street; permission having been refused, A nevertheless put up the balconies, not over the street, but over his own land, because he considered that as they were not over a street, which was wide enough, the municipality had no right to refuse permisssion. *Held*, A was not entitled to an injunction to restrain the municipality from removing the balconies erected in defiance of the refusal.

Mr. Justice Ranade held that the erection was an external addition for which permission was necessary, and had been aked for and refused, and that it was immaterial, when the additions were on the side of public streets, whether they overlooked plaintiff's own land, or encroached on the public street. It is for the municipality to decide whether the streets are broad enough, and whether *nejwas* might or might not prove dangerous in the case of accidents by fire. The extent of these large discretionary powers enjoyed by the municipality has been clearly set forth in I. L. R. 12 Bom. 490. The respondent ought to have applied for fresh permission before he made the new additions to his house. The present case is governed by P. J. 1895, 375 and I. L. R 19 Bom. 27 (vide note 7 *supra.*)

Mr. Justice Parsons (dissentient) held that if the balconies overhang the public street, so as to be an obstruction, &c., they could undoubtedly be prohibited; but as the *nejwas* in question were erected over the plaintiff's own land, and the evidence negatived that they were an encroachment on the street or a danger in time of fire, and no reason could be given by the municipality for the prohibition, the municipality could not refuse the permission asked for. It is competent to a Civil Court to examine the reasons given by a municipality for an order refusing permission to build, and if it finds that they are beyond the power conferred by the Act, or, to use the words of the Act itself, "inconsistent with the Act," to hold that the order is *ultra vires* and to set it aside. The orders that legally can be issued by a municipality under section 33 of the Act nowhere extend to the issue of a prohibition to a person not to build on his own land, but are strictly limited to the issue of orders in accordance with the provisions of the Act, and are intended only to ensure that he shall so build as not to offend against the requirements of the Act or such by-laws as the municipality may have legally made.

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Mr. Justice Candy to whom the matter was referred held that as plaintiff had asked for permission and it was refused, he could not build in defiance of the refusal, and so was not entitled to the injunction. (*The Godhra Municipality* v. *Heptula Bhai*, I. L. R. 2 Bom. 572.)

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In the Municipal Act (XX of 1891) there are two sections under which a Committee may order the removal of a building or a portion of a building, *viz.*, section 92 and section 95. The former is concerned with new buildings, and the latter with projections or structures, overhanding, projecting into, or encroaching upon the street, etc.

The powers given by the Act to Municipal Committees are an interference for the public good with the ordinary rights and privileges of the public, and therefore, the law should be very strictly construed against Committees. If a Committe wishes to exercise these extra-

ordinary powers it must do so strictly in accordance with law and procedure, and if a Committee directs a person to remove a building on the ground that it has been recently built without permission, that person is not bound to remove the building, which it has been proved was not built recently, merely on the ground that it is on a public street, and would be quite justified in asking a Court to decide whether the notice actually served on him stated the facts correctly and gave sound reason for the removal of the building concerned. This, of course does not mean that the Courts will interfere with the descretion of the Committee lawfully exercised.

It was open to the municipality to serve plaintiff with the proper notice and then take such action as the law allows for the demolition of the building. (*Mahomed Yasin* v. *Municipal Committee, Lahore,* 110 P. L. R. 1911; 1911, 9 Ind. Cas. 889.)

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Held, that section 87 applied only to new buildings in respect of which notice to erect or re-erect was necessary, that the wall having been erected many years ago, the notice of the municipality for its removal was *ultra vires*, and that section 152 of the Act as to appeals from orders of the municipality did not apply. Weekly Notes 1907, p. 2, and (1906) 10 C. W. N. 1004 referred to. (*Emperor* v. *Ram Dayal*, I. L. R. (1910) 33 All. 147; 7 All. L. J. 1075; 8 Ind. Cas. 569.)

Acquittal on charge for building contrary to Act no bar to subsequent prosecution for failure to demolish.—The accused was desirous of adding balconies to his building in a public street, and under sec. 342 of the Bombay City Act was required to give notice. The notice originally furnished contained no reference to the erection of certain balconies overhanging the street and the erection of these balconies became the subject of a reference by the accused to the Municipal Engineer in which he hoped that no objection would be taken to their erection. The Municipal Engineer on behalf of the municipality did object to the erection of these balconies, and the accused, in spite of the objection raised, proceeded to erect the balconies stated. For this act he was prosecuted under sec. 471 for contravening the provisions of sec. 347 of the Act and in course of that prosecution he was acquitted by the Magistrate. This occurred in 1901. Subsequently in 1902 the municipality under sections 308 and 309 called upon the accused to remove the balconies which had been in existence at the time of the former prosecution. The question is whether the former acquittal precludes the municipality from bringing the present charge. Now on this point there does not seem to be the smallest doubt because the offence could not have been committed until the notice to remove was served on the accused; and the notice on the accused was not served until the year following that in which he was acquitted under the former charge. Therefore it seems quite clear to us that sections 403 (1) and 236 and 237 of the Criminal Procedure Code have no application. The offence cannot be considered to be the same offence, because the offence in this cate was his refusal to comply with the notice directed to him under section 308 (2) of the Act. (*Municipality of Bombay* v. *Javu Jagjivan* (1902) 4 Bom. L. R. 575.)

Provisions as to height of building abutting on public street should be complied with in interests of public health.—Accused gave notice of his intention to erect a building which touched on either side of it public streets which ran parallel to each other; the municipality objected as the building would in height contravene section 349-B of the Bombay City Act. Notwithstanding accused proceeded with the erection. He was prosecuted and the Magistrate convicted him, holding that the face of the building should be constructed as the portion of the building facing the street and not in the limited sense of the main entrance to the building, and so it came within the section.

Before the High Court on appeal it was contended that the Act did not provide for the actual case in point and this was a *casus omissus*. *Held*, that it was not permissible to create a *casus omissus* by interpretation save in some case of strong necessity. See per Lord Fitzgerald in *Mercy Docks and Harbour Board* v. *Henderson Brothers* (1888) 13 App. Cas. 595 607. These provisions of the Act are intended in the interests of public health, and the Court ought to construe them so as to advance that object. A reasonable view was that the building must conform to the conditions mentioned in the section. Conviction up held on these grounds if not on those on which the Magistrate proceeded. (*Emperor* v. *Rustomji* (1907) 9 Bom. L. R. 363.)

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Municipality may require alteration or demolition.—This vests the municipality with a discretion in the matter, and the Civil Courts will not interfere with the proper exercise of that discretion.

The discretion of taking action or otherwise under sec. 33 (3) (Bom. VI of 1873), is vested in the municipality, which alone can determine whether or not the removal of a building erected contrary to the provisions of sec. 33 is or is not a measure likely to promote the public convenience. If the municipality adopts the proper procedure, no Court can review its decision on the ground that in the opinion of the Court, the removal of the building is not likely to promote public convenience. The Legislature has confided to the municipality and the municipality alone the duty of deciding what measures within its legal powers are for the public convenience, and its discretion is not subject to control by the Courts. (*Panachand* v. *The Ahmedabad Municipality*, I. L. R. 22 Bom. 230: P. J. 1896, p. 296.)

Order to remove, if ultra vires—suit for injunction against municipality.—The plaintiff, as the owner of house and premises obtained permission from the municipality to execute certain repairs therein. The President being of opinion that under cover of the permission granted, she had made considerable additions and alterations, made a provisional order under section 287, clause (1) of the Madras City Municipal Act (III of 1904), directing their removal, and subsequently confirmed that order under clause (2) of section 287. An appeal by the plaintiff to the Standing Committee having proved ineffectual, she filed a suit in the City Civil Court for the issue of a perpetual injunction restraining the Corporation from demolishing the alleged additions, which she claimed to have been in existence for more than 20 years. *Held*, that when a right and an infringement thereof are alleged, a cause of action is disclosed, and unless there is a bar to the entertainment of a suit, the ordinary Civil Courts are bound to entertain the claim. Though section 287 (3) says that the decision of the Standing Committee is 'final.' The word "final" refers to proceedings before the Corporation and is intended to bar an appeal from the Standing Committee to the general body of Commissioners, but not to shut out the jurisdiction of the Courts. When a special tribunal has been created or empowered to afford redress there is an implied prohibition against a suit being filed in the ordinary Courts, but the Standing Committee cannot be held to be an independent body or a special tribunal authorised to settle finally disputes as between the tax-payers or house-owners and the Corporation of which they are the members. It is not such a tribunal as the Magistrate appointed under sectien to hear appeals against levy of taxes or tolls. (See *Bhai Shankar* v. *The Municipal Corporation of Bom.* (1907) I. L. R. 31 Bom., 604).

Held therefore that a suit for injunction will lie and that the proper remedy is not by way of *mandamus*. *Bholaram Chowdry* v. *Corporaiton of Cal.* (1909) I. L. R. 36 Cal. 671, distinguished.

Held further, that the suit was properly brought against the President as he was acting on behalf of the Corporation. (*Valli Ammal* v. *The Corporation of Madras* (1915) I. L. R. 38 Mad., 41; 17 M. L. J. 531.)

Limitation of prosecution for non-compliance.—A prosecution for non-compliance of a notice to demolish must be made wlthin 6 months of the date fixed in the notice for non-compliance. There is no provision in the Calcutta Act for a continuing offence. See I. L. R. 37 Cal. 545, note 35, section 48.

The following 2 rulings under the Calcutta Act are noteworthy as showing the principles on which a Civil Court would interfere with the exercise of the discretion of a municipality.

If proper discretion not exercised Civil Court will interfere.—The petitioner completed certain additions to his premises in August 1902, deviating to some extent from the sanctioned plan and he also erected a cooking shed at the beginning of 1903 without permission. A part of the premises was re-valued and its assessment increased, in March 1903, in consequence of the improvements made, including the deviations.

In May 1903 a prosecution was instituted against him in respect of the cooking-shed only, and an order for partial demolition passed in August of the same year. The rest of the premises was re-assessed in September 1904 at a higher rate on account of the improvements.

In February 1905 a notice was served on the petitioner to show cause why the additions, which were not in accordance with the sanctioned plan, should not be demolished, and an order was made by the Magistrate in August 1905 directing the demolition of such portion of the premises.

Held that under s. 449 of the Calcutta Municipal Act it is discretionary with the Magistrate to pass an order of demolition or not, and that, under the circumstance of the case, the order was not a fair or proper one and could be set aside by the High Court. (*Shaik Abdul Samad* v. *Corporation of Calcutta* I. L. R. (1905) 33 Cal. 287; (1905) 10 C. W. N. 182; S. C. 3 C. L. J. (1905).)

The municipality in January 1905 sanctioned the construction of a room according to a plan submitted by the petitioner, who however slightly altered the position of a wall. He was prosecuted under sec. 579 of the Calcutta Act for this deviation and fined on 15 Nov. 1905. The Magistrate gave certain directions as toa lteration in the room, these were made

and the building was reassessed on the ground of improvement. Later on the municipality applied to the Magistrate under sec. 449 for demolition of the room and the Magistrate made an order accordingly on July 1906. On a motion to set aside this order on the ground that the Magistrate had not tried and determined the question whether the demolition was justifiable.

Held, that the Magistrate was bound to exercise a descretion after receiving evidence and hearing the defence, and not having done so, his order must be set aside. (1905) I. L. R. 33 Cal. 287; 10 C. W. N. 182 referred to.

The direction should be exercised with due regard to those rules which guide Courts of Equity in granting injunctions, with this difference that the Magistrate has also to consider whether or not a building ought to be demolished on the ground of its being a danger or obstruction to the public. Various grounds for consideration stated.

Instead of demolition the Magistrate should consider whether other remedial measures should not be taken. Interference with private rights beyond limits necessary is much to be depreciated. *Held further* that the High Court had power to direct whether the room in question should be demolished or not, and on a consideration of all the circumstances, it decided that demolition was not necessary. Circumstances which should guide Courts in making such orders, stated at length. (*Chuni Lal Dutt* v. *Corporation of Calcutta*, I. L. R. 34 Cal. 341; (1906) 11 C. W. N. 30.) See also I. L. R. 38 Cal. 296 noted s. 3 (15).

21. **Inspection of building.**—The marginal note should be "Municipality may inspect building and require alteration to be made." This sub-sec. is taken from the Bombay City Act, the first 30 words from sec. 350, and the rest is identical with sec. 353, except that the words "not latter than * * * has been completed, may" are substituted for "within 3 months after the completion thereof."

