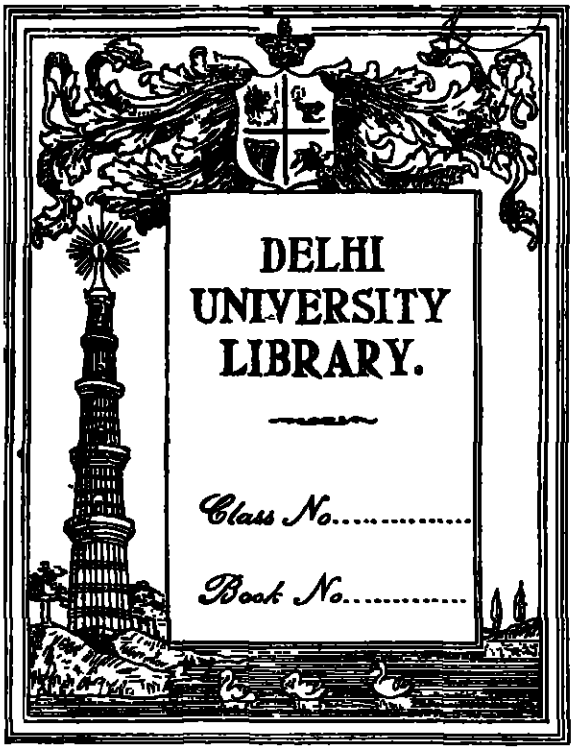
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THE BOMBAY MUNICIPAL BOROUGHS ACT, 1925

WITH

AMENDMENTS, EXPLANATORY NOTES, GOVERNMENT RESOLUTIONS AND CASE-LAW UPTO JUNE 1945

BY

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PREFACE

The Bombay Municipal Boroughs Act was first enacted in 1925 and thereafter has been subjected to frequent and piecemeal amending legislation. The result is that some of its provisions are rendered inconsistent or ambiguous, and doubts have arisen as to the exact meaning of some other. Doubts exist as to the scope of such an important provision as an election inquiry under S. 15 and recently Macklin, J in Hafzurraheman v. Hasansaheb, 46 B L R 371, has found it impossible to reconcile the provisions of sub-section (5) of section 15 with the other provisions of the said section and has consequently declared the said sub-section as otiose. The Act is silent as to the exact scope of the jurisdiction of civil courts in regard to matters dealt with in the Act and the powers of revision by the High Court with the result that these have been the subject of many decisions, some even conflicting. Careful study of these and other decisions bring to light many glaring omissions and defects.

Though all these technical defects can be removed by placing on the statute book a well-drafted and thoroughly revised new Act incorporating all amendments, the main fault in the Act lies in its scheme The administration of municipalities in the province with the exception of a few in large towns like Ahmedabad has proved a failure as evidenced by yearly reports on the administration of the said municipalities What is more there do not appear to be any chances of improvement The reason is that there is something fundamentally wrong in the very constitution of the municipalities. If our towns and cities are to be improved and brought on level with modern towns and cities elsewhere, every municipal borough must have a more enlightened and competent board, than at present available, to manage its affairs Experience of the working of the Act during all these years has shown that everywhere there has been a steady and progressing deterioration in the quality and competency of the men in whose hands the affairs of the borough are placed The squalor and shabbiness of a town, its failure to provide necessities like dustless roads, drainage and waterworks, and numerous instances of waste and maladministration provide ample proof of this deterioration for all to see with a naked eye. Though it may hurt our pride, the remedy lies in restricted franchise or providing suitable qualifications for sitting on the board of a municipality If a municipality is to serve as a model to its inhabitants and to play its part in improving their standard of living, it must be an efficient and well-managed body. It should be more like an efficient business house than an arena for political, communal or personal squabbles From this point of view, the scheme of communal electorates requires to be abandoned.

The authors in their own experience have felt the need of a book like the present giving at once and at hand all the information required All the reported cases of the Bombay High Court on the subject including useful cases of similar other Acts namely, the Bombay District Municipal Act, 1901, the Bombay Local Boards Act, 1923 and the City of Bombay Municipal Act, 1888, have been incorporated in the book. A comparative table showing the provisions of this Act in juxtaposition with similar provisions of other similar Acts of the province is given to facilitate a comparative study where necessary A case index and a subject index have also been provided for ready reference The authors have tried to reconcile the various provisions of the Act with one another and with the scheme of the Act. They have also tried to clarify ambiguities, inconsistencies and doubts in interpretation and have not hesitated to express their own opinion where necessary. Important subjects like election, building permissions and suits by or against a municipality, have been dealt with at length and important cases from all over India have been noted on the subjects of election and election petitions.

The book was delayed in the press and in order to bring the case-law up-to-date, a supplement of case-law from January 1944 to June 1945 is printed in the book

The book is intended to be of equal use to the lawyers as well as administrators. Especially for the use of the latter all the important Government Resolutions and opinions of the Legal Remembrancer have been included in the book and an index of Government Resolutions is also printed for ready reference. It is possible that some of the Government and municipal offices making use of the book may not have a law library at their command and hence specially for their benefit important portions from the reported cases of the Bombay High Court have been printed in extenso It is hoped that this will obviate the necessity of frequent resort to law libraries and enhance the usefulness of this book.

For the special use of the province of Sind, a Sind Supplement has been included showing the affected provisions of the Act as they stand after their amendment by the Government of Sind All the cases reported from the Court of the Judicial Commissioner of Sind since 1914 have been included

The authors believe that a book like the present volume conduces towards better knowledge of the provisions of the Act and consequent better and efficient administration and they will consider themselves fully rewarded for their labours if this end is achieved and the book is found useful by those for whom it is written.

BROACH
Dated, 14th July, 1945.

J C GANDHI,
B. A. PATEL.

ABBREVIATIONS

A. C	Appeal cases
A G	Advocate General
App Cas	Appeal cases
A I R	All India Reporter
All	Allahabad.
Art	Article
B. C. M. Act.	Bombay City Municipalities Act.
B. D M. Act	Bombay District Municipal Act
B L B Act	Bombay Local Boards Act
B. L R	Bombay Law Reporter
B M B Act	Bombay Municipal Boroughs Act.
Bom	Bombay
Cal	Calcutta.
C B M Act	City of Bombay Municipal Act.
Ch.	Chancery Division.
cl.	Clause
Ch D	Chancery Division
C P C	Civil Procedure Code.
C P D	Common Pleas Division
Cr. P. C.	Criminal Procedure Code.
Exch. D.	Exchequer Division
F. B.	Full Bench
F. C.	*Federal Court of India*
G C G D	Government Circular, General Department.
G. I A.	Government of India Act
G M. G D	Government Memorandum, General Department.
G N. G D	Government Notification, General Department
G O G. D	Government Order, General Department
G R G D	*Government Resolution, General Department*
G O. R. D	Government Order. Revenue Department
H L.	House of Lords.
I. A.	Indian Appeals
Ibid.	Same as above
I. C.	Indian Cases.
I. L. A.	Indian Limitation Act.
I. L. R.	Indian Law Reporter
I P C.	Indian Penal Code
K B.	King's Bench
L. A.	Local Authority
Lah.	*Lahore*
L. J Ch.	Law Journal Chancery.
L. J. C P	Law Journal Common Pleas.
L. J Ex.	Law Journal Exchequer
L. J Q. B.	Law Journal Queen's Bench.
L R. ch	Law Reports Chancery.
L. R. Ex.	Law Reports Exchequer
L. R. H. L.	Law Reports House of Lords.
L. R. I. A.	Law Reports Indian Appeals.

L. R. Q. B.	Law Reports Queens' Bench.
L. T.	Law Times.
L. T. N. S.	Law Times New Series.
Mad.	Madras
Nag.	Nagpur
O.	Order.
P. C.	Privy Council
P. J.	Printed Judgments
Pat	Patna.
Q. B.	Queen's Bench.
Q. B. D	Queen's Bench Division.
r.	Rule
R. L. A.	Remembrancer of Legal Affairs
s	Section
Sch	Schedule
Sub-cl	Sub-clause
Sub-s	Sub-section.
T. L. R.	The Times Law Reports.
Unrep. Cr. C	Unreported Criminal Cases of the High Court of Bombay.

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SCHEDULE I—VII

Bombay Act No. XVIII of 1925

(THE BOMBAY MUNICIPAL BOROUGHS ACT, 1925)

(8th June, 1926)

Amended by Bom. Act. 10 of 1926
" " " " 1 of 1927
" " " " 12 of 1927.
" " " " 3 of 1930
" " " " 4 of 1930
" " " " 9 of 1930.
" " " " 25 of 1930.
" " " " 12 of 1931
" " " " 23 of 1931.
" " " " 7 of 1932
" " " " 15 of 1932.
" " " " 17 of 1933
" " " " 14 of 1934.
" " " " 19 of 1935.
" " " " 14 of 1936
" " " " 15 of 1936
" " " " 24 of 1936
" " " " 9 of 1938
" " " " 8 of 1939
" " " " 19 of 1942

Adapted and modified by the Adaptation of Indian Laws Order in Council

An Act to give wider powers in the management of municipal affairs in certain cities

WHEREAS it is expedient to amend the law relating to the management of municipal affairs in certain cities of the Bombay Presidency,

And Whereas the previous sanction of the Governor General required by section 80A of the Government of India Act has been obtained for the passing of this Act, It is hereby enacted as follows —

CHAPTER I.

Preliminary.

rt title and nt

1 (1) This Act may be called the Bombay Municipal Boroughs Act, 1925

(2) It extends to the whole of the Bombay Presidency.

Short History and Title—This Act was originally enacted as the Bombay City Municipalities Act, (Bombay Act 18 of 1925) This title caused confusion for though City Municipalities included in Schedule I were governed by this Act, others were governed by the Bombay District Municipal Act, 1901 (Bom Act, 3 of 1901) The Act did not apply automatically to all city municipalities but applied to only those municipalities which were placed in Schedule I by the Provincial Government in exercise of their powers under section 4 of the Act The present title was substituted by Bombay Act 4 of 1930, section 4

Before the enactment of the Bombay City Municipalities Act, 1925 and its application to several city municipalities, all the city municipalities in the Presidency except the Municipal corporation of the city of Bombay were governed by the Bombay District Municipal Act, 1901 This act was found to be inadequate and unsuitable for requirements of municipal administration in larger cities The Bombay City Municipalities Act, 1925 was enacted to meet these requirements The scheme of the Act is that while all large questions of policy are left to be determined by the Municipality, a standing committee is provided to dispose of questions of lesser interest The executive power is to be exercised by the permanent staff and is vested in the Chief Officer who can only be removed by an adverse vote of 2/3 of the whole body of councillors There is also an important change in the basis of franchise In other respects the Act proceeds substantially on the lines of the Bombay District Municipal Act, 1901

Objects and reasons—For statement of objects and reasons, see Bombay Government Gazette, 1925 Part V, pages 187-195, for report of the select committee, see ibid pages 335-342 and for proceedings in council, see council debates, 1925, Vols 15 and 16

Amendments—The Act has been amended by Bom Act 10 of 1926, 1 of 1927, 12 of 1927, 3 of 1930, 4 of 1930, 9 of 1930, 25 of 1930, 12 of 1931, 23 of 1931, 7 of 1932, 15 of 1932, 17 of 1933, 14 of 1934, 19 of 1935, 14 of 1936, 15 of 1936, 24 of 1936, 9 of 1938, 8 of 1939 and 19 of 1942 and is adapted and modified by the Adaptation of Indian Laws Order in Council The words 'Municipal Boroughs' were substituted in place of 'City Municipalities' in this section by Bom Act 4 of 1930, s 4 Other changes made in the Act by the above amending Acts are noted at the proper places

Application—The Act applies to those municipal districts which are included in Schedule I under section 4 of the Act and from their respective dates of such inclusion as specified by the notifications under section 4 of the Act Section 5 of the Act provides that from the date of such inclusion the Bombay District Municipal Act 1901 shall not apply to the municipal district so included It may be noted that the Provincial Government have powers under section 4 of the Act to exclude in a similar manner any municipal

district from Schedule I and from the date of such exclusion this Act will have no application to the municipal district so excluded which will be governed by the Bombay District Municipal Act, 1901, under section 5(2) of this Act For the municipal boroughs to which the Act applies see Schedule I It may be noted that out of nearly 130 municipal districts in the Bombay Presidency, only 31 are included in Schedule I and to the rest the Bombay District Municipal Act 1901, still applies

Commencement —The Act came into operation on 8th June 1925 (Vide s 5 General Clauses Act 1904)

Extent —By the Bombay General Clauses Act, 1904, section 3(7), the Presidency of Bombay means the territories within British India for the time being under the administration of the Governor of Bombay in Council This Act does not apply to Aden and Perim, since those places are not in the Presidency of Bombay (G O 8471 of 9-8-20) In the Bombay Presidency the City of Bombay and Karachi City have separate Acts for themselves The Bombay Municipal Corporation is governed by the City of Bombay Municipal Act (Act 3 of 1888) and the Karachi Municipality by the City of Karachi Municipal Act (Act 17 of 1933)

2 (Act V of 1868 not to apply to powers under this Act) Omitted by the Adaptation of Indian Laws Order in Council.

3 In this Act and in the schedules, unless there be something repugnant in the subject or context,— Definition

(1) "Annual letting value" shall mean the annual rent for which any building or land, exclusive of furniture or machinery contained or situate therein or thereon, might reasonably be expected to let from year to year, and shall include all payments made or agreed to be made by a tenant to the owner of the building or land on account of occupation, taxes, insurance or other charges incidental to his tenancy

(2) "Building" shall include any hut, shed or other enclosure, whether used as a human dwelling or for any other purpose, and shall also include walls, verandahs, fixed platforms, plinths, doorsteps and the like

(3) "Commissioner" shall mean the Commissioner of a division appointed under the Bombay Land Revenue Code, 1879, and in Sind, the Provincial Government Bom V of 1879

(4) "Councillor" shall mean any person legally a member of the municipality in a municipal borough

(5) "Dangerous disease" shall mean cholera, plague, small-pox, and any endemic, epidemic or infectious disease by which the life of man is endangered

(6) "House-gully" means a passage or strip of land constructed, set apart or utilized for the purpose of serving as a drain or of

affording access to a privy, urinal, cess-pool or other receptacle for filthy or polluted matter, to municipal servants or to persons employed in the cleansing thereof or in the removal of such matter therefrom

(7) "Judge" shall mean District Judge, Joint Judge, Assistant Judge, Judge of a Court of Small Causes, Subordinate Judge, or Joint Subordinate Judge

(8) "Land" shall include land which is built upon or covered with water

Bom. III of 1901

(9) "Municipal borough" shall mean a Municipal district as defined in the Bombay District Municipal Act, 1901, included or hereafter included in Schedule I, during the period of such inclusion

Bom. III of 1901

(10) "Municipal district" shall mean a municipal district as defined in the Bombay District Municipal Act, 1901

(11) "Nuisance" shall include any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smelling or hearing, or which is or may be dangerous to life or injurious to health or property.

(12) "Octroi" shall include a terminal tax

(13) "Official year" shall mean the year commencing on the first day of April

(14) "Owner" shall include the person for the time being receiving the rent of any land or building, whether on his own account or as agent or trustee for any other person or for any society or for any religious or charitable purposes, or who would so receive the rent if such land or building were let to a tenant

(15) "Public securities" shall mean—

(a) securities of the Central Government and of the Provincial Government,

(b) stocks, debentures or shares in railway or other companies the interest whereon has been guaranteed by the Secretary of State for India in Council or the Central or the Provincial Government,

(c) debentures or other securities for money issued by or on behalf of any local authority in exercise of powers conferred by an Act of a legislature established in British India; or

(d) a security expressly authorized by any order which the Provincial Government makes in this behalf

(16) "Public street" shall mean any street—

(a) over which the public have a right of way, or

(b) heretofore levelled, paved, metalled, channelled, sewered or repaired out of municipal or other public funds, or

(c) which under the provisions of section 115 or 116 is declared by the municipality to be, or under any other provisions of this Act becomes a public street

(17) "Private street" means a street which is not a public street.

(18) "Salaried servant of the Crown" shall not include a retired servant of the Crown in receipt of a pension or a person in receipt of a salary from the Crown who is not a full time servant of the Crown.

(19) "Street" shall mean any road, footway, square, court, alley, or passage, accessible whether permanently or temporarily to the public whether a thoroughfare or not, and shall include every vacant space, notwithstanding that it may be private property and partly or wholly obstructed by any gate, post, chain or other barrier, if houses, shops or other buildings abut thereon and if it is used by any persons as a means of access to or from any public place or thoroughfare, whether such persons be occupiers of such buildings or not, but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid

(20) "Tax" shall mean any toll, rate, cess, fee or other impost leviable under this Act and shall include a water rate

(21) "Vehicle" shall include bicycles, tricycles, motor cars, and every wheeled conveyance which is used or is capable of being used on a public street

Amendments:—In sub-section (3) the words 'Provincial Government' were substituted for the words 'Commissioner in Sind' by the Adaptation of Indian Laws Order in Council In sub-section (15) (a) the words 'Central Government' and 'Provincial Government' were substituted for the words 'Government of India' and 'Local Government' respectively, ibid In sub-section (15) (b) the words 'or the Central or the Provincial Government' were inserted, ibid In sub-section (15) (d) the words 'the Provincial Government' were substituted for the words 'the Government,' ibid In sub-section (18) the words 'servant of the Crown' and 'from the Crown' were substituted for the words 'servant of the Government' and 'from the Government' respectively, ibid

General—This section is equivalent to section 3 of the Bombay District Municipal Act, 1901, with suitable additions and omissions The alterations are noted below under proper heads

Include:—In Emperor v Chhaganlal Motiram Mehtaji, 29 B.L.R. 733, which was a case under the Bombay District Municipal Act 1901, while discussing the definition of 'building' given in s 3(7) Fawcett J remarked "With regard to this reasoning it must be remarked that the definition in section 3(7) does not use the word 'means' but the word 'include,' therefore the definition is not intended to be an exhaustive definition No doubt it has been held that the word 'include' can be equivalent to 'mean and include,' see for instance **Dilworth v The Commissioner of Stamps, (1889) A.C 99** But in the present case there is no scope for any such view The definitions in section 3 use the word 'mean' when that is the intention, for instance all the definitions in clauses 1 to 5 use the word 'mean', then the next two use the word 'include' instead of 'mean', and consequently there is a clear indication of an intention that the word 'include' should not be equivalent to the word 'mean'"

The same view was taken in **Emperor v. Provident Investment Co, Ltd, 45 B.L.R 965** wherein on this point Beaumont C J observed "It has been argued that the definition in s 3 (w) of the (city of) Bombay Municipal Act is an exhaustive definition, and reliance was placed on a decision of the Privy Council in **Dilworth v Commissioner of Stamps Dilworth v Commissioner of Land and Income Tax, (1899) A C 99,** in which it was pointed out that a definition introduced by the word 'includes' may be exhaustive, since the word 'includes' in the context in which it appears may be equivalent to 'means and includes' But, in my opinion, it is impossible to take that view in this case In the first place, the next two sub-sections (x) and (y) are introduced by the word 'means,' and the following sub-section (yy) is introduced by the words 'means and includes' It seems to me impossible to suppose that the draftsman, when he used only the word 'includes' in sub-section (w), intended his definition to be exhaustive The definition is, I think, merely an enlarging definition, and includes in the term 'street' many places which would not ordinarily be regarded as streets"

Sub-section (1)—Annual letting value —In the Bombay District Municipal Act, 1901, the definition did not include the latter part Now the Annual letting value represents the gross annual rental of any building or land exclusive of any furniture or machinery situate therein or thereon without any deductions on any account whatsoever and for purposes of assessment of tax on the basis of annual letting value, section 78(2) provides for a deduction of 10 per cent of the said valuation in lieu of all allowance for repairs or for any other account whatsoever Thus the meaning of annual letting value is made abundantly clear The figure arrived at after making a deduction of 10 per cent from the annual letting value is the rateable value of the building or land The expression 'Capital value' occurs in the Act but is not defined anywhere in the Act

Furniture or Machinery —Section 154 of the City of Bombay Municipal Act 1888 runs as under —

154(1) In order to fix the rateable value of any building or land assessable to a property-tax, there shall be deducted from the amount of the annual rent for which such building or land might reasonably be expected to let from year to year a sum equal to 10 per centum of the said annual rent and the said deduction shall be in lieu of all allowance for repairs or on any other account whatever (2) The value of any machinery contained or situate in or

upon any building or land shall not be included in the rateable value of such building or land

This section was considered by the Bombay High Court in **Haji Dawood v. Municipal Commissioner of Bombay City, 24 B L R 476,** wherein deductions were claimed on account of costs of bath tubs, lavatories, and electric lights and fans It was held that electric lights and fans did not come within the term machinery in section 154(2) of the Bombay City Act and deductions for the cost of bath tubs and lavatories were also not allowed on the ground that without these conveniences the premises would not ordinarily be let Under the City of Bombay Act the value of machinery alone is to be excluded in computing the rateable value, while under the Boroughs Act, value of machinery as well as furniture is to be excluded Thus unless bath tubs, lavatories, electric fans or lights fall within the term machinery or furniture no abatement can be allowed on account of cost of any of them even under the Boroughs Act It is submitted that none of these items come within the term machinery or furniture in section 3 (1) and hence no abatement could be made for any of them

Annual letting value does not mean annual gross income —In **Secretary of State v Hughes, 16 B L R 121,** the Cantonment Magistrate of Poona served on the secretary of the Western India Turf Club a notice stating that he had revised the valuation of the club's property at Poona and assessed the rate at Rs 9,840/- per annum based on an annual income of Rs 2,60,000 This income was arrived at by totalling up the large number of fees received by the club from various licensees who were allowed to ply their trade on the race course The items consisted mostly of fees paid by book makers and keepers of refreshment stalls and by the public for admittance as spectators The assessment was levied at 4 per cent on Rs 2,46,000 the gross amount so received The net profits made by the plaintiffs averaged about Rs 30,000 a year, Regulation 1 of the Poona Cantonment Taxation Regulations, 1881, ran as follows — '1 The estimated gross annual rent at which the houses, buildings, and lands, liable to property rates might reasonably be expected to let from year to year shall, for the purposes of the said rates, be held and deemed to be the annual value of such houses, buildings and lands The value of a house or building so estimated shall not include the value of any machinery contained therein' In the course of the judgment Scott C J remarked 'that the Cantonment Magistrate has wholly disregarded the basis upon which the rate is to be assessed He has assessed a rate upon the gross income of the plaintiffs, which would not even be a basis for the levy of income-tax Even if the plaintiffs' net profits, which average about Rs 30,000/- a year, had been taken as the basis of valuation, it is clear, for the reasons stated by the District Judge, that no hypothetical tenant could be expected to offer such a sum as rent for the property in question, for as the District Judge points out 'if the plaintiffs were to let the race course and buildings for more than about Rs 30,000/- a year it is obvious that their tenant would conduct business at a loss, and if they were to let it for that sum only he would make no profit It would, therefore, not be reasonable to expect that he would offer such a rent It appears to us that the judgment of Lord Halsbury in **Mersey Docks and Harbour Board v. Birkenhead Assessment Committee,** already referred to, so far from being any authority in favour of the contention of the appellants, is a direct authority for the proposition that where a taxing authority is called upon to assess the

tax based upon annual letting value he does very wrong indeed if he rates as if he were dealing with the questions for the income-tax The Cantonment Magistrate has, as stated by the District Judge, 'not calculated the tax on the annual value but on some strange and novel method of his own The law does not justify his action at all It was outside the law, and he has assumed powers which the law has not given to him The enhancement of the tax was, therefore, ultra vires, and not a legitimate method of arriving at a fair letting value of the house'

Jurisdiction of Civil Courts.—Regulations No 13, 15 and 42 of the Poona Cantonment Regulations 1832 were as follows —'13 Appeals against any rate charged under the foregoing provisions shall be heard and determined by the Cantonment Committee But no such appeal shall be heard unless the amount of the rate has been deposited with the Cantonment Magistrate and unless complaint has been previously made to the Cantonment Magistrate as herein before provided' '15 The assessment by the Cantonment Magistrate of any rate, when no complaint or appeal therefrom is made as herein before provided and the adjudication of any appeal under s 13 shall be final' '42 No assessment and no charge or demand of any rate, duty or fee made under the authority of the Regulations shall be impeached or affected by reason of any mistake in the name of any person liable to pay such rate, duty or fee, or in the description of any property or thing liable to such rate, duty or fee, or any mistake in the amount of assessment, nor shall any proceedings under these Regulations be quashed or set aside for want of form in any court Provided that the directions of these Regulations be in substance and effect complied with' In the **Secretary of State v. Hughes, 16 B.L.R. 121,** quoted above, it was held that the action of the Cantonment Magistrate was not warranted by the Regulations, in as much as reasonable time was not given to the plaintiffs to take advice as to the increase in the rate from Rs 201/- to Rs 9,840/- and that he had wholly disregarded the basis upon which the rate was to be assessed, and that therefore the jurisdiction of the civil courts was not ousted, the money having been claimed and received from the plaintiffs without a shadow of right

The above case was decided on the authority of **Kasandas v Ankleshwar Municipality, 3 B.L.R 882,** wherein it is laid down that where, in the assessment of a house-tax by a municipality, no breach of the prescribed rules has been committed, the civil courts, in the absence of proof of malafides, perversity, or manifest error, cannot interfere on the mere suggestion that the valuation is too high, and that the civil courts have jurisdiction to interfere in cases where the plaintiff's complaint is not merely that the valuation for the purpose of assessing house-tax is wrong but that it has been arrived at in contravention of the rules which are by law applicable Also in **Morar v. Borsad Town Municipality, 2 B.L.R 417,** it was held that a civil court has no power to interfere in the matter of valuation of houses made by a municipality Thus it is clear that the civil courts have no jurisdiction in the matter of valuation unless there is breach of the prescribed rules, or a wrong basis is adopted or there is proof of malafides, perversity or manifest error The plaintiff filed a suit in a civil court to recover from a town municipality the amount of house-tax illegally assessed and recovered from him The court came to the conclusion that there was an illegality in the assessment and recovery complained of, but the court by itself went into the question of

assessment and fixed the amount of house-tax and dismissed the plaintiff's suit Held, setting aside the decree and amending the plaintiff's claim, that the High Court could interfere under s 622 of the Civil Procedure Code, 1882, in as much as the court in fixing the amount of house-tax exercised the function which the legislature vested elsewhere, and so far exercised its jurisdiction improperly **Hamirsing v. Amod Town Municipality, 7 B L R 288**

The plaintiff paid a house-tax at the rate of Rs 6, for the year 1890 without any protest When the tax was sought to be levied from the plaintiff at the same rate for the year 1891, he objected to the levy as illegal and excessive and paid the tax under protest He then sued to recover what he alleged was an excess charge of Rs 5 in respect of the tax for 1891 His claim was rejected on the ground that he was stopped from recovering the alleged excess by reason of his having paid the tax for 1890 without protest Held that the suit was not barred The levy of a tax in each year gives a new and distinct cause of action, and the payment of the tax without protest for one year does not bar a suit to recover a sum paid in a subsequent year under protest on account of a tax which was not legally chargeable for that year **Pitambardas v Jambusar Town Municipality 17 Bom 510**

Sub-section (2)—Buildings —This term is defined both in the Bombay District Municipal Act, 1901, and the City of Bombay Municipal Act 1888 In the District Act the definition is identical, the only difference being that in place of the word 'otherwise' occurring in the District Act, the words 'for any other purpose' are used in the Boroughs Act to make the meaning more clear The City of Bombay Act defines the term 'building' as including 'a house, outhouse, stable, shed, hut and every other structure, whether of masonry, bricks, wood, mud, metal or any other material whatever' The definitions in all the three Acts are very wide and yet are not exhaustive as evidenced by the use of the word 'include' The question of correct meaning of the term building' is of great practical importance, because section 123 requires notice of any construction or reconstruction etc, of a building to be given to the Chief Officer with a view to obtaining his permission The Act also empowers the Chief Officer to demolish any construction or reconstruction made without giving the notice Consequently the term has been the subject of several decisions of the Bombay High Court, and they are noted below

Material alteration or reconstruction of a wall amounts to construction of a building —In **Krishnaji Narayan Pokha v The Municipality of Tasgaon, 18 Bom 547** it was held that the building of a new wall on the site of the old wall including the old foundations was not an addition to the existing building within the meaning of s 33 of the District Municipal Act (Bom Act 6 of 1873) In **Queen Empress v Tippana, (1888) unreported Cr C 402** which was also a case under the District Municipal Act, 1873, it was held that the building of an isolated wall on an old foundation did not amount to an erection of a building under s 33 In **Emperor v Kalekhan Sardarkhan, 12 B L R 1060**, a case under the Bombay District Municipal Act 1901, it was held that the rebuilding of a wall that had fallen down amounted to a reconstruction of building However a contrary view was taken in **Emperor v De Souza, 13, B L R 494** In the present Act, all this conflict of judicial opinion is set at rest by the Explanation to s 123 which states that the expression 'to construct a building' throughout the chapter includes any material alteration, enlargement or reconstruction of any building, or of any wall, verandah, fixed platform, plinth, door-step or

the like, whether constituting part of a building or not It is clear, therefore that under the explanation to s 123 of the Boroughs Act any material alteration or reconstruction of any wall would amount to a construction of a building within the meaning of s. 123 See **Emperor v. Chhotalal Mansukhram, 30 B.L.R. 1082**

Compound wall:—The 'Compound wall' comes within the definition of 'building' in section 3(7) of the Bombay District Municipal Act, 1901 See **Emperor v. Ramrao Ahaji Prabhu, 23, B L.R. 831.** The definition of 'building' in the Boroughs Act is for all practical purposes identical with that in the District Act, 1901, and hence this ruling will apply with equal force to a case under the Boroughs Act

Foundations "Primarily the word 'building' is quite wide enough to include the foundations, which, in fact, are an essential part of a permanent building It seems to me absurd on the face of it to say that the foundations are not included in the word 'building' and the Municipal Act, 1901, in my opinion, clearly shows that foundations are intended to be covered" **Emperor v. Chhaganlal, 29 B L.R. 733.** These remarks apply with equal force to a case under the Boroughs Act, for, as pointed out above there is no substantial difference between the definitions of 'building' in the two Acts

Wire-fence:—An ordinary wire-fence is not a 'building' within the meaning of clause 7 of s 3 of the Bombay District Municipal Act, 1901 **Emperor v. Ranchhodlal 19 B L.R. 521.** A fence six feet in height and consisting of wooden planks attached to posts embedded in the earth on the boundary of one's property is neither a 'wall' nor an 'enclosure' and therefore not a 'building' as defined in s 3(2) of the Bombay Municipal Boroughs Act, 1925 Hence the erection of such a fence without permission does not offend against the provisions of s 123(7) of the Act **Emperor v Hasanbhai Rehmatbhai Vinawala, 44 B.L.R. 45.**

Sub-section (3)—Commissioner —The powers under the Act which will be exercised by divisional Commissioner in the Province of Bombay are to be exercised in Sind by the Provincial Government of Sind

Sub-section (4)—Councillor —The definition is unnecessary Also it is not as clear as it ought to be The word 'legally' whose exact meaning may be doubted is used 'Legally' here does not mean anything more than 'declared to have been duly elected or nominated under the provisions of this Act' The word 'member' is also vague A councillor is a person who is declared to have been duly elected or nominated a councillor under the provisions of the Act, and whose election or nomination is not set aside or who is not disqualified by a competent authority under the provisions of the Act A councillor who is declared to have been duly elected a councillor under the provisions of the Act does not cease to be a councillor merely because there may be flaws in his election, or his nomination may be invalid or he may be subject to any disability or disqualification He is legally a member so long as his election is not set aside under s 15 of the Act or he is not disqualified under s 12(5) or s 28(2) of the Boroughs Act His election cannot be challenged except under s 15 of the Act and within the time prescribed therein A party will not be allowed to challenge the election of a councillor after this period on the ground that he is not 'legally' a member of the municipality If however he is subject to any disqualifications specified in s 12 or s 28 of the Act he can be disqualified by the Collector under these sections

of the Act But until he is so disqualified by the Collector he continues to be legally a member of the municipality Thus it is clear that the use of the word 'legally' is not intended to entitle a party to dispute the validity of the election of a councillor at any time It only requires that the councillor must be declared to have been duly elected or nominated under the provisions of the Act A councillor is a public servant under s 56 of the Act He is a public servant within the meaning of s 21 of the Indian Penal Code

Sub-section (8)—Land —The definition is wide enough to include open land as well as land built upon or covered with water

Sub-section (10)—Municipal district'—S 3(5) of the Bombay District Municipal Act, 1901, defines 'Municipal District' as follows —"Municipal District" shall mean any local area which is at present a municipal district, and any local area which may hereafter be constituted a municipal district under section 4, if such municipal district has not ceased to exist under the provisions of the said section"

This term does not include a Notified Area See **Emperor v Mohedin, 41 B.L.R. 93**

Sub-section (11)—Nuisance— This definition is identical with the definitions of 'Nuisance' in the City of Bombay Municipal Act, 1888 and the Bombay District Municipal Act, 1901 In **Alimahomed v Municipal Commissioner of Bombay, 27 B L.R 581,** it was held that the term 'nuisance' includes both private nuisance as well as public nuisance

A legal nuisance is rather an evasive, shifting and intangible thing hard to be pinned down by a verbal definition It must always be conditioned by time, place and circumstances In estimating a nuisance complained of, the court must have regard to the station in life of the plaintiff, and to the locality and the nature of the nuisance complained of In the absence of statutory provisions, no general considerations of mere policy, or abstract public rights, can be allowed to prevail against what the law recognises and always has recognised as the legal rights of the individual There are many degrees in all nuisances, those which (1) endanger life (2) endanger health and (3) diminish the comforts of the plaintiff In the first two kinds of nuisances, the courts would not hesitate to prevent it by an injunction, but where the nuisance is of the third kind, that would always be a question whether the court would proceed against him who causes that nuisance by injunction or compensate the sufferer in damages **Bai Bhicaiji v Pirojshaw, 17 B L.R. 1040** In the same case it was also held that the nuisance complained of being of a totally different character from the one anterior to it could not be legalised as an *easement, and that if the nuisance existed it was no answer to say that the* defendant has done everything in his power and taken all reasonable precautions to prevent its existence In this case horse stables in the neighbourhood of the plaintiffs were held to constitute a nuisance and plaintiffs were held entitled to relief by way of injunction and damages It may also be noted that the stables were erected on a pattern approved by the municipality and yet it was held that if in fact the nuisance existed, this was no defence to an action for nuisance In **Sady v Suka, 5 B LR 116,** it was held that to entitle a private individual to sue for a public nuisance, it must be shown that he suffers some particular damage beyond that suffered by the public, and the particular damage must be both direct and substantial No individual or class of individual can sue in respect of public right unless the obstruction caused

has resulted in special damage **Virupaxappa Fakirappa v Sharif Sab Mulla, 11. B.L.R. 372** The Advocate General represents in this presidency the Attorney General in England and has all his powers. In the case of constructive public nuisance in law—meaning that which is only wrong because it contravenes the provisions of an Act, the Attorney General's special power extends in England No such power can be derived from s 91 of the Code of Civil Procedure, which is in terms restricted to public nuisance in fact No mandatory injunction against a private individual for what is a nuisance in law will be granted except where it has been created and persisted in defiance of local authority and that local authority has not sufficient power to enforce compliance with the law **Advocate General of Bombay v Haji Ismail Hasam, 12 B.L.R 274** Though a legitimate calling or trade may involve a serious nuisance by noise, it does not render that noise non-objectionable merely because it is an incident of a legitimate trade **Hari v. Vithal, 8 B.L.R 69** Where a privy is allowed to remain in such a condition as to be nuisance to persons lawfully using a public place or way, proceeding to cause the nuisance to be abated can be instituted under chapter 10 of the Code of Criminal Procedure Section 133 of the Criminal Procedure Code does not empower a Magistrate to order a privy to be removed on the ground that it is only recently made in any locality In **re Balaji Narayan, 4. B.L.R 882**

Sub-section (12)—Octroi-Terminal Tax.—There is no definition of 'octroi' in the Bombay District Municipal Act, 1901, See notes under s 73

Whether a suit to recover octroi maintainable —See notes under this head under s 98

Sub-section (13)—Official Year —This means a period of one year commencing from 1st April of a year and ending with 31st March of the following year

Sub-section (14)—Owner—Whether receiver is an owner.—This definition is taken from the B D M Act, 1901 It does not contain the proviso which is to be found in the District Act With that difference the definition is identical In the City of Bombay Municipal Act, 1888, the term 'premises' is used in place of 'land or building' and also a receiver, sequestator and a manager appointed by any court of competent jurisdiction to have the charge of or to exercise the rights of an owner of the premises are specifically included Thus the City of Bombay Act very clearly includes a receiver or a manager within the definition of the term 'owner', but under the Boroughs Act it is doubtful whether they are owners within the meaning of s 3(14) As a matter of fact in **W. R., Fink v. The Corporation of Calcutta 30 Cal 721,** it was held that a receiver appointed by court is not the owner of the premises he holds as the receiver within the definition of the term 'owner' If he receives rent for such premises he does not do so on his own account or as agent and trustee for any person but as officer of court and as manager of the property on its behalf. This case was followed in **Corporation of Calcutta v Haji Cassim Ariff Bham, 38 Cal 714.** It is obvious that a receiver appointed by court is not the agent of the court It is also clear that he is not trustee for any person Thus it appears that a receiver will not come within the definition of 'owner' in s. 3(14) of the Boroughs Act The definition of the term 'owner' in the Boroughs Act is wider than in the District Act The definition in the City of Bombay Act is as shown above wider than in the Boroughs Act

Lessee of vacant plot —In **Emperor v Ramchandra Bhaskar, 12 B.L.R. 669,** it was held that the mere owner of land who has let it out under a building scheme for building purposes is not the owner of the property within the meaning of s 305 of the City of Bombay Municipal Act, 1888, because the property contemplated by the section necessarily embraces buildings whether erected or to be erected, and the legislature regards him as the owner of the premises, who has the right to receive rent in respect of that property It would therefore include a lessee from the original owner of vacant site who takes the building site on a long term and erects a building upon the site

Rent Farmer —A rent farmer who takes a lease of a house from its owner on certain terms comes within the definition of the word 'owner' as he receives the rent of the premises **Emperor v Aziz Gaffoor Kazi, 30 B.L.R 1439** This case was followed in **Emperor v Sahrif Dadu Miyaji, 32 B L R 332**

Tenant who sub-lets —A lessee who under the terms of his lease is entitled to sub-let the premises and receives rent from his sub-tenants comes within the term 'owner' and the municipality may either proceed against him or his landlord **Emperor v Jaffar Cassam Moosa 30 B L R 1442**

Person who actually recovers rent is an owner —The definition of owner given in s 3 of the Bombay Municipal act came for consideration by Rangnekar J in **Bombay Municipality v Charandas, 30 B L R. 169** His Lordship said "But supposing that the Service on Bisheshar can be challenged on the ground that he is not a servant of the family of the owner, I think the case falls also within sub-clause (a) of that section Section 3 of the act gives a statutory definition of the term 'owner' and that seems to be very clear It says that unless there be something repugnant in the subject or context, 'Owner' where used in reference to any premises, means the person who receives the rent of the said premises, or who would be entitled to receive the rent thereof if the premises were let, and includes (1) an agent or trustee who receives such rent on account of the owner Therefore every possible way by which the municipality can get at a person who has a beneficial interest in the property in order to secure compliance with the provisions of the Municipal Act has been contemplated and provided for by extending the ordinary meaning of the term 'owner' by section 3 of the Act except of course when the context itself is against such a construction Now, if as I have found Bisheshar was actually receiving the rent, whether he was doing so rightly or wrongly, and in this case I think he was doing so rightly, I do not see what objection there can be in holding that the service upon him would fall within sub-clause (a) of s 485'

The word 'Owner' as defined by sec 3(m) and used in sections 257(1) and 375 of the City of Bombay Municipal Act, 1888 does not include trustees of a Wakf property who under permission of the High Court to raise a loan on the property borrow money on the property and give to the creditor the right of collecting rents from the tenants of the property entitling him out of the rent to pay to himself a commission of certain percent and to appropriate the balance of the rent in reduction of the loan The expression "receives the rent" in sec 3(m) is not used in any technical sense **Emperor v. Nur Mahmed, 43 B.L.R 598.** This ruling would equally apply to a case under the Boroughs Act

A Fazendar is not the person liable, as owner of the premises, to provide

privy accommodation under section 248 of the Bombay Municipal Act (III of 1888) The beneficial owner of the house built on the Fazendar's Land being the "owner" within the meaning of the section See **The Municipality of Bombay v Shapurji Dinsha, 20 Bom. 617**

Owner not named in notice—Whether trustee could be prosecuted· Under s 154 clause (2) (B D.M Act, 1901) it is open to the Municipality to issue the notice addressed to the owner of the premises without specifying the name If they do so they can prosecute the trustee who was receiving rents from tenants of the property under s 3 Cl 8 of the Act but he could not be prosecuted for failure to comply with notice addressed to another person and delivered to him as agent of that person **Hasomal M Gurbaxani v King Emperor, A.I.R. 1925 Sind 262**

Sub-section 3 (16)—Public street —'Public street' is defined both in the District Act and in the Boroughs Act in the same terms In the City of Bombay Municipal Act 1888, cl (a) of the definition does not occur Before a 'street' is held to be a 'public street' or a 'private street,' it must be proved to be a street within the meaning of s 3(19)

In Oosman Jamal v. Esmailjee Hasanji, 2 B L R 952 where the lane in dispute was shown besides its user as a public lane to be (1) named by the municipality, (2) bearing a name in Laughton's Plan, and (3) described as a public lane in the documents of title, the lane was held to be a public lane

The mere circumstance that the street is lighted or swept by the municipality is not of itself sufficient to convert a private into a public street The Municipal Act makes a clear distinction between street and public street It is only public streets which are vested in the municipality, while over private streets the municipality may exercise certain powers but the property in land in those streets does not necessarily belong to the municipality **The Ankleshwar Municipality v Rikhavchand Kapurchand 2 B L.R 176**

In cases where the existence of public High Way is in issue, it is of crucial importance to distinguish between the grant to the public as such of a right of way and the permission which naturally flows from the use of the ground as a passage for visitors to or traders with the tenants whose shops abut upon it A person in dedicating land to public use may limit the purpose of the dedication as he wishes but the dedication must be to the public as a whole There cannot in law be a dedication to a limited part of the public In order to constitute a valid dedication to the public of a highway by the owner of the soil, there must be an intention to dedicate User by the public is only evidence of such intention **Muhammad Rustum Ali v Municipal Committee of Karnal, 22 B L R. 563**

The applicability of section 48, Bombay District Municipality Act 1873 is not taken away where it appears simply that the disputed street door and its wall belonged to a private person and that they were not built for any public purpose out of any public funds, because the user by the public for very many years may show a dedication to the public **The Municipality of Umreth v Somnath 2 B L.R 218**

Whether Khadki is a public street —The plaintiff was the owner of two and mortgagee in possession of a third house out of a set of six houses which surrounded an open court and which including the court originally belonged to a single individual The plaintiff built an ota or verandah and

put up a wooden bench in front of his house which the municipality of the town ordered to be removed The occupants of each house had the right of way across the court which was used as a means of access to the houses by the persons having business with the house holders Held, that such limited access by the public was not sufficient to show that the court or khadki ceased to be private property and was converted into a street vesting in the municipality within the meaning of sections 3 and 17 of the B.D M Act 6 of 1873 and the municipality had not any right to interfere with the plaintiff's erection **Kalidas v. Municipality of Dhandhuka, 6 Bom. 686** Referring to this case, *Lokur J observed* in **Emperor v Provident Investment Co., Ltd, 45 B.L.R 965** as follows "There the question really was whether a private 'court' which was surrounded by houses but to which the public had access, had thereby ceased to be private property and was converted into a 'street' within the meaning of Ss 3 and 17 of the Bombay District Municipal Act (VI of 1873) In that Act there was no definition of a public street and no powers were conferred upon the Municipality to deal with private streets The Municipality had, therefore, to contend that the passage in question was a public street which, according to s 17(f), had vested in it As there was no evidence that the public had a right to use that passage, it was held not to be a public street as claimed by the Municipality"

Sewered'—In **Emperor v Edulji K. Patel, 14 B L R 1169,** it was held that the street in question was not public for it could not be said to be sewered merely because there ran under it a pipe laid by the Bombay Municipal Corporation which though carrying off sullage water from the houses on the said street did not carry any rain or other water or sullage from the street The case was decided on the interpretation of the word 'sewer' Batchelor J in the course of his judgment said "It was urged on behalf of the petitioner that the word 'sewer' must be restricted to that narrower meaning which it sometimes bears in ordinary parlance, that is to say, to the meaning of liquid filth or excrementitious matter We have nothing in the Act to guide us as to the particular meaning in which the word is used in s 3, and upon the best consideration which we can give to the matter we think that the narrower meaning contended for by the petitioner is not the meaning in which the word is there employed It appears on reference to recognised dictionaries that the word 'sewer' is derived from the word 'to sew' which in Webster is explained as meaning 'to drain as a pond for taking the fish' So according to Webster 'sewer' signifies a drain or passage to convey off water and filth underground There is not we think any sufficient reason to suppose that the word when used in the Bombay Act is intended to bear any other meaning than this—its recognised meaning On reference to Stroud's Judicial Dictionary we observe that there is judicial authority for giving to the word the significance which Webster attaches to it, for in **Sutton v The Mayor and Aldermen of Norwich (1858), 27 L.J Ch 739-742,** Vice Chancellor Kindersley says the word 'sewer comes from the verb 'to sew' that is to drain and has a much more extended signification, embracing works on the largest scale such as draining the Fens of Lincolnshire by means of canals etc In Wharton's Law Lexicon the word is similarly defined as being a trench or channel through which water flows On these grounds it seems impossible to us to limit the meaning of the word 'sewer' in section 3 of the municipal Act in the manner desired by the petitioner We think on the authorities to which we have referred, that the word must bear the wider signification and must refer to the carrying off

other water besides liquid filth This construction appears to derive support from the language of the section which requires that the street should be sewered Seeing that a street is hardly a place in which sewage in the narrower sense would ordinarily be expected it is probable that the legislature in using the word 'sewer' intended to convey the wider meaning If that is so then it follows that this street cannot be said to be sewered merely because there runs under it a pipe which though carrying off sullage water from certain houses has not direct connection with the surface of the street"

An exactly contrary conclusion was arrived at in **Emperor v. Ramrao Vishwanath, 20 B.L.R. 620** This case was decided on the interpretation of the word 'street' It was held in this case that the word 'street' included the houses on either side of the street and these having been 'sewered,' the street was 'sewered' and therefore it was a public street In the course of the judgment Shah J said "It has been held in several cases that a street includes the houses on either side of it and that it does not merely mean the road-way There is no reason why for the purpose of the definition the word should not be understood in that popular and generally accepted sense There is no force in the argument that in order to decide whether these streets are sewered or not we must consider whether there is any sewer for the road-way to carry rain water and should leave out of consideration the sewering of the houses There is nothing in the context to justify such an interpretation of the word 'street' or of the word 'sewer'" The case of **Emperor v. Edulji K Patel 14 B.L.R. 1169,** does not appear to have been referred to in this case either in the argument or in the judgment Both the cases are decided by the divisional benches of the Bombay High Court Facts in both the cases are similar and thus there appears to be a clear conflict of decisions on this point It is submitted that a street in which the houses on either side are alone sewered cannot be said to have been sewered and therefore it is not a public street and the decision in **Emperor v. Edulji K Patel, 14 B.L.R. 1169** is correct We also respectfully submit that merely because the word 'street' includes the houses on either side of it and there runs under it a pipe which carries the sullage from these houses, the street cannot be said to be sewered

Railway lines across a public street —The effect of vesting public streets in a municipality is only to vest in that body such property as is necessary for the control and maintenance of the street as a highway for public purpose Where therefore a railway company wishes to lay a line of railway upon and across a street it is neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land Under s 7, of the Indian Railways Act, 1890, the Railway Company had authority to make and maintain the lines of railway notwithstanding anything in any other enactment for the time being in force **G.I.P Railway v The Municipal Corporation of Bombay 16 B.L.R. 104.**

Whether the soil under a public street belongs to the municipality'—**In Chhotalal Panachand v The Borough Municipality of Nadiad, 41 B.L.R. 1097,** Lokur, J after quoting the definition of public street as defined in s 3 (13) of the Bombay District Municipal Act, 1901, (s 3 (16) of the Boroughs Act, 1925) said "It does not follow from this definition that the soil of every public street must necessarily be of the ownership of the municipality S 50 (2) (f) of the Bombay District Municipal Act, 1901 (s 63 of the Boroughs Act, 1925) says that all public streets and the pavements, stones and other materials thereof and also all trees erections, materials, implements and things provided

for such streets shall be vested in and belong to the municipality, and shall be held and applied by them as trustees In interpreting s 32 of the Bengal Municipal Act (Bengal 5 of 1876) which is worded similarly, the Calcutta High Court in **Chairman of the Naihati Municipality v Koshori Lal Goswami (13 Cal 171)** observed as follows — 'If the word 'road' carried with it all the soil, all the materials, and all the erections on it, this enumeration, in express words, of 'pavements,' 'stones,' etc would be unnecessary Clearly then there must be some limitation to the word 'road' It does not mean everything above and below the road, and we think, looking at the case of **St. Mary, Newington v. Jacobs,** that the sub-soil did not belong to the municipality' In that case the municipality claimed compensation for the whole soil on the ground that they had a title to the property in the soil under the said s 32 of the Bengal Municipal Act, 1876, the Calcutta High Court held that the soil belonged to the Zemindar In the Bombay Act the word 'street' is used instead of the word 'road' The same view was taken in **Modhu Sudan Kundu v Promoda Nath Roy,** and it was held that s 10 of the Bengal Municipal Act (Bengal 3 of 1864) did not deprive a person of any right of private property that he might have in land used as a public road, nor did it vest the sub-soil of such land in the municipality It was further, held that when such land was no longer required as a public road, the owner was entitled to claim its possession I agree with that view, and unless it is definitely proved that the soil of any public street belongs to the municipality it cannot be presumed to be of the ownership of the municipality merely on the ground that it is used as a public street In fact s 90 sub-s (5) of the Bombay District Municipal Act, 1901, contemplates a private street being declared by the municipality as a public street, but thereby the soil of such street does not come to be of the ownership of the municipality The only effect of such a declaration is that the street is allowed to be used by the public and the public can claim a right of way over it as contemplated by s 3 sub-s (13) (a) of the Act If so, the decision of the City Survey Enquiry Officer that the Khadki was a public street did not declare that the municipality was the owner of the soil of the street It may be that at one time it was private street and was declared by the municipality as a public street under s 90 sub-s (5) of the Bombay District Municipal Act Even in that case the City Survey Enquiry Officer would be justified in holding the Khadki to be a public street, although the soil belonged to the owners of the adjoining houses If the City Survey Enquiry Officer had decided that the soil belonged to the municipality and had been declared a public street, then the plaintiff's claim in the present suit would have been inconsistant with that decision By reason of the plaintiff's failure to file a suit within one year after the decision of the City Survey Enquiry Officer, he is debarred from challenging the municipality's claim that the Khadki is a public street, but the plaintiff is not debarred from claiming that even though it is a public street, the soil of the street belongs to him Section 90 sub-s (1) of the Bombay District Municipal Act, 1901, which corresponds to s 114, sub-s (1), of the Bombay Municipal Boroughs Act, 1925, which now governs the Nadiad Municipality, empowers the Municipality 'to widen, open, enlarge or otherwise improve, and to turn, divert, discontinue, or stop up any public street' In exercise of this power the defendant municipality passed a resolution discontinuing the use of the Khadki in dispute as a 'public street' Such discontinuance did not require the sanction of the Commissioner under s 40 sub-s

(2) of the Bombay District Municipal Act, 1901, or s 48 sub-s (2) of the Bombay Municipal Boroughs Act, 1925, since such discontinuance did not amount to a lease or sale of any municipal land, unless it is held that the soil of the Khadki belongs to the municipality The question whether the soil of the Khadki belongs to the owners of the adjacent houses or to the municipality has not yet been determined If it belongs to the municipality then the plaintiff has no claim over it and the suit is bound to be dismissed If on the other hand it belongs to the plaintiff and other residents of the locality, then the municipality can discontinue its use as a public street without the sanction of the Commissioner, since thereby it does not part with any land belonging to it Admittedly, the municipality passed a resolution at its general meeting discontinuing the use of the Khadki as a 'public street,' and the resolution was duly communicated to the owners of the houses in that locality That resolution took effect immediately, unless it is held that it required the sanction of the Commissioner Whether such sanction is required or not depends on the ownership of the municipality over the soil of the Khadki"

Public street ceases to be so by over 30 years' adverse possession.—"It is not that however long a private person may have been in possession of a portion of a public street or a road the Municipality have still powers under section 122 of the B.D.M Act to direct him to give up possession or to force him to give up possession of such part of public street or road In this case it has been proved as a fact that the Verandah has been on the present site for more than 30 years Assuming that it was originally built on a part of a public street or road the Municipality is now barred from bringing a suit for recovering possession by virtue of Article 146 A of the Indian Limitation Act and the result must follow under s 28 that the plaintiff has acquired a title to the land on which the Verandah is built by over 30 years' possession It is therefore no longer a part of the public street or road, and the Municipality have no jurisdiction over it because section 122 only refers to encroachments or obstructions in a public street or in an open space not being private property" **Tayeb Ali v The Dohad Municipality, 22 B L R 951** This case was followed in **Abbaji Ragho v Jalgon Municipality, 23 B.L.R 1028, and the** decision in **The Dakor Town Municipality v Anupram, 15 B L.R 833** expressing the contrary view was overruled

Drains and gutters alongside a public street are public street —See notes under this head under s 143

Sub-section (17)—Private street —A street which does not come within the definition of Public street is a private street Where the houses on either side of a street were alone sewered without the street itself being sewered and an underground drain pipe was carried below the surface of the street by the Municipality it was held that this was not sufficient to bring the street within the category of a public street see **Emperor v Adulji K Patel, 14 B.L.R 1169** A contrary view has been taken in **Emp v Ramrao Vishvanath, 20 B.L.R 620,** but in this case **Emp v Adulji K Patel, 14 B L.R 1169,** does not appear to have been referred to in argument or judgment Both are decisions of division benches of the Bombay High Court and in this conflict of decisions, we respectfully submit that the view expressed in **Emp v Edulji K. Patel,** is preferable For details, see notes under the head 'sewered' under s 3

In order to show in a criminal trial that a street is a 'private street' within the meaning of the term as defined in s 3(y) of the City of Bombay

Municipal Act, 1888, it is incumbent on the Municipality to prove at any rate prima facie, the negative proposition that no works of the kind mentioned in 3(x) had been carried out by the municipality in the street prior to the date when the Act came into force **Emperor v Byram Khodadad Irani, 45 B.L.R. 60.**

Sub-section (18)—Salaried servant of the Crown.—The definition makes it clear that a retired servant of the Crown in receipt of a pension is not a salaried servant of the Crown Similarly a servant of the crown who had joined the P F scheme in which Government contributed its quota cannot be said to be a salaried servant of the crown after he has retired The definition also makes the position of part time servant of the crown clear Thus all persons who are not full time servants of the crown do not come within the definition although they may be in receipt of their salaries Thus a Government pleader or a public prosecutor who is paid a monthly salary or retainer by the crown does not come within the definition as he is not a full time servant of the crown **See Harnandan Prasad v B. Kamta Prasad, A.I.R. 1934 All 376** However Government pleaders and Public Prosecutors in Bombay Province are not allowed to join any political party or to enter a local body by departmental rules

Sub-section 19—Street —This definition is the same as in the B D M Act, 1901 The definition in the city of Bombay Municipal Act 1888 is as under — '3(w) Street includes any highway and any causeway, bridge, viaduct, Arch, road, lane, footway, square, court, Alley or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of 20 years, and, when there is a footway as well as a carriage way in any street, the said term includes both'

The owner of a large piece of land divided it into several small building sites which were sold to different persons These sites were ranged on either side of two proposed roads which ran through the land and which touched a high road at the one end and a dead wall on the other Each of the purchasers entered into a covenant with the owner whereby he agreed to prepare and keep free for passage so much of the road as lay in front of his site Under these circumstances the question arose whether the proposed road fell within the meaning of the term street as used in the city of Bombay Municipal Act 1888 Held, that the proposed road would constitute a street within the meaning of the city of Bombay Municipal Act, 1888 **Municipal Commissioner v. Mathurabai, 8 B L R 457.** Referring to this case Lokur J observed in **Emperor v. Provident Investment Co., Ltd, 45 B L.R. 965** as follows "In that case the owner of a large plot of ground abutting on a highway divided the plot into nineteen small plots and sold them to different purchasers These plots were mapped out as abutting on the sides of parallel roads which were marked as proposed road Each of the purchasers of the plots entered into a covenant with the owner to keep open that portion of the proposed road which stood in front of his plot and to prepare so much of the road One such purchaser, Mathurabai, constructed a building which was in height more than one and a half times the width of the open space on which it abutted, and the question raised was 'whether the vacant space in front of the house when and if, laid out as a means of passage with houses on both sides and when, and if, used as such by the occupiers of such house, and not by the public generally, would constitute a street within the meaning of the Bombay Municipal Act' and it was held that it would In doing so Russell J referred to the observations of Jessel M R in **Taylor v. Corporation of**

Oldham, (1878) 4 Ch. D. 395 where the word 'street' had to be interpreted in accordance with the interpretation clause contained in the Public Health Act of 1875 in England. Although that clause gives a much wider meaning to the word 'street' than s 3(w) of the Bombay Act, effect was given to the natural meaning of the word It is true that the form in which the question was framed makes the answer, somewhat misleading, since it reads as if the space in front of Mathurabai's house was held to be a street by itself Had there not been other spaces in continuation of it on both sides, and lined with houses on their two sides, it would not have been a street, merely because Mathurabai's house abutted on it The gist of the finding in that case is that the space on which the building abutted being a part of the street, its height could not be allowed to exceed one and a half times the width of that space However the governing interpretation of s. 3(w) is correctly laid down there."

An open space of varying width in a Dehla abutted by houses on its two sides is a street within the meaning of sec 3(12) of the **B.D Municipal Act, 1901 Dahyabhai Lallobhai v. The Ahmedabad Municipality, 25 B.L.R. 1218.** In the course of the judgment Shah Ag C J said "The accused have applied for a revision of this order, and two points have been urged firstly, that the open space in respect of which the notice is given is not a 'street' within the meaning of the definition of the word as given in s 3, clause (12), of the Bombay District Municipal Act III of 1901, and, secondly, that the notice is vague and indefinite We have heard an interesting argument as to whether it would be a street within the meaning of the definition I am satisfied that the space in respect of which notice is given is a street within the meaning of the second paragraph of clause (12) of s 3 of the Act It has been urged in support of the contention on behalf of the applicants that the last clause of that paragraph, viz, 'but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid' has reference to all persons other than the occupiers in that street or in that space On the other hand it is urged that 'other persons' mean persons other than 'the occupier of any such building,' and that the last clause has no reference to the space which the applicants cannot prevent other occupiers from using at all hours Having regard to the expression used in that definition 'notwithstanding that it may be private property,' and to the grammatical construction, it seems to me that 'all other persons' would mean persons other than the occupier of such building, and would not mean all occupiers of all the buildings within that space. That contention must, therefore, be disallowed" Agreeing with this view Crump J observed "The land with which we are concerned in the present case falls within the definition of 'street' contained in the second paragraph of clause (12) of s 3 of the Bombay District Municipal Act III of 1901 It is a vacant space, and the fact that it is private property, does not prevent of its being a 'street,' or the fact that it is closed by gates at either end Houses abut upon it and it is used by the occupiers of such houses as a means of access to and from public places and thoroughfares Therefore it fulfils the definition of 'street,' unless it is excluded by the concluding words of this paragraph which run as follows —'But shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforsaid' Now, construed grammatically, there can be no doubt that the word 'other' means persons other than the occupier of any such building, and if the word 'occupier' be read along with

the words 'any part of such space' the intention of the legislature is clear enough That intention is to preserve the rights of the occupier of any building to any part of the open space over which he has exclusive right as against the occupiers of other buildings It is only such portions of the open space that are excluded from the definition of 'street' Therefore these words, which have been relied upon in the present case, do not have the effect which is sought to attribute to them It is only, if it be established that any of these owners was entitled to exclude all other persons including the other occupiers in this dehla from any part of the open space, that he can claim that that particular portion of the open space is not within the definition of 'street'

The Accused owned a large plot of land at Kurla He left its middle portion vacant for passage, and built a one storyed house on one side of the passage He also commenced to build a chawl on the other side At the same time he applied to the Kurla Municipality for permission to add one more storey to his existing house The Municipality refused the permission asked for When the building was approaching completion, the Municipality prosecuted the accused for breach of their by-law No 132 which provided that the height of a building should not be more than the width of the street on which it abutted, Held, that the accused did not contravene the by-law since the vacant space left by him between his buildings which were under construction was not a street within the meaning of sec 3(12) of the B.D M Act, 1901 The case of **Municipal Commissioner v Mathurabai, 8 B L.R 457** does not appear to have been referred to in this case, but this case is decided on the construction of the last clause in the definition 'but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid' In the course of the judgment MacLeod C J said "we must assume that the buildings had not been completed at the time that the charge was laid and so the owner of the premises would still be considered as the occupier of the building which was being erected and it would be in his power to prevent all persons from using the space between the buildings until they were let out to tenants The result must be that while the owner of a large area of building land is erecting buildings thereon, the open spaces between the buildings cannot possibly be considered as streets until the buildings are finished, as clearly the owner has a right to prevent all other persons from using his private land" **Emperor v Tyabali Mulla Lukmanji, 26 B L.R. 216**

The word street in section 17 of the Bombay District Municipal Act (VI of 1873) means and includes not merely the surface of the ground, but so much above and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes The plaintiff proposed to make a balcony projecting over a public road The Municipality objected to the work as an encroachment on a public street He therefore sued the Municipality to establish the right to build the proposed balcony Held that, so far as the column of space standing over the street was vested in the Municipality the plaintiff had no right to occupy it with a balcony which by intercepting light and air would greatly impair the use of the area as a street **Nagar Valabh v Municipality of Dhandhuka, 12 Bom 490**

The inclusive definition of the term 'street' in s 3(w) of the City of Bombay Municipal Act, 1888, is not intended to exclude the ordinary popular and natural sense of the word, where that is properly applicable, but to en-

large its meaning so as to make the word, qua the Act, embrace ways and spaces which do not otherwise come within it Hence a well laid out passage of private ownership 'running between two rows of buildings and used by tenants and occupants of those buildings and by public generally for access to the buildings from the main public road' over which the public have not acquired any right of passage, and which though not joined to the public road is one over which the Bombay Municipality is exercising its powers treating it as a private street, is a street within the meaning of s 3(w) **Emperor v. The Provident Investment Co, Ltd, Bombay** 45 **B L.R. 965.** In the course of the judgment Lokur J observed "It cannot be said that every open space or road which has buildings on one or both of its sides must be regarded as a street within the meaning of the Act In that case the Municipality will have power to interfere with rights of private ownership, and thereby the owners will be discouraged in leaving open spaces between their buildings for the use and benefit of their tenants On the other hand it is necessary in the interest of public health that the municipality should have powers to deal with roads which are lined with houses and are intended to give access to the occupants of these houses, especially in the case of congested localities where chawls are built on private lands with narrow roadways between them for the use of the poor tenants occupying them" In the same case Beaumont C J dealing with the point observed "It has been argued that the definition in s 3(w) of the **Bombay Municipal** Act is an exhaustive definition and reliance was placed on a decision of the Privy Council in **Dilworth v Commissioner of Stamps; Dilworth v. Commissioner of land and Income Tax, (1899) AC 99** in which it was pointed out that a definition introduced by the word 'includes' may be exhaustive, since the word 'includes' in the context in which it appears may be equivalent to 'means and includes' But in my opinion, it is impossible to take that view in this case In the first place, the next two sub-sections (x) and (y) are introduced by the word 'means' and the following sub-section (yy) is introduced by the words 'means and includes' It seems to me impossible to suppose that the draftsman, when he used only the word 'includes' in sub-section (w), intended his definition to be exhaustive The definition is, I think, merely an enlarging definition and includes in the term 'street' many places which would not ordinarily be regarded as streets"

Such space:—Grammatically the words 'such space' in the exception refer back to the words 'every vacant space' at the beginning of the paragraph and are not connected with the previous paragraph 'Every vacant space' which satisfies certain requirements, is included in the definition if there is no right of way of any sort across it Logically too the words cannot refer back to the first paragraph for the definition would then exclude private streets, which as Cl (3) shows, are included in the term 'street' If, therefore a vacant space is in fact a road or footway which is accessible to the public, it is a street and that para, 2, refers only to such vacant spaces as are neither roads, footpaths, squares, Court-alleys or passages **Gurmukhsing v Karachi Municipality, A.I.R. 1930 Sind 30.**

Sub-section 20—Tax:—This definition slightly differs from the definition in the B.D.M Act 1901 In the Boroughs Act it is made clear that 'Tax' shall include a water-rate In the city of Bombay Municipal Act 1888 'Tax' is defined as including any impost leviable under that Act The definition in

the Boroughs Act appears to have been given from the point of view of collection and franchise only i e to say that the definition means that any toll, rate, cess, fee, water-rate or other import leviable under the Act will be treated as Tax for purposes of recovery and franchise This definition should therefore be made use of only for this limited purpose This interpretation is not made clear in the definition and in that sense the definition is very misleading This interpretation becomes clear on a careful study of the various provisions of the Act As a matter of fact there are fundamental differences and distinctions between a tax on one hand and a toll or a rate or a cess or a fee on the other and some of them have been recognised in the Act itself For example a toll can be farmed out but a tax cannot be This is recognised by making provision for leasing out tolls under s 101 of the Boroughs Act But the Act does not authorise any farming out of any tax Similarly a tax has no reference whatsoever to any service rendered or to anything supplied and an individual is bound to pay the tax irrespective of any service rendered to him or anything supplied to him if he falls within the taxable category This is not so in the case of a rate which is in proportion to the service rendered or anything supplied to the individual himself and often varies according to service rendered or article supplied Tax is usually to raise General revenues to meet the general cost of administration etc while rates, and cesses are usually levied to meet the costs of services rendered and should always be in proportion to the costs of those departments Fees are levied to meet the costs of police duties performed by the Municipality such as supervision over and control of dangerous trades or for services rendered Fees also could not be levied for raising general revenues or for any other purpose There is fundamental difference in the procedure laid down for levying a fee and for imposing a tax More elaborate procedure is provided for imposition of a tax while the procedure for levying a fee is simpler See sections 58 and 75 of the Act According to the definition tax shall mean fee Then, why is different procedure provided? From the above discussion it is clear that the definition is intended only for the purposes of recovery and franchise

The Broach Borough Municipality imposed license fees on certain dangerous and offensive trades with the declared object of meeting the enhanced cost of education It was contended on the authority of **Emperor v Brijmohanlal, I.L R 56 All. 743** that the imposition was illegal as it was not to meet the cost of supervision and control of these trades but to meet the costs of education which the Municipality was not entitled to do in this way Wassoodev J who decided this case did not accept the view expressed in **Emperor v Brijmohanlal, I L R 56 All 743** on the ground that the definition of tax in the Boroughs Act included fee and therefore there was nothing wrong in a Municipality imposing a license fee on dangerous and offensive trades to meet the costs of education or for General revenues It is respectfully submitted that this view is incorrect The very term license fee shows that it is a fee for issuing the licenses which are merely for the purpose of supervising and controlling the trades As explained above on a careful study of the Act it is clear that the definition is intended only for the purpose of recovery and franchise and the difficulty is created by not making this clear in the definition If this view is correct it also explains away the ground on which Wassoodev J mainly based his decision **Sorabji Lakdawalla and**

another v the Broach Borough Municipality. 43 B.L.R 533 The question of the extent of the powers of a municipality to levy license fees under the District Municipalities Act (Madras Act 5 of 1920) came up for consideration before the Madras High Court in **Municipal Council, Kumbakonam v. Ralli Brothers, A.I.R. 1931 Mad. 497** In that case Messrs Ralli Brothers brought a suit for a declaration that their firm was not liable to pay a license fee of Rs 100/- in respect of their premises used for storing groundnuts on the ground that such a charge was unreasonable and excessive and fixed in an arbitrary manner and they prayed for a refund of the sums paid They contended that the levy was ultra vires and the contention was accepted by the learned trial judge In appeal Bhashyam Ayyangar J said "It is undisputed that the respondent firm were bound to take out a license in the years in question for storing groundnut on their premises and the appellant Council were entitled to charge a fee for such license If the Council had charged a mere fee, the respondent would have had no right of suit The respondent's contention is that what they were charged with was really a tax under the guise or cloak of a license fee The fee charged is Rs 100 per year, and it is certainly out of proportion to the cost of the work involved in issuing the license and supervising the premises The evidence shows that a higher fee than Rs 30 is not charged for any other license, although many other cases can be easily pointed out from the schedule relating to licenses, in connection with which the work of supervision must be far more strict and onerous for the Council The inference therefore appears reasonable that although the Council purported to levy the sum of Rs 100 in this case as license fee it was really not that but a tax in disguise In this view, their action was not in substance or effect a compliance with the provisions of the Act but ultra vires, and the bar of suit provided for in s 354(2), cannot consequently avail them" In this case **Corporation of Madras v. Spencer & Co., Ltd, A.I.R. 1930 Mad 55** was followed Wherein it was held 'a Corporation empowered to levy license fees, wanted to raise them from Rs 25 to Rs 200, solely for the purpose of raising the revenue, the rise being merely a counter demonstration to the order of Government refusing to allow the Corporation to take the abkari revenue of the city Held that the power given to councillors to levy license fees cannot be used as a power of taxation There is a great difference between taxes and license fee That a tax is not the same as a license fee, is clear from the fact that no permission has to be obtained before the tax becomes payable and the tax is not paid for such permission, whereas the license fee is payable in respect of a permission which is granted by the corporation So the taxes cannot be treated as being in the same category as license fees under the Act The fee income must be more or less proportionate to the trouble and expense incurred by the corporation in issuing license and in controlling trades and other matters for which licenses are issued But roughly speaking if the fees bring in much more than the cost of necessary operations, or if the fees are so fixed that the whole cost incurred by the corporation in connection with all the licenses or a grossly disproportionate part of it was imposed on one particular trade or a few particular trades, then the Courts can interfere on grounds of unreasonableness Hence where the license fees for storing spirits was raised from Rs 25 to Rs 200, the Courts interfered' Similarly in **India Sugars & Refineries Ltd, v. Municipal Council, Hospet, A.I.R 1943 Mad 191** it was held that a license

fee for carrying on a particular trade or industry should not be regarded as a form of taxation the extent of which is to be governed purely by revenue considerations The license fee should bear as nearly as possible a relation to *the cost of issuing the licence and the cost of supervising the trade* or *of any* special measures rendered necessary by the character of that trade The municipality would not be justified in increasing the license fee chargeable upon a particular industry merely by reason of the cost of ordinary municipal services to which that industry is entitled by virtue of its position as a tax payer in *the municipality But if the industry involves special sanitary precautions*, a special supervising agency or such like expenditure, it is reasonable to take this expenditure into account in fixing the amount of the fee When a supervising agency is necessary for a number of industries it will always be difficult to say how the cost is to be apportioned and so long as the apportionment is made on a reasonable basis, it is not for the Courts to interfere with the way in which it has been achieved It was also held in this case that *the Courts should not declare a fee or a levy to be ultra vires merely because* it is somewhat higher than might have been thought necessary on a different view of the facts

Toll does not mean fee —Section 3(14) of the B D M Act III of 1901 defines Tax as including any toll, rate, cess, fee or other impost leviable under the Act A toll is therefore quite distinct from a fee referred to in Sec 3(14) The toll referred to in Sec 81(A) must refer to the toll dealt with in part V of Ch VII of the B D.M Act 1901 Sections 75 to 81A deal with Octroi and tolls whereas the right to charge fees for occupation of Municipal lands is dealt with in part III of Ch VII and is authorised under Sec 70 of the B D.M Act 1901 The toll referred to in Sec 81-A therefore cannot include the fee authorised under sec 70 and therefore the Municipality has no power to lease *or auction the right to levy fees due for temporary occupation of municipal* land **Sholapur Municipality v Shivram, 30 B L R. 715**

Pilgrim tax is not toll —**In Saundatti Municipality v Shripad Bhat, 35 B L.R. 163** which was a case of pilgrim tax it was held that the right to lease which the Municipality enjoyed under sec 81-A was a right to lease the levy of any toll and not the right to lease the levy of any tax The express right to farm out tolls negatived an implied power to farm out taxes

Charge on Government Property for unpaid municipal taxes.—In Secretary of State v. Bombay Municipality, 37 B L R 499 which was a case under sec 212 of the city of Bombay Municipal Act 1888 equivalent to sec 112 of the Boroughs Act, it was held that the lands belonging to Government, can be subject to a charge under that section for unpaid municipal taxes Similarly in **Secretary of State for India v the municipal corporation of Bombay, 37 B.L R 513,** it was held that the charge for unpaid municipal taxes under sec 212 of the city of Bombay municipal Act 1888 attaches to land vested in the Railway Administration of the G I P Rly

Tax for water supplied by meter is not property tax —Dues for water supplied by meter to a property do not fall within the expression 'property Tax' as defined by sec 140 of the city of Bombay Municipal Act 1888, and as such do not constitute a charge on the property under Sec 212 of the Act The reason that they are recoverable as arrears of water tax would not bring them within the category of water tax **Municipal Corporation of the City of Bombay v. Haji Eisa Haji Oosman, 37 B L.R. 1017.**

Fixed charges and agreement for payment in lieu of water-rate—whether a tax or a contractual charge—application of s 75 to rules under s. 58(j) for water rate under s. 91 & s 48 —Plaintiff sued committee of management of Hyderabad for the refund of charges paid for supply of water by the municipality to a private connection to his house on the ground that the rules were not first published under s 60 (B D.M Act 1901) Held apart from the words 'subject to the provisions of Ch VII' rules under s 46(1) do not require preliminary publication for the purpose of inviting objections but merely require the sanction of the Governor in Council or the Commissioner under proviso (a) to s 46 The words 'subject to the provisions of Ch VII' cannot in themselves make the provisions of s 60 applicable to a case of water rate under s 71(1)(b) which is the case where the municipality proposes to impose a tax The main provision in the rules under s 46(1) and 71(1) is that the municipality will supply water to private persons on certain terms and this clearly makes an offer to such private persons to supply them with water on the terms laid down and the water rate received is a contractual charge Water rate under s 71(1)(b) is not a tax under s 3(14) but only a contractual charge S 40 does not apply to water rate under s 71(1)(b) though it is a contractual charge **Committee of Management Hyderabad v. Seth Ramchand Lownkiram A.I.R. 1923 Sind 1.**

Position of local bodies regarding the levy of octroi and terminal tax and making deductions from the amount of refund of octroi.—See notes under this head under s 73

Sub-section (21)—*Vehicles*'—This sub-section is equivalent to section 3(17) of the B.D.M Act 1901 wherein vehicle is defined in the same terms In **Dahyabhai Narandas v. Pestonji Jamshedji, 17 B.L.R 63** which was a case under the B.D M Act 1907 it was held that hand trollies running on rails laid on a public street and used by contractors for the purpose of carrying materials to fill up a tank are vehicles and are liable to be assessed for wheel tax

CHAPTER II

CONSTITUTION OF MUNICIPALITIES.

(1) Municipal boroughs.

Extension of Act to and withdrawal of Act from municipal districts and boroughs

4. (1) The Provincial Government may, by notification in the Official Gazette and with effect from a date to be specified in the said notification, include in Schedule I any municipal district or exclude any municipal boroughs from the said schedule

(2) The Provincial Government may, after consulting the municipality, by notification in the Official Gazette and with effect from a date to be specified in the said notification, extend, contract or otherwise alter the limits of any municipal borough

Limits to be specified in notification altering area

(3) A notification altering the limits of a municipal borough shall clearly set forth the local limits of the area to be included in or excluded from such municipal borough

Property and rights of municipalities which have ceased to exist to vest in the Provincial Government

(4) Save where it is otherwise provided in this Act, when a municipality ceases to exist on account of its members ceasing to hold office, or for any other reason whatsoever, the property and rights vested in the municipality shall, subject to all charges and liabilities affecting the same, vest in His Majesty, and the proceeds thereof, if any, shall be expended under the orders of the Provincial Government for the benefit of the local area in which such municipality had jurisdiction

Amendments In sub-section 1 the words 'the provincial Government' and 'official Gazette' were substituted for the words 'the Government' and 'Bombay Government Gazette' by the Adaptation of Indian Laws Order in Council The words 'other than the municipal district of Karachi' occurring after the words 'municipal district' were repealed by Bombay 17 of 1933 section 4

In sub-section 2 the words 'the Provincial Government' and 'Official Gazette' were substituted for the words 'the Government' and 'Bombay Government Gazette' by the Adaptation of Indian Laws Order in Council

Sub-section 4 was inserted by Bom 1 of 1927, sec 2 The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws order in Council

General:—A combined reading of sections 1, 4 and 5 shows that although under section 1 the Act extends to the whole of the Bombay Presidency, it does not apply to any Municipal district unless it is included in schedule 1 by a notification in the official Gazette by the Provincial Government

Under sub-section 1 the date of inclusion is also to be specified in the notification The Provincial Government also possess powers under sub-section 1 to exclude any municipal Borough from the said schedule Under the said powers the Godhra Municipal Borough was excluded from the Schedule but is now again included

Under sub-section 2 the provincial Government have powers to extend, contract or otherwise alter the limits of any Municipal Borough The term Municipal Borough is defined in section 3(9) The date from which the alteration is to take effect is to be specified in the notification in the Official Gazette The Government cannot exercise their powers under this sub-section without consulting the Municipality concerned and the change is also required to be notified in the Official Gazette

Under sub-section 3 the new area brought in or the area excluded must be very clearly set forth with the local limits in the notification

Sub-section 4 comes into operation when a Borough Municipality ceases to exist When a Municipality is dissolved or superseded under Sec 219, although the Municipality ceases to exist the saving clause at the commencement of sub-section 4 shows that the case will be governed not by sub-section 4 but by provisions of sec 219 There is a difference between provisions of sub-section 4 and those of sec 219 Although in both the cases the property and rights of the Municipality vest in His Majesty, under Sub-Section 4 the proceeds thereof are to be expended under the orders of the Provincial Government while under section 219 the powers and duties of the Municipality are to be exercised and performed by such person or persons as the Commissioner may appoint It is difficult to visualise cases when sub-section 4 would be of use As pointed out above, it is of no use in case of dissolution or supersession It is also of no use between the expiry of term of one board and the constitution of the new board because section 25(2)(b) clearly provides that the term of office of outgoing councillors shall extend to and expire on the day previous to the first meeting with quorum of the new board It seems that the sub-section would apply if all members cease to hold office either by resignation or disqualification It may appear that the sub-section 4 would apply if the Municipality is abolished altogether This can be done only by taking out the borough from schedule 1 and then declaring under section 4(1) of the BDM Act 1901 that the area administered by the Municipality ceased to be a Municipal district, because under sec 5(2) as soon as a borough is taken out from schedule 1, it becomes a municipal district and BDM 1901 applies In such a case the provisions of sec 4(4) of the BDM Act would apply and not sub-section 4 of this Act Thus it seems there is no contingency when sub-section 4 might come into operation beyond the far distant possibility of all members losing their seats by resignation or disqualification

Bom III of 1901 not to apply to municipal boroughs Bom III of 1901

5. (1) The provisions of the Bombay District Municipal Act, 1901, shall not apply to any municipal district included or hereafter included in Schedule I from the date of such inclusion

Provided that—

(a) references in any other enactment or in any instrument to the Bombay District Municipal Act, 1901, shall, unless a different intention appears, be constructed in respect of any municipal borough as references to this Act,

Bom III of 1901

(b) any appointment, notification, notice, tax, order, scheme, license, permission, rule, by-law or form made, issued or imposed

under the Bombay District Municipal Act, 1901, in respect of a municipal district included or hereafter included in Schedule I, so far as is not inconsistent with the provisions of this Act, and any appointment, notification, order, scheme, rule, by-law or form made or issued under any other law in respect of such district shall continue in force and be deemed to have been made, issued or imposed under the provisions of this Act or of such other law in respect of the municipal borough constituted by such inclusion, unless and until it is superseded by any appointment, notification, notice, tax, order, scheme, license, permission, rule, by-law or form made or issued under this Act or such other law

Bom III of 1901 Continuance of Acts notifications etc in respect of boroughs

(2) From the date specified in a notification under sub-section (1) of section 4, excluding a municipal borough from Schedule I, it shall cease to be a municipal borough and the provisions of the Bombay District Municipal Act, 1901, shall apply to it

Bom III of 1901 Municipal boroughs excluded from Schedule I

Sub-section 1 —This sub-section clearly states that from the date of inclusion of any Municipal district in Schedule 1 to this Act, Bombay District Municipal Act, 1901 shall cease to apply to that Municipal District The Municipal District so included will be a Municipal Borough and will be governed by this Act

Proviso (a) —This proviso make it clear that inspite of the fact that the Bombay District Municipal Act 1901 will cease to have any operation references in any other enactment or any instrument to the Bombay District Municipal Act 1901 shall be read as references to this Act in respect of a Municipal Borough governed by this Act Thus this proviso is a saving one

Proviso (b) —This proviso is also a saving clause It is very important Without this proviso all the appointments, notifications, notices, taxes, orders, schemes, licenses, permissions, rules, by-laws or forms made, issued, or imposed under the Bombay District Municipal Act 1901 in respect of a Municipal district included in Schedule I would be without any legal authority and in order to save them this proviso has been necessary However it should be noted that everything done under the District Act is not saved but only those things, which are not inconsistent with the provisions of this Act and are not superseded by any thing done under this Act This proviso not only saves acts under the Bombay District Municipal Act 1901, but also saves everything done in respect of the Municipal Borough under any other law so far as it is not inconsistent with this Act or is not superseded by anything done under this Act

However so far as rules and by-laws are concerned some time limit should have been prescribed in the proviso so as to compel the Municipalities governed by the new Act to frame rules and by-laws under the new Act In absence of any such limit although years have passed since the enactment of Act of 1925, some Municipalities have not cared to frame rules and by-laws thereunder and still continue to be governed by rules and by-laws framed under the District Act which can hardly meet the requirements under the new Act

In **Emperor v. Heptulla Alibhai 32 B L.R 757**, it was contended that as the rules were framed and sanctioned under the Bombay District Municipal Act 1901, they would not apply to the Surat Municipality in the absence of a special

resolution in that behalf by the Bombay Government Mirza J negativing the contention observed "Sec 5(1)(b) of the Bombay City Municipalities Act 1925 seems to be a complete answer to that contention"

Sub-section (2):—Under this sub-section, from the date of exclusion of a Municipal Borough from Schedule I, it becomes a Municipal District and the B.D.M Act 1901 automatically applies to it Thus if a Municipality in a Municipal Borough is to be abolished altogether the Municipal Borough must first be excluded from Schedule I and then the resulting Municipal district must be abolished by a notification under sec 4 of the B.D.M Act 1901 If an area is declared to be a municipal district it is compulsory under sec 9 of the B.D.M Act 1901 that it should have a Municipality and therefore in order to abolish the Municipality, the Municipal district must be abolished in the sense that a declaration must be made that it has ceased to be a Municipal district

Transfer of rights etc, on inclusion in Schedule I

6. The property, rights and liabilities of the municipality in a municipal district included or hereafter included in Schedule I, shall vest in the municipality of the municipal borough constituted by such inclusion, from the date of such inclusion.

Scope.—This section provides for the transfer of the property, rights and liabilities of the municipality in the municipal district to the municipality of the municipal borough in which the municipal district is converted The transfer takes effect from the date of inclusion of such a municipal district in Schedule I

Preliminaries before notification

7. (1) Not less than three months before the publication of a notification under section 4 the Provincial Government shall cause to be published in the Official Gazette in English, and in at least one of the local newspapers (if any) in the vernacular language of the district in which the municipal borough or municipal district is situate, and to be posted up in conspicuous places in such municipal borough or municipal district in such vernacular language, a proclamation announcing that it is proposed to include in or exclude from Schedule I the municipal district or municipal borough, as the case may be, or to alter the limits of the municipal borough in a certain manner, and requiring all persons who entertain any objection to the said proposal to submit the same, with the reasons therefor in writing, to the Collector within two months from the date of the said proclamation, and whenever it is proposed to add to or exclude from a municipal borough any inhabited area, it shall be the duty of the municipality also to cause a copy of such proclamation to be posted up in conspicuous places in such area

(2) The Collector shall, with all reasonable despatch, forward every objection so submitted to the Provincial Government

(3) No such notification as aforesaid shall be issued by the Pro-

vincial Government unless the objections, if any, so submitted are in its opinion insufficient or invalid

Amendments —In this section the words 'the Provincial Government and 'Official Gazette' were substituted for the words 'the Government' and 'Bombay Gazette' respectively by the Adaptation of Indian Laws Order in Council

Sub-section (1).—This sub-section provides that whenever the Provincial Government propose to take action under sections 4(1) and 4(2) in respect of any municipal district or borough, it has first to publish a proclamation inviting objections from the public The proclamation must be published in English in the Official Gazette and in the vernacular of the district in one of the local papers, if any The proclamation is also required to be posted up in conspicuous places in the municipal borough or district in its vernacular language The proclamation must contain the proposal to include in or exclude from Schedule I or to alter the limits of the municipal borough showing the manner in which they are proposed to be altered The objections from the public are to be submitted in writing and with reasons to the Collector within two months from the date of the proclamation The sub-section also requires that when any inhabited area is to be added to or excluded from a municipal borough it will be the duty of the municipality to post copies of the proclamation in conspicuous places in the inhabited area affected The publication of the notification under sections 4(1) & 4(2) must not be less than three months after the publication of the proclamation

Sub-section (2) — Under this sub-section the Collector is required to forward the objections received under sub-section I to the Provincial Government

Sub-section (3) —This sub-section prohibits the Provincial Government from issuing any notification under sections 4(1) & 4(2) unless it is of the opinion that the objections received are insufficient or untenable

(2) Municipalities

Incorporation of municipalities

8. In every municipal borough there shall be a municipality, and every such municipality shall be a body corporate by the name of 'the Borough Municipality', and shall have perpetual succession and a common seal, and may sue and be sued in its corporate name through its Chief Officer

Amendments —In this section the words 'The——Borough Municipality' were substituted for the words 'the Municipality of——' by Bombay 24 of 1936, s 2, schedule

General.—*This section is similar to section 9 of the District Municipal* Act, 1901, but in the latter Act the words 'through its Chief Officer' do not occur Under this section it is compulsory that there must be a Municipality for every Municipal Borough A Municipality is a corporation aggregate A corporation aggregate has been defined as 'A collection of many individuals united into one body under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued,

of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the designs of the institution or the powers conferred upon it either at the time of its creation or at any subsequent period of its existence' (Kyd on corporation Vol I P 13) All corporations have the following leading features —(1) Each and every corporation must have a name even though it be fictitious by which it is known or indentified It is usually conferred by statute (2) A corporation aggregate expresses its will as a general rule whenever strangers are concerned by its common seal And the power to possess and use a seal is incidential to every corporation (3) All corporations are to have a place of foundation i e, to belong to some definite locality (See **The Law of Municipal Corporations by Aiyengar second edition P 3**) All these requirements of a corporation are provided in this section

Title in a suit.—This section provides that a Municipality must sue or be sued in its corporate name through its Chief Officer The corporate name must be in accordance with the provisions of this section Thus if a municipality sues or is sued, it must appear in the title of the suit as follows —"The Borough Municipality, through its Chief Officer" The words 'through its Chief Officer' must be written in the title of the suit This is clear from the section itself Also see the Law of pleadings by Mogha 4th edition P 136 This provision is necessary to indicate the officer upon whom service of summons, processes and notices etc should be made and therefore the provision is made in the Borough Act Although Order 29 rule 2 of the Code of Civil Procedure, Act 5 of 1908, provides for service of process in case of a suit against a corporation, those provisions will not be applicable to a Municipality governed by the Boroughs Act in view of statutory provisions of sec 8 Under this section the corporation must sue or be sued through its chief Officer Thus the process and summons etc must be served on the Chief Officer, and any service on any one other than the Chief Officer will not be valid The term Chief Officer in this section obviously includes any acting or officiating Chief Officer

A suit by a Municipality framed in contravention of s 29 of Bengal Municipal Act 3 of 1884 by being brought in the name of the municipality instead of in the name of chairman as enjoined by s 29 is not maintainable even though the plaint be signed by the chairman It must be brought in the name of the chairman **Bishnupur Municipality v Sarat Chandra Chaudhari, A.I.R. 1931 Cal. 804.**

Where the plaintiff in a suit against a Municipality, sues the chairman only instead of the Municipal Commissioners, it is merely a technical flaw and no importance should be attached to it, specially when the Municipal Commissioners duly appear and defend the suit in the trial court and court of Appeal **Jogendra Nath Banerji v Tollyganj Municipality, A.I.R 1939 Cal. 178**

Subscription and varification of pleadings — This section is silent on this point Hence it would appear that as regards signing and varification of pleadings on behalf of the municipality order 29 Rule 1 of the Civil Procedure Code will apply Order 29 rule 1 provides that in suits by or against a corporation any pleading may be signed and varified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case

Corporation—Liability for malicious prosecution, libel, wrongful dismissal etc.—An action for malicious prosecution will lie against a corporation Pollock in his Law of Torts, 13th Ed P 324, considers that an action lies for a wrongful act done by a servant of the corporation in the course of his employment and in the corporation's supposed interest The principle has the authority of the Privy Council in *Citizens' Life Assurance Company* v **Brown (1904) A.C. 423,** where it was held that a corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment **Chhaganlal v. Thana Municipality, 34 B.L.R 143**

It is well established by authority that a corporation can be actuated by that kind of malice which is essential to the maintenance of an action for malicious prosecution instituted by its officers in the scope of their duty, provided the necessary ingredients of such a prosecution are made out, and in the assertion of its rights, a corporation may render itself liable for malicious prosecution **Municipality of Ahmedabad v. Panubhai, 37 B.L.R. 468** See also **The Town Municipality of Jambusar v Girjashanker, 7 B L R 655** and **Bhaguji v The Alandi Municipality, 38 B.L R 1098**

A person may become liable for a prosecution instituted by his agent under his authority express or implied In such a case the malice of his agent will be imputed to him **Lodd Govindas v Arumuga, A I R. 1937 Mad. 676.** It is on this principle that a corporation is liable for this tort, though it has no mind and cannot be guilty of malice **Abrath v. N.E Ry Co, (1885) 11 Q B.D: 440.** The agent will also be liable unless he was merely a ministerial agent, like a clerk or solicitor **Johnson v Emerson, (1871) L.R 6 Ex. 329.** See **The Law of Torts in England and India by S Ramaswamy Iyer, Second Edition Pages 400-401.**

A corporation will be liable for the malice of its agents or servants **Citizens' Life Assurance Co v Brown, (1904) A C 423.**

In the **Union Benefit Guarantee Company Ltd v Thakorlal P Thakore, 37 B L.R. 1033** Wadia J said "**In Metropolitan Saloon Omnibus Company v Hawkins, (1859) 4 H. & N 87, 90** Pollock C.B. suggested that the right of action of a corporation to sue for libel was limited to a publication which affected its property, but it has now been held that there is no such limitation The question for consideration is whether the words complained of are in disparagement of its corporate property or its business or its reputation In the words of Lord Blackburn in **Capital and Counties Bank v. Henty, (1882) 7 App Cas. 741, 777** an action will lie if a statement is published without lawful justification or excuse and is calculated to convey to those to whom it was published an imputation on the plaintiffs, injurious to them in their trade or holding them up to hatred, contempt or ridicule" In appeal Beaumont C J and Blackwell J confirmed the decree passed in this case and concurred with the reasoning of the trial judge

A Corporation is liable for the slander or libel published by its agents or officers within the scope of their authority **Citizens' Life Assurance Co v Brown, (1904) A.C 423,** and **Glasgow Corporation v. Lorimer, (1911) A C. 209.**

If the agents of a corporation act in pursuance of real or supposed powers in its behalf the Corporation is liable for their acts And even if the acts of the agents amount to implied malice or even express malice on behalf of

and in the interest of the Corporation, the Corporation is still liable The ground of the principal's liability for the acts of its agent rests on the very simple ground that he is not merely a **causa sina qua non** of the injurious act of his agent but the **causa causans** For a principal to be liable for an agent's act, it must always be necessary that to the question 'what made the agent to do it' the only answer possible should be 'he was doing the thing for his principal' Per Batty J in **Jahangir v. Secretary of State for India, 6 B.L.R. 131.** In the same case Per Jacob J 'the principle of the liability of a master for the wrongful acts of his servant is equally applicable whether the agency is for a corporation in a matter within the scope of the Corporate powers or for an individual And where a libel arises out of excess of censure by a servant, the act becomes one of an authorised class which becomes wrongful by reason of excess, and the master is liable for such act of the servant, since but for such excess it would have been clearly within the scope of the authority and the master would be responsible for the manner in which the servant had discharged the duty entrusted to him although he might not have authorised the particular act'

It is on the principle of vicarious liability that corporations are made to pay damages from their funds for wrongs which they themselves are incapable of committing **Mersey Docks and Harbour Board v. Gibbs, (1864) L.R. 1 H.L. 93.** They are liable even for torts requiring a mental element as an ingredient, though they themselves have no mind, e g, malicious prosecution, malicious libel, deceit In India local authorities like municipalities and district boards have been held liable for the faults of their officers or servants **Vizagapatam Municipal Council v Foster, (1917) I L.R 41 Mad 538** On the question whether a corporation can be held liable for an ultra vires tort, there is a difference of opinion among text writers but the weight of authority is in favour of the view that a corporation would be liable for the tort of its servant committed in the course of some enterprise or business which, though **ultra vires** or beyond its corporate powers, was expressly authorised or ratified by it In other cases a corporation may not be liable **The Law of Torts in England and India by S Ramaswamy Iyer, Second Edition P 600.**

A corporation is a 'person' in the eyes of the law and can be sued in the same circumstances as a natural person. It can obviously be liable only vicariously for the torts of its agents or servants acting in the course of their employment It may therefore become liable not merely for negligence but for torts like libel, malicious prosecution or deceit, though it has no mind and is incapable of malice or fraud But the liability of a corporation to pay compensation from its corporate funds for wrongs done by its officers may be limited by the statute of incorporation In such cases the remedy can only be against the actual wrongdoer For instance, under the Government of India Act, 1858, the Secretary of State for India in Council was constituted as a body corporate and could be sued only in certain circumstances for the wrongs of public officials **The Law of Torts in England and India by S. Ramaswamy Iyer. Second Edition P 660**

A local authority was held liable when a school mistress employed in one of its elementary schools ordered a young pupil to go and poke the fire in the stove in the tiffin room for preparing her tiffin and the girl while doing so sustained injury by her clothes catching fire The order was regarded as reasonably incidental to the discipline which a teacher is expected to exercise

over the pupils **Smith v Martin, (1911) 2 K. B 775.** Similarly the school authority was held liable when child's apron caught fire during instructions in cookery **Fryer v. Salford Corporation, (1937) 1 A.E.R 617** See also **Jones v. London County Council, (1932) 48 T.L.R. 577 and Rans Thorne v Otteley, (1937) 3 A.E.R. 907.**

In **Prabhu Lal v. District Board, Agra, A.I.R 1938 All. 276** which was a case of wrongful dismissal, it was held that the Board was liable for damages on the ground that the act of dismissal was the act of the Board and it was the Board which employed the plaintiff In this case the chairman of the Board was not held liable and it was said that even if there was malice on his part he would not be liable We do not agree with that view The agent will also be liable unless he was merely a ministerial agent like a clerk or solicitor See **Johnson v Emerson (1871) L.R. 6 Ex. 329**

Non-feasance—Mis-feasance—Nuisance—Non repairs of roads—whether Municipality liable:—The plaintiff filed a suit against the Ahmedabad Municipality to recover Rs 75/- as damages sustained by him in respect of an injury caused to his horse and carriage in consequence of the neglect of the Municipality to repair a road The road was in a bad state of repair in consequence of which the plaintiff's horse stumbled and broke his right leg This was also accompanied by breaking of the poles of the plaintiff's carriage Held, that the default leading to the damage was a mere non-feasance and the plaintiff's suit fails, for the statute does not impose upon the Municipality a duty towards the plaintiff which they negligently failed to perform **Achartlal v. the Ahmedabad Municipality, 6 B L.R 75.**

The Government made a drainage channel for the convenience of the Municipality of Dholka Owing to some default, the water instead of flowing along the channel so made flowed across the road into the plaintiff's field and caused damage to the plaintiff The plaintiff having sued to recover damages, the Municipality contended that they were not liable in as much as the damage arose from non-feasance and not from mis-feasance Held, overruling the contention, that the exemption from liability of local bodies on the ground of non-feasance was confined to neglect of highway and did not apply to drainage works carried out by local bodies for their convenience which they were bound to maintain in a proper state of repairs so that they should not be a nuisance to the neighbouring owners **Dholka Town Municipality v. Desaibhai, 15 B.L R 1034** This case was considered by Broomfield J. in **Mohanlal v. Ahmedabad Municipality, 40 B.L.R. 552,** where after discussing the cases of **Borough of Bathurst v MacPherson and Municipality of Picton v. Geloert** the learned Judge observed "It is clear, therefore, from the perusal of the authorities on which the Court relied in **Dholka Town Municipality v Desaibhai,** that the judgment went further than was necessary and probably further than was intended in saying that the exemption from the liability of local bodies on the ground of non-feasance is confined to neglect of highways What was really decided in that case was that where there has been non-feasance which has resulted in a public nuisance, then an action will lie on proof of particular damage"

Similarly, a Municipality constructed a dam in a creek, but by allowing a ditch, which was connected with the creek and which drained away rain water, to be filled up with rubbish of the town, and the sluices at the dam to be choked up with weeds, silt, and such other things, the rain water col-

lected in the creek, carried away the dam and flooded the plaintiff's property, held, that the Municipality was liable for the mis-feasance since it turned their works by their negligence into a nuisance **Rajendralal v. Surat City Municipality, 10 B.L.R. 498.** In this case Knight J said "It is argued for the respondent municipality, on the authority of the ruling of this Court in **Achratlal Harilal v. The Ahmedabad Municipality, 6 B.L.R. 75,** that the facts held proved above amount to no more than non-feasance for which the respondent is not liable in damages at the instance of any private individual In that case it was held that there being no duty cast upon the Municipality by the District Municipal Act to repair roads vested in it, no person injured by the non-repair of such a road could sue it for damages, because the omission of the Municipality to repair was non-feasance But, as has been pointed out by the House of Lords in **Mayor etc. of Shoreditch v. Bull** 'the distinction between non-feasance and mis-feasance might be carried too far,' and 'in some cases non-feasance might be equivalent to mis-feasance' And of the latter, **Borough of Bathurst v Macpherson** affords an illustration The facts of that case were as follows The Borough of Bathurst had constructed a barrel drain under or in proximity to the highway The drain having fallen into disrepair, a portion of the highway, subsided into it, leaving a hole into which the plaintiff's horse fell as he was riding along the highway, with the result that he sustained personal injuries The Privy Council held upon these facts that the Municipality having constructed the barrel drain was bound to keep it in a state of repair which would prevent its causing a dangerous hole to be formed in the highway That decision is explained in these terms by the Privy Council in Municipal Council of Sydney v **Bourke** —"The **ratio decidendi** was that the defendant had caused a nuisance in the highway It was entirely independent of the question whether there was an obligation to keep the highway in repair and whether any person injured by the breach of such a duty could maintain an action The case was not treated as one of mere non-feasance, and indeed it was not so The defendants had created a nuisance Having made the drain and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain and the road had consequently subsided and become founderous' Similarly here, the respondent Municipality constructed the dam in the Macca creek and by not keeping the ditch in a state of repair but by allowing it to be choked with rubbish of the town and allowing the dam to be choked up with the weeds, hedges and silt turned their works by their negligence into a nuisance so as to throw the water collected on their property—the said creek—into appellant's land That is a clear act of mis-feasance and falls within the principle of law illustrated in **Borough of Bathrust v. Macpherson** The respondent's act is similar to that of a man who brings water on to his own land and dams it up so that if it breaks away it must be a danger to his neighbour and must do him injury, there the man is liable, though he does nothing to let the water out, but it bursts away without any subsequent act of his"

In **Mohanlal v. Ahmedabad Municipality, 40 B.L.R 552,** the Ahmedabad Municipality, acting under the advice of a Government expert, passed orders cutting off the water supply of the city from 10 p.m. at night until 5 a.m. in the morning owing to shortage of water Plaintiff's house was situated within the limits of the Muncipality One night a house adjoining to his caught fire and the fire spread to his house which was destroyed as water could not be obtained

from the water mains for about half an hour after the arrival of fire engines The plaintiff sued to recover damages from the Municipality for a breach of the duty imposed upon it by section 68(1)(d) of the Bombay Municipal Boroughs Act, 1925, to make an adequate and reasonable provision for extinguishing fire There was no delay or negligence on the part of the Municipal servants either in the fire brigade department or in the water supply department The plaintiff's contention was that the Municipality was guilty of misfeasance because it had done a positive act, namely, it cut off the water supply for certain hours of the night Held, that the action of the Municipality in failing in its duty to make an adequate and reasonable provision for extinguishing fire did not amount to mis-feasance, but to non-feasance, and therefore no action lay The following remarks of Lord Cairns L C in **A'kinson v. Newcastle Water Works Company, (1877, 2 Exch D 441)** were quoted with approval by Broomfield J —"Now, a priori, it certainly appears a startling thing to say that a company undertaking to supply a town like Newcastle with water, would not only be willing to be put under this parliamentary duty to supply gratuitously for the purpose of extinguishing fire an unlimited quantity of water at a certain pressure, and to be subjected to penalties for the non-performance of that duty, but would further be willing in their contract with parliament to subject themselves to the liability to actions by any number of house-holders who might happen to have their houses burnt down in consequence, and it is, a priori, equally improbable that parliament would think it a necessary or reasonable bargain to make In the one case the undertakers would know beforehand what they had to meet as the consequence of their neglect, they would come under definite penalties, in the other, they would virtually become gratuitous insurers of the safety from fire, so far as water is capable of producing that safety, of all the houses within the district over which their powers were to extend"

If a duty is implied by a statute, which, but for the statute would not exist and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy Where it is not the scheme of a Municipal Act that a rate-payer should come to the court for non-feasance of Municipal Commissioners, a suit by a rate-payer against the Municipal Councillors, not for any wrongful act committed by them, but for a neglect of their duty, does not lie and the only remedy of the plaintiff would be under the relevant sections of the Municipal Act An illegal omission on the part of the Municipal Commissioners comes within the expression 'for any act purporting to be done under this Act' in s 535, as much as any act done under the Act and a suit against a Municipality for non-feasance of a duty is bad, if no notice as required by s 535 is served upon the Municipal Commissioners, prior to the institution of the suit **Jogendra Nath Banerjee v. Tollyganj Municipality, A.I.R 1939 Cal 178.**

Right of Inspection —When there is no statute conferring on all the members of a corporation, a right to inspect, copy or take extracts from the registers or any other documents belonging to it, the only right that the member of a corporation can have against the corporation in reference to such matter, is that which at common law belongs to every member of a corporation The result of the authorities on the point is summed up in Taylor on evidence Vol II para 1495 (10th edition) in the following words 'On the application of a member the King's Bench Division will, in general, grant a rule for a limited inspection of the documents of the corporation,

if it be shewn that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question depending in which the applicant is interested, but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was sometimes formerly laid down more broadly, and the language ascribed to the court in one or two cases might almost lead to the inference that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body But any such doctrine is now exploded, and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object' **The Bank of Bombay v. Sulleman Somji, 10 B.L.R. 636 (P.C), reversing 9. B.L.R. 165.**

Seal:—Though a contract by a corporation must ordinarily be under seal, still where there is an executed consideration, an action will lie though this formality has not been observed **Abaji Modak v. The Trimbak Municipality 5. B.L.R. 689.**

This case was considered by another division bench of the Bombay High Court in the case of **Municipality of Sholapur v. Abdul Wahab, 23. B.L.R. 244,** where Mr. Justice Shah refused to make any comment on the case but Mr Justice Crump in his judgment has made the following comment "In this view of the case, it is unnecessary to consider whether the decision in **Abaji v. Trimbak Municipality** applies here or not But in view of the remarks of the lower Court and in deference to the arguments advanced here, it is, I think, desirable to point out that so far as the judgment in that case applies the rule of common law as to contracts under seal, it is to some extent obiter For the learned Chief Justice says that to consider the point it is necessary to travel outside the pleadings Further, it must be remembered, that it is a decision on a Statute which is no longer in force It is difficult to say, even if it were applied here, that it fits the facts of this case The facts of that case lay down that a Corporation can sue on a contract which should have been under seal in spite of the omission of that formality where there is executed consideration. That is not exactly the case before us, and it is, therefore, not necessary to consider how far that decision can be reconciled with the decision of the House of Lords in **Young & Co v. Mayor etc. of Royal Leamington Spa** and how far the rule of English common law can prevail either in England or in India against Statutes containing restrictive provision as to the form of corporate contracts These are questions which will require consideration when a proper case arises"

With regard to these remarks of Mr Justice Crump Mirza, J observes as follows in **Municipal Corporation of Bombay v. Secretary of State, 36. B.L.R. 568 (594):** "With great respect it seems to me that Mr Justice Crump was right, sitting in the Appeal Court as he did, to throw doubt on the vaildity of the observations made by the learned Chief Justice in **Abaji Sitaram v. Trimbak Municipality.** With great respect I agree with Mr Justice Crump that these observations of the learned Chief Justice are in the nature of obiter and hence not binding on this Court On the facts of the case before him the learned Chief Justice considered that it was a case of an executed consideration These facts were similar to the facts of the present case The executed consideration which was relied on in that case consisted in the

Municipality giving the right to collect the tolls and taxes to the defendant The executed consideration on the part of the Municipality in the present case is said to be money they have expended under the contract with Government As the judgment of the Appeal Court on this point is, in my opinion, obiter, I am at liberty, with great respect, not to follow the view which has been expressed by the learned Chief Justice, that consideration in such cases should be regarded as being executed The case before the learned Chief Justice seems to have been one of the part performance and not of executed consideration" Further in the course of the same judgment Mirza J at pages 600-601 observed "On the assumption that no valid contract has been entered into on behalf of the Secretary of State in Council, Mr Coltman has argued that the contract has become binding upon the Secretary of State because of executed consideration on the part of the plaintiffs He has relied very strongly for this part of this argument upon **Abaji Sitaram v Trimbak Municipality** I have already dealt with this authority in the earlier part of this judgment and have ventured to express an opinion with great respect that the observations of the learned Chief Justice, on which Mr Coltman has relied, are obiter and not binding on me I have also called attention to the observations of Mr Justice Crump regarding this case in **Municipality of Sholapur v Abdul Wahab.** The observations of the learned Chief Justice have been dissented from, by the Allahabad High Court in **Radha Krishna Das v. The Municipal Board of Benares.** In **Ramaswamy Chetty v The Municipal Council, Tanjore,** on a similar point having come up for decision before the Madras High Court, that Court has followed **Radha Krishna Das v The Municipal Board of Benares** and has dissented from **Abaji Sitaram v. Trimbak Municipality** on the ground that it does not refer to or consider the authorities on which the Allahabad case has proceeded The observations of the learned Chief Justice have also come in for adverse criticism by Sir Frederick Pollock and Sir Dinshah Mulla in their learned commentary on the Indian Contract Act, 6th Edn at pp 375-377 The observations of the learned Chief Justice are, in my opinion, impliedly overruled by the Judicial Committee of the Privy Council in **Ariff v Jadunath Majumdar** (33 **B.L.R 913**) and are irreconcilable with the judgment of the House of Lords in **Young & Co v Mayor etc, of Royal Leamington Spa** as well as with the decision of the Court of Appeal in **Hunt v Wimbledon Local Board**"

(3) Election of Councillors

9. (1) Every such municipality shall consist of— Municipalities to consist of elected councillors

(a) elected councillors, and

* * *

(2) Any vacancy due to failure to elect the full number of councillors which under this section might be elected and any vacancy due to failure to elect a councillor under section 29 may, notwithstanding anything in this Act, be filled up by nomination by the Provincial Government Failure to elect

(3) Councillors elected or nominated under the Bombay District Municipal Act, 1901, and holding office in a municipal district included or hereafter included in Schedule I, immediately prior to such inclusion, shall be deemed to have been elected or nominat- Bom III of 1901 Continuance of councillors holding office at commencement of Act

Election in case of non-continuance

Bom III of 1901

ed, as the case may be, under this Act provided that where the Provincial Government has directed that all the councillors shall be elected, councillors nominated under the Bombay District Municipal Act, 1901 shall not be deemed to have been nominated under this Act, and councillors shall be elected under the provisions of this Act in place of such nominated councillors.

Amendments:—In sub-section (1) the clause (b) and provisos were deleted by Bom 9 of 1938 Sec 6 In sub-sections 2 and 3 the words 'the Provincial Government' were substituted for the words 'the Government' by the adaptation of Indian Laws Order in Council

Sub-section (1):—This shows that a municipality comes into existence as soon as it has its elected members, even though at the time, it may have no President See, **Samaldas v. Jesangbhai, 38 B L.R 1331 (1334).**

Nomination abolished.—Clause (b) of sub-section (1) and its provisos were as under

'(b) Nominated councillors that is to say such persons as from time to time are by name appointed in this behalf, or are executing the functions of any office, from time to time notified in this behalf by Government Provided that the number of elected councillors shall not be less than 4|5ths of the whole number and that not more than ½ of the nominated councillors shall be salaried servants of the Government, Provided also that the Government may direct that all the councillors shall be elected'

Thus before the amending Act Bom 9 of 1938 a Municipality consisted of elected and nominated councillors By the deletion of sub-clause (b) with its provisos, nominations are abolished and now a Municipality under the Boroughs Act consists only of elected councillors

Bom Act 9 of 1938 also contains section 9 which saves all nominations made before that act came into force and also provides for filling up any casual vacancy in a nominated seat in the same manner as if the said Act had not come into force

Sub-section (2):—However nominations are not abolished altogether from the Act Under this sub-section powers are reserved by Government to fill up by nomination any vacancy due to failure to elect and due to failure to fill up any casual vacancy by election The powers of nomination are reserved for the Provincial Government

Failure to elect—setting aside of an election'—Section 10(2) (Bengal Local Self-Government Act 3 of 1885 as amended by Act 24 of 1932) contemplated a default in electing the requisite number of members at an election directed by the Local Government under s 10(1) and does not apply where an election is held under s 10(1) and the requisite number of successful candidates returned, but for any of the reasons specified in s 18B, the election of the returned candidates is afterwards declared void The sequel in such a case is governed by the provisions of s 19 The vacancy or vacancies are required to be filled up by a fresh election, and it is not within the competence of Local Government, purporting to act under s 10(2) to dispense with such fresh election and appoint the elected members themselves The words 'is not filled' in s 10(2) refer to the stage at which the result of the election is declared, not necessarily to the latter stage when the names of the returned

candidates are officially published in the Gazette There is nothing in the Act or in the Rules to show that a person is not to be deemed to be duly elected until the publication of his name in the Gazette It is therefore wrong to say that because the names of the elected candidates had not been published in the Gazette, their elections should be deemed not to have been held at all **Sashi Sekhar Bose v. Province of Bengal, A I R 1943 Cal 65.**

Sub-section (3) —Under this sub-section the Provincial Government have the option to continue or discontinue the nominated councillors, if any, at the time of transfer of a Municipal district into a Municipal Borough If the Provincial Government directs that all the councillors of the new Municipal Borough shall be elected councillors the nominated councillors will vacate their seats and elected councillors will take their place The elections must be held under the provisions of this Act

10. (1) The Provincial Government shall, from time to time, generally or specially for each municipality—, The Provincial Government shall determine number of councillors fix proportion of elected and nominated councillors and make rules for regulating elections

(a) determine the number of councillors,

* * *

(c) make rules consistent with this Act prescribing the number of councillors to be elected, the number of wards to be constituted for Mahomedans, and Non-Mahomedans in each municipal boroughs, the extent of such wards and the number of councillors to be elected by each ward and the number of seats to be reserved in each ward for women or for any tribe, caste or community and prescribing the manner in which the Muhammadans in any municipal borough may declare that all the wards constituted for their community be abolished, providing for the preparation and revision of the lists of voters from time to time, fixing the date after which no application for enrolment in any such list under preparation or revision shall be received, declaring the manner in which the right to vote of any undivided family, or any company or firm, or any other association or body of individuals or any trustees of any building or land being two or more in number entered in such list, may be recorded and exercised, and prescribing the restrictions if any, on the number of votes which a voter may give,

determining the manner in which and the authority by whom any objection to such lists in regard to the names entered therein or omitted therefrom may be heard and decided, and to what judicial authority the appeals as to such entries and omissions shall lie; prescribing the date for the publication of the Municipal Election Roll;

regulating generally such elections

Provided that rules so made shall not provide for the reservation of seats in any ward for the representatives of any tribe, caste or community—

(a) other than—

(i) a backward tribe,

(ii) Harijans, or

(iii) any community, the members of which are under the Fifth Schedule to the Government of India Act, 1935, entitled to separate constituencies for electing representatives to the Bombay Legislative Assembly, and

(b) unless the Provincial Government is of opinion that the reservation of such seats is necessary having regard to the population of such tribe, caste or community in the municipal borough;

Explanation.—For the purpose of this section—

(1) A Harijan shall mean a member of a scheduled caste as defined in the Government of India (Scheduled Castes) Order, 1936;

(2) A backward tribe shall mean a tribe specified in Part II of the Thirteenth Schedule to the Government of India (Provincial Legislative Assemblies) Order, 1936

(1-A) If at any time the Muhammadans in any municipal borough who are qualified voters declare either unanimously or by majority in the manner prescribed by rules made under sub-section (1) that all the wards constituted for their community in such municipal borough be abolished, the Provincial Government shall abolish all such wards and may also make rules prescribing the manner in which the representation of the said community shall be secured in such municipal borough,

Provided that notwithstanding anything contained in the proviso to sub-section (1) the rules so made shall provide for reservation for the representatives of the Muhammadan community of such number of seats in such wards in the municipal borough as is, in the opinion of the Provincial Government, necessary having regard to their population in such municipal borough

(2) The Provincial Government may from time to time delegate to the Commissioner any of the powers granted to the Provincial Government by clause (c) of sub-section (1), subject to such restrictions or conditions, if any, as the Provincial Government may

attach to the delegation and such powers shall not be exercised without first receiving the opinion of the municipality concerned

Amendments —In sub-section (1) the words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council Clause (b) was deleted by Bom 9 of 1939 s 7(1)

In sub-section (1) clause (c) the words 'And Non-Mohmedans' were substituted for the words 'Non-Mohmedans and Depressed classes' by Bom 9 of 1938 s 7(2)(a)

In sub-section (1) clause (c) the words 'And the number of seats to be reserved in each ward for women or for any tribe, caste or community and prescribing the manner in which the Mohmedans in any Municipal borough may declare that all the wards constituted for their community be abolished, were inserted by Bom 9 of 1938 s 7(2)(b)

Proviso to sub-section (1)(c) was added by Bom 9 of 1939 s 7(2)(c)

The explanation was substituted for the original by Bom 9 of 1938 s 7(3)

Sub-section (1A) with its proviso was inserted by Bom 9 of 1938 s 7(3)

In sub-section (2) the words 'the Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council

Sub-section (1)(b) —The sub-section (1)(b) was as under —

'(b) Fix subject to the provisions of Sec 9 the proportion of the councillors if any who shall be nominated'

The nominations under Sec (9) having been abolished this clause became redundant and was removed by Bom 9 of 1938, s 7(1)

Sub-section (1)(c)'— Seperate electorates for depressed classes are abolished and provision is made for reservation of seats for women or for any tribe, caste or community and also for enabling Mohmedans in a Municipal borough to abolish separate electorates provided for them For this purpose necessary amendments have been made in this clause Sub-section (1)(c) empowers the Provincial Government to make rules consistent with this Act for purposes mentioned in the clause

Regulating Generally such elections —This terminology is very wide and enables the Provincial Government to make rules for the various stages of the election from the time of publication of the Municipal election roll to the end of the elections see **Nand Ram v Chote Lal, I.L.R 35 Allahabad 578**

Proviso to sub-section (1)(c) This proviso explains that ordinarily reservation of seats is to be made only for a backward tribe, Harijans or any community described in cl (a)(iii) in the proviso However, the Provincial Government has powers under clause (b) to the Proviso to provide reservation of seats for any such tribe, caste or community only if it deems it necessary to do so having regard to the population of such tribe, caste or community in the Municipal borough

Explanation to sub-section (1):—The original explanation defined a depressed class for the purpose of this section The term depressed class having been removed from the sub-section altogether that explanation became

redundant, but as new terms 'Harijans' and 'A Backward Tribe' are introduced they are defined in the new explanation The definitions are very clear

Scheduled Castes:—Under the Government of India (Scheduled caste) order 1936 the following are the scheduled castes in the Presidency of Bombay

Asodi	Dhegu-Magu	Mahar
Bakad	Dhor	Mang Garudi
Bhabbi	Garode	Meghval or Menghwar
Bhangi	Halleer	Mini Madig
Chakrawadya-Dasar	Halsar or Haslor, or Hulsavar	Mikri
Chalwadi	Holaya	Nadja
Chambhar or Mochigar, or Samagar	Khalpa	Shenva or Shindhava
Chena-Dasaru	Kolcha or Kolgha	Shingdav or Shigadya
Chuhar or Chuhra	Koli Dhor	Sochi
Dakaleru	Lingader	Timali
Dhed	Madig or Mang	Turi
		Vankar
		Vitholia

Mochi (except in the Ahmedabad, Kaira, Broach and Panch Mahals and Surat districts)

Kotegar (in the Kanara district only)

Backward Tribes —Under part II of the 13th Schedule to the Government of India Act (Provincial Legislative Assemblies order 1936) the Backward Tribes in the Presidency of Bombay are as under —

Bards	Naikda or Nayak
Bavcha	Pardhi including Advichincher or Phanse Pardhi
Bhil	Patelia
Chodhra	Pomla
Dhanka	Powara
Dhodia	Rathava
Dubla	Tadvi Bhil
Gamit or Gamta	Thakur
Gond	Valvai
Kathodi or Katkari	Varli
Konkna	Vasava
Koli Mahadev	
Mauchi	

Sub-section (1A):—This sub-section with its proviso is new It provides for abolition of seperate muslim electorate if the qualified muslim voters in a municipal borough either unanimously or by majority so declare Thus free choice is left to them without intervention of any other authority In case the separate electorates are abolished it is compulsory for the Provincial Government to provide reservation of seats for the Muslim community to secure their proper representation The number of seats so reserved shall be determined having regard to their population in the municipal borough

Sub-section (2):—The rule making powers which the Government possess under sub-section (1)(c) can be delegated under this sub-section by the Provincial Government to the Commissioner The Provincial Government may attach restrictions or conditions to the delegation The Commissioner is required to consult the municipality concerned before exercising the powers

so delegated There is no such restriction on the exercise of the said powers by the Provincial Government

Final —Final means not liable to be challenged in a civil suit See observations of Mitter J in **Sibesh Chandra v. Bibhu Bhusan, A.I.R. 1928 Cal. 750 (2)** and of Nasim Ali J in **Mahedar v Kanta Chandra, A.I.R. 1935 Cal. 10** wherein the learned Judge said "It was urged by the learned advocate for the appellant on the authority of the decision in the case of **Rathis Chandra v. Amulya Charna, A.I.R. 1931 Cal. 36** that the word 'final' in the rules quoted above means final so far as the executive authorities are concerned and consequently the question can be tried again by the civil Court That was however a case which arose out of an election under the Bengal Municipal Act in which there is an express proviso to s 15 of the said Act retaining jurisdiction of the civil Courts to try suits relating to election The learned advocate for the defendant respondent on other hand contended that the word 'final' in Rr 1-A and 26-B means 'not liable to be challenged in a civil suit' The observations of Mitter, J, in the case of **Sibesh Chandra v. Bibhu Bhusan, A.I.R. 1928 Cal 750** support this contention of the respondent It was however contended by the learned advocate for the appellant that the observations of Mitter, J, in that case were mere obiter dicta inasmuch as the learned Judge having found that the objection taken by the plaintiff in that case, (namely whether Tarak was a qualified voter) fell within R 42, it was not necessary for the learned Judge to come to a decision as to the meaning of the word 'final' in that rule Even if it be assumed that the observations of Mitter, J, in that case are obiter dicta, I am not prepared to say that the opinion expressed by the learned Judge in that case is wrong" See also **Muhammad v. Mirza, A.I.R 1935 All 106,** wherein it was held that, even such omission as the omission to submit the proceedings of the revising committee formally before the district Magistrate or similar irregularities would not vest in the civil Court jurisdiction to re-open the matter and question the legality of any order passed by the revising committee or the District Magistrate In this case their lordships observed "It is quite clear that the right conferred on people residing in a ward is merely to object to the preparation of an electoral roll within the prescribed time and to submit their grievances before the Revising Committee The only other authority who can revise the order of the Revising Committee is the District Magistrate Subject to any order passed by the District Magistrate, the order made by the Revising Committee is final The order of the District Magistrate also is final, and the electoral roll, such orders and the electoral roll so amended cannot be altered In view of these provisions in the rules, there can be no manner of doubt that the only right which the plaintiffs had was to prefer their objections before the Revising Committee and then ultimately to appeal to the District Magistrate But the District Magistrate's order whether it was for or against the applicants and whether it was right or wrong has to be final A Civil Court could therefore prima facie have no jurisdiction to question the order of the District Magistrate which, under the Rules, is declared to be final"

A Civil Court has no jurisdiction to decide a dispute as to the qualification of the members of the District Board A dispute as to the qualification for membership of the District Board is a dispute under the rules framed under s 138-A laying down the qualifications, and under R I-A all disputes arising under the rules shall be decided by a Magistrate whose decision will be final

It is clearly intended by the legislature that the procedure should be a summary one so that disputes as to qualification should not be kept pending in civil Court **Dr. Kasiruddin v Dr. Mafizuddin, A I.R. 1936 Cal. 295**

Sub-section (4) of section 37 which gives to the order of the Judge a finality does not exclude the power of the judge to review his own order The word 'final' used there means that the order is a non-appealable one **Phani Bhusan Sen v. Sanat Kumar Maitra, A.I.R 1935 Cal. 773**

Order of District Judge in re. amendment of the list of voters not subject to revision:—The whole scheme of Act 3 of 1901 is that in matters of dispute relating to Municipal election, while inquiry shall be held by a Judicial Officer as distinct from a Revenue Officer, that Judicial Officer shall hold an inquiry as a persona designata and not as a court It was not the intention of the legislature that the words 'judicial authority' in Cl (iv) of sub-s (1)(c) of *s* 11 should be construed to mean a court as such. There is no distinction between an inquiry relating to the validity of the election itself and objections regarding the list of voters Hence the orders of the District Judge and of the Assistant Judge in an appeal relating to the amendment of the list of voters are in the capacity of persona designata and therefore an application against such orders does not fall under s. 115 Civil Procedure Code **Harchandrai v. Municipality of Tando Adam, A.I.R. 1938 Sind 153**

Returning Officer and Appellate authority disposing of objections to voters' list under the rules are acting judicially —The District Election Officers in disposing of objections under R 11 to entries in the electoral rolls and the appellate authorities who hear appeals from their decisions are in performing those functions acting judicially **Inspector of Municipal Councils and Local Boards, Madras v Alahari, A.I.R. 1934 Mad 140** The legal consequence of this is that it will not be open to anyone to interfere with them in anyway in performance of their duties under the rules In the above case the Inspector issued a circular in the nature of a general executive direction to District Election Officers and Deputy Inspectors of Local Boards to treat the certificate of a village officer that a lease is genuine as prima facie evidence of the genuineness of a lease It was held that for the Inspector or anyone else to attempt to interfere with the exercise of those officers of their judicial functions would be obviously and very seriously improper

The decision which the Magistrate gives under R 26(b) is a judicial decision and not simply an executive order passed by the Returning Officer in connection with the preparation of a register of voters **Mahedar Rahaman v. Kanti Chandra, A.I.R 1935 Cal 10.**

Nomination Paper —Where a nomination paper is not signed by the candidate, but the candidate himself impresses his name by a rubber stamp in the declaration clause and in the column of 'full name of the candidate' the nomination paper is valid as having been properly signed Where a nomination paper is not validly signed by the candidate, he cannot be allowed to affix his signature after the due date of its filling **Ratansi Damji v Ratansi Virji, 41 B.L R. 524**

Object and scope of the rules require that the signature on the nomination paper should be put in by the very party concerned and not by his proxy **A. Doraswami v. Joseph A.I.R. 1926 Mad. 319.**

Where the rules enact that no voter shall be at liberty to nominate more candidates than there are vacancies, what is sought to be prevented is that no voter shall nominate a larger number of candidates than there are vacancies and not that a voter shall be forbidden from subscribing more than one nomination paper in favour of the same candidate There was but one vacancy and the voter put forward but one candidate. **Thubati v. Taluk Board, Narasaraopet, A.I.R 1929 Mad. 607.**

Reservation of seats in Municipal wards — Subject to the condition that where there are separate wards for Muhammadans, only Muhammadans can stand for election by Muhammadan wards and only non-Muhammadans can stand for election by non-Muhammadan wards, there is no restriction on a duly qualified candidate standing for election in any ward, even if he belonged to a community for which a seat or seats are reserved in one or more wards Similarly women can stand for election in any ward It is not necessary for a woman candidate standing for election in a ward in which a seat is reserved for woman or for a candidate standing for election in a ward in which a seat is reserved for his or her community to make a declaration that he or she is a candidate for the reserved seat The claims of such a candidate will be automatically taken into account when declaring the result for the reserved seat All that is necessary is that every candidate should indicate his or her community or caste in the nomination paper in the space provided for the purpose It is not intended that candidates belonging to a community for which a seat is reserved in any ward should be debarred from being elected to an unreserved seat in the same ward, if they have secured the necessary votes Similarly women standing for election in a ward in which a seat is reserved for women are eligible for election to unreserved seats also, if they have secured the necessary votes **(G C.G.D No. S. 90 dated the 18th July, 1938)**

Powers of District Judge hearing appeals on applications for amendment of Voters' lists —The District Judge empowered under the election rules of municipality to hear appeals against their decisions on applications to include or to exclude names of voters from the list of voters, is a persona designata and not a court While hearing such appeals the District Judge exercises such powers as are expressly or by necessary implication conferred on him under the Municipal Act or the rules thereunder There is no warrant for the District Judge importing into such inquiry his ordinary civil power such as the power to give interim injunction restraining the municipality from holding elections, and indeed such an injunction cannot be said to be for the purposes of or in furtherance of the trial of such appeals If the District Judge is unable to decide in time the appeal or appeals and the municipal election roll is not prepared and published in time for the elections, the old municipal election roll continues in operation under the proviso to s 13(1) of the District Municipal Act and the election would be held under the old election rolls That being so it would be without the jurisdiction of the District Judge to issue a temporary injunction in such cases **(G.C.G.D. No. 9448 dated the 16th November 1932)**

11. (1) Save as provided in section 16, every person whose name is entered in the current electoral roll or part thereof, prepared for a municipal borough which constitutes or forms part of

Persons qualified to vote or be candidates at a municipal election

Electoral roll of tax payers

a territorial constituency and published under rule 23(3) of the Bombay Legislative Assembly Electoral (Preparation, Revision and Publication of Electoral Rolls) Rules, 1936, shall be qualified to vote at a municipal election in such Municipal Borough.

(2) (a) Save as provided in section 16, every person—

(i) who in any municipal borough, on the first day of April next preceding the date of publication of the electoral roll, occupied as owner or tenant a house or building, or part of a house or building separately occupied, as a dwelling or for the purpose of any trade, business or profession of which the annual rental was not less than Rs. 12 or of which the capital value was not less than Rs 200, or

(ii) who for a period of not less than three months next preceding the last day before the preparation or revision of the list of voters upon which under the rules applications for enrolment may be received has been assessed to the qualifying tax.

and who within the three months next preceding the date referred to in sub-clause (ii) has paid all arrears of taxes, if any, due from him to the municipality, shall be qualified to be entered in the list of voters for such municipal borough and to vote at a municipal election in such municipal borough

Explanation.—A person shall be deemed to be in arrears of taxes if he has not paid within one month of the date of presentation any bill which has been presented under section 104

Provided that a person who—

(i) is not a British subject or a subject of an Indian State, or

(ii) has been adjudged by a competent court to be of unsound mind, or

(iii) is under 21 years of age,

shall not be entitled to have his name entered in such electoral roll.

Explanation —For the purposes of this section, "the qualifying tax" means a tax, other than octroi, toll and the tax on vehicles and animals plying for hire or kept for the purpose of being let for hire, imposed in a municipal borough

(b) The electoral roll of tax-payers for the time being in force shall be conclusive evidence for the purpose of determining whether any person is entitled to vote under the provisions of this subsection at any election If an electoral roll is not revised in accord-

ance with the rules made under clause (c) of sub-section (1) of section 10, the roll shall continue in force until such revision has taken place.

(3) Every person so qualified to vote who for a period of not less than six months next preceding the last day before the preparation or revision of the electoral roll upon which under the rules applications for enrolment may be received has been resident in such borough or within seven miles of the limits thereof shall, subject to the provisions of this Act and of any other law for the time being in force, be qualified to be a candidate at a municipal election in such municipal borough

Explanation—For the purpose of this section a person shall be deemed to be resident in or within seven miles of the limits of a municipal borough if he ordinarily resides or has his principal place of residence in or within seven miles of the limits of such borough

Amendments:—In sub-section 1 the words 'territorial constituency and published under rule 23(3) of the Bombay Legislative Assembly Electoral (Preparation, Revision and Publication of Electoral Rolls) Rules 1936', were substituted for the words 'General Constituency, and published under Regulation 6(3) of Part II of the Bombay Electoral Regulations, 1923' by Bom 24 of 1936, s 2, Schedule with effect from the 31st day of March 1937

In sub-section (2) sub-clause (a) (ii) was substituted for the original clause by Bom 4 of 1930, s 4

Short history —This section deals with franchise under the Boroughs Act In the Bombay D.M Act, 1901 the basis of franchise was different see section 12 of the District Act From that basis a departure was made in the Boroughs Act and the franchise was widened Under the Boroughs Act one of the basis of franchise is the electoral roll published under the Bombay Legislative Assembly Electoral Rules 1936 In short everyone who is a voter in the electoral roll prepared for a municipal borough under the Legislative Assembly Electoral Rules 1936 is qualified to have his name entered as a voter in the Election roll of the Municipality The second basis of franchise is the occupation as owner or tenant of a house or a part of a house of which annual rental was Rs 12 or more or of which the capital value was Rs 200 or more Both of these basis are new The third basis is that of being assessed to the qualifying tax for a period of at least three months next preceding the publication of the preliminary list of voters coupled with payment of all the arrears of taxes within the time above prescribed The third basis is similar to the basis of qualifying tax provided in the B.D.M Act 1901 with certain differences The Educational qualifications and qualifications of status are not made basis of franchise in the Boroughs Act as is done in the District Act Thus it will be clear that there is a fundamental change in the basis of franchise from the district Act to the Boroughs Act

Sub-section (1):—Under this sub-section a voter at the Bombay Legislative Assembly elections is qualified to have his name entered in the Municipal election roll, but if his name is not entered in the municipal

election roll he will not be entitled to vote at the municipal election although his name may be in the Electoral roll for the Assembly A voter in the Assembly list is not qualified to be a voter in any municipal borough he chooses but is qualified to be a voter in the particular municipal borough for which his name appears in the Assembly electoral roll Also a person merely possessing qualifications to have his name entered in the Assembly Electoral roll is not entitled to have his name entered in the municipal election roll unless his name is already entered in the Electoral roll for the Assembly

Qualified to vote—Entitled to vote —The phrase 'qualified to vote' is not identical with the phrase 'entitled to vote' A person may be qualified to vote but he will not be entitled to vote unless his name appears in the Electoral roll Qualified to vote only means that the person possesses the necessary qualification to have his name entered in the voters' lists Entitled to vote means that the person's name appears as a voter on the voter's list The subsection also provides that a person who is disqualified for corrupt practice under sec 16 of the Act will not be said to be qualified to vote although he might be possessing the necessary qualifications See notes under this head under s 16

Sub-clause (2)(a)(i).—This sub-clause provides the second basis of franchise in the Boroughs Act Under this sub-clause occupation as an owner or tenant of a house or building of an annual rental of Rs twelve or more or of the capital value of Rs 200 or more is a qualification for being a voter. Such occupation must be on the 1st day of April next preceding the publication of the Electoral Roll It should be noted that the condition of payment of arrears of taxes applies to this sub-clause also

Electoral roll —Means the final municipal election roll on the basis of which the elections are held See notes under this head under s 13

Occupied:—This does not mean that the voter himself must actually reside in the house or he himself must carry on trade, business or profession in the building It is sufficient if he has occupied it either as owner or tenant for the purpose of dwelling or any trade, business or profession He might carry on these through his servants Similarly it is sufficient if he occupies it as a dwelling irrespective of the fact whether he himself resides there in or not For example, if a person takes a house on lease, furnishes it but does not reside therein at all, even then he is the occupier of the house and if the house is of the annual rental of Rs 12 or more or is of a capital value of Rs 200 or more he will be qualified to vote An owner who has rented out his house cannot be said to be occupying the house and is therefore not qualified to vote on this ground

Part of a house or building separately occupied —Separately occupied means separately occupied as a tenant or owner Everyone of the members of a family, jointly occupying a house is not entitled to be a voter For purposes of being a voter there must be separate occupation of a part of a house

Annual rental —Annual rental means total rent for a year.

Capital Value:—This term is not defined anywhere in the Act It is not the same as market value Capital value means the cost of constructing the building less depreciation for wear and tear

Owner or tenant of a house of which the annual rental was not less than Rs. 12 or of which the capital value was not less than Rs. 200:—This does not mean that the occupant of a house which fetches an annual rent of Rs 8/-

only will not be qualified to vote although the capital value of the house may be Rs 200/- or more Between the two requisites of the qualifying house, the conjunction is 'or' and not 'and' Also the word 'owner' does not go with the capital value only and the word 'tenant' does not refer to annual 'rental' only The requirement is that the house must either be fetching an annual rent of Rs 12/- or more, or in the alternative it must be worth Rs 200/- or more

Sub-clause (2)(a)(ii):—This sub-clause is new and was substituted by Bom 4 of 1930 s 4 This sub-clause provides a franchise on the basis of assessment to the qualifying tax

The last day before the Preparation or revision of the list of voters upon which under the rules application for enrolment may be received.—This phraseology is confusing It means the date of publication of the preliminary voter's list

Qualifying tax:—This term is defined for the purpose of this section only in the Explanation in this sub-section According to this definition it means every tax excluding Octroi, Toll, and Tax on vehicles and animals plying for hire Thus all indirect taxes are excluded from the definition of qualifying tax and the term seems to cover only direct taxes The scheme appears to be that the franchise is given only to those who themselves bear the taxes Octroi includes Terminal Tax and therefore Terminal Tax is not a qualifying Tax The term Tax is used here in the wide sense in which it is defined in s 3(20) Thus a fee, rate, cess etc included in the definition of tax under s 3(20) will be a qualifying tax

Assessed:—The requirement is not that the person should pay the tax for the three months It is sufficient if he is assessed for it However the clause about payment of arrears of taxes which applies to both the sub-clauses (i) & (ii) provides that in addition to such assessment, he must not be in arrears of taxes A person is not said to be in arrears unless a bill under s 104 is presented and he fails to pay the bill within one month from the date of such presentation This disqualification for failure to pay arrears of taxes does not apply to persons qualified to vote on the qualification mentioned in s 11(1)

If an objection is made that a person whose name is included in the electoral roll is not an assessee then all that the revising authority can inquire into is the fact whether he has been assessed The question whether the assessee has been illegally or improperly assessed is a matter which does not lie within the scope of the Revising Authority **Somasundara Mudaliar in re. A.I.R. 1932 Mad 171.**

Proviso —Under this proviso a person who is not a British subject or a subject of an Indian state or who is adjudged to be of unsound mind or is under 21 years of age is not entitled to be a voter although he might possess the requisite qualifications under sub-section (2)(a)

Clause 2(b) —Under this clause the Electoral Roll is conclusive on the question as to whether a person is entitled to vote at the election or not If a person's name is in the Election Roll he is entitled to vote His right to vote cannot be questioned on any ground Similarly if a person's name is not entered in the electoral roll he is not entitled to vote irrespective of the question whether he possesses the requisite qualifications or not This clause

also provides for the contingency when an Electoral roll is not revised in accordance with the rules In such a case the unrevised roll shall continue in force until such revision takes place In view of provision of section 13 this clause is redundant

Sub-section (3):—This sub-section prescribes the qualification to stand as a candidate at a municipal election It provides that over and above the qualification to vote as given in sub-sections (1) and (2), there should be the residential qualification namely that the person who desires to stand as a candidate must be a resident in the municipal borough or within 7 miles of the limits thereof for a period of six months or more next preceding the publication of the Preliminary Voter's list A person who is a voter will not be entitled to stand as a candidate unless he possesses this residential qualification Similarly a person who possesses the necessary residential qualification will not be entitled to stand as a candidate unless he is qualified to vote, and unless his name appears in the municipal election roll (see section 14 of the Act) The phrase qualified to vote appears to have been deliberately used in this sub-section A person who wants to stand as a candidate must be qualified to vote i e to say for this purpose the entry of a name in the Electoral Roll will not be conclusive proof that the person is qualified to vote It must be noted in this behalf that the conclusiveness of the Electoral Roll under sub-section 2(b) is only for the purpose of determining whether any person is entitled to vote or not It does not apply to the question of determining whether a person is entitled to stand as a candidate The result is that although a candidate's name appears as a voter in the Electoral Roll it will be open to show that he is not qualified to vote and therefore not entitled to stand as a candidate Thus we arrive at the same result as was arrived at in **Vinayak v. Gopal, 40 B L R. 525**, which was a case under the Bombay District Local Boards Act 1923 The scheme of the Boroughs Act appears to be that while the Electoral Roll is made conclusive for the purpose of determination of the right to vote it is not made conclusive for the determination of the right to stand as a candidate

Subject to the Provisions of this Act and of any other law for the time being in force —This means that if the intending candidate is not prevented from standing as a candidate by any other provision of this Act or by the provisions of any other law for the time being in force Thus if a person is subject to any of the disqualifications mentioned in s 12 or 15(6) he will not be entitled to stand as a candidate, although he may be possessing the qualifications mentioned in section 11(3)

Resident:—The meaning of the word is made clear by the explanation to this sub-section Under this explanation it is sufficient if a person ordinarily resides or has his principal place of residence in the Borough or within 7 miles of the limits thereof A person who stays with his father in a residence belonging to him for only some months of the year cannot be said to have a residence within the meaning of s 7, Village Local Self Government Act, so as to entitle him to vote unless there is evidence that he has some title to the place of residence, nor can such person be deemed to be the only member of a joint family entitled to vote within the meaning of s 7, unless he is nominated to vote on behalf of the family Such a person not having the necessary qualification for a Local Board is not qualified to be member of a District Board. **Dr. Kasiruddin v. Dr. Mafizuddin, A.I.R. 1936 Cal. 295.**

Nomination —In determining the eligibility of a candidate, the circumstances and the position of the candidate as they existed at the date of nomination and not at the date of election, should be considered **Satyandra v. Chairman of the Municipal Commissioners of Decca, A.I.R. 1931 Cal. 288.**

A Civil Court has no jurisdiction to decide a dispute as to the qualification of candidates.—See notes under the head 'Final' under s 10

General disqualifications for becoming a councillor Vacation of seat Decision of Provincial Government in case of dispute

12. (1) No person may become a councillor—

(a) who—

(i) has been sentenced by a Criminal Court to imprisonment or whipping for an offence punishable with imprisonment for a term exceeding six months, or to transportation, such sentence not having been subsequently reversed or quashed, if and so long as such a sentence has not expired, or

(ii) has been removed from office under section 27 and five years have not elapsed from the date of the expiry of such removal, unless he has, by an order which the Provincial Government is hereby empowered to make, if it shall think fit, in this behalf, been relieved from the disqualification arising on account of such sentence or removal from office; or

(b) who is an uncertificated bankrupt or an undischarged insolvent, or

(c) who is a judge

(2) No person—

(a) who is a subordinate officer or servant of a municipality, or

(b) who, save as hereinafter provided, has directly or indirectly, by himself or his partner, any share or interest in any work done by order of a municipality, or in any contract or employment with or under or by or on behalf of a municipality,

may be a councillor of such municipality

(3) A person shall not be deemed to have incurred disqualification under clause (b) of sub-section (2) by reason of his—

(i) having any share or interest in any lease, sale or purchase of any immoveable property or in any agreement for the same, or

(ii) having a share or interest in any joint-stock company or in any society registered or deemed to be registered under

the Co-operative Societies Act, which shall contract with or be employed by or on behalf of the municipality, or

(iii) having a share or interest in any newspaper in which any advertisement relating to the affairs of the municipality may be inserted, or

(iv) holding a debenture or being otherwise interested in any loan raised by or on behalf of the municipality, or

(v) being professionally engaged on behalf of the municipality as a legal practitioner, or

(vi) having a share or interest in the occasional sale to the municipality of any article in which he regularly trades, or in the purchase from the municipality of any article, to a value in either case not exceeding in any official year five hundred rupees or such higher amount not exceeding two thousand rupees as the municipality with the sanction of the Provincial Government may fix in this behalf, or

(vii) having a share or interest in the occasional letting out on hire to the municipality or in the hiring from the municipality of any article for an amount not exceeding in any official year fifty rupees, or such higher amount not exceeding two hundred rupees as the municipality with the sanction of the Provincial Government may fix in this behalf, or

(viii) being a party to any agreement made with the municipality under the provisions of s 91 or of proviso (a) to sub-section (1) of section 194.

(4) If any person is elected or nominated as a councillor in contravention of the provisions of this section his seat shall subject to the provisions of sub-section (5) be deemed to be vacant

(5) In every case, the authority competent to decide whether a vacancy has occurred under this section shall be the Collector. The Collector may give his decision either on an application made to him or on his own motion Until the Collector decides that the vacancy has arisen, the seat of the person elected or nominated shall not, under sub-section (4), be deemed to have become vacant. An appeal shall lie against every such decision of the Collector to the Provincial Government and the orders passed by the Provincial Government in such appeal shall be final·

Provided that no order shall be passed under this sub-section

by the Collector against any councillor without giving him a reasonable opportunity of being heard

Amendments.—In sub-sections (1) and (3) the words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council In sub-section (4) the words 'subject to the provisions of sub-section (5)' were inserted by Bom 8 of 1939, S 3 Sub-section (5) was substituted by Bom 8 of 1939, s 3

General —This section is equivalent to section 15(1) & (3) of the B.D.M Act 1901, sections 16 & 18 of the City of Bombay Municipal Act, 1888 and s 9 of the B.L.B Act, 1923 with slight differences It deals with disqualifications which prevent a person from standing as a candidate at an election If inspite of any of these disqualifications he succeeds in getting himself elected the Collector is empowered under sub-section 5 to unseat him Section 28 deals with disqualifications to which a councillor may become subject after his term of office begins

Clause (1) (a).—Under this clause the provincial Government is empowered to relieve a person from the disqualifications mentioned in sub-clauses (i) & (ii)

Sub-clause (1) (a) (i) —This sub-clause applies only if the offence is punishable with imprisonment for a term exceeding six months or with transportation Secondly this sub-section comes into operation only if the sentence awarded is of imprisonment, whipping or transportation Also the sub-section requires that the sentence should not have been subsequently reversed or quashed The disqualification lasts only so long as the sentence lasts Even this disqualification the Government are empowered to condone under clause (a) Under this sub-clause there is no disqualification for a person sentenced to pay a fine and it makes no difference if he is ordered to suffer imprisonment in default This disqualification also does not come into operation if a person is sentenced to imprisonment or whipping for an offence punishable with imprisonment for six months or less Thus a person who is suffering imprisonment in default of payment of fine or a person who is suffering imprisonment for an offence punishable with imprisonment for six months or less is entitled to stand as a candidate from Jail A person is entitled to stand as a candidate as soon as he is out from jail, however heinous the offence for which he may have been imprisoned Similarly, a person would be entitled to stand as candidate as soon as he suffered the sentence of whipping It seems unreasonable that a person who is removed from office under section 27 for misconduct or disgraceful conduct or incapacity is disqualified under sub-clause (ii) for a period of five years while a person guilty of most ghastly offences under the Indian Penal Code is free from any disqualification as soon as he steps out of jail In view of absence of any compulsory educational or property qualifications for becoming a councillor this sub-section requires to be revised if the undesirable element is to be kept out from Local Self Government institutions If the offence is punishable with imprisonment for more than six months the disqualification will be incurred even if the sentence is less than six months' imprisonment

Sub-clause (1) (a) (ii):—Under section 27 the provincial Government is empowered to remove any elected or nominated councillor on the ground of misconduct in the discharge of his duties or of any disgraceful conduct or incapacity of performing his duties as a councillor The disqualification lasts for a period of five years from the date of such removal

Clause (1) (b)—Uncertified bankrupt or an undischarged insolvent:—The term uncertified bankrupt is from English law The English Act of 1831 provides that the disqualification shall cease on the Bankrupt obtaining his discharge though by 46 and 47 Vic C 52 S 32, a certificate that there has been no misconduct is also necessary An undischarged insolvent means a person who is adjudicated an insolvent and who has yet not been given his discharge

An annulment of adjudication under Ss 35, 39 or 43, Provincial Insolvency Act, on whatever ground it is based, must be taken to put an end to the legal character of an insolvent which adjudication under the Act confers upon a debtor and he can no longer be regarded in the eye of law as an insolvent Consequently a person whose adjudication is annulled under s 43, Provincial Insolvency Act, is not disqualified for election as a member of a local board as an 'undischarged insolvent' under s 55(2)(b), Madras Local Boards Act, in as much as s 55, Madras Local Boards Act, is not controlled by s 73, Provincial Insolvency Act **Chinniya v Subbaratnam, A.I.R. 1941 Madras 22.**

Sub-section (3) of s 15 (B.D.M Act, 1901) refers to sub-s (2) and to the case where a councillor becomes disqualified during his term of office and not to the case where there was a disqualification before election The disqualification mentioned in s 73, Provincial Insolvency Act is a disqualification under s 15, Municipal Act and applies to candidate for election to a municipal council Where a candidate for a municipal election is not eligible for election under s 73, Provincial Insolvency Act, not having applied for a certificate to the effect that his insolvency was caused by misfortune without any misconduct on his part, the fact that since the election he has obtained the necessary certificate and got rid of the disqualification does not help him Provision of the law must be strictly followed **Dayaram v. Keshavji, A.I.R 1933 Sind 416.**

There has never been any express repeal of s 103-A, Rangoon Insolvency Act, in its application to the Rangoon Corporation as is clear from Sec 5, City of Rangoon Municipal Act *It is quite possible to read s 12 Rangoon City* Municipal Act and s 103-A, Rangoon Insolvency Act, together by saying that their combined effect is that an undischarged insolvent is disqualified but that his disqualification only ceases when he gets his discharge plus the certificate mentioned in s 103-A, Rangoon Insolvency Act In the case of a certificate under s 103-A it is not necessary that there should be a separate document headed 'certificate' and commencing with the words 'I hereby certify' or 'it is hereby certified', but there must be somewhere in the record a statement by the court granting the discharge that the insolvent's insolvency was caused by misfortune without any misconduct on his part A finding to the effect that, the fact that the insolvent's assets are not of a value equal to four annas in the rupee on the amount of his unsecured liabilities had arisen from circumstances for which he could not justly be held responsible does not imply that the insolvency was caused by misfortune There is a contrast between the words 'misconduct' and 'misfortune' The absence of misconduct does not mean that insolvency was caused by misfortune **Wilcox v. Patel, A.I.R. 1942 Rangoon 30**

Clause (1) (c)—Judge—This term is clearly defined in section 3(7). It means District Judge, Joint Judge, Assistant Judge, Judge of a Court of Small Causes, Subordinate Judge, or Joint Subordinate Judge

Clause 2 (a)—Subordinate officer or servant of a Municipality:—These terms are not defined in the Act The words 'of a municipality' also go with 'Subordi-

nate officer' Subordinate officer of a municipality means an officer who is subordinate to the municipality i e, to say an officer who is subject to the orders of the Municipality and in that sense the term 'subordinate' is used here The term 'servant of a municipality' means a person whom the municipality has power to appoint, dismiss, transfer, degrade, promote or fine The difference between the two terms appears to be that while the latter is a servant of the municipality, the former may or may not be so, and yet if he is subject to the orders of the municipality he will be disqualified from becoming a councillor of the municipality under this clause The term 'subordinate officer of a municipality' is used to meet cases wherein the municipality has no power to appoint, dismiss, promote, degrade or fine the officers and yet they are subject to the orders of the municipality For example, the Municipal Commissioner of Bombay is a Government servant and yet is subject to the orders of the Municipal corporation of Bombay He is therefore an officer subordinate to the municipality and his case will be covered by this clause

School Master disqualified —Under the rules, the master of a municipal school is a servant of the Municipality, even though his services be lent to the Municipality by Government, and, therefore, such a master is disqualified for becoming a member of the Municipality **(G.R G D No 1320 dated the 23rd April 1892).**

Hospital Assistant not disqualified—A Hospital Assistant whose salary is either partly or wholly paid from municipal funds, does not, therefore, cease to be a Government servant The municipality has no power to appoint, dismiss, transfer, degrade, promote or fine him He is not their servant, but is subject to the orders of the Surgeon-General and of Government In these circumstances he seems eligible for election or appointment as a Municipal Commissioner **(G.R G.D. No 3032 dated the 12th August 1885).**

Councillor appointed to discharge the duties of the Chief Officer disqualified —A councillor is defined in section 3(4) of the Bombay Municipal Boroughs Act, 1925, as 'any person legally a member of the municipality in a municipal borough' Section 12(2) (a) of the Act provides that no person who is a subordinate officer or servant of a municipality may be a member of such municipality Section 28(1)(a) of the Municipal Act further provides that if any councillor during the terms for which he has been elected or nominated becomes subject to any disqualification specified in s 12, he shall be disabled from continuing to be a councillor and his office shall become vacant Municipal Councillors appointed to do duty as Chief Officers for any period, however small it may be, will become servants of the municipality and thereby be disqualified as member of the municipality **(G C G D No 2802/33 dated the 23rd July 1938).**

Clause (2) (b) —This clause is very wide and its scope is curtailed by subsection (3) which provides exceptions to the general disqualification given in this clause To incur a disqualification under this clause the candidate must have share or interest in (1) any work done by order of the municipality, (2) in any contract or employment with or under or by or on behalf of a municipality The share or interest may be direct or indirect It may be by the candidate himself or his partner

Share or interest:—The interest contemplated in this clause is either pecuniary or material S 16 (1) (f) of the City of Bombay Municipal Act, 1888, is similar in terms to the present clause 'The interest contemplated by

section 36 clause (p) and by S 16(1)(f) of the City of Bombay Municipal Act, 1888, must not be too speculative and remote It must not be a mere sentimental interest such as that which a father may have in the prosperity of his son. But where there is a pecuniary advantage or a reasonable expectation of a pecuniary advantage, it must be regarded as an interest within the meaning of the section If the interest is pecuniary it is immaterial that the amount involved is trifling If it is not pecuniary it must at least be a material interest' **Nariman v Municipal Corporation of Bombay, 25 B.L.R. 689.** In this case a meeting of the Bombay Municipal Corporation was held in Bombay on Feb 19, 1923, at which a proposition was moved that the report 'regarding the revision of the present scale of tramway fares be approved and adopted' To the above proposition an amendment was moved that the further consideration of the report be adjourned to the April meeting of the Corporation The amendment was put to the vote and declared lost by the casting vote of the Chairman It was alleged that some of the councillors who voted at the aforesaid meeting were disqualified from voting at it, since they owned shares in the Bombay Tramways Company, which shares they had transferred nominally to their wives and children simply with the view of enabling themselves to vote at the tramway debates in the meetings of the Corporation One of the councillors was the editor of a newspaper which occasionally published advertisements of the Tramway Company, and himself held a pass from the Company as such editor which entitled him to travel in the cars of the Company free of charge It appeared that he was only a paid editor and had no proprietory interest in the newspaper Another councillor held shares in the Company as a trustee Two more were recipients of medallions from the Company which entitled them, on payment of the usual fare, to travel on the hind platform of a car when its inside was full The plaintiff, who was one of the councillors of the Corporation, filed a suit in his own name in the High Court of Bombay for a declaration that the announcement by the Chairman that the amendment was lost was invalid and that the amendment was duly carried, and for an injunction restraining the Corporation from acting upon the announcement of the Chairman Held, (1) that neither the paid editor of the newspaper, nor the trustee nor the medallion holders has such an 'interest' in the Bombay Tramways Company as to disqualify them under s 36 clause (p) of the City of Bombay Municipal Act, 1888, from voting at the meetings of the Corporation at which affairs relating to the Company came up for discussion, (2) that the councillors who had only nominally transferred their shares to their wives or relatives were not competent to vote at such meetings In the course of the judgment Mulla J observed "It is clear on the language of s 36 clause (p) that a councillor, whose name stands as a share holder on the register of the said company, and who has a beneficial interest in the shares, is disqualified from voting or taking part in the discussion of any matter pertaining to the said company It is also clear that if the shares stand, not in his name, but in the name of a nominee of his, the beneficial interest being in him, he is similarly disqualified The shares may again stand in the name of a councillor who holds them not in his own right but as a trustee for another Where the shares stand in the name of a person who has no beneficial interest in them but is a mere trustee, he cannot, it seems, vote at the meetings of the company in which he holds the shares in a manner inconsistent with the interest of the beneficiaries The reason is that he derives the position which he holds as a member of the company from the legal owner-

ship of the shares But if such a person is also a member of the Corporation, he is not, I think, debarred from voting or taking part in the discussion in any matter relating to the Company at meetings of the Corporation He is under no obligation to vote at such meetings in a manner beneficial to the interests of the cestui que trust for he does not owe the membership of the Corporation to the fact that he is a shareholder of that Company He commits no breach of the trust, if he votes, at the meetings of the Corporation in contravention of the interests of his beneficiary It is no part of his duty as a trustee to vote at meetings of the Corporation in matters affecting the Company as the beneficiary would have him to do If no such duty is imposed upon him by law, it cannot be a case of conflict between two duties Nor can it be a case of conflict between interest and duty, the interest which he has in the beneficiary being no higher than what a father has in the prosperity of his son" In view of the exception provided in sub-section (3) clause (ii) of s 12 of the Boroughs Act, this authority will not be applicable in all respects to a case under the Boroughs Act But the principles laid down in this case are of use in interpreting the provisions of sub-section (2) clause (b) under the Boroughs Act

Although by s 64, Sale of Goods Act, the sale is complete and property passes when the hammer falls still if the sale is one with conditions, until these are fulfilled, the contract remains in force The word 'interested' is to be interpreted in its ordinary wide sense and not confined to interest in money In doing so, of course, one must bear in mind that the intention underlying s 45 (1), C.P Municipalities Act is to prevent jobbery and impure administration and where interest proved could not possibly lead to corruption then the word could be interpreted in favour of the accused Certain manure belonging to a municipality was purchased by A for his field which he held jointly with a municipal member Another member who was friend of A assisted him in removing the manure from municipal land to A's field with the help of municipal sweepers Held that both the members were interested in the contract with the municipality and as such liable to punishment under s 168, Penal Code **Hazarimal v Emperor, A I.R. 1940 Nag 81.**

Date of nomination the relevant date—Disqualification does not continue after the contract is completed but payment remains to be made.—The plaintiff was elected a member of a district municipality on Feb 12, 1925, for a period of three years commencing from April, 1, 1925, and on May 9, 1925, the municipality elected him to be a member of the School Board On a petition presented to the District Judge challenging the plaintiff's election to the municipality it was held on August 26, 1925 that he was disqualified under s 15(f) of the District Municipal Act for election on the municipality by reason of his interest in a printing contract which the municipality had entered with his father with whom he was joint The contract expired on March 25, 1925 In the course of the judgment Madgaonker J observed, "It does not however follow that the disqualification continued from April 1, 1925 onwards and existed on May, 9, 1925 or about a week before i e, the date of the nomination of the plaintiff to the School Board The mere fact that some of the bills remain unpaid did not necessarily cause the disqualification to continue" **Keshav Mahadev v Laxman Narayan, 32 B L.R 614.** The following remarks from **Cox v. Truscott, (1905) 92 L T 650** were quoted with approval in this case 'Where a contractor has wholly performed his part of the contract and nothing remains to be done under it except that he is to receive payment, his disqualification comes to an end'

Where a contractor has performed his part of a contract with a municipality and the bill for the work done has been finally passed, but the whole or part of the dues remains unpaid, the contract is not at an end in the sense that it is discharged in its entirety and that the contractor has no further interest in it Nor does the bill in such circumstances extinguish the original contract and establish in its place a mere relationship of debtor and creditor between the contractor and the municipality in the sense that the subsisting interest of the contractor is not a mere interest in the bill regarded as security for payment of money due within the meaning of cl (c) of the proviso to s 57 Consequently anyone on the side of the contractor having an interest in the contract would be disqualified to stand for election as commissioner till the date of discharge of the contract **Satyendra Kumar v. Chairman of the Municipal Commissioners of Dacca, A.I.R. 1931 Cal. 288.** This case was distinguished in **T. M Athikesavalu v. S. Ekambara, A.I.R. 1939 Madras 473.** In the latter case it was held Where the work to which contract relates had been completely performed and completely paid for by the local Board before the date of nomination so that nearly nothing remained to be done by either party to the contract, it cannot be said to have been a subsisting contract at the time, merely because it is possible that an objection to any payment made under the contract might be made by the Audit Department and the amount covered by the objection might have to be recovered from the security deposit made by the contractor

In determining the eligibility of a candidate the circumstances and the position of the candidate as they existed at the date of nomination and not at the date of election, should be considered **Satyendra v. Chairman of the Municipal Commissioners of Dacca, A.I.R. 1931 Cal. 288.**

Directly or indirectly·—These terms are very wide and are used to meet the requirements of a case wherein the candidate has the real share or interest but the contract is entered into in the name of others Under this clause it is immaterial who the nominal parties to the contract etc may be. It is very important that councillors should have no interest which would be in conflict with the interest of the municipality These terms therefore attach disqualification not only to the contracting parties, but also to those who have a share or interest in the contract, work or employment etc The case of sub-contracts would be covered by these terms

A councillor who lends money to a contractor of the municipality upon the personal credit of such contractor for the purpose of such money being applied in carrying out the municipal contract is disqualified·—A, the vice-president of a municipal board had authority to enter into contracts for the municipality, to pass the contractor's bills and to issue cheques in payment thereof He gave two contracts for the construction of municipal drains to B B had no capital to carry out these works so A who carried on a money lending business on his own behalf advanced the money and repaid himself out of the realisations of the municipal cheques issued by himself Held, that A had a pecuniary interest in the contracts within the meaning of s 146(1) of the Berar Municipal Act and was guilty of an offence under s 168 of the Penal Code as applied to Berar **A.B. v. Emperor 10 I.C 577.** S 146(1) of the Berar Municipal Act runs as under 'If any member, officer or servant of a committee is otherwise than with the permission in writing of the Commissioner, directly or indirectly interested in any contract made with the committee, he shall be deemed to have

committed an offence under section 168 of the Indian Penal Code' During the course of the judgment Stanyon A J C observed "There can be no doubt that in the circumstances of this country, and in the best interests of the community, the legislature cannot go too far in safeguarding an exotic like Local Self-Government, still little more than a mere seeding, against the disease to which a long experience of it, as an indigene, has shown it to be peculiarly liable, and I have no doubt that all such provisions as section 146(1) of the Berar Municipal Law, (which are to be found as far as I can see, in every municipal enactment enforced and applied by the Government of India), are designed to put a check on every kind of jobbery, and every fraudulent or improper use of office by municipal members and servants Only a board which, individually as well as collectively is above all suspicion of fraud and jobbery, can hope to obtain and retain that degree of public confidence, without which it cannot be a fit manager of public business and proper trustee of public funds It is notorious to all who have any experience of municipal business, as carried on at the present day in, at least the Central Provinces and Berar, that executive responsibility is almost entirely vested in the President or Vice-President and the Secretary of each Committee How much of this power owes to each of these officers is a question which depends upon the circumstances of each particular case In some cases the President holds sway in others the leading authority is the Secretary, in regard to works to be carried out by the Board, the usual course is for the Board to sanction the work and the estimated outlay and to leave everything else in the hands of its office-bearers In the present case as we have seen, the executive authority was the applicant as Vice-Chairman, the Chairman being presumably a busy gazetted officer of Government, with little time to attend to the internal details of Municipal administration The public interest required that the contracts in this case should be given to some person wholly unconnected otherwise with the Board, and who was fully capable of performing them and that the applicant, as the representative of one party to such contracts, should remain a vigilant and, if not hostile, at least disinterested critic of the manner in which each contract was performed by the contractor That position of disinterestedness was lost the moment the applicant lent money to the contractor, because the contractor was admittedly insolvent, and the applicant's recovery of his money depended upon the due performance of the contracts and the resulting payments by the Board for the same It is not going too far to say that the loans were made upon the security of the payments to be made by the Board, because the making of those payments lay in the hands of the applicant The conduct of the applicant in connection with the payments makes this sufficiently clear It is manifest that the applicant would not have lent the impecunious contractor Rs 350/- upon his personal credit Nor is it probable that he would have lent the money had the passing of the works and payment for the same been beyond his control Even the usual banker of the contractor had refused to capitalise him for these particular contracts Therefore the applicant was pecuniarily interested in the success of the contractor's work, and in full and early payment for the same It is difficult to conceive a more glaring violation of section 146(1) of the Berar Municipal Law than is here disclosed, even if fraud was entirely absent It is manifest that the circumstances are such as would have lent colour to a contention that the applicant was either the true but undisclosed contractor, or at any rate a concealed partner of the person

with whom the contracts purport to have been made It is a well-established practice, in connection with benami transactions in India, to presume that the property purchased with the money of A, in the name of B, is purchased for the benefit of A, and it does not seem easy to avoid the presumption that in a Municipal contract in the name of B, which is entirely worked with the money of A, B, is merly the benamidar of A It is not at all clear what the conditions of the advance were and what was the precise sum over and above his outlay which applicant paid himself, and the whole transaction obviously is well within the mischief against which section 146(1) of the Berar Municipal Law is directed Upon the best consideration that I have been able to give to the subject, I hold that any member of a municipal board in Berar who lends money to a contractor with his board upon the personal credit of such contractor, for the purpose of such money being applied in carrying out the municipal contracts, violates section 146(1) of the Berar Municipal Law and becomes liable to punishment under section 168 of the Indian Penal Code as applied to Berar A Fortiori the applicant as Vice-Chairman, authorised to enter into and to pay for municipal contracts was rightly convicted"

Joint Hindu family —In the case of a Hindu undivided family it follows that the earnings of all members go to the common pot and hence a candidate from such a family is disqualified if another member of the family is a contractor or employee of the municipality However the presumption will not apply where the income does not go to the joint family funds under the provisions of any law such as Hindu Gains of Learning Act, 1930 (Act 30 of 1930) If the members of a Hindu or any other family mess together or reside together in the same house, this in itself will not be sufficient unless they are joint in estate For the purpose of disqualification under this clause, union in estate is the criterion and not mere commensality The only difference between a Hindu family and families belonging to other communities is that while in the case of a Hindu family there is a presumption that the property is joint, there is no such presumption in other cases **(See. G.R.G/D. No. 2265 of 6-7-1902).**

A merely affectionate or friendly interest in the person who holds the contract or employment is no disqualification —**in Le Feuvre v Lankestor, 23 L.J.Q B. 254,** Coleridge J dealing with an analogous position said, 'Suppose the contract to be with a man's relative, such as his brother or his son, he might have a bias on his mind to decide the question improperly, but no one could say that this would bring the case within the fair meaning of the words in the section' The view taken by Coleridge J in this case was not approved by Stanion A J C in 10, I C 577

Assignment of contract:—It sometimes happens that a candidate for councillorship makes an assignment of a contract before election to make his way for candidature clear But in that case the assignment must be bonafide and not merely nominal It should also be complete i e, to say no liability or interest under the contract should remain with the candidate Also the assignment must be complete and effective before the date of nomination The assignment must also be made with the privity of the local authority i e to say must be approved and accepted by the person or the body authorised to sanction the assignment A person made a tender to a board but asked the finance committee to relieve him of the tender as he intended to offer himself as a candidate The committee released him subject to sanction of the board

Such approval was given subsequently but not until after the nomination day As the tender was a contract he was disqualified from nomination and the subsequent ratification had no retrospective operation to relieve him of the disqualification **Ford v North (1901) I Q B. 683**

Defendant and his partner had contracted with the corporation to do certain works Before defendant's election the partnership was dissolved and defendant assigned to his partner all his interest in the contracts which were not completed at the time of the election The corporation did not assent to the assignment or release the defendant from his contracts Held, he was disqualified because he remained liable under his contracts **Cox. v. Embrose (1890), 60. L.J.Q.B 114.**

Surety for a person contracting with the municipality disqualified.— A councillor stood surety for a person who entered into a contract regarding lighting with the municipality The councillor bound himself to the Municipality to the extent of Rs 2000/- if the contractor made a default Under Ss 127 & 128 of the Indian Contract Act, a contract of guarantee or surety is a collateral or accessory contract and the liability of the principal and the surety is Co-extensive It was therefore held that the councillor had an interest in the contract and was therefore disqualified from continuing on the Municipal Board **(G R G D No 6320 dated the 13th July 1925)**

Surety for a municipal servant disqualified.—Under s 128 of the Indian Contract Act a surety's liability is co-extensive with that of the principal debtor If, therefore, a person stands as a surety for the faithful performance of the duties of a municipal employee and undertakes to indemnify the municipality against any loss caused by an employee, it can be held that he is interested in the employment with or under the municipality and is ,therefore, disqualified under section 12(2)(b) of the Bombay Municipal Boroughs Act or section 15(1)(f) of the District Municipal Act (G C G D No s 137 dated the 15th March 1939)

Agent of an Insurance Company insuring municipal property disqualified —An agent of an insurance company with which the municipality has insured some of its property and who gets a commission is disqualified The insurance society would come under the term 'employed by' **(R L A 's opinion No. 529 dated the 29th February 1924).**

Agent of a company selling company's products to the municipality disqualified:—A representative of a company who sells company's products to the municipality and gets commission on the sale is disqualified The sale is a 'contract' within the meaning of s 4 of the Sale of Goods Act, 1930 Proviso vi to s. 15(1) (f) of the Bombay District Municipal Act, 1901 (equivalent to sub-section 3(vi) read with sub-section 2(b) of the B.M B Act, 1925) indicates that 'interest in occasional sale' is 'an interest in work' or interest in employment' **(R L.A 's opinion No 4315 dated the 1st September 1933)**

Sub-section (3) —This sub-section provides exceptions to the general rule laid down in clause (b) of sub-section (2)

Clause (3) (i) —This clause provides that it is open to a person to lease or sell any immovable property to the municipality without incurring any disqualification He can also take on lease or purchase any immovable property from the municipality without bringing himself within the disqualification

Any agreement for lease, sale or purchase of any immovable property is also exempted under this clause

Clause (3) (ii):—Under this clause the shareholder or a director of a joint stock company having a contract with or having an employment with the municipality is not disqualified Similarly persons having a share or interest in any society registered or deemed to be registered under the Co-operative Societies Act are exempted The owners of a firm which acts as agents for an insurance company with which the municipality has insured some of its property and who get a commission out of the sum paid by the municipality are disqualified But one who is merely a share holder in a joint stock company acting as agents for an insurance company would not be disqualified

Councillors holding shares in a Co-operative society contracting with the municipality disqualified:—Councillors who held shares in a Co-operative society or a Co-operative store which contracted with the municipality were held disqualified under the Bombay District Municipal Act, 1901, as such societies were held not to be joint stock companies **(R L A.'s opinion No. 776 dated the 7th April 1924 in G.R.G.D. No. 5323 dated the 30th April 1924).** In the B.M B Act, 1925, the words 'or in any society registered or deemed to be registered under the Co-operative Societies Act' are added in sub-section 3(ii). Hence they will not be disqualified under the Boroughs Act unless they vote for such a contract in which case they will incur disqualification under s 28 (1) (b) (i)

Clause (3) (vi)·—Under this clause sale to the municipality of an article in which a person regularly trades, of the total value of Rs 500/- or less in an official year is permitted So also purchase from the municipality of articles of total value not exceeding Rs 500/- in an official year is allowed This pecuniary limit may be extended to Rs 2000/- by the municipality with the sanction of the Provincial Government

Supply of materials by a Councillor to a contractor for execution of a contract with the Municipality.— The mere fact that a municipal councillor was a brick merchant and supplied them to a contractor engaged to build a market for the municipal corporation does not disqualify him from sitting and acting as a municipal councillor when there is nothing to show that the councillor had any knowledge that the contract for bricks with the contractors was likely to fall to his share nor whether and if so when, the possibility would arise when he would have to decide between his duty to the corporation and serving his own interests **M A. Shakur v. Municipal Corporation of Rangoon, A.I.R. 1925 Rangoon 367**

Councillor who purchases manure from the municipality disqualified:— Section 15(1)(f) of the Bombay District Municipal Act, 1901, says 'no person who has any interest in any contract with a municipality may be a councillor of such municipality,' and then lays down several exceptions to this rule Section 15(2)(a) provides that any councillor becoming disqualified under the aforesaid rule shall be disabled from continuing to be a councillor and his office shall become vacant

2 The words of section 15(1)(f) are very wide The purchase of manure from the municipality is, in my opinion, undoubtedly a contract with the municipality and so also would be the purchase of any other movable Such purchases do not fall within any of the seven exceptions. Occasional purchases from a municipality are not included in the sixth exception which

permits occasional sales to a municipality within certain limits The legislature alone can add to the exceptions expressly provided by the Act Such a purchase is not an agreement voidable at the option of the municipality under section 40(4)(a) and (7) of the Bombay District Municipal Act, 1901 **(R.L.A.'s opinion No 14 dated the 5th January 1906 in G R G D. No. 1408 dated the 7th March 1906)**

Purchases of manure from a municipality by a councillor thereof constitutes a contract with that municipality within the meaning of the word contract in that section and every purchase must be in legal conception a contract The fact that the municipality has fixed the price and published it only amounts to this that the municipality offered the commodity for sale at a certain rate, as soon as a member of the public accepted the offer there was a complete contract **(Advocate General's opinion No. 11 dated the 19th February 1906 in G.R G.D. No 1408 dated the 7th March 1906)**

Clause (3) (vii):—Clause 3(1) deals with lease of immovable property This clause deals with letting out to or hiring from the municipality of any movable article The total amount of hire in an official year should not exceed Rs 50/- This limit can be raised to Rs 200/- by the municipality with the sanction of the Provincial Government

Clause (3)(viii):—S 91 deals with fixed charges and agreements for payment in lieu of taxes for water supplied, fixing a special rate in lieu of special sanitary cess and composition of tax on animals and vehicles The proviso (a) to sub-s 194(1) deals with agreement for construction of drainage and water connections If a person is party to any of these arrangements with the municipality he is not disqualified under this clause

Sub-section (4) —If a person who was subject to any of the disqualifications mentioned in s 12 on the date of his nomination, is elected or nominated, it is open to anyone to apply to the Collector at any time to declare him disqualified and to declare his seat vacant But until the Collector declares the vacancy the councillor continues to be legally a member of the municipality It is open to apply to the Collector at any time i e , to say even after the expiry of the period of limitation prescribed under s 15 for an election petition Thus if any person gets himself elected inspite of his disqualification he can be brought to book at any time during his term of office The application can be made even after the disqualification has ceased It is quite sufficient if he was subject to any disqualification on the date of his nomination If by the time of nomination for the by-election his disqualification has ceased, he can be a candidate at such by-election

Sub-section (5):—This sub-section prescribes the authority for deciding whether any vacancy has occurred under sub-s (4) The Collector is empowered to act either on his own motion or on an application made to him Sub-s (5) also makes it clear that the vacancy does not arise until the Collector decides against the councillor An appeal lies to the Provincial Government against the decision of the Collector whether it is in favour of the councillor or against him The orders passed by the Provincial Government on the appeal are final i e to say they cannot be challenged in any court of law Pending the decision of his appeal to the Provincial Government under sub-s (5) the councillor cannot act as such or take his seat in the municipality

The proviso to this sub-section provides that before making any order

against the councillor under sub-s (5), the Collector must give him a reasonable opportunity of being heard The Provincial Government is not required to hear any party before deciding the appeal

Final:—*See notes under this head under s 10*

Operation of lists,

13. (1) When, in accordance with rules framed under clause (c) of sub-section (1) of section 10, a list of voters has been prepared, or, upon a general revision, completed, a copy thereof signed by such person as may be designated in this behalf in the rules aforesaid, shall be the Municipal Election Roll A new Election Roll shall be published in each year on such date as may be prescribed by the rules, and shall continue in operation for a period of twelve months from that day,

Provided that if a new Election Roll is not published in any year before the date prescribed, the roll then in operation shall continue in operation until the new roll is published

Right to vote to depend on entry in roll

(2) At every election of councillors every person enrolled in the Municipal Election Roll as for the time being in operation under sub-section (1), shall be deemed to be entitled to vote, and every person not so enrolled shall be deemed to be not entitled to vote.

Amendments:—The words 'Clause (c) of sub-section (1) of section 10' were substituted for the original words by Bombay 10 of 1926, s 2,

Sub-section (1)—*Municipal Election Roll*:—*This sub-section defines* the Municipal Election Roll It is the final list of voters after all the formalities prescribed in the rules framed under Sec 10(1)(c) have been completed The Municipal Election Roll should be signed by the person designated in this behalf in the rules It is required to be published every year on a date specified in the rules and it continues in operation for a period of 12 months from such date of publication This sub-section also provides for the contingency when a new election roll is not published in any year before the date prescribed in the rules In such a case the roll then in operation continues under this sub-section until a new roll is published

Sub-section (2):—This sub-section provides that an entry in the Municipal election roll is conclusive so far as the right to vote is concerned If a person's name appears in the roll as a voter he is entitled to vote at the election irrespective of the fact whether he is qualified to vote or not Similarly if a person's name does not appear in the roll, he is not entitled to vote at the election although he may be possessing all the necessary qualifications to be a voter However, it should be noted that this sub-section deals only with the right to vote and not with the right to stand as a Candidate at the election

Want of fresh electoral roll does not render election invalid:—Where objection was taken to the election held in the year 1929 of a member of a union, which was dissolved by Government notification under s 45, on the ground that the electoral roll on the basis of which the election was conducted was a roll prepared for the year 1923-24 and no other later roll was prepared, and that the old roll contained names of persons who were dead and of persons who were unfit to be voters and did not contain the names of persons

who were fit to be voters, Held that under s 51(4) an electoral roll published in any year remains in force till the publication of a fresh electoral roll and that the want of a fresh electoral roll did not render an election invalid. **T.S. Venkataramana v. Kuppuswami, A.I.R 1930 Mad 954.**

Fabrication of Electoral Roll is an offence punishable under Ss. 193 and 465 Indian Penal Code:—Procuring by dishonest and fraudulent means an entry in an electoral roll, of the names of persons who were not legally eligible to vote, and wilfully and improperly omitting from the electoral roll the names of persons entitled to vote and fraudulently and dishonestly altering the electoral roll, after its final publication by inserting certain names therein without lawful authority are offences punishable under Ss 193 and 465 (Indian Penal Code) **Nur Ahmed v Jogesh Chandra Sen, A I.R. 1934 Cal 838**

Electoral Roll.—Even after the electoral roll is final and completed any questions relating to offences committed under Ss 52 and 55 can be gone into by a court and enquiry made regarding them To hold otherwise would be incorrect as then there would never be any scope for the operation of those sections **P R Narayanswami v R Subbaratnam, A.I R 1929 Madras 910(2).**

The 'electoral roll' refers not to voters' list of a particular ward in which election has taken place but to the whole municipality and any person whose name is on it is entitled to make a complaint under s 34 **(Bengal Municipal Act, 15 of 1932) Kazi Ali Haider v Upendra Nath Kundu, A.I.R. 1939 Cal. 662.**

A declaration in respect of the correctness or otherwise of an electoral roll, when the election is already over, which would be a mere empty and useless one and which will not affect the legal position of the parties to the election cannot be granted **Abdul Ahad v Ashfaq Ali, A.I.R. 1933 Oudh 433(2).**

Qualified to vote—Entitled to vote—See notes under this head under s 15

14. A person shall not be qualified to be elected a councillor unless he is enrolled in the Municipal Election Roll

Enrolment in Municipal Election Roll necessary for elected councillor Representative of an Association

Provided that if any Company, body corporate, or other association of individuals is enrolled in the Municipal Election Roll, any one person duly authorized in this behalf by a resolution of such company, body or Association to represent such association shall be deemed to be qualified to be elected a councillor.

General:—This section requires that if a person wants to stand as a candidate at an election his name should appear as a voter in the Municipal election roll If his name does not appear he is not entitled to stand as a candidate although he might be possessing all the necessary qualifications to be a voter But if his name appears in the election roll it will still be open for a rival candidate to challenge that he is not qualified to vote and therefore not qualified to stand as a candidate Section 11 (3) requires that a candidate must be qualified to vote Neither section 14 nor section 13(2) provides that the Municipal Election Roll shall be conclusive on the question whether a Candidate is qualified to vote and hence qualified to stand as a candidate The words 'a person shall not be qualified to be elected a councillor unless he is enrolled in the municipal election roll do not bar a right to contend that a person whose name is entered in the municipal election roll is not qualified to vote and hence not qualified to stand as a candidate

Sub-section 3 of section 14 of the Bombay Local Boards Act (Bom 6 of 1923) read as follows —14(3) 'No person shall be qualified to be elected for any constituency of a Taluka or District Local Board unless his name is in the revised list last published before the date of an election for a constituency of such Taluka or District Local Board' This provision is analogous in terms to the present section and it came to be interpreted in **Vinayak v Gopal, 40 B.L.R. 525.** Divetia J who decided this case interpreted section 14(3) as follows — "Section 14(3) says that no person shall be qualified to be elected for any constituency of a Taluka or District Local Board unless his name is in the revised list In other words no body whose name did not appear in the list of voters was qualified to stand as a candidate, but that does not mean that if a person's name appears on the Voters' list and he is therefore entitled to stand as a candidate at the election his candidature cannot be challenged on the ground that although his name appears on the Voters' list he was not duly qualified as a voter This provision does not go further than saying that it is only the person whose name is on the list who can stand as a candidate'

It may be noted that s 14 of the B L B Act, 1923 is now amended providing that a person whose name is entered in the election roll is entitled to stand as a candidate No such amendment is made in the Boroughs or the District Act Hence the ruling in **Vinayak v Gopal** will not now apply to a case under the Local Boards Act but will apply to a case under the Boroughs or the District Act

In **Nand Lal Gupta v Commissioner of Arrah Municipality through Chairman, Arrah Municipal Board, A I R 1942 Patna 259,** it was held, that the entry of a member of a joint Hindu family, who is not the manager, in the electoral roll as representing the family is improper Although Rules 20 and 18(2) do not use the word 'conclusive' in reference to the electoral roll they declare the roll to be 'final' which amounts to the same thing The fact that the name of a person was improperly or through mistake entered in the electoral roll does not affect the jurisdiction of the registering authority to decide the question whether that name should be entered or not Consequently, a person who is improperly or through mistake entered on the final electoral roll is entitled to vote and by reason of rule 20 qualified to be elected a commissioner This decision seems to conflict with the decision of **Vinayak v Gopal 40 B.L.R. 525** but rule 20 of the Bihar and Orissa Municipal Election Rules of 1937 provides that 'any person entitled to vote under these rules shall be qualified to be elected as a commissioner' This is quite different from the provision in this section that 'a person shall not be qualified to be elected a councillor unless he is enrolled in the Municipal Election Roll' A comparison of these two provisions clearly shows that whereas in the Bihar case the rule made a positive provision making a person enrolled in the election roll qualified for being elected, in the present section the provision is a negative one debarring a person not enrolled in the election roll from becoming a candidate for election

In R V Palanisami Pillai v Srinivasarangachariar, A.I.R. 1925 Madras 160 it was held, that, the word 'preparation' in R 8(e) is used in general sense and *therefore includes the action of the revising authority* The petitioner secured 37 votes and the respondent secured 14 votes at a poll for filling up a vacancy of a councillor in the municipality The respondent contended in the election petition that the petitioner's name being wrongly entered in the electoral roll the petitioner was disqualified under s 48(1) The lower appellate court held that the revising authority admitted the petitioner's name but the order of

the revising authority was ultra vires Held that the validity and conclusiveness of the register under rule 8(e) could not be questioned in election proceedings and the petitioner must therefore be deemed to have been duly elected

In C. Janardhana v. N. M. Verghese, A.I.R 1925 Mad. 707 it was held, that unless the objections raised in the election petition can be brought under one or other of the three sub-clauses of rule, the election petition must be rejected in limine When the only point taken in the petitions to contest a municipal election was that the candidates who had been declared elected had been wrongly put upon the electoral roll because they had not paid their taxes and that one of them was not a resident within the municipality Held that the objection to the election was not a valid one Held also for the purposes of an election, a roll has to be settled and after that is settled, it must be taken as settled for all purposes of the election upto the very end till it is finally declared who the properly elected candidate is

Determination of validity of elections.

15. (1) If the validity of any election of a councillor is brought in question by any person qualified to vote at the election to which such question refers, such person may, at any time within ten days after the date of the declaration of the result of the election, apply to the District Court of the district within which the election has been or should have been held, for the determination of such question

Powers of Judge holding inquiry

(2) An inquiry shall thereupon be held by a Judge, not below the grade of an Assistant Judge, appointed by the Provincial Government either specially for the case or for such cases generally, and such Judge may, after such inquiry as he deems necessary and subject to the provisions of sub-section (3), pass an order confirming or amending the declared result of the election, or setting the election aside For the purposes of the said inquiry the said Judge may summon and enforce the attendance of witnesses and compel them to give evidence as if he were a Civil Court, and he may also direct by whom the whole or any part of the costs of any such inquiry shall be paid, such costs shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure. The decision or order shall be conclusive

V of 1908

(2A) All applications received under sub-section (1)—

(a) in which the validity of the election of councillors elected to represent the same constituency is in question shall be heard by the same Judge; and

(b) in which the validity of the election of the same councillor elected to represent the same constituency is in question shall be heard together

Explanation.—For the purposes of this sub-section a constituency shall mean each ward or a public body or association constituted or entitled to elect councillors.

1 Lim.

(2B) Notwithstanding anything contained in the Code of Civil Procedure, 1909, the Judge shall not permit (a) any application to be compromised or withdrawn or (b) any person to alter or amend any pleading, unless he is satisfied that such application for compromise or withdrawal or the application for such alteration or amendment is bona fide and not collusive

Declaration in case of corrupt practice by a candidate

(3) (a) The Judge, if satisfied that a candidate has, within the meaning of sub-section (4), committed any corrupt practice for the purpose of the election, shall declare the candidate disqualified both for the purpose of that election and of such fresh election as may be held under sub-section (2), and shall set aside the election of such candidate if he has been elected

Scrutiny of votes and declaration in other cases

(b) If in any case to which clause (a) does not apply, the validity of an election is in dispute between two or more candidates, the Judge shall, after a scrutiny and computations of the votes recorded in favour of each candidate, declare the candidate who is found to have the greatest number of valid votes in his favour, to have been duly elected

Provided that for the purpose of such computation no vote shall be reckoned as valid if the Judge finds that any corrupt practice was committed by any person, known or unknown, in giving or obtaining it.

What is corrupt practice.

(4) A person shall be deemed to have committed a corrupt practice within the meaning of sub-section (3)—

(i) who with a view to inducing any voter to give or to refrain from giving a vote in favour of any candidate, offers or gives any gratification or holds out any promise of individual profit, or holds out any threat of injury to any person, or

(ii) who gives, procures, or abets the giving of a vote in the name of a voter who is not the person giving such vote;

(iii) who pays or promises to pay any person whomsoever on account of the conveyance of any elector to or from any place for the purpose of recording his vote;

(iv) who hires, employs, borrows or uses for the purposes of the election any boat, vehicle, or animal, usually kept for letting on hire or for the conveyance of passengers by hire;

Provided that any elector may hire any boat, vehicle or animal or use any boat, vehicle or animal which is his own property to convey himself to or from the place where the vote is recorded; and a corrupt practice shall be deemed to have been committed by a candidate, if it has been committed with his knowledge and consent, or by a person who is acting under the general or special authority of such candidate with reference to the election

Candidates when deemed to have committed corrupt practice.

Explanation 1.—For the purposes of this section the term "gratification" is not restricted to pecuniary gratification or gratifications estimable in money, and include all forms of entertainment and all forms of employment for reward

Explanation 2.—The expression 'a promise of individual profit"—

(i) does not include a promise to vote for or against any particular measure which may come before a municipality for consideration, but

(ii) subject thereto, includes a promise for the benefit of the person himself or any person in whom he is interested

(5) If the validity of the election is brought in question only on the ground of any error by the officer or officers charged with carrying out the rules made under clause (c) of sub-section (1) of section 10, or of an irregularity or informality not corruptly caused, the Judge shall not set aside the election

Mere irregularities and informalities not to invalidate election

Explanation.—The expression "error" in this clause does not include any breach of or any omission to carry out or any non-compliance with the provisions of this Act or the rules made thereunder whereby the result of the election has been materially affected

(6) If the Judge sets aside an election under clause (a) of sub-section (3), he may, if he thinks fit, declare any person by whom any corrupt practice has been committed within the meaning of this section, to be disqualified from being a candidate in that or any other municipal borough or district for a term of years not exceeding seven, and the decision of the Judge shall be conclusive provided, however, that such person, may by an order which the Provincial Government is hereby empowered to make, if it shall think fit, in that behalf, be at any time relieved from such disqualification: provided further that no such declaration shall be made in respect of any person without such person being given an opportunity to show cause why such declaration should not be made

Disqualification of persons committing corrupt practice

Amendments:—In sub-sections (5) and (6) the words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council Sub-sections (2A) and (2B) were inserted by Bombay Act 14 of 1936, s 2

Scope.—This section corresponds with s 22 of the B.D M Act, 1901 and s 33 of the City of Bombay Municipal Act, 1888 It lays down the procedure for challenging the election of an elected councillor A study of the section shows that under this section an election of a councillor can be challenged on four grounds only They are (1) corrupt practice, (2) scrutiny and computation of votes, (3) error or irregularity or informality corruptly caused, and (4) breach of or any omission to carry out or any non-compliance with the provisions of this Act or the rules made thereunder whereby the result of the election has been materially affected See sub-sections (3)(a) and (b) and sub-section (5) No other case appears to have been contemplated in this section An election of a councillor cannot be challenged under this section on the ground of his disqualification unless the case falls under sub-section (5) of this section For any other case of disqualification, the necessary procedure is provided in Sec. 12 sub-sections (4) and (5) If the disqualification was known to a rival candidate before the nomination he might raise an objection to the nomination before the Returning officer and if necessary pursue his remedy in any appeals that may be open under the rules against the orders of the Returning Officer If he is still not satisfied he may reagitate the matter after the election under section 12(4) and (5) and the orders of the collector or if there is any appeal to the Provincial Government the orders of the Provincial Government will be final Hence the disqualification of a candidate cannot be made a ground of attack in an election petition under s 15 unless the case falls under sub-section (5) of that section Similarly if there are any other grounds of attack available, the objections must be raised at the proper stage and before the officer or tribunals provided for the purpose in the rules Thus if a candidate is not qualified to stand as a candidate, the objection must be raised before the Returning Officer to his nomination, and if unsuccessful there, must be pursued in appeals provided therefor, in the rules It is not open to a party to keep quiet at that stage and then agitate the matter in an election petition under s 15 Section 15 does not permit an election petition on any ground other than those provided for in sub-sections (3) and (5) Same view was taken by Otter J in **D Mailsing v. G C Bourne, A I.R. 1931 Rangoon 326,** wherein he held, that rule 27 clearly contemplates disqualification for nomination as well as election and consequently an objection as to the validity of nomination on the ground of disqualification if not brought under rule 27, it is not open to the objector to bring it under rule 53 and if such objection is brought under rule 53, High Court can in a suitable case issue a mandamus on the officer holding the inquiry under rule 53, to forbear from doing so Words 'irregularity in election proceedings' do not cover the election of a disqualified candidate

A similar view was taken in M P Mangala Goundar v. P. S. Ayyathori Mudaliar, A.I.R. 1928 Madras 641, wherein it was held, that the municipalities are the creations of a special statute and the qualifications for councillorship are laid down in the statute and the several disqualifications of candidates are set out seriatim in s 49 If such disqualifications are overlooked at the time of scrutiny, the methods of removing the councillor are provided in s 51 The plain meaning of cl 3, s 51, would exclude any other remedy as no deci-

sion of any other tribunal in any other proceeding declaring the councillor to be disqualified would have any force when the clause says he shall be deemed to be qualified unless and until the decision of the District Court is given against him To allow another remedy to be pursued would result in conflicting decisions Cl (c) rule 11, refers only to the irregularities in the nomination paper and not to the disqualification of the candidate R 11 concerns only with the irregularities or illegalities that might be committed during the conduct of the elections and the phrase 'non-compliance with the provisions of the Act' cannot refer to anything antecedent to the actual election itself such as the disqualification of the candidate at the time of the election, but only to the conduct of the election during which any of the provisions of the Act or the rules thereunder may be violated Where the statute itself gives a remedy for infraction of any of its provisions, it is not open to the Court to hold that another remedy not specifically provided is open In the course of the judgment Devadoss J said "The contention of the learned Advocate General is that the disqualification of a candidate under s 49 cannot furnish a ground for an election petition, and if he is a disqualified candidate his nomination paper ought to have been rejected by the scrutinizing officer before the election, and after the election has been held and after he has been declared elected the only remedy is by moving the District Judge under s 51 of the Act The contention of Mr Sitaram Rao for respondent 1 is that the election petition could be sustained on the ground of disqualification existing at the time of the election and it is not necessary that an application should be made under s 51 and further that respondent 1 being a defeated candidate he is entitled to agitate the question whether the petitioner is or is not a properly qualified person by an election petition, for if he is a disqualified person his election would be bad and the respondent would be entitled to be declared elected, and still further, if the remedy under s 51 is the only remedy, he would be without a remedy and the legislature could not have intended such a result The Government have framed rules for the conduct of elections and for the decisions of disputes as to validity of an election When a seat becomes vacant not less than 30 days before the date fixed for the holding of the election the chairman shall prepare and publish a notice in English and in the Vernacular of the locality stating the number of persons to be elected and the wards for which they are to be elected and other details Under rule 2 the nomination of candidates shall be made in form no 1 Rule 2(A) requires certain formalities to be gone through on the presentation of the nomination paper Under rule 3 the chairman fixes a date for the scrutiny of the nomination papers Under rule 4(1) the candidates, one election agent, one proposer and one seconder of each candidate and one other person duly authorised in writing by each candidate may attend at the time and place fixed for the scrutiny Under rule 4(2) the chairman shall then examine the nomination papers and decide all objections which may be made at the time to any nomination and may either on such objection or on his own motion after such summary inquiry, as he thinks necessary, reject any nomination on any of the following grounds (1) that the candidate is ineligible for election under Ss 48 and 49 District Municipalities Act, (2) that the proposer or seconder is a person whose name is not registered on the electoral roll, and (3) that there has been any failure on the part of the candidate or his proposer or seconder to comply with any of the provisions of rule 2 Under subrule 3 he shall endorse his decision on the nomination paper Under rule 5(a)

the chairman shall prepare a list of persons whose nominations have not been rejected and who have not withdrawn their candidature in Form III and publish it not later than four days before the date fixed for election Rule 5(b) says that the list shall describe the candidates as in their nomination papers and exhibit their names in alphabetical order In rule 11 of the rules for the decision of disputes as to the validity of an election several grounds are set forth which on proof would invalidate an election The clause upon which respondent 1 relies is clause (c) which says 'If the result of the election has been materially affected by an irregularity in respect of a nomination paper or by the improper reception or refusal of a vote or by any non-compliance with the provisions of the Act or the rules made thereunder, the election of the returned candidate shall be void' The question is whether the disqualification of a candidate before election is one of the grounds covered by cl (c) Before examining that it is necessary to see whether s 51 is a bar to the maintenance of an election petition on the ground of one of the disqualifications mentioned in s 49 existing at the time of the election S 51 reads as follows — '(1) Whenever it is alleged that any person who has been elected or appointed as a councillor is disqualified under s 49 or s 50 and such person does not admit whether or not he has become disqualified for office, such councillor or any other councillor may and the chairman, at the request of the council, shall apply to the District Judge of the District in which the municipality is situated (2) The said judge after making such inquiry as he deems necessary, shall determine whether or not such person is disqualified under s 49 or s 50 and his decision shall be final (3) Pending such decision the councillor shall be deemed to be qualified This section provides what course should be adopted if a person disqualified under s 49 is elected a councillor The question is when a special statute like the District Municipalities Act lays down a certain course to be pursued in the case of certain persons is it open to the Court to hold that the ordinary remedy by way of election petition is open notwithstanding the special remedy provided by the Act The argument of Mr Sitarama Rao is that the special remedy is not open to the respondent 1 the defeated candidate and that he having suffered defeat is not to be deprived of the remedy at law by reason of anything contained in s 51 and that rule 11(c) of the rules for the decision of disputes as to the validity of election applies to the present case The municipalities are the creation of a special statute and the qualifications for the councillorship are laid down in the statute and several disqualifications are set out seriatim in s 49 If such disqualifications are overlooked at the time of scrutiny the method of removing the councillor is provided in s 51 Clause (3), s 51, seems to exclude any other remedy, for it says distinctly 'pending such decision the councillor shall be deemed to be qualified' The plain meaning of cl 3 would exclude any other remedy, as no decision of any other tribunal in any other proceeding declaring the councillor to be disqualified will have any force when the clause says he shall be deemed to be qualified unless and until the decision of the District Court is given against him To allow another remedy to be pursued would result in conflicting decisions If the District Judge were to hold on a reference by the petitioner or by another councillor or by the chairman at the request of the council that the councillor was not disqualified at the time of the election and if the court which hears the election petition were to hold that the election was bad as the petitioner was disqualified to be a candidate at the time of the election, there would be two conflicting decisions and the

question would be which should prevail It is not right to impute to the legislature the enactment of a statute which would give rise to conflicting decisions It is argued by the learned Advocate General that the rules are framed under the rule making power given to the Government under s 303 District Municipalities Act and the rules framed under the Act cannot override the clear provisions of the Act and when there is a conflict between the rules and the Act, the Act might prevail In the view I take of cl (c) no such conflict exists, for I am of opinion that an election petition on the ground of disqualification of a candidate at the time of the election would not lie Clause (c) says 'If the result of the election has been materially affected by any irregularity in respect of a nomination paper or by the improper reception or refusal of a vote or by any non-compliance with the provisions of the Act or the rules made thereunder, the election of the returned candidate shall be void' Mr Sitarama Rao contends that the clause 'affected by any irregularity in respect of a nomination paper' would cover the present case It refers only to the irregularities in the nomination paper and not to the disqualification of the candidate Under the rules as I have mentioned certain formalities have to be gone through before the nomination paper would be accepted and the candidate declared eligible to be elected The irregularity mentioned therein is with respect to names, numbers and other particulars which the nomination paper should contain The question of disqualification is a matter to be decided by the scrutinising officer, the chairman If the chairman on hearing the objections declares that the nomination paper is accepted, the candidate whose nomination paper has been accepted is entitled to contest the election If he accepts the nomination paper of a disqualified candidate any rival candidate has his remedy by appealing to Government against the decision of the chairman After the nomination paper is accepted election is held Rule 11 of the rules relating to the disputes as to the validity of an election concerns itself only with the irregularities or illegalities that might be committed during the conduct of the election, and no mention is made of anything that might have happened previous to it If it was the intention of the framers of the rules to make the disqualification of a candidate a ground for declaring his election invalid, I fail to see why they could not have put it as one of the grounds in rule 11 On reading rule 11 it is clear that it can only refer to what happens during the actual election itself Therefore the phrase 'non-compliance with the provisions of the Act' can not refer to anything antecedent to the actual election itself such as the disqualification of a candidate at the time of the election, but only to the conduct of the election during which any of the provisions of the Act or the rules thereunder may be violated" This decision was overruled in **J. Selvarangaraju v T Doraiswamy, A I R 1929 Mad. 727,** where it was held that a disqualification under s 49 can be made a ground for a petition before an election court impugning the election This case was also followed in **M. Shanmuga v S Subboraya A I.R. 1933 Mad 133** But the decision in the latter cases turned upon the fact that s 51 provided no remedy to a rival candidate and hence the case was covered by rule 11 cl (c) and therefore an election petition could be made on such a ground However, where the Act or the rules provide sufficient remedy to challenge the nomination of a candidate on the ground of disqualification to all including the rival candidates, the remedy by way of an election petition would not be open and the rulings in **A I.R. 1929 Mad 727 & A I R 1933 Mad 133** would not apply

In **Dayaram v Keshawaji, A I R 1933 Sind 416,** it was held that there is

nothing in sub-section (1) of s 22 (B.D.M Act 1901) in derogation of the generality of the power of the court to consider the validity of an election on any ground that may be urged Although this was a case under the B D M Act, 1901 sec 22 of that Act is similar in terms to s. 15 of the B M.B Act, 1925 and the ruling would apply It is submitted with respect to the learned judge who decided the case that the view expressed by him does not appear to be correct on a close study of s 15 and the scheme of the Act as explained above

In **Phani Busen Sen v Sanat Kumar Maitra, A I.R 1935 Calcutta 773,** it was held that notwithstanding a decision by the chairman or the District Magistrate that the nomination paper of a candidate is in order, the District Judge in considering an election petition can go into the question again In this case the objection to the nomination paper was to the effect that the candidate was not eligible for election on the ground that he had been convicted about two years ago under s 420 Indian Penal Code and sentenced to a fine of Rs 500/- and detention till the rising of the court In this case there was an express provision in s 39 (d) of the Bengal Municipal Act 15 of 1932 that wrong acceptance or rejection of a nomination paper can be a ground for an election petition as is the case in s 33 of the City of Bombay Municipal Act, 1888

In **Vinayak v Gopal, 40 B.L.R 525,** it was held that in the case of a candidate at an election the entry of his name in the voter's list was not conclusive of his right to stand as a candidate but the question whether this right can be challenged in an election petition or not was neither raised nor decided Hence although an election petition on this ground was entertained by the District Judge, this case is no authority for the proposition that an election petition can be made on the ground that the successful candidate was not really qualified to stand

The word 'preparation' in R 8(e) is used in general sense and therefore includes the action of the revising authority The petitioner secured 37 votes and the respondent secured 14 votes at a poll for filling up a vacancy of councillor in the municipality The respondent contended in the election petition that the petitioner's name being wrongly entered in the electoral roll the petitioner was disqualified under s 48(1) The lower appellate court held that the revising authority admitted the petitioner's name but the order of the revising authority was ultra vires. Held 'that the validity and conclusiveness of the register under Rule 8(e) could not be questioned in election proceedings and the petitioner must therefore be deemed to have been duly elected **R. V Palanisami v R Srinivasarangacharlar, A.I.R 1925 Mad 160.**

Unless the objection raised in the election petition can be brought under one or other of the three sub-clauses of rule 11, the election petition should be rejected in limine Where the only point taken in the election petition to contest a municipal election was that the candidates who had been declared elected had been wrongly put upon the electoral roll because they had not paid their taxes and that one of them was not a resident within the municipality Held that the objection to the election was not a valid one Held, also for the purposes of an election, a roll has to be settled and after that is settled, it must be taken as settled for all purposes of the election upto the very end till it is finally declared who the properly elected candidate is **C. Janardhanan v. N. M. Verghese A.I.R. 1925 Mad 707**

Court should confine itself to the grounds raised in the petition:— Court dealing with election petition must confine itself to the matters raised

in the petition **R. S. Naidu v J Ramier, A.I.R 1926 Mad 947** Where the election commissioner declares an election void on the ground not taken in the petition and declares another candidate elected in his place, the action of the election Commissioner is one in excess of jurisdiction **M Sanmuga v. S Subboraya A.I R. 1933 Mad. 133(2)**

Jurisdiction of Civil Courts excluded —The scheme of the Act is to provide a complete machinery for the determination of the rights created under the Act and the rules made thereunder and this section provides a special tribunal to determine the validity or otherwise of the election of a councillor *This right cannot be challenged in any other way except as provided in the Act or the rules* It is not open to anyone to bring a suit for the same in a Civil Court or to attack it in any other way When the Act itself provides a tribunal, the jurisdiction of the Civil Court is impliedly excluded Similarly when the Act itself does not permit the election of a councillor to be challenged on any other ground than those mentioned in s 15, the same could not be challenged in a Civil Court on grounds not permitted in s 15

It is not open to anyone to challenge anything done by an officer or officers charged with carrying out the rules made under clause (c) of sub-section (1) of section 10 except in the manner and to the extent provided in this Act and *the rules made thereunder The rules under Sec 10(1)(c) must provide for* decision of questions likely to arise at various stages of election such as entries in the Voter's list, nomination and so on, and the decision of the officers concerned under the rules will not be challengeable except as provided in Sec 15(5) Sec 15 provides a special tribunal for the purpose and no suit will be maintainable in a civil court to challenge any of those decisions Under sec. 15(5) the decisions of the officer or officers charged with carrying out the rules made under Sec 10(1)(c) are final unless (1) there is some irregularity or informality corruptly caused or (2) there is breach of, or omission to carry out, or any non-compliance with the provisions of this Act or the rules whereby the result of the election is materially affected, when they can be attacked under sec 15(5) before the special tribunal

In **Bhaishankar v Municipal Corporation of Bombay, 9 B L R 417,** it was held "Where a special tribunal, out of the ordinary course, is appointed by an Act of legislature to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, an essential condition of those rights is that they should be determined in the manner prescribed by the Act, to which they owe their existence The Chief Judge of the Small Causes Court at Bombay is the sole tribunal indicated under the City of Bombay Municipal Act to determine questions relating to disputed elections No other Court has jurisdiction to hear suits arising under the Act The jurisdiction of the courts can be excluded not only by express words, but also by implication, and there certainly is enough in Sec 33 of the Municipal Act for this purpose, for there is no right which the plaintiff can at this stage assert as the subject of this suit, which is not subject to the condition that its essential basis must depend on the decision of the Tribunal created for that purpose"

In Vinayak v. Gopal, 40 B.L.R. 525, the question whether the Civil Court had jurisdiction to entertain the suit was neither raised in the High Court nor decided and hence this case is no authority to show that the Civil Court has jurisdiction in the matter

Where the rejection of the nomination was on the ground that it did not give the number of the ward for which the candidates decided to stand, and in the other case on the ground that the thumb mark of the seconder of the candidate had not been attested Held, that the rejection of the nomination papers was not in law justified If a man entitled to vote or to be a candidate at an election is wrongfully deprived of that right, an action for damage lies against the person depriving him But if the act by which the right is interfered with is an act done in a judicial capacity, no action lies unless the act is done maliciously which in this context really means dishonestly The general right of being nominated to stand as a candidate for municipal election is a legal character. This legal character is itself the creation of a specific statute, the District Municipalities Act V of 1920, and it is settled law that where a statute itself sets up a proper tribunal for trying cases of the infringement of the right to such a legal character and that tribunal has functioned judicially the civil Court will have no jurisdiction The Local Government is the final arbiter for deciding what the rules mean, the Civil Court cannot ordinarily be asked to decide whether the Local Government's interpretation of its own rules is right or wrong But where the proper tribunal has declined jurisdiction and the aggrieved party is thus bereft of his statutory and constitutional remedy, it is the province of the Civil Court as a court of equity, to fill the vacuum created and to exercise the jurisdiction which the proper tribunal has failed to exercise It cannot be admitted that the order of the chairman in the matter of interpretation of the rules is absolutely final The correct principle is that when a duly constituted tribunal has refused to try the question of the right of a party to the legal character of one entitled to be nominated to stand as candidate for an election, and there is no other remedy available, the ordinary Civil Court has jurisdiction to entertain a suit for that relief and the right to grant a proper temporary injunction retaining matters in status quo ante until the suit is tried Where the election has taken place the remedy of the candidate whose nomination paper has been wrongly rejected by the chairman is to file an election petition to Sub-Judge but not a Civil suit nor can he restrain the elected candidate from doing his duties as a commissioner **Sarvothama Rao v The Chairman Municipal Council, Saidapet, A.I.R 1923 Mad. 475.** This case was not followed in **Joti Prasad Upadhiya v. Amba prasad, A I.R 1933 All 358,** wherein their lordships referring to this case said, "With due deference and for reasons given above we are unable to agree with that decision When the legislature has prescribed a particular method for the redress of an alleged wrong, that method alone is open to an aggrieved party and in such a case Civil Court has no jurisdiction to deal with the matter reserved by the legislature to a specially appointed tribunal" It was also not followed in **In re T Balaji Rao Naidu, A I R 1933 Mad 103,** and **Muhommad Ekram Khan v Mirza Muhammad Baker A I R 1935 All 106**

If the tribunal has exercised the discretion entrusted to it bona fide not influenced by extraneous or irrelevant considerations and not arbitrarily or illegally the Courts cannot interfere, they are not a court of appeal from the tribunal but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusions or deciding jurisdiction It is idle to ask for a mandamus when there has been no refusal to perform a statutory

duty and the question whether in point of law it was properly performed is in doubt The High Court has to consider whether it would accord with such discretion to exercise the extraordinary jurisdiction of the court to make an order in the nature of a mandamus—a jurisdiction intended to be the last resort **Manindra Chandra Nandi v Provas Chandra Mitter, A.I R 1924 Cal. 761.**

The whole intention of Ss 19 to 27 clearly implies an intention that election of any person as a member of Board shall only be challenged by an election petition presented in accordance with the Act and no suit lies in Civil Court to challenge the same **Abdul Rahman v Abdul Rhaman, A.I R 1925 All. 380 (F B.)** In the course of the judgment their lordships said "Section 9 of the Civil Procedure Code declares that Civil Courts shall have jurisdiction to try all suits of a civil nature except suits of which their cognisance is either expressly or impliedly barred It is quite true that it is not stated in so many words that there shall be no right of suit It is also true that in two places in the Act, Ss 164 and 321 there are provisions expressly barring the right of suit in particular matters But the whole scheme of Ss 19 to 27 clearly implies an intention that the election of any person as a member of a Board shall only be challenged by an election petition presented in accordance with the Act The inquiry held by the Commissioner is not a summary inquiry subject to the result of a suit The Commissioner is armed with all the powers of a Civil Court and his decision is intended to be a final settlement of the question in dispute The ordinary rule is that when the statute which creates the right also prescribes a specific remedy, the person aggrieved is limited to the remedy so prescribed As this Court observed in **Sham Lal v Bindoo, (26 All 594)** with reference to a similar contention under the Guardians and Wards Act, a separate suit, if permitted, might result in two opposite decisions, equally final and equally binding, one declaring an election valid and the other declaring it invalid The matter was well put by Sir Lawrence Jenkins, Chief Justice of Bombay High Court, in **Bhaishankar Nanabhai v The Municipal Corporation of Bombay (9 B L R 417)** —'But under s 33 the Chief Justice has jurisdiction to determine the validity of a contested election, and so he is the tribunal appointed by the Act for that purpose But where a special tribunal, out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as is otherwise expressly provided or necessarily implied that tribunal's jurisdiction to determine those questions is exclusive It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence In such a case there is no ouster of the jurisdiction of the ordinary courts, for they never had any, there is no change of the old order of things, a new order is brought into being"

When three candidates offered themselves for an election of a Taluk Board on the day fixed for the scrutiny of nomination papers, the President of the Taluk Board rejected the nomination paper of one candidate on the ground that he was an Honorary Magistrate and the other withdrew, consequently the third candidate was deemed to be elected The defeated candidate filed a suit in the District Munsif's Court against the President and the successful candidate for a declaration that he was a duly nominated candidate Held that under rule of the rules for the conduct of inquiries relating to elections the jurisdiction of the civil courts to entertain the suit was barred **A. V. Srinivasalu Reddy v S Kuppuswami Goundar, A I R 1928 Mad 253.**

The municipalities are the creation of a special statute and the qualifications for the councillorship are laid down in the statute and the several disqualifications of candidates are set out seriatim in s 49 If such disqualifications are overlooked at the time of scrutiny, the methods of removing the councillor are provided in s 51 The plain meaning of cl 3, s 15, would exclude any other remedy as no decision of any other tribunal in any other proceeding declaring the councillor to be disqualified would have any force when the clause says he shall be deemed to be qualified unless and until the decision of the District Court is given against him To allow another remedy to be pursued would result in conflicting decisions Cl (c), rule 11, refers only to the irregularities in the nomination paper and not to the disqualification of the candidate R 11 concerns only with the irregularities or illegalities that might be committed during the conduct of the elections and the phrase 'non-compliance with the provisions of the Act' cannot refer to anything antecedent to the election itself such as the disqualification of the candidate at the time of the election, but only to the conduct of the election during which any of the provisions of the Act or the rules thereunder may be violated Where the statute itself gives a remedy for infraction of any of its provisions, it is not open to the court to hold that another remedy not specifically provided is open. **M. P Mangal Gounder v P S Ayyathorai Mudaliar, A I R. 1928 Madras 641.**

Where a distinct remedy is open to a party aggrieved by an order, it is abuse of the process of the Court to approach High Court for issue of a writ of certiorari **Somasundara Mudaliar In re A.I.R 1932 Mad 171**

When the legislature has prescribed a particular method for the redress of an alleged wrong, that method alone is open to the aggrieved party and in such a case the Civil Court has no jurisdiction to deal with the matter reserved by the legislature to a specially appointed tribunal Hence the jurisdiction of a Civil Court to try a suit challenging the validity of the election of a chairman of a District Board is impliedly barred by s 35(3) District Boards Act and even an arbitrary disregard by the Local Government of the mandatory provisions of that section by refusing to appoint a tribunal to decide the question does not bring into play the jurisdiction of the Civil Court The District Board Act is a self-contained Act containing exhaustive provisions for the constitution of Boards, for the preparation of electoral rolls, for the election of members and chairman of the Board, for the manner in which the validity of the elections of members and chairman can be called into question, and the tribunal by which questions are to be determined If the law is clear it is the duty of the Court to give effect to it without attempting to inquire into the reason for the enactment **Joti Prasad Upadhiya v Amba Prasad, A.I.R. 1933, All 353.** In the course of the judgment their lordships dissenting from the view taken **in Sarvothama Rao v Chairman Municipal Council, Saidapet, A.I.R. 1923 Madras 475,** observed "The view that we take is opposed to the view expressed in Sarvothama Rao v Chairman Municipal Council, Saidape' In that case Wallace J while dealing with R 31 of the Election Rules under the Madras District Municipalities Act (5 of 1922) which lays down that 'If any question arises as to the interpretation of the rules otherwise than in connection with an election inquiry, the question shall be referred to the Local Government, whose decision shall be final' observed that 'now if this tribunal had functioned in this case and given a decision I am clear that the Civil Court would have no jurisdiction But where the proper tribunal has declined jurisdiction and the aggriev-

ed party is thus bereft of his statutory and constitutional remedy, it is the province of the Civil Court, as a Court of equity, to fill the vacuum created and exercise the jurisdiction which the proper tribunal has failed to exercise' With due deference and for reasons given above we are unable to agree with that decision When the legislature has prescribed a particular method for the redress of an alleged wrong that method alone is open to the aggrieved party and in such a case the civil Court has no jurisdiction to deal with the matter reserved by the legislature to a specially appointed tribunal" Although this was a case under the U.P District Boards Act (x of 1922) the principles apply with equal force to the present Act, because the scheme under the present Act and the rules is the same as in the U.P District Boards Act

Local Boards, District Councils or Municipalities are the creations of statutes which expressly confer power on the Local Government to frame rules for the purpose of carrying out the objects of the Acts The Local Government can therefore lawfully create a forum for the purpose of deciding disputes as to elections Since these Acts do not take away, any rights which had previously vested in the public, but on the contrary create new rights, it is perfectly open to the Local Government to impose restriction on the exercise of such rights by means of its rule-making power provided the rules are not repugnant to the express provisions or the policy of the Act The principle is that when the statute which creates the right also prescribes a special remedy the person aggrieved is limited to the remedy so prescribed **Vithoba v. Govindrao, A.I.R. 1933 Nagpur 193 (F B)**

The U.P District Boards Act, does not contemplate that the validity of an election shall be questioned on any of the grounds mentioned in s 15 otherwise than by an election petition which must be decided by an election tribunal constituted under the provisions of the Act, and the Civil Court has no jurisdiction to go into the question A declaration in respect of the correctness or otherwise of an electoral roll, when the election is already over, which would be a mere empty and useless one and which will not affect the legal position of the parties to the election cannot be granted **Abdul Ahad v Ashafaq Ali, A I R 1933 Oudh 423(2)**

Where the legislature has set up a special tribunal for the purpose of determining certain questions as to rights which are the creatures of the Act, then the jurisdiction of that tribunal is exclusive and the Civil Court cannot take cognisance of such matters **Mahadar Rahman v Kanti Chandra, A I.R. 1935 Cal 10**

It follows from s 4 Civil Procedure Code, that where there is a special or local law, the Civil Court would not have jurisdiction under s 9 to entertain a claim merely because it is of a Civil nature A special law overrides the general jurisdiction conferred on Civil Courts to entertain suits of a Civil nature The U P Municipalities Act gives no right to a person to challenge the election of a member otherwise than on the grounds mentioned in s 19 of the Act A suit therefore in a Civil Court challenging the election of members of a municipal Board on grounds other than those mentioned in s 19 U.P Municipalities Act is barred **Nawal Kishore v Municipal Board, Gorakhpur, A I R 1937 All 365**

Where the Local Government has not set up an election tribunal in the proper sense, which would decide all disputes arising out of election, particularly where election is impeached on grounds of bribery and corruption, the jurisdiction of Civil Courts cannot be said to be ousted But in so far as the

disputes come within the purview of the rules, and barring the exceptions provided in the rules, themselves, the jurisdiction of Civil Courts no longer exists, even though the dispute be deemed to be included in s 18-B, cl (c) Bengal Local Self Government Act **Abala Kant Ghose v Syed Jalaluddin Hashemy, A.I.R. 1937 Cal. 487.**

Where new tribunals are constituted to determine new questions under new Acts, the tribunals so constituted by and for the purpose of those Acts, unless the contrary is expressly enacted or necessarily implied, are special tribunals and the judges when they are named are named as persona designata and not as Court **Mirza v Trikamdas, A.I.R 1939 Sind 165.**

A contrary view has been taken in the following five cases —

In **Kali Prasad Singh v Makutdhari Prosad Sinha A.I R. 1933 Patna 155,** it was held, that a District Magistrate is not empowered to hear election petitions which are based on any thing more than some irregularity in the Electoral Rules The most common grounds on which elections of all kinds are liable to be attacked are the improper rejection or acceptance of nomination papers, bribery, corruption, intimidation, or personation discovered after the election It does not appear that the rules empower the Magistrate to hear petitions based on any of these grounds And the provision in R 68 that disputes under the rules are to be decided by the District Magistrate where they have not been decided already by any authority whose decision is declared to be final is only a precautionary measure to see that some authority is provided by the rules for the decision of disputes necessary when rules are being framed, since it is difficult to make provision for possible grounds of dispute over the observance of every rule The order of a Returning Officer summarily rejecting the nomination of a candidate can be challenged under s 42 Specific Relief Act, because the arbitrary decision of the Returning Officer not only takes away the right of the candidate to stand for election, but also deprives the electors of the exercise of their right of franchise in choosing their own representative And the Civil Court has jurisdiction to entertain such cases

In **Vasistha Narain Sinha v Sant Lal Kumar, A.I.R 1934 Patna 27,** it was held, that the jurisdiction of the District Magistrate as regards matters other than those which are finally disposed of by other authorities, is co-extensive with that of the other officers who have finally to determine the matters under the election rules Where the validity of an election was challenged on the ground that the polls were closed owing to the riot caused by the conduct of the opposite side and that there was no proper election by reason of the prevention of the voters from exercising their right to vote, held, that the dispute was not one arising under the electoral rules and therefore not within the cognizance of the District Magistrate under s 68

In **Lachmi Chand Suchanti v Ram Pratap Chaudhari, A I.R 1934 Patna, 670(2) (F.B),** it was held, per Full Bench that the words 'it shall be lawful' are mandatory and not merely permissive It was the intention of the legislature that what is generally known as an election petition Court should be set up for deciding all disputes relating to all elections instituted under the Act, that such Court should be appointed by the Local Government and that the Local Government should frame rules for its procedure and that all disputes of any character should come before and be decided by such Court It is clearly contemplated both by the legislature and by the Local Government that an election may be declared invalid, and the legislature clearly contemplated that

the Local Government would appoint an authority to decide all disputes relating to elections, which necessarily includes the decision upon petitions to have an election declared invalid for any reason such, for example, as there has been material irregularity and such irregularity in the conduct of the election has materially affected the result thereof, or upon such ground as wholesale bribery or public disorder which prevented the voters from exercising their franchise The District Magistrate is not intended to act as an election tribunal in the ordinary sense The authority of the District Magistrate is limited to deciding any dispute relating to the procedure of the election, save and except such disputes as are to be decided by the presiding officer or the Returning Officer and hence Civil Court's jurisdiction is not ousted Where the right and liability have been created by statute and where the legislature has left to another authority the appointment of a tribunal to try such liability and the framing of the procedure under which the tribunal so to be appointed is to carry out its duties, but the tribunal so contemplated by the legislature has never been brought into existence, the subject has the right to proceed in the ordinary Civil Courts with corresponding rights of appeal, unless and until the legislature carries out its duty of appointing a special tribunal Obiter—Per Courtney Terrell *C J* when a special tribunal has been appointed and its procedure framed, then the subject cannot proceed to a Civil suit in the event of the special tribunal refusing or neglecting to carry out its duties in a proper manner, in other words, refusing or neglecting to exercise its jurisdiction

In Rathis Chandra Munshi v Amulya Sharan Ghatak, A I R 1931 Cal 36, it was held Per Suhrawardy, J that although the Local Government had laid down that the authority which shall decide disputes relating to elections shall be the District Magistrate, the Civil Court has jurisdiction to declare an election held under the Municipal Act invalid, and the order of the District Magistrate is final so far as executive authorities are concerned Per Costello J, that the proviso to s 15 (Bengal Municipal Act 3 of 1884) suggests that in spite of R 16 there shall be a right to refer to the Civil Court where there has been an irregularity in connection with holding of elections such as an unqualified candidate being allowed to go to the poll This case was distinguished in **Mahedar v Kanti Chandra, A I R 1935 Cal. 10,** on the ground that in that case there was an express proviso to s 15 of the Bengal Municipal Act 3 of 1884 retaining jurisdiction of Civil Courts to try suits relating to election

In Gopesh Chandra Aditya v Binode Lal Das, A I R 1936 Cal 424, it was held, that so long as proviso to s 13 (Assam Municipal Act 1 of 1923) is retained in the statute the jurisdiction of the Civil Court to adjudicate upon the validity or invalidity of the elections is not affected by anything contained in the rules framed under s 296(2) or by establishment of special tribunals to consider election petitions

In the three Patna cases referred to above the decisions turned upon the point that the Local Government had not appointed special tribunals to decide the disputes in question and hence the jurisdiction of the Civil Courts was not ousted In the two Calcutta cases referred to above the decisions turned upon the point that in the Municipal Acts in question there was an express provision that the jurisdiction of the Civil Courts was not ousted Thus these five cases can be distinguished on these grounds and the final position is that where special tribunals have been created by the special statutes to decide disputes

about rights which are the creation of the special statutes the jurisdiction of Civil Courts is impliedly ousted unless it is specifically saved by provision to that effect in the special statutes

The decision of a tribunal cannot be said to be without jurisdiction merely because it is wrong.—Under the Madras Rules no breach of the rules whether mandatory or directory invalidates an election unless the result of the election has been materially affected by such breach What is a 'material irregularity' is a matter in itself undefinable and must be decided on the facts of each case So far as it may be negatively defined it is not a mere mistake of fact or law unless that mistake has occasioned a wrong assumption or refusal of jurisdiction since a Court which has jurisdiction to decide a case on a point of fact or law has jurisdiction to give a wrong as well as a right decision on either point **Ahmed Thambi v. V S. Basaria, A I R. 1923 Madras 254.**

Where the Act gives an election officer jurisdiction to examine the nomination papers and scrutinize them and listen to objections and having listened to objections, to decide whether the nomination papers should be received or rejected, the High Court cannot interfere with the decision by certiorari even if he were wrong as he had jurisdiction to make the order and as that is a matter for which there is a remedy provided by means of an election petition. Certiorari should only be granted when no other suitable remedy exists **L. S M. Govindaswami v. Ramalingaswami, A.I R 1932 Mad 321** In this case **Manindra Chandra v Provesh Chandra, A I R 1924 Cal 761 was relied on**

Provided a District Judge is acting within his jurisdiction his decision under s 51, however erroneous on the facts or even on the construction of the rules, cannot be revised by the High Court For where a District Judge who has jurisdiction to inquire into an election petition under the rules, passes, as a result of his inquiry, an erroneous order based on an erroneous construction of the sections of the Act or the rules, it cannot be interfered with in revision, and it cannot be said in such case that on account of this error of law the District Judge exercised a jurisdiction which did not exist **R Kandaswami v. Municipal Council of Pollachi A I R 1933 Mad 260** In this case the case of **Parthasaradhi Naidu v Koteswara Rao, A.I R 1924 Mad. 561,** was relied on

Writ of Mandamus —In T B Keshav Rediar v. Tasildar of Polur, A.I.R. 1933 Mad 319, the prayer was made in the following terms —'That this court should be pleased to issue a writ of certiorari to the Election Officer and to direct the said officer to include my name in the list of nominated candidates and then to proceed to hold the election' It was held that this was obviously a prayer for a direction which would be suitable in a writ of Mandamus but was quite inappropriate in a writ of certiorari It was also held that the court has no power to issue a writ of Mandamus (vide s 50, Specific Relief Act) It was further held that the High Court has power under s 45, Specific Relief Act to issue a mandatory order to public servants and to others to do specific acts within the local limits of its Ordinary Civil Jurisdiction but not against the Governor in Council nor against the Governor acting with ministers It was also held that the relief though nominally against the Election Officer was in reality against the Government who had by their order cancelled the order of the Election Officer accepting the nomination paper of the petitioner and had directed him to exclude the petitioner's name from the list of valid nominations and ballot papers and that therefore the Government should have been a party to the petition

The Chief Judge has power to declare a person duly elected should it turn out that he has the majority of the votes By virtue of provision (b) of s 45, the Court must be satisfied that subordinate Court is proposing to do something which the Court has clearly no power to do By virtue of provision (c) of s 45, (Specific Relief Act, 1877) Courts must be satisfied that such doing or forebearing is consonant to right and justice The Courts will interfere only when they will find intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law and also where they find that no proper jurisdiction is used **L H Wellington v Chief Judge, Rangoon Small Causes Court, A I R 1935 Rangoon 349**

Writ of certiorari —When a court of similar authority gives to itself a jurisdiction which it properly has not got by taking an erroneous view of law, a writ will be issued, but there will be no writ if it makes a mistake in the law when acting in the exercise of a jurisdiction which it undoubtedly possesses **M Shanmuga Mudaliar v S Subboraya Mudaliar, A I R 1933 Madras 133 (2).**

When a court of similar authority gives to itself a jurisdiction which it properly has not got by taking an erroneous view of law, a writ will be issued, but there will be no writ if it makes a mistake in the law, when acting in the exercise of a jurisdiction which it undoubtedly possesses Where the Election Commissioner who possesses jurisdiction either to declare another person duly elected or to order a fresh election, makes a mistake in overlooking that the votes cast for the disqualified candidate will be thrown away that mistake is not sufficient to warrant the issue of a writ **Kuramutla Gangadu v. D V.N. Abreham, A I.R 1934 Mad 174**

On all ordinary principles, writ of certiorari lies, the test being whether the officer against whose proceedings it is directed was acting in a judicial capacity But it is of a purely discretionary character and only to be resorted to where the merits of the case call for it Proceedings before a Munsif as Election Commissioner are judicial and a writ lies to vacate his order provided the merits of the case call for it **Thirumala Chettiar v Chellam Pillai, A I.R 1934 Madras 190**

The President of a Union Panchayat issued a notice for the election to be held, and fixed a day for nominations On the same day a new election roll was published which omitted the name of the petitioner, apparently on the ground that he had not paid his taxes The date for the scrutiny of nominations was fixed a few days later On that day, the President scrutinized the nominations on the footing of the new electoral roll and rejected the petitioner's nomination as he was not on the new electoral roll Held that the decision of the President was a ministerial act and not a judicial one And even if it be held that his act in rejecting the nomination was judicial, still his act was in accordance with rules and there was no fault to find with it There was no ground, therefore, for the issue of a writ of certiorari The petitioner's remedy was by way of election petition **Y Desi Chettiar v J K Chinnasami Chettiar, A I R 1928 Madras 1271** In the course of the judgment their lordships observed 'It is argued that because the rejection of the nomination was a judicial act—see **Sarvothama Rao v Chairman, Municipal Council, Saidapet, A I.R. 1923 Mad 475,**—the preparation of the roll which led to the rejection must also be a judicial act This argument we do not follow The roll had to be prepared whether or not there was an election pending and the two matters, the preparation of the electoral roll and the rejection of nominations,

are entirely separate functions The preparation of a new electoral roll is in no sense a judicial act It was purely a ministerial act, the creature of a statute which does not declare any power in this Court to issue a writ of certiorari if the rules are not obeyed Ordinary Civil Courts are given no control over the preparation of such roll, and, under the rules, the roll once published is final Under the rules also a new roll comes into force on the date of its publication The present roll therefore came into force on 14th May 1928 and as the scrutiny was not made till 17th May 1928 the President was acting in accordance with the rules in checking the nominations by the new roll To hold otherwise would mean that a body of persons might be elected to serve for a term for which they were not on the electoral roll at all, and we are clear that s 54, Local Boards Act, is wholly opposed to such a view So that even if we were to hold that the President was acting as a Judge in rejecting the nomination, his act was in accordance with the rules and there is no fault to find with it If, as we hold, he was not going outside his jurisdiction in interpreting the rules, whether wrongly or rightly, and there would be no ground for the issue of a writ If the argument be that the new roll is invalid because it was not compiled according to the rules, the answer again is that the compilation of such a roll is merely a ministerial act and not a judicial one, and that there is no statutory authority giving this Court power to issue a writ in matters of ministerial function"

If in an inquiry by an Election Commissioner for which there is jurisdiction, an error is made which can be regarded as something which goes beyond the jurisdiction of the tribunal or is as done without jurisdiction and is not merely a wrong view of law, then a writ can be granted A decision on a matter of fact in proof of which there is no evidence is beyond the scope of the tribunal's jurisdiction which gives the decision and is not valid **T. S. Shankaranarayana Pillai v A M Ahmed, A I R 1934 Mad 357**

Where as a result of non-compliance by the Polling Officer with R 16 and consequent invalidation of ballot papers under R 20 the Election Commissioner declares election void and orders fresh election on the ground that the circumstances of the invalidation of the ballot papers disenfranchised a number of voters, refusing to consider in what numbers the invalid ballot papers had been distributed in favour of the rival candidates, particularly when both on the invalid ballot papers and valid ballot papers the elected candidate has majority and result of election is not materially affected under R 10 (e), the error is of such a nature as to justify grant of certiorari Procedure by certiorari is not exclusively connected with cases of jurisdiction or its absence, deciding a question not put to it for decision and avoiding an answer to the real question which it had to decide, make an inferior tribunal amenable to correction by certiorari **Y Mahabeleshwarappa v. S Ramchandra Rao A.I R., 1936 Mad 669** In the course of the judgment Cornish J observed "The question then is whether this error of the Election Commissioner can be remedied by means of certiorari The writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that it may be certified whether the decision is within the jurisdiction of the inferior court, if it is a tribunal which has to decide the rights after hearing evidence and opposition, it is amenable to a writ of certiorari Per Scrutton, L.J in **1931 2 KB 233(3)**. An election Commissioner is undoubtedly such a tribunal But certiorari will not issue in respect of a wrong decision of a tribunal upon a matter which is within its power to decide, for there is as

Lord Summer has observed in (1922) 2 AC 128 (4) at P 151, a difference between a wrong exercise by a tribunal of the jurisdiction which it has and a usurpation by the tribunal of the jurisdiction which it has not In 5 P C 417(5), at P 442, Sir J Colvile has indicated how a usurpation of jurisdiction by the tribunal might arise It may be founded on the incompetency of the judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, or on a fact to be adjudicated upon in the inquiry, as where decision of some fact in the course of the inquiry by the tribunal ousts its jurisdiction See the judgment of Fletcher Moulton, L J in (1906) 2 K.B 501 (6) at P. 537. Thus a tribunal may wrongfully assume jurisdiction or decline jurisdiction upon an erroneous interpretation or understanding of the law which governs its powers As stated by Farwell, L J in (1910) 2 K B 165(7) at 179 the Courts will prevent the intentional usurpation or mistaken usurpation of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which case the courts have regarded them as declining jurisdiction In that case it was held that the Board of Education by deciding a question not put to it for decision and by avoiding an answer to the real question which it had to decide, had declined jurisdiction and had made itself amendable to correction by certiorari The same principle was stated by the Divisional Court (Lord Alverstone, L C J , and Wills and Kennedy, JJ) in 91 L.T 94(8) I think that in the present case Election Commissioner has entirely misapprehended the real question for his decision He has failed to decide it upon the mistaken hypothesis that the circumstance of 322 votes having been invalidated must have materially affected the result of the election His words are I need hardly say that the disenfranchising of at least 322 voters when the majority of the counter-petitioner was only 144 did materially affect the result of the election And being of opinion that 'a vote recorded on an invalidated paper is no vote at all' he declined to consider in what numbers the invalid ballot papers had been distributed in favour of the rival candidates In short, the Election Commissioner had declared the election void without considering and without determining the very question upon which his jurisdiction to declare the election void depended He had no power to do that In my judgment it is a proper case for interference by certiorari and the commissioner's order should be quashed "

In order to avail of the right given under R 14 it is for the person appealing to intimate his intention of appearing in person or through an agent because, although there is provision under R 13 for notice to be sent by the Election Officer to the person concerned, under R 2 (a), there is no provision for the appellate authority to give notice to anybody There is nothing to prevent an appellant intimating his desire to be heard under R 14 in his appeal notice in form VI, and if the appellate authority disposes of the matter in such time that it was impossible for the person aggrieved to intimate to him of his intention of appearing, then in such a case High Court might possibly think fit to interfere Where therefore a person appealed from the order of Election Officer but did not intimate his intention to appear personally or by an agent before appellate authority even during a month's time after filing of the appeal, and the Inspector decided the appeal on the documents filed by the Election Officer, Held that the Inspector did not act without jurisdiction and hence High Court would not issue a writ of certiorari

Dhoolipala Venkateswaralu v. District Election Officer, Kistna, A I R. 1937 Mad 284.

It may be noted that the writ of certiorari could only be issued by the High Courts of Bombay, Calcutta, Madras and Rangoon only within the local limits of their original civil jurisdiction.

Sub-section (1):—This sub-section provides that the election petition must be made to the District Court of the District in which the election is held or should have been held It also prescribes that the petition must be made within ten days after the date of declaration of the result of the election It also lays down that the petitioner must be a person qualified to vote at the election The words used are "Qualified to vote" not "entitled to vote" If the latter words were used it was quite sufficient if the petitioner's name appeared in the Municipal Election Roll However, the words used are 'Qualified to vote' That means that the petitioner must possess the necessary qualifications to be a voter at the election in dispute As to what these qualifications are see Sec 11(1) and (2) If a person is not qualified to vote under Sec 11 (1) and (2), he cannot be a petitioner even if his name may have been entered in the Municipal Election Roll Similarly, if a person's name is not in the Election Roll and yet if he was qualified to vote at the election he is competent to apply under this sub-section Thus the petitioner's right to present the petition can be challenged even if his name appears in the election roll If it is shown that he is not qualified to vote, the petition must fail.

At the election to which such question refers:—This means at the 'election of the councillor' i e to say, the petitioner must be qualified to vote in the constituency and also in the ward for which the councillor stood as a candidate Thus a person qualified to vote in a Muslim constituency is not competent to apply under this section against a councillor who is elected from the General constituency Similarly a person qualified to vote at the election of councillors from a ward A will not be entitled to present a petition under this section against a councillor elected from ward B In short the petitioner must be qualified to vote for the councillor The underlying principle is that petitioner can challenge a councillor who represents him and not any other councillor who does not represent him

The expression 'qualified to vote at the election to which such question refers' came to be interpreted in **Naranarayan Mandal v Aghorechandra Ganguli, I.L R 63 Cal. 136,** wherein Henderson J observed In order to entitle him to bring this petition, the petitioner must show that he is a person qualified to vote at the election to which the question refers It is quite clear that some meaning must be attached to these limiting words S K Ghose J. thought that they were intended to exclude persons who were not qualified on the polling day but have become qualified in the few days intervening between that and the time within which the election petition is to be filed His conclusion is in these words 'This does not mean that the qualification is confined to the election in a particular ward but it only means that the qualification must be possessed at the time of the election and not at the time of the application' With great respect to the learned Judge, we are of opinion that this is far too narrow a construction to place upon these words If the intention of the legislature had been that a person qualified to vote in any ward was entitled to file a petition, it would have been quite easy to employ language similar to that used in Section 23 sub-section (1) with regard to

qualifications of candidates In our opinion, the intention of the legislature was that the right to file an election petition is to be confined to a person who was qualified to vote at the particular election which has been called in question On this point Mr Chatterji argued that Section 23 does not make any provision with regard to qualifications for voting in particular wards In our opinion, that section is not the place where such a provision would be naturally expected The whole question becomes clear from the provisions of section 21, sub-section (3), which is in these terms —When a municipality has been divided into wards the electoral roll shall be divided into separate lists for each ward Now, it could hardly be contended that the lists for wards are to be prepared according to the arbitrary pleasure of the committee appointed under section 21, sub-section (1) to prepare the electoral roll The only reasonable interpretation is that each ward should be considered as a separate entity and that persons whose names are to appear in the electoral roll in that ward are those who have the qualifications laid down in section 23 with respect to that ward In other words, section 36 means that a petitioner must be qualified to vote, i e, entitled to have his name entered in the electoral roll of the ward, the election in which is called in question by the petitioner In the present case, the petitioner was not so qualified and the learned judge rightly rejected his petition There is one other small point The learned judge, while dismissing the application found that the petitioner might have brought another petition under section 39 as an unsuccessful candidate In our opinion, the learned judge has misconceived the meaning and scope of that section It merely provides for additional relief which may be given to petitioner under section 36, when he was himself a candidate at the election If the petitioner was not a candidate, the only relief which can be asked for is that the election should be set aside Where he is a candidate, he may ask that he shall be declared to have been elected"

Qualified to vote—Entitled to vote —These expressions came to be interpreted in **Naranarayan Mandal v Aghorechandra Ganguli, I L R. 63 Cal 136,** wherein Henderson, J observed "In order to determine the meaning of the words 'qualified to vote,' it is necessary to examine the provisions of sections 21 and 23 We do not think there can be any doubt that section 23 lays down certain qualifications to entitle the holder to have his name included in the roll of voters and section 21 deals with the electoral roll itself There is no difficulty in deciding who is entitled to vote That is made quite clear by the provisions of section 21, sub-section (2) A person whose name is on the electoral roll is entitled to vote whether he is qualified or not A person whose name is not on the electoral roll is not entitled to vote even though he may be qualified Section 23 does not itself contain the words 'qualified to vote' But it is quite clear from the provisions of section 21, sub-section (1) that the words 'qualified to vote' used therein have the same meaning as the corresponding words at the beginning of section 23, sub-section (2) Thus, a person who is qualified to vote is entitled to have his name entered in the electoral roll and that, in our opinion, is the meaning of the words 'qualified to vote' We, therefore, agree with S K Ghose J that there is a distinction between 'qualified to vote' and 'entitled to vote'

Within ten days after the date of declaration of the result—Amendment of the petition—The wording is clear Use of the word "after" clearly shows that the date of declaration of the result is to be excluded from the period of ten days prescribed If the petition is made within the next

ten days, it is sufficient compliance If once the petition is made within ten days, it can be amended after that period and the amendment will take effect from the date of presentation of the petition A petition was filed against a successful candidate alleging various instances of personation of voters for which the opposite party was stated to be legally responsible The petition was filed within the time allowed, but before the petition was heard, the petitioner being in a position to give further cases of personation applied to amend the petition Held, that it was competent to the court to allow the petition to be amended by the addition of fresh instances of personation **Nawabkhan v Muhammad Zamin, I.L.R. 34 All 649**

An application for an amendment of the petition filed after the expiry of the days allowed for an objection petition may in the discretion of the judge be allowed **D A Kandasami v G F.F Foulkes, A I R 1926 Mad 396**

An application to amend must always be made promptly and except for special reasons, an attempt to introduce new charges at a late stage ought not to be allowed even though the person applying for the amendment was not previously aware of the necessary facts Mere ignorance of facts cannot be said to be a special reason for allowing an amendment Every application for leave to amend must be considered in the light of the particular facts and circumstances in which the particular amendment is sought The objections on the ground of non-qualification and disqualification are separate and distinct though both of them relate to a dispute as to the qualification of a candidate declared elected to councillorship In the case of an objection petition under s 15(1) disputing the election on the ground of his non-qualification by reason of Sch I, Ch 3, R 2(2)(b) an amendment that the candidate was disqualified by reason of s 12 amounts to the introduction of a new charge into the case (neither the bona fides of the petitioner seeking the amendment nor the absence of prejudice of the candidate held sufficient reason for allowing the amendment) Where the matter upon which court is adjudicating under s 15(1) is the qualification or non-qualification of a candidate declared elected to be a councillor, the court ought not to take notice of anything (such as ground of conviction under s 12) which would disqualify him, even though it is brought to its notice during the course of the adjudication **Narayana v. Dugal, A I R 1942 Rangoon 17.**

Form of the Election Petition—whether it should be verified —The section says nothing about the form of the application It also does not say whether it is to be verified or not However, when the application is to be made to the District Court, it follows that ordinary rules of subscription and verification of pleadings apply Accordingly the application must either be verified or supported by an affidavit as is required in the case of an application under the Civil Procedure Code In **Surajnaram v Jang Bahadur, A I R 1924 All 132,** Mears C J and Piggot J have expressed an opinion that the petition need not be verified The Act was silent on the point In that case the petition was required to be presented to the commissioner and not to the District Court We think that this makes a difference In our opinion when a petition is required to be presented to the District Court, it means that it shall be presented in accordance with the practice and procedure of that court

Presentation of the election petition —The petition can be presented to the clerk of the Court of the District Court See **Jagmohan v Venkatesh, 35, B.L R 89**

Where there is a practice for the petition to be presented to the Collector to be handed over to a Joint Magistrate who makes them over to the Collector on his arrival, presentation of petition to the Joint Magistrate is valid presentation to the Collector if made in time But where there is no such practice established and the petition reaches the Collector out of time the petitioner must suffer under the provisions **Surajnarayan v Jang Bahadur A I.R 1924 All 132**

Parties to the Petition —*The Act is silent as to who should be made* parties to an election petition, but it is clear from the wording 'if the validity, of any election of a councillor is brought in question' that at least a candidate who is elected and whose election is sought to be set aside must be made a party to the petition Section 33(1) of the City of Bombay Municipal Act, 1888, requires that if the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates who though not declared by the commissioner under s 32 to have been elected, have secured according to the result published a greater number of votes than the said candidate Also in **Sharafali Mamooji 12 B.L.R 737**, which was a case under the City of Bombay Municipal Act, 1888, it was held, that an application under s 33(1) should name the person whose election is objected to The principles of this case will apply to a case under s 15 of the B M B Act, 1925 In a petition under s 15 of the B M B Act, in the absence of any provision in the Act itself the ordinary principles of practice, procedure and justice will govern the case and accordingly all persons against whom any relief is claimed or whose presence is necessary for a final and complete adjudication of the matters in dispute should be joined as parties to the petition It is not in every case that the Returning Officer or the Municipality is required to be made a party They are necessary parties if something is alleged against them In a case under sub-section (3)(a) it will suffice to make the candidate whose election is challenged on the ground of corrupt practice a party-defendant to the petition because this sub-section contemplates the setting aside of the election of the candidate guilty of corrupt practice and holding a fresh election to fill the vacancy Thus under this sub-section there is no question of filling the vacancy by the candidate next on the list and hence other candidates and the Returning Officer are not necessary parties In a case under sub-section (3)(b) the position is quite different Here the words 'after a scrutiny and computation of the votes recorded in favour of each candidate' show that votes recorded for all candidates who contested the election are to be scrutinised and hence if anything is to be alleged in respect of any vote the candidate for whom the same is cast should be made a party to the petition Hence an unsuccessful candidate lower down in the list in order to get himself declared elected must in addition to the candidate or candidates whose election he challenges make all the candidates either successful or unsuccessful parties to his petition and *make specific allegations* about votes recorded in their favour Similarly, under sub-section (5) if all the elected candidates affected by the defect mentioned in that sub-section are not made parties those who are left out will get the benefit as their election cannot be set aside In this case also a bye-election is to be held to fill the vacancy or vacancies As regard the parties entitled to make an election petition it may be noted that in cases falling under sub-sections 3(a) and (5) any person qualified to vote in the ward electing the councillor or councillors whose election is challenged can

file the election petition, in cases falling under sub-section 3(b) the person filing the election petition must be an unsuccessful candidate qualified to be elected at the election

Where no right to relief is alleged to exist against a person he is not a proper party and an order making him liable for costs cannot be supported **M Lakshumanayya v. S. Rajam, A.I.R 1930 Mad. 195.**

Whether a judge holding inquiry under s 15 is a Court within the meaning of s 195 of the Criminal Procedure Code —In re. Nanchand Shivchand, 15 B.L.R 45, it was held that a District Judge determining the validity of elections under s 22 of the District Municipal Act (Bombay Act III of 1901), is a 'court' within the meaning of s 195 of the Criminal Procedure Code, 1898 A prosecution for attempting to fabricate false evidence (ss 193, 511 Indian Penal Code) before the District Judge when so acting cannot lie in absence of sanction under s 195 of the Criminal Procedure Code, 1898 In the course of the judgment Batchelor J referring to **Balaji v. Merwanji, 21 Bom 279,** observed "The learned Government Pleader for the opponents has called our attention to the case of **Balaji Sakharam Gurav v. Merwanji Nowroji Antia** where it was held that a District Judge acting under a section, corresponding with that now before us, is not a 'court' within the meaning of s 622 of the old code of Civil Procedure This, however, as it seems to us, does not carry the matter very far, for the only point which then engaged the attention of the Bench was whether the District Judge when acting under the Municipal Statute was a Civil Court amenable to the revisionary jurisdiction of this court The fact that the question had to be answered in the negative seems to us to throw but little light upon the different question whether the District Judge in such circumstances is or is not a court for the purposes of s 195 of the Criminal Procedure Code Upon this point we think that guidance is afforded to us by the decision in **Raghoobuns Sahoy v Kekil Singh (I.L.R 17 Cal 872)** where the learned judges say that the word 'court' in the Criminal Procedure Code certainly has a wider meaning than the words 'court of justice' as defined in the Penal Code 'Having regard,' they say, 'to the obvious purpose for which s 195 was enacted, we think that the widest possible meaning should be given to the word court as occurring in that section' We agree with this interpretation of the section, for it appears to us that the reason of the thing is in favour of that view In other words, we think that the same reasons which necessitates the precautions imposed on a prosecution in respect of offences committed in regard to an ordinary civil or criminal court equally require that those precautions be observed where the alleged offences have occurred in connection with proceedings held by the District Judge acting under the Municipal Act It may be observed also that the word 'court' as defined in s 3 of the Evidence Act is wide enough to include a District Judge acting as described In that capacity the District Judge is by statute empowered to receive evidence on oath, to hold inquiry into the matters in controversy, to summon and enforce the attendance of witnesses and finally to decide the matters in dispute, making such award of costs as to him may seem right It is true that in sub-section 2 of s 22 the District Judge is described as empowered to act as if he were a Civil Court, and it may be suggested that these words negative the theory that he is in law a civil court That, however, does not negative the view that he may be a court, and that he should be a court, whether civil or other, is all that is required under s 195 of the Criminal Procedure Code Following the Calcutta decision

which we have cited we think that he should be so regarded" This authority (15 B.L.R 45) obviously would govern a case under the Boroughs Act also Thus if any of the offences mentioned in s 195 of the Criminal Procedure Code is committed during the course of an inquiry under s 15 it is only the Judge holding the inquiry who can lodge a complaint of the offence A private party is prohibited under s 195 to lodge any such complaint However, a contrary view has been taken in **U Aung Myin U v District and Sessions Judge, Henzada, A I.R. 1940, Rang 148,** wherein it is held that District Judge acting not as a court but as a persona designata under the Act is not entitled to proceed under s 476, Criminal Procedure Code, and is not entitled to lay a complaint in pursuance of an order passed in the proceeding purporting to have been taken under that section In the course of the judgment Mackney J said "Some days after the inquiry (election petition inquiry) was concluded (17th March 1939), that is on 29th April 1939, U Ba-chum made an application to the District Judge requesting that a complaint should be made before a Magistrate under s 193 Indian Penal Code against U Aung Myin U for perjury in respect of this statement The learned District Judge, after holding an inquiry, concluded that this was a case in which complaint should be laid and he has laid complaint accordingly In the course of this order the learned District Judge has correctly realized that in holding the inquiry in question he acted as a persona designata and not as a court and that consequently s 195 and s 476, Criminal Procedure Code, would not apply Nevertheless, it is clear that it was as District Judge that he has decided that a complaint should be laid and that he has laid a complaint It is quite clear that the District Judge in this matter not acting as a court is not entitled to proceed under s 476, Criminal P C, and was not entitled to lay a complaint in pursuance of an order passed in the proceedings purporting to have taken under that section"

Sub-section (2) —This sub-section does not lay down any procedure to be followed in the inquiry That is presumably left to the Judge holding the inquiry However, the judge holding the inquiry is empowered to summon and enforce the attendance of witnesses and compel them to give evidence as if he were a civil court i e, to say in the manner prescribed in the civil procedure code, 1908 The inquiry is to be held by a judge not below the grade of an Assistant Judge, and appointed to hold the inquiry by the Provincial Government for the case or for such cases generally

After such inquiry as he deemed necessary —These words show that the scope and procedure of the inquiry are left entirely to the discretion of the Judge holding the inquiry

Costs of inquiry —The provisions with regard to costs of the inquiry are contained in Sub-section (2) Therein, the Judge holding the inquiry is empowered to pass such orders as he thinks fit with regard to the costs of the inquiry No separate suit is required to be brought for recovering the costs thus awarded, but the sub-section provides that they shall be recoverable under the civil procedure code in the same manner as costs awarded in a suit i e to say, by an application for execution under order 21 of the civil procedure code, 1908

Where no right to relief is alleged to exist against a person, he is not a proper party and an order making him liable for costs cannot be supported **M. Lakshmanayya v S. Rajam, A.I R 1930 Mad 195**

The decision or order shall be conclusive.—The decision or order of the

Judge appointed to hold the inquiry under Sec 15(2) cannot be challenged for all purposes The order of costs passed by the judge under s 15(2) is also final and conclusive and cannot be challenged in anyway **Balaji Sakaharam v Merwanji Nowroji, I L R 21 Bom 279. In Jagmohan v. Venkatesh, 35 B L.R 89,** it was held that a judge acting under s 15 of the Bombay City Municipalities Act, 1925, is not a court but a persona designata and the High Court has therefore no jurisdiction to revise his order under s 115 of the civil procedure code, 1908 The same view was adopted in **Balaji Sakharam Gurav v Merwanji Nowroji Antia, 21 Bom. 279,** a case under Bombay District Municipal Act Amendment Act (II of 1884), in **Gangadhar v. Hubli Municipality, 28 B.L.R. 519,** and **Harchandrai v. Municipality of Tando Adam, A.I.R. 1938 Sind 153,** which are cases under s 22 of the B.D.M Act, 1901, in **Hemandas v Bhai Nichaldas, A I.R 1934 Sind 110,** a case under s 19 B L.B. Act, 1923, in **Mirza Adam Khan v. Tikamdas Wadhumal, A.I R. 1939 Sind 165,** a case under Ss 16 and 17 of the Karachi City Municipal Act 1933, and in **R. S Navalkar v Mrs. Sarojini Naidu, 25 B L R 463,** which was a case under s 33 of the City of Bombay Municipal Act 1888 In re **Sharafaly Mamooji, 12 B L R 737,** it was held that if the Judge refuses to exercise duties clearly imposed upon him by statute and by such refusal the franchise of such person is injured, the High Court under s 45 of the specific Relief Act of 1877, may direct the judge to perform the duties But these powers are given only to the High Courts of Bombay, Madras and Calcutta and are exercisable only within the Local limits of their ordinary original civil Jurisdiction See s 45 specific Relief Act, 1877 No such powers are available in the mofussil The result is that whatever the order of a Judge under Sec 15 of the Boroughs' Act, there is no remedy against it

Revision when lies against decision of Assistant Judge—Assistant Judge has no inherent jurisdiction to question election—High Court would not interfere if effect is to restore order contrary to law'—A question whether the applicant was a duly qualified voter is clearly within the competence of the Judge as a persona designata to decide His decision is, therefore not that of a court, and s 115, Civil P C can have no application If, however the Judge, as a persona designata, exceeds the powers conferred on him by the section or acts outside it, he ceases to act as persona designata, and becomes a court subordinate to the High Court under s 115, Civil P C In the case of a disputed election where the local body itself is a creature of statute and the rights of voters and candidates and members are conferred by the provisions of the statute or rules made thereunder, canons of justice and equity cannot operate If a right is not conferred by the provisions of the statute or statutory rules that right does not exist Such rights are not conferred by canons of equity and justice It is therefore wrong to hold that a candidate to an election, not a duly qualified voter under the provision of s 19(1) (B L B Act 1923) had an inherent right to question the validity of an election in which he is closely interested The powers conferred under s 115 are discretionary and the High Court would not interfere to set aside an order of the Assistant Judge in order to restore an order of the Collector which is clearly contrary to the provisions of the statute **Pir Baksh Khan Muhammad Baksh Khan v Darya Khan Samdad Mastoi, A.I.R 1943 Sind 233.**

Sub-section (2A)'—This sub-section is new It is designed with a view to avoid conflict of decisions The word constitutency is defined in the explanation only for the purpose of this sub-section i e to say, for purposes of this sub-

section a constituency means each ward or a public body or association constituted or entitled to elect councillors

Sub-clause (a) deals with applications challenging the election of councillors elected by the same constituency It is laid down that these should be heard and decided by the same Judge If this were not so, it is obvious that confusion might arise on account of conflict of orders and decisions under section 15

Sub-clause (b) deals with applications to challenge the election of the same councillor from the same constituency If these applications were not heard together there is a possibility of a conflict of decisions arising To avoid this, this sub-clause is necessary

Sub-section (2B) —This provision is new and has been introduced with a view to prevent collusive compounding of election petitions in any way Thus if once a petition is filed it must be decided on merits The sub-section also indirectly shows that a bonafide amendment of an election petition is permissible See notes under the head 'within ten days after the date of declaration of the result—Amendment of the petition' under this section

Sub-section (3) —Clause (3)(a) of this sub-section provides that if a candidate is guilty of corrupt practice he is to be disqualified under this subsection and if he is elected his election is required to be set aside He is also prevented from contesting the by-election necessary to fill in the vacancy

If he has been elected —These words show that this clause not only applies to an elected candidate but also to a candidate who has failed in the election The necessity of providing for this is that under sub-section (1) the petition can no doubt be given only when the election of some one or more elected candidates is to be challenged, but for the purpose of getting another candidate much lower down in the list declared elected under 3 (b) to a seat not covered by s 3 (a) it may be necessary to show that other candidate or candidates preceding such candidate in the list are guilty of corrupt practice though not elected In such a case the intervening candidates who were not elected but are disqualified under this clause cannot be taken into account in the scrutiny and computation of the votes under clause (b) In a case like this it is necessary that such intervening candidates though not elected must be made parties to the petition and specific allegations must be made against them in the same manner as against the elected candidate It should be noted that this subsection does not contemplate the setting aside of the whole election but only of that particular candidate, who is guilty of corrupt practice Also this subsection contemplates a fresh election to fill in the vacancy so caused and hence it would not be open to the District Judge to declare any other candidate elected while setting aside the election of a candidate on the ground of corrupt practice As regards the remaining seats the District Judge after a scrutiny and computation of the votes recorded in favour of each candidate may declare the candidate or candidates found to have the greatest number of valid votes to have been duly elected to seats not covered by sub-section 3 (a)

Shall set aside the election —Under clause 3 (a) if the elected councillor is found guilty of corrupt practice his election is to be set aside and a fresh election is required to be held to fill in the vacancy The procedure of scrutiny and computation laid down in clause (b) will not apply to such a case This is made clear at the commencement of clause (b) by the use of words showing that clause (b) does not apply to a case covered by clause (a) In the fresh

election all the candidates whether successful or unsuccessful who are disqualified under clause (a) cannot stand as candidates

Clause 3 (b) —This clause deals with the cases of candidates who are not disqualified under 3 (a) Between these candidates the only question is of scrutiny and computation If any of the elected candidates who is party to the petition is disqualified under 3 (a) there must be a fresh election to fill in his place The computation and scrutiny of votes must take place only with respect to seats not declared vacant under sub-section 3 (a), leaving the seats declared vacant under 3 (a) to be filled by a fresh election

Miscount alleged by petitioner —Where a miscount is alleged by the petitioner and his application is supported by a verified petition, and the court is satisfied that there is reasonable ground for the petitioner's belief that there has been a miscount, the court has jurisdiction to grant a recount **M. Lakshumanayya v S. Rajam, A.I R 1930 Mad 195**

If in any case to which clause (a) does not apply.—This means a case in which election is not set aside under sub-section 3 (a)

Scrutiny —This means scrutinising the ballot papers with a view to find out whether a particular vote is valid or invalid

Computation:—This means counting The proviso states that votes which are given or obtained as a result of corrupt practice are to be excluded from computation Sub-section (4) defines corrupt practice

Sub-section (4) —This sub-section deals with corrupt practice by a person and corrupt practice by a candidate Clauses (i) (ii) (iii) and (iv) of sub-section (4) prescribe the circumstances in which a person will be deemed to have committed a corrupt practice A candidate will be deemed to have committed a corrupt practice if it has been committed (1) with his knowledge and consent or (2) by a person who is acting under general or special authority of such candidate with reference to the election

Gratification —This term is not defined in the Act but explanation (1) to this sub-section lays down that for the purposes of this section 'gratification' is not restricted to pecuniary gratification or gratifications estimable in money and includes all forms of entertainment and all forms of employment or reward Thus the term gratification is intended to cover a very wide range of inducements calculated to affect the voting

A promise of individual profit —Explanation 2 lays down that this term does not include a promise to vote for or against any particular measure but subject thereto includes a promise for the benefit of the person himself or any person in whom he is interested Thus it will appear that this term is used not in a narrow sense but only with a view to exclude a promise to vote for any particular measure It follows from this that a promise to vote for a particular measure with a view to benefit the person himself or any person in whom he is interested is a promise for the benefit of the nature mentioned in clause (ii) of explanation (2) and is within the mischief contemplated by the section

In **Rahim Basrio v Wali Mahomed Lutifali, A.I.R 1919, Sind 51,** it was held that the payment of carriage hire for voters is not a valuable consideration within the meaning of s 22 (4) Bombay District Municipal Act unless the free conveyances are supplied in exchange for a promise to vote for the candidate who supplies them This ruling would not now apply to a case under the

Boroughs Act in view of the amended provisions of the B M.B Act, 1925, s 15 (4) (iii) which makes payment for conveyance of a voter a corrupt practice

Sub-section (5) —This sub-section lays down that the Judge shall set aside the election only in the following two cases viz (1) if there is an error or irregularity or informality in carrying out the rules caused by corruption, and (2) if there is breach of, or omission to carry out, or, non-compliance with the provisions of this Act or the rules and this breach or omission or non-compliance has materially affected the result All other errors, irregularities and informalities in carrying out the provisions of the Act or the rules afford no ground for setting aside the election

In **Dayaram v Keshawji, A I R 1933 Sind 416,** the election of the opponent was challenged on the ground that he was disqualified from standing as a candidate at the election It was held that where, although there is an error in accepting the nomination of a candidate to a municipal election, it is not shown that the error arose because the returning officer did not follow the rules, nor is the election questioned merely because of the error of the Returning Officer or because of irregularity or informality, s 22(5) (B D M Act) does not apply

Result of election has been materially affected —This means that the breach, or omission or the non-compliance must substantially alter the result of the election, i e to say a substantial change in the list of successful candidates

Under the Madras Rules no breach of the rules whether mandatory or directory shall invalidate an election unless the result of the election has been materially affected by such breach What is a 'material irregularity' is a matter in itself undefinable and must be decided on the facts of each case So far as it may be negatively defined it is not a mere mistake of fact or law unless that mistake has occasioned a wrong assumption or refusal of jurisdiction, since a court which has jurisdiction to decide a case on a point of fact or law has jurisdiction to give a wrong as well as a right decision on either point **Ahmed Thambi v V S Basaria, A I R 1923 Mad 254**

A breach of election rules will not in itself justify an election court holding that the election is invalid and must be set aside It has to be further proved that the breach of the rules materially affected the result of the election Where R 32 was violated Held that the breach of the rule did not ipso facto invalidate the election The result of the election must be affected in some other way than by the mere breach of the rule, that is, the breach must in itself have resulted in and produced some other result which had in itself the effect of invalidating a candidature or a nomination or an election, as for example the breach must have resulted in the candidature or the nomination of some one incompetent to stand or some one who could not be validly nominated **A Palanivapa Chettiar v K N Krishnaswami Chettiar A I R 1925 Mad 877**

A court would not be justified in setting aside an election on the ground that time allowed by rule 10 to apply to magistrate was not made available in consequence of publication of the revised register before the time allowed under rule 10 had elapsed after the applications were rejected where it has not been shown that the omission to comply with the rule affected the result of the election or that any of the applications was wrongly rejected The rights which the successful candidates acquire in the elections cannot be interfered with unless at least it is reasonably clear that the irregularity contributed directly

or indirectly to the acquisition of those rights or that it has really operated to the prejudice of the rate-payers who intended to take part in the elections **Bhuban v Chairman, Dacca Municipality, A I.R. 1927, Cal. 704.**

The provision with regard to the president and not the vice-president being an authority for the purpose of presenting nomination papers and scrutinizing them cannot be regarded as mandatory and any infringement of the provision can only be an irregularity which would be available for setting aside the election only if and when it should be made out that such irregularity affected the result of the election **Chellaswami v Korusal, A I R 1927 Mad 935.**

The words 'result of the election' in R 10 (c) mean the return of the candidate and not the amount of his majority So that if the number of ballot papers rejected by reason of non-compliance with the rules did not suffice to turn the scale against the elected, the result of the election could not be held to have been materially affected **Y Mahabaleshwarappa v. S Ramachandra Row, A I R 1936 Mad 669** It was also held in this case, that, where as a result of the non-compliance by the 'Polling Officer with R 16 and consequent invalidation of ballot papers under R 20 the election commissioner declares election void and orders fresh election on the ground that the circumstance of the invalidation of the ballot papers disenfranchised a number of voters, refusing to consider in what numbers the invalid ballot papers had been distributed in favour of the rival candidates, particularly when both on the invalid ballot papers and valid ballot papers the elected candidate has majority and result of election is not materially affected under R 10 (c), the error is of such a nature as to justify grant of certiorari

When the electoral officer commits mistakes or omissions in not preparing electoral roll from the lists and registers maintained by the municipal office the Municipal Board cannot be blamed for such omission or mistakes Even if there be such mistakes they would be merely in the nature of an irregularity and not an illegality so as to vitiate the election itself Such mistakes or irregularities can be taken into account by the tribunal only if they have materially affected the result of the election and they can then be inquired into by the tribunal whose decision is final *The civil court cannot therefore declare an* election wholly void merely because such mistake or irregularity has occurred **Nawal Kishore Agarwala v Municipal Board, Gorakhpur, A I.R 1937 All. 365.**

Sub-section (6) —This sub-section empowers the Judge to disqualify a person who has committed a corrupt practice The disqualification may extend to seven years and may be in respect of any Municipal Borough or District The Provincial Government is empowered to relieve the person from such disqualification The Judge is required to hear the person before any order is passed against him The word used in this sub-section is 'person' and not 'a candidate' This means that the Judge can make an order of disqualification under this sub-section against any person whether he is a candidate or not The disqualification mentioned in this section is a disqualification from standing as a candidate and not for the purposes of voting

Injunction to restrain election—Whether should be granted —Where the rejection of the nomination paper was on the ground that it did not give the number of the ward for which the candidate desired to stand, and in the other case on the ground that the thumb mark of the seconder of the candidate had not been attested Held, that the rejection of the nomination papers was not

in law justified If a man entitled to vote or to be a candidate at an election is wrongfully deprived of that right, an action for damages lies against the person so depriving him But if the act by which the right is interfered with is an act done in a judicial capacity, no action lies unless the act is done maliciously which in this context means dishonestly The general right of being nominated to stand as a candidate for municipal election is a legal character This legal character is itself the creation of a specific statute, the District Municipalities Act V of 1920, and it is settled law that where a statute itself sets up a proper tribunal for trying cases of the infringement of the right to such a legal character and that tribunal has functioned judicially the civil court will have no jurisdiction The Local Government is the final arbiter for deciding what the rules mean and the civil court cannot ordinarily be asked to decide whether the Local Government's interpretation of its own rules is right or wrong But where the proper tribunal has declined jurisdiction and the aggrieved party is thus bereft of his statutory and constitutional remedy, it is the province of the civil Court as a court of equity to fill the vacuum created and to exercise the jurisdiction which the proper tribunal has failed to exercise It cannot be admitted that the order of the chairman in the matter of the interpretation of the rules is absolutely final The correct principle is that when a duly constituted tribunal has refused to try the question of the right of a party to the legal character of one entitled to be nominated to stand as a candidate for an election and there is no other remedy available, the ordinary Civil Court has jurisdiction to entertain a suit for that relief and the right to grant a proper temporary injunction retaining the matter in status quo ante until the suit is tried Where the election has taken place the remedy of the candidate is to file an election petition to Sub-Judge or District Judge but not a civil suit nor can he restrain the elected candidate from doing his duties as a commissioner **Sarvothama Rao v. The Chairman, Municipal Council, Saidapet, A I R 1923 Mad. 475** This case was not followed in **A I R 1933 All 358, A I R 1933 Mad 103 and A.I R 1935 All 106**

It is impossible to lay down an exhaustive rule but generally speaking injunctions should be confined to preserving the status quo ante, to preventing irremediable damage or loss to the property in the suit or to averting substantial injury No such conditions arise where the court is moved not to reinstate the unseated councillor but to unseat the councillor declared elected in his stead and thus create a vacancy in the municipal council pending a civil litigation in respect of that matter, in such a case there is no ground for interference **E M Gopalakrishna v A Vilanga, A I R 1926 Mad 132.**

Though a candidate for election to a Local Board like anyone else has a right to pursue his legal remedies, whatever they may be, save in exceptional circumstances, it is an abuse for a candidate who for some reason is shut out, to make his pursuit of his remedies in the civil courts a weapon for dislocating the electoral machinery and stopping an election In the absence of any special reason an order for injunction for that purpose should not be granted **T Balaji Rao Naidu In re A I R 1933 Madras 103** In this case the case of **Sarvothama Rao v The Chairman, Municipal Council, Saidapet, A I R 1923 Madras 475** was distinguished and not followed

Where the effect of granting a temporary injunction, will be to deprive finally and for ever the defendants of the right which they claim (which in this case was to hold the election without delay) and would be tantamount to

granting the plaintiff the relief sought in his suit and might deprive the defendants of a right to which they are really entitled, the temporary injunction shall not be granted for it would be grave injustice to the defendants for which they could not be adequately compensated afterwards Moreover, a court cannot be asked to give the relief which forms the cause of action in the suit under colour of a temporary injunction Where the plaintiff claims to be an elected member of a corporation, but does not obtain leave to bring a representative suit he must prove that he himself has a right enforceable by law requiring the corporation not to proceed with an election Such a right must be personal to the applicant And before he can succeed in obtaining the temporary injunction he must satisfy the court that the comparative mischief or inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it Waste of money is not an irreparable injury **Rochiram A. Amesur v. Municipal Corporation, Karachi, A.I.R 1934 Sind 136.** In the course of the judgment it was observed "The plaintiff asks for an order requiring a specific act to be forborne by a corporation A provision is made for such orders by the Specific Relief Act of 1877, s 45 But the legislature has thought fit to reserve the privilege of suing for an order under s 45 to the inhabitants of certain specially favoured localities Relief under this section can be had by the citizens of Bombay, Madras, Calcutta, Rangoon, but a citizen of Karachi, is to this extent, an outlaw He may suffer under the same grievance, but he may not seek the same redress This defect in the powers of this court was revealed in a previous suit brought against the same municipality by the **Daily Gazette Press, Ltd., A.I.R. 1930 Sind 287.** It was then said to be unfortunate that the High Court of this Province should not be in the same position to afford relief under the provisions of s 45 as other High Courts elsewhere In Karachi as things now stand, a corporation may refuse to do an act which is clearly incumbent on it in its corporate character Some person may thereby suffer injury in his property, franchise or personal right He may apply to this High Court, and this Court may be convinced that the act is consonant to right and justice and that the applicant has no other specific and adequate legal remedy, but that the remedy given by an order under s 45 would be complete Nevertheless an order under that section cannot by this court be made This section appears to be conclusive of the present suit It is clear that a suit as the present falls under s 45 That section has been frequently applied to similar suits For instance in **A.I R 1925 Bom 355 (27 B.L.R. 368),** it has been applied to a suit to obtain a declaration that the preparation and publication of the lists of voters for a District Local Board was illegal and ultra vires and that no valid election could take place under those lists This is exactly the case of the present applicant His words are 'that on 19th May 1934, defendant 2 published the preliminary Electoral Roll, that this act is unauthorised, illegal and ultra vires and that if elections are held on this roll the said elections will be entirely invalid The High Court of Bombay held that the only section which can possibly apply is s 45 But s 45 can only apply when the applicant has no other specific legal remedy This decision seems therefore to imply that there is no remedy under s 54 In **I.L.R. 19 Cal. 195,** the High Court of Calcutta similarly held that the petitioner had no remedy other than under s 45, Specific Relief Act"

Where a belated application for injunction is filed for injunction against the Returning Officer on the eve of the date fixed for the election and such

application could have been filed long before, injunction should not be granted which would put a stop to the carrying out of the election **Muhammed Ekram Khan v Mirza Muhammad Bakar, A.I R. 1935 All. 106.** In this case also **Sarvothama Rao v. Chairman, Municipal Council, Saidapet, A I R 1923 Mad 475,** was dissented from

Under R 35 (2) the 'election proceedings' continue right till the results are declared and it is competent for the Government to stay them at any time before that The jurisdiction of the Election Commissioner to enquire commences only when the results are declared Thus where the polling at only one booth is stopped by the polling officer under R 24-B (1) and the Government on inquiry conclude that there has been systematic interruption of the polling at all the polling booths and fix a date for the fresh poll, the order of the Government is not ultra vires The Election Commissioner cannot interfere unless the order of the Government is ultra vires of the election rules or mala fide Nor has the Election Court any jurisdiction to consider whether the order of a fresh election was justified or not justified on the facts **C. V. C T. V Venkatachalam Chettiar v. V Vr N Ar Nagappa Chettiar, A.I R. 1938 Mad 189.**

Refusal to accept nomination paper by the receiving officer—Suit for declaration and injunction against the Municipality —A receiving officer appointed by the Collector under the Election rules, refused to accept the nomination paper of the plaintiff, a candidate at a by-election for a councillorship of the Surat City Municipality and the list of candidate that was published omitted plaintiff's name from it The plaintiff thereupon sued the Municipality for a declaration that he was entitled to come forward as a candidate and for an injunction to prevent the Municipality from carrying on the by-election without accepting plaintiff as a candidate Held (1) that the suit for declaration failed since the Municipality neither denied nor was interested to deny the character or right which the plaintiff sought to establish It was the receiving officer that was concerned with the question and over him the Municipality had no control (2) That the claim for injunction too could not be sustained since the Municipality had done no wrong and was threatening to do no wrong It only proposed to proceed in accordance with the Act and the Rules so far as they related to it **Surat Municipality v Chunilal, 8 B.L.R. 209.**

Refusal to accept nomina'ion paper by the receiving officer—suit for damages —To support an action for damages against a person appointed to receive the nomination papers of candidates for councillorship on a Municipality, for refusing to receive a nomination paper it is necessary to allege and prove malice **Chunilal v. Kripashankar, 8 B L R 838** In the course of the judgment Jenkins C J observed "The case appears to us to be one to which the language of Lord Chief Justice **Abbot in Uplen v Morris** is peculiarly applicable It may be said here, as it was said there, that "The officer to a certain degree is a ministerial one but he is not so to all intends and purposes, neither he is wholly a judicial officer His duties are neither entirely ministerial nor wholly judicial They are of a mixed nature It cannot be contended that he is to exercise no judgment, no discretion whatsoever the greatest confusion would prevail if such a discretion were not to be exercised On the other hand, the officer could not discharge his duty without great peril and apprehension if in consequence of a mistake he became liable for an action It has been argued that Lord Holt, who with great honour to himself once filled this seat, intimated his opinion that the mere refusal of the vote of a person entitled to vote would give the party a right to sue the returning officer. Whether he ever

did say so or not, we do not certainly know for the reports of that case are very imperfect No one entertains as greater veneration for that learned judge than I do, but if he did so express himself I am bound to deliver my opinion that he was mistaken' In our opinion it would be unreasonable to hold that an officer who had to perform the functions allotted to the defendant was liable to a suit because he made a mistake in good faith in determining questions that arose for his decision We do not say that the defendant did make a mistake For, in view of the view we take the question does not arise for our decision, but assuming that he made a mistake, still we think that in the absence of malice no suit can lie against him"

Suit to restrain the Collector from holding elections—and for declaration that the preparation and publication of the list of voters is illegal and ultra vires.—A suit to obtain a declaration that the preparation and publication of the lists of voters for a District Local Board was illegal and ultra vires and that no valid election could take place under the lists, and for an injunction restraining the Collector from holding election of members of the District Local Board, falls within the purview of s 45 of the Specific Relief Act, 1877 **Kanaiyalal v Secretary of State, 27 B.L.R 368** In this case The District Judge said "Now the only effective relief which the plaintiff has prayed for is the injunction restraining the Collector from himself or through his Subordinates holding Elections of members of the District Local Board What the Plaintiff seeks is in substance a writ of mandamus or a writ in the nature of quo Warranto It is a high prerogative writ of a very extensive remedial nature If this court has power to grant the writ then undoubtedly it would be proper to make this rule absolute by granting the plaintiff a temporary injunction in the terms prayed for The writ such as is claimed by the plaintiff is principally used for public purposes and to compel the performance of public duties This is not a suit under any specific provisions of any specific Act, nor is it a suit for the declaration of the Plaintiff's right to vote and stand as a candidate for election which would be a suit of a civil nature **(I.L.R. 24 Cal 107)**, nor is it a suit to establish any legal character to which the plaintiff is entitled under the provision of section 42 of the Specific Relief Act The present suit is in my opinion a suit of the nature contemplated by the provisions of section 45 of the Specific Relief Act" Referring to this Macleod C.J observed "This is a perfectly correct exposition of the substance of the plaintiff's claim and the Judge was clearly right in holding the suit was of the nature contemplated by s 45 of the Specific Relief Act The plaintiff's pleader however in arguing that the decision was wrong seeks to lead the court away from the real issues in the case by asking us to consider not the relief claimed by the plaintiff but the statement in his plaint with regard to his own personal right to be put on the list of voters, although no relief is claimed in respect of such right We are not concerned in this case with the question in this case whether the Plaintiff is entitled to vote, whether his name has been placed on the wrong list of voters, or whether his name has been omitted from the list in which he says his name ought to be He sues as a member of the public for a declaration that the Collector in the performance of his duties with regard to District Local Board election has not performed his duties in the proper way, has done that which he ought not to have done, or has left undone that which he ought to have done, and that in consequence of such illegal action the defendant should be restrained from holding the elections Section 42 of the Specific Relief Act, therefore, has no application whatever to this case The

only section which can possibly apply is s 45 There can be no doubt that the District Judge has no Jurisdiction to make any order which would be in the nature of a mandamus in a suit under s 45 of the Specific Relief Act That Jurisdiction has been given only to the High Courts mentioned in the section, and it can only be exercised within the local limits of their ordinary original civil jurisdiction"

Nomination Paper—candidate affixing rubber stamp valid—signature cannot be affixed after due date:—Where a nomination paper is not signed by the candidate, but the candidate himself impresses his name by a rubber stamp in the declaration clause and in the column of 'full name of the candidate,' the nomination paper is valid as having been properly signed Where a nomination paper is not validly signed by the candidate, he cannot be allowed to affix his signature after the due date of its filing **Ratanji Damji v Ratansi Virji, 41 B.L.R 524**

Nomination paper cannot be signed by proxy —Object and scope of the rules require that the signature on the nomination paper should be put in by the party concerned and not by the proxy **A Doraswami v Joseph, A I.R. 1926 Mad 319**

A voter cannot nominate more candidates than there are vacancies—He can subscribe more than one nomination paper of the same candidate.—Where the rules enact that no voter shall be at liberty to nominate more candidates than there are vacancies, what is sought to be prevented is that no voter shall nominate a larger number of candidates than there are vacancies and not that a voter shall be forbidden from subscribing more than one nomination paper in favour of the same candidate There was but one vacancy and the voter put forward but one candidate **Thubati v Taluk Board Narsaraspet. A I.R 1929 Madras 607**

Forged nomination paper—Offence under s 471 Indian Penal Code—Chairman rejecting it and the District Magistrate hearing an appeal against rejection are not courts within the meaning of s 195 (1) Criminal Procedure Code—Complaint by Chairman or District Magistrate not necessary —Section 33, Bengal Municipal Act, does not contemplate the offence of filing a forged nomination paper by the accused Section 33 has nothing to do with the submission of the forged nomination paper before the election commences The section deals with an act committed in the course of electoral operations and not with an act committed before the electoral operations commence The act of submitting a forged nomination paper does not therefore constitute an offence punishable under the Bengal Municipal Act, but it constitutes an offence punishable under the Penal Code s 471 The trial must therefore be held according to provisions of Criminal Procedure Code and nothing contained in s 34 Bengal Municipal Act can apply to such a trial The Chairman rejecting the forged nomination paper and the District Magistrate acting under the Bengal Municipal Act in an appeal against the order of rejection are not courts within the meaning of s 195 (1), Criminal Procedure Code and thus no complaint by such chairman or the District Magistrate is necessary for prosecuting the accused under s 471, Penal Code **Bibhuti Bhusen Banerjee v Dwarikanath Bhattacharjee, A.I R 1943 Cal. 574**

Submission of nomination paper —Provision in s 13 (Assam Municipal Act 1 of 1923) regarding submission of nomination paper to the chairman is

mandatory and the candidate must send his nomination paper to the chairman If he sends it to anybody else, even to the magistrate appointed to hear objections under r 14, he does not comply with the rule, nor does the fact that the Magistrate sends back the nomination paper to the chairman would satisfy the requirements **Gopesh Chandra Aditya v Benode Lal Das, A.I.R. 1936 Cal. 424.**

The provisions of R 15 (1) are imperative and not merely directory and the infringement of it affects the validity of election **Rathis Chandra Munshi v. Amulya Charan Ghatak, A.I.R. 1931 Cal. 36.** In this case rule 15 (1) provided that a candidate for election shall send his name to the chairman in writing not less than 28 clear days before the date fixed for the election It was held that a nomination not submitted 28 clear days before the date fixed for the election was not a valid nomination

Electoral Roll—Grouping of Voters—Interference with franchise or personal right—Injunction.—The applicant who was enrolled as a voter in the Municipal electoral roll for the city of Bombay, refrained from exercising his right as a voter in the Municipal election of councillors held in Bombay on February 7, 1939 Before the result of the election was announced by the Municipal Commissioner under section 34 of the city of Bombay Municipal Act, 1888, he filed an application in the High Court submitting that the ward lists for the City of Bombay upon which the Municipal electoral roll of December 1938, was founded were not prepared in accordance with the mandatory provisions of s 10 sub-ss (3) and (4) of the City of Bombay Municipal Act, that there was, therefore, no proper electoral roll in operation at the date of the general election, that a properly prepared roll being the basis of an election, there was no basis for the election held and that the applicant could not exercise his right to vote, and that the elections held under that roll were in law a nullity He applied for an order under section 45 of the Specific Relief Act 1877, requiring the Municipal Commissioner to forbear from doing the following specific acts (a) to cause lists prescribed under cl (k) of s 28 of the city of Bombay Municipal Act to be prepared for each ward and made available for sale or inspection in the Municipal Commissioner's office, (b) to declare the result of the general election of councillors under the provisions of s 32 of the Act, and (c) to fix the requisite notice in respect of the result of the general election of councillors under the provisions of s 32 Held, (1) That the wording of s 19, Sub-Ss (3) and (4) of the City of Bombay Municipal Act, was mandatory, but there was nothing in Sub-ss (3) and (4) which prevented the grouping of voters according to communities, for the ward lists would still be in alphabetical order, though, literally speaking the names of the voters appearing in the alphabetical order were grouped according to the communities to which they belonged, (2) That an electorate remained joint even though its component members were grouped according to the communities to which they respectively belonged, (3) That even if the ward lists were not literally prepared in accordance with the provisions of s 19 sub-ss (3) and (4) they were substantially so prepared, and it had not been alleged that any injustice had resulted to any one on the account, and the applicant had failed to satisfy the court that the ward lists and the electoral roll had injured his franchise or personal right, (4) That the applicant was not prevented from voting at the general election, or signing the nomination paper of a candidate as proposer or seconder, if he had chosen to do so, even though his name was placed among Hindus, and was not placed strictly according to the

alphabetical order among the voters, irrespective of their communities, (5) That there was no act or omission which could be said to have interfered with the applicant's franchise, and therefore his franchise had not been injured within the meaning of the proviso (1) to s 45 of the Specific Relief Act, (6) That the applicant had no special interest of his own as a voter beyond what he had in common with other voters, and there was, therefore no injury to his personal right, (7) That under s 33, sub-s (5), of the City of Bombay Municipal Act, every election not called in question in accordance with sub-ss (1) to (3) was a good and valid election, and it was incumbent upon the Municipal Commissioner to Act under ss 28 (k) and 32 of the Act, (8) That the doing of the Acts specified by the applicant did not constitute any infringement of his franchise or personal right, (9) That it was the doing of the Acts specified by the applicant and not the forbearance to do them that was enjoined upon the Municipal Commissioner, and the Municipal Commissioner, could not be restrained from doing that which until the election was set aside, was clearly incumbent upon him to do them under the Act, (10) That section 33 of the City of Bombay Municipal Act did not take away the applicant's right to go to the High Court, under s 45 of the Specific Relief Act, even before the declaration of the result of an election was completed, but the remedy under s 33 was the more complete remedy, and the applicant could not say that he has no other remedy whatsoever, though at the moment the application was filed he had technically no right under section 33 of the Act, (11) That the electoral roll could have been challenged under the Act before the general election, but the applicant waited till after the election was over and the declaration of the result was about to be completed and the order prayed for would not be, owing to this among other circumstances consistent to right and justice, and (12) That, as the applicant had not complied with the provisions of s 45 of the Specific Relief Act, his application was liable to be dismissed In the exercise of its extraordinary jurisdiction the Court generally had regard amongst other things to considerations of the importance of the case, or the principles involved, or the delay on the part of the applicant in making the application, or to considerations involving protection of the rights of other persons **Shankarlal v The Municipal Commissioner of Bombay, 41 B.L.R. 911.**

Conclusive:—See notes under the head 'Final' under s 10

Aggrieved person—aggrieved party'—An aggrieved person under s 318 does not mean only an aggrieved party, but includes any person who is really affected by the order which may have been passed behind his back **Lalman v. Ch. Bishambhar Nath, A I.R. 1932 All. 159.** The same view was taken in **Sheo Ram v. Sone Lal, A.I.R 1929 All. 910.**

Want of fresh electoral roll does not render election invalid:—Where objection was taken to an election, held in the year 1929, of a member of a union, which was dissolved by Government Notification under s 45, on the ground that the electoral roll on the basis of which the election was conducted was a roll prepared for the year 1923-24 and no other later roll was prepared, and that the old roll contained names of persons who were dead and of persons who were unfit to be voters and did not contain the names of persons who were fit to be voters, Held that under s 51 (4) an electoral roll published in any year remains in force till the publication of a fresh electoral roll and that

the want of a fresh electoral roll does not render an election invalid **T. S. Venkataramana v. Kuppuswami, A.I.R. 1930 Mad. 954.**

Marking ballot paper with blue pencils does not invalidate election if it does not indicate the persons using them:—In an election two members by previous arrangement with a candidate used blue pencils to assure him that they had voted for him and election was sought to be cancelled on the ground that the secrecy of the ballot was violated Held that unless it could be proved that the use of blue pencils indicated the persons who used them, the election would not be rendered invalid **V E. Rajabahadur v. A M Viswanatha, A.I.R. 1930 Mad. 97.**

Declaration of result of the poll—Ministerial or administrative act.—The act of presiding member in declaring the result of the poll is a purely ministerial or administrative act and a writ of certiorari cannot be granted in respect of such an act **Vankata Narsinha v Municipal Council, Narasaraopet, A.I.R 1931 Mad. 122**

Indian Penal Code s 499, exception 8—defamation—A petition to the president however malicious that a certain person was not qualified for election as a member of a Local Board on account of his suffering from leprosy comes very near to exception 8 to s 499 **C Doraisami v. Kanniappa Chettiar, A.I.R. 1931 Mad. 487.**

Polling Officer:—Where a Tahsildar acting as polling officer in connection with a municipal election committed an offence under s 58 Madras District Municipalities Act and was prosecuted therefor without previous sanction of the Local Government Held, that the person appointed to be a polling officer though he was a public servant, was for the time-being not acting or purporting to act in the discharge of his official duty as such and therefore s 197 Criminal Procedure Code can have no application **S S Jagannadhaswamy v. T Manikyam, A I.R 1928 Mad 161**

Returning Officer—A Deputy Magistrate who has been appointed as the Returning Officer by the District Magistrate for the purposes of election work of the municipality at the time, cannot be said to be a public officer who is acting in that connection in his official capacity as such public officer within the meaning of s 80 (Civil Procedure Code, 1888) **Muhammad v. Mirza, A.I.R 1935 All 106** In the course of judgment their lordships observed "The learned counsel for the appellants has also urged before us that s 80 Civil P C applied to this case and without previous notice the suit was not maintainable S 80 cannot possibly apply to any of the defendants other than Mr Shimbhu Nath who was a Deputy Magistrate, but Mr Shimbhu Nath who had been appointed as the Returning Officer by the District Magistrate for the purposes of this election and who was doing the election work of this municipality at the time cannot be said to be a public officer who was acting in that connection in his official capacity as such public officer A public officer for the purpose of s 80 is defined in s 2 (17) and none of the categories mentioned therein would include such a Returning Officer We, therefore, think that s 80 is inapplicable"

Returning Officer's decision about eligibility of a candidate, a judicial decision—The function of the Returning Officer in deciding a question as to the eligibility of a candidate for election is in the nature of a judicial function and his decision in the nature of a judicial decision **Manindra Chandra Nandi v. Provas Chandra Mitter, A.I.R. 1924 Cal. 761.**

Fabrication of Electoral Roll is an offence punishable under s. 193 and 465 Indian Penal Code — Procuring by dishonest and fraudulent means an entry in an electoral roll, of the names of persons who were not legally eligible to vote, and wilfully and improperly omitting from the electoral roll the names of persons entitled to vote and fraudulently and dishonestly altering the electoral roll, after its final publication by inserting certain names therein without lawful authority are offences punishable under ss 193 and 465 (Indian Penal Code) **Nur Ahmed v Jogesh Chandra Sen, A.I R 1934 Cal. 838**

If one member is not duly qualified, the whole election does not become invalid —The mere fact that one of the members has been found not to be duly qualified does not invalidate the whole election **Dr Kasiruddin v. Dr. Mafizuddin, A I R. 1936 Cal 295.**

Election cannot be set aside merely by consent.—There is no provision under s 15 to declare an election of a councillor void merely by his consent In order to set aside an election one of the grounds mentioned in s 15 must be established If the District Judge sets aside an election without finding that one of the grounds mentioned in s 15 was established he acts without jurisdiction **P. S P. Piran Malai v S. P N M Muhammed Ibrahim, A I R 1936 Madras 105.**

Any election —The words 'any election' which appear almost at the beginning of s 15 (1) cover both the case of a whole election being invalid and also the case of the election of one of two or more candidates being invalid, in a constituency returning two or more candidates Where the election of a candidate is found to be invalid on ground of corruption and his election is severable from that of other candidates who were declared elected from the constituency the election of the candidate guilty of corruption alone should be set aside The holding of by-elections for single councillorship in a two councillor constituency is perfectly valid **Wilcox v Patel, A I R 1942 Rangoon 30.**

Right to canvass is not a part of the franchise of the voter—Right to nominate a candidate is —A right to canvass for or against a candidate cannot be regarded as a special right of a voter and much less a part of the franchise of a voter If indeed it be a right, it is a right which a voter enjoys with thousands of others who are non-voters and it is impossible to recognise or give effect to any such right in law The right to nominate a candidate is undoubtedly part of the franchise and a denial of that right does constitute a denial of the franchise **T Ekambara v. Commissioner of the Madras Corporation A.I R. 1927 Madras 22**

Personation —Personation by a voter when proved only results in the striking off of the particular vote so recorded It does not necessarily prevent that particular candidate being returned **Narayana v. Dugal, A I R 1942 Rangoon 17**

Right of a candidate to see a voter with a view to judge identity—Parda women:—Rule 23 certainly contemplated that a candidate should have an opportunity of seeing the various voters so that he may have an opportunity of judging whether the offence of personation is being committed or not If no offence is committed he has to rest content But if one is committed the procedure in R 23 has got to be observed And to carry out this purpose the women voters will even have to be compelled to unveil themselves **A K Bijli Sahib v M. K Mahomed Asan, A.I.R. 1934 Madras 27** This case went in appeal and

the judgment of the appeal court is reported in **A.I.R. 1934 Madras 259** The view of the lower court was confirmed and the appeal was dismissed

Right to enter voting partition.—A candidate for election as municipal commissioner is not entitled to be present in that part of the polling station where votes are actually recorded Rights of candidates or electors which are rights expressly given by statute do not carry with them any rights under natural law not given by satutory law Where the plaintiff asks for a declaration of his right to be present at a particular place and further for injunction restraining the defendants from prohibiting him (plaintiff) to be so present, the suit is not barred **Howrah Municipality v. Haripuda Roy Chowdhury, A.I.R. 1924 Cal 1070**

Voting Paper:—The name of the candidate for whom the vote was cast being struck out on the voting paper does not invalidate the vote The appearance of a tracing of some letters under the cross-mark made on the voting paper against the name of one of the candidates does not invalidate the vote unless the marks are such that the voter may be identified from them Where the cross-mark is bisected by the line between the names of the candidates, no clear intention of the vote having been cast in favour of one candidate or the other can be gathered, and that vote should be excluded from votes counted The presence of writing other than the cross-mark would invalidate the vote only if it should be found that the writing is a mark by which the voter may be afterwards identified It must be either a mark which on the face of it shows or may show the person who has voted or with regard to which there is evidence on the record which shows that the mark was put in there by some pre-arrangement or conspiracy by reason whereof by looking at the mark one will be in a position to say that it is the vote of such and such a person In other cases also if the intention that the voter should be identified could be gathered from the mere appearance of the writing the vote will be rejected **T C. Xavier v. E. C Joseph, A.I.R. 1925 Madras 614**

Where the voting papers of two votes besides the cross-mark against the name of the candidate showed lines scoring out the names of the other candidates and the Returning Officer did not take these votes into consideration in the candidate's favour apparently because of those lines but the election court held them to be valid, in spite of these lines Held that the election court had jurisdiction to go behind the decision of the Returning officer in matters of this kind All that the polling officer has to see when the voter presents himself to him is whether the name of the voter is on the roll He need not wait to the end of the day in respect of every vote to see if any one else of the same name appears and claims that he is the voter on the roll **K K. S Manmuddi Konar v. P. Shamsuddin Sahib Bahadur, A.I R 1925 Madras 1207**

Inspection of Ballot Papers —The power of ordering inspection of the ballot papers should be exercised by the election court with the greatest circumspection If it is necessary to find ballot papers, the search must be conducted by the Judge himself or by the subordinates in whose impartiality he has complete confidence The parties themselves should never have access to the general contents of the ballot box This irregularity does not however necessarily vitiate the inquiry **Pulakam v Nooney, A I.R 1928 Madras 1129**

Corrupt Practice.—In A. K Bijli Sahib v M. K. Mahomed Asan, A.I.R. 1934 Madras 27, it was averred that one of the candidates seated in an easy chair

was remarking as the voters were proceeding that gosha women need not vote and that the better thing for them would be to remain at home and that his own wife remained at home Held that there was neither a threat to any candidate or any voter with an injury of any kind or an attempt to induce a belief in the voter that he would be rendered the object of Divine displeasure

Under R 10 (b) of Election Rules under Madras Local Boards Act two circumstances are contemplated With regard to the procuring or inducing, it is the election of the returned candidate that is in contemplation, with regard to the material effect, it is the result of the election that is contemplated The rule contemplates a difference between the election and the result of the election And it would be seen that the word 'election' is very much wider than the words 'the result of the election,' and contemplates something more like the conduct of the election as differentiated from the purely isolated fact of the result Where a candidate who was elected as a member of the District Board had supplied petrol to two private cars which were used for the purposes of his election and had hired a bus for the purposes of conveying voters to the poll, the Election Commissioner declared the election void Held that the election was procured or induced by corrupt practices mentioned in R 10 (b) (ii) and (iii), Held further that the proviso to R 10 did not apply as it would be used only when the corrupt practice committed by somebody other than the candidate himself Where a person is elected by corrupt practices, his election is liable to be set aside ,and the fact that such practices have been used by the rival candidates also does not help him because such practices on both sides do not have the effect of cancelling out each other **V. Ramanna v Inspector of Local Boards, Madras, A.I.R. 1937 Madras 557.**

The word 'corruption' in s 15 (1) means the doing of an act, with a motive or intention by means of it to produce an effect upon the election, not going so far as bribery, but with a motive thereby to influence the election, provided that the act done is contrary to the intention of the Act and amounts to conduct which it was evidently the intention of the legislature to discountenance, P a barrister and a candidate for the municipal elections even after being debarred on ground of misconduct involving moral turpitude continued to put up name-boards outside his office describing him as a barrister-at-law for a number of years and allowed the name-boards misrepresenting him as a barrister to continue even at the time of municipal elections A staff reporter of a newspaper interviewed P previous to the election for material for publication of a sketch of his career since he had offered himself as a candidate for the elections The article was published in the newspaper with a photograph of P and described him to be a barrister when in fact he was not P was not shown to have taken any steps to correct or contradict the description of himself as a barrister Held that P committed a fraud upon the electorate by misrepresenting himself as being a member of the bar and his conduct with reference to the putting of name-boards and the newspaper article amounted to corruption within the meaning of section 15 (1) Held further that in order to establish that the corruption on the part of P did not invalidate his election it was necessary to show that his return could not have been affected by the continued existence of the name-plates and by the publication of the newspaper article It was not sufficient merely to prove that the return had not been in fact affected In the circumstances of the case the corruption on the part of P invalidated his election **Wilcox v Patel, A.I.R. 1942 Rangoon 30**

Publication of names of elected councillors not a bar to election petition — The publication in the Calcutta Gazette of the name of a person as an elected commissioner does not prevent proceedings for setting aside his election being taken or continued before the District Judge **Phani Bhusen Sen v Sanat Kumar Maitra, A I R. 1935 Cal 773**

Forfeiture of deposit —The condition of the forfeiture of deposit under R 34 framed under the Act is the failure to secure the minimum number of votes out of the votes actually polled from amongst voters whose names appear in the electoral roll The condition is not that there should be a failure to secure a minimum number of votes out of all the persons eligible as voters A candidate therefore who forfeits his deposit on his failure to obtain the minimum number of votes out of the votes actually polled cannot be attribute his failure to the initial mistake by the Returning Officer in not compiling the electoral roll from the municipal lists and registers Much less the Municipal Board can be taxed with liability for such omission Nawal **Kishore v Municipal Board, Gorakhpur, A I R 1937 All 365**

Section 15 does contemplate that a candidate who has forfeited his deposit, may, in certain circumstances be deemed to have been elected **Narayan v Dugal, A I R 1942 Rangoon 17**

A ballot paper which is rejected under R 45 is a spoiled ballot paper A, a candidate for municipal election got less than the minimum fraction of votes recorded which is prescribed by R 34 But the election was subsequently quashed as being void ab initio on the ground that the ballot papers had no official marks as required by R 45, all of them being thus invalid A filed a suit for refund of the deposit Held that A did not forfeit his deposit All the ballot papers being invalid there was no valid vote cast at all, and it could not be said that A received less than the requisite minimum fraction of the total number of votes validly polled That a forfeiture could however take place if the election was set aside on a ground personal to the elected candidate and a fresh election was ordered **Sahu Kalyan Das v Municipal Board, Chandausi, A.I.R 1932 Allahabad 158**

Whether petition should be made separately against each candidate.— *It is true that there is no express provision enabling an unsuccessful candidate* or a voter to challenge the election of two candidates in one petition but where an unsuccessful candidate standing for election for one of the two seats of a ward files a petition for setting aside both the elections on the ground that there had been impersonation and that the persons impersonted were the same in both the cases the Election Commissioner can treat the petition as a petition in each case and can require the petitioner to make further provision with regard to costs **Seeni Madar Sahib v Abdur Rahman Sahib, A.I R 1939 Madras 792.**

Election —'Election' within the meaning of s 59 (2) (b) means complete elections which have resulted in the creation of a councillor and does not cover disputes arising before such election **G A G K Laxmanan v J S Kannappar A.I.R 1927 Mad. 93**

The term 'election' embraces the whole procedure whereby an elected member is returned whether or not it be found necessary to take a poll **A. V Srinivasalu Reddy v. S. Kuppuswami Goundar, A.I.R 1928 Mad. 253.**

The rules framed for the conduct of elections of municipal councillors

assume that nomination of candidates is included in the election The word 'election' includes both 'nomination' and the 'poll' **J. Selvaranga Raju v. T. Doraiswami, A.I.R 1929 Madras 727**

Disputes relating to the qualification of voters is a dispute relating to elections under the Act **Mahedar Rahman v Kanti Chandra, A.I.R 1935 Cal. 10.**

Uncontested election —Where the number of candidates being less than the number of vacancies a candidate has been deemed to be duly elected under R 7 (1) a District or Subordinate Judge is not competent to decide a dispute under the rules framed by the Government for the decision of disputes regarding the validity of an election under the Madras District Municipalities Act The scope of R 1 must be limited to cases where a poll has been held. **N. Srinivasachariar v B S Venkatachirana Aiyar, A.I.R 1925 Mad. 376**

Failure to elect—Setting aside of an election —See notes under this head under s 9

Voter disqualified for corrupt practice

16 Any person who has been convicted of an offence under section 171-E or 171-F of the Indian Penal Code, or has been disqualified from exercising any electoral right for a period of not less than five years on account of malpractices in connection with an election, shall be disqualified for five years from the date of such conviction or disqualification from voting at any municipal election in any municipal borough or district or at any election to a local board constituted under the Bombay Local Boards Act, 1923

XLV of 1860

Bom VI of 1923

General —This section deals with persons who are convicted under s 171 (E) or 171 (F) of the I P C or who have been disqualified from exercising any electoral right for a period of five years or more on account of malpractices in connection with an election S 171 (E) I P C deals with bribery and s 171 (F) I.P C deals with undue influence or personation at an election Under this section such persons are disqualified from voting at any municipal election or a local board election for a period of five years But if their names are enrolled in the Municipal election roll they will be entitled to vote under s 13 (2) In spite of their names appearing in the Municipal election roll they will not be entitled to stand as Candidates as they are not qualified to vote under s 11 The words occurring at the commencement of s 11 'Save as provided in s 16' may be noted

Publication of names of councillors in the Official Gazette.

17 The names of all councillors, finally elected to any municipality and the names of nominated councillors, if any, appointed thereto shall be published, as soon as conveniently may be, in the Official Gazette

Amendments —The words Official Gazette' were substituted for the words Bombay Government Gazette' by the Adaptation of Indian Laws Order in Council

Finally elected —This means elected after the result of the election Petitions if any

Publication in the Gazette —There is nothing in the Act or in the Rules to show that a person is not to be deemed to be duly elected until the publica-

tion of his name in the Gazette It is therefore wrong to say that because the names of the elected candidates had not been published in the Gazette, their election should be deemed not to have been held at all **Sashi Sekhar Bose v Province of Bengal, A.I.R 1943 Cal. 65.**

(4) Appointment of presidents and vice-presidents

Election of president and vice-president. Continuance of president or vice-president holding office at the commencement of this Act

18 (1) A municipality shall be presided over by a president who shall be elected by the councillors from among their number. There shall be a vice-president similarly elected for each municipality No salaried servant of the Crown shall be eligible for election as president or vice-president of a municipality and the election of any such person shall be void

(2) A president or vice-president holding office in a municipal district, included or hereafter included in Schedule I, at the time of such inclusion shall be deemed to have been elected under this section and shall continue to hold the office of president or vice-president as the case may be until a fresh election has been held under the provisions of this Act.

Amendments.—The words 'servant of the Crown' were substituted for the words 'servant of Government' by the Adaptation of Indian Laws Order in Council

Sub-section (1).—This provides that a salaried servant of the crown cannot be a President or vice-president The President and Vice-president must be elected from amongst the councillors

Sub-section (2):—This is a saving clause and provides for the continuance in office of a President or Vice-president holding office in a Municipal district at the date of inclusion in Schedule I until a fresh election is held under the Boroughs Act

Salaried servant of the Crown.—See notes under s 3 (18)

Term of office of president and vice-president

19. (1) Save as otherwise provided in this Act a president or vice-president shall hold his office for such term, not less than one year and not exceeding three years, as the municipality shall, previous to the election of the president or vice-president determine, or until the expiry within the said term of his term of office as councillor, but shall be eligible for re-election

Provided that the term of office of such president or vice-president shall be deemed to extend to and expire with the date on which his successor is elected

President and vice-president to continue to carry on certain duties until their successors take over charge

(2) On the expiry of the term of office of a municipality the president and vice-president shall continue to carry on the current administrative duties of their office until such time as a new president and vice-president shall have been elected and shall have taken over charge of their duties

Amendments —The word 'On' was substituted for the word 'Out' by Bombay 19 of 1935, s 2 (1) (a) The provisos to sub-section (2), and sub-section (3) were deleted by Bombay 8 of 1939, s 3 (b) (i) and (ii)

Sub-section (1) —This provides that a President or a vice-president cannot be elected for a period of less than one year or more than three years The period for which a president or vice-president is elected is required to be fixed by the Municipality before the election of such president or vice-president If before the expiry of the term of office as President or vice-president the term of office as councillor expires, the term of office as President or Vice-President will also expire Under this sub-section the President or Vice-president is eligible for re-election as President or Vice-president provided he is a councillor

Proviso to sub-section (1) — Under this proviso the president or vice-president does not cease to function as such on the expiry of his term of office fixed by the Municipality before his election, but continues to act as such until *his successor is elected This proviso does not deal with the case when the* term of office of the Municipality expires For that sub-section (2) is provided This proviso deals with cases arising before the expiry of the term of office of the Municipality The difference in phraseology between this proviso and sub-section (2) may be noted The proviso extends the term of office of the President or a Vice-President and in that case he is obviously entitled to carry on all the functions of a President or a Vice-President The sub-section (2) empowers the President or Vice-president only to carry on the current administrative duties of their offices This suggests that they are not entitled to act as President or Vice-president in all respects However, what this exactly *means requires to be made more clear*

Sub-section (2) —As stated above this sub-section comes into operation after the expiry of term of office of a Municipality, i e, to say, three years from the date on which the first General meeting with quorum of the new board is *held or in the case of an extension after the period of extension is over* Under this sub-section although a President or a Vice-president may carry on the current administrative duties, their terms of office as President or Vice-president are not extended and therefore it appears they are not entitled to perform any duties other than current administrative duties

Board not legally constituted—temporary injunction should be granted — Where it is clear that if the new Board is not legally constituted its acts will be ultra vires and that if it be restrained from functioning, the duties of the Board cannot be carried on at all The Chairman and the Vice-Chairman of the old Board should continue to perform their routine duties until the new Board begins to function, and in such a case the balance of convenience is on the side of a person who has brought a suit for a declaration that the election to Board is illegal and for an injunction to prevent the Board functioning Temporary injunction should, therefore, be granted **Mahamed v District Local *Board and others*, A I R 1929 Sind 224**

Interpretation of Ss 19 (2) and 25 (2) (b) of the B M B Act, 1925—Powers of the president of a retiring Municipality—Although the extended period of four years prescribed under sub-section (1) of s 25 may have expired under Cl (b) of section 25 (2), which has to be read with sub-section (1), the term of office of outgoing councillors is to be deemed to extend to and expire with the day before the date of the first general meeting of the new municipality

During this period they can continue to act as councillors and they can meet for the transaction of municipal business The provision in s. 19 (2) that on the expiry of the term of office of a municipality the President and the Vice-president shall continue to carry out the current administrative duties of their offices until such time as a new President and Vice-president shall have been elected and shall take over charge of their duties, does not affect the operation of s 25 (2) (b) **(G.C G.D. No s. 120 dated the 1st April 1935)**

Election of president and vice-president.

19A. (1) When a new municipality is constituted after a general election the Collector shall call a meeting for the election of a president and vice-president The meeting shall be called within twenty-five days from the date on which the names of the councillors of the new municipality are published in the Official Gazette under section 17, but shall not be held on a date prior to the date on which the term of office of the retiring councillors prescribed or extended, as the case may be, under sub-section (1) of section 25 expires, or on which the municipality is re-established under sub-section (3) of section 219 after dissolution or under sub-section (5) of section 219 after supersession, as the case may be.

(2) The meeting called under sub-section (1) shall, until the municipality elects its own chairman for that meeting, be presided over by one of the persons appointed by the Collector in the manner hereinafter provided

(3) For the purposes of sub-section (2) the Collector shall select three persons who shall be councillors of the new municipality after obtaining their consent in writing to the selection, and shall arrange their names in a list in order of preference The retiring president, if any, and the retiring vice-president, if any, shall, if they consent, be among the persons selected and shall, if both consent, be placed respectively first and second in the list If either the retiring president or the retiring vice-president alone consents, he shall be placed first in the list The person whose name is placed first in the list shall preside at the meeting called under sub-section (1), but if such person is absent or is unable or fails for any reason to preside, the person whose name is placed second in the list shall preside If the persons whose names are placed first and second in the list are both absent or are unable or fail for any reason to preside, the person whose name is placed third shall preside If none of the three persons named in the list is present or able or willing to preside, the meeting shall not be held and the Collector shall, as soon as may be, call a fresh meeting, and shall select three other

persons in the manner prescribed above, one of whom shall preside thereat in the order specified above

(4) If in the election of a chairman for the meeting called under sub-section (1) there is an equality of votes, the result of the election shall be decided by lot to be drawn in the presence of the person presiding in such manner as he may determine As soon as a chairman is elected, he shall take the chair, and the meeting shall proceed to elect the new president The new president shall take the chair as soon as he is elected and the meeting shall then proceed to elect the new vice-president

Amendments —This section is new and was inserted by Bombay 8 of 1939 Sec 3 (c)

General —*This section provides for calling a meeting of the new board and* for election of a new President and Vice-president

Meeting, Notice, Quorum, Adjournment etc·—Section 35 deals with ordinary general meetings and special general meetings called by a President or Vice-president and the question arises whether the provisions of sec 35 will apply to a meeting called by the collector under this section If section 35 does not apply, then, in the absence of any provision for a quorum it follows that the meeting must transact business as prescribed under this section whether there is or there is not a quorum in the meeting But this conclusion appears to be inconsistent with provisions of sec 25 (2) which provides that the term of office of the new councillors shall be deemed to commence on the date of the 1st general meeting at which a quorum is present Thus if in the meeting called by the Collector there is no quorum and a President is elected, the election will have been made by councillors whose term of office has not yet commenced under sec 25 (2) Hence if there is no quorum, the election of president or vice-president cannot take place and the meeting must be adjourned by the presiding authority under sec 35 (7) S 35(7) provides that no quorum shall be necessary in a meeting adjourned for want of quorum But in view of provisions of s 25 (2), the election of a president or vice-president cannot be made without quorum as pointed out above, and hence the meeting must again be adjourned by the presiding authority and the same procedure must be followed until there is a quorum

Section 35 lays down that the provisions contained therein will apply to the meetings of the Municipality, i e to say, all meetings of the Municipality irrespective of the fact whether they are called by the President or the Collector It is clear that having regard to section 9 the Municipality comes into existence as soon as it has its members elected and members nominated even though at the time the Municipality may have no president, see **Samalbhai v. Jesangbhai, 38 B L.R (1334).** Hence it would appear that the provisions of section 35 will equally apply to meetings called by the Collector under section 19A or section 23 This view is further supported by the fact that the Act does not provide any separate rules with respect to the meetings called under section 19A or section 23 However section 35 does not say anything about the meetings called under section 19A or section 23 and in fact sub-sections (1) and (2) of s 35 deal only with ordinary and special general meetings called by the

President It would therefore have been much better, if it was made clear whether the provisions of section 35 are to apply to meetings called under section 19A or section 23 and if so to what extent As a matter of fact in **Pandurang v. Ramchandra, 32 B.L.R. 1252**, it was argued that the provisions of section 35 of the Bombay Local Boards Act 1923 (equivalent to section 35 of this Act) did not apply to meetings called under section 27 and section 26 of that Act (equivalent to section 19A and section 23 of this Act) It was held that the provisions of section 35 did apply to the meetings called under section 27 or section 26 Broomfield, J at Page 1272 of the report observes —'Section 35, therefore, provides for two kinds of meetings, quarterly and special A meeting summoned under section 27 is obviously not a quarterly meeting Equally obviously it may be described as a special meeting, but Mr Thakor argues that it is not a special meeting within the meaning of section 35 It is not a meeting which the president may summon 'whenever he thinks fit' The president, that is the president of the retiring board, is bound to summon this meeting under section 27, and if he does not do so within a certain time the Collector is to exercise his powers Section 27 itself lays down who is to preside at the meeting, and the provisions of section 35 (2) (e) are not applicable Therefore, the argument is, meetings summoned under section 27 and also meetings summoned under section 26 for the filling up of casual vacancies in the office of president and vice-president, are in a category by themselves and not governed by the provisions of section 35 It is admitted, of course, that such meetings cannot be held without notice, but it is contended that in the absence of special provision any reasonable notice will suffice The Act appears to be lacking in precision and completeness in this respect, and as it stands it is a little difficult to say what the intention of the legislature was Some of the language of section 35 is certainly not appropriate to a meeting summoned under section 27 or section 26 But because section 35 (2) (a) enables the president to call a special meeting whenever he thinks fit, and requires him to do so in case of a written request, it does not necessarily follow that meetings summoned under section 27 or section 26 are not special meetings also, within the meaning of section 35 Those provisions of section 35 which are inappropriate to such meetings would not apply to them, on the principle **generalia specialibus non derogant** But provisions which are appropriate, for instance the provision about notice may reasonably be held to apply It is to be noted that section 35 is the first section of a general chapter dealing with the conduct of business of the local boards Clause (4) of the section, which provides that acts of the board etc, are not to be invalidated by mere informalities, appears to be obviously applicable in respect of all meetings, including those summoned under section 27 or section 26 Moreover, if it had been the intention of the Legislature that meetings summoned under those sections should be subject to special rules as regards notice, one would have expected that, that would have been expressly so provided The other view, that only reasonable notice is required would be certain to lead to disputes and difficulties On the whole I am of opinion that the provisions of section 35 (2) (b) requiring fourteen clear days' notice for special meetings, apply as much to meetings summoned under section 27 or 26 as to any other special meetings"

In another case under the same Act similar arguments were advanced suggesting that provisions of section 35 did not govern the proceedings of a meeting called for election of a president but they were negatived by both the learned judges who heard the appeal In the course of the judgment Rangne-

kar Ag C J observed "It is argued that a meeting for electing a president is a special meeting and differs from other meeting held for transacting business As far as I can see, the Act makes no distinction between a meeting held by the Board for electing a President or any other meeting held to transact any other business Section 35 would equally apply to both Nor do the regulations make any such distinction" **Samalbhai v Jesangbhai, 38 B L.R 1331**

Irregularity in the proceedings of the meeting—Chairman continuing to preside after the election of the President —In Basaya v Murgaya, 28 B L R 1184 it was held that this was merely an irregularity covered by section 38 of the Bombay District Municipal Act 1901, equivalent to section 57 of the Boroughs Act It was also held that the proceedings were not vitiated by the irregularity It is submitted that section 38 was not intended to cover such a case Moreover this was a case under the Bombay District Municipal Act and at that time there was no clear provision requiring the President to take the chair as soon as he was elected There is now such a statutory provision in section 19A of the Boroughs Act, and in view of the mandatory provision requiring the president to take the chair such a procedure would now be held to be illegal vitiating the proceedings altogether See **Trimbak v Vishnu, 38 B L.R. 1314** In that case referring to **Basaya v Murgaya, 28 B L.R 1184.** Broomfield, J remarked "That was a case under section 26 (5) of the B.D M Act There had been no breach of any provision of the statute and nothing was decided which bears upon the present issue" In the same case, referring to **Gopal v Shanmukhappa, 29 B L R 1325,** which was a case under section 27 of the B L.B Act 6 of 1923, Broomfield, J said "The facts in that case were these The retiring President called the meeting and attended it and took the chair He then dissolved the meeting on the ground that one member had not received the notice Seven members accepted his ruling and left The others declined to accept his ruling and elected a new Chairman, after which the meeting proceeded to elect a new president The issues before this Court in the appeal, as stated in Chief Justice Marten's judgment, were whether the meeting was validly convened, whether the retiring President had power to dissolve the meeting, and whether the fact that seven members left after he had pronounced the meeting dissolved affected the subsequent proceedings The point that the election of the Chairman was illegal, because the retiring President was not in the chair when he was elected, was not taken It is always unsafe to presume that a point not argued or considered has been decided by the Court by implication If this point had been taken, the answer would probably have been that the retiring President was in the chair or at any rate the requirements of the section had been substantially complied with Marten C J 's statement of the facts on which this Court decided the appeal is this 'As I read the learned Judge's judgment, the chairman never in fact left his chair, or at any rate left the meeting until some time after a new chairman was elected Consequently, the seven members proceeded to leave this meeting before it had really broken up and before at any rate the chairman had properly left his chair' The retiring President's right under s 27 is to convene the meeting and to be present and preside till the election of a chairman In this case he had convened the meeting, he was present, he had not 'properly left the chair' until after the Chairman was elected Under the circumstances it cannot be suggested in my opinion that this court took the view that it was immaterial whether the retiring President was in the chair or not I do not, therefore,

consider that this case can be regarded as an authority on the question which has to be decided in this appeal"

President elected at meeting irregularly called and functioning as President —The post can be regarded as vacant only after election is declared void:— Where a president who is elected at meeting however irregularly called, and he is functioning as such, he could be removed only as a result of proper proceedings and the President's post can be considered vacant for the purpose of holding another election only when his election has been declared void in accordance with the rules **T. S Shankaranarayana Pillai v A M. Ahmed Miran Sahib, A.I.R 1934 Mad 357.**

Lacuna —This section applies only when a new Municipality is constituted after General election S 23 provides for the election of a President or vice-president in case of a casual vacancy occurring before the expiry of their terms of office But beyond these two cases there is one more case which is not provided for anywhere in the Act Under section 19 the Municipality is empowered to fix the period of office of a President or Vice-president This may be for the term of office of the Municipality or for any lesser period not under one year If the election is for the whole term of office of the councillors, section 19 A will apply after the new elections But if the election is for lesser period there is no procedure for the election of a new President or Vice-president after the expiry of the term of office of the outgoing President and Vice-President Sections 19 A and 23 obviously do not apply Formerly there was a provision for such a contingency in section 23 (2), but that section 23 (2) was deleted and a new one substituted in its place by Bombay 8 of 1939, section 3 (8). The new sub-section does not provide for any such contingency Thus there is a lacuna which must be provided for by making necessary amendment in this section.

Sub-section (1):—Under this sub-section the duty of calling a meeting of a newly constituted Municipality for election of a President and a vice-president is thrown on the Collector The meeting is to be called within 25 days from the date of publication of the names of the Councillors in the Official Gazette This date should not be before the date of expiry of the term of office of the retiring Councillors nor should it be before the date from which the Municipality is re-established under section 219 (3) or 219 (5)

Sub-section (2) —This sub-section provides for presiding over the meeting called by the Collector under sub-section (1) The meeting in the first instance is to be presided over by a person appointed by the Collector in the manner provided in sub-section (3) until the meeting elects its own chairman for that meeting The section does not say anything about a quorum, and as pointed out above section 35 will have application to a meeting called by the Collector It therefore follows that quorum is required for such a meeting This view is also consistent with section 25 (2)

Sub-section (3) —This sub-section prescribes an elaborated procedure for presiding over a Meeting called by the Collector until the meeting elects its own chairman The persons appointed by the Collector must be councillors of the new Municipality, i e, to say, it is not open to the Collector to appoint any person who is not elected or nominated on the new board Thus the precedence given to the President or Vice-president in the sub-section will be of no use unless they are elected or nominated councillors of the new Municipality

Sub-section (4) —This provides that if there is a tie for the election of a

Chairman for the meeting the result shall be decided by lot The lot must be drawn in the presence of the person presiding and in the manner decided upon by him On the election of the Chairman he takes the chair and the meeting must proceed to elect the new President But the section does not say what is to happen if the elected chairman does not take the chair or the meeting does not proceed to elect the new President The chairman for the meeting has to vacate the chair in favour of the new President as soon as the latter is elected The meeting has then to proceed to elect the new Vice-president

Change of place and time of meeting —A mere change of place and time of meeting where an election is to take place does not vitiate the election when no voter is misled or prevented in any way from voting **Dwarkanath v Chandra Mohan, A.I.R 1926 Cal 665**

Resignation of president and vice president

20. A president may resign his office by tendering his resignation in writing to the municipality, and such resignation shall take effect on its acceptance by the municipality Such acceptance shall be published in the Official Gazette A vice-president may resign his office by tendering his resignation in writing to the president

Amendment —The words 'Official Gazette' were substituted for the words 'Bombay Government Gazette' by the adaptation of Indian Laws Order in Council

General.—This section deals with resignations by President and Vice-president The President's resignation is required to be submitted to the Municipality and it does not take effect until it is accepted by the Municipality The acceptance of the resignation is also required to be published in the Official Gazette A Vice-president's resignation is required to be submitted to the President The section is silent as to when it is to take effect, and in the absence of any specific provision requiring acceptance or prescribing the time when it is to take effect it follows that it comes into force immediately it is tendered to the president No resignation of a president as such will be required if a President resigns his seat as a councillor It may be noted a councillor's resignation takes effect immediately it is tendered to the President (see Sec 26) Only the president's resignation of his office of President requires acceptance by the Municipality

Resignation—Removal from office—absence —A President of a Taluk Board is a public servant within the meaning of s 197 Criminal Procedure Code and s 21 Penal Code The provisions of s 197 are mandatory and no sanction of Government obtained at the appellate stage can validate the proceedings To relinquish an office is one thing and to be removed from it is another and quite a different thing Of his own motion a man may discontinue attendance, and abandon his place But in order that he may be removed from his office there must be motion originating from without The verb is in the passive voice and this implies that the subject undergoes the operation of an agent other than himself The only agency by which the president of the municipality can be removed from his office is the Local Government There is vast difference between removal from the office and ceasing to hold an office As a matter of that an officer in the present case, a municipal president may resign his appointment and on such resignation being accepted he ceases to hold the office Where by the rules a member ceases to be a member of the muni-

cipality on failure to attend a certain number of meetings and ipso facto ceases to be the president, the failure to attend the meetings and thus ceasing to be a member and therefore ceasing to be a president stands more or less on the same footing as resigning an office and cannot come within the purview of the expression 'removed from office' in s 197 of the Code The sanction of Local Government under s 197 is necessary before a municipal president can be tried for embezzlement in connection with the disbursement of the municipal money and for falsification of the payment accounts **Hidayatulla and others v. Emperor, A.I.R. 1933 Sind 161.**

Liability of President and vice-president to removal

21. A president or vice-president shall be removable from his office as such president or vice-president by the municipality by a resolution passed to that effect, provided that three-fourths of the whole number of the councillors of the municipality vote in favour of such resolution and provided, further, that before such resolution is passed the president or vice-president is given a reasonable opportunity of showing cause why such resolution should not be passed

General —This section empowers the Municipality to remove a President or vice-president from his office as president or a vice-president by a resolution The resolution must be passed by at least 3/4ths of the total number of councillors of the municipality Before such resolution is passed the President or Vice-president must be given a reasonable opportunity of showing cause against such a resolution The section does not say that the matter should be placed on the agenda of the meeting in which the resolution is passed but the words used in the section require something more than this Thus a President or vice-president against whom a resolution is sought to be passed under this section must be given an opportunity to have his say before the meeting and if he cannot attend in person he must be given an opportunity to show cause in writing Mere placing the matter on the agenda will not suffice The president or the vice-president must be invited to show cause either in person or in writing before a resolution is passed against him

Whole number of councillors —This means total number of councillors determined for a Municipality by the Provincial Government under sec 10 (1) (a), i e, to say, the total number is not to be reduced by any casual vacancies

***Resignation—removal* from office—Absence:**—See notes under the same head under s 20

Requisition for a meeting to remove a president—effect of withdrawal by some of the requisitionists—See notes under the same head under *s* 35

Consequences of absence of president or vice-president without leave

22. (1) Every president who for a period exceeding three months and every vice-president who for a period exceeding one month, shall absent himself from the municipal borough in such manner as to be unable to perform his duties as such president or vice-president, shall cease to be president or vice-president unless leave so to absent himself has been granted by the municipality

Limit to grant of leave and arrangements pending absence of vice-president

(2) Leave under sub-section (1) shall not be granted for a period exceeding six months, and whenever leave is granted to a vice-president under that sub-section, a councillor shall be elected by the councillors from among their number to perform all the duties and exercise all the powers of the vice-president, during the period for which such leave is granted

Sub-section (1):—This sub-section is vague In the first place the meaning of the phrase 'in such manner as to be unable to perform his duties' is not clear Secondly the section does not lay down the authority who is to decide whether a vacancy under this section has arisen or not

This sub-section does not come in the way of a president or vice-president who absents himself in such a way as to be able to perform his duties This section comes into operation only when a president or a vice-president absents himself in such a way that he is unable to perform his duties In such a case the president can absent himself without leave for a period of three months only and a vice-president for a period of one month only For any period exceeding these periods leave of the municipality must be obtained

Vacancy:—The section does not lay down any authority to decide whether a vacancy under this section has arisen or not In absence of any other authority prescribed it follows that it is the municipality who is to decide this question

Sub-section (2) —This sub-section provides that the maximum period of leave in all that can be granted during the whole term of office of a president or a vice-president is of six months This period is in addition to the period of absence without leave prescribed in sub-section (1) Sub-section (2) also provides that whenever leave is granted to a vice-president a councillor must be elected to perform his duties and exercise his powers during the period of his leave There is no such provision made in the case of the absence of the President for the simple reason that a vice-president is already there to perform the duties and exercise the powers of the president

Resignation—Removal from office—absence —See notes under the same head under s 20

Whether leave can be granted to a vice-President who is ex-officio councillor and is transferred temporarily to another district —A councillor who by his absence ceased to execute the functions of an office notified under s 19 (1) (b) (ii) of the B D M Act, 1901 and therefore ipso facto ceased to be a nominated councillor of the municipality, his place being taken by his successor can be granted leave under s 23 (6) so as to tide over the period of absence and to enable him to resume his office on his return Section 23 (3) no doubt requires that a Vice-President should be elected by the councillors from among their number, but it does not enact that a vice-President so elected must cease to be vice-president on his ceasing to be a councillor Sub-section (8) of the section enumerates the cases in which a vacancy in the office of the Vice-President occurs, which has to be filled up by the election of some other councillor These are (a) his death, (b) his resignation, (c) his removal from office under s 23 (7), (d) his becoming incapable of acting in such office i e (i) his absenting himself from the municipal district in such manner as to be unable to perform his duties as vice-President without leave under s 23 (5) and (6) or

(ii) being physically or mentally incapable of performing the duties of his office, (e) his having ceased to be a councillor under sub-section (2) of section 15 Of these heads (a), (b), (c) and (e) obviously do not apply to this case, nor does (d) (ii) The only head of those enumerated which can possibly apply is d (i) but that itself provides for the grant of leave under specified conditions. Hence s 23 (8) does not render the grant of leave illegal The provision in s 23 (7) that 'the term of office of every vice-President shall cease on the expiry of his term of office as Councillor does not mean that his ceasing to be a councillor under s 10 (1) (ii) ipso facto vacated his office as vice-president The expression 'terms of office' as defined in s 17 relates to the period of three years extensible by the commissioner's order to four years, for which nominated or elected councillors can hold office at one time and has no reference to the provisions of s 10 (1) (ii) Accordingly a Vice-President's term of office as councillor did not expire within the meaning of s 23 (7) on his ceasing to be a councillor by virtue of the provisions of s 10 (1) (ii), but would only expire at the same time as that of the other councillors under s 17 **(R L A 's opinion no. 1014 dated the 1st July 1902 in G R.G D No 3922 dated the 16th July 1902).**

Vacancies in office of president and vice-president to be filled up

23. (1) In the event of the non-acceptance of office, death, resignation or removal from office of a president or of a vice-president or of his election being void, or of his becoming incapable of acting in such office or having ceased to be a president or a vice-president under sub-section (1) of section 22 or a councillor under sub-section (1) of section 28, previous to the expiry of his term of office as president or vice-president, the vacancy shall be filled up within twenty-five days from the occurrence of the vacancy by the election of some other councillor thereto

(2) The provisions of section 19-A shall be applicable, so far as may be, to the calling of a meeting and the procedure to be followed at such meeting for the election of a president under sub-section (1)

Amendment —The word 'within twenty-five days from the occurrence of the vacancy' were inserted by Bombay 19 of 1935, Section (3) (1) Sub-section (2) was substituted by Bombay 8 of 1939, section 3 (8)

Sub-section (1)'—The outgoing President or vice-president not eligible for re-election for a casual vacancy —This provides for filling in the casual vacancy occurring in the office of a president or a vice-president The sub-section requires that the vacancy must be filled in within 25 days from the date of its occurrence The vacancy must be filled in from amongst the councillors Under this section the vacancy must be filled in by the election of some other councillor as president or vice-president, i e, to say, that for the purpose of filling in a casual vacancy in the office of a president or vice-president the outgoing president or vice-president is not eligible for re-election This is made clear by the use of the words 'by the election of some other councillor thereto' The same view was taken in **Bankimchandra v. Khagendra Nath Ganguli, A I R 1933 Cal 443**, where the wording was similar

Sub-section (2) —This prescribes the procedure for filling a casual vacancy occurring in the office of a president The sub-section lays down that the pro-

cedure prescribed in Section 19A must be followed as far as applicable This means that for the election of a president under sub-section (1) the Collector has to call a meeting and appoint persons to preside at such a meeting in accordance with section 19A For filling a vacancy occurring in the office of a vice-president, procedure laid down in section 19A is not made applicable under this sub-section That means that the ordinary procedure for calling a meeting of the municipality and transacting business therein is to be followed i e to say that for filling in a vacancy in the office of a vice-president the president will have to call a meeting If he is present at the meeting he will preside and in his absence the meeting will elect its own chairman from amongst the councillors present under section 35 (5)

Lacuna.—The original sub-section (2) provided for election of a new president or vice-president after the expiry of their terms of office fixed under section 19 (1) The present sub-section which was substituted by Bombay 8 of 1939 section 3 (8), does not provide for any such contingency Section 19A also does not apply to such a case Thus the amendment effected by Bombay 9 of 1939 has left a lacuna which requires to be corrected See notes under this head below section 19A

Procedure —The provisions of section 35 apply so far as they are applicable to a meeting to be called under this section See notes under section 19A

23A Collector to call meeting for election of president or vice-president in certain cases Deleted by Bom 8 of 1939, s 3

(5) Term of office of councillors

Term of office of councillors holding office prior to commencement of Act and of councillors then elected

24. (1) Save as otherwise provided in this Act councillors deemed to have been elected or nominated under sub-section (3) of section 9 shall continue to hold office for the term for which they were elected or nominated under the Bombay District Municipal Act, 1901 Councillors elected under the said sub-section shall hold office for the same period as councillors deemed to have been elected as aforesaid Bom III of 1901

Provided that—

(a) the Provincial Government may, by a notification in the Official Gazette and subject to the other provisions of this Act, extend the term of office of any municipality for a period up to a date not later than the thirty-first day of December 1928

(b) any notification issued under proviso (a) after the expiry of the term of office of any municipality constituted under the Bombay District Municipal Act, 1901, and before the thirty-first day of May 1927 shall be deemed to have been issued and to have had effect as from the date of expiry of the term of office of such municipality, and any appointment, notification, notice, tax, order, scheme, licence permission, rule, by-law or form made, issued or imposed under the Bombay District Municipal Act Bom III of 1901 Bom III of 1901

1901, by any such municipality so far as is not inconsistent with the provisions of this Act shall be deemed to be valid and to have been made, issued or imposed under this Act and shall continue in force unless and until it is superseded by any appointment, notification, notice, tax, order, scheme, licence, permission, rule, by-law, or form made, issued or imposed under this Act

(2) The provisions of clause (b) of sub-section (2) of section 25 shall apply to such councillors

Amendments —The proviso to sub-section (1) was added by Bombay 1 of 1927 section 3 In proviso (a), the words 'the Provincial Government' were substituted for the word 'Government' and the words 'Official Gazette' for the words 'Bombay Government Gazette' by the Adaptation of Indian Laws Order in Council The figures '1928' were substituted for the original figure '1927' by Bombay 12 of 1927 section 2

Sub-section (1) —This sub-section provides that the councillors continued or elected under section 9 (3) on the inclusion of a municipal district in schedule I shall hold office for the term for which the continuing councillors were elected or nominated under the Bombay District Municipal Act 1901

Proviso —This was inserted by Bombay 1 of 1927 which came into force on 24th March 1927 As the time between this date and 31st December 1927 was found insufficient it was extended for a year by Bombay 12 of 1927 section 2 by substituting the figures '1928' in place of '1927' When section 24 was inserted in the Act of 1925 it was expected that the time given to the newly constituted borough municipalities would be sufficient to enable them to frame rules for the holding of new elections Unfortunately some municipalities were unable to do so in time In some other cases elections purporting to be held under the new Act were declared invalid In some cases the term of office of the municipalities expired without fresh elections having been held under the new Act To avoid further complications it was considered advisable to take the power of extending beyond the period prescribed in section 24 of the new Act but upto 31st December 1927 (subsequently changed to 1928) the life of an expiring municipality and also of a municipality whose term had expired and to validate all acts and proceedings done by the latter municipality from the date of expiry of its original term of office Hence this proviso was added

Sub-section (2).—This puts the councillors continued and elected under section 9 (3) on the same footing as Councillors elected under this Act

Extension of term of office of councillors elected under the B.D.M Act, 1901. The term of office of councillors of a Borough Municipality elected under the B.D.M Act 1901 cannot be extended under the provisions of s 25 of the Bombay City Municipalities Act, 1925 as s 25 of the B C M Act, 1925 applies only to councillors nominated or elected under that Act Such a case is governed by s 24 of the B.C.M Act, 1925 as amended by sec 3 of the B C.M (amendment) Act 1927 (Bom 1 of 1927) Government can by notification extend for a period upto a date not later than 31st December 1927 (amended to 31st December 1928 by Bom 12 of 1927) the life of such a Borough Municipality (G C.G.D. No. 888 dated the 4th July 1927).

Validation of acts of expired Municipalities

24A Any municipality of a municipal borough included in Schedule I which has not been constituted in accordance with the provisions of this Act and the rules made thereunder shall, save where it is otherwise provided in this Act, be deemed not to have been duly constituted and its members, both elected and nominated, shall be deemed not to have been duly elected and nominated

Scope —This section was inserted by Bombay 1 of 1927 section 4 As pointed out in the notes below section 24, in some cases elections purporting to be held under the new Act had to be declared invalid and power was taken to extend the life of the old boards to enable them to frame new election rules under the new Act and to hold elections in accordance with the provisions of the new Act It was necessary that councillors of municipalities the term of office of which had expired and who had not been duly elected in accordance with the provisions of the new Act should vacate their offices For that purpose this section was added

Term of office of councillors after general election

25. (1) Councillors nominated or elected at a general election under this Act shall, save as otherwise provided in this Act, hold office for a term of three years, extensible by order of the Provincial Government to a term not exceeding in the aggregate four years, if on any occasion the Provincial Government shall think fit, for reasons which shall be notified together with the order in the Official Gazette, so to extend the same,

Provided that before such order is made the Provincial Government shall invite and consider objections, if any, from the voters entitled to vote at the municipal election in the municipal borough concerned

(2) (a) The term of office of such councillors shall be deemed to commence on the date of the first general meeting which shall be held after such election and after the expiry of the term of the outgoing councillors hereinbefore provided and at which a quorum shall be present, and

(b) the term of office of the outgoing councillors shall be deemed to extend to and expire with the day before the date of such meeting

Amendments —In sub-section (1) the words 'the Provincial Government' and the words 'Official Gazette' were substituted for the words 'the Government' and the words 'Bombay Government Gazette' by the Adaptation of Indian Laws Order in Council

Sub-section (1) —This prescribes that the councillors elected or nominated at a general election shall hold office for a period of 3 years The Provincial Government are also empowered to extend the period for a maximum period of one year The proviso requires that before the Government extends the period it should invite and consider objections from the voters on the election roll of the municipal borough.