What is meant by completion.—Under section 353 of the Bom. City Act, a notice was given 3 months after completion to R. to reduce height of the building. R. contended that the prosecution was time barred. Municipality urged that the building could not be said to have been completed, unless and until such accomodations as privies and cesspools had been executed in accordance with the requirements of the Health Department; and therefore the notice was within time.

Held, that the notice was time barred. The word "completion" must be taken in its ordinary sense, and the Court cannot read into the section "in accordance with sanitary regulation" or sanitary officer's opinion. (*The Bom. Municipality* v. *Raghunath Malrand* I. L. R. 19 Bom. 372).

The Bom. City Act sec. 352, provides that the building may be out into and laid open for purpose of inspection

22 **What is meant by "to erect a building."**—Clauses (*b*) and (*c*) are, with somewhat different wording, similar to sec. 337 of the City of Bombay Act, 1888, which also includes in the terms, "to newly erect a building or re-erect any building pulled down to the plinth, or any frame-building of which only the frame work is left down to the plinth." This latter clause was included in the section by the Bill as originally drawn, but was omitted by the Legislature.

Most of the clauses of this explanation are identical with the Panjab Act, sec. 94, which defines the expression "erect or re-erect any building," with the following difference; in (*a*) the words "re-construction" is added; in (*e*) the words "its drainage, ventilation, or other sanitary arrangements, or its security or stability" are here substituted for "an alteration of its drainage or sanitary arrangements, or affect its security;" in (*f*) "out-houses" are omitted.

The C. P. C. Act, sec. 52, says, the expression includes erecting any wall, and all additions and alterations which involve new foundations or increased superstructure on existing foundation, &c.

Building, definition of.—The Bill I of 1914 proposed to add to this section the following paragraph:—"The word 'building' throughout this chapter means a building as defined in section 3." This it was said was necessary in consequence of the ruling in 13 Bom. L. R. 494 noted *infra*. The Special Commiteee omitted it from the Act but in Council it was again sought to have it inserted as it was contended that this addition would remove the flaw in the above ruling and enable a municipality to control such constructions. The proposal was however eventually withdrawn as it was explained that the amendment would not have the effect of meeting the difficulty.

Re-erecting a platform to a greater height.—In this case, the accused was convicted of having erected a platform or *khata* on municipal ground without having previously obtained permission to do so. The Sub-Divisional Magistrate reversed the sentence. The Local Government appealed to the High Court.

It was contended on behalf of the accused that he erected his old *khata*, which was only one span high, to the height of about two cubits, and that it was not necessary under the Act to ask the permission of the municipality, as the accused only repaired his old *khata*.

Their Lordships, in disposing of the matter, said: We think the erection of this *khata* comes within Clause I of sec. 33, as an addition to an existing building under the wide definition of a building, given by sec. 3 of the Act. It is permanent in character, and serves as a broad extended door-step or raised platform of communication with the public road. As a "door-step" is in terms included in the definition of a building, we are of opinion this erection is included also. We restore the conviction and sentence passed by the Magistrate—(Bom. H. C. Crim. Ruling No. 47, of 7 August 1889. *Imperatrix* v. *Devindrapa Khandapa.*)

Re-building wall which has fallen down.—The accused applied to the municipality on the 19th April 1910 for leave to reconstruct a wall of his house which had fallen down. The municipality on the 13th May issued an order to the accused prohibiting him from making the reconstruction. In the meanwhile, on the 11th May, the accused without waiting reconstructed the wall. On being prosecuted under section 96 the Magistrate relying on the case of *Queen-Empress* v. *Tippana* (1888) Ratanlal's Un. Cri. Cas., p. 402, acquitted him. On appeal:—

Held, reversing the order of acquittal, that the accused had erected a building within the meaning of section 96 since the rebuilding of the whole wall which had fallen down was a material reconstruction or an erection of a building as defined in the explanation to the section.

Queen-Empress v. *Tippana* is not an authority under the new Act. (*Emperor* v. *Kalekhan Sardarkhan*, (1910) 35 Bom. 236 (1910) 12 Bom. L. R. 1060).

Reconstructing side wall of house on old foundation not necessarily new building.—The accused owned a house, one of the side walls of which had fallen down. He rebuilt it on its old foundation, without having previously obtained permission of the municipality. He was thereupon charged, under section 96 of the Bombay District Municipal Act (Bom. Act III of 1901), for having erected a building without permission of the municipality:—

It was contended for the municipality that this was a "re-construction of a building" as 'building' by sec. 3 (7) "shall include also walls, &c." Heaton J. says "This may mean that any wall or door-step, &c., is itself a building, or that a building includes all its walls, &c. If the former interpretation be taken, the wall in question is a building and it has been reconstructed. If the latter interpretation is taken, then the wall is only part of a building, the building is the whole house. If a wall stood by itself it would be building, but where there is a complex building such as a house, the "building" meant by sec. 96 is the whole house and not a selected portion of it such as a wall.

It may be that the re-construction of a wall may be a re-construction within the meaning of sec. 96, of that building of which it forms a part. It may be that the section intended to leave it to be determined as a question of fact in each case whether the re-construction of any particular wall or portions of a building is substantially a re-construction of a building. If it does, then the question is whether there has or has not been substantially a re-construction of the building. The Magistrate has found that it is not and the materials on record do not show that he is wrong.

Chandavarkar J. held that the Magistrate having found as a fact that accused had reconstructed the wall, the only question was whether it came under sec. 96. "The case is on all fours with 12 Bom. L. R. 1060 (note , section) in which I fully concur. A wall such as this expressly falls within the definition of building and its re-construction amounts to "erecting a building."

On reference to Chief Justice Scott it was held that the accused committed no offence under section 96, for it could not be said as a matter of law that the material re-construction of a small wall must constitute the "erection of a building."

It is recognized in England to be a rule with regard to the effect of interpretation-clauses of a comprehensive nature that they are not to be taken as strictly defining what the meaning of a word must be under all circumstances, but merely as declaring what things may be comprehended within the term where the circumstances require that they should.

The Queen v. *The Justices of Cambridgeshire* (1838) 7 Ad. & E. 480, *Meux* v. *Jacobs* (1875) L. R. 7 H. L. 481 and *Mayor, &c., of Portsmouth* v. *Smith* (1885) 10 App. Cas. 364, followed.

The word 'building' in this section must be given its ordinary meaning, a meaning which the neighbouring sections indicate. It is possible that the re-erection of a wall may (under certain circumstances) amount to a material re-construction of a building under the section, but it does not necessarily do so.

(1910) 35 Bom. 236, distinguished as there accused treated the re-erection of his wall as falling within the section. In this present case the wall is a small one and accused has

all along regarded it as not coming under the section. (*Emperor* v. *B. H. DeSouza* (1911) 35 Bom. 412, 13 Bom. L. R. 494.)

A space of ground enclosed by kanat screens.—*Held* that sec. 87 of the N. W. P. and Oudh Municipality Act (I of 1900) as to power to regulate new buildings read with sec. 9 (6) which defines the expression "erect or re-erect any building," did not apply to a structure which consisted of "a small space adjacent to a bungalow enclosed by means of kanats or canvas screens and within private grounds."

If such an enclosure was prejudicial to the health safety and convenience of the public the municipality should consider whether such could not be guarded against under some other provisions of the Act. (*Kanita Nath* v. *The Municipal Board of Allahabad*, I. L. R. (1905) 28 All. 199.)

Note.—This might possibly come in under clause (*f*) "other structures."

Material alteration, &c.—In the Calcutta Act to 're-erect' includes "the re-construction of a building after more than one-half of its cubical extent has been taken, burnt, or fallen down."

Material alteration.—The mere addition of a masonry edging to a *chabutra* attached to a house on a public street is not a material alteration so as to furnish ground for a conviction under the V. P. Act. (*Radha Ballabh* v. *Emperor* (1904) 23 Ind. Cas. 193.)

New wall is a building.—Plaintiff straightened some of the walls by building against the pre-existing walls what may be called a secondary or double wall; he also built a new masonry wall and there-by enlarged his court-yard. *Held* that though the first mentioned wall may be open to doubt, the 2nd wall was an erection of a house within the meaning of sec. 23 s. 240 of the Bengal Act. Where the term 'building' is not defined in the Act, it ought to be construed in its ordinary sense and as including erections, structures or buildings such as masonry walls. (*Mahabir Das* v. *Gaya Municipality*, (1915) 26 Ind. Cas. 651.)

Re-building of house abutting on street burnt down is to re-erect a building.—A house abutting a public street was burnt down so that nothing but the 4 walls on the ground floor remained. Accused in re-building the house pulled down the front wall to the plinth and the other three to some 6 feet or so of the plinth, and proceeded to build to a height greater than allowed by sec. 349 B of the Bom. City Act. He was convicted under s. 471 for contraventing the provisions of this section which prohibits a building which "abuts on" a street to be "erected or raised" above a certain height.

Sec. 337 (2) provides that "to erect a building" means "to newly erect a building or to re-erect any building pulled down to the pliuth." Admittedly this definition does not apply to this erection.

As to the meaning of 'raised' the question was whether 'building' was to be construed as "the original building" or as the "ruin left by the fire." In interpreting these words it should be borne in mind that we are dealing with legislature of a somewhat technical kind enacted for a specific purpose. The purpose is unmistakeably the health and well-being of the City. To secure sanitary sufficiency of light and air there must be some relation between the width of a street and the height of the buildings on both sides. No doubt this is based on the teachings of modern sanitary science and equally no doubt the legislature intended that all reasonable opportunities should be seized of enforcing the standard laid down. The present case is not one of pulling down but of accidental destruction by fire and as such is not specifically dealt with in the Act, so the intention of the legislature has to be inferred. It is rersonable to infer that the law intended that the opportunity for sanitary improvement should be taken in such a case. The word "raised" is inserted in the section to include cases which are not included in the word "erected." The building which was the subject of structural operations was the ruin and that building having beyond question been raised, sec. 349 B applied.

The fact that the re-erection has been set back some inches from the actual line of the street, did not make it any the less a building abutting the street. Conviction confirmed. (*In re Ali Mahomed* (1907) 9 Bom. L R. 737.)

'Re-erection' is different from 'erection':—Accused applied for permission to re-construction his house. The total length of the walls of the house was 229 feet, of this a piece 28 feet long by 9 feet high was the old wall and the rest of it was all new. The question arose whether accused in putting up the building on the remains of a wall 28 feet in length erected, re-erected or re-constructed a building.

The High Court on a reference by the Magistrate held that this was a question of fact which must be determined on the evidence and circumstances of each case.

'Re-erection' is something different from 'erection' of a building. To 'erect' is defined by s. 337 (2) of the Bom. City Act. 'Re-erection' is not defined. It must mean

something excluded from the definition of 'erecting a building.' If accused pulled the building down to the plinth, he may come under sec. 337. He may not have pulled down to the plinth but may have re-erected within the meaning of sec. 349 C. Both are questions of fact. (*Emperor* v. *Nanabhoy*, (1907) 9 Bom. L. R. 936.)

Renewing the posts of a chapri abutting on public road and putting back roof in its old place is not to "erect or re-erect a building."—See 6 Ind Cas. 431 noted sec. 175 where it was held that it was not. The High Court after referring to I. L. R. 28 All. 199 (vide note p. 289) and I. L. R. 18 Bom. 547 ( ) say, "An examination of the ground on which a Commitee may refuse to sanction the erection or re-erection of a building and the conditions which may be imposed on an intending builder may be helpful to determine what the words "erect or re-erect" are meant to cover. No power is given to a Committee absolutely to deprive owners of the legitimate use of their lands. The object of the section is to ensure the safety and sanitation of the building and the suitability of the structural appearance relatively to neighbouring buildings and also to conserve the health, safety or convenience of the public or of the persons dwelling in the vicinity. Where a re-erection cannot come under any of these heads, it will not be a re-erection contemplated by the section."

Repairing tin roof of a shed not a "re-erection."—Accused had a shed consisting of four posts and a tin roof standing partly projecting beyond the building line of a road. He had occasion to take the roof off and repair it. He was convicted of re-erecting a building in breach of the provisions of sec. 449 (1) (*c*) Calcutta Act, and the Magistrate directed him to demolish the portion beyond the building line. *Held* that accurred's act was not a re-erection within the meaning of sec. 3 (39) (*a*) of the Act which is re-construction of the building if more than one-half of its cubical contents are taken down, nor did the act come under sec. 351 as to "no portion of any building or wall abutting on a public street shall be constructed within the line." (*Tripendeswar Mitter* v. *Corporation of Calcutta*, I. L. R. 39 Cal. 84; 16 C. W. N. 23; (1911) 11 Ind. Cas. 997.)

Re-construction—meaning of.—Section 342 (*d*) of the Bombay City Act requires that notice should be given to the municipality when a person intends "to remove or re-construct any portion of a building abutting on a street which stands within the regular line of such street."

The word 're-construction' as used in section 342 has some other element than that of addition, alteration or repair. If the repair is of an ordinary and casual character, it is not re-construction of any portion of the building. If, on the other hand, the repairs are of a more or less substantial character, affecting the stability of the building, they are re-construction whether the repairs are done inside or outside the house. In each case, it is a question of fact whether the partial works done with reference to a building are mere repairs or are re-construction of a portion of the building. The difference between repairs and re-construction is one of degree, and can be made out by finding whether what has been done adds to and was intended to add to the structural capacity of the building.

The question what are "repair," "construction" and "re-construction" was considered by the House of Lords in *Haddinott* v. *Newton Chambers & Co., Ld.*, 1901, A. C. 49.

Lord Macnaghten says:—"It seems to me that whenever new material is put into a building so that it becomes an integral part of the structure, you have something in the nature of construction. You are putting together the old materials and the new." Then His Lordship observes "May not one say with the strictest propriety that a building is in course of construction when it is being re-constructed in order to make it what it was intended to be a firm and substantial structure capable of resisting the action of the wind? Re-construction is but construction over again." In this quoted case the building had been completed and all that was done subsequently was that certain iron stays were added for its stability, not for ornament, between the girders and the pillars, which supported the building; and it was held that this new work was "re-constructed."

Held, that the action of plaintiff in removing the joists, planks and *koba* floor on the first 3 floors of her house and placing new joists, new planks and new *koba* floors there amounts, within the meaning of the section, to a re-construction of that portion of the building. Accordingly suit for restraining the municipality from pulling down so much of the building as was unauthorised, dismissed. (*Dewkabai* v. *Municipal Commissioner of Bombay* (1904) 6 Bom. L. R. 1028.)

[1]Regulation of huts.

97. It shall not be lawful for any person to erect any hut or shed or range or block of huts or sheds, or to add any hut or shed to any range or block of huts or sheds already existing when this Act comes into opera-

tion, without giving previous notice to the municipality; and the municipality may require such huts or sheds to be built so that they may stand in regular lines, with a free passage or way in front of and between every two lines of such width as the municipality may think proper for ventilation and to facilitate scavenging, and at such a level as will admit of sufficient drainage, and may require such huts to be provided with such number of privies and such means of drainage as to them may seem necssary. If any hut or shed or range or block be built without giving such notice to the municipality, or otherwise than as required by the municipality, the municipality may give written notice to the owner or builder thereof, or to the owner or occupier of the land on which the same is erected or is being erected, requiring him within such reasonable time as shall be specified in the notice to take down and remove the same, or to make such alterations therein or additions thereto as having regard to sanitary considerations the municipality may think fit.

1 **Huts.**—This is almost an exact reproduction of sec. 34 of Bom. VI of 1873. See sec. 181-A and 181-B of the Madras Act.

Notice.—See sections 154 and 155.

Erecting a hut without notice and failing to remove it when required to do so are two distinct offences (*Chairman Howrah Municipality* v. *Golapi Bewa*, 10 C. L. J. 16; 1909, 2 Ind. Cas. 939.)

Owner-occupier.—See notes 4 and 5 page 219.

[1]Improvement of huts.

98. (1) Whenever the municipality are of opinion that any huts or sheds, whether used as dwellings or stables or for any other purposes, and whether existing at the time when this Act comes into operation or subsequently erected, are by reason

(*a*) of insufficient ventilation or of the manner in which such huts or sheds are crowded together, or

(*b*) of the want of a plinth or of a sufficient plinth or of a sufficient drainage, or

(*c*) of the impracticability of scavenging,

attended with risk of disease to the inhabitants or the neighbourhood, they shall cause a notice to be affixed to some conspicuous part of each such hut or shed, requiring the [2]owner or occupier thereof, or the ower of the land on which such hut or shed is built, within such reasonable time as may be fixed by the municipality for that purpose, to take down and remove such hut or shed, or to execute such operations as the municipality may deem necessary for the avoidance of such risk.

(2) In case any such [2]owner or occupier shall refuse or neglect to take down and remove such huts or sheds, or to execute

such operations within the time appointed, the municipality may cause the said huts or sheds to be taken down, or such operations to be performed in respect of such huts or sheds as they may deem necessary to prevent such risk.

(3) If such huts or sheds be pulled down by the municipality, the municipality shall cause the materials of each hut or shed to be sold separately, if such sale can be effected, and the proceeds, after deducting all expenses, shall be paid to the owner of the hut or shed, or if the owner be unknown or the title disputed, shall be held in deposit by the municipality until the person interested therein shall obtain the order of a competent Court for the payment of the same.

Provided always that in case any huts or sheds, existing at the time when the land on which they are situate first became part of a municipal district, should be pulled down under this section by order of the municipality, or in pursuance of their notice, compensation shall further be made to the [2]owner or owners thereof, and the amount thereof, in case of dispute, shall be ascertained and determined in the manner provided section 160.

1 **Huts.**—This section is an almost exact reproduction of sec. 35 of Bom. Act VI of 1873 except the words "of insufficient ventilation" "to take down and remove such hut or shed" and "a plinth or of a sufficient plinth." These last seven words were designed to prevent the practice of building on sodden, low-lying and unhealthy ground. The words as to when the land "first became part of the municipal district" were substituted for "when this Act came into force" in the old Act. See the Bengal Act, secs. 245—248, as to sanitary measures with regard to Blocks of Huts.

Hut.—This is included in the definition of "building, sec. 3 (7), but there can be no doubt that the term here used is not intended to refer to *pacca* houses however small but merely to the ordinary mud or bamboo and mat habitations of the poorer classes. In a Calcutta unreported case (*vide* report of the Howrah Municipality for 1882-83), it was held that it does not include a structure with *katcha-pucca* walls.

Notice.—See sections 154 and 155.

Municipality and Magistrate must see to a compliance with the Act, otherwise Civil Court will interfere.—The municipality issued a general notice to owners of *bustees* to do a lot of operations, some of which were admittedly the work of the municipality. Accused offered to place his land at the disposal of the municipality to make any improvement they wished; this was declined and a revised notice was issued under section 408 Calcutta Municipal Act (III B. C. of W. 1899). This notice also required a number of operations to be done some of which it was the duty of the municipality to do. Accused having failed to comply, he was convicted. *Held* that the conviction was bad. When the municipality directs one of several owners of a *bustee* to carry out certain improvements and issues a general notice, it is the duty of the municipality to serve him with a copy of the standard plan approved by the Committee under sec. 407 and point out to him in that plan what work he is to do.

The duty of the corporation in improving *bustees* is a most important one and they have been invested with the most ample powers, but when certain penal sections enforced by the criminal law are put in motion on the reports of municipal servants it is incumbent on the Magistrate and the authorities of the Corporation to see that the legal procedure which is a condition precedent to any conviction, is strictly and properly carried out. (*Kanai Lal Galan* v. *The Corporation of Calcutta*, (1906) 11 C. W. N. 508.)

2 **Owner or occupier.**—See notes 4 and 5, sec. 63.

"In the present case, the owners of the huts were given notice to quit the huts at once and on their refusal to do so, the huts were pulled down. We cannot hold that this notice was legal under sec. 35 (Act VI of 1873) which clearly contemplates that, in the first instance,

the owner of the property in question shall be required to "execute such operations" as the municipality may deem necessary for the avoidance of risk of disease, &c., and that the removal of the property shall be carried out by the municipality only if such operations are not executed. (*Jairam Ramsay* v. *W. E. Scott.* P. J. 1888, p. 87.)

"*Owner*" *is Receiver appointed by the High Court.*—When a notice under section 408 of the Calcutta Municipal Act has been served on the actual owner of an estate in the hands of a Receiver appointed by the High Court, he is liable under the section as such, and not the Receiver, to carry out the requisitions made therein. It is incumbent on the owner in such a case to request the Receiver to comply with the notice, after taking the directions of the Court, and on the latter's failure to do so he should himself apply to the High Court making the Receiver a party. If the Court refuses the application, the owner would be enabled to satisfy the Magistrate that he had used all diligence to carry out the requisitions, and in the event of a conviction the penalty would be merely nominal. If the owner is helpless in the matter the General Committee may proceed under the section against the occupiers. *Parkar* v. *Inge*, 17 Q. B. D. 584, referred to. A Receiver appointed by the High Court is not the "owner" of the premises he holds as such, nor is he an "agent or trustee" within the definition of the term in section 3 (32) of the Calcutta Municipal Act. *Fink* v. *Corporation of Calcutta*, I. L. R. 30 Cal. 721, followed. (*Corporation of Calcutta* v. *Haji Kassim Ariff Bham* (1911) I. L. R. 38 Cal. 714.)

See *Corporation of Calcutta* v. *Muzaffar Hussain* (1910) 8 Ind. Cas. 53 as to the meaning of owner in the case of *bustees* and as to service of notice for improvements under the Calcutta Act.

(3) *Powers connected with Drainage, &c.*

99. (1) All sewers, drains, privies, water-closets, house-gullies and cesspools within the municipal district shall be under the survey and control of the municipality.

[1]Municipal control over drains, &c.

[2](2) All covered sewers and drains, and all cesspools, whether public or private, shall be provided by the municipality or other persons to whom they severally belong, with proper traps, or other coverings or means of ventilation, and the municipality may, by written [3]notice, call upon the [4]owner of any such covered sewers, drains, or cesspools to make provision accordingly.

1 **Origin of section.**—Sub-sec. (1) is clause 1 of sec. 39 of the old Act of 1873, with the words "water-closets" added. See note to sec. 106. See Madras Act, sec. 210 and 214 (1). The Bombay City Act makes a distinction between municipal drains, and private drains, only the former being under municipal control. The sub-section follows Bengal Act, secs. 190 and 197. Sec. 48 (1) provides for by-laws "regulating the construction, maintenance and control of drains, sewers, cesspools, water-closets, privies, latrines, urinals, &c."

See sec. 50 (2) (*c*) as to all public sewers and drains, and all sewers, drains, tunnels, culverts, &c., in alongside or under any street, and all works appertaining thereto belong to the municipality.

Madras Act, sec. 166 (1), requires that owners or occupiers of lands or buildings skirting public streets or roads shall construct, &c., culverts over the side channels or ditches at the entrances to such lands or buildings.

2. **Traps to be provided.**—Sub-sec. (2) is clause 2 of sec. 37 of the old Act, and corresponds with Bombay City Act, sec. 243. Marginal note should be "Traps &c., when to be provided." *Vide* "Contents."

3. **Notice.**—See sec. 154-158. Instead of sending the notice, the municipality may do the work without giving the person the option of doing it himself, sec. 112 (1).

Service of written notice prescribing a time for compliance is essential and cannot be dispensed with. As the municipality may make by-laws in this matter, G. R. 4371 of 21 Oct. 1859 G. D. does not apply.

4 **Owner.**—See note 4, sec. 63, page 174. See also sec. 156 (1), proviso (*b*), as to such charges being considered "improvements expenses" and how they are to be recovered; also sub-sec. (2) and (3) of that section as to recovery from occupier and his remedies against owner.

100. (1) In order to carry out any drainage scheme, it shall [1]Powers for making drains. be lawful for a municipality to carry any drain, sewer, conduit, tunnel, culvert, pipe or water-course through, across or under any street, or any place laid out as or intended for a street, or under any cellar or vault which may be under any street, and, after giving reasonable notice in writing to the owner or occupier, into, through or under any land whatsoever within the municipal district.

(2) The municipality, or any officer appointed by them for such purpose, may enter upon an construct any new drain in the place of an existing drain in any land wherein any drain vested in the municipality has been already constructed, or may repair or alter any drain vested in the municipality.

(3) In the exercise of any power under this section no unnecessary damage shall be done, and compensation, which shall, in case of dispute, be ascertained and determined in the manner provided in section 160, shall be paid by the municipality to any person who sustains damage by the exercise of such power.