Sub-section (2) (a) —This provides that the term of office of the new councillors commences from the date on which a general meeting with quorum of the new municipality is held It also provides that this meeting should be held after the expiry of the term of office of the outgoing board i e three years plus the extended period if any from the date on which the first general meeting with quorum of the outgoing board was held

Sub-section (2) (b) —This prescribes that the term of office of the outgoing councillors shall be deemed to extend to and expire with the day before the date on which a general meeting with quorum of the new municipality is held This would mean that during the period between the expiry of the term of office of the outgoing board and the first general meeting with quorum of the new board the old board can meet and carry on all its functions Section 19 (2) on the other hand provides for a president or vice-president on the expiry of the term of office of a board to continue to carry on only the current administrative duties of his office till his successor is elected by the new board and takes over charge It is necessary to make more clear as to what is intended by these provisions

Interpretation of ss 19 (2) and 25 (2) (b) of the B.M B Act.—Powers of President of a retiring municipality —Although the extended period of four years prescribed under sub-section (1) of s 25 may have expired under cl (b) of s 25 (2) which has to be read with sub-s (1), the term of office of outgoing councillors is to be deemed to extend to and expire with the day before the date of the first general meeting of the new municipality During this period they can continue to act as councillors and they can meet for the transaction of municipal business The provision in s 19 (2) that on the expiry of the term of office of a municipality the President and the Vice-president shall continue to carry out the current administrative duties of their office until such time as a new President and Vice-president shall have been elected and shall take over charge of their duties, does not affect the operation of s 25 (2) (b) **(G C G.D No s 120 dated the 1st April 1935).**

Extension of term of office of councillors elected under the B D M Act, 1901 See notes under this head under s 24

Resignation of councillors

26. Any councillor may resign his office by giving notice in writing to that effect to the president

Scope —Under this section a councillor's resignation must be in writing and it must be submitted to the President The section says nothing about acceptance It follows that the resignation comes into effect as soon as it is tendered to the President Resignation must also be addressed to the President As soon as a councillor resigns his office, all the offices that he is holding in virtue of his being a councillor automatically fall vacant Thus if a president resigns his councillorship he also ceases to be a President

Resignation—Removal from office—absence —See notes under the same head under s 20

Whether a municipal councillor who has resigned can be removed under s. 16 B D M Act, 1901 (s 27 of the B M B Act, 1925) —It is open to a councillor to resign his office and when he has resigned he ceases to be a councillor from the date of his resignation Government cannot, therefore, remove him from an office which he no longer holds **(G M.G.D no. 1571 dated the 1st April 1910).**

Liability of councillors to removal from office

27. The Provincial Government if it thinks fit, on the recommendation of the municipality supported by at least two-thirds of the whole number of councillors, may remove any councillor elected or nominated under this Act, if such councillor has been guilty of misconduct in the discharge of his duties, or of any disgraceful conduct or has become incapable of performing his duties as a councillor

Provided that no resolution recommending the removal of any councillor shall be passed by the municipality unless the councillor to whom it relates has been given a reasonable opportunity of showing cause why such recommendation should not be made

Amendments —The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

General —This section provides for removal of a councillor by the Provincial Government if (1) he is guilty of misconduct in the discharge of his duties or (2) of any disgraceful conduct, or (3) has become incapable of performing his duties as a Councillor Before the Provincial Government removes a Councillor under this section the removal must be recommended by a municipal resolution which must be supported by at least 2/3rds of the whole number of Councillors The municipality before passing any such resolution must give to the Councillor a reasonable opportunity to show cause against such a resolution In spite of the recommendation of the municipality the Government may not remove the councillor if it does not think fit to do so

Whole number of councillors —See notes under section 21

A reasonable opportunity of showing cause —See notes under section 21

Guilty of misconduct in the discharge of his duties —The section requires that the misconduct for which a councillor is liable to removal must be in the discharge of his duties as a councillor Any misconduct unconnected with his duties as a councillor will not render him liable to removal under this section

Disgraceful Conduct —The qualifying words 'in the discharge of his duties are not used in connection with disgraceful conduct That means that the disgraceful conduct may not be in the discharge of his duties as a councillor What is and what is not disgraceful conduct will depend upon the facts and circumstances of each particular case

Incapable of performing his duties as a Councillor.—This does not mean incapacity or incompetency as used in ordinary parlance It means some mental or physical or legal disability which incapacitates a person from acting as a councillor such as, insanity or paralysis

Sanction necessary to prosecute a councillor for anything done or purporting to have been done in the discharge of his official duty —Under section 56 a Councillor is a public servant within the meaning of section 21 of the Indian Penal Code Under this section it is only the Provincial Government who can remove him from office Therefore he comes within the scope of section 197 of the Criminal Procedure Code and Provincial Government's sanction is necessary to prosecute him for any offence alleged to have been committed by him

while acting or purporting to act in the discharge of his official duty See **Emperor v. Rudragouda Rachangouda, 39 B L.R. 70.**

In the discharge of his duties:—The test is whether the act complained of was or was not a duty imposed upon by the Act In **Emperor v. R K. Naik, 41 B L R. 1227** the act complained of was the delivery of a false travelling allowance bill by the Administrative officer of the District Local Board Beaumont C J said "It is argued that the rule makes it compulsory upon the Administrative Officer to deliver a travelling allowance bill But, in my opinion, the rule only means that the travelling allowance bill must be delivered if travelling allowance is being claimed There is nothing in the rules which compels the Administrative Officer to claim travelling allowance if he does not desire to do so Therefore the delivery of his travelling allowance bill was not a duty imposed upon him by the Act In the second place it seems to me clear that the charge of cheating by suppression of the fact that the accused owned a motor car involves an act outside the accused's official duties He was not under any statutory duty to refrain from stating to the board that he possessed and used his own car The charge is more analogous to a charge under section 409 than to a charge under section 477A, because a part of the ingredients of the charge is not in any way concerned with the official duties of the officer" It was held that a prosecution against an Administrative Officer of a Local Board for an offence punishable under section 420 of the Indian Penal Code 1860, for submitting a false travelling allowance bill to the board, can lie in absence of a notice under section 136 of the Bombay Local Boards Act, 1923, in as much as the delivery of his travelling allowance bill is not a duty imposed upon him by the Act The same test was applied in ***Emperor v Vishnu, 42 B L R 1193*** In this case accused No 1 was a sub-overseer in the employ of a District Local Board, and it was a part of his duty to report to his employers through the Works Committee the progress of the works in his charge carried out by a contractor and their measurements, and also to sign bills prepared by the contractor in authentication of the measurements given and the charges made therein Accused No 2 was an elected member of the Board, the Chairman of the Works Committee, and a statutory public servant not removable from his office except with the sanction of the Local Government He was charged with the duty of supervising the works, take their measurements and to countersign the bills of the contractor by way of authenticating the measurements given and the charges made A bill prepared by a bogus contractor stating measurements and charges of work done and signed by accused No 1 and countersigned by accused No 2 was submitted to the President of the Board, and payment was obtained from him The two accused having been prosecuted for offences of cheating and falsification of accounts and abetment thereof under sections 420 and 477A read with section 114 of the Indian Penal Code, contended that their acts were purporting "to have been done in pursuance of" the Bombay Local Boards Act, 1923, and they could not be prosecuted by virtue of section 136 (2) of the Act without giving them one month's notice and accused No 2 further contended that he could not be prosecuted in the absence of sanction from the local Government under section 197 of the Criminal Procedure Code, 1898 It was held (1) that the accused in submitting the bill were purporting to act, though not actually acting, in pursuance of the Bombay Local Boards Act, even if they appended to the bill a statement which was false to their knowledge, (2) that it having been the duty of the accused to sign and countersign the bill respectively in

order to enable the contractor to claim, and the District Local Board to pay, the amount of the bill, the preferring of the bill was an official act, and it made no difference that in the discharge of the official duty a fraudulent statement was inserted in the bill, (3) that therefore the act complained of, namely, the fraudulent and dishonest representation by means of the bill and measurement sheet, was protected under section 136 of the Bombay Local Boards Act (4) that accused No 2 having been a statutory public servant according to section 135 not removable without the sanction of the local Government under section 31 of the Act, and the act complained of having been done or purported to be done in the exercise of his official duty, sanction of the Government was necessary to his prosecution under section 197 of the Criminal Procedure Code, 1898" See also detailed notes under s 206 under the head **'Act done or purporting to have been done in pursuance of this Act'**

Status at the time of offence relevant —It is the status of the accused at the time of the Commission of the alleged offence and not his status at the time of the complaint or of the order issuing process that is material for the purposes of s 197 **Sugamchand v Seth Narayandas, A I R 1932 Sind 177**

Resignation—Removal from office—absence —See notes under the same head under s 20

Whether a municipal councillor who has resigned can be removed under s 16 B D M Act, 1901 (s 27 of the B.M B Act, 1925) —It is open to a councillor to resign his office and when he has resigned he ceases to be a councillor from the date of his resignation Government cannot, therefore, remove him from an office which he no longer holds **(G M.G D no 1571 dated the 1st April 1910)**

Whether s 16 of the B D M Act, 1901 (s 27 of the B.M.B Act, 1925) applies to a councillor guilty of misconduct during a previous term —The application of s 16 is not limited to misconduct committed during the term in which the question of removal arises Had such been the intention the word 'is' would probably have been used instead of words has been' It would not be reasonable to hold that if misconduct committed in a previous term were discovered in a subsequent term the operation of s 16 would be barred Similarly if a councillor, not previously a member of the council had just immediately before his election been guilty of misconduct which would preclude the possibility of any respectable person sitting on the same board with him, it would be unreasonable to hold in this case also that the operation of the section was barred Therefore, a municipality in submitting a recommendation under s 16 is entitled to review the whole previous history of the councillor in question **(R L.A 's opinion no 33—(confidential) dated the 25th August 1919 in G O G D no. 7464 dated the 4th September 1919)**

Disqualification continuing a councillor

28. (1) If any councillor during the term for which he has been elected or nominated—

(a) becomes subject to any disqualifications specified in section 12, or

(b) acts as a councillor in any matter—

(i) in which he has directly or indirectly, by himself or his partner any such share or interest as is described in clause

(i), (ii), (iii), (iv) or (viii) or of sub-section (3) of section 12 whatever may be the value of such share or interest, or

(ii) in which he is professionally interested on behalf of a principal or other person, or

(iii) in which he is engaged at the time in any case against the municipality, or

(c) departs beyond the limits of the Presidency with the declared or known intention of absenting himself continuously for a period exceeding six months, or

(d) not being a president or vice-president or a salaried servant of the Crown, absents himself during four successive months from the meetings of the municipality, except with the leave of the municipality,

(e) fails to pay any arrears of any kind due by him to the municipality within three months after a special notice in this behalf has been served upon him,

he shall subject to the provisions of sub-section (2) be disabled from continuing to be a councillor and his office shall become vacant

(2) In every case, the authority competent to decide whether a vacancy has arisen shall be the Collector The Collector may give his decision either on an application made to him by any person or on his own motion Until the Collector decides that the vacancy has arisen, the councillor shall not be disabled under sub-section (1) from continuing to be a councillor An appeal shall lie against every such decision of the Collector to the Provincial Government and the orders passed by the Provincial Government in such appeal shall be final

Provided that no order shall be passed under this sub-section by the Collector against any councillor without giving him a reasonable opportunity of being heard

Amendments —In clause (1) (d) the words 'servant of the Crown' were substituted for the words servant of the Government' by the Adaptation of Indian Laws Order in Council In sub-section (1) the words 'subject to the provisions of sub-section (2)' were inserted by Bombay 8 of 1939, section 3 (f) (i) Sub-section (2) was substituted for the original by Bombay 8 of 1939, sectin 3 (f) (ii)

Scope —Section 12 refers to disqualifications which prevent a person from becoming a councillor, i e, to say, it refers to the disqualifications to which a person is subject on the date of nomination and thereafter until his term of office under section 25 (2) (a) commences Section 28 deals with disqualifica-

tions acquired after that date Moreover, section 28 is wider inasmuch as in addition to the disqualifications enumerated in section 12 it provides disqualifications for acting as a Councillor in certain matters, for absence without leave from the meeting of the municipality, for departing beyond the limits of the Presidency with the intention of absenting himself for a period of six months and for failure to pay arrears due to the municipality after special notice This section is equivalent to s 15 (2) of the B D M Act, 1901, sections 17, 18 and 36 (b) of the C B M Act, 1888 and s 30 of the B L B Act, 1923

Sub-section (1) —This sub-section prescribes the disqualifications

During the term for which he has been elected or nominated —This means three years from the date on which a first general meeting with quorum of the new municipality is held If the term is extended the phrase will cover the extended period also

Sub-section (1) (a)—becomes subject —This means that the disqualification must be acquired during the term of office as Councillor If the disqualification was acquired before the commencement of this term the case will be governed by section 12 and not by this section

Sub-section (1)(b)—acts as a councillor —A Councillor acts as a councillor not only when he votes but if he takes part in the meeting in any way when any item prohibited under this sub-section is under consideration A councillor takes part in a meeting when he takes part in the discussion or when he sits in the meeting as a councillor The Government appear to have held in some cases that mere presence does not amount to acting as a Councillor, but this view appears to be wrong because without the presence of the Councillor sometimes a quorum may not be formed The Councillor concerned ought to leave the meeting when any of the items mentioned in this sub-section in which he is interested is taken up for consideration A councillor acts as a Councillor even if he votes against or remains neutral

Sub-section (1)(b)(i)—Whatever may be the value of such share or interest.—Under section 12(3)(vi) and section 28(a) the disqualifying share or interest must pertain to a transaction or transactions amounting to more than Rs 500/- in an official year There is no such limitation in the present provision Under this clause a Councillor will be disqualified whatever the value of the share or interest if he acts as a councillor in a matter in which he has a share or interest

Sub-section (1)(b)(ii)—professionally interested —This deals with professional interest such as an interest of a lawyer, an architect, an engineer, a contractor, a medical man, etc The professional interest must be in the item which is before the municipality for consideration The professional interest means that the services of the professional man in exercise of his profession must have been availed of in the matter

Sub-section (1)(b)(iii)—At the time —This means that the engagement must be continuing at the time of acting as a Councillor Before the engagement is made or after it is over, the disqualification does not attach for acting as a councillor in the matter

Engaged —This means retained or employed The engagement may be in any capacity such as a pleader, doctor, architect, or an expert

Substantive resolution —A resolution to inform the collector that a previous resolution authorizing the dropping of a prosecution against a person is

confirmed when as a matter of fact there was no previous resolution is not equivalent to the passing of a substantive resolution to drop the prosecution A councillor acting as the pleader of the prosecutee and voting for such a resolution does not incur disqualification **(R L A's opinion No 1620 dated the 12th October 1921 in G R G D No 802 dated the 15th November 1921)**

Against the Municipality —These words go with the word 'engaged' and not with the word 'case' This means that if a Councillor is engaged for the municipality he can act as a Councillor in such a matter, but if he is engaged against the municipality he cannot take part in the consideration of the matter

Sub-section (1)(c)—Declared or known —Declared means declared by the Councillor 'Known' means from unimpeachable evidence

Limits of the Presidency —See notes under section 1

Continually —means without break

Sub-section (1)(d)—with the leave of the municipality —Under this sub-section a Councillor who remains absent without leave from the meetings of the municipality during four successive months incurs a disqualification from continuing as a Councillor President, vice-president and salaried servants of the Crown are exempted from the operation of this rule Thus a president, a vice-president or a salaried servant of the Crown can remain absent from the meetings of the municipality for any length of time without incurring any disqualification Similarly, any councillor also can do so provided he obtains leave from the municipality The absence must be with the leave of the municipality This means that the leave must be obtained before the absence bringing the disqualification i e before the end of four successive months of absence

Four successive months —Obviously the period of four months can only run from the date of the first meeting which a councillor fails to attend, for there can be no default where there is no call for attendance **(G R G D No. 3580 dated the 28th June 1902)**

Under s 28(1)(d) a councillor is disabled from continuing to be a councillor and his office becomes vacant, if not being a President, vice-president or a salaried servant of the Government, he absents himself during four successive months from the meetings of the municipality except with the leave of the municipality The criterion is not absence from four successive meetings but absence during four successive months counting from the date of first absence **R L A's opinion No 2566 dated the 10th August 1927 in G R G D No 4240 dated the 23rd August 1927)**

A member did not attend the meetings of the Taluk Board on 10th July 1926 There was again a meeting of the Board on 12th August 1926 which also he did not attend There were no meetings in September and October There was a meeting on 13th November 1926 which he attended *Held* that the period of absence for three consecutive months is to be computed from the date of his first default in attending the meeting and the member thus brought himself clearly within s 56(1)(b) **District Board of Guntur v Desu Subba Rao, A.I R 1928 *Mad* 983(2)**

The failure to attend meeting during three consecutive months is to be computed forward from the date of the first failure, not backward from the last Section 216(1)(a) (equivalent to s 192(1)(c) of the B M B Act, 1925) does

not apply to the case of a person who is permanently residing within the local area and who has given his home address as the place to which notices were to be sent but who for purposes of business had temporarily left for a place outside the local area **Ramanathan Chettiar in re AIR 1931 Madras 136.**

Meetings of the municipality —This means more than one meeting A member ceases to hold office for failure to attend meetings for three consecutive months and not for failure to attend three consecutive meetings and the period is to be computed from the date of the first default Further there must be at least two meetings which a member has failed to attend for the sub-section to apply The question whether the president of the Board has or has not reported the failure of the member to attend the meetings of the Board cannot affect the question whether the member had or had not ceased to be a member of the Board **S K Mariya v Muthuvelu, AIR 1926 Mad 877**

Meetings of the municipality do not include meetings of a committee — Under s 15(2)(a) of the BDM Act 1901 a councillor absenting himself during 4 successive months from the meetings of the municipality without leave will be disabled from continuing to be a councillor That he attends during the same period meetings of the managing committee of the municipality cannot exonerate him from his duty to attend the meetings of the municipality For a meeting of the managing committee is not a meeting of the municipality as the one is an executive body while the other is a legislative one The Act makes a clear distinction between he meetings of a municipality and the meetings of a committee (Vide chapter III(1) and III(2) **(R L A's opinion No 1037 dated the 8th June 1923 in G R G D No 4240 dated the 19th June 1923)**

Sub-section (1)(e)—Due by him to the municipality The words 'due by him to the municipality' in s 15(2)(f) of the BDM Act, 1901 (equivalent to s 28(1)(e) of the BMB Act, 1925) mean due by him to the municipality as such and not due to the municipality when acting only as the agent of Government in the collection of a Penal tax or rate imposed by Government to defray the cost of additional Police under s 26(2) of the Bombay District Police Act, 1890 **(R L A's opinion No 3865 dated the 1st August 1933 in G R G D No s 136—8142—A dated the 14/15th August 1933)**

Section 15(2)(f) of the BDM Act, 1901 (section 28(1)(e) of the BMB Act, 1925) providing for a disability from continuing to be a councillor when a councillor makes default in paying the arrears due to the municipality is a special provision affecting the disqualification of defaulting councillors It has no connection with Ch VIII of the Act concerning the process of recovery of dues and there is nothing in the Act to suggest that the issue of a special notice should be preceded by an attempt under that chapter to recover the arrears due For disqualification under s 15(2)(f) of the BDM Act, 1901 and s 28(1)(e) of the BMB Act 1925 what is necessary is that there must be some arrears which the councillor has failed to pay within 3 months after special notice 'Arrears' mean money not paid on the due date or proper time for payment or which remains unpaid though due The definition of arrears involves the existence of some default on the part of the parties assessed to seek out the collector and to pay it It is clear from the provisions of Ch VIII of the Act that presentation of a bill and the issue of a notice are necessary only for the purposes of recovering the taxes by destraint It follows therefore that the rates become due for recovery as soon as they are duly levied whereafter on non-payment, they become arrears and it is the duty of the assessees to pay

them without waiting for presentation of bills and issue of notices of demand Consequently owing to non-payment the tax due falls into arrears even on the 1st April if under the rules it is leviable from that date and under s 15(2)(f) of the B D.M Act, 1901 (sec 28 (1)(e) of the B.M.B Act, 1925) a special notice can validly be issued immediately by the President for payment of the arrears **(Examiner Local Fund Account's No L 1813-3106 dated the 21st November 1941)**

Special notice—who can issue it—Whether an ordinary notice under Ch. VIII necessary before issuing special notice—mode of service—There is no special provision in the Act prescribing the authority by whom a special notice must be given In the absence of special provision the Chief Officer and President have power to issue such a notice The executive power for the purposes of carrying out the provisions of the Act vests in the Chief Officer under s 30(2) of the Act, and it is only when it is in the Act expressly so directed, that his actions are subject to the approval or sanction of the municipality There are in fact no other restrictions, limitations, conditions or rules applying to his service of these special notices The President is to watch over the executive administration of the municipality and to exercise supervision and control over the acts and proceedings of all officers and servants of the municipality in matters of executive administration under s 31(b) and (c) of the Act The notices issued under the signature of the Chief Officer and the President are legal and proper Section 28(1)(e) of the Bombay City Municipalities Act, provided for a disability from continuing to be a councillor when a councillor makes default in paying the arrears due by him to the municipality This is a special provision affecting the qualifications of defaulting councillors and is not a provision for recovery of arrears It has no connection with Ch VIII, and there is nothing in the Act to suggest that the issue of a special notice must be preceded by any attempt under that chapter to recover arrears due The provisions of s 192(1) must be construed strictly Substituted service under cl (d) can only be resorted to if none of the other means mentioned is available **(R.L.A.'s opinion No. O Munis—Cities—15 dated the 23rd July 1928 in G R G.D. No. 4240 dated the 28th July 1928)**

Whether removal from office necessary in case of disqualification under s 15(2)(a) of the B D M Act, 1901 (s 28(1)(a) of the B.M B Act, 1925) — A councillor disqualified under s 15(2) of Bom Act III of 1901, at once ceases to be a member and no further order is required unless in case of dispute when an order may be passed under s 15(3) **(R L A's opinion No 33-(confidential) dated the 25th August 1919 in G O G D No 7464 dated the 4th September 1919)** Present sub-section 15(3) of B D M Act was substituted for the original by Bom Act 8 of 1939, s 2 and the present sub-section 28(2) of the B M B Act was substituted for the original by Bom Act 8 of 1939, s 3(f)(ii) Under these sections, as they stand at present the councillor who is disqualified is not disabled until the collector decides the matter

Subject to the provisions of sub-section (2) —These words are added to make it clear that a vacancy does not arise under sub-section (1) until the collector has given his decision and that the collector's decision is subject to appeal to the Provincial Government

Sub-section (2) —This sub-section is new See notes under section 12 sub-section (5)

Salaried servant of the Crown —See notes under s 3(18)

Final —See notes under this head under s 10

Service of notice —See notes under s 192

Resignation—Removal from office—absence —See notes under the same head under s 20

See notes under s 12

Casual vacancies how to be filled up

29. Where a vacancy occurs through the non-acceptance of office by a person elected or appointed to be a councillor, or through such person being disqualified for becoming a councillor, or through any election being set aside under the provisions of sub-section (2) of section 15, or through the death, resignation, removal or disability of a councillor previous to the expiry of his term of office, the vacancy shall be filled up, as soon as it conveniently may be, by the election or nomination as the case may be, of a person thereto, who shall hold office so long only as the councillor in whose place he is elected or nominated would have held it if the vacancy had not occurred Provided that no election shall be held to fill up a vacancy occurring within four months of the date on which the term of the municipality expires

A councillor whose office has become vacant under section 28 shall, if his disability has ceased, be eligible for re-election

Amendment —The proviso was added by Bombay 19 of 1935, section 5

Scope —This section provides for filling up a casual vacancy in the office of a councillor The councillor filling in the vacancy will hold office only for the unexpired period of the outgoing councillor's term of office The section also provides that if a vacancy has occurred within four months of the date on which the terms of the municipality expires no election will be held, i e, to say, if the vacancy has arisen in an elected seat it should remain vacant, but if it has fallen in a nominated seat then it could be filled in by nomination

The second paragraph of the section provides that a councillor who is disqualified under section 28 will be eligible for re-election if his disability has ceased, i e to say, has ceased on the date of nomination for the by-election

Disability under s 15(2) of the B D M Act 1901 (s. 28 of the B M B Act, 1925)—Whether for the unexpired period of the term during which it occurs — A councillor disabled from continuing to be a councillor and whose office has become vacant under s 15(2) will only be eligible for re-election at the end of the term for which he was appointed but not before The vacancy is for the unexpired period of that term and the disability must extend to that portion Section 18 of the B D M Act, 1901 clearly contemplates that, qua the disabled councillor the vacancy continues even after the election or appointment to fill the vacancy and the disabled councillor cannot, during the period referred to, be said to be 'duly qualified' under s 19 **(R L A.'s opinion No 1658 dated the 20th July 1904 in G.R G D No. 3875 dated the 26th July 1904).** The same view was taken in **G R G D No 5140 dated the 30th August 1906**

There is no reason for holding that the continuance in the words 'disabled

from continuing to be a councillor' does not relate to the current term for which but for the disablement, the councillor would continue to hold office Any doubt as to the meaning to be attached to the words is however removed by the terms of s 18 which show that the person elected to fill the vacancy must be some one different from the person, whose office has become vacant **(Advocate General's opinion No 95 dated the 3rd December 1906 in G R.G.D. No. 7419 dated the 14th December 1906).**

It appears that the intention of the legislature was that the councillor who had become disabled *from continuing to be a councillor* and whose office has become vacant should not be eligible for re-election at the next by-election **(Advocate General's opinion No 5 dated the 29th January 1929).** The position is, however, different under the B.M.B Act, 1925 as para 2 of section 29 (equivalent to s 18 of the B D.M Act, 1901) clearly allows such a councillor to contest the by-election caused by his disability if the disability has ceased

(6) Municipal government Functions of President and Vice-President

Municipal government vests in the municipality

30. (1) Except as in this Act otherwise expressly provided, the municipal government of a municipal borough vests in the municipality

Executive power vests in the Chief Officer

(2) The executive power for the purpose of carrying out the provisions of this Act vests in the Chief Officer appointed under section 33, subject, wherever it is in this Act expressly so directed, to the approval or sanction of the municipality or of the standing committee and subject also to all other restrictions, limitations and conditions imposed by this Act and the rules made thereunder

Sub-section (1) —This sub-section expressly lays down that the statutory powers vested by the Act in the Chief Officer and other authorities or committees do not vest in the municipality This meaning is made clear by the use of the words 'Except as in this Act otherwise expressly provided' Thus the powers vested in the Chief Officer and other statutory authorities by the Act cannot be exercised by the municipality

Sub-section (2) —This sub-section vests all the executive power in the chief officer The powers of the chief officer are subject to the restrictions imposed by this Act and the rules made thereunder They are also subject to the approval or sanction of the municipality or of the standing committee, wherever so expressly provided in the Act Where it is not so expressly provided in the Act his actions are not subject to the approval of the municipality or the standing committee Thus he has many independent executive powers under the Act

Function of president

31. It shall be the duty of the president of a municipality—

(a) to preside, unless prevented by reasonable cause, at all meetings of the municipality, and subject to the provisions of the rules for the time being in force under clause (a) of section 58 to regulate the conduct of business at such meetings,

(b) to watch over the financial and executive administration of the municipality and to perform such executive functions as may be allotted to him by or under this Act,

(c) to exercise supervision and control over the acts and proceedings of all officers and servants of the municipality in matters of executive administration and in matters concerning the accounts and records of the municipality, and subject to the rules of the municipality at the time being in force, to dispose of all questions relating to the service of the said officers and servants, and their pay, privileges and allowances,

(d) the president of a municipality may in cases of emergency direct the execution or stoppage of any work or the doing of any act which requires the sanction of the municipality, and the immediate execution or doing of which is, in his opinion, necessary for the service or safety of the public, and may direct that the expense of executing such work or doing such act shall be paid from the municipal fund

Provided that—

(a) he shall not act under this section in contravention of any order of the municipality prohibiting the execution of any particular work or the doing of any particular act, and

(b) he shall report forthwith the action taken under this section and the reason therefor to the Standing Committee at its next meeting

Scope —This section prescribes the duties of a president

Clause (a)—Unless prevented by reasonable cause —This does not mean that the president may remain present in the meeting and may not preside for some reasonable cause This only means that if he is prevented by some reasonable cause from attending the meeting or remaining present thereat the vice-president or in the absence of the vice-president any other councillor may take the chair Section 32 empowers the vice-president to take the chair only in the absence of the president It follows from this that if the president is present in the meeting nobody else can take the chair If in spite of the presence of the president in the meeting, the vice-president or anyone else takes the chair it is illegal and the proceedings of the meeting would be illegal See notes under the head **'Irregularity in the proceedings of the meeting—chairman continuing to preside after the election of the president'** under section 19A The same arguments as have been applied there in the case of a meeting for the election of a president and a vice-president will equally apply to any other general meeting under the Act because section 31 (a) specifically lays down that it shall be the duty of the president to preside at all the meetings of the municipality in which he is present Any breach of this statutory provision would be clearly illegal and render the proceedings invalid

Conduct of business at meetings'—Under this clause the president is empowered to regulate the conduct of business at the meetings subject to the rules framed under section 58 (a) In the absence of a rule on any particular point of procedure arising at the meeting, the president should be guided by established practice and precedents

Rules for guidance of chairman —Blackwell in his law of meetings has given the following summary of the rules for meetings which should serve as an useful guide to the chairman of the meetings, in absence of any statutory provision or rules, on any point arising there at —

1 If at the appointed hour there be a sufficient number (quorum) present to make a meeting, the person (if any) entitled should take the chair, but if there be no such person present, then a chairman for that meeting should be chosen by those present

2 The general authority of the chairman to manage and control the meeting should be loyally respected, and a person, even if speaking, or desiring to speak, should sit down, if the chairman rises to say anything

3 On taking the chair, the chairman should call for order, and cause the notice convening the meeting to be read, or himself briefly state the object of the meeting

4 The chairman should himself read or cause to be read letters of apology for non-attendance and other correspondence

5 The minutes (if any) of the last meeting, if any, should be read and put to the meeting for confirmation, and signed by the chairman, who puts the motion for confirmation to the meeting

6 If no special resolution to vary the order of proceeding be passed, the rest of the business should be transacted, subject to statutory directions, in the order in which it occurs in the agenda paper, but irrespective of its position on the agenda paper, an amendment should be taken during the discussion of the question it proposes to amend

7 Every principal motion should be relevant to some part of the business which the meeting has met to transact, should be written or printed, and signed by the mover If not seconded, it does not become a question and cannot be debated, and the next business should be called on But if duly seconded, such motion becomes a question which the chairman should propose to the meeting for discussion, and failing, or after discussion, put for decision

8 To enable the chairman to decide upon its relevancy or propriety, every amendment, whether of the original question or of another amendment, should be in writing and signed by the mover It should be in order, relevant to and show its effect upon the question or amendment it proposes to amend It should be moved and seconded, and then becomes a distinct question, which should be put to the meeting afterwards for decision If there are several amendments of one question, they should be called on in the order in which they affect that question No amendment may be moved respecting a question or part of a question, already accepted by the meeting (No amendment can be brought forward after the close of the poll)

9 The formal motions, viz, "the previous question," "that the meeting proceed to the next business," "adjournment," and the "closure" need not be in writing, but must be moved and seconded and *put to the meeting, upon which*

they become distinct questions It is, generally speaking, for the chairman to accept or not to accept the closure The previous question may not be moved when an amendment is under discussion, but the other formal motions may be moved at any reasonable time Formal motions should not supervene one upon another, and if any discussion be allowed, it should be of a very limited character

10 By leave of the meeting, any motion may be withdrawn before it has been put for decision

11 Subject to the closure, each person shall be allowed, as far as practically possible, to make one speech upon each distinct question upon which discussion is allowed (Discussion must be relevant to the subject under debate)

12 In the absence of any rule to the contrary the mover and seconder of any motion are deemed to have spoken upon such motion

13 The chairman may call upon intending speakers in such order as he pleases, but the meeting may, at any moment when the chairman is about to exercise his right of call, resolve that Mr So-and-so be now heard In exercising his right to call, the chairman ought to call upon the supporters and opponents of a resolution impartially

14 (A point of order is either an alleged irregularity in what a speaker is saying at the moment or an allegation that a motion on the agenda is defective, e g, ultra vires) A person whether he has already spoken or not, may rise and speak forthwith to a point of order, provided he takes the point at once

15 Any person who has already spoken may forthwith if the actual speaker gives way, or, if not, at the end of that speaker's speech, briefly speak again to remove a misconception as to a material part of his former speech

16 The mover of the original question should be allowed to reply briefly to the arguments used by his opponents

17 Every speaker should rise, address the chair, and stand while speaking His remarks should be spoken, not read, should be relevant to the question, reasonably brief, neither obstructive nor full of repetitions He should be deferential to the chairman, respectful to the meeting and not wantonly offensive to any person present or absent He should not use offensive personal allusions, contemptuous insulting, or threatening language, or impute improper motives to, or make groundless charges against his opponents He should not use disloyal or seditious language, and should avoid referring to cases subjudice

18 After the reply, the question should be put for decision forthwith Every question should be decided by a majority of votes The votes to be taken by a show of hands in the first instance One hand one vote The chairman's declaration of the result is prima facie decisive, but if not accepted, should be challenged at once and a division or poll claimed If not challenged at once, the chairman's declaration is conclusive Where a particular majority is required, the chairman's declaration may be impeached The demand for a poll need not be in writing

19 If on a division or poll being taken, the votes recorded including that of the chairman, are equally divided, the chairman has a second or casting vote

20 Any objection to the validity of the decision of any question should be made and insisted upon at once It not, it should be deemed to have been waived

21 An invalid resolution may be cured subsequently

Rights and duties of the chairman.—"A meeting presided over by a chairman neither elected nor appointed according to the provisions of the statute is not a valid meeting The law relating to the election of a chairman has been already discussed The nature and extent of the authority of the presiding officer of the council, in the absence of rules of procedure adopted by the council and of statutory provisions upon the subject, can only be determined by such principles of parliamentary usage as have been generally adopted or observed in deliberative assemblies, and which are reasonably essential to the due execution of the legitimate business of the Council He represents the assembly in determining and declaring its will upon matters properly before it The chairman collects, as it were, his authority from the meeting If it has adopted rules of procedure which are legally unobjectionable it is his duty to apply and enforce them The chairman should be well acquainted with the statutory rules, standing orders or regulations of the Council over which he is presiding and his decisions should be governed and controlled by them On taking the chair, the chairman becomes invested with prima facie authority to regulate and control the proceedings of the meeting for the purpose of that meeting, to preserve and maintain order, including the right to remove disorderly persons, to decide whether motions, be they principal ones or merely formal ones, are in order, to exclude irrelevant motions, to take care that the proceedings are conducted in a proper manner, to regulate the discussion by calling on persons to speak, to see that the items of business are taken in the order as set out in the agenda paper unless that order is previously altered or is subsequently altered with the consent of the meeting, to see that due and sufficient opportunity is given to those who wish to speak to express their views on the subject under discussion, to allow no discussion unless there is some motion before the meeting, to prevent irrelevant discussion, and forbid a second speech on the same motion except in the case of the proposer, who usually has a right to reply on the discussion, to decide points of order, to maintain his ruling on points of procedure, to put questions to the meeting for decision, to see that the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting, to declare the result, to grant a poll, to see that the minutes are properly framed, and to sign them, in certain events and under certain conditions to adjourn the meeting, to declare the business of the meeting at an end and the meeting closed, and generally to decide all incidental questions that arise and are connected with the management of the meeting, and require immediate decision In the exercise of this authority, however, the chairman must act bona fide, and if he does, his decisions, even when not strictly correct, will be upheld by the Court in the absence of evidence that substantial injustice has arisen therefrom But if the chairman acts improperly or mala fide, his affected decisions are not binding, and in a proper case, the Court will interfere If the chairman should decline to continue to preside over the meeting, the meeting itself can resolve to go on with the business with another chairman appointed for the purpose" —**Aiyengar's Law of Municipal Corporation in British India Second edition Pages 148-150**

Adjournment of meetings —"In the case of all public bodies invested with public duties the President or Chairman has not at common law a power to adjourn against the wishes of the meeting, and ordinarily, the right to adjourn is in the meeting itself, i e a majority of those present As observed by Lord

Hardwick, the right is in the assembly itself, for, if there be an assembly all consisting of equals and there be no custom nor rule of law to direct the adjournment, the right must be in the persons which constitute the assembly" Where a meeting cannot be held for want of a quorum, it is not competent to the members present to adjourn the meeting to another time unless notice of the adjournment be given to all the members or unless the Rules specifically provide for the event

A Chairman has no right to adjourn a meeting against the expressed wish of the members present, so as to prevent them from proceeding to the transaction of the business for which they have been called together A statutory chairman, however, may have the power to adjourn for a subsidiary purpose as for taking a poll or where the meeting is so poorly attended as not to be representative of the general body

The chairman has no power arbitrarily to decline an adjournment of a meeting, without the consent of a majority of the members, unless he has exhausted all his legitimate powers for preserving order before declaring the adjournment, or unless the meeting is in such a state of disorder and excitement that the transaction of business is impracticable If a meeting of a City Council is illegally adjourned by its presiding officer who withdraws, a quorum of the members of the Council may elect a chairman for that meeting, and proceed with the transaction of business When, however, the statute provides that the chairman shall preside at all meetings of the Municipal Council at which he is present, a meeting at which he is present and does not preside is incapable of effective action, and if, when he rules a motion out of order and declines to put it, the moving party, instead of appealing from the ruling, puts the motion himself and declares it to be carried, such action is of no legal effect, even if a majority of the Council voted in support of the motion so put

The question of adjournment should be decided by vote and not by the chairman A motion for adjournment whether of the meeting or of the debate, may be proposed by any person who has not already spoken, at any reasonable time in the course of the meeting, if no person is speaking at the time It need not be in writing If no one seconds the motion, it falls to the ground, but if the motion be seconded and put to the meeting, it then becomes a distinct question upon which, in the absence of a special rule to the contrary, any person may speak whether such person has already spoken or not But the mover has no right of reply If the first motion for adjournment be defeated a second one to the same effect may be moved on the same day after a reasonable time

An adjournment may arise in four ways —

1 Failure to make a meeting—i e quorum of members not present, although this is strictly a postponement A meeting cannot be adjourned, if there was in fact no meeting The rules, by-laws or regulations of every corporate body provide for adjournment ipso facto to a certain fixed date, if a quorum is not present within a certain time

2 Failure to keep a meeting—i e a count out

3 Adoption of motion for adjournment

4 Action of chairman

A regular or a special meeting may adjourn to a future day and at such meeting it will not be lawful to transact any business which might not have been transacted at the original meeting of which it is but the continuation

The only power which the presiding officer has to declare the meeting adjourned of his own initiative and without putting a motion to the meeting, is as a last resort, when disorder becomes so great that business cannot be transacted and the chairman cannot enforce order So also where there is no quorum, the President or chairman merely adjourns or postpones the meeting After a final adjournment of the meeting, the members have no power to assemble or to transact business required to be transacted at a meeting until the next regular meeting, unless they be convened in the meantime in the manner prescribed by law

A properly convened meeting should not be postponed The proper course to adopt is to hold the meeting as originally intended, and then and there adjourn it to a more suitable date If this course be not adopted, there is a danger of certain members ignoring the notice of postponement, and if sufficient to form a quorum, holding the meeting as originally convened and validly transacting the business thereat

In certain cases it might be within the powers or province of the chairman or president of the meeting to postpone it, at the same time, it is desirable that such postponement should be with the consent of the members generally present In all cases, notice of postponement should be sent to all who received the original notice to attend" **Aiyangar's Law of Municipal Corporations in British India, Second edition, Pages 139-142**

Decisions of the President—not necessarily final —"I may also refer to **Henderson v Bank of Australia** as illustrating that the decisions of a chairman are not necessarily final, and that if on any important question he wrongly rules out a particular amendment, then it is open for the Court to revise his decision and to hold if necessary that the resolution passed thereafter was irregular and not binding" Martin C J in **Gopal v Sanmukhappa, 29 B L R 1325 (1330)**

President's power to dissolve —A President has no absolute powers to dissolve a properly convened meeting He has no powers to dissolve a meeting except as provided in the rules or when the meeting refuses to obey his ruling or becomes unruly Except in these cases he cannot arbitrarily dissolve a properly convened meeting If the meeting is not properly convened he may dissolve the same but in that case he must be correct on the fact that the meeting was not properly convened If he wrongly dissolves the meeting the other councillors can continue the meeting in his absence and those councillors who leave the meeting cannot complain afterwards A case of this type arose in the case of **Gopal v Shanmukhappa, 29 B L R 1325** wherein Martin C J observed —"The question arises whether the President had power to dissolve the meeting which, in our opinion, was properly convened It is said that it was his duty to see that the meeting was properly convened, and it, therefore follows from that, that if in his opinion it was not properly convened he had power to dissolve the meeting there and then One flaw in that argument, in our opinion, is that the President must at any rate be right on his facts Accordingly, if in fact the meeting was properly convened, and notices had been properly given, it would not be left to his absolute and final discretion to say whether in law the meeting had been properly convened or not It is unnecessary for us to say whether he had power to dissolve the meeting supposing even one notice had not been properly given, because there is sub-section (4) of section 35 which, as I have already mentioned, ex-

pressly provides for want of a notice being served on an individual member of the board There may be other matters to be considered also in that connection, but what I do say is that if as here the meeting was properly convened, it does not lie on him to dissolve it forthwith Next, turning to the question as to whether the fact that seven members thereupon left the meeting, that again, I think, is partly a question of fact As I read the learned Judge's judgement the chairman never in fact left his chair, or at any rate left the meeting until some time after a new chairman was elected Consequently, the seven members proceeded to leave this meeting before it had really broken up and before at any rate the chairman had properly left his chair If, therefore they chose to do that, I think they could only do so at their own peril, and if in law the chairman's act was illegal and the remaining members were entitled to proceed with the meeting and elect a new chairman, then the retiring seven members could not complain in law The question seems to me, therefore, to be one entirely different from that in the **King** v **Gaborian**, where the presiding officer viz, the mayor and also two aldermen and several burgesses left the meeting without any objection, and it was not until after that had been done that certain persons who remained in the room purported to make a new election On the other hand, in **National Dwellings Society** v **Sykes** Mr Justice Chitty held that it is the duty of a chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it but he has no power to stop or adjourn a meeting at his own will, and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened and to appoint another chairman for that object Counsel for the appellants says that in that case the meeting had begun and that a particular resolution had been passed Let that be so To my mind it maks no essential difference whether the chairman illegally and at once declared the validity called meeting dissolved, or whether he waited till one or two or three resolutions had been passed, and then made an announcement before all the business for which the meeting has been called had been concluded I may also refer to **Henderson** v **Bank of Australasia** as illustrating that the decisions of a Chairman are not necessarily final, and that if on any important question he wrongly rules out a particular amendment, then it is open for the Court to revise his decision and to hold if necessary that the resolution passed thereafter was irregular and not binding In the view, then, which I take on the facts of this particular case, I think the members had power to continue the meeting notwithstanding the chairman's erroneous declaration of the dissolution, and I further think that they were entitled to elect their new chairman, and thereafter to elect their new president for the ensuing three years in accordance with section 27 of the Act"

Clause (b) —The president has no executive powers beyond those allotted to him by or under this Act 'Under this Act' means in accordance with the provisions of this Act

Clause (c) —Under this clause the president is given powers to dispose of all questions relating to the service of the municipal officers and servants etc. Under section 34(1)(b) similar powers are given to the Chief Officer in respect of posts mentioned in s 34(1)(c) and the powers of both the president and Chief Officer are made subject to the rules of the municipality framed under section 58 Thus provision should be made in the rules dividing these

powers between the President and the Chief Officer so that there may not be any conflict in the exercise of the said powers

Officers and Servants —'As already observed, a municipal corporation being an artificial person can only act through the medium of real persons In the first place, these persons will be the members themselves and secondly, officers and servants of the corporation At Common Law, an office was defined as a right to exercise a public or private employment and to have the fees thereof, whether public or private The term "office" embraces the ideas of tenure, duration, emoluments and duties It is the duty of an office and its nature that makes a public officer and not the extent of his authority An office must be distinguished from the mere employment The position of an officer appears to involve some discretion of authority and is to be distinguished from that of a mere servant whose only duty is to obey orders, though it is not always easy to draw the line In one view, they are all agents of the corporation, the extent of the powers varying in each case The relation that exists between a corporation and an employee or servant is a contractual one, while in the other case it is not so A municipal officer is one whose duties and functions relate exclusively to the local affairs of a municipality, he is one who holds for a time a permanent municipal position of trust and responsibility with definite municipal powers, duties and privileges, and these offices can only be created or abolished by statute In general, it may be stated that a person whose duties are fixed by statute or law or any bye-law is an officer Public officers are a public trust and the persons to be appointed shall be selected solely with a view to the public welfare A municipal corporation cannot create a public office without express legislative authority All the Acts creating municipal corporations in British India make distinct provision regarding the appointment of the various municipal officers, clerks and servants, regarding their qualifications, their pay and pension, leave and other allowances and provident funds, regarding their suspension, punishment, resignation, retirement and dismissal, and these provisions should be strictly followed" **Aiyangar's Law of Municipal Corporations in British India Second edition Pages 122-123**

Powers of general Supervision and Control —Under section 30(1) of the *B.M.B Act, 1925*, the municipal government vests in the municipality while s 30(2) provides that the executive powers vest in the chief officer subject to such restrictions or limitations as may be imposed by the Act and the rules thereunder The functions of a President are specified in s 31 Clause (b) lays down that he is to watch over the financial and executive administration of the municipality and to perform such executive functions as may be allotted to him by or under this Act Clause (c) states that he has to exercise supervision and control over the acts and proceedings of all officers and servants of the municipality in matters of executive administration and in matters concerning the Accounts and records of the municipality This clause read with 34(1) shows that a chief officer has to act under the supervision and control of the President Section 58 (b) empowers a municipality to make rules determining the executive functions to be performed by the President Under s 46 a municipality can delegate some of its own powers, duties and executive functions to the President Section 31 read with s 58(b) clearly shows that the legislature has drawn a distinction between the powers of control and supervision which a President can exercise over executive officers and his power to perform particular executive functions himself Apart from the functions

which are to be performed under rules made under that section and in emergent circumstances under cl (d) of s 31 it does not appear that a President can do executive act himself on behalf of the municipality Under s 30(2) that power vests in the Chief Officer and under other provisions of the Act or rules made under section 58(a) can be delegated to other officers The President cannot, therefore under s 31 exercise any executive powers vested in the Chief Officer or other executive authority of the municipality over their head except the powers which he can exercise under s 31 (d), sec 46 or under rules made under s 58(b) There are other provisions in the B M B Act, 1925, which lay down that certain orders or acts passed by the Chief Officer shall be subject to appeal or revision either to the municipality or the standing committee (C F Section 34(2)(a) proviso, 48(4), 50(2), 109, 118, 120, 136) As pointed out above under s 46 these powers can be delegated to a President But the powers of general control or supervision vested in a President will not by themselves give him authority to sit in judgment either in appeal or revision over the orders of a Chief Officer Powers of superintendence do not enable a controlling authority to set aside or interfere with the orders of the authority under its control It can certainly direct them to do their duty in accordance with the provisions of the Act or the rules thereunder or to abstain from doing anything in contravention of those provisions **(I L R 1 All 101)** If, therefore, the Chief Officer fails in any of his duties which are to be performed subject to supervision and control of the President, the latter can direct him to do his duty or can bring such failure to the notice of the municipality Except in the case provided for in s 31(d) and in cases where a President is empowered specifically to perform any executive functions under sec 46 or the rules made under s 58(b) the President has no power to sanction any expenditure or work **(R L A's opinion no 0 munis—Cities—7-30 dated the 12th June 1930 in G R G D no S 120 dated the 30th June 1930)**

Clause (d) —This clause deals with the powers of the president in an emergency Under this clause the president may order the execution of any work without the municipality's sanction The only requirements are that there should be an emergency and secondly the work should be necessary for the service or safety of the public He is also empowered to direct that the expense of such work shall be paid from the municipal fund This power should be sparingly used and the president should not issue any orders under this clause unless there is no time to aproach the municipality The proviso (a) requires that the president shall not exercise the emergent powers under this clause in regard to any work or act which the municipality has prohibited Under proviso (b) the president is required to report his action together with the reasons therefore to the standing committee at its next meeting

Functions of vice-president

32 It shall be the duty of the vice-president of a municipality—

(a) in the absence of the president and unless prevented by reasonable cause, to preside at the meetings of the municipality and he shall when so presiding exercise the same authority as is vested in the president under clause (a) of section 31,

(b) to exercise such of the powers and perform such of the duties of the president as the president may from time to time depute to him, and

(c) pending the election of a president, or during the absence of the president, to exercise the powers and perform the duties of the president.

Scope.—This section deals with the powers and duties of the vice-president

Clause (a) —This empowers the vice-president to preside at the meetings of the municipality when the president is absent When so presiding he has the same powers as the president For president's powers see notes under section 31 (a)

Clause (b) —This enables the president to depute to the vice-president some of his powers and duties and the vice-president to exercise and perform the powers and duties so deputed to him This clause is silent as to the powers and duties which could be deputed to the vice-president It therefore follows that the president may depute any of his powers and duties unless contrary is provided in the Act

Clause (c).—This enables the vice-president to automatically assume all the functions of a president in the latter's absence or pending his election

(6A) Special provisions for exercise of powers and performance of duties of president and vice-president in certain contingencies

32A If at any time it appears to the Collector that a situation has arisen whereby the president or the vice-president as the case may be is for any reason not likely to exercise and perform any of the powers and duties conferred and imposed on him or deputed to him by or under this Act, then notwithstanding anything contained in this Act or in the rules or regulations made thereunder, the Collector may by order in writing authorise any councillor, other than the president or the vice-president as the case may be, or the chief officer to exercise and perform all the powers and duties of the president or the vice-president as the case may be, for such period as the Collector may from time to time direct

Amendments —This section was inserted by Bom 19 of 1942, s 4 It remains in force for six months only i e up to 5th May 1943 Provided that the Provincial Government may by notification direct that it shall remain in force for a further period not exceeding six months at a time, but in no case beyond the 1st day of April 1944

(7) Appointment and powers of chief and other municipal officers

Appointment of Chief Officer Conditions of tenure

33. (1) There shall be a chief officer in every municipal borough who shall be a graduate of a recognised university or a qualified engineer appointed by the municipality

Bom III of 1901

Provided that a person permanently appointed as Chief Officer under the Bombay District Municipal Act, 1901, before the coming into operation of this Act or a person temporarily appointed as

chief officer under this Act for a period not exceeding two months in the aggregate in a year need not be a graduate of a recognised university or a qualified engineer

Provided further that, with the previous sanction of the Provincial Government, a person who is not a graduate of a recognised university or a qualified engineer may be appointed Chief Officer of a municipal borough with an annual income of less than two lacs of rupees

(2) No Chief Officer shall be removed from office, reduced or suspended unless by votes of at least two-thirds of the whole number of councillors, and no such officer shall be punishable with fine

Amendments —This section was substituted for the original section by Bombay 1 of 1926, section 3 and took effect from the date when the original Act came into operation The words or a person temporarily appointed as Chief Officer under this Act for a period not exceeding two months in the aggregate in a year' were inserted by Bombay 4 of 1930, section 4 The further proviso was added by the Bombay 7 of 1932, section 2 In the further proviso the words 'the Provincial Government' were substituted for the word 'Government' by the Adaptation of Indian Laws Order in Council

General —This section provides that every borough municipality shall have a Chief Officer He must be a graduate of a recognised university or a qualified engineer He is to be appointed by the municipality Thus he is a statutory Officer under the Act If a municipality has an annual income of less than two lacs of rupees it can appoint a person who does not possess any of the above qualifications as Chief Officer with the previous sanction of the Provincial Government An exception is also made in case of a temporary appointment of a person for a period of not more than two months in the aggregate in a year A Chief Officer who does not possess any of the above qualifications is permitted to continue as such if he was permanently appointed under the Bombay District Municipal Act, 1901 before this Act came into operation i e before 8th June 1926

A recognised university —means a university recognised by the Provincial Government

Qualified Engineer —Government have directed that a qualified engineer is one who is eligible for the Associate Membership of the Institution of Civil Mechanical or Electrical Engineers or of the Institution of Engineers (India), that is, who has passed the examination admitting him to such Associate Membership or another examination considered as exempting him from that examination, e g the B E of the Bombay University **(G R G D No 371 dated the 31st October 1927).**

Appointed by the municipality —These words do not go with the words 'qualified engineer' but with the words 'Chief Officer' It means that the appointment of the chief officer is to be made by the municipality, i e, to say, by a majority of votes in a properly convened general meeting for the purpose

Temporary appointment —Any acting, officiating or temporary appointment in the office of the chief officer is covered by this section and accordingly must be made by the municipality In the case of a temporary appointment not exceeding two months the requirement of the prescribed qualifications is dispensed with but the Act requires that the appointment must be made by the municipality

Provisions of s 33 apply to acting appointments also —The provisions of s 33 of the Bombay City Municipalities Act, 1925, are peremptory and must be complied with both as regards acting as well as permanent appointments **(R L A 's opinion no 2375 dated the 23rd July 1927 in G.R G D No 4892 dated the 1st August 1927)**

Before the coming into operation of this Act —means before 8th June 1926

A person temporarily appointed for a period not exceeding two months in the aggregate in a year —This means that the same person cannot hold a temporary appointment of Chief Officer for more than two months in all in a year, if he does not possess the requisite qualification But the difficulty could be obviated by appointment of another person in the temporary vacancy, or by obtaining Provincial Government's previous permission in case of a municipality having an annual income of less than two lacs of rupees

Sub-section (2) —Under this sub-section a Chief Officer cannot be fined at all He also cannot be removed from office, reduced or suspended except with the votes of at least 2/3rds of the whole number of councillors

Whole number of councillors —This does not mean the total number of councillors present at the meeting or holding office at the time It means the number of councillors determined by the Provincial Government under s 10(1)(a) Thus the expression will include absent councillors as well as vacant seats

Removed from office or reduced — This is a very wide term and includes not only reduction in pay but also reduction to some inferior post without reduction in salary This includes also a cut in the salary on the ground of economy or any ground whatsoever The Chief Officer of the Municipal Borough of Dhulia held the combined post of the Chief Officer and Engineer on a salary of Rs 350/- per month The Dhulia municipality split up the post in two separate posts, one of the Chief Officer on a salary of Rs 200/- and the other of an Engineer on a salary of Rs 150/- without two-third majority The person holding the combined post was invited to accept either of the two posts He refused to do so and his services were dispensed with. On a suit being brought for damages the municipality contended that this neither amounted to removal or reduction and that the municipality had done nothing more than mere splitting up of the post It was held that the effect of the municipal resolution was that he was removed from the office, held by him and relegated to an inferior position, i e, to say, if he had accepted the offer of one or other of the separated posts The language of the section is wide enough to cover a case like the present where the removal or reduction is not by way of punishment but is the result of a separation of offices formerly combined **Municipal Borough of Dhulia v. Ramchandra, 39 B L R 1269**

In determining whether a person has resigned or has been compelled to resign the correct test is to find whether the acts and conduct of the servant evince his intention no longer to be bound by the contract, or whether the

conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment In the latter case there is a wrongful dismissal and repudiation of the contract and the use of polite instead of peremptory language would not alter the conclusion **Abraham v The Karachi Municipality, A I.R 1929 Sind 69**

To relinquish an office is one thing and to be removed from it is another and quite a different thing Of his own motion a man may discontinue attendance and abandon his place But in order that he may be removed from his office there must be motion originating from without The verb is in the passive voice and this implies that the subject undergoes the operation of an agent other than himself The only agency by which the president of the municipality can be removed from office is the Local Government There is a vast difference between removal from office and ceasing to hold an office As a matter of that an officer in the present case, a municipal president, may resign his appointment and on such resignation being accepted he ceases to hold the office Where by the rules a member ceases to be a member of the municipality for failure to attend the meetings and thus ceasing to be a member and therefore ceasing to be a president stands more or less on the same footing as resigning an office and, cannot come within, the purview of the expression 'removed from office' in s 197 of the code (Criminal Procedure Code) **Hidayatullah and others v Emperor, A I R 1933 Sind 161**

Extent of Misconduct necessary for dismissal —There is no fixed rule of law defining the degree of misconduct which will justify dismissal from service Much will depend on the nature of the misconduct and the nature of the duties to be performed by the person dismissed **Abraham v The Karachi Municipality, A I R 1929 Sind 69**

Discharge—Dismissal —The word removed from office is the genus of which discharge and dismissal are the species Discharge may be affected without any fault on the part of the servant for reasons such as abolition of post, combination of posts, economic reasons, etc without any stain on the character of the servant whereas dismissal is due to faults or misconduct on the part of servant Both are to be regulated according to the provisions of the Act such as sections 33 and 34 of the B.M B Act, 1925 and the provisions of the rules that may be framed under s 58(c) of the B M B Act This difference between discharge and dismissal is pointed out in the **Gokak Municipality v Rajaram Shridhar, 42 B L R 886,** at Page 893 where Broomfield J observed "We think however that it is sufficiently clear from the proceedings that the plaintiff was not dismissed for misconduct under this rule (R 145) but that his services were dispensed with under rule 156" It is also pointed out in **Municipal Board, Shahjahanpur v. Sardar Sukha Singh, A I R 1937 All 264** a page 267 where their lordships observed "We now proceed to discuss the plaintiff's contention that the resolution discharging him was irregular in respect that he was not given an opportunity of being heard in his defence It is quite clear from a consideration of the document on record that the plaintiff was not dismissed His conduct was never in question As a matter of policy the Municipal Board decided to retain the services of an executive officer only They, therefore, dispensed with the services of the plaintiff They did not dismiss him"

Contract of Service —A mere resolution of the Board appointing a person does not dispense with the necessity of a contract in writing under s 65 (U P District Boards Act 10 of 1922) without which a Board is not bound in law **B Roshan Lal Gaswala v District Board Aligarh, A.I R 1935 All. 802.**

In the Municipal Borough of Dhulia v Ramchandra, 39, B.L.R 1269, discussing this point Broomfield J observed at page 1272 "The action for damages for wrongful dismissal is ordinarily based on contract i e a breach of the contract to employ But the plaintiff in the present case says nothing about contract The basis of the action according to the plaint is not the breach of a contract but the removal of the plaintiff contrary to the provisions of the Municipal Act It is true that the plaintiff describes his service as permanent service but it is clear both from the plaint and the correspondence prior to the suit that the plaintiff would not have considered that he had any grievance if the resolution removing him had been passed by the requisite majority of the councillors The learned trial judge held that the plaintiff was entitled to the relief claimed by reason of the breach of the provisions of the Act because his removal from office was therefore unlawful The conditions requisite for a contract binding on the Municipality are laid down in s 40 of the Act of 1901, the Bombay District Municipal Act III of 1901 which was in force when the plaintiff was appointed It is there provided that in case of certain contracts, including every contract the performance of which cannot be completed within a year must be in writing and must be signed by the President or Vice-President and two other councillors and sealed with the seal of the municipality The only writing here is the letter exhibit 26 addressed to him by the President"

The position however is different under the Bombay Municipal Boroughs Act, 1925 Under this Act only contracts for the execution of work or supply of materials or goods which would involve an expenditure of more than Rs 500 are required to be in writing and sealed with the common seal of the Municipality A contract of employment does not fall in this category and hence is not required to be in writing or sealed with the common seal of the Municipality Hence a resolution of appointment of the Board is enough to constitute a valid contract the terms of which will be those contained in the resolution itself and the provisions of the Municipal Act and the Rules made thereunder regulating the relations between the Municipality and its officers and servants

Power to dismiss does not include right to publish unfavourable opinion:— The power to dismiss a servant, which is exercisable conditionally by all employers, does not extend to or include the right to publish statements of the principal's unfavourable opinion as to the dismissed agent's character **Jehangir M Cursetji v Secretary of State for India, 6 B L R 131**

Wrongful dismissal —As regards Government servants s 96B of the Government of India Act, 1919 in express terms states that office is held during pleasure and it has been held by their lordships of the Privy Council in **R. T. Rangachari v. The Secretary of State for India in Council, 39 B L.R 688** and in **R Venkatarao v. The Secretary of State for India in Council, 39 B.L.R 699,** that there is no right of action against Government in a Court of law by a servant of the Crown for his dismissal from service whether rightful or wrongful or for the breach of any of the rules made thereunder on the part of Government His proper remedy in such a case is by administrative process and not by a law suit The reason was that in view of the provision in the

Act itself that the service was at pleasure the rules in the case of Government servants do not form part of the contract of employment as that would be inconsistent with the provision in the statute itself that the service was at pleasure The rules were therefore held to be merely for the guidance of the authorities Further, the rules made detailed provision for administrative process by way of appeal to the higher authorities and the statute itself made the Secretary of State the supreme authority in the matter and thus by creating a special forum for redress of the grievance ousted the jurisdiction of the civil courts Similar provision that the service of Government servants is at the pleasure of the Crown is also made in s 240 (1) of the Government of India Act, 1935 and hence the position of Government servants is the same under this Act also

However it has been held under both the Acts that if the dismissal is bad in its origin or void or inoperative being in contravention of a provision in the statute itself the Government servant has a right of action in a court of law and can sue for a declaration that the order of dismissal is ultra vires and inoperative, that he still continues in his post and for arrears of salary from the date of ultra vires order of dismissal to the date of valid order of dismissal in future See **R T Rangachari v The Secretary of State for India in Council 39 B.L.R 688, Suraj Narain Anand v The North-West Frontier Province, A I R 1942 F C 3 and A I R 1942 F C 47, and Abdul Vakil v The Secretary of State, A I R 1943 Oudh 368**

There is no provision in the Bombay District Municipal Act, 1901, the Bombay Municipal Boroughs Act, 1925 or the Bombay Local Boards Act, 1923 that the service of the employee is at the pleasure of the local bodies governed by these Acts and hence an employee of any of these local bodies has a right of action in a court of law in case his dismissal is wrongful or in breach of any of the provisions of the statute or the rules made thereunder or in breach of any special contract of employment between him and the local body In his case the rules regulating the relations between him and the local body and forming conditions of service form part of the contract of employment and stand on the same footing as provisions of the statute itself He has also a cause of action if his dismissal is in violation of ordinary principles of natural justice See **The Municipal Borough of Dhulia v Ramchandra Bapuji Kale, 39 B L.R 1269, Gokak Municipality v Rajaram Shridhar Kulkarni, 42 B L.R 886, Abraham v The Karachi Municipality, A I R 1929 Sind 69 and A I R 1933 Sind 93(2), Manekji v The Municipal Commissioner of Bombay, 32 B L R 463, Padmakant v The Ahmedabad Municipality 44 B L R 814, and Haji Shafi Muhammad Sadaturio v Municipal School Board, Shahdadpur, A I R 1943 Sind 98** However, in case of a Government servant whose services were transferred under the Bombay Primary Education Act, 1923 to the local authority it was held that by s 8(2) of the Bombay Primary Education Act, 1923 the local authority had all the powers of the Government including the right to dismiss at pleasure and hence the servant had no right of action in a court of law against the School Board for retiring him prematurely **See The District School Board of North Kanara v Parmeshwar Gattu Naik, 45 B L R 480**

In **Abraham v The Karachi Municipality, A I R 1929 Sind 69,** it was held, that, A statutory power to appoint fine, reduce, suspend or dismiss officers and servants is vested in the Karachi Municipality by reason of s 184 and 46 (e) But the provisions of R 90 of the Rules framed by the Karachi Municipality

constitute a statutory restriction or limitation to the power given by Statute to the Municipality to dismiss their servants R 90 is manifestly for the protection and benefit of officers and servants of the Municipality and the existence of such a rule is inconsistent with the position that a servant of the Karachi Municipality is a servant who may be dismissed at pleasure at any time without notice and without reason In a suit for damages for wrongful dismissal brought by an officer or servant of the Karachi Municipality against the Municipality, once the Court is satisfied that the plaintiff's dismissal has been in accordance with the rules and by-laws of the Municipality, it has no jurisdiction to probe any further into the question If, however, the Court finds that the plaintiff's dismissal had been wanton and in utter disregard of the rules and by-laws of the Municipality, the Municipality would forfeit the protection and privileges afforded to them by Statute and the plaintiff would be entitled to succeed as in an ordinary suit between master and servant for wrongful dismissal

The above case went in appeal and the judgment of the appeal court is reported at **A I R 1933 Smd 93 (2)** wherein it was held that where an employee in Municipal service, who has been dismissed by the Municipality sues it for damages on the ground that he was dismissed without notice given or cause shown, then he would have no cause of action The Municipality is not required by their statute to give notice or show cause But if he alleges that the Municipality in dismissing him has not conformed to its own rules, it is an allegation which discloses a cause of action and which the Court has jurisdiction to consider and decide Where the statute vests a discretion in the Municipality the Court must be satisfied that, that discretion has been exercised according to the limitations imposed by the statute But the Municipality is not under any obligation to satisfy the Court that their decision was reasonable and the Court is not entitled to consider whether the said decision was justified Where jurisdiction to decide a question has been conferred by statute upon what may be called a "Domestic Tribunal" that Tribunal has jurisdiction to decide rightly or to decide wrongly The decision of such a Tribunal must be final If it were found that persons who have a power of this description have in the course of their inquiry disregarded the procedure by the statute incumbent upon them, then the Court might interfere But if they have followed that procedure correctly Court has no power to interfere and must accept their decision Per Mehta, A J C —Where a person gets himself engaged in the service of a Municipality he must be deemed to have agreed to abide by the law under which the Municipality had to function Where a party to a contract agrees that in case of any dispute arising out of the contract he will abide by the decision of the other party, he cannot afterwards be allowed to say that such decision is not binding upon him, being a decision by a person in his own cause, unless it can be shown to be arbitrary or otherwise unjust Hence a person in Municipal service cannot insist on any limitations to the power of the Municipality to dismiss him not provided for in that behalf by the Act or rules having the force of law

In The Municipal Borough of Dhulia v Ramchandra Bapuji Kale, 39 B.L.R 1269, Section 33 of the Bombay Municipal Boroughs Act, 1925, (corresponding with s 182 of the Bombay District Municipal Act, 1901) provides, inter alia, that no Chief Officer of a Municipality shall be removed from office, reduced or suspended unless by the votes of at least two-thirds of the whole number of councillors The plaintiff was the Chief Officer as well as Engineer of the

defendant Municipality drawing a salary of Rs 350 per month and serving from April 17, 1922 On April 12, 1929, the Municipality resolved by a majority of fifteen to eleven (the total number of councillors being thirty-one) to separate the two offices of the Chief Officer and Engineer and offer them to two persons on lower salaries On July 10, 1929, the President of the Municipality required the plaintiff to elect one of the two posts he would like to hold, but the plaintiff gave no reply The President then gave a notice to the plaintiff on September 23, 1929, that his services would be dispensed with from December 31, 1929, or any subsequent date Eventually his services were dispensed with from February 1, 1930 The plaintiff was then fifty-three years of age, and under the rules of the Municipality he was entitled to serve till he completed fifty-five years (r 188) At the suit of the plaintiff the trial Court held that the resolution of the Municipality dated April 12, 1929, was unlawful and unenforceable and that the plaintiff was wrongfully dismissed, and awarded to the plaintiff as damages the pay he would have drawn had he served for the full period The defendant Municipality having appealed — Held, (1) that the resolution dated April 12, 1929, constituted a breach of the provisions of s 33 of the Bombay Municipal Boroughs Act because its effect undoubtedly was that the plaintiff was removed from the office held by him and relegated to an inferior position if he had accepted the offer made to him, (2) that s 182 of the Act of 1901 and s 33 of the Act of 1925 took the case out of the general rule that a Crown servant might be dismissed at pleasure, even if it did apply to the plaintiff, and prevented his removal from office except in accordance with the provisions of those sections, (3) that the contravention of the statutory provision contained in s 33 gave the plaintiff a right of action, (4) that the plaintiff was, therefore, entitled to recover damages from the defendant for the injury sustained by him by reason of the non-compliance with the statutory provision contained in s 33

In The Gokak Municipality v Rajaram Shridhar Kulkarni, 42 B L.R 886 it was held that, in the case of the discharge or dismissal of an employee of a local body a cause of action for damages for wrongful dismissal arises when there has been a breach of any provision, whether contained in a statute or rule made under the statute, which may fairly be regarded as forming one of the conditions of service, and affecting the tenure of office of the employee

In The District School Board of North Kanara v Parameshwar Gattu Naik 45 B L.R 480, it was held that, the general rule, which is expressly recognised by s 240 of the Government of India Act of 1935, as it was by s 96 of the Act of 1919 and which exists independently of statute, is that Government servants hold office during His Majesty's pleasure which means in effect at the pleasure of Government This implies the power to dismiss and includes also the power to require a Government servant to retire at any time on pension This rule does not apply in the case of employees of local bodies e g a municipality In the case of the discharge or dismissal of an employee of a local body, a cause of action for damages for wrongful dismissal arises when there has been a breach of any provision, whether contained in a statute or rule made under the statute, which may fairly be regarded as forming one of the conditions of service and affecting the tenure of office of the employee However, under *s 8(2) of the Bombay Primary Education Act, 1923, the local authority possesses* all the power of Government including the power to terminate the services of an employee at pleasure, subject only to the recognised statutory exceptions

Hence where a school board acting under the powers delegated to it by the local authority and with the sanction of the authority compulsorily retires an employee before he has reached the age of 55, the latter has no right of action against the board Rule 55(2) of the Bombay Primary Education Rules made under section 27 of the Bombay Primary Education Act, 1923 does not give a right of service till age of 55 or imply that an employee cannot be dismissed or made to retire before that age except for misconduct

In **Manekji v The Municipal Commissioner of Bombay, 32 B.L.R. 463,** it was held, that under s 83 of the City of Bombay Municipal Act, 1888, the Standing Committee of Corporation is constituted the domestic tribunal to which the right to appoint or dismiss its servants is delegated, and the Act does not retain the ordinary law regulating the dismissal of a servant by his master The matter is not left open to be reviewed in a Court of law But there are limitations on the exercise of the statutory powers of the domestic judge, viz, (1) there must be evidence before the domestic Judge on which he can reasonably find that the ground of dismissal stated in the statute is in fact proved before him, (2) the enquiry before the domestic judge must be conducted in accordance with the principles of natural justice and in particular the accused must be given an opportunity of being heard in his own defence and of cross-examining the opposing witnesses and also of calling his own evidence, (3) the decision must not be based on purely capricious grounds No express power of appeal to the Courts is given from an order of dismissal under s 83 of the City of Bombay Municipal Act, and no such power can be implied on the true construction of the Act, provided the above limitations are complied with

In **Padmakant Motilal Vora v The Ahmedabad Municipality 44 B.L.R. 814,** it was held, that, if a master chooses not to terminate a contract of service of his servant notwithstanding dereliction of duty on his part entitling the master to dismiss the servant, the master cannot by merely suspending the servant refuse to pay the wages of the servant during the period of the suspension treating the contract as a continuing contract The reason of this rule is that there is no implied power in the employer to punish a servant by suspension Where, however, the master has the power of suspension which he exercises upon a supposed misconduct of the servant, such suspension will inevitably mean the suspension of the entire contract and therefore the obligations on both sides Where, therefore, the suspension of a municipal employee is rightly ordered and within the powers of the Municipality and its officers, such suspension involves the suspension of payment of wages to the employee, during the period of suspension The action of a Municipality in dismissing its servants under the authority delegated under the Municipal Act is not open to review in a Court of Law, provided that the Municipality has reasonably acted within its powers, that is, the grounds of dismissal are proved, that the inquiry against the servant is conducted in accordance with the principles of natural justice, and that the servant is given reasonable opportunity of being heard in his defence Whether that opportunity was given or not would depend upon the circumstances and facts proved It is, however, not open to a party to contend that the evidence led did not warrant a drastic action like dismissal, for upon that point the Municipality is the sole judge

In **Haji Shafi Muhammad Sadatorio v Municipal School Board, Shahdadpur, A.I.R. 1943 Sind 98,** it was held, that under R 34(6) the School Board has the power to dismiss a teacher for serious misconduct or gross inefficiency and after

full enquiry And the Court cannot substitute its own judgment and discretion for that of the School Board The phrase "after a full enquiry" merely means that the enquiry must be conducted according to the principles of natural justice, the accused must know the charge against him, and must have full and reasonable opportunity to meet it The Court cannot enquire into details and import to the jurisdiction of a domestic tribunal, technicalities which have no necessary place If the accused had ample opportunity to meet the charges against him, and if these were held proved by the School Board the School Board would be justified in their conclusion that the accused was guilty of a serious misconduct

In Roshan Lal Geswala v District Board, Aligarh, A I.R 1935 All 802, it was held that a District Board servant is under the general disability of other public servants in that he holds his office during pleasure, and he cannot sue the District Board or the Secretary of State in a Court of law for wrongful dismissal, nor can he sue for declaration that a resolution removing him is null and void as such a declaration would not come under s 42, Specific Relief Act Dissenting from this view, Broomfield J in **The Municipal Borough of Dhulia v Ramchandra, 39 B L.R 1269,** observed Then the question arises whether this contravention of a statutory provision gives plaintiff a right of action Mr Thakor says no, and for this proposition he mainly relies on a case recently decided by the Allahabad High Court, **Roshan Lal Geswala v. District Board, Aligarh** The circumstances there were in many respects very similar to those of the present case A District Board had passed a resolution abolishing the posts of Secretary and Engineer and creating a new combined post The services of the Secretary were dispensed with and the Engineer was appointed to the new post The resolution was not passed by the majority of votes required by s 71 of the local Act in question, which is similar to s 33 of our Bombay Act of 1925 It provides 'A board may by special resolution punish or dismiss its Secretary, provided (a) that such resolution is passed by a vote of not less than two-thirds of the total number of members of the Board for the time being, or (b) that it is passed by a vote of not less than one half of the total number of such members and is sanctioned by the local Government' A suit by the ex-Secretary against the District Board and the Secretary of State for a declaration that the resolution was void and his dismissal wrongful and for damages was held not to be maintainable The view taken by the Court was that a District Board Servant is under the general disability of other public servants in that he holds his office during pleasure and he cannot sue the District Board or the Secretary of State in a Court of law for wrongful dismissal Any irregularities or non-compliance with rules in connection with the order of dismissal of a public servant whose office is terminable at pleasure would not, it was held give him a cause of action or right of suit in a Court of Law, either for damages or specific performance or an injunction The only remedy would be to appeal to the local Government under a provision of the local Act in question allowing such an appeal Now there is no doubt as to the position of Crown servants The general rule applicable to them is that they hold office during His Majesty's pleasure and may be dismissed without notice and without reason assigned without having any cause of action in the Courts

But with all deference to the learned Judges who decided **Roshan Lal v District Board, Aligarh,** I am by no means satisfied that this general rule applies in its entirety to other public servants not in the employment of the Crown Even if the employees of local bodies were to be regarded as being

on the same footing as Crown servants, the general rule that a Crown servant may be dismissed at pleasure is, as I have said, subject to statutory exceptions There must be at any rate this difference between the position of servants of the Crown and other public servants that it is not necessary in the case of the latter that the exception to the general rule should be contained in the Government of India Act It is sufficient if there is any provision in the statute governing the appointment of the officer in question which takes the case out of the rule In my opinion s 182 of the Act of 1901 and s 33 of the Act of 1925, would take this case out of the general rule even if it did apply to the plaintiff, and would prevent him being removed from office except in accordance with the provisions of those sections As far as I can see the cases of **Wright v Zetland (Marquis)** and **Shenton v Smith** do not support the proposition based upon them in **Roshan Lal v District Board, Aligarh**, that the employee of a local body has no right of action in case he is dismissed from office or removed from office in contravention of provisions such as those in s 33 of Act XVIII of 1925 It cannot be denied, I think, that the provisions in question are binding on the Municipality The argument of the learned counsel for the appellant in this case that no suit lies in case of breach of the provisions would really make them almost a dead letter No right of appeal is provided under our Municipal Acts such as is provided in the Act dealt with in the Allahabad case There is nothing but s 214 of Act XVIII of 1925 which gives the Collector power to suspend the execution of municipal orders or resolutions, and this provision is one which is not likely to be put in force in favour of an individual The removal of plaintiff contrary to the provisions of s 33 must be regarded as an infringement of the plaintiff's right to hold office unless or until he is lawfully removed" In the same case Wasoodev J observed "The learned counsel for the Municipality has however contended that the Municipality had a right to remove the plaintiff without assigning cause or without observing the procedure prescribed by s 33 inasmuch as the plaintiff held his office at the pleasure of the Municipality As an authority in support of that statement we were referred to **Roshan Lal Geswala v District Board, Aligarh** My learned brother has examined that case in great detail At first sight that case seems to have been decided upon the special provisions of the District Boards Act, 1922, specially ss 71 and 82 The latter provided a remedy by way of appeal to the Local Government against any wrongful act of the Board There is no such remedy provided by the District Municipal Act There are, however, some common features in this case and the case of **Roshan Lal Geswala v District Board, Aligarh** The servants of both the local bodies in question have been statutorily described as public servants within the meaning of the definition of that term in the Indian Penal Code Upon consideration of that description and the authorities such as **Shenton v. Smith, Wright v Zetland (Marquis), and Notley v. London County Council**, Mr Justice Bennet held that the principles governing public servants of the Crown applied to servants of local bodies Whatever justification there may be on grounds of public policy for bringing the servants of local bodies within the statutory definition of public servants, with extreme respect it seems to me difficult to conclude from that circumstance and the authorities that the local bodies enjoy all the prerogatives of the Sovereign governing his relations with his servants The decisions in cases between the Crown and its servants cannot be regarded as authority in my opinion for disregarding the statutory procedure if any for the dismissal of servants of public bodies It is

clear that the provisions of s 182 and s 33 of Bombay Acts of 1901 and 1925, respectively, were enacted with the object of providing security for the holder of the office against summary dismissal by the ordinary vote of the majority *That rule is conductive to stability in the higher grades of municipal service* and is essentially for public good Any action, therefore, of the Municipality taken in violation of that rule must be regarded as ultra vires Any other construction, securing immunity from action taken for injury caused by reason of the disregard of those provisions, would be frustrating the object of the Legislature in enacting the safeguard Undoubtedly, every resolution passed by a majority of votes is an expression of the will of the public body passing it But when the law lays down that a resolution upon a particular matter must contain the expression of the pleasure or will of a stated number of members of the Corporation, the failure to comply with the provisions of the law will render the expression nugatory and of no consequence Consequently, in my opinion, the action taken upon that resolution, which was not in accordance with the provisions of s 33 of the Municipal Act of 1925, was wrong and irregular The rule contained in s 182 of the Act of 1901 and s 33 of the Act of 1925 created, in the view I take, obviously for the protection of the Chief Officer indicates in clear language the terms of his employment It undoubtedly gives him the right to remain in service unless and until the pleasure of the Municipality in regard to his removal is regularly and legally expressed Upon the principal **ubi jus ibi remedium** the servant must have the means to maintain that right if an injury were caused to him by disregard of that rule Otherwise it would be a vain thing to have a safeguard without the means of enforcing it I do not see the force of the argument, therefore, that no action lies against the Municipality even if it violates the rules of procedure laid down by the law of its incorporation"

In Municipal Board, Shahjahanpur v Sardar Sukha Singh, A.I.R 1937 All. 264, it was held that section 71 by implication empowers a Municipal Board to discharge servant whose services are no longer required Apart altogether from s 81, a Municipal Board like any other employer of labour is entitled to discharge servants it no longer desires to employ Though specific provision is made, in the Act for the dismissal or punishment of a servant, there is no such provision for the discharge of an employee whose services are no longer required Without special statutory provision however a Municipal Board is clearly entitled to perform all the acts necessary in the conduct of its business The discharge of servants whose office has been abolished as a matter of policy is clearly a step which a Municipal Board is entitled to take in the conduct of its business Court has no jurisdiction to force an employer of labour to retain the services of a servant he no longer wishes to employ Every employer is entitled to discharge a servant for whose services he has no further need If his discharge amounts in the circumstances to wrongful dismissal then no doubt the employee is entitled to damages He is not however entitled to a declaration that he is still in the employment of his master, nor is he entitled to claim the continuance of his salary from his employer A Secretary of a Municipal Board was discharged from his services by a special resolution of its members and he appealed to the Commissioner against such resolution On dismissal of appeal he filed a suit for declaration that he was entitled for continuance of his service and that the resolution dispensing with his services was void Held that he could not maintain such declaratory suit but he could file a suit for damages for wrongful dismissal if there be any

In **Prabhu Lal Upadhya v District Board, Agra, A I R 1938 All 276,** it was held that the officers of District Boards are public officials and are in a sense Government servants Ordinarily a Government servant holds his office at the will and pleasure of the Crown and although there may be rules prescribing formalities before the dismissal of such servants, yet a failure to comply with such rules and formalities does not give a Government servant a cause of action Where however the statute itself places limitation upon the Crown's right to dismiss a servant and places restriction upon the Crown's power of dismissal, the provisions of the statute must be strictly complied with, and a dismissal, which is not in strict accordance with the precise terms of the statute will give the servant a cause of action Rule 3 in ch 3 of the Rules framed under s 172, U P District Boards Act, is a rule for the guidance of the authority concerned i e District Board of Agra, and although the terms of the rule ought to be strictly complied with, yet a failure to do so will not give a cause of action to a servant dismissed from the service of the Board But on the other hand the failure to comply with the terms of U P District Boards Act will give the dismissed servant a cause of action Section 71, District Boards Act, expressly provides that a Secretary can be dismissed only by a special resolution passed by a vote of not less than two-thirds of the total number of members of the Board for time being This is a term of the statute itself and must be complied with when the Secretary of the Board is sought to be dismissed When therefore a secretary of the Board is dismissed from service by the Board without a vote of not less than two-thirds of the total number of members of the Board upon a special resolution, as required by s 71, the Secretary has a cause of action against the Board and is entitled to sue it for damages for his illegal and wrongful dismissal The Secretary is not however entitled to a declaration that the resolution purporting to dismiss him was null and void or to an injunction restraining the Board from giving effect to the resolution The duties of the plaintiff as Secretary of the Board being of a personal and confidential character, it would be impossible for any court to ensure that, in the event of an injunction being granted its terms would be carried out by the parties The case of the plaintiff falls under Ss 56 and 21, Specific Relief Act and no injunction can be granted As no injunction can be granted to the plaintiff the declaration sought for by him would, even if granted not be effective Moreover, according to s 42 Specific Relief Act, the plaintiff not being a person entitled to any legal character or a right in any property, his case is not one in which a declaration under S 42 can be granted The granting of declaration being discretionary, even if the plaintiff be legally entitled to the declaration claimed by him, the Court would not grant it as mere granting of declaration without injunction would not be an effective remedy The plaintiff is all the more disentitled to a relief by way of declaration on grounds of equity, when his own conduct in the matter has not been entirely free from blame So also the Court has no jurisdiction to pass an order of reinstatement of the plaintiff in his appointment as it would only be done by granting the declaration and injunction prayed for The only relief to which the plaintiff is entitled is relief by way of damages, and to such damages only as would compensate him for the actual loss caused to him by his wrongful dismissal He is not entitled to any damages for the trouble and inconvenience caused to him in having to bring the suit and conduct it In assessing the damages, the court is entitled to take into consideration all that happened and

is likely to happen to increase or mitigate the plaintiff's loss and a salary for three months is an adequate compensation to be awarded in such case

Both the above cases of **A I R 1937 All 264** and **A I R 1938 All 276** were referred to and distinguished by Broomfield J in the **Gokak Municipality v Rajaram Shridhar Kulkarni,42 B L R 886** as follows "Reliance was placed on a decision of the Allahabad High Court, **Municipal Board of Shahjahanpur v Sukha Singh A I R 1937 All 264** That was a case in which the Secretary of a Municipality brought an action for a declaration that he had not been legally dismissed and that he was still the servant of the Board and entitled to continue drawing his salary It was found that there had been certain irregularities in the proceedings because three of the members of the Board had not received timely notice of the meeting at which the services of the Secretary were dispensed with It was held by the High Court that failure by the Municipality to observe strictly the rules and regulations in the conduct of its business did not afford the plaintiff a ground for maintaining his suit This case, however, is no authority for the proposition that a breach of the rules would not have entitled the plaintiff to bring a suit for damages for wrongful dismissal That point was expressly left open in the judgment (see page 442 of the report) I may note that the Court also declined to make any pronouncement one way or the other on the question whether the plaintiff in that case, who was the Secretary of a Municipality, stood in the same position as civil servant i e a servant of the Crown in respect of liability to be dismissed at pleasure with no right to maintain a suit for damages

The question of the right of a dismissed servant of a local authority to sue for damages was also considered in **Prabhu Lal Upadhya v District Board, Agra, A.I.R. 1938 All 276** The facts there were that the Secretary of a District Board was dismissed contrary to the provisions of s 71 of the local District Boards Act which provided that the Secretary could only be dismissed by a special resolution passed by a vote of not less than two-thirds of the total number of members of the Board The dismissal was also alleged to be contrary to a rule made under the Act which provided that no officer or servant should be dismissed without a reasonable opportunity being given him of being heard in his own defence It was held by the High Court that the breach of the statutory provision gave a cause of action for damages for wrongful dismissal but that the breach of the rule would give no cause of action The reason for the distinction made appears to be this The general rule is that servants of the Crown hold office at pleasure But where the statute under which they are appointed itself places a limitation upon the Crown's right to dismiss and contains provisions for the protection and benefit of an officer, a breach of such a statutory provision gives a cause of action On the other hand a mere non-compliance with rules does not give a cause of action because such rules are framed for the guidance of officers of the Government or the public authority and can be changed from time to time No doubt this case does afford some support for the argument put forward by Mr Shah in this case But it is to be observed that the learned Judges who decided the case treated the Secretary of the District Local Board as though he was on the same footing as a servant of the Crown and therefore prima facie subject to the rule that servants of the Crown hold office at the pleasure of the Crown In **Municipal Borough of Dhulia v Ramchandra Bapuji,** it was pointed out by this court, after a discussion of various authorities in particular certain English cases that it may well be doubted whether the rule in question applies to the em-

ployees of local bodies who are not properly speaking servants of the Crown at all I may point out that the Bombay District Municipal Act of 1901 itself differentiates between servants of the Government and Municipal servants, for instance in ss 10 and 15 In **Municipal Borough of Dhulia v Ramchandra Bapuji**, we held in effect that the conditions of service of the employees of local bodies must be ascertained from the special laws under which they were appointed It is true as Mr Shah pointed out that in the particular case we were dealing with the breach of a statutory provision not the breach of a rule But we are not prepared to accept Mr Shah's argument that the case can be distinguished on that ground In the case of Crown servants the prerogative of the Crown comes into play It is quite reasonable to say in such a case that the general rule is that Crown servants can be dismissed at pleasure without giving a cause of action, and if any one alleges an exception to that rule, he must show that there is an exception in a statute which is binding on the Crown But if there is no general overriding principle of liability to dismissal at pleasure, if you have to look to the special law to ascertain what the conditions of service are, it is difficult to see why a distinction should be made between a statutory provision and a provision made by a statutory rule Of course if there has merely been a breach of some rule dealing with matters of formality or procedure, it is reasonable to hold that the breach gives no cause of action against the local body That was the case in **Municipal Board of Shahjahanpur v Sukha Singh** But in the case of a rule like r 156 with which we are concerned, which clearly affects the conditions of service of Municipal employees, on what principle can one say that it is immaterial whether the Municipality observes the rule or not? Rule 156 as well as the other rules which have been referred to in the argument have been made under s 46 of the Act of 1901 by which the Municipality has power to make rules not inconsistent with the Act, among other things for the guidance of their officers and servants and determining the mode and conditions of appointing, punishing or dismissing any officer or servant Why should one say that this rule which purports to confer important rights on the employees of the Municipality is merely framed for the guidance of the officers of the Municipality or of the Municipality itself? It is worthy of note that the Municipality itself relied on this rule as the main defence to the suit It hardly lies in the mouth of the appellant therefore to argue that a breach of the rule would not give a discharged employee a cause of action In our view in the case of the discharge or dismissal of an employee of a local body a cause of action for damages for wrongful dismissal arises when there has been a breach of any provision, whether contained in a statute or rule made under the statute which may fairly be regarded as forming one of the conditions of service, and affecting the tenure of office of the employee concerned In the present case, therefore, if we had held that there had been a breach of this r 156, we should have held that the plaintiff had a cause of action for damages" Rule 156 referred to was in the following terms 'Every Municipal officer or servant is liable to discharge at one month's notice, but except with the concurrence of the President and the sanction of the Municipality, no officer or servant whose salary exceeds Rs 10 shall be discharged before he has reached the age of fifty-five Explanation Discharge does not include dismissal' As shown above the Allahabad cases of **A I R 1935 All 802, A I R 1937 All 264** and **A I.R 1938 All 276** have been dissented from by the Bombay High Court in important respects in **39 B.L.R. 1269** and **42 B.L.R 886** and the view taken in these Allahabad cases that even if

the resolution of dismissal was ultra vires the employee was not entitled to a declaration that the order of dismissal was ultra vires, that he continues in his post and for arrears of salary has been over-ruled by the Federal Court in **Suraj Naram Anand v The North-West Frontier Province, A I R 1942 F.C 1** and **A.I R 1942 F C 47** wherein their lordships of the Federal Court have held that the proper relief in such cases is a declaration that the order of dismissal is ultra vires, that the employee still continues in his post and for arrears of salary from the date of such ultra vires order of dismissal to the date of a valid order of discharge or dismissal in future

Dismissal in contravention of a provision in the statute was held in the case of a servant of a municipality to be ultra vires in **The Municipal Borough of Dhulia v Ramchandra Bapuji Kale, 39 B L R 1269,** wherein Broomfield J observed at page 1277 "The removal of plaintiff contrary to the provisions of s 33 must be regarded as an infringement of his right to hold office unless or until he is lawfully removed," Wasoodev J observed at page 1281 "Any action therefore, of the Municipality taken in violation of that rule (s 33 of the B M B Act) must be regarded as ultra vires" It was also held in **The Gokak Municipality v Rajaram Shridhar Kulkarni, 42 B L R 886,** that the rules stand on the same footing as a provision in the statute itself The observations of Broomfield J on this point are at page 891 as follows "But if there is no general over-riding principle of liability to dismissal at pleasure, if you have to look to the special laws to ascertain what the conditions of the service are, it is difficult to see why a distinction should be made between a statutory provision and a provision made by a statutory rule" It therefore follows that in case of employees of local bodies dismissal in breach of a provision whether contained in the statute itself or in the rules framed under the statute is ultra vires and an employee so dismissed has a right to sue for a declaration that the resolution or order of dismissal is ultra vires, that he still continues in his post and for arrears of salary from the date of such ultra vires resolution or order of dismissal to the date of a valid resolution or order of dismissal in future If the dismissal is not jutified on merits or where grounds of dismissal are not proved the dismissal is not rightful but is wrongful and in such a case the employee will have a right to sue for damages for wrongful dismissal

In short the position is therefore as follows A Government servant has no right of suit in case his dismissal is wrongful or in breach of rules, but in case his dismissal is in breach of a provision in the statute it is ultra vires and he can sue for a declaration that the order of dismissal is ultra vires, that he continues in his post and for arrears of salary A servant of a local body has a right of suit in case his dismissal is wrongful for damages for wrongful dismissal but where his dismissal is in breach of a provision whether contained in the statute itself or in the rules framed under the statute his dismissal is ultra vires and he has a right to sue for a declaration that the order or resolution of dismissal is ultra vires, that he still continues in his post and for arrears of salary Thus there is a very important difference between the position of a Government servant and that of a servant of a local body

Measure of damages —In the Municipal Borough of Dhulia v. Ramchandra Bapuji Kale, 39 B.L.R 1269, it was held that the effect of rule 188 and s 182, B.D.M Act, 1901 (equivalent to s 33 B M B Act, 1925) read together seemed to be that the Chief Officer was entitled like any other municipal officer or servant to one month's notice before discharge, that, therefore, the only damages which the plaintiff could claim were for the period of notice Discussing

this point Broomfield J in the course of the judgment observed "the plaintiff's claim to salary upto the time of his reaching the age of fifty-five is based upon r 188 which is in these terms 'Subject to s 182 of the Act every Municipal officer or servant is liable to discharge at one month's notice, but, except with the concurrence of the President and the sanction of the Municipality, no officer or servant whose salary exceeds Rs 15 shall be discharged before he has reached the age of 55' Section 182 of the Act of 1901 is the section to which I have frequently referred providing that the Chief Officer shall not be removed from office except by a certain majority of the whole number of councillors Mr Thakor suggested that as r 188 is made subject to s 182 it follows that the provisions as to one month's notice does not apply in the case of a Chief Officer I cannot accept that contention The rules under s 46 must not of course be inconsistent with the Act, but the rule to the effect that an officer or servant is liable to discharge at one month's notice is not in any way inconsistent with the provision in s 182 that the Chief Officer is not removable from office unless by a certain majority of votes The effect of r 188 and s 182 read together seems to me to be that a Chief Officer is entitled like any other municipal officer or servant to one month's notice before discharge But his position differs from that of other municipal officers and servants in this that he cannot be discharged except in the manner provided by s 182 or s 33 of the present act But in view of the provisions of these ss 182 and 33 it is impossible in my opinion to accept the plaintiff s claim, which has been allowed by the learned trial Judge, that he has a right of serving until he reaches the age of fifty-five It is not a case of service during good behaviour It is a case of service at the will of the Municipality, the only limitation being that the will of the Municipality must be expressed in the manner provided by s 182 and s 33, and unless the will of the Municipality is expressed in that manner removal from office is unlawful The learned Advocate General suggested that having regard to the special facts of this case the Court might assume that the plaintiff would not have been removed, apart, that is to say, from the separation of the two offices, and would have been allowed to complete his service upto the age of fifty-five years In my opinion, however, we cannot make any assumption of that kind in his favour As it is not to be regarded as a case of service during good behaviour, and as there was nothing to prevent the plaintiff being removed from office at any time by a valid resolution under s 33, the only damages which he can claim are wages for the period of notice, that is to say, Rs 350" The learned Judge has observed that no assumption can be made in plaintiff's favour that he would not be removed, apart, that is to say, from the separation of the two offices, and would have been allowed to complete his services up to the age of 55 years At the same time the learned judge has based the damages on the assumption that the plaintiff would be validly removed in future by valid resolution and was therefore entitled to damages only for the period of notice of one month provided in rule 188 It is respectfully submitted that this view is not correct It ignores the fact that up to the date of decision of the case no valid resolution of discharge had been passed and no assumption can be made that such a resolution is passed or that in future the municipality would be able to pass a valid resolution of discharge in conformity with the provisions of rule 188 and s 182 This was a case of discharge in contravention of a provision in the statute requiring two-third majority and hence the resolution was ultra vires and the proper relief in this case would have been a declaration that the

plaintiff's discharge was ultra vires, that he continued in his post and for arrears of salary

In the Gokak Municipality v Rajaram Shridhar Kulkarni, 42 B.L.R. 886, it was held that the measure of damages in the case of a plaintiff employed under a contract for a definite period is the actual loss incurred by him In an action for wrongful dismissal the plaintiff may therefore recover the wages for the whole unexpired period of service, though the fact that he has obtained or might reasonably have obtained other occupation will be taken into account Where, however, the plaintiff is liable to be discharged at a month's notice, he is entitled, on wrongful dismissal, to damages for the period of notice only This was also a case of discharge but in this case the discharge was held to be not in contravention of a provision contained in the statute or the rules made thereunder and hence no damages were awarded In his case it was held that there was no contract to employ for a definite period The reason for saying so is that although the plaintiff was ordinarily entitled to serve up to the age of 55 there was a rule entitling the municipality to discharge the plaintiff with one month's notice Rule 156 providing for discharge with one month's notice was in the following terms 'Every municipal officer or servant is liable to discharge at one month's notice but except with the concurrence of the president and sanction of the municipality, no officer or servant whose salary exceeds Rs 10 shall be discharged before he has reached the age of 55 Explanation Discharge does not include dismissal' In our opinion this rule clearly fixes the period of service up to the age of 55 and at the same time provides a mode by which the service could be terminated earlier

In **Abraham v. the Karachi Municipality, A.I.R 1929 Sind 69,** it was held that every master has an inherent right to dispense with the services of his servant with reasonable notice As to what is reasonable notice depends on the nature, of the servant's employment When this is determined, the measure of damages is what the servant would have earned in the employment of his master during the period of notice The damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment In this case the plaintiff was a sub-engineer of the Karachi Municipality and it was held that he was given opportunities to defend himself which fully complied with the requirements of rule 90 which was as follows 'No officer or servant shall be dismissed without a reasonable opportunity being given to him of being heard in his defence' The suit was therefore dismissed but on P 83 of the report his lordship has expressed an opinion that if he had awarded damages he would have awarded the plaintiff 12 months' salary as damages for wrongful dismissal

In **the Municipality of Tatta v Assanmal Chandoomal, A.I R 1914 Sind 125,** it was held that if no custom or stipulation as to notice exists and if the contract of service is not one which can be regarded as a yearly hiring the service is terminable by reasonable notice What is reasonable notice is a question which varies with the circumstances of the case Having regard to the standard generally applied in England for clerks in superior position a municipal secretary in India is entitled to three months' notice

The position therefore is that where the dismissal is ultra vires the proper relief is a declaration that the order of dismissal is ultra vires, that the employee continues in his post and for arrears of salary from the date of ultra vires order

of dismissal to the date of valid order of dismissal in future In case the employment is for a fixed period and the dismissal is wrongful the measure of damages is wages for the whole unexpired period of service, though the fact that the employee has obtained or might have obtained other employment would be taken into account In case the employment is not for a fixed period and the dismissal is wrongful the measure of damages is salary for the period of reasonable notice

Powers and duties of Chief Officer.

34. (1) The Chief Officer shall—

(a) subject to the general control of the president, watch over the financial and executive administration of the municipality and perform all the duties and exercise all the powers specifically, imposed or conferred upon him by, or delegated to him under this Act;

(b) subject to the provisions of sub-section (4), exercise supervision and control over the acts and proceedings of all officers and servants of the municipality as regards appointments referred to in clause (c) in matters of executive administration and in matters concerning the accounts and records of the municipality; and subject further to the rules of the municipality for the time being in force, dispose of all questions relating to the service of the officers and servants and their pay, privileges, leave and allowances;

(c) subject to the provisions of sub-section (4) appoint to any post the monthly salary for which as fixed by rules made under clause (c) of section 58 does not exceed Rs. 50 and to any other post the appointment to which has not been otherwise provided for by such rules,

(d) with the permission of the President furnish to the Collector, or such other officer as the Collector shall from time to time nominate in this behalf, a copy of every resolution passed at any meeting of the municipality,

(e) subject to the provisions of this Act and of the by-laws for the time being in force thereunder, grant, give and issue under his signature all licenses and permissions which may be granted or given by the municipality or the standing committee under this Act, other than licenses for markets or slaughter-houses;

(f) receive and recover and credit to the municipal fund all fees payable for licenses and permissions granted or given by him under the powers aforesaid,

(g) subject to the orders of the president, or of the standing committee or of the municipality, as the case may be, take prompt

steps to remove any irregularity pointed out by the auditor appointed under section 210;

(h) report to the President and the standing committee all cases of fraud, embezzlement, theft, or loss of municipal money and property.

(2) The Chief Officer may—

(a) subject to the provisions of sub-section (4) fine, reduce, suspend or dismiss any municipal servant whose salary does not exceed Rs 30 and subject further to the provisions of the rules, for the time being in force, any other municipal officer or servant, not being the health officer, engineer, or auditor of the municipality;

Provided that in respect of any punishment other than a fine not exceeding one week's salary his order shall be subject to an appeal either to the standing committee or, if the rules for the time being in force so provide, to the municipality,

(b) subject to the provisions of this Act and of the by-laws for the time being in force thereunder, at his discretion suspend, withhold or withdraw any license, in case in which he is empowered to grant or give a license and in which the municipality or the standing committee may suspend, withhold or withdraw such license,

(c) with the sanction of the standing committee, delegate any of his powers or duties to any municipal officer or servant;

Provided that such delegation shall be subject to such limitations, if any, as may be prescribed by the standing committee, and also to control and revision by the Chief Officer

(3) The Chief Officer shall at any time supply any return, statement, account or report or a copy of any document in his charge, called for by the municipality or the standing committee and shall comply with any orders passed by the municipality or the standing committee thereon

(4) The powers conferred on the municipality by or under any of the provisions of this Act to appoint, grant leave of absence to, punish or dismiss any master, teacher or other person employed in a primary or other school vested in or maintained by the municipality, or employed in any educational institution aided by the municipality, shall not be exercised by the Chief Officer.

(5) (a) A municipality may appoint a health officer and an engineer or any one or more of such officers, whether temporarily or permanently

Appointment of health officer and engineer

(b) No such officer shall be removable from office, reduced or suspended unless by the assent of at least two-thirds of the whole number of councillors, and no such officer shall be punishable with fine

General.—This section prescribes the powers and duties of the Chief Officer

Sub-section (1)(a).—This sub-section enables the Chief Officer to perform all the duties and exercise all the powers imposed on him by this Act or delegated to him under the Act The President will not be able to interfere with the Chief Officer's statutory or thus delegated duties and powers The words "Subject to the general control of the President" govern the first clause only, i.e to say, they do not apply to the performance of duties and exercise of the powers by the Chief Officer These words were added as the President is also given similar powers of keeping a watch over the financial and executive administration under section 31(b) and it was desirable that there should be no conflict of opinion between the Chief Officer and President in the exercise of these concurrent powers

Sub-section (1)(b).—This sub-section empowers the Chief Officer to exercise control over certain acts and proceedings of officers and servants who are holding posts mentioned in clause (c) and to decide question relating to the service, pay, privileges, leave and allowances of such officers and servants Under section 31(c) the president is given similar powers in respect of all officers and servants of the municipality while under this clause the Chief Officer is given the same powers in regard to officers and servants holding the posts mentioned in clause (c) The exercise of these powers both by the Chief Officer and the President is made subject to the rules framed under section 58 and hence rules should be so framed under section 58 as to avoid any conflict between the Chief Officer and the President in the exercise of these powers

Officers and Servants.—See notes under section 31(c)

As regards appointment referred to in clause (c).—This phrase means persons who are holding posts mentioned in clause (c) the appointment to which can be made by the Chief Officer

Sub-section (1)(c).—This empowers the Chief Officer to make appointment to all posts the maximum grade of which does not exceed Rs 50/- per month, and also to the posts for appointment to which no provision has been made in the rules

Any post the monthly salary for which does not exceed Rs. 50/-.—Note the word 'post' The post must be such that the maximum salary payable under the same must not exceed Rs 50/- This will exclude officers and servants the maximum salary of whose grade may be more than Rs 50/- though they may be appointed on a salary of less than Rs 50/-

Sub-section (1)(d).—Under this clause it is the duty of the Chief Officer to furnish to the Collector or any other officer nominated by him in this behalf

a copy of every municipal resolution But before doing so he must obtain the President's permission

Interpretation of s 24(1)(d) and s. 173 of the B.D M. Act, 1901 (equivalent to s. 34(1)(d) and s. 213 of the B.M B. Act, 1925).—Section 173 of the B.D M Act, 1901 (s 213 of the B M B Act, 1925), is general and relates to the powers of the Collector to call for any extract from the proceedings of the municipality or any document or paper in its possession Section 24(1)(d) refers specifically to the duty of the President (Chief Officer with the consent of the President in the case of Boroughs Act) himself to send a copy of every resolution passed by the municipality in addition to his duty to comply with the requisition made to the municipality by the Collector under s 173 It seems to be the specific duty of the President of a municipality, therefore, to send copies of the resolutions passed, whether a requisition of the same is made by the Collector or not. **(R L.A 's opinion No 1120 dated the 17th April 1925 in G R.G.D No. 6210 dated the 28th April 1925)**

Sub-section (1)(e):—Under the Act and the by-laws the municipality and the standing committee have powers to grant, give and issue certain licenses and permissions This clause empowers the Chief Officer to exercise these powers of the municipality and the standing committee subject to the provisions of the Act and the by-laws framed thereunder The powers thus given to the Chief Officer under this clause cannot be exercised by him with regard to licenses for markets or slaughter houses

Sub-section (1)(f):—This provides that whenever the Chief Officer issues licenses and permission in exercise of his powers under clause (e) above, the duty of recovering and crediting the fees to the municipal fund lies on him.

Sub-section (1)(g).—Under this it is the duty of the Chief Officer to remove irregularity pointed out by the auditor appointed under the rules of the municipality and in doing so he must conform to the orders, if any, of the president or the standing committee or the municipality

Sub-section (1)(h) —Under this it is the statutory duty of the Chief Officer to report both to the president and the standing committee all cases of fraud, embezzlement, theft, or loss of municipal money and property The president in his turn is required by the rules framed under the Local Fund Audit Act to report all such cases to the Collector and Examiner, Local Fund Accounts

Sub-section (2)(i).—Under this sub-section the Chief Officer is empowered to fine, reduce, suspend or dismiss any municipal servant whose salary at the time does not exceed Rs 30/- per month This means that any servant who is at the time drawing a salary of Rs 30/- or less may be fined, reduced, etc by the Chief Officer whatever the grade of the servant The use of the words "fine, reduce, suspend or dismiss" suggest that the power of Chief Officer under this sub-section is confined to want of 'good behaviour' It will not be open to the Chief Officer under this sub-section to discharge a servant without any cause. In exercising his powers under this sub-section he will be governed by the rules or in absence thereof by ordinary principles of justice, equity and good conscience The Chief Officer is also empowered under this sub-section to exercise these powers in respect of any other municipal officer or servant other than the health officer, engineer or the auditor but he cannot exercise these powers in respect of officers or servants in whose case these powers are allotted to some other authority under the rules If the rules have made no such allocation, the

Chief Officer under this sub-section can deal with all officers and servants except the health officer, engineer and auditor

If the Chief Officer inflicts a fine equal to or less than one week's salary his orders are not appealable In all other cases his orders are subject to appeal to the standing committee or to the municipality if the rules so provide, i e if the rules are silent the appeal will lie to the standing committee The word 'either' in the proviso is superfluous

Sub-section (2)(b) —This sub-section enables the Chief Officer to suspend, withhold or withdraw any license which he is empowered to grant or give or which the municipality or the standing committee is empowered to suspend, withhold or withdraw The Chief Officer has to exercise his powers under this clause subject to the provisions of this Act and of the by-laws in force thereunder

Discretion not to be used capriciously or in an arbitrary manner:— The Chief Officer's discretion cannot be used capriciously or in an arbitrary manner If he does so the Court will interfere Otherwise the Court has no jurisdiction to interfere because the Court cannot substitute its own opinion in place of the Chief Officer's **See Haji Esmail v. Municipal Corporation of Bombay and Ahmed Moosa v. Municipal Corporation of Bombay, 5 B.L.R. 1001.**

Under s 411 of the Bombay Municipal Act, 1888, the Municipal Commissioner has power either to grant or refuse a license for carrying on the business of a Butcher's shop in the City of Bombay As long as he exercises the power in a proper manner i e not arbitrarily or for an ulterior motive, the Court will not interfere under s 45 of the Specific Relief Act 1877 **Fakir Mahomed Malang v. The Municipal Commissioner of Bombay, 39 B.L.R 536**

Sub-section 2(c) —The Chief Officer is authorised under this clause to delegate any of his powers or duties to any municipal officer or servant He must do this with the sanction of the standing committee The delegation will be subject to the limitations prescribed by the standing committee The exercise of the delegated powers and duties will be subject to control and revision by the Chief Officer The sub-section is clear that it is only the Chief Officer who can delegate his powers Neither the standing committee nor the municipality can do so.

Sub-section (3).—This provides that the Chief Officer must supply to the municipality or the standing committee any return, statement, account or report or a copy of any document in his charge called for by it He should also carry out the orders of the municipality or the standing committee passed thereon The words 'in his charge' go with the word 'Document' This sub-section refers only to documents in the charge of the Chief Officer He cannot be called upon to supply the original document The sub-section only requires that a copy of the document should be supplied

Sub-section (4):—This sub-section deals with the educational staff, and lays down that the powers given under this section to the Chief Officer are not exercisable by him in respect of such staff

Sub-section (5):—This sub-section shows that it is not compulsory for a borough municipality to appoint a Health Officer or an engineer But if one is appointed he cannot be removed, reduced or suspended except by the votes of at least 2/3rds of the whole number of Councillors He also cannot be fined. See notes under section 33(2)

The power of appointing a Health Officer or an engineer whether temporarily or permanently vests in the municipality This sub-section should not have been included in the section dealing with the powers and duties of the Chief Officer

Wrongful dismissal.—See notes under this head under s 33

Power of Provincial Government to remove chief officer, health officer or an engineer

34A. (1) Notwithstanding anything contained in section 33 and sub-section (5) of section 34, it shall be lawful for the Provincial Government on the recommendation of any municipality supported by a resolution passed by a majority of the councillors present at a special general meeting called for the purpose to make in its discretion an order vetoing the continuance in office of any person holding the appointment of a chief officer, a health officer or an engineer:

Provided that—

(a) Notwithstanding anything contained in sub-section (7) of section 35, no resolution shall be passed by such meeting unless a quorum shall have been present throughout, and

(b) no order shall be made under this section unless an inquiry has been made into the matter by such person and in such manner as the Provincial Government may direct and unless the person affected by the order has been given a reasonable opportunity at the inquiry of explaining the allegations made against him

(2) The tenure of office by any person whose continuance in office is vetoed under sub-section (1) shall cease and determine on and from such date as may be appointed by the Provincial Government, in that behalf.

Amendments:—This section was inserted by Bombay 3 of 1930, section 2. In sub-sections (1) and (2) the words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council.

Scope.—The Provincial Government is empowered under this section to remove from office a chief officer, a health officer or an engineer on the recommendation of the municipality by a resolution The municipality's resolution must be passed by a majority of the councillors present in the meeting, i e to say, a majority of the councillors present in the meeting must vote for it If equal number of councillors vote for and against it and the r solution is passed by the casting vote of the chairman the resolution cannot be said to have been passed by a majority of the councillors present The resolution must also be passed at a special general meeting called for the purpose, i e to say, the notice of the meeting must show that the meeting is called to make a recommendation to the Government

Proviso (a).—This proviso requires that the meeting wherein such a resolution is passed must have a quorum Even if it is a meeting adjourned on the previous occasion for want of a quorum, the meeting in which such a resolu-

tion is passed must have a quorum This is inspite of the provisions of section 35(7) and this is made explicitly clear in the proviso

Proviso (b).—This proviso requires the Provincial Government to hold an inquiry before any orders are passed under this section and to give an opportunity thereat to the officer concerned to explain the allegations made against him The inquiry will be made by a person appointed in this behalf by the Provincial Government and it must be made in accordance with the directions of the Government

Sub-section (2) —The date of determination of the service under this section is to be fixed by the Provincial Government

Government's right to veto continuance in office of a Chief Officer, a health officer or an Engineer.—It is clear that the Provincial Government can exercise its power under this section to veto the continuance in office of a Chief Officer, health officer or engineer only on the *recommendation of a municipality* supported by a resolution passed by a majority of the councillors present at a special general meeting called for the purpose. If any of these conditions viz, (1) recommendation of a municipality, (2) support of majority of councillors present and (3) special general meeting called for the purpose, is absent Government cannot validly exercise its power to veto the continuance in office of any such officer. Further under s. 35(12) a municipality can cancel or modify a resolution by following the procedure prescribed therein If, therefore, at any time before the Government passes an order vetoing the continuance in office of any such officer the municipality cancels its recommendation Government cannot pass any such order as the very foundation on which the order can be passed *is absent on the date of the order*

CHAPTER III.

CONDUCT OF BUSINESS

(1) Municipal Meetings.

35. The following provisions shall be observed with respect to the meetings of a municipality:— Provisions in regard to meetings of a municipality

(1) There shall be held four ordinary general meetings in each year for the disposal of general business, on or about the tenth day of the months of January, April, July and October, respectively and such other ordinary general meetings as the president may find necessary It shall be the duty of the president to fix the dates for all ordinary general meetings Ordinary general meetings

(2) The president may, whenever he thinks fit, and shall, upon the written request of not less than one-fourth of the councillors and for a date not more than fifteen days after the presentation of such request, call a special general meeting If the president fails to call a special general meeting as provided in this clause the Vice-President may call such meeting for a day not more than thirty days after the presentation of such request. Special general meetings

(3) Seven clear days' notice of an ordinary general meeting, and three clear days' notice of a special general meeting, specifying the time and place at which such meeting is to be held and the business to be transacted thereat shall be served upon the councillors, and posted up at the municipal office or the local kacheri or some other public building in the municipal borough and also published in a local vernacular newspaper having a large circulation if such exists. The said notice shall include any motion or proposition which a councillor shall have given written notice, not less than ten clear days previous to the meeting, of his intention to bring forward thereat, and in the case of a special general meeting, any motion or proposition mentioned in any written request made for such meeting Notice of meetings

(4) Every meeting of a municipality shall, except for special reasons to be mentioned in the notice convening the meeting, be held in the buildings used as a municipal office by such municipality Meetings to be held at municipal office

(5) Every meeting shall, in the absence of both the president and the vice-president, be presided over by such one of the councillors Absence of the president and the vice-president

present as may be chosen, by the meeting to be chairman for the occasion, and such chairman shall exercise thereat the powers vested in the president by clause (a) of section 31

Meetings must ordinarily be open to the public.

(6) Every meeting shall be open to the public unless the presiding authority deems any inquiry or deliberation pending before the municipality such as should be held in private

Provided that the said authority may at any time cause any person to be removed who interrupts the proceedings

Provided further that the presiding authority may cause to be removed from the meeting any councillor who does not obey his ruling

Adjournment in absence of quorum.

(7) If less than one-third of the whole number of councillors be present at a meeting at any time from the beginning to the end thereof, the presiding authority shall after waiting for not more than 30 minutes adjourn the meeting to such hour on the following or some other future date as he may reasonably fix, a notice of such adjournment shall be fixed up in the municipal office, and the business which would have been brought before the original meeting, had there been a quorum thereat, shall be brought before the adjourned meeting and may be disposed of at such meeting or at any subsequent adjournment thereof whether there be a quorum present or not

Business to be transacted at meetings and order of business

(8) Except with the permission of the presiding authority, which permission shall not be given in the case of a motion or proposition to modify or cancel any resolution within three months after the passing thereof, no business shall be transacted and no proposition shall be discussed, at any general meeting unless it has been entered in the notice convening such meeting or, in the case of a special meeting, in the written request for such meeting The order in which any business or proposition shall be brought forward at such meeting, shall be determined by the presiding authority, who in case it is proposed by any member to give priority to any particular item of such business or to any particular proposition, shall put the proposal to the meeting and be guided by the majority of votes given for or against the proposal

Minutes of proceedings

(9) In every municipality there shall be kept in the vernacular language and if any councillor so desire, in English also, minutes of the names of the councillors and of the Government officers, if any, present under the provisions of sub-section (14) and of the proceedings at each general meeting in a book to be provided for the pur-

pose, and such minutes shall be signed, as soon as practicable, by the presiding authority and shall at all reasonable times be open for inspection by any inhabitant of the municipal borough

Questions decided by majority of votes

(10) All questions shall be decided by a majority of votes of the councillors present and voting, the presiding authority having a second or casting vote in all cases of equality of votes Votes shall be taken and results recorded in such manner as may be prescribed by rules in that behalf for the time being in force under clause (a) of section 58

Adjournments

(11) Any general meeting may, with the consent of a majority of the councillors present, be adjourned from time to time to a late hour on the same day or to any other day, but no business shall be transacted at any adjourned meeting other than that left undisposed of at the meeting from which the adjournment took place.

A notice of such adjournment posted in the municipal office shall be deemed sufficient notice of the adjournment meeting

Modification and cancellation of resolutions.

(12) No resolution of a municipality shall be modified or cancelled within three months after the passing thereof, except by a resolution supported by not less than one-half of the whole number of councillors and passed at a general meeting, whereof notice shall have been given fulfilling the requirements of sub-section (3) and setting forth fully the resolution which it is proposed to modify or cancel at such meeting and the motion or proposition for the modification or cancellation of such resolution

Notice of certain business to be given to the Government Executive Engineer or Educational Inspector

(13) Except for reasons which the presiding authority deems urgent, no business relating to any work which is being executed for the municipality by a Government Executive Engineer or to any educational matter, shall be transacted at any meeting of a municipality, unless at least fifteen days previous to such meeting a letter has been addressed to the said Executive Engineer or to the Deputy Educational Inspector of the district, informing him of the intention to transact such business thereat, and of the motions or propositions to be brought forward concerning such business

Certain Government officers may attend and may be required to attend meetings

(14) (a) The members of the Sanitary Board, and the Executive Engineer, Deputy Educational Inspector and the Assistant Director of Public Health, and the Civil Surgeon in the district when charged with any of the duties of a health officer therein, if not members of the municipality within the district, shall have the right of being present at any meeting of such municipality, with the consent of the municipality, each of them may take part at such meeting in the

discussion or consideration of any question on which by virtue of the duties of his office, he considers his opinion or the information which he can supply will be useful to such municipality:

Provided that the said officers shall not, unless they are members of the municipality be entitled to vote upon any such question.

(b) If it shall appear to a municipality that the presence of the Executive Engineer, Deputy Educational Inspector, Assistant Director of Public Health, or Civil Surgeon of or in the district is desirable for the purpose aforesaid at any meeting of such municipality, it shall be competent to such municipality, by letter addressed to such officer not less than fifteen days previous to the intended meeting, to require his presence thereat, and the said officer unless prevented by sickness or other reasonable cause, shall be bound to attend such meeting:

Provided that such officer on receipt of such letter may, if unable to be present himself, instruct a Deputy or Assistant or other competent subordinate as to his views, and may send him to the meeting as his representative instead of appearing thereat in person

Scope.—This section applies to all meetings of a municipality including a meeting called under sections 19 A or 23 by the Collector See notes under section 19A

Provisions of sub-sections (4)(9)(10) and (14) are made applicable to committee meetings by section 43

Sub-section (1).—Under this sub-section there should be at least four ordinary general meetings in each year There may be more if the president finds necessary The dates of all ordinary general meetings must be fixed by the president The sub-section is silent as to who is to call these ordinary general meetings In **Basaya v Murgaya, 28 B L R 1184**, which was a case under the Bombay District Municipal Act, 1901 it was held that the meeting convened by the Chief Officer was not ultra vires as there was no provision then in the Bombay District Municipal Act as to who should convene the first meeting after a new board came into existence It appears that this authority will apply with equal force if a Chief Officer called an ordinary general meeting provided the date is fixed by the president

Sub-section (2).—This deals with special general meetings of the municipality A special general meeting can be called by the president whenever he thinks fit He is also required to call a special general meeting if he is requested in writing to do so by at least one-fourth of the councillors, that is one-fourth of the councillors holding office at the time This will exclude vacancies on the board When a request is made the president is bound to call a special general meeting to be held within fifteen days from the presentation of the request If the president fails to do so, the vice-president is empowered to call such a meeting to be held on a date within thirty days from the date of presentation of the request There is no provision as to what should be done if the vice-president also fails to call the meeting

A special general meeting can be called only by a president or in his absence or on his failure as above by the vice-president This being the statutory provision if anybody else calls the meeting it is illegal and the illegality cannot be cured by section 58

The special general meeting of a district municipality to be a valid meeting under section 27(2) of the Bombay District Municipal Act (2 of 1884) must be one called by the president If the meeting is not so called the defect cannot be cured by section 17(2) of the Act **Abbaji v. the Trimbak Municipality, 5 B.L.R. 689.**

Requisition for a meeting to remove a president—effect of withdrawal by some of the requisitionists'—In the requisition signed by the requisitionists the signatures of the individual members on the requisition are their individual acts and are not the result of any joint act by the requisitionists Hence, some of the requisitionists can without the consent of the other requisitionists withdraw from the requisition The Chairman is not bound to call a meeting as soon as a requisition is received and on the withdrawal by some of the requisitionists before the prescribed period expired making the number of the remaining requisitionists less than the required number, there is no requisition as required by s 30 (b) (Bengal Local Self-Government Act 3 of 1885) and the chairman is right in dissolving the meeting and the meeting held thereafter is not sanctioned by law and a resolution by such meeting is therefore no valid resolution by the Board for sending an application to the Provincial Government for the removal of the Chairman from the chairmanship of the Board under s 28 The Civil Court has jurisdiction to question the order of removal made by the Provincial Government under s 28 on an application based on such resolution and as the very foundation of the exercise of the power by the Local Government under the last para of s 28 of the removal of a chairman of the District Board for persistent neglect of duty as chairman is the application of the Board, the Civil Court can declare the order of removal under s 28 as inoperative on the ground that there was no foundation for such order (Per Pal J)—A chairman of a District Board as such has a legal character and is prima facie entitled to a relief from a Civil Court from any interference with his right in that character unless and until that relief is taken away by any express provision of law or by necessary implication of any provision of law Section 9 Civil P C, ensures this relief and there is nothing in any way affecting this relief given him by s 9 Civ P C **Moulvi Lutfar Rahaman v. Moulvi Waliur Rahaman A.I.R. 1943 Cal 59.**

Sub-section (3)'—This deals with notice of meetings An ordinary general meeting requires seven clear days' notice to every individual councillor To compute seven clear days the day on which service of notice is effected on the councillor and the day on which the meeting is held must be excluded For service of notice see section 192 The notice must show the time and the place of the meeting, as also the business to be transacted thereat The notice must also be posted up at the municipal office and also must be published in a local vernacular newspaper, if any, having a large circulation If the local paper has not a large circulation a notice may not be published in it. A written notice of any motion received from a councillor ten clear days before the date of the meeting must be included in the notice

For a special meeting three clear days' notice must be given to each individual councillor. In addition to the matters required to be mentioned therein

in respect of an ordinary general meeting, a notice for a special general meeting must contain any motion mentioned in any written request for such a meeting

Presumption of regularity of proceedings:—Sub-section (2) of section 57 lays down that until the contrary is proved every meeting of a municipality or of a committee appointed under this Act in respect of proceedings whereof a minute has been made and signed in accordance with this Act shall be deemed to have been duly convened and held Thus, in absence of proof to the contrary it will always be presumed that a proper notice of meeting was given and served on each councillor in accordance with the requirements of this Act In **the Municipality of Sholapur v. The Sholapur Spinning and Weaving Company Ltd, 20 Bombay 732,** Jardine J dealing with this question said "The question at issue is, whether the two taxes were imposed without any notice at all to some of the commissioners In the Dakor case, it was admitted that this irregularity had occurred in the convening of the meeting In the present case there is no such admission, nor is there any evidence of such irregularity The two Courts below have presumed this irregularity to exist merely because the municipal officers were unable to find and produce at the trial the circular or other record of intimation given to the persons who so long ago as 1877 and 1882 were municipal commissioners We are of opinion that in drawing this presumption, and acting upon it, the lower Courts have fallen into error of law If the Sholapur Spinning Company had any irregularity to allege, it should have done so by definite statement, e g that certain commissioners named had not received notice, and the burden of proving such a statement was on the company as in the absence of evidence or indication to the contrary the presumptions were that the Municipality had used the regular procedure, and that the common course of business had been followed in the particular cases We must hold, therefore, that the two taxes were legally imposed"

Irregularity in the service of notice:—Section 57(1) provides that no resolution of a municipality or of any committee appointed under this Act shall be deemed invalid on account of any irregularity in the service of notice upon any councillor or member, provided that the proceedings of the municipality or committee were not prejudicially affected by such irregularity

It will be seen that this provision deals with irregularity in the service of notice and not in the notice itself Thus if the notice itself is irregular the defect will not be cured under section 57 But if the irregularity is in the service of the notice it is curable under section 57 provided there was no possibility of any change in the result in respect of any resolution passed by the meeting if the irregularity had not occurred Irregularity in the service of notice covers cases of short notice and if the short notice has not occasioned prejudice to anyone the defect will be cured under section 57 The expression "service of notice" occurring in section 57 is used in a wider sense embracing not merely the irregularity committed in the manner of effecting service but also includes cases of non-service as well as short-notice In **Pandurang v. Ramchandra, 32 B.L.R. 1252,** which was a case under the Bombay Local Boards Act 1923, two members did not receive the notice at all but were present at the meeting and the remaining members did not get fourteen clear days' notice but only twelve clear days' notice It was not shown that the voting at the meeting would have been different if fourteen clear days' notice was given Held, that the defect was cured under section 35(4) of the Local Boards Act, 1923 (equivalent to section

57 of the Boroughs' Act) In view of this clear provision in the Boroughs' Act curing irregularities, the ruling in **Joshi Kalidas Sevakram v The Dakor Town Municipality, 7 Bombay 399**, will not be applicable to a case under the Act It may be mentioned that such a provision did not exist in the Bombay District Municipal Act, 1873, by which that case was governed The Boroughs Act does not make any difference as regards service of notice to the councillors for meetings called to impose a tax and meetings called to transact any other business and there is no reason why provisions of section 57 should not apply to a meeting called for imposing a tax Of course if the proceedings are prejudicially affected the defect in service of notice will not be cured In **Pandurang v. Ramchandra, 32 B L R 1252**, Broomfield J has taken a similar view and said "In the former of these cases (i e **Joshi Kalidas Sevakram v. The Dakor Town Municipality, 7 Bombay 399**) where the question was whether a tax had been legally imposed, it appeared that three members of the municipality who were absent from Dakor had no notice at all of the meeting and also that no notice mentioning the business to be transacted had been posted up at the Kacheri It is also to be noted that Bombay Act 6 of 1873 which applied to that case contained no provision corresponding to section 35(4) of the Bombay Local Board Act"

Service of notice —This section does not provide any special mode for service of notice required to be served on the councillors under sub-section (3) Sec 192 (1) provides for the service of every notice on any person in all cases not otherwise specially provided for in the Act and there is no reason why the provisions of sub-section (1) of section 192 should not apply in regard to effecting service of notice on the councillors under section 35 (3) There is nothing in section 192(1) suggesting anything against such a course It follows, therefore, that as far as personal service on a councillor under section 35(3) is concerned, provisions of section 192(1) will apply In a case under the Bombay Local Board Act, 1923, **Gopal v. Shanmukhappa, 29 B.L.R. 1325**, Marten C.J held that section 63 (equivalent to section 192 (c) of the Boroughs Act) did not apply to the service of notice for meetings of the Board under section 35(2)(b) (equivalent to section 35(3) of the Boroughs Act) because service of such a notice is otherwise specially provided for by the use of the word 'circulated' in section 35(2) (b) of the Act As regards a service of notice of meeting on a councillor under the Boroughs Act it cannot be said that service of such a notice is otherwise specially provided for, because no words like "circulated" are used in section 35(3) to suggest a different or special mode of service of such a notice The word used is 'served' It is therefore clear that this view of Marten C J will not govern a case under the Boroughs Act As a matter of fact the original Bill contained the word "circulate" with an additional clause providing for sending of the notice by registered post to a councillor who may be absent from home when notice of a meeting is circulated In the statement of objects and reasons it was stated that such a clause was necessary because absence from meetings entailed a penalty and therefore it was necessary to give due intimation of the time and place of the meeting to the councillor The select committee in order to meet this requirement substituted the words "served upon" in place of the word 'circulated' thereby applying the procedure laid down in section 192(1) The additional clause providing for service by registered post then became unnecessary and was omitted

Form of notice:—The sub-section though prescribing the contents of the notice does not prescribe the form As pointed out above the provisions of sec-

tion 192 apply to a notice of meeting so far as they are applicable Sub-section (4) of section 192 provides that no notice shall be invalid for defect of form. Applying therefore this provision to a notice of meeting it follows that a notice of meeting will not be invalid for defect of form It may be in any form provided it contains matters required to be included therein under this sub-section

Contents of notice —In the case of a special general meeting called at the instance of councillors under section 35(2) it is sometimes contended that the President cannot place on the agenda any matter other than those mentioned in the written request for calling such a meeting This contention is untenable in view of the wording of sub-section (3) and provisions of sub-section (8) In sub-section (3) the wording is "The said notice shall include any motion or proposition mentioned in any written request for such meeting" This suggests that there may be matters on the notice other than those for which a written request is made Sub-section (8) further shows that in proper cases the presiding authority has powers to give permission for taking up any matter not on the agenda This also clearly suggests that when president has powers to take up any matter not on the agenda he has powers as well to place a matter on the agenda and then take it up See **The Surat City Municipality v Ochhavram Jamnadas, 21 Bom. 630**

Sub-section (4):—This sub-section requires that every meeting of a municipality must be held in the municipal office If any meeting is to be held elsewhere for any special reasons they should be given in the notice of meeting

Sub-section (5):—This sub-section provides that if both the president and the vice-president are absent in any meeting of the municipality, the meeting should proceed to elect a chairman from amongst the councillors present Such a chairman can preside only so long as both the president and the vice-president are absent If any one of them turns up he has to vacate the chair in favour of the president or vice-president This is clear from the use of the words "in the absence of both the president and vice-president" in this sub-section A chairman elected to preside under this sub-section has all the powers of the president under section 31(a) to regulate the conduct of business at the meeting See notes under section 31(a)

Sub-section (6) —This sub-section lays down the general principle that all meetings of the municipality must be open to the public i e every member of the public is entitled to attend it as a spectator This general rule is made subject to only one exception namely, if the presiding authority considers that any inquiry or deliberation should be conducted in private he may close the meeting to the public until the inquiry or deliberation is over The presiding authority is also empowered to order removal of any person other than a councillor from the meeting if such person interrupts the proceedings For the same reason the presiding authority is not entitled to cause a councillor to be removed A Councillor can be removed from the meeting under the orders of the presiding authority only if he does not obey his ruling In view of these provisions it is clear that a presiding authority has no powers of ordering removal of a councillor from a meeting beyond those vested in him under this sub-section

Sub-section (7):—This sub-section enables the presiding authority to adjourn a meeting whenever there is no quorum In such a case the presiding authority may adjourn the meeting at once i e as soon as the meeting becomes one without a quorum or he may wait to a maximum extent of thirty minutes to see if a quorum is formed by the incoming of some councillor or councillors,

But if the quorum is not formed after waiting for thirty minutes he must adjourn the meeting During those thirty minutes or until the quorum is formed (if one is formed during these thirty minutes) no business can be transacted The presiding authority cannot adjourn the meeting sine die but he must adjourn it to some fixed hour on some other day, i e to say, the meeting cannot be adjourned to some hour on the same day A notice of such adjournment stating the hour and date of the adjourned meeting must be put up at the municipal office The business that was before the original meeting must be brought before the adjourned meeting i e nothing more nor less and this may be disposed of at such meeting or at any subsequent adjournment thereof irrespective of the fact whether there is or there is not a quorum *at these adjourned meetings This means that meetings held to dispose of* business of a meeting which had to be adjourned for want of a quorum do not require any quorum

Quorum —Persons who are present at a meeting in fact, but who do not take active part in the proceedings or vote, cannot be regarded as absent for the purpose of a quorum **Dwarakanath v Chandra Mohan, A I R 1926 Cal 665.**

Less than one-third —This means if one-third or more than one-third of the whole number of councillors are present there will be a quorum

Whole number of councillors —This means the number determined under section 10(1)(a) and not the number who may happen to be holding office at that time

At any time from the beginning to the end thereof.—This means that if at any time during the course of the meeting the quorum is broken the procedure prescribed in this sub-section is to be followed

The presiding authority —This means a president or in his absence a vice-president or in the absence of both a chairman elected to preside If the president or vice-president is present at the hour fixed for the meeting he will take the chair and carry out the provisions of this sub-section But if both of them are absent at the time, there is no presiding authority who could adjourn the meeting as required by this sub-section In such a case a presiding authority *must first be elected under sub-section (5) of this section in spite of the* fact that there is no quorum in the meeting There is nothing in sub-section (5) to prevent such a course being taken and the use of the term 'presiding authority' in this sub-section suggests that such a course must be taken In such a case, the wording of the section shows that the period of thirty minutes commences after the chairman is elected

After waiting —This shows that during this period when there is no quorum *no business can be transacted*

On the following or some other future day —This shows that the meeting cannot be adjourned to an hour on the same day as could be done when a meeting is adjourned under sub-section 10

The business which would have been brought before the original meeting — This means the business which was in the agenda paper of the original meeting and remained undisposed of for want of quorum Note that the words used are 'would have been' and not 'could have been' That means no item outside the items pending on the agenda of the adjourned meeting can be taken up even with the permission of the presiding authority The business to be transacted at the meeting must be confined to the items pending on the agenda paper

Shall be brought:—This means that it is compulsory that all the items on the agenda that were pending at the time of adjournment must be brought before the adjourned meeting

Sub-section (8) —This sub-section deals with business to be transacted at a municipal meeting and the order in which such business is to be transacted Ordinarily the order is to be decided by the presiding authority However, councillors are also permitted to propose that a particular business shall be given priority over other business in the agenda The presiding authority is bound to put the proposal for priority to vote and if it is carried the presiding authority is bound to give effect to the proposal Thus the powers of the president are not absolute in this matter

The sub-section gives the president full powers to permit taking up any matter although not on the agenda However, he cannot give such a permission when the motion or proposition is for modifying or cancelling a resolution passed within three months just preceding The President can exercise these powers in his own favour also i e to say, he can take up any matter as a special case on his own motion subject to the abovementioned exception In the case of an ordinary general meeting no permission is necessary if the matter is on the agenda In the case of a special general meeting no permission is necessary if the motion or proposition is entered in the written request for such meeting irrespective of the fact whether it is or it is not entered in the agenda The above is the intendment and correct meaning of this sub-section but unfortunately the wording is most unhappy and fails to bring out the above meaning In the **Surat City Municipality v Ochhavram Jamnadas, 21 Bom 630,** it was contended that the resolution imposing the tax was illegal because the scheme was proposed to be adopted at a meeting without previous notice Dealing with this objection Parsons J observed "The words 'except with the permission of the presiding authority' clearly govern the whole of the rest of the clause and therefore even if there were no mention of this business in the notice convening the meeting the resolution would not be bad We think however that the mention in the notice 'that the Government Resolution No 3947 of the 31st October 1892 with the opinion of the Legal Remembrancer about the revised scheme of taxation' was the business to be transacted, was under the circumstances sufficiently explicit and justified a detailed revised scheme of taxation being placed before the meeting and proposed for adoption It was then open to any commissioner to raise any objection he chose to the adoption The resolution that was ultimately passed to adopt the scheme and to impose the tax was in our opinion valid and binding"

Sub-section (9) —Under the sub-section minutes in the vernacular language are compulsory Minutes in the English language are not compulsory unless any councillor demands that minutes in English be also kept A separate book is to be provided for keeping the minutes The minutes are to contain the names of councillors and of Govt officers present at the meeting and also the proceedings of the meeting The presiding authority is required to sign the minutes as soon as practicable and they are to be open to inspection at all reasonable times by any inhabitant of the municipal borough Some municipalities have framed rules under section 58(a) for the manner in which the minutes are to be kept, circulated or read and passed thinking that these rules constitute rules for conduct of business Sub-section (9) read with section 57(2) does not contemplate any such rules and we seriously doubt that these rules

could be included in the rules for conduct of business We are, therefore, of opinion, that such rules are ultra vires At any rate such rules if framed must not contravene the provisions of this sub-section Under section 57(2) when a minute has been made and signed in accordance with this sub-section a presumption arises that the meeting of the municipality or of the committee was duly convened and held and all the members of the meeting were duly qualified and in case of meeting of a committee a further presumption arises that the committee was duly constituted and had the power to deal with the matters referred to in the minute Both the presumptions are rebuttable, i e to say, are good only so long as contrary is not proved

Sub-section (10)—Casting vote—This sub-section provides that all questions before a meeting shall be decided by a majority of votes of the councillors who are present and vote one way or another The presiding authority has one ordinary vote and a second casting vote in case of equality of votes The presiding authority may arrive at its decision to give its casting vote to one side or the other in any way he likes In **J B Petit v The Municipal Corporation of Bombay, 29 B L R 1430,** the chairman of the meeting drew lots to make up his mind as to whom he should give his casting vote It was contended that this was illegal and consequently the election was invalid *It* was held, (1) that the chairman had under the circumstances given a valid casting vote since the legislature in section 36(q) of the Bombay City Municipal Act, 1888 did not in any way fetter the presiding authority as to the means by which he might make up his mind, whether by exercising his judgment, consulting a friend, spining a coin, drawing lots or otherwise before intimating his preference for or choice of one candidate or another, (2) that the chairman did exercise his judgment in considering the respective merits of the two candidates and by reason of their equality of merits he was entitled to assist himself in choosing between them by drawing lots In the course of the judgment Mr Justice Blackwell stated "In my opinion the giving of a vote does not necessarily involve the exercise of *judgment at all It involves* merely the expression or intimation of a wish or choice That wish or choice may indeed be actuated by judgment, but it may also, as it seems to me, be actuated by mere whim or caprice The method by which the wish or choice is arrived at is in my judgment wholly immaterial so long as the person upon whom the duty of giving the vote is cast expresses or intimates his wish or choice, however arrived at" This sub-section also does not in any way fetter the presiding authority as to the means by which he might make up his mind and therefore the above reasoning would equally apply to a case under this sub-section Under this sub-section votes are to be taken and results recorded in accordance with the rules framed under section 58(a) but this provision has nothing to do with the *manner or the means by which the presiding authority may arrive at its* decision Any rule framed under section 58(a) fettering the presiding authority's absolute liberty in the matter of giving his casting vote is ultra vires It is obvious that the presiding authority cannot be compelled to exercise his casting vote. Hence if the presiding authority in spite of the equality of votes fails to exercise his casting vote the proposition is neither carried nor lost and can be brought up again at a subsequent meeting

A majority of votes of the councillors present and voting:—This expression which occurs in section 36(q) of the Bombay City Municipal Act, 1888 has been discussed by Mr Justice Blackwell in **J B Petit v The Municipal Corporation of Bombay, 29 B L R 1430,** wherein he said "It was further contended

on behalf of the plaintiff that the regulations for the appointment of the President of the Corporation made on March 28, 1927, are ultra vires Those regulations are to be found in Exhibit B, and the relevant paragraphs are 9-12 Those paragraphs are in the following terms —

'If there are only two candidates, then the one who gets the larger number of votes shall be declared elected'

'If there are more than two candidates, the candidate who gets the least number of votes shall be eliminated and votes taken again for the remaining candidates This process shall be continued until there are two candidates left and then the one who gets more votes shall be declared elected'

'If at any ballot, the total of the votes secured by two or more candidates is less than the number of votes of a candidate immediately above them, they shall be eliminated before the next ballot is taken'

It was argued that, inasmuch as section 37 of the Act requires the Corporation to appoint one of their number to be President, the appointment was a question falling within section 36(q), that section 36(q) provides that every question (with certain immaterial exceptions) 'shall be decided by a majority of votes of the councillors present and voting on that question, that majority means bare majority, that the appointment is one question, that that question cannot legally be split up into a series of preliminary questions involving the elimination of candidates, and that where there are more than two candidates the only legal method of appointment is one by ballot, and that the candidate polling the largest number of votes is entitled to be declared elected, though he may not receive an absolute majority of votes of the councillors present and voting on that question I do not agree with this argument Section 37(1) of the Act provides that 'the Corporation shall, at their first meeting in each official year, appoint one of their own number to be president' The section does not prescribe the method of appointment or in any way fetter the decision of the members of the Corporation upon this question The method of appointment would, it seems to me, be a question to be 'decided by a majority of votes of the councillors present and voting on that question' as provided by section 36(q) The method of appointment was, in fact, a question decided by a majority of votes of the councillors present and voting on that question, as appears from Exh I to the written statement of the defendant Corporation, at a meeting of the Corporation held on March 28, 1927, when the regulations in question were passed The method of appointment having been so decided, namely, in accordance with the regulations, the regulations themselves seem to me to be mere machinery for giving effect to the decision of the Corporation to appoint in accordance with the regulations It was argued that under section 36 of the Act the Corporation can only make regulations with respect to the mode of transaction and managing the business of the Corporation, subject to the condition therein laid down, and therefore subject to the condition (q) and that if the Corporation purported to pass regulations which enabled the question of the appointment of the President to be determined except as one indivisible question by a bare majority upon a ballot between candidates however numerous, those regulations would be ultra vires In my judgment this contention is unsound The Corporation having decided the question of the method of appointment by the requisite majority, namely, in accordance with certain regulations, I hold that these regulations are mere machinery for giving effect to the decision of the Corporation upon that question, and that

the regulations are intra vires I answer the first issue in the negative I am also of opinion that the word 'majority' in section 36(q) of the Act means absolute majority, having regard to the fact that the words used are 'a majority of votes of the councillors present and voting on that question' In Webster's Dictionary 'majority' is thus defined —'The greater of two numbers that are regarded as parts of a whole or total, the number greater than half, more than half of any total, also, the excess of this greater number, as of votes, over the remainder of the total Sometimes majority is used to designate what is more properly called plurality Thus, if in a total of 95,000 votes A receives 50,000, B 30,000, and C 15,000, then A receives a majority of all (that is, an absolute majority), and his majority over his competitors is 5,000 votes (that is, the excess over the total votes of C and B) But, if in a total of 95,000 votes, A receives 45,000, B 30,000 and C 20,000, then A receives a plurality (that is, a total larger than any competitor) while his plurity over his competitors is 15,000 (that is, his excess over B his highest competitor) In this latter case A does not receive a majority, properly speaking' A distinction is here drawn between 'majority' in a strict sense, and 'plurality' In Murray's Dictionary 'majority' is defined as —'The greater number or part, a number which is more than half the whole number, spec the larger party voting together in a deliberative assembly or electoral body,' and 'absolute majority' as —'A number of votes received by one candidate which is more than half the total number polled, or than half the number of electors' I do not myself think that when the Legislature enacted sub-section (q) of section 36 it contemplated a ballot between several candidates, and bare majority If the Legislature had contemplated such a case, and had intended the word 'majority' to mean 'bare majority' I think it would have used appropriate words such as the 'largest number of votes' In my opinion, the Legislature having used the words 'a majority of votes of the Councillors present and voting on that question,' these words must be construed as meaning an absolute majority If this be the right construction of sub-section (q) then if the regulations are not mere machinery, but in themselves involve questions within the meaning of sub section (q) I still think that the Corporation have complied with the Act The effect of paragraphs 9-12 of the regulations is this, that whenever one of a number of candidates for the appointment of president obtains an absolute majority, he shall be declared elected, but that until that result is arrived at, there shall be a process of elimination, the question of elimination itself being in each case decided by a majority of votes of the councillors present and voting on that question' This reasoning of Blackwell J applies equally well to the same expression used in sub-section (10) and hence the expression "majority" in sub-section (10) means an absolute majority in the sense in which that expression is interpreted by Blackwell J and a municipality is intra vires in framing regulations prescribing the method by which that absolute majority is to be arrived at

In **Samalbhai v. Jesangbhai, 38 B L R 1331,** a case under the Bombay Local Board Act 1923 it was held that a regulation framed by the Local Board providing that in the case of election of president and vice-president votes shall be taken by ballot was ultra vires the Act and in contravention of section 35(2)(k) Section 35(2)(k) is in these terms 'Minutes shall be kept of the names of the members and of the Government officers, if any, present under the provisions of section 40 and of the proceedings at each meeting of the board, and if any member present at the meeting so desire, of the names of

the members voting, respectively, for or against any resolution, in a book to be provided for this purpose, which shall be signed, as soon as practicable, by the president, vice-president or the chairman of such meeting and shall at all reasonable times be open to inspection by any member of the board or any inhabitant of the district' It will be noted that the words 'and if any member present at the meeting so desire, of the names of the members voting respectively for or against any resolution, in a book to be provided for the purpose' do not occur in sub-section (9) of the Bombay Municipal Borough Act 1925 Hence a rule or a regulation framed under section 58(a) providing for taking of votes by ballot on any matter will not be ultra vires or in contravention of the Act Thus this part of the decision in **Samalbhai v Jesangbhai, 38 B.L.R 1331,** is not applicable to a case under sub-section (10) of the Boroughs Act

Section 92 provides that all questions shall be decided 'by a majority of the votes of the members present and voting' and it applies to all questions that may come up before a meeting of the Board and not only to the election of the chairman and vice-chairman, etc So long as a member himself is duly qualified to vote and records a vote, he is a member who is 'present and voting' The fact that the person for whom he voted turned out to be a disqualified person would render his vote useless, but it would not be accurate to say that the voting itself was not valid The vote was good, but it was futile inasmuch as it has been wasted or thrown away As the word 'majority' of the votes is used and not the greater number of votes, the legislature obviously intended that there should be only one question put at a time and not that votes should be asked for on two separate questions put simultaneously **Harnandan Prasad v. B, Kamta Prasad Kakkar, A I R 1934 All. 375.**

Sub-section (11)—This sub-section provides for adjournment of a general meeting According to this sub-section the presiding authority can with the consent of a majority of the councillors present adjourn the meeting but not otherwise It may also be noted that although the majority may consent he is not bound to adjourn the meeting The sub-section only says that the presiding authority can do so if the majority consent Thus the presiding authority has no absolute power of adjournment nor can a majority in the meeting compel the presiding authority to adjourn the meeting See **Parshuram Dattaram Shamdasani v The Tata Industrial Bank Ltd, 25 B L R 1083**

Date and hour of adjournment—It is not necessary that a meeting should be adjourned to some other date It may be adjourned to a later hour on the same day

Business at the adjourned meeting—The sub-section specifically lays down that no business other than the business left undone at the meeting from which the adjournment took place can be transacted at the adjourned meeting This means that only items on the agenda left undisposed of can be considered at the adjourned meeting No special or other work however urgent or important can be taken up. The powers of the presiding authority under section 35(2) to permit special business are rendered nugatory by this sub-section so far as an adjourned meeting is concerned.

Notice of an adjourned meeting—An individual notice to every councillor of an adjourned meeting is not necessary The sub-section clearly provides that a notice of adjournment posted in the municipal office is sufficient notice of the adjourned meeting However this notice should state the hour, day and

place of the adjourned meeting, and also should state the business that is left undisposed of at the meeting which was adjourned

Sub-section (12) —This sub-section prescribes a procedure that must be followed if a resolution passed by a municipality is to be modified or cancelled within three months from the passing thereof This sub-section does not state that every resolution of a municipality can be modified or cancelled nor does it state the nature or class or type of resolutions which can be modified or cancelled In fact on these two points the whole of the Act is entirely silent However as pointed out above this sub-section merely provides a procedure and should not be understood to mean that every resolution of a municipality can be cancelled or modified The sub-section only means that the procedure prescribed in the sub-section must be followed for the purpose of cancelling or modifying a resolution which can properly be cancelled or modified If this were not so and if it was held that every resolution of a municipality can be cancelled or modified, a *chaos would result For example, section 21 provides* that a president can not be removed from his office except with the votes of at least three-fourths of the whole number of councillors Now if it was held that a municipality can cancel or modify any and every resolution then a resolution electing a particular councillor as president can also be cancelled This can be done by one-half of the whole number of councillors within three months or by a bare majority after three months Thus the provisions of section 21 could be circumvented Similarly if resolutions sanctioning works and expenditure are cancelled or modified after the works are executed or expenditure incurred partly or wholly, there would be chaos in the administration Of course the municipality may change its policy or its plans so far as the resolutions are not yet executed but it will lead to absurd results if the municipality were held to have powers to cancel or modify resolutions after they were fully executed It is clear that sanctions can not be withdrawn so as to affect or prejudice what has already been done Thus, in short, it is clear that a municipality has no powers of cancellation or modification in cases where such cancellation would result in circumventing or contravening the provisions of this Act or the rules Similarly, a municipality has no such powers in regard to resolutions which have already been executed or sanctions which have already been acted upon There may be other cases as well *It seems that the only* resolutions that can be properly modified or cancelled by a municipality are those pertaining to policy and change of schemes or plans before they are put into execution In order to avoid any ambiguity on these points it would be much better if the Act clearly indicates the resolutions which can be modified or cancelled

Requirements —It should be noted that this sub-section applies only if a resolution is to be cancelled or modified within three months from the passing thereof Beyond three months the procedure laid down in this sub-section need not be followed, i e to say, the proposition or notice for the modification or cancellation may be brought forward and carried in the ordinary way Thus, after three months a resolution can be modified or cancelled by a bare majority of the councillors present Also the modifying or cancelling resolution may be brought forward as a special case with the permission of the presiding authority under sub-section (8) of this section The notice of meeting in which a resolution is sought to be modified or cancelled must be given in the manner prescribed under sub-section (3) and the original resolution which is to be modified or cancelled must be fully set out therein The proposition or motion for

the modification or cancellation of the resolution must also be set out fully in the notice of the meeting

Sub-section (13).—This sub-section requires that when any work is being executed for the municipality by a Government Executive Engineer and if any business is to be brought forward before a meeting relating to that work, fifteen days' previous notice by a letter must be given to the said Executive Engineer The letter must also contain the motions or propositions which are to be brought forward concerning such work Similarly, in case of educational matters similar notice in a similar way must be given to the deputy educational inspector of the district

Sub-section (14).—This sub-section deals with the right of certain government officers named in the sub-section to be present at municipal meetings It also provides that a municipality may require any of such officers to be present at any of its meetings

The Chief Officer to be present at every meeting of the municipality but not to vote upon or make any proposition

36. The Chief Officer shall be present at every meeting of the municipality, and may with the permission of the president or of the municipality make an explanation or a statement of facts in regard to any subject under discussion at such meeting, but shall not vote upon or make any proposition at such meeting

Scope.—This section requires the Chief Officer to remain present at every meeting of the municipality The requirement being statutory he cannot be asked to leave the meeting But he cannot speak at the meeting except with the permission of the President or of the municipality He is also not entitled to vote at the meeting He also cannot move any propositions

(2) Committees

Standing committee

37. (1) In every municipality there shall be a committee called the standing committee consisting of such number of councillors not being more than twelve nor less than six, as the municipality may determine and elected by the municipality in accordance with rules framed under section 58, clause (a) The members so elected shall hold office for a period of one year

Powers of standing committee.

(2) The standing committee shall exercise the functions allotted to it under this Act and subject to any limitations prescribed by the municipality especially in this behalf or generally by rules made under clause (a) of section 58, and to the provisions of section 34, 37A and 38 shall exercise all the powers of the municipality

Amendment.—In sub-section (2) the figures and word '37A' were inserted by Bombay 4 of 1930, section 4

General.—This section deals with the standing committee Its members are to be elected by the municipality in accordance with the rules framed under section 58(a) The members of the committee should not be less than six and more than twelve They hold office for a period of one year from the date of their election Under sub-section (2) the standing committee is empowered to exercise all the functions allotted to it under this Act

Statutory powers of the standing committee:—Under section 58(a) the municipality can frame rules delegating even the statutory powers of the standing committee to any other committee or to the chief officer

Other powers of the standing committee:—Section 38 enables the municipality to appoint other executive committees to exercise such of its powers as may be delegated to them The municipality may also delegate any of its powers to the Chief Officer The powers remaining with the municipality after such delegation are what are called residuary powers of the municipality and under section 37(2) they are exercisable by the standing committee subject to the limitations prescribed by rules under section 58(a) or in any other way by the municipality

The standing committee cannot exercise the powers of the Chief Officer under section 34 or of the pilgrim committee under section 37A This is also made clear by sub-section (2) In **Emperor v Jesangbhai, 37 B L R 184,** it was held that under section 37 of the Bombay Municipal Boroughs Act, 1925, the standing committee is required to exercise the functions allotted to it under the Act and also the residuary powers of the municipality which have not been validly delegated to some other body

Rules framed under section 58(a) —This means that a standing committee can be elected only if there are rules framed under section 58(a) It may be noted that the words 'the rules for the time being in force' are not used as has been done in some other cases Thus old rules framed under the Bombay District Municipality Act of 1901 will not be of use for the election of the standing committee under this Act In absence of rules framed under section 58(a) of this Act, a standing committee cannot be elected

Whether the statutory powers and duties of the Standing Committee remained with the Municipality if no standing committee is constituted:—If no standing committee is appointed its statutory powers and duties under the Act do not remain with the municipality and no one can exercise them In **Prithviraj v Lonavla Municipality, 35 B L R 138,** Nanavati J said "The learned district judge further considered that as no standing committee had been constituted, its powers and duties must be considered as remaining with the municipality itself This also does not appear to be a valid argument If it were to be accepted it would follow that it would be open to any municipality to neglect the provisions of the Act to constitute the various statutory bodies required under it"

Whether the appointment of a standing committee is mandatory — In **Prithviraj v Lonavla Municipality, 35 B L R 138,** the District Judge in the lower court had dealt with the question as follows —"But it could scarcely have been the intention of the Legislature that the Municipality should not be able to function till the standing committee had been appointed As such a committee could not be appointed till rules regulating its appointment and constitution had been framed, and as this process must necessarily take sometime since the new Act has recently come into operation, it must, I think, be presumed that the Legislature intended that in the commencement other agencies than the standing committee would be able to carry on the administration of the Municipality" In the High Court Nanavati J disagreeing with this view said "I do not agree with this view In the earlier sections of the Act provision is made for the continuance of rules and by-laws made under the former Act so far as they were not inconsistent with the new Act, s 5 The Munici-

palities concerned must have been aware that the new Act was likely to be enacted under which they would have to function and they probably had ample notice to make preparation for bringing the necessary machinery into existence, before the Act was actually applied to them In any case, I think it cannot be assumed that the legislature intended to leave all powers to be exercised as it suited the municipalities for some indefinite period after the Act came into force If the Legislature thought it necessary to make any provisions for the transition period it would have made some arrangement and introduced provisions of a transitory character as is done in the various Acts The learned District Judge further considered that as no standing committee had been constituted its powers and duties must be considered as remaining with the municipality itself This also does not appear to be a valid argument If it were to be accepted, it would follow that it would be open to any municipality to neglect the provisions of the Act to constitute the various statutory bodies required under it The learned District Judge admits that if a standing committee had been constituted its powers clearly could not be delegated to the President It would seem to stand on even stronger ground that if the standing committee has not been constituted at all the municipality could not delegate its powers as such delegation is clearly inconsistent with the provisions of the Act. As I have already pointed out, those powers are defined by statute, and the statute is mandatory in its terms" Thus the view taken in this case was that the appointment of a standing committee was compulsory and it was not open to a municipality to neglect to constitute a standing committee The same meaning comes out of the wording of s 37 which lays down that in every municipality there shall be a committee called the standing committee

Interpretation of s 37—Election of Standing Committee —The managing committee constituted under the B D M Act, 1901, cannot be continued as a standing committee under Act XVIII of 1925 **(R L A's opinion No 491 dated the 7th February 1927 in G R G D No 371 dated the 14th February 1927).**

Under s 58(a) of the Bombay City Municipalities Act, 1925, rules must be made regulating the appointment and constitution of the standing committee and the delegation of any of the powers or duties of a municipality to the standing committee Section 37(1) of the Act contemplates that rules shall be framed by the municipality under s 58(a) for the election of the standing committee before it is constituted Under s 37(2) the standing committee exercises the functions allotted to it under the Act, and subject to any limitations prescribed by the municipality especially in this behalf or generally by rules made under cl (a) of s 58, and to the provisions of sections 34 and 38, shall exercise all the powers of the municipality The result is that if no rules are framed by the municipality under s 58(a) the standing committee exercises, subject as stated above, the functions allotted to it under the Act and all the powers of the municipality As rules made under Bombay Act III of 1901 for the managing committee are inconsistent with the provisions of Bombay Act XVIII of 1925, they cannot continue in force for the working of the standing committee ipso facto under s 5(1), proviso (b) of Bombay Act XVIII of 1925, though it may be possible to adopt them **mutatis mutandis** as rules under that Act, for the working of the standing committee **(R L A.'s opinion No. 1426 dated the 25th April 1927 in G R G.D No 371 dated the 2nd May 1927).**

Power of the Municipality to dissolve a standing or executive committee:— In the case of consultative committees referred to in s 30 of the B D M Act,

1901 (s 39 of the B M B Act, 1925), the Act specially authorises the municipality to discontinue or alter the constitution of any such committee. The omission of any such authorization as regards the executive committees referred to in sections 27 to 29 (sections 37 and 38 of the B M B Act) appears significant, and s 16 of the Bombay General Clauses Act, 1904, would not therefore seem to apply In the absence of any rule rendering the period of a committee's constitution dependent upon the will of the municipality, it does not appear that the municipality has the power to dissolve any of the committees referred to in sections 27 to 29, within the period for which they were appointed **(R L A.'s opinion No 579 dated the 14th March, 1921, in G.O.G.D. No 3969 dated the 15th April 1921).**

Whether managing committee can hear appeals from the orders of the Chief Officer under s 183 of the B D M Act, 1901, (statutory powers of the Chief Officer) —Under s 27 cl 2(n) of the Act the managing committee is absolutely debarred from exercising any of the statutory powers mentioned in s 183 where there is a Chief Officer to exercise them To allow a managing committee to hear appeals from the Chief Officer's orders would be tantamount to allowing it to exercise powers contrary to the provisions of the Municipal Act. The managing committee cannot therefore hear appeals from orders made by the Chief Officer in exercise of the power vested in him by s 183 of the Act The disposal of appeals from the orders passed by the Chief Officer in exercise of powers delegated to him by the municipality is a matter for regulation by the Board under s 48(a) of the Act (s 58(a) of the B.M B Act, 1925) in the same way as the delegation of powers to him under that section **(G R G D No. 6625 dated the 20th October 1911)** The position is the same under the B.M B Act, 1925, and the standing committee cannot hear appeals from the orders of the Chief Officer in exercise of his statutory powers except in cases where such powers are made subject to an appeal to the standing committee

Pilgrim Committee.

37A. (1) In every municipality notified by the Provincial Government in this behalf there shall be a committee called the Pilgrim Committee consisting of four councillors of whom one shall be the President of the municipality and the other three shall be elected in accordance with rules made under clause(a) of section 38 and of two persons appointed by the Provincial Government, both of whom may be salaried servants of the Crown .

(2) The members of the Pilgrim Committee shall hold office for the duration of the municipality and thereafter up to the date on which a new Pilgrim Committee is constituted in accordance with the provisions of this section

In the case of supersession of the municipality or of the Pilgrim Committee, a new Pilgrim Committee shall be constituted by the Commissioner Such Committee shall consist of six persons nominated by the Commissioner and shall continue until the municipality is re-established, and a new Pilgrim Committee is constituted, in accordance with the provisions of this section, or, in case of

supersession of the Pilgrim Committee, until the Pilgrim Committee is re-established.

(3) The Pilgrim Committee shall manage and administer the pilgrim fund established under proviso (c) to section 65 and shall exercise the powers and perform the duties of the municipality in respect of the said fund and of works constructed or maintained out of the said fund and shall exercise such other powers and perform such other duties as may be allotted to it by the municipality subject to such limitations and restrictions as may be prescribed by the municipality by rules made in this behalf under clause (aa) of section 58

(4) All the provisions of this Act relating to the duties, powers, liabilities, disqualifications and disabilities of councillors shall be applicable, so far as may be, to the members nominated on the Pilgrim Committees

(5) In the event of the death, resignation, disqualification, disability or removal of a nominated member previous to the expiry of his term of office, the vacancy shall be filled up by the appointment of a person thereto who shall hold office so long only as the person in whose place he is appointed would have held it if the vacancy had not occurred

(6) Section 45 shall not apply to the Pilgrim Committee, provided that the municipality shall have power, at any time, to call for any extract from any proceedings of the Pilgrim Committee and for any return, statement of account or report concerning or connected with any matter with which the Pilgrim Committee deals and every such requisition shall, without unreasonable delay, be complied with by the Pilgrim Committee

(7) The provisions of section 210, 211 and 212 shall, so far as may be, apply to the Pilgrim Fund Account and the Pilgrim Committee shall, with respect to the preparation and submission to the municipality of its annual budget, follow the following procedure, namely —

"The Pilgrim Committee shall in sufficient time submit its annual budget and all alterations therein to the municipality for consideration, and, if the municipality agrees to it, for its incorporation in the general municipal budget If the municipality do not agree to the budget as framed by the Pilgrim Committee, they shall return it to the Pilgrim Committee for reconsideration, either in whole or in part, together with any alterations,

which they may recommend, and if the Pilgrim Committee agrees to those alterations, the budget so altered shall be incorporated in the general municipal budget If the municipality and the Pilgrim Committee fail to reach an agreement, the budget with a statement of the points in dispute shall be referred by the municipality to the Commissioner, whose decision on such points shall be final"

(8) The provisions of sections 213, 215, 218 and 219 shall apply to a Pilgrim Committee and in their application to a Pilgrim Committee the said sections shall be construed so far as may be, as if for the word "municipality" occurring in the said sections the words "Pilgrim Committee" were substituted

Amendments —This section was inserted by Bombay 4 of 1930, section 4 In sub-section (1) the words 'the Provincial Government' were substituted for the word 'Government' by the Adaptation of Indian Laws Order in Council In sub-section (1) the words, figures, letter and brackets 'of four councillors of whom one shall be the President of the municipality and the other three shall be elected in accordance with rules made under clause (a) of section 58 and of two persons appointed by the Provincial Government both of whom may be salaried servants of the crown' were substituted for the words, figures, letter and brackets 'of three councillors of whom one shall be the president of the municipality and the other two shall be elected in accordance with rules made under clause (a) of section 58 and of three persons nominated by the commissioner of whom not more than two may be salaried servants of the crown' by Bombay 9 of 1938, section 8

In sub-section (3) the words 'and of works constructed or maintained out of the said fund and shall exercise such other duties as may be allotted to it by the municipality' were inserted by Bombay 19 of 1935, section 6

General —This section deals with the constitution of the pilgrim committee A pilgrim committee is not required to be constituted in every municipality but only in such municipalities as are notified by the Provincial Government in this behalf The committee consists of four councillors and two persons appointed by the Provincial Government One of these four councillors must be the President and the remaining three must be elected under the rules framed under section 58(a)

Sub-section (1)—Rules made under clause (a) of section 58.— See notes under section 37

Sub-section (2) —Duration of the municipality means the term of office of the municipality

Supersession —When a municipality is superseded a new pilgrim committee must be appointed Similarly, when a pilgrim committee is superseded a new pilgrim committee must take its place In both the cases the new committee is to be appointed by the Commissioner, all the six members of which will be nominated by the commissioner The committee appointed by the commissioner will continue until the municipality is re-established and a new pilgrim committee is constituted under this sec-

tion, or in the case of supersession of the pilgrim committee until the pilgrim committee is re-established

Sub-section (3) —This sub-section deals with the duties and powers of the pilgrim committee

Sub-section (4) —This sub-section does not apply to the elected members of the pilgrim committee because the provisions of this Act apply to them on account of their being councillors This sub-section makes certain provisions of this act applicable to the nominated members of the pilgrim committee, i e to say, puts them on the same footing as elected members in matters of duties, powers, disqualifications, etc This sub-section will apply not only to the two persons appointed by Government under sub-section (1) but also to the six persons nominated by the commissioner under sub-section (2).

Sub-section (5) —This deals with a casual vacancy in the nominated seats in the pilgrim committee Vacancies in the elected seats will be filled in under rules framed under section 58(a) and hence no provision is made therefor in this section

Sub-section (6) —The pilgrim committee is exempted from the operation of section 45 It is only required to supply to the municipality any extract from any of its proceedings, any return, statement, etc when asked to do so by the municipality

Sub-section (7) —Section 210 deals with audit of accounts, section 211 with transmission of accounts to Provincial Government, and section 212 with publication of accounts These three sections are made applicable to the Pilgrim Fund, Account The sub-section further provides for the preparation and incorporation of the annual budget of the committee in the municipal budget and for settlement of disputes between the municipality and the pilgrim committee in this behalf by the commissioner whose decision is final

Sub-section (8) —This provides for Government's supervision and control over the affairs of the pilgrim committee and its supersession, etc, by the Government

Other executive committees

38. (1) Notwithstanding anything contained in section 37 (2) other committees consisting of such number of councillors as the municipality may decide, may be appointed to exercise the powers and perform the duties of the municipality in respect of any purpose not being, where a Pilgrim Committee is appointed, powers or duties referred to in section 37-A The standing committee shall not exercise any powers or perform any duties which such committee has been appointed to exercise or perform

(2) The members of such committees shall be elected by the municipality in accordance with the rules framed under clause (a) of section 58 and such members shall hold office for a period of one year

Amendments.—In sub-section (1), the words, figures and letters "not being where a Pilgrim committee is appointed, powers and duties referred to in section 37A" were inserted by Bombay 4 of 1930, section 4

General —This section provides for the appointment and constitution of

committees other than a standing committee or a pilgrim committee The number of members of a committee appointed under this section is not fixed by the Act as in the case of a standing committee or a pilgrim committee but the municipality is given full discretion to fix the number All the members of a committee appointed under this section must be councillors of the municipality A committee can be appointed under this section for any purpose whatsoever, except those of a pilgrim committee where one is appointed The committee so appointed will exercise all the powers and perform all the duties of the municipality which are delegated to it either by rules under section 58(a) or by resolutions

Powers of the municipality which are thus delegated to a committee under this section are not exercisable by the standing committee after such delegation The committees appointed by this section are sometimes known as executive committees because they are appointed to exercise the powers and perform the duties of the municipality and are not merely consultative Under section 38 of the Act the power of the municipality to delegate is confined to its residuary powers which are exercisable by the standing committee and does not apply to the special functions which are allotted to the standing committee under the Act But even this can be done by framing a rule under s 58(a) which in terms empowers the municipality to frame a rule delegating the powers or duties of one committee to another committee See **Emperor v Jesingbhai, 37 B L.R, 184**

Sub-section (2) —This provides that the members of a committee under this section must be elected by the municipality in accordance with rules framed under section 58(a) and they will hold office for a fixed period of one year after their election

Rules framed under section 58(a) —See notes under this head under s 37

Power of the municipality to dissolve a standing or executing committee — See notes under this head under s 37

Consultative committees.

39. A municipality may from time to time appoint such other committees consisting of such councillors as it thinks fit, and may refer to such committee for inquiry and report or for opinion such special subjects relating to the purposes of this Act as the municipality shall think fit, and may at any time discontinue or alter the constitution of any such committee The municipality may direct that the report of any such committee shall be made to the standing committee, or to a committee appointed under section 38, instead of to the municipality

General —This section deals with what are known as consultative committees, i e, to say, committees which are not appointed to exercise any of the powers of the municipality, but only to inquire and report or give its opinion The final action is reserved for the municipality or for any executive committee if the municipality so desires A committee appointed under this section may be discontinued at any time by the municipality The municipality may also alter its constitution at any time, i e to say, add to or remove from the committee any member or members or substitute other members in place of the existing members The committee being obviously for inquiry and report, no

period of office is fixed The power of appointing such committees is vested in the municipality

Power of the municipality to dissolve a standing or executive committee.— See notes under this head under s 37

When persons other than councillors may serve on committees

40. Notwithstanding anything contained in this Act, it shall be lawful for a municipality from time to time by a resolution supported by not less than one-half of the whole number of councillors, to elect as members of any committee appointed under section 39 or 38 any person of either sex, who is not a councillor but who in the opinion of such municipality possesses special qualifications for serving on such committee, provided that the number of persons so elected on any committee shall not exceed one-third of the total number of the members of such committee.