1 **Drainage.**—This is taken from sec. 222 of the Bom. City Act, and is on the lines of sec. 210 (2) and (3) of the Madras Act.

Municipality liable for injury caused by drain.—Where a municipality excavated a trench for a pipe drain in a public lane, and the trench getting filled with rain-water caused a land slip and damage to plaintiff's house. *Held* that as the drain was the chief cause of the damage, the municipality was liable. (*Vithaldas Dharamdas* v. *Municipal Commissioner of Bombay* (1902) 4 Bom. L. R. 914.)

In a suit for alleged damage done to the plaintiff's premises by excavations for drainage purposes, which the Justices were authorised to make by Act VI of 1863 (Ben. C), it being shown that the Justices had entrusted the execution of the work to skilled and competent contractors—*Held*, the Justices were not liable. (*Ullman and others* v. *The Justices of the Peace for Calcutta.* 8 B. L. R., 265.)

Suit for damages caused by drainage.—Plaintiff brought a suit on 5 Feb. 1908 against the municipality for compensation for damages in respect of injury occurring about 3 Aug. 1906, caused by the construction of a sullage drainage system. *Held* the suit was barred under Articles 24 and 2, Limitation Act.

Under Art. 2 it is not necessary that the municipality must at the time of doing the act openly assert or inform the other party that he is acting in pursuance of a particular enactment. It is sufficient for the municipality to show that in doing the act they were at the time under the honest belief that the act was authorised by the Statute. 160 P. R. 1883 followed. 124 P. R. 1881 referred to.

The omission to give notice under section 120-C, Panjab Municipal Act does not affect Article 2, Limitation Act. 5 W. R. 137 referred to.

Even when compensation is claimed for damage resulting from the consequences of the acts of a public body done in pursuance of statutory powers Article 2 applies. (*Richard Watson* v. *Municipal Corporation of Simla*, 72 P. R. 1909; 112 P. W. R. 1909; 1909, 2 Ind. Cas. 819.)

When a municipal *pucca* drain eventually finds its outlet upon private land and the continuation of the drain is not shown to belong to the municipal or be a public drain, *held* that persons who obstructed &c., the drain at such continuation could not be punished under sec. 168 of Act I of 1900 (Local.)

The Municipal Act is a local Act of a highly technical nature, and one which touches the private rights of individuals. It has therefore to be most carefully construed, and the intention of the framers of the Act must be obtained from the particular language used. (*Dassa* v. *Emperor*, 6 A. L. J. 566; 1909, 2 Ind. Cas. 408.)

101. (1) If any building or land be at any time undrained, or not drained to the satisfaction of the municipality, the municipality may by written [2]notice call upon the [3]owner to construct or lay from such building or land a drain or pipe of such size and materials, at such level, and with such fall as they think necessary for the drainage of such building or land into

[1]Sufficient drainage of houses.

(*a*) some drain or sewer, if there be a suitable drain or sewer [4]within fifty feet of any part of such building or land, or

(*b*) a covered cesspool to be provided by such owner.

(2) It shall not be lawful newly [5]to erect any building, or to re-build any building, or to occupy any building newly erected or re-built, unless and until—

New buildings not to be erected without drains.

(*a*) a drain be constructed, of such size, materials and description, at such level, and with such fall, as shall appear to the municipality to be necessary for the effectual drainage of such building;

(*b*) there have been provided for and set up in such building and in the land appurtenant thereto, all such appliances and fittings as may appear to the municipality to be necessary for the purposes of gathering and receiving the drainage from, and conveying the same off, the said building and the said land and of effectually flushing the drain of the said building and every fixture connected therewith.

[6](3) The drain to be constructed as aforesaid shall empty into a municipal drain, or into some place legally set apart for the discharge of drainage, situated at a distance not exceeding fifty feet from such building; but if there is no such drain or place within that distance, then such drain shall empty into such cesspool as the municipality direct.

1 **Origin of section.**—Sub-section (1) is taken from sec. 37 of the old Act of 1873. See the Panjab Act, sec. 122, and Madras Act, sec. 213-A. See also section 156, proviso (*a*), as to special agreement. Sub-section (2) and (3) are from the Bombay City Act sec. 234.

The Sanitary Board suggested that provision should be made in the section for all house connections for privies or bath-rooms as regards a general drainage scheme being carried out by, or under the control of, the municipality; and that the cost may be recovered from the owner or occupier, as a public improvement under sec. 156 (1), proviso (*b*).

The experience of Karachi, Rangoon and Bombay shows that the success of a drainage scheme depends in a large measure on the house connections; to be efficient and satisfactory, these ought to be on a uniform plan, both as regards materials and construction; and no opening ought to be left for ill advised economy on the part of the owner, as defective house connection will certainly cause illness in the occupiers of the house. Privies and bath-rooms are always against the outside wall of a house, so the interior arrangements will not be interfered with.

Sec. 209 of the Madras Act provides that the municipality may contract with the owner or occupier for construction and repair of any drain, privy, &c.

2 **Notice.**—See sections 154-158. Also sec. 112.

The Madras Act, sec. 213-A, provides that no requisition to connect with any drain or place set apart, shall be made (1) on any person entitled to exemption from taxes on buildings and lands on account of the annual value not exceeding Rs. 6 of owner's sole property and (2) no person to be required to expend upon such drain a sum exceeding 5 times the amount payable annually by him on account of taxes on the building or land to be drained. The sum in excess of such amount to be borne by the municipality.

3 **Owner.**—See note 4, section 99.

4 **Within 50 feet.**—The Panjab Act says "not more than 100 feet." So also the Madras Act, the Bombay City Act, secs. 231—232 and Bengal Act, sec. 227.

5 **To erect a building.**—See explanation to sec. 96.

The Bengal Act, sec. 242, provides that the municipality may prohibit the owner of any new house to let it for occupation, until the drainage and latrine accommodation have been inspected and approved.

6 **Drain where to empty.**—The marginal note should be as shown in "Contents." "Such drains where to empty into."

Legally set apart for the discharge of drainage.—A place "lawfully set apart" for the use of the public by the Corporation within the meaning of section 299, Calcutta Municipal Act (III B. C. of 1889) must be a place over which the Corporation have acquired by some procedure under the statute a right to make use of private property as a public drain.

Where every hut in a *busti* had a surface drain connected with the private common drain of the landlord and this latter drain discharged into the municipal sewer at a distance outside the statutory limits:—*Held* that the private common drain cannot be presumed to be a place lawfully set a apart for the discharge of drainage within the meaning of section 299, that a tenant in one of the huts in the *busti* cannot be called upon to alter his connecting drain to suit the convenience of the Corporation, and that he cannot be fined for neglecting to do so. (*Gobinda Chandra* v. *Corporation of Calcutta*, I. L. R. (1910) 38 Cal. 268; 13 C. L. J. 327; 15 C. W. N. 412; 1910, 8 Ind. Cas. 706.)

Municipality not authorised to require drain in particular location.—Accused was convicted and fined Rs. 25 for not complying with a notice issued by the Municipal Commissioner of Bombay under sec. 231 of Bombay Act III of 1888. The notice required him to make an open drain in the gully on the west of his premises, this drain to be so constructed as to adjoin the west wall of his building.

Held, that clause (a) merely gives the Commissioner power to require that a drain should be made "of such material, size and description and laid at such level and with such fall and outlet as may appear to the Commissioner necessary, emptying into such municipal drain or place aforesaid." There is nothing in the language of the section autorising the Commissioner to direct that the drain shall be made so as to adjoin any particular part or wall of the premises. In *In re Khimji Jairam* (I. L. R. 24 Bom. 75) there was a notice given by the Municipal Commissioner, under sec. 249 of the Act requiring the accused to construct a urinal of six compartments in the open space inside the entrance gateway to the cloth market from Champawady and a water closet in the corner of the entrance from 1st Ganeshwady near the fire-engine station. This Court held the notice to be bad, because sec. 249 did not give power to the Commissioner to direct that the urinal should be constructed in the particular place in the accused's premises. The principle of that ruling applies to sec. 231 of the Act.

The making of the drain being then the essential part of the whole notice, leading to the other requisitions, and the requisition in respect of that part being *ultra vires* of the Commissioner, we must treat the notice as illegal and reverse the conviction and sentence. (*Emperor* v. *Nadirsha*, I. L. R. (1904) 29 Bom. 35; (1904 6 Bom. L. R. 667.)

102. The owner or occupier of any building or land within the municipal district shall be entitled to cause his drains to empty into the sewers of the municipality, provided that he first obtains the written permission of the municipality, and that he complies with such conditions as the municipality prescribe as to the mode in which and the superintendence under which the communications are to be made between drains not vested in the municipality and drains which are so vested.

[1]Power of owners and occupiers of buildings or lands to drain into municipal drains.

1 **Drains to empty into municipal sewers**—This is taken from sec. 228 of Bombay City Act. See also sec. 227 as to conditions for connecting drain of private street with a municipal drain.

Section 226 of that Act makes it obligatory for the owner of such a drain to allow its use to others or to admit others as joint owners; and sec. 238 gives power to the committee to authorise this, after hearing parties.

Permission.—If he does not obtain permission he becomes liable under section 109.

Bom. City Act, sec. 240 provides that without permission drains are not to pass beneath buildings.

103. (1) If the owner or occupier of any building or land desires to connect the same with any municipal drain, by means of a drain, to be constructed through land, or to be connected with a drain, belonging to or occupied by or in the use of some other person, he may make a written application in that behalf to the municipality.

[1]How right to carry drain through land or into drain belonging to other persons may be obtained.

(2) The municipality thereupon, after giving to such other person and reasonable opportunity of stating any objection to such application, may, if no objection is raised or if any objection which is raised is in their opinion insufficient, by an order in writing authorise the applicant to carry his drain into, through, or under the said land, or into the said drain, as the case may be, in such manner and on such conditions as to the payment of rent or compensation, and as to the respective responsibilities of the parties for maintaining, repairing, flushing, cleaning and emptying the said drains as may appear to them to be adequate and equitable.

Such right how and on what conditions to be authorised by municipality.

(3) Every such order shall be a complete authority to the person in whose favour it is made, or to any agent or other person employed by him for this purpose, after giving or tendering to the owner or occupier of the said land or drain the compensation or rent, if any, specified in the said order, and otherwise fulfilling, as far as possible, the conditions of the said order, and after giving to the said owner or occupier reasonable notice in writing, to enter upon the land specified in the said order with assistants and workmen at any time between sunrise and sunset, and, subject to all the provisions of this Act, to do all such work as may be necessary—

Written order of municipal authority for execution of necessary work.

(*a*) for the construction or connection of the drain, as may be authorised by the said order,

(*b*) for renewing, repairing or altering the same, as may be necessary from time to time, or

(*c*) for discharging any responsibility attaching to him under the terms of the order as to maintaining, repairing, flushing, cleaning or emptying the said drain or any part thereof.

1 **Origin of section.**—Sub-section (1) is taken from sec. 237 of the Bombay City Act; sub-sec. (2) from secs. 230 (1) and 238 (1) and sub-sec. (3) from sec. 230 (2), (3) and 238 (2) of the same Act.

A man-hole is included in the expression "any other device for carrying off sewage &c." and falls within the term 'drain' as defined in the Bombay City Act 1888 s. 3 (*a*).

The expression "the Commissioner may carry any municipal drain.....into, through or under any land whatsoever within the city" covers a drain which is above the surface of the ground. The words "into, through or under" are meant to include drains passing over the land (*Dattatraya B. Chitnis* v. *The Municipal Commissioner of Bombay.* (1907) 9 Bom. L. R. 1321.)

Work how to be carried out.

104. In executing any work under section 103, as little damage as possible shall be done, and the owner or occupier of the buildings or lands for the benefit of which the work is done, shall

(*a*) cause the work to be executed with the least practicable delay;

(*b*) fill in, reinstate and make good at his own cost and with the least practicable delay the ground or any portion of any building or other construction opened, broken up or removed for the purpose of executing the said work; and

(*c*) pay compensation to any person who sustains damage by the execution of the said work.

Origin of section.—This is taken from the Bom. City Act, sec. 230 (4).

[1]Rights of owner of land through which drain is carried in regard to subsequent building thereon.

105. If the owner of any land into, through or under which a drain has been carried under section 103 whilst such land was unbuilt upon, shall at any subsequent time desire to erect a building thereon, the municipality shall, if they sanction the erection of such building, by written notice require the owner or occupier of the building or land for the benefit of which such drain was constructed to close, remove or divert the same, and to fill in, re-instate and make good the land in such manner as they may deem to be necessary, in order to admit of the construction or safe enjoyment of the proposed building.

1 **Origin of section.**—This is taken from the Bom. City Act, sec. 230 (5).

If necessary the municipality may take action without giving the notice, sec. 112.

[1]Provision of privies, &c.

106. (1) In case the municipality shall be of opinion that any privy or cesspool, or additional privies, or cesspools, should be provided in or on any building or land, or in any municipal district in which, with the approval of the Sanitary Board, a water-closet system has

been introduced, that water-closets should be substituted for the existing privies in or on any building or land, or that additional water-closets should be provided therein or thereon, the municipality may, by written [2]notice, call upon the [3]owner of such building or land to provide such privies, cesspools or water-closets, as the municipality may deem proper.

[4](2) The municipality may, by written notice, require any person or persons employing workmen or labourers exceeding twenty in number, or owning or managing any market, [5]school or theatre or other place of public resort, to provide such latrines and urinals as the municipality may direct, and to cause the same to be kept in proper order, and to be daily cleaned.

[6](3) The municipality may, by written [2]notice, require the [3]owner or occupier of any land upon which there is a privy, to have such privy shut out, by a sufficient roof, and a wall or fence, from the view of persons passing by or resident in the neighbourhood, or to alter as they may direct any privy door or trap door which opens on to any street, and which they deem to be a nuisance.

1 **Origin of section.**—This is a reproduction of section 36 of the old Act, Bombay VI of 1873, with some additions.

This is on the lines of the Bombay City Act, section 248, which, however, also provides for a privy, &c., used in common by the occupiers of two or more premises. See also sections 250 and 251 of that Act for special provisions in regard to privies and water-closets. See also Madras Act, section 207.

Section 54 (1) makes it one of the obligatory duties of a municipality to make reasonable provision for (*i*) constructing, &c., public latrines, privies, urinals, drains, sewers, &c., &c. This follows section 252, Bombay City Act and Madras Act, section 206, which adds that latrines for public use must be licensed. The Bengal Act, section 193 provices for common privies and urinals for the separate use of each sex; and section 194 provides for licensing such necessaries for public accommodation.

Section 241, Bombay City Act. provides that no cesspool shall be constructed beneath certain buildings, nor within 20 feet of any well, &c. The Bengal and Panjab Acts say within 50 feet.

The provision as to a water-closet system and water closets has been made for the sanitary requirements of towns in which such a system might be introdnced. Hence the word "water-closet" has also been introduced with some other sections.

Municipal order for privy cannot justify it if a nuisance, and may be removed—Defendant had a cess pit on his land; when re-building his house he erected a privy under municipal orders in its place. Plaintiff failing to get it removed filed a suit for an injunction for its removal and no other privy to be erected in the future. The lower Court held that though a nuisance there was no better spot for it and as defendant had built it under municipal orders the suit was dismissed. On appeal to the High Court, *held*, the District Judge has found that the privy is a nuisance, but has held that the defendants have established the two propositions laid down by Lord Watson in *Metropolitan Asylum. District* v. *Hill*, as requisite to justify such a nuisance: firstly that he was acting under imperative orders of the legislature, and secondly that he could not possibly obey those orders without injuring private rights. The defendant may have acted under the orders of the municipality, but the terms of the statute, Bombay Act VI of 1873, sec. 36, under which those orders were given were not imperative in requiring the municipality to call on the owner of the particular house inhabited by the defendants or any houses within a particular area in which the defendants house was situated, to build a privy, but are simply permissive, leaving it to the discretion of the municipality to determine when the power conferred on them shall be exercised. In such a case Lord Watson says "The fair inference is that the Legislature

intended that discretion to be exercised in strict conformity with private rights." Again there is nothing in the Act which necessarily requires privies to be erected, although their being so erected would create a nuisance, or to lead to the inference that the legislature supposed that they could not be erected without creating a nuisance, from which it might be concluded that the Legislature intended they should be made regardless of other person's rights. The absence of these indications in the Act under which the power is exercised is relied on by Lord Selbourne and Lord Blackburn in the case above referred to as distinguishing it from the *Directors, &c., of the Hammer Smith and City Railway Company* v. *G. H. Brand.* As the municipality had therefore, in our opinion on the proper construction of the Act, no authority to order the defendants to erect a privy regardless of the plaintiffs rights, they cannot plead that they acted under their orders. (*Sayad Jafir Saheb* v. *Sayed Kadir Rahiman* (I. L. R. 12, Bom. 634).

2 **Notice.**—See sections 112, 154-155.

A notice requiring accused to construct urinals in a particular place on his premises is *ultra vires*, and the conviction reversed. (Bom. H. C. Crim. R. No. 22 of 1899. *In re Bombay Municipality* v. *Khimji Jairam.* I. Bom. L. R. 431, I. L. R. 24 Bom. 75.)

3 **Owner or occupier.**—See notes 4 and 5 sec. 63.

"A Fazandar, as owner of the land, is not the person liable as owner of premises, to provide privy accommodation. The tenant paying ground-rent, as beneficial owner of a house built on the Fazandar's land, the owner is liable within the meaning of the section. (*The Municipality of Bombay* v. *Shapurji*, Bom. H. C. Cr. Ruling No. 32 of 1895.)

4 **Latrines to be provided by certain persons.**—This follows Madras Act, sec. 208. The marginal note should be "Employers of labourers, managers of markets, to provide latrines, &c."

"*Employing*"—*meaning of*—In the corresponding sec. 249 of the Bom. City Act, the words used are "are employed." In the case of *the Municipality of Bombay* v. *Ahmedbhai Habibhai* (I. L. R. 23 Bom. 528, 1 Bom. Law Reporter 12, Bom. H. C. Cr. R. No. 2 of 1899.) these words were held to refer to employment of any kind or for any length of time, whether from day to day, or occassional, or regular all the year round. It is not for a Civil Court to lay down nice distinctions as to the number of hours in the day, or of days in the year which constitute such employment. The Legislature has left that to the municipality, provided it is found that persons exceeding 20 in number are employed. In the case of *Hargreavs* v. *Taylor* (32 L. J., (N. S.), M. C. p. 111.) this position was laid down in respect of a corresponding provision of the English Act.

Mr. Justice Parsons expressed the opinion that it would be a perfect answer to the requisition, were the owner on receipt of the notice to close his premises or to cease employing thereon more than 20 workmen or labourers.

5 **School or theatre or other public place of resort.**—These words were not in the old Act. The Bom. City Act mentions "railway station, dock, wharf, or other place of public resort."

It was held in I. L. R. (1906) 30 Bom. 392; 8 Bom. L. R. 115 that a theatre was a place of public resort within the meaning of sec. 249 of the Bom. City Act. The object and scope of the section is to provide proper and decent accommodation for persons of both sexes in the way of latrines, urinals &c.

6 **Sub-section (3).**—The marginal note should be "Privies to be shut out from public view, &c." See the Bom. City Act, sec. 250, for provisions as to privies.

Nuisance.—See section 3 (15).

107. (1) All sewers, drains, privies, water-closets, house-gullies and cesspools within municipal district shall, unless constructed at the cost of the municipality, be altered, repaired, and kept in proper order at the cost and charges of the [2]owners of the land and buildings to which the same belong, or for the use of which they are canstructed or continued, and the municipality may, by written [3]notice, require such owner to alter, repair, and put the same in good order in such manner as they think fit.

[1]Cost of altering, repairing and keeping in proper order privies, &c.

[4](2) The municipality may, by written notice, demolish or close any privy or cesspool, whether constructed before or after the coming into operation of this Act, which in the opinion of the municipality, is a nuisance, or is so constructed as to be inaccessible for the purpose of scavenging or incapable of being properly cleaned or kept in good order.

1 **Origin of section**.—This is taken from sec. 39, clause 1 of the old Act of 1873, but considerably altered and extended. Compare sec. 214, Madras Act, and secs. 122—123, Panjab Act.

The Bom. City Act, sec. 226, provides that a drain in any street, if constructed, whether at cost of the municipality or not, for the sole benefit of any adjoining premises, shall be repaired, &c., by the owner or occupier.

2 **Owner.**—See note 3, sec. 63. Bengal Act, sec. 224, says "owner or occupier."

One H was required by a municipality under sec. 39, Bom. VI of 1873, to white-wash the privy of the house owned by him. The notice was received by accused, a nephew of H, on whom it was served, as it was said that he looked after everything connected with the house, and the receipt was also signed by him. The notice not having been complied with accused was convicted under sec. 74 of the Act. *Held* conviction wrong as the section concerned itself with the owner of a house. The fact that accused received the notice for the owner could not make him liable. (*Queen Emp.* v. *Nathabai Nalchund.* Bom. H. Cr. Ruling 28 of 1898.)

3 **Notice to alter, repair and keep in good order.**—See section 112, 154-158.

Sec. 224, Ben. Act III of 1884, as to repair and make efficient of privies, &c., contemplates a case of mere efficiency even where no repair is necessary, and therefore the notice does properly come within that section. (*Pivri Municipality* v. *Kissorilal*, I. C. W. N. 244.)

Under the old Act, non-compliance with this notice, was not punishable. (See *in re* Tukaram Vithal. I. L. R. 2 Bom. 527). Now however, it is clear that sec. 155 applies to such a notice.

4 **Municipality may demolish privies**.—This sub-sec. was not in the old Act, sec. 39 of which only authorised the demolition of privies, &c., erected after the coming into force of the said Act. The alteration in the law was made expressly to meet the difficulty as to demolishing and closing ancient fixed khalhuas, referred to in G. R. 1771 of 19 May 1893, Gen. Dep.

The marginal note should be "Power to demolish, &c., privies, &c."

"Sec. 39 authorises the municipality to require a privy, even though it may have been in existence prior to the coming into force of Act III of 1873, to be altered, repaired, or put in good order as the municipality think fit. (*Ahmedabad Municipality* v. *Gafarbhai* 1878, P. J. 12.)

Owner cannot be required to demolish and sub-section should be amended.—A District Municipality issued a written notice under s. 107 (2) to the accused stating that the cess-pool of his house was a nuisance and that therefore within seven days from receipt of the notice the pipe and the drain of the cess-pool should be removed, and that if no steps were taken as directed within the time fixed, steps would be taken according to law. The accused disobeyed this notice, for which he was prosecuted under s. 155 of the Act :—

Held, that as there was no power given under s. 107 (2) to the municipality to lawfully direct an owner or occupier to demolish or close a cess-pool himself, there was no disobedience of any lawful direction on the part of the accused under s. 155.

It is clear that this clause requires amendment. If the legislature intends that the municipality itself should take action, then the word 'on' should be substituted for "by" before "written notice"; if it is intended that the owner should take action, then the words "require the owner to" should be inserted after written notice. (*Emperor* v. *Luduram Manomal*, (1909) 11 Bom. L. R. 1349; 1909, 4. Ind. Cas. 835.)

[1]Power to close existing private drains.

108. When any building or land within the municipal district has a drain communicating with any cesspool or sewer, the municipality, if they consider that such drain, though it may be sufficient for the drainage of

such building or land, and though it may be otherwise unobjectionable, is not adapted to the general sewerage of the district, may close such drain, and such cesspool or sewer, whether it is or is not on land vested in the municipality, on providing a drain or drains equally effectual for the drainage of such building or land, and the municipality may do any work necessary for the purpose.

1. **Closing drains.**—This is taken from sec. 233, Bom. City Act, which however, provides that the expense of such drain and work done is to be paid by the municipality. It also provides that instead of closing the drain, the municipality may direct it to be used only for certain purposes and a new entirely distinct drain be made for other purposes. Sec. 224 provides that if this is a municipal drain its closing, &c., should be done so as to create the least practicable nuisance or inconvenience, and if any person is deprived of the use of any drain, the municipality must provide one as equally effectual.

The marginal note is misleading. It should be "Power to close drains, &c." The section applies to *all* drains, not only to private ones; and also to cesspools and sewers.