Duties etc of such persons

All the provisions of this Act relating to the duties, powers, liabilities, disqualifications and disabilities of councillors shall be applicable so far as may be to such persons

General —This section provides for appointment of outsiders on committees appointed under section 38 or section 39 The total number of such members on any committee must not exceed one-third of the total number of members on such committee The resolution appointing such members must be passed by at least one-half of the whole number of councillors This power of appointing outsiders on committees is exercisable by the municipality and should not be exercised unless the municipality is of the opinion that such person possesses special qualifications for serving on the committee To such outsiders all the provisions of the Act relating to the duties, powers, disqualifications, etc of councillors are applied by this section

Whole number of councillors —See notes under s 21

Casual vacancies, re-eligibility

41. A vacancy occurring in a standing committee or in a committee appointed under section 38 shall as soon as possible, and a vacancy occurring in any other committee may be filled up by the election of a member thereto subject to the same provisions as those under which the member whose place is to be filled up was elected A person elected under this section shall hold office so long only as the person in whose place he is elected would have held it if the vacancy had not occurred No person shall be ineligible at any time for election as a member of any such committee on the ground that he has previously been a member of that committee

Scope —This section provides for filling up casual vacancies occurring in any committee As regards standing committee or a committee appointed under section 38 it is compulsory that a vacancy shall be filled up as soon as possible As regards other committees, i e to say, a pilgrim committee or a committee formed under section 39 it is not compulsory to fill up a casual vacancy Section

37A sub-section (5) provides that a casual vacancy in a nominated seat in the pilgrim committee must be filled up by nomination Thus a combined reading of section 37A and section 41 shows that as regards a pilgrim committee while it is not obligatory to fill up a vacancy in an elected seat, it is compulsory to fill up a vacancy in a nominated seat There is no reason why the words any other committee used in this section should not include a Pilgrim Committee, and it is clear that as the phraseology stands this section applies to a pilgrim committee In that case the result as pointed out above is anomalous and section 41 requires to be made clear as far as a pilgrim committee is concerned It is possible that this defect is due to the fact that section 37A providing for the appointment of a pilgrim committee was subsequently inserted and section 41 as originally framed did not cover the case of a pilgrim committee But now in view of insertion of section 37A, section 41 requires to be amended

Ex-officio and appointed chairman, Non-attendance of chairman.

42. (1) The president or vice-president, if elected a member of any committee, shall be ex-officio chairman thereof

Provided that in the case of a Pilgrim Committee the President shall be ex-officio chairman thereof

(2) A municipality may appoint a chairman for a committee of which there is no ex-officio chairman

(3) A committee of which there is an ex-officio chairman or a chairman appointed by the municipality, shall at each meeting which such chairman does not attend, appoint from its members a chairman for such meeting

(4) A committee, of which there is no ex-officio chairman or chairman appointed by the municipality shall appoint from time to time a chairman from the members of such committee

Amendments —In sub-section (1) the proviso 'provided that in the case of a Pilgrim Committee the President shall be ex-officio chairman there of' was added by Bombay 4 of 1930 section 4

Scope —This section provides that whenever a President or a vice-president is elected a member of any committee other than a pilgrim committee he automatically becomes chairman of the committee The section does not say clearly that if both the President and Vice-president are elected members of such a committee the President shall be the ex-officio chairman But there can be no doubt that in such a case the president will be ex-officio chairman and not the vice-president If a president or a vice-president is not elected on any such committee the municipality may appoint a chairman for the committee But if the municipality does not do so the committee is empowered to elect a chairman as and when it becomes necessary The committee is also empowered to elect a chairman for the meeting if in any meeting the ex-officio chairman or the chairman appointed by the municipality is absent

The case of a pilgrim committee is entirely different In this case the president of the municipality is an ex-officio member under section 37A (1) Under the proviso to sub-section (1) of section 42 he is an ex-officio chairman

of the pilgrim committee Thus none other than the president of the municipality can be a chairman of the pilgrim committee

From time to time —This means whenever it becomes necessary to have a chairman

Ex-officio —Means automatically by virtue of his office Thus as soon as he vacates the office he also vacates the ex-officio office For example, a president of a municipality is an ex-officio member and ex-officio chairman of the pilgrim committee But as soon as he ceases to be the president he also automatically ceases to be a member and chairman of the pilgrim committee.

Procedure at meetings

43. (1) The provisions of sub-sections (4), (9), (10) and (14) of section 35 shall be complied with in all proceedings of committees as if meetings of committees were included in all references to meetings of a municipality contained in those provisions, and as if for the word "municipality" where it occurs in the proviso to clause (a) of sub-section (14) of section 35, there was substituted the word "committee"

If the chairman of any committee has been absent from the municipal borough for a period exceeding fifteen days, the president or vice-president may, in his absence, call a meeting thereof

Provided that, notwithstanding anything to the contrary contained in sub-section (9) of section 35, a committee may record its proceedings either in English or in the Vernacular language, as it may think fit

Meeting and adjournment of committees

(2) A committee may meet and adjourn as it thinks proper, but the chairman of a committee may whenever he thinks fit, and shall, upon the written request of the president of the municipality or of not less than two members of the committee and for a date not more than two days after the presentation of such a request, call a special meeting of such committee

Quorum

(3) No business shall be transacted at any such meeting of a committee unless more than one-third of the members of the committee be present thereat

Sub-section (1) —By this sub-section certain provisions of section 35 applicable to meetings of the municipality, i e to say, provisions regarding (1) place of meeting, (2) minutes of proceedings, (3) decision of questions by majority of votes and (4) attendance of Government officers at meetings, are made applicable to committee meetings with the only difference that liberty is given in the case of a committee to record its proceedings in English only if the committee so desires In the case of a meeting of the municipality the proceedings must be recorded in vernacular irrespective of the fact whether they are recorded in English or not This is not compulsory in the case of committee meetings

The sub-section also enables a President or a vice-president to call a meeting of any committee in the absence of its chairman provided the chairman is absent from the municipal borough for more than fifteen days

Section 35(4), (9), (10) and (14) —See notes under section 35

Sub-section (2)—A committee may meet and adjourn as it thinks proper. This means that a committee may determine the time and date of its meetings For example, a standing committee may resolve that it shall meet at 4 p m on every Saturday In such a case no notice of a meeting will be necessary. In addition to the meetings arranged by the committee itself the chairman is also authorised to call a meeting of the committee whenever he thinks fit He is also enjoined to call a meeting of the committee if the president or two members or more of the committee so request in writing When a meeting is called on such a request it must be called to meet on a day within two days after the presentation of such request The Act does not provide any remedy if the chairman fails to call a meeting in spite of such a request A meeting called by the chairman is a special meeting Under this sub-section the power of adjourning a meeting also vests in the committee The chairman has no powers to adjourn a meeting of the committee

Sub-section (3)—Quorum —The committee cannot transact any business in any meeting unless there is a quorum If there is no quorum the members must disperse and in the next meeting also there must be a quorum The quorum prescribed for a committee meeting is the presence of more than one-third of the members of the committee This does not mean more than one-third of the whole number on the committee, that is to say, vacancies in the committee on the date of the meeting are to be excluded Thus if there are 12 seats on a committee out of which four are vacant on the day of the meeting the quorum required is the presence of three and not five as would be required if there was no vacancy It may be noted that whenever the "whole number" is intended those words are used See for example section 35(7)

Under section 35(7) when there is no quorum in a meeting of the municipality, the Presiding authority is authorised to adjourn the meeting to some other date and hour, but no such authority is given to the chairman under this sub-section The meeting also cannot pass any such resolution This sub-section prohibits it from transacting any business Also there is no provision in this sub-section that in a meeting adjourned for want of quorum, no quorum will be necessary All this suggests that a committee meeting cannot be adjourned for want of a quorum but must disperse Similar view was expressed in **Nilkanth v Murari, 25 B L R 315**, by Martin J who observed "Admittedly there was no quorum, for the quorum is three Could then the two members adjourn the meeting either to a later hour that day or to some subsequent day, and in any event would such an adjournment be valid unless notice of the adjournment was given to all the members? Now there are no special rules of this Committee which have been framed, or at any rate which have been brought to our attention, and we must therefore decide the case on general principles There being no quorum, I fail to see what power the two members had to adjourn the meeting to three o'clock that day or to three o'clock say two days afterwards, unless at any rate notice of the adjournment was given to all the members Ex hypothesi no such notice of the adjournment was given, and it seems to me, therefore, that the adjourned meeting at three o'clock was invalid This seems to me to be no mere technicality If, for

instance, some member had come at nine o'clock and found nobody present, he would naturally assume that either the meeting had been held and was over, or that it had failed for want of a quorum, and that in any event he had come too late, and might go away He would not necessarily know without some express notice that the meeting was to be held at three o'clock I do not say that that happened in the present case But one has to consider the matter on general principles"

Procedure by circular

44. (1) Notwithstanding anything contained in section 43 the chairman of a committee may, instead of convening a meeting, circulate a written proposition of his own or of any other member of the committee or of any executive officer of the municipality for the observations and votes of the members of the committee

Propositions when to be sent to Government Officers for remarks.

(2) Previous to circulating any such proposition as aforesaid, the chairman may, if he thinks fit, and, if the business to which it relates is of the nature described in sub-section (13) of section 35, shall obtain thereupon the remarks, if any, which any Government Officer whose presence the municipality would be entitled to require under the provisions of clause (b) of sub-section (14) of section 35, desires to record

Decisions how to be taken on propositions circulated

(3) The decision on any proposition so circulated shall be in accordance with the majority of votes of the members of the committee who vote upon it, unless a special meeting is convened to consider the said proposition

And how to be recorded

(4) Every decision arrived at by a committee under this section shall be recorded in the minute book

Sub-section (1):—This provides that a chairman of a committee may instead of calling a meeting circulate any written proposition for the observations and votes of the members of the committee The written proposition may be from the chairman himself or from any other member of the committee or from any executive officer of the municipality

Sub-section (2):—This sub-section requires that if the proposition relates to a matter of the nature described in section 35(13) the chairman before circulating any such proposal as aforesaid must obtain thereon the remarks, if any, from a Government officer whose presence the municipality may require under section 35(14)(b) In other matters the chairman may obtain such remarks before circulating the poposition

Sub-section (3):—Under this sub-section after the proposition is circulated the chairman if he wants to decide on the votes so cast he must decide in accordance with the majority of votes But he is not bound to do so In that case he must call a special meeting of the committee to consider the proposition The sub-section does not fix the time within which the special meeting must be called This is defective

Sub-section (4).—A decision arrived at by a committee by circular must be recorded in the minute book

Subordination of committees to municipality

45. (1) A committee shall conform to any instructions that may from time to time be given to it by the municipality, the municipality may at any time call for any extract from any proceeding of any committee and for any return, statement, account or report in connection with any matter with which any committee has been authorised or directed to deal, every such requisition shall, without unreasonable delay, be complied with by the committee so called upon

(2) Every order passed by a standing committee or by a committee appointed under section 38, other than orders under sub-section (3) of section 81, shall be subject to such revision and open to such appeal as may be required or allowed in respect thereof by any rules of the municipality for the time being in force under section 58

Sub-section (1) —This empowers the general board to require a committee (1) to conform to its instructions, (2) to supply any extract from its proceedings and (3) to supply any written statement, account or report in connection with any matters under its authority

Sub-section (2) —This provides for revision and appeal over the orders of a standing committee and a committee appointed under section 38 Orders under section 81(3) are not subject to revision or appeal under this sub-section The revision or appeal under this sub-section will lie only as provided for in the rules under section 58 There will be no revision or appeal if it is not provided for in the rules under section 58

Appeal not compulsory before bringing a suit —It is not compulsory for a party aggrieved by an order or decision of a committee to appeal to the municipality as provided in the rules before exercising his right of suit if any The rules providing for appeals must be construed as permissible and not mandatory They refer to departmental procedure only and do not debar the institution of the civil suits They only provided one more chance to party if he wants to take it to persuade the municipality to his point of view But if he does not take the chance and straightaway proceeds to a civil court his suit cannot be said to be premature See **Vasudevacharya and others v The Municipality of Sholapur, 22 Bom 384**

Powers, duties and functions may be delegated to officers whose expenses may be paid

46. Any powers or duties or executive functions which may be exercised or performed by or on behalf of the municipality may be delegated in accordance with rules to be made by the municipality in this behalf, to the president or to the vice-president or to the chairman of the school or other committee, or to one or more stipendiary or honorary officers, but without prejudice to any powers that may have been conferred on the Chief Officer by this Act or on any committee by or under section 37, 37-A or 38, and each person, who exercises any power or performs any duty or function so

delegated, may be paid all expenses necessarily incurred by him therein

Amendment —The figures and letter '37A' were inserted by Bom 4 of 1930, s 4

Scope—This section provides for delegation of all powers, duties and executive functions of a municipality except the statutory powers of the Chief Officer and powers conferred on any committee by or under section 37, 37A, and 38 of the Act

Which may be exercised or performed by or on behalf of the Municipality—This means all the powers, duties and executive functions of a municipality which may be exercised or performed by itself or any of its committees or officers Thus all powers, duties and executive functions of a municipality including those of its committees and officers, except the powers which are specially excluded by this section itself i e the statutory powers of the Chief Officer or of any committee, are covered by this section

In accordance with rules to be made by the municipality in this behalf:—Necessary provision for making rules for purposes of section 46 has been made in section 58 Section 58(a) enables the municipality to make rules regulating the delegation of powers and duties mentioned in this section Section 58(b) provides for determining the executive functions to be performed by the president, vice-president and the chairman of any committee Section 58(c) provides for determining the powers and duties of the staff of officers and servants to be employed by the municipality and so on In short section 58 is complementary to section 46 The delegation under section 46 has to be made in accordance with rules framed in this behalf under section 58 In absence of a rule providing for the delegation, no delegation can be made at all Rules under section 58 must be framed so as not to contravene any of the provisions of the Act including section 46 Thus a rule cannot be framed under section 58 so as to delegate any of the statutory powers of the chief officer or of any committee conferred on it by or under section 37, 37A or 38 to the president or such other individuals as are mentioned in section 46 In **Prithviraj v The Lonawala City Municipality, 35 B L.R 138,** it was held that the rule made by the municipality delegating all powers of the standing committee including the statutory powers to the president was ultra vires and did not authorise him to exercise the powers of the standing committee conferred on it by section 81

By or under —There is a fundamental distinction between the phrases "by the Act" and "under the Act" Powers conferred by the Act mean powers which are specifically mentioned in the statute itself Powers under the Act mean powers granted under the provisions of the Act, i e, to say, by rules framed under the Act or by resolution passed under the Act or by such means as are provided for in the Act

Specific or general powers —The Surat Municipality framed rule No 44 in the following terms 'An executive committee may depute any of the members or the Chief Officer or any Municipal Officer or servant under the control of the Committee to perform the executive functions resultant from any of their resolutions In the absence of any such specific deputation in the terms of a resolution, the necessary functions shall be performed by the chief officer' It was contended that this rule was ultra vires of section 46 of the Bombay City Municipalities Act inasmuch as it conferred not a specific

but a general power on the chief officer It was held that this did not detract in any manner from the powers conferred on the standing committee by the Act and hence the rule was not ultra vires of section 46 of the Act **Emperor v Heptulla Alibhai, 32 B L.R. 757**

But without prejudice to any powers that may have been conferred etc — This phrase has been interpreted in **Emperor v Heptulla Alibhai 32 B.L.R 757,** wherein Mirza J while considering rule 44 framed by the Surat Municipality observed —"No doubt if the powers conferred by rule 44 detracted in any manner from the powers conferred on the standing committee by the Act the rule would be ultra vires of section 46 of the Act" In the same report Broomfield J is stated to have observed "Mr was quite correct in pointing out that rules delegating powers made under section 46 of the Act must be subject to any powers which have been conferred by the Act itself on the Chief Officer or on any committee The rules, therefore, must be consistent with and must not in any way detract from the powers conferred upon the standing committee by section 37 If it had been provided in the rules that the Chief Officer was to have the power to issue a notice under section 137 of his own motion such a rule would obviously have been inconsistent with the Act and ultra vires, but a rule which merely allows the Chief Officer to sign the notice does not in any substantial way trench upon the powers of the executive committee" This means that the statutory powers of the Chief Officer or any committee cannot be delegated to the president and other persons mentioned in this section It should be noted that this exception refers only to powers and not to duties or executive functions

Power of standing committee or Chief Officer under s 200 B M B Act 1925 cannot be delegated to the President —Although section 30 of the Bombay City Municipalities Act, 1925, provides generally that the municipal government vests in the municipality, it contains the words 'except as in this Act otherwise expressly provided' Section 200 vests the power of directing prosecutions in the Standing Committee or the Chief Officer If there be no Standing Committee appointed for the municipality, it does not appear that the general body of the municipality or any other officer can direct such prosecutions No such power can be delegated by a municipality to its president under s 46 The municipal funds too cannot be spent for such prosecution It is, however, open to any member of the public to set the law in motion by a complaint **(R L A.'s opinion no 419 dated the 31st January 1928 in G R G D No 371 dated the 15th February 1928)**

(3) Joint transactions with other bodies

47. (1) A municipality may from time to time

Joint committees of local bodies Joint levy of octroi

(a) join with any other municipality or with any local board, cantonment authority, sanitary board, sanitary committee or committee appointed for a notified area or with any combination of such municipalities, boards, authorities or committees—

(i) in appointing out of their respective bodies a joint committee for any purpose in which they are jointly interested, and in appointing a chairman of such committee, and

(ii) in delegating to any such committee power to frame terms binding on each such body as to the construction and future maintenance of any joint work, and any power which might be exercised by any of such bodies, and

(iii) in framing and modifying rules for regulating the proceedings of any such committee in respect of the purpose for which the committee is appointed, and

(b) enter, subject to the sanction of the Provincial Government, into an agreement with a municipality, cantonment authority, board, committee or combination as aforesaid for the levy of octroi duty, and tolls whereby the octroi duties and tolls respectively leviable by the bodies so contracting may be levied together instead of separately within the limits of the area subject to the control of the said bodies

(1A) Where a municipality has requested the concurrence of any other local authority under the provisions of sub-section (1) in respect of any matter and such other local authority had refused to concur, the Commissioner may pass such orders as he may deem fit, requiring the concurrence of such other local authority, not being a cantonment authority, in the matter aforesaid, and such other local authority shall comply with such orders

(2) If any difference of opinion arises between bodies having joined or entered into an agreement for any purpose under this section, the decision thereupon of the Provincial Government or of such officer as it appoint in this behalf, shall be final,

Provided that if one of the bodies concerned is a cantonment authority, any such decision shall be subject to the concurrence of the Central Government

Amendments —In sub-sections (1)(b) and (2) the words "the Provincial Government" were substituted for the word "Government" by the Adaptation of Indian Laws Order in Council Sub-section (1A) was inserted by Bombay 14 of 1934, section 4 The proviso to sub-section (2), "Provided that if one of the bodies concerned is a cantonment authority, any such decision shall be subject to the concurrence of the Central Government" was inserted by the Adaptation of Indian Laws Order in Council

Scope —This section provides machinery for joint committees of Local Bodies for any purpose in which they are jointly interested and for joint levy of octroi duty and tolls The joint committees constituted under sub-section (1) of this section will have such powers as are delegated to it by the bodies which join in forming the committee The committee's proceedings will be conducted in accordance with the rules jointly framed by the bodies who have joined in appointing the committee Provision has been made in sub-section (2) for solution of differences of opinion arising between the bodies in regard

to any matter for which they have joined together It provides that in case of difference of opinion the decision of the Provincial Government or such officer as it appoints for the purpose shall be final

Sub-section (1) clause (b) —This provides for bodies joining together for joint collection of octroi duty and tolls • But the agreement is subject to the sanction of the provincial govt This clause provides only for a joint levy and not for a levy which a component Local body cannot separately levy Thus this clause deals only with the procedure of collection and does not confer any additional powers of taxation It should be noted that sub-section (2) dealing with differences of opinion also applies to differences of opinion arising under this clause

Sub-section (1A) — This sub-section is to avoid deadlock when a local body refuses to join for a purpose under sub-section (1) In such case the commissioner is empowered to pass final orders and if he requires the concurrence of any local authority the local authority is bound to comply with his orders Only an exception is made in the case of a cantonment authority

Cantonment authority —It should be noted that a cantonment authority cannot be required by the commissioner to concur under sub-section (1A) Similarly, in case of difference of opinion the decision of the provincial government or of an officer appointed by it in this behalf shall be subject to the concurrence of the Central Government if one of the bodies concerned is a cantonment authority

(4) Contracts

Power of municipality to sell, lease and contract

48. (1) A municipality shall be competent, subject to the restriction contained in sub-section (2), to lease, sell or otherwise transfer any movable or immovable property which may, for the purposes of this Act have become vested in or been acquired by it, and so far as is not inconsistent with the provisions and purposes of this Act, to enter into and perform all such contracts as it may consider necessary or expedient in order to carry into effect the said provisions and purposes

(2) In the case of every lease or sale of land under sub-section (1) of section 114 and of a lease of immovable property for a term exceeding seven years and of every sale or other transfer of such property, the previous sanction of the Commissioner is required

Sanction by resolution at general meeting requisite to validity of certain contracts

(3) In the case—

(a) of a lease for a period exceeding one year or of a sale or other transfer or contract for the purchase of any immovable property,

(b) of every contract which will involve expenditure not covered by a budget grant,

(c) of every contract the performance of which cannot be completed within the official year current at the date of the contract,

the sanction of the municipality by a resolution passed at a general meeting is required

Execution of contracts on behalf of municipality

(4) In a municipality—

(a) every contract under or for any purpose of this Act shall be made on behalf of the municipality by the Chief Officer,

(b) no such contract for any purpose which the Chief Officer is not empowered by this Act to carry out without the approval or sanction of some other municipal authority, shall be made by him until or unless such approval or sanction has first of all been duly given,

(c) no contract which will involve an expenditure exceeding three hundred rupees shall be made by the Chief Officer unless otherwise authorized in this behalf by the municipality except with the approval or sanction of the standing committee,

(d) every contract made by the Chief Officer involving an expenditure exceeding two hundred rupees and not exceeding three hundred rupees shall be reported by him, within fifteen days after the same has been made, to the standing committee,

(e) the foregoing provisions of this section shall apply to every variation or discharge of a contract to the same extent as to an original contract

(5) No contract shall be binding on a municipality unless the requirements of this section have been complied with

Sub-section (1) —The former part of this Sub-section deals with lease, sale and transfer of movable and immovable property, the latter part empowers a municipality to enter into and perform contracts necessary to carry out the objects and the provisions of the Act The powers of a municipality for lease, sale and transfer of any movable and immovable property are subject to no restriction except that provided in sub-section (2) The powers of a municipality of entering into and performing contracts are subject to the restrictions that the contract is not inconsistent with the provisions and purposes of the Act and that in the opinion of the municipality it should be necessary or expedient in order to carry out the provisions and purposes of the Act Thus, very wide powers are given to a municipality under this sub-section

Have become vested in or been acquired by it —This shows that a municipality is competent to lease, sell or otherwise transfer any movable or immovable property vested in it either by Government or anybody else It further shows that a municipality is competent even to sell, lease or transfer in any way any property acquired by it either under the provisions of this Act or under the Land Acquisition Act

As it may consider necessary or expedient —Whether a particular contract is or is not necessary or expedient in order to carry into effect the provisions and purposes of this act is to be decided by the municipality and not

by anybody else That means that the decision of the municipality on this point is final and cannot be questioned in a Court of Law or before any other authority

In order to carry into effect provisions and purposes of this Act —In the Fort Press Company Ltd v The Municipal Corporation of the City of Bombay, 21 B L R 1014, it was held that a binding agreement as to the amount of compensation payable to the owner of property which is notified by the Government under the Land Acquisition Act, for acquisition for a public body for a public purpose, can be made between the public body and the owner before the Collector has made his award under the Land Acquisition Act Marten J in the course of the judgment observed "Under the City of Bombay Municipal Act, 1888 (Act of III of 1888) the Municipality have vide powers of acquiring land Only s 517 was cited out to us but I think, other sections are material Under section 61(m) it is the duty of the Municipality to make adequate provisions for (inter alia) the construction and improvement of public streets This should be read with section 290 which gives vide powers to the commissioner, subject to the provisions of Ss 90 to 92 to acquire land for such purposes and to dispose of the same Section 87 also gives a general power to corporation to acquire and hold land In the present case, the defendant's land is required for what is usually known as the Church Gate Street Improvement This as will be seen on looking at the Plan Exh H to the plaint, involves the widening of the Church Gate Street, and the construction of a new street between it and Meadows Street to relieve the great congestion of traffic in this locality Subject to certain restrictions, the entire executive power for the purpose of carrying out the provisions of the Act vests in the Municipal Commissioner (See S 64) and he enters into contract on behalf of the corporation (S 69) Under s 90 any land to be acquired for the purposes of the Act may be acquired by the Commissioner on behalf of the Corporation by agreement subject to the approval of the Standing Committee In the present case, negotiations for that purpose began as long as August, 1916, but no agreement was arrived at Section 91 I will quote in full viz, (1) Whenever the Commissioner is unable to acquire any immovable property under the last preceding Section by agreement—Government may in their discretion, upon the application of the Commissioner made with the approval of the Standing Committee, order proceedings to be taken for acquiring the same on behalf of the corporation, as if such property were land needed for a public purpose within the meaning of the Land Acquisition Act 1870' This reference is now to the Land Acquisition Act 1894 see that Act s 2(3) That such an application was made by the commissioner is pleaded in para 3 of plaint and not denied in written statement Sub-section (2) of s 91 of the City of Bombay Municipal Act is as follows —'The amount of compensation awarded and all other charges incurred in the acquisition of such property shall, subject to all other provisions of this Act be forthwith paid by the commissioner and thereupon the said property shall vest in the Corporation' This sub-section does not say whether the Commissioner is to pay this sum to the collector or to the land owner direct, but if the latter it varies s 31 of the Land Acquisition Act under which the Collector is the person to pay the compensation and in any event it would seem to vary s 16 of that Act which provides for the land vesting absolutely in Government free from all encumbrances Section 92 gives power to dispose of property Section 517 (h) gives vide powers to compromise The financial provisions will be found in chapters VII and VIII Section 111

provides for the establishment of a Municipal Fund, and s 139 for certain taxes to be levied by the Corporation I think I have now stated enough to show that the Bombay Municipality have vide independent powers as indeed one would expect in a corporation of their importance, and that the intervention of Government is only necessary to enforce an acquisition and even then it is the municipality which pays and the municipality which gets the land"

Whether a municipality has powers to lease or auction the right to levy fees due for temporary occupation of municipal land —This question cropped up in the **Sholapur Municipality v Shivram Bhagvan Sarode, 30 B.L.R. 715.** That was a Case under the Bombay District Municipal Act, 1901, s 40 of which is equivalent to the present section It was held that the Municipality had no power to lease or auction the right to levy fees due for temporary occupation of municipal land Dealing with the point Patkar J said "It is further contended that the Municipality has a right under s 40 of Act III of 1901 to enter into a contract which they may consider necessary or expedient in order to carry into effect the provisions and purposes of the Act The purpose of the Bombay District Municipal Act is to levy fees authorised under s 70 and the auction sale or right to lease the levy of such fees does not fall within the ambit of any of the provisions or the purposes of the Municipal Act It is stated in Halsbury's Laws of England, vol VIII, article 805, page 359, as follows 'Where a corporation is created by statute its powers are limited and circumscribed by the statute creating it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation What the statute does not expressly or impliedly authorise is to be taken to be prohibited If for instance, the subject matter of a contract is beyond the scope of the constitution of the corporation it is ultra vires, that is, it is beyond the powers of the corporation to make the contract which is therefore void ab initio and cannot be ratified We may also refer to the cases of **Municipal Council, Kumbhakonam v Abbas Sahib, I L.R 36 Mad 113, and Dundee Harbour Trustees v D and J Nicol, (1915) A C. 550, 556, 561.** We have, therefore, to look to the statute in order to find out whether any power is given to the Municipality either expressly or by necessary implication to lease or auction the right to levy the fees due for temporary occupation of municipal land, and it appears that there is no such provision in the Act The express power to farm out tolls negatives an implied power to farm out or auction the levy of the fees for occupation of municipal land. Under s 140 of the Act the Municipality has the right to sell by public auction only the privilege of occupying any stall in a market The action of the Municipality in putting up to auction the right to levy the fees in question on March 16, 1924, was ultra vires, and the contract in suit is therefore unenforceable" Discussing the question in the same case Baker J said "The question in this case is as to the right of the Municipality to sell or lease to contractors the right of collecting fees from persons selling fodder on land belonging to the Municipality The right to collect such fees is given to the Municipality by s 70 of the District Municipal Act (Bom Act III of 1901) It has been contended by the learned pleader on behalf of the appellant that under s 40 of the Act, the Municipality has a right to enter into and perform all such contracts as they may consider necessary or expedient in order to carry into effect the provisions and purposes of the Act, and that will cover the lease or sale in question That power, however, is subject to the proviso that it should be exercised so far as is not inconsistent with the provisions and purposes of the Act It is

admitted that the powers of a corporation must be limited by the Act which creates it S 70 forms part of chapter VII of the Act which refers to Municipal taxation That chapter is divided into five parts, and part (5) refers to octroi and tolls In s 59 the taxes imposable under the Act are enumerated, and tolls are expressly defined as referring to vehicles and animals used for riding, draught or burden and entering into the Municipal District and not liable to tax under the preceding clause It is under s 81A of the Act which was inserted by the Act VIII of 1914, that the Municipality is authorised to lease the levy of any toll that may be imposed under this Act Section 70 defines the impost in question in the present case as a fee, and in view of the distinction between it and a toll, which is defined in s 59 I am of opinion that the special provision made by s 81A of the Act cannot be extended so as to cover the fee with which we are now concerned, and, it will appear that if s 40 as contended by the learned pleader for the appellant, gives the Municipality the power to lease or sell the right to collect taxes, there would have been no necessity for the addition of s 81A to the Municipal Act to legalise the leasing of the levy of tolls The same view has been taken by the Madras High Court in the case of **Municipal Council, Kumbakonam v Abbas Sahib, I L R 36 Mad 113**, but as that decision was based on the local law in force in Madras, I prefer to base my decision on the conclusions arising from the terms of our Bombay District Municipal Act"

Sub-Section (2) —This sub-section requires Commissioner's previous sanction in cases of leases of immovable property by a Municipality for a term of more than seven years and for every sale or transfer of immovable property by the Municipality In case of lease of land used or acquired for a public street Commissioner's sanction is required even if the lease be for a period of seven years or less

Sub-section (3) —This sub-section enumerates sales, leases and contracts for which sanction of the municipality by a resolution passed at a general meeting is required Thus under this sub-section every lease of immovable property for a period exceeding one year and every sale or other transfer of immovable property will require the sanction of the general board As regards contracts all contracts for the purchase of immovable property, all contracts which will involve expenditure not covered by a budget grant and all contracts, the performance of which cannot be completed within the official year in which the contract is made require the sanction of the municipality The powers of a municipality under this sub-section cannot be delegated Section 58 provides that the rules for delegation must not be inconsistent with the Act and a rule providing for the municipality's sanction in any other way except by a resolution passed at a general meeting as required by this sub-section would be inconsistent with the provisions of this sub-section Under section 46 also there cannot be any delegation unless there is a requisite rule framed under s 58 See notes under that section Hence the powers of the municipality under this sub-section cannot be delegated under s 46 also

Sub-section (4)(a) —This clause empowers the Chief Officer to make all contracts on behalf of the municipality subject to the restrictions mentioned in clauses (b)(c)(d) and (e) That is to say where those restrictions do not apply the Chief Officer has powers to enter into a contract on behalf of the municipality Secondly, the Chief Officer is the only person authorised to make a contract on behalf of the municipality This being a statutory power it

cannot be delegated under s 46 See notes under s 46 Sub-section (5) lays down that contract not made in accordance with the provisions of this section shall not be binding on the Municipality Thus if a contract on behalf of the municipality is made by a person other than the Chief Officer it will not be binding on the municipality Thus there will be no mutuality and the contract will not be binding on the other party also This means that the contract will be void altogether and not merely voidable

In the **Ahmedabad Municipality v Sulemanji Ismailji, 5 B L R 592,** it was held that in a suit for damages for breach of an executory contract, it is open to the defendant to show that it is not binding upon him in as much as it is not binding upon the plaintiff Jenkins, C J delivering the judgment of the Appeal court observed "We would affirm the decree of the lower appellate court on the ground that this is a suit brought by the Municipality for breach of an executory contract, so that it is open to the defendant under the circumstances to show that it is not binding on him inasmuch as it is not binding on the Plaintiff It is not binding on the Plaintiff because the formalities prescribed by section 30 of the Bombay District Municipal Amendment Act 1884 have not been complied with" This case was followed in the **Municipal Corporation of the City of Bombay v The Secretary of State for India, 36, B L R 568,** where it was held that the contract having been made by the Municipality through its President, and not through its commissioner was not binding on the Municipality by virtue of s 69(a) of the City of Bombay Municipal Act, 1888, and that it was not on that account a voidable contract as defined in s 2(i) of the Indian Contract Act, 1872 That, therefore the contract was not binding on the defendant also for want of mutuality This was a case under the City of Bombay Municipal Act 1888, s 69(a) of which is similar to the present provision Dealing with the question Mirza J said "It is conceded by Mr Coltman that the contract which has been arrived at could not be enforced against the Bombay Municipality as it is not made on behalf of the Municipality by its Commissioner as required by s 69A of the City of Bombay Municipal Act, the president of the Corporation having no such authority by law to bind the plaintiffs It is pointed out by the Advocate General that the alleged contract contravenes also the provisions of s 69C and s 70 (1)(b) of the City of Bombay Municipal Act These sections are mandatory and not merely directory While conceding that the contract would not be enforceable against the plaintiffs, Mr Coltman relies upon s 71 of the City of Bombay Municipal Act which provides that a contract which has not been executed in accordance with the provisions of the Municipal Act shall not bind the Corporation Mr Coltman contends that in such a case the contract would not be void but voidable at the option of the plaintiffs Such an agreement, he argues, would be a unilateral or voidable contract enforceable only at the instance of the Municipality He relies upon the definition of a voidable contract given in s 2(i) of the Indian Contract Act, which is as follows —'An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract' The only instances of voidable contracts which are to be found in the Indian Contract Act are under ss 14, 15, 16, 17 and 18 which are made voidable under ss 19 and 19A Another instance of a voidable contract is to be found in s 30 of the Guardians and Wards Act where a minor on attaining majority might, on grounds similar to those set out under ss 19 and 19A of the Indian Contract Act, avoid contracts entered into on his behalf during

his minority No such grounds are here pleaded against the defendant, but it is argued on general principles that voidable contracts should not be restricted to those contracts only which are set out in the Indian Contract Act, but a contract of the nature now before the Court should also be regarded as a voidable contract coming under the definition of that term given in s 2 (1) of the Indian Contract Act I do not agree with this view The learned Advocate General has contended that if the contract is not binding upon the plaintiffs on the ground above stated, it cannot be binding on the defendant either for want of mutuality He relies upon a ruling of this High Court in **Ahmedabad Municipality v Sulemanji, 5 B L R 592** where in a suit for damages for breach of an executory contract, a division bench has held that it was open to the defendant in that suit to show that the contract was not binding on him inasmuch as it was not binding on the plaintiff The learned Chief Justice in his judgment observes that the executory contract sued upon was not binding upon the plaintiff Municipality before him because certain formalities prescribed by s 30 of the Bombay District Municipal (Amendment) Act, 1884, had not been complied with and therefore it was open to the defendant before him to show that it was not binding on him inasmuch as it was not binding upon the plaintiff Mr Coltman contends that this ruling is not applicable to the present case because here the Court is concerned not with an executory but with an executed contract He relies upon Leake on Contracts, 8th Edn, pp 6-7, where it is stated —'An executed consideration is some act performed or some value given at the time of making the promise and in return for the promise then made, as where goods are delivered, or services rendered, upon credit, that is, upon a promise to pay for them at a future time, or where money is paid in advance for a promise given —An **Executory** consideration is a **promise** to do or give something in return for the promise then made The contract with an executory consideration thus comprises two promises commonly described as **mutual promises**, the one promise forming the consideration for the other, and conversely Consequently, contracts of this kind must be binding on both parties, otherwise the consideration for one of the promises fails, and the contract is then described as being void for want of mutuality,
Mr Coltman has argued that because the Municipality has expended moneys the consideration is an executed one The moneys expended by the Municipality, on the Municipality's own case, seem to have been expended by way of part performance after the contract and not by way of executed consideration at the date of the contract Pollock and Mulla in their commentary on s 2 of the Indian Contract Act, 6th Ed, p 30, have thus stated the difference between the two kinds of consideration —'A consideration which consists in performance (or so far as it consists in performance) is said to be executed If and so far as it consists in promise, it is said to be executory' The consideration here relied on, on behalf of the plaintiffs, is a promise to expend large sums of money and not a performance The consideration in my judgment would be executory and not executed Mr Coltman has relied on **Abaji Sitaram v Trimbak Municipality, 5 B.L.R. 689**, where our Appeal Court has held that though a contract by a corporation must ordinarily be made under seal, still where there is that which is known as an executed consideration, an action will lie though this formality has not been observed In that case the Trimbak Municipality, who were the plaintiffs, had granted to the defendants a right of collecting tolls and taxes for a period of fourteen months for a sum of Rs 15,001, out of which the defendants had paid

Rs 1,500 in advance The plaintiff Municipality had agreed to give a certain remission to the defendants and had sued the defendants for the balance due after making allowance for the remission which was allowed and the part payment which was made The defendants relied upon an earlier resolution of the Municipality by which Rs 7,000 out of the contract amount was proposed to be remitted The remission proposed at the earlier meeting was held to be invalid on the ground that the meeting of the Municipality had not been properly convened Whether this earlier resolution was or was not binding seems to have been the only point raised in the pleadings and decided by the lower Court in favour of the Municipality The learned Chief Justice in confirming the decision of the lower Court made some observations on a point outside the pleadings which was taken for the first time by appellants' counsel before the Appeal Court These observations appear in the judgment at p 72 of the report and are as follows —'This discussion leads us to consider a point, which was raised before us for the first time, and then only as a result of investigation made in the course of the hearing before us It appears that the contract under which defendant 1 becomes entitled to levy and collect the tolls was not under seal, and so failed to comply with section 30 (of the District Municipal Act II of 1884) to which I have already alluded The Advocate General, relying for this purpose on section 23 of the Indian Contract Act, has asked us to hold that there was no contract at all under which the plaintiff Municipality can claim Apart from the fact that this is travelling outside the pleadings of the parties, we think, there is another reason why we cannot give effect to the contention It is well recognised law in England that though a contract by a corporation must ordinarily be under seal, still where there is that which is known as an executed consideration, an action will lie though this formality has not been observed Notwithstanding section 23 of the Indian Contract Act, we see no reason for not adopting the same view of the law here For we think when, regard is had to the principle on which the English Courts have proceeded, it is clear we do not run contrary to any provision of section 23 of the Contract Act in holding that in this country too, as in England, where there is an executed consideration, a suit will lie even in the absence of a sealed contract And on the facts of this case we hold that there has been an executed consideration It is, however, at the same time manifest that the doctrine we have here applied would on the facts in no way assist the defendant's contention that the performance of his promise has been legally dispensed with or remitted.' This case has been considered by another division bench of our High Court in the case of **Municipality of Sholapur v Abdul Wahab, 23 B L R 244**, where Mr Justice Shah refused to make any comment on the case, as apparently it was not necessary for him to do so for purposes of the appeal before the division bench But Mr Justice Crump in his judgment has made the following comment (p 804) —'In this view of the case, it is unnecessary to consider whether the decision in **Abaji Sitaram v Trimbak Municipality** applies here or not But in view of the remarks of the lower Court and in deference to the argument advance here, it is, I think, desirable to point out that so far as the judgment in that case applies the rule of common law as to contracts under seal, it is to some extent **obiter** For the learned Chief Justice says that to consider the point it is necessary to travel outside the pleadings Further, it must be remembered that it is a decision on a Statute which is no longer in force It is difficult to say, even if it were applied here, that it fits the facts of this

case The facts of that case lay down that a corporation can sue on a contract which should have been under seal inspite of the omission of that formality where there was executed consideration That is not exactly the case before us, and it is, therefore, not necessary to consider how far that decision can be reconciled with the decision of the House of Lords in **Young & Co v Mayor, etc of Royal Leamington Spa (1883) 8 App. Cas 517**, and how far the rule of English common law can prevail either in England or in India against Statutes containing restrictive provisions as to the form of corporate contracts These are questions which will require consideration when a proper case arises' The above observations made by Mr Justice Crump regarding **Abaji Sitaram v. Trimbak Municipality** were not necessary as the learned Judge himself recognises for deciding the appeal before the division bench and were **obiter** The object with which the observations were made was to draw attention to the ruling of the House of Lords in **Young & Co v Mayor etc, of Royal Leamington Spa,** with which the remarks of the learned Chief Justice seem to be in conflict and to suggest that the remarks of the learned Chief Justice, were in the nature of **obiter** A further point seems to be thrown out for consideration in an appropriate case when it arises, viz, whether a contrary ruling of the Appeal Court should be allowed to override the clear provisions of a statute With great respect it seems to me that Mr Justice Crump was right, sitting in the Appeal Court as he did, to throw doubt on the validity of the observations made by the learned Chief Justice in **Abaji Sitaram v Trimbak Municipality** With great respect I agree with Mr Justice Crump that these observations of the learned Chief Justice are in the nature of **obiter** and hence not binding on this Court On the facts of the case before him the learned Chief Justice considered that it was a case of an executed consideration These facts were similar to the facts of the present case The executed consideration which was relied on in that case consisted in the Municipality giving the right to collect the tolls and taxes to the defendant The executed consideration on the part of the Municipality in the present case is said to be moneys they have expended under the contract with Government As the judgment of the Appeal Court on this point is, in my opinion, **obiter**, I am at liberty, with great respect, not to follow the view which has been expressed by the learned Chief Justice, that consideration in such cases should be regarded as being executed **The case** before the learned Chief Justice seems to have been one of part performance and not of executed consideration The present case, in my opinion, is of a similar nature Mr Coltman has relied also on the case of **The Fishmonger's Company v. Robertson, (1843) 5 M & G 131,** where it was held that the contract sued upon having been executed on the part of the corporation and the defendants in that suit having received full consideration, they were bound by the contract and the plaintiffs were entitled to sue on the contract although the contract was not executed under seal as required by a statutory provision That case may be distinguished from the present case on the ground that there the consideration given by the corporation was executed and not executory In the present case the consideration appears to be executory and a mere part performance of the contract by the Municipality would not convert the consideration into executed consideration so as to condone non-compliance with the provisions of a statute in respect of the formalities which are to be observed in entering into a contract on behalf of the corporation The analogy to be drawn form this case in favour of the plaintiffs in respect of the defective contract so far as it affects the defendant would, in my opinion, not

apply The objection taken on the ground of want of mutuality is, in my opinion, fatal to the plaintiffs' case and should be allowed"

Sub-section (4) (b).—Provides that unless and until the purpose is sanctioned by the requisite authority the chief officer cannot enter into any contract whatsoever in regard to that purpose This appears to be the proper meaning both grammatically and according to the ordinary rules of construction **In Pandu Laxman Gowand v Municipal Corporation of Bombay, 32 B.L.R. 832,** the question arose whether the approval or sanction required under s 69(b) of the City of Bombay Municipal Act, 1888, (equivalent to the present clause) is for the 'purpose' referred to therein or to the 'contract' It was held by both learned Judges deciding that case that the approval or sanction is for the 'purpose' of one and not to the 'contract' It was also held in that case that provisions necessitating such sanction are compulsory and not merely directory and if they are not complied with there is no binding contract The contract cannot also be enforced by municipality against other party for want of mutuality

Ratification·—A combined reading of this clause with sub-section (5) shows that if the chief officer enters into a contract before obtaining the requisite previous sanction the contract is not at all binding on the municipality Thus the contrtct being bad ab initio cannot be cured by any subsequent ratification or grant of requisite sanction In **Pandu Laxman Gowand v. Municipal Corporation of Bombay, 32 B L.R 832,** Martin J while discussing a similar provision under the City of Bombay Municipal Act, 1888, has remarked at page 841 of the report "Then as regards the argument that it can be given effect retrospectively, in the first place s 69(b) expressly provides that 'approval or sanction has first of all been duly given' that is, before the contract can be entered into"

Sub-section (4) (c):—Under this clause Chief Officer cannot enter into a contract involving an expenditure of more than Rs 300/- without the sanction of the standing committee Thus the scheme of the Act is that the Chief Officer can enter into a contract involving expenditure of Rs 300/- and under without any sanction, provided the requisite sanction for the 'purpose' is obtained When the expenditure involved is more than Rs 300/- in addition to the sanction for the 'purpose' there should be a sanction to the contract by the standing committee It should be noted that the municipality's sanction is not necessary whatever the value provided the case does not fall under Sub-section (3) The municipality is also empowered to dispense with the sanction of the standing committee in any case particularly or generally The municipality can also delegate the powers of the standing committee under this clause to any other committee by framing rules under s 58(a)

Sub-section (4) (d)·— As will be seen from sub-section (c), standing committee's sanction is not required for a contract involving an expenditure of Rs 300/- and less, but under this Clause it is provided that if the contract is for an expenditure exceeding Rs 200/- the chief officer must report the contract within fifteen days from the making thereof to the standing committee.

Sub-section (4) (e)·—This clause deals with the contract and not with the 'purpose' It, therefore, applies to clauses (a), (c) and (d) only That means that any variation or discharge of a contract must be made by the Chief Officer and not by anybody else

To the same extent as to the original contract —This means that whatever sanctions are required for the original contract are also required for the slightest variation or discharge of the same The phrase does not mean that the sanctions would become necessary only if the variation or discharge was to a particular extent i e to an extent of more than Rs 300/- for necessitating the sanction of the standing committee

Sub-section (5) —This sub-section provides that a contract is not binding on a municipality unless the provisions of s 48 are complied with If a contract is not binding on the municipality it also cannot be binding on the other side for the simple reason that there will be want of mutuality Thus if the requirements of s 48 are not complied with the contract will altogether be void See **Ahmedabad Municipality v. Sulemanji, 5 B.L.R. 592, and The Municipal Corporation of the City of Bombay v The Secretary of State, 36 B.L.R. 568** These are, however, considerations turely under the Municipal Act Considerations under other laws, for example, the **Indian Contract Act**, might arise and in a fit case a party may not be allowed to resile See **the Poona City Municipality v. Ramchandra G Kurve, 10 B.L.R. 617.** Similarly, different considerations would arise under s 70 of the Contract Act See **Pakanji Edulji and Sons v. The Lonavala City Municipality, 39 B.L.R. 835**

In **Ahmedabad Municipality v. Suleman Ismailji, 5 B L R 592**, it was held that in a suit for damages for breach of an executory contract, it is open to the defendant to show that it is not binding upon him inasmuch as it is not binding upon the plaintiff Jenkins C J in his judgment observed "We would affirm the decree of the lower appellate court on the ground that this is a suit brought by the municipality for breach of an executory contract, so that it is open to the defendant under the circumstances to show that it is not binding on him inasmuch as it is not binding on the plaintiff It is not binding on the plaintiff because the formalities prescribed by section 30 of the Bombay District Municipal Amendment Act, 1884, have not been complied with" No doubt this was a case under the Bombay Municipal Act, 1884, but the conclusion would be the same in a case under the present Act This case has been followed in **the Municipal Corporation of the City of Bombay v. The Secretary of State for India, 36 B.L.R 568**, wherein it was held that the contract having been made by the Municipality through its President, and not through its Commissioner, was not binding on the Municipality by virtue of s 69(a) of the City of Bombay Municipal Act, 1888, and that it was not on that account a voidable contract as defined in s 2(1) of the Indian Contract Act, 1872, that, therefore, the contract, was not binding on the defendant also for want of mutuality

In Abbaji Sitaram Modak, etc v the Trimbak Municipality, 5 B.L.R. 689, it was held that though a contract by a corporation must ordinarily be under seal still where there is an executed consideration an action will lie though this formality has not been observed

In the **Municipality of Sholapur v Abdul Wahab, 23 B L.R. 244,** Crump J while considering this case remarked "In this view of the case it is unnecessary to consider whether the decision in **Abaji v Trimbak Municipality, 5 B.L.R 689,** applies here or not But in view of the remarks of the lower court and in deference to the arguments advanced here, it is, I think, desirable to point out that so far as the judgment in that case applies the rule of common law as to contracts under seal it is to some extent obiter For, the learned Chief Justice says that to consider the point it is necessary to travel outside the pleadings. Further, it must be remembered that it is a decision on a statute which is no

longer in force It is difficult to say, even if it were applied here, that it fits the facts of the case The facts of that case lay down that a corporation can sue on a contract which should have been under seal in spite of the omission of that formality where there is executed consideration That is not exactly the case before us, and it is, therefore, not necessary to consider how far that decision can be reconciled with the decision of the House of Lords in **Young & Co. v. Mayor, etc., of Royal Leamington Spa, (1883) 8 App. Cas. 517,** and how far the rule of English common law can prevail either in England or in India against statutes containing restrictive provisions as to the form of corporate contracts These are questions which will require consideration when a proper case arises"

In **Ariff v. Jadunath Majumdar, 33 B L R 913,** their Lordships of the Privy Council have laid down that the English equitable doctrine of part performance cannot be applied by analogy so as to modify or override the mandatory provisions of an Indian statute, such as the Transfer of Property Act, and thus, in effect, to nullify the statutory requirement of a registered instrument As held by Mirza J in **the Municipal Corporation of City of Bombay v. The Secretary of State for India, 36 B L R 568,** the above case completely overrules the view expressed in **Abbaji v Trimbak Municipality, 5 B L R 689** In **36 B L.R. 568** Mirza J while considering **5 B L R 689** made following comments on page 593 of the report "Mr Coltman has relied on **Abaji Sitaram v Trimbak Municipality, 5 B L R 689,** where our Appeal Court has held that though a contract by a corporation must ordinarily be made under seal, still where there is that which is known as an executed consideration, an action will lie though this formality has not been observed In that case the Trimbak Municipality, who were the plaintiffs, had granted to the defendants a right of collecting tolls and taxes for a period of fourteen months for a sum of Rs 15,001, out of which the defendants had paid Rs 1,500 in advance The plaintiff Municipality had agreed to give a certain remission to the defendants and has sued the defendants for the balance due after making allowance for the remission which was allowed and the part payment which was made The defendants relied upon an earlier resolution of the Municipality by which Rs 7,000 out of the contract amount was proposed to be remitted The remission proposed at the earlier meeting was held to be invalid on the ground that the meeting of the Municipality had not been properly convened Whether this earlier resolution was or was not binding seems to have been the only point raised in the pleadings and decided by the lower court in favour of the Municipality The learned Chief Justice in confirming the decision of the lower Court made some observations on a point outside the pleadings which was taken for the first time by appellants' counsel before the Appeal Court These observations appear in the judgment at p 72 of the report and are as follows — "This discussion leads us to consider a point, which was raised before us for the first time, and then only as a result of investigation made in the course of the hearing before us It appears that the contract under which defendant 1 becomes entitled to levy and collect the tolls was not under seal, and so failed to comply with section 30 (of the District Municipal Act II of 1884) to which I have already alluded The Advocate General, relying for this purpose on section 23 of the Indian Contract Act, has asked us to hold that there was no contract at all under which the plaintiff Municipality can claim Apart from the fact that this is travelling outside the pleadings of the parties, we think, there is another reason why we cannot give effect to the contention It is well recognised law in

England that though a contract by a corporation must ordinarily be under seal, still where there is that which is known as an executed consideration, an action will lie though this formality has not been observed Notwithstanding section 23 of the Indian Contract Act, we see no reason for not adopting the same view of the law here For we think when, regard is had to the principle on which the English Courts have proceeded, it is clear we do not run contrary to any provision of section 23 of the Contract Act in holding that in this country too, as in England, where there is an executed consideration, a suit will lie even in the absence of a sealed contract And on the facts of this case we hold that there has been an executed consideration It is, however, at the same time manifest that the doctrine we have here applied would on the facts in no way assist the defendant's contention that the performance of his promise has been legally dispensed with or remitted' This case has been considered by another division bench of our High Court in the case of **Municipality of Sholapur v. Abdul Wahab, 23 B.L.R 244,** where Mr Justice Shah refused to make any comment on the case, as apparently it was not necessary for him to do so for purposes of the appeal before the division bench But Mr Justice Crump in his judgment has made the following comment (p 804) —'In this view of the case, it is unnecessary to consider whether the decision in **Abaji Sitaram v. Trimbak Municipality** applies here or not But in view of the remarks of the lower court and in deference to the argument advanced here it is, I think, desirable to point out that so far as the judgment in that case applies the rule of common law as to contracts under seal, it is to some extent **obiter.** For the learned *Chief Justice says that to consider the point it is necessary to travel outside the* pleadings Further, it must be remembered that it is a decision on a Statute which is no longer in force It is difficult to say, even if it were applied here, that it fits the facts of this case The facts of that case lay down that a corporation can sue on a contract which should have been under seal in spite of the omission of that formality where there is executed consideration That is not exactly the case before us, and it is, therefore, not necessary to consider how far that decision can be reconciled with the decision of the House of Lords in **Young & Co, v Mayor, etc, of Royal Leamington Spa, (1883) 8 App Cas. 517,** and how far the rule of English common law can prevail either in England or in India against Statutes containing restrictive provisions as to the form of corporate contracts These are questions which will require consideration when a proper case arises' The above observation made by Mr Justice Crump regarding ***Abaji Sitaram v Trimbak Municipality*** *were not necessary as the* learned Judge himself recognised for deciding the appeal before the division bench and were **obiter** The object with which the observations were made was to draw attention to the ruling of the House of Lords in **Young & Co., v Mayor, etc, of Royal Leamington Spa,** with which the remarks of the learned Chief Justice seem to be in conflict and to suggest that the remarks of the learned Chief Justice, were in the nature of **obiter** A further point seems to be thrown out for consideration in an appropriate case when it arises, viz, whether a contrary ruling of the Appeal Court should be allowed to override the clear provision of a statute With great respect it seems to me that Mr Justice Crump was right, sitting in the Appeal Court as he did, to throw doubt on the validity of the observations made by the learned Chief Justice in **Abaji Sitaram v. Trimbak Municipality.** With great respect I agree with Mr Justice Crump that these observations of *the learned Chief Justice are in the nature* of **obiter** and hence not binding on this Court On the facts of the case before him the learned Chief Justice considered that it was a case of an executed consideration These facts were similar to the facts of the present case The

executed consideration which was relied on in that case consisted in the Municipality giving the right to collect the tolls and taxes to the defendant The executed consideration on the part of the Municipality in the present case is said to be moneys they have expended under the contract with Government As the judgment of the Appeal Court on this point is, in my opinion, **obiter**, I am at liberty, with great respect, not to follow the view which has been expressed by the learned Chief Justice, that consideration in such cases should be regarded as being executed The case before the learned Chief Justice seems to have been one of part performance and not of executed consideration *The present case, in my opinion, is of a similar nature.*" He accordingly refused to follow the view of the learned Chief Justice in **5 B.L.R 689**, on the ground that it was **obiter**. While discussing the case further in the course of the judgment he has remarked at pages 600-601 that "On the assumption that no valid contract has been entered into on behalf of the Secretary of State in *Council, Mr Coltman has argued that the contract has become binding upon* the Secretary of State because of executed consideration on the part of the plaintiffs He has relied very strongly for this part of his argument upon **Abaji Sitaram v Trimbak Municipality**. I have already dealt with this authority in the earlier part of this judgment and have ventured to express an opinion with great respect that the observations of the learned Chief Justice, on which Mr Coltman has relied, are **obiter** and not binding on me I have also called attention to the observations of Mr Justice Crump regarding this case in **Municipality of Sholapur v Abdul Wahab, 23 B L.R 244** The observations of the learned Chief Justice have been dissented from by the Allahabad High Court in **Radha Krishna Das v The Municipal Board of Benares, I.L.R 27 All. 592** In **Ramaswamy Chetty v The Municipal Council, Tanjore, I.L.R. 29 Mad 360**, on a similar point having come up for decision before the Madras High Court, that Court has followed **Radha Krishna Das v The Municipal Board of Benares** and has dissented from **Abaji Sitaram v Trimbak Municipality** on the ground that it does not refer to or consider the authorities on which the Allahabad case has proceeded The observations of the learned Chief Justice have also come in for adverse criticism by Sir Frederick Pollock and Sir Dinshah Mulla in their learned Commentary on the Indian Contract Act, 6th Edn, at pp 375-377 The observations of the learned Chief Justice are, in my opinion, impliedly overruled by the Judicial Committee of the Privy Council in **Ariff v Jadunath Majumdar, 33 B L.R 913** and are irreconcilable with the *judgment of the House of Lords in* **Young & Co., v Mayor, etc, of Royal Leamington Spa**, as well as with the decision of the Court of Appeal in **Hunt v Wimbledon Local Board, (1878) 4 C P.D 48**"

In **Chhunnamal v Mulchand, 30 B.L.R 837**, their Lordships of the Privy Council dissented from the decision of Jenkins C J in **Abaji Sitaram v Trimbak Municipality, 5 B.L.R 689**, laying down that the promise mentioned in s 63, Indian Contract Act, can only do the acts he by that section is empowered to do, if there be an agreement as defined by s 2 (e) amongst the parties to that effect, and they held that the language of section 63 does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines

In **Pandu v. Bombay Municipality, 32 B.L.R. 832**, it was held that provisions necessitating such sanctions are compulsory and not merely directory and if they are not complied with there is no binding contract

Mutuality is the essential condition of the Contract under s 42 Therefore it cannot be said that where the suit on a contract under s 42 is not against the District Local Board but by it, the formalities provided in s 42 (2) need not

be fulfilled by the contract sued upon for it would mean that while one side would be bound, the other side would not A surety bond or agreement of suretyship when executed after the main contract is dependent on and supplementary to the principal contract in the sense that if the principal contract falls for want of consideration, the agreement of suretyship falls too, but it does not follow that the two contracts or agreements are not separate and distinct A suretyship agreement neither signed by the President or members of the District Local Board nor bearing its seal but signed only by the persons to be charged cannot be said to confirm to the provisions of s 42(2) and therefore is void The fact that the District Local Board is accepting no liability under the agreement is no ground for non-compliance with s 42(2) The suretyship agreement being separate and distinct from the principal agreement the fact that the principal agreement was in accordance with s 42(2) does not obviate necessity of the suretyship agreement from complying with the provisions of s 42(2) But though such an agreement is void the party receiving benefit thereunder must restore the same under s 65, Contract Act Statutory prohibitions are not subject to the common law exception of executed contracts and therefore a contract though executed, must be deemed to be void on the ground of failure to comply with statutory provisions relating to the manner in which it shall be made **Bhumbo Metharam v District Local Board, Hyderabad Sind, A.I.R. 1940 Sind 199**

In Palanji Edalji and Sons v the Lonavala City Municipality, 39 B.L.R. 835 the plaintiffs who were building contractors contracted with the Lonavala Municipality to build for them a vegetable market The work was to be completed within three months, and the plaintiffs deposited with the Municipality a sum of Rs 1,000 on terms that if the work was not completed within the period the Municipality would be entitled to forfeit the deposit amount While the building of the vegetable market was in progress, the Municipality thought of building a beef market and a slaughter-house and the President of the Municipality thereupon asked the plaintiffs orally to execute those works also Under Ss 48 and 49 of the Bombay Municipal Boroughs Act, 1925, the sanction of the Municipality by a resolution passed at a general meeting is required for every contract entered into by the Municipality involving expenditure not covered by a budget grant, and every contract for the execution of any work involving expenditure exceeding Rs 500 is required to be in writing with all the particulars and under the seal of the Municipality The provisions of those sections were not complied with in regard to the building work of the beef market and the slaughter-house The plaintiffs, however, completed all these three works, though not in stipulated time of three months, and put the Municipality in possession of them As the plaintiffs failed to complete the vegetable market within the stipulated time, the Municipality claimed to forfeit the deposit amount It also refused to pay the charges of the plaintiffs in respect of the work done for building the beef market and the slaughter-house contending that as the contract for those works was not entered into in accordance with the provisions of the Bombay Municipal Boroughs Act, the Municipality was not bound to pay for the same Held as regards the work done for the beef market and the slaughter-house, that although there was no valid enforceable contract for construction of these works, and although the plaintiffs could not claim payment for them under any contract, still they were entitled to compensation under the provisions of s 70 of the Indian Contract Act for the work done by them for the Municipality, the benefit of which was accepted and enjoyed by the Municipality Held as regards the deposit amount, (1) that

the deposit ought to be considered as a stipulation by way of penalty within the terms of s 74 of the Indian Contract Act, and the Municipality was not entitled to enforce the penalty in terms but to receive from the plaintiffs who had broken the contract reasonable compensation not exceeding the amount of the penalty stipulated for, (2) that s 55 of the Indian Contract Act also applied and time was not of the essence of the contract in this case and that if that section was given effect to, damages could have been claimed by the Municipality in respect of this penalty clause, but as no such claim was made by the Municipality, the plaintiffs were entitled to return of the deposit In the course of the judgment Tyabji J said "Section 70 provides for a case where (1) a person lawfully does anything for another person, or delivers anything to him, (2) the second requirement of the section is that the lawful act or delivery shall not have been intended to be done gratuitously, and (3) the third is that the other person enjoys the benefit thereof When these three conditions are satisfied, then under s 70 the latter person is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered The compensation to be made is in respect of the benefit enjoyed by the second person The argument in connection with s 70 addressed to us on behalf of the defendants was that the act done by the plaintiffs cannot be considered to be a lawful act, inasmuch as it was done in contravention of ss 48 and 49 of the Bombay Municipal Boroughs Act, and that in any case ss 48 and 49 must override the provisions of s 70 of the Indian Contract Act **Young & Co., v. Mayor, etc., of Royal Leamington Spa, (1883) 8 App. Cas 517** and similar cases were relied upon for the proposition that when a corporation is restricted by statute from entering into contracts to a particular effect unless certain formalities are observed, a corresponding liability ought not to be allowed to arise apart from a contract satisfying the statute to do so would be rendering nugatory the statutory provision and disregarding the requirements of the legislature The case in India, however, stands on a different footing We have here such sections as ss 48 and 49 of the Bombay Municipal Boroughs Act provision as to how contracts may be made On the other hand s 70 of the Indian Contract Act contains a provision for binding a person to make compensation under conditions which do not postulate a contract The expression 'person' under the General Clauses Act, s 3 (39), includes 'any company or association or body of individuals, whether incorporated or not' A Municipality is a body of persons incorporated and must consequently be included in the term 'person' The applicability of s 70 of the Indian Contract Act cannot, therefore, be excluded by the fact that there is no enforceable contact, (or to use the language of the Municipal Boroughs Act that there is not any contract binding on the Municipality), by reason of the requirements of ss 48 and 49 not having been followed Section 70 does not depend upon the existence of a contract binding on the parties and does not provide for contractual liabilities There have been many cases on s 70 in the Indian High Courts, but we are particularly concerned with those that refer to the apparent conflict between such a provision as is contained in ss 48 and 49 of the Bombay Municipal Boroughs Act and the Indian Contract Act, s 70 There need not necessarily be any conflict There may be cases where there is no contract and s 70 may be given effect to, apart from the provisions of ss 48 and 49 of the Bombay Municipal Boroughs Act The English cases are distinguishable since there is in India a statutory provision creating a liability arising not out of contract but out of relations resembling those created by contract The relation under s 70 is

created by the fact that one person lawfully does something for another or delivers anything to him and by the fact that the other person enjoys the benefit thereof and when this relation arises, the liability to make compensation or to restore the thing delivered arises as a statutory liability not arising out of contract" Barlee J who decided this case with Tayabji J observed in this behalf as follows "The principal point in this case,—and a point of very great interest,—is whether s 70 applies at all to Municipalities It is argued on the strength of English cases cited in Halsbury, Vol VIII, p 359, paragraph 805, and in particular **Young & Co v Mayor, etc, of Royal Leamington Spa, (1883) App. Cas 517** that the equitable principle of compensation cannot be applied where statute bars the way But in India, where we have no conflict between equity and statute, and the conflict, if any, is between statutes, it does not appear that the English case-law on the subject ought to govern our decision We have to decide whether s 70 of the Indian Contract Act is to be read subject to the provincial enactment embodied in the Bombay Municipal Boroughs Act which gives powers to Municipalities to enter into contracts A local legislature has power under s 80A of the Government of India Act to alter or repeal Acts of the Central Legislature provided the previous sanction of the Governor General in Council is obtained, and the previous sanction of the Governor General in Council was obtained in this case Therefore the local legislature was competent by s 48 to alter or amend s 70 of the Indian Contract Act But they did not do so directly and I cannot find that they did so by necessary implication, for the two sections 49 of the Bombay Municipal Boroughs Act and 70 of the Indian Contract Act do not seem to be in **pari materia.** The former section lays down the requirements of a valid contract, the latter deals with the situation which arises when one of those requirements has not been fulfilled I cannot see that the former can be looked on as an exception to the other, even though it may have the effect of imposing liability on a Municipality, for such liability is in no way contractual As my learned brother has pointed out the rate-payers are protected by the provision that they can only be held liable to pay for such benefits as they have received or to restore something to which they have no claim"

The nett result of all the above authorities is that equitable doctrines of English law are not to be applied to override the mandatory provisions of the Municipal Act, but statutory law in India such as the s 70 of the Indian Contract Act can be applied so as to give proper relief although the contract may be void on account of non-compliance with the requirements of this section

Whether s. 206 applies to a suit on contract —S 48 of the Bombay District Municipal Act, (Amendment Act II of 1884) does not apply to a suit for the specific performance of a contract or for damages for breach thereof The **Municipality of Faizpur v Manak Dulab, 22 Bom 637** Section 48 referred to in this decision is equivalent to section 206 of the Boroughs Act In that case Parsons J said "This suit was brought on the allegations that the plaintiff allowed the defendant Municipality to remove some 'Otas' belonging to him and the latter agreed that they would rebuild them on the completion of a gutter which they intended to build beneath the side but that they now refuse to perform their agreement It is thus a suit for specific performance of a contract, or for damages for breach thereof Such a suit is not an action for anything done or purporting to be done in pursuance of the Bombay District Municipal Act for the Act, though it may give the Municipality power to make contracts does not authorize them to refuse to perfom them, and no section

of the Act has been quoted as one under which they are now purporting to act. That s 48 does not apply to actions on contracts was ruled in **Mayandi v McQuhae** and was also stated in the judgment of **Ranade J in Manohar v The Dakor Municipality, 22 Bom. 289."**

See also notes under s 206 under the heads **'suit to recover amount deducted for non-performance of a contract from the deposit made by contractor—notice necessary' 'Suit for specific performance of contract or damages for breach thereof—Notice not necessary, and 'Acts done under contract authorised but not required by the Act—cause of action'**

Fixed charge and agreement for payment in lieu of water-rate—Whether a tax or a contractual charge—application of s. 75 to rules under s. 58(j) for water rate under s. 91 and of s 48 —See notes under this head under s 3(20)

Section 48(4)(c) and (d)—Whether power to enter into contract includes power to sanction expenditure.—Power to enter into contract and power to sanction expenditure are different and distinct powers and in the absence of a rule made under s 58(a) read with s 34 (1)(a) delegating to the Chief Officer the power to sanction expenditure the Chief Officer cannot incur expenditure on his own authority on contract entered into by him in pursuance of the powers vested in him under s 48(4)(c) and (d) of the BMB Act and he has to obtain sanction of the competent authority before payment **(Examiner *Local Fund Accounts' no. L 18/9-1554 dated the 14th July 1942*)**

Tenancy at will not a lease for a term exceeding seven years even though engagement be for a longer period —Leases taken which provide for annual rent and also stipulate that the lessee is liable to be evicted in the case of non-payment of the annual rent fixed or at any time when the municipality may require the land create a tenancy at will (vide **8 All. 405 at P 408, 14 Bom. 19; 19 Bom. 150)** In **motion v Woods (L R 3 Q D. 658)** the engagement was for ten years, but as there was a stipulation that the landlord might re-enter when he pleases it was construed as creating only a tenancy-at-will Sanction of the Commissioner under s 40(1), B D M Act, 1901, (Equivalent to s 48(2) of the B.M.B Act, 1925) is, therefore, not necessary to such leases **(R L.A.'s opinion no. 1152 dated the 8th May 1926 in G.R G.D No 6690 dated the 11th June 1926).**

Whether Commissioner's sanction necessary for transfer of set-forward land Under s 93 of the B.D M Act 1901, the municipality and under s 120(1) of the B M.B Act, 1925, the standing committee have power to allow any building to be set forward for improving the line of any public streets in which such building is situated In the exercise of this power it may be necessary for the municipality or the standing committee to transfer a strip of road-side land But the transfer of a strip of road-side land must be effected subject to the provisions of s 40(2) and 48(2) of the Acts respectively **(R L A's opinion no 837 dated the 11th February 1932 in G R G.D no. 2640 dated the 28th March 1932).**

Municipality's power to lease or sell street land:—See notes under this head under s 114

Value of stamp on contracts by local bodies with contractors for execution of works, etc:—A bond under s 2(5)(a) of the Indian Stamp Act, 1899, is an agreement to pay money in the first instance, but if a specified act is or is not performed, the case may be the obligation is void A convenant with a penalty is an agreement to do a particular act in the first instance, and, if the act is not performed, to pay a sum of money as damages. Such a covenant falls

under schedule I article 5(c) Vide 8 Cal 284 The agreement in question being a covenant with a penalty falls under Schedule I article 5(c) **(R L.A.'s opinion no 1279 dated the 15th June 1920 in G O G D no. 7478 dated the 14th July 1920).**

Mode of executing contracts

49. (1) Every contract entered into by a Chief Officer on behalf of a municipality shall be entered into in such manner and form as would bind such Chief Officer if such contract were on his own behalf, and may in the like manner and form be varied or discharged

Provided that—

(a) where any such contract, entered into by a Chief Officer, would require to be under seal, the same shall be sealed with the common seal of the municipality,

(b) every contract for the execution of any work or the supply of any materials or goods which will involve an expenditure exceeding five hundred rupees, shall be in writing, and shall be sealed with the common seal of the municipality and shall specify the work to be done or the materials or goods to be supplied, as the case may be, the price to be paid for such work, materials or goods and in the case of a contract for work, the time or times within which the same or specified portions thereof shall be completed

(2) The common seal of the municipality shall not be affixed to any contract or other instrument except in the presence of two members of the standing committee, who shall attach their signatures to the contract or instrument in token that the same was sealed in their presence The signatures of the said members shall be distinct from the signatures of any witnesses to the execution of any such contract or instrument

(3) A contract not executed in the manner provided in this section shall not be binding on the municipality

Scope—S 48 has empowered the Chief Officer to make a contract on behalf of the Municipality This section provides the form and the manner in which he should make the contract or vary or discharge the same The section requires that the variation and discharge should also be made in the same form and manner in which the original contract is required to be made under this section whatever may be the extent of variation or discharge

Sub-section (1) —This sub-section requires that the contract should be in the name of the Chief Officer on one side and in the name of the other party on the other side It should be noted that this sub-section deals not with any particular kind of contract but with contracts of every description

Proviso (a) —This means that if any contract of whatever description and value is required to be under seal under the provisions of this Act or of rules

made thereunder it shall be sealed with the common seal of the Municipality

Proviso (b):—This proviso deals with a contract for the execution of any work or supply of goods or materials involving an expenditure of more than Rs 500 It provides that such a contract must be in writing and must be sealed with the common seal of the municipality The proviso also states the matters that must be included in the written contract It should be noted that a time-limit is an essential condition of a municipal contract and must be mentioned in the written contract

Sub-section (2) —The common seal under provisions (a) and (b) above must always be applied in the presence of at least two members of the standing committee who should attach their signatures in evidence of the fact that the seal was applied in their presence It should be noted that the signatures of the attesting witnesses are quite distinct from those of the witnesses to the document

Sub-section (3) —This is similar to sub-section (5) of Section 48 and provides that a contract not entered in the manner and form prescribed in s 49 is not binding on the Municipality See notes under s 8 and sub-section 5 of s 48 and the cases cited thereunder, particularly **5 B L R. 689, 30 B.L.R 837, 36 B.L.R., 568, 39 B L.R 835 and A I.R. 1940 Sind 199**

Tenders to be invited for contracts involving expenditure exceeding Rs 1,000

50. (1) Except as is otherwise provided in sub-section (3), a Chief Officer shall, at least seven days before entering into any contract for the execution of any work or the supply of any materials or goods which will involve an expenditure exceeding one thousand rupees, give notice by advertisement in a local newspaper, inviting tenders for such contract

(2) The Chief Officer shall not be bound to accept any tender which may be made in pursuance of such notice, but may, with the approval of the standing committee, accept any of the tenders so made which appears to him, upon a view of all the circumstances, to be the most advantageous or may reject all the tenders submitted to him

(3) A municipality may authorise the Chief Officer, for reasons which shall be recorded in its proceedings, to enter into a contract without inviting tenders as herein provided or without accepting any tenders which he may receive after having invited them

Scope:—This section deals with inviting tenders and their acceptance or rejection

Sub-section (1) —provides that in case of a contract for work or supply of materials or goods the Chief Officer shall invite tenders provided that the expenditure involved is more than Rs 1000/- If it is Rs 1000/- or less he need not invite any tenders The tenders must be invited by a notice in a local newspaper at least seven days previous to the date on which he enters into the contract It appears that no tenders are necessary if the contract is not for the execution of any work or for the supply of materials or goods whatever the amount involved

Sub-section (2) —It says that the Chief Officer is not bound to accept any particular tender received in answer to the notice under sub-section (1) He is also not bound to accept the lowest tender He is empowered to accept any tender which upon a view of all the circumstances he considers to be the most advantageous to the municipality But he cannot do so except with the approval of the standing committee Thus he may reject a tender which is approved by the standing committee but he cannot accept a tender if it is not approved by the standing committee whose approval is required only for an acceptance This is made clear by the use of word 'may again before 'reject' thereby indicating that the clause 'may reject all the tenders submitted to him' should be read after 'but' without the intervening clauses to arrive at the correct meaning

Sub-section (3)—This is an exception to the general rule laid down in sub-section (1) and (2) Under this sub-section a municipality is empowered to authorise its Chief Officer to enter into a contract without complying with sub-section (1) i e without inviting tenders It may also authorise the Chief Officer to enter into a Contract without accepting any of the tenders invited by him, i e to say without re-inviting the tenders if he does not accept any of the tenders received If a municipality exercises its powers under this sub-section it must record its reasons in the proceedings for so doing The record of reasons is necessary to keep a healthy check in financial matters It should be noted that sub-section (3) deals only with contracts mentioned in sub-sec (1) and not any other contracts

Security when to be taken for performance of contract

51. A Chief Officer shall require security for the due performance of every contract into which he enters under section 50 and may, in his discretion, require security for the due performance of any other contract into which he enters under this Act

Scope.—Under this section security for the performance of a contract is compulsory for a contract of work or supply of goods or materials involving in either case an expenditure exceeding Rs 1000/- In all other cases whether to take security or not is a matter left to the discretion of the Chief Officer The section does not prescribe the amount of security to be taken It therefore, follows that that matter is within the discretion of the Chief Officer who is empowered to take it

(5) Compulsory acquisition of land

Recourse to the Land Acquisition Act, 1894

52. When there is any hindrance to the permanent or temporary acquisition by a municipality upon payment of any land or building required for the purposes of this Act, the Provincial Government may, after obtaining possession of the same for itself under the Land Acquisition Act 1894, or other existing law, vest such land or building in the municipality on its paying the compensation awarded, and on its repaying to the Provincial Government all costs incurred by the Provincial Government on account of the acquisition. 1 of 1894

Amendments.—The words 'The Provincial Government' were substituted

for the words 'the Government' and 'Government' by the adaptation of Indian Laws Order in Council

Scope —This section enables a municipality to acquire land or building where it cannot do so without the aid of Government under the Land Acquisition Act In such a case the Provincial Government has to obtain possession of the property under the Land Acquisition Act and vest it in the municipality after the latter pays the compensation awarded and all costs incurred by Government on account of the Acquisition

A binding agreement as to the amount of compensation can be made before the collector makes the award —In **the Fort Press Co Ltd v The Municipal Corporation of the City of Bombay, 21 B.L.R. 1014**, which was a case under the City of Bombay Municipal Act, 1888, s 91 (similar to s 52 in the Boroughs Act), it was held that (1) a binding agreement as to the amount of compensation payable to the owner of property, which is notified by the Government under the Land Acquisition Act for acquisition for a public body for a public purpose, can be made between the public body and the owner before the Collector has made his award under the Land Acquisition Act, (2) that the offer and acceptance amounted to an agreement definitely fixing the compensation as between the parties themselves whatever sum might ultimately be awarded by the collector and with an obligation on either party to refund any excess or make good any deficiency as the case might be, (3) that the agreement was arrived at for the purpose of proceedings under the Land Acquisition Act and could be specifically enforced by the plaintiffs against the defendants, and (4) that the power of withdrawal given to Government by s 48 of the Land Acquisition Act did not render the agreement void for want of mutuality

Municipality can take possession when the collector makes the award:— In **the Bombay Municipality v. M. Damodar Brothers, 23 B.L.R 35**, which was also a case under the City of Bombay Municipal Act 1888, it was held (1) that when the Government undertook on the application of the Municipality, under s 91 of the City of Bombay Municipal Act, to acquire land, the effect of acquisition and the resultant vesting was as effective and complete as when the collector made an award under s 16 of the Land Acquisition Act, (2) that s 91 of the City of Bombay Municipal Act had modified the provisions of the land acquisition Act so as to vest the property acquired by the collector in the corporation on the payment of compensation awarded instead of in the Government, and therefore, no transfer from Government to the corporation was needed, (3) that s 31 of the Land Acquisition Act did not apply in the case of acquisitions made by virtue of the provisions of s 91 of the City of Bombay Municipal Act, (4) that in the case of acquisitions under s 91 of the City of Bombay Municipal Act the taking of possession by the collector and his handing over the same to the Municipality was not necessary The property vested directly in the Municipality without the intervention of Government or the collector, and when the property was so vested in the Municipality, the Municipality was entitled to take possession

Required for the purposes of this act.—It is open to a civil court to consider the question whether an acquisition proposed by a municipality is or is not required for the purposes of this Act, but once it is established the municipality has full discretion in the matter and civil court cannot interfere In **Shahstri Ramachandra Dinnath v. The Ahmedabad Municipality, 2 B.L.R. 395,**

it was contended that widening of a private street was not one of the purposes of the Act and therefore it was not open to the Municipality to acquire land for such a purpose and a civil court can prevent it by injunction from doing so It was held that widening a private street was also for carrying out purposes of the act and hence the Municipality had powers to acquire the land and had full discretion in the matter and therefore a civil court had no jurisdiction to entertain a suit for an injunction to restrain the Municipality from acquiring the same In the course of the judgment Parson J observed —"A Municipality, therefore can only acquire land when it is required for the purpose of that Act They are also forbidden to apply their funds otherwise than as trustees for the purposes of the Act If we take the purpose stated in the declaration, namely, for widening the road in Jati's Pole, and that alone, no doubt as argued by the pleader for the appellant it would not come within the terms of the Act, for the Act deals with public streets it only vests in the Municipality (Sec 17) and allows them to light, water, cleanse, construct, alter and maintain them (s 24) I think, however, that it is open to the defendant to show that the purpose stated in the declaration is not only the purpose for which the land is required but rather the achievement of that purpose will render it possible to carry out avowed purposes of the Act For instance s 24 of the Act says that it shall be the duty of every municipality to make adequate provision, out of the Municipal property and funds for certain matters, and among these matters are the extinguishing of fire, the reclaiming of unhealthy localities and any other measure likely to promote the public safety, health, convenience or education If it were shown that the widening of this pole was conducive or necessary to provide for any of these matters, then I conceive that the defendant Municipality would have the power to expend Municipal funds in the acquisition of land to widen the Pole The judge of the lower appellate court has found as a fact that this has been proved, and the finding is one that this court must accept The existence of a very narrow passage, only six feet wide, in a crowded quarter of a city like Ahmedabad may be most dangerous and insanitary Its widening may enable fire engines to be taken up it and thus to extinguish a fire that otherwise might cause the destruction of the whole quarter It may also enable the locality to be better lighted, and ventilated and made more healthy In dealing with the case so far I have used the term "widening the road" because that is the one used in the declaration, but it is misleading inasmuch as it assumes that the land acquired will be thrown into and become a part of that road, this however, clearly is not the case The strip acquired will under the Act become vested in the defendant Municipality and can be used by them for any purpose they choose which is sanctioned by the Act It will obviously be useful to the Municipality for many public purposes Indeed its acquisition may be but the first step towards the making of a broad public street through this quarter of the town Viewed in this light the acquisition of the land in suit is within the powers of the defendant Municipality and Civil Court has no jurisdiction to restrain them in the exercise of such powers" This was a case under the Bombay District Municipal Act, 1873, s 25 which is similar to the present provision in the Boroughs Act and the above reasoning equally applies to a case under s 52 of the present Act

Valuation of land and property damaged or destroyed by fire after the date of the publication of the notification for acquisition.—See notes under this head under s 114

(6) Liabilities of councillors, officers and servants.

Councillors to be held responsible for misapplied funds

53. Every councillor shall be personally liable for the misapplication of any fund to which he shall have been a party, or which shall have happened through, or been facilitated by gross neglect of his duty as a councillor and may be sued for recovery of the moneys so misapplied as if such moneys had been the property of the Crown for the purposes of the Province

Provided that no councillor shall be personally liable in respect of any contract or agreement made, or for any expense incurred, by, or on behalf of the municipality, the funds at the disposal of each municipality shall be liable for, and be charged with, all costs in respect of any such contract or agreement and all such expenses

Amendments:—The words 'The crown for the purposes of the province' were substituted for the 'Government' by the adaptation of Indian Laws Order in council

Scope.—This section provides that a councillor shall be personally liable for the misapplication, of municipal fund (1) to which he is a party or (2) which shall have happened through him or (3) which has been facilitated by gross neglect of his duty as a councillor

Happened —In Manilal Gangadas Desai v The Secretary of State for India, 17 B L.R 1115, which was a case under the Bombay District Municipal Act 1901, s 42, which is equivalent to the present section, it was held that the operation of section 42 of the Bombay District Municipal Act of 1901 indicates that the word is employed rather in the broad and popular sense than in the narrow or etymological sense There is no requirement that the misapplication must be by the councillors themselves or by any specified persons whatsoever, and the use of the passive word 'happened' seems to suggest also that the scope of the section extends to a misappropriation of the municipal funds by a municipal employee, provided only that the misappropriation was facilitated by the councillors' gross neglect of their duties

Misapplication —In Manilal Gangadas Desai v The Secretary of State for India 17 B L R 1115, it was contended that the word misapplication in 'the section contemplated only misapplication of funds by official acts of the councillors to public objects not permitted by section 54 to 56 of the Bombay District Municipal Act 1901 Hayword J discussing this question observed:—"But the main contention in this appeal has been whether the mis-appropriation by defendants Nos 1 and 2 could be held to be 'misapplication' within the meaning of s 42 of the Bombay District Municipalities Act of 1901 It has been argued that misappropriation could not be called 'misapplication in ordinary language and that the word 'misapplication' as introduced into the section contemplated only misapplication of funds by official acts of councillors to public objects not permitted by ss 54 to 56 of the Act Now it seems to me that if a man entrusted with moneys for a particular purpose, applies or converts those moneys to his own use either by depositing them in his own cash box or by spending them on himself, he could correctly be said, in ordinary language, either to have misappropriated or misapplied those moneys The result of misappropriation was the misapplication of those funds Any diversion of funds however caused from their proper purposes would be covered

by the wide term 'misapplication' and it is in this wide sense that the term has, in my opinion, been introduced into s 42 of the Act It has purposely not been restricted to a misapplication to which a councillor shall have been a party, but has been applied expressly to a misapplication which shall have happened through, or been facilitated by, gross neglect of duty by a councillor That is to say, which has happened by any other agency through gross neglect of a councillor It would appear, therefore, to have been introduced in its ordinary wide sense upon a consideration alone of the construction of the section This conclusion is, in my opinion, confirmed by a consideration of the objects aimed at by the section"

In The Secretary of State for India v Monilal Harivallabhadas Bhagat, 21 B L.R. 371, the Ahmedabad Municipality did not permit inspection of its primary schools by a Government Inspector 'The Secretary of State for India in Council sued to recover a sum of Rs 1,68,600/- from defendants Nos 1 to 19 who were members of the Ahmedabad Municipality It was held that a primary school maintained by a Municipality out of its funds does not cease to be a primary school within the meaning of s 54 of the Bombay District Municipal Act merely because the Municipality does not permit its inspection by a Government Inspector The money spent by the Municipality in maintaining such a school cannot be treated as misapplied within the meaning of sec 42 of the Act The word 'misapplication' in s 42 of the Bombay District Municipal Act, 1901 means the wrong application of funds or the use of funds for purposes outside the scope of the Act

In **Govind v. Chiplun Municipality, 34 B L R 1216,** the defendants who constituted the Managing Committee of the Chiplun Municipality during their term of office, ordered for the Municipality dustbins, and paid for them out of the municipal funds The Municipality sued to recover the money paid, from the defendants on the ground that they have issued the completion certificate negligently and had misapplied municipal funds in paying for the dustbins It was held that these facts do not establish any misapplication of the Municipality's money Beaumont C J discussing this point observed at page 1219 of the report —"The Municipality was quite entitled to order the dustbins, and was quite entitled to take delivery of them and pay for them, and having paid they could not recover the money It was not in fact the defendants who paid because the defendants were not the persons to pay out the money of the Municipality All that the defendants did was to give completion certificates in a negligent manner, and that, in my opinion, was not a misapplication of the moneys of the Municipality"

Whether embezzlement by municipal employees is a misapplication of Municipal funds within the meaning of this Section —This question was answered in the affirmative in **Manilal Gangadas Desai v The Secretary of State for India, 17 B L.R 1115,** referred to above At page 1129 of the report Hayward J said "But the main contention in this appeal has been whether the misappropriation of money by the Defendants Nos 1 and 2 could be held to be 'misapplication' within the meaning of sec 42 of the Bombay District Municipalities Act of 1901 It had been argued that misappropriation could not be called 'misapplication' in ordinary language and that the word 'misapplication' as introduced into the section contemplated only misapplication of funds by official acts of the Councillors to public objects not permitted by ss 54 to 56 of the

Act Now it seems to me that if a man, entrusted with moneys for a particular purpose, applies or converts those moneys to his own use either by depositing them in his own cash-box or by spending them on himself, he could correctly be said, in ordinary language, either to have misappropriated or misapplied those moneys The result of his misappropriation was the 'misapplication' of those funds Any diversion however caused from their proper purposes would be covered by the wide term 'misapplication' and it is in that wide sense that the term has, in my opinion, been introduced into sec 42 of the Act"

Limitation —In **Manilal Gangadas Desai v The Secretary of State for India, 17 B.L.R. 1115,** it was contended that a suit under s 42 of the Bombay District Municipal Act 1901 fell under article 36 of the Indian Limitation Act It was held that a suit by the Secretary of State for India under this section falls under Article 149 of the Indian Limitation Act and the suit is in time if it is brought within a period of 60 years At page 1129 of the report Hayward J observed "It has also been argued that the claim was time-barred It was argued that the misappropriation occurred in 1903-1904 and the amount could not be recovered by suit filed in 1910, i e beyond the period prescribed by Art 36 of the schedule to the Indian Limitation Act Now it might have been open to argument that the suit was barred under that Article, had the suit been one by the Municipality but this suit was not brought by the Municipality nor was it brought on behalf of the Municipality It was brought by the Government under a special right vested in the Government by s 42 of the Bombay District Municipalities Act of 1901 It appears to me therefore, that the suit was clearly within time under the provisions of Art 149 of the schedule to the Limitation Act"

Gross neglect of duties —**In Manilal Gangadas Desai v The Secretary of State for India, 17 B.L.R 1115,** Hayward J discussing this question said· "It has been argued however, that the misappropriation of the three items was not facilitated as alleged by the admitted non-observance of the rules which required the defendant councillors, among other things, periodically to count the cash, examine the accounts and control the amount of the cash kept in hand by the Secretary and to satisfy themselves that proper security was given by the secretary It appears to me that prima facie the neglect of such duties would necessarily facilitate misappropriation by the secretary and that the persistent neglect of such duties, specifically prescribed, could not be held to be other than gross neglect of duties within the meaning of s 42 of the Act It is no answer whatever to say that other checks upon the dealings of the secretary were neglected by other persons, such as the appointment of proper auditors by the general body and general control by the president of the Municipality"

Who can sue under this section —**In Govind v the Chiplun Municipality, 34 B.L.R 1216,** it was held that under Sec 42 of the Bombay District Municipal Act, 1901 equivalent to Sec 53 of the Bombay Municipal Boroughs Act, Government would be the only possible plaintiffs But this does not deprive the Municipality of the right which it possesses under the ordinary law of suing any person whether or no he be a councillor who misappropriates (the Municipality's) property Discussing this point Beaumont C J observed· "If this were a suit within section 42, it seems to me that the Government would be the only possible plaintiffs Section 42 imposes on a Councillor a liability to be sued

for misapplication or for facilitating by the neglect of his duty as a councillor, the misapplication of moneys of the municipality, and he is to be sued as if such moneys had been the property of Government I apprehend that if the moneys had been the property of Government nobody but Government could have sued in respect of them and therefore if the suit has been brought under section 42 it could, as it seems to me, only have been brought by Government But I agree with the lower courts in thinking that the Municipality can itself sue for misapplication of its moneys In my opinion Sec 42 does not deprive the municipality of the right which it possesses under the ordinary law of suing any person, whether or no he be a councillor, who misappropriates the Municipality's property" It may be noted that for an injunction restraining a municipality from misapplying its funds a suit will also lie at the instance of individual tax payers See **Vaman v the Municipality of Sholapur, 22 Bom. 646** But this will not be a suit under this section In **22 Bom 646** Tyabji J observed: "The plaintiffs in the present case, as rate payers, are in my opinion, not mere strangers, but are directly interested in the proper application of the Municipal funds The absence of interest could have been urged against them with great force, if they had been merely inhabitants of Sholapur and not rate payers and as such contributors to the fund It would in my opinion have been fatal to them if they were not even the residents of Sholapur, and, therefore, not interested in the administration of the Sholapur Municipality at all In this case, however, the observations of Lord Cranworth already quoted above, directly apply to the plaintiffs and in my opinion sufficiently dispose of the District Judge's argument based upon s 56 of the Specific Relief Act, cl (k), as to the sufficiency of the plaintiffs' interest as individual rate payers" In the course of the same judgment Parson J observed "That personal interest must, I think, be held to exist in the case of every individual tax payer, since he who is liable to contribute to the funds cannot but be interested in its proper application It was conceded in argument by the pleader for the defendant that the suit for an injunction would lie if brought by the whole body of tax payers, or if brought by one on behalf of all the others under the provisions of s 30 of the civil procedure code But if the whole body of the tax payers can sue, it can, only because they are interested in the proper application of the fund and if the whole body are so interested it can only be because they contribute and are liable to contribute to the fund It seems, therefore, to me to follow that the individuals who contribute and are liable to contribute to the fund must be held to be personally interested in the due application of that fund and the suit does not, therefore, fall within the prohibition of cl (k) of Sec 56 of the Specific Relief Act of 1877"

Notice —Whether a notice under s 206 is necessary or not in a given suit under s 53 of the Act will depend on the particular facts of the case The wording of S 53 is very wide and a notice under section 206 will be necessary only in those cases which fall within four corners of s 206 In **Govind v The Chiplun Municipality, 34 B.L R 1216**, this question arose but the point was not decided because that suit was held not to be under s 42 of the Bombay District Municipal Act 1901 (equivalent to s 53 of the Boroughs Act)

Proviso —This proviso excludes the personal liability of a councillor for any contract or agreement made or for any expense incurred by or on behalf of the municipality except when the case falls within the mischief aimed at under the section This means that unless there is misapplication to which a coun-

cillor is party or which has happened or been facilitated by the councillor's gross neglect of his duty he is not personally liable

Power to write off loss incurred by causes other than irrecoverable taxes such as embezzlement theft, etc.— Under Bombay Act III of 1901, the mofussil municipalities have the power to write off losses incurred by them on account of causes other than irrecoverable taxes such as embezzlement, theft, etc Section 50 sub-section (2) and section 51 of the B.D.M Act, 1901 (s 63(2) and s 65 of the B.M.B Act, 1925) make it clear that the position of the municipalities in respect of municipal property and funds is in law that of trustees As trustees they would be bound to exercise over the trust property the same degree of caution and care as a man of ordinary prudence would exercise in the case of his own property If, in spite of such care and caution, loss arises by reason of theft, etc, the municipality is not liable, i e, such loss rests with the trust estate If then the municipality is not liable to make good such loss the same could only be 'written off' in the accounts of the municipality. The Act does not empower municipalities to make rules for writing off such losses of property In the case of theft or embezzlement of the funds of the municipality and the loss resulting therefrom the municipality would have the power to write off such loss only if the facts of the case were such as not to attract the application of s 42 of the Act (s 53 of the B.M.B Act) **(Advocate General's opinion No. 26 dated the 23rd June 1919 in G.O.G.D No 6721 dated the 9th August 1919)**

Officer or servant of municipality not to be interested in contract with such municipality

54 (1) Any person who has directly or indirectly by himself or his partner, any share or interest in any contract with, by or on behalf of a municipality, or in any employment with, under, by or on behalf of a municipality, other than as a municipal officer or servant, shall be disqualified for being an officer or servant of such municipality

(2) Any municipal officer or servant who shall acquire, directly or indirectly, by himself or his partner, any share or interest in any such contract or employment as aforesaid, shall cease to be a municipal officer or servant, and his office shall become vacant

(3) Nothing in this section shall apply to any such share or interest in any contract or employment with, under, by or on behalf of a municipality, as under clauses (i), (ii) and (iv) of sub-section (3) of section 12, it is permissible for a person to have without his being thereby disqualified from becoming a councillor

Scope:—This section aims at preventing a municipal officer or servant from having any interest in any contract or employment with the municipality Sub-section (1) prevents any person having any such interest from being appointed an officer or a servant of the municipality Sub-section (2) removes him from such post if he subsequently acquires such interest Sub-section (3) provides exceptions to the general rule For detailed notes on various points and phrases used in this section, see notes under sections 12 and 28

Vacancy —The section does not prescribe the authority to decide, in case of dispute, whether a vacancy has occurred or not under this section, as has now been done in sections 12 and 28 It appears that though the defect is cured in Ss 12 and 28 it is still left uncured in this section In absence of any provision in this behalf it is reasonable to suppose that the authority who has power to remove the officer or servant concerned has the power to decide whether a vacancy has occurred or not under this section, i e to say, for deciding this question the same provisions of the Act or the rules as are applicable for removal of the officer or servant concerned will apply The reason for this is that in substance a decision of this nature against an officer or servant amounts to his removal in effect It should be noted that s 54 brings about the disqualification on the officer or servant concerned irrespective of the fact whether he acquires the objectionable interest either knowingly or unknowingly Section 55 comes into play only if the interest is acquired knowingly

Penalty for councillor, officer or servant of a municipality being interested in contract, etc., with that municipality

55 (a) Any councillor who knowingly acquires directly or indirectly any share or interest in any contract or employment with, under, by or on behalf of a municipality of which he is a member, not being a share or interest such as under section 12 it is permissible for a person to have without being thereby disqualified from becoming a councillor and

(b) any municipal officer or servant who knowingly acquires directly or indirectly any share or interest in any contract, or, except in so far as concerns his own employment as municipal officer or servant, in any employment with, under, by or on behalf of a municipality of which he is an officer or servant, not being a share or interest such as under clauses (i) and (iv) of sub-section (3) of section 12—it is permissible for a person to have without being thereby disqualified from becoming a councillor,

shall be liable on conviction before a criminal court, to a fine which may extend to five hundred rupees

Scope —Sections 12 28 and 54 are disqualifying provisions Sections 12 and 28 dealt with Councillors while section 54 was concerned with municipal officers and servants Section 55 is a penalising provision both for Councillors and municipal officers and servants

Sub-section (a) deals with Councillors who knowingly acquire interest prohibited under s 12 Sub-section (b) deals with municipal officers and servants who knowingly acquire interest prohibited by the same section The only difference is that while in the case of a councillor all the exceptions provided in s 12 are considered unobjectionable, in the case of a municipal officer or servant only exceptions provided in clauses (i) and (iv) of Sub-section (3) of s 12 are permitted Further a comparison of sub-section (3) of section 54 with sub-section (b) of this section shows that if a municipal officer or servant's case falls under clause (ii) of sub-section (3) of section 12, he will not be liable to loose his job under sec 54 but will be liable to punishment under sec 55(b) The punishment provided in this section is the same both for a councillor as well as a Municipal officer or a servant namely a fine extending to Rs 500/- The fine is

to be inflicted by a criminal court on conviction by it The Municipality has no power to inflict the fine

Knowingly —This means that before or at the time of acquiring the interest the person so acquiring is aware of it If he comes to know that he has acquired an interest, subsequently i e after he has acquired it, he cannot be said to have acquired it knowingly Knowingly is *quite different from intentionally* Intentionally includes knowledge as well as intention

Who can launch a prosecution under this section:—Necessary provision has been made for this under s 200 of the Act Under that section the standing committee and the chief officer have concurrent powers for starting prosecutions except in case of prosecutions mentioned in sub-section (3) The Chief Officer cannot start a prosecution under s 55 except with the previous approval of the standing committee An offence under section 55 is not a cognisable offence Hence it follows that it is only *the standing committee or the chief officer* with the approval of the standing committee who can launch prosecution under this section. It follows that nobody else can do so See also notes under s 200

Whether Government sanction necessary for a prosecution under this section —Section 197 of the code of criminal procedure, 1898, provides that no court shall take cognisance, except with the previous sanction of the Provincial Government of an offence alleged to have been committed by a public servant while acting or purporting to act in the discharge of his official duty if the public servant is not removable from his office save by or with the sanction of the provincial Government. Thus two things are necessary for application of this section Firstly the public servant must be one who cannot be removed from his office except by or with the sanction of the Provincial Government A Municipal Councillor is such a public servant See sections 27 and 56 of the Boroughs Act A Chief Officer is not such a public servant because he can be removed by a requisite majority without the sanction of the Government. See Section 33 of the Boroughs Act Thus section 197 applies to a Municipal Councillor but will not apply in the case of Chief Officer The second condition necessary is that the offence must be committed while acting or purporting to act in the discharge of his official duty A Councillor or a Municipal Officer or servant does not acquire the prohibited interest or share in the discharge of his official duty On the contrary he acts against his duties in acquiring such interest For meaning of the expression 'in discharge of his official duty' see notes under that head under section 27 Section 197, therefore, does not cover cases of this type It provides a protection to those public servants who while in the discharge of their duties happen to contravene some law and thereby become liable to an offence The section is intended to protect acts done in good faith by honest public servants in the discharge of their official duties But for such protection they would be liable to be subjected to unnecessary and frivolous prosecutions For a prosecution under s 55 no sanction of Government is necessary at all The only check is that provided in s 200 which is a sufficient protection against unnecessary harassment

Councillors etc. to be deemed public servants

XLV of 1860

56. (1) Every municipal councillor, officer or servant and every lessee of the levy of any municipal tax, and every servant or other person employed by any such lessee shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code

(2) The word "Government" in the definition of "legal remuneration" in section 161 of that Code shall, for the purposes of sub-section (1) of this section, be deemed to include a municipality XLV of 1860

Sub-section (1) —This provision makes every Municipal Councillor, officer or servant and every lessee of the levy of any Municipal tax and every servant or other person employed by such lessee a public servant within the meaning of section 21 of the Indian Penal Code and thus enlarges the list of public servants enumerated in that section The effect of this is that such of the public servants mentioned in this section as are not removable from their office save by or with the sanction of the Provincial Government will get necessary protection under section 197 of the Code of Criminal Procedure, 1898, while acting in the discharge of their official duties and all the provisions of the Indian Penal Code which are applicable in respect of public servants will apply also in regard to persons mentioned in this sub-section Thus the safeguards for public servants such as punishment for obstructing a public servant, etc, in the Indian Penal Code, will be available to these public servants also This is with a view to facilitate the municipal administration

Sub-section (2) —The combined effect of sub-sections (1) and (2) is to make section 161 of the Indian Penal Code applicable to public servants mentioned in sub-section (1)

Section 21 of the Indian Penal Code —As noted above s 56 of the B.M.B Act effects a change in section 21 of the Indian Penal Code inasmuch as it brings within the scope of s 21 I P C certain persons who were not included therein In **Emperor v Elias Ezekil**, 6 **B L R** 54, the question arose whether the Government of Bombay had power to alter or amend any of the provisions of the Indian Penal Code which is an Act of the Imperial Legislature It was held that the Local Legislature had such a power with the previous sanction of the Governor General under section 43 of the Indian Councils Act 1861 and therefore such a provision in the Municipal Act was not ultra vires

Clerk in cess department is public servant —A clerk in the Cess collection department of a District Municipality constituted under the Bombay District Municipal Act, 1901, is a public servant under section 21 clause (10) of the Indian Penal Code, 1860 To offer any obstruction to him is punishable under section 186 of the code **Emperor v Babulal Kanaiyalal, 10 B L R 761.**

Section 197 of the Code of Criminal Procedure, 1898—Act done or purporting to be done in discharge of his official duty —The President of a Taluka Local Board being a statutory public servant under section 135 of the Bombay Local Boards Act 1923 and being removable from his office only by Local Government for misconduct, neglect of or incapacity to perform his duty the court has no jurisdiction to take cognizance of any offence committed by him while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Local Government under section 197 of the Criminal Procedure Code, 1898 Where the court has acted without jurisdiction with regard to a part of the trial, the whole proceedings were vitiated by the illegality committed, and any conviction based on such proceedings cannot stand **Emperor v. Rudragouda Rachangouda, 39 B.L.R 70**

A prosecution against an administrative officer of a Local Board for an offence punishable under section 420 of the Indian Penal Code, 1860, for submitting a false travelling allowance bill to the Board, can lie in absence of a

notice given under s 136 of the Bombay Local Boards Act 1923, inasmuch as the delivery of his travelling allowance bill is not a duty imposed upon him by the Act, **Emperor v Naik, 41 B L.R 1227.** Hence no sanction of the Government will be necessary for such a prosecution

Accused No 1 was a Sub-Overseer in the employ of a District Local Board, and it was a part of his duty to report to his employers through the Works Committee the progress of the works in his charge carried out by a contractor and their measurements, and also to sign bills prepared by the contractor in authentication of the measurements, given and the charges made therein Accused No 2 was an elected member in the Board, the Chairman of the Works Committee, and a statutory public servant not removable from his office except with the sanction of the local Government He was charged with the duty of supervising the works, take their measurements, and to countersign the bills of the contractor by way of authenticating the measurements given and the charge made A bill prepared by bogus contractor stating measurements and charges of work done and signed by accused No 1, and countersigned by accused No 2 was submitted to the President of the Board, and payment was obtained from him The two accused having been prosecuted for offences of cheating and falsification of accounts and abetment thereof under ss 420 and 477A read with s 114 of the Indian Penal Code, contended that their acts were purported "to have been done in pursuance of" the Bombay Local Boards Act, 1923, and they could not be prosecuted by virtue of s 136 (2) of the Act without giving them one month's notice, and accused No 2 further contended that he could not be prosecuted in the absence of sanction from the local Government under s 197 of the Criminal Procedure Code, 1898 Held, (1) that the accused in submitting the bill were purporting to act, though not actually acting, in pursuance of the Bombay Local Boards Act, even if they appended to the bill a statement which was false to their knowledge, (2) that it having been the duty of the accused to sign and countersign the bill respectively in order to enable the contractor to claim, and the District Local Board to pay, the amount of the bill, the preferring of the bill was an official act, and it made no difference that in the discharge of the official duty a fraudulent statement was inserted in the bill, (3) that therefore the act complained of, namely, the fraudulent and dishonest representation by means of the bill and measurement sheet, were protected under s 136 of the Bombay Local Boards Act, (4) that accused No 2 having been a statutory public servant according to section 135, not removable without the sanction of the local Government under s 32 of the Act and the act complained of having been done or purported to be done in the exercise of his official duty, sanction of the Government was necessary to his prosecution under s 197 of the Criminal Procedure Code, 1898 **Emperor v Vishnu, 42 B L.R 1193.**

A president of the municipal council was charged with an offence of threatening a voter with injury to his property with intent to induce such voter to vote for a candidate or to abstain from voting Held, that no sanction was necessary It cannot be held that threatening the voter with injury could be committed by a public servant only or such an offence involves as one of its elements that it was committed by a chairman of a municipality **Rajarao v. T. Ramaswamy A I.R. 1927 Mad 566**

An administrative officer of a School Board appointed under s 9(1) Bombay Primary Education Act is not a public officer not removable from his office

save by or with the sanction of Government within the meaning of s 197 and can be prosecuted without the sanction of Government under s 197, **S S. Shirke v. Emperor, A I R 1931 Bombay 527** In the course of the judgment Patkar Ag C.J observed "The accused is the Administrative Officer of a School Board appointed under s 9(1) Bombay Primary Education Act (Bombay Act 4 of 1923) S 197 Criminal Procedure Code relates to public servant not removable from his office save by or with the sanction of a Local Government or some higher authority It is not disputed that the accused is a public servant Under s 9(2) Bombay Primary Education Act (Bombay Act 4 of 1923), the School Board Administrative Officer shall not save with the previous sanction of the Government be removable from office, reduced or suspended unless by the votes of at least two-thirds of the whole number of councillors It would, therefore, follow that he can be removed from his office without the previous sanction of Government when there is a clear majority of two-third of its members Reliance has been placed on behalf of the applicant on the case of **Ramnarayan Sarora v Parswanath Sen, (A.I R 1938 Cal 516).** That case relates to a chairman who under s 24 Bengal Municipal Act 3 of 1884 is removable from office by a resolution of the commissioners in favour of which not less than two-thirds of the whole number of commissioners have given their votes at a meeting specially convened for the purpose But the removal under the section of the chairman from his office is under s 59 of the Act subject to the approval of the Local Government No such approval of the Local Government is necessary in the case of the present accused if two-thirds of the whole number of councillors have voted for his removal The accused, therefore, is not a public servant who is not removable from his office save by or with the sanction of the Local Government when he can be removed by the local authority by the votes of at least two-thirds of the whole number of councillors We, therefore, think that s 197 does not apply to the present case" The same principles will apply to the case of a Chief Officer, a Health Officer or an Engineer of a Borough Municipality who can be removed under s 33 of the B M B Act, 1925, by the votes of at least two-thirds of the whole number of councillors without the sanction of the Local Government, even though their removal under s 34-A can be effected by the Local Government only

A president of a Taluk Board is a public servant within the meaning of s 197, Criminal Procedure Code and s 21 Penal Code The provisions of s 197 are mandatory and no sanction of Government obtained at the appellate stage can validate the proceedings To relinquish an office is one thing and to be removed from it is another and quite a different thing Of his own motion a man may discontinue attendance and abandon his place But in order that he may be removed from his office there must be motion originating from without The verb is in the passive voice and this implies that the subject undergoes the operation of an agent other than himself The only agency by which the president of the municipality can be removed from his office is the Local Government There is vast difference between removal from an office and ceasing to hold an office As a matter of that an officer in the present case, a municipal president, may resign his appointment and on such resignation being accepted he ceases to hold the office Where by the rules a member ceases to be a member of the municipality on failure to attend a certain number of meetings and ipso facto ceases to be the president, the failure to attend the meetings and thus ceasing to be a member and therefore ceasing to be a president stands more or less on the same footing as resigning an office and

cannot come within the purview of the expression 'removed from office' in s 197 of the code The sanction of the Local Government under s 197 is necessary before a municipal president can be tried for embezzlement in connection with the disbursement of the municipal money and for falsification of the payment accounts **Hidayatulla and others v Emperor, A I R 1933 Sind 161**

The chairman of the District School Board constituted under the Bombay Primary Education Act, 1923, is a public servant within the meaning of s 21(10) of the Indian Penal Code, 1860 He is not removable from office save by or with the sanction of Government and cannot be prosecuted for any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty without the previous sanction of the Local Government under s 197 of the Criminal Procedure Code **Nhana Saheb Ahmedsaheb in re: 38 B.L.R. 956.** In this case a complaint was filed by a member of the District School Board against its chairman charging him with having forged the minutes of a meeting of the School Board and thereby committing an offence under s 465 of the Indian Penal Code It was held that the offence was committed by him while acting or purporting to act in the discharge of his official duty It was further held that the chairman was a public servant within the meaning of s 21(10) of the Indian Penal Code and that he was not removable from his office save by or with the sanction of Government On this question Wassoodew, J in the course of the judgment observed "There is no statutory provision, as in other Acts constituting local authorities granting immunity to the members of the District School Board from prosecution by including them within the definition of 'public servant' The status of those members and Chairman will depend, therefore, on the nature of their statutory duties Indeed only refer in that connection to the provisions of r 23(c) and r 142 of the rules framed by Government under the Bombay Primary Education Act It is clear that under the latter rule the chairman shares the responsibility for drawing cheques on banks for payments of funds belonging to the Board Consequently he could be regarded as an officer expending property of the Board for a secular common purpose of the District within the meaning of cl (10) of s 21 of the Indian Penal Code The emergency powers conferred by r 23(c) also mean nothing else than the performance of acts of an executive character When it is conceded that the executive officer who is described as Administrative Officer—is a public servant within the meaning of s 21(10), there is no difficulty in bringing the chairman within that category In my opinion it would make no difference to that position because the Act and the rules specify the duties of the Administrative Officer without reference to the chairman On general principles when Act itself provides for the election of a Chairman by the Board from amongst its members, there could be no difficulty in treating him as representative of the Board participating in the functions which the Board has been constituted to perform Amongst their functions are the functions which an officer is required to perform under cl (10) of s 21 so as to bring him within the definition of the term 'public servant' Therefore, I agree with my learned brother that the Chairman must be regarded as a 'public servant' With regard to his liability for removal from office with the sanction of the Local Government, it is sufficient to say that in the absence of any provision for the removal of the Chairman qua Chairman either in the body of the Act or in the rules, the only provision under which his removal can take place is the provision contained in r 13(a) Therefore the only way in which a chairman could be removed from his office is by removing

him as a member with the sanction of Government under r 136(a). Accordingly the second condition under s 197 of the Criminal Procedure Code has been fulfilled in this case'

For fuller notes on the subject see notes under the head "Act done or purporting to have been done in pursuance of this Act" under s 206

(7) Validity of Proceedings

Acts and Proceedings of municipality and committee not vitiated by disqualifications, etc. of members thereof.

57. (1) No disqualification of or defect in the election or appointment of any person acting as councillor or as the president or presiding authority of a general meeting or as chairman or member of a committee appointed under this Act shall be deemed to vitiate any act or proceeding of the municipality or of any such committee, as the case may be, in which such person has taken part, whenever the majority of persons, parties to such acts or proceeding, were entitled to act

No resolution of a municipality or of any committee appointed under this Act shall be deemed invalid on account of any irregularity in the service of notice, upon any councillor or member, provided that the proceedings of the municipality or committee, were not prejudicially affected by such irregularity

Proceedings presumed to be good and valid.

(2) Until the contrary is proved every meeting of a municipality or of a committee appointed under this Act in respect of proceedings whereof a minute has been made and signed in accordance with this Act, shall be deemed to have been duly convened and held and all the members of the meeting shall be deemed to have been duly qualified, and where the proceedings are the proceedings of a committee, such committee shall be deemed to have been duly constituted and to have had the power to deal with the matters referred to in the minute

Vacancy not to affect proceedings.

(3) During any vacancy in a municipality or committee the continuing councillors or members may act as if no vacancy had occurred

Sub-section (1) Para 1:- This provision saves certain acts and proceedings of a municipality in case of disqualification or defect in the election or appointment of a councillor or president or a presiding authority of a meeting or a chairman or member of a committee In absence of this provision chaos would result in the municipal administration, if subsequently any disqualification or defect as is mentioned in this sub-section is discovered It should be noted that this sub-section covers defects in the election or appointment of a presiding authority in a general meeting, but does not cover the case of a person who was not entitled to preside at all Thus if a person other than the one prescribed in s 19A or s 31 presides at a meeting the proceedings will not be saved under this sub-section A contrary view was then taken in **Basaya v Murgaya, 28 B L R 1184** wherein the chair-

man of the meeting continued to preside after the election of the new president Their Lordships of the Bombay High Court held that the defect was cured under s 38 of the Bombay District Municipal Act, 1901 (equivalent to the present sub-section) This case came to be considered in **Trimbak v. Vishnu, 38 B L.R 1314,** wherein it was held that (1) under s 23 sub-section (7A) of the Bombay District Municipal Act 1901, the reteiing president was an integral part or that his presence in the chair was an integral part of the machinery for the election of a chairman at the meeting at which the new President had to be elected (2) that the provision contained in section 23(7A) was not a mere matter of procedure which could be disregarded without affecting the validity of the proceedings, (3) that, therefore, the election of plaintiff No 5 as the new President was not valid Referring to **Basaya v. Murgaya,** Broomfield J said "**Basaya v. Murgaya** has been relied on for the respondents That was a case under s 26 sub s (5) of the Bombay District Municipal Act There had been no breach of any provision of the statute and nothing was decided which bears upon the present issue The court held that s 38 of the Act covered the case of the irregularity, if any, in continuing the Chairman as the Chairman of a general meeting after the President was elected Mr O'Gorman has argued that the provisions of s 38 might be applied to this case also That section says this 'No disqualification of or defect in the election or appointment of any person acting as councillor or as the president or presiding authority of a general meeting or as Chairman of a Committee, appointed under this act shall be deemed to vitiate any act or proceeding of the municipality or of any such committee, as the case may be, in which such person has taken part, whenever the majority of persons, parties to such act or proceeding, were entitled to act' This section comes in chapter III of the Act which deals with the conduct of business It is conceded that it only applies in the case of proceedings of a duly constituted Municipal Board after the election of its President and other officers The section in my opinion, cannot apply to a case like the present So far as it is relevant to the present case the only defect which will be cured by it would be a defect in the election or appointment of the presiding authority of a general meeting or Chairman of a committee appointed under the Act Now the meeting at which the plaintiff No 5 was elected president was not a general meeting Sec 26 of the Act shows what are general meetings of the municipality Four ordinary general meetings are provided, and special general meetings are provided, and special general meetings may be summoned by the president whenever he thinks fit, and must be summoned by him upon the written request of not less than one-fourth of the councillors But the meeting of November 6, 1934, was neither an ordinary nor a special general meeting within the terms of s 26 Obviously it was not a meeting of a committee In my opinion the provisions of s 38 cannot be applied in the case of a preliminary meeting which is held before the Municipality is properly speaking constituted at all That case must be governed by the express provisions contained in s 23 (7A) and having regard to those provisions it could not be said that apart from the defect in the election of the chairman, the majority of persons were entitled to act as they did" Tyabji J in the same report while supporting the above view further observed "Secondly, what section 38 cures is something that arises out of persons taking part in such meetings notwithstanding that the election or appointment of such persons is subject to some disqualifications or defect Here it is not objected that some person has taken part in the meeting who was disqualified or whose election or appointment was

defective What is objected to is that a person did not preside who is required to preside over the meeting—no doubt for a very short time and while a very formal act is being done But for the time being no one acted as Chairman Thirdly, the operation of section 38 is restricted to cases in which the majority of the persons who are parties to such Acts or proceedings are entitled to act Here the new Municipality did an act—elected their Chairman for the meeting—without having the person presiding over their deliberations who is required by s 23(7A) to preside over them The majority are not entitled to act in this respect They were not entitled to decide whether they should proceed to elect their Chairman without having the retiring President or anyone else in the Chair If the terms of Sub-section (7A) are considered strictly, then the meeting was not properly constituted for the purpose of electing Chairman in the absence of the retiring President The meeting becomes entitled to elect its Chairman only when the retiring president presides at such meeting. Section 38 does not deal with such a case as is under consideration"

Whether s 57 applies to a meeting, called under sections 19A or 23 — It would appear from certain observations of their Lordships in **Trimbak v. Vishnu** 38 B L R 1314, that provisions of section 57 do not apply to meetings called under sections 19A or 23 There is nothing in section 57 to support this view But their Lordships who decided the case of **Trimbak v. Vishnu** have held that a meeting called for the election of a president of the newly elected Board was not a general meeting of the Municipality but was merely a preliminary meeting held before the Municipality is constituted at all However in **Samalbhai v Jesangbhai** 38 B L.R 1331. Rangnekar Ag C.J has expressed altogether a contrary view At page 1334 of the report the learned Judge observed "It is clear that having regard to this section and the other provisions to which our attention has been drawn, the Board comes into existence as soon as it has its members elected and members nominated, even though at the time the Board may have no president" Further on at page 1336 of the report the learned Judge has observed It is argued that a meeting for electing a president is a special meeting and differs from other meetings held for transacting business As far as I can see, the Act makes no distinction between a meeting held by the Board for electing a president or any other meeting held to transact any other business S 35 would equally apply to both Nor do the regulations make any such distinction" It is respectfully submitted that the view expressed by Rangnekar Ag C J in **Samalbhai v Jesangbhai** is correct though this opinion would not affect the decision in **Trimbak v Vishnu** because as observed by Tyabji J the facts of that case are not covered by s 57 In **Pandurang v Ramchandra** 32 B L R 1252, Broomfield, J has held that s 35 of the Bombay District Local Boards Act 1923 which is equivalent to sections 35 and 57 of the present Act applies to a meeting summoned under s 27 or 26 (equivalent to sections 19A and 23 of the present Act) Thus the view of Broomfield J as expressed in **Pandurang v Ramchandra**, 32 B L R 1252, appears to be contrary to his own view expressed in **Trimbak v Vishnu** 38 B.L R 1314 As stated above the view expressed by Rangnekar J in **Samalbhai v Jesangbhai**, 38 B L.R. 1331, is correct and provisions of sections 35 and 57 apply to meetings held under section 19A and 23 of the present Act

Whenever the majority of persons, parties to such acts or proceedings were entitled to act.—Contrast this with the phrase used in para 2 of sub-section (1) There the words used are "provided that the proceedings of the Municipality or committee were not prejudicially affected by such irregularity" From

the use of these different phrases it appears that both are not intended to mean one and the same thing The meaning of this latter expression is clear namely that excluding the defective votes the majority for the proposition carried must be maintained If excluding these votes the majority becomes a minority, the result is said to be prejudicially affected by the irregularity and hence it would be vitiated This does not appear to be the meaning of the phrase used in para 1 of sub-section (1) 'Parties to such Acts or proceedings' mean all those persons who have taken part irrespective of the fact whether they have voted for or against the proposition If this interpretation is correct then the meaning of the phrase used in para (1) in sub-section (1) is that the total number of valid votes cast for and against the proposition must exceed the total number of defective votes, i e to say, amongst the persons taking part in the matter there should be a majority of persons entitled to act as against those not entitled to act In such a case the resolution carried will be held to be valid This term does not appear to have been clearly interpreted in any decided case, but from the language used by both the learned judges in connection with this provision in **Trimbak v. Vishnu, 38 B L R. 1314,** at pages 1322 and 1324, it appears that the view expressed above is correct However, it is always unsafe to presume that a point not argued or considered has been decided by a court by implication and this was not the point argued by counsel or considered by their Lordships The language of the phrase is most unhappy and is capable of at least three interpretations One is that it means the same thing as the phrase used in the subsequent part of the sub-section, i e to say, that the majority for the carried proposition must not be lost by excluding invalid votes The second meaning is the one adopted by us and the third is that amongst the persons voting for the proposition there is a majority of valid votes as against defective votes The third interpretation appears to us quite unreasonable and meaningless Out of the first two interpretations the first is obviously most reasonable and in consonance with similar provision in the City of Bombay Municipal Act, 1888, s 36 (q) However, if we adopt this view then there is no reason why this different language was used here as against the clear language used in the next para as well as in s 15 (5) Also the obvious meaning of the expression is one adopted by us However, it must be said that the exact meaning and intendment of the expression are not free from doubt and it is suggested that measures should be taken to clear the ambiguity

Sub-section (1) Para 3—This para deals with irregularity in the service of notice upon a councillor

Provided that the proceedings of the Municipality or committee were not prejudicially affected by such irregularity —In **Panduranga v Ramachandra, 32 B.L.R.** 1252 fourteen clear days' notice as required by section 35 (2) (b) of the **Bombay Local Boards' act** was not served on two members but they were present at the meeting Their Lordships held that the want of notice was a mere irregularity and the court would not interfere as no prejudice was shown to have ensued to any party by it This provision specifically lays down that defect in the service of notice is a mere irregularity and not an illegality and the proceedings will be affected by the defect only on proof of prejudice caused by it to some party The provision covers every kind of defect in service of notice

including no service at all Also see notes under the head **"Irregularity in the services of notice"** under section 35(3)

Sub-section (2) —This sub-section raises presumptions mentioned in the sub-section provided a minute of the proceedings has been made and signed in accordance with the provisions of the Act As a result of this sub-section the burden of proof will be on the party who alleges against such presumptions In the Bombay Act 6 of 1873 there was no such provision but their Lordships raised similar presumptions by virtue of s 114 illustration (e) of the Indian Evidence Act and threw the burden of proof on the party who alleged that the required notices were not given before impositions of a tax, See **The Municipality of Sholapur v The Sholapur Spinning and Weaving Co Ltd, 20 Bom. 732**, wherein their Lordships held that "A defendant who in answer to a claim for arrears of taxes by a Bombay District Municipality alleges that the taxes were illegal, (1) because no notice had been given him under s 57 (Bombay Act II of 1887), (2) because no notice had been issued by the municipality to the commissioners under s 11 of Bombay Act VI of 1873, must prove the defence and in the absence of such proof the Court will presume that the municipality has used the regular procedure, and that the common course of business has been followed in the particular cases"

Sub-section (3).— This is an enabling provision entitling the remaining members to act, and not making it necessary for them to await the filling of the vacancy before they can continue their work

CHAPTER IV

RULES AND BY-LAWS.

Municipalities to make rules

58. A municipality shall make rules not inconsistent with this Act and may from time to time alter or rescind them—

(a) regulating the conduct of its business and the delegation of any of its powers or duties to any committee or to the Chief Officer or subject to the provisions of section 37A the powers or duties of any committee to any other committee or to the Chief Officer and the appointment and constitution of committees,

(aa) prescribing the limitations and restrictions subject to which the Pilgrim Committee shall exercise the powers and perform the duties of the municipality in respect of the Pilgrim Fund

Defining the functions of the president and others

(b) determining the executive functions to be performed by the president, vice-president and the chairman of any committee,

Establishment.

(c) determining the staff of officers and servants to be employed by the municipality and the respective designations, salaries, fees and absentee or other allowances of such officers and servants and their powers and duties,

General guidance of municipal servants

(d) generally for the guidance of its officers and servants in all matters relating to the municipal administration,

Amount of security

(e) fixing the amount and nature of the security to be furnished by any officer or servant from whom it may be deemed expedient to require security,

Mode of appointing etc., municipal servants

(f) determining subject to the limitations imposed by sections 33, 34(5) and 34A, the mode and conditions of appointing, punishing, or dismissing any officer or servant, and delegating to officers designated in the rules the power to appoint fine, reduce, suspend or dismiss any officer or servant,

Leave to municipal servants

(g) regulating the grant of leave to its officers or servants and fixing the remuneration to be paid to the persons, if any, appointed to act for them whilst on leave;

Pensions etc

(h) regulating the period of service of its officers and servants and determining the conditions under which such officers and servants or any of them shall receive pensions, gratuities or compassionate allowances on retirement or on their becoming

disabled through the execution of their duty, and the amount of such pensions, gratuities or compassionate allowance, and prescribing the conditions under which any gratuities or compassionate allowances may be paid to the surviving relatives of any such officers or servants whose death has been caused through the execution of their duty,

Provident funds.

(i) authorizing the payment of contributions, at such rates and subject to such conditions as may be prescribed in such rules, to any pension or provident fund which may be established by the municipality or, with the approval of the municipality, by its officers, and servants,

Prescribing taxes

(j) prescribing the taxes to be levied in the municipal borough for municipal purposes, the circumstances in which exemption will be allowed, the conditions on which and the extent to which remissions will be granted, and the system on which refunds will be allowed and paid, in respect of such taxes, the limits of the charges or payments to be fixed in lieu of any tax under section 91, the fees to be charged for licences or permissions granted under section 90 and for giving copies and stamping weights and measures, the fees for notices demanding payments due on account of any tax and for the issue and execution of warrants of distress, and the rates to be charged for maintaining any live-stock destrained, and the time at which and the mode in which such taxes, charges, payments, fees or rates shall be levied or recovered or be payable and the persons authorised to receive payment of the same and the manner in which auctions of movable and immovable property under section 106 shall be held

Writing off amounts due.

(k) prescribing the conditions subject to which sums due on account of any tax or of costs in recovering any tax may be written off as irrecoverable, and the conditions subject to which the whole or any part of any fee chargeable for distress may be remitted by the standing committee

Provided that—

Approval required to rules

(a) no rule or alteration or rescission of a rule made under this section shall have effect unless and until it has been approved by the Provincial Government,

Officers transferred from or to the service of the Crown

(b) if an officer serving or having served under a municipality has been, or is, transferred from or to the service of the Crown, or is partly employed by the Crown and partly by a

municipality, the municipality shall make such contributions to his pension and leave allowances as may be required, by the conditions of his service under the Crown, to be made by him or on his behalf

Notice required in certain cases of dismissal.

(c) a municipality shall not unless with the assent of the government concerned dispense with the services of any officer transferred from the service of the Crown to the service of the municipality or employed partly by the Crown and partly by the municipality, or finally dismiss from the service of the municipality any officer transferred from the service of the municipality to the service of the Crown without giving the government concerned six months previous notice

Amendments:—In sub-section (a) the words, figures and letter 'subject to the provisions of section 37A' were added by Bom 4 of 1930, S 4 The clause (aa) was inserted by ibid In sub-section (f) the figures, word, letter and brackets '33, 34(5) and 34A' were substituted for the figures words and brackets '33 and 34(5)' by Bom 3 of 1930 s 3 In sub-section (j) the words 'Issue and' were inserted by Bom 12 of 1931, s 3(i) In proviso (a) the words 'The Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council The proviso (b) was substituted for the original proviso (b) by ibid In proviso (c), the words 'The Government concerned and the words 'The Crown' wherever they occur were substituted for the words 'The Government' by ibid

General.—This section empowers a municipality to make rules in regard to matters mentioned in the section and also to alter or rescind them The rules must not be inconsistent with the provisions of the Act A new rule or any alteration or rescission of an existing rule comes into effect only after the approval of the provincial Government has been given

Difference between a rule and a by-law —While this section empowers a municipality to frame rules, section 61 gives powers to it to frame certain by-laws The salient points of difference between rules and by-laws were pointed out by Tyabji J in **Emperor v Vishnu Shankar, 39 B L R 89.** His Lordship remarked "It is true that both rules and by-laws may be made by the Municipality and both require to be approved or sanctioned by the Governor in Council or Commissioner But, to mention two salient matters in which they differ —(1) Rules have effect when they are approved, whereas by-laws require to be previously sanctioned, when by-laws are proposed, their drafts have to be published and objections and suggestions received and considered, By-laws can be made only after this procedure has been followed (2) There is no provision in respect of rules similar to the last paragraph of s 48, sub-section (1), following cl (u) which provides that 'every Municipality may with the like sanction prescribe a fine not exceeding five hundred rupees for the infringement of any such by-law" In this case it was held that it was not competent to a District Municipality to make a by-law under the powers given to it by section 48 of the Bombay District Municipal Act 1901, (equivalent to section 61 in the Boroughs

Act) providing for penalty for breach of a rule made under s 46 of the Act (equivalent to s 58 in the Boroughs Act) e g for payment of toll on conveyances

Whether duties and powers of the standing committee could be delegated to the President.—In **Prithviraj v Lonavala City Municipality, 35 B L.R 138,** the Municipality of Lonavala constituted under this Act did not appoint a standing committee as required by s 37 but made a rule which was sanctioned by the Government under section 58(b) read with s 46 of the Act delegating to the President all powers or duties or executive functions to be exercised or performed on behalf of the Municipality The Municipality prepared under s 80 a revised assessment list of houses within its limit and objections to it were disposed of by the president under the authority of the above rule It was held that such a rule was ultra vires and this function could not be delegated to the President in view of the provisions of s 81 which lays down that the function could be delegated only to a committee The powers of the standing committee under s 81 are of the nature of judicial functions and not executive functions and therefore could not be delegated to the President under section 58(b) It should also be noted that the President is not included in s 58(a) He could be delegated under s 58(b) only executive functions as distinguished from duties and powers

Powers, Duties and Executive functions.—In section 58, a distinction is made between duties and powers on one hand and executive functions on the other Clause (a) deals with delegation of duties and powers while clause (b) provides only for delegation of executive functions **In Prithviraj v Lonavala City Municipality, 35 B L R 138,** it was observed that the term executive function is nowhere defined but it cannot be extended to include a function to consider objections and dispose of them on general principles Such a duty has the character more of a judicial than of an executive function

Powers and Duties that could be delegated under s 58(a).—It appears that under s 58(a) a rule could be framed to delegate any of the powers or duties of a municipality or of any committee The only powers and duties that could not be delegated by the municipality are those of the Chief Officer given to him by the Act Clause (a) does not provide for delegation of Chief Officer's powers and duties by the municipality However, the Chief Officer can do so under s 34

In **Emperor v Jesingbhai, 37 B L R 184,** a question arose whether the statutory powers of the standing committee under s 186 could be delegated to any other committee It was held (1) that under s 37 of the Bombay Municipal Boroughs Act, 1925, the standing committee is required to exercise the functions allotted to it under the Act and also the residuary powers of the municipality which have not been validly delegated to some other body, (2) that under s 38 of the Act the power of the municipality to delegate is confined to its residuary powers which are exercisable by the standing committee and do not apply to the special functions which are allotted to the standing committee under the Act (3) that s 58 in terms gives power to the municipality to make a rule delegating the powers or duties of one committee to another committee, and that it is competent to make a rule delegating a power or duty allotted by the Act to the standing committee to some other committee (4) that under rules framed by the municipality under s 58(a), the sanitary committee was competent to take action under section 186 of the Act (5) that therefore the accused was guilty of an offence punishable under section 186 of the Act

Licence Fee—by-law for taking licence necessary before imposition of fee—Rule for imposing such fee.—The Borough Municipality of Broach framed by-laws under section 61 of the Bombay Municipal Boroughs Act, 1925, one of which made it compulsory for traders in fire-wood and charcoal to obtain licenses for carrying on their trade, but prescribed no fee for the grant of such licenses Subsequently the Municipality, with the sanction of Government, framed, in the exercise of power given to it by the provisions of s 58(j) of the Act, a new rule (r 208(a)) under which it levied a yearly license fee not only in respect of storing wood, coal and charcoal, bu. also for the manufacture and sale of sweetmeats, the object of the levy being to enable the Municipality to meet educational expenses The plaintiffs who respectively were traders in fire-wood and charcoal, and manufacturers and sellers of sweetmeats and confectionery, and carried on their business within the Municipal limit of Broach sued for a declaration that the Municipality had no right to recover from them any sum under the pretext of license fees The lower court having held that the levy was legal, the plaintiffs appealed —Held, (1) that under s 91(1) of the Bombay Municipal Boroughs Act, the question of charging license fees would arise when a license was granted, and a license could only be granted if the law required a license to be granted; (2) that there was no provision in the Act requiring persons carrying on the trades enumerated in its s 186(1) to apply for and obtain a license, that under the scheme under the Act it was left to the discretion of the Municipality to so require them, that the Municipality might by framing the necessary by-laws require any trade to be carried on under a license, and that the section therefore provided a penalty for using a place for a trade without a license only when the by-laws provided for obtaining a license, (3) that the object for which a fee or tax was levied by a public body did not serve necessarily as a guide for saying whether the imposition was a 'fee' or a 'tax', (4) that merely because the Municipality before making the rule had in a public notification indicated the object for which it was to be applied (viz, to meet educational expenses), that would not render the formality observed in passing the rule unsuitable or unauthorised, (5) that inasmuch as the by-laws provided for a license to be taken in the case of storage of fire-wood and charcoal, the Municipality was competent to make rules prescribing the fee to be charged for such licence, (6) but that as regards the manufacture and sale of sweetmeats the Municipality not having first made a by-law insisting upon a license and then framed a rule prescribing a fee under section 58(j) of the Act, the levy of fees upon the manufacturers and sellers of sweetmeats was not in accordance with law **Sorabji Hormasji Lakdawala v The Broach Municipality 43 B.L.R 533** *See notes under s 3(20)*

Sub-section (j)—Rules for refund —Under section 158 of the City of Bombay Municipal Act, 1888, the following general conditions were prescribed by the standing committee with reference to claims for drawback of the general property tax leviable in Bombay —'(1) Except with the special sanction of the Commissioner no claim for drawback shall be entertained unless submitted to the Commissioner not less than 30 days before the commencement of the half year to which such claim relates (2) Drawback of the one-fifth part of the general tax shall be sanctioned by the Commissioner in cases falling within either of the following classes and in no others —(a) Chawls or buildings let out for hire in single rooms either as lodging or godowns for the storage of goods (b) properties which, in the opinion of the Commissioner, are usually or frequently vacant either wholly or partially (3) No sanction for drawback shall

extend or apply to any floor on which trade or manufacture is carried on, or any goods are sold' The Commissioner having refused to sanction a drawback of the tax leviable on certain properties of the plaintiff on the ground that they did not fall within the terms of the above conditions the plaintiff filed this suit It was contended in this behalf that the second and third of the above conditions were bad and that the standing committee could not by so called general conditions limit or curtail the right given to tax payers by s 158 Held that the conditions prescribed by the Standing Committee were not Ultra Vires and that the Commissioner was justified in refusing the drawback **Goverdhandas v The Municipal Commissioner, 17 Bom 394** Section 86 of the Boroughs Act provides for obligatory and discretional refunds of house tax Necessary rules are to be framed under s 58(J) The rules should not curtail the rights of the tax-payers under s 86

Rule Permissive or Mandatory —The plaintiffs having sued the Municipality of Sholapur for damages and for an injunction restraining the Municipality from stopping the supply of water to their house The first court allowed the claim, but the Judge in appeal dismissed the suit holding that it was premature, and that the plaintiffs had no right to sue the Municipality for damages under rule 16 of the rules framed by the Municipality under s 14 of the District Municipal Act (Bom Act VI of 1873), that rule providing that 'Parties dissatisfied with a decision of the Managing Committee or of any sub-committee may prefer an appeal to the Municipality whose decision shall be final' Held, reversing the decree, that the rules must be construed as permissive and not mandatory It referred to departmental procedure only and did not debar the institution of the civil suit **Vasudevacharya and others v The Municipality of Sholapur, 22 Bom 384**

Wrongful dismissal —See notes under s 33

Whether by-law can cut down an exemption allowed by the legislature.— See notes under this head under s 51 The same principles will apply in the case of rules

Fixed charges and agreement for payment in lieu of water-rate—Whether a tax or a contractual charge—Application of s 75 to rules under s 58(j) for water rate under s 91 and of s 48 —See notes under this head under s 3(20)

Section 58 (c) and proviso (a) to s 58 —their application to abolition of post or reduction in salary or allowance, etc —Notwithstanding anything contained in clause (a) of the proviso to s 58 or in sub-section (1) of s 59 of the B M B Act, a municipality has power under sub-clause (2) of s 59 to make without sanction a rule under cl (c) of s 58 creating an appointment or increasing the salary of an appointment or granting or increasing an allowance in any case where the salary of such appointment or the amount of such allowance or increase as the case may be does not involve a charge on the municipal fund exceeding Rs 100- in the month The sub-section (2) of s 59, therefore, provides an exception to the general rule contained in the proviso (a) to s 58(c) read with s 59(1) and this exception relates only to creating an appointment or increasing the salary of an appointment or granting or increasing an allowance subject to a certain limit, and it does not provide for a power of the municipality to abolish an appointment or to reduce the salary or allowance of an appointment without the sanction of the commissioner or of Government In cases not exactly covered by s 59(2) the general rule contained in s 58 will itself apply Consequently it is necessary that a munici

pal borough should amend or alter the rule with the sanction of the Commissioner or Government under s 59(1) read with s 58(c) and proviso (a) of s 58 if it wants to abolish a post or to reduce the scale of salary, etc, of any post sanctioned by its rules even though such reduction may result in gain to the municipal fund **(Examiner Local Fund Account's no L. 2/3877 dated the 26th January 1939).**

Whether rules under s 58(c) to (i) apply to School Board servants:— Rules framed by a Local Authority for the benefit of its employees under the Bombay Local Boards Act or the B.D.M Act 1901, or the B.M.B Act 1925, would not be applicable to the employees of School Board which is an independent body established under a separate enactment **(Examiner Local Fund Account's no. L. 8-3852 dated the 19th January 1942).**

S. 58(j)—Position of local bodies regarding the levy of octroi and terminal tax and making deduction from the amount of refund of octroi:—See notes under this head under s 73

Rules for levying fees for aerial projections and temporary surface occupation of public streets:—See notes under the head **'Municipality's powers and duties as regards public streets etc'** under s 143

Rules regarding permanent surface projections over sewers, gutters, etc—ultra vires:—See notes under s 143 under the head **'Drains and gutters along a public street are public street**

Rules and by-laws imposing a tax on Hotels and Restaurants —Section 80(1) of the B.D.M Act (s 75 of the B.M.B Act, 1925) provides that a municipality may make rules prescribing taxes to be levied Under s 59 (s 73 of the B.M.B Act) a municipality has power to levy a tax on professions A tax on hotels and restaurants can be deemed to be a tax on professions Rules made for the levy of a tax on hotels and restaurants are legal under the provisions of s 46, sub-section (1) of the B.D.M Act (s 58(j) of the B.M.B Act) Section 48(4) of the B.D.M. Act (s 61(1)(ee) of the B.M.B Act) enables a municipality with the previous sanction of the Provincial Government to make by-laws regulating any matter relating to municipal administration The sanitation of hotels and restaurants would be a matter relating to municipal administration and it would be competent for a municipality to make by-laws regulating such matters The entry of Harijans to hotels and restaurants would not be a matter relating to the municipal administration and any by-law relating to such entry would not be valid under cl (u) of s 48 of the B.D.M Act, 1901 **(R.L.A.'s opinion no. 13104 dated the 19th December 1939 in G.M.G.D no s 91(18)—7014—dated the 5th January 1940).**

Rule prescribing remission of Notice fee ultra vires —Under s 46(j) of the B.D.M Act, 1901 or s 58(k) of the B.M.B Act, 1925, a municipality has power to make a rule prescribing (1) the conditions subject to which sums due on account of costs in recovering a tax may be written off as irrecoverable and (2) the conditions subject to which the whole or any part of any fee chargeable for distress, may be remitted (1) does not include the power to sanction remissions. The question, therefore, is whether the fees for notices can be deemed to be fee chargeable for distress The provisions of s 85(a) and (b) of the Act of 1901 and those of s 108 of the Act of 1925 make a clear distinction between 'fees for notices' and 'fees for distress' and the latter does not include the former, though both make up the cost of recovery of tax The legislature having made a clear distinction between the two fees, has empowered the muni-

cipality to make rules sanctioning the remissions of one only viz the fees for distress **(R.L.A's opinion no. 6514 dated the 14th December 1932 in G.M.G.D. No s 91(64) 13466-A dated the 19th December 1932)**

Levy of fees for notices issued —Although it may not be proper to construe the provisions of section 82 or section 85 of the B D M Act 1901 (Sections 104 and 108 of the B M B Act, 1925), by the analogy of the Land Revenue Code Rules, section 85 empowers a municipality to charge fees for notices issued The reference in the said sections to section 82(3) does not show that fees are not recoverable till the notice is actually served It will therefore be competent for a municipality to make a rule providing for the recovery of notice fees as soon as the notice issues **(R.L.A s opinion no. 3135 dated the 23rd December 1925 in G.R.G.D no 6575 dated the 11th January 1926)**

Rules for levying fees for projecting shop boards—Whether action under s 60(b) and (c) of the B D M Act, 1901 (s. 75(b) and (c) of the B M.B Act, 1925) necessary —Section 46(1) of the B D M Act 1901 (s 58(j) of the B M.B Act, 1925), lays down that the prescribing of fees charged for licenses inter alia is subject to the provisions of chapter VII, but it does not say that it is subject to the particular provisions of s 60(b) and (c) and the question is whether s 60 does refer to such fees at all As observed by the Remembrancer of Legal Affairs, in his remarks given in he preamble of G R G D No 1414 dated the 17th March 1903, section 60(b) only applies to rules made under s 46(1) when those relate to a tax Although 'tax' in s 3(14) (s 3(20) of the B M B Act) includes a fee, the fee in this case is leviable under s 70 (s 90 of the B.M.B Act) and is not a tax under s 59 (s 73 of the B.M B Act), and s 60(a)(1) (s 75(a) of the B M B Act) indicates what is meant by the word tax in s 60 as it refers to one or other of the taxes specified in s 59 It appears, therefore, that in the case of such fees it is not necessary to take action under s 60(b) and (c) **(R L'A's opinion no 3 dated the 4th January 1915 in G O G D no. 719 dated the 26th January 1915)** In section 58 (j) of the B.M B Act the words 'subject to the provisions of ch VII' occurring in s 46(1) of the B D M Act do not occur

Discretionary power to make rules.

58A A municipality may, at its discretion, make rules, not inconsistent with this Act, determining the conditions under which gratuities or compassionate allowances may be paid to the surviving relatives of its officers and servants or any of them who die during service and the amount of such gratuities or compassionate allowances

Provided that no rule or alteration or rescission of a rule made under this section shall have effect unless and until it has been approved by the Provincial Government

Amendments —This section was inserted by Bom 9 of 1930, s 2 and the words 'The Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council

Scope —**This section enables a municipality to frame rules for payment of gratuities and compassionate allowances to the surviving relatives of its officer and servants who die during service This provision is different from the provision made in clause (h) of s 58** There the provision is made for retirement

and death in execution of duty, while here the provision is made for death during service though not in execution of duty These rules require approval of the Provincial Government Unless there are rules framed and approved by Government, it is not permissible to pay any gratuity or compassionate allowance by a mere resolution

Rules made with approval of commissioner or without approval

59 (1) Notwithstanding anything contained in clause (a) of the proviso to section 58, the approval required to be given in respect of rules framed under clause (c) of section 58 may be given by the Commissioner instead of by the Provincial Government, subject to the condition that any such rules relating to Chief Officers, health officers or engineers or to the salaries, fees or absentee or other allowances of such officers shall require the sanction of the Provincial Government

(2) Notwithstanding anything contained in clause (a) of the proviso to section 58 or in sub-section (1) of this section, a municipality shall have power to make without sanction a rule under clause (c) of section 58, creating an appointment or increasing the salary of an appointment or granting or increasing an allowance in any case where the salary of such appointment or the amount of such allowance or the amount of such increase, as the case may be does not involve a charge on the municipal fund exceeding rupees one hundred in the month

Provided that the Provincial Government may withdraw this power from any municipality either permanently or for such period as they think fit to prescribe when, in their opinion there are good reasons for doing so

Amendments —In sub-section (1) the words 'the Provincial Government' were substituted for the words 'Government' and for the words 'the Government' by the Adaptation of Indian Laws Order in Council In proviso to sub-section (2) the words 'the Provincial Government' were substituted for the words 'the Government' by ibid

Sub-section (1) —This sub-section provides for Commissioner's approval in place of the approval of Provincial Government in regard to rules framed under section 58(c) except where they relate to a Chief Officer, a Health Officer or an Engineer

Sub-section (2)—This sub-section dispenses with the sanction required under section 58 proviso (a) and s 59(1) in case of a rule made under section 58(c) whereby a charge not exceeding one hundred rupees per month is placed on the Municipal Fund It should be noted that this sub-section enables a municipality to create an appointment or increase the salary or grant or increase an allowance within certain limits without the sanction of Government or the Commissioner but does not empower it to make a similar reduction Thus no post could be abolished or reduced without the necessary amendment in the rules framed under s 58(c) and this will require an appropriate sanction

Interpretation of s 59(2):—Section 59(2) gives the power of creating an appointment whereof the salary does not involve a charge on the municipal fund exceeding rupees one hundred in the month This power is more important than the power of allowing an increase in salary to the extent of rupees one hundred in a month The increase in salary without sanction permitted in express terms by sub-section (2) of s 59 cannot be construed to mean an increase which together with the original salary would in the aggregate exceed rupees one hundred in the month The Act provides certain checks against the abuse of the power granted by sub-section (2) of s 59 (i) The municipality is required to make a rule sanctioning the increase in salary Where rules were already in existence prior to the passing of the Act, these rules will be deemed to have been made under this Act by virtue of s 5(1)(b) An increase in salary granted under s 59(2) would, in that case, necessitate the alteration or rescission of any rule previously existing and such alteration or rescission would have to be made by a rule (ii) The proviso to sub-section (2) of s 59 gives Government the power to withdraw the power granted by the sub-section in case any municipality abuses the power (iii) A similar power of interference is given by s 213(2)(b) and s 214 which empower the Government to suspend the execution or prohibit the execution of any order or resolution granting an increase in salary unnecessarily, on the ground that a waste of public funds was injurious to the public (iv) Section 216 is also to the same effect and it can be invoked to prevent extravagance (v) Finally, section 219 confers extraordinary powers on the Government to meet every serious contingency **(R L.A.'s opinion no 2564 dated the 10th August 1927 in G R G D no 371 dated the 25th August 1927)**

Notwithstanding anything in cl (a) of the proviso to p 58 or in sub-section (1) of s 59 of the B M B Act, 1925, a municipality has power under sub-section (2) of s 59 to make without sanction a rule under cl (c) of s 58 creating an appointment or increasing the salary of an appointment or granting or increasing an allowance in any case where the salary of such appointment or the amount of such allowance or increase as the case may be does not involve a charge on the municipal fund exceeding Rs 100/- in the month The sub-section (2) of s 59, therefore, provides an exception to the general rule contained in the proviso (a) to s 58(c) read with s 59(1) and this exception relates only to creating an appointment or increasing an allowance subject to a certain limit, and it does not provide for a power of the municipality to abolish an appointment or to reduce the salary or allowance of an appointment without the sanction of the Commissioner or of Government In cases not exactly covered by s 59(2) the general rule contained in s 58 will itself apply Consequently it is necessary that a municipal borough should amend or alter the rule with the sanction of the Commissioner or Government under s 59(1) read with s 58(c) and proviso(a) of s 58, if it wants to abolish a post or to reduce the scale of salary, etc of any post sanctioned by its rules even though such reduction may result in a gain to the municipal fund (Examiner Local Fund Accounts' no. L 2|3877 dated the 26th January 1939)

Power to suspend, reduce or abolish any existing tax.

60 (1)Subject to the requirements of clause (a) of the proviso to section 58 a municipality may, except as otherwise provided in clause (b) of the proviso to section 103 at any time for any sufficient reason, suspend, modify or abolish any existing tax by suspending, altering or rescinding any rule prescribing such tax

(2) The provisions of chapter VII relating to the imposition of taxes shall apply so far as may be to the suspension, modification or abolition of any tax and to the suspension, alteration or rescission of any rule prescribing a tax

Sub-section (1):—This sub-section empowers a municipality to suspend, modify or abolish any existing tax by suspending, altering or rescinding the relevant rule But the suspension, alteration or rescission will have effect only after the approval of the Provincial Government has been obtained, i e, to say, it cannot have any retrospective effect There is one exception to the exercise of this power viz, that it is not open to a municipality to exercise its powers under this section in case of a tax imposed at the instance of Government under s 103

Sub-section (2):—By this sub-section the procedure prescribed under Ch VII relating to imposition of taxes has been made applicable in the case of suspension, modification or abolition of any tax and the rule prescribing such tax

Power to make by-laws

61 (1) A municipality, may from time to time, with the previous sanction of the Provincial Government make, alter or rescind by-laws not inconsistent with this Act—

Markets and slaughter-houses, etc, etc.

(a) for the regulation and inspection of markets and slaughter-houses and all places used by or for animals which are for sale or hire, or the produce of which is sold, and for the proper and cleanly conduct of business therein, and for fixing the rents and other charges to be levied for the use of any of them which belong to the municipality, for regulating the sale of fruit and vegetables in the municipal market or other specified places;

Licensing, regulating and inspecting certain businesses.

(b) prescribing the conditions on or subject to which and the circumstances in which and the areas or localities in respect of which, licenses may be granted, refused, suspended or withdrawn for the use of any place not belonging to the municipality—

(i) as a slaughter-house;

(ii) for the manufacture, preparation, storing, sale or supply for the purpose of trade of any article or thing intended for human food or drink, whether such food or drink is to be consumed in such place or not,

(iii) for any of the purposes mentioned in sub-section (1) of section 186, and providing for the inspection and regulation of the conduct of business in any place used as aforesaid, so as to secure cleanliness therein or to minimise any injurious offensive or dangerous effect arising or likely to arise therefrom,

(c) prescribing the conditions on or subject to which and the circumstances in which and the areas or localities in respect of which licenses may be granted, refused, suspended or withdrawn for the use of whistles and trumpets operated by steam or mechanical means in factories or other places for the purpose of summoning or dismissing workmen, or persons employed, Use of steam whistles, etc.

(d) prescribing the conditions on or subject to which and the circumstances in which and the areas or localities in respect of which licenses may be granted, refused, suspended or withdrawn for the use of any place or building for the purpose of lodging pilgrims, and providing for the inspection and regulation of such places or buildings, Pilgrims' lodging houses

(e) prohibiting the stalling or herding of horses, camels, cattle, donkeys, sheep or goats, otherwise than in accordance with such regulations prescribed in such by-laws in regard to the number thereof, and the places to be used for the purpose, as may be necessary to prevent danger to the public health, Stalling of cattle, etc

(f) prescribing the conditions on which sweetmeats may be sold and on which licenses may be granted, refused, suspended, or withdrawn for the use, for purposes of trade, of any place for stabling milch cattle, for storing or selling milk, or for making storing or selling butter or other milk products, Milk shops

(g) (i) for the inspection of milch cattle, and prescribing and regulating the construction, dimensions, ventilation, lighting, cleansing, drainage and water-supply of dairies and cattle-sheds in the occupation of persons following the trade of dairy-men or milk-sellers, For regulating dairies and cattlesheds

(ii) for securing the cleanliness of milk-stores, milk-shops and vessels used by milk-sellers or buttermen for milk or butter, Milk stores, etc.

(h)

(i)

(j) for the registration of births, deaths, and marriages within the municipal borough and for enforcing the supply of such information as may be necessary to make such registration effective, Registration of births, etc

(k) regulating the disposal of the dead and the maintenance of all places for the disposal of the dead in good order and in a safe sanitary condition due regard being had to the religious usages of the community or section of the community entitled to the use of such places for the disposal of the dead. Regulating the disposal of the dead

S 11

For enforcing supply of information as to epidemics

(l) for enforcing the supply of information as to any cases of dangerous disease, and carrying out the provisions of sections 179 and 180,

For enforcing supply of information as to liability to municipal taxation

(m) for enforcing the supply of such information by inhabitants of the municipal borough as may be necessary to ascertain their respective liabilities to any tax imposed therein,

Octroi

(n) fixing octroi limits and stations, providing for the exhibition of tables of octroi, regulating, subject to any general or special orders which the Provincial Government may make in this behalf, the system, under which refunds are to be made on account thereof when the animals or goods on which the octroi has been paid, or articles manufactured wholly or in part from such animals or goods, are again exported, and the custody or storage of animals or goods declared not to be intended for use or consumption within the municipal borough, and prescribing a period of limitation after which no claim for refund of octroi shall be entertained and the minimum amount for which any claim to refund may be made,

Terminal tax

(o) fixing terminal tax limits and stations, providing for the exhibition of tables of terminal tax, and regulating the mode of recovery of such tax,

For protecting water

(p) for conserving and preventing injury to sources and means of water supply and appliances for the distribution of water, whether within or without the limits of the municipal borough, and regulating all matters and things connected with the supply and use of water and the turning on or turning off and preventing the waste of water, and the construction, maintenance and control of municipal water-works, and of pipes and fittings in connection therewith, whether the property of the municipality or not,

Explanation —Sources and means of water-supply shall include private wells which are used by the public

Public baths etc.

(q) regulating the use of public bathing and washing places within the municipal borough,

Conservancy

(r) regulating sanitation and conservancy and the disposal of the carcasses of dead animals,

Temporary structures and buildings

(s) regulating the conditions on which permission may be given for the temporary occupation of, or the erection of temporary structures on, public streets or for projections over public streets,

(t) regulating the structure and dimensions of plinths, walls foundations, roofs and chimneys of new buildings for the purposes of health, and determining the purposes for which existing pose of securing stability and the prevention of fires, and for puror newly erected buildings may be used in any area, Buildings

(u) for preventing the erection of buildings without adequate provision being made for the location and laying out of streets; and for the payment of compensation in such cases when necessary, Streets

(v) for ensuring the adequate ventilation of buildings by the provision and maintenance of sufficient open space either internal or external and of doors and windows and other means for securing a free circulation of air, Ventilation

(w) prescribing the qualifications of surveyors or persons by whom plans required under section 123 are to be prepared or of plumbers, for licensing persons to be surveyors or plumbers and, fixing the fees chargeable for such licenses, and for modifying the provisions of or revoking such licenses, and prohibiting any alterations or repairs or fittings to water or drainage-pipes or house-connections being carried out or made except by such persons Qualified surveyors

(x) regulating, in any other particular not specifically provided for in this Act, the construction maintenance and control of drains, sewers, ventilation shafts receptacles for dung and manure, cesspools, water-closets, privies, latrines, urinals and drainage or sewerage works of every description whether the property of the municipality or not, Drains

(y) determining the information and plans to be required by the municipality under sections 117 and 123, Requiring information and plans in certain cases

(z) prohibiting vehicular traffic in any particular street, so as to prevent danger, obstruction or inconvenience, to the public by fixing up posts at both ends of such street or portion of such street, prohibiting the transit of any vehicles of such form, construction, weight or size or laden with such heavy or unwieldy objects as may be deemed likely to cause injury to the roadways or to any construction thereon, or risk or obstruction to other vehicles or to pedestrians along or over any street, except under such conditions as to time, mode of traction, or locomotion, use of appliances for protection of the roadway, number of lights and assistants, and other general precautions as may be Controlling unwieldy traffic

prescribed either generally in such by-laws or in special licenses to be granted in each case upon such terms as to time of application and payment of fees therefor as may be prescribed in such by-laws

Provided that no such by-law relating only to any particular street or portion of a street shall be deemed to be in force, unless and until notices of such prohibitions shall have been posted up by the municipality in conspicuous places at or near both ends of such street or portion of a street,

Public parks

(aa) securing the protection of public parks, gardens and open spaces, vested in or under the control of the municipality, from injury or misuse, regulating their management and the manner in which they may be used by the public, and providing for the proper behaviour of persons in them,

(bb) prescribing the conditions on or subject to which licenses may be granted, refused, suspended or withdrawn, for the use of carts and hand-barrows, other than those plying for hire in respect of which licences have been granted under the Bombay Public Conveyances Act, 1920, and providing for the seizure and detention of any handcarts or hand-barrows which have not been duly licensed in pursuance of the by-laws made under this section;

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(cc) prescribing the conditions on or subject to which licences may be granted, refused, suspended or withdrawn for hawking or exposing for sale in any public place or street any article whatsoever, whether it be for human consumption or not,

(dd) prescribing the conditions on or subject to which permission may be granted, renewed, refused, suspended or withdrawn for erecting, exhibiting, fixing or retaining any sky-sign or advertisement, over any land, building or structure

Explanation—The expression "sky-sign" shall mean any word, letter, model, sign, device or representation in the nature of an advertisement, announcement or direction, supported on or attached to any post, pole, standard, framework or other support wholly or in part upon or over any land, building or structure which, or any part of which sky-sign shall ve visible against the sky from some point in any street and includes all and every part of any such post, pole, standard, framework, or other support The expression "sky-sign" shall also include any balloon, parachute or other similar device employed wholly or in part for the purposes

of any advertisement, announcement or direction upon or over any land, building or structure or upon or over any street, but shall not include—

(a) any flagstaff, pole, vane or weather-cock, unless adapted or used wholly or in part for the purpose of any advertisement, announcement or direction,

(b) any sign, or any board, frame or other contrivance securely fixed to or on the top of the wall or parapet of any building, or on the cornice or blocking course of any wall, or to the ridge of a roof,

Provided that such board, frame or other contrivance be of one continuous face and not open work, and do not extend in height more than three feet above any part of the wall, parapet or ridge to, against, or on which it is fixed or supported,

(c) any word, letter, model, sign, device or representation as aforesaid, relating exclusively to the business of a railway company, and placed wholly upon or over any railway, railway station, yard, platform or station approach belonging to a railway company, and so placed that it cannot fall into any street or public place;

(d) any notice of land or building to be sold or let, placed upon such land or building,

(ee) *generally for the regulation of all matters relating to* municipal administration, General regulation

and the municipality may, with the like sanction, prescribe a fine not exceeding five hundred rupees for every infringement of any such by-law Fine may be imposed for infringement of by-laws

(1a) A municipality may, from time to time, with the previous sanction of the Central Government make, alter or rescind by-laws, but not so as to render them inconsistent with this Act, for the taking of a census within the municipal borough and for enforcing the supply of such information as may be necessary to make such census effective

(2) A municipality shall before making any by-law under this section, publish in such manner as shall in its opinion be sufficient for the information of the persons likely to be affected thereby, a draft of the proposed by-law, together with a notice specifying a date on or after which the draft will be taken into consideration and shall before making the by-law, receive and consider any ob Publication of drafts of proposed by-laws

jection or suggestion with respect to the draft which may be made in writing by any person before the date so specified.