Where a Municipal Board, acting under its statutory powers, ordered the course of a drain which it considered to be prejudicial to health and public comfort to be diverted, held that the Civil Court had no power to disturb the order of the Municipal Board, which had powers to pass orders with regard to drains under sections 90 and 91 of Act No. 1 of 1900. If a Municipal Board assumes a power or authority which the law has not given, its action can be challenged by a suit in a Civil Court, but if it confines itself within its statutory powers, such exercise of its powers cannot be questioned in a Civil suit. *Frewin* v. *Lewis*, 4 Myl. and Cr. 349, referred to. (*Abdul Aziz* v. *Municipal Board, Pilibhit*, (1905) 2 A. L. J. 222; A. W. N. (1905) 79.)

Even though a person may have obtained a decree from a Civil Court declaring his right to pass water along a drain through another person's land, this did not preclude the municipality from closing the drain if they thought it necessary to do so. Sec. 2 of the U. P. Act (corresponding to s. 2 of this Act) could not affect the powers given by sec. 91 (corresponding to this section). (*Chauli* v. *Municipal Board of Muzaffarnagar* 26 Ind Cas. 781.) *Abdul Aziz* v. *Chairman Municipal Board Pilibhit* A. W. N. (1905) 79; 2 A. L. J. 222 on all fours and followed.

109. The municipality may, by written notice, require that any such sewer, drain, privy, water-closet, house-gully or cesspool on any land within municipal limits, constructed, rebuilt or unstopped—

[1]Power in respect of sewers, &c., unauthorisedly constructed, rebuilt or unstopped.

(*a*) after such land became part of a municipal district, and

[4](*b*) either without the consent or contrary to the orders, directions or general regulations or by-laws of the municipality, or contrary to the provisions of any enactment in force at the time when it was so constructed, rebuilt or unstopped,

shall be demolished, amended or altered, as they may deem fit, by the person by whom it was so constructed, rebuilt or unstopped, and every person so constructing, rebuilding or unstopping any such sewer, drain, privy, water closet, house-gully or cesspool, whether he does or does not receive such notice, or does not comply therewith, [5]shall, in addition to any penalty to which he may be liable on account of such non-compliance, [6]be punished with fine which may extend to twenty-five rupees.

1 **Alteration, demolition &c. of sewers.**—This is taken from section 39, clause 2, of the old Act of 1873, but considerably altered and extended. Section 213, Madras Act,

prohibits construction of any drain, privy or cesspool without written permission. See sec. 112 also sec. 257, Bom. City Act.

Accused gave notice to the municipality under section 33 (VI of 1873) of his intention to build a house, and submitted a plan of the proposed building. The municipality replied that the site of the privy as shown was objectionable, and returned plan for amendment. Accused built a privy on the proposed site after a month had expired. *Held*, accused's action came within the words of the penal section 39 (2), as there was the construction of a privy, which was, as regards its site, contrary to the direction of the municipality. (*Queen Imp.* v. *Harkisandas Nautamdas*, Bom. H. C. Crim. R. 65 of 1895.) This would also be punishable under section 96 (5).

Construction of latrine not a continuous offence—requisition must be proved.—Accused constructed a latrine and privy in contravention of sec. 270 and 271 of the Bengal Act, and was convicted. *Held* that as section 353 of the Act requires that the prosecution should be instituted within 6 months after the commencement of the offence, and the offence was not a continuous one, it was barred as made after the period. A continuous offence would be one such as where a person throws or puts or permits his servant to throw or put sewage or offensive matter on any road. The construction of a latrine or privy could not be regarded as one. *Held* further that before a conviction can be had it must be proved to the Magistrate's satisfaction that the requisition on the accused, the disobedience of which he is charged, was actually made and served on him. Conviction squashed. (*Bidhu Bhusar Mallick* v. *Assensole Municipality*, (1901) 6 C. W. N. 167.) See notes page 270, and note 1 sec. 110.

N. B.—Under this sec. 109 proof of notice is however necessary only for a conviction for non-compliance with a notice; otherwise notice not necessary.

110. (1) Whoever, without the written consent of the municipality first obtained, makes or causes to be made any drain into or out from any of the sewers or drains vested in the municipality, shall be punished with fine which may extend to twenty-five rupees, and the municipality may, by written [2]notice, require such person to demolish, alter, remake, or otherwise deal with such drain as they may think fit.

[1] Encroachments on municipal drains.

[3](2) No building shall be newly erected or rebuilt over any sewer, drain, culvert or gutter vested in the municipality, without the written consent of the municipality, and the municipality may, by written [2]notice, require the person who may have erected or rebuilt such building to pull down or otherwise deal with the same as they may think fit.

1 **Origin of section.**—This is a reproduction of sec. 38 of the old Act of 1873.

Section 155, Panjab Act, extends also to "alters or causes to be altered," and makes the fine Rs. 50.

Section 211, Madras Act, extends to "stop up, divert, obstruct, or in any way interfere with such public drain, &c., whether it passes through public or private grounds."

Petitioner was convicted of the offence of having erected a culvert on pucca drains belonging to the municipality, and the prosecution was made 6 months after the date on which the commission of the offence was first brought to the notice of the chairman. *Held*, that, though the offence was continuous in its nature, the prosecution was barred under sec. 353, Bengal Act III of 1884 (corresponding to proviso to sec. 161 *post*), and that sec. 218 had no application. (*Luttisingh* v. *Behir Municipality*. 1 C. W. N. 492.)

Permission to create a drain did not affect the right of the municipality to order removal of a house built on land given to plaintiff under a void agreement. See 4 Ind. Cas. 55 noted page 108.

2 **Notice.**—See sections 112, 154 to 158.

3 **Building over sewers.**—The marginal note should be "Building over sewers, &c., when allowable"

Section 212, Madras Act, extends also to erections "upon any ground which has been covered, raised or levelled, wholly or in part by street sweepings or other rubbish."

The Bom. City Act, section 223 (1) says, "no building shall be newly erected and no street or railway constructed." If so done, the Commissioner may remove or otherwise deal with it, and the party pays all expenses. See also Panjab Act, sec. 124.

Newly erect or rebuild.—See explanation sec. 96.

Written consent.—This cannot refer to sewers, drains &c., on a *public street*, for such sewers, &c., are part of the street and no permission can be given by a municipality for what would certainly constitute an obistruction in a public street. The Act no where gives power to permit a permanent surface projection in a public street. Sec. 113 refers only to aerial projections. (See note to sec. 113.) Without such provision this sub-section cannot be construed as authorising a municipality to consent to any building over a sewer, &c., in a public street. See 122 (1) makes such a building penal. The grant of such permission would be an infringement of the duty imposed by sec. 54 (*i*) to maintain the street and of the trust declared in sec. 50 (2) (*f*). (G. R. 7119 of 22 Dec. 1905, G. D.)

Where such "sewer, gully, &c., is not in a public street but in some other "drain &c., vested in the municipality" this permission may be given, presumably when the building could not interfere with the use of the drain.

Fees chargeable for drains not in public streets.—Where such gutters, etc., are not in public street, there is no legal objection to the municipality requiring fees to be paid in any case where consent is given under section 110 (2). Such fees will not be imposed by virtue of the power conferred by section 70, but as a condition of the consent and under the general right of the municipality (like any other owner) to charge rent or any other money consideration for any license (as defined in section 52 of the Indian Easements Act, 1882), which consistently with the provisions of the Act they may grant to another in respect of property vested in them (*cf.* sections 50 to 52 of the Act). Rules authorizing such charges can, however, only be made as by-laws under section 48 (r) and (n) of the Act, and not under section 46. (i) (G. R. 3076 of 16-4-1908.)

111. (1) The municipality or any officer appointed by them for such purposes may, subject to the restrictions of this Act, inspect any sewer, drain, privy, water-closet, house-gully, or cesspool, and for that purpose, at any time between sunrise and sunset, may enter upon any lands or buildings with assistants and workmen, and cause the ground to be opened where he or they may think fit, doing as little damage as may be.

[1]Inspection of drains, &c.

(2) The expense of such inspection, and of causing the ground to be closed and made good as before, shall be borne by the municipality, unless the sewer, drain, privy, water-closet, house-gully or cesspool is found to be in bad order or condition, or was constructed in contravention of the provisions of any enactment, or of any by-laws of the municipality in force at the time, in which case such expenses shall be paid by the owner of such sewer, drain, privy, water-closet, house-gully or cesspool, and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under Chapter VIII.

Expense of inspection when to be borne by the municipality.

1 **Origin of section.**—Sub-sec. (1) is a re-enactment of the first part of sec. 40 of the old Act of 1873. It follows sec. 253—254 of the Bom. City Act; sec. 215, Madras Act, and sec. 106, Panjab Act.

Sub-section (2) is a re-draft in a better form of the rest of old section 4. It now removes any doubt as to the incidence of liability for expenses incurred in the inspection of private drains. This follows sections 255 and 256 of the Bom. City Act.

place &c. any projection overhanging any street without permission and (2) that the municipality may give notice for removal of the same and that compensation should be paid for structures lawfully existing at birth of municipality The owner of a house to which was attached a balcony overhanging a public road repaired the balcony, which had become dilapidated, and made it serviceable, but without obtaining the permission of the Municipal Board thereto. The Board thereupon issued notice to the house-owner under sec. 88 to remove the balcony, and, in default of compliance, prosecuted him.

Held that the board had power, under sec. 88, (2), to order the removal of the balcony without assigning any reason, and that it was not necessary for the Board, in the case of a notice issued under section 88, to tender or express its willingness to pay compensation in respect of the structure the demolition of which was ordered. If the owner had any claim for compensation he should put it before the municipality and if the Board wrongly refused to pay, he could recover it by suit, but he was bound to comply with the order and so was rightly convicted under sec. 147 for non-compliance. (*Emperor* v. *Nanna Mal*, I. L. R., 35 All. 375.)

Plaintiff's verandah overhung land which he claimed to be his, but which the municipality, alleging to be a public road, directed him to remove as being an encroachment under section 341 of the Calcutta Act. Plaintiff then brought a suit for an injunction against the municipality ; the lower Court held that the verandah was not a fixture under section 341 nor was it an encroachment or obstruction or projection on a public road under the section and granted the injunction. On appeal, held that the municipality was entitled to remove it as it *overhung a public road*, but plaintiff would be entitled to a decree in a S. C. Court for the value of it when removed as the verandah had been in existence as part of the original building for more than 60 years and did no one any harm. On 2nd appeal held that it was not a *fixture* attached to a building within the meaning of section 341 and so the injunction was granted without any expression of opinion on the other points. (*Barada Parsad Roy* v. *Corporation of Calcutta*, 14 C. L. J. 611; 15 C. W. N. 730; 1911, 10 Ind. Cas. 310.) See note 11 *infra*.

9 **Written notice.**—Non-compliance is punishable under sec. 155 and under sec. 154 (6) the municipality may do the removal and charge expenses. If occupier complies he may recover expenses from owner unless he himself made the projection &c. sec. 157.

Under the Bengal Act, sec. 204, if notice not complied with within 8 days, the Magistrate may, on the application of the municipality, order the removal, and the expenses so incurred by the municipality are to be paid by the defaulting owner or occupier.

10 **Projection, &c., from building over or into public street.**—*Safe and convenient passage along such street.*—"The eaves of certain buildings belonging to the plaintiff projected over the public road. The Municipal Commissioner gave notice to the plaintiff requiring him within thirty days to remove the said eaves as being "a projection, encroachment or obstruction," within the meaning of section 195 of Acts III of 1872 and IV of 1878. The plaintiff thereupon filed this suit, praying for injunction against the Municipal Commissioner. The eaves in question projected to the extent of one foot eight inches. The width of the road in front of the buildings was about forty feet, and the length of the eaves varied from seven feet to nine feet two inches above the road-way. At the time this suit was filed there was an open drain or gutter, one foot three inches wide, running along by the side of the plaintiff's buildings and between them and the road. The gutter, however, subsequently to filing of this suit, but before the hearing, was covered over and so much additional width was thereby added to the road.

"*Held* that the eaves constituted an obstruction within the meaning of the above section, and that the Municipal Commissioner was entitled to remove them.

"Under the above section, the question to be decided, is not whether there is a real practical inconvenience to the public traffic in the street. Those are not the words used in the section, and if that was the intention of the Legislature, it would have been expressed. The words, in their plain and obvious meaning, import "passage along the whole of the street."

In the case of *Bagshaw* v. *Burton Local Board of Health*, a question was raised upon precisely similar words in an English Statute. In that case, the defendants objected to a small enclosed garden in front of the plaintiff's house in which plants and shrubs were growing as "an obstruction to the safe and convenient passage" along the street. The plaintiff sued to restrain the defendants from removing the alleged obstruction or interfering with the plaintiff's enjoyment of his garden. The street was thirty-six feet wide. Jessel. M. R. said: "I have no doubt that the wall and shrubs have obstructed, and that they are obstructions: so that the only question remaining is whether they are obstructions to the safe and convenient passage along any street. The words 'along a street' mean 'along the whole of the street'; and if you take and enclose a portion of the street itself, how can it be said that that is not an obstruction to the safe and convenient passage along the street? It appears to me that I should be cutting down this Act of Parliament and making it almost meaningless if I so held, and

entitled to remove the pial as an encroachment or obstruction under section 168 of the Madras Act. The right of the municipality to remove an obstruction does not depend on its title or right to the possession of it, as is clear from sec. 168 (3) which entitles a person lawfully erecting an obstruction to reasonable compensation for the removal. The prayer of the plaintiff for an injunction against the Municipal Council could not therefore be granted, nor could the prayer for declaration of title be granted, as it was only incidental to the substantial relief asked for, namely, an injunction which was refused. *Sundaram Ayyar* v. *The Municipal Council of Madura* (1902) I. L. R. 25 Mad. 635; *Rolls* v. *Vestry of St. George the Martyr, Southwark* (1880) 14 Ch. D., 785 at pp. 795 and 796; *Municipal Council of Sydney* v. *Young* (1898) A. C., 457 and *Midland Railway* v. *Wright* (1901) I Ch., 738, referred to. Also (1896) I. L. R. 19 Mad. 154, App. 156. (*Basaweswaraswami* v. *The Bellary Municipal Council* (1915) I. L. R., 38 Mad. 6; 23 M. L. J. 478.)

Per contra.—Plaintiff had a mud *koradu* (pavement) in front of his house admitedly constructed on land which had been part of a public street. He applied to the municipality for permission to renew it by erecting a stone *pial* and *koradu*, but the municipality refused, and gave him notice under sec. 168 to remove the same. *Held*, that adverse possession by a person for twelve years before the Limitation Amendment Act of 1900 came into force, of some portion of a street vested in a municipality is sufficient to give the person a clear title as against the municipality. Under sec. 168 of the Madras Act the Municipal Council is not entitled to remove the projections and encroachments made by a person who has acquired full title to them and to the site on which the encroachments stand by adverse possession for the statutory period. I. L. R., 38 Mad., 6; S. C., 23 M. L. J., 478, distinguished. There Government was a party to the suit and the title was not lost. Further, the adverse title established did not relate to the whole cubic space of the street but to a space over a drain space which still continued vested in the municipality. An erection which has become lawful by adverse possession might still be an obstruction or encroachment so far as the drain space beneath it is concerned. But where the whole cubic space forming a portion of a street has been acquired by adverse possession, it ceases to be a street and so no longer an encroachment or obstruction. To the argument that the acquisition of title by adverse possession has nothing to do with the municipality's power to remove encroachments because clause (3) provides for compensation, the answer is that that clause relates only to encroachments lawfully made (evidently by license) and not to unlawful encroachments which have became indefeasible by adverse possession, (*The Chairman, Municipal Council, Srirangam*, v. *Subba Pandithar*, (1915) I. L. R., 38 Mad. 456; 25 M. L. J. 297.)

Note.—It is submitted that this ruling of which Sadasiya J. said he had "serious doubts" is not good law. The Courts in the Bombay Presidency would in any case be bound by I. L. R. 38 Bom. 15, *supra*, which is supported by 3 Ind. Cas. 516 and I. L. R. 38 Mad. 6, *supra*.

Public street losing it character as such by adverse possession, removal not legal.—There was a lane at the back of plaintiff's house which was originally a public street. In 1881, he applied to the municipality for permission to enclose it by building 2 walls. This was granted. In 1902 the municipality directed him to remove the walls and other constructions made in the lane under sec. 88 of the Agra and Oudh Municipal Act (I of 1900) which corresponds to this section 113 (3). Plaintiff brought a suit to restrain the removal by the municipality. *Held* that as plaintiff had alone used the road for 25 years at least and had enclosed it with permission, it was no longer a public road and that therefore the removal was not justified. The fact that the Board might be able to establish their right to the land did not effect the question. (*Alopi Din* v. *Municipal Board of Allahabad*, (1907) L. A. L. J. 8; A. W. N. (1907) 2.)

Encroachment lawfully made is removeable, proper suit not for an injunction, but for compensation.—Section 168 (1) of the Madras Act provides for the removal of "any projection, encroachment or obstruction made against or in front of any building or land in any public street." *Held*, that "in any public street" refer to building or land and not to a "projection." So also in section 169 "public street" did not refer to the verandah, balcony, &c., but to "building or land." The pandal in question being a projection in front of a building which is on a public street, it was removeable under section 168. The section provides for compensation for encroachment, &c., "lawfully made." This means whether before or after the birth of the municipality. *Held* further that if the encroachment was lawfully made plaintiff's remedy if compensation not paid was a suit for its recovery and no suit for injunction would lie. (*Mothe A. Guru* v. *Municipal Council, Ellore*, (1909) 23 M. L. J. 757; 7 M. L. T. 66; (1909) 4 Ind. Cas. 828.) But see I. L. R. 31 Mad. 181 end of note 2 *Supra*.

Held following the above ruling, that there can be no easement which overrides the provisions of sec. 168. (*Latchmi Narayana* v. *Municipal Council, Trichinopoly*, (1910) 5 Ind. Cas. 916.)

Order for demolition of structure overhanging a public road—Offer of compensation not a condition precedent to order.—Sec. 88 (1) of the U. P. Act provides that no one shall add or

a street, by written notice require the owner to remove it, and section 122 empowered the municipality to remove the encroachment if it had been put up after the place had become a Municipal District.

In the present case the municipality having failed to prove either of these points to justify their action the decree was confirmed. (*Dakore Town Municipality* v. *Travedi Anupram* (1913) 38 Bom. 15; 15 Bom. L. R. 833.)

Projecting platform removeable even if lawfully made,—Civil Court declined to interfere.—Plaintiff was the owner of a shop in front of which ran a drain separating it from the road. In 1894 with the permission of the municipality, he erected masonry supports on the street side of the drain and covered over the drain with loose planks. In 1905 the municipality cancelled the permission and required the removal of the platform. There was no compliance with this order. In 1906 the municipality granted plaintiff permission to place a corrugated iron shelter above the drain and supported from the wall, the loose planks on the drain being removeable whenever necessary to clean the drain. In January 1907 the municipality issued a notice under sec. 88 (2) of Act I of 1900 to plaintiff to remove the structures and the planks; defendants objections were disallowed; in February a notice was issued under sec. 148 and on the same day the municipality removed the structures and planks. Plaintiff then gave the municipality notice and brought a suit for an order on the municipality to restrain the removal or that he might be allowed to do so, the municipality paying him Rs. 50 for his expenses.

Held that the Board having acted within its statutory powers the Civil Court was not competant to interfere. The Act itself supplies the machinery whereby parties may appeal and sec. 152 provides that no notice or order can be questioned otherwise than by such appeal. Sec. 88 provides "it shall not be lawful, without the written permission of the Board, to add to, or place against or in front of any building any projection or structure overhanging, projecting into or encroaching on any street or into, on or over any drain sewer or aqueduct therein" and clause 2 provides that the Board may, by notice, require the owner or occupier of any building to remove or alter any such projection or structure." *Held* that this is not limited to any projection &c. which has been unlawfully made without permission. The word "such" has the same meaning as in clause 2 proviso as to compensation being payable. A. W. N (1907) 2; 4 A. L. J. 8 did not apply as there the action of the Board was held to be *ultra vires*. (*Chairman, Municipal Board, Bahraich* v. *Parbhu*, 12 Oudh Cases 191; (1909) 3 Ind. Cas. 516.)

Obstruction over drain in street—suit for injunction to restrant removal by municipality—no title as against Government until 60 years adverse possession—municipal right to remove not affected by title to the land.—Plaintiff the owner of a house situated in a public street brought a suit for a declaration of his right to a pial over a drain in the street and for restraining the municipality from removing the same. It was proved that the land originally belonged to Government who had dedicated it to the public as a street, that the pial was constructed about 1883, that prior thereto there were loose slabs of stones over the drain used by plaintiff for vending various articles but that the municipality used to remove these slabs when necessary for the purpose of repairing, &c. the drain. Plaintiff claimed that the site of the pial belonged to him and had been enjoyed by him for more than 60 years and so the municipality could not remove it as an obstruction or encroachment in a street. The municipality denied the right and Government (made a party to the suit) set up its ownership to the site. *Held*, that plaintiff's possession was effective only when the pial was constructed.

A person can acquire a title to the site of a pial over a drain in a street vested in a municipality by adverse possession against the municipality for the prescriptive period, which was 12 years before Article 146-A of the Indian Limitation Act (XV of 1877) was passed in 1900 under Act XI of 1900. The right of a Municipal Council to the street and the drains is not a mere right of easement, but is a special right of property in the site previously unknown to law, but created by statute. Although it is not open to the municipality to give up the rights of the public by any act of their own, that would not affect the capacity of a person in adverse possession to acquire rights which would affect the public. The question whether possession has been adverse or not does not depend upon the needs or requirements of the owner but on the character of the occupation of the person in possession. Fugitive or unimportant acts of possession would not be sufficiently effective to make the possession adverse. Even if the Municipal Council had no right to the possession of the space above the drain but only a right of user for the discharge of its functions with respect to the drains, still the plaintiff as the person in possession of the pial would have a right to it against all but the true owner which was the Government in this case, but as against the Government the plaintiff had not established a title as he had not been in adverse possession for sixty years. Although the plaintiff had acquired a title to the site of the pial by adverse possession as against the Municipal Council, the right of the latter to the drain under the pial had not been affected, and the Council was

When ownership of streets does not vest in municipality. Order for removal in respect of encroachment, &c., acquired by adverse possession.—Plaintiff had a pial, that is, a projection from the main wall of his house over the municipal drain and partly over the road or highway adjoining the drain, and this projection rested upon masonry pillars standing on the road. The municipality gave notice for removal under section 168 of the Madras Act, upon which plaintiff filed a suit to restrain the removal. The lower Court found that the pial had been in existence for 30 years at least, that it did not interfere with the cleaning of the drain, that it projected a little into the street and beyond the drain, and that plaintiff having acquired a right to the land by adverse possession, he was entitled to the injunction.

Held, on appeal, that if the street or highway over the land was dedicated to the public either by the State or by the owners of the land adjoining the highway or by any other person, the ownership in the soil of the street or highway will continue vested, subject only to the burden of the highway, in the State or the respective owners of the land on either side of the highway, *ad medium filum*, or in any other person who may have dedicated the street to the public, as the case may be.

When a street is vested in a municipality, such vesting does not transfer to the municipality the rights of the owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth *usque ad cœlum*, but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street. It has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers.

The operation of sec. 28 of the Limitation Act upon Article 146-A (*vide* note 1 sec. 122) will be to extinguish the right of highway on the expiration of 30 years from the date of dispossession of the municipality by encroachment, and thus free the land from the burden of the highway, if the person encroaching upon the highway be the owner of the land. If the owner of the land on which the highway exists, be a third party, an encroachment of a permanent character on the public highway will also, as a general rule, operate as occupation of the soil and dispossession of the owner of the soil equally with the municipality, and his ownership will be extinguished in favor of the trespasser at the expiration of the ordinary period of limitation, *viz*, 12 years, and at the expiration of 30 years the ownership thus acquired by the wrongdoer will be freed from the burden of the highway. But if the highway has been dedicated to the public by the Crown, the right of the Crown as owner of the land can be extinguished only at the expiration of 60 years' adverse possession or occupation by the trespasser. The curious result, therefore, of the new Article will be that, in cases in which the site of the street belongs to the Crown, on the expiration of 30 years from the date of dispossession of the municipality, the Crown will have the land freed from the burden of the highway and will be entitled to remove the obstruction or encroachment and after removing the same, it may again dedicate, as a highway, the portion of land thus freed from the burden. But if it suffers the obstruction to continue for a further period of 30 years, the trespasser would become the absolute owner of the land.