Objections and suggestions to be submitted to Central or Provincial Government

(3) When any by-law made by a municipality is submitted to the Central or the Provincial Government for sanction, a copy of the notice published and of every objection or suggestion received under the provisions of sub-section (2) shall be submitted for the information of that Government along with the said by-law

Amendments —In sub-section (1) the words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

Clauses (h) and (i) shall be deemed to have been repealed by the coming into force of Part VI of the Bombay Weights and Measures Act, 1932 (Bom 15 of 1932) in any area Clauses (h) and (i) run as follows — '(h) For the inspection of weights and measures under section 177 and for the stamping of weights and measures and for charging fees for the same (i) For defining the standard weights and measures used within the Municipal Borough'

In clause (j) the words 'and the taking of a census' occurring between the words 'marriage' and 'within' and the words 'or census' occurring between the words 'registration' and 'effective' were omitted by the Adaptation of Indian Laws Order in Council

In clause (n) the words 'the Provincial Government were substituted for the words 'the Government' by ibid

Clauses (bb), (cc) and (dd) and the explanations were inserted by Bom 19 of 1935, s 7(i) The original clause (bb) was relettered (ee) by ibid, s 7(ii)

The sub-section (1a) was inserted by the Adaptation of Indian Laws Order in Council In sub-section (3) the words 'the Central or the Provincial Government' and the words 'that Government' were substituted for the words 'the Government' by ibid

General—Previous sanction —This section gives powers to a municipality to make by-laws in regard to matters mentioned in the section and to alter or rescind them The by-laws must not be inconsistent with the provisions of the Act The powers under this section are to be exercised with the previous sanction of Government, i e, to say, that after the Government sanction is obtained the municipality must pass a resolution adopting or altering or rescinding the by-laws Again, if the sanctioning authority makes any alteration in the proposed by-law the procedure prescribed under clauses (2) and (3) of this section must again be followed and fresh sanction of the Government should be obtained after such procedure is followed The Vile Parle Municipality made by-laws under the powers conferred upon it by s 48 of the Bombay District Municipal Act 1901 (equivalent to s 61 of the Boroughs Act) and submitted them to the Commissioner for sanction The Commissioner made material alterations in the by-laws so submitted, but left Ch III intact The Municipality took no further action on the revised by-laws when received The Municipality thereafter treated chapter 3 of the by-laws as having come into operation and prosecuted the accused for a breach of one of the by-laws in that Chapter It was held that the by-laws in Ch III never came into operation because of the failure of the Municipality to pass a resolution to bring them into existence after the by-

laws were received from the Commissioner **Emperor v Shirinbai, 42 B.L.R. 1060.** In the course of the judgment Beaumont C J observed "Now it is to be noticed that the by-laws have to be made with the previous sanction of the Commissioner It seems to me that the only way in which a Municipality can make a by-law is by passing a suitable resolution So that, the resolution must be passed after the sanction of the Commissioner has been obtained Therefore it seems to me wrong to say as the learned Advocate General does, that as soon as the sanction of the Commissioner is given, the proposed by-law at once becomes operative I do not think that it does I think that it must be brought before the Municipality and considered Where the Commissioner makes material alterations in the draft, I am disposed to think that the Municipality must follow the provisions of sub-section (2) of section 48, and invite criticism upon the altered by-law because the fact that the public have approved of the by-law in one form is no justification for passing it in another form In the present case it may be that inasmuch as the commissioner had not altered the Chapter in which the particular by-law was contained, it was not necessary to invite any further criticism upon that Chapter But I am already of opinion that, in order to bring Chapter III into operation it was necessary to have a resolution of the Municipality, and **non constat** that the Municipality would have been prepared to bring into operation one chapter without the others Inasmuch as they never passed such a resolution, I am clearly of opinion that the learned Sessions Judge is right and that there are no by-laws in existence"

Difference between a rule and a by-law —See notes under this head under section 58

Regulation of the conduct of business in any place used as aforesaid.— The powers given to make by-laws for this purpose do not include powers to require external structures In **Emperor v Raghunath, 4 B.L.R. 585,** a by-law framed by a District Municipality provided that every place used for drying fish or fins shall be surrounded with a wall not less than six feet in height or with a fence made of bamboo mats or double cadjan leaves Held, that the by-law was ultra vires of the powers conferred by s 33(b) of the Bombay District Municipal Act, 1884, and s 48(b)(iii) of the Bombay District Municipal Act, 1901 as both these sections extended only to the regulation of business within the place used and gave no authority to require external structures

Bombay Primary Education Act—Census of school going children—validity of by-laws authorising census—Rescission of the resolution for introduction of compulsory education neither sanctioned nor published—invalidly of resolution The Surat City Municipality having passed a resolution in 1918 for the introduction of the Bombay Primary Education (District Municipalities) Act in the City of Surat, the Act was so introduced by a notification of the Government of Bombay published in the Bombay Government Gazette, in October, 1919 To carry out rule 5 of the rules framed under the Act by the Government of Bombay, the Surat City Municipality framed by-laws 4 and 5 under section 48(f) of the Bombay District Municipal Act, 1901, laying the duty down on every occupier of a building to supply information for the undertaking of the census of the school going children, and penalising the failure by a fine Subsequently in 1922, the Municipality rescinded its resolution of 1918, but the rescission was neither sanctioned by Government nor published in the local official gazette Shortly afterwards, the Municipality was superseded and replaced by a committee of management appointed by the Government of Bombay The Com-

mittee of Management appointed a School Committee which undertook census of school going children in the City of Surat in order to carry out the resolution of 1918 The accused, who was an occupier of a building in Surat was called upon to fill up a form to enable the taking of census, but he declined to do so He was prosecuted for the breach of by-laws and it was contended on his behalf, first that the by-laws framed under s 48(f) of the Bombay District Municipal Act, 1901 were invalid if they attached liability to punishment for breach of the rules framed under the Bombay Primary Education (District Municipalities) Act, 1901, and secondly that the resolution of 1918 having been superseded in 1922, was no longer in force Held, (1) that by-laws Nos 4 and 5 framed by the Surat City Municipality under s 48(f) of the Bombay District Municipal Act, 1901 were valid, since it was provided by s 1(3) of the Bombay Primary Education (District Municipalities) Act, 1918, that the Act was to be construed as part of and supplementary to the Bombay Municipal Act, (2) that the resolution of 1922, having neither been sanctioned by the Government of Bombay nor published in the Bombay Government Gazette could not operate to rescind the resolution of 1918 which was duly sanctioned and published (s 21 of the Bombay General Clauses Act, 1904), **Emperor v Parshottam, 25 B.L.R. 767.**

Whether a by-law could be framed to impose penalty for breach of a rule framed under s 58 for payment of toll —The accused resided at Godhra the municipal affairs of which were governed by a municipality constituted under the Bombay District Municipal Act, 1901 He owned a motor car which was plied for hire between Godhra and Kalol The car was garaged in Godhra The Municipality of Godhra levied toll tax on vehicles coming within the limits of the Municipality It was usual for the Municipality to lease out the collection of the toll While the system was in force, the Municipality levied wheel-tax direct from the accused, and no toll tax was paid by him to the contractor From April 1, 1934, the Municipality abolished the system of leasing out collection of toll taxes, and levied it departmentally On March 30, 1934, the Municipality gave a notice to the accused that his car would not be assessed to wheel-tax and that it would be liable to pay the toll tax Thereafter, the car entered the limits of the Godhra Municipality on May 12, 13 and 14, and the accused did not pay any toll tax demanded from him The accused was, on these facts tried for breach of by-law 152 framed by the Municipality under s 48(1)(u) of the Bombay District Municipal Act, 1901 The by-law ran thus '152(1) No person shall, with the intention of evading payment of the toll-tax take or attempt to take any conveyance liable to pay such tax into the limits of the Municipality, without paying the tax at the Toll naka (2) a breach of this by-law shall, on conviction, be punishable with fine which may extend to five rupees for each offence' It was held that it was not competent to a district municipality to make a by-law under the powers given to it by s 48 of the Bombay District Municipal Act, 1901, providing for penalty for breach of a rule made under s 46 of the Act, e g for payment of toll on conveyances **Emperor v. Vishnushankar, 39 B.L.R. 89** In the course of the judgment Tyabji J observed "The powers of the Municipality to make by-laws are contained in s 48 of the Bombay District Municipal Act That section empowers the Municipality (with certain restrictions not now material) to make by-laws not inconsistent with the Act regulating the matters mentioned in its numerous clauses The only clause of s 48 that is relied on is the last, denominated by the letter (u) Under cl (u) every Municipality may make by-laws 'generally for the regulation of all matters relating to municipal administration' A pro

hibition against taking conveyance into the limits of the Municipality may be the subject of a by-law if it can be brought within the terms of cl (t) The by-law in question, however, cannot be brought under the cl (t) But it is urged that this particular prohibition falls under the cl(u) because it regulates a matter regarding municipal administration, in this manner that a rule—rule 152—has been framed under s 46 of the Act by which it is prescribed that the toll in question shall be levied—a toll under s 3(14) of the Act being included in the term 'tax' that the prohibition in the by-law in question subserves the rule for payment of the toll and that the prohibition thus becomes a matter regulating municipal administration According to this argument though a matter (like imposing a toll) may originally have to be regulated by a rule, yet after a rule has been made the enforcement of the rule may become a matter relating to municipal administration, and in that manner, the recovery of a toll may become a matter relating to municipal administration, and consequently a prohibition connected with the enforcement of the toll may be the subject of by-law under s 48(u), and then Municipality may prescribe a fine for the infringement of the by-law containing the prohibition by which the payment of the toll is required not to be evaded Three steps are involved in this argument, first, a rule validly made, secondly, a by-law regulating the matter governed by the rule—which matter has by reason of the rule become a matter relating to Municipal administration, thirdly, a fine prescribed for the infringement of the by-law (not of the rule) The argument requires a consideration of the provisions of the Act empowering Municipalities to make rules and by-laws They are contained in ss 46-49 which constitute Chapter IV Ss 46, 46(a) and 47 deal with rules S 48 deals with by-laws, s 49 with which Ch IV closes is ancillary, copies of rules and by-laws shall be available to the public for inspection and purchase Under these sections rules are clearly discriminated from by-laws The matters to be regulated by rules are mentioned in s 46 and those by by-laws in s 48 It is true that both rules and by-laws may be made by the Municipality, and both require to be approved or sanctioned by the Governor in Council or Commissioner But to mention two salient matters in which they differ (1) Rules have effect when they are approved Whereas by-laws require to be previously sanctioned, when by-laws are proposed, their drafts have to be published and objections and suggestions received and considered by-laws can be made only after the procedure has been followed (2) There is no provision in respect of rules similar to the last paragraph of s 48 sub-s(1), following cl (u) which provides that every Municipality, may, with the like sanction, prescribe a fine not exceeding five hundred rupees for the infringement of any such by-law A toll may be levied by the Municipality only by making a rule under s 46 cl (i) That clause contains several restrictions with reference to making rules prescribing taxes one main restriction is that such a rule can only be made subject to the provisions of Ch VII That long chapter (ss 59 to 81A) contains detailed provisions relating to Municipal taxation, to three of which I will refer First, the imposition of a tax or a toll is covered by s 59(b), sub-cls (ii) and (iii) These sub-clauses are mutually exclusive Secondly, the elaborate preliminary procedure laid down in s 60 is also required to be followed before a tax (or toll) can be imposed This procedure includes the publishing of the draft rules and taking into consideration objections raised to them Thirdly, s 79 provides a special penalty for non-payment of any toll leviable by a Municipality This may seem sufficient indication that

the Legislature did not intend that these two processes should be interchangeable in regard to levying a toll Taxes and tolls are covered in detail by special provisions relating to the rules by which they may be imposed and their non-payment penalized Can the legislature have intended that they should be liable to be regulated cumulatively by altogether different process of making by-laws—a process governed by its peculiar procedure and giving rise to distinct sanction of its own? And yet this is what must happen if a matter primarily to be regulated by a rule is too circuitously made the subject of a by-law—if the evasion of a rule may be prohibited by a by-law, and the infringement of the by-law prohibiting the evasion of the rule may be made punishable by fine The paragraph following cl (u) empowers the Municipality to prescribe a fine for infringement of by-laws Obviously it is not contemplated by the paragraph that by-laws should themselves impose fines, otherwise a by-law may provide for a fine and then for infringement of that by-law a fine may be prescribed The language of the paragraph empowering fines prescribed by the Municipality is not the same as the language of the clauses empowering rules and by-laws to be made,—though fines have to be prescribed 'with the like sanction' Again the Act contains several sections imposing specific penalties for failure to comply with specified direction of a Municipality I have already referred to s 79 Section 155 is a general section for penalties incurred by infringements of orders and notice not punishable under any other section The terms of such sections make it increasingly difficult to hold that it could have been the intention of the legislature to allow such a penal provision, as is before us being circuitously enacted by the Municipality under the form of a by-law In our opinion though the by-law relied upon purports to prohibit the taking of vehicles within certain limits, it is in substance concerned with the enforcement of a toll Matters relating to payment of tolls ought to be dealt with by rules under s 46 and not by-laws under section 48 That being so assuming that the second part of the by-law was enacted in conformity with the requirement of the paragraph permitting the prescription of fines for infringement of by-laws and that s 59 cl (b), Sub-cl (ii) and (iii) have not been in any way violated, the by-law imposes a penalty for the infringement of a rule, and it is not within the powers of the Municipality to enact such a by-law" It should be noted that ss 46 and 48 of the Bombay District Municipal Act are equivalent to ss 58 and 61 of the Boroughs Act respectively

By-laws framed under cl (u) of s 48 of the B.D.M Act, 1901, (s 61(1)(cc) of the B.M.B Act, 1925) prescribing a penalty for non-payment of tolls are ultra vires of the provisions of the said Act (G.C.G.D no s 91 dated the 30th April, 1937)

Licence fee—By-law for taking out license pre-requisite before imposition of fee—Rule for imposing such fee —See notes under this head under s 58 See also notes under s 3(20)

Sub-section (1)(v).—This clause is equivalent to s 461(d) of the Bombay City Municipal Act, 1888 In **Municipality of Bombay v Sunderji, 22 Bom. 980,** it was held that the Municipality of Bombay has power under s 461, cl (d)(1) of Bombay Act III of 1888, to make a by-law restraining the height of a new building erected on a site which has been previously built upon

Whether by-law can cut down an exemption allowed by the legislature.—No by-law of the Municipality can cut down an exemption allowed by the legislature If the municipality has its by-laws so framed so as to cut down that

exemption such a by-law would be invalid But in the case of a Terminal Tax there is no such exemption given by the statute It is only under the by-law that any one is entitled to the refund of the terminal tax at all It is competent for the authorities which out of mere grace allow an exemption to prescribe and lay down under what conditions it will grant that exemption **Karachi Municipality v M R. D'sa and another, A I.R 1921 Sind 175**

S 61(1)(n) and 61(1)(ee)—Position of local bodies regarding the levy of octroi and terminal tax and making deductions from the amount of refund of octroi —See notes under this head under s 73

S 61(1)(z)—Whether by-law permanently closing a street to vehicular traffic valid —It is dobutful whether a by-law closing permanently a street to vehicular traffic will be valid under s 48(t) of the B D M Act, 1901, (equivalent to s 61 (1)(z) of the B M.B Act, 1925) inasmuch as it prohibits permanently the use of particular kind of traffic The words except under such conditions as to time' in the clause indicate that it will not be legal to prohibit the use of the road permanently The municipality can, however, move the District Magistrate to make rules under s 39(m) of the Bombay District Police Act for the purpose **(R L A's opinion no 666 dated the 1st March 1928 in G R G D no 7102 dated the 20th March, 1928)**

Power of a municipality to regulate height of buildings in the interest of public health under s 96(2) in the absence of by law under s 48 —See notes under this head under s 123

Whether a municipality can frame by-laws for licensing and regulating places under s 151 of the B D M. Act, 1901 (s 186 of the B M B. Act 1925) for manufacturing, storing or selling explosives or petroleum —See notes under this head under s 186

Rules and by-laws imposing a tax on hotels and restaurants —See notes under this head under s 58

By-law for levy of fee for occasional slaughter of animals at private houses —ultra vires -Section 48(1)(a) of the B D M Act 1901 (s 61(1)(a) of the B M B Act, 1925) empowers the municipality, with the requisite sanction, to make, alter or rescind by-laws but not so as to render them inconsistent with the Act, for fixing the rents and other charges to be levied for the use of any slaughter houses which belong to the municipality It does not authorise the levy of charges for the use of any other slaughter houses Section 48(1)(b) (s 61(1)(b) of the B M B Act) empowers the municipality to make by-laws prescribing the conditions subject to which licenses may be granted for the use of any place not belonging to the municipality as a slaughter house This does not authorise the municipality to make a by-law that recurring fees should be levied for the use of such places The imposition of such fees would amount to a tax, and no tax can be imposed by the municipality without the observance of the preliminary procedure required by s 60 of the Act (s 75 of the B.M B Act) A place does not become a slaughter house by reason merely of a single animal being slaughtered in it Under the Act as it stands, therefore, the slaughter of a single animal without a license on unlicensed premises which are not ordinarily used as a slaughter house, does not expose a person to the penalties of s 139 of the Act (s 172 of the B M B Act), no license being necessary for such a purpose Nor can fees legally be levied under section 48 for the use of such places as slaughter houses, unless they belong to the municipality

(R.L.A.'s opinion no. 693 dated the 13th April 1921 in G O G.D. no 5977 dated the 12th May 1921)

By-laws for aerial and surface projections:—See notes under s 143 under the heads **'Municipality's powers and duties as regards public streets, etc'** and **'Drains and gutters alongside a public street are public street'**

Rules and by-laws to be printed and sold

62 The rules and by-laws for the time being in force shall be kept open to public inspection at the municipal office at all reasonable times, printed copies thereof and of this Act in the vernacular language of the district and in English shall be kept on sale at cost price

CHAPTER V

MUNICIPAL PROPERTY AND FUND

Power to acquire and hold property for the purposes of the Act

63 (1) A municipality may acquire and hold property both movable and immovable, whether within or without the limits of the municipal borough

(2) All property of the nature specified in the clauses to this section, not being specially reserved by the Provincial Government, shall be vested in and belong to the municipality, and shall, together with all other property of what nature or kind soever, which may become vested in the municipality, be under its direction, management and control, and shall be held and applied by it as trustee, subject to the provisions and for the purposes of this Act

(a) All public town-walls, gates, markets, slaughter-houses, manure and night-soil depots, and public buildings of every description

(b) All public streams, tanks, reservoirs, cisterns, wells, springs, aqueducts, conduits, tunnels, pipes, pumps and other water works, and all bridges, buildings, engines, works, materials and things connected with or appertaining to such water works, and also any adjacent land, not being private property, appertaining to any public tank or well

(c) All public sewers and drains, all sewers, drains, tunnels, culverts, gutters and water-courses in, alongside or under any street, and all works, materials and things appertaining thereto; all dust, dirt, dung, ashes, refuse, animal matter, filth, or rubbish of any kind collected by the municipality from the streets, houses, privies, sewers, cesspools or elsewhere.

(d) All public lamps, lamp-posts, and apparatus connected therewith, or appertaining thereto

(e) All lands transferred to it by the Crown, or by gift or otherwise, for local public purposes

(f) All public streets, and the pavements, stones and other materials thereof and also all trees, erections, materials, implements and things provided for such streets

Amendment —The words 'The Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council The word 'Crown' was substituted for the words 'The Secretary of State for India in Council,' ibid

Vesting of Public Streets in municipality—laying of railway lines under statutory authority over such streets—land need not be acquired —Where a railway company wishes to lay a line of railway upon and across a street, it is neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land If the Government, under s 7 of the Indian Railways Act 1890, were to direct the Collector to take order for the acquisition of land he would make his award and take possession and the land would then vest absolutely in Government for the railway company free from all incumbrances The land 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 railway upon and across the street The effect of s 289 of the Bombay City Municipal Act, 1888, vesting all public streets and pavements, stones and other materials in the corporation and under the control of the Commissioner is only to vest in that body such property as is necessary for the control and maintenance of the street as a high way for public purposes The Great Indian Peninsula Railway in constructing the Harbour Branch Railway laid down the lines of rails in a level crossing across a public street known as the Sewri Koliwada Road vested in the Municipal Corporation of Bombay under section 289 of the Bombay City Municipal Act 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 a permission granted by the Corporation and confirmed by the Government under section 293 of the Act or acquiring the land required for the level crossing under the Land Acquisition Act, 1894 The defendant company pleaded that they had authority to make and maintain the lines of railway under section 7 of the *Indian Railways Act, 1890 The Lower Court granted the declaration sought,* on the ground that the defendant company could make its private terms with the Municipality or it could acquire the portion of the street it needed under the Land Acquisition Act, but until it had done the one or the other it was a trespasser on municipal land The railway company having appealed —Held, dismissing the suit, that the statutory authority under s 7 of the Indian Railways Act being established, the application of s 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' **Great Indian Peninsula Railway v The Municipal Corporation of Bombay, 16 B L R 104**

Whether a municipality can authorise the use of a street for purpose other than as a Public Street —The accused who were timber merchants were authorised by the Municipality of Poona to use a strip of a street for the purpose of exposing logs of timber for sale They were charged with the offence of causing obstruction in a public street, under s 61, cl (f), of the Bombay District Police Act, 1890 and convicted by the Magistrate The Sessions Judge, being of opinion that the conviction was illegal, referred the case to the High Court Held, confirming the conviction, (1) that the Municipality had not statutory authority to divert a portion of the public street for the purpose of exposing the timber for sale, (2) that, under s 50 of the District Municipal Act, public streets were vested in the Municipality for the purpose of being maintained as public streets, (3) that s 90 of the District Municipal Act did not empower the Municipality to discontinue or stop up a part of a street so as to provide a market, (4) that the Municipality could not allow a permanent obstruction upon any public street vested in it, and (5) that ss. 139 and 140 of the District

Municipal Act did not empower the Municipality to license the holding of a market in a public street **Emperor v Vishvanath, 28 B.L.R. 1033**

Whether the words 'public streets' include the soil beneath the streets — In **Chhotalal v The Borough Municipality of Nadiad 41 B.L.R. 1097,** it was held compensation payable to the owner of property, which is notified by the Gov- that the words 'public street' in s 50(2)(f) of the Bombay District Municipal Act, 1901 (equivalent to section 63(f) of the Boroughs Act) do not include the soil beneath the streets, unless it is definitely proved that the soil of a public street belongs to the Municipality It cannot be presumed to be of the ownership of the Municipality, merely on the ground that it is used as a public street

Land Acquisition Act—agreement as to the amount of compensation before the award by the Collector—effect—A binding agreement as to the amount of ernment, under the Land Acquisition Act, for acquisition for a public body for a public purpose, can be made between the public body and the owner before the Collector has made his award under the Land Acquisition Act The plaintiffs, the Municipal Corporation for the City of Bombay wanted to acquire certain property of the defendant company for widening a street As the parties could not arrive at an agreement as to its price the plaintiffs applied to the Government to acquire it on the plaintiff s behalf under the Land Acquisition Act. Further negotiations were thereafter resumed and the plaintiff's engineer wrote to the defendant's engineer, after an interview with the latter, asking whether the defendants were willing to accept the sum of Rs 1,45,517 for the property subject to certain deductions On 12 September 1917 the Secretary of the defendant company wrote to the plaintiff's engineer that 'the Company is willing to accept without prejudice the sum of Rs 1,45,517 inclusive of 15 per cent for compulsory acquisition, etc' The Municipal Commissioner approved of the acceptance of this offer The Directors of the defendant Company had also passed resolutions approving of the offer At a meeting before the Collector, who was holding inquiry under the Land Acquisition Act, the above arrangement was recorded by the Collector at the instance of the plaintiff's solicitor and the defendant's engineer Subsequently the defendants' solicitor wrote to the plaintiffs' engineer that the defendants withdrew the offer made by them in their letter of 12th September The plaintiff's solicitor replied that it was not open to the defendants to withdraw from their offer which was accepted and acted upon But the defendants put in a claim before the Collector for Rs 5,71,660, as compensation for the acquisition of their property The plaintiffs, thereupon, sued for a declaration that there was a contract binding on the defendants in terms of the latter's letter of 12th September under which the defendants could not claim a sum more than Rs 1 45,517 as compensation for their property in the proceedings under the Land Acquisition Act that if the Collector awarded as compensation more than that sum the excess amount would belong to the plaintiffs and if he awarded less the plaintiffs were bound to make up the sum agreed upon The defendants contended that there was no contract between them and the plaintiffs that their letter of the 12th September was only an invitation to the plaintiffs to make a proposal to them, that the Directors or the Secretary of the defendant Company had no power to enter into an agreement for the sale of the property, and that the agreement was void for want of mutuality because under s 48 of the Land Acquisition Act the Government could withdraw from the compulsory acquisition altogether if they liked The Court of first instance passed a decree in favour of the plaintiffs in terms of the declaration prayed for On appeal —Held, confirming the decree

of the lower court, (1) that the defendant's letter of the 12th September was an offer and not mere invitation to make offer and that the offer was made and accepted by the duly authorised agents of the defendants and the plaintiffs, (2) (Heaton J dubitante), that the offer and acceptance amounted to an agreement definitely fixing the compensation as between the parties themselves whatever sum might ultimately be awarded by the Collector and with an obligation on either party to refund any excess or make good any deficiency as the case might be, (3) that the agreement was arrived at for the purpose of proceedings under the Land Acquisition Act and could be specifically enforced by the plaintiffs against the defendants, and (4) that the power of withdrawal given to Government by s 48 of the Land Acquisition Act did not render the agreement void for want of mutuality **The Fort Press Company Ltd. v. The Municipal Corporation of the City of Bombay, 21 B.L.R 1014**

Property vesting in a municipality remains its property even on cessation of its use for the purpose which led to its vesting —All properties specified in s. 63(2) of the Bombay Municipal Boroughs Act, 1925, are properties of a public character They include public wells When property of this nature described in s. 63 of the Bombay Municipal Boroughs Act, 1925, and vested by the Provincial Government in a Borough municipality ceases to be used for the purpose which led to its vesting e.g., when a public well on its being filled up ceases to be used as a public well, the land does not on the cessation of such user revert to the Provincial Government, but remains the property of the borough municipality **The Borough Municipality of Ahmedabad v The Government of the Province of Bombay, 44 B L R. 354**

Public Street—Private Street—Street —See notes under these heads under s 3

Deprovincialisation of Provincial Roads —Government can by issuing a notification under s 63(2) of the B M b Act 1925 or section 50(2) of the B D M Act, 1901 cancel the reservation of a portion of the Provincial Road within the municipal limits This will automatically vest the road in the municipality and the municipality will be obliged to maintain that section of the road at its own expense **(G R G D No 5543 dated the 8th August 1933)**

Municipality's power to lease or sell street land —See notes under this head under s 114

Cess-pools—Right to dig in sides of streets does not vest in a municipality The legal effect of the statutory vesting of a street in a municipality is not to transfer to the municipality the ownership of the sub-soil upon which the street rests, the street, qua street, vests in the municipality that is, the surface, and only so much of the soil below the surface as is necessary to enable the municipality adequately to maintain and manage the street as a street Cess-pools dug on the sides of roads, having no direct connection whatever with drains or sewers cannot be included in the term works" used in its context in cl (c) of sub-s (2) of s 63 The municipality has therefore no right to dig cess-pools in the sides of streets for the convenience of neighbouring householders and the profit or convenience of the municipality **Hyderabad Municipality v. Province of Sind, A.I.R. 1943 Sind 254.**

Decision of claims to property by or against the municipality

64. (1) In any municipal borough to which a survey of lands, other than lands ordinarily used for the purposes of agriculture only has been or shall be extended under any law for the time being in force, where any property or any right in or over any property is claimed by or on behalf of the municipality, or by any person as against the municipality, it shall be lawful for the Collector after formal enquiry, of which due notice has been given, to pass an order deciding the claim

(2) Any suit instituted in any civil court after the expiration of one year, from the date of any order passed by the Collector under sub-section (1), or, if one or more appeals have been made against such order within the period of limitation, then from the date of any order passed by the final appellate authority, as determined according to section 204 of the Bombay Land Revenue Code, 1879, shall be dismissed (although limitation has not been set up as a defence) if the suit is brought to set aside such order or if the relief claimed is inconsistent with such order provided that the plaintiff has had due notice of such order

Bom V of 1879

(3) (a) The powers conferred by this section on a Collector may also be exercised by an Assistant or Deputy Collector or by a Survey Officer as defined in the Bombay Land Revenue Code, 1879

Bom V of 1879

(b) The formal enquiry referred to in this section shall be conducted in accordance with the provisions of the aforesaid Code

Bom V of 1879

(c) Any person shall be deemed to have had the notice of an enquiry or order under this section if notice thereof has been given in accordance with rules made in this behalf by the Provincial Government

Amendments —The words 'The Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

Scope —This section provides for decision of certain claims to property by or against a municipality Sub-section (2) provides that an order passed under this section or in an appeal against the same under the Bombay Land Revenue Code can be challenged in a Civil Court within a period of one year from the date of the order but not thereafter The limitation of one year applies to a relief which is inconsistent with the decision but not to any other relief In **Chhotalal v The Borough Municipality of Nadiad, 41 B L R 1097,** the City Survey Enquiry Officer of Nadiad decided in 1916 that a certain land was part of a public street In 1929, the plaintiff, who owned a house abutting on the land, built an Otla and a privy on this land The defendant municipality ordered their removal, and thereupon all the residents who had their houses abutting on the land, including the plaintiff, made an application to the municipality that the land be declared to be of private ownership and not a public street At a general meeting of the municipality, held on February 28 1931, it

was resolved that the public street should be made a private street This resolution was forwarded to the Collector, but he refused to sanction the conversion of the public street into a private street In 1935, the plaintiff filed a suit against the municipality for a declaration of his title to the land under and in front of the Khadaki and for an injunction restraining the municipality from interfering in his enjoyment of the land The Municipality contended that the plaintiff's suit was time-barred under section 50-A of the Bombay District Municipal Act, 1901 as it was not filed within one year of the decision of the City Survey Enquiry Officer —Held that the suit was barred under sub-s (2) of s 50-A of the Bombay District Municipal Act, 1901, as it was not brought within one year from the decision of the City Survey Enquiry Officer It was also held that the City Survey Enquiry Officer by deciding that the street was a public street did not decide that the soil belonged to the municipality, and the plaintiff was not debarred from claiming that, even though it was a public street, the soil of the street belonged to him

Starting point for limitation—In **Municipality of Hyderabad v Allahdino and others, A I R 1931 Sind 146,** two questions of law arose for consideration First, whether under clause (2), s 50(A) District Municipal Act 3 of 1901, limitation runs against a plaintiff from the date on which the order complained against is written and signed by the officer concerned or from any later date Secondly, where an appeal has been filed against a part of such order, whether in respect of that part of the order which is not appealed against, limitation runs from the date of such order or the date of the order passed in appeal These questions arose under the following circumstances The plaintiffs' appellants made a claim before the survey officer that the defendants in each case were tenants of the plaintiffs in respect of those portions of land on which they had constructed huts, having been permitted to do so, and were trespassers in respect of the vacant portions of land in front of their huts, having unauthorizedly encroached upon them After enquiry the Settlement Officer disallowed the claim of the plaintiffs in respect of the built portions but allowed their claim in respect of the portions which were open These orders were passed in each case on 15th March 1923 The defendants appealed against the latter part of the order to the Assistant Collector of Halla, who, without notice to the parties that he will hear and dispose of the appeals on any particular day, passed orders on 13th March 1924, allowing the claims of the defendants in respect of unbuilt portions also He communicated his orders to the plaintiffs on 19th May 1924 and the plaintiffs instituted their suits on 18th May 1925, that is to say, within one year of the date of the communication of the appellate orders to them It was held Per Rupchand, A J C—Statutes of limitation are to be construed strictly and the defence of lapse of time against a just demand is not to be extended to cases which are not clearly within the enactment, while provisions which give exceptions to the operation of such enactments are to be construed liberally in the manner most favourable to the person whose right is the subject of limitation Therefore the provisions of s 50(A)(2) must be taken to refer to case where previous notice is duly given that the order will be pronounced on a particular day, but is not intended to refer to cases where no such notice is given In the latter case the date on which such order would in the ordinary course of events have reached the plaintiff but for his own act of default would be the date from which limitation should run Per Wild, J C—When an order has been passed by a Collector under s 50(A)(2), after formal inquiry of which due notice has been

given, the plaintiff has had due notice of such order and must bring his suit to set aside such order within one year It was further held that where appeal has been filed against a part of the order only time runs from the date of the final or appellate order even as regards the part of the order not appealed against

Secretary of State not a necessary party in a suit under sub-section (2) — At the instance of the Nadiad District Municipality, Government introduced survey within the municipal limit as contemplated by s 50A of the Bombay District Municipal Act, 1901 In the course of the survey, the Survey Officer decided that a piece of land was a 'street land' as defined in section 3(12) of the Act This decision was, on appeal, affirmed by the Collector The plaintiff having sued the Municipality for a declaration that the land in question was of his ownership, it was objected that the Secretary of State for India was a necessary party —Held that the Secretary of State was not a necessary party, inasmuch as the suit contemplated by s 50A(2) of the Bombay District Municipal Act was a suit between a private party and the Municipality **Nathalal v Nadiad Municipality, 25 B L R 58** Also see **Bai Parvati v the Nadiad Municipality, 25 B L R 63**

Sub-section (2) —does not apply to a suit between two private parties — Section 50A of the Bombay District Municipal Act, 1901, (equivalent to s 64 of the Boroughs Act) applies to a case where any property is claimed by a municipality, or by any person as against a municipality Sub-section (2) of s 50A does not relate to a suit as between two rival owners, but to a suit to be brought either by a municipality against an owner, or by an owner against a municipality In **Ramacharya v Ramrao, 32 B L R 900**, it was argued on behalf of the appellants that as the suit was not brought within a year after the date of the municipal order of April 11, 1922, it must be dismissed under section 50A of the Bombay District Municipal Act, 1901 On this point his lordship the Chief Justice observed "Now, in the first place, I am far from satisfied that the present suit comes within s 50A at all That section applies to a case where any property is claimed by the Municipality or by any person as against the Municipality and there may be an order by the Collector But as regards the municipal notice in question, I do not think that there was any such claim by the Municipality, nor was there any claim by the defendants against the Municipality It was an ordinary case of a city survey and an enquiry in respect of that But even if it could be said that the rights of the Municipality would necessarily have to be considered in such an enquiry, for instance, whether any part of Court-yard had public right over it and so on, yet sub-section (2), in my opinion, does not relate to a suit as between the rival owners, but to a suit to be brought either by the Municipality against the owner or by the owner against the Municipality The present suit has nothing whatever to do with the Municipality It is merely between two rival claimants to this particular plot of land This view of the Act is borne out by the decision of Sir Lallubhai Shah and Mr Justice Crump in **Nathalal v Nadiad Municipality, 25 B L R 58** There at page 62 Sir Lallubhai says 'the wording of sub-section (2) of s 50A, in my opinion, clearly indicates that whether the relief claimed is inconsistent with that order or whether the relief is to have the order set aside, the suit has to be filed within a particular time, and that the suit as there contemplated is clearly a suit between a private party and the Municipality' That being so, on both these grounds I am of opinion that this section does not apply in the present case"

Municipal fund

65. All moneys received by or on behalf of a municipality by virtue of this or any other Act, all taxes, fines, and penalties paid to or levied by it under this Act other than fines imposed by any court, all proceeds of land or other property sold by the municipality, and all rents accruing from its land or property, and all interest, profits and other moneys accruing by gift or transfer from the Crown or private individuals or otherwise, shall constitute the municipal fund, and shall be held and dealt with in a similar manner to the property specified in section 63·—

Provided that—

Special trusts

(a) nothing in this section or in section 63 shall in any way affect any obligation accepted by or imposed upon any municipality by any declarations of trust executed by or on behalf of such municipality or by any scheme settled under the Charitable Endowments Act, 1890, for the administration of any trust, or by a trust of the nature specified in clause (b) of this proviso;

VI of 1890

(b) a municipality may, subject to the condition that reasonable provision shall be made for the performance of all obligations imposed or that may be imposed on it by or under this Act, or any other law for the time being in force, credit to a separate heading in the municipal accounts any portion of the municipal fund received or set apart by it specially for the purposes of schools or dispensaries or water works or fire-brigades or other such purposes as the Commissioner in this behalf approves, and the municipality may apply any sums properly so credited exclusively to the special purposes for which such sums were received or set apart

(c) (1) Every municipality in a municipal borough in which a tax on pilgrims resorting periodically to a shrine within the limits of the municipal borough is levied shall, subject to the condition that reasonable provision shall be made for the purposes specified in clause (2), credit the proceeds of the said tax to a separate heading in the municipal account, to be called the "Pilgrim Fund Account"

(2) The purposes for which provision shall be made by a municipality before the proceeds of the pilgrim tax are credited to the Pilgrim Fund Account shall be the following, namely, the payment to the municipality of such percentage of the proceeds of the said tax as may be determined from time to time by the municipality with the approval of the Commissioner for,

(i) making reasonable provision for the performance of all obligations imposed or which may be imposed on it by or under this Act or any other law for the time being in force,

(ii) such general duties of the municipality as are connected with the health, convenience and safety of the said pilgrims, and

(iii) the cost of collection of the said tax

(3) The sums credited under clause (1) shall be devoted to such works conducive to the health, convenience and safety of the said pilgrims as may be approved by the Commissioner

Amendments —The words 'Other than fines imposed by any Court' were inserted by the Adaptation of Indian Laws Order in Council The word 'Crown' was substituted for the words 'Secretary of State for India in Council,' ibid Proviso (c) was added by Bom 4 of 1930, s 4(x)

Application of municipal property and funds within and without the municipal borough

66 The municipal fund and all property vested in a municipality shall be applied for purposes of this Act within the limits of the municipal borough,

Provided always, that it shall be lawful for the municipality with the sanction of the Provincial Government or any officer duly authorised by it in this behalf,—

(a) to incur expenditure in the acquisition of land or in the construction, maintenance or repair of works beyond the said limits for the purpose of obtaining a supply of water required for the inhabitants of the municipal borough, or of establishing slaughter-houses or places for the disposal of night-soil or sewage or carcasses of animals or for drainage works, or for any other purpose calculated to promote the health, safety or convenience of the inhabitants of the said borough or

(b) to make a contribution towards expenditure incurred by any other local authority or out of any public funds for measures affecting the health, instruction, safety or convenience of the public and calculated to benefit the residents within the limits of the contributing municipality, or

(c) to create scholarships tenable outside the limits of the municipal borough

Provided, further, that nothing in this section or in any other provision of this Act shall be deemed to make it unlawful for a municipality when with such sanction as aforesaid it has constructed works beyond the limits of the municipal borough for the supply of water or for drainage as aforesaid—

(a) to supply or extend to or for the benefit of any person or

buildings or lands in any place whether such place is or is not within the limits of the said borough, any quantity of water not required for the purposes of this Act within the said borough, or the advantage afforded by the system of drainage-works, on such terms and conditions with regard to payment and to the continuance of such supply or advantages as shall be settled by agreement between the municipality and such person or the occupier or owner of such buildings or lands, or

(b) to incur any expenditure, on such terms with regard to payment as may be settled as aforesaid, for the construction, maintenance, repair or alteration of any connection pipes or other works necessary for the purpose of such supply or for the extension of such advantages

Amendments —The words 'The Provincial Government were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council

Scope —The section deals with the application of municipal property and fund both within and without the Municipal Borough

Individual tax payer can sue to restrain a municipality from misapplying its funds —A suit will lie at the instance of individual tax payer for an injunction, restraining a municipality from misapplying its funds See **Vaman v. The Municipality of Sholapur, 22 Bom 646** In that case the plaintiffs who were three in number were tax payers of Sholapur They sued for an injunction to restrain the Municipality of Sholapur from expending any sum out of the municipal funds on the purchase of musical instruments for a band, which they had resolved to establish The plaintiffs contended that this was not one of the purposes for which the Municipality was authorised by law to spend municipal funds The Municipality pleaded that the plaintiffs had no right to sue, that they had no cause of action and that the proposed expenditure of municipal funds was not illegal The High Court held that each individual who contributes and is liable to contribute to the fund must be held to be personally interested in the due application of that fund and the suit does not therefore fall within the prohibition of cl (k) of s 56 of the Specific Relief Act, 1877

Misapplication —See notes under that head under section 53

Power to deposit and invest surplus funds

67 (1) It shall be lawful for a municipality to deposit with the Imperial Bank of India or such other bank as may hereafter be appointed to conduct the business of His Majesty's treasury at Bombay or with the sanction of the Provincial Government in any bank in the Presidency of Bombay, any surplus funds in its hands which may not be required for current charges, and to invest such funds in public securities in the name of the municipality, and from time to time to dispose of such securities as may be necessary

Surplus not so deposited or invested how to be dealt with

(2) All surplus funds over and above what may be required for current expenses, unless deposited or invested as provided for in sub-section (1) shall be deposited in the local Government trea-

sury or such other place of security as may be sanctioned in the rules of the municipality

Amendments —The words 'at interest' occurring between the words 'deposit' and 'with the Imperial Bank of India' were deleted by Bom 23 of 1931, s 4(1) The words 'The Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

Whether a municipality can invest its surplus funds in war bonds.— Section 53 of the B D.M Act, 1901, provides that it shall be lawful for the municipality to invest any surplus funds in its hands which may not be required for current charges in public securities Section 67 of the B M.B Act, 1925 is similarly worded The words 'it shall be lawful' in both the sections confer power on the municipality to make the deposit or investment in the manner provided therein Public securities as defined in both the Acts would include war bonds whether interest free or bearing interest But the power conferred on a municipality under the above provisions is subject to the other provisions of the Act It is clear from s 50 read with s 51 of the B D M Act, 1901, as well as s 63 read with s 65 of the B M B Act, 1925 that the municipal fund is to be held by the municipality concerned as a trustee According to the general principle of law a trustee in exercising his power to invest the trust funds has to act as a man of ordinary prudence Although, therefore, a municipality has power to invest its surplus funds in war bonds whether such bonds bear interest or are interest free in its capacity as a trustee of the municipal funds, it will not be considered legal for it to invest all its funds in interest free bonds, if bonds bearing interest are available The proper view to take will, therefore, be that there is no doubt that a municipality can invest its surplus funds in interest bearing war bonds, but so far as interest free bonds are concerned, it can invest therein a reasonable amount The position of a Local Board will also be similar Under s 74 of the Bombay Local Boards Act, 1923, the Provincial Government can sanction the investment of the local funds in war bonds Local Boards hold the local fund also as trustees and the investment in interest free bonds will, therefore, have to be of a reasonable amount **(R L.A.'s opinion no. 7069 dated 7th August 1940 in G M G D no 4254/33 dated the 20th August, 1940).**

Whether municipal funds can be deposited in a Co-operative Society — The business of a co-operative society is not banking, but as is stated in the preamble to the Co-operative Society's Act, 1912 it is a society formed 'for the promotion of thrift and self-help amongst agriculturists, artisans and persons of limited means' Moreover under sections 30 and 31 of the Act, there are restrictions on borrowing and other transactions with non-members In section 32(1) a registered (co-operative) society is placed in a separate category from a Bank or a person carrying on the business of banking A 'Bank' is defined as a place where money is deposited for the purpose of being let out to interest, returned by exchange, disposed of to profit, or to be drawn out again as the owner shall call for it' (Warton) A 'co-operative society' is defined as 'a society established on the principle of joint stock association for the production of commodities, or their purchase and distribution for consumption or for the borrowing and lending of capital among its members (Webster) Therefore a co-operative society is not a Bank for the purposes of s 53(1) of the B.D.M Act, 1901 **(R L.A.'s opinion no 971 dated the 23rd April 1915 in G.O.G.D no. 3702 dated the 5th May 1915).**

CHAPTER VI

OBLIGATORY AND DISCRETIONAL FUNCTIONS OF MUNICIPALITIES

Duties of Municipalities

68 It shall be the duty of every municipality to make reasonable and adequate provision—

(1) for the following matters within the municipal borough under its authority, namely —

(a) lighting public streets, places and buildings,

(b) watering public streets and places,

(c) cleansing public streets, places and sewers, and all spaces, not being private property, which are open to the enjoyment of the public, whether such spaces are vested in the municipality or not, removing noxious vegetation, and abating all public nuisances,

(d) extinguishing fires, and protecting life and property when fires occur,

(e) regulating or abating offensive or dangerous trades or practices,

(f) removing obstructions and projections in public streets or places and in spaces, not being private property, which are open to the enjoyment of the public, whether such spaces are vested in the municipality or in His Majesty;

(g) securing or removing dangerous buildings or places, and reclaiming unhealthy localities,

(h) acquiring and maintaining, changing and regulating places for the disposal of the dead,

(i) constructing, altering and maintaining public streets, culverts, municipal boundary marks, markets, slaughter-houses, latrines, privies, urinals, drains, sewers, drainage-works, sewerage works, baths, washing places, drinking fountains, tanks, wells, dams and the like,

(j) obtaining a supply or an additional supply of water, proper and sufficient for preventing danger to the health of the inhabitants from the insufficiency or unwholesomeness of the existing supply, when such supply or additional supply can be obtained at a reasonable cost,

(k) naming streets and numbering houses,

(l) registering births, marriages and deaths,

(m) public vaccination,

(n) suitable accommodation for any calves, cows, or buffaloes required within the municipal borough for the supply of animal lymph,

(o) establishing and maintaining public hospitals and dispensaries, and providing public medical relief,

(p) establishing and maintaining primary schools,

(q) printing such annual reports on the municipal administration of the borough as the Provincial Government by general or special orders requires the municipality to submit;

(r) paying the salary and the contingent expenditure on account of such police or guards as may be required by the municipality for the purposes of this Act or for the protection of any municipal property,

(s) erecting substantial boundary marks of such description and in such position as shall be approved by the Collector, defining the limits or any alteration in the limits of the municipal borough, and

(2) subject to such reasonable and adequate provision as aforesaid, for the following special matters, namely —

(a) providing special medical aid and accommodation for the sick in time of dangerous disease; and taking such measures as may be required to prevent the outbreak or to suppress and prevent the recurrence of the disease,

(b) giving relief and establishing and maintaining relief works in time of famine or scarcity to or for destitute persons within the limits of the municipal borough

Amendments —The words 'The Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council

Scope —This section prescribes the obligatory duties of a municipality Failure to perform any of these duties may invite necessary action by controlling authority under the provisions of the Act but will not render a municipality liable in damages to a party who has suffered any loss or damage on account of non-performance of any such duty The reason is that the non-performance of a duty prescribed under section 68 amounts to non-feasance as distinguished from mis-feasance for which a municipality would be liable in damages There is a fundamental difference between a mere non-feasance and mis-feasance Mis-feasance involves an overt act which is responsible for the

damage For a detailed discussion see notes under the head 'Non-feasance—mis-feasance—nuisance' under section 8

Provision for anti-rabic treatment of indigent persons.

69. Every municipality shall, out of the municipal property and fund, make payments, at such rates and subject to such conditions as the Provincial Government from time to time by general or special order prescribes, for the maintenance and treatment in any institution which the Provincial Government declares by notification to be suitable for such purpose either within or without the municipal borough, and for other necessary expenses, of persons undergoing anti-rabic treatment as indigent persons according to the rules applicable to such institution and proceeding from the municipal borough;

Provided that the municipality shall not be liable under this section for the maintenance, treatment and other necessary expenses of any person undergoing anti-rabic treatment as an indigent person in any such institution as aforesaid, unless such person, previous to his admission thereto. has been resident in the municipal borough for at least one year

Amendments.—The words 'The Provincial Government' were substituted for the words 'Government' by the Adaptation of the Indian Laws Order in Council.

Provision for lunatics and lepers.

70. Every municipality shall also, out of the municipal property and fund, make payments at such rates as the Provincial Government from time to time by general or special order prescribes, for the maintenance and treatment either in the municipal borough or at any asylum, hospital or house, whether within or without such borough, which the Provincial Government declares by notification to be suitable for such purpose —

V of 1898.

(a) of lunatics, not being persons for whose confinement an order under Chapter XXXIV of the Code of Criminal Procedure 1898, is in force, and

(b) of lepers, resident within, or under any enactment for the time being in force removed from, such borough,

Provided that the municipality shall not be liable under this section for the maintenance and treatment of any lunatic or leper in

IV of 1912.

any such asylum, hospital or house as aforesaid, unless such lunatic or leper, immediately previous to his admission thereto, has been resident in the municipal borough for at least one year,

Provided further that where an application is made to the High Court or a District Court under the provisions of section 88 of the Indian Lunacy Act, 1912, no order for the payment of the cost of

maintenance of the lunatic by a municipality shall be made without an opportunity being given to such municipality to show that the lunatic has an estate applicable to his maintenance or that there is a person legally bound, and having the means, to maintain him. The officer in charge of any asylum to which lunatics for whose maintenance and treatment a municipality is liable under this section are admitted shall maintain a clear account of the cost of maintenance and treatment incurred on account of each lunatic detained in the asylum and shall furnish a copy thereof to the municipality on application

Amendments:—The words 'The Provincial Government' were substituted for the word 'Government' and for the words 'The Government' respectively by the Adaptation of Indian Laws Order in Council

The words 'Where an application is made to the High Court . . . to maintain him' were substituted for the words 'before making any order' the Local Government' by Bom 15 of 1936, s 4

Discretionary powers of expenditure of municipalities.

71 A municipality may, at its discretion, provide, either wholly or partly, out of the municipal property and fund for—

(a) laying out, whether in areas previously built upon or not, new public streets, and acquiring the land for that purpose, and the land required for the construction of buildings or curtilages thereof, to abut on such streets,

(b) constructing, establishing, or maintaining public parks, gardens, libraries, museums, lunatic asylums, halls, offices, dharamsalas, rest-houses and other public buildings;

(c) furthering educational objects other than those set forth in clause (p) of sub-section (1) of section 68,

(d) planting and maintaining road-side and other trees,

(e) providing music for the people,

(f) taking a census, and granting rewards for information which may tend to secure the correct registration of vital statistics;

(g) making a survey,

(h) paying the salaries and allowances, rent and other charges incidental to the maintenance of the Court of any stipendiary or honorary Magistrate, or any portion of any such charges,

(i) arranging for the destruction or the detention and preservation of dogs which may be destroyed or detained under section 157 of this Act or under section 49 of the Bombay District Police Act, 1890, Bom IV of 1890.

(j) securing or assisting to secure suitable places for the carrying on of the offensive trades specified in sub-section (1) of section 186;

(k) supplying, constructing and maintaining, in accordance with a general system approved by the sanitary board, receptacles, fittings, pipes and other appliances whatsoever, on or for the use of private premises, for receiving and conducting the sewage thereof into sewers under the control of the municipality;

(l) the acquisition and maintenance of grazing grounds; and the establishment and maintenance of dairy farms and breeding stud,

(m) establishing and maintaining a farm or factory for the disposal of sewage,

(n) the construction, maintenance, management, organisation or purchase of telephone lines, or for guaranteeing the payment of interest on money expended for the construction of a telephone line subject to the previous sanction of the Commissioner when the line extends beyond the limits of the municipal borough,

(o) providing accommodation for any class of servants employed by the municipality,

(p) the construction of sanitary dwellings for the poorer classes,

(q) the construction, management and maintenance of light-railways and tramways,

(r) any other measure not specified in section 68 likely to promote the public safety, health, convenience or education; and

(s) by a resolution passed at a general meeting and supported by two-thirds of the whole number of councillors any public reception, ceremony, entertainment or exhibition within the municipal borough

Scope:—This is an enabling section conferring on a municipality certain discretionary powers of expenditure The duties mentioned in this section are not obligatory as in section 68 but are merely discretionary

Building of quarters for municipal servants is a measure likely to promote public safety, etc.:—In Municipal Corporation of Bombay v Ranchhodadas, 27 B.L.R. 1130, it was held that the building of quarters for municipal servants etc is a measure likely to promote public safety, health, convenience or instruction within the meaning of s. 63(k) of the City of Bombay Municipal Act, 1888 (equivalent to s 71(r) of the Boroughs Act) It was also held in this case that if the Municipal Commissioner and the Corporation think that such measure is

likely to promote public convenience the matter lies within their discretion and it would not be for a court of law to interfere with the exercise of that discretion It was further held that under section 6(3) of the Land Acquisition Act the declaration made by Government is conclusive evidence that the scheme has been duly made and sanctioned, but this provision does not affect the right of the claimant to institute a suit to have it declared that the Corporation in framing the scheme acted ultra vires or that the scheme as sanctioned does not authorise them to acquire by paying compensation the land in question It was therefore open to the plaintiffs to seek the declaration they asked for in the suit If the Corporation were not empowered by the provisions of the City of Bombay Municipal Act, 1888, to acquire the land in suit then the plaintiffs would be entitled to the injunction they asked for It was also held that the mere fact that the provision of shops on the ground floor was contemplated would not be sufficient to invalidate the whole scheme

Land can be acquired to widen a private street.—In Shastri Ramachandra v. The Ahmedabad Municipality, 2 B.L.R., 395, the Ahmedabad Municipality purchased through Government a narrow strip of land at the entrance of a private street for the purpose of widening the street in order to facilitate the effective use of fire engines It was held that the acquisition of land for such purpose was within the powers of the Municipality, as it was conducive to the promotion of the public health, safety and convenience, and that the Civil Court had no jurisdiction to restrain the Municipality from exercising such powers

Scheme for widening a road not illegal because it is financed out of proceeds of sale of surplus land —In Parshottam v The Secretary of State for India 39 B.L.R. 1257, the Government of Bombay issued, at the instance of the Ahmedabad City Municipality, a notification, on August 23, 1928, under section 4 of the Land Acquisition Act of 1894, for compulsory acquisition of certain Lands for the purpose of constructing a new road in the city The lands were required for construction of an arterial road, and for sites abutting on the proposed road with a view to sell them at profit to reduce the cost of the scheme Subsequently the Municipality dropped the scheme, and later framed a new one which required a smaller area of land To enable the Municipality to put through their new scheme the Government issued on May 18, 1934, a notification under section 6 of the Act The plaintiffs who were owners of some of the lands affected by the new scheme, brought a representative suit against the Secretary of State and the Ahmedabad Municipality to have it declared that the notification issued by Government were ultra vires and illegal and for an injunction restraining them from acquiring their sites The trial court dismissed the suit The plaintiffs appealed to the High Court valuing their claim in appeal at Rs 5 for all purposes and contending that the notification under section 6 was ultra vires in absence of a prior notification under section 4, that the notification was bad inasmuch as it sought to acquire lands for the purpose of recouping the cost of the scheme, that the notification was illegal and void under section 4 and s 6 and that the power of the Municipality to 'purchase' lands under section 114 of the Bombay Municipal Boroughs Act, 1925, did not include the compulsory acquisition of lands Held, (1) that the notification under section 6 of the Land Acquisition Act, 1894, was not open to any objection, as the Municipality had approved of the scheme and moved Government to take action, and that the fact that at some time between the dates of the two notifications under ss 4 and 6 respectively it was of a different opinion was irrelevant, (2) that the notification of 1934 under s 6 was not

bad on the score of non-publication of a fresh notification under s 4 because the first notification of 1928 was sufficient, (3) that the acquisition was not illegal on the ground that the scheme was to be financed or partly financed out of the proceeds since the power to acquire adjacent land for the construction of buildings and to dispose of that land was specifically given to the Municipality by ss 71 and 114 of the Bombay Municipal Boroughs Act, 1925, (4) that the notification was not rendered void on account of the long delay which occurred between the dates of notifications under ss 4 and 6 and which under the circumstances was not unreasonable, (5) that the term "purchase" as used in s. 114 of the Bombay Municipal Boroughs Act, 1925, included compulsory acquisition if necessary

Political Question.—*The main object for which powers of Local Self-Government are transferred to Municipal Corporation under this Act is that the City fathers should look after the health of the city and the comfort and well-being of its residents* But it is not correct to say that for the well-being of such public subjects it may not in certain instances be necessary or in any case be not proper for them to discuss political subjects or that the discussion of such subjects is ultra vires **Daily Gazette Press Ltd v Karachi Municipality, A.I.R. 1930 Sind 287.**

Whether Local Bodies can open cheap grain shops.—It is competent for Local Bodies to incur expenditure in opening cheap grain shops for the benefit of the residents in the areas subject to their authority Vide s. 50(k) and (n) of the Bombay Local Boards Act, 1923 and the corresponding section 56(1) of the Bombay District Municipal Act, 1901 and s 71(r) of the Bombay Municipal Boroughs Act, 1925 **(G.C G.D. No. 4997/33 dated the 7th July 1942)**

Previous sanction.—Under s 56(m) of the B.D.M Act, 1901, and s 50(o) of the B L.B Act, 1923, the previous consent of the collector is necessary to the expenditure of public receptions, etc When a municipality or local board, therefore has incurred such expenditure without the consent of the Collector, it is deemed to have acted ultra vires and the members of the municipality or local board who were parties to such expenditure are personally liable **(G.R.G.D. no 6557 dated the 22nd March 1926).** Under the corresponding s 71(s) of the B.M.B Act, 1925 previous sanction of the Collector is not necessary but such expenditure is to be sanctioned by a resolution passed at a general meeting and supported by two-thirds of the whole number of councillors A resolution passed without this requisite majority will not be valid

S. 71(r)—Whether local board can sanction an advance from its fund for purchase of a motor car by its president or members'—A local board has no power to make advances to its president or members for the purchase of a motor cycle or a motor car for use in touring in the Board's business Clause (gg) of s 30 of the B L B Act lays down that it is the duty of local boards so far as the local fund at their disposal will allow to make provision for the payment to members of the board of expenses incurred in travelling for the purpose of the business of the board, in accordance with the rules made in this behalf The terms of this clause would perhaps cover advances made to members of the Board for travelling expenses about to be incurred by them But they are not wide enough to cover loans made to enable members to provide themselves with permanent or quasi-permanent means of conveyance, which although they may be mortgaged to the board are to remain the property of the members. These are not what are ordinarily understood as being 'expen-

ses incurred in travelling' In view of the special provision contained in cl (gg), the absence of any express provision enabling the Board to make such advances is significant, and such a power cannot reasonably be inferred from the general powers and duties of the Board to construct works or to provide for any other 'measures likely to promote the health, comfort or convenience of the public' (clause (k)) **(R.L.A.'s opinion no 648 dated the 31st March 1921 in G.O.G.D. no. 3710 dated the 11th April 1921)**

Arrangements purporting to be binding permanently or for a term of years

72. Where a municipality has entered into any arrangement or made any promise, purporting to bind it or its successors for a term of years or for an unlimited period, to continue to any educational or charitable institution a yearly contribution from the municipal property or fund, it shall be lawful for the municipality or its successors with the sanction of the Provincial Government to cancel such arrangement or promise, or to discontinue, or to diminish such yearly contribution, provided that it shall have given at least twelve months' notice of its intention so to do to the manager or managers of such institution

Amendments:—The words 'The Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council

General:—This section enables a municipality to get out of its undertaking to any educational or charitable institution where the undertaking is for a term of years or for an unlimited period But this cannot be done without the sanction of the Provincial Government and at least twelve months' previous notice must be given to the Manager of the institution concerned This section refers to yearly contributions to such institutions and it appears that the section is intended to deal with gratuitous contributions The section will not apply in case of contracts for consideration

CHAPTER VII.

MUNICIPAL TAXATION

(1) Imposition of Taxes.

Taxes which may be imposed

73. Subject to any general or special orders which the Provincial Government may make in this behalf and to the provisions of sections 75 and 76, a municipality may impose for the purposes of this Act any of the following taxes, namely—

(i) a rate on buildings or lands or both situated within the municipal borough,

(ii) a tax on all vehicles, boats or animals used for riding, draught or burden and kept for use within the said borough, whether they are actually kept within or outside the said borough,

(iii) a toll on vehicles other than motor vehicles or trailers save as provided in section 14 of the Bombay Motor Vehicles Tax Act, 1935 and animals used as aforesaid, entering the said borough but not liable to taxation under clause (ii) of this section;

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(iv) an octroi on animals or goods or both, brought within the octroi limits for consumption or use therein,

(v) a terminal tax on goods imported into or exported from the terminal tax limits,

Provided that, save as provided in clause (xiv) no such tax shall be leviable in a borough in which an octroi was not levied on or before the 6th July 1917,

(vi) a tax on dogs kept within the said borough;

(vii) a special sanitary cess upon private latrines, premises or compounds cleansed by municipal agency, after notice given as hereinafter required,

(viii) a general sanitary cess for the construction and maintenance of public latrines, and for the removal and disposal of refuse;

(ix) a drainage-tax,

(x) a general water-rate or a special water rate or both for water supplied by the municipality, which may be imposed in the form of a rate assessed on buildings and lands or in any other form, including that of charges for such supply, fixed in such

mode or modes as shall be best adapted to the varying circumstances of any class of cases or of any individual case;

(xi) a lighting tax,

(xii) a tax on pilgrims resorting periodically to a shrine within the limits of the municipal borough,

(xiii) a special educational tax,

(xiv) any other tax (not being a toll on motor vehicles and trailers, save as provided by section 14 of the Bombay Motor Vehicles Tax Act, 1935) which under the Government of India Act, 1935, the Provincial Legislature has power to impose in the Province. Bom. XXXIV of 1935

(xv) * * *

Provided that—

(a) no tax imposed as aforesaid, other than a special sanitary cess, a drainage tax or a water-rate, shall, without the express consent of the Crown, be leviable in respect of any building or part of any building or of any vehicle, animal or other property, belonging to His Majesty and used solely for public purposes and not used or intended to be used for purposes of profit, and no toll shall be leviable in respect of any animal or vehicle used for the passage of troops or the conveyance of Crown stores or of any other Crown property, or for the passage of military or police-officers on duty or the passage or conveyance of any person or property in their custody,

(b) no special sanitary cess shall be leviable in respect of any private latrines, premises or compounds unless and until the municipality has—

(i) made provision for the cleansing thereof by manual labour, or for conducting or receiving the sewage thereof into municipal sewers, and

(ii) issued either severally to the persons to be charged, or generally to the inhabitants of the borough or part of the borough to be charged with such cess, one month's notice of the intention of the municipality to perform such cleansing and to levy such cess,

(c) the municipality in lieu of imposing separately any two or more of the taxes described in clauses (i), (viii), (x) and (xi), may impose a consolidated tax assessed as a rate on buildings or lands or both situates within the municipal borough

(2) Nothing in this section shall authorise the imposition of any tax which the Provincial Legislature has no power to impose in the Province under the Government of India Act, 1935:

Provided that a municipality, which immediately before the commencement of Part III of the said Act was lawfully levying any such tax under this section as then in force, may continue to levy that tax until provision to the contrary is made by the Central Legislature.

Amendments:—The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council The words figures and brackets '(Other than Motor Vehicles or trailers save as provided in section 14 of the Bombay Motor Vehicles Tax Act, 1935) were inserted by Bom 34 of 1935, s 22 sch II. The words 'Cases' was substituted for the word 'case' by Bom 24 of 1926, s 2, schedule Clause (xiv) was substituted for the original clause and clause(xv) was omitted by the Adaptation of Indian Laws Order in Council The word 'Crown' was substituted for the word 'Government' and sub-section (2) was inserted by ibid

Sub-section (1)(i)—Rate on buildings or lands—Charitable and Religious purposes:—The part of hostel of a College occupied by students and the Superintendent of the hostel is occupied for charitable purposes within the meaning of s 143(1)(a) of the City of Bombay Municipal Act and is therefore exempt from general taxation leviable under section 140(e) of the City of Bombay Municipal Act Where a part of the hostel of a College was occupied by a Professor and assistant Superintendent in addition to the Superintendent of the hostel —Held, that such part of the hostel was liable to be rated for general tax leviable under s 140(c) of the City of Bombay Municipal Act, unless it was shown that the duties of the Professor and Assistant Superintendent for purposes of supervision, physical welfare and education of students, were such as to make their presence on the premises absolutely necessary **P. W Monie v. The Rev. Robert Scott, 20 B.L.R. 839.**

The Municipality of Jalgaon made a by-law under which 'buildings used exclusively for religious, charitable or municipal purposes' were exempt from the payment of house-tax The defendant was the manager of a temple at Jalgaon The temple property consisted of the temple proper, a room set apart for visitors, and a suit of twelve rooms, one of which was occupied by the manager and the remaining eleven were let to tenants The rent recovered was used for the purpose of the temple The first three were exempt from the payment of the house-tax, but the municipality used to levy the tax on the eleven rooms which it enhanced for the year 1927-28 and recovered it from the defendant The defendant appealed against the levy of the tax to a magistrate under section 110 of the Bombay Municipal Boroughs Act, 1925, who decided that the rooms were not amenable to the tax The municipality refunded the amount of the tax, and, instead of applying in revision against the magistrate's order under s 111(1) of the Act, filed a suit in the Civil Court to set aside the order of the magistrate and to recover the amount of the tax from the manager The Manager also filed a suit to recover the tax paid by him for the foregoing year, for a declaration that the whole property was exempt from payment of house-tax, and for an injunction to restrain the municipality from levying the tax in future:—Held, (1) that, as the eleven rooms were used for a secular purpose,

they were not exempt from payment, of the house-tax, and the fact that the income derived from such use was devoted to religious purposes did not bring the rooms within the ambit of the by-law, (2) that the words 'any appeal shall at the instance of either party be subject to revision' in s 111(1) of the Act were not mandatory in the sense that it was incumbent on either party to adopt the remedy provided in the section, (3) that the Civil Court had, therefore, jurisdiction to entertain the suit brought by the municipality **Kanhardas v Keshav, 37 B.L.R 235.**

The buildings occupied by the University of Bombay, viz, the Sir Cowasji Jehangir Hall, the library and the Rajabai Tower are not Government property, and are not included in the property for which Government pays a lump sum under s 144 of the Bombay Municipal Act III of 1888 The above buildings are exempt from taxation, being 'buildings exclusively occupied for charitable purpose' within the meaning of clause (a) of s 143 of the Bombay Municipal Act III of 1888 The words "Charitable purposes" have acquired a technical meaning in the presidency of Bombay, and in that sense they include all purposes within the meaning of Statute 43 Eliz, c 4 **The University of Bombay v The Municipal Commissioner for the City of Bombay, 16 Bom. 217.** In course of the judgment Sargent C.J observed "It was contended also that as university obtained an income from the fees paid by the students on the occasion of the examination held by the University, it derived a revenue from the occupation of the buildings, and the case of **Queen v Sterry** was referred to in support of that contention That case is one of a number of decisions under the English Poor Law Act as to which we may remark that it is very far from easy to reconcile them with one another The Court considered in that case, that the test to be applied was solely whether any revenue (whether beneficial or not) was derived from the occupation, and whilst admitting, no doubt, that the institution was, in the main in the nature of a charitable institute, they held that as £12 a year was derived from each scholar, the trustees of the schools were liable to pay poor rates But here the sole test by s 143(a) is whether the building is exclusively occupied for a charitable purpose, and the mere circumstance, that small fees are required from the students before examining them, which produce a revenue insufficient to defray the expenses of the university in conducting those examinations and keeping up the necessary establishment and which requires to be considerably supplemented by Government, cannot in our opinion, alter the essential character of the purpose for which the buildings are occupied It was said, however, that a library was not necessary for the special purpose for which the University was established, and the building cannot, therefore, be regarded as used for a charitable purpose But a well-selected library is clearly, if not necessary, at least a most useful, purpose to which such a university can appropriate a part of its buildings, affording as it does, important assistance to those who conduct the examinations as well as to the students who are preparing for them, and thus as was held in the analogous case of the University of Oxford furthering the great object for which the university was established, viz, the better encouragement of Her Majesty's subjects in the pursuit of a regular and liberal course of education As to the Tower we think it must be regarded as it was intended to be as an architectural building annexed to the library and cannot for the present purpose, be treated as distinct from it"

Municipality cannot levy a rate on building and land and a separate rate on the same land —The plaintiff owned two survey numbers, which he divided into small plots, and let those plots, to tenants numbering 350 Each of the

tenants built his own house on the plot demised by him and paid ground rent to the plaintiff not exceeding Rs 3-8-0 a year The Municipality of Sholapur, within whose limits the lands were situated made rules for the levy of a general rate on buildings and lands, under which buildings or lands yielding a yearly rent not exceeding Rs 10 were exempt from payment of the rate, but provided a graduated scale of rates on buildings or lands yielding rent of more than Rs 10 a year House-tax was levied by the municipality from each one of the tenants The ground rent paid by the tenants to the plaintiff aggregated to Rs 800 a year, on which the municipality levied a rate of Rs 40 The plaintiff having sued to have a refund of Rs 40, and to restrain the municipality from levying double house-tax on his land Held that (1) unless it had been made clear that the municipality were levying from the owners of the various buildings on the plaintiff's land a rate calculated on that part of the hypothetical rental which represented merely the return on the cost of the buildings, it would be most probable that the municipality were already taxing those particular properties at their full amount, (2) that though the municipality could levy a rate either on the building or land on which the building stood or levy one rate for both building and land, yet it could not levy a rate which would include the rate on building and land and a second rate on the land itself, (3) that even if the municipality levied a rate on the land, they would have to do so on each plot underneath each building and not on the whole survey numbers. **The Sholapur Municipality v Shanker, 23 B.L.R 1018.**

Rent:—The extra fees paid by a student residing in a hostel of a college is not rent within the meaning of s 143 (2)(d) of the City of Bombay Municipal Act: ***P. W. Monie v the Rev. Robert Scott, 20 B.L R 839***

School Building transferred to District Local Boards by non-Local Authority municipalities whether liable to municipal taxes:—All school buildings transferred to District Local Boards by the non-Local Authority municipalities under s 6(1) of the Primary Education Act, vest in the District Local Board concerned, which virtually becomes owner thereof The municipal tax will consequently be payable by the District Local Boards to the municipalities unless the Local Board property is exempted under the municipal rules (**Examiner Local Fund Account's no L 8—3656 dated the 6th January 1942**).

Whether local bodies can levy betterment charges:—Section 59 (1) of the B.D.M Act, 1901, provides that a municipality may impose a rate on buildings or lands within the municipal district Section 60(iii) shows that such rate or tax can be imposed on any class or classes of persons or property It is doubtful whether this provision is intended to provide that buildings or lands in a particular area or locality can be held to form a class for the purpose of taxation only on the ground that they are situate in one area or locality Section 63(1)(d) shows that a rate on buildings or lands has to be assessed on the annual letting value or other valuation of the property The term 'annual letting value' as defined in s 3(11) means annual rent which any building or land might reasonably be expected to let from year to year So also the words 'other valuation' are intended to apply to the market value or any valuation based on other methods The mode of assessing building or land rate seems, therefore, limited to their annual or other valuation In consequence of any work constructed by the municipality it is possible that the valuation of the property which derives a benefit therefrom might be increased. Although, therefore, it is permissible to assess the rate on such increased valua-

tion, it does not appear section 63(1)(d) will permit the imposition of a portion of the cost of such work on the buildings or lands and the recovery of such cost by means of a special or enhanced cess or rate Proviso (b) to s 158(1) of the Act shows that wherever it is intended that the municipality should have power to recover the cost of any improvement made by it to any building it is specially empowered to do so Thus under the Bombay Town Planning Act, 1915, a local authority is specially empowered to recover 'betterment or improvement charges' The Bombay Municipal Boroughs Act, 1925, contains similar provisions See sections 73, 75(a)(i), 78(1)(d) and 194 of the Act The only difference is that under section 78(1)(d) the rate on buildings or lands can be assessed on capital or annual letting values In regard to the Bombay Local Boards Act, 1923, under sections 99 and 100 a local board can be empowered to impose a rate on buildings or lands But as stated above these provisions are insufficient to empower a local board to levy betterment charges and the three Acts referred to will have to be amended if the local authorities are to be empowered to levy betterment charges **(R L A's opinion no 0. Munis Dist. 7/30 dated the 30th May 1930 in G C G D no. 8685—A, dated the 12th August 1931)**

Sub-section (1)(ii)—Vehicle —Hand-trollies running on rails laid on a public street and used by contractors for the purpose of carrying materials to fill up a tank are vehicles as defined in section 3 cl (17) of the District Municipalities Act, 1901 (equivalent to s 3(21) of the Boroughs Act) and are liable to be assessed for Wheel-tax under s 59 (ii) of the Act (equivalent to section 73(1)(II) of the Boroughs Act) **Dayabhai v. Pestanji, 17 B L R 63.**

Kept for use within the said borough —In the Surat City Municipality v. Manekiai, 22 B.L R. 1104, it was held that a vehicle which is kept outside but plies for hire inside a municipal district is not liable to pay wheel-tax under section 59(b)(ii) of the Bombay District Municipalities Act, 1901 But this authority will not apply to a case under the Boroughs Act because in the latter Act we find the additional words 'Whether they are actually kept within or outside the said borough'

In **Bandra Municipality v The Burma Shell Storage and Distributing Co. of India Ltd, 40 B.L R. 111,** the plaintiffs were a company trading in petrol having their storage tanks within the limits of the Bombay Municipality They maintain a fleet of motor lorries in Bombay for the supply of its pumping stations both in Bombay and outside Bombay These lorries were housed in Bombay where the bulk of their work was done Wheel-tax in respect of them was paid to the Bombay Municipality Four of these lorries made occasional visits to Bandra, a suburb of Bombay, to replenish the Company's pumping stations there The Bandra Municipality imposed a wheel-tax on those lorries under section 73 (ii) of the Bombay Municipal Boroughs Act, 1925 The plaintiffs paid the tax under protest and thereafter filed a suit for its refund, contending that although the lorries were in fact occasionally used within Bandra for the purpose of replenishing the pumps, nevertheless, upon a true construction of s 73(ii) of the Act, it could not be said that they were kept for that particular use so as to enable the Bandra Municipality to tax them Held that as the supply by the lorries of the pumping stations at Bandra was a very minor object, their user was not within the meaning of the words "kept for use within the borough" in s 73(ii) of the Bombay Municipal Boroughs Act, 1925, and therefore the plaintiffs' lorries were not liable to be taxed by the Bandra Municipality The words "kept for use" in section 73(ii) of the Bombay Municipal

Boroughs Act, 1925, really mean "maintained with the main object of being used" In the course of the judgment Maclean J observed. "Unfortunately it is not possible to lay down a general rule which would be applicable in every particular case, because in each case what matters is the main object with which the lorry is kept and that is always a question of fact In the present case, however, upon the facts it is clear that the supply of the filling station at Bandra is a very minor object, and on that ground we do not think that the plaintiffs' lorries are liable to be taxed by the Bandra Municipality The declaration sought for must therefore be given, and to that extent the appeal of the municipality must be dismissed This case was considered by Beaumont C.J. in **Chunilal v. Ahmedabad Municipality, 41 B.L.R 1249,** and there his lordship said: "I have no comment to make upon the decision, but I would venture to suggest that Mr Justice Maclean in a dictum not necessary for the decision of the case went rather too far in saying that user must be 'main user' in order to fall within the section Reference to a 'main user' involves a comparison between one method of user and another It is possible to suppose a case in which a motor lorry might be kept for normal and regular use on two or three days in a week within the borough, and for regular use for the rest of the week outside the borough, and I think it would be difficult to say in such a case that the lorry was not kept for use within the borough, because it was kept for more extensive use outside the borough"

In Chunilal v Ahmedabad Municipality, 41 B.L.R 1249, one Jethalal (father of plaintiffs Chunilal and others) owned two motor lorries, which were garaged in plaintiffs' bhata (lime-kiln) which was situated outside the limits of the Ahmedabad Borough Municipality Whenever the lorries went into the above limits, they paid toll tax. After April 1, 1936, when the Bombay Motor Vehicles Tax Act came into operation, the municipality demanded payment of wheel-tax for the lorries, and the plaintiffs' father paid it under protest. The plaintiffs' father filed a suit to recover the amount of wheel-tax that he had paid for a period of one year in respect of the lorries It was held that the expression "kept for use within the borough" meant kept for normal use within the borough and no doubt where a vehicle is kept for normal use outside the borough an occasional use within the borough could be rejected on the principle of **de minimis non curat lex.** It was also held that a vehicle which is both used in the presidency and is also used within the borough may be the subject of taxation by two taxing bodies under the Bombay Motor Vehicles Tax Act, 1935, and the Bombay Municipal Boroughs Act, 1925

The words 'kept for use' used in sec 59(a)(ii) of the B.D.M. Act, 1901 and s 73(ii) of the B.M.B Act, 1925, mean 'kept for normal use' and not 'kept with the main object of being used' The right of a municipality to levy wheel-tax on motor vehicles plying between two municipal districts, therefore, depends on the question whether the particular vehicle makes a normal use of the municipal roads It is not necessary that for the purpose of liability to wheel-tax a motor vehicle should necessarily use municipal roads extensively. In the case of District Municipalities, however, the motor vehicles will be liable to wheel-tax only if they are also garaged within the municipal area as laid down in s 59(b)(ii) of the District Municipal Act **(Examiner Local Fund Accounts No. L. 2/1153 dated the 20th June 1942)**

Sub-section (1)(iii)—Powers of Government regarding levy of tolls:— Section 102 of the B.M.B. Act and s. 73 of the B.D.M Act provides that (i) if the toll tax is unfair in its incidence Government may suspend the whole tax or (ii)

if the toll tax is obnoxious to the interests of the general public Government may suspend the whole tax or part thereof The distinction drawn in the section itself between suspension because of the unfairness in its incidence and suspension because of its obnoxiousness to the interests of the general public excludes any question of incidence in the latter case but at the same time limits the action of Government to cases where apart from any question of incidence Government consider a part of the tax obnoxious to the interests of the general public Where under s 73(iii) of the B.M.B Act (section 59(b)(iii) of the B.D.M Act) a tax is imposed upon vehicles and animals entering the municipal borough (district) the tax upon certain classes of vehicles or animals may form part of a tax within the meaning of s 102 B.M.B Act (s 73 B.D.M Act) The tax may be divided into parts i.e a tax on certain classes of vehicles throughout the municipal area or a tax on all vehicles at some places on the municipal area or a tax on some vehicles at some places in the municipal area Government can therefore suspend such tolls as they consider to be obnoxious to the public interest Government can also exclude a provincial road from the Municipal limits under sections 4 and 8 B.D.M Act and the corresponding sections 4 and 7 of the B.M.B Act and thereby automatically debar the municipality from levying tolls on all traffic passing along the provincial road This would also make it impossible for the municipality to levy octroi or terminal tax since it would not be entitled to stop or examine any vehicle or passengers on the road for purposes of such taxes **(G.R.G.D. No 5543 dated the 8th August 1933)**

Sub-section (1) (iv)—Articles brought in by post —The Municipality of Ahmedabad imposed octroi duty on goods brought into the walled city of Ahmedabad by post under rules framed under the old Municipal Act It was objected that the imposition of the tax was not authorised inasmuch as when the rules were framed the framers did not contemplate the possibility of the introduction into the city of goods by post and that the procedure required by sec 60 of the District Municipal Act, 1901, was not observed in imposing the octroi duty Held, overruling the objection, that s 76 of the Act gave powers for assessing Octroi duty upon goods coming into the walled city and as rule No 84 which was promulgated under the old Act and which permitted the levying of Octroi duty on goods coming into the walled city of Ahmedabad was in force no further by-laws were necessary for the purpose of assessing duty on articles brought in by post **The Ahmedabad Municipality v. Sakarchand, 17 B.L.R 182**

Account Books Of Merchants —The provisions of section 76(1)(b) of the District Municipalities Act, 1901 (equivalent to s 94 of the Boroughs Act) permit a municipal Officer to claim inspection only of bills, invoices or documents of a like nature but he cannot claim inspection of private accounts of merchants **The Ahmedabad Municipality v Sakarchand, 17 B.L.R 182**

Octroi on animals or goods brought within the Octroi limits for consumption or use therein —**In Emperor v Harjivan Valji, 28 B.L.R 115** it was contended that the goods brought within the octroi limits not for consumption but for transit were not liable to the payment of octroi under clause (iv) of s 59 of the District Municipal Act, 1901 (equivalent to section 73(1) (iv) of the Boroughs Act) Dealing with the contention, Fawcett J said 'The first point raised by the Sessions Judge is that the provisions of this clause cannot apply in the present case, because, in fact these goods were not brought within the Octroi limits for consumption or use therein, and so were not goods liable to the pay-

ment of octroi under clause (iv) of section 59 of the Act, which empowers a municipality to impose an octroi on goods brought within the municipal octroi limits for consumption or use there This argument entirely ignores the provision of s 48 sub-section (1)(j) of the same Act, under which the municipality has power to frame octroi by-laws regulating the system under which the refunds are to be made when the animals or goods on which the octroi has been paid or articles manufactured wholly or in part from such animal or goods are again exported and prescribing a period of limitation after which no claim for refund of octroi should be entertained, and the minimum amount for which any claim to refund may be made It is no doubt the case that octroi is leviable only on goods which are actually brought in for consumption and use within the municipal limits But the Act recognizes that provision has to be made for goods in transit through the municipal district, and for safeguarding the municipality from loss owing to any misrepresentation that may be made when goods are brought within the municipal limits that they are only being brought in transit and not for use or consumption within such limits Accordingly, the municipality have framed by-laws which are appendix F in the pamphlet produced before us By-law no 1 says that 'Octroi at the rates specified in the accompanying schedule shall be levied on the articles therein named when imported into the Kalyan Municipal District' That of course primarily applies to goods imported for use and consumption within those limits But the wording also covers goods in transit and subsequent by-laws provide for refunds in such cases The main by-law is no 9 which runs as follows —'persons importing goods in transit which enter the town and pass out of it intact within 24 hours of their entering, shall deposit the amount of duty due on them at the in-going Naka and receive a receipt for the same They shall present the receipt at the Naka at the time of export for endorsement as to the goods having passed out of the town intact and present the endorsed receipt at the municipal office, where on satisfying the Managing Committee of the correctness of the endorsement they will obtain refund of the amount of duty deposited by them' By-laws 10 and 11 provide for similar refunds if the goods stayed longer than 24 hours, and if they are exported within a year of the date of importation, and rule 12, provides for the procedure under which application for refund should be made By-laws 13 and 14 provide for the Managing Committee's passing orders for refunds and for an appeal in case of refusal to the General Board and rule 16 says that rules 10 to 14 shall not apply to any goods in respect of which arrangements have been made for an account current under s 80 Therefore having regard to the provisions of section 48 that I have referred to and these by-laws, the goods in question were, in my opinion liable to the payment of octroi within the meaning of sub-section (2) of s 77 of the District Municipal Act (equivalent to section 96 of the Boroughs Act)"

Imported·—A rule of Thana Municipality provided for the levy of octroi duty on certain articles "when imported within the Thana Municipal District" Held, that goods merely passing through the Municipal District in the course of transit to Bombay were 'imported' within the meaning of the rule and were therefore, liable to duty In **Re Rahimu Bhanji, 22 Bom 843** Their Lordships observed "We must give the word 'imported' in the rules of the Thana Municipality, its ordinary meaning As soon, therefore, as the goods in the present case passed within the limits of the Municipality, they were imported, that is brought within those limits from a place without its boundaries The only re-

medy of the applicant if he exports them, whether that is done on the same day or at some other more distant time, is to claim a refund of the duty paid"

Position of local bodies regarding the levy of and making deductions from the amount of refund of octroi —Octroi is defined in Murray's Dictionary as 'a duty or tax levied on certain articles on their admission into a town' Webster defines it as 'a tax levied in money or kind on commodities, especially provisions, as a condition of their being brought into a town or other urban municipality' Though an octroi and a terminal tax are separately provided for in s 73 of the Bombay City Municipality Act, 1925, there is a definition of octroi in s 3(12) of the Act which runs as follows —'Octroi shall include a terminal tax' This definition has been newly added into the Act In a case reported in **22 Bom. 843**, being a case under the B D M Act, 1873, it was held that goods merely passing through the municipal district in the course of transit were liable to Octroi duty Therefore an octroi may be imposed (1) on goods brought within the octroi limits for consumption or use therein and (2) on goods brought within the octroi limits not for consumption or use therein, but as goods in transit. Both these kinds of octroi are provided for in s 59 of the B D M Act, 1901, one in cl (iv) and the other in clause (x-A) which was inserted into the section by the Devolution Act, 1920 Clause (x-A) relates to 'any other tax' which under rules made under cl (a) of s 80-A sub-section (3) of the Government of India Act the local authority may be authorized to impose by any law made by the Local Legislature without the previous sanction of the Governor General Rules can be made under section 59 of the B D M Act, 1901, to include 'an octroi' without any qualification An octroi on goods brought for consumption or use being specifically provided for in cl (iv), the words 'any other tax' in cl (x-A) can only refer to an octroi on goods brought within the octroi limits though not for consumption or use therein, in other words goods in transit It is erroneous to suggest that goods which are merely in transit through the octroi limits are not liable to octroi duty They are liable to such duty under the newly added cl (x-A) Section 48(j) of the B D M Act, 1901, (equivalent to s 61(1)(n) of the B.M B Act, 1925) provides for the making of by-laws, fixing octroi limits, providing for the exhibition of tables of octroi, regulating the system under which refunds are to be made on account thereof when goods on which the octroi has been paid 'are again exported,' and prescribing the minimum amount for which any claim to refund may be made The language of that section is wide enough to include (a) goods brought within the octroi limits with the object of consuming or using them therein, but they are not consumed or used, and 'are again exported', and (b) goods brought within the octroi limits not for consumption or use therein but in transit only Therefore a by-law under section 48(j) of the B D M Act, 1901 disallowing refund of octroi below a certain minimum is not ultra vires and does not require previous sanction of the Governor General in Council **(Advocate General's opinion no 18 dated the 11th April 1929 in G R.G.D. no 7073 dated the 15th May 1929)**

Clause (j) of s 48(1) of B D M Act, 1901 mentions specifically several matters with respect to which octroi by-law can be made In such cases the maxim **expressio unius est exclusio alterius** applies and the legislature must be deemed to exclude any other matter which is not specifically mentioned The general provisions in cl (u) of s 48(1) of the B D M Act, 1901, cannot be held to provide for matters which are not specifically mentioned so far as cl (j) is concerned. The word 'tax' as defined in s 3(14), B D.M Act, 1901, is very wide and includes any fee or impost Any deduction which a municipality may claim out of the

amount to be refunded would,in the absence of any specific provision authorising it appear to be a 'tax' A municipality is authorized under s 59(b) (x-A) of the B D M Act, 1901, to levy an octroi on goods or animals imported into municipal limits which are not actually consumed or used there but are merely in transit. It is, therefore, open to a municipality to frame rules prescribing that only a portion of the duty may be refunded This would be imposing a new tax or 'octroi' under s 59(b) (x-A) of the B.D.M Act, 1901, read with item 7 of Schedule II to the Scheduled Taxes Rules As the tax is included in cl (x-A) of s 59(b) it does not fall within cl. (xi) of the section and the sanction of the Governor General in Council is not necessary **(R.L A 's opinion no 820 dated the 14th February 1931 in G R G.D no. s 91(42) dated the 23rd March 1931).**

In view of the provisions of the Government of India Act, 1935, the above position has changed and is now as under

Municipalities are competent to levy those taxes which a Provincial Government, in accordance with list II of VII Schedule to the Government of India Act, 1935, is authorized to levy Octroi is a cess falling under item 49 of the Provincial Legislative List Octroi presupposes refund on goods not consumed locally In making such refunds deduction is made by some municipalities. The position regarding the powers of municipalities to make deduction from the amount of refund of octroi is as under Deductions from the amount of octroi in effect amount to imposing a new or additional tax of that amount and after 1st April 1937 a municipality has no power to levy such a tax either under entry no 49 in the Provincial Legislative List or any other entry in the said list However, in virtue of the provisions contained in the proviso to (i) sub-section (2) of section 73 of the B M.B Act, 1925, and (ii) sub-section (2) of section 59 of the B.D.M Act, 1901, it is open to a municipality, which immediately before 1st April 1937 was lawfully levying such a tax to continue to levy that tax after that date until provision to the contrary is made by the Central Legislature In the case of a local body which has introduced the system of octroi and refund for the first time after 1st April 1937 the deductions from the amount of refund of octroi will be illegal In cases where the levy of such a tax is illegal it would not be possible to set any time limit for the export of article and to lay down that no refund of an octroi would be granted if an article is exported after the time limit so fixed The claimant would be entitled to the full refund of octroi paid on the article if he proves that the article exported is the same on which octroi was levied on its import, and it is immaterial that the articles are exported from the octroi limits on the same days on which they had been imported or at a more distant date **(G C.G D No. 183 dated the 19th January 1942)**

Sub-section (1)(v)—Levy of terminal tax by Municipality—Tidal Navigable River-Right to its bed.— Generally, where a property is bounded by a road or a river, the boundary, even if given as the road or the river, is the middle of the road or river as the case may be But that principle is not applicable to the case of a river which is tidal and navigable In the case of a tidal navigable river the bed of the river belongs to the Crown up to the line of the medium high water mark, that is, the line of the medium tide between the spring and the neap tides throughout the year The medium high water mark of such a river is not the same thing as the middle line of the river **Ad Medium Filun A qax.** The Municipality of Bulsar is therefore not entitled to demand terminal tax for goods which are not brought within the limits of the Bulsar Municipality on the near side of the river Aurange, which is a tidal and navigable river

and which forms one of its boundaries, that is above the line of medium high water mark of the Aurange river on the southern side **Narottamdas Harjivan and Co v Bulsar Town Municipality and Manibhai Chhotubhai and Co. v Bulsar Town Municipality, 42 B L R 1034.**

Position of local bodies regarding levy of terminal tax — Under cl (x-A) of s 59 of the B D M Act, 1901, as inserted by the First Schedule of the Devolution Act XXXVIII of 1920, the Governor in Council or the Commissioner, as the case may be, has the power to sanction the introduction of 'any other tax which, under rules made under clause (a) of s 80-A, sub-s (3), of the Government of India Act, a local authority may be authorized to impose by any law made by the local legislature without the previous sanction of the Governor General' Hence the Governor in Council or Commissioner can sanction a terminal tax if a terminal tax is a tax which could be authorized by a new Act of the local legislature without an infringement of the Schedule Taxes Rules Those Rules allow the local legislature to make law authorizing a terminal tax without the sanction of the Governor General only in a local area in which an octroi was levied on or before the 6th July 1917 In respect, therefore, of any municipality in which octroi was levied before that date, the Governor in Council or the Commissioner, as the case may be, has power to sanction a terminal tax under clause (x-A) In other municipalities the Governor in Council or the Commissioner has no such power under cl (x-A), but he has such power under cl (xi) as now amended by the Act mentioned, if the nature and object of the tax have been approved by both the Governor in Council and the Governor General in Council, but not otherwise **(R.L.A.'s opinion no 855 dated the 19th May 1921 in G.R.G D. no. 6713 dated the 1st June 1921)** Under the Boroughs Act special provision is made by cl (v) of s 73 about the imposition of a terminal tax in certain cases. In other cases the tax will fall either under cl (xiv) or cl. (xv) Under the Government of India Act, 1935, the position has now changed and is as under —

Under item 49 in List II (Provincial Legislative List) of Schedule VII to the Government of India Act, 1935, cesses can be levied only on the entry of goods into a local area for consumption, use or sale therein This item must be read in conjunction with item 58 of List I (Federal Legislative List) of Schedule VII to the Government of India Act, by which the levy of terminal taxes on goods and passengers carried by railway or air is reserved to the Federal Government The position, therefore, is that in future no fresh octroi or terminal tax can be imposed by any local body on goods—exported from, or in transit through a local area, nor can any terminal tax be levied on goods carried by railway or air If, however, any local body has been lawfully levying immediately before the commencement of Part III of the Government of India Act, 1935, a terminal tax or octroi on goods exported from or in transit through a local area or a terminal tax on goods carried by railway or air it may continue to levy such taxes until provision to the contrary is made by the Federal Legislature (Vide section 143 (2) of the Government of India Act, 1935) **(G.R G D No. 183 dated the 5th July 1937)**

Power given by s 143(2) of the Government of India Act, 1935, to continue the levy of certain taxes which were being levied by local bodies immediately before the 1st April, 1937, includes the power to levy those taxes at lower rates or over a narrower range than the rates or the range obtaining on 31st March 1937, but not at higher rates or over a wider range Thus, in the case of a ter-

minal tax, the levy of which is continued by virtue of s 143(2) of the Government of India Act, 1935, it is permissible for a local body (i) to abolish or reduce the tax in respect of any article mentioned in the Schedule of rates, or (ii) to close an existing tax station or to open a new station, provided such opening does not involve the extension of the terminal tax limits or the widening of the scope of the tax (e g making road-borne goods subject to taxation if they were not so subject on 31st March 1937) It is not permissible for a local body (i) to extend the terminal tax limits, (ii) to add new items to the schedule of rates or increase any rate mentioned therein, or (iii) to extend the scope of the tax by imposing it for the first time on goods carried by a particular form of transport **(G C G D No. 183 dated the 2nd April 1938)**

Whether terminal tax can be levied outside the municipal limits:— A municipality has no power to make a rule prescribing the levy of terminal tax at a station outside the municipal limits **(R.L.A's opinion no O. Munis—Cities—11 dated the 3rd August 1928 in G R G D no 87 dated the 17th August 1928)**

Sub-section (1)(vii)—Proviso (b)(i) to sub-section (1)—Special Sanitary cess—made provision for the cleansing, etc —The Municipality of Ahmedabad constructed a main sewer along the road on which the plaintiffs' premises abutted On these premises the plaintiffs had private latrines for their operatives and at first they had them cleansed by manual labour Later on, the plaintiffs converted their privies to the flushing system, and carried out at their own cost connection between the privies and the main sewer of the municipality The municipality thereupon, levied special sanitary cess for the connection from the plaintiffs under the provisions of s 59(b)(vi) of the Bombay District Municipal Act, 1901 The plaintiffs, having sued to recover the amount of the cess levied from them Held, dismissing the suit, that the municipality were entitled to levy the special sanitary cess from the plaintiff inasmuch as although the owner of private premises with private latrines might pay the whole of the expense of the connection between his premises and the man-hole, still it could be said that the municipality had made provision for the receiving of sewage from his private latrines by having laid down the sewer, with man-holes at intervals with which connections were made with private premises **The Ahmedabad Municipality v. The Gujarat Ginning and Manufacturing Co., Ltd, 22 B.L.R 747**

Sub-section (1)(vii)—Proviso (b)(ii) to sub-section (1) —The liability to pay the Halalkhore Tax (Special Sanitary Cess) does not arise until after notice has been given under section 57 of the Bombay District Municipal Act 1884 **The Municipality of Sholapur v. The Sholapur Spinning and Weaving Co Ltd, 20 Bom 732** In view of the present proviso the same position arises in a case under the Boroughs Act

Sub-section (1)(viii)—General Sanitary cess—Notice—Jurisdiction:— The levying of a general sanitary cess by a District Municipality under s 59(vii) of the District Municipal Act, 1901 (equivalent to s 73(1)(viii) of the Boroughs Act) is not illegal on the ground of want of notice under section 65(1) of the Act (equivalent to s 81 of the Boroughs Act) A suit to recover the amount of tax illegally recovered by a municipality, coupled with a claim to interest on the amount as damages, falls under article 35(j) of the second schedule of the Provincial Small Causes Courts Act and is thus exempted from the jurisdiction of that Court **Kalyan Municipality v Govind, 27 B L.R. 447.**

Sub-section (1)(ix)—Drainage Tax—Sullage water Cess—House tenants:— The plaintiff owned a house which was sub-divided into seventeen different tenements occupied by seventeen different families Each tenement was numbered separately in the City Survey and Cess Register of the Municipality, and separate iron plate numbers were affixed to the tenements Each tenement had separate entrance leading through a gate into the high way The tenements had separate drains which opened into eight drains connected with the municipal gutter direct The whole house was described only by one number and was so entered in the Municipal register The City Municipality of Belgaum framed rules for the sullage water cess under s 46(i) of the Bombay City Municipalities Act, one of which ran 'Every house that lets out sullage water into Municipal gutters or Municipal limits shall pay Rs 5 per year' The plaintiff was called upon under the rule to pay Rs 85 as the sullage water cess for his house —Held (1) that the plaintiff's house should be considered as seventeen different tenements and the rule must be intended to apply to each one of the tenements, (2) that there was nothing inconsistent in construing the word 'house' as used in the rule, as separate tenements, (3) that the Cess was properly levied on the plaintiff's house **Hari Govind v The City Municipality of Belgaum, 31 B.L.R 1249**

Sub-section (1)(x)—Water supplied by the Municipality'—In section 73(x) *of the Bombay Municipal Boroughs Act, 1925 the expression 'water supplied by* the Municipality' means water supplied for general public purposes, and is not *limited to water connected up with particular premises The true construction* of the clause is that the municipality can charge a water-rate if they supply *water to the borough* **The Brahman Mitra Mandal Co-operative Society Ltd v The Municipality of Ahmedabad, 42 B L.R. 587**

Rule for levy of lump sum charges by the standing committee for water supplied without meter ultra vires — A lump sum imposed arbitrarily by the standing committee of a borough municipality on certain trades, and not on the district generally and not depending on the value of the property assessed, is not a rate, for the purpose of s 73(x) of the Bombay Municipal Boroughs Act 1925, and a rule providing for levy of lump sum charges at the discretion of the standing committee when water was supplied without meter is ultra vires the municipality **Motiram v Ahmedabad Municipality, 44 B.L.R 280**

Levy of water tax—Time from which the tax becomes payable—building assessable to the tax.—The plaintiff company occupied an extensive piece of land on which were erected buildings for the purposes of their mill By May 31, 1923, the Municipality of Ahmedabad laid down water pipes within 75 feet of some of the mill buildings, and by December 27, 1923, erected two stand-pipes within 500 feet of some of the mill buildings On August 7, 1923, the Municipality served on the plaintiff company bills demanding water tax on all the buildings of the mill from April 1, 1923, to March 31, 1924 The penalty for non-payment of the tax, as mentioned in the bill, was one of eight annas Under the powers vested in it by section 46(i) of the Bombay City Municipalities Act, 1925, the Ahmedabad Municipality had framed rules, one of which (rule 3) provided. 'The said taxes shall be payable in advance in one instalment, and shall accrue due on April, 1' Rule 6 provided 'mill buildings and tanks attached thereto, out-houses, warehouses, godowns, houses, bungalows, and all other buildings of any kind connected with them shall be assessed ' Rule 22 provided that 'building whereof no part is within 75 feet of a water pipe or within 500 feet of a standpipe shall be exempted from the water tax.'

The plaintiff company filed a suit for a declaration that they were not amenable to the water tax, contending, first, that the bills presented to them were defective in law as they omitted to mention all the penalties consequent upon non-payment of the tax and were inaccurate as regards the amount, secondly, that under rule 3 they were not liable to pay the tax for any period prior to April 1, 1924, and thirdly, that the buildings outside the radius of 75 feet from the water-pipe or 500 feet from the stand-pipe were not assessable to the water tax. The Municipality accepted portion of the first contention and agreed to abate their demand of the tax for April and May 1923 Held, (1) that the Municipality sufficiently complied with the law by stating in the bills only the next step to which they should have recourse, viz, a notice of demand inasmuch as s 104 (3) of the Bombay City Municipalities Act, 1925, did not expressly say that all the liabilities including the ultimate liability incurred in default of payment were to be specified in the bills, (2) that the plaintiff company were liable to pay the water tax from June 1, 1923, (3) that not merely the actual physical buildings within 75 feet of a water-pipe or 500 feet of a stand-pipe were liable for assessment, but that if any appreciable portion of a mill building fell within those radii, the whole building of the mill became liable **The Raipur Manufacturing Co Ltd v The Ahmedabad Municipality, 31 B.L.R 1224**

Bill for water and other rates presented to rate payer—tender for water rate only—non-acceptance by Chief Officer—cutting of water supply—suit for injunction—Damages awarded to plaintiff for expenses incurred in procuring water:—The Committee of management superseding the Surat City Municipality presented to the plaintiff (a rate payer) a consolidated bill for various rates including rate for water The plaintiff tendered payment of the water-rate and one other item only, but the Chief Officer declined to accept partial payment and cut off the plaintiff's water supply One of the by-laws of the municipality empowered the municipality to cut off water supply if water charges were not paid The plaintiff sued the Committee of Management to obtain a mandatory injunction enjoining it to re-connect the water supply and to recover as damages the amount spent by him for labour charges in procuring water from a well during the period he was without the supply of water —Held that, (1) inasmuch as the By-law of the municipality gave a specific remedy, viz, to cut off the water supply in certain limited events, it followed that in the absence of specific provision in that behalf the municipality was not entitled to cut off the water supply on grounds other than those expressly mentioned and authorised, (2) that the plaintiff was entitled to the mandatory injunction prayed for but it was without prejudice to future circumstances, (3) that the plaintiff was entitled to the damages claimed as the defendants acted in excess of their legal powers **Bhukhandas Lallubhai v. Thakorram Kapilram, 28, B.L.R. 1465.**

Sub-section (1) (xiv) and sub-section (2)—Imposition by local bodies of taxes on professions, trades, callings and employments—Position under the Government of India Act, 1935'—If such taxes have already been imposed and are being levied by local bodies they are legal even though they may be graded and assessed according to income, and under section 143 (2) of the Government of India Act, 1935, the local authorities can continue to levy such taxes even after the commencement of Part III of the Act until provision to the contrary is made by the Federal Legislature It would not be legal to impose any such tax after the commencement of Part III of the Government of India Act, if the tax is graded or assessed according to income or if it becomes necessary to ascertain the whole or part of the income of the person taxed for the purpose of levying

such tax If such tax is to be imposed it will have to be graded and assessed *on a basis different from income, e g residential areas,* number of servants, apprentices or vehicles kept, etc **(G R G D no 288-33 dated the 28th May, 1936)**

Has power to impose —These words mean 'could or can impose' They do not mean 'has been imposed' See **Nalottamdas Harjivan and Co v The Bulsar Town Municipality and Manibhai Chhotubhai *and Co* v Bulsar Town Municipality, 42 B L R 1034**

Sub-section (1)—Proviso (A)—Property of Railway vesting in Government whether subject to municipal taxes —Under the proviso to s 59 of the B D M Act the property of a Railway vesting in Government is liable to municipal taxes as it is used for purposes of profit **(R L A's opinion no 1293 dated the 31st May 1926 in G R G D no 3789 dated the 11th June 1926)**

The Administration of a Railway vested in the Government remains a Railway Administration within the meaning of s 135 of the Indian Railways Act and is also entitled to the benefit of that section The property of such a Railway is liable to those municipal taxes which are sanctioned by the Government of India under s 135 and with regard to those taxes it would be entitled to the concessions mentioned in sections 143, 144, 170 and 172 of the City of Bombay Municipal Act, 1888 The City of Bombay Municipal Act makes no distinction between Government property used for purposes of profit and Government property not so used as the District Municipal Acts do For the purposes of s 59 of the B D M Act 1901 (Bom III of 1901) and section 73 of the B C M Act 1925 (Bom XVIII of 1925) the property of such a Railway would have to be regarded as used for purposes of profit and therefore liable to be taxed at the full rate to such municipal taxes as have been sanctioned by the Government of India under s 135 of the Indian Railways Act **(R L A's opinion no 3998 dated the 17th December 1926 in G R G D No 3979 dated the 4th January 1927)**

In respect of the tax payable by the Railway administration to a local authority under the provisions of the Railways (Local Authorities Taxation) Act, 1941, it is provided by s 3 (2) of that Act that in lieu of the tax such sum may be paid as may be fixed by a person being a District Judge or High Court Judge, appointed in this behalf In respect of the tax payable by the Railway Administration to a local authority under the provisions of the Railways Act 1890, it is provided by s 135 of that Act that in lieu of the tax such sum may be paid as is fixed by an officer appointed in this behalf, the officer so appointed at present being the Commissioner The question now is whether s 3(2) of the Railway (Local Authorities Taxation) Act ousts the jurisdiction of the Commissioner in all cases The answer is in the negative Section 135 of the Railway Act has not been repealed either expressly or by implication On the contrary that section and the notifications under it continue to apply to all railways other than the State owned railways The Railways (Local Authorities Taxation) Act, 1941, has in fact no application to railways other than State owned railways As regards State owned railways also s 135 continues to have application, but with a force limited in two directions under the Government of India Act 1935, firstly, the principal provision of s 154 of the Government of India Act precludes the levy of any new or higher tax on the railway by a local authority except when a Federal Law otherwise provides and secondly, section 143 (2) and the proviso to s 154 of the Government of India Act preclude the exemption, whether partial or complete, of the railway from any tax continued to be levied

by a local authority 'except when a Federal Law otherwise provides' The result is that in respect of State owned railways a Federal law alone can—(a) remove or reduce the liability to an existing tax, and (b) add or increase the liability to a fresh or higher tax imposed by a local authority The Railways (Local Authorities Taxation) Act is such a Federal Law In other words, it enables fresh or increased taxation by local authority whenever the Central Government publishes a declaration in this behalf by a notification under s 3 (1) It also enables reduction or removal of any existing taxation whenever the Central Government revokes or varies a notification already issued under s 4 It is thus clear that until a notification of revocation or variation is issued under s 4, a notification already issued under s 135 of the Railway Act will continue to have the same binding force against the State owned railways as is permitted by the Government of India Act To the extent that s 135 subjects the State owned railways to any particular tax, the machinery to fix an alternative sum in lieu of that tax is therefore prescribed by s 135 of the Railways Act and not the one referred to in the section 3 (2) of the Railway (Local Authority Taxation) Act, **(R L.A.'s opinion no 3477 dated the 23rd April 1942 in G R G D No 4372/33-A dated the 21st May 1942)**

Traveller's Bungalow '—A traveller's bungalow which is provided for the accommodation of the European or higher class native travelling public is 'used solely for the public purposes' within the meaning of proviso (a) to s 59 of Bombay Act III of 1901. A building cannot be said to be 'used or intended to be used for the purposes of profit' unless there is at least some reasonable prospect of a net profit being derived from the use to which a building is put The traveller's bungalows are therefore legally exempt from taxation unless Government expressly consent to its imposition **(R L.A.'s opinion no B-200 dated the 20th December 1901 in G R.G D no 177 dated the 9th January 1902 and printed as accompaniment to G R G D no 6765 dated 22nd April 1927.)**

Provision of residences for Government Officials has been held by Privy Council to be a public purpose **(Petit v Secretary of State, 39 Bom 279)** A fortiori, the provisions of practically rent free accommodation for touring officers is a public purpose and the fact that non-officials are allowed to use the bungalows when not required by officials is quite irrelevant in this connection. The bungalows are exempt from taxation **(R.L.A.'s opinion no 1322 dated the 11th April 1927 in G R G D no 6765 dated the 22nd April 1927).**

Puggis' quarters attached to District bungalows —Puggis' quarters form necessary adjuncts of the District bungalow and are on the same footing as that mentioned in **General Department Resolution no 6765 dated the 22nd April 1927,** they cannot be considered as being used for purposes of profit, the main ground being that the bungalows and the quarters from one unit **(G R.G.D. no 6765 dated the 26th November 1928)**

Police Buildings —The levy of house tax on police buildings situated within municipal limits is opposed to the provisions of s 77 of the District Police Act 1890 and to the provisions of s 59 of the B D M Act, 1901 Police buildings are used solely for public purposes and not for purposes of profit and they are therefore, exempt from taxation under proviso (a) to s 59 of the B.D.M Act, 1901, or proviso (a) to s 73 of the B C.M Act, 1925 **(G R G.D no. 6765 dated the 4th July 1927)**

Hostels attached to Government Schools:—Under proviso (a) to s 59 of the B D.M. Act, 1901 (or proviso (a) to s 73 of the B.C.M. Act, 1925), no tax other

than a special sanitary cess (a drainage tax) or a water-rate shall be levied without the express consent of Government in respect of any building belonging to His Majesty and used solely for public purposes and not used or intended to be used for purposes of profit As held by the Privy Council the term 'public purpose' includes purpose, that is, an object or aim in which the general interest of the community as opposed to the particular interests of individuals is directly and vitally concerned **(I L R 49 Bom. 279).** Education is in the general interests of the community and a hostel attached to a Government High School can appropriately be said to be used for a public purpose within the meaning of the provisions above mentioned The rent realised in respect of rooms occupied by boarders is only nominal and no profits are derived from the institution The Hostels are, therefore, exempt from municipal taxation **(R.L.A.'s opinion no 1833 dated the 7th May 1927 in G R.G D no 6765 dated the 17th August 1927).**

Jail buildings —Under proviso (a) to s 59 of the B.D M Act, 1901 and proviso (a) to s 73 of the B M B Act, 1925, all prisons and residential quarters of the jail staff are exempt from the levy of house tax by municipalities, on the ground that they are buildings belonging to His Majesty and used solely for public purposes and are not used or intended to be used for purposes of profit **(G.R.G.D no 6765 dated the 7th October 1927)**

Rent free quarters of peons of Revenue and excise department:— The quarters are built according to a system which brings an economic rent. They are therefore used or intended to be used for the purposes of profit within the meaning of proviso (a) to s 59 of the B.D M Act, 1901 and proviso (a) to s 73 of the B C M Act, 1925 That they are given rent free makes no difference inasmuch as Government gets a return in smaller wages being paid to the peons on that account **(G R G D no. 6765 dated the 14th December 1928)**

Charitable buildings belonging to Government—Whether exempt from house tax·—Land and buildings in the City of Bombay used exclusively for charitable purposes, e g medical, educational, public health or agriculture, though vested in His Majesty are exempt from payment of the general tax of the Bombay Municipality under s 143 (1)(a) of the City of Bombay Municipal Act, 1888 The distinction between s 143(1)(a) and s 143(1)(b) is the purpose for which the building or land is occupied, and the question of ownership is not the first important factor Once the property is held to be exclusively occupied for charitable purposes, it is immaterial who is the owner If it is not so occupied, the next question is whether the building or land is vested in His Majesty If so the next question to be considered is whether the same is used solely for public purposes If it is shown that the building or land vested in His Majesty was solely occupied for a public purpose, the last question is whether it was used or intended to be used for the purposes of profit If all the three features exist, the assessment will be as provided in s 144 and the amount will be ascertained by the machinery provided in s 144(2) and (3), **The Municipal Corporation of the City of Bombay v The Province of Bombay, 45 B L R 914**

General—Whether a tax can be leased.—In the Saundati Yellama Municipality v Shripad Bhat, 35 B L R 163, it was held that s 81 (a) of the Bombay District Municipal Act, 1901 (equivalent to s 101 of the Boroughs Act) empowers a municipality to lease the levy of any toll imposed under the Act but not the levy of any tax From this it follows that since there is no provision to farm out a tax a municipality has no power to lease the levy of a tax

Power to limit or extend the period of sanction:— By this section the Government are given wide and unrestricted powers According to this section all taxation is to be imposed subject to any general or special orders which may be made by Government It is therefore competent to Government to limit the period of operation of the tax in the first instance and to extend the period **See Dema v. Emperor, 38 B L.R 790** According to the same case the extension of the period of sanction does not amount to imposition of a new tax

Whether by-law can cut down an exemption allowed by the legislature:— See notes under this head under s 61

Rules and by-laws imposing a tax on hotels and restaurants:— See notes under this head under s 58

Interpretation of s. 74—buildings beneficially occupied —See notes under this head under s 74

Interpretation of s 60 (c) of the B.D.M. Act, 1901 and of s. 75 (c) of the B.M.B. Act, 1925—Whether fresh publication necessary in case of modification of the proposed tax.—See notes under this head under s. 75

Payment to be made to the municipality in lieu of a rate on buildings by the Govt concerned or the Crown Representative, as the case may be.

74 (1) The Government concerned or the Crown Representative, as the case may be, shall pay to the municipality annually in lieu of a rate on buildings from which buildings vesting in His Majesty are exempted by proviso (a) to section 73, a sum ascertained in the manner provided in sub-sections (2) and (3).

(2) The rateable value of the buildings vesting in His Majesty and beneficially occupied, in respect of which but for the said exemption a rate on such buildings would be leviable from the Government concerned or the Crown Representative shall be fixed by a person from time to time appointed in this behalf by the Provincial Government The said value shall be fixed by the said person, with a general regard to the provisions hereinafter contained concerning the valuation of property assessable to property-taxes, at such amount as he shall deem to be fair and reasonable The decision of the person so appointed shall hold good for a term of five years, subject only to proportionate variation, if in the meantime the number and extent of the buildings vesting in His Majesty in the said borough materially increases or decreases

(3) The sum to be paid annually to the municipality by the Government concerned or the Crown Representative shall be eight-tenths of the amount which would be payable by an ordinary owner of buildings in the said borough on account of the said rate on buildings on a rateable value of the same amount as that fixed under sub-section (2)

Amendments:—The words 'Government concerned or the Crown representative as the case may be' and 'Government concerned or the Crown representative' were substituted for the word 'Government' by the Adaptation of Indian Laws

Order in Council The words 'The Provincial Government' were substituted for the words 'The Government' by ibid

Scope —This is a special provision made for buildings vesting in His Majesty It will be noted that such buildings are exempted from payment of a rate on buildings under proviso (a) to s 73 This section provides for payment in lieu of such a rate It should also be noted that this section only provides for payment in lieu of a rate on buildings but does not make provision for other exemptions granted under the proviso

Buildings of the University of Bombay are not Government property:— The buildings occupied by the University of Bombay, viz, the Sir Cowasji Jehangir Hall, the Library and the Rajabai Tower, are not Government property, and are not included in the property for which Government pays a lump sum under s 144 of the Bombay Municipal Act III of 1888 **The University of Bombay v. The Municipal Commissioner of Bombay, 16 Bom 217** Dealing with the question, Sargent C J said "The first question which it will be convenient to consider is whether, as contended for the University, the buildings in respect of which the municipality seeks to levy the general tax are Government property and as such included in the property for which Government pays a lump sum under s 144 of the Bombay Act III of 1888 We have no doubt that they cannot be included in it The circumstances under which the buildings in question viz, the University Hall, Library and Tower were erected are stated in the University Calendar, and they clearly show that the buildings owe their existence to benefactions intended as gifts to the University, the acceptance of which as such was formally voted with respect to each building by a resolution of the senate In the case of the Hall the Government itself contributed a part of the cost, and it was accordingly formally handed over by the original benefactor, Sir C Readymoney and the Government in 1875, after its completion, to the University, to be held, and was accepted as expressed in the resolution of the senate of 18th July, 1863—to be held according to the Act of Incorporation The several buildings thus became, it is clear, the property of and vested in the University to be used for the purposes of the University as provided by s 2 of the Act of Incorporation (XXII of 1857), and under these circumstances it follows that they are not held by the Crown or for the Crown, but are as Lord Cairns expresses it in **Greig v University of Edinburgh** 'Property vested in the Senatus Academicus for University purposes' and none of those purposes, as Lord Westbury pointed out in the above case are purposes 'within the proper meaning of Government purposes' It is true that the Governor of Bombay in Council has certain powers under the Act of nominating the Vice-Chancellor and Fellows, and controlling the creation of by-laws and imposition of fees But such powers are of a visitorial character, and as was held in the case of the University of Edinburgh, do not affect the question whether the property is Crown property"

Interpretation of s. 74—buildings beneficially occupied —Under s 73 of the Bombay Act XVIII of 1925, buildings belonging to His Majesty and used solely for public purposes and not used or intended to be used for purposes of profit are exempt from all forms of municipal taxation except special sanitary cess, a drainage tax and water rate Such buildings under s 74(1) are liable to pay annually in lieu of rate on buildings, a sum ascertained in the manner provided in s 74(2) and (3) Section 74(2), however refers only to such buildings as are beneficially occupied and s 74(3) prescribes the payment of a fixed proportion of their rateable value It should, therefore, be considered that the special

reduced payment in lieu of rate on buildings should be on buildings belonging to His Majesty and used solely for public purposes and beneficially occupied As regards buildings not beneficially occupied, though the same are used for public purposes, no rateable value should be fixed and no sum in lieu of a rate on buildings should be paid A building should be considered as beneficially occupied when the occupation is of value to the owner or occupier of the building **(G.R.G D no 6765 dated the 27th November 1928).**

See notes under Proviso (a) to s 73.

Charitable buildings belonging to Government—Whether exempt from house-tax.— See notes under this head under s 73

Procedure preliminary to imposing tax.

75. A municipality before imposing a tax shall observe the following preliminary procedure —

(a) it shall, by resolution passed at a general meeting, select for the purpose one or other of the taxes specified in section 73 and approve rules prepared for the purposes of clause (j) of section 58, prescribing the tax selected, and in such resolution and in such rules specify—

(i) the classes of persons or of property or of both, which the municipality proposes to make liable, and any exemptions which it proposes to make,

(ii) the amount or rate at which the municipality proposes to assess each such class,

(iii) in the case of a rate on buildings or lands or both, the basis, for each class, of the valuation on which such rate is to be imposed;

(iv) all other matters which the Provincial Government may require to be specified therein

(b) When such resolution has been passed, the municipality shall publish the rules so approved with a notice in the form of Schedule II prefixed thereto

(c) Any inhabitant of the municipal borough objecting to the imposition of the said tax or to the amount or rate proposed or to the classes of persons or property to be made liable thereto or to any exemptions proposed may, within one month from the publication of the said notice, send his objection in writing to the municipality; the municipality shall take all such objections into consideration, or shall authorize a committee to consider the same and report thereon, and unless it decides to abandon the proposed tax, shall submit such objections with its opinion thereon and any modifications proposed in accordance therewith, together with the notice and rules aforesaid to the Provincial Government

Explanation —In the case of lands the basis of valuation may be either capital or annual letting-value

Amendments —The words "The Provincial Government" was substitutes for the words "The Government" by the Adaptation of Indian Laws Order in Council

Procedure before imposing a tax—Validity of a tax —This section prescribes the procedure that must be strictly observed before imposing a tax In **Kalu Karim v. City Municipality of Broach, 29 B.L.R 1041**, the Municipality of Broach in order to levy terminal tax on certain commodities brought within its limits followed the procedure laid down in section 60 of the Bombay District Municipal Act, 1901 (equivalent to s 75 of the Boroughs Act) by publishing under section 60 draft rules and scale of tax, and inviting objections of the public to the levy of the tax When the rules and the scale were submitted to the Government for sanction, the Government sanctioned the rules and the scale, but omitted one item from the schedule The Municipality commenced to levy the tax on items sanctioned by the Government, and again applied, to government for sanction to the omitted item The Government allowed the sanction, and the Municipality began to levy the tax on articles covered by the new item One of the articles so included was fruits The plaintiffs who were fruit merchants, sued for a declaration that the imposition of the tax on fruits was illegal on the ground that the municipality had not followed the procedure prescribed by section 60 of the Act before obtaining the sanction of the Government on the second occasion The trial Court decreed the suit but the District Judge on appeal dismissed it on the ground that the levy on the second occasion was not a new tax and the procedure under section 60 was therefore not obligatory On second appeal —Held, that, the levy of the tax on fruits was illegal for it was obligatory on the municipality before it approached Government to reintroduce the item which had been disallowed on the first occasion, to follow the procedure prescribed by section 60 of the Bombay District Municipal Act 1901 (equivalent to section 75 of the Boroughs Act)

In **Joshi Kalidas v The Dakor Town Municipality, 7 Bom. 399**, on the 18th of March 1880, the Dakor Town Municipality acting under the powers onferred upon them by the Bombay Act 6 of 1873, convened a meeting at which it was resolved to impose a house-tax in the town, and also another meeting on the 2nd of April 1880, at which a classification of the houses was made and the rates fixed The Revenue Commissioner N D, on behalf of the Government sanctioned the resolution on the second of June, 1880 Notice of the meeting of the 18th March 1880 was not served on three of the Commissioners, they being absent at the time from Dakor, and no notice specifying the business to be transacted therein was posted up at the Kacheri, as required by section 11 cl 1 of the Act K, a house-holder, sent a notice to the municipality on the 25th of January, 1881, impeaching the legality of the tax On the 3rd of June, 1881, he paid the tax, namely Rs 2 for which he had been rated, and on the 6th of January 1882, he sued for a refund of the same sum from the municipality Held, that the suit was not brought too late to satisfy the requirements of section 86 of the Act When the notice of the 25th of January, 1881 was sent by K, he had no cause of action against the municipality for anything done No notice, therefore, such as is contemplated by s 86, was ever sent by K, and consequently there could be no final order on such notice from which the three months prescribed by that section would run The provisions of s 11 cl 1, as to notice of

meeting are not directory but obligatory, and notice to all the Commissioners of the meeting of the 18th of March 1880, being a material part of the machinery provided by the Act for imposing a legal tax, was a condition precedent to the validity of that tax Consequently the resolution come to on the 18th of March 1880 was not legal, and whether sanctioned or not by the Government, it always retained its inherent defect Section 21 which enables the Government to dispose of objections made to a tax by the inhabitants of a town, is quite consistent with the well established jurisdiction of the Civil Court to decide as to the validity of any fresh tax or impost, and affords no sufficient ground for the conclusion that the intention of the legislature was to take away that jurisdiction This was a case under the Bombay District Municipal Act, 1873 wherein there was no provision like section 57 of the Boroughs Act In the Boroughs Act, section 57 clearly lays down that an irregularity in the service of notice of a meeting will be of no avail unless the proceedings are materially prejudiced Also the Boroughs Act does not make any difference between a meeting for imposition of a tax and any other meeting Hence non-service of notice to any Councillor will not invalidate the proceedings unless they were prejudicially affected In view of this, **Josi Kalidas v the Dakor Municipality, 7 Bom. 399,** is no longer a good authority under the Boroughs Act See notes under the head **'irregularity in the service of notice'** under section 35 and also notes under section 57

In 1891 the Municipality of Surat apppointed a committee to revise the taxation of the city, proposing to reduce some of the existing taxes and impose others with a view (inter alia) of obtaining a better water supply for the city A scheme of taxation drafted by the committee was subsequently adopted by the municipality, and it included a new house and property tax. The municipality then issued a notice with regard to this last mentioned tax under the provision of section 21 of Act VI of 1873 setting forth the particulars of the proposed tax and requiring objections to be lodged within a fortnight from the date of the notice A number of objections were received which were laid on the table for twenty one days for perusal and consideration by municipal commissioners At the end of that time a special meeting of the commissioners was held at which it was resolved that the objections were invalid, and the scheme and the rules with regard to the levying of the tax were forwarded to the Government and were sanctioned The plaintiffs sued for an injunction restraining the municipality from levying the tax, contending that it was illegal on the ground (1) that there was no municipality desirous of imposing the tax for any of the purposes allowed by the Act inasmuch as the commissioners who passed the resolution to impose the tax, did not know for what purpose the tax was to be imposed, (2) that the resolution imposing the tax was illegal because the notice calling the meeting of the commissioners, which passed the resolution did not specify this tax as the object of the meeting, (3) that the notice given under section 21 of Act VI of 1873 was bad as it did not state the purpose of the proposed tax, (4) that the nature and the amount of the tax were not sufficiently stated in the notice, (5) that the notice ought to have stated the mode in which the valuation of the property for the purpose of the tax was to be made, (6) that the objections of the rate payers were not sufficiently considered, (7) that it did not appear whether the tax was to be paid in advance or not, and (8) that the assessment of the tax was made on a wrong basis Held, that the purpose of the tax was sufficiently known to the commissioners' (2) that the resolution imposing the tax was not invalid, although the notice convening the

meeting did not specify the object of the meeting, (3) that the notice did not specify the purpose of the tax, (4) that as to the nature and the amount of tax the notice was sufficient, as it stated that the amount would depend on the valuation of the property, (5) that the notice did not define the mode of valuation, (6) that the objections were sufficiently considered, (7) that the tax was to be paid partly in advance, (8) that the assessment would not affect the validity of the tax, but would give a right of appeal to have the valuation set right. **Surat City Municipality v Ochhavram Jamnadas, 21 Bom. 630**

Whether the procedure prescribed is necessary in case of extension of period of sanction.—The extension of the period of sanction fixed under section 77 (c) does not amount to imposition of a new tax and therefore in such a case it is not necessary to repeat the procedure prescribed under this section **See Dema v. Emperor, 38 B.L.R 790.**

Shall take all such objections into consideration —In the Surat City Municipality v Ochhavram Jamnadas, 21 Bom. 630, a special general meeting was held to consider the objections at that meeting It was proposed and seconded that "the municipality having considered the objections and being of opinion that they are invalid, the rules passed on 23rd November, 1892, be forwarded for sanction by Government" Three amendments were proposed successively to this proposition viz, (1) that the scheme should not be submitted to Government as it was illegal, (2) that petitions be severally considered and disposed of, (3) that the printed petitions be read and considered separately Each was voted and negatived, and the original proposition was ultimately put to the meeting and carried Discussing this point in the course of the judgment Parson J observed "It seems to us that this is a consideration within the meaning of the clause which requires consideration only and is silent as to the amount as well as the quality of that consideration It is to be noted also that it is the objection only that has to be considered The petitions may be, innumerable, the objections may be few In the present case it has been pointed out to us that they are very few, for the most part the petitions contain only individual objections to pay a house-tax and statement that a water supply was not necessary During the twenty three days that the petitions lay on the table most of the commissioners went and read them, three of them read them whole, one read fifty, another a thousand, another four or five thousand and so on One witness only says that he did not read any, but he had been sick and had not attended the meetings for over a year and a half before he was examined The members, therefore, who attended at the special meeting were generally well acquainted with the nature of the objections and so able to discuss and consider them Apparently a full discussion took place about them No one was refused a hearing, and it is not suggested that the meeting was brought to an end by any application of the closure or other abrupt method. All that was refused was the reading and consideration of the petitions severally That in our opinion, was unnecessary, in the present case it was almost impossible"

Chairman considering the objections and reporting his opinion to Government, not valid —In the Municipality of the City of Poona v. Mohanlal Lilachand and others, 9 Bom 51, it was held that the requirements of cl 2 of s 21 of the Bombay District Municipality Act VI of 1873, which enacts that "any inhabitant of the Municipal District objecting to such tax, toll or impost, may within a fortnight from the date of the said notice, send his objection in writing to the municipality and the municipality shall take such objections into consideration

and report their opinion thereon to the Governor in Council" are not satisfied by the Chairman of the Managing Committee considering the objections of the inhabitants and reporting his opinion to the Governor in Council, or his representative the Commissioner of the Division The provision for forwarding the opinion of the municipality on the objections is essential part of the machinery provided by that section for the legal imposition of a tax

Burden of proof:—See notes under section 57 (2)

Fixed charges and agreement for payment in lieu of water-rates—Whether a tax or a contractual charge—Application of s 75 to rules under s 58(j) for water rate under s. 91 and of s. 48:—See notes under this head under s. (20)

Whether local bodies can levy betterment charges —See notes under this head under s. 73.

Rules for levying fees for projecting shop boards—Whether action under s. 60 (b) and (c) of the B.D.M. Act, 1901 's. 75 (b) and (c) of the B M.B. Act, 1925) necessary.—See notes under this head under s 58

Rules and by-laws imposing a tax on hotels and restaurants —See notes under this head under s 58

Interpretation of s. 60 (c) of the B D.M. Act 1901 and of s 75(c) of the B.M.B. Act, 1925—Whether fresh publication necessary in case of modification of the proposed tax:—Under s 60 (c) of Bombay Act III of 1901 as it stands, if a municipality decides to modify a tax proposed and published it cannot submit the modified proposals to the commissioner but must go through the whole business of publication again It was presumably for this reason that the significant omission of the words 'or to modify' was made in section 75 (1) of Bombay Act XVIII of 1925 Under the later Act fresh publication of modified proposals for taxation is not necessary **(R L.A.'s opinion no O Munis. Dist 9 dated the 27th August 1928 in G.M G D no 371—11602 A dated the 27th September 1928).**

Power to sanction, modify and impose conditions.

76 The Provincial Government may refuse to sanction the rules submitted under section 75, or may return them to the municipality for further consideration, or if no objection which is in its opinion sufficient, was made to the proposed tax within the period prescribed under section 75, may sanction the said rules without modification, or subject to such modifications not involving an increase in the amount to be imposed, or to such conditions as to the application within the municipal borough to any purpose or purposes of this Act specified in such conditions of the whole or any part of the proceeds of the tax, as it deemed fit

Amendments.—The words 'The Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council.

Power of Government to dispose of objections to a tax does not take away the jurisdiction of Civil Courts to consider its legality:—This section enables the Government to dispose of objections made to tax by the inhabitants of the town This power is quite consistent with the well established jurisdiction of a civil court as to the validity of any fresh tax or impost and affords no sufficient

ground for the conclusion that the intention of the legislature was to take away that jurisdiction See **Joshi Kalidas v The Dakor Town Municipality, 7 Bom. 399.** This was a case under the Bombay District Municipal Act, 1873, but on this point it will be applicable to a case under the Boroughs Act Also see notes under section 75

Publication of sanctioned rules with notice.

77 Rules sanctioned under section 76 with the modifications and conditions, if any, subject to which the sanction is given shall be published by the municipality in the municipal borough, together with a notice reciting the sanction and the date and serial number thereof, and the tax as prescribed by the rules so published shall, from a date which shall be specified in such notice and which shall not be less than one month from the date of publication of such notice, be imposed accordingly, and the proceeds thereof shall be applied by the municipality in accordance with all conditions, if any, subject to which sanction under section 76 was given

Provided that—

(a) a tax leviable by the year shall not come into force except on one of the following days, namely, the first day of April, the first day of July, the first day of October or the first day of January in any year, and if it comes into force on any other than the first day of April, it shall be leviable by the quarter till the first day of April then next ensuing,

(b) on or before the day on which a notice is issued under this section, the municipality shall publish such further detailed rules as may be required, and as may have been approved by the Provincial Government under clause (a) of the proviso to section 58, prescribing the mode of levying, and recovering the tax therein specified and the dates on which it or the instalments, if any, thereof shall be payable

(c) if the levy of a tax, or of a special portion of a tax, has been sanctioned for a fixed period only, the levy shall cease at the conclusion of that period, except so far as regards unpaid arrears which may have become due during that period

Amendments —The words The Provincial Government were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council

Publication —Once the rules sanctioned are published under this section any further tax will be a new tax and will require a fresh notice under section 75 See **Kalu Karim v City Municipality of Broach, 29 B L R 1041**

Rules not covered by the provisions of the Act cannot have force of law —This section does not say that rules sanctioned under s 76 are to have the force of law and moreover it cannot be the intention of the legislature to give legal effect to the rules not covered by the provisions of the Act See **Dema Mahidu v**

Emperor, 38 B.L.R. 790, wherein sections 101 and 102 of the Bombay Local Boards Act, 1923, (which are equivalent to s 76 and 77 of the Boroughs Act) came for consideration It will thus be seen that if any rule is against the provisions of the Act or is not covered by the Act it will be invalid in spite of the fact that the Government have sanctioned the same under section 76

Provisions of section not to apply to extension of period of levy

Sub-Section 77(c)—Extension of period does not require fresh publication.—This provides for sanction for a fixed period and states that after the expiry of the period the levy shall cease This does not mean that the Government have no powers of extending the period—See **Dema v Emperor, 38 B.L.R 790** According to the same case the extension of the period does not amount to imposition of a new tax and therefore it is not necessary to repeat the procedure prescribed in section 75

Municipalities empowered by Provincial Government to levy taxes at varying amounts or rate.

77A. (1) The Provincial Government may, by notification in the Official Gazette, empower any municipality to levy any tax imposed by such municipality under section 73 within such maximum and minimum limits either as to the amounts or the rate as may be specified in such notification

(2) notwithstanding any resolution or rule under section 75 specifying the amount or rate at which such tax is leviable, any municipality empowered under sub-section (1) may, by a resolution passed at a general meeting, decide to increase or reduce the amount or rate at which such tax is leviable

Provided that—

(a) such increase or reduction shall be within the maximum and minimum limits fixed in respect of such tax under sub-section (1), and

(b) such increase or reduction shall not exceed ten percentum of the amount or rate at which such tax was leviable during the preceding official year

(3) When a municipality has by a resolution passed under sub-section (2) decided to increase or reduce the amount or rate at which any tax is leviable, the municipality shall publish in the municipal borough the resolution together with notice specifying a date, which shall not be less than one month from the date of publication of such notice from which the amount or rate at which any tax is leviable shall be so increased or reduced The tax at the amount or rate so increased or reduced shall be leviable from the date specified in such notice

Amendments:—Section 77A was inserted by Bom 19 of 1935, s 8 The words 'The Provincial Government' and the words 'Official Gazette' were substituted

for the words 'The Government' and 'Bombay Government Gazette' respectively by the Adaptation of Indian Laws Order In Council

Scope.—This section has been newly inserted to obviate the necessity of following the lengthy procedure prescribed in section 75 for small increases or decreases in the rate or amount of any tax After the necessary powers are given by the Provincial Government by a notification in the official Gazette, the municipality can alter the amount or rate within the prescribed limit by a mere resolution In that sense this section provides an exception to the procedure prescribed in section 75 Of course the powers of the municipality under this section are restricted by the proviso to sub-section (2) and a public notice as required by sub-section (3) must be given

(2) Assessment of and Liability to Rates on Buildings or Lands

78 (1) When a rate on buildings or lands or both is imposed, the Chief Officer shall cause an assessment-list of all buildings or lands or lands and buildings in the municipal borough to be prepared containing— Preparation of an assessment list

(a) the name of the street or division in which the property is situate,

(b) a description of the property sufficient for identification,

(c) the names of the owner, and occupier, if known,

(d) the valuation based on capital or annual letting value, as the case may be, on which the property is assessed, and

(e) the amount of the tax assessed thereon

(2) In assessing a tax on buildings or lands, where the valuation determined under clause (d) of sub-section (1) of this section is the annual letting value, a sum equal to ten per centum of the said valuation shall be deducted therefrom in lieu of all allowances for repairs or on any other account whatsoever

(3) For the purpose of preparing such assessment list the Chief Officer or any person acting under his authority may inspect any building or land in the municipal borough, and on the requisition of the Chief Officer the owner or occupier of any such building or land shall, within such reasonable period as shall be specified in the requisition, be bound to furnish a true return to the best of his knowledge or belief and subscribed with his signature of the name and place of abode of the owner or occupier or of both and the annual letting value and his estimate of the value of such building or land

Annual letting Value —See notes under section 3

Whether local bodies can levy betterment charges:—See notes under this head under s 73

Person primarily liable for a rate on buildings or lands or both how to be designated if his name cannot be ascertained

79. (1) When the name of the person primarily liable for the payment of a rate on buildings or lands or both in respect of any premises cannot be ascertained, it shall be sufficient to designate him in the assessment book, and in any notice which it may be necessary to serve upon the said person under this Act, "the holder" of such premises, without further description

Occupier liable for a rate on buildings or lands or both until he gives information

(2) If, in any such case, any person in occupation of the premises shall refuse to give such information as may be requisite for determining who is primarily liable as aforesaid, such person shall himself be liable, until such information is obtained, for all rates on buildings or lands or both leviable on the premises of which he is in occupation

Person primarily liable.—For the meaning of this expression see section 85

Publication of notice of assessment-list

80. When the assessment-list has been completed, the Chief Officer shall give public notice thereof and of the place where the list or a copy thereof may be inspected, and every person claiming to be either the owner or occupier of property included in the list, and any agent of such person, shall be at liberty to inspect the list and to make extracts therefrom without charge

Public notice of time fixed for lodging objections

81. (1) The Chief Officer shall, at the time of the publication of the assessment-list under section 80, give public notice of a date, not less than one month after such publication, before which objections to the valuation or assessment in such list shall be made, and in all cases in which any property is for the first time assessed or the assessment is increased, he shall also give notice thereof to the owner or occupier of the property, if known, and if the owner or occupier of the property is not known, he shall affix the notice in a conspicuous position on the property

Objections how to be made

(2) Objections to the valuation and assessment of any property in such list shall, if the owner, or occupier of such property desires to make an objection, be made by such owner or occupier or any agent of such owner or occupier to the standing committee before the time fixed in the aforesaid public notice, by application in writing, stating the grounds on which the valuation or assessment is disputed, all applications so made shall be registered in a book to be kept by the standing committee for the purpose

Hearing of objections

(3) The standing committee after allowing the applicant an opportunity of being heard in person or by agent, shall—

(a) investigate and dispose of the objections,

(b) cause the result thereof to be noted in the book kept under sub-section (2), and

(c) cause any amendment necessary in accordance with such result to be made in the assessment list

Provided that powers and duties of the standing committee under this sub-section may be transferred to any other committee appointed by the municipality or with the permission of the Commissioner, to any officer or pensioner of the Crown

Authentication of list.

(4) When all objections made under this section have been disposed of and all amendments required by sub-section (3) have been made in the assessment-list, the said list shall be authenticated by the signature of the chairman and at least one other member of the standing committee, or if the standing committee's powers and functions under sub-section (3) have been transferred to any other committee or to an officer or pensioner of the Crown, by the signature of not less than two members of such committee or of the officer or pensioner aforesaid, the person or persons so authenticating the list shall certify that no valid objection has been made to the valuation and assessment contained in the list except in the cases in which amendments have been made therein

Custody and inspection of list

(5) The list so authenticated shall be deposited in the municipal office, and shall there be open for inspection during office hours to all owners and occupiers of property entered therein or to the agents of such persons, and a notice that it is so open shall be forthwith published

Authenticated list how far conclusive

(6) Subject to such alterations as may be made therein under the provisions of section 82 and to the result of any appeal or revision made under section 110, the entries in the assessment-list so authenticated and deposited and the entries, if any, inserted in the said list under the provisions of section 82 shall be accepted as conclusive evidence—

(i) for the purpose of all municipal taxes, of the valuation, or annual letting value on the basis prescribed in the rules regulating the rate, of buildings, lands and both the buildings and lands to which such entries respectively refer, and

(ii) for the purposes of the rate for which such assessment-list has been prepared, of the amount of the rate leviable on such buildings or lands or both buildings and lands in any official year in which such list is in force

Amendments.—The words 'the Crown' were substituted for the word 'Government' and for the words 'the Government' by the Adaptation of Indian Laws Order in Council

Authentication of the list.—Absence of authentication on an assessment list as required by this section does not by itself render the levy of the tax illegal **See Ambalal v The Ahmedabad Municipality, 23 B L R. 48** which was a case under section 65(4) of the Bombay District Municipal Act, 1901 (equivalent to s 81(4) of the Boroughs Act 1925)

Assessment list—procedure should be strictly followed.—Rule 74 of the Ahmedabad Municipality provided for preparation of the list and hearing and decision of objections to be completed before 1st of April every year and laid down that the payment of the tax shall be considered due on that date The Municipality sought to enhance the tax and for that purpose published the assessment list with the proposed alterations in April 1911 The notice of the proposed increase in tax was given to the plaintiff, on 20th June The plaintiff objected to the enhancement on 12th July but a demand was made for the enhanced amount on the 18th July A further protest was made by the plaintiff on the 30th July and his objections were heard and disposed of in December 1911 A notice of demand was served on the 27th January 1912, and the amount claimed by the municipality for the year 1911-12 was paid under protest It was held that the rule was not inconsistent with the provisions of the Act, and the municipality was empowered to make it under section 46(1) of the District Municipal Act, 1901 (equivalent to s 58 (1) of the Boroughs Act) The rule was held to be binding on the municipality and it was held that the non-compliance with that rule entitled the plaintiff to recover what had been levied by way of house and property tax in excess of what was payable in the beginning of the official year i e 1st of April **Ambalal v Ahmedabad Municipality, 23 B L.R. 48.**

Difference between taxation and assessment.—The plaintiff filed in 1920 a suit against the Municipality of Kalyan, for the refund of Rs 363-0-1 levied from him by the municipality for general sanitary cess and shop tax in regard to his property situated within the Kalyan Municipal area He also claimed Rs 6-10-9 as interest on the above sum to the date of the suit at rate of 6 per cent per annum The plaintiff's contention was that the recovery was illegal inasmuch as he was not given the notice required by s 65(1) of the District Municipal Act, and that the municipality did not observe the procedure prescribed by ss 59 to 65 of the Act in regard to the imposition of those taxes Dealing with this contention Macleod C J said "It is perfectly obvious that the plaintiff misread s 65 (1) and has confused taxation with assessment The municipality were not assessing plaintiff's property for the first time nor were they increasing the assessment Therefore no notice was required to be given to the plaintiff under that section They were levying the tax under s 59 (vii) 'a general sanitary cess for the construction or maintenance or both construction and maintenance of public latrines and for the removal and disposal of refuse' Proviso (i) says such a tax can be levied as a rate on buildings The municipality can impose separately any two or more of the taxes described in cls (i) (vii), (viii) and (ix), or they may impose a consolidated tax assessed as a rate on buildings or lands The fact remains that they were empowered to impose a general sanitary cess They did so by resolving that a rate of three per cent on the letting values of buildings should be levied for that purpose It is not suggested that the proper measures were not taken in order to validate the imposition of the tax." **Kalyan Municipality v.**

Govind Karsan, 27 B L R 447. It was also held in this case that a suit to recover the amount of tax illegally recovered by a municipality, coupled with a claim to interest on the amount as damages, falls under article 35 (j) of the second schedule of the Provincial Small Causes Courts Act, and is thus exempted from the jurisdiction of that Court

Objections—Standing Committee—Delegation —Under this section the objections to the assessment list are to be made to and heard by the Standing Committee The powers of the Standing Committee under this section can be delegated to some other committee by the municipality or with the permission of the Commissioner to any officer or pensioner of the Crown The words of the 'Crown' also go with the word 'Officer' Thus the power of the Standing Committee under this section cannot be transferred to the President, and if the municipality has made a rule transferring these powers to the President the rule is ultra vires The Municipality of Lonavala constituted under the Bombay City Municipalities Act, 1925, did not appoint a standing committee as required by s 37, but made a rule which was sanctioned by Government under section 58 (b) read with s 46 of the Act, and which ran 'All powers or duties or executive functions to be exercised or performed on behalf of the Municipality are delegated to the President' The Municipality prepared a revised assessment list of houses within its limits under s 80 to which objections were preferred, which in the absence of the standing committee by whom they were, as provided by s 81 to be disposed of, were disposed of by the President under the authority of the above rule Held, that the rule made by the municipality delegating the powers of the standing committee to the President was ultra vires, and did not authorise him to hear and decide the objections **Prithviraj v The Lonavala Municipality, 35 B.L.R 138**

Objection to assessment—hearing —Where a committee to deal with objections to assessment confirms the assessment without giving the assessee opportunity to be heard, and the assessee without filing an appeal to the magistrate pays the amount under protest and sues for recovery of the amount in a civil court, the suit is maintainable, as one of the essential conditions expressly laid down by s 65 (3) is not complied with and the order passed by the Assessing Committee is without jurisdiction and ultra vires **Karsondas v. Karachi Municipality, A.I.R. 1936 Sind 114.**

Refund of excess —A municipality assessed a tax for the year without complying with the provisions of the law The assessee paid it under protest and sued for refund of the excess It was contended that the assessment fixed and levied during the previous year was good and hence he was entitled to refund of excess over that amount Held that the mere fact that the municipality failed to comply with the provisions of the section was not by itself sufficient to enable the assessee to escape payment of the proper assessment Before he could recover the excess which he paid he must satisfy the court that it was not payable **Karsondas v Karachi Municipality, A I R 1936, Sind 144** In the course of the judgment the learned Judge observed "It is urged on behalf of the plaintiff that as the assessment levied from the plaintiff for the year in dispute was fixed without complying with the provisions of the law, the assessment fixed and levied during the previous year stands good, and the defendants are entitled to recover that amount and no more But we are afraid we cannot accede to this argument The mere fact that the defendants failed to comply with the provisions of the section is not by itself sufficient to enable the

plaintiff to escape payment of the proper assessment Before he can recover the excess, which he has paid he must satisfy the court that it was not payable and that the annual letting value of his property during the year in dispute was the same as that shown by him in his objections

Sub-section (2):—Sec 110 provides that no appeal shall be maintainable unless an application in writing under this clause stating the grounds on which the claim of the municipality is disputed is made to the standing committee within the time fixed in the notice given under this section

Sub-section (6)—Finality of the list—Jurisdiction of Civil Courts:—Sections 78 to 81 and sections 110 and 111 provide a complete machinery for determining the amount of tax to which a building or land is liable . This sub-section lays down that after a list is prepared and authenticated in the manner provided in sections 78 to 81 it is final subject to an appeal under section 110 or revision under section 111 or amendment by the Standing Committee under section 82. Thus jurisdiction of a civil court is completely ousted so far as assessment is concerned and it is not open to a civil court to substitute itself in the place of the authorities empowered under the above sections and put its own valuation. That would be substituting an authority quite different from the one prescribed by the Act

Under the rules passed under the Bombay District Municipal Act (Bom. Act VI of 1873) as amended by Bombay Act II of 1884, the Municipality of Wai estimated the annual letting value of a house belonging to the accused at Rs 50 and levied a house-tax of Rs 2-8-0. A, a tax-payer applied to the Managing Committee for a reduction of the tax, but his application was dismissed Default having been made in the payment of the tax, A was prosecuted under section 84 of the Act before a second class magistrate He contended that the estimate made by the municipality was too high and that his house would not let for more than 10 or 12 rupees a year The magistrate took evidence on the point and found that the annual rental of the house would not exceed Rs 12, and he ordered payment of 12 annas only on account of the tax Held, that the magistrate had no power to go behind the estimate of value framed by the Managing Committee under the powers given to it by the rules He ought to have accepted as conclusive the amount found by the Managing Committee to be the letting value of the house, and held the legal liability of the accused to pay the tax based on this amount to be proved The remedy of the accused, if he considered his house assessed too highly, was to apply to the Managing Committee, and no other mode of redress was open to him **The Municipality of Wai v Krishnaji Gangadhar, 23 Bom 446** . In the course of the judgment Parson J said "In the case of the **Municipality of Ahmedabad v Jumna Punja (17 Bom. 731)** where the legal liability depended upon the possession of a Khalkundi and a tub and there was no provision for the determination of this point by the municipality, we held that the magistrate should himself determine the point This is doubtless good law In criminal references Nos 119 and 120 of 1891 the legality of the assessment depended upon the amount of the earning of the family and its possessing Khalkuwas or Khalkundis In our judgments we say 'Neither in the Municipal Acts nor in the rules framed thereunder was there any machinery provided by which the amount of the earnings of the family or the question of its possession of Khalkuwas or Khalkundis could be determined by the municipal authorities Nor is there any mode provided by which a person assessed to pay the cess in question at a certain rate can contest that assessment before municipal or other civil authority'. It was obvious therefore that the magistrate had to determine the

point before he could hold legal liability proved In the present case also the question of legal liability for a certain amount of tax has to be determined by the magistrate, and he has to determine it upon the value of the premises of the accused The determination, however, of this value is not placed in his hands The rules provide for this value being estimated by the Managing Committee and a mode of redress against over-valuation is provided by application to the Managing Committee In such a case the magistrate ought to have accepted as conclusive the amount found by the Managing Committee to be the letting value of the house and held the legal liability of the accused to pay the tax based on this amount to be proved He had no power to review the decision of the Managing Committee, and reverse it on fresh evidence taken before himself "

The above case was followed in **Morar v Borsad Town Municipality, 2 B L R 417,** where it was held that a civil court has no power to interfere in the matter *of valuation of houses made by a municipality The learned Judges observed* "The question referred for our decision is whether a civil court can interfere in the matter of the municipal valuation of the houses We answer that question in the negative The rules imposing the house-tax defined estimated value to mean with reference to a house or a shop '(a) the market value of the site thereof, and (b) the present value of the buildings, arrived at by the Committee appointed for this purpose by the municipality by computing the probable cost of erecting the same and making a fair deduction on account of deterioration' Thus the valuation in the first instance is placed in the hands of a Committee *By a subsequent rule a remedy against over-valuation by this committee is provided* in the shape of an appeal to the General Committee It is we think clear that a civil court cannot put itself in the place of, or over, either the committee or the General Committee and revise the valuation made by them The case is exactly similar to the case of the **Municipality of Wai v Krishnaji Gangadhar, 23 Bom 446** decided by us on the 5th September 1898, for although in that case we dealt with the powers of a magistrate, the powers of a civil court are no greater It is bound to accept as conclusive the valuation come to by the only authority in whom the power of making the valuation is placed by law, and it *cannot substitute for that valuation one made by itself* "

In **Karsandas v The Ankleshwar Municipality, 3 B L R 882,** the same principle was approved and it was held that where, in the assessment of a house-tax by a municipality no breach of prescribed rules has been committed, the civil courts in the absence of any proof of malafides, a perversity or manifest error, cannot interfere on the mere suggestion that the valuation is too high Civil Courts have jurisdiction to interfere in cases where the plaintiff's complaint is not merely that the valuation, for the purpose of assessing house-tax, is wrong, but that it has been arrived at in contravention of the rules which are by law applicable

In **Hamirsing v The Amod Town Municipality, 7 B L R 288,** the plaintiff filed a suit in a civil court to recover from a town municipality the amount of a house-tax illegally assessed and recovered from him The court came to the conclusion that there was an illegality in the assessment and the recovery complained of, but the court by itself went into the question of assessment and fixed the amount of house-tax and dismissed the plaintiff's suit Held, setting aside the decree and awarding the plaintiff's claim, that the High Court could interfere under s 622 of the Civil Procedure Code, inasmuch as the court in fixing

the amount of a house-tax exercised the functions which the legislature vested elsewhere, and so far exercised its jurisdiction improperly

However, a suit will lie in a civil court if the imposition of the tax is challenged on the ground of its being illegal or invalid See **Joshi Kalidas v Dakor Town Municipality, 7 Bom. 399; Pitambardas v Jambusar Town Municipality 17 Bom 510, The Surat City Municipality v. Ochhavram Jamnadas, 21 Bom 630, Karsandas v. Ankleshwar Town Municipality, 3 B L R 882, Chunilal Thakordas Modi v Surat City Municipality, 5 B.L.R. 267, Hamirsing v Amod Town Municipality, 7 B L.R. 288; The Secretary of State for India v Huges, 16 B L R 121, The Surat City Municipality v. Chhabildas, 16 B L R 749, Ambalal Sarabhai v the Ahmedabad Municipality, 23 B.L.R. 48, Kalyan Municipality v Govind Karsan, 27. B L.R 447, Hari Govind v. The City Municipality of Belgaum, 31 B L R 1249, Kanhardas v. Keshav, 37 B.L.R. 235; M. S. Bhopeshetty v B V Bhatt, 42 B.L R 223, and Karsandas v Karachi Municipality, A.I.R. 1936 Sind 114**

Also a suit will lie in respect of any liability to municipal taxation See **M S. Bhopeshetty v B V Bhatt, 42 B L.R 223**

In **the Surat City Municipality v Ochhavram Jamnadas, 21 Bom 630,** the plaintiff objected that the assessment of the value of the property classified has been made upon an erroneous basis and not according to the rules Parson J, *disposing of this objection observed* "We need not discuss this objection as we are of opinion that even if the complaint were well founded it would not affect the validity of the tax It would only give the plaintiff and other persons whose property has been similarly assessed, a right of appeal to have the valuation set right" A similar complaint was made in the **Secretary of State for India v Huges, 16 B L R. 121** In that case the case of **21 Bom 630,** does not appear to have been cited nor is it referred to in the judgment but a contrary view has been taken In that case the Western India Turf Club at Poona was taxed at *Rs* 201 per year up to 1908 upon an estimated gross letting value of the race course property at Rs 5,038 A notice was served upon them on the 8th October 1908, by the Cantonment Magistrate, Poona that the said property was under the Poona cantonment taxation regulations valued at Rs 2,46,000 and rated at Rs. 9,840 per annum The notice further required that if any complaint was to be made against the taxation it should be made to the Cantonment Magistrate within three days from the receipt thereof The rules regulating the magistrate's action in this respect required that the complaint against his valuations should be made to him within three days before the date fixed in the public notice and that the date so fixed must not be less than 15 days from the publication of the notice The magistrate confirmed the assessment The plaintiffs appealed to the Cantonment Committee, but the appeal was rejected The Plaintiffs thereupon, paid under protest, on the 28th November 1908, a cheque for Rs. 4,819-3-10 being assessment for one-half year The cheque was cashed on the 27th May 1909 The Plaintiffs filed the present suit, on the 28th March 1912, to have it declared that the increased assessment was illegally levied from them and to recover back the increase paid by them under protest The lower court decreed the claim The Secretary of State appealed contending that the court had no jurisdiction to entertain the suit and that a portion of the claim was barred by Art 62 of the Limitation Act, 1908 Held, (1) That the action of the Cantonment Magistrate was not warranted by the regulations, inasmuch as reasonable time was not given to the plaintiffs to take advice as to the increase in the rate from Rs 201 to Rs 9,840 and that he had wholly disregarded the

basis upon which the rate was to be assessed, and that therefore the jurisdiction of the Civil Court was not ousted, the money having been claimed and received from the plaintiff without the shadow of a right In the course of the judgment Scott C J observed "It appears to us that the judgment of Lord Halsburry in **Mersey Docks and Harbour Board v Birkenhead Assessment Committee,** already referred to, so far from being any authority in favour of the contention of the appellant is a direct authority for the proposition that where a taxing authority is called upon to assess the tax based upon annual letting value he does very wrong indeed if he rates as if he were dealing with the question for the income tax The Cantonment Magistrate has, as stated by the District Judge, 'Not calculated the tax on the annual value but on some strange and novel method of his own The law does not justify his action at all It was outside the law, and he has assumed powers which the law has not given to him, the enhancement of the tax was, therefore ultra vires, and not a legitimate method of arriving at a fair letting value of the house" It is therefore clear upon the authority of **Karsandas v Ankleshwar Municipality, 3 B L R 882,** that the case is one in which the jurisdiction of the Civil Courts is not ousted" It seems to us that this point was thoroughly discussed and considered in **16 B L R 121** and the view taken in that case appears in our opinion to be the correct view

In every case of assessment the procedure laid down by the Act should be strictly followed and the finality of the decision, when not in confirmity with the statutory provision, may be challenged in a court of law Where a committee to deal with objections to assessment confirms the assessment without giving the assessee opportunity to be heard, and the assessee without filing an appeal to the magistrate pays the amount under protest and sues for recovery of the amount in a civil court, the suit is maintainable as one of the essential conditions expressly laid down by s 65 (3) is not complied with and the order passed by the assessing committee is without jurisdiction and ultra vires And s 86 is no bar to such a suit For s 86 is an enabling section which empowers the assessee who is aggrieved by an order passed with jurisdiction by the assessing committee to appeal to a Magistrate on facts In the absence of this section it would not be open to an assessee to attack the decision of the assessing committee on the merits But that does not mean that where the attack goes to the very root of the assessment fixed on the ground of non-compliance by the assessment committee with the preliminaries laid down by the statute, which they are required to comply with before they give their decision, the assessee may not resort to the ordinary tribunal It is an elementary principle of law that a provision contained in a statute which purports to restrict the common right of a party of access to a civil court must be interpreted with the utmost strictness s 86 is not impliedly intended to bar the right of a party aggrieved by the excessive levy of a tax to resort to a court of law But that section is only intended to give to the aggrieved party a summary remedy by way of an appeal to a Magistrate against an assessment of facts which would otherwise be barred **Karsondas v Karachi Municipality, A I R 1936 Sind 114**

Presumption about notice of assessment —If individual notice is proved to have been given under s 81 the presumption as to official or legal acts which may be raised under s 114, Evidence Act, should be raised, and it can be presumed that public notice under s 80 was properly given of the assessment list and that all formalities required for the proper assessment of the tax were followed by the Municipality Section 114 applies not only to civil court but also to

criminal cases When the prosecution ask that a person should be convicted for obstruction of a public servant in the discharge of his public functions they must show that a public servant was discharging public duties imposed upon him by law **Jamnadas Tharoomal v. Emperor, A I.R 1940 Sind 42.**

Amendment of assessment-list Notice of new buildings.

82 (1) The standing committee may at any time alter the assessment-list by inserting or altering an entry in respect of any property, such entry having been omitted from or erroneously made in the assessment-list through fraud, accident or mistake, or in respect of any building constructed, altered, added to or reconstructed in whole or in part, where such construction, alteration, addition, or reconstruction has been completed after the preparation of the assessment-list, after giving notice to any person interested in the alteration of the list of a date, not less than one month from the date of service of such notice, before which any objection to the alteration should be made

Objection how dealt with

(2) An objection made by any person interested in any such alteration, before the time fixed in such notice, and in the manner provided by sub-section (2) of section 81, shall be dealt with in all respects as if it were an application under the said section

Effect of amendment

(3) An entry or alteration made under this section shall subject to the provisions of section 110, have the same effect as if it had been made in the case of a building constructed, altered, added to or reconstructed on the day on which such construction, alteration, addition or reconstruction was completed or on the day on which the new construction, alteration, addition or reconstruction was first occupied, whichever first occurs, or in other cases, on the earliest day in the current official year on which the circumstances justifying the entry or alteration existed, and the tax or the enhanced tax as the case may be shall be levied in such year in the proportion which the remainder of the year after such day bears to the whole year

Scope.—This section provides for amendment of the assessment list by the standing committee on account of alterations in a building after the preparation of the assessment list or on account of an error due to fraud, accident or mistake With regard to alteration in a building the amendment takes effect from the date of the completion of the alteration or from the date of the occupation of the altered building whichever is earlier and the tax is to be levied from such a date, i e to say, not for the whole year but for a period covered from such a date to the end of the official year, proportionately Similarly, with regard to the amendment on account of mistake, fraud or accident the amendment will take effect from the earliest day in the current official year on which the circumstances justifying the amendment existed It should be noted that the section empowers the standing committee to make amendments in the

current assessment list only and under this section the amendment can take effect from a date in the current official year only Thus there can be no amendment of the assessment lists of the previous years nor can the amendment of the current list take effect from a date in any of the previous official years Thus it is not open to a municipality to recover tax for previous years, if the necessary entries were not there in the assessment list of previous years But if assessment lists for the previous years contained the necessary entries, recoveries could be made even for these years in the current or subsequent years

Assessment of new buildings raised during the year or raising of the assessment on buildings improved during the year.—Section 66 of the B.D M Act, 1901 (s 82 of the B.M.B Act, 1925) provides for the amendment of the assessment list in certain cases, but neither that section nor any other enactment in the same chapter allows of the entry of new buildings erected during the year or the raising of the assessment on buildings that have been improved during the year It is, therefore, the intention of the Act that such cases should await the conclusion of the year, when alterations in the assessment list can be made under s 67 (s 84 of the B M B Act) **R L A's opinion no 1260 dated the 6th May 1918 in G O G D no 8757 dated the 18th October 1918).** The position under the B.M B Act is however, different as s 82 corresponding to s 66 of the B D M Act expressly allows amendment of the assessment list in course of the year on account of new buildings or improvement of existing buildings

Notice to be given to the standing committee of demolition or removal of a building

83. (1) When any building or any portion of a building which is liable to the payment of a rate on buildings or lands or both is demolished or removed, otherwise than by order of the standing committee, the person primarily liable for the payment of the said rate shall give notice thereof, in writing, to the Chief Officer

(2) Until such notice is given the person aforesaid shall continue liable to pay every such rate as he would have been liable to pay in respect of such building, if the same, or any portion thereof had not been demolished or removed

(3) Provided that nothing in this section shall apply in respect of building or portion of a building which has fallen down or been burnt down

New assessment list need not be prepared every year

84. (1) It shall not be necessary to prepare a new assessment-list every year Subject to the condition that every part of the assessment-list shall be completely revised not less than once in every four years, the Chief Officer may adopt the valuation and assessment contained in the list for any year, with such alterations as may be deemed necessary, for the year immediately following

(2) But the provisions of sections 80, 81 and 82 shall be applicable every year as if a new assessment-list had been completed at the commencement of the official year

Tax from whom primarily leviable

85 A tax imposed in the form of a rate on buildings or land or both shall be leviable primarily from the actual occupier of the property upon which the tax is assessed if he is the owner of the property, or holds it on a building or other lease from the Crown or from the municipality, or on a building lease from any person Otherwise the tax shall be primarily leviable as follows, namely:—

(a) if the property is let from the lessor,

(b) if the property is sublet, from the superior lessor,

(c) if the property is unlet, from the person in whom the right to let the same vests,

Recovery from occupiers.

Provided that where the tax is based on the annual letting value, on failure to recover any sum due on account of such tax from the person primarily liable, such portion of the sum may be recovered from the occupier of any part of the property in respect of which it is due, as bears to the whole amount due the same ratio, which the rent annually payable by such occupier bears to the aggregate amount of rent so payable in respect of the whole of the said property, or to the aggregate amount of the letting value thereof, if any, stated in the authenticated assessment-list, whichever of those two amounts is the greater,

Remedy of occupier in such case.

Provided, further, that for any sum paid by or recovered from any occupier who is not primarily liable under this section, he shall be entitled to credit in account with the person primarily liable for the payment of that sum

Amendments —The word 'Crown' was substituted for the words 'Secretary of State for India in Council' by the Adaptation of Indian Laws Order in Council

Proviso-Occupier'—This proviso contemplates that the occupier from whom the taxes are leviable under this proviso should be a tenant of the property **In Re Nur Mahamad Karim Ilahi, 31 B L.R 541** the applicant was employed as a watchman for a house in Vile Parle on a salary of Rs 25/- per month by the owner of the house who resided in Africa The house was reputed to be haunted and hence there was no tenant The watchman occupied a portion of the house and even conducted a tea shop therein It was held that he was not liable for the house-tax and the Halalkhore Tax under the proviso to this section for the reason that the word occupier in this proviso contemplated a tenant Proviso to s 112 restricts the liability of such a tenant to the taxes that have become due, during the past one year, or since the tenant has first occupied whichever period is less

Owner'—See notes under section 3(14)

Annual letting value —See notes under section 3 (1)

Remission of tax in case of vacancies when obligatory

86 (1) Where any building or land which is assessed to a rate based on the annual letting value and payable by the year, or in

respect of which a special sanitary cess is payable by the year or by instalments, has remained vacant and unproductive of rent throughout the year or portion of the year for which the rate is leviable, or throughout the period in respect of which any such instalment is payable, the standing committee shall remit or refund not less than two-thirds of the amount of the rate, or of the cess or instalment of the cess, as the case may be

Provided that no such remission or refund shall be granted unless notice in writing of the fact of the building or land being vacant and unproductive of rent has been given to the Chief Officer, and that no remission or refund shall take effect for any period previous to the day of the delivery of such notice

When discretional.

(2) Where any such building or land as aforesaid—

(a) has been vacant and unproductive of rent for any period of not less than sixty consecutive days, or

(b) consists of separate tenements one or more of which has or have been vacant and unproductive of rent for any such period as aforesaid, or

(c) is wholly or in great part demolished or destroyed by fire or otherwise deprived of value, the standing committee may remit or refund such portion, if any, of the rate, cess or instalment as it may think equitable

Burden of proof on claimant

(3) The burden of proving the facts entitling any person to claim relief under this section shall be upon him

Explanatory clause

(4) For the purposes of this section (a) a dwelling-house within the limits of a municipal borough notified by the Provincial Government as a hill station municipal borough shall be deemed to be vacant notwithstanding the fact that it contains the furniture habitually used in it, if otherwise unoccupied; and (b) a building or land shall be deemed to be productive of rent if let to a tenant who has a continuing right of occupation thereof, whether it is actually occupied by such tenants or not

Amendments —The words '(a) a dwelling house and (b)' were inserted by Bom 12 of 1931, s 3 (1) The words 'The Provincial Government' were substituted for the word 'Government' by the Adaptation of Indian Laws Order in Council

Scope.—This section applies where the assessment is on the basis of annual letting value and not on the capital value In cases where the assessment is made on the basis of capital value there is no provision in the Act which authorises a remission of tax and hence no remission of tax can be allowed in such a case

Section 69 throws a duty on a municipality to grant a refund and the municipality cannot escape that duty by any act of delegation. Of course, it is necessary to make enquiry in such matters and power to make enquiry can be delegated. But the municipality remains responsible for the due performance of their statutory duty **Rewachand v. Karachi Municipality, A.I.R. 1930. Sind 93.**

See also notes under s. 58 (j).

Notice to be given to the Chief Officer of all transfers of title of persons primarily liable to payment of a rate on buildings or lands.

87. (1) Whenever the title of any person primarily liable for the payment of a rate on buildings or lands or both to or over such land or buildings or both is transferred, the person whose title is so transferred and the person to whom the same is transferred shall, within three months after execution of the instrument of transfer, or after its registration if it be registered, or after the transfer is effected, if no instrument be executed, give notice of such transfer in writing to the Chief Officer.

(2) In the event of the death of any person primarily liable as aforesaid, the person to whom the title of the deceased shall be transferred as heir or otherwise, shall give notice of such transfer to the Chief Officer within one year from the death of the deceased

(3) If the person liable to give the notice referred to in sub-section (1) or sub-section (2) fails to give such notice he shall be punished with fine which may extend to fifty rupees

Amendments — The words 'The person whose title is so transferred and' were inserted by Bom 24 of 1936, s 2, Schedule

Form of notice

88. (1) The notice to be given under the last preceding section shall be in the form of Schedule III or Schedule IV, as the case may be, and shall state clearly and correctly all the particulars required by the said form.

XVI of 1908.

(2) On receipt of any such notice, the Chief Officer may, if he thinks it necessary, require the production of the instrument of transfer, if any, or a copy thereof, obtained under section 57 of the Indian Registration Act, 1908.

Liability for payment of a rate on buildings or land or both to continue in the absence of any notice of transfer.

89. (1) Every person primarily liable for the payment of a rate on buildings or lands or both who transfers his title to or over such building or land or both without giving notice of such transfer to the Chief Officer as aforesaid, shall, in addition to any other liability which he incurs through such neglect, continue liable for the payment of the said rate on the buildings or lands or both until he gives such notice, or until the transfer shall have been recorded by the standing committee.

(2) But nothing in this section shall be held to diminish the liability of the transferee for the said rate or to affect the prior

claim of the municipality on the said buildings and lands conferred by section 112, for the recovery of the rate on the lands or buildings or both.

(3) Power To Charge Fees

Fees may be charged for certain licenses

90 (1) When any license is granted under this Act, or when permission is given thereunder for making any temporary erection or for putting up any projection, or for the temporary occupation of any public street or other land vested in the municipality, the authority granting or giving such license or permission may charge a fee for the same

Levy of fees for unauthorised occupation or projection.

(2) The municipality may charge a higher fee by way of penalty for any erection, or projection, or for the use or occupation of any public street or other land vested in the municipality, by any person without its permission or license Such fee shall be leviable irrespective of any other penalty or liability to which the person liable to pay the same may be subject under any other provision of this Act or any other law for the time being in force

The rates of such higher fees shall be determined by rules.

Market and other separate fees.

(3) A Chief Officer may also charge such fees as may be fixed by by-laws under clause (a) of sub-section (1) of section 61, for the use of any such places mentioned in that clause as belong to the municipality and as may be fixed by by-laws under clause (h) of sub-section (1) of section 61 for stamping weights and measures.

Shop board projected without permission of the municipality—By-law providing charging of fees for projection not ultra vires—The accused, who occupied a shop abutting on a public street, projected a shop-board in front of his shop into the public street, without the permission of the municipality He was prosecuted for making the projection without permission and without paying fees prescribed in that behalf (by-law No 10 of the Surat City Municipality). It was contended that the by-law was ultra vires of the municipality—held (1) that the accused in erecting the shop-board without paying the prescribed fee, had contravened by-law 10, (2) that by-law 10 was not ultra vires of the Surat City Municipality **Emperor v Nagindas, 20 B.L.R 388,** Shah J in the course of the judgment observed "Section 70 of the Bombay District Municipalities Act (equivalent to s 90 of the Boroughs Act) was referred to as showing that the power to charge fees was limited in the manner stated in that section But it seems to me that under the terms of the section when permission is given for putting up any projection, the Municipality may charge a fee for such permission There is nothing in the words of the section to justify the applicant's contention that the word "permission" there means "written permission" as contemplated by the first part of s 113, sub-section 1, or that it means permission subject to certain conditions I feel clear that the fee which is prescribed by by-law 10 is within the powers conferred on the Municipality by the Bombay District Municipalities Act which provides that when permission is given for

putting up any projection, the Municipality may charge a fee for such permission Here the permission granted is general subject to the payment of the prescribed fees I am, therefore, of opinion that the contention that this part of the by-law is ultra vires must be disallowed "

Right to levy fees under this section cannot be leased —In the **Sholapur Municipality v. Shivaram, 30 B L R. 715,** it was held that a municipality has no power to lease or auction the right to levy fees due for temporary occupation of municipal land This was a case under the District Municipal Act 1901, but sections 40, 70 and 81A of the District Municipal Act are equivalent to sections 48, 90 and 101 of the Boroughs Act In the course of the judgment Baker J. observed "The question in this case is as to the right of the municipality to sell or lease to contractors the right of collecting the fees from persons selling fodder on land belonging to the municipality The right to collect such fees is given to the municipality by section 70 of the District Municipal Act (Bom Act III of 1901) It has been contended by the learned pleader on behalf of the appellant that under s 40 of the Act, the Municipality has a right to enter into and perform all such contracts as they may consider necessary or expedient in order to carry into effect the provisions and the purposes of the Act, and that covers the lease or sale in question That power, however, is subject to the proviso that it should be exercised so far as is not inconsistent with the provisions and purposes of the Act The question is therefore whether the sale of the right to levy fees on persons selling fodder is inconsistent with the provisions and purposes of the Act It is admitted that the power of a corporation must be limited by the Act which creates it Section 70 forms part of Chapter VII of the Act which refers to municipal taxation That chapter is divided into five parts, and part (5) refers to Octroi and tolls In s 59 the taxes imposable under the Act are enumerated, and tolls are expressly defined as referring to vehicles and animals used for riding, draught or burden, and entering into the municipal district and not liable to tax under the preceding clause It is under s 81A of the Act which was inserted by Act VIII of 1914, that the municipality is authorised to lease the levy of any toll that may be imposed under this Act Section 70 defines the impost in question in the present case as a fee, and in view of the distinction between it and a toll, which is defined in s 59, I am of opinion that the special provision made by s 81A of the Act cannot be extended so as to cover the fee with which we are now concerned, and, it will appear that if s 40, as contended by the learned pleader for the appellant gives the municipality the power to lease or sell the right to collect the taxes, there would have been no necessity for the addition of section 81A to the Municipal Act to legalise the leasing of the levy of tolls The same view has been taken by the Madras High Court in the case of **Municipal Council, Kumbakonam v Abbahs Sahib,** but as that decision was based on the local law in force in Madras, I prefer to base my decision on the conclusion arising from the terms of our own Bombay District Municipal Act "

Licence fee—by-law for taking license necessary pre-requisite before imposition of fees—Rule imposing such fee—See notes on this head under section 68 and notes under s 3 (20)

Limitation—Fee is not rent.—Fee charged by the Municipality for issuing a permission for use of municipal land under the provisions of s 90, Bombay Act 18 of 1925 is not rent within the meaning of Art. 110. Lim Act, and a suit for

recovery of such fees is not governed by Article 110 There being no article within which such a suit can be brought, it is governed by Art 120 **Masand v. Sikarpur Municipality, A.I R 1936, Sind 184**

Temporary Occupation —The accused who were timber merchants were authorised by the Municipality of Poona to use a strip of a street for the purpose of exposing logs of timber for sale They were charged with the offence of causing obstruction in a public street under section 61 cl (f) of the Bombay District Police Act, 1890, and convicted by the magistrate The Session Judge, being of opinion that the conviction was illegal, referred the case to the High Court — held, confirming the conviction, (1) that the Municipality had no statutory authority to divert a portion of the public street for the purpose of exposing timber for sale, (2) that under section 50 of the District Municipal Act, public streets were vested in the Municipality for the purpose of being maintained as public streets, (3) that s 90 of the District Municipal Act did not empower the municipality to discontinue or stop up a part of a street so as to provide a market, (4) that the municipality could not allow a permanent obstruction upon any public street vested in it, and (5) that ss 139 and 140 of the District Municipal Act did not empower the municipality to license the holding of a market in a public street **Emperor v. Vishvanath, 28 B L.R. 1033.**

Sub-section (2).—This prescribes the cases in which it is open to a municipality to charge a higher fee by way of penalty It is not open to a municipality to charge a higher fee in any other case under this section

Levy of projection fees by municipalities on Provincial roads illegal:—Fees cannot be levied on projections on public roads which do not vest in the municipality The words 'vested in the municipality' occurring in s 90 of the **B C.M Act, 1925, qualify both 'public street' and 'other land' (R L.A.'s opinion no 2555 dated the 9th August 1927 in G R.G.D. no 1896 dated the 26th August 1927).**

Rules for levying fees for projecting shop boards—Whether action under s. 60 (b) and (c) of the B.D M. Act, 1901 (s 75 (b) and (c) of the B.M.B Act, 1925) necessary —See notes under this head under s 58

Whether applications to a municipality for permission for temporary erections require to be stamped with Court-fee stamps.—Applications to a municipality for permission to erect temporary booths require to be stamped with one-anna Court fee stamps The Court Fees Act applies to certain applications made to public officers by virtue of s 6 of the Act This appears to include applications to municipalities which formerly consisted of municipal Commissioners but now consist of municipal Councillors in this presidency, in view of the illustration to the 10th clause of s 21 of the Indian Penal Code, s 45 of the B.D.M Act (s 56 of the B M B Act, 1925) and cl 21 of s 19 and paragraph 3 of schedule II(1) (a) of the Court Fees Act It appears, further, that applications for permission to erect temporary booths can fairly be said to 'relate to' or in the words of Websters' Dictionary, 1903 'have bearing or concern' with the conservancy or improvement of municipal districts within the meaning of para 3 of schedule II(1)(a) of the Court Fees Act This interpretation is in accordance with that of the Legal Remembrancer underlying **Government Resolution in the Revenue Department no 960 dated the 3rd Feburary 1893,** and appears also to be the view held in the Punjab according to Page 104, para 151 of the Punjab Stamp Manual, and in the Central Provinces according to the Superintendent of Stamps' circular no. II dated

the 16th November 1896 (R.L.A.'s opinion no. B. 3042 dated the 11th November 1906 in G.R.R.D no. 382 dated the 14th January, 1907).

Fees for aerial and surface projections.—See notes under s 143 under the heads **'Municipality's powers and duties as regards public streets, etc'** and **'Drains and gutters alongside a public street are public street.'**

(4) Special Provisions Relating to Certain Taxes

Fixed charges and agreements for payment in lieu of taxes for water supplied.

91. (1) A municipality may, instead of imposing a water-rate, or where a water-rate has been imposed, in individual cases, instead of levying a rate imposed in respect of the supply of water belonging to the municipality to or for use in connection with any private lands or buildings,—

(a) fix at rates not exceeding such as shall be specified in the rules in force under section 58, charges for such supply according to the quantity used, as ascertained by measurement; or

(b) arrange with any person on his application to supply on payment, periodical or otherwise, water belonging to the municipality, in such quantities or for such purposes, whether domestic, ornamental, or irrigational or for trade, manufacture or any other purpose, on such terms and subject to such conditions as it shall fix by agreement with such person,

Provided that—

(a) the meters, connection-pipes and all other works necessary for and incidental to such supply, and all repairs, extensions and alterations of such works shall be under the control of the municipality, and the expense thereof shall, so far as is not inconsistent with the rules or by-laws of the municipality, be defrayed by the persons liable for the charges or payments fixed in respect of such supply; and

(b) such supply of water shall be and shall be deemed to have been granted, subject to all such conditions as to the limit or stoppage thereof and as to the prevention of waste or misuse, as are prescribed in the by-laws for the time being in force under section 61.

Power to fix a special rate in lieu of special sanitary cess.

(2) Where a municipality has made provision for the cleansing of any factory, hotel or club or any group of buildings or lands used for any one purpose and under one management, it may instead of levying in respect thereof any special sanitary cess imposed under this chapter, fix a special rate and dates and other conditions

for periodical payments thereof; such rate, dates and conditions, shall be determined either,

(i) in accordance with the rules for the time being in force under section 58, or

(ii) by written agreement with the person who would have been otherwise liable for the cess provided that in fixing the amount of such rate proper regard shall be had to the probable cost to the municipality of the service to be rendered

Power to compound tax on vehicles or animals.

(3) Where a municipality has imposed a tax on vehicles or animals used for riding, draught or burden and kept for such use within the municipal borough it may compound with the keeper of any livery-stable or of horses or vehicles kept for sale and hire for the payment of a lump sum for any period not exceeding one year at a time, in lieu of any amount which such keeper would otherwise have been liable to pay on account of the tax imposed as aforesaid.

Recovery of sums claimed under this section

(4) Every sum claimed by a municipality as due under sub-section (1) as charges, payments or expenses, or as a special rate under sub-section (2) or as a lump sum payable under sub-section (3), shall for the purposes of chapter VIII, be deemed to be, and shall be recoverable in the same manner as an amount claimed on account of a tax recoverable under the said chapter,

Provided that nothing in this section shall affect the right or power of a municipality to contract with any person to supply for use beyond the limits of the municipal borough, at such rates and on such conditions as the municipality may think fit, any quantity of water belonging to the municipality but not required for the purposes of this Act.

General.—This section provides for supplying water by measurement and for compounding of water rate, special sanitary cess and tax on vehicles or animals This is an enabling section and empowers a municipality to compound its claims in suitable cases

Recovery:—The procedure prescribed in Chapter VIII of this Act is made applicable by clause (4) to municipal claims under this section, i e to say, that the procedure of bill, notice and warrant is applicable A claim of a municipality under this section does not create a charge on the property under section 112

In the Municipal Corporation of the City of Bombay v Haji Elsa, 37 B.L.R, 1017, it was held that the tax for water supplied by meter to a property does not fall within the expression 'property tax' as defined by section 140 of the City of Bombay Municipal Act, 1888, and such tax does not constitute a charge on the property under section 212 of the Act

Fixed charges and agreement for payment in lieu of water-rate—Whether a tax or a contractual charge—Application of s 75 to rules under s 58 (j) for water rate under s. 91 and of s 48:—See notes under this head under s. 3 (20),

Taxes on pilgrims may be assigned in part to local boards

92. Where a tax is imposed under this Act on pilgrims resorting periodically to a shrine within the limits of a municipal borough, the Commissioner may require the municipality of such borough to assign and pay to the district local board or to the taluka local board having authority in the taluka in which such municipal borough is situate, or partly to the said district local board and partly to the said taluka local board, such portion of the total collections on account of such tax as he shall deem fit, and the portion so assigned shall be expended by the said board or boards, within the areas respectively under their authority, on works conducive to the health, convenience and safety of the said pilgrims

(5) Octroi and Tolls

Octroi by-laws to be submitted with proposal for imposition of octroi

93 A municipality, when submitting for sanction a proposal for the imposition of octroi, shall submit therewith for sanction a draft of by-laws for the purposes of clause (n) of sub-section (1) of section 61, after observing the requirements of sub-sections (2) and (3) of that section

Power to examine articles liable to octroi

94 (1) A person bringing into or receiving from beyond the octroi limits of a municipal borough any animal or goods on which octroi is payable shall, when required by an officer authorized in this behalf by the Chief Officer and so far as may be necessary for ascertaining the amount of tax chargeable,—

(a) permit that officer to inspect, examine, weigh, and otherwise deal with such animal or goods, and

(b) communicate to that officer any information and exhibit to him any bill, invoice or document of a like nature, which he may possess relating to such animal or goods;

(c) make a declaration in writing to that officer regarding the correctness and accuracy of the document shown to him.

Power to search where octroi is leviable.

(2) If any person bringing into or receiving from beyond the octroi limits of a municipal borough in which octroi is leviable, any conveyance or package, shall refuse on the demand of an officer authorized by the Chief Officer in this behalf, to permit the officer to inspect the contents of the conveyance or package for the purpose of ascertaining whether it contains anything in respect of which octroi is payable, the officer may cause the conveyance or package to be taken without unnecessary delay before a Magistrate or such officer of the municipality as the Provincial Government appoints in this behalf by name or office, who shall cause the inspection to be made in his presence

Amendments.—The words 'The Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council

Articles received by Post liable to Octroi duty.—Octroi duty is chargeable on goods received within the Octroi limits of a municipal borough and it matters very little the way in which they were received within such limits The articles received by post are liable to Octroi duty In **the Ahmedabad Municipality v. Sakarchand, 17 B.L.R 182,** which was a case under section 76 of the District Municipal Act (equivalent to section 94 of the Boroughs Act) the Municipality of Ahmedabad imposed Octroi duty on goods brought into the walled city of Ahmedabad by post under rules framed under the old Municipal Act It was objected that the imposition of the tax was not authorised inasmuch as when the rules were framed the framers did not contemplate the possibility of the introduction into the city of goods by post and that the procedure required by section 60 of the District Municipal Act, 1901, was not observed in imposing the octroi duty Held, overruling the objection, that section 76 of the Act gave powers for assessing octroi duty upon goods coming into the walled city and as rule No 84 which was promulgated under the old Act and which permitted the levying of octroi duty on goods coming into the walled city of Ahmedabad was in force no further by-laws were necessary for the purpose of assessing duty on articles brought in by post

Inspection of bills, invoices or documents of a like nature.—It should be noticed that the section gives power to inspect a bill, invoice or a document of like nature. This does not include the books of accounts of merchants and a Municipal officer is not entitled to inspect the same under this section In **the Ahmedabad Municipality v Sakarchand 17 B.L.R. 182,** it was held that the provision of s 76 (1) (b) of the District Municipal Act (equivalent to s 94 (1) (b) of the Boroughs Act) permit a Municipal Officer to claim inspection only of bills, invoices or documents of a like nature, he cannot claim inspection of private accounts of merchants

Inspection can be had at entrance, within the limits or at the exit—Goods in transit liable to Octroi—Refusal to show goods amounts to obstruction in the discharge of public functions:—An octroi is a tax levied upon articles which are brought into the gates of a city whether for consumption or use therein or not. Hence goods which are dutiable are always liable to terminal tax or octroi even if they are in transit and not brought within the octroi limits for consumption or use therein Section 76 (B D M Act, 1901) does not require the Octroi Officer to ask for inspection only at the place where the goods enter the limits of the Municipality and not inside such limits or at a place of exit from such limits and therefore, though certain persons are not asked to show their goods at the Octroi station situated at the entrance to the local limits of the Municipality they are not entitled to refuse to give inspection when asked to do so within the local limits Refusal to show goods to an Octroi Officer who is acting within his authority in asking the accused to show the goods amounts to obstruction offered in the discharge of the public functions of the officer and is punishable under s 186 and assault on the officer makes the accused liable for an offence under s. 332 The discretion vested in a trying Magistrate as regards the matter of sentence cannot be legally interfered with in revision, more so when the Court of first appeal has not considered it desirable to interfere with the same and when no sufficient grounds are urged to show that the discretion has been improperly exercised as to call for interference **Sajan v. Emperor, A I.R 1935 Sind 245**

Rule authorising a councillor to exercise powers under s. 76 of the B.D.M. Act, 1901 (s 94 of the B.M.B. Act, 1925) ultra vires —Powers under s. 76 of the B.D M Act, 1901, can be exercised only by an officer authorised in that behalf by the municipality (In the case of Boroughs Act by an officer authorised in that behalf by the Chief Officer) Councillors of the municipality are not officers within the meaning of s. 76, and a municipality is therefore not competent to delegate the powers exercisable thereunder to them **(G.C.G D no. 91 dated the 9th April, 1938).**

Presentation of bills for octroi

95 An officer demanding octroi by the authority of the municipality shall tender to every person introducing or receiving anything on which the tax is claimed, a bill specifying the animal or goods taxable, the amount claimed, and the rate at which the tax is calculated.

Penalty for evasion of octroi

96. Where any animal or goods passing into a municipal borough are liable to the payment of octroi, any person who, with the intention of defrauding the municipality, causes or abets the introduction of or himself introduces or attempts to introduce within the octroi limits of the said borough any such animal or goods upon which payment of the octroi due on such introduction has neither been made nor tendered, shall be punishable with fine which may extend to ten times the amount of such octroi or to fifty rupees, whichever may be greater.

With the intention of defrauding—Master's liability for servant's offence—Goods in transit—Non-payment of Octroi—Deposit:—The accused, a grocer at Bhiwandi ordered out goods from Bombay The goods were put into a hired motor lorry which passed through the limits of Kalyan Municipality, but the lorry driver instead of paying octroi on the goods at Kalyan, rapidly drove past the ingoing Naka and similarly passed out at other end of the limits The Kalyan Municipality had, in virtue of the powers vested in it, under s. 48 (1) (j) of the Bombay District Municipal Act, framed octroi by-laws, which provided for levy and refund of octroi on goods passing through its limits The accused was, on these facts, charged with evasion of octroi, an offence punishable under s 77 cl 2 of the B D M Act, 1901 At the trial evidence was led to show that in preceding years the accused had similarly evaded payment of octroi — Held, (1) that in view of s 48 (1) (j) and the by-laws framed thereunder, the accused was liable to the payment of octroi within the meaning of sub-section 2 of s 77 of the Bombay District Municipal Act, (2) that the word "defraud" in s 77 (2) having been used in a popular sense, i e to deprive a person of some rights or property to which he was entitled, the accused had an intention to defraud the Municipality who was prevented from getting the deposit of octroi under the by-laws, (3) that the evidence that the accused had been connected with similar cases of non-payment of octroi was admissible in evidence on the question of his knowledge and intention, under s. 15 of the Indian Evidence Act, (4) that it was open to the lower Courts to have regard to probabilities in the manner permitted by s 114 of the Indian Evidence Act and to infer that a course of conduct on the part of lorry-drivers could not have gone on without the

connivance and the consent of the accused **Emperor v Harjivan Valji, 28 B L.R. 115.** The correctness of the reasoning adopted in this case was doubted in **Emperor v. Vishram Valji, 37 B L R. 102** In this case, the accused, who was a contractor for the new Narbada Railway Bridge, had goods consigned to him to the Broach Railway Station, from where they were re-railed to the bridge siding and used up in the bridge construction He paid no octroi duty on the goods so consigned to him The railway station was, but the bridge siding was not, within the limits of the Broach Municipality The Municipality charged the accused with fraudulent evasion of octroi on the goods, an offence punishable under s 96 of the Bombay Municipal Boroughs Act 1925 The accused contended that he was not liable to pay the octroi, because the goods were never in fact consigned to him within the municipal limits but were really consigned to him at the bridge siding —Held, that there was no reason for thinking that the claim of the accused to be exempt from octroi was not bona fide and no intention to defraud was proved, and that the accused was not guilty of the offence charged The term 'defraud' denotes some form of dishonesty An 'intention to defraud' has to be inferred from the conduct of the accused, and must necessarily involve something in the nature of cheating A bona fide allegation that a tax is not payable, which allegation is subsequently proved to be ill-founded, does not justify a finding that there was an intention to defraud In this case while considering the case of **28 B L.R. 115,** Beaumont C J observed "The facts of that case are quite different from the facts of the present case, and the decision can, therefore, be distinguished But I feel bound to say that I am quite unable to follow or adopt the reasoning of Mr Justice Fawcett He considers that the word 'defraud' is popularly used in a sense which differs from its legal sense and that a man may be said in a popular sense to intend to defraud whenever he resists a claim which is well founded in law, and that in this statute the word is used in its popular sense I do not agree with the learned Judge To my mind 'defraud' always denotes some form of dishonesty But even if the learned Judge were right in thinking that the expression 'intended to defraud' has one meaning in law and another in popular usage, I fail to see why the court should give to the expression its popular, rather than its legal, meaning in a penal statute as against an accused person Such a construction infringes the principle that penal statutes must be construed strictly In my opinion in the present case there is no reason whatever for thinking that the claim of the applicant to be exempt from the tax is not bona fide, and no intention to defraud is proved Whether the claim is well founded or not, I do not propose to consider In my opinion there being no intention to defraud, the conviction was wrong and must be set aside"

Tables of tolls to be shown on demand.

97 A municipality imposing any toll under this Act shall cause to be kept at such place where such toll is to be collected, a table in the vernacular language of the district, showing the amounts leviable in all cases provided for in the rules, including the terms if any, on which the liability to pay such tolls may be compounded by periodical payments, and it shall be the duty of every person authorized to demand payment of a toll, to show such table on the request of any person from whom such demand is made

Power to seize vehicle or animal or goods on non-payment of octroi or toll

98 (1) In the case of non-payment on demand of any octroi or of any toll leviable by a municipality, any person appointed to collect such octroi or toll may seize any animal or goods on which octroi is chargeable, or any vehicle or animal on which the toll is chargeable or any part of the burden of such vehicle or animal which is of sufficient value to satisfy the demand, and may detain the same He shall thereupon give the person in possession of the vehicle, animal or thing seized, a list of the property together with a written notice in the form of Schedule VII

Power to sell property seized at once.

(2) When any property seized is subject to speedy decay, or when the expense of keeping it together with the amount of the octroi or toll chargeable is likely to exceed its value, the person seizing such property may inform the person in whose possession it was that it will be sold at once, and shall sell it or cause it to be sold accordingly unless the amount of octroi or toll demanded be forthwith paid,

Release of property on payment.

(3) If at any time before a sale had begun, the person from whose possession the property has been seized, tenders at the municipal office the amount of all expenses incurred and of the octroi or toll payable, the Chief Officer shall forthwith deliver to him the property seized;

Sale.

(4) If no such tender is made, the property seized may be sold, and the proceeds of such sale shall be applied in payment of such octroi, or toll and the expenses incidental to the seizure, detention and sale

(5) The surplus if any, of the sale proceeds shall be credited to the municipal fund, and may, on application made to the Chief Officer in writing within three years next after the sale, be paid to the person in whose possession the property was when seized, and if no such application is made, shall be the property of the Municipality

Whether a suit to recover octroi maintainable —It is not open to a Municipality to file a suit in a civil court to recover octroi dues unless an account of the party concerned is being maintained under s 99 See **Poona Municipality v R. N. Pranjpe & Sons, 35 B L.R. 581** Dealing with the point Beaumont C J said "In my opinion the learned Judge was right in holding that the suit does not lie The question turned on the construction of s 203 of the Bombay Municipal Boroughs Act, 1925 To appreciate that section it is necessary to look at a few of the earlier sections S 73 gives a right to the municipality to charge an octroi on animals or goods brought within the octroi limits S 98 provides that in case of non-payment on demand of any octroi leviable by a municipality any person appointed to collect such octroi may seize the goods, and then power is given to sell the goods Section 99 provides that the standing committee if it thinks fit

instead of requiring payment of octroi due from any person, mercantile firm or public body to be made at the time when the animals or goods in respect of which the octroi is leviable are introduced in the octroi limits of the municipal borough, may at any time direct that an account current shall be kept on behalf of the Municipality of the octroi so due from such person, firm or body, and then it is provided that any amount due on the current account shall for the purposes of Chapter VIII be deemed to be recoverable in the same manner as an amount claimed on account of any tax recoverable under the said chapter Then Chapter VIII deals with the recovery of the various taxes, but having regard to s 104 (1) (b) the chapter does not apply in respect of a sum leviable under sub-s (1) of s 98 or payable on demand on account of an octroi So the result is that unless there is a current account kept under s 99 the provisions for payment contained in Chapter VIII do not cover an octroi payable on demand Then s 203, which is the one relied on by the plaintiffs as entitling them to sue, reads as follows — 'In lieu of any process of recovery allowed by or under this act or in case of failure to realise by such process the whole or any part of any amount recoverable under the provisions of Chapter VIII or of any compensation, expense, charges or damages payable under this Act it shall be lawful for a municipality to sue in any Court of competent jurisdiction the person liable to pay the same' The only jurisdiction to sue given to the municipality by that section is to sue a person liable to pay, and, as far as I can see, there is no liability imposed on these defendants to pay any octroi since the Municipality have failed to prove that a current account was kept under s 99, and that, therefore, the powers of recovery conferred by Chapter VIII apply in this case That being so I think the learned Judge was right in holding that s 203 does not apply, and in the absence of any statutory authority to that effect it seems to me that there is no right in the Municipality to sue to recover this sum" This case was distinguished by Wassoodev J in **Bhusawal Municipality vs The Hindustan Construction Company, Bombay, 44 B I R 890**, wherein it was held —that s 203 of the Bombay Municipal Boroughs Act, 1925, provides an alternative remedy to make recovery of municipal dues by suit According to the first part of the section that alternative remedy can be adopted 'in lieu of any process of recovery allowed by or under the Act', provided the person sued is liable to pay It can also be resorted to in case of failure to realise by process the whole or any part of any amount recoverable under the provisions of the Chap VIII The process of recovery of octroi dues other than by suit is indicated in ss 98 and 99 of the Act If a current account of octroi dues has been kept as required by s 99, a suit will lie under s 203 for the recovery of municipal dues If no process as contemplated by s 98 to recover octroi duty is issued then in lieu thereof it is lawful for the municipality to sue under s 203 in any Court of Competent Jurisdiction the person liable to pay the same Under s 203 the municipality has the right to sue only a person liable to pay But the liability to pay, in order that the first clause of s 203 may come into operation, may arise independently of ss 98 and 99 In the consideration of the application of the first clause of s 203 the court has to consider whether that liability to sue has arisen under the Act The first clause of s 203 is not restricted in its operation to the process of recovery permissible under Ch VIII It does not say so in terms The word 'process' in the first clause implies summary process generally The words 'such process' in the second clause merely refer to the generality of summary remedy conferred by the statute A corporation like an individual has a right to enforce its claim by suit unless the right is expressly limited or the limitation is clearly implied A suit to

recover octroi dues for goods brought within the limits of a borough municipality from the defendant who is liable to pay is maintainable under s 203 In the course of the judgment his lordship observed "Undoubtedly it is true that the right is given under s 203 to the Municipality to sue only a person liable to pay But the liability to pay in order that the first clause of s 203 may come into operation may arise independently of s 98 and s 99 In my opinion in the consideration of the application of the first clause of s 203 the Court has to consider whether that liability to sue has arisen under the Act For that purpose it would be necessary to refer to certain sections of the Act particularly in regard to the imposition of taxes Section 73 contains a catalogue of taxes which may be imposed by the Municipality Clause 4 of that section specifies a tax known as 'an octroi on animals or goods or both, brought within the octroi limits for consumption or use therein' The procedure preliminary to the imposition of a tax is contained in s 75 The municipality before imposing a tax has by resolution to select one or other of the taxes specified in s 73 and approve rules prepared for the purpose of cl (j) of s 58, prescribing the tax selected, and in such resolution and in such rules specify according to s 75 (a) (i) the class or classes of persons or of property or of both, 'which the municipality proposes to make liable' Section 58 (j) deals with the power of the Municipality to make rules prescribing the taxes to be levied, the time at which and the mode in which such taxes shall be levied or recovered or payable and so forth In order to ascertain whether the defendants are liable to pay octroi dues one has necessarily, by reason of the provisions of s 75 (a) (i) to refer to the rules specifying the class of persons or property proposed to be made liable The rule of the Municipality in that behalf particularly r 15 is as follows 'any person bringing goods or animals into the municipal limits without passing any import Naka shall pay duty at the Municipal Office' The rates are prescribed according to the schedule annexed to the rules. So then r 15 of the rules of the plaintiff-Municipality makes the defendant liable to pay That distinguishes in my opinion this case from the case in **Poona Municipality v. Paranjpe & Sons**, for the Municipality there failed to prove independently of s 98 the liability of the defendants to pay It was a case as I have said where the Municipality claimed octroi unrecovered through mistaken calculation and the Court held that the suit to make such a recovery was incompetent under s 203"

Power to keep account current with person, firm or public body in lieu of levying octroi on introduction of goods

99. The standing committee, if it thinks fit, instead of requiring payment of octroi due from any person, mercantile firm or public body to be made at the time when the animals or goods in respect of which the octroi is leviable are introduced within the octroi limits of the municipal borough, may at any time direct that an account current shall be kept on behalf of the municipality of the octroi so due from such person, firm or body. Such account shall be settled at intervals not exceeding one month, and such person, firm or public body shall give such information or details and make such deposit or furnish such security as the standing committee or any officer authorized by it in this behalf shall consider sufficient to cover the amount which may at any time be due from such person, or body in respect of such dues. Any amount so due at the expiry of any such interval

shall, for the purposes of chapter VIII, be deemed to be, and shall be recoverable in the same manner as, an amount claimed on account of any tax recoverable under the said chapter

General:—This is a section intended to give facilities in the matter of payment of octroi and it enables the standing committee to keep a current account in lieu of levying octroi at the time of introduction of goods Dues in this account can be recovered under Chapter VIII, i e to say, by the procedure of bill, notice and warrant If no current account is kept the procedure of bill, notice and warrant will not apply Also a suit to recover the dues in this account will lie under section 203 Where an account is not kept under this section, for the question whether a suit under s 203 will lie or not see notes under s 98

Collection of octroi by one public body on behalf of others

100 Where any agreement such as is referred to in clause (b) of sub-section (1) of section 47 has been entered into, such one of the bodies entering into the agreement as by the terms thereof shall be specified in this behalf, shall have the same power to establish such octroi limits and octroi stations as that body may deem necessary for the entire area in which the octroi is to be collected, and shall have the same power of collecting octroi on animals or goods or both brought within the limits so established, and the provisions of the Act under which that body is constituted relating to octroi shall apply in the same way as if the limits so established were wholly comprised within the area subject to the control of that body and the collections made and the cost thereby incurred shall subject to the provisions of section 44, be divided between the bodies entering into agreement, in such proportions as shall have been determined in the agreement

Amendments:—The words 'the Act under which that body is constituted' were substituted for the words 'this Act' by Bom 14 of 1934, s 4 (2) (i) The words 'that body' were substituted for the words 'The body by which they are so established' by Bom 14 of 1934, s 4 (2) (ii)

Farming of tolls

101 (1) It shall be lawful for a municipality to lease by public auction or private contract the levy of any toll that may be imposed under this Act,

Provided that the lessee shall give security for the due fulfilment of the conditions of the lease.

Persons employed by lessee of toll to have power of seizure

(2) Where any toll has been leased under this section, any person employed by the lessee to collect such toll shall, subject to the conditions of the lease, execute the powers and perform the duties conferred and imposed by sub-sections (1) and (2) of section 98 on a person appointed to collect a toll, and any property seized shall be dealt with as if it had been seized under the provisions of that section,

Provided that no property seized may be sold except under the orders of the Chief Officer

'Toll' does not include 'tax'—A tax other than a toll cannot be leased out.—This section provides for farming out of any toll Although the term tax includes toll, the term toll does not include any tax See **The Saundatti Yellema Municipality v Shripad Bhat, 35 B L R 163.** In this case it was held that s 81 A of the Bombay District Municipal Act, 1901, (equivalent to s 101 of the Boroughs Act,) empowers a municipality to lease the levy of any toll imposed under the Act, e g , toll on animals and conveyances under s 59 (iii) but not the levy of any tax e g tax on pilgrims under s 59 (x) In the course of the judgment Rangnekar J said "section 59 gives the Municipality the power to lease a right to levy tolls which may be imposed by the Municipality under this Act It follows from this section that the Municipality has no power to lease a right to levy any 'tax' or any other kind of impost other than a toll, for it is clear law that the powers of a corporation created by statute are limited by the statute itself, and what a corporation is not expressly authorized to do, it must be taken to have been impliedly prohibited by the statute" Although this was a case under the Bombay District Municipal Act, 1901, the ruling applies to a case under the Boroughs Act as the relevant sections in both the Acts are similar in terms Thus it is not open to a municipality to lease out any tax except a toll imposed under the Act The only toll which could be imposed under the Act is one under s 73 (iii) i e, a toll on vehicles and animals and therefore it is the only tax that could be leased out

Fees cannot be leased out:—Fees are not toll and therefore cannot be leased out under this section In **the Sholapur Municipality v Shivram, 30 B.L.R. 715,** it was held that under the Bombay District Municipal Act, 1901, a municipality has no power to lease or auction the right to levy fees due for temporary occupation of municipal land Dealing with the question Baker J said "The question in this case is as to the right of the municipality to sell or lease to contractors the right of collecting fees from persons selling fodder on land belonging to the municipality The right to collect such fees is given to the municipality by s 70 of the District Municipal Act (Bom Act III of 1901) It has been contended by the learned pleader on behalf of the appellant that under s 40 of the Act the municipality has a right to enter into and perform all such contracts as they may consider necessary or expedient in order to carry into effect the provisions and purposes of the Act, and that will cover the lease or sale in question That power however is subject to the proviso that it should be exercised so far as is not inconsistent with the provisions and purposes of the Act The question is therefore, whether the sale of the right to levy the fees on persons selling fodder is inconsistent with the provisions and purposes of the Act It is admitted that the powers of a corporation must be limited by the Act which creates it Section 70 forms part of Chapter VII of the Act which refers to municipal taxation. That chapter is divided into five parts, and part (5) refers to octroi and tolls In s 59 the taxes imposable under the Act are enumerated and tolls are expressly defined as referring to vehicles and animals used for riding, draught or burden and entering into the municipal district and not liable to tax under the preceding clause. It is under s 81A of the Act which was inserted by the Act VIII of 1914, that the municipality is authorised to lease the levy of any toll that may be imposed under this Act S 70 defines the impost in question in the present case as fee, and in view of the distinction between it and a toll, which is defined in s 59, I am of opinion that the special provision made by s. 81A

of the Act cannot be extended so as to cover the fee with which we are now concerned and it will appear that if s 40, as contended by the learned pleader for the appellant gives the municipality the power to lease or sell the right to collect taxes, there would have been no necessity for the addition of s 81A to the Municipal Act to legalise the leasing of the levy of tolls The same view has been taken by the Madras High Court in the case of **Municipal Council, Kumbakonam v Abbas Sahib**, but as that decision was based on the local law in force in Madras, I prefer to base my decision on the conclusions arising from the terms of our own Bombay District Municipal Act" This case is equally applicable to a case under the Boroughs Act

Any toll.—The expression 'any toll' in s 117 (3) of the B.L.B Act is not restricted merely to the 'tolls' for roads and bridges but includes 'toll for public ferries' also **Chelaram v District Local Board of Karachi, A.I.R 1930 Sind 176.**

Whether toll can be farmed out —A toll is a tax within the meaning of the Act, section 59 (b) (iii) of the B D M Act, 1901, (s 73(iii) of the B.M B Act, 1925) The procedure in levying any tax is laid down in s 60 of the B.D M Act (s 75 of the B M.B Act) It is necessary inter alia, that the municipality shall prepare rules for the purposes of clause (i) of s 46 of the B.D M Act (s 58 (j) of the B M B Act) **prescribing the tax selected** The words in bold type would appear to indicate that the rules, required as an essential preliminary to the imposition of a tax, are not rules as to all matters dealt with by section 46 (i) The rules so framed are also to specify the matters stated in section 60 (a) (iii), (iv) and (v) It is not, therefore, correct to say that the municipality is bound before imposing a tax to publish rules prescribing the mode of levying and recovering the tax, and even if it were so, the objection would rather be one to the validity of the tax than to the mode of collection Possibly the meaning is that without a rule under s 46(i) prescribing that a tax may be farmed out it is not legal for the municipality to do so However, the general maxim **delegates non protest delegate** would appear to apply Statutory powers cannot be delegated without statutory permission **(Hardcastle on statutory Law Edn. 2 Page 234, I L R 18 Madras, Page 118)** The power to collect tolls is given to the municipality by the B D M Act The extent to which the municipality can delegate its powers is laid down in s 37 of the B D M Act, (s 46 of the B.M B Act) which provides, inter alia for such delegation to stipendiary officers A farmer of tolls is clearly not within the terms of the section Therefore, the system of farming out tolls is not strictly in accordance with law **(R L A's opinion no. 769 dated the 19th March 1909 in G R G D no. 1724dated the 1st April 1909). This** position has however changed Section 81A which has been introduced in B D M Act by Bom Act 8 of 1914, s 18 and s 101 of the B M B Act expressly allow a toll to be farmed out

(6) Powers of Provincial Government in Respect of Municipal Taxes

Power of Provincial Government to suspend levy of objectionable taxes.

102 If it shall at any time appear to the Provincial Government on complaint made or otherwise that any tax leviable by a municipality is unfair in its incidence, or that the levy thereof or of any part thereof is obnoxious to the interest of the general public, it may require the municipality, within such period as the Provincial Government shall fix in this behalf, to take measures for removing any objection which appears to it to exist to the said tax;

and if, within the period so fixed, such requirements shall not be carried into effect to the satisfaction of the Provincial Government, it may, by notification in the Official Gazette, suspend the levy of such tax, or of such part thereof, until such time as the objection thereto shall be removed

The Provincial Government may at any time by a like notification, rescind any such suspension.

Amendments —The words 'The Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council The words 'Official Gazette' were substituted for the words 'Bombay Government Gazette' by ibid.

Powers of Government regarding levy of tolls:—See notes under this head under s 73 (iii)

Power of Provincial Government to require municipalities to impose taxes

103. Where it appears to the Provincial Government that the balance of the municipal fund of a municipality is insufficient for meeting any expenditure incurred under section 215 or for the performance of any duties for the performance of which the Provincial Government has directed the Commissioner to fix period under section 218 the Provincial Government may by notification requires the municipality to impose, within the municipal borough any tax specified in the notification which may be imposed under section 73 and which is not at the time imposed within the said borough or to enhance any existing tax in such manner or to such extent as the Provincial Government considers fit; and the municipality shall forthwith proceed to impose or enhance, in accordance with the requisition, such tax under the provisions of this chapter as if a resolution of the municipality had been passed for the purpose under section 75

Provided that—

(a) the Provincial Government shall take into consideration any objection which the municipality or any inhabitant of the municipal borough may make against the imposition or enhancement of such tax

(b) it shall not be lawful for the municipality to abandon or modify or to abolish such tax when imposed;

(c) the Provincial Government may at any time cancel or modify any requisition made by it under this section and the levy of the tax or the enhancement, except as to arrears theretofore accrued due, shall thereupon cease or be modified accordingly.

Amendments —The words 'The Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

CHAPTER VIII

RECOVERY OF MUNICIPAL CLAIMS

Presentation of bill for taxes.

104 (1) When any amount,

(a) which by or under any provisions of this Act, is declared to be recoverable in the manner provided by this chapter, or

(b) which, not being leviable under sub-section (1) of section 98 or payable on demand on account of an octroi or a toll, is claimable as an amount or instalment on account of any other tax which now is imposed or hereafter may be imposed in any municipal borough

shall have become due, the Chief Officer shall, with the least practicable delay, cause to be presented to any person liable for the payment thereof, a bill for the sum claimed as due

Contents of bill.

(2) Every such bill shall specify the period for which, and the property, occupation or thing in respect of which, the sum is claimed, and shall also give notice of the liability incurred in default of payment and of the time within which an appeal may be preferred as hereinafter provided against such claim

If bill not paid within fifteen days, notice of demand to issue

(3) If the sum for which any bill has been presented as aforesaid is not paid at the municipal office or to a person authorized by any rule in that behalf to receive such payments, within fifteen days from the presentation thereof the Chief Officer may cause to be served upon the person to whom such bill has been presented a notice of demand in the form of Schedule V, or to the like effect

Right of distress depends upon observance of statutory formalities.—The requirements of this section must be fully satisfied before a warrant can be issued under section 105 In **the Surat City Municipality v Chhabildas Dharamchand 16 B.L.R 749,** to recover the arrears of House-Tax the Surat Municipality served upon the plaintiff a bill, which did not specify the time within which an appeal might be preferred as required by s 82(2)(b)(ii) of the District Municipalities Act, 1901 On failure to pay the arrears, the Municipality issued a notice of demand, and followed it up by the issue of a distress warrant When the warrant was executed, the plaintiff paid up the amount of the arrears He next filed a suit to recover it back from the Municipality —Held, awarding the claim, that the procedure followed by the Municipality in recovering the amount of arrears was not a legal procedure inasmuch as the bill did not fulfil the statutory requirements of s 82(2)(b)(ii) of the Act and the right of distress depended upon the observance of the statutory formalities, it being a right conferred by the statute only upon those conditions Section 82(2)(b)(ii) of the District Municipal Act 1901 is equivalent to sub-section (2) of this section

and the principle of this case would apply to a case under the Boroughs Act. But this does not mean that every ultimate penalty or liability must be mentioned It is quite sufficient if the next immediate liability is stated In **the Raipur Manufacturing Co Ltd., v. The Ahmedabad Municipality, 31 B.L.R 1224**, the plaintiff company occupied an extensive piece of land, on which were erected several buildings for the purposes of their mill By May, 31, 1923, the Municipality of Ahmedabad laid down Municipal water pipes within 75 feet of some of the Mill buildings, and by December 27, 1923, erected two stand-pipes within 500 feet of some of the mill buildings On August 7, 1923, the Municipality served on the plaintiff company bills demanding water-tax on all the buildings of the mill from April, 1, 1923, to March 31, 1924 The penalty for non-payment of the tax, as mentioned in the bill, was one of eight annas Under the powers vested in it by s 46(1) of the Bombay City Municipalities Act, 1925, the Ahmedabad Municipality framed rules, one of which (rule 3) provided 'The said taxes shall be payable in advance in one instalment, and shall accrue due on April 1' Rule 6 provided 'mill buildings and tanks attached thereto, outhouses, warehouses, godowns, houses, bungalows, and all other buildings of any kind connected with them—shall be assessed' Rule 22 provided that buildings whereof no part is within 75 feet of a water-pipe or within 500 feet of a—stand-pipe—shall be exempted from the water-tax The plaintiff company filed a suit for a declaration that they were not amenable to the water-tax, contending first, that the bills presented to them were defective in law as they omitted to mention all the penalties consequent upon non-payment of the tax, and were inaccurate as regards the amount, secondly, that under rule 3, they were not liable to pay the tax for any period prior to April 1, 1924, and thirdly, that the buildings outside the radius of 75 feet from the water-pipe or 500 feet from the stand-pipe were not assessable to the water-tax The Municipality accepted a portion of the first contention and agreed to abate their demand of the tax for April and May 1923 Held, (1) that the Municipality sufficiently complied with the law by stating in the bills only the next step to which they would have recourse, viz, a notice of demand, inasmuch as s 104(3) of the Bombay City Municipalities Act, 1925, did not expressly say that all the liabilities including the ultimate liability incurred in a default of payment were to be specified in the bills, (2) that the plaintiff company were liable to pay the water-tax from June 1, 1923, (3) that not merely the actual physical buildings within 75 feet of a water-pipe or 500 feet of a stand-pipe were liable for assessment, but that if any appreciable portion of a mill building fell within those radii, the whole building of the mill became liable In the course of the judgment Madgaonker J observed "The objection to the bill, exhibit 16, for the appellants is on the score that it fails to comply with s 82, cl (2), sub-cl (b), para, 1, and does not sufficiently set out the liability incurred in default of payment It is argued that the word 'liability' would include all the liabilities up to distress, and the ultimate liability and particularly the liability to distress and sale under s 82(2) of the Bombay District Municipal Act, and not merely the first liability, so called, to a demand notice with a penalty of eight annas, which is the only liability actually specified in the bill Exhibit 44 For the respondents it is contended that the liability does not mean all the liabilities, but merely the immediate liability in case of non-payment of the bill, and cl (3) of s 82 is relied upon as showing that under the law the bill only contemplates the mention of the notice of demand, and it is only when the bill is not paid and a

notice of demand, in the form of schedule B, is sent that in the notice of demand mention of a distress warrant is necessary, and therefore presumably not in the bill Reference is made for the appellants to s 102 of the Madras District Municipalities Act (iv of 1884) from which the corresponding section 82 of the Bombay Act is said to have been taken It is important, however, to note that the Madras Act contains no provision for a notice of demand as the Bombay Act The question, therefore, reduces itself whether by the word liability' the legislature meant the immediate liability or all the further liabilities including the ultimate liability It may be conceded that fiscal statutes which increase pecuniary burdens must be strictly construed in favour of the subject, at least in regard to the liability to pay the tax and also in regard to the amount **Partington v. The Attorney-General (1869) L R 4 H L 100** Similarly, in the case of penalties, the requirements of the law before the penalty is incurred must be strictly complied with. For instance, where the bill omitted to state the time within which an appeal might be preferred, as is necessary under section 82(2)(b)(ii) the subject was held not liable **Surat Municipality v. Chhabildas, 16 B.L.R. 749.** At the same time such penal Acts are not to be so construed as to furnish a chance of escape and a means of evasion 'Repairs' in the Church Buildings Acts were held to include others such as lighting, cleaning etc. **The Queen v The Official Principal of the Consistory Court (1862) 31 L J Q.B 106,** Maxwell on the Interpretation of statutes, 5th edition, pp 465 and 468 In other words, to revert to the familiar maxim, the courts have to consider what liability the legislature meant to impose and the amount of it and the conditions necessary before the penalty, if any, was incurred In the present case reading ss 82 and 83 together, the law contemplates that Municipalities should issue a notice of demand in the form of schedule B before they had recourse to distress It is true that the words in s 82, cl (3) are 'the Municipality may cause to be served' It is in evidence here, however, that the practice in Ahmedabad was to serve such notices of demand as the bill actually states As the clause now in question does not expressly say that all the liabilities including the ultimate liability incurred in default of payment are to be specified in the bill, on the ordinary canons of interpretation the argument for the respondent is in my opinion correct, that the Municipality sufficiently complied with the law when they stated the next step to which they would have recourse viz, a notice of demand It is true that the liability under the notice of demand was merely eight annas But the slightness of the amount does not make it the less a liability within the meaning of the law"

Period of limitation —There is no period of limitation prescribed either under s 104 or s 105 Thus a bill can be sent at any time, after the amount has become due, but it must be sent with the least practicable delay The notice of demand is to be issued after lapse of fifteen days from the date of service of the bill and at any time after a lapse of similar period from the date of the service of notice a distress warrant can issue Thus a municipality can recover its claims under Chapter VIII at any time, provided the procedure laid down is followed This is irrespective of the fact that a suit for the amount under section 203 of the Boroughs Act may be time-barred The period of limitation prescribed for a suit under s 203 does not apply when a Municipality chooses to recover the amount by the procedure of bill, notice and warrant The procedure by way of suit under s 203, provides merely an alternative method of realising municipal claims This question directly arose in **the Surat Borough Municipality v. Sarif Kurrunnissa Begum Saheb, 41 B.L.R 1002** and in appeal reported at 42

B L R 960, wherein it was held that s 105 of the Bombay Municipal Boroughs Act, 1925 is not subject to any period of limitation as regards the issue of a distress warrant for the recovery of arrears of taxes due to a municipality The provisions of this section are applicable even if the period for bringing a suit under section 203 of the Act has expired In the course of the judgment Broomfield J observed "on the construction of ss 104, 105 and 203 we can find no justification for the finding of the lower Courts that the levy of taxes by distress can only be made within the period limited for a suit Section 104 provides that as soon as any tax becomes due, the Chief Officer shall, with the least practicable delay, cause a bill for the sum due to be presented If the sum claimed is not paid within fifteen days, the Chief Officer may cause a notice of demand to be served It is not alleged that there was any delay in the presentation of the bills in this case No time is prescribed within which a notice of demand must be sent Then it is provided in s 105 that if the person on whom a notice of demand has been served does not either pay or show cause or prefer an appeal within fifteen days from the service of the notice, the sum in question may be levied under a warrant It is not stated that this warrant is to be issued within fifteen days, or with the least practicable delay, or within a reasonable time or anything of the sort The power given is quite general and unrestricted, and the reasoning which has found favour with the Courts below requires the insertion of words in the section which find no place there It may be that the Legislature may have contemplated that the distress procedure should be taken promptly and within a reasonable time, but it had not said so It is not open to the Courts, in our opinion, to infer that s 105 is subject to any period of limitation or to say that the provisions of this section are inapplicable if the period for bringing a suit under s 203 has expired Under s 203 a suit may be brought, within the period of limitation or course, in case of failure to realise the municipal taxes by the summary process If recourse is had to a suit in those circumstances, it is quite true that the distress proceedings must have been taken within the period of limitation for the suit, since otherwise the suit would be barred But the argument for the respondent takes no account of the words at the beginning of the section which show that recovery by suit is an alternative procedure which may be resorted to in cases where the distress procedure has not been or could not be availed of If there are two methods of procedure open to the Municipality, one by distress under s 105 and the other by suit under s 203, it is, in our opinion, impossible, to say that because one of these alternative methods is subject to limitation, the other must also be so subject We think that if it had been intended that the procedure under s 105 should be subject to any limitation, the legislature would have said so In any case, it is not for the Courts to give effect to an intention which has not been expressed"

When a bill is presented with 'the least practicable delay' as required by sec 104(1) of the B.M B Act, 1925, the right to issue a notice of demand and then to recover the amount by a distress warrant under s 105, accrues to the municipality and the right is not lost by lapse of time The periods of limitation prescribed, for filing a suit, under the Limitation Act govern the procedure in a Court of Law and the powers of the municipality acting under provisions of sections 104 and 105 of the Boroughs Act are not fettered by the Limitation Act. The fact that the remedy of the municipality to recover the amount by filing a suit in a Civil Court under s 203 is time-barred cannot therefore prevent it from exercising the special

powers conferred upon it by the B M.B Act. This legal position will apply mutatis mutandis to the cases governed by the B.D.M Act, 1901 also. (Examiner Local Fund Account's No. L 2—4090 dated the 27th January 1942)

105. (1) If the person on whom a notice of demand has been served under section 104, sub-section (3), does not, within fifteen days from the service of such notice, either— In what cases warrant may issue.

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

(b) show cause to the satisfaction of the Chief Officer, why he should not pay the same, or

(c) prefer an appeal in accordance with the provisions of section 110 against the demand, such sum with all cost of the recovery may be levied under a warrant signed by the Chief Officer in consultation with the President in the form of Schedule VI or to the like effect, by distress and sale of the movable property or the attachment and sale of the immovable property of the defaulter, provided that where any measures precautionary or otherwise, have been taken in respect of any such property for the recovery of any sum claimed by the Provincial Government, any proceedings under this chapter in respect of such property shall abate.

(2) Where the property is in the municipal borough the warrant shall be addressed to an officer of the municipality Where the property is in another municipal borough or district, the warrant shall be addressed to the Chief Officer in the municipal borough or to the vice-president in the municipal district, as the case may be, where the property is in a cantonment the warrant shall be addressed to the Executive Officer of the Cantonment; and where the property is not in a municipal borough or district or Cantonment to a Government Officer not lower in rank than a Mahalkari; provided that such Chief Officer, vice-president, Executive Officer or Government Officer may endorse such warrant to a subordinate officer Where the property is in the City of Bombay, the warrant shall be addressed to the Registrar of the Court of Small Causes of Bombay, To whom warrant should be addressed.

Provided that the Registrar may endorse such warrant to a subordinate officer.

(3) It shall be lawful for any officer to whom a warrant issued under sub-section (1) is addressed or endorsed, if the warrant contains a special order authorizing him in this behalf, to break open at any time between sunrise and sunset any outer or inner door or window of a building, in order to make any distress directed in Power of entry under special order.

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.

Warrant how to be executed.

(4) It shall also be lawful for any such officer, if authorized by the warrant, to distrain, wherever it may be found, any movable property or attach any immovable property of the person named in the warrant issued under sub-section (1) as defaulter, subject to the following conditions, exceptions, and exemptions, namely —

(a) the following property shall not be distrained:—

(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 property distrained shall be as nearly as possible equal in value to the amount recoverable under the warrant; and if any property has been distrained which, in the opinion of the Chief Officer or of the person to whom the warrant was addressed, should not have been so distrained, it shall forthwith be returned to the defaulter;

(c) the officer shall on distraining or attaching the property forthwith make an inventory thereof, and give to the person in possession thereof at the time of distraint or attachment a written notice in the form of Schedule VII;

(d) (i) when the property is immovable, the attachment shall be made by an order prohibiting the defaulter from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge;

(ii) the order shall be proclaimed at some place on or adjacent to the property by beat of drum or other customary mode, and a copy of the order shall be fixed on a conspicuous part of the property and then upon a conspicuous part of the municipal office, and also, when the property is land paying revenue to

the Provincial Government, in the office of the Collector of the district in which the land is situate,

(e) any transfer of or charge on the property attached or of any interest therein made without the written permission of the Chief Officer shall be void as against all claims of the municipality enforceable under the attachment

Amendments:—The words 'the Provincial Government' were substituted for the word 'Government' by Adaptation of the Indian Laws Order in Council The words 'where the property is in a Cantonment the warrant shall be addressed to the Executive Officer of the Cantonment' were added by Bom 4 of 1930, s 4 The words 'or Cantonment' occurring between 'or District' and 'to a Government' were inserted by ibid

The words 'Executive Officer' occurring between 'Vice President' and 'or Government' were inserted by ibid

The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

See Notes under s. 104.

Sale of goods distrained in Special cases.

106 (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 Chief Officer shall at once give notice to the person in whose possession the property was, when distrained, 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.

Sale of property distrained or attached, application of proceeds of sale

(2) If not sold at once under sub-section (1), the property distrained or attached or in the case of immovable property a sufficient portion thereof may, unless the warrant is suspended by the Chief Officer or the sum due by the defaulter together with all costs incidental to the notice, warrant, and distress or attachment and detention of the property, is paid, be, on 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 Chief Officer, and the proceeds or such part thereof as shall be requisite, shall be applied firstly in discharge of any sum due to the Provincial Government in respect of such property and secondly in discharge of the sum due and of all such incidental costs as aforesaid. Where the sum due together with costs is paid, by the defaulter as aforesaid, the attachment if any of immovable property shall be deemed to have been removed. Sales of immovable property under this sub-section shall be held in the manner laid down in the rules framed in that behalf

Surplus, if any, how dealt with.

(3) The surplus, if any, shall be forthwith credited to the municipal fund, notice of such credit being given at the same time to the person in whose possession the property was at the time of distraint or attachment, if such person shall claim the surplus by written application to the Chief Officer within three years from the date of the notice given under this sub-section, the Chief Officer shall refund the surplus to such person Any sum not claimed within three years from the date of such notice shall be the property of the municipality

Amendments:—The words 'the Provincial Government' were substituted for the word 'Government' by the Adaptation of Indian Laws Order in Council The words 'three years' occurring between the words 'claimed within' and 'from the date of such notice' were substituted for the words 'one year' by Bom 4 of 1930, s 4

Sale outside the district.

107 Where the warrant is addressed outside the municipal borough the Chief Officer may by endorsement direct the officer or Registrar of the Court of Small Causes of Bombay to whom the warrant is addressed, to sell the property distrained or attached; in such case it shall be lawful for such officer or Registrar to sell the property and to do all things incidental to the sale in accordance with the provisions of section 106, and to exercise the powers and perform the duties of the Chief Officer under section 106, sub-sections (1) and (2) in respect of such sale, except the power of suspending the warrant Such officer or Registrar shall, after deducting all costs of recovery incurred by him, remit the amount recovered under the warrant to the Chief Officer by whom it was issued who shall dispose of the same in accordance with the provisions of section 106

Fees and costs chargeable

108 Fees for every notice issued under sub-section 104, every warrant issued under sub-section (1) of section 105 or distress or attachment made under sub-section (4) of the said section and the maintenance of 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 105.

Amendments:—The words 'Every warrant issued under of the said section' were substituted for the words 'Every distress or attachment made under sub-section (4) of s 105' by Bom 12 of 1931, s (3) (iii)

Summary proceedings may be taken against persons about to leave the borough

109 (1) If the Chief Officer shall at any time have reason to believe that any person from whom any sum recoverable under the provisions of this chapter is due or is about to become due, is about forthwith to remove from the municipal borough, the Chief Officer may direct the immediate payment by such person of the sum so due or about to become due by him and cause a bill for the same to be presented to him

(2) If, on presentation of such bill, the said person do not forthwith pay the sum due or about to become due by him, the amount shall be leviable by distress and sale of the movable property or the attachment and sale of the immovable property of the defaulter in the manner hereinbefore prescribed, except that it shall not be necessary to serve upon the defaulter any notice of demand and the Chief Officer's warrant for distress and sale may be issued and executed without any delay.

Appeals to Magistrates

110. (1) Appeals against any notice of demand issued under sub-section (3) of section 104 may be made to any Magistrate or Bench of Magistrates by whom under the directions of the District Magistrates such class of cases is to be tried

(2) 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 standing committee as follows:—

(i) in the case of a rate on buildings or lands or both within the time fixed in the notice given under section 81 or 82 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 104 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

Application to the Standing Committee necessary before appeal to the Magistrate in the case of water-rate assessed in the form of a rate on buildings or lands —This section provides for an appeal against the notice of demand served under section 104 But no appeal is open unless an application as required by sub-section (2) (b) has been made and the amount of claim is deposited in municipal office **In the Borough Municipality of Ahmedabad v. the Ahmedabad Manufacturing and Calico Printing Co, Ltd., 41 B.L.R. 1015, it was held that**

expression 'a rate on buildings or lands' in s. 110 (2)(b)(i) of the Bombay Municipal Boroughs Act, 1925 includes a tax in the form of a rate on buildings, or lands and the provisions of cl (b)(i) apply also to a water-rate assessed on buildings or lands and therefore no appeal lies to a Magistrate under s 110 in such a case where an application as required by s 110 (2)(b)(i) is not made to the Standing Committee

Jurisdiction of Civil Courts.—This section does not oust the jurisdiction of a Civil Court in cases where the validity or legality of a tax or liability to tax is questioned or where malafides, perversity or manifest error are proved See **Joshi Kalidas v. The Dakor Town Municipality** 7 Bom 399, **Pitamberdas v Jambusar Town Municipality**, 17 Bom 510, **The Surat City Municipality v. Ochhavram Jamnadas**, 21. Bom. 630, **Kasandas v Ankleswar Municipality** 3 B L.R. 882; **Chunilal Thakordas Modi v Surat Municipality**, 5 B.L.R 267, **Hamirsing v. Amod Town Municipality**, 7 B.L.R. 288, **The Secretary of State for India v Huges** 16 B L.R. 121; **The Surat City Municipality v Chhabildas**, 16 B L.R 749; **Ambalal Sarabhai v. The Ahmedabad Municipality**, 23 B L R 48, **Kalyan Municipality v. Govind Karsan**, 27 B L R 447, **Hari Govind v The City Municipality of Belgaum**, 31 B.L.R. 1249, **Kanhardas v Keshav**, 37 B L R. 235, **M. S Bhopshetty v. B. V. Bhatt**, 42 B L.R 223, and **Karsondas v Karachi Municipality**, A.I R. 1936 Sind 114. Also see notes under section 81 (6). Such a suit is an independent suit and it is not required to be brought after exhausting the remedies prescribed in sections 110 and 111 of the Act In **Chunilal Thakordas Mody v. The Surat City Municipality**, 5 B L.R 267, it was held that where a municipality imposes a tax a person contending that it is illegally levied can at once file a suit therefor against the Municipality in a Civil Court Section 86 of the Bombay District Municipal Act, 1901 (equivalent to section 110 of the Boroughs Act) does not provide a preliminary which one must necessarily resort to before he can file an action in a Civil Court In **Hari Govind v. The City Municipality of Belgaum**, 31 B L.R. 1249, it was held that there is nothing to prevent a suit being filed under section 206 of the City Municipalities Act even though the assessee may not have followed in its entirety the procedure for appealing to the magistrate laid down in section 110 of the Act In **Kanhardas v. Keshav**, 37 B.L R. 235, it was held that the words in section 111 of this Act that the decision passed in appeal by the magistrate was subject to revision by the court to which appeals would ordinarily lie are not mandatory in the sense that it was incumbent on either party to adopt the remedy provided in the section and the civil court had jurisdiction to entertain a regular suit In **M. S Bhopshetty v. B V. Bhatt**, 42 B L.R 223, it was held that a civil court has jurisdiction to entertain a suit in respect of any liability to municipal taxation Such a suit is an independent suit, and need not be filed after exhausting the other remedies provided in ss 110 and 111 of the Bombay Municipal Boroughs Act, 1925 In the course of the judgment Divet a J observed "It is further held in **Kanhardas v. Keshav** that quite apart from the Municipal Act the Civil Court has jurisdiction to deal with a civil right such as liability to taxation The effect of this decision is that not only has the Civil Court jurisdiction to entertain a suit with regard to any liability to Municipal taxation but that also such a suit is an independent suit and is not to be filed after exhausting the other remedies provided in section 110 and 111 of the Bombay Municipal Boroughs Act S 111 does not say that the decision of the magistrate or any other order passed in revision of that decision is final till it is set aside in a regular suit, and that result in my opinion,

follows as a corollary from the decision in **Hari v Belgaum Municipality**, that there was nothing to prevent a suit being filed even though an assessee might not have followed in its entirety the procedure for appealing to the magistrate Article 14 would apply only to those orders which require to be set aside in a regular suit before any relief inconsistent with the order could be obtained But the order of the Bench Magistrate being not such an order, Art 14 in my opinion can have no application to the facts of the present case The order passed by the Bench Magistrate in appeal, though subject to revision, seems to me to be a summary order which did not prevent a suit being filed even without preferring an appeal to the magistrate against the notice of demand"

However a suit will not lie to challenge the assessment or valuation made under section 81 or on appeal under s 110 or in revision under s 111 **See notes under s. 81(6)**

On the 18th of March, 1880 the Dakor Town Municipality, acting under the powers conferred upon them by the Bombay Act VI of 1873, convened a meeting at which it was resolved to impose a house-tax on the town, and also another meeting on the 2nd of April, 1880, at which a classification of the houses was made and the rates fixed The Revenue Commissioner N D on behalf of the Government sanctioned the resolutions on the 2nd of June, 1880 Notice of the meeting of the 18th of March, 1880, was not served on the three of the Commissioners, they being absent at the time from Dakor, and no notice specifying the business to be transacted therein was posted up at the Kachari, as required by s 11 cl 1 of the Act K a house-holder, sent a notice to the Municipality on the 25th of January 1881, impeaching the legality of the tax On the 3rd of June 1881, he paid the tax, namely Rs 2 for which he had been rated, and on the 6th of January 1882, he sued for a refund of the same sum from the Municipality Held, that the suit was not brought too late to satisfy the requirements of section 86 of the Act When the notice of the 25th of January, 1881, was sent by K, he had no cause of action against the Municipality for anything done, no notice therefore, such as is contemplated by s 86, was ever sent by K, and consequently, there could be no final order on such notice from which the three months prescribed by that section would run The provisions of section 11 cl (1), as to meeting are not directory, but obligatory, and notice to all the Commissioners of the meeting of the 18th of March 1880, being a material part of the machinery provided by the Act for imposing a legal tax, was a condition precedent to the validity of that tax Consequently, the resolution come to on the 18th of March, 1880, was not legal, and whether sanctioned or not by the Government, it always retained its inherent defect Section 21, which enables the Government to dispose of objections made to a tax by the inhabitants of a town, is quite consistent with the well-established jurisdiction of the Civil Court to decide as to the validity of any fresh tax or impost, and affords no sufficient ground for the conclusion that the intention of the legislature was to take away that jurisdiction **Joshi Kalidas v The Dakor Town Municipality 7 Bom 399**

In 1891 the Municipality of Surat appointed a committee to revise the taxation of the city, proposing to reduce some of the existing taxes and impose others with a view (inter alia) of obtaining a better water supply for the city A scheme of taxation drafted by the Committee was subsequently adopted by the Municipality, and it included a new house and property tax The Municipality then issued a notice with regard to this last mentioned tax under the provisions of s 21 of

Act 6 of 1873 setting forth the particulars of the proposed tax and requiring objections to be lodged within a fortnight from the date of the notice A number of objections were received which were laid on the table for twenty one days for perusal and consideration by the Municipal Commissioners At the end of that time a special meeting of the commissioners was held at which it was resolved that the objections were invalid, and the scheme and the rules with regard to the levying of tax were forwarded to the Government and were sanctioned. The plaintiffs sued for an injunction restraining the Municipality from levying the tax, contending that it was illegal, on the ground (1) that there was no municipality desirous of imposing the tax for any of the purposes allowed by the Act, inasmuch as the Commissioners who passed the resolution to impose the tax did not know for what purpose the tax was to be imposed, (2) that the resolution imposing the tax was illegal because the notice calling the meeting of the Commissioners which passed the resolution did not specify this tax as object of the meeting, (3) that the notice given under s 21 of the Act of 1873 was bad, as it did not state the purpose of the proposed tax, (4) that the nature and the amount of the tax were not sufficiently stated in the notice, (5) that the notice ought to have stated the mode in which the valuation of property for the purpose of the tax was to be made, (6) that the objections of the rate payers were not sufficiently considered, (7) that it did not appear whether the tax was to be paid in advance or not, and (8) that the assessment of the tax was made on a wrong basis Held, (1) that the purpose of the tax was sufficiently known to the Commissioners, (2) that the resolution imposing the tax was not invalid, although the notice convening the meeting did not specify the object of the meeting, (3) that the notice need not specify the purpose of the tax, (4) that as to the nature and the amount of the tax the notice was sufficient as it stated that the amount would depend on the valuation of the property, (5) that the notice need not define the mode of valuation, (6) that the objections were sufficiently considered, (7) that the tax was to be paid partly in advance, (8) that the assessment would not affect the validity of the tax, but would give a right of appeal to have the valuation set right Held, therefore, that the tax was legally imposed **Surat City Municipality v. Ochhavram, 21 Bom 630**

In **Kasandas v. Ankleswar Municipality, 3 B L R 832,** it was held that in the absence of proof of malafides, perversity or manifest error Civil Courts ought not to interfere with house valuation made by a municipality for the purpose of taxation unless there is a breach of the rules prescribed by law for making the valuation Delivering the judgment Jenkins C J observed "The plaintiff sues to recover from the defendant Municipality Rs 7-9-0 as over charged house-tax, but his suit has been dismissed by both the lower Courts on the ground that the matter is one in which the Civil Courts have no jurisdiction The conclusion is based on the decision of this Court in **Morar v Borsad Town Municipality,** Mr Jhaveri however contends that this case does not fall within the principle of that decision, that his complaint here is not merely that the valuation is wrong, but that it has been arrived at in contravention of the rules which are by law applicable Had the Appellant been able to make out that which is the basis of his argument, that the prescribed rules for arriving at a valuation had not been observed, then I agree, that he would have successfully distinguished this case, but in that he has failed For the purposes of the house-tax it is provided by the rules relating to the Ankleswar Municipality that 'the market value of a house means the price which may be expected to obtain for the house at a sale held under circumstances neither very favourable nor very unfavourable'

The mode in which the Municipality's officer arrived at this valuation is set out in the judgment of the first Court, and in my opinion it does not contravene the rule I have just read It was a legitimate method of arriving at the fair selling value of the house As no breach of prescribed rules has been committed then in the absence of any proof of malafides, perversity, or manifest error, we do not think we ought to interfere on the mere suggestion that the valuation is too high "

Where a Municipality imposes a tax, a person contending that it is illegally levied can at once file a suit therefor against the Municipality in a Civil Court Section 86 of the Bombay District Municipal Act, 1901, does not provide a preliminary which one must necessarily resort to, before he can file an action in a Civil Court, **Chunilal v. Surat City Municipality, 5 B L R 267**

The plaintiff filed a suit in a Civil Court to recover from a Town Municipality the amount of house-tax illegally assessed and recovered from him The court came to the conclusion that there was an illegality in the assessment and recovery complained of, but the Court by itself went into the question of assessment and fixed the amount of house-tax, and dismissed the plaintiff's suit —Held, setting aside the decree and awarding the plaintiff's claim, that the High Court could interfere under s 622 of the Civil Procedure Code inasmuch as the court in fixing the amount of house-tax exercised the functions which the legislature vested elsewhere, and so far exercised its jurisdiction improperly **Hamirsing v Amod Town Municipality, 7 B.L.R. 288**

In **the Secretary of State for India v Huges, 16 B.L R 121** it was held, that the action of the Cantonment Magistrate was not warranted by the regulations, inasmuch as reasonable time was not given to the plaintiffs to take advise as to the increase in the rate from Rs 201 to Rs 9840 and that he had wholly disregarded the basis upon which the rate was to be assessed, and that therefore the jurisdiction of the Civil Court was not ousted, the money having been claimed and received from the plaintiff without the shadow of a right

In **the Surat City Municipality v Chhabildas, 16 B.L R 749**, to recover the arrears of house-tax, the municipality served upon the plaintiffs a bill, which did not specify the time within which an appeal might be preferred, as required by s 82(2)(b)(ii) of the District Municipalities Act, 1901 On failure to pay the arrears, the Municipality issued a notice of demand, and followed it up by the issue of a distress warrant When the warrant was executed, the plaintiff paid up the amount of the arrears He next filed a suit to recover it back from the Municipality —Held, awarding the claim, that the procedure followed by the Municipality in recovering the amount of arrears was not a legal procedure inasmuch as the bill did not fulfil the statutory requirements of s 82 (2) (b) (II) of the Act, and the right of distress depended upon the observance of the statutory formalities, it being a right conferred only by the statute upon those conditions

In **Ambalal Sarabhai v The Ahmedabad Municipality 23 B.L R 48**, one of the rules framed by a district Municipality under s 32(h) of the Bombay District Municipal Act, 1884 and kept in force by s 2 of the Bombay District Municipal Act, 1901, prescribed certain procedure to be followed on certain fixed dates, before the house and property tax could be levied or enhanced The Municipality sought to enhance the tax by following out the procedure prescribed but on dates, much posterior to those fixed. The plaintiff having been compelled to pay the tax thus enhanced, sought for a refund of the enhanced tax Held, that rule 74, which the Municipality was competent to make under s 32(h) of the Bombay

District Municipal Act, 1884 was binding equally upon the Municipality and the house owners and that its non-compliance by the Municipality entitled the plaintiff, who was the house owner, to recover what was levied from him by way of house and property tax in excess of what was payable by him at the beginning of the year

In **Kanhardas v Keshav, 37 B L R. 235,** the Municipality of Jalgaon made a by-law under which 'buildings used exclusively for religious, charitable, or Municipal purposes' were exempt from the payment of the house-tax The defendant was a manager of a temple at Jalgaon The temple property consisted of the temple proper, a room set apart for visitors, and a suite of twelve rooms one of wh ch was occupied by the manager and the remaining eleven were let to tenants The rent recovered was used for the purpose of the temple The first three were exempt from the payment of the house-tax, but the Municipality used to levy the tax on the eleven rooms which it enhanced for the year 1927-28 and recovered from the defendant The defendant appealed against the levy of the tax to a magistrate under section 110 of the Bombay Municipal Boroughs Act, 1925 who decided that the rooms were not amenable to the tax The Municipality refunded the amount of the tax and, instead of applying in revision against the magistrate's order under section 111(1) of the Act filed a suit in the Civil Court to set aside the order of the magistrate and to recover the amount of the tax from the manager The manager also filed a suit to recover the tax paid by him for the foregoing year, for a declaration that the whole property was exempt from payment of the house-tax, and for an injunction to restrain the Municipality from levying the tax in future Held, (1) that as the eleven rooms were used for a secular purpose, they were not exempt from payment of the house-tax and the fact that the income derived from such use was devoted to religious purposes did not bring the rooms within the ambit of the by-law, (2) that the words 'any appeal shall, at the instance of either party, be subject to revision' in section 111 (1) of the Act were not mandatory in the sense that it was incumbent on either party to adopt the remedy provided in the section, (3) that the Civil Court had, therefore, jurisdiction to entertain the suit brought by the municipality

In **M. S Bhopshetty v B. V Bhatt, 42 B.L.R. 223,** was held that a Civil Court has jurisdiction to entertain a suit in respect of any liability to municipal taxation

In every case of assessment the procedure laid down by the Act should be strictly followed and the finality of the decision, when not in confirmity with the statutory provisions may be challenged in a Court of Law Where a committee to deal with objections to assessment confirms the assessment without giving the assessee opportunity to be heard, and the assessee without filing an appeal to the Magistrate pays the amount under protest and sues for recovery of the amount in a Civil Court the suit is maintainable as one of the essential conditions expressly laid down by s 65 (3) is not complied with and the order passed by the assessing committee is without jurisdiction and ultra vires And s 86 is no bar to such a suit For s 86 is an enabling section which empowers an assessee who is aggrieved by an order passed with jurisdiction by the assessing committee to appeal to a Magistrate on facts In the absence of this section it would not be open to an assessee to attack the decision of the assessment committee on the merits. But that does not mean that where the attack goes to the very root of the assessment fixed on the ground of non-com-

pliance by the assessment committee with the preliminaries laid down by the statute, which they are required to comply with before they give their decision, the assessee may not resort to the ordinary tribunal It is an elementary principle of law that a provision contained in a statute which purports to restrict the common right of a party's access to a Civil Court must be interpreted with the utmost strictness Section 86 is not impliedly intended to bar the right of a party aggrieved by the excessive levy of a tax to resort to a court of law But that section is only intended to give to the aggrieved party a summary remedy by way of appeal to a Magistrate against an assessment of facts which would otherwise be barred A municipality assessed the tax for the year without complying with the provisions of the law The assessee paid it under protest and sued for refunds of taxes It was contended that the assessment fixed and levied during the previous year was good and hence he was entitled to refund of excess over that amount Held that the mere fact that the municipality failed to comply with the provisions of the section was not by itself sufficient to enable the assessee to escape payment of the proper assessment Before he could recover the excess which he had paid he must satisfy the court that it was not payable· **Karsandas v Karachi Municipality, A I R 1936 Sind 114**

Estoppel:—If house-tax is paid for one year without protest it does not prevent the assessee from challenging the same assessment in a subsequent year In **Pitamberdas v Jambusar Town Municipality, 17 Bom. 510**, the plaintiff paid house-tax at the rate of Rs 6 for the year 1890 without any protest When the tax was sought to be levied from the plaintiff at the same rate for the year 1891, he objected to the levy as illegal and excessive, and paid the tax under protest He then sued to recover what he alleged was an excess charge of Rs 5 in respect of the tax for 1891 His claim was rejected on the ground that he was estopped from recovering the alleged excess by reason of his having paid the tax for 1890 without protest Held that the suit was not barred The levy of a tax in each year gives a new and distinct cause of action, and the payment of the tax without protest for one year does not bar a suit to recover a sum paid in a subsequent year under protest on account of a tax which was not legally chargeable for that year Although this was a suit, the same principle will apply in an appeal under s 110

Limitation:—In **M S Bhopshetty v Bhatt, 43 B.L R 223**, it was held that an order under s 110 or 111 is a judicial order and not a quasi judicial or executive order A judicial order does not require to be set aside in order to obtain a relief inconsistent with it and therefore the limitation of one year prescribed in article 14 of the Indian Limitation Act 1908 does not apply to a suit brought to obtain a relief inconsistent with such an order

In **Govind Bala v Ganu Abbaji, 10 B L R 749**, it was held that article 14 does not contemplate a judicial order

Powers of a magistrate in appeal under this section:—A magistrate hearing an appeal under s 110 of the B M B Act 1925, is an ordinary court and as such can allow additional evidence oral or documentary to be led before him **The Municipal Borough of Ahmedabad v the Aryodaya Ginning and Manufacturing Co, Ltd., 43 B.L.R 816.** Dealing with this point Wadia J said "It is argued first that a magistrate acting under s 110 is merely an appellate authority upon whom no powers of taking evidence have been conferred by the statute, and that therefore no evidence could be taken by him The Act undoubtedly does not contain any provisions giving specific powers to the magistrate acting under s 110 to take

evidence, to summon witnesses, to order the production of documents or to administer oaths But the magistrate acting under s 110 of the Bombay Municipal Boroughs Act is not a **persona designata** but an ordinary Court, whose decisions are subject to revision by the Court to which appeals from his decision would ordinarily lie, and as has been recently held by this Court in **Lokmanya Mills Ltd. v Municipal Borough, Barsi, 41 B L R 937**, a further revision application lies to the High Court against an order in revision passed by a Sessions Judge under s 111 of the Bombay Municipal Boroughs Act from an order passed by a magistrate under s 110 of the Act In this respect the magistrate acting under s 110 of the Bombay Municipal Boroughs Act differs from the magistrate dealing with appeals under s 86 of the Bombay District Municipal Act, and from the Chief Judge of the Small Causes Court acting under s 217 of the City of Bombay Municipal Act In these cases the Magistrate or the Chief Judge is a **persona designata**, and this explains why in the City of Bombay Municipal Act it was found necessary to confer specific powers upon the Chief Judge to summon and enforce attendance of witnesses and compel them to give evidence and to compel the production of documents No such special provision was necessary under the Bombay Municipal Boroughs Act because the appellate authority under s 110 is a Court, and it has inherent powers to summon witnesses, to compel production of documents and to administer oaths There is therefore no force in the contention that the Magistrate acting under s 110 has no power to take evidence because such powers are not specifically conferred on him by the Act The next contention is that at any rate he is an appellate authority and cannot ordinarily take evidence, and that it would only be in special circumstances such as are dealt with in O.XLI,r 27, of the Code of Civil Procedure, that he could allow evidence to be led in an appeal The position of a Magistrate acting under s 110 is a very anomalous one It was held in **In re Dalsukhram, 9 B L.R 1347**, that a Magistrate hearing an appeal of the kind mentioned in s 86 of the Bombay District Municipal Act was merely an appellate authority having jurisdiction given by the Act to deal with a question of civil liability, that he was not therefore an inferior criminal Court, and that a revision application against his order would not lie to the High Court on its criminal side under s 435 of the Code of Criminal Procedure In **Surat Municipality v Hamiduddin, 40 B L R. 387** the same view was taken by Mr Justice Norman with regard to the provisions of ss 110 and 111 of the Bombay Municipal Boroughs Act, and it was held that in such a case a revision application would lie to the High Court only on the civil side The same view was taken in **Lokmanya Mills Ltd., v. Municipal Borough, Barsi, 41 B.L.R 937.** It may therefore, be taken as settled that a magistrate acting under s 110 is an appellate authority having jurisdiction given by the Act to deal with a question of civil liability, and not a **persona designata** The question still remains whether a Magistrate acting under this section is in the position of a Court hearing a civil appeal as regards the taking of evidence, i e whether normally he would be bound to decide the appeal on the evidence already led before the lower tribunal, the standing committee of the Municipality, and could only allow additional evidence to be led before him in appeal under the special conditions laid down in O XLI,r.27, of the Code of Civil Procedure The provisions of ss 110 and 111 are peculiar Although the authority upon which the appellate jurisdiction is conferred is a criminal Court, the matters which it is called upon to decide are of a purely civil nature, and it is for this reason that this Court has held that a second revision application against

the magistrate's order would lie to the High Court on the civil side, even though the revision provided, by s 111 lies to another criminal Court, namely the Sessions Court The fact that the appellate authority under s 110 is a Court from whose decision a revision application lies to its superior Court, the Sessions Court, and a further revision application lies to the High Court, suggests that the Legislature must have contemplated that the magistrate acting under s 110 would base his decisions upon evidence which the revising Courts could consider Section 81 of the Bombay Municipal Boroughs Act which provides for objections to the assessment list prepared by the Chief Officer being lodged before the standing committee, and which gives the standing committee power to investigate and dispose of such objections, does not give the standing committee any power to summon witnesses or to administer oaths or to compel the production of documents All that the section provides is that the standing committee shall allow the applicant an opportunity of being heard in person or by agent If this is the only evidence on which the standing committee can base its decision, and if the magistrate hearing the appeal is not allowed to take any other evidence and is to be compelled to base his decision on the evidence already adduced before the standing committee, there will in most cases be very little material before the Magistrate to enable him to decide the appeal satisfactorily, and very little material on which the revising Courts can deal with applications made to them In this connection it is significant that under the City of Bombay Municipal Act the Chief Judge of the Court of Small Causes, by whom as a **persona designata** appeals against any rateable value or tax fixed or charged under the Act can be heard and determined, is given specific powers by s 588 of the Act to summon and enforce the attendance of witnesses, to compel them to give evidence, and to compel production of documents. The Act contemplates that in hearing an appeal under s 217 the Chief Judge may allow evidence to be led, and it seems to us that a similar interpretation must be put upon the provisions of s 110, and this conclusion derives support from the fact to which I have already referred that a Magistrate acting under s 110 is not a **persona designata** but an ordinary Court, against whose decisions revision applications are expressly provided for by the Act itself The learned magistrate has pointed out that the evidence before the standing committee in this case consisted of valuation statements prepared by the valuation officer of the Municipality and the opponent's objections, and a statement prepared by the opponent's engineer There was no evidence to show on what date the figures relied on by the two sides were based, and unless the Magistrate was permitted to take evidence it would be very difficult for him to come to any satisfactory decision on the appeal It is true that s 110 refers to the magistrate exercising powers under that section as an appellate authority But, as I have already pointed out the provisions of this section, and of similar section in the other Acts, are of a somewhat anomalous nature, and it would be difficult to regard the magistrate's powers under this section as being strictly limited to those of an appellate Court The fact that the tribunals from whose decisions the appeals are provided are tribunals which could not take evidence on oath or compel evidence to be given would itself require that somewhat wider powers than those of an ordinary appellate Court should be exercised by the Magistrate under s 110 It may be noted that s 110 refers to appeals of this class being 'tried' by the Magistrate, a term which would ordinarily be used of original trials rather than of appeals Taking into consideration the peculiar position of the Magistrate under s 110 we think that he must have

the power of taking evidence if he considers such evidence necessary Since he is an authority deciding a question of civil liability his position is analogous to that of a Civil Court, and the considerations which should govern him in deciding whether evidence should be allowed would be similar to those which would prevail with a civil appellate Court, though, for the reasons mentioned above there would have to be considerably more latitude in such matters than a civil appellate Court could allow"

Grounds of appeal —The section does not lay down the grounds on which an appeal can be made under this section It therefore follows that the appeal can be made on any ground In the **Municipal Borough of Ahmedabad v The Aryodaya Ginning and Manufacturing Co, Ltd, 43 B L R** 816, it was contended that an appeal under s 110 being not against the assessment but the notice of demand, the question of the assessment itself could not be challenged at all in such an appeal except on some ground of illegality such as a wrong person being made liable Dealing with the contention Wadia J said "The third contention urged by Mr Thakor for the applicant is that an appeal under s 110 being not against the assessment but against the notice of demand, the question of the assessment itself could not be challenged at all in such an appeal except on some ground of illegality such as a wrong person being made liable We are unable to put such a very restricted interpretation upon the language of s 110 It is obvious that such an interpretation would deprive the persons taxed of all right of appeal except in an extremely limited number of cases, and it does not seem to have been the intention of the Legislature so to restrict the right of an appeal"

Entries in the assessment-list and taxes and decisions to be final.

111 (1) Every entry in the assessment list made under the provisions of this Act against which no objection is made as hereinbefore provided, and the amount of every sum claimed from any person under this Act on account of any tax, if no appeal therefrom is made as hereinbefore provided, and the decision of the Magistrate or Bench of Magistrates upon any appeal shall, at the instance of either party, be subject to revision by the Court to which appeals against his or their decisions ordinarily lie

(2) Effect shall be given by the Chief Officer to every decision of the said Magistrate or Bench of Magistrates on any appeal or any decision in revision on such appeal against any such entry of tax

Finality of the assessment list—This section provides that for the purpose of assessment the entry in the assessment list is final subject to the decision of the Magistrate under s 110 or of the revising authority under s 111 It also lays down that the decision of the Magistrate where no revision is made and the decision in *revision are final Thus they cannot be challenged*, in a civil court except where the legality or validity of a tax or liability to a tax is in question **See notes under s. 81(6).**

Revision:—This section lays down in terms that the decision of the Magistrate on appeal under s 110 shall be open to revision by a court to which ordinarily appeals lie from the Magistrate's orders This section does not say whether the orders passed in revision by such a court are subject to revision

or appeal by the High Court, and this question has been a subject of several decisions by the High Court In re. **Dalsukharam Hargovandas, 9 B L.R 1347,** it was held that under s 86 of the Bombay District Municipal Act, 1901, a Magistrate hearing an appeal of the kind mentioned in the 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, to which alone the revisional jurisdiction of the High Court applies under s 435 of the Criminal Procedure Code, 1898 This case was followed in **Karachi Municipality v Jaffarji Tyabji, A.I R. 1927 Sind 23,** which was also a case under the Bombay District Municipal Act, 1901

In **the Ahmedabad City Municipality v Vadilal, 30 B.L.R. 1084,** (a case under the Boroughs Act) it was held that no revisional application lies to the High Court against an order passed by the Sessions Judge on revision against an order passed by a first class Magistrate in appeal against a notice of demand, under s 110 of the Bombay City Municipalities Act, 1925 However, in **the Surat Borough Municipality v Hamiduddin, 40 B.L.R. 387,** it was held that the High Court can entertain a civil revision application under s 115 of the Civil Procedure Code of 1908, against an order passed by a Sessions Judge in revision under s 111 of the Bombay Municipal Boroughs Act, 1925, from an order passed by a Magistrate under s 110 of the Act, but it will not interfere unless it appears that there has been some grave abuse of its power by the Sessions Court or the decision is manifestly erroneous or unjust The case of **30 B.L.R. 1084** was considered in this case and distinguished on the ground that all that was laid down in that case was that the matter was a civil one and Sessions Court did not act as a Criminal Court and therefore its decision on revision was not open to revision by the High Court under the Criminal Procedure Code In the course of the judgment Norman J said "Previous attempts have been made to bring such matters before this court on its Criminal side The first is reported in **re Dalsukhram, 9 B L R. 1347** at which date there was nothing analogous to the present section 111 and as far as the Act was concerned the decision of the Magistrate was final The Court held that the Magistrate hearing the appeal was merely an appellate authority having jurisdiction given by the Act to deal with the questions of a civil liability and was not 'an inferior Criminal Court', his decision therefore, was not subject to a revision on the criminal side The matter again came before this court in **Ahmedabad Municipality v Vadilal, 30 B L R 1084,** the order sought to be revised being one made under s 111 of the Act The Court after referring to the earlier decision, again remarked that the matter related to a civil liability and held that it had no jurisdiction The **ratio decidendi** appears to be that as the matter was civil one, the Sessions Court was not a criminal Court and its decision could not therefore be revised on the Criminal side A revision application will lie on the civil side only from a court subordinate to a High Court and it is argued by Mr Desai that the Courts which are subordinate to the High Court are enumerated in s 3 of the Civil Procedure Code It has however been held in **Purshottam v. Mahadu, 14 B.L.R 947,** that s 3 of the Civil Procedure code is not exhaustive That case arose out of an application to revise a decision made in revision by the Collector under the Mamlatdar's Courts Act It was held that as the Collector by the Act is declared to be a Court, he was acting judicially and as he was dealing with a civil matter, the application to the High Court did lie That decision is, I think, much in point here Section 111

shows that the revisional power is exercised by a court and not by a **Persona designata**, and it has been held in the decisions on the criminal side to which I have already referred that the matter is one of a civil liability The Sessions Court is therefore for the purposes of the Municipal Boroughs Act a Court dealing judicially with a civil liability and the fact that the Sessions Judge's functions are ordinarily criminal is no more material than the fact that the Collector's functions are ordinarily executive It appears to me therefore that this application does lie"

In the Lokmanya Mills Ltd v The Municipal Borough of Barsi, 41 B.L.R. 937, it was held that the High Court has jurisdiction under s 115 of the Civil Procedure Code 1908, to entertain an application in revision against an order in revision passed by a Sessions Judge under section 111 of the Bombay Municipal Boroughs Act, 1925, from an order passed by a Magistrate under s 110 of the Act, but it will entertain such application very sparingly

It should be noted that the District Municipal Act, 1901 does not contain any provision equivalent to s 111 of the Boroughs Act, i e to say, there is no provision for revision against the Magistrate's order on appeal An attempt was made in the **Vita Municipality v. Gangaram, 43 B.L.R. 333,** to argue that the Magistrate hearing an appeal under s 86 of the District Municipal Act 1901 was a Civil Court and therefore his decision was open to revision by the High Court under s 115 of the Civil Procedure Code This contention was negatived on the ground that the Magistrate acted as a **Persona Designata** and therefore order passed by him was not open to revision by the High Court under s 115 of the Civil Procedure Code

Grounds of revision by the High Court:—**In Surat Municipality v. Hamiduddin, 40 B.L.R. 387,** it was held that the High Court will not interfere unless it appears that there has been some grave abuse of its power by the Sessions Court or the decision is manifestly erroneous or unjust In the course of the Judgment Norman J said "The main ground of this application is that the Sessions Judge though only a Court of revision acted as if he were a Court of appeal. He held that the two lands were public places of worship whereas the Magistrate had held that they were private places of worship and he lowered the assessment of the superstructure That he stretched his powers of revision to the utmost may be admitted, but his discretion is wide, and I do not think that any further revision by this court would be justified"

In the **Lokmanya Mills Ltd. v. The Municipal Borough of Barsi, 41 B.L.R 937,** it was stated that such applications should be very sparingly entertained Beaumont C J said "On the merits in this case the real complaint is that the Sessions Judge has gone wrong in his law But that is not a ground which would justify us in interfering in revision, in other than very special circumstances It is a matter of appeal, and no appeal lies"

Decision upon an appeal:—The words "Decision upon an appeal" in s 111 of the Act do not imply that the decision of the appeal referred to means the final decision The revision Court, therefore, can interfere in revision with interlocutory orders passed by a Magistrate under s 110 of the Act. **The Municipal Borough of Ahmedabad v. The Aryodaya Ginning and Manufacturing Co., 43 B.L.R. 816.**

Liability of land, buildings, etc., for rates.

112 All sums due on account of any tax imposed in the form of a rate on lands or buildings or both shall, subject to 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 movable property, if any, found within or upon such building or land, and belonging to any person liable for such tax

Provided that no arrears of any such tax shall be recovered from any occupier who is not the owner if such arrears have been due for more than one year or for a period during which such occupier was not in occupation

Whether Special Sanitary cess and water rate are a charge on property:— In the **Bandra Municipality v Vanechand, 35 B L R** 599, it was held that this section contemplated placing the burden only of house-tax on the property, and that a special sanitary cess was not a rate on lands or buildings occurring in this section and therefore there was no charge on the property for arrears of that cess Discussing this point in the judgment Rangnekar J said "The appeal has been exhaustively argued by Mr Parulekar on behalf of the Municipality, and he stated that if he was not able to satisfy the Court that the view taken by the lower Court with regard to the sanitary cess was wrong, he would not take up the Court's time in arguing the question of the water tax, as he felt that s 112 of the Bombay Municipal Boroughs Act, might not in terms apply to it, and he has confined his argument to the claim in respect of the special sanitary cess The only question in appeal, therefore, is, whether the Municipality under the Bombay Municipal Boroughs Act, XVIII of 1925, and the rules made by it under s 58 of the Act, is entitled to a charge on property in respect of the tax known as special sanitary cess. The other question raised by Mr Parulekar is that even if the Municipality are not entitled to a charge in this case, they are entitled to a personal decree against the defendant in respect of the amount due for this particular tax The question thus raised turns upon a proper construction of certain sections of the Bombay Municipal Boroughs Act, 1925, read with the rules made by the Bandra Municipality under the Act Chapter VII deals with 'Municipal Taxation', the first section in it is s 73 under sub-heading (1) "Imposition of Taxes" The section lays down what taxes may be imposed by a Municipality The word 'Tax' is defined by s 3 as meaning various kinds of imposts, cesses, charges or taxes Section 73 shows clearly the distinction between various kinds of levies or cesses or taxes which the Municipality can impose Thus under s 73(1) we have a rate on buildings or lands Under (ii) there is tax on certain kinds of vehicles or animals, etc Under (iii) a toll on other vehicles Under (iv) an octroi on animals, and so on Then there is a tax on dogs Then we come to (vii) which provides for a special sanitary cess upon private latrines, etc, cleansed by municipal agency, after notice given as required under the section Then there is a drainage tax, and in (x) there is a special water rate, which may be imposed in the form of rate assessed on buildings or in any other form, ond so on, Proviso (b) of the section shows that no special sanitary cess can be levied until the municipality has 'issued either severally to the persons to be charged, or generally to the inhabitants of the borough to be charged with such cess, one month's notice of the intention of

the municipality to perform such cleansing and to levy such cess' Apart from anything else it seems to me to be clear from s 73 itself that there is a distinction between a special sanitary cess and a rate on buildings and lands, and further that in the case of the former no liability would accrue and no cess would be allowed until a notice is given to the person to be charged, thus indicating that the liability should be imposed on the person to whom the notice is given In the same chapter under heading '(2) Assessment of and liability to rates on buildings or lands', there are several sections running from 76 to 89 which show clearly how rates on buildings or lands are to be assessed, and show clearly that it is the house-tax as such which is mentioned and referred to in these sections as a 'rate on buildings or lands' Of these s 85 makes it clear that the tax imposed in the form of a rate on buildings or lands is primarily leviable on the actual occupier of the property upon which the tax is assessed Then under heading '(4) special provision relating to certain taxes' in the same chapter provision is made for assessing taxes other than those previously dealt with and for fixing the liability in respect thereof and this matter is dealt with in ss 91 and 92 with the exception of octroi and tolls, which are dealt with under sub-heading (5) The next chapter, that is chapter VIII, refers to and deals with 'Recovery of Municipal Claims,' and it is in that chapter that s 112 finds a place It is on this section that Mr Parulekar relies It runs thus 'All sums due on account of any tax imposed in the form of a rate on lands or buildings or both shall, subject to prior payment of land revenue, if any be a first charge upon the buildings or land, in respect of which such tax is leviable ' It may be noticed that the language employed in this section in describing the tax which is declared to be a charge is substantially the same as the language in s 81 which it is clear refers to a house-tax authorised under s 73(1) I now come to the Rules entitled 'Bandra Municipality Rules, 1920,' a copy of which is made available to me owing to the courtesy of Mr Parulekar At page 108, there is a heading 'Time and mode of Recovery of Municipal taxes, &c' The first rule under that heading is Rule 337 which refers to Schedule E Rule 317 says that the Municipality shall levy the taxes and recognise the exemptions specified in Schedule E, which is printed at page 176 of the Bandra Municipality Rules In Schedule E there are various columns under various headings, and the third column is in regard to 'Class of person or property liable and the fourth shows "Amount for which or rate at which classes liable' It is not necessary to refer to these columns Column 2 gives the names of taxes, and the first tax described is 'House Tax', which, it is clear, corresponds with the first tax in s 73(1) and column 3 shows that in respect of this tax all houses and buildings including land are liable Coming to the special sanitary cess the following note appears under column 3 'The owner or the occupant at the discretion of the Municipality', the rest of the note is irrelevant So that the liability in respect of the house-tax is clearly imposed on the house or building concerned, the liability in respect of the sanitary cess is imposed on the owner or occupant Mr Parulekar refers to column 4 dealing with the amount which shows that special sanitary cess is to be assessed in a particular manner, i e four per cent of rental value as fixed for house tax assessment &c, and argues that that shows that it is tax in the form of a rate on the houses or buildings. I am unable to accept this argument particularly in view of the specific language of the sections and the rules This then being the scheme of the Act and the rules, it is difficult to see how a special sanitary cess will come under the words 'a rate on lands or buildings' or even within the words 'in the form of a rate

on lands or buildings' occurring in s 112 of the Act There is no clear indication anywhere that in the case of this tax property was primarily liable I think, therefore, that the view of the lower appellate court that the Act does not contemplate placing the burden of the special sanitary cess on the building concerned is correct"

The above case was distinguished by Wassoodev J in **Shidrao v. Athni Municipality, 44 B.L.R. 849**, wherein it was held that a claim to recover arrears of house tax which is a rate on buildings as also a claim to recover arrears of general sanitary cess, if made a tax imposed in the form of a rate on buildings, both being under s 87 of the Bombay District Municipal Act, 1901, are first charges on buildings in respect of which they are levied and are governed by art 132 of the Indian Limitation Act 1908 The rule **expressio a unilis est exclusio alterius** has to be applied with great caution, for it is not of universal application and it cannot be applied unless the statute by its language shows that all things different in genus and description from those which are enumerated are intended to be excluded Referring to the case of **Bandra Municipality v. Vanechand, 35 B.L.R 599**, his lordship said "I was referring to the case of **Bandra Municipality v Vanechand** for the view that the general sanitary cess cannot be made a charge on property That case was decided by reference to certain provisions of the Bombay Municipal Boroughs Act (Bom XVIII of 1925) and the rules of the Bandra Municipality Here we are not dealing with the Bombay Municipal Boroughs Act Although s 73 of that Act is in pari Materia with s 59 of the Bombay District Municipal Act, we do not know in what form the rules were framed by the Bandra Municipality I do not think that in the view I take of the Bombay District Municipal Act and the rules of the Athni Municipality, that decision would be an authority governing the present case"

Section 212 of the City of Bombay Municipal Act, 1888 is equivalent to s 112 of the Boroughs Act, though in place of words 'property taxes' the words 'any tax imposed in the form of a rate on land or buildings or both' are used in the Boroughs Act

The scheme of the City of Bombay Municipal Act is to levy taxes in respect of land or building and then to impose a liability to pay the tax on the person having certain interests in the land or building, with the alternative remedy, if the tax is not paid, of a charge under section 212 on such land or building Therefore a charge is imposed under that section, not on the interest on land or building of the person liable to pay the Municipal taxes, but on land or building itself Accordingly the Municipality is entitled to have a charge on the land belonging to Government in respect of Municipal taxes remaining unpaid by a person to whom the land was leased by Government but which lease was subsequently determined. **The Secretary of State for India v. Municipal Corporation of Bombay, 37 B.L.R 499**

In the Secretary of State for India v the Municipal Corporation of Bombay 37 B.L.R 513, it was held that the charge for unpaid Municipal Taxes created by s 212 of the City of Bombay Municipal Act, 1888, attaches to land vested in the railway administration of the Great Indian Peninsula Railway

In the Municipal Corporation of Bombay v Haji Eisa, 37 B.L.R. 1017, it was held that the tax for water supplied by meter to a property does not fall within the expression 'property tax' as defined by s 140 of the City of Bombay

Municipal Act, 1888, and such tax does not constitute a charge on the property under section 212 of the Act

Charges on property—no deduction on their account allowed from income from property in income-tax assessment.—The expression 'an annual charge not being a capital charge' in s 9(1)(iv) of the Indian Income Tax Act, 1922, does not cover municipal taxes which are made a charge on property—under s 212 of the City of Bombay Municipal Act, 1888 Hence an assessee is not entitled under s 9 (1) (iv) to a deduction of the amount paid by him as general tax to the Bombay Municipality in respect of the immovable property belonging to him, when he is being assessed on income derived from property The **Commissioner of Income-Tax, Bombay v Mahomedbhoy I A. Rowji, 45 B L.R 584.**

Receipts to be given for all payments

113 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 such payments

Receipt for tax requires receipt stamp—A receipt by a Municipality, acknowledging payment of house-tax exceeding twenty rupees, requires a receipt stamp under schedule I Art 52 of Act 1 of 1878 In **re Karachi Municipality, 12 Bom. 103.**

CHAPTER IX

MUNICIPAL POWERS AND OFFENCES

(1) Powers in respect of Streets

Power regarding public streets, etc.

114. (1) It shall be lawful for a municipality to lay out and make new public streets, to construct tunnels and other works subsidiary to public streets, to widen, open, enlarge or otherwise improve, and to turn, divert, discontinue or stop up any public street, and, subject to the provision of sub-section (2) of section 48 to lease or 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·

Provided that no public street shall be permanently discontinued, stopped up or used for any other purposes of this Act without the previous sanction of the Commissioner

Acquisition of adjacent land to form street

(2) In laying out, making, 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 purchase the land required for the construction of houses and buildings to form the said street, and, subject to the provisions contained in sub-section (2) of section 48, may sell and dispose of such additional land 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 it may think fit

Amendments:—The proviso 'Provided that no sanction of the Commissioner' was added by Bom 19 of 1935, s 9

General —Section 114 (1) is equivalent to s 289 (2) and (3) of the City of Bombay Municipal Act, 1888 and s 114(2) is equivalent to s 296

Acquisition of land to carry a road bridge by prescribing a line valid·— In **Abdul Rahim v. Municipal Commissioner of Bombay, 20 B.L.R. 937** which was a case under s 296 of the City of Bombay Municipal Act, 1888, it was held that the Municipal Authorities of the City of Bombay have power, under the City of Bombay Municipal Act, to acquire land for widening, extending and improving a public street, and to pay compensation to the owner of the land notwithstanding that the purpose for which the land is taken is not solely the 'preservation of the line of street', but includes the building of a bridge to carry the road over a railway on the level of the street They are not restricted to acquiring the land and paying compensation for it under the Land Acquisition Act They can prescribe a line for the street and take possession of the part of the owner's land which falls within the line, and so avoid having to proceed under the latter Act.

Lands and buildings outside the regular line can be acquired and sold:— In **Bombay Municipality v M Damodar Brothers, 23 B L.R. 35,** it was contended that the Municipality should at present take possession only of the portions actually required to be thrown into streets to be widened It was held that s 296 of the City of Bombay Municipal Act (equivalent to s 114(2) of the Boroughs Act) expressly empowered the Municipality to acquire in addition to the land actually required for widening any public street all such land and buildings outside the intended regular line of such street as it should deem expedient and to sell such additional land The plaintiffs the Municipal Corporation of the City of Bombay moved the Government of Bombay to acquire certain buildings on their behalf for widening a street The Government issued the necessary notification for the acquisition of the buildings The second plaintiff, the owner of the buildings, had let them to a person who had leased different portions of the buildings to different defendants. By the time the proceedings before the Collector terminated, but before his award was actually published, the Executive Engineer of the Municipality and the second plaintiff came to an agreement whereby in consideration of the second plaintiff agreeing to pay the portion of the compensation payable to two other claimants and agreeing not to claim from the Municipality the compensation payable to himself the Municipality agreed to convey to him the residue of the land acquired from him after retaining the portion necessary for the purpose of widening the street and also a certain other strip of land The Executive Engineer informed the Collector of the above arrangement and the Collector published his award The Municipality served notice on the defendants to vacate the premises in their occupation in a week The defendants refused to vacate and plaintiffs filed suits for recovery of possession. The defendants contended that there was no vesting of the property in the Municipality because the provision of the Municipal Act and the Land Acquisition Act had not been complied with that when property vested in the Municipality under s 91 of the City of Bombay Municipal Act such vesting was not of such an absolute character as the vesting in Government under s 16 of the Land Acquisition Act, that the Bombay Rent Act applied and under the circumstances of the case there was no sufficient cause for ejecting the defendants within the meaning of the proviso to s 9 of the Act, and that the notice to vacate the premises in a week was not a valid notice —Held, (1) that when Government undertook, on the application of the Municipality, under s 91 of the City of Bombay Municipal Act, to acquire land, the effect of acquisition and the resultant vesting was as effective and complete as when the Collector made an award under s 16 of the Land Acquisition Act (2) That s 91 of the City of Bombay Municipal Act had modified the provisions of the Land Acquisition Act so as to vest the property acquired by the Collector in the Corporation on payment of compensation awarded instead of in the Government, and, therefore, no transfer from Government to the Corporation was needed (3) That s 31 of the Land Acquisition Act did not apply in the case of acquisitions made by virtue of the provisions of s 91 of the City of Bombay Municipal Act (4) That in the case of acquisition under s 91 of the City of Bombay Municipal Act the taking of possession by the Collector and his handing over the same to the Municipality was not necessary The property vested directly in the Municipality without the intervention of Government or the Collector, and, when the property was so vested in the Municipality, the Municipality was entitled to take possession (8) That s 296 of

the City of Bombay Municipal Act expressly empowered the municipality to acquire in addition to land actually required for widening any public street all such land and buildings outside the intended regular line of such street as it should deem expedient and to sell such additional land

In **Khanderao v The Municipal Corporation of Bombay, 24 B.L.R 361,** the defendants, the Municipal Corporation of the City of Bombay, proposed to acquire from the plaintiff and other adjoining land-owners, more land than was needed for the actual construction of a new road and the widening of an old road with a view to recoup a portion of the expenditure that was to be incurred in making and widening the roads, by the re-sale of the surplus as frontages The plaintiff alleged that, under the City of Bombay Municipal Act, the defendants had power to acquire land only if the same was required for constructing a new road or for widening or otherwise improving a road He filed a suit for a declaration that the defendants were not entitled to take more land than was required for the purpose of the road-way The defendants contended that, under *s 296 of the City of Bombay Municipal Act, they were* empowered to acquire all such land as it seemed expedient to them to acquire outside of the regular line of the proposed roads—Held, that the Municipal Corporation was entitled, under the provisions of s 296 of the City of Bombay Municipal Act, to acquire more land than was necessary for the actual *construction of the new road and for the widening of the old road in order* that by the re-sale of the surplus land they might recoup themselves for the expenses of construction and widening. Per Macleod C J—Considering that in s 296 (Act III of the 1888) not only is special reference made to s 90 but also the same distinction appears in that section between what may be acquired for a *particular purpose and what it may seem expedient to acquire, it may be fairly* assumed that under s 296 it was intended that if it seemed expedient for the purposes of the Act for the Corporation to acquire additional land outside the regular line or the intended regular line of the street, they could do so Considering the whole of s 296 together with ss 91 and 92 it seems that power has been given to the Commissioner to acquire frontages whenever it may seem expedient for the Corporation to acquire them, the only restriction on such powers being that the decision regarding the expediency must be arrived at honestly and on reasonable grounds Per Fawcett J—The acquisition of lands and buildings adjacent to, though outside, the actual road-way of a new or widened street, for the mere purpose of recoupment, is legitimate and authorized under the City of Bombay Municipal Act This case went in appeal to the Privy Council and the decision of the Privy Council is reported in **Khanderao v. The Municipal Corporation of Bombay, 26 B.L.R. 193,** where it was held that under the City of Bombay Municipal Act (Bombay Act III of 1888) the Bombay Municipality has the power to acquire lands not only for the purpose of widening the streets but also to take extra land contiguous to the widened street, even if the latter was intended to be leased or re-sold Delivering the judgment of the Board, Lord Dunedin observed 'It appears to their Lordships that it is clear beyond all doubt not only that the Municipality may acquire land for the purpose of making a street but that they may acquire, if it seems expedient, land outside the regular line of such street If the matter had ended there, it might have been said that the land outside the street was only *meant to form an appendage to such street but then comes clause (c) which* says that they may 'lease, sell or otherwise dispose of any land or building

purchased under clause (b)' This seems to their Lordships to point to recoupment with almost the greatest certainty that could be expressed in words The powers, no doubt are drastic, but they are not altogether untrammelled, because when s 91 which is one of the sections to which section 296 is subject, is looked at, it is found that if the Commissioner is unable to acquire any property by agreement Government may in their discretion, upon the application of the Commissioner made with the approval of the standing committee, order proceedings to be taken for compulsory acquirement, so that in the discretionary power of the Government would always be found a certain limitation over and above the limitation which their Lordships think necessarily follows from the fact that what is done must be done in the course of making or widening the street for it appears to their Lordships that the Municipality certainly could not take land which was not in contiguity Their Lordships think that this result would follow notwithstanding any of the somewhat more vague words which are used in the earlier sections of the Act"

These decisions would apply equally well to a case under section 114 of the Boroughs Act, because cl (2) of s 114, is similar in terms and also gives power to the Municipality to purchase land outside the regular line of the street and to sell or lease the same In fact in **Parshottam v The Secretary of State for India, 39 B L.R 1257**, which was a case under s 114 of the Boroughs Act, it was held that the acquisition was not illegal on the ground that the scheme was to be financed or partly financed out of the proceeds, since the power to acquire adjacent land for the construction of buildings and to dispose of that land was specifically given to the Municipality by ss 71 and 114 of the Bombay Municipal Boroughs Act, 1925

Purchase —The term purchase as used in s 114 of the B.M.B Act, 1925 included compulsory acquisition if necessary **Parshottam v. Secretary of State for India, 39 B.L.R. 1257**

To discontinue or stop up any public street —This does not mean that the Municipality has power to discontinue or stop up a part of a street so as to provide a market The accused who were timber merchants were authorised by the Municipality of Poona to use a strip of a street for the purpose of exposing logs of timber for sale They were charged with the offence of causing obstruction in a public street, under s 61 cl (f) of the Bombay District Police Act, 1890, and convicted by the Magistrate The Sessions Judge, being of opinion that the conviction was illegal, referred the case to the High Court —Held, confirming the conviction, (1) that the Municipality had no statutory authority to divert a portion of the public street for the purpose of exposing the timber for sale, (2) that, under s 60 of the District Municipal Act public streets were vested in the Municipality for the purpose of being maintained as public streets, (3) that s 90 of the District Municipal Act did not empower the Municipality to discontinue or stop up a part of a street so as to provide a market, (4) that the Municipality could not allow a permanent obstruction upon any public street vested in it, and (5) that ss 139 and 140 of the District Municipal Act did not empower the Municipality to license the holding of a market in a public street **Emperor v Vishwanath, 28 B.L.R. 1033** Dealing with this point in the Judgment Fawcett J observed· "The contention that has been put before us, as also before the Magistrate and the Sessions Judge, is that under section 90 of the Bombay District Municipal Act, the Municipality has authority to discontinue or stop up any public street, and, therefore, they have power to dis-

continue or stop up a part of such street, accordingly, it is contended that there is no objection to their allowing a strip of a street to be used as a Market for the sale of timber I think that in considering this argument, it is important to remember that public streets are vested in the Municipality for the purpose of being maintained as public streets, under s 50 of the Bombay District Municipal Act, and that section expressly declares that public streets so vested in them shall be applied by them as trustees, subject to the provisions and for the purposes of the Act Therefore, it rests upon any one who supports the action of the Municipality to show that it had statutory authority to divert a portion of a public street in the manner that has been done I also think that the Act contains clear provisions, which show that ordinarily a Municipality should not allow a permanent obstruction upon any public street vested in the Municipality Section 122 of the Bombay District Municipal Act is a very plain enactment to that effect Sub-section (4) of that section refers to the piling of fuel in by-streets, but says that the Municipality only has authority to allow such piling of fuel for not more than four days, in such manner as not to inconvenience the public or any individual Therefore, a strong presumption arises that the Legislature did not intend by the general power it gave to the Municipality to discontinue or stop up public streets, that they should use that power for a purpose which contravenes the intention shown by section 122 of the Bombay District Municipal Act So far as the question of licensing markets is concerned, there are the provisions of sections 139 and 140 of the Bombay District Municipal Act, which contemplate the Municipality constructing or opening markets But those provisions would ordinarily apply to the erection or other provision of some place as a market, not in a public street but in a proper locality And it would entail a contravention of the intention shown by s 122 of the Bombay District Municipal Act to hold that those sections are meant to cover the licensing of a market in a public street Then coming to s 90 of the Bombay District Municipal Act, it obviously is dealing with the question of providing proper highways and thoroughfares in the Municipal area, and since power is given to widen, open or enlarge or otherwise improve streets, a corresponding power is given to turn, divert, discontinue or stop up streets That power would ordinarily be meant to enable the Municipality to provide a substituted street which would be an improvement on an old street and then to stop or discontinue that old street It seems to me that it is perverting the proper meaning of the section to say that it contemplates a case of stopping up a portion of a street, so as to provide a market, as has been done in this case I am quite aware that it is a common practice in this country to use portions of the public streets as temporary markets, and no doubt it is very difficult to stop that practice But at the same time, when we are considering whether there is authority for the Municipality to allow a portion of a street to be kept for the use of a market that practice does not discharge the onus I have mentioned In my opinion the Act contains provisions which go against any such supposition" It is clear therefore that the power of discontinuance or stoppage is given and is to be used for the purpose of improvement of an old street and not for the purpose of creating obstructions in a public street Although this was a case under section 90 of the District Municipal Act, the decision would be the same under section 114(1) of the Boroughs Act because both are similar and other provisions of the District Municipal Act which have been considered by Fawcett, J In the above judgment have their corresponding provisions in the Boroughs Act also

Section 90 applies to all public streets whether old or new —It does not necessarily follow because certain powers are conferred upon a municipality by the legislature that the exercise of the power is always valid Powers materially affecting the welfare of the community must necessarily be exercised not arbitrarily or capriciously but in a reasonable manner and with due regard to the well-known maxim which is applied in cases where highways are concerned that regard for the public welfare is the highest law Sec 90 (B.D.M Act) is not confined to new public streets alone It applies to all public streets whether old or new If the ordinary grammatical construction of a statute will result in a manifest contradiction of the apparent purpose of the Act, the rules of grammar are subordinated to the rules of common sense and the statute is construed with reference to the intention of the legislature **Hyderabad Municipality v Kazi Fakhruddin, A I R. 1925 Sind 90** In this case the Hyderabad Municipality blocked two streets by erecting walls across them It was held that the action of the municipality was justified under s 90

Permission to block a street for private purpose cannot be given.—The municipality is not the absolute owner of property which is vested in it as a statutory body, the municipality holds property as trustees and holds it for the purposes of the Act Hence the power conferred for the purposes of the Act to 'stop up' streets under s 114 of the Act cannot be exercised to cover a case where the municipality authorizes or rather purports to authorize certain individuals to build a wall across a public street for their own purpose **Chellaram v. Emperor, A.I R 1942 Sind 91**

Public street-Private street—Street —See notes under sections 3(16), 3(17), and 3(19)

Municipality's power to lease or sell street land —Municipalities cannot legally sanction the sale of the plots on which encroachments have been erected, as the general rule is that the streets are vested in them as trustees under s 50(2) of the B D M Act, 1901 (s 63(2) of the B M B Act, 1925), and the object of the trust is that the streets may be open for public traffic The case does not appear to be covered by s 90(1) (s. 114(1) of the B.M.B. Act) which empowers the municipality to sell part of a street when a new street is laid out or an old one is altered by them nor by s 93 (s 120 of the B M B Act) The sale being illegal, it would be illegal for the commissioner to sanction it Only the surface of a street vests in the municipality and the sub-soil remains with the owner If the owner is Government and the period of adverse possession has not reached 60 years, it would be possible for the Collector to deal with the encroachment under s 37(2) of the Land Revenue Code It may be possible to induce the encroacher to purchase the sub-soil and there appears no legal objection to Government's vesting the land below the surface in the municipality in order that they in turn may sell it to the encroacher (**R L.A.'s opinion no. 1307 dated the 13th August 1921 in G.R G.D no 2640 dated the 20th October 1921**).

Under s 50(2)(f) of the Bombay District Municipal Act, 1901, (s 63(2)(f) of the B.M.B Act, 1925) all public streets vest in and belong to the municipality, and have to be held and applied by it, subject to the provisions and for the purposes of the Act The municipal estate in such streets is a trust Under s. 90(1) (s 114(1) of the B.M B Act) the municipality may, subject to the provisions of sub-section (2) of s. 40 (s 48(2) of the B M.B. Act) sell any street

land not required for any public street, or any other purposes of the Act Under s 40(1) a municipality is competent to lease any immovable property which for the purposes of the Act may have become vested in it but by sub-section (2) if it sells or transfers or leases for more than seven years, the Commissioner's sanction is necessary Thus though there is a provision for a municipality leasing other land vested in it, the only one as to 'street land' is that of selling It would seem, therefore, that the case of a municipality leasing street land was not contemplated by the legislature and no provision for it exists in the Act and that it must either remain as street land or be sold since the only power given by the Act is to sell The question of Government's right to resume land no longer required for the street, and not used subject to the provisions and for the purposes of the Act, is a very difficult one It is true that the general theory as to the extent of municipal ownership over streets, is as laid down in the opinion of the Remembrancer of Legal Affairs of the 15th March 1918, and quoted in Joglekar's Land Revenue Code, Pages 66-68 **(I L R 44 cal 689)** But the point dealt with by the Remembrancer of Legal Affairs and in the Calcutta case, was not the same as here, for the general theory that municipal ownership is for certain purposes only, and that when these cease to operate the land reverts to its original ownership, is qualified by the fact that the municipality may in certain circumstances, under s 90(1) sell such land This special provision in the Act is inconsistent with the theory of the extent of municipal ownership There is also no power given in the Act, to Government to resume the land which has been vested in a municipality, except in the case of its supersession under s 179 (s 219 of the B M B Act) **R L A.'s opinion no 1880 dated the 15th October, 1923 in G.R G D no 4777 dated the 22nd November 1923)** This position about leasing street land is now changed as the words 'to lease or sell' were substituted for the words 'to sell' in s 90(1) of the B D M Act, 1901, by Bom Act XXVI of 1930, s 6 and the words 'to lease or sell' occur in s 114(1) of the B M B Act, 1925

Valuation of land and property damaged or destroyed by fire after the date of the publication of the notification for acquisition —Property in the land under acquisition does not vest in Government until the award has been made and the Collector has taken possession (vide s 16 of the Land Acquisition Act) The Collector cannot, it appears, take account of the loss of buildings in the land by fire between the date of the declaration under s 6 and the vesting of the land in Government, except perhaps if loss was caused by wilful damage done by the owner, in which case the principle that no man can take advantage of his own wrong would probably operate See Halsbury's Laws of England, Vol VI P 35 In England in the case of **Phoenix Assurance Company v Spooner (L R. (1905) 2 K.B. 753)** it was held that the risk of fire was the risk of the acquiring Corporation from the date of the notification to treat, but that the Company with which the owner had insured the premises were entitled, on payment by them of the loss, to all the rights then vested in the owner in respect of the destroyed property, including a right to be paid by the acquiring Corporation the value of the property before fire This would probably be held to be the case in India also, and, therefore, the owner would find it difficult to get the value of the buildings from Government and at the same time the insurance money from the insurance company Government would have no claim to the insurance money But they would have their remedy by withdrawing from the acquisition of the land under s 48 at any time before

possession was taken and afterwards notifying the land again under s. 6 **(R.L.A.'s opinion no 635 dated the 29th March 1921 in G.O.R.D. no 1038 dated the 9th April 1921)**

Under s. 23 of the Land Acquisition Act, in determining the amount of compensation, the court is bound to take into consideration the market value of the land (which includes buildings, vide s 3 (a)) at the date of the declaration The owner gets no benefit from any rise in the value of land after the declaration, and so also he loses nothing by any fall in its value after its declaration It is possible that the Court might take the view that this principle applies to ordinary rises and falls in value and not to destruction of buildings and fixtures by fire, flood or other agency But there is no apparent authority for that view, and it would be dangerous to rely on it in the absence of anything to that effect in the Act, which enters fully into the considerations by which the award is to be governed If Government do not choose to withdraw from the acquisition they must pay the full value of buildings destroyed by fire except if the loss has been caused by the act of the owner To take action under s 48 and to notify the land again for acquisition may not always be profitable owing to the subsequent rise in value of the land but it does not appear that the owner could recover from Government under s. 48, compensation for the loss caused by fire unless he shows that the fire was due to the acquisition proceedings which is unlikely to be the cause. **(R.L.A.'s opinion no 920 dated the 2nd June 1921 in G.O.R.D no 1619 dated the 13th July 1921).**

Power to require repair, etc. of private streets.

115 (1) Where the standing committee considers that in any street not being a public street, or in any part of such street, within the municipal borough, 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 standing committee may by written notice require the 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.

And to declare such streets public.

(2) After such work has been carried out by such owners, or, as provided in section 194 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 standing committee, to be a public street

Apportionment of expenses in default.

(3) If the notice under sub-section (1) is not complied with and such work is executed by the municipality as provided in section 194, the expenses thereby incurred shall be apportioned by the standing committee between such owners in such manner as it may think fit, regard being had, if it deems it necessary to the amount and value of any work already done by the owners or occupiers of any such lands or buildings

Owner.—See notes under section 3(14)

In **Emperor v. Ramchandra, 12 B.L.R 669**, one Narayan Morarji Zaoba was the owner of a large plot of land, which subsequently became known as Zaoba's Oart in Bombay He divided the said plot into a number of small building sites which were ranged on either sides of a private street, which he projected to run through the plot of land Those building sites were let out to different persons Ramchandra (accused) was one of the lessees He rented from Zaoba one of the building sites on the 4th July 1892, under a lease which was to last for a period of 30 years, at a monthly rent of Rs 14 Under the terms of the lease he was under an obligation to remove any building he might erect, at the expiration of the lease unless it was purchased by the lessor, and to pay and contribute a rateable proportion of the expenses of making repairing and cleaning all roads, pavements, sewers, drains, pipes, water-courses or other conveniences which might belong to or be used for the premises near or adjoining thereto The lessee erected a building on the site and let it to tenants from whom he received rents The Municipal Commissioner of the City of Bombay sent on the 29th of August, 1909, a notice to Ramchandra requiring him in common with other persons, holding lands fronting and *adjoining the private street, within sixty days, to level, metal, drain and light* the street Ramchandra failed to comply with the notice He was therefore tried by the Chief Presidency Magistrate of Bombay under s 471 of the City of Bombay Municipal Act, 1888 for the failure to comply with the notice He was convicted and sentenced to pay a fine of one rupee The accused applied to the High Court under its Criminal Revisional Jurisdiction It was held that the mere owner of land who has let it out under a building scheme for building purposes is not the owner of the property, within the meaning of s 305 of the City of Bombay Municipal Act, 1888, because the property contemplated by the section necessarily embraces buildings, whether erected or to be erected, and the legislature regards him as owner of the premises who has the right to receive rent in respect of that property It would therefore include a lessee from the original owner of vacant site who leases the building site on a long term and erects a building upon the site This interpretation would apply in a case under the Boroughs Act also

Public Street—Private Street—Street.—See notes under section 3 (16), 3(17) and 3(19)

The applicant owned a house abutting on a street which contained a drain-pipe laid by the Municipality The drain pipe carried only sullage from the houses on either side of the street, and did not carry any rain-water or other water or sullage or anything else from the street itself The Municipal Corporation of Bombay issued a notice on the applicant under s 305 of the City of Bombay Municipal Act, 1888, calling upon him to level, metal or pave, drain and light the street running by his premises The applicant was, for disobedience of this notice, convicted under s 471 of the Act It was contended in defence that s 305 did not apply because the street in question was not private but public, owing to its having been sewered by the drain-pipe laid by the Municipality —Held, that the street in question was not public, for it could not be said to be 'sewered' merely because there ran under it a pipe which though carrying off sullage water from certain houses had no direct connection with the surface of the street **Emperor v. Eduljee, 14 B.L.R 1169**

A contrary view was taken in **Emperor v Ram Rao, 20 B.L.R. 620.** But unfortunately the case of **14 B.L.R. 1169** was not cited or considered in this case We have already expressed our opinion in our notes under s 3(16) that the view expressed in **14 B.L.R 1169** is correct In **20 B.L.R 620,** in 1883 or thereabout the Municipality of Bombay constructed a sewer along two lanes in Bombay known as the Hanuman Cross lanes It received sullage from houses on either side of the lanes The Municipality issued a notice in 1916 calling upon the owners of the houses on either side of those lanes to level, metal, drain and light the lanes under the provisions of s 305 of the City of Bombay Municipal Act, 1888 On failure to comply with the notice, the owners were prosecuted, the Municipality contending that the notice was proper inasmuch as the sewer laid in the lanes did not make them public streets, and the streets did not include houses on either side of the street, Held that (1) s 305 of the City of Bombay Municipal Act had no application to the two lanes in question, for they having been streets sewered by the Municipality in 1883 were public streets within the meaning of s 3 (x) of the Act, (2) that the term 'street' included houses on either side of it and was not restricted only to the roadway

Notice:—There was a plot of land known as Pranlal Seth's Dehla in the city of Ahmedabad It contained a road way of irregular width, either end of which was protected by gates About a hundred houses abutted on the sides of the open space The houses belonged to different persons to whom the plots of lands were sold by the original owner, who at one time owned the whole parcel of land On August 9, 1921, the Ahmedabad Municipality issued a notice calling upon the owners of houses in the Dehla to level, channel and light the road in Dehla. On further consideration, the Municipality re-issued the notice on June 30, 1922 in the following terms 'by order of the Chief Officer, Ahmedabad Municipality you are hereby informed by this notice that you get the Dehla road in your pole levelled and make way for passage of water and put up lights for the inhabitants of the Dehla' It was held that notice issued by a District Municipality under s 90(3) of the Act, calling upon the inhabitants of a Dehla to level the dehla road and to channel and light it is too vague and indefinite to be legally enforced **Dahyabhai v The Ahmedabad Municipality, 25 B L R 1218** Dealing with the point Shah C J observed "It is argued that the notice is vague and indefinite,-and that therefore, it could not be legally enforced I think there is force in this contention, because it is not stated what space in the dehla is to be levelled and how It is generally stated that the road is to be levelled Secondly, as regards the passage of water it is not stated in notice as to whether the water meant was the rain water only or the rain water and sullage water or only the sullage water and what sort of private passage was to be provided As regards the lights it is not stated whether the lights are to be put up for the inhabitants of the dehla In other words, the manner of carrying out the work is not specified as required by s 90 sub-s (3) of the Bombay District Municipal Act It is difficult to comply with a notice which is so vague and indefinite I think this contention of the applicant should be allowed It would not be reasonable to require the present applicants to comply with notices, the vagueness of which I have just indicated" Crump J agreeing with this view observed "I agree that a notice, such as we have in this case, is not drafted with the precision with which it ought to be drafted, and that it would be practically impossible for a person receiving such a notice to know precisely what

he was called upon to do, or in what manner he was called upon to do it Section 90 of the Act, under which that notice purports to be issued requires that the work shall be specified, and that the manner of doing the work shall also be specified Taken literally the notice would require the occupiers to level and make passages for water with regard to the whole of this open space, in fact convert the whole of the dehla into a made road It is conceded by the Magistrate in his Judgment that that could hardly be the intention, and indeed that is clearly so, if the situation of the property is apprehended The manner in which the work is to be carried out is not attempted to be specified and I agree that on that ground the convictions must be set aside" This case was under the Bombay District Municipal Act 1901, s 90, but the provisions of s 115 of the Boroughs Act are similar and therefore the ruling would apply

Whether this section applicable to the Crown —Provisions of section 305 of the City of Bombay Municipal Act, 1888 are equivalent to s 115 of the Boroughs Act In **Hiranand v The Secretary of State for India, 36 B L R. 820,** which was a case under s 305 of the City of Bombay Municipal Act 1888, it was held that the Crown is not bound by the provisions of s 305, 489 and 491 of the City of Bombay Municipal Act, 1888, as they do not expressly or by implication refer to the Crown The intention that the Crown should be bound or has agreed to be bound must clearly appear from the language used and from the nature of the enactment

Power to declare any street a public street subject to objection by the owners

116 The standing committee may, at any time, by notice fixed up in any street or part of a street not maintainable by the municipality, give intimation of its 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 the 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

Public Street—Private Street—Street —*See notes under sections* **3(18), 3(17),** and **3 (19)**

New private streets.

117 (1) Every person intending to lay out or make any new street, shall give notice in writing thereof to the Chief Officer and shall furnish plans and sections showing the intended level, means of drainage, direction and width of such street, and such other particulars as may be required by the by-laws in force in this behalf, and save as hereinafter provided, the level, means of drainage, direction and width of every such street shall be fixed or approved by the standing committee

Power of municipality to pass interim orders

(2) Before passing orders under sub-section (1), the standing committee may either issue 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 a demand for further particulars

Right to proceed in certain cases

(3) If—

(a) within one month from the receipt of the notice given under sub-section (1) the standing committee has neither—

(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 standing committee, having issued such demands for and having received in accordance with the demand such further particulars, has 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 under sub-section (1) and as is not inconsistent with any provision of this Act or of any by-law for the time being in force thereunder

Penalty.

(4) Whoever lays out or makes 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 standing committee, 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 hundred and fifty rupees, and the standing committee may cause any street so laid out or made to be altered, and any building constructed in such street to be altered or removed, and the expense thereby incurred shall be paid to it by the offender, and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under Chapter VIII

Public Street—Private Street—Street.—See notes under sections 3(16), 3 (17), and 3 (19)

Merely by omitting to give notice under s 302 of the City of Bombay Municipal Act, 3 of 1888 (equivalent to s 117 of the B.M.B. Act, 1925) person cannot claim exemption from operation of the Act:—In **Emperor v. Provident Investment Co Ltd**, 45 B.L.R. 965. *Lokur J observed on this point as follows* "It is argued that a passage of private ownership can be a private street only when an intimation to that effect is given to the Municipal Commissioner under s 302 Normally, whoever intends to make or lay out a new private street ought to give written notice of his intention to the Commissioner But he cannot be allowed to take advantage of his omission to fulfil that statutory

obligation, and claim exemption from the operation of the Act in respect of his road, if it is really a 'street' in the true sense of that term According to the definition in s 3(y), every street, which is not a public street, is a private street, whether notice of its construction is given to the Commissioner or not"

The regular line of a public street

118 (1) The Chief Officer shall, subject to the approval of the municipality, prescribe a line on each side of every public street within the municipal borough and may from time to time prescribe a fresh line in substitution for any line so prescribed, or for any part thereof.

Provided that—

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

(b) the Chief Officer shall comply with any orders passed by the municipality after considering any written objection or suggestion in regard to such proposal, delivered at the office of the municipality within such time as may be specified 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) (a) Except under the provisions of section 143 no person shall construct or reconstruct any portion of any building within the regular line of the public street without the permission of the Chief Officer under section 123

(b) Where the Chief Officer refuses permission to construct or reconstruct any building in any area within the regular line of the public street, such area shall with the approval of the municipality be added to the street and shall thenceforth be deemed part of the public street and shall be vested in the municipality

(c) Compensation, the amount of which shall in case of dispute be ascertained and determined in the manner provided in section 198, shall be paid by the municipality to the owner of any land added to a street under clause (b) of sub-section (3) 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 or order passed by the Chief Officer under the said sub-section

Provided that no such compensation shall be payable in cases to which section 149 applies.

(4) Whoever contravene the provisions of sub-section (3) shall be punished with fine which may extend to one thousand rupees and, in the case of a continuing contravention with an additional fine which may extend to rupees ten for every day during which such contravention continues after the conviction for the first such contravention, and the chief officer may—

(a) direct that the building be stopped, and

(b) with the previous sanction of the standing committee, by written notice, require such building or portion thereof to be altered or demolished in accordance with the provisions of such notice

Whether powers under this section can be used for the purpose of widening a street —In **the Municipal Commissioner v. Mancherji, 13 B.L.R 1130,** it was contended that although a regular line may be substituted from time to time for the old line it will be vitiated by illegality of the motive for the substitution, if that motive is not simply preservation of a regular line but the securing of a wider street and the case of **Essa Jacob v Municipal Commissioner of Bombay, 2 B.L.R 810,** was relied upon It was held that the Municipal Commissioner of the City of Bombay has the power, under the provisions of the amended s 297 of the City of Bombay Municipal Act, 1888, to prescribe a line on each side of a public street, and also to prescribe a fresh line in substitution for any line so prescribed or for any part thereof even though its effect be to widen the street Over-ruling the objection Scott C J said —"The ratio of the Judgment, (2 **B.L.R. 810**) therefore, is that if a line has already been prescribed the condition requiring and justifying the exercise of the power in section 297 does not exist It is certainly no authority for the proposition that if the motive of the prescription of the line is the desire to widen the street the power conferred by the section cannot be exercised Under the amended section the power of the Commissioner to prescribe a line no longer depends on the same condition as before, namely the absence of a line already prescribed The substitution of a fresh regular line for a street or part of a street under the present s 297(b) will in all probability in a progressive city like Bombay have for its object the widening of the street" Dealing with the point Batchelor J observed —"But in this case there is, I think, no obscurity in the section itself, and, if that is so, the appeal to the heading is beside the point If fresh lines may from time to time be prescribed, it is certain that, at least in the great majority of the cases, the effect of a new line will be to increase the width of the street in comparison with the earlier line and a result so directly flowing from the amended section may be safely taken to have been contemplated and approved by the Legislature" Section 297 of the City of Bombay Municipal Act, 1888 is similar to s 118 of the Boroughs Act and this case is a good authority for a case under the Boroughs Act also

The same view was upheld by the Privy Council in **Abdul Rehim v Municipal Commissioner of Bombay, 20 B.L.R. 937** It was held that the Municipal Authorities of the City of Bombay have power under the City of

Bombay Municipal Act, to acquire land for widening, extending, and improving a public street, and to pay compensation to the owner of the land, notwithstanding that the purpose for which the land is taken is not solely the 'preservation of the line of the street", but includes the building of a bridge to carry the road over a railway on the level of the street They are not restricted to acquiring the land, and paying compensation for it under the land Acquisition Act They can prescribe a line for the street and take possession of the part of the owners' land which falls within the line, and so avoid having to proceed under the latter Act Delivering the Judgment of the Board, Lord Sumner observed —"The appellant's whole contention is that this exercise of the Commissioner's power was good or bad according as he acted with a single eye to the creation and preservation of a regular boundary to Elphinstone Road as an end itself, or with the ulterior object of extending the road in order to be able to raise it by an incline to the level of the necessary overbridge. The contention must stand or fall on the construction of the Bombay Act There is no word in the Act which prescribes the frame of mind in which the Commissioner is to exercise the powers given by s 297, or which restricts the objects for which he is to exercise them to the mere regulation of the street in question or to the creation or preservation of a regular line in it Even if it were proved, as it is not that the creation and preservation of a regular line on the north side of the road was no part of the Commissioner's object, though it certainly was an incidental result of his scheme, their Lordships can find nothing in the Act which either entitles the appellants to investigate his motives or has the effect of invalidating his action on account of the purpose, with which in fact he prescribed the regular line of the street in 1901 Cases in which it has been *held that powers conferred only for a statutory purpose cannot be validly* exercised for a different purpose are not in point Such an exercise of the powers is outside the Act which confers them Here the exercise of the powers was within the Act, for it was in strict confirmity with the terms of the Act 'Preservation of regular line in public streets' is the heading to the group of sections beginning with s 297, but this cannot be pressed into a constructive limitation upon the exercise of the powers given by the express words of the Act The preservation of the line of the street is not laid down as the definite and sole object for which the power is to be exercised It may be the immediate effect of that exercise, but certainly it is not more"

Whether Municipality can order set-back under s. 123(2) where there is no regular line prescribed under section 118 —The plaintiff who owned a house at Rander, applied to the Rander Municipality on the 25th April 1911 for permission to rebuild it On the 5th June, 1911, the Municipality granted her permission on condition among others, that she should in rebuilding her house keep an open space of 5 feet 8 inches in front of her house so as to widen an existing road from 8 feet 4 inches to 14 feet It appeared that the Municipality had not determined any regular line either for the existing street or for the future as contemplated in s 92 of the Municipalities Act, 1901, but the condition in question was prescribed presumably under s 96(2) of the Act The plaintiff disregarded the condition and built upon the space in question The Municipality having threatened her to pull down the building, the plaintiff filed a suit to restrain the Municipality from doing so The lower Courts refused to grant the injunction prayed for The plaintiff appealed —Held, (1) that the power of the Municipality under s 96 to prescribe the location of the

building was given in relation 'to any street existing or projected as they think proper' Whereas, the municipality 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 but was not yet projected, (2) that if the condition of the permit was complied with the plaintiff would have to give up or keep vacant and 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 provision of s 92 which contemplated that when a set-back was determined upon compensation should be paid to the owner, (3) that the plaintiff was, therefore, entitled to the injunction sought by her **Bai Fatma v The Rander Municipality, 16 B L.R 529** This was a case under the District Municipal Act, 1901 and ss 91A, 92 and 96 of that Act are equivalent to ss 118, 119 and 123 of the Boroughs Act.

In **Emperor v. Thakordas, 27 B.L R 1023,** there was a regular line prescribed and therefore the Municipality had powers to order a set-back under sec 91A as well as under s 96(2) In the course of the judgment, Macleod C J observed "It seems unfortunate that the proceedings were not taken against the accused under s 91A instead of under s 96 However that may be, by Act VIII of 1914 a consequential amendment was made to s 96 adding the words 'or is empowered by s 91A to give permission to reconstruct' The accused No 1 was therefore, bound to ask for permission under s 96 to reconstruct his building within the regular line of the street and the Municipality were entitled to issue such orders as they thought proper, not inconsistent with the Act, and to impose in writing such conditions with reference to the location of the building in relation to any street existing or projected as they thought proper Any reference, therefore, to s 92 is quite irrelevant and the suggestion that the Municipality could not refuse permission to build within the regular line of the street without paying compensation cannot be sustained The scheme of s. 92 is quite different from that of s 91A There is no question of an owner applying for permission to build, but certain powers are given to a Municipality, if any of the conditions mentioned therein exist, to require the owner by written notice to remove his building to the regular line of the street or the front of the adjoining building on either side The penalty for not complying with the orders of the Municipality issued under s 96 is provided by sub-section (5)" Thus according to this case where there is a regular line prescribed conviction can be either under s 91A (equivalent to s 118 of the Boroughs Act) or under s 96(5) (equivalent to s 123(7) of the Boroughs Act)

Section 91A which was introduced in the Bombay District Municipal Act of 1901, provided that it was the duty of every 'Municipality' to prescribe a line on each side of every public street, and that no person was at liberty to construct or re-construct any portion of any building within the regular line of the public street In the year 1924, the word, 'Municipality', in s 91A was replaced by the phrase 'City Municipality and such other Municipality as may be notified by Government in this behalf' In 1920, the Nandurbar Municipality, which was neither a city Municipality nor a Municipality notified by Government, prescribed a regular line of a public street The Municipality was notified by Government in 1927, but it did not thereafter prescribe a regular line of the street The applicant applied in 1932 to the Municipality for permission to rebuild a wall of his house which abutted on a public street The Municipality gave him the permission, subject to the condition that the wall

should be setback to the regular line prescribed for the street The applicant rebuilt the wall without the setback, for which he was prosecuted under s 96(5) of the Act —Held, (1) that until the Municipality prescribed a line under the powers which they acquired in 1927 on the notification of Government they were not in a position to take advantage of s 91A of the Act, (2) that the condition imposed by the Municipality could not be justified under s 96 (2) of the Act, inasmuch as the setback required was not in relation to any street existing or projected but was really in relation to some future possible widening of the existing street, (3) that the applicant, therefore, was not guilty of any offence **Emperor v Onkardas, 36 B L.R 217** Thus in this case also really speaking there was no regular line prescribed and therefore it was held that there could be no conviction either under 91A or 96 The net result of these three rulings is that where there is a regular line prescribed, setback can be ordered and conviction can be made either under s 91A or s 96, and where there is no regular line prescribed, no setback can be ordered and for disobedience of an order for setback, there cannot be a conviction either under s 91A or s 96

Compensation—Dispute as to amount of Compensation—Limitation—Suit:— See notes under section 119 The same principles will apply in a case under this section also

Reconstruct'—See notes under s 123

Permission —Permission in s 91A (3) means the permission referred to in s 96(2) and does not include right to proceed given in s 96(4) **Nihalchand v Karachi Municipality, A I.R 1930 Sind 20.**

Whether payment of compensation is a condition precedent to refusal to build within the regular line of the street.—In **Emperor v Thakordas, 27 B L.R. 1023,** it was contended that the Municipality could not refuse permission to build within the regular line of the street without paying compensation, and the case of **Bai Fatma v Rander Municipality, 16 B L.R 529,** was relied upon Dealing with the contention and the case of **Bai Fatma v Rander Municipality** Macleod C J said "It is important to note that there was no regular line of a public street determined upon in the locality where the plaintiff's house was situated Nor could it be disputed that where the conditions contemplated in s 92 existed, a Municipality could not get a setback without paying compensation as provided by sub-section 3 Thereafter a very important alteration in the law was effected by the addition of s 91A to the Bombay District Municipal Act by Bombay Act III of 1914, which may very well have been enacted in order to obviate the inconvenience arising from a Municipality having to pay compensation for scattered setbacks within the regular line of a street long before the street itself could be widened Sub-section 1 makes it 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, provided that public notice must be given and all objections considered within the time specified in the notice By sub-s 2 the line for the time being so prescribed shall be called the regular line of the public street Then by sub-s 3, except under the provisions of s 113, (with which we are not now concerned), no person shall construct, or without the permission of the Municipality under s 96, reconstruct, any portion of any building within the regular line of the public street, and by sub-s 4,

whoever contravenes the provisions of sub-s 3 shall be punished with fine which may extent to 1,000/- 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 It seems unfortunate that the proceedings were not taken against the accused under s 91A instead of under s 96 However that may be, by Act VIII of 1914 a consequential amendment was made to s 96 adding the words or is empowered by s 91A to give permission to reconstruct' The accused No 1 was therefore bound to ask for permission under s 96 to reconstruct his building within the regular line of the street and the Municipality were entitled to issue such orders as they thought proper not inconsistent with the Act, and to impose in writing such conditions with reference to the location of the building in relation to any street existing or projected as they thought proper Any reference, therefore, to s 92 is quite irrelevant and the suggestion that the Municipality could not refuse permission to build within the regular line of the street without paying compensation cannot be sustained The scheme of s 92 is quite different from that of s 91A There is no question of an owner applying for permission to build but certain powers are given to a Municipality, if any of the conditions mentioned therein exist, to require the owner by written notice to remove his building to the regular line of the street or the front of the adjoining building on either side "

Continuing contravention—Continuing offence —A Presidency Magistrate, having convicted certain accused persons and fined them under s 471 of the City of Bombay Municipal Act (Bombay Act III of 1888), proceeded in the same order, purporting to act under the provisions of s 472, to fine them so much per day in case they continued the offence held, that the latter order was illegal under s 472 of the Act 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 In **Re Limbji, 22 Bom. 766.** In the course of the judgment their lordships observed "The Presidency Magistrate in these cases having convicted the several accused persons and fined them under the provision of s 471 of the City of Bombay Municipal Act 1888, proceeded in the same order, purporting to act under the provisions of s 472 to fine them so much a day in case they continued the offence. We think the latter order illegal The section (472) provides that 'Whoever after having been convicted after contravening any provision of any of the sections herein below in this section mentioned continues to contravene the said provision shall be punished for each day that he continues so to offend' Clearly this necessitates a separate 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 him in his discretion to determine The orders in the present case are bad as being convictions and punishments for offences which the accused persons had not committed, and with which they were not and could not have been charged, at the time the sentences were passed The effect of such orders would be to deprive the accused persons of the opportunity to deny the commission of the offence or plead extenuating circumstances and to take away from the magistrate, who might have afterwards

to levy the fine, the discretionary power vested in him by law to determine the amount that should be inflicted after investigation of the case."

Failure to remove a building in respect of which a person has been convicted under s 123(7) or 118(4) of the Bombay City Municipalities Act is not a "continuing contravention' within the meaning of those sections **Emperor v Bechardas, 32 B.L.R 768** In the course of the judgment Broomfield J observed —"The first point raised by Mr R J Thakor for the applicants is that there has been no 'continuing contravention' of the provisions of the Act He argues that these words in ss 123(7) and 118(4) must refer to some further construction subsequent to the first conviction, and not merely to the failure to pull down or remove a building in respect of which a conviction has been had I think this is the correct view It appears to me to be the most natural interpretation of the words, considered in their context and in relation to the other provisions of the Act The original offence made punishable by s 123(7) is the beginning of any construction, alteration, addition or reconstruction contrary to the provisions of the Act or any by-law The original offence made punishable by s 118(3) is the construction or reconstruction of any portion of a building within the regular line of the public street without permission Any further construction of the building can quite fairly be described as a continuance of the original offence But if the building is completed at the time of the first conviction it is difficult to see how the offence described as above can be held to continue, or how there can be said to be a continuing contravention of the prohibitions It would have been very easy for the legislature to make the failure to remove the building a punishable offence also, as has been done as matter of fact in s 143, and as was done in s 472 of the City of Bombay Municipal Act III of 1888 That section is as follows —'Whoever, after having been convicted of (a) contravening any provision of any of the sections, subsections or clauses mentioned in the first column of the following table, or of any regulation made thereunder, or (b) failing to comply with any requisition lawfully made upon him under any of the said section continues to contravene the said provision or to neglect to comply with the said requisition, or fails to remove, or rectify any work or thing done in contravention of the said provision, as the case may be, shall be punished, for each day that he continues so to offend, ' The language of this section is interesting because it provides both for a continuing contravention and, separately, for failure to remove an offending building, the implication being that the latter would not be included in the former No doubt it does not necessarily follow that the words, 'continuing contravention' in ss 123 and 118 of the Act, we are considering have the same restricted meaning as in the City of Bombay Municipal Act But I think the language employed in the latter does afford some support to the applicant's contention that the restricted meaning suggested by them is the natural one On the other hand I do not think that Mr G N Thakor, who appears for the Municipality, gains anything by the comparison which he asks to make between the language of s 123(7) and that of s 96(5) in the District Municipal Act of 1901, to which s 123(7) corresponds The offence made punishable by old s 96(5) was the beginning or making of any building or alteration or addition contrary to the provisions of the Act or of any by-law There was no provision about a continuing contravention, but the insertion of that provision in the new s 123(7) does not seem to imply in any way that it was meant to cover a mere failure to remove a building erected contrary

to the provisions of the Act In fact a comparison of the language of the two sections rather suggests that the provision about continuing contravention is meant to apply to further construction of a building after the first beginning The words in s 96(5) of the Act of 1901 are 'whoever begins or makes any building ' Fawcett J in **Emperor v Chhaganlal** said (p 737) —'I think that due effect should be given to the words 'or makes' in s 96(5) They show that it is not only the mere beginning of a building that is punishable, but its continuance even to completion without the requisite permission In other words, it is a continuing offence' Now in the new s 123(7) these words "or makes" do not appear, and the provision about continuing contravention was necessary, therefore, to cover the case of a building which has not merely been begun but continued even to completion in contravention of the Act The insertion of the provision about continuing contravention in s 123(7) can, therefore, be perfectly well explained without supposing that it was intended to cover the failure to remove a building Moreover, there does not appear to be the slightest necessity for such a wide construction of the words The new Act, like the old, gives the Municipality ample powers for dealing with buildings constructed in contravention of the Act or by-laws Section 123(7) itself provides that the Chief Officer may by notice require that the offending building be demolished Failure to comply with such a notice is punishable under s 193, and under s 192 the Chief Officer may, if necessary, demolish the building himself and recover the cost There is this further point to be noticed Cases may not infrequently occur when it is not necessary to go so far as to demolish a building because of a contravention of the building rules The person responsible may have to be prosecuted and fined, because the law *must be maintained, but sometimes that may be enough, and the building* may be allowed to stand If, besides being fined, the owner is also to be required to demolish the building, he may fairly expect that he will be so informed by a notice, otherwise how is he to know what his position is? If no notice is sent, it would surely be most unreasonable that the Municipality should be able to come down upon him after eighteen months, or even within six months (to adopt the Sessions Judge's view of what is permitted by the Act), and get him fined so much a day for the whole period That seems to me to be the obvious answer to the construction placed upon these sections by the Sessions Judge, namely, that they give the Municipality a choice of remedies When the Act provides a direct straightforward and perfectly effective method of securing the removal of a building which has been erected in contravention of the law, there is no reason why the legislature should be supposed to have provided an alternative method which is indirect and liable to become both capricious and oppressive We have not been referred to any authority which is inconsistent with what is on the face of it the natural interpretation of the words 'continuing contravention' But the case of **Marshall v Smith** is a very good authority in support of it The facts there were that Marshall was convicted and fined for building a wall four and a half inches in thickness, in contravention of a by-law requiring party-walls to be nine inches at least in thickness He was afterwards convicted under another by-law which provided that—'In case any offence under any of the foregoing by-laws shall continue, the person offending shall be liable to a further penalty for each day during which such offence shall continue' It was held that the failure to remove the wall was not a continuing offence and that the conviction was bad An attempt was made to distinguish this

case on the ground that the words in the by-law were 'continuing offence', not "continuing contravention" But as in each case the offence consists of the contravention of certain rules the two expressions must mean the same thing It was also pointed out that in consequence of the decision in **Marshall v Smith** a new s 158 of the Public Health Act 1875, was enacted, which provided that —'where an urban authority may under this section pull down or remove any work the existence of the work during its continuance in such a form and state as to be in contravention of the by-law shall be deemed to be a continuing offence, but a penalty shall not be incurred in respect thereof after the expiration of one year from the day when the offence was committed or the by-law was broken' Since that change in the law the position of course is different in England But there is no provision corresponding to the above s 158 in the Act with which we have to deal **Marshall v. Smith** was cited by Rankin C J in **The Corporation of Calcutta v. Ananta Dhar (p 698)** as the leading case which has never been dissented from in England", and he held in the case before him that where the Calcutta Municipal Act made it an offence to make a roof or external wall of inflammable materials, the suffering the roof to remain after conviction was not a continuation of the offence I hold, therefore, that the failure to remove a building in respect of which a person has been convicted under s 123(7) or 118(4) is not a continuing contravention within the meaning of those sections"

The expression 'continuing offence' has a well recognised meaning. It means that if an act of the accused constitutes an offence and if that act continues from day to day, then a fresh offence is committed on every day on which the act continues If the act prohibited is that of working a factory, an offence is committed on every day on which the factory is worked It may not strictly be a continuing offence, because the owner of the factory may cease to work it for a longer or a shorter period and then reopen it, but on any day on which he is shown to have worked the factory without the requisite permission he has committed an offence and it is immaterial to consider whether he committed an offence by working the factory on some previous occasion **Emperor v Karsondas, 44 B L R 756**

Starting point for limitation for prosecution for a continuing offence — Under s 200 of the B M B Act a prosecution for an offence under the Act must be launched within six months from the date of the commission of the offence **In Emperor v Chhotalal, 38 B L R 1164,** it is held that the expression 'commission of the offence' means commission of the offence in respect of which the prosecution is launched, i e to say, commission of the offence charged Thus we have only to look at the date of the offence in the charge and if the prosecution is launched within six months from that date it cannot be said to be time-barred In **Emperor v Bechardas, 32 B L R 768,** it was held that limitation for a prosecution for a continuing offence runs from the time when the offence is first committed, or where the offence consists in the failure to remove a building after conviction from the date of the conviction Commenting on this case in **Emperor v Karsandas, 44 B L R 756,** Beaumont C J observed "The learned magistrates were, I think somewhat misled by **Emperor v. Bechardas (32 B.L.R 768)** and particularly by the head-note The real question in that case was whether the offence charged was what is known as a continuing offence, and court held that it was not As I ventured to point out in **Emperor v Chhotalal Amarchand (38 B L R. 1164)** a continuing offence

is not a very happy expression, because a person must be charged with committing an offence on a particular date, and he cannot be charged with committing an offence **de die in diem**. But the expression has a well recognised meaning It means that if an act of the accused constitutes an offence, and if that act continues from day to day, then a fresh offence is committed on every day on which the act continues If the act prohibited is that of working a factory an offence is committed on every day on which the factory is worked It may not strictly be a continuing offence, because the owner of the factory may cease to work it for a longer or a shorter period and then reopen it, but on any day on which he is shown to have worked the factory without the requisite permission, he has committed an offence, and it is immaterial to consider whether he committed an offence by working the factory on some previous occasion The head-note in **Emperor v Bechardas** (supra) says 'Limitation for a prosecution for a continuing offence runs from the time when the offence is first committed' If the expression 'the offence is first committed' refers to the date when the act constituting the offence first took place, the statement is obviously wrong, because it would abolish altogether the distinction which has been recognised over and over again between an act which constitutes an offence once and for all and an act which continues, and, therefore, constitutes a fresh offence on every day on which it continues Under s 390 the establishing of a factory without permission is an offence committed once and for all when the factory is established, but the working of a factory without permission is an offence which arises on every day on which the factory is worked, and as the prosecution in this case is for working the factory two days before the date of the summons, it is plain that s 514 is no bar to the prosecution"

Possession of Land given and matter referred to Panchayat to fix price—No agreement as to price—Suit to recover possession on the ground that the action of the Municipality was not authorized by law —Defendant municipality purporting to act under s 92 B D M Act offered plaintiff a certain price for a plot of land or to refer the matter to a panchayat to fix the price Plaintiff gave possession of the land, but the parties were unable to agree to the price and plaintiff was referred to the District Court to have the price fixed Subsequently it was discovered that the defendant's action was not authorised by law and plaintiff brought the present suit to recover possession The suit was dismissed on the ground that as the plaintiff had agreed to part with the land at a price to be fixed under s 160 B D M Act, there was a contract binding on him and that the mistake as to the right of the defendant to act under s 92 of that Act was a mistake of law which under s 21 Contract Act did not invalidate the contract Plaintiff appealed held (1) that mistake of the parties in respect of the right of the defendant to acquire the land was one of fact and therefore, did not fall under s 21 Contract Act, (2) that the contract between the parties was merely one for the sale of immovable property which under s 45 Transfer of Property Act did not of itself create any interest or charge upon the property, (3) that the defendant had no power to act under s 92 B D M Act and consequently s 160 of the Act did not apply, (4) that inasmuch as the price is the essence of a contract of sale and the price in the present case was not ascertained in the manner contemplated by the parties, there was no price provided within the meaning of s 50 Contract Act, there was no valid

sale and the plaintiff was entitled to recover possession **Hemumal Harpalmal v Committee of Management Hyderabad** A.I R 1920 Smd 59.

Conditional permission—work started—Whether set-back could be ordered under s 92(1)(b) or action taken under s. 91A(4) or s 96(5)(a) & (b) of the B D M Act, 1901 —See notes under this head under s 119

(2) Powers To Regulate Buildings, Etc

Setting back projecting building

119 (1) If any part of a building projects beyond the regular line of a public street as prescribed under section 118 or beyond the front of the building on either side thereof, the municipality may —

(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 of 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 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

Acquisition of land which is within the regular line of a street and open or occupied only by platforms etc

(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 structure external to a main building, the municipality after giving the owner of the land not less than fifteen clear days' written notice of its intention, or if the land is vested in His Majesty, then with the permission 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

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 198 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 149 applies

(4) When the amount of compensation has been so ascertained and determined, or when a ruinous or dangerous building falling under sub-section (1) has been taken down under the provisions of section 149 the municipality may, after tendering the amount of compensation, if any, as may be payable, take possession of the land, so added to the street, and, if necessary, may clear the same

Compensation—Dispute as to amount of Compensation—Limitation—Suit·—In 1891 the Municipal Authorities of Bombay gave notice to the plaintiffs under section 299 of Bombay Act III of 1888 that they required 23.30 square yards of the plaintiff's land for street improvement On the 14th December, 1891 the plaintiffs gave possession of the land to the Municipality, and on 27th January, 1892, claimed Rs 60 per square yard as compensation By letter dated 23rd February 1892, the Municipal Commissioner (without prejudice) offered Rs 50 per square yard as compensation and stated that on the plaintiff's producing the title-deeds and papers to establish their title the necessary documents in connection with the payment would be prepared Nothing further took place in the matter until the 14th February, 1894, on which date the plaintiff wrote a letter to the Municipal Commissioner in which without mentioning any sum he requested the payment of the amount which might be due to him as compensation for his land taken by the Municipality The Commissioner refused to pay the compensation, contending that the plaintiff's claim was time-barred The plaintiffs thereupon brought this suit claiming Rs 1,165 (being at the rate of Rs 50 per square yard) as compensation for the land taken up by the defendant or in the alternative for that sum as damages for the breach of contract to pay purchase money for the land The defendant pleaded (1) that notice under s 527 of the Municipal Act III of 1888 was necessary before suit was filed and (2) that the suit was barred by Limitation The Chief Justice of the Small Causes Court found for the Defendant with costs and dismissed the suit contingent on the opinion of the High Court On a case Stated, held (1) that notice under s 527 of Bombay Act III of 1888 was not necessary, that section not being applicable to suits brought to enforce payment of compensation under s 301 of the Act. (2) that the suit was not barred by limitation Per Farran, J—A suit against the Municipality of Bombay for compensation for land acquired by Municipality under section 299 of Act III of 1888 is not an action of tort or quasi tort but a simple action for the price of land, which the terms of section 301, of the Act impose upon the Commissioner to pay The obligation to pay that price is of the same nature (1) whether the owner assents to the valuation of the land placed upon it by the Commissioner, (2) whether the value is determined by the Chief Judge of the Small Causes Court, or (3) whether it is left undetermined Section 527 does not apply to any of these three cases In all of them the obligation to pay is imposed by section 301, and does not arise from the manner in which the amount of the price to be paid is arrived at Section 504 prescribes the

only mode in which in case of dispute the value of the land can be determined If the owner of the land disputes the Commissioner's valuation he must apply to the Chief Judge of the Small Causes Court within a year. If he does not do so the result is that he loses the power of effectually disputing the Commissioner's valuation but does not lose his right to the amount of the valuation The owner of the land has a remedy independent of the provision of s 504 The section only deals with cases where there is a dispute as to the value of the land, and leaves untouched those cases where there is no such dispute but where the Commissioner for some reason declines to pay In such cases the owner is left to his ordinary remedy, no special mode of procedure being prescribed Cases in which there has been a dispute, but in which the owner abandons his claim to dispute the valuation of the Commissioner, fall within the latter category **Manekial v Municipal Commissioner for City of Bombay, 19 Bom 407**

The Calcutta Municipal Act 1899, provides that the Corporation shall compensate every person who suffers damage by the removal of fixtures erected before June 1, 1863 The Corporation served J with notice under section 341 to remove certain structure and thereafter obtained orders from the Magistrate for their demolition, but took no steps to enforce these orders J brought a regular suit in the court of the Subordinate Judge against the Corporation claiming (1) declaration that the fixtures were erected before June 1, 1863, (2) declaration that she was entitled to compensation for loss she would suffer by their removal, (3) declaration that the Corporation could not remove them till compensation was paid, (4) that the Court should fix the amount of the compensation and (5) an injunction restraining removal till the compensation was paid —held, (1) that, on the true construction of s 341(3), the assessment of compensation was not a condition precedent to the demolition of the structures (2) that Courts other than Small Causes Court were by s 617, debarred from fixing the compensation, and therefore as the suit sought relief under any but the first two heads, it was misconceived but that J was entitled under s 42 of the Specific Relief Act, 1, of 1877 to a declaratory decree for the first two claims, the corporation having denied her right to compensation until the hearing of the appeal against the decree of subordinate Judge **Mrs A J Joseph v The Corporation of Calcutta 18 B.L R 878**

A certain mosque in Bombay was abutted on the north, west and east by public streets In December, 1886 the Municipal Commissioner, pursuant to s 166 of the Bombay Municipal Acts III of 1872, and IV of 1878, required the trustees of the mosque to set back the building on the said three sides for the purpose of improving the public streets It was contended that the amount of compensation to be paid to the trustees was to be measured by the loss of rent which they would have received for certain rooms which they had proposed to build on the land in question Held, that the words of s 163 of the Municipal Acts III of 1872 and IV of 1878 were intended to ensure compensation to the owner for every sort of damage, and not to restrict it to compensation for such damage as he might by his own arrangement reduce it to Compensation becomes due under the section as soon as the corporation takes possession, which is when the owner begins to build, and there being no words in the section to show a contrary intention, the compensation must be assessed according to the state of things then existing, and not upon the basis of what

the owner may have it in his power to do towards diminishing the damage which would otherwise result to him Held, also, that in cases of compensation granted under s 163 of the Municipal Acts III of 1872 and IV of 1878, the addition of 15 per cent, cannot be allowed **Municipal Commissioner of Bombay v Patel Haji Mahamad and others, 14 Bom. 292**

Where in case of set-back, land with buildings thereon was taken up by the Municipal Commissioner from a private owner under Act III of 1888, ss 298, 299 and 301, held, that the amount of compensation awarded to the owner should be calculated with regard to the price given within a few years previously for land of a similar character in the immediate neighbourhood of the land in question Held also that the addition of 15 per cent could not be allowed An appeal lies to the High Court from a decision of the Chief Judge of the Small Causes Court of Bombay granting compensation to the owner of land taken by the municipality in case of a set-back under the Municipal Act III of 1888 sections 298, 299, 301 **Municipal Commissioner of Bombay v Sayed Abdul, 18 Bom 184** The principles laid down in these two cases will apply in a case under the Boroughs Act also But on the question of addition of 15 per cent for compulsory acquisition, see notes under the head **'Measure of compensation—Addition of 15 per cent.'** under s 198

Difference between ss 118 & 119.—The scheme of s 92 (equivalent to s 119 of the Boroughs Act) is quite different from that of s 91A. (equivalent to s 118 of the Boroughs Act) There is no question of an owner applying for permission to build, but certain powers are given to a Municipality, if any of the conditions mentioned therein exists, to require the owner by a written notice to remove his building to the regular line of the street or the front of the adjoining building on either side **Emperor v Thakordas, 27 B L.R 1023**

On either side —This means on any one of the sides, not necessarily both **The Dhulia Municipality v Kisandas, P J 1896 Page 781**

Taken down —A portion of a building was within alignment area about two and a half feet on one side and six feet at the other end The external masonry wall was demolished and pillars and door frames and doors were erected Parts of the floor and parts of the side wall came within alignment area on the street side The flooring and side-wall within alignment area were renewed It was held that the owner of the house took down a material portion of the projecting part of his building projecting beyond the regular line of the street as determined on for the future within the meaning of s 92 **Nihalchand v Karachi Municipality, A I R 1930 Sind 20**

Conditional permission—work started—whether set-back could be ordered under s. 92(1)(b) or action taken under s 91A(4) or s 96(5)(a) and (b) of the B.D.M. Act, 1901 —As a municipality cannot enforce set-back without paying compensation to the owner of the building set-back under s 92 of the B.D.M Act, 1901 (s 119 of the B M B Act, 1925), the condition that compensation would not be paid if the municipality should widen the street was not a legal condition and must be taken as a nullity This being so, the permission given by the municipality was sufficient for the owner to start rebuilding and action cannot be taken under s 91A(4) or s 96(5)(a) and (b) (s 118(4) and s 123 (7)(a) & (b) of the B.M B Act, 1925) Nor does it appear that the municipality

can take action under s 92(1)(b) (s 119(1)(b) of the B.M.B Act), for to do so would be practically to cancel the permission to build already given. **(R L A's opinion no 1823 dated the 19th November 1921 in G R.G.D. no. 1200 *dated the 20th November 1921*).**

Setting forward to regular line of street.

120 (1) The standing committee may, upon such terms as it thinks fit, allow any building to be set forward for improving the line of any public street in which such building is situated

(2) If the land which will be included in the premises of any person permitted under sub-section (1) to set forward a building belongs to the municipality, the permission of the standing committee to set forward the building shall be a sufficient conveyance to the said owner of the said land, and the price to be paid to the municipality by the said owner for such land and the other terms and conditions of the conveyance shall be set forth in the said permission

May allow —These words show that if an owner wants to set forward his building to conform to the regular line of the street he has to apply for it and the standing committee may allow the application on such terms as it thinks fit Thus the amount to be paid to the Municipality and other terms are to be laid down by the standing committee There is no provision for compulsory setting forward nor for fixation of the price by arbitration under section 198

Transfer of a strip of road-side land —Under s 93 of the B D M Act, 1901 the municipality and under s 120(1) of the B.M B Act, 1925, the standing committee have power to allow any building to be set forward for improving the line of any public street in which such building is situated In the exercise of this power it may be necessary for the municipality or the standing committee to transfer a street of road-side land But the transfer of a strip of road-side land must be effected subject to the provisions of sections 40(2) and 48(2) of the Acts respectively **(R L A's opinion no 837 dated the 11th February 1932 in G R G D no 2640 dated the 29th March 1932)**

Roofs and external walls of buildings not to be made of inflammable materials

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

Power to require removal of roof and wall if inflammable.

(2) The Chief Officer 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 Chief Officer

(3) An appeal shall lie to the standing committee against any order of the Chief Officer refusing the consent under sub-section (1) or against any notice given by the Chief Officer under sub-section (2) if made within fifteen days of the receipt of such refusal or notice, as the case may be.

Penalty.

(4) 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 fine which may extend to twenty-five rupees, and with further fine which may extend to ten rupees for every day on which the offence is continued after the date of the first conviction.

Continuing offence.—See notes under the head 'continuing contravention, etc.' under s 118.

Starting point for limitation for prosecution for a continuing offence:—See notes under this head under s 118.

Level of buildings

122. No building shall hereafter be constructed 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 Chief Officer

Notice of new buildings

123 (1) Before beginning to construct any building, or to alter externally or add to any existing building, or to construct or reconstruct any projecting portion of a building in respect of which the standing committee is empowered by section 119 to enforce a removal or setback, or to construct or reconstruct which the Chief Officer is empowered by section 118 to give permission, the person intending so to construct, alter, add or reconstruct shall give to the Chief Officer notice thereof in writing and shall furnish to him at the same time, if required by a by-law or special order to do so, 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 Chief Officer, and all information required by the by-laws or demanded by the Chief Officer 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, and the purpose for which the building will be used.

Power of Chief Officer to pass orders

(2) Save as otherwise provided in this Act or the rules and by-laws thereunder, the Chief Officer may either give permission to construct, alter, add or reconstruct according to the plan and information furnished or may impose in writing conditions, in accordance with this Act and the rules and by-laws made thereunder, as to level, drainage, sanitation, materials or to the dimensions and cubical contents of rooms, doors, windows and apertures for ventilation or to the number of storeys to be erected, or with reference to the location of the building in relation to any street existing or projected, or the purpose for which the building is to be used, or may direct that the work shall not be proceeded with unless and until all questions connected with the respective location of the building and any such street have been decided to his satisfaction

(3) The municipality may, before any work has been commenced in pursuance of any permission granted by the Chief Officer under sub-section (2), revoke such permission and may give fresh permission in lieu thereof on such conditions, in accordance with this Act and the rules and by-laws made thereunder, with reference to the matters mentioned in the said sub-section, as it thinks proper, and may direct that the work shall not be proceeded with unless and until all questions connected with the respective location of the building and any such street have been decided to its satisfaction

Or to suspend the work or to require further particulars

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

(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.

(5) A work proposed in a notice given under sub-section (1) may be proceeded with in the manner specified in such notice, provided such manner 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, namely —

(a) in case the Chief Officer within one month from the receipt of the notice given under sub-section (1) has neither—

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

(ii) issued under sub-section (4) any provisional order or any demand for further particulars,

(b) in case the Chief Officer having issued such demand for and having received such further particulars, has issued no further orders within one month from the receipt of such particulars.

Commencement of work

(6) No person who becomes entitled under sub-section (2) or (5) 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 became entitled so to proceed therewith, unless he shall have again become so entitled by a fresh compliance with the provisions of sub-sections (1) to (5) And no person to whom permission to erect or alter or add to any building has been granted by the municipality under section 96 of the Bombay District Municipal Act, 1901, shall be entitled to commence such work after the expiry of one year from the date on which this Act comes into force

Bom III of 1901

(7) Whoever begins any construction, alteration, addition or reconstruction without giving the notice required by sub-section (1) or without furnishing any plan, information or particulars required by or under this section, or, except as provided in sub-section (5), without awaiting or in any manner contrary to such legal orders of the Chief Officer as may be issued under this section, or contrary to the provisions of sub-section (5) or (6) or in any other respect contrary to the provisions of this Act or of any by-law in force thereunder, shall be punished with fine which may extend to one thousand rupees, and in the case of a continuing contravention of any of the aforesaid provisions, he shall be liable to an additional fine which may extend to ten rupees for each day during which such contravention continues after conviction for the first such contravention, and the Chief Officer may—

(a) direct that the construction, alteration, addition or reconstruction be stopped, and

(b) upon a conviction being obtained under sub-clause 7 by written notice, require such construction, alteration, addition or reconstruction to be altered or demolished in accordance with the provisions of such notice.

(8) The Chief Officer may at any time inspect any work of which notice is required by sub-section (1) without giving notice of his intention to do so, and at any time during the execution of any such work as aforesaid, may, by written notice, specify any matter in respect of which the execution of such work is in contravention of any provision of this Act or of any by-law made under this Act at the time in force or of any order passed under this section, and require the person executing such work to cause anything done contrary to any such provision or by-law or order to be amended or to do anything which by any such provision or by-law or order he is required to do but which has been omitted.

Explanation—The expression "to construct a building" throughout this chapter includes—

(a) any material alteration, enlargement or reconstruction of any building, or of any wall, verandah, fixed platform, plinth, doorstep or the like, whether constituting part of a building or not,

(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, reconstructed, converted or added to, is throughout this chapter included under the expression "a new building"

Authority of the Municipality—Civil Courts' interference with the discretion given to public bodies —The word 'street' in s 17 of the Bombay District Municipal Act (VI of 1873) means and includes not merely the surface of the ground, but so much above and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes The plaintiff proposed to make a balcony projecting over a public road The Municipality objected to the work, as an encroachment on a public street He, therefore, sued the Municipality to establish his right to build the proposed balcony. Held, that, so far as the column of space standing over the street was vested

in the Municipality, the plaintiff had no right to occupy it with a balcony, which by intercepting light and air would greatly impair the use of the area as a street Section 33 of the Bombay District Municipal Act (VI of 1873) gives the Municipality a discretion to issue such orders as it thinks proper with reference to a proposed building Civil Courts cannot interfere with that discretion, unless it is exercised in a capricious, wanton, and oppressive manner **Nagar Vallabh v Municipality of Dhandhuka, 12 Bom 490.**

The plaintiff was the owner of two houses on each side of the passage of a khadki, or open square, containing three or four other 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 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 householders, 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 Vallabh v Municipality of Dhandhuka, 12 Bom 490**

A suit for an injunction to restrain a municipality from removing a certain building or construction is not an action for anything done, or purporting to have been done in pursuance of the Act within the meaning of s 48 of Bombay Act II of 1884 Such a suit can, therefore, be brought without giving previous notice to the municipality Apart from the provisions of s 33 of Bombay Act VI of 1873, it is only if the site of a building is vested in a municipality under s 17, that this body is empowered, whether by s 42 or by any other section, to take steps for the removal of the building The discretion of taking action or otherwise under the 3rd clause of s 33 is vested in the municipality, which alone can determine whether or not the removal of a building erected contrary to the provisions of s 33 is or is not a measure likely to promote the public convenience If the municipality adopt 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 **Patel Panachand v. the Ahmedabad Municipality, 22 Bom 230.**

Municipality has no power to refuse permission to build on land with a view to acquire the land —It is not competent to a District Municipality to refuse permission to build on a land with a view to acquire the land, under the Land Acquisition Act, 1894, at a reduced compensation Such a refusal, even if made, cannot be taken into consideration in fixing the amount of compensation. **Maneklal v. The Land Aquisition Officer, West Khandesh, 39 B.L.R. 142** In the course of the judgment after referring to the provisions of s 96(2)

Tayabji J observed "None of these alternatives permit the Municipality to refuse in general terms permission to build All that they permit is to impose conditions of special classes, or to direct that the work shall not be proceeded with until questions relating to the location of the building have been decided to their satisfaction Nor are these the only limitations upon the powers of the Municipality in regard to granting permission to build There are further limitations which are illustrated by a criminal case **Emperor v Onkardas, (36 B L R. 217)** It was held there that the Municipality in question had in the circumstances no authority to give permission to build with the condition imposed that the owner shall only build leaving a setback of a certain space In that case, though it was intended to add that part of the land to the street, the regular line of street in accordance with s 91A(1) had not been prescribed Where such a line is prescribed, compensation for the value of the land added to the street has to be paid by the Municipality The owner built disregarding the condition of leaving a setback and he was held not to have acted contrary to any legal orders of the Municipality, nor to have become liable to fine The basis of the reasoning was that the Municipality could not legally impose the condition of a set-back without paying compensation Bombay District Municipal Act s 91A, **Bai Fatma v. Rander Municipality, (16 B L R 529).** The position then under the Act and in accordance with principle, stands thus the Municipality as a public body is under the necessity not to exercise its authority in a capricious, wanton, oppressive, arbitrary or tyrannical manner even when acting within the defined limits of its powers It must use even its admitted powers considerately, with a discretion suitable to the nature and importance of the duties to be discharged, and with a fair and honest judgment Secondly, under the Act the Municipality has been given no power to refuse in general terms permission to build It has only power to impose conditions with reference to the location of the building in relation to any street existing or projected *Thirdly even such conditions cannot be so imposed as to contravene* the provisions for compensation when a regular line of street is prescribed The result is that the Municipality may for consideration acquire the right to prevent the owners of land adjoining a street from building on such parts of the land as it desires to add to the street but the Municipality is not entitled as was argued before us to prevent building sites being built upon without compensating the owners"

Production of Sanad Under s 33 of the Bombay District Municipal Act (Bombay Act VI of 1873) a Municipality has no right to insist on the production of a sanad issued under s 10 of the City Survey Act (Bombay Act IV of 1868) before granting permission to build **In re Jamnadas 15 Bom. 516**

The question whether under s 96 of the District Municipalities Act 1901, the Municipality has jurisdiction or right to call for information regarding ownership must be decided on the circumstances of each case Where, however, a person so produces the title-deeds and furnishes the information asked for he is bound to wait for one month from that date for the orders of the Municipality before he can proceed with the intended construction **Emperor v Pranshanker, 6 B L R 581**

New wall on the site of an old wall including the old foundations:— Plaintiff having built a new wall on the site of an old wall including the old

foundations, the Municipality pulled the wall down Plaintiff thereupon sued the Municipality for damages The Judge rejected the claim for damages Held, that the building of a new wall on the site of the old wall including the old foundations was not an addition to the existing building within the meaning of s 33 of the District Municipal Act (Bombay Act VI of 1873) The Municipality was, therefore, liable in damages for any expense which the plaintiff was put to by their pulling down the wall **Krishnaji v Municipality of Tasgaon, 18 Bom. 547.**

Where the owner of the door of a street alters it by narrowing the doorway he is not bound to give notice to the Municipality under s 33, Bombay District Municipal Act, 1873 **The Municipality of Umreth v. Somnath, 2 B.L.R. 218.**

One of the walls of the house of the accused having fallen down he applied on the 19th April 1910 to the Municipality for leave to re-construct it Without having received the leave or without waiting for it for one month from the date of his application, he re-built the wall on the 11th May 1910 On the 13th idem, the Municipality issued an order to the accused prohibiting him from making the re-construction The accused was upon these facts prosecuted under s 96 of the Bombay District Municipal Act, 1901, but was acquitted by the Magistrate The Government having appealed—Held, reversing the order of acquittal, that the accused had erected a building within the meaning of s 96 of the Bombay District Municipal Act, 1901, inasmuch as in re-building the whole wall which had fallen down, there was a material reconstruction or an erection of a building, as defined in the explanation to the section **Emperor v. Kalekhan, 12 B.L.R. 1060.**

The accused was charged with the offence of erecting a building without the permission of the Municipality under s 96 of the Bombay District Municipal Act, 1901, in that he built up one of the small walls of his house on its old foundation without having previously obtained the permission of the Municipality Held, that the accused committed no offence under s 96, for it could not be said as a matter of law that the material reconstruction of a small wall must constitute 'the erection of a building' Where a term is interpreted in a statute as 'including' &c, the comprehensive sense is not to be taken as strictly defining what the meaning of the 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 **Emperor v De Souza, 13 B.L.R 494** Scott C J in the course of the judgment observed "The question referred to me may be formulated thus —Whether the reconstruction of a wall upon its own foundation is necessarily the 'erection of a building' within s 96 of the District Municipal Act? According to the explanation appended to that section the expression 'to erect a building' throughout Chapter IX includes any material alteration, enlargement, or reconstruction of any building Whether the reconstruction of a wall of whatever importance forming part of a house is necessarily the 'erection of a building', depends upon whether the interpretation clause s 3(7), is to be taken as substituting impliedly for the word 'building' wherever it occurs in the Act not merely all erections falling within the ordinary comprehension of the term 'building' but also all other things included within the definitions It is recognised in England to be a rule with regard to the effect of interpretation clauses of a comprehensive nature such as we have here

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 (see the judgment of Lord Denman in **Queen v The Justices of Cambridgeshire**, of Lord Selbourne in **Meux v Jacobs** and of Lord Watson in **The Mayor of Portsmouth v Smith**) In the present case the only complaint is that a small wall was built on an old foundation without the permission of the Municipality The Magistrate has held that in erecting this wall the accused was not 'erecting any building' within s 96, and this conclusion must, I think, be accepted unless it can be said as a matter of law that the material reconstruction of a small wall must constitute the 'erection of a building' For the reason above stated I do not think that the Court is precluded from giving to the word 'building' in that section its ordinary meaning, a meaning which the neighbouring sections indicate as the sense in which the Legislature was using that expression in the group of sections of which s 96 forms part It is possible that the re-erection of a wall may (under certain circumstances) amount to the material reconstruction of a building under s 96, but I do not think it necessarily does In **Emperor v Kalekhan Sardarkhan**, referred to by Chandavarkar J, the applicant had treated the re-erection of his wall as falling within the section; and had applied for leave to re-erect it but did not wait to see if the permission would be granted or refused and there was no appearance on behalf of the accused In the present case the wall is a small wall and has all along been regarded by the applicant as not a building within the s 96"

The construction of walls on old foundations is tantamount to a construction of a building within the meaning of s 123 of the Bombay City Municipalities Act, 1925, and involves the giving of a notice to the Municipality under sub-s (1), s 123, of the Act **Emperor v Chhotalal, 30 B L R 1082** Dealing with the previous case law on the point Patkar J said "On the question whether the building of a wall amounts to a reconstruction or an erection of a building within the meaning of s 96 of Bombay Act III of 1901 and s 33 of Bombay Act VI of 1873, there is a conflict of judicial opinion in several decisions of this Court It was held that the building of an isolated wall on an old foundation did not amount to an erection of a building under s 33 of the District Municipal Act, Bom Act VI of 1873 See **Queen Empress v Tippana (1888) unrep cr c 402.** In the case of **Emperor v Kalekhan Sardarkhan, 12 B L R 1060**, it was held that the rebuilding of a wall that had fallen down amounted to a re-construction of a building The contrary view was taken in the case of **Emperor v De Souza, 13 B L R. 494.** Under the interpretation clause, s 3 cl (7), of Bombay Act III of 1901, a wall came within the inclusive definition of a building In the Explanation to s 123 of the City Municipalities Act (Bombay Act XVIII of 1925), it is mentioned that the expression 'to construct a building' throughout the chapter includes any material alteration, enlargement or re-construction of any building, or of any wall, verandah, fixed platform, plinth, door-step or the like, whether constituting part of a building or not It is clear, therefore, under the explanation to s 123 of Bombay Act XVIII of 1925, that any material alteration or re-construction of any wall would amount to a construction of a building within the meaning of s 123 We think, therefore, that the view taken by the Second Class Magistrate that the construction of walls on old foundations did not amount to re-construction of a building is not correct It further appears

that the walls have been built within the alignment line If these walls were built within the road line, the construction of the walls would be contrary to ss 118 and 119, and would fall within sub s. (1) of s 123 and the construction of the said walls without notice would be punishable under sub s (7) of s 123 of the Act" The position under the B D M Act, 1901 is also the same in view of amended explanation to s 96 [amended by Bom 26 of 1930, s 8(g)].