Benson J. while concurring in this view of the law as to vesting of streets in a municipality and also as to the application of the law of limitation says "but having regard to the limited and special nature of the right over the soil vested in the municipality, it is difficult to see how the erection of the pial could amount to a dispossession of the municipality in respect to this right so as to enable the plaintiff to acquire the rights of a full owner over the site occupied by the pial." He also adds "I reserve for consideration the question whether the remedy by injunction is the one that ought in any case to be granted in a case like the present where the removal of the pial is alleged to be necessary on sanitary grounds." *N. B.*—The suit was referred for further evidence and eventually plaintiff dropped it. I. L. R. 13 Cal. 171, 20 Cal. 732 and 7 All. 362 referred to. I. L. R. 19 Mad 154 commented on (*vide* note 1 s. 122). (*S. Sundaram Ayyar* v. *Municipal Council Madura and Sec. of State*, I. L. R. (1901) 25 Mad. 635.)

N. B.—The flaw in this ruling is that whatever rights plaintiff may have acquired in the land, did not deprive the municipality of the right to remove the encroachment, they merely gave him a claim to compensation. This is made clear in the next rulings. See also note 2, p 150 and note 1 s. 122 as to power of Government to resume the land.

Encroachment removeable even if by adverse possession land became property of the encroacher.—In a suit brought against a municipality to restrain them from obstructing the plaintiff in re-instating a stone which was imbedded in his *otla* in its original position, the lower appellate Court found that the stone had been *in situ* for twelve years, therefore the municipality had no right to interfere with it as there had been adverse possession for the statutory period of the portion of the street occupied by the stone. On second appeal by the municipality. *Held*, that the municipality was the creature of the Statute with duties *inter alia* to preserve the passage along public streets. It mattered not for the municipality whether the encroachment had been in existence for 12 years or more. Under section 113 the municipality might, on proof that the encroachment objected to was an obstruction to the safe and convenient passage along

tions will be allowed. It does not dispense with the necessity for applying for permission in each case.

Shop-boards.—This was inserted here by sec. 8 of Bom. Act IV of 1904.

For rules sanctioned by Govt. for fees for permission to put up shop boards see G. R. 719 of 26 January 1915 note 20 sec. 46.

6 **Penalty for unauthorised aerial projections.**—The marginal note to this sub-sec. (2) should be as this head note.

An otta is not a mere projection, but a "building," and cannot be dealt with under this section. (See note 2 to sec. 92.)

"*Owner or occupier.*"—Under the old Act this was "any person." See note 3 *supra.*

"*In contravention of such orders.*"—Even if the municipality has not passed by-laws as to this matter, permission has to be obtained in each case and such permission states the special conditions to be carried out. Any structure not made in accordance with these orders will be "in contravention," &c. Such projections can also be dealt with under sec. 122.

7 **Failure to remove after conviction.**—See note 3 page 270.

8 **Removal of projections.**—Sub-section (3) is taken from section 42, clause 1 of the old Act, with the exception that whereas under that section notice was required only in the case of projections before the Act came into force, and compensation given for such old projections lawfully made, (Cf. *the Ahmedabad Municipality* v. *Manilal*, I. L. R. 19 Bom. 212), now notice is required in *all* cases, and compensation is to be given not only in all cases of projections, &c., before the land became a municipal district, but also for projections, &c., set up after that date, with the written permission of the municipality. See the corresponding sections 308 and 309, Bombay City Act, and section 95, Panjab Act.

See section 54 (*f*) which makes it the duty of a municipality to make reasonable provision for this purpose. See also section 122, as to punishment for, and removal of projections and encroachments.

This follows Bengal Act, section 204, which relates only to projections, &c., before the coming into force of the Act, and order for removal to be made by Magistrate on application of municipality.

Municipal duty in relation to encroachments &c.—Though this sub-section uses the word 'may,' there is no doubt that the Civil Courts will hold that in respect of projections &c. which are unauthorised, the municipality as trustees of the public in respect of public streets and high roads, are bound to take proceedings for their removal, and in the event of their neglecting to do so, (besides Government action under Chapter XII), any rate payer may bring a suit against the municipality to insist upon the performance of this obligatory duty. It is only in respect of projections &c., for which compensation would be payable that the obligation of a municipality is limited to the extent of making "reasonable provision" for their removal, and to this extent the Civil Courts could insist upon action being taken.

Civil Courts cannot question municipal discretion.—If the municipality decides to take action the Civil Courts cannot question its discretion in the matter so long as the municipality acts in accordance with the provisions of the Act.

So too in prosecutions for recovery of the penalty provided for disobedience or non-compliance with the municipal orders, the Magistrate is bound by the same principles. See note 1 to sec. 122 and notes 4 and 6 sec. 131.

Onus of proof of encroachment.—In front of plaintiff's house were 3 pials which projected beyond the main walls and abutted on a public street. The municipality under sec. 139 of Madras Act III of 1871 considered one of them "an obstruction or encroachment in a public street," and after notice caused it to be removed. It was proved that the pial existed for 50 years:—*Held*, that in the circumstance the *onus* lay upon the municipality to prove that the land, upon which the projections had been built, found part of the road, and that they were not constituent parts of the house. In the absence of such proof the action of the municipality in the removal of the projections was illegal. (*Hanumayya* v. *Roupell* (1884), I. L. R. 8 Madras 64.)

Where plaintiff had been in enjoyment of the plots of land for 9 and 4 years and gave notice to the municipality before building on them, and the latter then took no objection, the onus is on the municipality to prove that plaintiff has encroached.

The onus cannot be said to be discharged by proof that plaintiff's house and verandah are a foot or so in advance of the neighbouring house where there is no line of frontage (now called 'regular line of street') to which all builders of houses should conform. (*Tippabholla L. Narasamia* v. *Municipal Council, Masulipatam*, 1 M. L. N. 430: 8 M. L. T. 290; 1910, 7 Ind. Cas. 808.)

plinths steps" as well as "shop-boards" but this was negatived on the ground that this would permit of permanent encroachments on public streets.

As to surface projections over gutters, &c., *not* in public streets, see note 3, sec. 110.

Under section 48 (1) (*n*) the municipality are to make by-laws regulating the conditions on which permission may be given for projections over public streets; and 70 provides that fees may be charged for such permissions.

Permission necessary for roofs, eaves, &c.—On the question whether the provision in the earlier part of this sub-section that the municipality may give written permission in the case of one class of aerial projections *viz.* verandahs, balcanies, &c., implies that such permission is not required in the case of the projections referred to in the latter part of the sub-section *viz.* roofs, eaves, &c., the Legal Remembrancer says :—

"On the one hand express and unambiguous wording is necessary to impose a charge. On the other hand it is a recognized rule of construction that ordinary words must be used in their ordinary sense. The word "conditions" in its ordinary meaning would include such a condition as that permission must be obtained before the construction of the projections referred to. It is further a cardinal rule of construction that the meaning of an enactment must be gathered from the context and the other provisions of the Act. Section 48 (1) (*n*) gives power to frame by-laws regulating the conditions on which permission may be given for projections over public streets without specifying any particular kind of projections. There is nothing in the Act to show any intention to restrict the powers of the municipality in regulating the construction of projections. On the contrary, the Act enforces the duty of the municipality to preserve public streets from encroachment with great strictness. And the meaning of the difference in the expressions used in sub-section (1) in regard to the two kinds of projections appears to be that the municipality must require that their permission is obtained in the one case, while in the other case it is obligatory only to impose conditions and discretional whether those conditions include the requirement of permission or not.

"Although the point is not free from doubt, in my opinion the municipality may require that their permission shall be obtained for *all* projections under section 113 (1) and may under section 70 (1) charge fees for the permission."

Roofing of a projection in a public street which was not private land, license necessary.—Section 169 Madras Act provides that any person intending to put up any verandah "to project over the pyals and pavements in front of any building or land in a public street or over such street" shall apply for a license. This license is not required in the case of verandahs &c. *within* the limits of *adjacent* property even though in a public street. The section draws a difference between projections over pyals and pavements in front of any building or land in a public street and projections over the street itself. I. L. R. 15 Mad., 292 noted p. 278 referred to. The koradu in question which was roofed was found to be 'in a public street' and not private property. Conviction for not obtaining a license confirmed. (*Narasinma Chari v. Chairman Municipal Council Conjeeveram.* I. L. R. (1908) 31 Mad. 181.) But see 4 Ind. Cas. 828 end of note 8 *infra.*

A public street as defined in section 3 (27) of the Madras Act, extends only up to the boundaries of the adjacent property.

3 **"Owners or occupiers."**—See notes 4 and 5, sec. 63.

The Bom. City Act, sec. 308 (3), provides that if the occupier does anything in compliance with the notice, he shall be entitled to credit same in account with the owner, unless the projection, &c., has been put up by himself.

4 **Height of aerial projection.**—This provision as to height was not in the old Act. A proposal to limit the height to 12 feet was rejected as it was deemed desirable to leave the height to be fixed according to the circumstances of each municipality, Govt. always have the right to sanction or not the height proposed in the by-laws to be made under sec. 48 (1) (*n*).

Sec. 313 (1), Bom. City Act, provides that no person shall, except with permission, "(*b*) project, at a height of less than 12 feet from surface of the street, any board or shelf, beyond line of plinth of any building, over any street, open drain, &c." and "(*c*) attach to, or suspend from, any wall or part of building abutting on a street, at less height than aforesaid, any thing whatever."

5 **Conditions as to roofs eaves &c.**—This last sentence was not in the older Acts. See sec. 311, Bom. City Act, as to ground floor doors, &c., not to open outwards on streets. Madras Act, sec 167, also prohibits making any door, &c. to open outward on any public street. See note 7 page 277.

This prescription to be made by by-laws under sec. 48 (1) (*n*). The object of this is to secure uniformity in such matters, and to let the public know what kinds of such projec-

Removal of projections.

[8](3) The municipality may, by [9]written notice, require the [3]owner or occupier of any building to remove or alter any projection, encroachment or obstruction which, whether erected before or after the site of such building became part of a municipal district, shall have been erected or placed against or in front of such building, and which

[10](*a*) overhangs or juts into, or in any way projects or encroaches upon, any public street, so as to be an obstruction to safe and convenient passage along such street, or which

[11](*b*) projects and encroaches into or upon any uncovered aqueduct, drain or sewer in such street, so as to obstruct or interfere with such aqueduct, drain or sewer, or the proper working thereof:

[12]Provided always that the municipality shall, if such projection, encroachment or obstruction shall have been made in any place before the date on which such place became part of a municipal district, or after such date with the written permission of the municipality, make reasonable compensation to every person who suffers damage by such removal or alteration; and if any dispute shall arise touching the amount of such compensation, the same shall be ascertained and determined in the manner provided in section 160.

1 **Projections in public streets.**—This section is a reproduction of section 42 of the old Act VI of 1873, very slightly altered. Sub-sec. (1) is the former part of and sub-sec. (2) the latter part of clause 3.

The provisions of sec. 96 apply to these projections. See also sec. 122.

This section applies only to projections over public streets:—(*a*) Sub-sec. (1) (2) to new aerial projections for all which permission may be granted; (*b*) Sub-sec. (3) to new as well as old aerial and surface projections, encroachments, &c., all which may be removed.

See the corresponding sec. 310 of the Bom. City Act which applies to "any streets" and which also provides for arcades. Also Madras Act, sec. 169 for licenses to be taken out for such projections, and sec. 165 for removal of unauthorised projections, &c.

"*Projection.*"—A projection of a building must be taken to be part of the building itself. "A projection from a building means a part of the building projecting or jutting out; it means a prominence extending from the building in the sense of coming out from the building as part of the building." Per Bruce J. in *Hull and London County Council* 1901, I. K. B., p. 588.

Madras Act, sec. 166 (iii), requires that the owners and occupiers of all buildings or premises adjoining a public thoroughfare should keep the external walls in proper repair.

2 **Written permission.**—This section refers to projections *over public streets* in which term is included the drains, sewers, &c., in such streets. It does not affect the right to put up *projections over private land* even though adjacent to or bordering on a public street, provided that the provisions of section 96 are complied with. On this point see note 1 to that section, page 275.

This refers to *aerial* not *surface* projections, so no permission can be given for surface projections over a public street or over the sewers, gullies, &c., which are all part of a public street. See opinions quoted G. R. 4364 of 24 July 1906 and 1080 of 15 Feb. 1907, noted pages 144—145.

A proposal was made in 1903 that this section should be amended so as to include among the things for which permission may be given such surface projections as "platforms,