Municipality may ask for plan and measurements.—On the 18th August, 1890, plaintiffs sent a notice to the Town Municipality of Umreth, intimating their intention to erect a building on their land, and giving a rough sketch plan of the land intended to be built upon In this notice plaintiffs did not expressly state their intention to build the wall in dispute On the 28th August, 1890, the Municipality wrote to the plaintiffs, requiring them to furnish a plan showing the design of the proposed building with its measurements On 30th September, 1890, the plaintiffs, without furnishing the plan as required, built a wall on their land Thereupon the Municipality gave a notice to the plaintiffs requiring them to pull it down, as it had been built without their permission The plaintiffs having failed to comply with this notice, the wall was demolished, and its materials were carried away by the municipal servants Thereupon the plaintiffs sued the Municipality to recover damages for the wrongful demolition of the wall Held, that the plaintiffs had contravened the provisions of cl 1 of s 33 of Bombay Act VI of 1873, inasmuch as they had built the wall without giving any notice, or (if they did give notice) without affording the information required by the Municipality The Municipality were, therefore, justified in ordering the wall to be demolished **Dave Harishanker v the Town Municipality of Umreth, 19 Bom. 27.**

Building in excess of permission.—Under the Bombay District Municipal Act where an owner having obtained permission under s 33 to build on one portion of his land builds on another portion without having obtained fresh permission, if such part of his building as is outside the limits for which permission has been granted is built without notice, the Municipality can in their discretion order it to be demolished **Bhavanishanker v The Surat City Municipality, 21 Bom 187**

Restriction of height.—The Municipality of Bombay has power under s 461, cl (d)(1) of Bombay Act III of 1888 to make a by-law restricting the height of a new building erected on a site which had been previously built upon **Municipality of Bombay v. Sunderji, 22 Bom. 980**

The accused erected a building which touched on either side of it public streets which ran parallel to each other The height of the house having exceeded the permissible limits, the Municipality required the accused to reduce the height, conformably to the provisions of s 349-B of the City of Bombay Municipal Act, 1888 The accused disobeyed the requisition and he was convicted and sentenced for the disobedience —Held, (1) that the building of the kind in question must at all events fulfil the conditions prescribed in cls 1, 2 and 3 of s 349B with reference to both the streets on which it abuts, even if it did not fall within cl 4 of the section (2) That the provisions in question of the Act were intended in the interests of public health, and the Court ought to so construe them as to advance that object It is not permissible to create a **casus omissus** by interpretation save in some case of strong necessity **Emperor v. Rustomji, 9 B.L.R. 363.**

Where the owner of a house destroyed by fire pulls down its remaining walls to six feet above the plinth, and the house abuts on a street, the height to which he can raise his new building is governed by the provisions of s 349B of the City of Bombay Municipal Act, 1888 Where in reconstructing a house, the owner set it back by five inches from the street in which it originally abutted Held that the house should be taken as abutting on the street notwithstanding the set back **In re Ali Mohmed, 9 B.L.R. 737**

The accused owned a large plot of land at Kurla He left its middle portion vacant for passage and built a one-storeyed house on one side of the passage He also commenced to build a chawl on the other side At the same time he applied to the Kurla Municipality for permission to add one more storey to his existing house The Municipality failed to give any orders for one month, after which the accused commenced to add the storey More than a month afterwards the Municipality refused the permission asked for When the building was approaching completion, the Municipality prosecuted the accused for breach of their by-law No 132, which provided that the height of a building should not be more than the width of the street on which it abutted —Held, that the accused in doing what he did had not contravened by-law No 132, since the vacant space left by him between his buildings, which were under construction was not a 'street' within the meaning of s 3(12) of the Bombay District Municipal Act 1901 **Emperor v Tyabalh, 26 B.L.R 216**

Re-erection of an existing structure—Section 48 of the Bombay District Municipal Act (Bom Act VI of 1873) refers to the erection of a thing for the first time, and not to the re-erection of an old structure which had been taken down for a temporary purpose only The accused was the owner of a shop in a public street at Thana The shop had planks attached to it in front, overhanging a public gutter These planks had been in existence before the District Municipal Act came into operation at Thana In April, 1897, the planks were temporarily removed under the orders of the plague authorities The plague having ceased, the accused replaced the planks in October, 1897, without the permission of the Municipality For this he was prosecuted and fined under s 48 of Bombay Act VI of 1873 Held reversing the conviction and sentence that the refixing of the planks was not an 'erection' within the meaning of s 48 of the Act **Kala Govind v The Municipality of Thana, 23 Bom 248**

Erection of balconies without permission—Prosecution—Acquittal—Notice to remove—Fresh prosecution for non-compliance with notice—whether tenable — The accused was prosecuted by the Bombay Municipality under section 342 of the Bombay City Municipal Act, for constructing two balconies to his house without the permission of the Municipality He was acquitted The Municipality then served a notice upon the accused under sections 308 and 309 of the Act asking him to remove the two balconies and also two others which were not new and on the accused's failing to comply with the notice, the Municipality prosecuted him again The Magistrate referred to the High Court the question whether the previous acquittal of the accused precluded the Municipality from bringing the second charge against him —Held, that there was no bar to the second prosecution as sections 403(1), 236, and 237 of the Criminal Procedure Code had no application The second offence could not have been committed until the notice to remove was served on the accused and this notice was not served upon the accused until the year following that in which he was acquitted under the former charge **Municipality of Bombay v. Javer Jagjivan, 4 B.L.R. 575.**

Whether section applies to a house abutting on a private street —A district Municipality can, under the provisions of s 33 of the District Municipal Act (Bom Act VI of 1973), order the removal of balconies put up by a person to his house abutting on a private street and constructed in defiance of the orders issued by the Municipality Per Chandavarkar J —(1) Reading the whole of s 33 of the Bombay Municipal Act (Bom Act VI of 1873) by itself and having regard 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', that is, it should be exercised, not capriciously or arbitrarily, but reasonably, provided the order is 'not inconsistent with the provisions' of the Act (2) 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 **Tribhovan v the Ahmedabad Municipality, 5 B.L.R 48**

Reconstruct:—The word 'reconstruction', as used in s 342 cl (d) of the City of Bombay Municipal Act, has some other element than that of addition, alteration or repair If the repair is of an ordinary and casual character, it is not reconstruction 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 reconstruction 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 reconstruction 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 **Dowakabai v the Municipal Commissioner of Bombay, 6 B L R 1028**

There were wooden pillars facing a street, on them was a continuous gallery or balcony which formed part of a room without any wall dividing the gallery from the room and with a common roof over the two The owner of the house removed the old wooden pillars and replaced them by pillars of masonry He also removed the old galleries and replaced them by new galleries forming part of the room next to them and without any dividing wall The galleries were within alignment area Held, that the whole portion within the alignment area was demolished and reconstructed Held also Section 96 (4) only authorises a person to proceed in such manner as is not inconsistent with any provisions of the Act including s 91A or of any by-law It is unreasonable to hold that under s 96(4) a person has a right to reconstruct a material part of his building within set back area unless in his notice or in the plans submitted under s 96 (1) he has clearly given notice to the municipality of his intention to do so **Nihalchand v Karachi Municipality, A.I.R. 1930 Sind 20.**

Abutting on the street:—Where in reconstructing a house, the owner set it back by five inches from the street on which it originally abutted Held, that the house should be taken as abutting on the street notwithstanding the set back, **In re Ali Mohmed, 9 B L R 737**

Re-erect:—The term 're-erection' applies to all buildings which are not included in s 337(2) of the Bombay City Municipal Act, 1888 A building with a ground-floor to which, after it has been in existence for some years, the owner wants to add one or more storeys would fall within "re-erection", provided it is not of the description mentioned in the definition of erection **Emperor v. Nanabhai, 9 B L R 932**

Sub-sections (4) & (5)—Provisional order:—The plaintiff applied to the defendant-Municipality, on the 31d July 1903, for permission to re-construct his house, and building balconies on the Southern and Eastern sides The Municipality gave to the plaintiff, on the 25th idem, permission to re-build his house; as regards balconies, it said that the matter was referred to the Managing Committee and until it was decided, he should not construct them For nearly one year, the Municipality did nothing The plaintiff after waiting for sometime built his balconies This was reported to the Municipality on the 15th July 1904, and it called upon the plaintiff, on the 4th August 1904, to remove the balconies The plaintiff, sued the Municipality for an injunction restraining it from removing his balconies —Held, that the order passed by the Municipality as to the balconies must be referred to sub-s 3(a) of s 96 of the Bombay District Municipal Act, 1901, that it was spent after the expiry of one month, and that thereupon the plaintiff became entitled under sub-s 4 of s 96 to proceed with the proposed work Under the Bombay District Municipal Act, 1901, 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 The words 'any provisional order' in sub-s 4(a)(ii) of s 96 refer only to a subsisting provisional order **The Ahmedabad Municipality v. Ramji Kuber, 13 B L R 914**

Condition to keep space open must be reasonable and not inconsistent with the Act—Condition to keep open space in absence of a prescribed regular line invalid'—The plaintiff, who owned a house at Rander, applied to the Rander Municipality on the 25th April 1911 for permission to re-build it On the 5th June 1911, the municipality granted her permission on condition, among others, that she should in re-building her house keep an open space of five feet eight inches in front of her house so as to widen an existing road from eight feet four inches to fourteen feet It appeared that the Municipality had not determined any regular line either for the existing street or for the future as contemplated in s 92 of the Bombay Municipalities Act, 1901, but the condition in question was prescribed presumably under s 96(2) of the Act The plaintiff disregarded the condition and built upon the space in question The Municipality having threatened her to pull down the building, the plaintiff filed a suit to restrain the Municipality from doing so The lower Courts refused to grant the injunction prayed for The plaintiff appealed —Held, (1) that the power of the Municipality under s 96 to prescribe the location of the building was given in relation 'to any street existing or projected as they think proper', whereas, the Municipality 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 but was not yet projected (2) That if the condition of the permit were complied with the plaintiff would have to give up or keep vacant and 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 s 92 which con-

templated that when a set-back was determined upon compensation should be paid to the owner (3) That the plaintiff was, therefore, entitled to the injunction sought by her **Bai Fatma v. the Rander Municipality, 16 B.L.R 529.**

The plaintiff who owned a house-site thirteen feet in width, applied to the defendant Municipality for permission to build on the site The Municipality referred the matter to the Collector who advised, in view of previous orders passed on the subject, that the plaintiff should be asked to leave open a strip of five feet on either side, and as he could not build on the remaining three feet of the site, he should be asked to keep the land open The order was in due course communicated to the plaintiff. The plaintiff having sued for a declaration that the order was ultra vires and void —Held, (1) that the advice given by the Collector was not an order under s 174 of the Bombay District Municipal Act, 1901, (2) that the order passed by the Municipality was outside their powers under s 96 of the Act, for though they were only entitled to direct that the proposed building should be set back to a certain distance from the street, yet they were not entitled to order that on each side of the building open spaces should be left with the object of preventing the applicant from building at all. **Ahmed v. Rander Town Municipality, 27 B.L.R. 429.**

The accused obtained from the Rander Municipality permission to build, which was given subject to the condition that the house should be built after leaving open the land within the alignment of the road in front. In spite of the condition, the accused built up his house within the alignment On a prosecution of the accused under s 96 of the Bombay District Municipal Act, 1901·—Held, that the accused had offended against s 96 of the Bombay District Municipal Act as amended in 1914, for he was bound to ask for permission to reconstruct his building within the regular line of the street and the Municipality were entitled to issue such orders as they thought proper not inconsistent with the Act and to impose in writing such conditions with reference to the location of the building in relation to any street existing or projected as they thought proper Under s 92, there is no question of an owner applying for permission to build, but certain powers are given to a Municipality, if any of the conditions mentioned therein exist, to require the owner by written notice to remove his building to the regular line of the street or the front of the adjoining building on either side **Emperor v Thakordas, 27 B.L.R. 1023.**

The plaintiff purchased an old dilapidated house in Nasik bearing Municipal No 759, and abutting the Gayadhani Lane on the south, for Rs. 10,000, by a sale deed, Exhibit 68, dated May 29, 1922 On June 26 following, he applied to the Municipality for permission to build a new house on the site thereof The Chief Officer, thereupon, ordered that he should leave a space of eight feet on the southern side all along the whole length of his house, which was eighty-nine feet seven inches from east to west, for being incorporated into the street adjoining it, and build on the remaining portion **Vaki v. The Nasik Municipality, 28 B.L.R. 535.** In the course of the judgment Macleod C J. observed: "That was an illegal order Admittedly, when the plaintiff asked for permission to build, a regular line of the street had not been prescribed. The Chief Officer, could not order the plaintiff to set back his land He could only lay down in what manner the new building should be erected having regard to the provisions of the Act"

Section 91A, which was introduced in the Bombay District Municipal Act of 1901, provided that it was the duty of every 'Municipality' to prescribe a line

on each side of every public street, and that no person was at liberty to construct or reconstruct any portion of any building within the regular line of the public street In the year 1924, the word 'Municipality', in s 91A was replaced by the phrase 'City Municipality and such other Municipality as may be notified by Government in this behalf' In 1920, the Nandurbar Municipality, which was neither a City Municipality nor a Municipality notified by Government, prescribed a regular line of a public street The Municipality was notified by Government in 1927, but it did not thereafter prescribe a regular line of the street. The applicant applied in 1932 to the Municipality for permission to rebuild a wall of his house which abutted on a public street The Municipality gave him the permission, subject to the condition that the wall should be set back to the regular line prescribed for the street The applicant rebuilt the wall without the set-back, for which he was prosecuted under s 96 (5) of the Act—Held, (1) that until the Municipality prescribed a line under the powers which they acquired in 1927 on the notification of Government they were not in a position to take advantage of s 91A of the Act, (2) that the condition imposed by the Municipality could not be justified under s 96 (2) of the Act, inasmuch as the set back required was not in relation to any street existing or projected but was really in relation to some future possible widening of the existing street, (3) that the applicant, therefore, was not guilty of any offence **Emperor v Onkardas, 36 B.L.R. 217.**

In all the above cases the decision proceeded upon the basis that the condition to keep open space imposed by the Municipality was either unreasonable or inconsistent with the Act But where the condition is neither unreasonable nor inconsistent with the Act the Municipality has power under s 123 of the B M B Act to impose it See **Municipality of Thana v. Fazal Karim, 3 B.L.R. 842,** wherein it was held that a municipality in granting permission to a person to erect his building can legally impose a condition that he should leave a gully of a certain dimension See also **Municipality of Karachi v. Mahmed Ali Esaji, A.I.R. 1916 Sind 17,** where it was held that a municipality is not liable to pay compensation in all cases where it orders a householder to leave vacant a strip of land on his own plot between the front of his house and the street, but only when the land left vacant is included in a public street Dealing with the point Boyd A J C observed. "Mr Dipchand contends that the words 'location of the building in relation to any street' have reference to cases of set-back and that in all such cases the municipality is liable to pay compensation But compensation is not payable unless the land left vacant is included in a public street This was made clear in the case of the **Municipality of Thana v. Fazal Karim (3 B.L.R. 882)** The recent case of **Bai Fatma v. Rander Municipality (16 B.L.R. 529)** is distinguishable, for the municipality in that case were held to have exercised the power unreasonably and in a manner inconsistent with the Act Fazal Karim's case shows that in certain circumstances the municipality could have ordered the plaintiff to set back his house and to leave vacant a strip on his own plot between the front of his house and the street. This is also apparent from the specification required as to limits of the proposed building in s 96 (1) (b). Now if the Municipality could set back the whole house a fortiori they could set back the door which was part of the house" Accordingly it was held in **Khushaldas Mulchand v. Emperor, A.I.R. 1918 Sind 53 (1),** that Section 96 does not empower the municipality to deprive the owners of legitimate use of

their land or to refuse permission to build at all, but it does confer on the municipality a very wide power of regulating buildings The object of the power is to secure the safety and sanitation of buildings to be newly erected This power though an encroachment on private rights is not inconsistent with the Act

Action of the Municipality preventing an owner of land from building on about a third of his land because the land unbuilt on forms an open lung in a congested area and further congestion in the area would create insanitary conditions which would endanger the health of the locality is in excess of the powers possessed by them. The proper procedure for the municipality to adopt in such a case is to acquire the plot in the interest of the health of the locality **Tikamdas Dewanmal v. Karachi Municipality, A.I.R. 1933 Sind 227.**

Conversion of any building —The accused obtained permission of the Municipality in 1903 to build a house, the principal room of which was described as a shop. The house was accordingly built, but the whole of it was used as a dwelling house up to 1911 In that year, however, the room was used as a shop, which user continued down to October, 1913, when it was again used as a dwelling-house along with the rest of the building For this altered use, the accused were convicted under s 96 (5) of the Bombay District Municipalities Act, in that they converted 'into a place for human habitation' a 'building not originally constructed for human habitation without giving notice to the Municipality The accused having applied to the High Court —Held, setting aside the conviction and sentence, that the words 'conversion of any building' in s 96, Explanation, implied some change in the building itself, and did not cover a case where the building remained absolutely unchanged and the only thing changed was the use or occupation to which the building was put **Emperor v Adurji & Brothers, 17 B.L.R. 212.**

Whether permission once granted can be revoked·—The accused having obtained from the Managing Committee of the Municipality permission to build his house with a certain gallery, began the building While the building was under construction, he received an order from the Municipality asking him to set it back by omitting the gallery The accused, notwithstanding the order, proceeded with his building in compliance with the permission first granted He was convicted under s 96, cl (5) of the District Municipalities Act, 1901 On an application to the High Court —Held, reversing the conviction, that the accused was not guilty of an offence under s 96 of the Act **Emperor v Kareem Ranjan, 19 B.L.R. 65.**

The plaintiff applied on the 1st December, 1913, to the defendant Municipality for permission to build a privy on his own land, which permission was granted on the 19th idem. The municipality gave notice to the plaintiff on the 6th January 1914 requiring him not to build the privy until further orders. The plaintiff sued for cancellation of the last-named order and for a perpetual injunction restraining the Municipality from preventing the plaintiff in the work of constructing the privy Held, that the first order made by the Municipality granting permission to the plaintiff to build the privy was a final order under s 96(2) of the Bombay District Municipalities Act, 1901, and that the subsequent order which purported to be provisional in its character was not referable to sub-s 3 of s 96, nor to any other section of the Act, and was, therefore, not legal, and that consequently the plaintiff was entitled

to the injunction claimed, he having commenced the work within a year within the meaning of s 96(4) of the Bombay District Municipalities Act, 1901 **Vithal v the Alibag Municipality, 20 B.L.R 756**

A permission to build once granted by a District Municipality, under s 96 of the Bombay District Municipal Act, 1901, cannot be subsequently revoked by the Municipality **Municipality of Sholapur v. Abdul Wahab, 23 B.L.R. 244.**

In **Mulji Tribhovan v the Dakor Municipality, 24 B L.R. 178 (F.B.)**, the plaintiff who wished to make additions to his existing building obtained permission to build, under s 96 of the Bombay District Municipal Act, 1901, from the Public Works Committee of the defendant Municipality. On an application by the plaintiff's neighbour, the permission was later recalled by the General Board of the Municipality The plaintiff having sued for a declaration that he was entitled to build in accordance with the permission once granted Held, by Macleod C.J and Fawcett J, that the General Body of the Municipality had power to cancel or revoke the permission to build granted by its Public Works Committee either of its motion or on the application of a person injuriously affected thereby Held, by Shah J concurring, that the power so exercised was subject to the qualification that the cancellation or revocation was otherwise consistent with the provisions of s 96 of the Bombay District Municipal Act, 1901 Referring to the above three cases Shah J observed: "As regards the decisions of this Court which have been referred to in the referring judgments I think that on their own facts they are distinguishable from the present case, and in those cases, so far as I can see, the result could not have been different in spite of the provisions of s 36(2) However that may be, if and so far as they purport to lay down any general rule which conflicts with the statutory powers of the General Body of the Municipality to modify the orders of their delegates or any Committee, they cannot be followed" Fawcett J observed "So far as those cases go, it is clear that s 36 was not considered in connection with the point there decided and there is no reason to suppose that the provisions of that section had been brought to the notice of the learned Judges who gave those rulings This is confirmed by the fact that in the first of these cases, **Emperor v. Kareem Ranjan,** *Batchelor J in giving the judgment of the Court expressly guarded himself by* saying 'If, however, words clearly importing such a power of subsequently overriding the permission were discoverable in the Statute, there would be no alternative but to give effect to them No such words are, however, discoverable' This overlooks s 36, sub-section (2), an enactment which purports to empower the Municipality under certain conditions to override any order given by the Managing Committee, and it would, therefore, presumably have affected the decision in **Emperor v Kareem Ranjan, 19 B L.R 65,** had it been brought to the Court's notice

There is nothing in s 96 or in any other provision of the B D.M Act, 1901, which enables a municipality or a municipal Commissioner exercising in virtue of s 186-G, the powers of a municipality (s 123 of the B M B Act, 1925) to revoke a permission to build once duly granted under s 96 sub-s (2) It would clearly cause great inconvenience if a Municipality had such a power and used it It is immaterial whether the person to whom the permission has been granted has commenced the work or not save in so far as the liability of the municipality to damages is concerned The ruling in **Tullaram v The Corporation of Calcutta, (1903) I.L R 30 Cal 317,** applies to such a case Cases

might arise in which a permission could be held to be invalid, for instance, if the consent of the Municipality or the Commissioner was obtained by fraud or misrepresentation on the part of the applicant or if the building infringed a bylaw (R.L.A.'s opinion No. 2279 dated the 12th September, 1916 in G.O.G.D. No. 7385 dated the 8th November, 1916). This position has now changed by the insertion of sub-section (2A) in s. 96 of the B.D.M. Act, 1901 by Bom Act XXVI of 1930, s. 8(c) and by the provision of sub-section (3) of section 123 of the B.M.B. Act, 1925, which expressly permit a revocation of such permission and giving of a fresh permission in lieu thereof before the work has started. Thus the present position is that the permission granted cannot be revoked or modified after the work has started.

Erection of a building:—The applicant added small bath rooms to the third and fourth floors of an old residential house in the City of Bombay, in such a way that the added rooms fell below the original height of the house. He was convicted of infringing the provisions of s 349B of the City of Bombay Municipal Act, 1888. On an application under revisional jurisdiction.—Held, reversing the conviction, that the accused was outside the purview of s. 349 of the Act, inasmuch as he had neither erected nor raised a building within the meaning of the section. **Emperor v. Kalianji, 19 B.L.R. 681.**

The erection of a compound-wall at a distance from the building is erecting a building within the meaning of s 96 of the Bombay District Municipal Act 1901. **Emperor v Ram Rao, 23 B.L.R. 831.**

An ordinary wire fence is not a 'building' within the meaning of cl (7) of section 3 of the Bombay District Municipal Act, 1901 Hence no permission from the Municipality is necessary before its erection. **Emperor v. Ranchhodlal 19 B.L.R. 521.**

A fence six feet in height and consisting of wooden planks attached to posts embedded in the earth on the boundary of one's property is neither a 'wall' nor an 'enclosure' and therefore not a 'building' as defined in s 3(2) of the Bombay Municipal Boroughs Act, 1925. Hence the erection of such a fence without permission does not offend against the provisions of s 123 (7) of the Act. **Emperor v. Hasanbhai Rahmatbhai Vinawala, 44 B.L.R. 45.**

Time limit for completion of work mentioned in the permit:—The accused obtained permission from the Godhra Municipality to re-build his house, on the 22nd October 1915, under s 96 of the Bombay District Municipalities Act, 1901. The permit contained a condition that the permission was to remain in force for six months from its date The accused was found re-building his house on the 3rd January 1918 He was accordingly prosecuted for re-building without permission, but was acquitted on the ground that the limitation of the period was illegal. The Municipality having applied against the order of acquittal —Held, upholding the order of acquittal, by Heaton J., that although the Municipality had power to say that a work to which it gave permission under s. 96 of the District Municipalities Act should be begun within a certain time, it was doubtful whether it had power to say that a work must be finished within a given time. Held, by Hayward J, that the time limitation contained in the permission to re-build was ultra vires and a limitation not contemplated by the Legislature in enacting s. 96 in its present form in Pombay Act III of 1901. **The Godhra Municipality v. Harilal, 21 B.L.R. 255.**

Addition of otla without permission:—Where a person builds an otla to

his house, without permission of the District Municipality under s. 96 of the Bombay District Municipalities Act, 1901, he is liable to have the otla removed at the instance of the Municipality, independently of the question whether the otla is built on a street-land or on a land forming part of the public street. **The Viramgam Municipality v. Bhaichand, 22 B.L.R. 61.**

Projection—Right to remove :—The plaintiff obtained from the defendant Municipality permission in 1897 to make a projection (dakhli) two feet in breadth and to cover it by an iron sheet roof one foot in breadth, to the second storey of his house abutting on a public street In contravention of the permission so given the plaintiff projected his dakhli by four feet and five inches On the 13th June 1898, the Municipality gave notice asking the plaintiff to remove the projection For failure to comply with the notice, the plaintiff was prosecuted under s 33 of the Bombay District Municipal Act, 1873, but was found not guilty He then applied to the Municipality to cancel the notice, but his application was referred by the Municipality to a Sub-Committee appointed to inquire into projections in the City The Municipality, purporting to act under ss 113 and 96 of the Bombay District Municipal Act, 1901, gave a notice to the plaintiff, on the 23rd July 1914, asking him to remove portions of the dakhli which projected beyond four feet from the plinth The plaintiff sued the Municipality to restrain it by injunction from removing the dakhli, Held, by Macleod C J, (1) that it had not been proved that the plaintiff applied in 1897 under s 33, but the facts rather pointed to his having asked for permission under s 42 of the Bombay District Municipal Act of 1873; (2) that unless the plaintiff gave notice under s 33 the Municipality had no power to call upon him to remove the projection, (3) that even if the plaintiff gave notice under s 33, the projection which infringed s 113 of the Bombay District Municipal Act, 1901 was only five inches at a considerable height above the ground, and the Court would consider that a notice to remove such a projection after the lapse of sixteen years was in the circumstances of the case an arbitrary and capricious exercise of the powers of the Municipality, (4) that the terms of the notice of 1914 which did not call upon the plaintiff to comply with the permission granted to him in 1897 but to comply with the provisions of s 113(1) of Bombay Act III of 1901 were sufficient evidence that the Municipality issued the notice under s 113(3) and the mere fact that they added s 96(5) could not enable them to compel the plaintiff to remove a projection which no doubt infringed the original permission, but which did not come within s 113(3) Held, by Fawcett J, (1) that the application made by the plaintiff in 1897 must be treated as one falling both under ss 33 and 42 of Bombay Act VI of 1873, and so far as the Municipality showed that the action complained of had been taken in the exercise of any power conferred upon it by s 33 it was entitled to do so, subject to any objection of limitation that might be valid, (2) that though the objection taken in the notice of 1914 was one which fell under s 113 of the Bombay Act III of 1901, yet it did not prevent the Municipality also relying on s 96 so far as it might be applicable, (3) that the notice, so far as it was based on s 96, was invalid as having been time-barred under s 96(6), and consequently the Municipality had no right to get the projection removed by executive action under s 154(6) of Bombay Act III of 1901, (4) that the delay of over sixteen years, which was due not to the Municipality having been in any way prevented from taking action under s 96(5) but to unnecessary procrastination, was unreasonable and constituted

bar to the defendants compelling the plaintiff by executive action to remove a projection, which admittedly did not come under s. 113(3) of the Bombay District Municipal Act, 1901

Per Macleod C.J.—"There can be no doubt that the owner of a building who wishes to alter it externally or add to it by erecting a balcony can give notice to the Municipality of his intention under s 96 and the Municipality could pass orders under the powers given by the section, and if those orders were disobeyed they could take action under clause 5 But projections over a public street are external alterations of a particular nature which cannot be built without special authorisation under s 113. Whereas if the Municipality are silent after due notice has been given to them under s 96 the person who had given notice can proceed to build or alter according to the plans furnished to the Municipality It is this difference between the two sections which has not been sufficiently noticed. If a person builds a projection over a public street without taking permission under s 113 or in contravention of the permission given under the section, he can be fined and the fine can be continued until he has complied with the orders of the Municipality But the Municipality have no powers to order him to remove the projection Under the Act of 1873, a person desirous of building a new building or reconstructing an old building on land abutting on a public street had to give notice under s 33 and if his plans included balconies or other structures overhanging the public street it would not be necessary for him to make a separate application under s 42(3) But if he built such projection without any orders being passed by the Municipality he would do so at his own risk Again if he wished only to add to an existing building by erecting a balcony overhanging a public street he would either give notice under s. 33 or apply for permission under s 42(3) If the balconies were to overhang his own land he would have to give notice under s 33 With regard to balconies overhanging a public street, the power of the Municipality would depend upon whether notice was given under s 33 or permission was asked for under s 42(3)"

Per Fawcett J.—"There seems to me to be no legitimate ground for the supposition that the Legislature intended that anything in s 113 should restrict the general powers conferred on a Municipality by s 96, except so far as such restriction is enacted expressly or by necessary implication The main object of s 113 clearly is to regulate projections over public streets, and as the Municipality under that section is authorised only to permit balconies &c projecting from an upper storey to an extent not exceeding four feet beyond the line of the plinth or basement wall, it is a necessary implication that its general power under s 96 is, in regard to balconies projecting over public streets, restricted to the same extent. It seems to me to be a quite unwarranted step to say that, because s 113 deals with the special case of these balconies, the Legislature meant to exclude them entirely from the purview of s 96 I concur with the learned Chief Justice in holding that s 33 of Bombay Act VI of 1873 (the equivalent of s. 96 of the Act of 1901) covers the case of a person wishing to add to an existing building by erecting a balcony overhanging a public street But I venture to doubt whether in such a case he could dispense with notice under s 33 and apply for permission only under s. 42 (the equivalent of s 113 of the Act of 1901)" **The Ahmedabad Municipality v Manilal, 23 B.L.R 193.**

Huts & Sheds :—Although under s. 3(2) "building" would include any hut, shed or enclosure, as there is a special provision, for huts and sheds in s. 125;

the erection of huts and sheds would always be governed by the provisions of s 125 which do not provide for any prosecution for constructing huts and sheds without permission Under that section the municipality have only powers of removal Hence conviction under s 123 for construction of huts and shed is bad See **Emperor v Matubhai, 24 B.L.R. 105.**

Foundations—Making a building—Further orders—All information they may require, etc.—Regarding the limits of the proposed building:—The accused gave, on March 31, 1924, a notice to the Surat Municipality of his intention to build a house The Municipality required him to furnish particulars of the proposed building Without the permission of the Municipality, the accused dug foundations in December 1924, and filled them in July, 1925 In October 1925, he built the northern wall, while the southern wall was built in November 1925 The Municipal'ty lodged a complaint against the accused, on December 19, 1925, under s 96(5) of the Bombay District Municipal Act,, 1901 —Held, (1) that the prosecution of the accused, so far as the foundations were concerned, was barred under the proviso to s 161(1) of the Act, since foundations of a building were included in the term 'building' as defined in s 3(7) of the Act, (2) that the prosecution with reference to the walls was within time, for the 'making' of the building in regard to its walls had begun within six months of the date of the complaint The words 'or makes' in s 96(5) of the Bombay District Municipal Act, 1901, show that it is not only the mere beginning of a building without permission that is punishable, but its continuance even to completion without the requisite permission, or in defiance of legal orders If a person is making a building in contravention of the kind specified in the section on any particular day, he is committing an offence, although the making may have begun on a previous day The offence is a continuing one A Court of Law is not entitled to go into the question of the exact motives with which the Municipality or an officer of the Municipality has acted, provided that the action taken is in accordance with law The words 'further orders' in s 96 (4) (b) do not merely mean orders of the kind referred to in sub-s (2), and may include any demand for further particulars The words 'all information they may require regarding the location of the building with reference to any existing or projected streets' in s 96(1)(b) are wide enough to include a demand by the Municipality to furnish a modified plan, excluding certain land which fell within a sanctioned alignment of a street and was proposed to be built upon The words 'regarding the limits . of the proposed building' in s 96(1) refer to the limits of the building apart from any question as to its location with reference to any existing or projected streets **Emperor v. Chhaganlal, 29 B.L.R. 733**

Eaves'—A District Municipality cannot, under ss 96 and 113 of the Bombay District Municipal Act, 1901, require that eaves should be so constructed as to overhang a private street above a certain height **Emperor v Gafoor, 31 B.L.R. 578** In the course of the judgment Patkai J observed "Clause (2) of s 96 of the present Act is restrictive in its terms Under that clause the Municipality have power to issue orders not inconsistent with the Act and (1) may give permission to erect or alter or add to the building according to the plan and information furnished, or (2) may impose in writing such conditions as to level, drainage, sanitation, materials, or dimensions and cubical contents of rooms, doors, windows and apertures for ventilation, or with reference to the location of the building in relation to any

street existing or projected, as they think proper; or (3) may direct that the work shall not be proceeded with unless and until all questions connected with the respective location of the building and any such street have been decided to their satisfaction. It does not appear in this case that the height at which the eaves were to be erected was mentioned in the plan or in the information furnished. It is suggested in support of this appeal that by the application discretion was entrusted to the Municipality to prescribe the height, and that the report of the Secretary and the permission fixed the height at twelve feet It does not appear that the accused left the matter to the discretion of the Municipality nor does it appear that in the plan or in the information furnished the height was mentioned to be twelve feet It is not suggested that the Municipality entered in the plan the height at which the eaves were to be built. It would, therefore, follow that the Municipality had no right to insist on having the eaves built at the height of twelve feet unless it was so mentioned in the plan or in the information furnished The regulation of the height at which eaves should be erected does not fall within the wording of the second part of this cause, for the second part is restricted to level, drainage, sanitation, material, or to the dimensions and cubical contents of rooms, doors, windows and apertures for ventilation or with reference to the location of the building and does not refer to the height at which eaves have to be erected It is conceded that the order of the Municipality does not fall under the second part of this clause Assuming, therefore, that s. 113 does not control the wide wording of s. 96, we think that the second clause of s 96 does not empower the Municipality to prescribe the height at which eaves should be erected. Under s. 113 power is given to the Municipality to prescribe the height at which the roofs or eaves may be erected, but such projections must, according to that section be over public streets. It is found in the present case that the street on which the eaves project is a private street and we accept the finding of the lower Court that the street is a private street and not a public street It would, therefore, follow that s 113, which empowers the Municipality to regulate the height of the eaves, does not apply to the eaves of the house in the present case as it abuts on a private street"

Application to restrain the Municipal Commissioner from giving his sanction—Injury to third person—His remedy:—An application, under s 45 of the Specific Relief Act, 1877, cannot be made by a third party to restrain the Municipal Commissioner for the City of Bombay, from giving his sanction, which has been given, to a petition by a building owner to add to the height of his building, so as not to contravene any of the provisions of the City of Bombay Municipal Act, 1888 **Bai Basantibai v. Bombay Municipality, 33 B.L.R. 31.** Dealing with the point Blackwell J. said, "The applicant in the present case has complained that the Commissioner has sanctioned the building plans of Sir Dinshah Mulla's client I do not see how the mere sanctioning of the plans can cause any injury to the property of a third person. It does not follow that the individual at whose instance the Commissioner has sanctioned the plans will ever act upon them He may act upon them or he may not If he does act upon them, then it seems to me that the question must always be open as to whether the plans so sanctioned did or did not contravene any of the requirements of the City of Bombay Municipal Act"

Ingredients of an offence under s. 123:—To establish an offence under s 96

of the Bombay District Municipal Act, 1901, all that is necessary is to show that the accused had begun construction, or started altering an existing construction, or added to it or reconstructed it, without giving a notice thereof in writing to the Municipality as required by sub-s (1) The Municipality is not bound to give notice to the accused under sub-s. (3) of s 96 before starting the prosecution **Bhaguji v. the Alandi Municipality, 38 B L.R. 1098**

Any Building —The words 'any building' in s 96 of the B.D M Act, 1901, are wide enough to cover a building in a private mahalla and permission of the Municipality is necessary to build any building within the mahalla **Emperor v. Janu Fakir, A.I R. 1922 Sind 22.**

Sub-section (5)—Notice need not be in a separate document from the plan—Burden of proof:—Where a proper notice has been given under s 123 of the Bombay Municipal Boroughs Act, 1925, and the proposed building including the drains has been proceeded with properly under sub-s. (5), it is not open to the Municipality subsequently to require the drains to be removed under s 137 of the Act. The accused submitted to the Ahmedabad Borough Municipality on August 11, 1934, the plan of a new building which he intended to construct, and as he received no reply from the Municipality he began to construct, his building On January 6, 1936, he submitted to the Municipality a completion plan of the building, and suggested addition of a drain and septic tank to his new house On March 18, 1936, he applied to the Municipality for permission to put up a septic tank and water-closet, and within less than a month of his last application, he started to construct a new drain for his house The accused was, on these facts, convicted under s 137(b) of the Bombay Municipal Boroughs Act, 1925 In revision —Held, (1) that the sending of a plan in January, 1936, with the endorsement upon it that it was a plan as to the proposed drainage and septic tank amounted to the giving of notice to the Municipality as to the work proposed to be constructed, (2) that there was nothing in s 123 of the Act which required that the notice should be in a document separate from the plan, (3) that as no action was taken by the Municipality for a month the accused was entitled to proceed with his work under s 123 (5) of the Act, (4) that there having been implied consent on the part of the Municipality, the accused was not liable to be convicted under s. 137 of the Act **Emperor v. Dhirajlal Dalsukhram, 40 B.L.R. 67.** In the course of the judgment Beaumont C.J observed "Now, if that is the right construction of the two sections, the question here is whether on the facts a notice of the proposed new building and drainage system was given and no action taken by the Chief Officer within a month What happened was that in 1934 the accused sent to the Municipality a plan and I gather, though the Magistrate does not say so in so many words, a notice as to the proposed building which he was going to construct, but that plan did not refer to the present drain and septic tank to which objection is taken That original plan was approved by the Municipality Then on January 6, 1936, the accused sent a fresh plan to the Municipality showing the drain and the septic tank, to which exception is now taken, in red That plan is headed 'Proposed drainage and septic tank of F P No 670'. The Magistrate says there was no application for leave to carry out the work, but there is such an application on the record On March 18, 1936, the accused sent an application to the Municipality with a further plan requesting the Municipality to permit him to construct a septic tank and a water-closet He then started to construct his new drainage in the month of April, 1936, that is to say, more than a month

after he sent the plan in January but less than a month after he made the application of March 18. Now, the lower Courts have both held that the sending of the plan in January, 1936, without any formal application for leave to build and any formal notice, does not amount to the giving of a notice under sub-s. (1) of s. 123, though the learned Additional Sessions Judge, as I have said, seems to consider that s 123 is irrelevant and the case turns entirely on s. 137 In my opinion, the sending of the plan in January with the endorsement upon it saying that it was a plan as to the proposed drainage and septic tank does amount to the giving of the notice to the Chief Officer as to the work proposed to be constructed, even apart from the letter to that effect which I find on the record That plan was sent after the submission of the former plan, and I think the Municipality must have understood from it that it was proposed to make the alteration shown in that plan to the building and drainage shown in the earlier plan There is nothing in s 123 which requires that the notice should be in a document separate from the plan I apprehend that the notice can be endorsed on the plan, and I think in the circumstances of this case the plan sent to the Municipality was sufficient notice under sub-s (1) of s 123 apart from any covering letter asking for leave, and as no action was taken for a month, I think that the accused was entitled to proceed with his work under sub-s (5) That being so, there was implied consent on the part of the Municipality which would prevent a conviction being recorded against him under s 137"

Section 105 of the Indian Evidence Act, 1872, is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception, and there is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition and a case in which it is not so included Hence, the accused who relies upon the permission given to him by sub-s. (5) of s. 123 of the Bombay Municipal Boroughs Act, 1925, has the burden cast upon him to prove that he comes within the terms of the sub-section and is thereby relieved of the liability which is otherwise upon him under sub-s (7) of the section—**Emperor v. Dahyabhai, 43 B.L.R. 519.**

In order to bring himself within the exception contained in s 123(5) of the Bombay Municipal Boroughs Act, 1925, the burden lies upon the accused to prove that his work was not inconsistent with any provisions of the Act or by-laws This, however, presupposes that a question has arisen as to whether he has committed a breach of any provision of the Act or by-laws As soon as the Municipality has notice that the accused is going to rely on s 123(5), the Municipality must allege what provisions of the Act or by-laws they say the accused has broken which disentitled him to rely on the sub-section When such an allegation is made, the burden is upon the accused to prove that he has not committed the breach of the Act or by-law alleged Unless, therefore, the Municipality alleges a breach of some specific provision of the Act or by-law, there is no issue on which any question of burden of proof can arise **Emperor v. Bhikhabhai, 43 B.L.R. 877.** Referring to **Emperor v Dahyabhai, 43, B.L.R 519,** Beaumont C.J. said "In **Emperor v. Dahyabhai Savchand** this Court held that in order to bring himself within that exception, the burden lay upon the accused to prove that his work was not inconsistent with any provisions of the Act or by-laws. But that presupposes that a question has arisen as to whether he has committed a breach of any provision of the Act or by-laws. It is obvious that

the accused person cannot go through every section of the Act and every by-law and prove affirmatively that he has not committed any breach of that section or that by-law In **Emperor v Dahyabhai Savchand** a question was raised as to whether a certain provision of the Act had been broken, though I am not quite sure from the report when the question was first raised in that case But it seems to me that the true view is that, as soon as the Municipality has notice that the accused is going to rely on s 123(5), the Municipality must allege what provisions of the Act or by-laws they say the accused has broken, which disentitles him to rely on s 123(5) When that allegation is made the burden is upon the accused to prove that he has not committed the breach of the Act or by-law alleged But unless the Municipality alleges a breach of some specific provision of the Act or by-law, it seems to me that there is no issue on which any question of burden of proof can arise, and I do not think that the Court intended in **Emperor v. Dahyabhai Savchand** to decide more than as to the burden of proof when an issue arose I think the learned additional Sessions Judge was wrong in assuming that he could not go into the question of the right of the accused to rely on sub-s (5) to s 123, unless he had affirmative evidence that no single provision of the Act or by-laws had been broken "

Width of the street—Opposite side of the street.—The words 'opposite side of the street' in by-law 233 need not necessarily be construed as excluding the raised pavement or platform in front of a building because the pavement or platform happens under another definition to form part of that building· **Naraindas v Karachi Municipality, A I R. 1933, Sind 258.** Delivering the judgment of the Court Aston A.J C said "This is a suit filed by the plaintiff Naraindas *Tulsidas for an injunction restraining the Karachi Municipality* from demolishing the summer house on his building The plaintiff is the owner of a building bearing S N 36/3 J L 6 Jail quarter On the 3rd floor of the building he has a summer house The defendants contend that the structure of the summer house was unauthorised The height of the building including the summer house is about 47 feet The Municipality contend that the width of the street being 20 feet the height of the building should not have exceeded 40 feet. By-law 233(1), Karachi Municipality Building By-laws is as follows 'Every person who erects a building on a plot which abuts on a street of less than 50 feet in width, shall so regulate the height of his building, that the height of no part of the building shall exceed twice the distance between the front or external wall of the building nearest to the street and the opposite side of such street' The plaintiff, on the other hand, contends that the refusal to grant sanction for the erection of the summer house was arbitrary and unreasonable and that he has a right to construct the same According to the plaintiff the width of the street is not 20 feet, but 25 feet The difference in the estimated width is due to the fact that the Municipality measure from the front external wall of the plaintiff's building to the edge of a 5 feet wide thalla or platform in front of the house of Ebrahimjee Hakimji on the opposite side of the street, while the plaintiff measures from his front external wall to the wall of Ebrahimji Hakimji's house not taking into consideration the platform In other words the dispute is about the meaning of 'the other side of the street' in by-law 233 Is the street that portion between the plaintiff's external wall and the platform of Ebrahimji Hakimji or between the plaintiff's external wall and the wall of Ebrahimji Hakimji's house? From a common-sense point of view, taking into consideration the object of the by-law (which is to regulate

the height of building for the purpose of preserving a sufficiency of light and air) a small pavement or platform, only 1 foot 4 inches high and 5 feet wide, on the opposite side of the street, could be safely disregarded, as negligible obstruction to light and air. Such a pavement or platform would not appreciably diminish the supply of light and air to the building abutting on the street From a common-sense point of view, therefore, the street (in its present condition) is a 25 feet street On behalf of the Municipality reliance is placed on **In re. Devendrappa** where it was held that the erection of a "katta" or broad extended door step or raised platform of communication with the public road was an addition to a building within the meaning of Cl 1, S 33, District Municipal Act (Bombay Act 6 of 1873) There can be no doubt, I think that the raised platform in front of Ebrahimji Hakimji's house forms a part of his building for the purposes of the District Municipal Act As **In re. Devendrappa** it is permanent in character, it is permanently attached to and forms part of the main building and it is a sort of extended door step or pavement or platform of communication with the public road But the fact that the platform is part of the building does not necessarily dispose of the matter, as I erroneously thought when dealing with the application for an interim injunction. Interpretation clauses of a comprehensive nature, as Scott C J, pointed out in **Emperor v. Braz H. De Souza** 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 Scott C.J there relied on the judgment of Lord Denman in **Queen v. Justices of Cambridgeshire** and of Lord Selborne in **Meux v Jacobs** and of Lord Watson in **Mayor of Portsmouth v. Smith.** Bearing this principle in mind, I do not think that the circumstances of the present case require that the words 'opposite side of the street' in by-law 233 should be construed as excluding the raised pavement or platform in front of Ebrahimji Hakimji's building because the pavement or platform happens under another definition to form part of Ebrahimji Hakimji's building. The words should, in my opinion, be construed in their ordinary sense as meaning the side formed by the wall of Ebrahimji Hakimji's house The street thus interpreted, will no doubt include a pavement or platform 5 feet wide and about 1 foot 4 inches high belonging to Ebrahimji Hakimji, but the definition of 'street' in s. 3(12) of the District Municipalities Act (Bombay Act 3 of 1901) as Barlee, A.J C observed in **Gurmukh Singh Javer Singh v. Karachi Municipality** does not negative the idea of private ownership and the words 'such space' in the exception embodied in the last part of para 2, s 3, cl. 12, as he pointed out, refer to the words 'every vacant space' at the beginning of that paragraph and do not refer to a vacant space, which is in fact a road or footway, etc., which is assessible to the public within the meaning of the previous paragraph There can be no doubt from the evidence, that the street in the present suit is accessible to the public. There is no doubt that the 5 feet platform is used by persons as a means of access to the building of Ebrahimji Hakimji. It is also used by passers-by going along the street The land Manager admits that the tenants of Ebrahimji Hakimji use it and that since there is no wall anyone can use it. Ghulam Hussein Ebrahimji, the owner of the plot, says if he came to know some one had passed along the platform he would not do anything. The last argument put forward on behalf of the Municipality with regard to the width of the street is that the pavement or platform must be excluded from the word 'street' because the owner could if he chose,

build a compound wall on the pavement or platform The only restriction made by the Municipality is that the 5 feet space must be open to the sky The Municipality in fact some time ago sanctioned a plan in which provision was made for a compound wall The Land Manager states that there is nothing to prevent the owner from building a compound wall now I am of opinion that there is no substance in this contention The present owner of the plot Mr Ghulam Hussein Ebrahimji, observed he would gain nothing by building a compound wall and one glance at the photograph Ex 8, shows that any wall or other obstruction on 5 ft wide pavement would prejudicially affect the owner of the building and pavement long before it made any appreciable difference to the light and air in the street, for the owner apart from the expense of the wall, would be shutting out light and air from his own premises by an erection only a few feet from his own apertures and if the erection he made did not shut out light and air from his own apertures only a few feet away, it would not appreciably diminish the light and air in the street. For the reasons above mentioned I am of opinion that the width of the street was 28 ft, that under the by-laws the plaintiff was entitled to erect his building up to a height of 50 feet, and that the only objection to the summer house contained in the notice of the Municipality, viz, that it raised the building to height contravening the by-laws, was an invalid objection inconsistent with the provisions of the Act; that the Municipality had no right to require the removal of the summer house or to remove it themselves as they threatened to do."

Powers of a Municipality under s. 96(2) B.D M Act—Whether a Municipality can order the owner of a house to construct the doors in such a way as not to project into the street:—The words of s 96(2) Bombay District Municipal Act (equivalent to s 123(2) of the B M B Act, 1925) gave a municipality very wide powers of regulating buildings, subject to only two restrictions on it, (1) the general limitation as to all statutory powers of public functionaries that the orders issued under it are reasonable and (2) the particular limitation expressed in the section that the orders are not inconsistent with the Act The particular instances specified in the latter part of 96(2) were added **abundanti cautela** when the amending and consolidating Act of 1901 was introduced and so do not curtail the general power Both under the general as well as particular powers conferred by s 96 Bombay Municipal Act a municipality is perfectly competent to pass an order calling upon the owner of a house to construct the doors of his house in such a way as not to project into the street· **Municipality of Karachi v Mahomed Ali Esaji, A.I.R. 1916, Sind 17**

Notice or permission necessary in case of all buildings whether on public road or in private Mohala—Regulating buildings.—The reference to s 92 in s 96 cl (1) does not govern the whole of clause but is limited to the clause describing projecting portions of buildings in respect of which the municipality are empowered by that section to enforce a removal or setback, so that notice or permission is requisite in case of all buildings whether on a public road or a private Mohala. S 96 does not empower the Municipality to deprive owners of the legitimate use of their land or to refuse permission to build at all but it does confer on the Municipality a very wide power of regulating buildings. The object of the power is to secure the safety and sanitation of buildings to be newly erected. This power though an encroachment on private rights is not inconsistent with the Act **Khushaldas Moolchand v Emperor, A.I.R. 1918, Sind 53 (1).**

Continuing contravention—continuing offence.—See notes under this head under s 118

Starting point for limitation for prosecution for a continuing offence.—See notes under this head under s 118

Whether a municipality can order withdrawal of prosecutions lodged by the Chief Officer under sections 96 and 155 of the B D.M. Act, 1901 (corresponding to sections 123 & 193 of the B.M B. Act, 1925).—See notes under this head under s 200

Whether a time-limit for the commencement of building can be imposed by a by-law.—A municipality cannot under section 96 (2) of the B.D M Act, 1901, impose a time-limit within which work is to be commenced The nature of the orders which can be given is set forth in considerable detail in that sub-section, nothing, however, is said as to the imposition of a time-limit Further any by-law imposing such a limit would be ultra vires The only relevant clause in s 48(1) is the general clause (u) However, that clause would not warrant such a by-law, having regard to the detailed provisions of s 96(2) which must be deemed to be exhaustive **(Advocate General's Opinion No. 42 dated the 19th September, 1918, in G O.G.D. No 3810 dated the 7th May, 1919).** The position has now changed by the insertion of sub-section (4A) in s 96 of the B D.M Act, 1901 by Bom Act XXVI of 1930, s 8(c) and by the provision of sub-section (6) in s 123 of the B.M.B Act, 1925 which limit the right to commence the work to one year from the date of the acquisition of the right.

Powers of a municipality to regulate height of buildings in the interest of public health under s 96 (2) in the absence of by-law under s. 48.—A municipality has power to regulate the height of buildings in the interest of public health by orders under s 96(2) of the B.D.M Act, 1901 (s 123(2) of the B M B Act, 1925) even though no by-law has been made under s 48 of the B D M Act, 1901 (s 61 of the B.M.B Act, 1925) regulating the height of the buildings The words 'may issue such orders not inconsistent with this Act as they think proper with reference to the work proposed' are very wide in their scope and are not limited in their meaning to the particular kind of orders detailed thereafter **(R.L.A.'s opinion No 1125 dated the 11th July, 1921 in G.R.G.D. No. 9421 dated the 1st August, 1921).**

Rule authorising a member of the managing committee to exercise the powers of the municipality under s. 96 (6) of the B D.M. Act, 1901, ultra vires.—Powers under s 96(6) of the B.D M Act, 1901, (s 123(8) & s 124 of the B M.B Act, 1925) are exercisable by or on behalf of a municipality and they can be delegated to one or more of the individuals mentioned in s 37 of the B D M Act (s 46 of the B.M.B Act). However, as ordinary members of the managing committee are not mentioned in s 37, the powers exercisable under s 96(6) cannot be delegated to them. They can be delegated only to the chairman of the committee **(G.C.G.D. No s. 91 dated the 9th April, 1938)** Under the B M B Act powers under s 123(8) and 124 vest in the Chief Officer and hence can only be delegated by the Chief Officer to any municipal officer or servant under s. 34(2)(c)

Conditional permission—Work started—Whether set back could be ordered under s. 92(1)(b) or action taken under s. 91-A(4) or s 96(5) (a) & (b) of the B.D.M. Act, 1901:—See notes under this head under s. 119.

Completion certificate; permission to occupy or use.

124. (1) Every person erecting a building or executing a work as described in sub-section (1) of section 123 shall, within one month after the completion of the erection of such building or the execution of such work, deliver or send or cause to be delivered or sent to the Chief Officer at his office, notice in writing of such completion, and shall give to the Chief Officer all necessary facilities for the inspection of such building or of such work:

Provided that—

(a) such inspection shall be commenced within seven days from the date of receipt of the notice of completion, and

(b) the Chief Officer may, not alter than one month from the date of receipt of the notice of completion by written intimation addressed to the person from whom the notice of completion was received, and delivered at his address as stated in such notice, or, in the absence of such address, affixed to a conspicuous part of the building to which such notice relates,

(i) give permission for the occupation of such building or for the use of the building or part thereof affected by such work, or

(ii) refuse such permission in case such building has been erected or such work executed so as to contravene any provision of this Act or of any by-law made under this Act at the time in force or of any order passed under section 123 intimating to the person who gave the notice under sub-section (1) of section 123 the reasons for such refusal and requiring such person, or, if the person responsible for giving notice under sub-section (1) of section 123 is not at the time of such notice the owner of such building or work, then such owner to cause anything which is contrary to any provision of this Act or of any by-law made under this Act at the time in force or of any order passed under section 123 to be amended or to do anything which by any such provision or by-law or order he is required to do but which has been omitted

(2) No person shall occupy or permit to be occupied any such building or use or permit to be used the building or part thereof affected by any such work, until

(a) the permission referred to in proviso (b) to sub-section (1) has been received, or

(b) the Chief Officer has failed for one month after the receipt of the notice of completion to intimate as aforesaid his refusal of the said permission.

(3) Whoever contravenes the provisions of this section or fails to comply with any order or requisition made thereunder shall be punished with fine which may extend to one hundred rupees and, in the case of a continuing contravention or non-compliance, with an additional fine which may extend to ten rupees for every day during which such contravention or non-compliance continues after the conviction for the first such contravention or non-compliance.

Completion:—One Raghunath Mukund was served with a notice under s. 353 of the City of Bombay Municipal Act (Bombay Act III of 1888), requiring him to reduce the height of a building which he had erected The building was completed in June, 1893, and the notice was issued on 13th January, 1894 Raghunath was prosecuted for not complying with this notice He contended that the notice was time-barred, as it had not been given within three months after the completion of the building In answer to this plea it was urged, on behalf of the Municipality, that the building could not be said to have been completed, unless and until such accommodations as privies and cesspools had been executed in accordance with the requirements of the Health Department, and that therefore, the notice was within time Held, that the notice was time-barred The word completion in s 353 of Bombay Act III of 1888 must be taken in its ordinary sense, and the Court cannot read into the section 'in accordance with sanitary regulations' or 'sanitary officers' opinions' **In re Raghunath Mukund, 19 Bom. 372.**

Scope—Limitation—'amended':—In Ahmedabad Municipality v. Manilal, 23 B.L.R. 193, Fawcett J discussing the question of limitation, observed "If sub-section (6) of section 96 had not been enacted, there would I think be good ground for contending that the notice of 1914 was not barred by limitation Sub s 5 contains no limitation and it has been held in regard to the corresponding provision contained in s 158 of the Public Health Act, 1875 (38 & 39 Vic. c 55), that where an authority may remove work executed contrary to the by-laws, it may apparently remove it at any time (see **Fairbrass v. Canterbury Corporation (1902) 77 J. P. 181.** Similarly, in **Bradley v Greenwich Board of works (1878) 3 O.B.D. 384**, where an Act authorised the apportionment of the cost of making a sewer without limiting any time for the purpose, the court refused to read in the words 'within a reasonable time'. But sub-section (6) of s 96 provides that 'the Municipality——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 .. has been completed, may by written notice specify any matter in respect of which the erection of such building . 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 .... who has erected .. such building . .. or if the person who has erected such building is not at the time of notice the owner thereof, then the owner of such building,——to cause anything done contrary to any such provision or by-law made, to be amended.' It seems to me that this exactly fits the present case, and that the power to issue the notice in question is subject to the time limit specified in the sub-section The word 'amended' is a wide one, and must, I think be held to cover any demolition that may be necessary for the purpose of altering a building so as to make it

comply with the provision of the Act or by-law contravened In the present case Tarbhovan certainly gave written information to the Municipality that he had completed the balcony when he made the petition to it in 1898, referred to in para 3 of the defendant's written statement No doubt the period of limitation prescribed by sub-section (6) is a special one that can only operate in favour of a person who takes the trouble of writing to the Municipality to inform it of the completion of the building, and to a case where the alleged contravention is one against the provisions of the Act or any by-law in force thereunder as opposed to an alleged contravention of the legal orders of the Municipality issued under section 96 But the latter condition applies and the mere fact that Tarbhovan did not confine his petition to a statement that the building had been completed, or that the Municipality already knew this from other sources would not in my opinion, suffice to take the case out of those contemplated by sub-section (6) Accordingly, I hold that the notice, so far as it is based on s 96, was invalid as being time-barred under s 96 (6) and consequently the Municipality have no right to get the projection removed by executive action under section 154 (6). I think also that in view of the time limit fixed in sub-section (6) of Section 96, there is the strongest ground for supposing that the Legislature intended that action under sub-section (5) should be taken with due deligence and within a reasonable time The time-limit of one month prescribed by sub-sections (3) and (6) supply a clear indication that the proper measure of time to apply to sub-section (5) is one of months, not of years, cf **Ahmedabad Municipality v. Ramji Kuber (1911), I L.R., 36 Bom 61, 65, 66).** In the case of **Fairbrass v. Canterbury Corporation,** the interval between the completion of the work and the notice of the corporation was only about six months, and probably a different view might have been taken if it had been six years In the present case the delay is one of over sixteen years and is due not to the Municipality being in any way prevented from taking action under sub-section (5) but (so far as can be seen from the present material) to unnecessary procrastination I concur, therefore with the learned Chief Justice in holding that the delay in this case is unreasonable and constitutes a bar to the defendants' compelling the plaintiff by executive action to remove a projection, which admittedly does not come under s 113 (3) The plaintiff is, therefore, entitled to an injunction to restrain the Municipality from taking such action I would, however, make the injunction subject to any right which the Municipality may be able to establish to get the projection that is objected to be removed by suit, as opposed to executive action cf **Nagar Valab Narsi v. The Municipality of Dhandhuka, (1877) I L R. 12 Bom. 490** and s 55, Specific Relief Act, ill (b) "

Whether the section applies to a building constructed without permission:— The accused applied to the Pen Municipality for permission to build a privy The permission was refused The accused still put up a privy on the site of an old one He was thereupon prosecuted for breach of the by-law No 9 of the by-laws for privies framed by the Pen Municipality, which ran as follows "After the completion of the privy the owner shall communicate this fact to the Chairman, Managing Committee and no person shall commence to make use of the privy unless he obtains a written order to that effect from the Chairman, Managing Committee" Held, that the communication required by by-law No 9 related to a privy with reference to which permission had been granted under the preceding by-law and not to a privy which had been con-

structed without the permission of the Municipality. **Emperor v. Ezekiel, 26 B.L.R 715.**

Continuing contravention.—See notes under this head under s 118

Starting point for limitation for prosecution for a continuing offence.—See notes under this head under s 118.

Regulation of huts.

125. 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 operation, without giving previous notice to the Chief Officer, the Chief Officer may require such huts or sheds to be built so that they stand in regular lines, with a free passage or way in front of and between every two lines, of such width as the Chief Officer 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 he may deem necessary. If any hut or shed or range or block be built without such notice being given to the Chief Officer or otherwise than as required by the Chief Officer, the Chief Officer 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 Chief Officer may think fit.

Construction of huts without permission is not punishable under s. 123, but the case falls under s. 125'—In **Emperor v Matubhai, 24 B L.R 105,** the accused was charged with an offence under section 96 (5) of the Bombay District Municipal Act III of 1901 The complainant, Mr Shinde, the Secretary of the Ghatkoper Kirol Municipality, alleged that the accused had commenced erecting a number of temporary huts on Survey No 31 of Ghatkoper village, situate within the limits of the Ghatkoper Kirol Municipality without having obtained permission from the Municipality under clause (1) of s 96 and thus had committed an offence punishable under s 96 (5) of the Act The Magistrate came to the conclusion that no offence had been committed under s. 96 (5), but on the facts he dealt with the case as if the Municipality had given notice to the accused under s 97, and the accused not having obeyed the requisitions of the Municipality had committed an offence under s. 155 of the Act, and fined him Rs 50, or in default simple imprisonment for one month On revision Macleod C. J said "Although under s 3 (7) 'building' would include any hut, shed or other enclosure, whether used as a human dwelling or otherwise, it does not follow that wherever the word 'building' is used in the Act it includes a hut or a shed Sections 96, 97 and 98 come under the heading in Chapter IX of 'powers to regulate buildings, etc', and it was clearly the intention of the Legislature that while the provisions of s 96 should apply to buildings in the ordinary sense of the word, special provision was made for

huts and sheds whether built for temporary purposes or for a more permanent object, so that when the accused wished to erect huts or sheds for the purposes of his development scheme, he was bound to give previous notice to the Municipality Then the Municipality might have made certain requisitions, and it is only when hut or shed or range or block is built without giving proper notice to the Municipality, or otherwise than as required by the Municipality, that the Municipality may give written notice to the owner or builder thereof requiring him within a certain specified time to take down or remove the same or to make such alterations therein or additions thereto, as, having regard to sanitary considerations the Municipality may think fit, and it is only when the directions given by the notice have not been complied with that proceedings can be taken under s 155 against the person to whom notice has been given. I do not think, therefore, that the Magistrate, once he had come to the conclusion that the proposed buildings of the accused did not come within s 96, could alter the charge and treat the offence as if it was punishable under s 155 All penal provisions of a statute must be very strictly construed, and it is impossible to say that the accused in this case brought himself within the provisions of that section I think, therefore, that the conviction was wrong and must be set aside and the fine, if paid, refunded."

Improvement of huts

126. (1) Where the standing committee is of opinion that any hut or shed whether used as a dwelling or as a stable or for any other purpose, and whether existing at the time when this Act comes into operation or subsequently erected, is by reason—

(a) of insufficient ventilation or of the manner in which such hut or shed is crowded together with other huts or sheds, or

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

(c) of the impracticability of scavenging, attended with risk of disease to the inhabitants of the neighbourhood, it shall cause a notice to be affixed to some conspicuous part of such hut or shed, requiring the owner or occupier thereof, or the owner of the land on which such hut or shed is built, within such reasonable time as may be fixed by the standing committee in this behalf, to take down and remove such hut or shed, or to carry out such alterations or works as the standing committee may deem necessary for the avoidance of such risk

(2) Where any such owner or occupier refuses or neglects to take down and remove such hut or shed or to carry out such alterations or works within the time appointed, the Chief Officer may cause such hut or shed to be taken down, or such alterations or works to be carried out, in accordance with the requirements of the standing committee

(3) Where such hut or shed is taken down by the Chief Officer, the said officer shall cause the materials of the hut or shed

to be sold, 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 is unknown or the title disputed, shall be held in deposit by the municipality until the person interested therein shall obtain an order of a competent Court for the payment of the same:

Provided always that where a hut or shed, existing at the time when the land on which it is situate first became part of a municipal district or borough, is taken down and removed under this section, compensation shall further be paid to the owner or owners thereof and the amount thereof, in case of dispute, shall be ascertained and determined in the manner provided in section 198

Notice—on whom to be served—A notice under s 360 of the City of Bombay Municipal Act (similar to s 126 of the Boroughs Act) to the owner of land to remove insanitary huts erected by his tenants on the land, can be validly served on a person who receives rent from the tenants on behalf of the owner **Emperor v. Laxaman, 30 B.L.R. 339**

(3) Powers Connected with Drainage, etc.

Municipal control over drains, etc.

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

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

Powers for making and repairing drains.

128 (1) It shall be lawful for a municipality for any drainage purposes to carry any drain, sewer, conduit, tunnel, culvert, pipe or watercourse 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 borough.

(2) A municipality, or any person acting under its authority, may construct a new drain in the place of an existing drain in any land wherein any drain vested in the municipality has been already constructed, or 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 198 shall be paid by the municipality to any person who sustains damage by the exercise of such power.

Compensation:—The plaintiffs were owners of a house consisting of a ground floor and upper storey and measuring 77 feet in length On the south side of the house was a gully, 3 feet 6 inches wide, separating it from another upper storied house The plaintiffs in this suit complained that in January, 1891, the defendant by his servants dug a trench, 8 feet deep along the whole length of the gully for the purpose of laying a drain pipe and that the work was done so negligently that the plaintiffs' house was injured and became in such a dangerous condition that it had to be pulled down The plaintiffs claimed Rs 3,996 as damages The defendant denied the negligence and alleged that the work was not done by his servants or agents, but by a contractor. Held that the defendant was liable for the act of his contractor The work was necessarily attended with risk, and the defendant could not free himself from liability by employing a contractor The defendant, as well as the contractor, was liable to the plaintiffs For the defendant it was contended that the notice of action given by the plaintiffs under s 527 of the Bombay Municipal Act (III of 1888) was insufficient The notice stated "that one S L., a contractor under you, and as such being your agent and servant, excavated a trench etc" It was urged that this was not a good notice, as it only alleged a cause of action arising out of the acts of the defendant's servants, and agents and not out of the acts of a contractor Held, that the notice was sufficient, the section only required the notice to State with reasonable particularity the cause of action, and this was done The individual by whom the damage was done was specified, and the acts which caused the damage were clearly set forth **Dhondiba and others v Commissioner of the City of Bombay, 17 Bom 307.**

In the middle of June, 1900, the defendant Municipality excavated a trench for a pipe drain in a public lane This trench remained open till the 1st of July, 1900 From 24th June to 1st July, 1900, there was very heavy fall of rain The rain water collected in the trench and by percolation or saturation, caused on the 1st July, 1900, a land-slip and collapse of the plaintiff's house which was close by the trench Plaintiffs sued the defendant Municipality to recover damages, alleging that the Municipality was negligent in digging the drain in the month of June when a heavy rainfall might be expected and leaving the trench open for many days so as to permit rain water to get into it and to percolate through or saturate the subsoil and thus to cause a land slip and to undermine the foundation of the plaintiffs' houses The defendant contended that the damage was due not to the drain but to the heavy rain which fell for some days prior to the 1st July, 1900, and to the giving way of the retaining wall of an adjacent tank, from which water, mud and silt was removed only on the 30th June, 1900 Held (1) that it could not reasonably be said that the removal of the water from the tank was alone, without anything else, sufficient to produce the accident, nor could it be contended that the rainfall could of itself have produced the land slip, that, therefore, the trench contributed materially to the accident; (2) that even if the removal of water from the tank be a contributory cause of the damage, the Municipality would not be relieved of its liability unless such removal was the whole cause and the drain had nothing whatever to do with it, (3) that the heavy rainfall by the end of June, is nothing very extraordinary for Bombay, and hence, it could not be

regarded as an act of God which would absolve the defendant from his liability; (4) that whether there was percolation or saturation, the drain was the chief cause of the damage to the plaintiffs' houses This percolation or saturation was due to the trench which the defendant had dug and to the negligence of the contractors in digging and keeping it open for several days, the defendant was therefore, liable to make good the damage To be regarded, in law, as the act of God, the occurrence must be overwhelming and not only unforeseen but incapable of being foreseen and absolutely incapable of being prevented, or guarded against **Vithaldas v The Municipal Commissioner of Bombay, 4 B.L.R., 914.**

Whether a court other than the District Court (under s. 196 of the B.M.B. Act) can determine the amount of compensation under this section:—Reading ss 222 and 504 of the City of Bombay Municipal Act, 1888 together, it is plain that the object of the Act is that if any damage is done or any portion of a man's property is taken away by the Commissioner's action under s 222 the amount of compensation should be assessed under s 504 of the Act, by the Chief Judge of the Small Cause Court, Bombay **Dattatray v The Municipal Commissioner of Bombay, 9 B.L.R 1321.** This is under the City of Bombay Municipal Act, 1888 but the principle of this ruling will equally apply to a case under the Boroughs Act Dealing with the contention that the suit was not maintainable, Russel J observed "The next question is the point that has been raised by the 3rd issue, viz, whether the plaintiffs are entitled to maintain this suit, and that involves the consideration of s 504 of the Municipal Act as amended. It says. 'If in any case not falling under s. 491, any person is required by this Act, or by any regulation or by-law framed under this Act, to pay any expenses or any compensation, the amount to be so paid and, if necessary, the apportionment of the same shall in case of dispute be determined, except as is otherwise provided in ss 502 and 515, by the Chief Judge of the Small Cause Court on application being made to him for this purpose at any time within one year from the date when such expenses or compensation first became claimable.' Section 222 of the Act says inter alia that in the exercise of any power under this section compensation shall be paid by the Commissioner to any person who sustains damage by the exercise of such power Reading those two sections together, in my opinion, it is plain that the object of the Act was that if any damage was done or any portion of a man's property was taken away, the amount should be assessed by the Chief Judge of the Small Cause Court The following is an extract from the article on compensation in the Encyclopaedia of the Laws of England —'By the common law of England, as stated by Mr Ingram in the introduction to his book on the Law of Compensation, no violation of the rights of private property is allowed even for the general good of the whole community The principle that the good of the individual should yield to that of the community—has in this country never been received with favour And no tribunal of judicature has ever been entrusted with the power of compelling a sale of land or dispossessing a citizen of his house or premises even for public purposes of great and manifest utility' In my opinion, if the Municipality had taken up the attitude that they admitted the plaintiff's title to this land and had admitted their title to some compensation, assuming the land to be the plaintiff's, inasmuch as this drain with the masonry structure has taken up 497¼ sq yards of their property, (and I apprehend at all events some compensation on the principle cited should be

paid to the plaintiffs), I should dismiss the suit on this ground; but that is not the attitude which the Municipal Commissioner has taken up, for this reason that the Municipal Commissioner denies (as of course he is perfectly justified in doing until it is proved that this is the plaintiff's ground at all) that any damage has been done In the latter Ex No 3 written by the Deputy Executive Engineer, it is said —'No damage has been done by reason of the Commissioner having exercised the powers under s 222 of the Municipal Act and therefore no compensation can be claimed in the case' Then the endorsement thereon by the Municipal Commissioner says —'The Commissioner is unable to entertain the claim for compensation' It appears to me that attitude may very considerably affect the question of costs of this suit, but of course I have nothing to do with that now, and nothing that I am saying now is in any way to be used or even referred to when the question of the amount of this compensation does come (as in my opinion it must come under s 504 of the Act) before the Chief Judge of the Small Cause Court, Bombay All I can say is that in my opinion the plaintiffs were justified in asking this court to say that they are entitled to some compensation for what has been done The question of the amount of that will be referred to the Chief Judge of the Small Cause Court as I have already said That being so, it is obvious from my judgment that I cannot dispose of this suit on these three preliminary issues, which have been raised, because another question arises, and that is this, that a specific issue has been raised as to whether the plaintiffs are the owners of this property. It appears to me that it would be a solemn farce for me to send this case down to the Chief Judge of the Small Cause Court to assess the compensation under the Act before the question of the plaintiff's ownership of his property was decided, because, obviously, if I were to send it down to him for the assessment of the compensation, the first question that would be raised would be whether the plaintiffs have any title to the land, and the effect of that would be to send back the case to me for trial as to whether the plaintiffs are entitled to this land Therefore it appears to me that this case must proceed on the issue as to the ownership of the land" Thus it will be clear that under the Boroughs Act the question of ascertaining the amount of compensation must be dealt with under s 198 and no suit will lie on that question but as regards other rights of the parties, a civil suit will lie

The Calcutta Municipal Act, 1899, provides that the Corporation shall compensate every person who suffers damage by the removal of fixtures erected before June 1, 1863 The Corporation served J with notices under s 341 to remove certain structures and thereafter obtained orders from the Magistrate for their demolition, but took no steps to enforce these orders J brought a regular suit in the Court of the Subordinate Judge against the Corporation claiming (1) declaration that the fixtures were erected before June 1, 1863, (2) declaration that she was entitled to compensation for loss she would suffer by their removal, (3) declaration that the Corporation could not remove them till compensation was paid, (4) that the Court should fix the amount of the compensation, and (5) an injunction restraining removal till the compensation was paid —Held, (1) that, on the true construction of s 341(3), the assessment of compensation was not a condition precedent to the demolition of the structures, (2) that Courts other than the Small Causes Court were, by s 617, debarred from fixing the compensation, and therefore as the suit sought relief under any but the first two heads, it was misconceived, but that J was entitled

under s 42 of the Specific Relief Act, 1 of 1877, to a declaratory decree for the first two claims, the Corporation having denied her right to compensation until the hearing of the appeal against the decree of the Subordinate Judge. **Mrs. A. J. S. Joseph v The Corporation of Calcutta 18 B.L.R. 878.**

Right to carry drain through land belonging to others:—Under s 142 the municipality has same powers of carrying water-mains as it has under this section to carry drain Hence see notes under s 142

Power to require sufficient drainage of houses

129 (1) If any building or land be at any time undrained, or not drained to the satisfaction of the Chief Officer, the Chief Officer, subject to the control of the standing committee, may by written notice call upon the 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 he may think necessary for the drainage of such building or land into—

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

(b) a covered cesspool to be provided by such owner and approved by the Chief Officer

Drainage of a building—Municipality's discretion—when court can interfere:—The Municipal Commissioner, may if he thinks fit cause any work described in section 231 of the City of Bombay Municipal Act, 1888, to be executed, and he is authorised by s 488 of the Act to enter upon any land to do so The Court has no power to interfere in the exercise of the discretion by the Municipal Commissioner under the Act, unless it is made to appear that the Municipal Commissioner is not acting in good faith but for some sinister or collateral purpose The Legislature has vested in the Municipal Commissioner a discretion and the Court will not interfere in his exercise merely because the object in view may be carried out in some other way nor will it lightly impute to him bad faith In section 260 of the City of Bombay Municipal Act, 1888, the words "The Commissioner may if he thinks fit" do not mean that the initiative of his action must come from the Commissioner only, and not from anyone else Section 231 of the Act applies to houses occupied as well as to new buildings The object of both of the sections 231 and 234 is 'the effectual drainage' of the building Section 231 is meant to apply to existing houses with possibly existing drains, and s 234 is meant to apply to houses newly erected or rebuilt **Gangjibhoy v. The Municipal Commissioner of Bombay I B.L.R. 754** The principles of this ruling will apply to a case under the Boroughs Act

Direction to construct drain adjoining a particular wall beyond municipality's powers—Notice illegal—When can a notice be said to be held in abeyance:—On the 27th May 1903 the Municipal Commissioner served a notice on the applicant under s 231 of the City of Bombay Municipal Act, requiring him to construct a drain from such parts of his premises as required to be drained and to carry out certain other works On the 29th idem, the applicant wrote to the Commissioner saying that the notice was incorrect and asking information on certain points The next day the Commissioner informed the applicant

that inquiries would be made in the matter of his complaint As a result of these inquiries the Commissioner issued on 3rd October 1903 a fresh notice whereby he required the applicant to construct a drain 'in the gully on the west of his premises' This drain was to be so constructed that it shall adjoin the west wall of the building The applicant failed to comply with this requisition for which he was prosecuted under s 471 of the Act Held, that (1) when the applicant complained that the requisition dated the 27th May 1903 had been made unjustly, he virtually asked the Commissioner not to enforce the notice but to reconsider the matter, and the Commissioner must be regarded as having consented when in reply he wrote that he would inquire The parties were after that in a state of negotiation, as it were, and neither could say against the other that the notice of the 27th May 1903 was operative: (2) that it was competent to the Commissioner to issue a fresh notice after the negotiations had closed as a result of the inquiry he had made on the applicant's invitation The requisition, therefore, of the 3rd October 1903, was so far valid and legal and the complaint was not time-barred (3) that clause (a) of s 231 of the Act merely gave 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 was nothing in the language of the section authorising to direct that a drain should be made so as to adjoin any particular part or wall of the premises, the requisition was so far ultra vires of the Commissioner and the notice dated the 3rd October 1903 was illegal If the parties who had entered into definite and distinct terms involving certain legal results—certain penalties or legal forefeiture—afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense, or held in abeyance, the person who might have otherwise enforced those rights will not be allowed to enforce them, where it would be inequitable having regard to the dealings which have thus taken place between the parties **Emperor v. Nadirsha, 6 B.L.R. 667.**

Notice requiring owner to submit a plan not proper—Notice not specifying materials, level, fall, etc, of the drain insufficient.—Section 129 of the Bombay Municipal Boroughs Act, 1925, gives power to the Chief Officer to require something to be done It is, therefore, for him to say what he requires to be done and not for the owner of the house or buildings to submit proposals The Chief Officer is bound to specify, in his notice, the size, materials, level and fall which he requires in respect of the drain which he is ordering The Chief Officer, of a Borough Municipality issued a notice under s 129 of the Bombay Municipal Boroughs Act, 1925, calling upon a house-owner to submit a plan for laying out a six inch drain in his property and to get it passed by the engineering department and after laying out a six inch drainage line according to the passed plan and getting a connection only through the Municipality to join it therewith within thirty days of the receipt of the notice A question having arisen whether the notice was valid under the section'—Held, that the notice was not a proper notice under s 129 of the Bombay Municipal Boroughs Act, 1925, for the section gave no power to the Chief Officer to require the house-owner to submit a plan Held, further that the notice requiring the owner of the house to construct a six inch drain was an insufficient notice under the

section, inasmuch as it did not specify the other matters referred to in the section, namely, the materials, level and fall of the drain **Emperor v Trikamlal, 40 B.L.R 314.** This case was referred to in **Emperor v. Eugene Miranda, 40 B.L.R. 320.**

Section 231 of the City of Bombay Municipal Act, 1888, empowers the Municipal Commissioner to serve a notice on the owner or occupier of a house to make a drain for waste of such material, size, and description and laid at such level (and according to such alignment) and with such fall and outlet as may appear to the Commissioner necessary, emptying into a municipal drain or some place legally set apart for the discharge situated at a distance not exceeding one hundred feet Thus, a notice authorised by the section is one requiring the owner or occupier to make a drain of the character therein specified, that is to say, of such material, size and description and so forth as may appear to the Commissioner necessary Hence, a notice issued under s 231 requiring the owner of a house to connect, within fifteen days, the unconnected waste water of the nahanies and washing places to the municipal storm water drain after obtaining the necessary permit of the owners of the drain was not a sufficient notice to comply with the section **Emperor v. Eugene Miranda, 40 B L.R. 320.**

Owner :—See notes under s 3

The Municipal Corporation of Bombay acquired certain premises which were used as bullock and buffalo stables for a public purpose The Corporation did not proceed with the demolition of the stables and on March, 10 1925, passed an agreement of farming the stables to the petitioner as licensee on his undertaking to pay Rs 180 per month 'as compensation for use and occupation by him as licensee' All repairs and requisitions were to be attended by him and he was to give *vacant possession of the premises* on one month's notice He used all the stables for his buffaloes except one which he used as motor garage The Municipal Commissioner served a notice on him alleging that he was a rent-farmer under s 231 of the City of Bombay Municipal Act and requiring him to drain the motor-garage into the existing drain, 'with all the necessary appliances and fittings' The petitioner contended that he was a tenant of the Municipal Commissioner or a licensee and not a rent-farmer and he did not comply with the requisition He was thereupon prosecuted and convicted Held, affirming the conviction, (1) that as the petitioner was put in exclusive possession of the premises and was to give vacant possession on a month's notice, and paid Rs 180 monthly in respect of use and occupation, he was a lessee; (2) that the agreement of March 10, 1925, amounted to a lease, (3) that as the petitioner was the sole tenant of the premises he was also 'occupier' within the meaning of s 231 of the City of Bombay Municipal Act and *therefore liable to comply with the requisition*; (4) that even if the petitioner was a rent-farmer he would be deemed to be the 'owner' under s 231 **Emperor v. Shrif Dadu Miyaji, 32 B L.R. 332.**

New buildings not to be erected without drains

130. (1) It shall not be lawful to construct or reconstruct any building, or to occupy any building newly constructed or reconstructed, unless and until—

(a) a drain be constructed of such size, materials and description, at such level and with such fall, as shall appear to the

Chief Officer to be necessary for the effectual drainage of such building;

(b) there have been provided for and set up in such buildings and in the land appurtenant thereto, all such appliances and fittings as may appear to the Chief Officer 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 off the said building and every fixture, connected therewith.

(2) The drain to be constructed as aforesaid shall empty into a municipal drain, or into some place set apart by the Municipality for the discharge of drainage, situate 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 a cesspool provided by the owner of such building and approved by the Chief Officer

See notes under section 129.

Powers of owners and occupiers of buildings or lands to drain into municipal drains.

131. (1) The owner or occupier of any building or land within the municipal borough shall be entitled to cause his drains to empty into a municipal drain, provided that he first obtains the written permission of the Chief Officer, and that he complies with such conditions as the Chief Officer may 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

(2) An appeal shall lie to the standing committee against any order of the Chief Officer under sub-section (1) if made within fifteen days of the receipt of such order

Right to carry drain through land or into drain belonging to other persons.

132 (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 Chief Officer

(2) Subject to the control of the standing committee the Chief Officer thereupon, after giving to such other person a reasonable opportunity of stating any objection to such application, may, if no objection is raised or if any objection which is raised is in his 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 condi-

tions 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 him to be adequate and equitable.

(3) Every such order shall be a competent 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, occupier or user 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, occupier or user 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 provisions of this Act, to do all such work as may be necessary—

(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.*

(4) In executing any work under this section 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.

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

133. If the owner of any land into, through or under which a drain has been carried under section 132 whilst such land was unbuilt upon, shall at any subsequent time desire to construct a building thereon, the Chief Officer subject to the control of the standing committee shall, if he sanctions the construction 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, reinstate and

make good the land in such manner as he may deem to be necessary, in order to admit of the construction or safe enjoyment of the proposed building.

Provision of privies, etc.

134. (1) Where the Chief Officer is 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 borough 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 Chief Officer, subject to the control of the standing committee, may by written notice call upon the owner of such building or land to provide such privies, cesspools or water-closets at such sites as he may deem proper.

(2) The Chief Officer, subject to the control of the standing committee, may by written notice require any person or persons employing workmen or labourers exceeding twenty in number, or owning or managing any market, school or theatre or other place of public resort, to provide such latrines and urinals at such sites as he may direct, and to cause the same to be kept in proper order, and to be daily cleaned

(3) The Chief Officer, subject to the control of the standing committee, may by written notice require the owner or occupier of any land upon which there is a privy or urinal, to have such privy or urinal shut out, by a sufficient roof and wall or fence, from the view of persons passing by or resident in the neighbourhood, or to alter as he may direct any privy door or trap door which opens on to any street, and which he deems to be a nuisance.

Privy constructed under municipal orders—nuisance to a neighbour—municipal orders no defence to a suit for its removal:—The terms of s. 36 of Bombay Act VI of 1873 are not imperative in requiring a Municipality to call on the owner of a house to build a privy, but are permissive, leaving it to the discretion of the Municipality to determine when the power conferred on them shall be exercised Accordingly, where the plaintiff complained that the defendants had erected a privy so close to his house as to be a nuisance and the lower appellate Court found it to be as such, but rejected the plaintiff's claim on the ground that the defendants had erected the same under the orders of the Municipality issued under s 31 of the Act Held, reversing the decree of the lower appellate Court, that the Municipality had no authority to order the defendants to erect the privy regardless of the plaintiff's right, and that the defendants therefore could not plead that they acted under the orders of the Municipality The High Court directed an injunction to remove the privy within three months from the date of its decision **Sayad Jafirsaheb v. Sayad Kadir Rahiman, 12 Bom. 634.**

Fazendar not an owner of the building :—A fazendar is not the person liable, as owner of the premises, to provide privy accommodation under s 248 of the Bombay Municipal Act (III of 1888), the beneficial owner of the house built on the Fazendar's land being the 'owner' within the meaning of this section **The Municipality of Bombay v. Shapurji Dinsha, 20 Bom. 617**

Are employed :—The words 'are employed' appearing in section 249 of the Bombay Municipal Act refer to employment of any kind for any length of term **The Municipality of Bombay v Ahmedbhoy, 1 B.L.R. 12.** Dealing with the reference Parson J said "The Magistrate has asked of this court the following question '—What is the meaning of the words 'are employed' appearing in section 249 of the Bombay Municipal Act? He thinks that the words refer to employment of any kind for any length of time I agree with him It is the obvious meaning of these words in the section, the object of which was to empower the Municipal Commissioner to require privy accommodation to be provided for places in which persons exceeding twenty in number are employed as workmen or labourers Neither the kind or duration of the employment is defined, and they therefore are immaterial The number only of employees is stated, and it alone will be the test of application. The Magistrate is therefore, right in his opinion that the section applies to all premises, where more than 20 persons are employed as workmen or labourers in any kind of work or for any length of time It is not for the court to lay down nice distinctions as to the number of hours in the day, or of days in the year, which constitutes employment necessitating privy accommodation The Legislature has left that to the descretion of the Municipal Commissioner, and has empowered him whenever he finds that persons exceeding twenty in numbers are employed as workmen or labourers on any premises, to require the owner thereof to provide necessary accommodation for them At the same time as the reference is rather vague and does not include what seems to be the real dispute in the case, I will express the further opinion that it would be a perfect answer to the requisition, were the owner on its receipt to close the premises or to cease employing therein more than twenty workmen or labourers The case has not been argued before us on behalf of the Municipality, and I reserve myself the right of reconsideration, but as at present advised, I think the owner would only be guilty of an offence under the section if after such requisition he failed to comply with it, and if more than twenty such persons were found to be employed without the required accommodation being provided for them" Answering the reference, Ranade J observed —"The point referred for the opinion of this Court relates to the construction of section 249 of the Bombay Act III of 1888, which empowers the Commissioner to require the owners of places in which persons exceeding twenty in number are employed as labourers or workmen in any manufacture, trade, or business to provide privies The word 'employed' used in this section is in its ordinary sense, i e caused to be engaged in doing some service There is nothing in the section which shows that the words were intended to signify the nature of the employment, as being from day to day, or occasional, or regular all the year round. The same word occurs in the two following sections in connection with buildings in which any person may be, or may be intended to be, employed in any manufacture, trade, or business without any limit as to numbers Actual employment is not essential in these two sections, and it is enough if the building is intended for such employment. In section 249, actual employment in numbers exceeding twenty

is an essential condition to empower the Municipal Commissioner to require the owner to provide for the convenience of persons so employed The real difficulty in the application of the section lies in the fact that the number of persons employed in the building in the dispute varies at different periods from five to fifty The section however, gives a discretion in this point to the Commissioner and is not, like section 248, imperative in its direction That discretion has to be carefully exercised by him, but the discretion is his, and cannot be called in question in a court of law Mr Scott in his edition of the Act, refers to the case of **Hargreaves v. Taylor 32 L.J., (N S), M C , P. 111** when this last point was laid down in respect of a corresponding provision of the English Act We think the Magistrate has correctly construed the section"

Notice to construct urinals at a particular place ultra vires :—Accused was convicted, and fined Rs 50 for not complying with a notice issued by the Municipal Commissioner of Bombay under section 249 of Bombay Act III of 1888 The notice required him 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 Held, reversing the conviction and sentence, that the notice was ultra vires inasmuch as it required to construct urinals in a particular place in his premises **In re Khimji Jayaram, 24 Bom 75**

Public Resort—theatre :—A theatre is a place of public resort within the meaning of section 249 of the City of Bombay Municipal Act, 1888 **Emperor v. Dwarkadas, 8 B L R. 115**

Godown :—The accused owned a house which was used for residential purposes and which had two water closets on each of its floors Contiguous to the house was a godown, belonging to the accused, where workmen more than 20 in number were employed and in which there were no separate water closets apart from those in the house The accused having been called upon under s 249 of the City of Bombay Municipal Act, to construct water closets in the godown, contended first, that section 249 did not apply, as the godown was not premises distinct from the house, and, secondly, the requisition was bad as the procedure prescribed by s 248 was not followed. Held, that the godown constituted distinct premises to which s 249 of the City of Bombay Municipal Act applied **Emperor v Amritlal, 30 B L R. 1422**

Sub-section (3)—Order to alter position of trapdoor .—Where a district Municipality once grants permission to erect a privy which is accordingly constructed and used, it is open to the Municipality subsequently to order a change in the position of the trapdoor to the privy from one side to the other under section 106 (3) of the Bombay District Municipal Act, 1901 **Ravishankar v The Dohad Municipality, 31 B L R 1295**

Power to require owners to keep drains, etc., in proper order; or to demolish or close a privy or cesspool

135 (1) All sewers, drains, privies, water-closets, urinals, house-gullies and cesspools within a municipal borough shall, unless constructed at the cost of the municipality, be altered, repaired, and kept in proper order at the cost and charge of the owners of the lands or buildings to which they belong, or for the use of which they have been constructed or continued, and the Chief Officer subject to the control of the standing committee, may by written

notice require any such owner to alter, repair, and put the same in good order in such manner as he may think fit

(2) Subject to the control of the standing committee the Chief Officer may by written notice require the owner to 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 Chief Officer 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

Municipality can require an owner to close or demolish a cesspool:—In **Emperor v Ladu Ram, 11 B L R 1349**, a District Municipality issued a written notice under s 107(2) of the Bombay District Municipal Act, 1901 to the accused stating that the cesspool of his house was a nuisance and that therefore within 7 days from the receipt of the notice the pipe and the drain of the cesspool 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) of the Act to the Municipality to lawfully direct an owner or occupier to demolish or close a cesspool himself there was no disobedience of any lawful direction on the part of the accused under s 155 of the District Municipal Act This position is now changed by the addition of the words 'require the owner to' in s 107 (2) of the B D M Act, 1901 by Bom Act IV of 1924 s 6 and the occurrence of these words in the B M B Act, 1925 It is now open to the Municipality to direct an owner or occupier to demolish or close a cesspool himself and in view of the change the ruling in the **11 B L R. 1349** will not apply to a case under this section

Municipality cannot give directions in regard to water supply:—The accused owned a house with several floors on the top of which was a storage tank which supplied water to the flushing tanks of the water closets below There was a *hand pump attached to the water pipe on the ground floor Owing to insuffi-* cient pressure in the water-main, the water did not rise to the storage tank. The Municipal Commissioner therefore issued a notice to the accused under s 257(1) of the City of Bombay Municipal Act calling upon him to raise water to the storage tank by means of the hand-pump For failure to comply with the notice, the accused was convicted under s 471 of the Act The accused having applied held, reversing the conviction that the Commissioner could under s 257, requisition work, to bring the condition of the privy or water closet within the previous provisions of the chapter, that is to say, with regard to their construction and maintenance, and that nothing whatever was said throughout the chapter with regard to water supply **Emperor v Sale Maham-mad, 26 B.L R. 178.**

Trustee of a wakf not collecting rent not an owner:—The accused and certain other persons were trustees of certain wakf properties in Bombay Under a permission obtained from the High Court, the trustees were enabled to raise a loan of Rs 20,000, on the securities of the wakf properties The trustees accordingly raised on February 5, 1940, a sum of Rs 3,500 from one Mohiuddin (creditor) and gave to him the right of collecting rent from certain tenants

of certain wakf property on condition that out of the rent the creditor was to pay to himself a commission of twelve and a half per cent and apply the balance in reduction of the amount of the advance On March 9, 1940, the accused was served by the Bombay Municipality with a notice under ss 257(1) and 375 of the City of Bombay Municipal Act, 1888, requiring him to clean the water closet pans, to put in working order the flushing tanks, to clean and repair the waste water pipes and to lime-wash the house internally On September 11, 1940, the accused pointed out to the Municipality that the house in question was in the possession of Mohiuddin under a deed and that he (creditor) was receiving rents in respect of it The accused was tried by an honorary Presidency Magistrate who found him guilty of offences under ss 257(1) and 375 of the City of Bombay Municipal Act, 1888, and sentenced him to pay a fine of Rs 60 on the two charges The accused applied to the High Court in revision It was held that the word 'owner' as defined by section 3(m) and used in ss 257(1) and 375 of the City of Bombay Municipal Act, 1888 does not include trustees of a wakf property, who, under a permission of the High Court to raise a loan on the property, borrow money on the property and give to the creditor the right of collecting the rents from the tenants of the property entitling him out of the rent to pay to himself a commission of certain per cent and to appropriate the balance of the rent in reduction of the loan The expression 'receives the rent' in s 3(m) is not used in any technical sense **Emperor v Noormohmed, 43 B L R 598** In the course of the judgment Beaumont C J observed "I gather that the bench relied upon a clause in exhibit C, under which the debtors covenanted to pay the Municipal taxes and to attend to all Municipal notices and to carry out the requirements contained therein But that is a matter between the debtors and their creditor The creditor if he complies with the notice, may have a right to recover the amount of his expenditure from the debtors But a clause of that sort cannot affect criminal liability arising under the Act In my opinion, therefore the accused is not an owner within the meaning of the Act and, therefore, his conviction was wrong and must be set aside"

Owner not named in notice—Whether trustee could be prosecuted.—See notes under this head under s 3(14)

Failure to keep drains, water pipes, etc, in proper repair—conviction under s 193A—notice not necessary:—It is not necessary that before a person can be convicted for not complying with the provision of, s 275(1) of the City of Bombay Municipal Act, 1888, he should be served with a notice under s 278(2) of the Act Under s 278(2) of the City of Bombay Municipal Act, 1888, it is not obligatory upon the commissioner to issue any notice The sub-section gives option to the Commissioner to give notice or not **Emperor v Mahomed Ilias Patel, 45 B L R. 899.**

Effect of amendment by s 6 of Bom Act IV of 1924—It was decided in **11 B.L.R 1349** that a municipality could not under s 107(2) require an owner to demolish or close his privy or cesspool the question whether the municipality itself could demolish or close was not decided The meaning of s 107(2) is certainly not clear, the sub-section does not make sense as it stands—The intention may have been to limit the power of the municipality to the power enacted under s 107 (1), to require the owner to demolish or close Where the intention is not clear, a court is not likely to infer that the municipality has so drastic a power as itself to demolish and close It appears, therefore, that

the sub-section is a dead letter **(R.L.A's opinion No 1962 dated the 12th October 1922 in G.R.G.D. No. 3341 dated the 27th October 1922).** The position is now changed The words 'require the owner to' are now added in s 107(2) of the B D.M Act 1901 by Bom Act IV of 1924 s 6 and these words also occur in s 135 (2) of the B M.B Act, 1925 The munic.pality and the Chief Officer respectively can now require the owner by notice to demolish or close and on non-compliance may themselves do so under s 156 of the B.D.M. Act and s 194 of the B M.B. Act

Power to close existing private drains

136 When any building or land within a municipal borough has a drain communicating with any cesspool or sewers, the Chief Officer, if he considers 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 locality, may, subject to the control of the standing committee, close such drain and such cesspool or sewer, whether they are or are 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 Chief Officer may subject as aforesaid, do any work necessary for the purpose

Power in respect of sewers, etc, unauthorisedly constructed, rebuilt or unstopped

137. The standing committee may by written notice require that any sewer, drain, privy, water-closet, urinal, house-gully or cesspool on any land within a municipal borough, constructed, rebuilt or unstopped—

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

(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 it 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, urinal, house-gully or cesspool, whether he does or does not receive such notice or does or does not comply therewith, shall, in addition to any penalty to which he may be liable on account of such non-compliance, be punished with fine which may extend to twenty-five rupees.

Notice ordered by Standing Committee but signed by the Chief Officer—not bad:—A notice ordered by the standing committee of a City Municipality under s. 137 of the Bombay City Municipalities Act, 1925, is not bad merely on the ground that it is signed not by the Chairman of the Standing Committee but by the Chief Officer of the Municipality Rule 44 framed by the Surat Municipality under s. 46 of the Bombay District Municipal Act, 1901 and continued

under s 5 of the Bombay City Municipalities Act, 1925, is not 'ultra vires'. **Emperor v. Heptulla, 32 B.L.R. 757.**

Drain constructed with permission—Whether its removal can be ordered.— Where a proper notice has been given under s 123 of the Bombay Municipal Boroughs Act, 1925, and the proposed building including the drain has been proceeded with properly under sub-section (5), it is not open to the Municipality subsequently to require the drains to be removed under s 137 of the Act The accused submitted to the Ahmedabad Municipality on August 11, 1934, the plan of a new building which he intended to construct and as he received no reply from Municipality he began to construct his building. On January 6, 1936, he submitted to the Municipality a completion plan of the building and suggested addition of a drain and septic tank to his new house On March 18, 1936, he applied to the Municipality for permission to put up a septic tank and water closet, and within less than a month of his last application he started to construct a new drain for his house The accused was on these facts, convicted under s. 137(b) of the Bombay Municipal Boroughs Act, 1925 In revision, it was held, that (1) the sending of a plan in January, 1936, with the endorsement upon it that it was a plan as to the proposed drainage and septic tank amounted to the giving of notice to the Municipality as to the work proposed to be constructed, (2) That there was nothing in s 123 of the Act which required that the notice should be in a document separate from the plan, (3) that as no action was taken by the Municipality for a month the accused was entitled to proceed with his work under s 123(5) of the Act, (4) that there having been implied consent on the part of the Municipality, the accused was not liable to be convicted under s 137 of the Act **Emperor v. Dhirajlal, 40 B.L.R. 67.** In the course of the judgment, Beaumont C J observed "The learned Sessions Judge expressed the view that s 123 was not concerned with the question of drainage because the latter group of sections beginning with s 127 and including s 137 deals expressly with the subject of drainage, and therefore, he considered that where the standing committee required a drain to be demolished under s 137, it would be no answer to say that it had been constructed under a notice given under s 123, after the lapse of a month, no action having been taken by the Chief Officer The learned Sessions Judge was of opinion that the provisions of s 123 did not apply and that if the drain had been constructed without the consent of the Municipality, then a conviction could properly be recorded under s 137 I am not able to agree with that view of the learned Sessions Judge because s 123 does in terms deal with the drains and sewers of the proposed new building, and it would be impossible to supply an accurate plan of a proposed new building unless the drainage system (if there was to be any) was included It seems to me impossible to hold that where a proper notice has been given under s 123, and the proposed building including the drains has been proceeded with properly under sub-section (5), nevertheless the Municipality can require the drains to be removed under s 137. I think that in such cases the answer is that the consent of the Municipality has been obtained by implication having regard to the provisions of s. 123, sub-s (5) No doubt, there may be a good many cases which fall either under the provisions of s 123 or under the provisions of s 137, but primarily s 137 is designed to give to the Municipality a power exercisable at any time merely by notice in writing to require the demolition of a drain constructed without proper consent or contrary to regulations whereas the penalty under s 123 for

breach of that section is primarily a fine, and demolition can only be ordered after conviction has been obtained under sub-section (7) (b) "

Encroachments on municipal drains.

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

(2) No building shall be newly constructed or reconstructed over any sewer, drain, culvert or gutter vested in a municipality, without the written consent of the Chief Officer; and the Chief Officer may by written notice require any person who has so constructed or reconstructed any building without such written consent, to pull down or otherwise deal with the same as he may think fit.

Inspection of drains, etc.

139. (1) A Chief Officer after due notice to the occupier may inspect any sewer, drain, privy, water-closet, urinal, 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.

Expense of inspection when to be borne by the municipality

(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, urinal, 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 or orders thereunder in force at the time or issued in respect of such construction; in which case such expense 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.

Standing committee may execute certain works under this sub-chapter without allowing option to person concerned of executing the same, Expenses in such cases by whom to be paid.

140. (1) The standing committee may, if it thinks fit, cause any work, the execution of which may be ordered by or on behalf of the municipality under any of the provisions of this sub-chapter, to be executed by municipal or other agency under its own orders, without first of all giving the person by whom the same would otherwise have to be executed the option of doing the same.

(2). The expenses of any work so done shall be paid by the person aforesaid, unless the municipality shall, by a general or special

order or resolution, sanction as it is hereby empowered to sanction the execution of such work at the charge of the municipal fund.

Pipes, etc., constructed by municipality to be municipal property

141. Any pipes, fittings, receptacles, or other appliances for or connected with the drainage of any private building or land shall, if supplied, constructed or erected at the expense of the municipality, be deemed to be municipal property, unless the municipality shall have transferred its interest therein to the owner of such building or land

(4) Powers in Respect of Water-Supply.

Power of carrying water mains.

142. For the purpose of obtaining a supply or an additional supply of water or of distributing the same, the municipality shall have the same powers and be subject to the same restrictions for carrying, renewing, repairing, and altering water mains, pipes and ducts within or without the municipal borough as it has and is subject to under the provisions hereinbefore contained for carrying, renewing and repairing drain within the municipal borough.

Rights of Corporation to enter Railway land —Under the Bombay Municipality Act (Bom Act III of 1888), the Corporation of Bombay has the right, for the purpose of supplying the city with water to enter upon land belonging to other owners, to make connections between the mains, and to lay the pipes forming the connections through or under such lands without the owner's permission, though not without giving them reasonable notice in writing Held, also that, s 12 of the Railways Act (IX of 1890) does not exclude the above right of the Corporation of Bombay to enter on land belonging to the G I P Railway Company for the said purposes **G.I P. Railway Company v The Municipal Corporation of Bombay, 23 Bom. 358.**

Right of Corporation to enter Government land—The provisions of sections 222 (1) and 265 of the City of Bombay Municipal Act, 1888, apply to Crown lands by necessary implication Hence the Municipal Commissioner for the City of Bombay has the power to lay watermains as well as drains in lands belonging to Government **The Province of Bombay v The Municipal Commissioner of the City of Bombay, 45 B.L.R 945**

Failure to keep drains, waterpipes, etc, in proper repairs—conviction under s. 193A—notice not necessary.—See notes under this head under s 135.

(5) Powers Regarding External Structures, Etc.

Permission necessary for certain projections.

143. (1) The Chief Officer, subject to any by-laws made under the provisions of this Act, may give written permission to the owners or occupiers of buildings in public streets to put up open verandahs, balconies or rooms, to project from any upper storey of such buildings, to an extent not exceeding four feet beyond the line of the plinth or basement wall of the building; and may prescribe the extent to which and the conditions under which roofs,

eaves, weather-boards, shop-boards, and the like may be allowed to project over such streets.

(2) (a) Notwithstanding any proceedings which may be taken under clause (b) of this sub-section, the Chief Officer may, by written notice, require the owner or occupier of any such building to remove or alter any such projection which has been constructed either without, or contrary in any manner to the permission or orders given or issued by or on behalf of the municipality.

(b) Any such owner or occupier putting up any projection as aforesaid without such permission or in contravention of such permission or orders, shall be punished with fine which may extend to twenty-five rupees, and if any such owner or occupier fails to remove any projection in respect of which he has been convicted under this section, he shall be punished with further fine which may extend to five rupees for each day on which such failure or neglect continues

Removal of projections.

(3) The Chief Officer may, by written notice, require the owner or occupier of any building to remove or alter any projection, encroachment or obstruction which, whether made before or after the site of such building became part of a municipal district or borough, shall have been made against or in front of such building, and which—

(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

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

Provided always that the Chief Officer 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 borough or after such date with the written permission of the municipality, pay 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 198

Refusal to permit projection—discretion—right of Civil Court to interfere:— The word "street" in s 17 of the Bombay District Municipal Act (VI of 1873) means and includes not merely the surface of the ground, but so much above

and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes The plaintiff proposed to make a balcony projecting over a public road The Municipality objected to the work, as an encroachment on a public street He, therefore, sued the Municipality to establish his right to build the proposed balcony Held, that, so far as the column of space standing over the street was vested in the Municipality, the plaintiff had no right to occupy it with a balcony, which by intercepting light and air could greatly impair the use of the area as a street Section 33 of the Bombay District Municipal Act (VI of 1873) gives the Municipality a discretion to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion, unless it is exercised in a capricious, wanton, and oppressive manner **Nagar Vallabh Narsi v. The Municipality of Dhandhuka, 12 Bom. 490.**

The plaintiff was the owner of two houses on each side of the passage of a khidki, or open square, containing three or four other 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 interest of the neighbouring householders, 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 Vallabh Narsi v The Municipality of Dhandhuka, 12 Bom. 490**

Municipality can remove lawful and unlawful obstructions from public street:—Under the District Municipal Act (Bom Act VI of 1873), a Municipality has power to have all obstructions in a public street removed, whether the obstructions were placed there lawfully or not The only distinction which the Act draws is between obstructions erected or placed before the Act came into operation and those which have been erected or placed since it came into operation As to the former, s 42, cl (1) of the Act provides that notice should be given, and if legally placed on the street, compensation should be awarded for their removal As to the latter, the Municipality can remove them under s 48 even without giving any notice The public have a right of passing over the whole of a street if it is a public street It is not the practice of the Court to interfere with corporate bodies 'unless they are manifestly abusing their power' **The Ahmedabad Municipality v Manilal, 19, Bom. 212.**

Notice not necessary for a suit to restrain a municipality from removing a building:—A suit for an injunction to restrain a municipality from removing a certain building or construction is not an action 'for anything done, or purporting to have been done in pursuance of the Act' within the meaning of s. 48 of Bombay Act II of 1884 Such a suit can, therefore, be brought without

giving previous notice to the municipality **Patel Panachand Girdhar v. Ahmedabad Municipality, 22 Bom 230.**

Erection of a building contrary to s. 33—Absolute discretion of the municipality to remove it—Apart from the provisions of s 33 of Bombay Act VI of 1873, it is only if the site of a building is vested in a municipality under s 17, that this body is empowered, whether by s 42 or by any other section, to take steps for the removal of the building The discretion of taking action or otherwise under the 3rd clause of s 33 is vested in the municipality, which alone can determine whether or not the removal of a building erected contrary to the provisions of s 33 is or is not a measure likely to promote the public convenience If the municipality adopt 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 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 **Patel Panachand Girdhar v. The Ahmedabad Municipality, 22, Bom. 230.**

Erection—re-erection of an old structure.—Section 48 of the Bombay District Municipal Act (Bom Act VI of 1873) refers to the erection of a thing for the first time, and not to the re-erection of an old structure which had been taken down for a temporary purpose only The accused was the owner of a shop in a public street at Thana The shop had planks attached to it in front, overhanging a public gutter These planks had been in existence before the District Municipal Act came into operation at Thana In April, 1897, the planks were temporarily removed under the orders of the plague authorities The plague having ceased, the accused replaced the planks in October, 1897, without the permission of the municipality For this he was prosecuted and fined under s 48 of Bombay Act VI of 1873 Held, reversing the conviction and sentence, that the refixing of the planks was not an 'erection' within the meaning of s 48 of the Act **Kala Govind v The Municipality of Thana, 23 Bom 248.**

Projection without permission—whether injunction to restrain removal can be granted.—A person has no right to build balconies (nejwas) to his house after a District Municipality refuses to grant permission to build them and having once put up such balconies he is not entitled to obtain from the Civil Court an injunction to restrain the Municipality from removing the balconies erected in defiance of their refusal **The Godhra Municipality v. Heptullabhai, 2, B.L.R. 572**

Prosecution for projection without permission—acquittal—whether bar to prosecution for non-compliance of notice to remove—The accused was prosecuted by the Bombay Municipality under section 342 of the Bombay City Municipal Act, for constructing two balconies to his house without the permission of the Municipality He was acquitted The Municipality then served a notice upon the accused under sections 308 and 309 of the Act, asking him to remove the two balconies and also two others which were not new and on the accused's failing to comply with the notice, the Municipality prosecuted him again. The Magistrate referred to the High Court the question whether the previous acquittal of the accused precluded the Municipality from bringing the second charge against him.—Held, that there was no bar to the second prosecution as sections 403 (1), 236, and 237 of the Criminal Procedure Code had no

application The second offence could not have been committed until the notice to remove was served on the accused and this notice was not served upon the accused until the year following that in which he was acquitted under the former charge **Municipality of Bombay v Zaver Jagjivan, 4 B.L.R. 575.**

One projecting board to two shops—Whether separate prosecution tenable:— A shop-keeper affixed to his shop a board which projected into a public street This shop was divided into two portions, one of which was occupied by the shop-keeper himself and the other was let by him to a tenant The shop-keeper was tried separately regarding the two projections and convicted and sentenced separately —Held, that the Magistrate was wrong in trying the two cases as two distinct offences It was one offence, because it related to one board **Emperor v Atmaram, 4, B.L.R. 942**

Projection on private street—power of municipality to remove:— A District Municipality can, under the provisions of s 33 of the District Municipal Act (Bom Act VI of 1873), order the removal of balconies put up by a person to his house abutting on a private street and constructed in defiance of the orders issued by the Municipality Per Chandavarkar, J.—(1) Reading the whole of s 33 of the Bombay District Municipal Act (Bom Act VI of 1873) by itself and having regard 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', that is, it should be exercised, not capriciously or arbitrarily, but reasonably, provided the order is 'not inconsistent with the provisions' of the Act (2) 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 **Tribhovan v The Ahmedabad Municipality, 5, B.L.R. 48**

Adverse possession—Obstruction to safe and convenient passage:— In the plaintiff's otla there was a stone which was in situ for twelve years and which projected into the public street on which the otla abutted The defendant-Municipality having removed the stone from its position, the plaintiff sued for an injunction to restrain the defendant from obstructing him in reinstating the stone The lower Court granted the injunction on the ground that the defendant-Municipality had no right to interfere with the stone as there was adverse possession for the statutory period of the portion of the street occupied by the stone On appeal —Held, confirming the decree, that the Municipality had not justified their action by reference to their statutory powers either under s 113 or 122 of the Bombay District Municipal Act, 1901, for it was not shown either that the stone which they had removed was an obstruction to the safe and convenient passage along the street or that the stone was set up by the plaintiff after the place became a Municipal district Held, further, that in either case it did not matter that the encroachment was in existence for twelve years or more, if the statutory conditions regulating the exercise of the power be shown to exist **The Dakor Town Municipality v. Anupram, 15 B.L.R 833.**

This view about adverse possession was, however, overruled in **Tayabali v. The Dohad Town Municipality, 22 B.L.R. 951,** and in **Abbaji v. The Municipality of Jalgaon, 23 B.L.R. 1028** See notes under the head **"Adverse possession"** under section 152

Whether by-law prescribing fee for projection ultra vires:—The accused, who occupied a shop abutting on a public street, projected a shop-board in front of his shop into the public street without the permission of the Municipality He was prosecuted for making the projection without permission and without paying fees prescribed in that behalf (by-law No 10 of the Surat City Municipality) It was contended that the by-law was 'ultra vires' of the Municipality —Held, (1) that the accused, in erecting the shop-board without paying the prescribed fee, had contravened by-law 10; (2) that by-law 10 was not 'ultra vires' of the Surat City Municipality. **Emperor v Nagindas, 20 B.L.R 388.**

Projection—no right to proceed without permission—order of removal after a number of years arbitrary and capricious:—The plaintiff obtained from the defendant Municipality permission in 1897 to make a projection (dakhli) two feet in breadth and to cover it by an iron sheet roof one foot in breadth, to the second storey of his house abutting on a public street In contravention of the permission so given the plaintiff projected his dakhli by four feet and five inches On the 13th June, 1898, the Municipality gave notice asking the plaintiff to remove the projection For failure to comply with the notice, the plaintiff was prosecuted under s 33 of the Bombay District Municipal Act 1873, but was found not guilty He then applied to the Municipality to cancel the notice, but his application was referred by the Municipality to a Sub-Committee appointed to inquire into projections in the City The Municipality, purporting to act under ss 113 and 96 of the Bombay District Municipal Act, 1901, gave a notice to the plaintiff, on the 23rd July, 1914, asking him to remove portions of the dakhli which projected beyond four feet from the plinth The plaintiff sued the Municipality to restrain it by injunction from removing the dakhli — Held, by Macleod C J, (1) that it had not been proved that the plaintiff applied in 1897 under s 33 but the facts rather pointed to his having asked for permission under s 42 of the Bombay District Municipal Act of 1873, (2) that unless the plaintiff gave notice under s 33 the Municipality had no power to call upon him to remove the projection, (3) that even if the plaintiff gave notice under s 33, the projection which infringed s 113 of the Bombay District Municipal Act, 1901, was only five inches at a considerable height above the ground, and the Court would consider that a notice to remove such a projection after the lapse of sixteen years was in the circumstances of the case an arbitrary and capricious exercise of the powers of the Municipality, (4) that the terms of the notice of 1914 which did not call upon the plaintiff to comply with the permission granted to him in 1897 but to comply with the provisions of s. 113 (1) of Bombay Act III of 1901 were sufficient evidence that the Municipality issued the notice under s 113 (3) and the mere fact that they added s 96 (5) could not enable them to compel the plaintiff to remove a projection which no doubt infringed the original permission, but which did not come within s. 113 (3).

Held, by Fawcett J, (1) that the application made by the plaintiff in 1897 must be treated as one falling both under ss. 33 and 42 of Bombay Act VI of 1873; and so far as the Municipality showed that the action complained of

had been taken in the exercise of any power conferred upon it by s 33 it was entitled to do so, subject to any objection of limitation that might be valid, (2) that though the objection taken in the notice of 1914 was one which fell under s 113 of the Bombay Act III of 1901, yet it did not prevent the Municipality also from relying on s 96 so far as it might be applicable, (3) that the notice, so far as it was based on s 96, was invalid as having been time-barred under s 96 (6), and consequently the Municipality had no right to get the projection removed by executive action under s 154 (6) of Bombay Act III of 1901,

Per Macleod C J—'There can be no doubt that the owner of a building who wished to alter it externally or add to it by erecting a balcony can give notice to the Municipality of his intention under s 96 and the Municipality could pass orders under the powers given by the section, and if those orders were disobeyed they could take action under clause 5 But projections over a public street are external alterations of a particular nature which cannot be built without special authorisation under s 113 Whereas if the Municipality are silent after due notice has been given to them under s 96, the person who has given notice can proceed to build or alter according to the plans furnished to the Municipality It is this difference between the two sections which has not been sufficiently noticed If a person builds a projection over a public street without taking permission under s 113 or in contravention of the provisions given under the section, he can be fined and the fine can be continued until he has complied with the orders of the Municipality. But the Municipality have no powers to order him to remove the projection" "Under the Act of 1873, a person desirous of building a new building or reconstructing an old building on land abutting on a public street had to give notice under s 33 and if his plans included balconies or other structures overhanging the public street it would not be necessary for him to make a separate application under s 42 (3) But if he built such projection without any orders being passed by the Municipality he would do so at his own risk Again if he wished only to add to an existing building by erecting a balcony overhanging a public street he would either give notice under s 33 or apply for permission under s. 42 (3) If the balconies were to overhang his own land he would have to give notice under s 33 With regard to balconies overhanging a public street, the power of the Municipality would depend upon whether notice was given under s 33 or permission was asked for under s 42 (3)"

Per Fawcett J—"There seems to me to be no legitimate ground for the supposition that the Legislature intended that anything in s 113 should restrict the general powers conferred on a Municipality by s 96, except so far as such restriction is enacted expressly or by necessary implication The main object of s 113 clearly is to regulate projections over public streets, and as the Municipality under that section is authorised only to permit balconies, &c, *projecting from an upper storey to an extent not exceeding four feet* beyond the line of the plinth or basement wall, it is a necessary implication that its general power under s 96 is, in regard to balconies projecting over public streets, restricted to the same extent It seems to me to be a quite unwarranted step to say that, because s 113 deals with the special case of these balconies, the Legislature meant to exclude them entirely from the purview of s 96" "I concur with the learned Chief Justice in holding that s 33 of Bombay Act VI of 1873 (the equivalent of s 96 of the Act of 1901) covers the case of a person

wishing to add to an existing building by erecting a balcony overhanging a public street But I venture to doubt whether in such a case he could dispense with notice under s 33 and apply for permission only under s 42 (the equivalent of s 113 of the Act of 1901)" **Ahmedabad Municipality v. Manilal, 23 B.L.R. 193.**

Eaves—Projecting on—Public street—Private street —A District Municipality cannot, under ss 96 and 113 of the Bombay District Municipal Act, 1901, require that eaves should be so constructed as to overhang a private street above a certain height **Emperor v. Gafoor, 31 B.L.R. 578.** See notes under the head 'eaves' under s. 123

Continuing offence:—See notes under the head 'continuing contravention, etc' under sec 118

Starting point for limitation for prosecution for a continuing offence:—See notes under this head under sec 118

Whether a Court other than the District Court (under s. 198 of the B. M. B. Act) can determine the amount of compensation under this section:—See notes under this head under s 128

Municipality's powers and duties as regards public streets—no power to lease permanently or for a substantial period.—A Corporation has no greater power than what the legislature has granted to it and public streets are vested in the municipality under s 60 (f) of the B D M Act, 1901, (s 63 (f) of the B M B Act, 1925) on trust for the purposes of the Act What those purposes are must be gathered from the strict interpretation of the provisions of the Act regarding public streets. Those provisions appear to be as follows —It is the duty of the municipality under section 54 (f) and (i) (s 68 (f) and (i) of the B M B Act) to remove obstructions and projections from and to alter and maintain public streets It is further lawful for the municipality under s 90 (1) (s 114 of the B M B Act) to widen, open, enlarge or otherwise improve public streets and under s 92 (s 119 of the B M B Act) to set-back and acquire on payment of compensation private houses and lands which project beyond the regular line, or the line determined upon for the future, of public streets and under s 93 (s 120 of the B M B Act) to alienate portions of public streets beyond such lines by allowing any building to be set forward upto such lines in order to improve the lines of public streets The municipality may under s 113 (1) (s 143 of the B M B Act) allow permanent aerial projections over public streets, which on the principle of the owner of the land being owner of the perpendicular column of air over it, are encroachments on public streets and under s 122 (4) (s 152 B M B Act) may allow temporary surface occupation or encroachment on public streets made before or after the birth of the municipality and under s 122 (2) remove perhaps aerial and certainly surface—the clause in the view of the new clause (3) would probably be held to include both—encroachments on public streets made after the birth of the municipality It appears that s 113 (3) so far as subsequent encroachments are concerned overlaps s 122 (2) It is clear that none of these provisions authorize the municipality to lease permanently or even for substantial periods portions of the public streets pending the extension of the streets to the regular line or lines determined upon for the future. The question of the fees leviable under s 70 (s. 90 B M B. Act) for permissions given for aerial projections under s. 113 (1) or for temporary surface occupation of public streets under s 122 (4)

can be settled under the rules made under s 46 (i) (s 58 (j) B M B Act) with the sanction of the Government and the conditions under which such permissions shall be granted can be regulated by by-laws under s 48 (n) (s 61 (s) B M B Act) after previous publication and with the sanction of Government. ***(R.L.A 's opinion No. 1140, dated the 18th June, 1906, in G.R.G.D. No 4364, dated the 24th July, 1906)***

Drains and gutters alongside a public street are "public street":—Rules prescribing fees for projections over public streets can be made under s 46 (f) of the B D M Act, 1901, (s 58 (j) of the B M B Act, 1925) and must therefore, be confined to the prescribing of 'fees to be charged for licenses or permissions granted under s 70' (s 90 of the B M B Act, 1925) This latter section only covers cases where permission is given for (a) making any temporary erection (b) putting up any projection (c) the temporary occupation of (i) any public street or (ii) other land vested in the municipality So far as public streets are concerned, it seems clear that the 'temporary occupation' and 'temporary erections' contemplated are limited to those permitted under s 122 (1) (s 152 of the B M B Act, 1925) And as already pointed out in **G R.G D No. 4364, dated the 24th July, 1906** the projections allowed under s 113 (1) (s 143 of the B M B Act, 1925) are only aerial projections and not surface ones A proposal made in 1903, that s 113 should be amended so as to include 'platforms', 'plinths' and 'steps' as well as 'shop boards' was in fact negatived on the ground that this would permit of permanent encroachments on public streets Such rules fall under the head of 'projections' and not 'temporary erections' or 'temporary occupation' and their legality must be determined with reference to the above test Therefore, rules regarding surface projections over sewers, gutters, etc, which form part of a 'public street' are 'ultra vires' As regards surface projections over municipal sewers, gutters, etc, in private land s 70 will not apply because the projection is not one of the kind contemplated in s 113 (1), so a rule under s 46 (i) cannot prescribe fees for such a case Where, however, such gutters, etc, are not in public streets there is no legal objection to the municipality requiring fees to be paid in any case where consent is given under s 110 (2) *(s 138 (2) of the B M B Act of 1925)* Such fees will not be imposed by virtue of the powers conferred by s 70, but, as a condition of the consent and as a general right of the municipality (like any other owner) to charge rent or other money consideration for any license (as defined in s 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, *(c f ss 50* to 52 of the Act) Rules authorizing such charges can, however, only be made as by-laws under s 48 (r) and (u) of the Act (s 61 (x) and (ee) of the B M.B. Act) and not under section 46 (i) In the case of by-laws under s 48 (r) and (u) the procedure prescribed by s 48 (2) and (3) (s 61 (2) and (3) of the B M B Act) must be followed In ordinary parlance a street certainly includes the gutters, footpaths, etc, that may be alongside the main roadway A man would, for instance, be said to be 'in the street' though he was not in the actual part of it used for traffic, but standing in the gutter alongside, and two boys gambling in a municipal drain alongside the street would surely not be allowed to plead that they were not gambling in a public street under s 12 of Bom. Act IV of 1887 And this must almost necessarily be so, because as stated in Bouvier's Law Dictionary, Vol II P 1409, 'a street, besides its use as a highway of travel, may be used for the accommodation of drains, sewers, aqueducts,

water and gas pipe lines, lines of telegraph and for other purposes conducive to the general, police, sanitary and business interests of a city.' A roadside gutter is also practically a part of a street provided for carrying off storm-water, etc., and so requisite for its preservation for the usual and intended purpose (cf **Nagar v Municipality of Dhandhuka, I L R 12, Bom 490, at P. 496**). There is nothing in the B D M Act, 1901, which indicates that the legislature did not intend gutters, etc, to be included in the definition of 'street' On the other hand there are plenty of instances where such drains or gutters are recognized as part of a street, e g, section 3 (13) (s 3 (16) of the B M B Act) where 'public street' is defined to include a 'street channelled, sewered, etc, out of municipal funds' and section 121 (1) and (2) (s 151 (1) and (2) of the B M B Act) where gutters are ranked with pavements or flags of a public street The public also have access to an open gutter and can, if necessary, use it as a footway so that it falls within the definition of 'street' in s 3 (12) (s 3 (19) of the B M B Act) The drains, and gutters alongside a public street, therefore, fall within the definition of a 'public street' **(R.L.A.'s opinion No. 14, dated the 7th January, 1908, in G R G D. No 3076, dated the 16th April, 1908).**

Person constructing a projection under this section does not acquire any right of easement —A person who has constructed a projection under s. 113 of the B D M. Act, 1901, (s 143 of the B M B Act) is a licensee and does not acquire any right against Government at all or against the municipality except the right to compensation under s 113 (3) Although no formal instrument has been taken from him, his position as licensee will not give any title to him by way of prescription either against the municipality itself or against Government The enjoyment of an alleged right which has taken place with the license of another person does not amount to enjoyment as of right **(R.L.A.'s opinion No. 135, dated the 12th January, 1927, in G R.G D. No 1898, dated the 15th February, 1927).**

Troughs and pipes for rain water.

144. The Chief Officer may by written notice require the owner of a building in any street to put up and keep in good condition proper trough and pipes for catching and carrying the water from the roof and other parts of such building, and for discharging the same, in such manner as he may think fit, so that it shall not fall upon the persons passing along the street

Fixing of lamps, brackets, etc, to houses.

145 The Chief Officer may erect or fix to the outside of any building brackets for lamps to be lighted with oil or gas, or subject to the provisions of the Indian Electricity Act, 1910, for lamps to be lighted with electricity or otherwise or subject to the provisions of the Indian Telegraph Act, 1885, for telegraph wires or telephone wires, or wires for the conduct of electricity for locomotive purposes; or such pipes as he may deem necessary for the proper ventilation of sewers and water-works· such brackets and pipes shall be erected so as not to occasion any inconvenience or nuisance to the occupants of the said building or of any others in the neighbourhood, or to the public.

XIII of 1885.

IX of 1910.

Naming streets and numbering houses penalty for defacing etc.

146 (1) The municipality may from time to time cause to be put up or painted on a conspicuous part of any building at or near each end or corner of, or entrance to a street, the name by which such street is to be known, and may from time to time fix a number in a conspicuous place on the outer side of any building, or at the entrance of the enclosure thereof fronting the street

(2) Any person who destroys, pulls down or defaces any such name or number, or puts any name or number different from that put up by the municipality, and any owner or occupier of any building, who shall not at his own expense keep such number in good order after it has been put up thereon, shall be punished with fine which may extend to twenty-five rupees

Penalty for defacing buildings etc

147 Any person—

(a) who, without the consent of the owner or occupier, and in the case of municipal property without the permission in writing of the Chief Officer affixes any posting bill, placard or other paper or means of advertisement against or upon any building, wall, board, fence, pale, post, lamp-post or the like, or

(b) who, without such consent as aforesaid, writes upon, soils, defaces or marks any such building, wall, board, fence, pale, post, lamp-post or the like, with chalk or paint or in any otherway whatsoever,

shall be punished with fine which may extend to twenty rupees.

Removal and trimming of hedges, trees etc.

148 The Chief Officer may by written notice require the owner or occupier of any land so to trim or prune the hedges thereof bordering any public street that the said hedges may not exceed the height of four feet from the level of the street, and width of four feet, and to cut down, lop, or trim all trees or shrubs which in any way overhang, endanger, or obstruct or which such officer deems likely to overhang, endanger or obstruct any public street or to cause damage thereto or which so overhang any public tank, well or other provision for water-supply as to pollute, or be likely to pollute the water thereof

(6) Powers for Promotion of Public Health, Safety and Convenience

Ruinous or dangerous buildings, precautionary measures.

149 (1) Where any building or anything affixed thereon is deemed by the Chief Officer to be in a ruinous state or likely to fall or in any other way dangerous to any inhabitant of such building or of any neighbouring building or to any occupier thereof or to passengers, the Chief Officer shall immediately, if it appears

to him to be necessary, cause a proper hoard or fence to be put up for the protection of passengers.

Provided that if the danger be not of hourly imminence, the Chief Officer may, instead of causing a hoard or fence to be put up, issue in the first instance notice in writing to the owner or occupier to put up a proper hoard or fence, and in the event of the owner or occupier failing to put up within two days from the service of such notice a hoard or fence which the Chief Officer considers sufficient in the circumstances of the case, the Chief Officer shall at once cause such hoard or fence to be put up

Repairs to be made by owner or occupier, default by such

(2) The Chief Officer shall also cause notice in writing to be given to the owner or occupier, requiring such owner or occupier forthwith to take down, secure, or repair such building, or thing affixed thereon, as the case shall require, and if such owner or occupier do not begin to repair, take down, or secure such building or thing within three days after the service of such notice, and complete such work with due diligence, the Chief Officer shall cause all or so much of such building or thing as he shall think necessary to be taken down, repaired or secured

(3) All expenses incurred by the Chief Officer under this section shall be paid by the owner or occupier of such building and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under Chapter VIII.

Discretion—how it should be exercised:—The primary object of s 354 of the City of Bombay Municipal Act, 1888, is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers But it does not follow that those powers must be exercised arbitrarily and without due consideration to the provisions of the section and the right of individuals In the first place, it must appear to the Commissioner that a structure is in a ruinous condition or likely to fall or in any way dangerous to any person occupying, resorting to or passing by such structure He may next by written notice require the owner or occupier to pull down, secure or repair The word 'appear' in the section does not mean 'appears to the eye' It is sufficient if it appears to the Commissioner on the representations of a competent officer whose duty it is to make such representations But the Commissioner's action 'when it appears' is judicial, so that he must exercise his discretion in determining what action should be taken He does not satisfy this test where he merely signs the notice which is sent to him by the Executive Engineer because it has been previously signed by that officer It is only by aid of a fiction that it can be said that a notice signed in this way by the Commissioner complies with the section, which should be considered as a notice to show cause It is not invalid, at the same time it cannot deprive the person served with it of his right to object unless the Legislature has clearly deprived him of such a right. Danger

means peril, risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time Section 354 applying as it does to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first the degree of danger must be ascertained and then the appropriate precautionary measure prescribed Discretion must not be arbitrary, the very term itself standing and unsupported by circumstances imports the exercise of judgment, wisdom and skill as contradistingu shed from unthinking folly, heady violence or rash injustice The *legislature has vested in the Commissioner a discretion in the matter (s 354)*, and the Court would not interfere in his exercise merely because the object in view might be carried out in some other way, nor would it lightly impute to him bad faith But the Court is, in the first instance, entitled to enquire whether the discretion has been exercised The discretion has to be exercised first in coming to a conclusion as to the state of the structure and then in fixing upon the remedy It is obviously impossible for the Commissioner to inspect all structures that are suspected of being dangerous Therefore, it is a sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous But if a notice is issued based on the representation of such a person it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motive in prescribing the steps to be taken If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be 'prima facie' evidence that the person appointed by the Commissioner had not exercised his discretion When the Commissioner has per force to act on the advice of his expert advisers it must be proved that they decided judicially what advices they should offer If they did not, the provisions of the section have not been complied with In other words the Commissioner can exercise his discretion through an agent, but it follows that if the agent has not exercised his discretion, nor has the Commissioner The Commissioner has the opportunity to remedy this when the owner complains Under certain circumstances, the safety of the public must be considered in priority to the right of private individuals as in the case of imminent danger, but where there is no suggestion of imminent danger the person affected is entitled to be heard as a matter of common justice **Lalbhai v. The Municipal Commissioner of Bombay, 10 B L.R 821.** Although this was a case under section 354 of the City of Bombay Municipal Act, *1888 the principles of the ruling equally apply to a case* under s 149 of the Boroughs Act

Whether to be taken down or repaired—who to decide —Under sub-section 2 of s 149 of the Bombay Municipal Boroughs Act, 1925, the option of determining whether a house which is in a ruinous state or likely to fall or in any other way dangerous to its occupier or to the public, ought to be taken down secured, or repaired rests with the Chief Officer and not with the owner of the property In construing an act of the Legislature, the wording of which is open to two possible constructions, the Court must look at what appears to have been the real object of the Act in order to determine which of the two rival constructions should be adopted **Emperor v. Bastiao, 36 B L.R. 430** .

Powers and duties with regard to dangerous, stagnant or insanitary sources of water-supply

150. (1) A Chief Officer may at any time by written notice require that the owner of or any person who has the control over any well, stream, channel, tank or other source of water-supply, shall, whether such source is private property or not, within a reasonable time to be specified in the notice, or in any case falling under clause (d) within twenty-four hours of such notice—

(a) keep and maintain any such source of water-supply, other than a stream, in good repair, or

(b) cleanse any such source of water-supply from silt, refuse and decaying vegetation, or

(c) in such manner as the Chief Officer may prescribe, protect any such source of water-supply from pollution by surface drainage, or

(d) repair, protect or enclose in such manner as the Chief officer approves, any such source of water-supply other than a stream in its natural flow, if for want of sufficient repair, protection or enclosure, such source of water-supply is in the opinion of the Chief Officer dangerous to the health or safety of the public or of any person having occasion to use or to pass or approach the same, or

(e) desist from using and from permitting others to use for drinking purposes any such source of water-supply, other than a stream in its natural flow, which is proved to the satisfaction of the Chief Officer to be unfit for drinking, or

(f) if notwithstanding any such notice under clause (e) such use continues and cannot in the opinion of the Chief Officer be otherwise prevented, close either temporarily or permanently or fill up or enclose or fence in such manner as the Chief Officer considers sufficient to prevent such use, such source of water-supply as aforesaid, or

(g) drain off or otherwise remove from any source of water-supply, or from any land or premises or receptacle or reservoir attached or adjacent thereto, any stagnant water which the Chief Officer considers is injurious to health or offensive to the neighbourhood

Remedy on non-compliance with directions issued.

(2) If the owner or person having control as aforesaid, fails or neglects to comply with any such requisition within the time specified by or under the provisions of sub-section (1), the Chief Officer may, and if in his opinion immediate action is necessary to protect the health or safety of any person, shall at once proceed to

execute the work required by such notice, and all the expenses incurred therein by the Chief Officer shall be paid by the owner of, or person having control over, such water-supply, and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under chapter VIII

Provided that in the case of any well or private stream or of any private channel, tank or other source of water-supply, the water of which is used by the public or by any section of the public as of right, the expenses incurred by the Chief Officer or necessarily incurred by such owner or person having such control, may, if the standing committee so direct, be paid from the municipal fund

Private well used by public —The municipality has no right to require a private individual owning well used by the public to keep up the well **Allahdino v. The Shikarpur Municipality, A.I R. 1924 Sind 139.**

Displacing pavements, etc

151. (1) Whoever displaces, takes up, or makes any alteration in the pavement, gutter, flags or other materials of any public street, or the fences, walls, or posts thereof, or any municipal lamp, lamp-post, bracket, water-post, hydrant, or other such municipal property therein, without the written consent of the Chief Officer or other lawful authority, shall be punished with fine which may extend to one hundred rupees.

Penalty for failure to replace after notice.

(2) Any person who, having displaced, taken up or made alteration in such pavement, gutter, flags, or other materials or in such fences, walls, posts, municipal lamps, lamp-posts, brackets, water-posts, hydrants, or other municipal property, shall fail to replace or restore the same to the satisfaction of the Chief Officer after notice to do so, shall be punished with fine which may extend to fifty rupees, and shall pay any expense which may be incurred in replacing or restoring the same, and such expense shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under chapter VIII.

Obstructions and encroachments upon public streets and open spaces.

152. (1) Whoever in any area after it has become a municipal district, or borough

(a) shall have built or set up, or shall build or set up, any wall or any fence, rail, post, stall, verandah, platform, plinth, step or any projecting structure or thing, or other encroachment or obstruction, or

(b) shall deposit or cause to be placed or deposited any box, bale, package or merchandise, or any other thing,

in any public place or street or in or over or upon any open drain, gutter, sewer, or aqueduct in such place or street shall be punished

with fine which may extend to twenty-five rupees, and with further fine which may extend to five rupees for every day on which such projection, encroachment, obstruction or deposit continues, after the date of first conviction for such offence.

(2) The Chief Officer shall have power to remove any such obstruction or encroachment, and shall have the like power to remove any unauthorised obstruction or encroachment of the like nature in any open space not being private property, whether such space is vested in the municipality or not provided that if the space be vested in His Majesty the permission of the Collector shall have first been obtained, the expense of such removal shall be paid by the person who has caused the said obstruction or encroachment, and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under chapter VIII

(3) Whoever, not being duly authorised in that behalf, removes earth, sand or other material from, or makes any encroachment in or upon any open space which is not private property, shall be punished with fine which may extend to fifty rupees, and, in the case of encroachment, with further fine which may extend to ten rupees for every day on which the encroachment continues after the date of first conviction for such offence

(4) Nothing contained in this section shall prevent the Chief Officer from allowing any temporary occupation of or erections in any public street on occasions of festivals and ceremonies, or the piling of fuel in by-streets and spaces for not more than ten days and in such manner as not to inconvenience the public or any individual or from allowing the occupation of, or temporary erection of structures on, any such streets or spaces for any other purpose in accordance with by-laws made under the Act

(5) Nothing contained in this section shall apply to any projection duly authorised under sub-section (1) of section 143

Amendments —The word 'area' was substituted for the word 'place' by Bom 19 of 1935 s 10 (a) (i) The words 'place or' were inserted, ibid s 10 (a) (ii) and (iii) The words 'or from allowing under the Act' were inserted, ibid s 10 (b)

(1) **See notes under s. 143.**

Bona fide disputes about ownership—no offence of wrongful obstruction:— The accused owned a shop, between which and the public road in front was a small strip of land This strip was used by him upwards of forty years for the purpose of depositing his bales and other goods The Municipality claimed the strip as part of the public road and prosecuted the accused for encroachment on it under s 122 of the District Municipalities Act, 1901, but the accused

was acquitted The municipal officers next went to the place in question and tried to remove the goods stocked on the land, but were obstructed by the accused On these facts the accused was prosecuted for an offence punishable under s 186 of the Indian Penal Code —*Held*, that the accused was not guilty of the offence, as the existence of a bona fide dispute between himself and the Municipality as to the ownership of the land prevented his obstruction being wrongful **Emperor v Shivdas, 15 B L R. 315**

Adverse Possession —In the plaintiff s otla there was a stone which was in *situ for twelve years and which projected into the public street on which the* otla abutted The defendant Municipality having removed the stone from its position, the plaintiff sued for an injunction to restrain the defendant from obstructing him in reinstating the stone The Lower Court granted the injunction *on the ground that the defendant Municipality had no right to interfere* with the stone as there was adverse possession for the statutory period of the portion of the street occupied by the stone On appeal —Held, confirming the decree, that the Municipality had not justified their action by reference to *their statutory powers either under s 113 or 122 of the Bombay District Municipal* Act, 1901, for it was not shown either that the stone which they had removed was an obstruction to the safe and convenient passage along the street or that the stone was set up by the plaintiff after the place became a Municipal district Held, further, that *in either case it did not matter that the encroachment* was in existence for twelve years or more, if the statutory conditions regulating the exercise of the power be shown to exist **Dakor Town Municipality v Anupram, 15 B.L R. 833.**

On the question of adverse possession a contrary view was taken in **Tayabali v The Dohad Municipality, 22 B L R 951** wherein it was held that when a person has his otla (verandah) encroaching upon the street lands for upwards of thirty years, it is not competent to a District Municipality to direct him to g ve up possession of the encroached land, under s 122 of the Bombay District Municipal Act, 1901 Referring to **Dakor Town Municipality v Anupram,** Macleod C J observed "We do not think that the decision of that case applies to the facts of this case, nor do we think that however long a private person may have been in possession of a portion of a public street or road, the Municipality have still powers under s 122 of the Bombay District Municipal Act to direct him to give up possession or to force him to give up possession, of such part of the public street or, road In this case it has been proved as a fact, and it has been accepted as a fact in both Courts, that the verandah has been on the present site for more than thirty years Assuming that it was originally built on a part of a public street or road, the Municipality is now barred from bringing a suit for recovering possession by virtue of Art 146A of the Indian Limitation Act and the result must follow under s 29 that the plaintiff has acquired a title to the land on which the verandah is built by over thirty years' possess'on It is, therefore, no longer a part of the public street or road, and the Municipality have no jurisdiction over it, because s 122 only refers to encroachments or obstructions in a public street, or obstructions or encroachments of the like nature in any open space not being private property Once I find that this verandah is bu lt on land which has ceased to be part of a public street, or road, and has become private property it follows that the Municipality cannot issue a notice against the owner to remove it The notice in this case which is dated 22nd December, 1915 directs the appellant to remove the en-

croachment, but it does not mention the section under which the notice is given I can only assume that it was issued under s 122 In my opinion the Municipality by their laches has lost rights to the land covered by this verandah, and, therefore, they had no longer any power to issue notice under s 122 for the removal of the verandah' It will thus appear that once the land ceases to be a public street by adverse possession of thirty years and more neither section 143 nor section 152 will have any application

The same view was taken in **Abbaji v The Municipality of Jalgaon, 23 B L.R 1028.** In course of the judgment Shah J observed "I agree that this case is not distinguishable from the case of **Tayabali v Dohad Municipality,** and that on the authority of that case the plaintiff is entitled, to a decree, which he prays for I desire to add, however, that, apart from that decision, I feel some difficulty in holding that the powers conferred upon the Municipality under s 122 for the removal of encroachments upon public streets are subject to the rule of limitation to be deduced from the combined operation of s 29 and Article 146A of the Indian Limitation Act, as regards the acquisition of title by adverse possession It seems to me that there is a good deal to be said in favour of the view that under s 54 of the Bombay District Municipal Act, it is obligatory on the Municipality to see that encroachments on public streets are removed and that the necessary powers are conferred upon the Municipality under s 122 without any limitation in the interests of the public At the same time it is clear that there is no express provision for a case of this kind where for thirty years the Municipality has taken no action, and the party encroaching on the public street claims to have acquired a title under the Indian Limitation Act by continuing the encroachment for a period exceeding thirty years In this conflict of considerations I am not prepared to dissent from the view taken in Tayabali's case The question no doubt is one of practical importance To my mind there is an apparent conflict between the decision in Tayabali's case and the ratio dec'endi in **Dakore Town Municipality v Anupram.** But Mr Justice Heaton, who was a party to both the decisions, agreed in the later case that the earlier decision was distinguishable Under the circumstances I think that the decision in Tayabali's case should be followed If that view is not in consonance with the true intention of the Legislature on this point, the Bombay District Municipal Act can be amended by the Legislature so as to give effect to its real intention"

However, in **Durlabhji v Municipal Corporation of Karachi, A.I.R. 1935 Sind 222,** it was held that where statutory powers are specifically conferred, it cannot be the intention of legislature that these powers should be nullified by the application of Art 146A, Limitation Act Where, therefore, there is a clear statutory provision authorising the Chief Officer to take action in respect of any structure, fixture or covering described in s 195 (Karachi City Municipal Act, 1933) erected before the Bombay District Municipal Act, 1901 came into force, a plea of acquisition of right by adverse possession cannot be availed of by a person owning such a fixture and he can be rightly fined for failure to comply with the orders of the Chief Officer in connection with the fixture In **Durlabhji v Municipal Corporation of Karachi, A.I.R. 1935 Sind 222, 22 B L.R 951 and 23 B.L.R 1028** were cited and distinguished With respect to these two cases it is observed "In the last of the two cases cited Shah J doubted whether the effect of Art 146A read with s 29, Limitation Act, was to deprive a municipality of its powers to remove encroachments or to carry out the duties imposed

upon it by the Legislature As there was no statutory provision, the learned Judge was not prepared to dissent from his brother Judges but in this case there is a clear statutory provision authorising the Chief Officer to take action in respect of any structure, fixture or covering described in s 195 erected before the Bombay District Municipal Act, 1901 came into force '

Disobedience of notice to remove encroachment.—The accused was served with a notice under s 122 of the Bombay District Municipal Act, 1901 to demolish an otla which he had put up some time back For non-compliance with the notice, the accused was convicted, under s 155 of the Act, of having disobeyed a lawful order On application to the High Court —Held, setting aside the conviction, that the proper step according to law which the Municipality should have taken was to remove the otla themselves and charge the accused with the cost of the removal Section 122 of the Bombay District Municipal Act, 1901 gives no power to a Municipality to issue a notice to a person alleged to have erected an encroachment to remove it Although the Municipality may send such a notice, it is not a notice under the section Such a notice may be sent as a matter of courtesy, preliminary to a Municipality taking action under the powers given them by the section to remove an encroachment themselves It is not intended, assuming a Municipality serves a notice upon a person to remove an encroachment, that if he does not do so, he may be convicted under s 155 of the Act **Emperor v Atmaram, 24 B L R 384**

Holding of a market in a public street —The accused, who were timber-merchants, were authorised by the Municipality of Poona to use a strip of a street for the purpose of exposing logs of timber for sale They were charged with the offence of causing obstruction in a public street, under s 61, cl (f), of the Bombay District Police Act 1890 and convicted by the Magistrate The Sessions Judge, being of opinion that the conviction was illegal, referred the case to the High Court -Held confirming the conviction, (1) that the Municipality had no statutory authority to divert a portion of the public street for the purpose of exposing the timber for sale, (2) that under s 50 of the District Municipal Act, public streets were vested in the Municipality for the purpose of being maintained as public streets (3) that s 90 of the District Municipal Act did not empower the Municipality to discontinue or stop up a part of a street so as to provide a market (4) that the Municipality could not allow a permanent obstruction upon any public street vested in it and (5) that ss 139 and 140 of the District Municipal Act did not empower the Municipality to license the holding of a market in a public street **Emperor v Vishvanath, 28 B.L.R 1033**

Whether a standing vehicle is an encroachment within the meaning of this section —In the Bombay Municipal Boroughs Act, 1925, s 152, sub-s (1) (a), deals with making some form of addition or annex, more or less permanent, to a building in the street It is directed against the man who has a shop or house in the street, and who encroaches upon the street by making some sort of addition to his house or shop The words "or any other thing" in s 152, sub-s (1) (b), must be read 'ejusdem generis as the words "box, bale, package or merchandise used in the section These words, seem to cover merchandise, and things in which merchandise can be packed, and any other thing must be of the same kind or genus and does not include a vehicle Hence, a motor car or a motor lorry or a horse drawn or hand-propelled vehicle, though containing

merchandise and left standing in a street, does not come within the section **Emperor v. Hasam, 42 B.L.R 785**

Posts of Aerial Electric line in street land—Who to bear cost of removal — The defendants were a Corporation who had obtained a license under the Indian Electricity Act (Act 9 of 1910) and as licensee under the Act had put up an aerial line, etc, on a certain street within the Municipal District of the Municipality of Karachi, the plaintiffs The Municipality having arranged with the North-Western Railways Co that the latter should effect an over-bridge, the aerial line and poles had to be shifted from their position The plaintiff's suit was for declaration that the cost of removal should be borne by the defendants —Held, that section 14 of the Electricity Act applied and not the Bombay District Municipal Act and the plaintiff must bear the cost of removal .Where there are two conflicting provisions of the Legislature and the question is which must be taken to govern the case, it is the duty of the Court to see the terms of which provision are more appropriate to the circumstances of the case in order to decide whether the one provision or the other governs the rights of the parties Where the rights of the parties have been expressly laid down in an Act specifically appropriate to classes of transactions exactly similar to those which are the subject of inquiry it must be clearly made out that a General Act governs the case which is applicable not to the particular class of transactions or persons before the Court but to a body of persons amongst whom the parties may be brought and it must be very clearly shown that such General Act is intended to override the Special Act **Municipality of Karachi v Karachi Electric Supply Corporation, Ltd., A.I.R. 1926 Sind 115.**

Continuing offence.—See notes under the head 'continuing contravention, etc,' under s 118

Starting point for limitation for prosecution for a continuing offence:— See notes under this head under s 118

Hoards to be set up during repairs, etc

153. (1) A person intending to construct or take down any building or to alter or repair any building externally shall, if the position or circumstances of the work is or are likely to cause or may cause obstruction, danger or inconvenience in any street, before beginning such work—

(a) first obtain a licence in writing from the Chief Officer so to do, and

(b) cause sufficient hoards or fences to be put up in order to separate the area where the work is to be carried on from the street, and shall maintain such hoard or fence standing and in good condition to the satisfaction of the Chief Officer during such time as the Chief Officer considers necessary for the public safety or convenience, and shall cause the same to be sufficiently lighted during the night, and shall remove the same when directed by the Chief Officer

(2) Whoever contravenes any of the provisions of this section shall be punished with fine which may extend to fifty rupees, and

with further fine which may extend to ten rupees for every day or night, as the case may be, on which such contravention continues, after the date of such conviction for such offence

Continuing contravention —See notes under this head under s. 118

Starting point for limitation for prosecution for a continuing offence.— See notes under this head under s 118

Fencing and lighting during repairs, etc.

154 (1) The Chief Officer shall, during the construction or repair of any of the streets, sewers, drains or other premises vested in the municipality, take proper precaution for guarding against accident, by shoring up and protecting the adjoining buildings, and shall cause such bars, chains, or posts as he shall think fit, to be fixed across or in any street to prevent the passage of carriages, carts or other vehicles, or of cattle or horses, while such construction or repair is being carried on and shall cause any such construction or repair work in a street to be sufficiently lighted and guarded during the night

(2) Whoever takes down, alters or removes any of the said bars, chains or posts, or removes or extinguishes any such light without the authority or consent of the Chief Officer, shall be punished with fine which may extend to fifty rupees

Timber not to be deposited or hole made in street without permission.

155 (1) No person shall, without the written permission of the Chief Officer or otherwise than in accordance with the conditions of such permission, make a hole in any street or deposit on any street any timber, stone, brick, earth or other material that has been or is intended to be used for building, such permission shall be terminable at the discretion of the Chief Officer, and when such permission is granted to any person, he shall, at his own expense, cause such materials or such hole to be sufficiently fenced and enclosed to be satisfaction of the Chief Officer until the materials are removed, or the hole is filled up or otherwise made secure, and shall cause such materials or hole to be sufficiently lighted during the night.

(2) Whoever contravenes any of the provisions of sub-section (1) shall be punished with fine which may extend to twenty-five rupees, and with further fine which may extend to ten rupees for every day or night, as the case may be, on which such contravention continues, after the date of the first conviction for such offence

Continuing contravention.—See notes under this head under s 118

Starting point for limitation for prosecution for a continuing offence:— See notes under this head under s 118

Dangerous quarrying.

156. (1) If in the opinion of the Chief Officer the working of any quarry or the removal of stone, earth or other material from the soil in any place, is dangerous to persons residing in or having a right of access to the neighbourhood thereof, or creates or is likely to create a nuisance, the Chief Officer may, by written notice, require the owner of the said quarry or place or the person responsible for such working or removal not to continue or permit the working of such quarry or the removing of such material, or to take such order with such quarry or place as the Chief Officer shall direct for the purpose of preventing the danger or of abating the nuisance arising or likely to arise therefrom,

Provided that if such quarry or place is vested in His Majesty, or if such working thereof or removal therefrom as aforesaid is being carried on by or on behalf of the Crown, or any person acting with the permission or under the authority of the Crown or of any servant of the Crown acting as such, the Chief Officer shall not take such action unless and until the Collector has consented to his so doing

Provided further that the Chief Officer shall immediately cause a proper hoard or fence to be put up for the protection of passengers near such quarry or place, if it appears to him to be necessary in order to prevent imminent danger

(2) Any expense incurred by the Chief Officer in taking action under this section shall be paid by such owner or the person responsible for such working or removal, and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under chapter VIII

Amendments —The words 'the Crown' were substituted for the word 'Government' by the Adaptation of Indian Laws Order in Council The words 'servant of the Crown' were subst tuted for the words 'officer of Government', ibid

Provisions as to dogs

157 (1) The Chief Officer may by public notice require that every dog while in the streets and not being led by some person shall be muzzled in such a way as to allow the dog freely to breathe and to drink, while effectually preventing it from biting

(2) Subject to the provisions of sub-section (3) the Chief Officer may take possession of any dog found wandering unmuzzled in any public place and may either detain such dog until its owner has claimed it, has provided a proper muzzle for it, and has paid all the expenses of its detention or cause it to be destroyed

(3) When a dog which has been detained under the last preceding sub-section is wearing a collar with the owner's name and address thereon, such dog shall not be destroyed until a letter stating the fact that it has been so detained has been sent to the said address, and the dog has remained unclaimed for three clear days provided that any dog which is found to be rabid may be destroyed at any time

(4) Any unclaimed dog and any dog, the owner of which refuses to pay all the expenses of its detention may be sold or destroyed, after having been detained for the said period of three clear days

(5) All expenses incurred by the Chief Officer under this section may be recovered from the owner of any dog which has been taken possession of or detained in the manner provided by chapter VIII

(7) Powers for the Prevention of Nuisances

Depositing dust, etc., committing nuisance.

158 (1) Whoever deposits or causes or suffers any member of his family or household to deposit any dust, dirt, dung, ashes, refuse or filth of any kind or any animal or any broken glass or earthenware or other rubbish or any other thing that is or may be a nuisance, in any street or in any arch under a street or in any drain beside a street or on any open space or on any quay, jetty or landing place or on any part of the seashore on the bank of a tidal river, whether above or below high-water mark, or on the bank of any river, water-course or nullah, except at such places, in such manner and at such hours as shall be fixed by the Chief Officer, and whoever commits or suffers any member of his family or household to commit nuisance in any such place as aforesaid, shall be punished with fine which may extend to twenty-five rupees

(2) Whoever throws or puts or causes or suffers any member of his family or household to throw or put any of the matters described in sub-section (1) except night-soil, or, except with the permission of the Chief Officer, any night-soil into any sewer, drain, culvert, tunnel, gutter or water-course, and whoever commits nuisance or suffers any member of his family or household to commit nuisance in any such sewer, drain, culvert, tunnel, gutter or water-course, or in such close proximity thereto as to pollute the same, shall be punished with fine which may extend to twenty-five rupees

Discharging sewage, etc.

159 Whoever causes or allows the water of any sink or sewer or any other liquid or other matter which is or which is likely to become offensive, from any building or land under his control, to run, drain, or be thrown or put upon any street or open space, or to soak through any external wall, or causes or allows any offensive matter from any sewer or privy to run, drain or be thrown into a surface drain in any street, without the permission in writing of the Chief Officer or who fails to comply with any condition prescribed in such permission, shall be punished with fine which may extend to twenty-five rupees.

Waste or dirty water must be offensive.—A person does not render himself liable to a penalty under s 54 of Bombay Act VI of 1873 for allowing mere waste or dirty water to run from his premises on to a public street, unless the water is 'offensive' **In re Gulabdas Bhaidas, 20 Bom. 83.**

Criminal cases cannot like civil suits be consolidated and tried together on the same evidence except within the limit as to joinder of charges laid down in the Criminal Procedure Code Such illegality is not cured by the fact that the accused's pleader has consented to the procedure adopted Under section 159 of the Bombay Municipal Boroughs Act, 1925, it must be proved firstly, that the accused is a person who has the building or land under his control, secondly, that he allowed the water to run upon any street, land or space and, thirdly, that the water was or was likely to become offensive The Secretary of a textile mill cannot, in absence of evidence, be made liable as such for an offence under s 159 as being in control of the mill premises **Emperor v Champaklal, 43 B L R 110**

Non-removal of filth, etc.

160 Whoever, being the owner or occupier of any building or land, keeps or allows to be kept for more than twenty-four hours, or otherwise than in some proper receptacle, any dirt, dung, bones, ashes, night-soil, filth or any noxious or offensive matter, in or upon such building or land, or suffers such receptacle to be in a filthy or noxious state, or neglects to employ proper means to remove the filth from and to cleanse and purify such receptacle, or keeps or allows to be kept in or upon such building or land any animal in such a way as to cause a nuisance, shall be punished with fine which may extend to twenty-five rupees and with further fine which may extend to five rupees for every day on which such offence is continued, after the date of the first conviction for such offence

Continuing offence.—See notes under the head 'continuing contravention, etc,' under s 118

Starting point for limitation for prosecution for a continuing offence.—See notes under this head under s 118

Removal of night-soil.

161 (1) The Chief Officer may from time to time fix the hours within which only it shall be lawful to remove any night-soil or other such offensive matter

(2) Whoever—

(a) when the Chief Officer has fixed such hours and given public notice thereof by beat of drum, removes or causes to be removed along any street, any such offensive matter at any time except within the hours so fixed, or

(b) at any time whether such hours have been fixed by the Chief Officer, or not,

(i) uses for any such purpose any cart, carriage, receptacle or vessel, not having a covering sufficient for preventing the escape of the contents thereof and of the stench therefrom, or

(ii) wilfully or negligently slops or spills any such offensive matter in the removal thereof, or

(iii) does not carefully sweep and clean every place in which any such offensive matter has been slopped or spilled, or

(iv) places or sets down in any public place any vessel containing such offensive matter, or

(v) drives or takes or causes to be driven or taken any cart, carriage, receptacle, or vessel used for any such purpose as aforesaid, through any street or by any route, other than as shall from time to time be appointed for that purpose by the Chief Officer by public notice

shall be published with fine which may extend to twenty-five rupees

Filthy buildings, etc.

162 (1) Whoever, being the owner or occupier of any building or land, whether tenantable or otherwise, suffers the same to be in a filthy and unwholesome state, or in the opinion of the Chief Officer a nuisance to persons residing in the neighbourhood, or overgrown with prickly-pear or rank and noisome vegetation and who shall not, within a reasonable time after notice in writing by the Chief Officer to cleanse, clear or otherwise put such building or land in a proper state have complied with the requisition contained in such notice, shall be punished with fine which may extend to twenty-five rupees, and with further fine which may extend to five rupees for every day on which the failure to comply with the said notice is continued after the date of the first conviction for such offence

Deserted and offensive buildings.

(2) Where any building, by reason of dilapidation, neglect, abandonment, disuse or disputed ownership, or of its remaining untenanted and thereby—

(a) becoming a resort of idle and disorderly persons, or of persons who have no ostensible means of subsistence, or who cannot give a satisfactory account of themselves, or

(b) coming into use for any insanitary or immoral purpose, or

(c) affording a shelter to snakes, rats or other dangerous or offensive animals,

is open to the objection that it is a nuisance, or so unwholesome or unsightly as to be a source of discomfort, inconvenience or annoyance to the neighbourhood or to persons passing by such building, the standing committee, if it considers such objection cannot under any other provision of this Act be otherwise removed, may, if there is any person known to reside within the municipal borough who claims to be the owner of such building by written notice directed to such person, require such person, or in any other case by written notice fixed on the door of any other conspicuous part of the building require all persons claiming to be interested in such building, within a period which shall be specified in the notice and shall not be less than seven days from the date of such notice, to cause such building to be taken down and the materials thereof to be removed, in the event of non-compliance with such requirement, the standing committee, on the expiration of the period specified as aforesaid, may forthwith cause the building to be taken down and the materials to be removed, and may sell such materials and apply the proceeds to defray any expenses incurred by it in so doing, all such expenses not thereby defrayed shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under chapter VIII

Whether order for structural alteration can be passed under this section — The Municipal Commissioner for the city of Bombay, issued a notice requiring the owner of a range of buildings to put it in a proper state by providing ridge ventilation within seven days which the owner did not comply with Held, that Section 220 of Bombay Municipal Act III of 1872, as amended by Bombay Act IV of 1878 does not empower the Municipal Commissioner to direct structural alterations, that the notice requiring ridge ventilation to be provided was illegal, and the owner by refusing to comply with it committed no offence **Empress v. Sadanand**, 8 Bom 151 West J delivering the judgment of the Court observed —"We think that s 220 of the Bombay Municipal Act III of 1872 would be unduly extended if it were so construed as to enforce

structural alterations As amended by Bombay Act IV of 1878 it runs thus:—'Whoever, being the owner or occupier of any house, building or land, whether tenantable or otherwise suffers the same to be in a filthy or unwholesome state, or, in opinion of the Commissioner, a nuisance to those in the neighbourhood, or overgrown with rank and noisome vegetation, and who shall not within 24 hours after notice in writing by the Commissioner to cleanse, clear or otherwise put the same in a proper state, have complied with the requisition contained in such notice, shall be liable,' etc It is obvious that most occupiers of the less wholesome houses in Bombay would be quite incapable of effecting structural alteration Supposing tenants, for instance, paying Rs 2 per month were asked by the Commissioner to make such alterations, they would not, of course, comply with the demand, specially within the twenty-four hours contemplated by the section We must, therefore, suppose that something less exacting and more practicable for the tenants, and therefore, also for the landlords (there being no difference made by the section in their position), was meant by the use of the expression 'filthy or unwholesome state' When a person is asked to cleanse, clear or otherwise put a building which is in a filthy or unwholesome state in a proper state, what is meant is that he is to remove the objectionable accidents, such as filth and nuisance, leaving the essence of the building the same as before Without proper safeguards, unlimited license is not to be given to a Commissioner to command or effect alterations in a structure, and we can well understand that the Legislature refrained from giving this power when conferring the power of causing nuisances to be removed We are, therefore, of opinion that the Legislature in enacting s 220 could not have intended, and did not intend, to invest the Municipal Commissioner with power of directing structural alterations As regards the question of notice, we think that when a notice is required by law, it cannot prescribe something which the Law itself does not contemplate or involve Mr Jardine, on behalf of the Commissioner, argues that the notice errs only by excessive indication, but the section appears to leave it to the owner or occupier to adopt such measures as he pleases to carry out the demand of the Commissioner It is not open to the Commissioner to prescribe his own measures and deprive the owner or occupier of his option If this were not so, the Commissioner might order expensive painting, or papering or other costly alterations beyond the means of the person concerned, and beyond the intentions of the Legislature We hold, therefore, that it was not competent to the Commissioner to require ridge ventilation in the notice; and as the notice was thus framed, no offence was committed by failing to do what it did not call on the owner to do.'

Vegetation must be actually rank or noisome —Section 131 of the Bombay District Municipal Act renders the owner liable for non-compliance with a notice issued under it not when the municipality considers vegetation to be rank or noisome but only when the vegetation is actually so To support a conviction under the section for non-compliance with a notice, the prosecution must establish affirmatively the objectionable character. **Emperor v Anandrao, 9 B L R. 247**

Occupier liable to remove nuisance —An occupier of land cannot plead as a defence to a notice under s 131 (B D M Act, 1901) that not he but the owner is responsible to remove a nuisance **Haji Umar v. King Emperor, A I.R. 1925 Sind, 264**

Continuing offence —See notes under the head 'continuing contravention, etc' under s 118

Starting point for limitation for prosecution for a continuing offence — See notes under this head under s 118

Owner not named in notice—whether trustee can be prosecuted.— See notes under this head under s 3 (14)

Buildings or rooms in buildings unfit for human habitation-

163 (1) If, for any reason, it shall appear to the standing committee that any building or any room in a building intended for or used as a dwelling is unfit for human habitation, the standing committee shall give to the owner or occupier of such building notice in writing, stating such reason, and signifying its intention to prohibit the further use of the building or room, as the case may be, as a dwelling, and shall in such notice call upon the owner or occupier aforesaid to state in writing any objection thereto within thirty days after the receipt of such notice, and if no objection is raised by such owner or occupier within such period as aforesaid, or if any objection which is raised by such owner or occupier within such period appears to the standing committee invalid or insufficient, the standing committee may by an order in writing prohibit the further use of such building or room as a dwelling

(2) When any such prohibition as aforesaid has been made, the Chief Officer shall cause notice of such prohibition to be affixed to, and the letters "U H H" to be painted on, the door or some conspicuous part of such building or room as the case may be, and no owner or occupier of such building or room shall use or suffer the same to be used for human habitation until the standing committee certifies in writing that the building or room, as the case may be, has been rendered fit for human habitation

Power to enter and inspect etc, buildings

164 It shall be lawful for the president, vice-president, chairman of the standing committee, Chief Officer or any councillor or officer authorised by the municipality in this behalf, at any time between sunrise and sunset after due notice to enter into and inspect all buildings and lands, and by written notice to direct for sanitary reasons all or any part thereof to be forthwith internally and externally limewashed or otherwise cleansed

Bathing places

165 (1) The standing committee may set apart sufficient public places, or any part of the seashore not being private property, for the purpose of being used as bathing places, and may also provide or set apart a sufficient number of convenient tanks or runs of water for the inhabitants to bathe in; and may also set apart tanks or reservoirs or runs of water for washing animals or

clothes, or for any purpose connected with the health, cleanliness and comfort of the inhabitants, and may prohibit the use, for any purpose mentioned in this section, of any or all other public places within the municipal borough

(2) Copies of all orders passed and notices issued by the standing committee and for the time being in force under this section, shall be kept at the Municipal office and shall be open for inspection by the public at all reasonable times

Regulation of washing of clothes by washermen

165A (1) The standing committee may, by public notice, prohibit the washing of clothes by washermen in the exercise of their calling, except at such places as it shall appoint for this purpose, and when any such prohibition has been made, no person who is, by calling, a washerman shall wash clothes at any place not appointed for this purpose by the standing committee, except for such person himself or for the owner or occupier of such place

Washing place to be provided by the standing committee for washermen

(2) The standing committee shall provide suitable places for the exercise by washermen of their calling and may require payment of such fees for the use of any such place as shall from time to time be determined by it with the approval of the municipality

(3) The standing committee shall, before issuing any public notice under sub-section (1), publish in such manner as shall in its opinion be sufficient for the information of persons likely to be affected thereby, a list of washing places proposed to be provided under sub-section (2) together with a notice specifying a date on or after which the list will be taken into consideration, and shall, before finally fixing the said places, receive and consider any objection or suggestion in respect thereto which may be made in writing by any person before the date so specified

Amendments —This section was inserted by Bom 12 of 1931 s 3 (iv)

Fouling water

166 Whoever in disobedience of any order of the municipality under section 165 or of any by-law bathes in any stream, pool, tank, reservoir well, cistern, conduit or aqueduct belonging to the municipality or washes or causes to be washed therein any animal or anything whatever or throws, puts or casts or causes to enter therein any animal or anything or causes or suffers to run, drain, or be brought there into anything that is or may become a nuisance or does anything whatsoever whereby any water therein shall be in any degree fouled or corrupted and whoever without permission of the Chief Officer steeps in any tank, stream, or ditch within or on the boundary of, the municipal borough any animal,

vegetable or mineral matter likely to render the water of such tank, stream or ditch offensive or a nuisance shall be punished with fine which may extend to fifty rupees.

Abatement of nuisance from wells, etc

167 (1) If, in the opinion of the Chief Officer—

(a) any pool, ditch, quarry, hole, excavation, tank, well, pond, drain, water-course, or any collection of water, or

(b) any cistern or other receptacle for water whether within or outside a building, or

(c) any land on which water accumulates and which is situate within a distance of one hundred yards from any building used as a dwelling house, is or is likely to become a breeding place of mosquitoes or in any other respect a nuisance, the Chief Officer may, by notice in writing, require the owner thereof to fill up, cover over or drain off the same in such manner and with such materials as the Chief Officer shall prescribe, or to take such order with the same for removing or abating the nuisance as the Chief Officer shall prescribe

(2) (a) No New well, tank, pond, cistern or fountain shall be dug or constructed without the previous permission in writing of the Chief Officer

(b) If any such work is begun or completed without such permission, the Chief Officer may either—

(i) by written notice require the owner or other person who has done such work to fill up or demolish such work in such manner as the Chief Officer shall prescribe; or

(ii) grant written permission to retain such work, but such permission shall not exempt such owner from proceedings for contravening the provisions of clause (a) of this sub-section

Fill up'—Section 381 of the City of Bombay Municipal Act, 1888, empowers the Commissioner to require the owner of low ground to cleanse and fill up the same but it does not permit him to issue an order that an indefinite quantity of low lying ground shall be filled to some particular level or filled up with sweet earth or that it shall be sloped in a particular direction **Municipal Commissioner of Bombay v. Hari, 1 B.L.R 518.**

To support a conviction for non-compliance with a notice issued under s 135 of the Act, it must be shown that there is some pool, ditch, tank, hole, water-channel, receptacle of foul water, &c, of the kind mentioned in the section, the filling, cleansing, draining or removal of which the municipality has directed by notice, or with regard to which the municipality has directed

such measures to be taken, as it considers necessary to abate or remove the nuisance **Emperor v. Anandrao, 9 B.L.R. 247.**

Section 167 of the Bombay Municipal Boroughs Act, 1925, requires that the Chief Officer should be satisfied of the existence of a nuisance, because he is given power to issue the notice there provided for if in his opinion a nuisance exists It is not necessary, therefore, that it should be proved by evidence that a nuisance exists in fact It is necessary, however, that the opinion of the Chief Officer should be properly proved The mere production of a notice signed by him is not enough The words 'fill up' in s 167 are intended to apply to the land on which water accumulates, but it is doubtful if they are intended to apply to filling up in the sense of raising the level of a large area of land which is naturally low lying land The phrase 'or to take such order with the same for removing or abating the nuisance as the Chief Officer shall prescribe' in the section must be considered with their context, on the principle of **noscitur a sociis Emperor v. D F D'Silva, 39, B L R. 77** The case of **1 B.L.R. 518** was followed in this case

Using offensive manure, etc.

168 Whoever, except with the written permission of the Chief Officer, and in accordance with the conditions of such permission, stores or uses night-soil or other manure or substance emitting an offensive smell, shall be punished with fine which may extend to twenty-five rupees.

Tethering cattle, etc.

169. Whoever tethers cattle or other animals, or causes or suffers them to be tethered by any member of his family or household, in any public street or place so as to obstruct or endanger the public traffic therein, or to cause a nuisance, or who causes or suffers such animals to stray about without a keeper shall be punished with fine which may extend to twenty-five rupees

Feeding animals on filth.

170. Whoever feeds any animal which is kept for dairy purposes or is intended for human food on excrementitious matter, stable-refuse, filth or other offensive matter, or permits such animal to feed or to be fed on such matter, shall be punished with fine which may extend to fifty rupees

Consumption of smoke.

171. (1) It shall be lawful for the municipality to direct by public notice that every furnace employed, or to be employed, in any works or buildings used for the purpose of any trade or manufacture whatsoever within the limits of the municipal borough whether a steam engine be or be not used or employed therein, shall in all cases be constructed, supplemented or altered so as to consume or burn, or reduce as far as may be practicable, the smoke arising from such furnace.

(2) If any person shall after such direction use, or permit to be used any such furnace not so constructed, supplemented or altered, or shall so negligently use, or permit to be used, any such furnace

that the smoke arising therefrom shall not be effectually consumed or burnt as far as may be practicable, such person being the owner or occupier of the said works or buildings or an agent or other person employed by such owner or occupier for managing the same, shall be punished with fine which may extend to fifty rupees and upon any subsequent conviction to five hundred rupees,

Provided that nothing in this section shall be held to apply to locomotive engines used for the purpose of traffic upon any railway or for the repair of roads

(8) Regulation of Markets, Sale of Food, etc

Licensing Markets and slaughter houses

172 (1) It shall be lawful for the municipality to direct that no place other than a municipal market or slaughter-house, shall be used for any of the purposes specified in sub-clauses (i) and (ii) of clause (b) of sub-section (1) of section 61 except under and in accordance with the conditions of a license from the standing committee, which may at its discretion from time to time grant, suspend withhold or withdraw such licenses either generally or in individual cases

(2) Whoever uses or permits the use of any place contrary to such direction, or without the license required as aforesaid, or in contravention of any of the conditions or during the suspension or after the withdrawal of such license, shall be punished with fine which may extend to twenty-five rupees

(3) Upon a conviction being obtained in respect of any place under sub-section (2) of this section, the magistrate shall, on the application of the standing committee but not otherwise, order such place to be closed, and thereupon appoint persons or take other steps to prevent such place being so used, and every person who so uses or permits the use of a place after it has been so ordered to be closed shall be punished with a fine which may extend to five rupees for each day during which he continues so to use, or permits such use of, the place after it has been so ordered to be closed

Bom. V of 1878

(4) Nothing in this section or in sub-clause (ii) of clause (b) of sub-section (1) of section 61 shall apply to any liquor as defined in the Bombay Abkari Act, 1878

Collection of shops not a private market—The accused erected a structure designed to be let as small shops on the side of a compound of his building, after having the plans approved by the Municipal Commissioner Each block of the structure was divided into sixteen shops which had no inter-communication. The shops were let to different tenants, one of whom sold flowers,

another sold toys, and the rest sold fruits of different kinds The accused had no control over the acts of shop-keepers On a prosecution of the accused for establishing a new private market for the sale of articles of human food without the sanction of the Municipal Commissioner (s 402 (2) of the City of Bombay Municipal Act, 1888) and for keeping open a private market without a license granted by the Municipal Commissioner (s 403 (1) (a) of the Act) — Held, (1) that the structure erected by the accused was nothing more than collection of shops and did not constitute a private market, and (2) that in any event the accused had not established a new private market nor had kept open a private market Held, further, that fruits were articles of human food within the meaning of s 402 of the City of Bombay Municipal Act, 1888 **The Bombay Municipality v Yen Kanna, 30, B L.R 1128**

No conflict between s 1 of the Bombay Markets and Fairs Act, 1862 and s 139 of the B D M Act, 1901 —The provisions of s 1 of the Bombay Markets and Fairs Act, 1862, are not in conflict with the provisions of s 139 of the Bombay District Municipal Act, 1901 A person who establishes a new cattle market on his private lands within the limits of a district municipality without obtaining permission of the District Magistrate as required by s 1 of the Bombay Markets and Fairs Act, 1862, commits an offence under the section **Emperor v Najmuddin, 42 B L R 584** In the course of the judgment Wadia J observed "It is contended that there is a conflict between the two Acts since under the Markets and Fairs Act the District Magistrate is given the power to allow or refuse the opening of a market, and under the Municipal Act the same power is given to the Municipality, and the two authorities may issue conflicting orders Section 66 of the Bombay District Municipal Act VI of 1873 contained provisions similar to s 139 of the Bombay District Municipal Act, III of 1901, and although the Markets and Fairs Act of 1862 has been amended three times since the passing of the Bombay District Municipal Act of 1873, there has been no amendment or repeal of the provisions of the Markets and Fairs Act so far as Municipal areas are concerned There is nothing in the language of the Bombay Markets and Fairs Act which prevents the application of it to Municipal areas, and the presumption therefore is that the Legislature intended that the opening of markets even in Municipal areas should be governed both by the Municipal Act and also by the Bombay Markets and Fairs Act, and there may be good reasons why this should be so The considerations on which a Municipality may grant or refuse permission to open a market within a Municipal area would not necessarily be the same as those which govern the action of the District Magistrate in granting or refusing permission for opening new markets under the Bombay Markets and Fairs Act of 1862 It may well happen that where two different municipal areas are adjacent to each other, the opening of a market in one area, though perfectly unobjectionable from the point of view of that Municipality, may nevertheless be open to serious objection from the point of view of the District Magistrate as likely to cause inconvenience to the inhabitants of the adjacent municipal area, or as likely to occasion a breach of the peace because of the new market being too near a market in the adjacent municipal area There may thus be very good reasons for retaining the control of both authorities as regards the opening of markets even within Municipal limits"

Public street cannot be diverted for purposes of a market;—Accused who were timber-merchants, were authorised by the Municipality of Poona to use

a strip of a street for the purpose of exposing logs of timber for sale. They were charged with the offence of causing obstruction in a public street, under s. 61, cl (f), of the Bombay District Police Act, 1890, and convicted by the Magistrate The Sessions Judge, being of opinion that the conviction was illegal, referred the case to the High Court —Held, confirming the conviction, (1) that the Municipality had no statutory authority to divert a portion of the public street for purpose of exposing the timber for sale, (2) that, under s. 50 of the District Municipal Act, public streets were vested in the Municipality for the purpose of being maintained as public streets; (3) that s 90 of the District Municipal Act did not empower the Municipality to discontinue or stop up a part of a street so as to provide a market, (4) that the Municipality could not allow a permanent obstruction upon any public street vested in it, and (5) that ss 139 and 140 of the District Municipal Act did not empower the Municipality to license the holding of a market in a public street **Emperor v. Vishvanath, 28 B.L.R. 1033** Dealing with the question whether the municipality had power to permit the use of a public street as market, Fawcett, J observed "So far as the question of licensing markets is concerned, there are the provisions of ss. 139 and 140 of the Bombay District Municipal Act, which contemplate the Municipality constructing or opening markets But those provisions would ordinarily apply to the erection or other provision of some place as a market, not in a public street but in a proper locality. And it would entail a contravention of the intention shown by s 122 of the Bombay District Municipal Act to hold that those sections are meant to cover the licensing of a market in a public street"

The accused was charged with selling or exposing for sale, without license from the Municipal Commissioner, fish intended for human food on the Chowpatti foreshore, contrary to the provisions of s 410 (1) of the Bombay Municipal Act, 1888 The sale was from a basket which the accused had placed on the sand at some distance from the water, the place being between the high and the low water mark The fish sold was fresh fish and it had been recently brought from one of the boats then in the Back Bay —Held, that the accused was liable under s. 410 (1) since it was impossible to say that fresh fish was sold from a vessel, when *as a matter of fact it had been sold from the basket on* the shore, it having been brought from the vessel which was in the water Held, in answer to the contention that the place where the fish was sold was a private market, that it was difficult to see how a place like the whole of the foreshore of Chowpatti could be held to be a private market, and, even if this were not so, since the Municipality started their case by showing that the place in question was the foreshore of Chowpatti, that was sufficient to throw the onus upon the accused to show that the foreshore of Chowpatty was a private market within the meaning of s 398 of the Bom Muni Act, 1888 Held, also that the Bombay Municipal Act, 1888, applied to the spot in question. **Emperor v Budheebai, 7 B.L.R. 726**

Continuing contravention:—See notes under this head under s 118

Starting point for limitation for prosecution for a continuing offence:—See notes under this head under s 118

Discretion to grant, suspend, withhold or withdraw licenses:—See notes under s 34

By-law for levy of fee for occasional slaughter of animals at private houses:—See notes under this head under s 61.

Opening, closing and letting of markets and slaughter-houses

173 (1) The municipality may from time to time open or close any public market or slaughter-house. It may also either take stallage or other rents or fees for the use by any person of any such market or slaughter-house, or from time to time sell by public auction or otherwise the privilege of occupying any stall or space in or of otherwise using any such market or slaughter-house.

(2) Any person, who, without the permission of or a license from the municipality, shall sell or expose for sale any article in the said markets or use the said slaughter-houses, shall be punished with fine which may extend to twenty-five rupees.

See notes under s. 172

Legality of the Practice of farming out slaughter houses.—Section 140 of Bom III of 1901 authorizes (a) the taking of a stallage rent or fee for the use of a slaughter house, (b) the selling by auction of the privilege of occupying any stall or place in a slaughter house, (c) the selling by auction of the privilege or otherwise of using a slaughter house The section does not contemplate the farming out of fees The principles laid down in **I.L.R. 36, Mad 113, would, therefore, be applicable (R.L.A.'s opinion No. 2216, dated the 18th September, 1920 in G.R.G.D No. 11254, dated the 4th November, 1920).** The position under the B M B Act, 1925, is different as a new section 174 is added which provides for the power of farming out slaughter houses

Farming of market and slaughter-house rent.

174 It shall be lawful for the municipality to lease by public auction or private contract the collecting of any rent or fees, which may be imposed under section 173.

Provided that the lessee shall give security for the due fulfilment of the conditions of the lease

Slaughter-houses etc. beyond municipal limits.

175 It shall be lawful for a municipality with the sanction of the Commissioner or, if authorised by him, of the Collector to establish slaughter-houses or places for the disposal of carcasses of animals beyond the limits of the municipal borough and all provisions of this Act and of by-laws in force thereunder relating to such slaughter-houses or, places within the municipal borough, shall have full force in slaughter-houses or places established under this section, as if they were within the municipal borough

Search for and inspection of unwholesome articles.

176 (1) The president, vice-president, chairman of the standing committee, Chief Officer, or any councillor or officers authorized by the municipality in this behalf—

(a) may at all reasonable times enter into any place for the purpose of inspecting and may inspect any animals, carcasses, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, milk, ghee, butter or other articles intended for human food

or drink or for medicine, whether exposed or hawked about for sale or of preparation for sale, or may enter into and inspect any place used as a slaughter-house, and may examine anything which may be therein, and

(b) in case any such animals, carcasses, or other articles before mentioned appear to be diseased or unsound or unwholesome or unfit for human food or drink or medicine may seize the same

Any article which is of a perishable nature may under the orders of the president, vice-president, chairman of the standing committee or Chief Officer if in his opinion it is diseased, unsound, *unwholesome or unfit for human food, drink or medicine*, forthwith be destroyed

Every animal and every article which is not of a perishable nature, if seized as aforesaid, shall be taken before a Magistrate

If it appear to the Magistrate upon sufficient evidence that any such animal or article is diseased or unsound or unwholesome or unfit for human food, drink or medicine, the owner or person in whose possession it was found not being merely bailee or carrier thereof, shall, if in such case the provisions of section 273 of the Indian Penal Code do not apply be punished with fine which may extend to one hundred rupees, and the Magistrate shall cause such animal or article to be destroyed or to be so disposed of as to prevent its being exposed for sale or use for human food or drink or medicine.

XLV of 1860

Adulterated articles for food or drink

(2) In every municipal borough in which by virtue of a notification under sub-section (4) of section 1 of the Bombay Prevention of Adulteration Act, 1899, the provisions of that Act are in force, and in respect of any food or drink to which the provisions of any section coming into force under sub-section (4) of section 1 of that Act are for the time being applicable in such borough by a notification, under sub-section (5) of section 1 of that Act, the following provisions shall be in force, namely —

Bom II of 1890

If any article to which this sub-section is applicable as aforesaid is intended for food or drink, the president, vice-president, chairman of the standing committee, Chief Officer or any councillor or officers authorised by the municipality in this behalf in case such article appears not to be what it is represented to be, may seize the same. and if it appears to a Magistrate upon sufficient evidence that

such article is not what it is represented to be, such Magistrate may order the same to be destroyed or to be so disposed of as to prevent its being exposed for sale or used for food or drink, and the owner thereof or the person in whose possession the same was found, not being merely carrier or bailee thereof, shall, if in such case the provisions of section 273 of the Indian Penal Code do not apply, be punished with fine which may extend to one hundred rupees XLV of 1860

Explanation—If such article having been exposed or stored in or brought to any place for sale as ghee contains any substance not exclusively derived from milk, it shall be deemed to be for the purposes of this sub-section, an article which is not what it is represented to be

Protection to persons acting in good faith

Where any article to which this sub-section is applicable, appears to the Magistrate not to be what it is represented to be, solely by reasons of the fact that there has been added to it some substance not injurious to health, no offence shall be deemed to have been committed by the owner of the article or the person in whose possession the same is found, if such owner or person proves to the satisfaction of the Magistrate—

(a) that such substance has been added to the article because the same is required for the production or preparation thereof, as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the article or conceal the inferior quality thereof, or

(b) that in the process of production, preparation or conveyance of such article, the extraneous substance has unavoidably become intermixed therewith, or

(c) that, by a label distinctly and legibly written or printed on or with the said article or by other means of public description, he had given sufficient notice that such substance has been so added, or

(d)—

(i) the said article was purchased by him with a written warranty that it was of a certain nature, substance and quality,

(ii) he had no reason to believe that it was not of such nature, substance and quality as aforesaid, and

(iii) it was not exposed, hawked about, or brought for sale by him otherwise than as an article of the nature, substance and

quality specified in the written warranty, and was in the same state in which he purchased it;

Bom. V of 1925.

Provided that this sub-section shall not apply to any borough to which the Bombay Prevention of Adulteration Act of 1925 has been extended.

Application for summons to be refused if not applied for within reasonable time.

(3) In all prosecutions under this section the Magistrate shall refuse to issue a summons for the attendance of any person accused of an offence against its provisions unless the summons is applied for within a reasonable time from the alleged date of the offence of which such person is accused

Amendments:—On the coming into operation of the Bombay Prevention of Adulteration Act, 1925 (Bom 5 of 1925), in any local area, in respect of any article of food, Bom 2 of 1899, except Sec. 6, shall be deemed to have been repealed (Vide Bom 5 of 1925, Sec 20, Schedule B).

Unwholesome food—destruction—prosecution:—When a person is found selling at a beef-staff meat unfit for human food, the Municipality may order the unwholesome meat to be forthwith destroyed, but it is not competent to a Magistrate to convict the person under s. 142 (1) of the Bombay District Municipal Act, 1901 **Emperor v. Haji Aboo, 22 B.L.R. 889.** Their Lordships observed "No offence with reference to meat which is an article of a perishable nature could have been committed under s 142 (1) and the convictions are clearly wrong The power which the section gives to the Municipality is the power to destroy forthwith any article which is of a perishable nature, and which in its opinion is diseased, unsound, unwholesome or unfit for food, drink and medicine The last paragraph of sub-section (1) relates to any animal and any article which is not of a perishable nature, and which under the next preceding paragraph can be taken before a Magistrate Mr Koyajee for the Municipality has not contested this position. But he had suggested in the argument before us that these convictions ought to be upheld on the ground that the facts which are alleged in the information disclose an offence under s 273 of the Indian Penal Code It is clear that the complaint related to an offence under a special Act, and not to an offence under s 273, and it would not be fair to allow the case at this stage to be treated as one relating to an offence under the Indian Penal Code Further, having regard to the wording of the last para of the sub-section, the Magistrate's finding involves the result that the provisions of s 273, Indian Penal Code, do not apply to this case."

Bailees—Agents—Magistrate to decide whether unwholesome food should be destroyed.—Section 142 gives protection to mere bailees and not to agents who are not mere bailees of goods entrusted to them but may sell or otherwise dispose of the goods Under s 142 it is for the Magistrate to decide whether certain gram in dispute should be destroyed or should be disposed of in a manner so as to prevent it being used for human consumption and he cannot delegate his function under s. 142 to the Health Officer. **Harchandmal v. Emperor, A.I.R 1931, Sind 39**

Powers of inspection of weights and measures, etc.

177. The president, vice-president, chief officer or any councillor authorised by the municipality in this behalf may at all reasonable times enter into any place (other than a place prescribed by rules

made under the Bombay Weights and Measures Act, 1932) where weights or measures or weighing or measuring instruments are used or kept for purposes of trade and inspect such weights or measures or weighing or measuring instruments. Bom. XV of 1932.

Amendments:—This section was substituted for the original section by Bom 15 of 1932, second Schedule Part I

The words, brackets and figures '(other than a place prescribed by rules made under the Bombay Weights and Measures Act, 1932)' were inserted by Bom 9 of 1935, s 6 (1)

(9) Regulation Of Dairies And Cattle Sheds.

178. (1) No person shall, for the purposes of trade, use or permit to be used any place for stabling milch cattle or for storing or selling milk or for making, storing or selling butter except under and in accordance with the terms of a license from the standing committee Licensing dairies.

(2) The standing committee may grant such license subject to such conditions as it may deem fit and may at any time withdraw such license on giving one month's notice to the licensee:

Provided that where the licensee has contravened any of the conditions of the license, the license may be withdrawn without any such notice

(3) Whoever so uses or permits to be used any place for any of the aforesaid purposes without, or in contravention of any of the conditions of, or after the withdrawal of, or during the suspension of such license, shall be punished with fine which may extend to fifty rupees and in the case of a continuing offence with additional fine which may extend to ten rupees for each day during which such offence is continued after the date of the conviction for the first such offence

(4) Upon a conviction being obtained in respect of any place under sub-section (3) the Magistrate shall, on the application of the municipality but not otherwise, order such place to be closed, and thereupon, appoint persons or take other steps to prevent such place being so used.

Ghee:—The term butter used in this section does not include Ghee as these are two quite different articles In s 412A of the City of Bombay Municipal Act which is similar to the present section the words used are 'butter or other milk products' It was held that these words do not include 'Ghee' **Emperor v Ratanji, 31 B.L.R. 591.** *Reasoning adopted there to show that 'Ghee' is not included is equally applicable here .* In that case dealing with the question

Mirza J observed "It will not be disputed that 'ghee' is derived from milk but can it be said of 'ghee' as it can be said of cream, butter, whey or curd that it is a direct product of milk? For one thing 'ghee' is not subject to the same speedy decay as these products of milk along with milk are In this respect 'ghee' does not resemble milk to the same extent as these products of milk do 'Ghee' is made from melted butter Pure 'ghee' no doubt is derived from milk, as it is made from butter which is a product of milk 'Ghee', however, is not the same as butter It possesses certain qualities, e g, durability, which makes it dist nct from butter In many respects 'ghee' and butter are put to different uses"

Continuing offence —See notes under the head 'continuing contravention, etc under s 118

Starting point for limitation for prosecution for a continuing offence.— See notes under this head under s 118

(10) Prevention of Dangerous Diseases

Power to prevent disease which may at any time be conferred

179 (1) The Provincial Government may at any time confer by notification on any municipality designated therein, all or any of the powers specified in sub-section (2) and such municipality shall, subject to all such limitations, restrictions and conditions, if any, as the Provincial Government in the same or in any subsequent notification may prescribe in such behalf, exercise within the municipal borough every power so conferred on it, for such period as may be specified in this behalf, in any such notification, or if no period is so specified, then, until the power is withdrawn

(2) The powers, all or any of which may be conferred under the preceding sub-section, are

(a) power by Orders, which may be either of special or general application, to direct that every medical practitioner, who knows or may have reason to believe that any person whom he has visited in his professional capacity in any dwelling not being a hospital, or that every manager of any factory or educational institution, or every head of a household, who knows or has reason to believe that any person who resides in any dwelling under his management or control, is suffering from any illness which may reasonably be supposed to be a dangerous disease, shall give information of the same with the least practicable delay to such person as may be designated by the municipality in that behalf,

(b) power to direct or authorize the inspection, without notice, or with such notice as to the person directed or authorised to inspect appears reasonable of any place in which any dangerous disease is reported or suspected to exist and the taking of measures to prevent the spread of the disease beyond such place,

(c) Power to prohibit the removal of water for the purpose of drinking from any well, tank or other place which may appear to the municipality, on the advice of a medical officer, likely to endanger or cause the spread of any dangerous disease,

(d) power to direct or cause the removal, on a certificate signed by any duly qualified medical practitioner authorised by the municipality in this behalf, of any person who is without proper lodging or accommodation, or who is lodged in a room or set of apartments occupied by more than one family, or in a place where his presence may be a danger to the neighbourhood, and who is suffering from a dangerous disease, to any hospital or place at which persons suffering from the said disease are received for medical treatment, and to prohibit the person so removed from leaving such hospital or place without the permission of the municipality,

(e) power to require by written notice the owner or occupier of any building or part of a building, or a person owning or in charge of any article therein, to cleanse or disinfect such building or part thereof or article, either at his own expense, or in case of poverty, or for other cause which the municipality in the circumstances of the case considers reasonable, at the expense of the municipality,

(f) power to provide the means and to prescribe places, for disinfecting or washing, bedding or other articles which have been exposed to infection from any dangerous disease, and to direct the destruction thereof,

(g) power—

(i) to provide and maintain suitable conveyance for the free carriage of persons suffering from any dangerous disease, and

(ii) when such provision is made, to prohibit the conveyance of such person in all or any public conveyances, and

(iii) to direct that any conveyances that may at any time be used for conveying any such persons shall be immediately disinfected,

(h) power to prohibit—

(i) any person suffering from any dangerous disease from wilfully exposing himself, without proper precautions against spreading the said disease, in any street or in any school or

factory, or in any inn, dharmshala, theatre, market or other place of public resort, or

(ii) any person in charge of any person so suffering from so exposing such sufferer,

(i) power to prohibit any person from removing to another place, or transferring to another person, except for the purpose of disinfection, any article which the person prohibited knows or has reason to believe has been exposed to infection of any kind whatsoever from any dangerous disease;

(j) power to prohibit the letting of or the providing of accommodation in any hotel, inn, dharmshala, or serai, in which a person has, or in which there is reason to believe that a person has been suffering from a dangerous disease, unless and until the person desiring so to let or provide accommodation shall have had the building, or part thereof, any article therein likely to retain infection, disinfected to the satisfaction of the municipality, or of such officer as the municipality may appoint in this behalf;

(k) power, with the previous permission in each case of a Magistrate exercising not less than second class powers, to destroy any insanitary huts or sheds in which there is reason to believe that persons have been suffering from a dangerous disease

(3) The municipality may, in its discretion, give compensation to any person who sustains substantial loss by the destruction of any property under this section, but, except as allowed by the municipality, no claim for compensation shall lie for any loss or damage caused by any exercise of the powers specified therein

(4) Any person who in a municipal borough disobeys any order which is for the time being in force therein, and which has been passed by the municipality in exercise of any power conferred on such municipality under this section, or obstructs any officer of the municipality or other person acting under the authority of the municipality in carrying out executively any such order, shall be punished with fine which may extend to fifty rupees.

Amendments:—The words 'The Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council

Public conveyance—carriage of person suffering from small-pox'.—The driver of a public conveyance in the City of Bombay who carries in his conveyance a person suffering from small-pox offends against the provisions of s 430 (3) of the Bombay Municipal Act, 1888 **Emperor v. Myaji, 7 B.L.R. 469** In the

course of the judgment their lordships observed "There is no doubt as we have said above, that the accused is guilty of an offence under the Municipal Act Section 430 sub-section (3) of that Act prohibits persons in charge of public conveyances from knowingly carrying therein any person suffering from a dangerous disease in contravention of s 429 which declares that when suitable conveyances have been provided for the free carriage of persons so suffering, it shall not be lawful to convey any such person by any other conveyance It would, therefore, seem to follow that the act with which the accused in this case is charged possessed that element of unlawfulness which is essential to constitute an offence under section 269 of the Indian Penal Code We think, however, that no previous prosecution having taken place under the enactments to which we have referred, the accused was probably unaware that his act was punishable under either of these enactments Mr Crawford, Solicitor for the Municipality, appears before us and says he does not wish to address the Court on the subject of the quantum of sentence The appellant has suffered eight days' imprisonment We are of opinion that this is a sufficient punishment, for this is the first offence of this kind which has been brought before this Court We think it desirable to note that s 22 of the Public Conveyance Act appears to render it compulsory on drivers to accept any fare that offers The Legislature may deem it advisable to remove from the statute book all apparent antimony between that section and s 429 and 430 of Bombay Act III of 1888"

Duties of Municipality on threatened or actual outbreak of dangerous disease

180 (1) In the event of the municipal borough or any part thereof being at any time threatened or visited with an outbreak of any dangerous disease, the municipality shall take all such measures as the Commissioner may deem necessary for the purpose of preventing, meeting, mitigating or suppressing such outbreak

(2) In such event as aforesaid the Commissioner may by special notification declaring that such municipal borough is threatened or visited with an outbreak of a dangerous disease, confer on the municipality all or any of the additional powers specified in the following sub-section and such municipality shall, subject to such limitations, restrictions and conditions, if any, as the Commissioner in the same or in any subsequent notification may prescribe, exercise every such power so conferred on it until the same is withdrawn by means of a like notification

(3) The powers, all or any of which may be conferred under the preceding sub-section, are—

(a) power to order, subject to the conditions—

(i) that the permission of a Magistrate exercising not less than second class powers shall be in each case first obtained, and

(ii) that accommodation for all persons to whom the order refers is available, or shall be provided, elsewhere,

the evacuation of an infected building used as a dwelling or of any part thereof, or of any building so used adjacent to such building,

by the person or persons residing, whether habitually or temporarily, therein;

(b) power to direct the examination by a medical officer of persons and if necessary, the disinfection of the clothing, bedding, or other articles suspected of being infected, belonging to persons either arriving from places outside the municipal borough, or residing in any building adjacent to any infected building, and to direct that any such person shall give his address and present himself daily for medical examination at such times and places as may be prescribed, for a period not exceeding ten days,

(c) power to prohibit either generally, or by special order in any individual case, assemblages consisting of any number of persons exceeding fifty, in any place whether public or private, or in any circumstances, or for any purpose, if in the opinion, recorded in writing, of the Civil Surgeon of the district or other medical officer appointed by the Provincial Government in this behalf, such assemblages in such place or in such circumstances or for such purpose, would be likely to become a means of spreading the disease or of rendering it more virulent

(4) The municipality may in its discretion give compensation to any person who sustains substantial loss by the destruction of any property under this section, but except as allowed by the municipality, no claim for compensation shall lie for any loss or damage caused by any exercise of the powers specified therein

(5) If in any municipal borough in which a notification under sub-section (2) is for the time being in force, any person—

(a) knowingly disobeys any order which for the time being is in force in such borough and which has been passed by the municipality in exercise of any power conferred on it under section 179 or under this section, or

(b) obstructs any officer of the municipality or other person acting under the authority of the municipality in carrying out executively any such order,

such person shall be punished with fine which may extend to—one thousand rupees

Amendments:—The word 'Commissioner' was substituted for the word 'Government' by Bom 19 of 1935, s 11

The words 'The Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council

Take all such measures as the Commissioner may deem necessary for the purpose of preventing, meeting, mitigating or suppressing such outbreak.—The city of Ahmedabad being threatened with an outbreak of cholera, the Presi-

dent of the local Municipality, acting under section 73 of Bombay Act VI of 1873, issued an order in the form of a proclamation, prohibiting the holding of caste-feasts when over thirty persons were to assemble After the promulgation of this order the accused gave a feast in a private house to upwards of thirty people of his caste He was thereupon convicted under s 188 of the Indian Penal Code (Act XLV of 1860), for disobedience of an order duly promulgated by a public servant, and sentenced to pay a fine of Rs 35 Held, reversing the conviction and sentence, that s 73 of the Bombay District Municipal Act (VI of 1873) did not empower the Municipality to place an interdict on people meeting together to eat and to drink in their own houses The words in the section, take such measures as may be deemed necessary to prevent, meet, or suppress the outbreak imply in themselves something actively to be done by the Municipality rather than any limitation to be imposed on the private rights of the citizens in their relations of daily life Special measures for the health of the town such as sulphur fumigation, daily flushing of sewers, insistence on good house-sanitation, isolation of infected districts and other similar steps to be taken by the authorities themselves fall naturally within the meaning of the terms of the section The Court ought not to strain an Act in favour of an interference with private rights which is not justified by the primary sense of the language **Queen Empress v Harilal, 14 Bom 180**

Withdrawal and modification of powers and orders

181 (1) The Provincial Government, in the case of any power conferred under section 179, and the Commissioner, in the case of any power conferred under section 180, may at any time—

(a) withdraw any such power,

(b) cancel or modify any limitation, restriction or condition prescribed in respect of any such power, or

(c) cancel any order passed by a municipality in exercise of any such power

(2) Every order passed by a municipality in exercise of any such power as aforesaid shall, on the withdrawal of such power, cease to be in force in the municipal borough

Amendments —The words, letters, figures and brackets 'The Government in case of any power conferred under section 179, and the Commissioner, in case of any power conferred under section 180 may at any time (a) withdraw any such power' were substituted for the original words, letters, brackets, and figures by Bom 19 of 1935 s 12

The words 'The Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council

Duties of Municipality in respect of disease among cattle, sheep or goats.

182 If in any municipal borough any infectious disease amongst cattle, sheep or goats breaks out or if the introduction of any such disease appears to be likely, the municipality shall take all such measures as it may deem necessary for the purpose of preventing, meeting, mitigating or suppressing the disease or the outbreak or introduction thereof—

Proceedings—to abate the overcrowding of the interiors of buildings.

183 (1) Whenever the standing committee considers the interior of a building is so overcrowded as to be or to be likely to become dangerous or prejudicial to the health of the inhabitants of that or of any neighbouring building, the standing committee may cause proceedings to be taken before a Magistrate of the first class for the purpose of obtaining an order to prevent such overcrowding

(2) Such Magistrate may, on the production of a certificate by a medical officer stating his opinion that the overcrowding complained of is likely to cause disease or risk of disease, and after such further inquiry, if any, as may appear to such Magistrate necessary, require the owner of the building within a reasonable time, not being more than six weeks or less than ten days, to abate the number of lodgers, tenants or other inmates of the said building to such extent as he shall deem necessary to prescribe, or may pass such other order as he shall deem just and proper

(3) If the owner of the said building shall have sublet the same, the landlord of the lodgers, tenants or other actual inmates of the same shall for the purposes of this section be deemed to be the owner of the building

(4) It shall be incumbent on any owner, to whom a requisition is issued under sub-section (2), forthwith to give to so many of the lodgers, tenants or other actual inmates of the said building as may be necessary to fulfil the conditions prescribed in such requisition, written notice to vacate the said building within the period specified in such requisition, and any such lodgers, tenants or inmates receiving such notice shall be bound to comply therewith

(5) Any owner who after the date specified in any requisition issued under sub-section (2) permits the overcrowding of any building in contravention of such requisition, and any person who omits to vacate any such building in accordance with notice given to him under sub-section (4), shall be punished with fine which may extend to ten rupees for each day subsequent to the date specified in such requisition during which such overcrowding or such omission to vacate, continues

Notice to abate overcrowding to be given to the owner —Where the owner of a building lets his rooms separately to individual tenants and these cause overcrowding, the notice to abate the same under s 379A(1) of the City of Bombay Municipal Act, 1888, must be given to the owner and not to the tenants **The Municipal Commissioner v Mathuradas, 13 B.L.R 640**

Continuing contravention—See notes under this head under s 118

Starting point for limitation for prosecution for a continuing offence:—*See notes under this head under s 118*

Special powers which may be conferred by the Provincial Govt in respect of overcrowded area

184. (1) If the Provincial Government is of opinion that risk of disease has arisen or is likely to arise either to any occupier in, or to any inhabitant in the neighbourhood of, any area by reason of any of the following defects, namely—

(a) the manner in which either buildings or blocks of buildings, already existing or projected therein, are, or are likely to become crowded together, or

(b) the impracticability of cleansing any such buildings or blocks of buildings, already existing or projected, or

(c) the want of drainage or scavenging, or the difficulty of arranging therein for the drainage or scavenging of any such buildings or blocks or area as aforesaid, or

(d) the narrowness, closeness, bad arrangement or bad condition of the streets or buildings or groups of buildings,

it may by notification confer on the municipality to which such area is subject, all or any of the powers specified in sub-section (2), and may, if it deems necessary, at any time make rules prescribing any limitations, restrictions, modifications, conditions, or regulations, subject to which the municipality shall exercise within that area all powers so conferred, unless and until those powers are withdrawn by a subsequent notification of the Provincial Government

(2) The powers all or any of which may be conferred on a municipality under sub-section (1) are as follows:—

(a) power when any building or block already existing or in course of erection, by reason of any defect specified in sub-section (1), has given or is in the opinion of the municipality likely to give rise to such risk as aforesaid, to require by a written notice, to be fixed upon some conspicuous part of such building or block and addressed, as the municipality deems fit, either to the owners thereof or to the owners of the land on which such building or block is erected or is in course of erection that the persons so addressed shall, within such reasonable time as shall be specified in the notice, either pull down or remove such building or block, or execute such works or take such action in connection therewith as the municipality deems necessary to prevent all such risk of disease;

(b) power by municipal or other agency to pull down or remove such building or block, or to execute such works or take such action as aforesaid, if the persons addressed in the said notice neglect so to do within the time specified therein;

(c) power, subject to a right of appeal to the Commissioner whose decision shall be conclusive, to prohibit, by written notice addressed to the owners and occupiers of any site or space hereinafter described and by general notice published in the manner provided in sub-section (3) of section 192, the erection of any building or of any building exceeding such dimensions as may be specified in such notice —

(i) on the site of any building which has, in whole or in part, under the provisions of this section been pulled down, or

(ii) on any space not occupied by buildings, whether such space is private property or not and whether it is enclosed or not, if the municipality considers that in order to prevent such risk as aforesaid, such site or space should not be built upon in whole or in part; and either to acquire such site or space or to prescribe such conditions as may be deemed necessary as to the use which the owner or occupier may make or permit to be made thereof

Provided that in every case compensation, the amount of which shall in case of dispute be ascertained and determined in the manner provided in section 198, shall be paid to any person whose rights are affected by such prohibition

(3) When, in pursuance of any notice under sub-section (2), any building has been pulled down, the municipality shall, unless such building has been erected contrary to any provision of this Act or of any by-law in force thereunder, pay to such owner or occupier as may have sustained damage thereby, reasonable compensation, the amount of which shall in case of dispute be ascertained or determined in the manner provided in section 198

(4) The Provincial Government may prescribe by rule a fine not exceeding five hundred rupees, for every breach, and a further fine not exceeding twenty rupees a day for every continuing breach, of any order made or conditions imposed by the municipality in exercise of any powers conferred upon it under this section.

Amendments:—The words 'The Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council.

Continuing contravention:—See notes under this head under s 118

Starting point for limitation for prosecution for a continuing offence:—See notes under this head under s 118

Closing of places for disposal of the dead

185. (1) Where the municipality is of opinion that any place used for the disposal of the dead is in such a state, as to be, or to be likely to become, injurious to health, it may submit its opinion with the reasons therefor to the Commissioner and the Commissioner thereupon, after such further inquiry, if any, as he shall deem fit to cause to be made, may by notification direct that such place shall cease to be so used from such date as may be specified in that behalf in the said notification

(2) A copy of the said notification together with a translation thereof in the vernacular of the district shall be published in the local newspapers, if any, and shall be posted up at the municipal office and in one or more conspicuous spots on or near the place to which the same relates

(3) Any person who buries or otherwise disposes of any corpse in any such place, after the date specified in the said notification for closure of the same, shall be punished with fine which may extend to one hundred rupees

(II) Nuisances From Certain Trades And Occupations

Regulation of certain trades.

186. (1) If it be shown to the satisfaction of the standing committee that any building or place used or intended by any person to be used—

(a) for boiling or storing offal, blood, bones or rags,

(b) for salting, curing, or storing fish,

(c) for storing hides, horns, or skins;

(d) for tanning;

(e) for the manufacture of leather or leather goods;

(f) for dyeing,

(g) for melting tallow or sulphur,

(h) for washing or drying wool or hair,

(i) as a brick, pottery or lime kiln;

(j) for soap making,

(k) for oil-boiling or oil extracting;

(l) as a manufactory of sago;

(m) as a distillery;

(n) for storing hay, straw, fodder, wool, coal or other combustible material,

(o) as a manufactory of snuff;

(p) for the manufacture or sale of sweetmeats;

(q) as a factory, workshop or place of business in which animals are employed or intended to be employed for doing work or in which steam, water or any mechanical power is used or intended to be used,

(r) as a manufactory or place of business of any other kind, from which offensive or unwholesome smells arise, or which may involve risk of fire;

(s) as a hair dressing saloon, or a barber's shop or a hamamkhana, is or is likely to become by reason of such use and of its situation a nuisance to the neighbourhood or is so used or is so situated as to be likely to be dangerous to life, health or property, the standing committee may by written notice require the owner or occupier—

(i) at once to discontinue the use of, or at once to desist from carrying out or allowing to be carried out the intention so to use, such building, or place, or

(ii) to use it in such manner or after such structural alterations as the standing committee in such notice prescribes, so that it may not become, or may be no longer, a nuisance or dangerous

Explanation 1 —For the purpose of clauses (q) and (r) nuisance shall include any contamination of the atmosphere whereby a deposit of soot is caused or any mechanical noise.

Explanation 2 —Nothing in clauses (q) and (r) shall be deemed to affect any provision of the Indian Boilers Act, 1923, or shall authorize any order relating to the fixing or fencing of an engine, millgearing, hoist or other machinery in any factory to which the provisions of the Indian Factories Act, 1911, are applicable

V of 1923.

XII of 1911

Liability to penalty after notice

(2) Whoever after notice has been given under sub-section (1), uses any building or place or permits it to be used in such a manner as to be a nuisance to the neighbourhood or dangerous to life, health, or property, shall be punished with fine which may extend to two hundred rupees, and with further fine which may extend to forty rupees for every day on which such use or permission of use is continued after the date of the first conviction.

(3) Upon a conviction being obtained under this section the Magistrate shall, on the application of the standing committee but not otherwise, order such place to be closed and thereupon appoint persons or take other steps to prevent such place being used for any purpose mentioned in sub-section (1).

(4) Whoever uses without a license or during the suspension or after the withdrawal of a license, any place for any purpose mentioned in sub-section (1) in any municipal borough in which by-laws are for the time being in force prescribing the conditions on or subject to which, the circumstances in which, and the areas or localities in respect of which, licenses for such use may be granted, refused, suspended or withdrawn, shall be punished with fine which may extend to fifty rupees for every day on which such use is continued after the date of first conviction

Penalty for unlicensed places in district in which by-laws under section 61 (1) (b) (iii) are in force

Amendments.—Clause (s) was inserted by Bom. 19 of 1935, s 13 In place of "Indian Factories Act XII of 1911" see now "The Factories Act, 1934 (25 of 1934)"

Place—This includes open ground —In a case under s 394 of the City of Bombay Municipal Act, 1888 equivalent to this section, it was held that the term 'premises' used in that section is not limited to buildings but also includes open ground **S B. Master v. Dharamsi Jetha, 3 B.L.R. 436. Candy J** observed —"Having regard to the nature of some of the articles dealt with in section 394 and in Schedule M, we think that it is impossible to restrict the meaning of the word 'premises' in that section to buildings it must also include open ground"

Person aimed at.—In Criminal reference No 105 of 1897 (see 4 B.L.R 943, at page 945) the Acting Chief Presidency Magistrate in making the reference to the High Court stated "In these cases the Municipality has prosecuted the owners of certain lands who allow cartmen to stable their carts and bullocks on the land and receive a fee of Re 1 for each cart and pair of bullocks The accused have no licenses under s 394 of the Municipal Act (III of 1888) That section says 'No person shall use any premises' for 'keeping horses, cattle, &c, for sale or hire' without a license The Magistrates generally construe this section to mean that the cartmen who use the land for stabling their bullocks must take out a license and that the owner of the land cannot be punished for allowing the cartmen to use his land It appears to me that the section is also open to the construction that as the owner puts his land to this use, he uses his premises for this purpose, and he is responsible if he does not possess a license Cartmen and milkmen cannot be expected to take out licenses for stables which do not belong to them They simply pay fee for each animal and it is the duty of the owner to take out a license for the stable if he wishes to use it for other than domestic purposes It is extremely inconvenient to prosecute 20 or 30 cartmen or milkmen when one prosecution against the landlord would suffice, and even when these tenants are driven away they are succeeded by others who have to be prosecuted The obvious intention of the section is that the licensee shall be responsible for the cleanliness of the premises and this cannot be done when the occupiers are held responsible and not the landlord—I have therefore, the honour to refer the question for the favour of opinion of the High Court, and to ask whether the owner of any premises who uses his premises as a stable for bullock carts or milch cattle or cab-horses is punishable under section 394, when he does so without a license" Their Lordships answering the reference observed "The Magistrate asks whether the owner of any premises who uses

his premises as a stable for bullock carts or milch cattle or cab-horses is punishable under section 394 of the City of Bombay Municipal Act, when he does so without a license The question assumes a use and the nature of the use and is one of fact rather than of law, and we refer the Magistrate for an answer to the words of the section itself which are very plain 'No person' it says, 'shall use any premises without a license for keeping horses, cattle or other four footed animals 'for sale or hire or for sale of the produce thereof' If the owner of the premises without a license allows such animals to be kept therein whether on payment of a fee or otherwise, in our opinion he should be considered to use his premises for that purpose and so to contravene the provisions of the section We return the case with the above answer"

The above case was distinguished in **Emperor v Mirza Mahomed Shirazi, 4 B.L.R 943** Wherein the appellant who was the owner of certain stables situate at Bhendy Bazar, Parel Road, had been fined for contravening the provisions of section 394, sub-section (1) clause (c), of the City of Bombay Municipal Act, namely, by using those premises for the purposes of keeping horses for sale or hire without a license granted by the Commissioner in this behalf It is in evidence that the premises have been leased by the appellant to a tenant, one Taja Noora on the 20th May, 1897, for the term of three years, and that after the termination of the lease the lessee was holding over as a monthly tenant The use and occupation of the premises were clearly with the tenant, and in the absence of any covenant to the contrary the landlord had no power to enter on the property or to allow or disallow any use to which the tenant might think proper to turn it It was held that Section 394 (1) (c) of the City of Bombay Municipal Act, 1888 is not intended to reach the landlord, but aims at the actual occupier or a tenant of the premises who converts them to the use mentioned in the section without a license and hence the appellant did not commit the breach of the Municipal Act Crowe J observed "Mr Crowford has read correspondence to show that the appellant knew that the tenants intended to use the premises as stables, and that is admitted throughout by the learned counsel for the appellant But the circumstance does not affect the question which arises in this case, which is the proper construction to be placed on the words of the section It seems impossible, to hold that the use of the premises was with the appellant when he had transferred such use to another The breach of the Municipal Act appears to us to have been committed, not by the owner, but by the occupier The landlord merely enjoyed the rent of the premises, the tenant converted them to the purpose of keeping horses for sale or hire and received the fees arising from the use to which he had converted them It is in our opinion immaterial in determining the proper construction to be placed on the wording of a statute that the appellant was aware of the use to which the premises would be put The wording of section 226 of the previous Act III of 1872, Bombay, seems to make the intention of the Legislature quite clear That section runs "The owner or occupier of every place within the city used by or for horses. and whoever without such license, uses any such place, or permits the same to be used for such purpose shall be liable' &c The alteration in the law is clearly intentional Under the old law the owner would have been liable, under the existing law the person using the premises is contemplated Our attention has been drawn to an unreported ruling of Parsons and Ranade, JJ in Criminal reference No. 105 of 1897, dated 2nd December 1897 where their Lordships held that an owner of pre-

mises who allowed cartmen to stable their carts and bullocks thereon receiving a fee of one rupee for each cart and pair of bullocks, without a license, should be considered to use his premises for that purpose, and so to contravene the provisions of the section That case is distinguishable from the present and the circumstances are entirely different The owner did there what the tenant appears to have done here The person who used the premises was the occupier and not the owner, and, therefore, we find that the appellant has been wrongly convicted We set aside the conviction and sentence and acquit the appellant and order the fine to be refunded"

In **Imperator v Tayabali, Criminal Revision application no 213 of 1911** (see **14 B L R 882 at page 885**) the facts were similar to those in criminal reference No. 105 of 1897 and it was held that the owner was liable under the Municipal Act In the course of the judgment Scott C J, observed "We have been referred to a decision of another bench of this Court **Emperor v Mirza Mahomed Shirazi, 4 B. L. R 943** in which the Court held that where the owner of premises has leased them out for term of three years, he would not be liable under the section for the acts of his tenants which he could not control Those are very different facts from the facts of the present case The alteration in the section when re-enacted in the Act of 1888 which is referred to in **Emperor v Mirza Mahomed Shirazi** has been relied upon for the petitioner We are not prepared to adopt the view of this Court in that case as to the reason for alteration, for upon the facts of this case the decision in **Criminal reference no 105 of 1897** is directly in point and is supported by the English case above cited Therefore, if the petitioner let out the land upon which the bullocks were kept he would be liable under the section having taken rent with the knowledge of the purpose for which the land was used If the land used was waste land for which the tenants were not paying rent, but which the landlord (the petitioner) permitted to be used out of kindness to the tenants, we think, he would clearly be using the land for bullocks, without a license, and would, therefore, be liable to conviction under the Act"

The above case was followed in **Emperor v. Dadabhai 14 B L. R 882** wherein Batchelor J observed "The facts found are that the premises in question belonged to the petitioner, that he has let them out to one Kondiba, and that for many years to the petitioner's knowledge the premises have been used by his tenant or sub-tenants for the purpose of stabling bullocks used for hire in contravention of this section The only question is whether upon that state of facts the petitioner was rightly convicted under section 394 That section provides that 'except under license granted by the Commissioner no person shall 'inter alia' keep or allow to be kept, in or upon any premises, cattle for letting out on hire ' It is urged by Mr Robertson for the petitioner that the responsibility for stabling the cattle without Municipal permission, lay upon the petitioner's tenant and upon him only And Counsel has referred to the lease given by the petitioner to his tenant, and to the clause in the lease which restrains the tenant from putting the land to any use not sanctioned by Municipal regulations It appears to us, however, that these terms of the lease make rather against the petitioner than in his favour, for they show that with the knowledge at his disposal he had the power to eject his tenant This he did not do, but stood by, and offered no obstruction or impediment to his tenant's unlawful use of the land It seems to us, therefore that it may rightly be said that despite the terms of the lease he allowed the unwarranted use of the premises The case falls within the decision of this

Court in **Imperator v. Tayabali Currimji Barodawalla (criminal revision application no. 213 of 1911)** where on a similar state of facts a conviction was affirmed, and reference was made to **Regina v Heyworth, (1866) 14 L T N S 660** That was a case which involved liability for using a place as a slaughter-house without a license under s 126 of 10 & 11 Vic 34. That section provided that 'every person who, without having first obtained such license as aforesaid uses as slaughter-house any place not used as such at the passing of the special Act, shall for each offence be liable to a certain punishment' In considering that section Mr Justice Lush said "The owner 'uses' the place by letting it out The license is not to the person, but to the place'—So upon these facts, we think, that under s 394 of the Municipal Act, the petitioner must be held to have allowed his cattle to be stabled by his tenant in contravention of the provisions of the Law It may well be, as Mr Robertson has suggested, and we are quite prepared to accept the suggestion that the petitioner has acted throughout in good faith, and under a mistaken belief as to his legal responsibility But, however, that be he has, in our opinion, rightly been convicted under s 394 and we must, therefore, discharge the rule ' Really speaking the facts of this case are similar to those in **Emp. v. Mirza Mahomed Shirazi, 4 B.L.R. 943,** but what seems to have weighed with their Lordships is the fact that although it was within the power of the landlord in this case to prevent his tenant from putting the land to an use prohibited by the Municipality he did not do so for a long time In **Emperor v Mirza Mahomed Shirazi,** on the facts proved it was not within the power of landlord to prevent his tenant from making use of the land as he did It is therefore, possible to distinguish the one case from the other on this ground

Storing:—The wording of Section 394 of the City of Bombay Municipal Act requires that the premises in order to attract the operation of the section, should be used for the purpose of storing The phrase, 'for the purpose' indicated that it must be the intention of those using the premises to store, that storing must be the object aimed at—the final cause for which the premises are used The actual use is by itself insufficient in the absence of proof as to the object aimed at **Emperor v Wallace Flour Mill Co., 6 B.L.R 735.** In this case, Aston J observed "The question is one of degree and intention to be decided upon the facts of each particular case In this case the quantity of oil, less than a fortnight's supply kept in a room in the mill premises was not unreasonably in excess of current requirements for use or consumption, and 'storing' was not in itself an object in view in keeping a supply limited to such requirements In my opinion, therefore, use of the premises for the purpose of storing is not established in this case, and an offence under section 394 clause (a) sub-section (1) of the City of Bombay Municipal Act is not proved"

The accused whose license to store firewood for sale was not renewed after its termination, continued to keep firewood for sale He was charged under section 151, sub-section (4) of the Bombay District Municipal Act, 1901, with the offence of using a place for storing wood without a license The Magistrate acquitted him on the ground that though the firewood was kept for sale, there was no storing of it within the meaning of clause (n) of sub-s 1 of s 151 of the Act On appeal by Government —Held, setting aside the order of acquittal, that keeping without a license wood for sale would amount to storing within the meaning of cl (n) and that the accused was, therefore, guilty under s 151 sub-s (4) **Emperor v Nanubhai, 28 B L.R 1070** In the

course of the judgment, dealing with the case of **Emperor v Wallace Flour Mill Co, 6 B. L. R 735** Fawcett J observed "That was a case where the proprietors of a Flour Mill were charged with having contravened certain provisions of the City of Bombay Municipal Act and a question arose whether they had used certain premises for the purpose of storing oil The Court held that, in as much as the evidence showed that they had only kept a supply for a few days' use, not for the dominant purpose of storage but for the daily use of the mill, the case did not fall within the statute That is an entirely different case to one where a man stores wood or oil, or any substance of the kind mentioned in s 151, for the purpose of selling it, and this had been pointed out in **Seshachalam Chetty v Emperor, (1913) 14 Cr L J 103** In that case the accused was found to have rented certain premises for storing oil without a license and the Judgment says (p 103) —"The evidence is that the petitioners are traders in oil, in considerable quantities which is kept by them in a godown Some stock of it may be kept in a part of the shop for the purpose of meeting the retail demand The stock naturally varies in quantity and may at one time be not more than will suffice for a day or less, and at another be enough for several days, but the place where the stock is kept is regularly used for the purpose of holding the stock and naturally a quantity of oil ordinarily sufficient to meet the estimated demand for the period which must elapse before renewal is possible, will usually be maintained there We think that a place so used may properly be described as a place for 'storing' the stock of oil which is to be sold at the earliest opportunity' Very much the same reasoning applies to the present case The accused, undoubtedly, used what is described as a shop for selling wood, and kept wood there in order to sell it That is a case which properly comes within the meaning of clause (n), as there would be continual storing of wood for the purposes of selling it, and not a casual storage of a few days' supply for domestic use '

Indian Railways Act (IX of 1890, S 7)—whether license necessary for storing sleepers by a Railway Company —The G I P Railway Company used certain plots of land in Bombay for the purpose of storing sleepers (timber), for the use of their line In the Presidency Magistrate's Court the Agent of the Company was charged under s 394 (1) (d) of the City of Bombay Municipal Act, with having used the plots for storing timber without a license from the Municipal Commissioner —Held, (1) that no license was necessary as s 7(1) of the Indian Railways Act, IX of 1890, enabled the Railway Company to do all acts necessary for making, maintaining, altering, or repairing and using the Railway notwithstanding anything in any other enactment for the time being in force (2) That the storing of sleepers was necessary for the maintenance, repairing, etc, of the railway line (3) That under sub-section (2) to s 7, the exclusive control of the Railway administration was vested in the Governor-General-in-Council and if the company was exercising its statutory powers in a manner inconsistent with the health of the inhabitants of Bombay or the safety of the property therein, it was open to the Municipal Commissioner to make a representation to the effect to the Governor-General-in-Council **Municipal Commissioner of Bombay v G I P Railway Company, 11 B L R 1181.**

Jurisdiction of the Civil Court —A District Municipality has powers under s 151 of the **District Municipal Act, 1901**, to require the owner of a Lime-kiln within the limits of the Municipality to desist from carrying out or allowing to be carried out the intention to use it as a lime-kiln, if it is of opinion

that it is or is likely to become a nuisance to the neighbourhood The Civil Court will not interfere with the exercise of that power unless it can be shown that the Municipality has exercised it in an improper manner It is only for the purpose of seeing whether the Municipality has exercised its power in the proper way that the Court will consider the evidence to see what steps the Municipality took before it issued the notice It is not for the Court to deal with the questions whether what is complained of by the Municipality has been or is likely to be a nuisance, and to consider whether as a matter of fact that particular use of land within the Municipal limits is a nuisance or is likely to become a nuisance to the neighbourhood **Noor Mahomed v the Surat City Municipality, 22 B L R 838.**

See also **Ali Mahomed v. Municipal Commissioner of Bombay, 27 B L. R 581,** wherein his lordship observed at page 583 of the report "The question of the jurisdiction of this Court to order the Municipal Commissioner to exercise his discretion under certain circumstances under section 45 of the Specific Relief Act has not been disputed, but I should like to refer to the judgments of this court on the point which make it quite clear under what circumstances this court has jurisdiction to interfere, with the discretion of the Commissioner, under section 45 of the Specific Relief Act As to the interference with the discretion of the Municipal Commissioner there is a decision of the Appeal Court in **Haji Ismail v. The Municipal Commissioner of Bombay (1903) (I L. R 28 Bom 253)** That was also a case of refusal to grant license to the applicant under s 394 of the City of Bombay Municipal Act The learned Judges of the Appeal Court lay down at page 260 as follows —'The power, then, to grant license vested in the Municipal Commissioner under s. 394 being purely discretionary, the only limit to its exercise is that it should not be arbitrary, vague and fanciful, but it must be legal and regular' Then on the facts of the case the Appeal Court found that they were not satisfied that the Commissioner had exercised his discretion arbitrarily and without any regard to the sanitary interest of the City for which the power is vested in him and accordingly dismissed the application of the applicant There is another decision of this court in **Gell v Taja Noora, (1903) I L.R 27 Bom. 307, s. c. 5. Bom. L. R 133,** where the question was of the exercise of discretion by the Commissioner of Police in refusing to grant a license for the conveyance of the applicant on the ground that the Commissioner had approved a certain pattern of victoria as a public conveyance and had refused a license to the victoria of the applicant on the ground that it did not confirm to the pattern That case also went up to the Appeal Court and both the Judge of the first instance Mr Justice Russel and the Appeal Court held that the ground on which the Police Commissioner had refused to grant the license was illegal and that, therefore, the Court had jurisdiction under s 45 of the Specific Relief Act to order him to issue the license asked for The observations of Mr. Justice Batty at page 320 and Mr Justice Starling at page 321 show that where the Commissioner has acted illegally in refusing to exercise his discretion this Court would interfere and order him to exercise his discretion and issue the license The ground in this case on which the Municipal Commissioner has declined to grant the license to the applicant is that he is prevented by the decision of the Appeal Court referred to by me from doing so If, therefore, the Appeal Court Judgment does not bear the construction which is put upon it by the legal advisers of the Municipal Commissioner, clearly the action of the Municipal Commissioner in declining to grant the license would be illegal."

Wrongful refusal to grant a license whether good defence.—Where a person stores oil without a license contrary to the provisions of s 394 of the Act, he cannot, in extenuation of his offence, plead that the Municipal Commissioner wrongfully refused to grant a license to him **Emperor v. Narandas Karsandas, 23 B.L.R. 353** Dealing with the point Shah J observed "As regards the second point, s 394 provides that except under and in conformity with the terms and conditions of the license granted by the Commissioner, no person shall keep in or upon any premises for any purpose whatever any articles specified in Part II, Schedule M, in excess of the quantity therein prescribed In the present case it is an admitted fact that at the time, when the oil in excess of the quantity allowed by law was kept, the petitioner had no license It is urged, however, that the discretion, which the Commissioner has under sub-section (3) of s 394 for granting a license, must be exercised reasonably and that as it has not been exercised reasonably in this case no offence is committed Assuming without deciding that the Commissioner did not exercise his discretion reasonably in refusing to grant the license applied for, I do not see how it could afford any answer to the present charge which is based upon the terms of s 394 under which the petitioner is prohibited from keeping any articles mentioned in part II, Schedule M, in excess of the quantity allowed, except under and in conformity with the terms and conditions of the license The argument urged on behalf of the applicant really amounts to this that if a license has been improperly refused it is tantamount to the grant of a license for the purpose of s 394, and that the oil must be treated as having been kept under the terms of this supposed license to be inferred from the wrongful refusal to grant the license It may be that the petitioner has a remedy against the Commissioner if he is in a position to establish that the refusal to grant the license is wrongful We are not concerned with that question in these proceedings We cannot consider in this case whether the Commissioner ought to grant a license to the petitioner for keeping oil on his premises I am quite clear that even if the refusal on the part of the Commissioner to grant the license be wrongful, it affords no answer to the present charge which is based upon the simple fact that the petitioner has kept certain oils on his premises without a license, contrary to the provisions of s 394 which is an act punishable under s 471 of the City of Bombay Municipal Act"

Nuisance—abatement—The High Court of Bombay will, under s 45 of the Specific Relief Act order the Municipal Commissioner of the City of Bombay to exercise his discretion for issuing a license under the provisions of s 394 of the City of Bombay Municipal Act (Bom Act III of 1888), where he mistakenly supposes himself to be bound not to grant it by a previous order of the High Court passed under s 515 of the latter Act The term "nuisance" as defined in s. 3(z) of the City of Bombay Municipal Act 1888, includes both private nuisance as well as public nuisance The Court ought most strongly to deprecate the use of the Municipal Act for the purpose of interfering in any way with the rights of private ownership beyond those limited powers which the Corporation had obtained by statute for the necessary protection of the public and the enforcement of proper sanitation The relief which, the Court can grant, under s 515 of the City of Bombay Municipal Act, in case of public as well as private nuisance is inter alia, abatement of the nuisance by ordering the Commissioner not to grant a license for stables etc But it does not follow from the Court's making an order on the Commissioner that he should not grant a license, that, that order is to govern all circumstances and all cases at all times In a private nuisance each individual has remedy in civil law by way of injunction and damages. He has

also his remedy under s 515 of the City of Bombay Municipal Act If the private nuisance affects two or three houses, the inhabitants of the two or three houses might either join in a civil suit or they might file separate suits or they might join in a complaint before a Magistrate and ask him to decide specifically that the particular nuisance is a private nuisance affecting the residents of the houses in question With regard to a public nuisance also, any resident of Bombay can ask for an order under s 515 If the Court finds a public nuisance proved, the order of the Court would give relief to the public of the locality as against the nuisance, and vacating of any one or more houses would not mean abatement of the nuisance in respect of the public In the case of public nuisance, no particular limits need be defined Where the Court passes an order under s 515 to abate a nuisance with reference to a particular house, and that house falls vacant subsequent to the passing of the order, and is not to be used any more for purposes other than those connected with the stables, the order ceases to have any operation **Ali Mahomed v Municipal Commissioner of Bombay, 27 B L R. 581.**

Whether powers under s. 186 could be delegated to the sanitary committee:— The Bombay Municipal Boroughs Act, 1925, by its s 37, sub-s (1), provides for the appointment of a standing committee, and its sub-s. (2) enacts that the standing committee shall exercise the functions allotted to it under the Act and subject to certain limitations shall exercise all the powers of the Municipality Section 38 provides that notwithstanding anything contained in s 37, sub-s (2), other committee may be appointed to exercise the powers and perform the duties of the Municipality, and the standing committee shall not exercise any powers or perform any duties which such committee has been appointed to exercise or perform Section 58 (a) empowers the Municipality to make rules regulating the delegation of any of its powers or duties to any committee or the powers or duties of any committee to any other committee Section 186 provides that if it be shown to the satisfaction of the standing committee that certain acts have been done, the standing committee may by notice require the owner or occupier of the properties concerned to take certain action, and if the action is not taken, the owner or occupier may be prosecuted. The Ahmedabad City Municipality, acting under the above provision, appointed a standing committee as well as a sanitary committee Under one of its rules made under s 58 (a) of the Act the Municipality appointed the sanitary committee as the controlling and executive committee in all matters relating to the department of public health The sanitary committee, acting under s 186, issued a notice to the accused calling upon him to close up the Dhobi Ghats on his premises The accused was convicted and sentenced for failing to comply with the requisition The accused applied to the High Court contending that under the terms of s 186 the standing committee alone could take action —Held, (1) that under s 37 of the Bombay Municipal Boroughs Act, 1925, the standing committee is required to exercise the functions allotted to it under the Act and also the residuary powers of the Municipality which have not been validly delegated to some other body, (2) that under s 38 of the Act the power of the Municipality to delegate is confined to its residuary powers which are exercisable by the standing committee and do not apply to the special functions which are allotted to the standing committee under the Act (3) that s. 58 in terms gives power to the Municipality to make a rule delegating the powers or duties of one committee to another committee, and that it is competent to make a rule delegating a power or duty allotted by the Act to the standing committee to some other committee, (4) that un-

der the rule framed by the Municipality under s 58(a) the sanitary committee was competent to take action under s 186 of the Act, (5) that, therefore the accused was guilty of an offence punishable under s 186 of the Act **Emperor v Jesinghbai, 37 B L R 184**

Imposition of restrictions & conditions—breach of condition a good ground to refuse a license —The Municipal Commissioner of Bombay in issuing a license for melting of vegetable oil can, in the exercise of his discretion under s 394 (4) (a) of the City of Bombay Municipal Act, 1888, impose such restrictions and conditions as he thinks fit to prescribe, e g a condition that no ghee or butter or other animal fat should be kept on the premises where the melting is done The Municipal Commissioner has a discretion, under s 394 (4) (b) of the Act, to refuse to renew a license on the ground that a breach of a condition in the license has been committed **Pachan Latha v. The Municipal Commissioner of Bombay, 38 B L R. 556.**

By-law for taking license necessary—storage of fire wood, coal and charcoal —manufacture & sale of sweetmeats.—The Borough Municipality of Broach framed by-laws under section 61 of the Bombay Municipal Boroughs Act, 1925, one of which made it compulsory for traders in firewood and charcoal to obtain licenses for carrying on their trade, but prescribed no fee for the grant of such licenses Subsequently the Municipality, with the sanction of the Government framed in the exercise of the power given to it by the provisions of s 58(j) of the Act, a new rule 208 (a) under which it levied a yearly license fee, not only in respect of storing wood, coal and charcoal, but also for the manufacture and sale of sweetmeats, the object of the levy being to enable the Municipality to meet educational expenses The plaintiffs, who respectively were traders in firewood and charcoal, and manufacturers and sellers of sweetmeats and confectionary, and carried on their business within the Municipal limits of Broach, sued for a declaration that the Municipality had no right to recover from them any sum under the pretext of license fees The lower Courts having held that the levy was legal, the plaintiffs appealed —Held, (1) that, under s 90 (1) of the Bombay Municipal Boroughs Act, the question of charging license fees would arise when a license was granted, and a license could only be granted if the law required a license to be granted, (2) that there was no provision in the Act requiring persons carrying on the trades enumerated in s 186 (1) to apply for and obtain a license, that under the scheme of the Act it was left to the discretion of the Municipality to so require them, that the Municipality might by framing the necessary by-laws require any trade to be carried on under a license and that the section therefore provided a penalty for using a place for a trade without a license only when the by-laws provided for obtaining a license, (3) that the object for which a fee or tax was levied by a public body did not serve necessarily as a guide for saying whether an imposition was a 'fee' or 'tax', (4) that merely because the Municipality before making the rule had in a public notification indicated the object for which it was to be applied (viz to meet educational expenses), that would not render the formality observed in passing the rule unsuitable or unauthorised, (5) that in as much as the by-laws provided for a license to be taken in the case of storage of firewood and charcoal, the Municipality was competent to make rules prescribing the fee to be charged for such a license, (6) but that as regards the manufacture and sale of sweetmeats the Municipality not having first made a by-law insisting upon a license and then framed a rule prescribing a fee under s 58 (j) of the Act the levy of fees upon the manufacturers and sellers of sweetmeats

was not in accordance with law **Sorabji Lakdawalla v. Broach Municipality, 43 B L. R. 533** See also notes under s 3 (20)

Power to grant a license includes power to refuse it:—The power to grant a license, by the Municipal Commissioner of the City of Bombay includes also the power to refuse the license **Haji Ismail v The Municipal Commissioner of Bombay, 5 B. L. R. 1001.**

Manufacturing oil by machinery —A manufactory or place of business where machinery is used for the purpose of extracting oil does involve a risk of fire A person can, therefore, be convicted for manufacturing oil by means of machinery within the Municipal District without obtaining a license in respect thereof **Hussain v Emperor, A. I R 1929 Sind 50 (2)**

Continuing fine.—When there is no previous conviction under s 155 of the Bombay District Municipal Act, 1901, a Magistrate cannot impose a continuing daily fine The words "after the date of the first conviction" in s 155 show that there should have been a conviction for a previous breach, and then subsequent conviction for continuing the breach after the date of the first conviction A Court cannot ordinarily sentence a person to pay a fine for a prospective offence, but can only impose a daily fine for failure or disobedience which is proved to have continued for a certain period after the date of the first conviction, or after the date of such notice or requisition as may be required by the enactment **Emperor v Dharala Mangal Jama, 28 B. L R 1040.**

Before a continuing fine is imposed for a continuing offence it must be alleged and proved that the accused had continued to use the premises for a specific number of days after his conviction, and that he had no license during those days This charge must be the subject of a separate prosecution, and a separate inquiry It is only on proof of the charge so laid that the Magistrate is called upon to exercise his discretion and to determine what would be the proper amount of fine per day which the accused should be made to pay and to give a finding as to the number of days for which such fine is to be levied **Hussain v Emperor, A, I. R 1929 Sind 50 (2).** Following this case it was held in **Jethanand v. Emperor, A I R 1929 Sind 52(2)** that there must first be a conviction for the breach and again a subsequent conviction for continuing the breach from the *date of the first conviction before an order can be passed inflicting a daily fine*

A daily penalty under s 186(2) cannot be imposed in anticipation of a repetition of the offence S 186 (2) does not indicate that an order of fine for further continuance of nuisance must necessarily be passed in the same order as that which records the first conviction Therefore on the principle that a person should not be punished in anticipation of the commission of an offence, it is necessary in every case where a fine for continuance of the offence is sought to be imposed for a fresh prosecution to be instituted There must be a conviction for a previous breach and then a subsequent fresh conviction for continuing the breach after the date of the first conviction before the daily penalty under s 186 (2) can be imposed **Tulsiomal v. Emperor, A. I R. 1942, Sind 78.**

Continuing offence—See notes under the head 'continuing contravention *etc'* under *s 118*

Starting point for limitation for prosecuton for a continuing offence:—See notes under this head under s 118

Conditions necessary for conviction.—In order to render a person liable to conviction and punishment under s 151, Bombay District Municipal Act (equi-

valent to s 186 of the B M. B Act, 1925), it must be proved (i) that a notice has been given him under sub-section (1), and (ii) that he uses the place in question or permits it to be used in such a manner as to be nuisance to the neighbourhood or dangerous to life, health or property The mere fact that notice in due form, was given regarding the place on a particular date cannot be conclusive evidence that there has been user of the place in such a manner as to be a nuisance after that date **Lurindaram Chuhermal v Karachi Municipality, A. I R 1914 Sind 103.**

Criminal Procedure Code, 1898 s. 133—Magistrate's powers—He should not generally interfere where Municipality has granted a license:—A Magistrate has jurisdiction to pass an order under s. 133 to regulate the manner in which a person working a lime kiln has been conducting his business if he finds that that person has been acting in a manner injurious to the health or physical comfort of the community It is generally inexpedient that a Magistrate would take action in such cases, for these matters are left by the legislature to the control of the Municipal Boards who have a Health Officer to instruct them on matters of hygiene If the Magistrate direct the accused to remove the kiln in spite of the license given by the Municipal Board, the High Court would be loath to uphold such an order in toto as it would afford a disastrous precedent by allowing Magistrates to interfere in matters which have been made over by the legislature to the Municipal Boards and the committees of public health appointed under them But where the Sessions Judge recommends modification of the Magistrate's order in accordance with the suggestion of the Health Officer of the Municipality, the aforesaid would not apply if the High Court were able to hold that such a modification was justified in the interests of public health If on the contrary it appears that the lime kiln is not a danger to the community, and if it causes discomfort to anyone, it is only to the complainant and his immediate neighbours who have deliberately chosen to reside in smoke and smell from the kilns, it would not uphold the order even in the modified form as recommended by the Sessions Judge **Laiman v Ch Bishambhar Nath, A I R 1932, All 159**

Whether by-laws in respect of a rice-mill run by steam or oil engine can be made:—Section 151 (1) (o) of the B D M Act, 1901, (equivalent to s 186 (1) (r) seems to contemplate places in which business which by their very nature involve a risk of fire are carried on A rice mill run by steam or by an oil engine does not necessarily involve a risk of fire, and it does not appear that by-laws can be made by a municipality in respect of such mills under s 48 (b) (iii) read with s 151 (1) of the Act **(R L. A's opinion no 125, dated the 6th January, 1924 in G R G D no 5062, dated the 18th January, 1924)** In the B M. B Act, 1925, a new clause (q) is added which will cover the case of such a rice-mill and hence the position is different under the Boroughs Act and such by-laws can be made under the Boroughs Act.

Whether a municipality can frame by-laws for licensing and regulating places under s. 151 of the B D. M. Act, 1901 (s 186 of the B. M. B. Act, 1925) for manufacturing, storing or selling explosives or petroleum:—Sec 48 (b) (iii) read with s 151 (1) (n) and (o) of the B D M Act, 1901, (s 61 (1) (b) (iii) read with s 186 (1) (n) & (r) of the B M B Act, 1925) enables a municipality to make by-laws for licensing and regulating places used for storing combustible materials or for any business which may involve risk of fire, and a penalty may be prescribed. Places used for storing and selling explosives or petroleum would

fall within these provisions The jurisdiction of the municipality over explosives would not be excluded by the mere fact that the earlier Municipal Act expressly mentioned explosives and the present Act omits to mention them The proceedings of the legislature do not control interpretation The facts that there are special Acts dealing with arms, explosives and petroleum does not prevent a local authority from regulating these matters by by-laws Section 31 of the Indian Arms Act, 1878, section 16 of the Indian Explosives Act, 1884 and section 26 of the General Clauses Act, 1897, preserve the liability to punishment under laws other than those specially dealing with arms, explosives or petroleum No doubt a by-law containing any thing actually inconsistent with the terms of a rule or license under a special Act will be ultra vires, but a by-law requiring a license or imposing a penalty or laying down additional conditions would not be beyond the competence of the local authority Section 23 of the Indian Petroleum Act, 1899, however gives the Government of India power to limit the jurisdiction of local authorities in dealing with petroleum, and the Government of India could accordingly remove that subject from the scope of by-laws and regulations of municipalities Also sanction may be withheld under s 48 of the B D M Act from new by-laws dealing with any of the subjects in question, and the Collector could probably take action under s 174 of the B D M Act (s 214 of the B M B Act), as regards the enforcement of existing by-laws (**R L A.'s opinion no. 20 dated the 17th December, 1917 in G O. G D no. 920, dated the 5th February, 1918**)

Prohibition of use of Steam whistles, etc.

187 (1) No person shall use or employ in any factory or any other place any whistle or trumpet operated by steam or mechanical means for the purpose of summoning or dismissing workmen or persons employed except under and in accordance with the conditions of a license from the standing committee

(2) The standing committee may grant such license subject to such conditions as it may deem fit and may at any time withdraw such license on giving one month's notice to the licensee;

Provided that where the licensee has contravened any of the conditions of the license, the license may be withdrawn without any such further notice.

(3) Whoever uses or employs any such whistle or trumpet as aforesaid without or in contravention of any of the conditions of or after the withdrawal of such license, shall be punished with fine which may extend to fifty rupees

Loitering or importuning for purposes of prostitution

188 Whoever in any street or public place within the limits of a municipal borough loiters for the purposes of prostitution, or importunes any person to the commission of sexual immorality, shall be punished with fine which may extend to fifty rupees

Provided that no Court shall take cognizance of an offence under this section except on the complaint of the person importuned, or of a Police Officer not below the rank of an officer in charge of a police

station and specially authorized in this behalf by the District Magistrate or by the municipality

Amendments:—In any Municipal Borough to which section 3 of the Bombay Prevention of Prostitution Act 1923 (Bom 11 of 1923) may be extended under section 1 of the said Act, section 188 of the Bom Act 18 of 1925 shall be deemed to have been repealed from the date of such extension(vide Bom 11 of 1923, section 13(2)

Brothels.

189 In any municipal borough—

(a) any part of which is within three miles of a cantonment, or

(b) to which on the application of the municipality the Provincial Government may by notification have declared this section to apply, any Magistrate of the first class, on receiving information that a house within the limits of such borough is used as a brothel, may summon the owner or occupier of such house and on being satisfied that the house is so used, may order the owner or occupier to discontinue such use of it, and, if such owner or occupier shall fail to comply with such order within five days, may impose upon him a fine not exceeding twenty-five rupees for everyday thereafter that the house shall be so used:

Provided that action under this section shall be taken only—

(a) with the sanction or by the order of the District Magistrate, or

(b) on the complaint of three or more inhabitants of the municipal borough residing in the vicinity of the house to which the complaint refers

Amendments.—The words 'the Provincial Government' were substituted for the words 'The Government' by the Adaptation of Indian Laws Order in Council

Continuing offence:—See notes under the head 'continuing contravention, etc' under s 118

Starting point for limitation for prosecution for a continuing offence:—See notes under this head under s 118

Pilgrim lodging houses.

190. (1) No person shall, in any municipal borough which the Provincial Government shall have declared by notification to be a pilgrim centre for the purpose of this section and of clause (d) of sub-section (1) of section 61, use or permit to be used any place or building for the purpose of lodging pilgrims except under and in accordance with the conditions of a license from the standing committee.

(2) The standing committee may grant such license subject to such conditions as it may deem fit and may at any time withdraw such license on giving one month's notice to the licensee:

Provided that where the licensee has contravened any of the conditions of the license, the license may be withdrawn without any further notice

(3) Whoever lodges or permits to be lodged, any pilgrim in any place or building without or in contravention of any of the conditions of or after the withdrawal of or during the suspension of such license, shall be punished with fine not exceeding five rupees for each such pilgrim for each day or part of a day during which such pilgrim has been so lodged

Amendments:—The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

Continuing offence:—See notes under the head 'continuing contravention etc.' under s 118

Starting point for limitation for prosecution for a continuing offence'—See notes under this head under s 118

Police and municipal officers to aid fire brigade

191 It shall be the duty of all police officers and of all municipal officers and servants to aid a fire-brigade in the execution of its duties Such officers and servants may close any street in or near which fire is burning and remove any persons who interfere by their presence with the operations of the fire-brigade

Amendments:—The words "the Provincial Government" were substituted for the words "the Government" by the Adaptation of Indian Laws Order in Council

Service of notices, etc., addressed to individuals.

192. (1) The service of every notice and the presentation of every bill under this Act on any person or to any person to whom it is by name addressed, shall, in all cases not otherwise specially provided for in this Act, be effected by a municipal officer or servant or other person authorized by the Chief Officer in this behalf—

(a) by giving or tendering the notice or bill to the person to whom it is addressed, or

(b) if such person is not found, by leaving the notice or bill at his last known place of abode, if within the municipal borough, or by giving or tendering, the notice or bill to some adult male member or servant of his family, or

(c) if such person does not reside within the municipal borough, and his address elsewhere is known to the President or other person directing the issue of the notice or bill, then by forwarding the notice or bill by registered post under cover bearing the said address; or

(d) if none of the means aforesaid be available, then by causing the bill or notice to be affixed on some conspicuous part of the building or land, if any, to which the bill or notice relates

Service of notices on owners or occupiers of buildings and lands.

(2) When any notice under this Act is required or permitted by or under this Act to be served upon an owner or occupier of any building or land, it shall not be necessary to name the owner or occupier therein, and the service thereof, in cases not otherwise specially provided for in this Act shall be effected either—

(a) by giving or tendering the notice to the owner or occupier or if there be more owners or occupiers than one, to any one of them; or

(b) if no such owner or occupier be found, then by giving or tendering the notice to some male adult member or servant of the family of any such owner or occupier as aforesaid, or

(c) if none of the means aforesaid be available, then by causing the notice to be fixed on some conspicuous part of the building or land to which the same relates

Public and general notices how to be published

(3) Every notice which this Act requires or empowers a municipal authority or officer to give or to serve either as a public notice or generally or by provisions which do not expressly require notice to be given to individuals therein specified shall be deemed to have been sufficiently given or served if a copy thereof is put in such conspicuous part of the municipal office during such period and in such other public buildings and places, or is published in such local papers or in such other manner, as the municipality in by-laws in this behalf prescribes

Defective form not to invalidate notice

(4) No notice or bill shall be invalid for defect of form

Execution of acts required to be done by any notice

(5) (a) Where any notice under this chapter requires any act to be done for which no time is fixed by this Act, the notice shall fix a reasonable time for doing the same

(b) In the event of non-compliance with the terms of the notice it shall be lawful for the Chief Officer to take such action or such steps as may be necessary for the completion of the act thereby required to be done, and all the expenses therein incurred by the municipality shall be paid by the person or persons upon whom the notice was served, and shall be recoverable in the manner provided in section 199

Servants of the family of the owner'—A person who recovers rent of premises belonging to persons constituting a family, on behalf of the family is a servant of the family of the owner within the meaning of s 485, cl (b), of the Bombay City Municipal Act, 1888 **The Municipal Corporation of Bombay v. Charandas, 36 B. L R. 169** In the course of the judgment Rangnekar J. observed "But it is further argued that even supposing Bisheshar was recovering rents of these properties he was not a servant of the family of the owners within the meaning of s. 485, and that, no doubt, is an important question

which arises for determination in this case, and I proceed to deal with it now There are two sections in the Act which lay down the procedure to be followed by the Municipal authorities in effecting service of any notice, bill, summons or schedule etc which is required by the Act to be served on owners of premises and other persons In construing these sections I think it is permissible to consider the aim, the scope and the object of the statute If the intention of the Legislature was that the widest possible powers should be given to the Municipal authorities in order that the object of the Act should be carried out, then I think it is the duty of a Judge to put upon these sections what is called a beneficial construction In my opinion, having regard to the object of the City of Bombay Municipal Act any construction which would facilitate the carrying out of that object ought to be adopted rather than any construction which would retard the fulfilment of the purpose and object of the statute Section 484 lays down that whenever service of notice etc is to be effected on any person then it has to be effected in four ways, and it seems to me that although, as Mr Mulla contends, the method of the service in ss 484 and 485 is identical with some exceptions, the object of s 484 is to have service effected on a person &conominee, and that appears from the wording of that section Under s. 485 wider powers seem to have been given to the Municipal authorities for the purpose of effecting service on an owner or occupier of premises That section says that when any notice etc is required by this Act (omitting unnecessary words) to be served upon or issued or presented to the owner or occupier of any building or land 'it shall not be necessary to name the owner or occupier therein, and the service shall be effected, not in accordance with s 484 but as follows' Then follow sub-clauses (a), (b) and (c) Now the first thing to notice is that it is not at all necessary under this section to address the notice in any particular name This, to my mind, indicates that the legislature intended to confer on the Municipal authorities widest possible powers for effecting service All that the section requires is that service should be effected in accordance with the provisions of sub-clause (a), (b) or (c) Clause (a) directs that notice etc shall in the first place be given or tendered to the owner or occupier, or if there be more than one owner or occupier, to any one of the owners or occupiers of such building or land In sub-clause (b) if the owners or occupier or no one of the owners or occupiers is found the service of the notice etc shall be effected by giving or tendering the said notice etc to some adult male member or servant of the family of the owner or occupier or of any one of the owners or occupiers Or, thirdly, if none of the means aforesaid be available, by causing such notice etc to be affixed on some conspicuous part of the building or land to which the same relates In a forcible argument Mr Mulla contends that service on Bisheshar does not come within any of these clauses Turning to clause (b) his argument is that even if Bisheshar was collecting rents on behalf of the defendants he could not be said to be a servant of the family of the owner Taking the provisions of these two sections together and bearing in mind the object of the legislature in framing these sections, it seems to me that what clause (b) really requires is that if service cannot be effected in the manner provided by clause (a), then it is open to the Municipal authorities to effect service by tendering or giving the notice, etc to an adult male member of the owner's family or a servant of his family I do not propose to consider the hypothetical cases put forward in the course of the argument The position appears to me on the evidence to be that the property in this case belonged to the defendants, and that is not disputed, subject to some interest in Monghibai, and that, therefore, the property was the family property, and that being so a person who recovers

rent on behalf of the family and to which the family is entitled, would I think fall within the description of 'servant of the family of the owner' I hold on the evidence in the case that Bisheshar was a servant of the owners within the meaning of sub-clause (b) of s 485, and service on him was proper service under the Act There is no doubt that the object was, as I have stated, to give very wide powers to the Municipal authorities to effect service If one turns to Order V, Rule 15, Civil Procedure Code, one finds that under that rule where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him and the explanation to the rule says, 'A servant is not a member of the family within the meaning of this rule' Contrasting this provision with that of s 485, it seems to me to be very clear that the restrictions imposed under Rule 15 of Order V of the Civil Procedure Code, are done away with when one comes to clause (b) of s 485 And I think there is considerable force in Mr Coltman's argument that these words are put in this clause in order to enable the Municipal authorities to effect service in cases of a joint family property To accept the narrow construction which the learned counsel for the defendants would put on these words would result, in my opinion, in certain absurd results For instance, if these words are to be taken in their narrow sense, namely, that a person on whom service is to be effected must be a domestic servant, this would result in making the service effected on the servant of the owner himself bad or invalid This could hardly have been intended by the legislature In my judgment a servant of the family of the owner means a servant employed for the benefit of the family in general and paid out of the family property or funds But supposing that the service on Bisheshar can be challenged on the ground that he is not a servant of the family of the owner, I think the case falls also within sub-clause (a) of that section Section 3 of the Act gives a statutory definition of the term 'owner' and that seems to be very clear It says that unless there be something repugnant in the subject or context, 'owner', when used in reference to any premises, means the person who receives the rent of the said premises, or who would be entitled to receive the rent thereof if the premises were let, and includes (1) an agent or trustee who receives such rent on account of the owner Therefore every possible way by which the Municipality can get at a person who has a beneficial interest in the property in order to secure compliance with the provisions of the Municipal Act has been contemplated and provided for by extending the ordinary meaning of the term 'owner' by section 3 of the Act, except of course when the context itself is against such a construction Now, if as I have found, Bisheshar was actually receiving the rent, whether he was doing so rightly or wrongly, and in this case I think he was doing so rightly, I do not see what objection there can be in holding that the service upon him would fall within sub-clause (a) of s 485 Mr Mulla's argument, as I understand it, is that having regard to the context and the terms of s 485, the word 'owner must be understood in every case in the ordinary sense, and he bases it on the words of the section 'it shall not be necessary to name the owner or occupier', and he argues that when the Act says that it is not necessary to name the owner, the term 'owner' must be understood in the ordinary sense Having given my best consideration to the arguments, I still fail to see what there is in the context which prevents an extended meaning allowed by s 3 being put on the term 'owner' in s 485 The underlying idea of s 485 seems to me that whereas under s. 484 it is necessary to mention the name of the owner, under s 485 no name need spe-

cifically be mentioned And obviously this provision is made for very good reasons There are several properties in Bombay which stood and are standing in the names of persons long since dead, and sometimes it is very difficult if not impossible to find out who really the owner of the property is, and the provision that it should not be necessary to name the owner is made to meet cases like these There are many properties in Bombay which belong to a joint and undivided Hindu family, or to people who are governed by or follow the Hindu law Obviously it is difficult to know who the 'owner' of such properties is, it would be equally difficult to know if a servant is a servant of the family or of any member of a family It is to meet cases like these that the legislature has enacted s 3 and s 485 of the Act I am unable to see why the word 'owner' in s 485 should not be construed so as to bear the extended sense allowed by s 3 In the case of **Peek v Waterloo Board of Health,** a case which arose under the Public Health Act, the Court held in defining the word 'owner' that a person who is de facto receiving the rent would be the owner within the meaning of s. 2 of that Act The case is cited in Halsbury, Vol XXIII So far as I can see, it has not been repealed, and I think it is an authority which throws considerable light on the question which I have to decide in this case" **See also notes under s. 3**

Whether s 192 (1) (c) applies to the case of a person who is permanently residing within the local area :—Section 216 (1) (a) (equivalent to s 192 (1) (c) of the B M B Act, 1925) does not apply to the case of a person who is permanently residing within the local area and who has given his home address as the place to which notices were to be sent but who for purposes of business had temporarily left for a place outside the local area. **Ramnathan Chettiar In re: A I. R 1931 Mad. 138.**

Owner not named in the notice—Whether trustee can be prosecuted :— See notes under this head under *s* 3 (14)

Service of notice :—The provisions of s. 192(1) must be construed strictly. Substituted service under cl (d) can only be resorted to if none of the other means mentioned is available **(R. L. A.'s Opinion no O Munis— cities—15 dated the 23rd July 1928 in G. R. G. D No 4240 dated the 28th July 1928).**

Punishment for disobedience of orders and notices not punishable under any other section.

193. Whoever disobeys or fails to comply with any lawful direction given by any written notice issued by or on behalf of a municipality under any power conferred by this chapter, or fails to comply with the conditions subject to which any permission was given to him by or on behalf of a municipality under any power so conferred, shall, if the disobedience or failure is not an offence punishable under any other section, be punished with fine which may extend to fifty rupees, and with further fine which may extend to five rupees for every day on which the said disobedience or failure continues after the date of the first conviction.

Provided that when the notice fixes a time within which a certain act is to be done, and no time is specified in this Act, it shall rest with the Magistrate to determine whether the time so fixed was reasonable time within the meaning of this Act.

Lawful direction—What is :—Section 131 of the Bombay District Municipal Act renders the owner liable for non-compliance with a notice issued under it,

not when the Municipality considers vegetation to be rank or noisome, but only when the vegetation is actually so To support a conviction under the section for non-compliance with a notice, the prosecution must establish affirmatively the objectionable character of the vegetation To support a conviction for non-compliance with a notice issued under s 135 of the Act, it must be shown that there is some pool, ditch, tank, hole, water channel, receptacle of foul water &c of the kind mentioned in the section, the filling, cleansing, draining or removal of which the municipality has directed by notice, or with regard to which the municipality has directed such measures to be taken, as it considers necessary to abate or remove the nuisance **Emperor v Anandrao 9 B. L R 247**

A District Municipality issued a written notice under s 107 (2) of the Bombay District Municipal Act, 1901, to the accused stating that the cess-pool of his house is a nuisance and that therefore within seven days from the 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) of the Act 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 of the District Municipal Act **Emperor v Laduram 11 B L R 1349** This position is now changed by the addition of the words 'require the owner to in s 107 (2) of the B D M Act, 1901, by Bombay Act IV of 1924, s 6 and the occurrence of these words in s 135 of the B M B Act, 1925 It is now open to the municipality to direct an owner or occupier to demolish or close a cesspool

The accused was served with a notice under s 122 of the Bombay District Municipal Act 1901 to demolish an otla which he had put up some time back. For non-compliance with the notice, the accused was convicted, under s 155 of the Act, of having disobeyed a lawful order On application to the High Court :— Held, setting aside the conviction, that the proper step according to law which the Municipality should have taken was to remove the otla themselves and charge the accused with the cost of the removal Section 122 of the Bombay District Municipal Act 1901 gives no power to a Municipality to issue a notice to a person alleged to have erected an encroachment, to remove it Although the Municipality may send such a notice, it is not a notice under the section Such a notice may be sent as a matter of courtesy, preliminary to a Municipality taking action under the powers given them by the section to remove an encroachment themselves It is not intended, assuming a Municipality serves a notice upon a person to remove an encroachment, that if he does not do so, he may be convicted under s 155 of the Act **Emperor v Atmaram, 24 B L R 384**

Section 167 of the Bombay Municipal Boroughs Act, 1925, requires that the Chief Officer should be satisfied of the existence of a nuisance, because he is given power to issue the notice there provided for, if in his opinion a nuisance exists It is not necessary therefore that it should be proved by evidence that a nuisance exists in fact It is necessary, however, that the opinion of the Chief Officer should be properly proved The mere production of a notice signed by him is not enough The words, "fill up" in s 167 are intended to apply to the land on which water accumulates, but it is doubtful if they are intended to apply to filling up in the sense of raising the level of a large area of land which is naturally low lying land The phrase 'or to take such order with the same for removing or abating

the nuisance as the Chief Officer shall prescribe' in the section must be considered with their context, on the principle of 'noscitur a sociis.' **Emperor v. D. F. D'Silva, 39 B. L. R. 77**

Section 381 of the City of Bombay Municipal Act 1888, empowers the Commissioner to require the owner of low ground to cleanse and fill up the same, but it does not permit him to issue an order that an indefinite quantity of low lying ground shall be filled up much less that it shall be filled to some particular level or filled up with sweet earth or that it shall be sloped in a particular direction **Municipal Commissioner of Bombay v Hari Dwarkoji, 1 B L.R 518**

Notice signed by the Chief Officer—whether proper —A notice ordered by the Standing Committee of a City Municipality under s 137 of the Bombay City Municipalities Act, 1925, is not bad merely on the ground that it is signed not by the Chairman of the Standing Committee but by the Chief Officer of the Municipality Rule 44 framed by the Surat Municipality under s 46 of the Bombay District Municipal Act, 1901 and continued under s 46 of the Bombay City Municipalities Act, 1925, is not ultra vires **Emperor v Heptulla, 32 B.L.R 757**

Who can complain ? —Under s 155 of the Bombay District Municipal Act, 1901, a complaint for an act which is an offence only under the Act, and not under any other Act, can be instituted by the Municipality alone and not by a private individual In regard to acts which are offences under the special law as well as offences under the general law, the fact that an act is an offence under a special law cannot exclude the right of any individual aggrieved to lodge a complaint under the general law **In Re Motilal Shah, 32 B.L.R 1502** In this case the petitioner applied to the Municipality of Mehmadabad for permission to put up a weather shed He first obtained permission to put it up Subsequently the permission was rescinded as being opposed to a certain rule, but he maintained it The opponent neighbour filed a civil suit to compel him to remove the weather shed and subsequently filed the present complaint before the First Class Magistrate, Mehmadabad, purporting to be made under ss 161 and 155 of the District Municipal Act, in respect of this weather shed The petitioner accused contended that the complaint was without jurisdiction, not having been made by the Municipality That application as well as the application to stay the complaint pending decision of the civil suit were rejected by the Magistrate The accused applies in revision to this Court and asks that the proceedings should be quashed or, in the alternative they should be stayed pending decision of the civil suit Dealing with the question Madgaokar J observed —"It is argued for the petitioner that s 155 read with s 161 of the Bombay District Municipal Act (III of 1901) implies that the legislature intended the prosecution to be instituted by the Municipality alone and not by a private individual such as the opponent. It is argued for the Crown that under the general law relating to the definition of offence under the Code of Criminal Procedure, it is open to any individual to lodge a complaint under s 155 equally with the Municipality It is undoubted that in regard to acts which are offences under the special law as well as offences under the general law, the fact that an act is an offence under a special law cannot exclude the right of any individual aggrieved to lodge a complaint under the more general law For instance, where an act was an offence under the Cattle Trespass Act as well as under s 82 of the old Bombay District Municipal Act (VI of 1873) corresponding to the present s. 161, the complaint by the private individual was held to be within the law **Queen-Empress v. Mulchand**, similarly where the complaint was a nuisance **Queen-Empress v Bai Reva.** But where an

act is not an offence under the general law but under the special law, under which a certain public authority is invested with a definite duty and with definite powers to discharge it, the question is more doubtful Thus, for instance, under the City of Bombay Municipal Act (Bom III of 1888) a complaint under ss 68, 231, 471, and 517 could only be lodged by the Commissioner or by an official to whom he delegates his function under s 68 The language of s 517 of that Act is as follows 'The Commissioner may (a) take, or withdraw from, proceedings against any person who is charged with (i) any offence against this Act etc ' There is no express provision in the section that no other person can institute such proceedings Similarly it was held in **The Queen v Cubitt** that 'where a statute created an offence and specified certain persons as those by whom the provisions of the Act shall be enforced, no other person can prosecute for the offence' In **Bradlaugh v Clarke**, it was observed (p 358) —'Where a penalty is created by statute, and nothing is said as to who may recover it and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it' These decisions are referred to and followed in **Ashutosh Ganguli v Watson** In **Chunilal v Ahmedabad Municipality** following **Wolverhampton New Waterworks Co. v. Hawkesford**, it was held "Where a statute created a right not existing at common law and prescribes a particular remedy for its enforcement, then that remedy alone must be followed' In the present case, it is clear that there is no general right in the petitioner to erect such a weather shed The matter was one within the competence of the Municipality alone to grant or to withhold permission, and the offence complained of by the opponent, if any, arises, by reason of disobedience to the order of the Municipality On general grounds it is clear that where a statute invests any public body or officer with the enforcement of any order and enacts that that body may institute prosecutions, such a provision would be unnecessary unless the legislature contemplates that body alone as the proper person to institute prosecutions A general right would include that body and would not need express enactment, and unless the right was confined to that body, such an enactment, on the whole, would be meaningless In the present case s 161 expressly enacts 'The municipality and the chief officer may direct any prosecution for any public nuisance ' We are of opinion, on the whole, that the legislature contemplated that the prosecution, if any, should be instituted by the Municipality alone and not by a private individual such as the opponent, so long as the acts complained of were offences only under the Act and not under any other Act, as in the present case "

After the date of the first conviction .—Where there is no previous conviction under s 155 of the Bombay District Municipal Act, 1901, a Magistrate cannot impose a continuing daily fine The words " after the date of the first conviction' in s. 155 show that there should have been a conviction for a previous breach, and then subsequent conviction for continuing the breach after the date of the first conviction A Court cannot ordinarily sentence a person to pay a fine for a prospective offence, but can only impose a daily fine for failure or disobedience which is proved to have continued for a certain period after the date of the first conviction, or after the date of such notice or requisition as may be required by the enactment **Emperor v Dharalla Mangal Jama, 23 B L R 1040**

Before a continuing fine is imposed for a continuing offence it must be alleged and proved that the accused had continued to use the premises for a specific number of days after his conviction, and that he had no license during those days. This charge, must be the subject of a separate prosecution, and a separate

inquiry It is only on proof of the charge so laid that the Magistrate is called upon to exercise his discretion and to determine what would be the proper amount of fine per day which the accused should be made to pay and to give a finding as to the number of days for which such fine is to be levied **Hussein v. Emperor, A.I.R. 1929 Sind 50(2)** Following this case it was held in **Jethnand v. Emperor, A.I.R. 1929 Sind 52(1)** that there must first be a conviction for the breach, and again a subsequent conviction for continuing the breach from the date of the first conviction, before an order can be passed inflicting a daily fine The delay caused by the fact that petitions made by the accused were under consideration cannot extend the period of six months allowed in such cases

Continuing offence.—See notes under the head 'Continuing contravention, etc ' under s 118

Starting point for limitation for prosecution for a continuing offence.—See notes under this head under s 118

General Penalty

193A Whoever does or omits to do an act in contravention of any provisions of this Act or the by-laws made thereunder or the conditions of a licence or permission granted by a municipality under the said provisions or by-laws shall, if such act or omission is not an offence under the said provisions or by-laws, be punished with fine which may extend to fifty rupees and with further fine which extend to five rupees for every day on which such act or omission continues after the date of the first conviction

Amendment —Section 193A was inserted by Bom 19 of 1935 s 14

Failure to keep drains, water pipes, etc, in proper repairs—Conviction under s 193A—notice not necessary:—See notes under this head under s 135

Municipality in default of owner or occupier may execute works and recover expenses.

194 (1) Where under the provisions of this Act any work is required to be executed by the owner or occupier of any building or land and default is made in the execution of such work, the municipality, whether any penalty is or is not provided for such default, may cause such works to be executed, and the expenses thereby incurred shall, unless otherwise expressly provided in this Act, be paid to by the person by whom such work ought to have been executed, and shall be recoverable in the same manner as an amount claimed on account of any tax-recoverable under chapter VIII either in one sum or by instalments as to the municipality may seem fit

Provided that—

Agreement for construction of drainage and water connections

(a) where any drainage scheme or water-works scheme has been commenced by any municipality, it shall be lawful for the municipality, without prejudice to its powers under section 129 or any other provision of this Act, to make a special agreement with the owner of any building or land as to the manner in which the drain-

age or water-connection thereof shall be carried out, and the pecuniary or other assistance, if any, which the municipality shall render: and any payment agreed upon by the owner shall be recovered in accordance with the terms of such agreement or in default, in the manner described in sub-sections (2) and (3),

Improvement-expenses.

(b) where an order or requisition has been passed under sub-section (1) of section 115, sub-section (1) of section 117, sub-section (2) or (8) of section 123 or under section 127, 129, 134 or 135 or where permission has been given under section 131, or where an arrangement has been made under proviso (a) of this sub-section, the municipality may, without prejudice to any other powers under this Act, if it think fit, declare any expenses incurred by the municipality in the execution of such order or in the carrying out of such requisition, permission or arrangement to be improvement expenses. Improvement expenses shall be a charge upon the premises or land, and shall be levied in such instalments as the municipality may decide, including interest at the rate of seven and a half per cent. per annum, and shall be recoverable in the manner described in sub-sections (2) and (3)

Power to levy charges on occupier who may deduct the same from his rent

(2) If the defaulter be the owner of the building or land, the municipality may, by way of additional remedy, whether a suit or proceeding has been brought or taken against such owner or not, require, subject to the provisions of sub-section (3), the payment of all or any part of the expenses payable by the owner for the time being from the person who then, or any time thereafter, occupies the building or land under such owner, and in default of payment thereof by such occupier on demand, the same may be levied from such occupier, and every amount so leviable shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under chapter VIII, every such occupier shall be entitled to deduct from the rent payable by him to his landlord so much as has been so paid by or recovered from such occupier in respect of any such expenses

Occupiers not to be liable for more than the amount of rent due.

(3) No occupier of any building or land shall be liable to pay more money in respect of any expenses charged by this Act on the owner thereof, than the amount of rent which is due from such occupier for the building or land in respect of which such expenses are payable, at the time of the demand made upon him or which at any time after such demand and notice not to pay rent to the landlord, has accrued and become payable by such occupier, unless he neglect or refuse, upon application made to him for that purpose

by the municipality, truly to disclose the amount of his rent, and the name and the address of the person to whom such rent is payable, but the burden of proof that the sum demanded of any such occupier is greater than the rent which was due by him at the time of such demand, or which has since accrued, shall be upon such occupier

Provided that nothing herein contained shall be taken to affect any special contract made between any such occupier and the owner respecting the payment of any such expenses as aforesaid.

Whether the section is binding on the Crown :—The Secretary of State for India was the owner of certain premises fronting, adjoining and abutting on a private street off Colaba Road, Bombay On May 31, 1930, the Municipal Commissioner of Bombay called upon the Secretary of State, under s 305 of the City of Bombay Municipal Act, 1888, to level, metal, drain and light, the street The Secretary of State failed to comply with the notice and the Municipal Commissioner, thereupon, caused the work to be executed under s 499 of the Act The Municipal Commissioner thereafter claimed two sums of Rs 691-12-0 and Rs 1,850-8-11 from the Secretary of State for the expense incurred in carrying out the work The Secretary of State disputed the right of the Municipal Commissioner to demand the payment The Municipal Commissioner referred the matter, under s 503 of the Act, for determination, to the Chief Judge of the Small Causes Court, Bombay The Chief Judge dismissed the suit holding that the Crown was exempted from liability to pay the expenses demanded by the Municipal Commissioner as the Crown was not expressly or by implication referred to in the provisions of ss 305, 489, and 491, of the City of Bombay Municipal Act, 1888 The Municipal Commissioner appealed It was held · The Crown is not bound by the provisions of ss 305, 489, and 491 of the City of Bombay Municipal Act, 1888, as they do not expressly or by implication refer to the Crown The intention that the Crown should be bound or has agreed to be bound must clearly appear from the language used and from the nature of the enactment **H K Kirpalani v The Secretary of State for India, 36 B.L.R. 820**

Posts of Aerial Electric line in street land—who to bear cost of removal:—See notes under this head under s 152

Whether local bodies can levy betterment charges :—See notes under this head under s 73

Occupier in default of owner may execute works and deduct expenses from his rent

195 Where default is made by the owner of any building or land in the execution of any work required to be executed by him, the occupier of such building or land may, with the approval of the municipality cause such work to be executed, and the expense thereof shall be paid to him by the owner or the amount may be deducted out of the rent from time to time becoming due from him to such owner

Proceedings if any occupier opposes the execution of the Act.

196 If the occupier of any building or land prevent the owner thereof from carrying into effect in respect of such building or land, any of the provisions of this Act, after notice of his intention so to

carry them into effect has been given by the owner to such occupier, any Magistrate upon proof thereof, and upon application of the owner, may make an order in writing requiring such occupier to permit the owner to execute all such works, with respect to such building or land, as may be necessary for carrying into effect the provisions of this Act, and may also, if he thinks fit, order the occupier to pay to the owner the costs relating to such application or order, and if, after the expiration of eight days from the date of the order, such occupier, continue to refuse to permit such owner to execute, any such work, such occupier shall for every day during which he so continues to refuse be punished with fine which may extend to fifty rupees and every such owner, during the continuance of such refusal, shall be discharged from any penalties to which he might otherwise have become liable by reason of his default in executing such works

Continuing offence'—See notes under the head 'continuing contravention etc' under s 118

Starting point for limitation for prosecution for a continuing offence.—See notes under this head under s 118

(15) Miscellaneous

Entry for purposes of the Act

197 It shall be lawful for the president, vice-president, Chief Officer or any officer authorised by the Chief Officer for such purpose, to enter for any purpose of this Act, between sunrise and sunset with such assistants as he may deem necessary, into and upon any building or land

Provided that, except when herein otherwise provided, no building or land which may be occupied at the time shall be entered unless with the consent of the occupier thereof, without twenty-four hours' written notice thereof having been given to the said occupier

Provided also that in the case of buildings used as human dwellings, due regard shall be paid to the social and religious customs of the occupiers

Notice to enter—obstruction amounts to wrongful restraint —There is nothing in s 159 of the Bombay District Municipal Act which authorises a Municipality issuing a notice under that section to give any direction to the person to whom the notice is given to do anything that they may require The notice has to be simply an intimation to the occupier of the land that the Municipality will enter for the purposes mentioned in the section at a specified hour on a specified day If the occupant does anything to prevent the entrance, he cannot be said to disobey the notice but his act will amount to wrongful restraint or wilful obstruction as the case may be. **Emperor v. Parshottam, 6 B. L R. 538.**

Arbitration in cases of compensation, etc

198 (1) If an agreement is not arrived at with respect to any compensation or damages which are by this Act directed to be paid, the amount and if necessary the apportionment of the same shall be ascertained and determined by a panchayat of five persons, of whom two shall be appointed by the municipality, two by the party to or from whom such compensation or damages may be payable or recoverable, and one, who shall be sir-panch, shall be selected by the members already appointed as above

(2) If either party or both parties fail to appoint members, or if the members fail to select a sir-panch within one month from the date of either party receiving written notice from the other of claim to such compensation or damages, such members as may be necessary to constitute the panchayat shall be appointed, at the instance of either party, by the District Judge

(3) In the event of the panchayat not giving a decision within one month from the date of the selection of the sir-panch or of the appointment by the District Court of such members as may be necessary to constitute the panchayat, the matter shall, on application by either party, be determined by the District Court which shall, in cases in which the compensation is claimed in respect of land, follow as far as may be the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court.

I of 1894

Provided that—

(a) no application to the Collector for a reference shall be necessary, and

(b) the Court shall have full power to give and apportion the costs of all proceedings in any manner it thinks fit

(4) In any case where the compensation is claimed in respect of land and the panchayat has given a decision, either party, if dissatisfied with the decision, may within a month of the date thereof apply to the District Court and the matter shall be determined by the District Court in accordance with the provisions of sub-section (3).

(5) In any case where the compensation is claimed in respect of any land or building the municipality may, after the award has been made by the panchayat or the District Court, as the case may be, take possession of the land or building, after paying the amount of the compensation determined by the panchayat or the District Court to the party to whom such compensation may be payable. If such party refuses to accept such compensation, or if there is no

person competent to alienate the land or building, or if there is any dispute as to the title to the compensation or as to the apportionment of it, the municipality shall deposit the amount of the compensation in the District Court.

Measure of Compensation—Addition of fifteen per cent.—A mosque in Bombay was abutted on the north, west and east by public streets In December, 1886, the Municipal Commissioner, pursuant to s 166 of the Bombay Municipal Acts III of 1872, and IV of 1878, required the trustees of the mosque to set back the building on the said three sides for the purpose of improving the public streets It was contended that the amount of compensation to be paid to the trustees was to be measured by the loss of rent which they would have received for certain rooms which they had proposed to build on the land in question Held, that the words of s 163 of the Municipal Acts III of 1872 and IV of 1878 were intended to ensure compensation to the owner for every sort of damage, and not to restrict it to compensation for such damage as he might by his own arrangement reduce it to Compensation becomes due under the section as soon as the Corporation takes possession, which is when the owner begins to build, and there being no words in the section to show a contrary intention, the compensation must be assessed according to the state of things then existing, and not upon the basis of what the owner may have it in his power to do towards diminishing the damage which would otherwise result to him Held, also, that in cases of compensation granted under s 163 of the Municipal Acts III of 1872 and IV of 1878, the addition of 15 per cent cannot be allowed **The Municipal Commissioner of Bombay v. Patel Haji Mahomed and others, 14 Bom. 292.**

Where, in case of set-back, land with buildings thereon was taken up by the Municipal Commissioner from a private owner under Act III of 1888, ss 298, 299 and 301 Held, that the amount of compensation awarded to the owner should be calculated with regard to the price given within a few years previously for land of a similar character in the immediate neighbourhood of the land in question Held, also, that the addition of 15 per cent could not be allowed An appeal lies to the High Court from a decision of the Chief Judge of the Small Causes Court of Bombay granting compensation to the owner of land taken by the Municipality in case of a setback under the Municipal Act III of 1888, ss 298, 299, 301 **Municipal Commissioner of Bombay v Syed Abdul Huk, 18 Bom 184**

Both these cases were distinguished in the **Borough Municipality of Ahmedabad v J V. Divetia, 39 B L R 329** and it was held that sections 23 to 25 of the Land Acquisition Act, 1894, constitute a code laying down the principles on which the District Court is to act in arriving at the compensation to be paid for compulsory acquisition of land These sections apply to proceedings in the District Court under s 198 of the Bombay Municipal Boroughs Act, 1925 A District Judge acting under s 198 is, therefore, entitled to allow the fifteen per cent under s 23 of the Land Acquisition Act in addition to the amount of compensation awarded under s 198 of the Bombay Municipal Boroughs Act, 1925 Referring to the above two cases which were cited, Beaumont C J observed "The two cases on which Mr Shah relied and which are referred to in the judgment of lower Court, **the Municipal Commissioner for the City of Bombay v Patel Haji Mahomed Ahmed Janu** and **Municipal Commissioner for the City of Bombay v Syed Abdul Huq**, were cases in which there was no provision similar to that in s 198 (3) of the Bombay Municipal Boroughs Act incorporating the procedure under the Land Acquisition Act Therefore those cases afford no assistance to

me in deciding the present case" The same view was taken in **Hyderabad Municipality v Moorjmal Mustakram, A I R 1918 Sind 65,** wherein it was held The word procedure in s 160 (3) is used in its popular and not strictly legal sense and a District Court in awarding compensation under that section has power to award 15 per cent of the market value in addition to such value

Bias—Disqualification of members of the Panchayat —The Municipality of Poona wishing to take up the applicant's land the Collector of Poona determined the amount of compensation and tendered it to the applicant, who declined to accept it The Collector thereupon referred the matter to the District Judge Two assessors were appointed to aid him, one by the applicant and another by the Collector The nominee of the Collector was the mamlatdar of Poona, a ratepayer and an ex-officio member of the Municipality, and during his membership the managing committee had unsuccessfully negotiated with the applicant for the purchase of the ground The District Judge made award upholding the Collector's valuation Held, that the award was bad and must be set aside, as the Collector's nominee had under the circumstances a real bias, and was not a qualified assessor within the meaning of s 19 of the Land Acquisition Act, X of 1870 **Kashinath Khasgivala v the Collector of Poona, 8 Bom 553.**

The above case was followed in **Swamirao v The Collector of Dharwar, 17 Bom 299** In this case certain land belonging to the applicant, a minor, was taken by the Municipality of Hubli under the Land Acquisition Act (X of 1870) The Mamlatdar of Hubli, who was an ex-officio member of the Municipal Committee, took part in the negotiations for the purchase of land He also gave evidence as to its value in the inquiry before the Collector As the price offered by the Collector was not accepted by the applicant, the matter was referred to the District Judge, under s 15 of the Act, for the purpose of determining the amount of compensation On this reference the Mamlatdar acted as an assessor appointed by the Collector, and was also examined as a witness as to the value of the land But no objection was taken to his acting as an assessor The District Judge eventually upheld the Collector's award On an application under s 622 of the Civil Procedure Code (Act XIV of 1882) Held, that the award was bad The Mamlatdar had, under the circumstances, a substantial interest in the matter, sufficient to disqualify him from acting as an assessor Held, also, that the minor applicant was not estopped from objecting to the competency of the Mamlatdar by the fact that his guardian had not raised any such objection in the Court below, and might, therefore, be taken to have waived it Assuming that there was a waiver, it could not bind the minor, as it was not for his benefit Held, also, that a person who is appointed an assessor under s 19 of the Land Acquisition Act (X of 1870) performs quasi-judicial functions, and is, therefore, incompetent to testify as a witness in the same proceedings

Suit for compensation—Notice—Limitation—Dispute as to the amount — In 1891 the Municipal authorities of Bombay gave notice to the plaintiffs under s 299 of Bombay Act III of 1888 that they required 23 30 square yards of the plaintiffs' land for street improvement On the 14th December, 1891, the plaintiffs gave possession of the land to the Municipality, and on 27th January, 1892, claimed Rs 60 per square yard as compensation By letter dated 23rd February, 1892, the Municipal Commissioner (without prejudice) offered Rs 50 per square yard as compensation and stated that on the plaintiffs producing the title-deeds and papers to establish their title the necessary documents in

connection with the payment would be prepared Nothing further took place in the matter until the 14th February, 1894, on which date the plaintiff wrote a letter to the Municipal Commissioner in which, without mentioning any sum, he requested the payment of the amount which might be due to him as compensation for his land taken by the Municipality The Commissioner refused to pay the compensation, contending that the plaintiffs' claim was time barred The plaintiffs thereupon brought this suit claiming Rs 1,165 (being at the rate of Rs 50 per square yard) as compensation for the land taken up by the defendant or in the alternative for that sum as damages for the breach of contract to pay purchase money for the land The defendant pleaded (1) that notice under s 527 of the Municipal Act III of 1888 was necessary before suit filed and (2) that the suit was barred by limitation The Chief Judge of the Small Causes Court found for the defendant with costs and dismissed the suit contingent on the opinion of the High Court On a case stated, Held (1) that notice under s 527 of Bombay Act III of 1888 was not necessary, that section not being applicable to suits brought to enforce payment of compensation under s 301 of the Act, (2) that the suit was not barred by limitation

Per FARRAN, J —A suit against the Municipality of Bombay for compensation for land acquired by the Municipality under s 299 of Act III of 1888 is not an action of tort or quasi-tort but a simple action for the price of land, which the terms of s 301 of the Act impose upon the Commissioner to pay The obligation to pay that price is of the same nature (1) whether the owner assents to the valuation of the land placed upon it by the Commissioner, (2) whether the value is determined by the Chief Judge of the Small Causes Court, or (3) whether it is left undetermined Section 527 does not apply to any of these three cases In all of them the obligation to pay is imposed by s 301, and does not arise from the manner in which the amount of the price to be paid is arrived at

2 Section 504 prescribes the only mode in which in case of dispute the value of the land can be determined If the owner of land disputes the Commissioner's valuation he must apply to the Chief Judge of the Small Causes Court within a year If he does not do so, the result is that he loses the power of effectually disputing the Commissioner's valuation but does not lose his right to the amount of the valuation

3 The owner of land has a remedy independent of the provision of s 504 The section only deals with cases where there is a dispute as to the value of the land, and leaves untouched those cases where there is no such dispute but where the Commissioner for some reason declines to pay In such cases the owner is left to his ordinary remedy, no special mode of procedure being prescribed Cases in which there has been a dispute, but in which the owner abandons his claim to dispute, the valuation of the Commissioner, fall within the latter category **Maneklal and another v the Municipal Commissioner of Bombay, 19 BOM 407**

Reading ss 222 and 504 of the City of Bombay Municipal Act, 1888, together, it is plain that the object of the Act is that if any damage is done or any portion of a man's property is taken away by the Commissioner's action under s 222, the amount of compensation should be assessed under s 504 of the Act, by the Chief Judge of the Small Causes Court, Bombay **Datatraya v. the Municipal Commissioner of Bombay, 9 B L R 1321**

The Poona City Municipality having determined to acquire a portion of the plaintiff's house for the purpose of widening a street, the plaintiff expressed his willingness to allow the municipality to acquire the same, but they could not agree as to the price That question was referred to arbitration as required by s 160 of the Bombay District Municipal Act, 1901, but the proceedings before the arbitrators were not successful The plaintiff then applied to the District Judge, under s 160(3) of the Act, requesting him to ascertain and determine the compensation payable The District Judge made his award The Municipality appealed from the award contending that they no longer required the plaintiff's premises and that there never was a completed contract with the plaintiff Held, (1) that there was a contract of sale at a fair valuation, where the Court not only can provide, but under special statute is compelled to provide, the means of ascertaining the price, and of such a contract specific performance would be awardable (2) that, therefore, there was a contract between the parties from which the Municipality could not resile As a general rule where the agreement is that the price of the estate shall be fixed by arbitrators and they do not fix it, there is no contract, as the price is of the essence of the contract of sale, and the Court cannot make a contract where there is none But the applicability or otherwise of this doctrine depends upon whether the fixing of the price is of the essence of the contract of sale Where there is a definite and a completed contract to give and take the estate upon terms to be settled thereafter, and the valuation cannot be made **modo et forma**, the Court will substitute itself for the arbitrators **The Poona City Municipality v Ramchandra, 10 B. L R. 617.**

To a suit for compensation for land legally acquired, s. 167 does not apply The cause of action in such a case is not the entry but the refusal to pay, or at any rate time runs from the date of an award of compensation under s 160 Were it otherwise, a municipality might avoid payment by delaying the appointment of arbitrators under the Act **Gurmukhsing v Karachi Municipality, A. I. R. 1930 Sind 30**

Agreement between the parties:—A binding agreement as to the amount of compensation payable to the owner of property, which is notified by the Government, under the Land Acquisition Act, for acquisition for a public body for a public purpose, can be made between the public body and the owner before the Collector has made his award under the Land Acquisition Act The plaintiffs, the Municipal Corporation for the City of Bombay, wanted to acquire certain property of the defendant company for widening a street As the parties could not arrive at an agreement as to its price the plaintiffs applied to the Government to acquire it on the plaintiff's behalf under the Land Acquisition Act Further negotiations were thereafter resumed and the plaintiffs' Engineer wrote to the defendants' Engineer, after an an interview with the latter, asking whether the defendants were willing to accept the sum of Rs 1,45,517 for the property subject to certain deductions On 12th September 1917—the Secretary of the defendant Company wrote to the plaintiffs' Engineer —'The company is willing to accept without prejudice the sum of Rs 1,45,517 inclusive of 15 per cent for compulsory acquisition, etc ' The Municipal Commissioner approved of the acceptance of this offer The Directors of the defendant Company had also passed resolutions approving of the offer. At a Meeting before the Collector, who was holding inquiry under the Land Acquisition Act, the above arrangement was recorded by the Collector at the instance of the plaintiffs' solicitor and the defendants' Engineer Subsequently the defendants' solicitor

wrote to the plaintiffs' Engineer that the defendants withdraw the offer made by them in their letter of the 12th September The plaintiffs' solicitor replied that it was not open to the defendants to withdraw from their offer which was accepted and acted on But the defendants put in a claim before the Collector for Rs 5,71,660, as compensation for the acquisition of their property The plaintiffs, thereupon, sued for a declaration that there was a contract binding on the defendants in terms of the latter s letter of 12th September under which the defendants could not claim a sum more than Rs 1,45,517 as compensation for their property in the proceedings under the Land Acquisition Act, that if the Collector awarded as compensation more than that sum the excess amount would belong to the plaintiffs and if he awarded less the plaintiffs were bound to make up the sum agreed upon The defendants contended that there was no contract between them and the plaintiffs, that their letter of the 12th September was only an invitation to the plaintiffs to make a proposal to them, that the Directors or the Secretary of the defendant Company had no power to enter into an agreement for the sale of the property and that the agreement was void for want of mutuality because under s 48 of the Land Acquisition Act the Government could withdraw from the compulsory acquisition altogether if they liked The Court of first instance passed a decree in favour of the plaintiffs in terms of the declaration prayed for On appeal —Held, confirming the decree of the lower Court, (1) that the defendants' letter of the 12th September was an offer and not a mere invitation to make offers and that the offer was made and accepted by the duly authorised agents of the defendants and the plaintiffs (2) (Heaton J dubitante), that the offer and acceptance amounted to an agreement definitely fixing the compensation as between the parties themselves whatever sum might ultimately be awarded by the Collector and with an obligation on either party to refund any excess or make good any deficiency as the case might be, (3) that the agreement was arrived at for the purpose of proceedings under the Land Acquisition Act and could be specifically enforced by the plaintiffs against the defendants, and (4) that the power of withdrawal given to Government by s 48 of the Land Acquisition Act did not render the agreement void for want of mutuality **The Fort Press Co Ltd v. The Municipal Corporation of Bombay, 21 B. L R 1014**

Interest.—In the case of the sale or acquisition of land in the absence of a contract to the contrary interest on the unpaid price runs from the date when the new owner enters into possession **Ratanlal v The Municipal Commissioner of Bombay, 21 B. L. R 114.**

Recovery of the amount of compensation —An order made by the District Court under s 160(3) of the Bombay District Municipal Act 1901 can be executed as a decree It is not necessary to make an application to the Court to pass a decree in accordance with the award **The Broach City Municipality v Gulam Rasul, 25 B L R 305.**

But if the award of the Panchayat is to be enforced a decree must be obtained in the Civil Court on the bases of the award The award of the Panchayat under s 198 cannot be enforced by a mere application to the District Court because there is no such provision in s 198 of the Boroughs Act See **the Municipality of Sholapur v Tuljaram, 33 B. L. R. 1067,** where it was held that there was nothing in s 198 which gave the District Court power to enforce an award of the Panchayat on the application of a party who relied upon it

Appeal:—No appeal lies from the decision of a District Court under cl 3 of s 160 of the Bombay District Municipal Act 1901 Where a statute creates

a right not existing at common law and prescribes a particular remedy for its enforcement, then that remedy alone must be followed **Chunilal v the Ahmedabad Municipality, 13 B. L. R. 958.** Section 198 provides an appeal to the District Court against the award of the Panchayat, but in that appeal the District Court has no jurisdiction to determine a dispute which had not been submitted to the arbitration of the Panchayat *See* ***Municipality of Sholapur v. Tuljaram, 33 B L R. 1067.***

Revision:—An application under the revisional jurisdiction of the High Court does not lie from the decision of a District Court under clause 3 of s 160 of the Bombay District Municipalities Act, 1901 **The Municipality of Belgaum v Rudrappa, 18 B. L. R. 340.**

The correctness of this decision was doubted in **33 B L. R 1067** But the point was not referred to the full bench as the case of **Sholapur Municipality v. Tuljaram 33 B L. R 1067** could be distinguished from the case of **The Municipality of Belgaum v. Rudrappa, 18 B L. R. 340** Referring to **18 B L. R 340** Broomfield J. observed "The first point to be noted in connection with this case is that the application had been properly made to the District Court under clause (3) of s 160 In that case the panch had failed to deliver their award and the District Court was, therefore, empowered to determine the dispute as to the amount of compensation It is true that the Judge in that case—he happened to be an Assistant Judge—did not decide the dispute, because he was of opinion that he had no jurisdiction to do so until certain other matters had first been submitted to arbitration Nevertheless it was possible for this Court to hold in the circumstances that the order was one which was intended to be final and should not, therefore, be revised. It was not a case like the present where the District Court was applied to for an order which it was not empowered to make—there is nothing in s 198 which gives the District Court power to enforce an award on the application of a party who relies upon it—and where moreover the Court has determined a dispute, viz, that between Tuljaram and Gangappa, which had not been submitted to arbitration and was not within the jurisdiction of the Court at all" Then after discussing the judgment in **18 B L. R. 340** and the cases relied upon therein the learned Judge further observed "It appears, therefore, that neither of the previous decisions on which the decision in **Municipality of Belgaum v Rudrappa** was based, can be regarded as an authority in support of the view that the High Court has no power to interfere in revision in a case like the present, where the District Court in construing and interpreting the award and enforcing the award as so interpreted and determining a dispute, as to the title to the compensation, which was not submitted to arbitration, has acted without any shadow of jurisdiction There are some decisions of other High Courts, to which my learned brother has referred, which make it doubtful whether **Municipality of Belgaum v Rudrappa** was correctly decided even on its own facts Possibly if the same or similar facts occur in future, it might be necessary to refer the matter to a full bench In the present case it is not necessary because **Municipality of Belgaum v Rudrappa** can be distinguished on the lines indicated in our judgments." The result was that revision was held competent in this case. After this the High Court of Bombay entertained an application in revision against the decision of the District Court under s 198 of the Boroughs Act, but in that case it seems that the point whether revision lies or not was not raised and hence the report of the case does not contain any discussion or decision on this point see **The Borough Municipality of Ahmedabad v J. V. Divetia, 39 B L.R. 320**

In **Hyderabad Municipality v Moorjmal Mustakram, A I R 1918 Sind 65** it was held that under s 160(3) of the Bombay District Municipal Act, 1901 the matter of compensation is to be determined by the District Court, which decides the question in the exercise of its jurisdiction as a Civil Court Its proceedings are therefore subject to revision by the Judicial Commissioner's Court under s 115 Civil Procedure Court

Boom in prices of land to be taken into consideration —In awarding compensation for the acquisition of land under s 160(3) Bombay District Municipal Act (equivalent to s 198 (3) of the B M B Act, 1925), if a boom in prices of land exists owing to certain extraordinary circumstances, it must be considered in estimating the market value of the land to be acquired Where, however, a portion of a land acquires a fancy value owing to the acquisition of a part of it for widening a street, no compensation is allowed for the severance of the same **Karachi Municipality v Khatanmal Hiranand, A. I R 1914 Sind 149 (2)**

199 If a dispute arises with respect to any costs or expenses which are by this Act directed to be paid, the amount, and if necessary the apportionment of the same shall, save where it is otherwise expressly provided in this Act, be ascertained and determined by the standing committee and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under chapter VIII.

Costs or expenses how determined and recovered.

CHAPTER X.

PROSECUTIONS, SUITS AND POWERS OF POLICE.

Municipality may prosecute

200. (1) The standing committee and, subject to the provisions of sub-section (3), the Chief Officer may direct any prosecution for any public nuisance whatever and may order proceedings to be taken for the recovery of any penalties and for the punishment of any persons offending against the provisions of this Act or of any rule or by-law thereunder and may order the expenses of such prosecutions or other proceedings to be paid out of the municipal fund

Provided that no prosecution for an offence under this Act or by-laws framed thereunder shall be instituted except within six months next after the commission of such offence

Jurisdiction of Magistrate, recovery of compensation and expenses.

(2) Any prosecution under this Act or under any rule or by-law thereunder may, save as therein otherwise provided, be instituted before any Magistrate, and every fine or penalty imposed under or by virtue of this Act or any rule or by-law thereunder, and any compensation, expenses, charges or damages for the recovery of which no special provision is otherwise made in this Act, may be recovered on application to any Magistrate, by the distress and sale of any movable property within the limits of his jurisdiction belonging to the person from whom the money is claimable

(3) The Chief Officer shall not, except with the previous approval of the standing committee, direct a prosecution or order proceedings to be taken for the punishment of any person offending against the provisions of the following sections or sub-sections, namely.—

section 55, sub-section (4) of section 118, section 171; and sub-section (4) of section 117, sub-section (4) of section 184.

Mere warning illegal—No sentence also illegal —Where an accused is found to have committed an offence under s 471 of the City of Bombay Municipal Act 1888, it is not competent to the Magistrate to warn and discharge him, on his abating the nuisance complained of, but the Magistrate should pass a sentence according to law The operation of s 562(1A) of the Criminal Procedure Code is confined to offences under the Indian Penal Code **Emperor v Merwanji, 30 B. L. R. 375.** In the course of the judgment Fawcett J observed "The Magistrate's order 'warned and discharged' is of a nature that suggests the analogy of an order for release of an accused after due admonition, such as is authorized by sub-s (1A) of s 562 But that particular sub-section does not apply in the present case, because it is confined to cases of an offence un-

der the Indian Penal Code, whereas this is an offence punishable under the City of Bombay Municipal Act This has already been pointed out by this Court in regard to offences under the Motor Vehicles Act, 1914, cf, **Emperor v Pandu Ramji** Nor is the case one that falls under sub-s (1) of s 562, Criminal Procedure Code, because the offence is not punishable with imprisonment but only punishable with fine Therefore, the order, supposing it to be one of conviction, is illegal in that the Magistrate has not passed a sentence according to law"

A Magistrate, proceeding under Section 74 of the Bombay District Municipal Act, is bound by the provisions of Section 245 of the Code of Criminal Procedure which require that a sentence must follow a conviction **Queen Empress v Hanmantdas, 2 B L R 611**

The provisions of s 562 (1A) of the Criminal Procedure Code, 1898, apply only to certain specified offences punishable under the Indian Penal Code, they have no application to offences punishable under other Acts, e g, the Motor Vehicles Act, 1914 **Emperor v Pandu, 28 B. L R 297**

Sub-Section (2)—Procedure—Scope of the inquiry —A proceeding before a Magistrate for the recovery of municipal cesses and taxes instituted under s 84 of Bombay Act VI of 1873, is a criminal prosecution, and must be conducted in the manner prescribed for summary trials under Chapter XXII of the Code of Criminal Procedure (Act X of 1882) In such a proceeding a Magistrate is not bound to order payment of the full amount claimed by the municipality, but must satisfy himself as to the extent of the defaulter's legal liability before passing any order against him **Municipality of Ahmedabad v Jamna Punja, 17 Bom. 731**

Limitation:—The accused gave, on March 31, 1924, a notice to the Surat Municipality of his intention to build a house The Municipality required him to furnish particulars of the proposed building Without the permission of the Municipality, the accused dug foundations in December 1924, and filled them in, in July 1925 In October 1925, he built the northern wall, while the southern wall was built in November 1925 The Municipality lodged a complaint against the accused, on December 19, 1925, under s 96(5) of the Bombay District Municipal Act, 1901 —Held, (1) that the prosecution of the accused, so far as the foundations were concerned, was barred under the proviso to s 161(1) of the Act, since foundations of a building were included in the term "building" as defined in s 3(7) of the Act, (2) that the prosecution with reference to the walls was within time, for the 'making' of the building in regard to its walls had begun within six months of the date of the complaint The words "or makes" in s 96 (5) of the Bombay District Municipal Act, 1901, show that it is not only the mere beginning of a building without permission that is punishable, but its continuance even to completion without the requisite permission or in defiance of legal orders If a person is making a building in contravention of the kind specified in the section on any particular day, he is committing an offence, although the making may have begun on a previous day The offence is a continuing one **Emperor v Chhaganlal, 29 B L R 733.**

The delay caused by the fact that petitions made by the accused were under consideration cannot extend the period of six months allowed in such cases **Jethanand v Emperor, A I R 1929 Sind 52 (1).**

See also notes under the head 'Starting point for limitation for prosecution for a continuing offence' under s 178

Who can complain:—Under s 155 of the Bombay District Municipal Act, 1901, a complaint for an act which is an offence only under the Act, and not under any other Act, can be instituted by the Municipality alone and not by a private individual In regard to acts which are offences under the special law as well as offences under the general law, the fact that an act is an offence under a special law cannot exclude the right of any individual aggrieved to lodge a complaint under the general law **In Re Motilal Shah, 32 B L. R. 1502**

In Emperor v Kassam, 36 B L. R 965, it was held that a complaint in respect of an offence under s. 313A of the City of Bombay Municipal Act, 1888, can be lodged by the police Section 517 of the Act is permissive in form, and the Municipal Commissioner may prefer a charge against any person under it, but there is nothing in the section to show that the Commissioner alone may take proceedings Referring to the case of **32 B L. R 1502** Beaumont C J observed "The learned Magistrates relied on the decision of this Court in **In re Motilal Shah** But that case is distinguishable It was a decision on a different Act, viz, the Bombay District Municipal Act of 1901 It was in respect of quite a different offence to the offence charged in this case, and it was a prosecution by a private individual and not by the police The case is, therefore, clearly distinguishable On the whole there seems to me to be nothing in the City of Bombay Municipal Act to prevent a police-officer from lodging a complaint in respect of an offence under s 313A."

Penalty—Fine—Imprisonment:—There is no distinction between the word "penalty" as used in the Bombay District Municipal Act (VI of 1873) and the word 'fine' as used in s 64 of the Indian Penal Code (XLV of 1860) Imprisonment can, therefore, be awarded in default of any penalty inflicted under s 64 of the Municipal Act **In Re Lakmia, 18 Bom. 400**

Magistrate—Disqualification—Personal interest — Municipal offence:—The mere fact that a Magistrate is the vice-president of a district municipality and chairman of the managing committee does not disqualify him from trying a charge of an offence brought by the municipality under Bombay Act VI of 1873 But if he has taken any part in promoting the prosecution, as, for instance, by concurring in sanctioning it at a meeting of the managing committee or otherwise, he will be disqualified by reason of the existence of a personal interest over and above what may be supposed to be felt by every municipal commissioner in the affairs of the municipality **Queen Empress v Pherozsha, 18 Bom. 442**

Effect of repeal of the Act—Pending proceedings:—A Municipality instituted proceeding under the Bombay District Municipal Act (Bom. Act VI of 1873) During the pendency of the proceeding the Act was repealed by Bombay Act III of 1901 The Magistrate, thereupon, acquitted the accused on the ground that under the new Act he had no jurisdiction to dispose of the complaint — Held, reversing the order and ordering the Magistrate to rehear the complaint, (1) that in the absence of the expression of any contrary intention in the new Act, the repeal of the old Act could not be deemed to affect any proceedings commenced before the new Act came into force (2) That the Magistrate was bound to conclude the proceedings which had already been instituted before him under the old Act, and that he could not disclaim jurisdiction, because the procedure laid down for proceedings instituted under the new Act was entirely different. **Mukand v Ladu, 3 B. L R 534.**

Revision —The High Court of Bombay has power, under s 435 of the Criminal Procedure Code, to revise an order passed by a Magistrate under s 161 (2) of the Bombay District Municipalities Act, 1901 **In Re Dinbai Jijibhoy, 21 B L R 755** Following this case the High Court held in re **Nurmahomed, 29 B L R 541** that it has jurisdiction to entertain the revision application

Private Street—Burden of proof in a prosecution —In order to show in a criminal trial that a street is a 'private street' within the meaning of the term as defined in s 3(y) of the City of Bombay Municipal Act, 1888, it is incumbent on the Municipality to prove, at any rate prima facie, the negative proposition that no works of the kind mentioned in 3(x) had been carried out by the Municipality in the street prior to the date when the Act came into force **Emperor v. Byram Khodadad Irani, 45 B L. R. 60.**

Whether a municipality can order withdrawal of prosecutions lodged by the Chief Officer under ss 96 and 155 of the B.D M Act 1901 (corresponding to sections 123 and 193 of the B M B Act, 1925).—Section 161 of the Bombay District Municipal Act, 1901, empowers the Chief Officer to direct a prosecution and to order proceedings to be taken for the punishment of any person offending against any of the provisions of the Act mentioned in section 183(d) In section 183 (d) 'clause (a) of sub-section (5) of section 96' is mentioned, although the drafting is clumsy, the effect of this is that the Chief Officer has power to order prosecution under clause (a) of sub-section (5) of section 96 He either himself lodges complaints or directs some other municipal officer or servant to do so This is within his statutory powers

The Municipality has a general power of control over its officers' actions, but not so when the latter are taken in the exercise of a power conferred by the legislature upon an officer independently of the municipality If a municipality has power to order its Chief Officer and his subordinates to remain absent from the court on the date of hearing of a case in which he has directed prosecution in exercise of his statutory powers, those powers would be nullified, and this was evidently not the intention of the legislature **(R. L. A.'s opinion no 12030 dated the 2nd December 1921 in G O G D no 216 dated the 7th January, 1921)** Thus it would appear that a municipality has no such powers

Interpretation of s 200 —Although s 30 of the Bombay City Municipalities Act, 1925, provides generally that the municipal government of a municipal borough vests in the municipality, it contains the words 'except as in this Act otherwise expressly provided' Section 200 vests the power of directing prosecutions in the Standing Committee or the Chief Officer If there be no Standing Committee appointed for the Municipality, it does not appear that the General Body of the municipality or any other officer can direct such prosecutions No such power can be delegated by a municipality to its President under s 46 The municipal funds too cannot be spent for such prosecutions It is, however, open to any member of the public to set the law in motion by a complaint **(R L. A.'s opinion no 419 dated the 31st January, 1928 in G. R. G D. no 371 dated the 15th February 1928)**

201 No distress levied or attachment made by virtue of this Act shall be deemed unlawful nor shall any party making the same be deemed a trespasser, on account of any defect or want of form in any summons, conviction or warrant of distress or attachment

Distress lawful though defective in form.

or other proceeding relating thereto, nor shall such party be deemed a trespasser 'ab initio' on account of any irregularity afterwards committed by him, but all persons aggrieved by such irregularity may recover full satisfaction for the special damage in any Court of competent jurisdiction

Damage to municipal property how made good

202 If through any act, neglect or default, on account whereof any person shall have incurred any penalty imposed by or under this Act, any damage to the property of a municipality shall have been committed by such person, he shall be liable to make good such damage as well as to pay such penalty, and the amount of damage shall, in case of dispute, be determined by the Magistrate by whom the person incurring such penalty is convicted, and on non-payment of such damage on demand the same shall be levied by distress, and such Magistrate shall issue his warrant accordingly

Alternative procedure by suit.

203 In lieu of any process of recovery allowed by or under this Act or in case of failure to realise by such process the whole or any part of any amount recoverable under the provisions of chapter VIII, or of any compensation, expenses, charges or damages payable under this Act, it shall be lawful for a municipality to sue in any Court of competent jurisdiction the person liable to pay the same

Limitation.—Fee charged by the Municipality for issuing a permission for use of Municipal land under the provisions of s 90, Bombay Act 18 of 1925, is not rent within the meaning of Art 110, Lim Act, and suit for recovery of such fees is not governed by Art 110 There being no article within which such a suit can be brought, it is governed by Art 120 **Masand Motiram v. Shikarpur Municipality, A. I. R 1936 Sind 184**

Section 105 of the Bombay Municipal Boroughs Act, 1925, is not subject to any period of limitation as regards the issue of a distress warrant for the recovery of arrears of taxes due to a Municipality The provisions of this section are applicable even if the period for bringing a suit under s. 203 of the Act has expired **Surat Borough Municipality v Sarifa & Surat Borough Municipality v Mustafa, 42 B L R 960**

Whether a suit to recover octroi maintainable:—See notes under this head under s 98

Also see notes under s 99

Power to sue, compromise and pay compensation.

204 (1) A municipality may sue in any Court of competent jurisdiction any person who may have in any way caused or may appear likely to cause any injury to any property, rights or privileges of the municipality

(2) A municipality may compound or compromise in respect of any suit instituted by or against it, or, in respect of any claim or demand arising out of any contract entered into by it under this Act for such sum of money or other compensation as it shall deem sufficient

Provided that, if any sanction in the making of any contract is required by this Act, the like previous sanction shall be obtained for compounding or compromising any claim or demand arising out of such contract

(3) A municipality may make compensation out of the municipal fund to any person sustaining any damage by reason of the exercise of any of the powers vested in it, its committees, officers and servants under this Act

(4) The municipal fund shall be liable to pay the expenses of any civil proceeding prosecuted or defended on its behalf

Assistance for the recovery of rent on land.

205 For the purpose of the recovery of any amount due on account of rent from any person to a municipality in respect of any land vested in or otherwise held by such municipality, the municipality shall be deemed to be a superior holder and every such person an inferior holder of such land, within the meaning of sections 86 and 87 of the Bombay Land Revenue Code, 1879, and the municipality as superior holder shall be entitled, for the recovery of every such amount to all the assistance to which under the said sections a superior holder is entitled for the recovery of rent or land-revenue payable to him by an inferior holder

Limitation of suits, etc.

206 No person shall commence any suit against any municipality or against any officer or servant of a municipality or any person acting under the orders of a municipality for anything done or purporting to have been done in pursuance of this Act, without giving to such municipality, officer, servant or person two months' previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act complained of,

and in the case of any such suit for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender

Suit for Ejectment:—Section 86, Bombay Act VI of 1873 is not applicable to suits in the nature of actions of ejectment, but only to suits for damages The limitation of three years provided in cl 43, sch II, of the Limitation Act, IX of 1871, applies only to suits for damages on account of trespass, and not to suits to recover immovable property from a trespasser, for which the period of limitation is twelve years, as provided by cl. 143. **Joharmal v the Municipality of Ahmednagar, 6 Bom 580**

The words 'in the case of any such action for damages' in s 48 (1) of the Bombay District Municipal Act Amendment Act (Bombay Act II of 1884) clearly show that it was contemplated that there might be actions of another description to which the provisions in the former paragraph would be applicable The section does not contemplate only 'suits to recover monetary compensation for a wrongful act' A suit in ejectment—not being a suit brought to recover damages 'for an act done or intended to be done'—was excluded under s 86 (2) of the Bombay District Municipal Act (Bombay Act VI of 1873), but being an 'action for an act done,' that act, being the dispossession by the municipality with a view to being restored to possession, falls under the provisions of the first paragraph of s 48 of Bombay Act of 1884 **Nagusha v Municipality of Sholapur, 18 Bom 19**

A mortgagee (defendant No 1) refused to give up part of the mortgaged land when the mortgage was paid off in 1881 He remained in possession and in 1888 he sold this land to the Municipality of Mahad (defendant No 2) The mortgagor subsequently sued the Municipality and its vendor to recover possession The Municipality contended that the suit was barred by limitation under s 48 of the District Municipal Act (Bombay Act II of 1884) Held, that the suit was not barred by s 48 That section does not apply to actions of ejectment brought against a Municipality Such an action, brought to try the title to land is not an action for anything done or purporting to be done in pursuance of the Act **Kashinath v Gangabai and others, 22 Bom 283.** Referring to **Nagusha v Municipality of Sholapur, 18 Bom 19,** Farran J observed "We are thus led to consider whether decision in **Nagusha v Municipality of Sholapur** was intended to extend beyond a state of facts similar to those in that case so as to embrace all actions of ejectment, and whether, if not, we ought so to extend it When the judgment is carefully read it will be found that it in terms applies only to actions of ejectment in which the plaintiff is dispossessed by the Municipality Omitting the reference to the section of the former Act the judgment is in these words 'A suit in ejectment being an action for an act done—(that act being the dispossession by defendant)—with a view to being restored to possession must be held to fall under the provisions of the first paragraph of the section (48) of the Act of 1884 That passage plainly does not expressly embrace nor do we think that by implication it necessarily embraces, actions in ejectment in which the plaintiff does not complain of being dispossessed by the Municipality, and having regard to its extremely guarded language we are not disposed to think that it was intended to extend beyond the actual case which the learned Chief Justice was dealing with That being so we are at liberty, we think, to consider the broader facts before us and see whether they bring the present case within the purview of the section" Dealing with the question whether actions in ejectment are governed by provisions of s 48 of Bombay Act II of 1884 the learned judge observed "The language of s 48 of Bombay Act II of 1884 differs so widely from that of s 86 of Bombay Act VI of 1873 that no inference as to the intention of the Legislature can be drawn from the change of expressions contained in the later section The Legislature departing from the technical language of the earlier section copied from English statutes has used in its stead simpler and more popular language The concluding paragraph of s 86 of the earlier Act would appear to have limited its application to actions for damages The concluding paragraph of s 48 of the later Act evidently has not that operation It shows, on the contrary, that the earlier paragraph of the section embraces other actions than actions for damages, but as besides actions of ejectment there are various other actions which can be brought against a Municipality which do not found in damages, e g, the familiar

one to recover money illegally demanded and paid under protest, this consideration does not bring us any nearer to an answer to the question whether actions of ejectment are within the scope of s 48 of Bombay Act II of 1884 It appears to us that it would be a straining of language to say that an ordinary action of ejectment against a Municipality to try the title to land is an action for anything done or purporting to be done in pursuance of the Act What in such an action is the act done or purporting to be done in pursuance of the Act? Suppose the case in which the Municipality comes in under a title at the time valid, but which subsequently fails, as when it purchases from a tenant for life and the remainderman after his death sues for its recovery How does the remainderman sue for an act done by the Municipality? He sues for his land The Municipality defend, not because they have acted or purported to act under the Act, but because they allege that the land is their land When in such a case is the act complained of done? The cause of action of the plaintiff dates from the death of the tenant for life, but at that time the Municipality has done nothing either in pursuance of the Act or otherwise Is then the act complained of, the refusal of the Municipality to restore the land to the plaintiff when he demands it? If it is, the answer is —That is not an act done in pursuance of the Act The Act does not enable or purport to enable the Municipality to keep land which does not belong to them' In this case **Nagusha v Municipality of Sholapur, 18 Bom 19,** was distinguished but in a subsequent case viz, **Manohar v the Dakor Municipality, 22 Bom 289** the Full Bench overruled it In that case the plaintiff was the inamdar of the village of Dakor He filed an ejectment suit against the Municipality of Dakor, alleging that the Municipality had illegally and wrongfully encroached upon a portion of the Gomti Lake at Dakor by laying the foundations of a building which they intended to erect for the purpose of a dharamshala The Municipality pleaded ('inter alia') that the suit was bad for want of notice of action under s 48 of the Bombay District Municipal Act II of 1884 Held, (by a majority of the Full Bench) that the provisions of s 48 of Bombay Act II of 1884 do not apply to actions for the possession of land brought against a Municipality Per PARSONS, J —The provisions of s 48 apply only to actions for the possession of land whereof the plaintiff has been dispossessed by the Municipality acting or purporting to act under some section of the Municipal Act, which empowers them to take possession of, or oust any one from that land Per RANADE, J —Section 48 does not generally apply to suits for the possession of land except in those cases where the claim arises on account of some act or omission of the Municipality when it acts in pursuance of its statutory powers, and encroaches upon private rights

In a suit brought against a municipality to recover possession of a piece of land taken by it, for damages for pulling down a wall on the land, and for an injunction held that as regards damages the suit came under s 48 of the District Municipal Act (Bom Act II of 1884) but as regards possession and injunction notice of action was not necessary under the section **Shidmallappa v the Gokak Municipality, 22 Bom 605**

Illegal Tax—Notice of action for refund—Limitation—Jurisdiction of Civil Court —On the 18th of March, 1880, the Dakor Town Municipality, acting under the powers conferred upon them by the Bombay Act VI of 1873, convened a meeting at which it was resolved to impose a house-tax on the town, and also another meeting on the 2nd of April, 1880 at which a classification of the houses was made, and the rates fixed The Revenue Commissioner, N D, on behalf of the Government, sanctioned the resolution on the 2nd of June, 1880

Notice of the meeting of the 18th of March, 1880, was not served on three of the commissioners, they being absent at the time from Dakor, and no notice specifying the business to be transacted therein was posted up at the kacheri, as required by s 11, cl 1 of the Act K, a householder, sent a notice to the municipality on the 25th of January, 1881, impeaching the legality of the tax On the 3rd of June, 1881, he paid the tax, namely Rs 2 for which he had been rated, and on the 6th of January, 1882, he sued for a refund of the said sum from the Municipality Held, that the suit was not brought too late to satisfy the requirements of s 86 of the Act When the notice of the 25th of January, 1881, was sent by K, he had no cause of action against the municipality for anything done, no notice, therefore, such as is contemplated by s 86, was ever sent by K and, consequently, there could be no final order on such notice from which the three months prescribed by that section would run The provisions of s 11, cl 1, as to notice of meeting are not directory, but obligatory, and notice to all the commissioners of the meeting of the 18th of March, 1880 being a material part of the machinery provided by the Act for imposing a legal tax, was a condition precedent to the validity of that tax Consequently, the resolution come to on the 18th of March, 1880, was not legal, and, whether sanctioned or not by the Government it always retained its inherent defect Section 21, which enables the Government to dispose of objections made to a tax by the inhabitants of a town, is quite consistent with the well-established jurisdiction of the Civil Court to decide as to the validity of any fresh tax or impost, and affords no sufficient ground for the conclusion that the intention of the Legislature was to take away that jurisdiction **Joshi Kalidas v. the Dakor Town Municipality, 7 Bom 399** In the course of the judgment Sargent C J observed "The questions referred to the Court arise out of a plaint filed by a householder of the town of Dakor, seeking to recover from the municipality of that town the sum of Rs 2, which he alleges to have been levied from him in payment of a house-tax illegally imposed on the inhabitants The first question is, whether the plaint is barred by s 86, Act VI of 1873, under which Act the tax was imposed and levied That section provides that no action shall be brought against the municipality for anything done, or intended to be done, under the Act, until the expiration of one month after a notice in writing stating with reasonable particularity the cause of action, and every such action shall be commenced within three months next after the passing of the final order by the municipality or officer having power to pass such order, and not afterwards It appears that the plaintiff, on receiving a bill from the secretary of the Municipality demanding payment of Rs 2, in respect of the house-tax in question, sent a notice to the municipality on the 25th January, 1881, stating that the house-tax was illegal, and that if the Rs 2 were levied from him he would sue the municipality for a refund, but it was not until the 3rd June, 1881, that he was compelled to pay the Rs 2 No subsequent notice was sent The present suit was filed on the 6th January, 1882 Now, the above dates show that when the notice of the 25th January, 1881, was sent by the plaintiff, he had no cause of action against the municipality for anything done and that, therefore no notice, such as is contemplated by s 86 was ever sent by the plaintiff, and that, consequently, there could be no final order on such notice from which the three months would run within which the present suit should have been brought Nor is there anything in the case to show that it was agreed between the parties that the notice of 25th January, 1881, and the letter of the vice-president in February, 1881, directing the secretary to enforce payment of the bills, should be treated as a notice and final

order for the purposes of s 86 The defendants cannot, therefore, establish their plea that the suit was brought too late, even assuming that the present action fell within s 86, as to which the authorities are very conflicting, although they might well have pleaded that the proper notice required by s 86 had not been given them "

A person suing the municipality constituted by Bombay Act VI of 1873 for the refund of money illegally levied from him as house-tax, is bound to serve a previous notice on the said municipality as required by s 86 of the Act The object of that provision would appear to be to give municipal bodies or officers, who in the bona fide discharge of their public duties may have committed illegal acts not justified by their powers, an opportunity of tendering sufficient amends for such acts before being harassed with an action Section 86 of the Act is not confined to an action of damages, but is applicable to every claim of a pecuniary character arising out of the acts of municipal bodies or officers, who in the bona fide discharge of their public duties may have committed illegalities not justified by their powers, **Ranchod v the Municipality of Dakor, 8 Bom** 421 In the course of the judgment Sargent C J observed "We think that the municipality were entitled to notice of plaintiff's suit, as provided by s 86 of the Municipal Act of 1873 The object of that provision would appear to be to give municipal bodies or officers, who, in the bona fide discharge of their public duties, may have committed illegal acts not justified by their powers, an opportunity of tendering sufficient amends for such acts before being harassed with an action The word 'damages' is not found in the clause, language of which merely points to an act for which redress may be afforded in money In **Sorabji Nassarvanji v The Justices of Peace of Bombay** and **Joharmal v The Municipality of Ahmednagar** the question was whether the section applied to an action of ejectment It is true that in the former case the Chief Justice contrasts such an action with actions for monetary compensation, which he considers to be the class of actions contemplated by the section But we do not understand him as intending to define the latter class of actions, although in one passage he uses the term 'damages' as equivalent to 'sufficient amends' In our opinion, the section is applicable to every claim of a pecuniary character arising out of such acts as those described above "

Suit to recover amount deducted for non-performance of a contract from the deposit made by contractor—notice necessary'—Section 167 of the Bombay District Municipal Act, 1901, governs a suit to recover the amount deducted by a District Municipality for the non-performance of a contract from the deposit made by the contractor for the due performance of his contract entered into with the Municipality **Baban Hemraj v Poona Municipality, 23 B.L.R 881.**

Suit for specific performance of a contract or damages for breach thereof—notice not necessary —A person seeking the protection of an Act cannot claim that his conduct has any relation to the 'execution of the Act,' if he knowingly and intentionally acts in contravention of its provisions It is an established principle of law that notice is not required where the action is brought on a contract The exemption from this requirement, however, does not apply to all suits in contract as distinct from suits on a contract, since a tort may give rise to a suit in contract **Ranchhoddas v the Municipal Commissioner for the City of Bombay, 3 B L R. 158**

Section 48 of the Bombay District Municipal Act Amendment Act (II of 1884), does not apply to a suit for the specific performance of a contract or

for damages for breach thereof **The Municipality of Faizpur v. Manak, 32 Bom 637**

Section 136 of the Bombay Local Boards Act, 1923 has no application to a suit to recover damages for a breach of contract, and, therefore, the time-limit prescribed by the section does not apply to such a suit **The District Local Board of Poona v. Vishnu, 35 B.L.R 55** In the course of the judgment, Murphy J observed "The current of decisions with the exception possibly of the case in **Baban Hemraj v The City Municipality, Poona, (23 B.L.R 881)**, is clearly to the effect that such cases, as the one we have to deal with, are not brought for acts done in pursuance of the provisions of the Act, and the exception seems as far as one can gather, to have been made, in the special circumstances of fines and penalties inflicted by a local board on a contractor the authorities being neither referred to nor discussed"

Acts done under contract authorised but not required by the Act—notice not necessary.—The protection afforded by s 527 of the City of Bombay Municipal Act, 1888, extends to acts done in direct execution of the powers conferred by the Act It does not cover acts done in pursuance of a contract which the Municipality is empowered to enter into, but is not required to enter into, by the Act The cause of action, in a suit to obtain return of debentures wrongfully renewed by a local authority, does not arise until a demand is made for the return of the debentures and the demand is refused. The Municipal Corporation of the City of Bombay was empowered to borrow money on the security of debentures by s 106 of the City of Bombay Municipal Act, 1888 and s 110 of the Act provided a form in which debentures should be issued The Act gave no power to the Municipality, to issue renewed debentures in place of old ones The debentures that were actually issued contained, however, a clause that 'this debentures can be renewed at any time at the option of the holder on payment of rupee one' The plaintiffs and one N were holders of eight debentures issued by the Municipality They were payable to any one of the holders The debentures were handed for collection of interest to a person, who after N's death, forged N's signature and endorsed them over to a bank who got the debentures renewed in their own name by the Municipality On November 30, 1932, plaintiffs drew attention of the Municipality to the forged signature on their debentures and asked for relief The Municipality asked for time on March 6, 1933, and again on July 27 1933, to enable them to look into the matter On August 11, 1933, plaintiffs filed a suit against the Municipality to recover possession of the eight debentures that stood in their names or in the alternative to recover the market value of the debentures together with accrued interest The Municipality contested the suit 'inter alia' on the ground that it was barred by s 527 of the Act as it was brought six months after the accrual of the cause of action and as no notice of suit had been given—Held, (1) that s 527 of the Act did not apply, inasmuch as the issue of debentures containing the option of renewal, and the giving effect to that option, were not acts done in direct execution of any power contained in the Act, but were acts done under a contract authorised, but not required, by the Act, (2) that even if s 527 applied, the suit was brought within the period of six months provided by the section, because the detention of the debentures by the Municipality became unlawful only when they refused to accede to the demand of the plaintiffs for the return of their debentures i e, July 27, 1933 **Vishwanath v the Municipal Corporation of Bombay, 40 B. L. R. 685**

A suit based upon contract is excluded from the purview of s 167 as it may fairly be assumed that every person knows that the law expects him to act according to his contract and not to break it and where he has not acted in accordance with his contract he has thereby knowingly disregarded the provisions of the statute and cannot expect the protection given by it No notice is, therefore, necessary nor is the rule of six months' limitation applicable to such a suit **Larkhana Municipality v Atmaram, A I R 1930 Sind 209**

The provisions of s 206 of the Bombay Municipal Boroughs Act, 1925, requiring notice of suit in suits filed against a borough municipality, do not apply to suits based on contracts **S V Mandlik v The Borough Municipality of Jalgaon, 45 B L R 1059** In this case the cases of **Manohar Ganesh Tambekar v Dakor Municipality, 22 Bom 289, Ranchordas Morarji v The Municipal Commissioner for the City of Bombay, 3 B L.R 158** and **Vishwanath Sadashiv v Bombay Municipality, 40 B L R 685** were followed and Privy Council decisions in **Bhagchand Dagadusa v Secretary of State for India, 29 B L.R 1227** and **Revate Mohan Das v Jatindra Mohan Ghosh, 36 B L R 544,** were distinguished In the course of the judgment Their Lordships observed "Mr Dixit's contention is that the view previously taken by this Court in **Manohar Ganesh Tambekar v The Dakor Municipality** and **Ranchordas Morarji v The Municipal Commissioner for the City of Bombay** must be treated as no longer good law in view of the two Privy Council decisions above referred to The decision of this Court in **Vishwanath Sadashiv v Bombay Municipality** was subsequent to the two Privy Council decisions, and the view formerly taken by this Court that the protection afforded by s 527 of the City of Bombay Municipal Act and the corresponding provisions in the other Municipal Acts did not cover acts done in pursuance of a contract was adhered to We do not think that there is anything in the two Privy Council decisions referred to which would compel us to hold that the view taken in the earlier Bombay decisions and affirmed in **Vishwanath Sadashiv v Bombay Municipality** is no longer good law The decisions of the Privy Council dealt with the interpretation of an entirely different statute, the Code of Civil Procedure The language of s 80 of that Code is, as was pointed out by their Lordships of the Privy Council, much wider than the words 'anything done or purported to be done in s 206 of the Municipal Boroughs Act and in the corresponding provisions of the other Municipal Acts It would be difficult to hold that a Municipality or an officer of a Municipality committing a breach of a contract entered into by the Municipality does the Act, or purports to do it, in pursuance of the provisions of the Act Under the provisions of s 68 of the Municipal Boroughs Act it is the duty of a Municipality to make reasonable and adequate provision for lighting public streets, places and buildings, but this does not make it obligatory on the Municipality to enter into a contract with a private Electricity Company for the lighting of the municipal area It is at the option of the Municipality, whether it will carry out the lighting of the streets itself or enter into a contract for the purpose with a private company The entering into a contract with the Jalgaon Electric Supply Company was, therefore, an act which the Municipality was empowered by the Act to do, but which it was not required to do It was a contract voluntarily entered into by the Municipality, and a deliberate breach of the contract cannot be treated as something done or purporting to have been done in pursuance of the Act In our opinion, therefore, no notice of the suit was necessary under s 206 of the Act"

Suit to restrain an illegal act—Notice not necessary —A suit was brought by the plaintiff against a municipality for an injunction to restrain them from

laying water pipes on his land The lower courts dismissed the suit for want of notice under s 48 of the District Municipal Act Amendment Act (Bom Act II of 1884) Held, reversing the decree, that the suit was not a suit for anything done in pursuance of the Act, but to prevent the municipality from doing what the plaintiff alleged to be an illegal act, and that s 48 did not apply **Harilal v Himat Manekchand and another, 22 Bom. 636**

Discretion of Municipality—Court would not interfere unless it is exercised in a capricious, wanton and oppressive manner —The word 'street' in s 17 of the Bombay District Municipal Act (VI of 1873) means and includes not merely the surface of the ground, but so much above and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes

The plaintiff proposed to make a balcony projecting over a public road. The Municipality objected to the work, as an encroachment on a public street He, therefore, sued the Municipality to establish his right to build the proposed balcony Held, that, so far as the column of space standing over the street was vested in the Municipality, the plaintiff had no right to occupy it with a balcony, which by intercepting light and air would greatly impair the use of the area as a street **12 Bom 490**

Section 33 of the Bombay District Municipal Act (VI of 1873) gives the Municipality a discretion to issue such orders as it thinks proper with reference to a proposed building Civil courts cannot interfere with that discretion, unless it is exercised in a capricious, wanton, and oppressive manner The plaintiff was the owner of two houses on each side of the passage of a khadki, or open square, containing three or four other 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 Valab Narsi v. the Municipality of Dhandhuka, 12 Bom 490**

Notice before accrual of cause of action, useless—In a suit against the Municipal Corporation where no notice setting forth with reasonable particularity the cause of action is proved to have been served on the corporation under s. 255 after the date of cause of action mentioned in the plaint, the suit is bad for want of notice under s 255 Any notice served before the date of cause of action is of no avail **Shabhan Mohib v Karachi Municipal Corporation, A. I R 1940 Sind 109**

Notice to state 'cause of action'—Municipality as well as contractor employed by it liable for negligence of the contractor:—The plaintiffs were owners of a

house consisting of a ground floor and upper storey and measuring 77 feet in length On the south side of the house was a gully, 3 feet 6 inches wide separating it from another upper-storied house The plaintiffs in this suit complained that in January, 1891, the defendant by his servants dug a trench, 8 feet deep, along the whole length of the gully for the purpose of laying a drain pipe and that the work was done so negligently that the plaintiff's house was injured, and became in such a dangerous condition that it had to be pulled down The plaintiffs claimed Rs 3,996 as damages The defendant denied the negligence, and alleged that the work was not done by his servants or agents, but by a contractor Held, that the defendant was liable for the act of his contractor The work was necessarily attended with risk, and the defendant could not free himself from liability by employing a contractor The defendant, as well as the contractor, was liable to the plaintiffs For the defendant it was contended that the notice of action given by the plaintiffs under s 527 of the Bombay Municipal Act (III of 1888) was insufficient The notice stated "that one S L, a contractor under you, and as such being your agent and servant, excavated a trench &c" It was argued that this was not a good notice, as it only alleged a cause of action arising out of the acts of the defendant's servants and agents, and not out of the acts of a contractor Held, that the notice was sufficient The section only required the notice to state with reasonable particularity the cause of action, and this was done The individual by whom the damage was done was specified, and the acts which caused the damage were clearly set forth **Dhondiba v the Municipal Commissioner of Bombay 17 Bom 307**

Levy of Tax in each year gives a new and distinct cause of action:— The plaintiff paid a house tax at the rate of Rs 6, for the year 1890 without any protest When the tax was sought to be levied from the plaintiff at the same rate for the year 1891, he objected to the levy as illegal and excessive, and paid the tax under protest He then sued to recover what he alleged was an excess charge of Rs 5 in respect of the tax for 1891 His claim was rejected on the ground that he was estopped from recovering the alleged excess by reason of his having paid the tax for 1890 without protest Held, that the suit was not barred The levy of a tax in each year gives a new and distinct cause of action and the payment of the tax without protest for one year does not bar a suit to recover a sum paid in a subsequent year under protest on account of a tax which was not legally chargeable for that year **Pitambardas v Jambusar Town Municipality 17 Bom. 510.**

Suit for damages for pulling down construction not falling under s 123:— Plaintiff having built a new wall on the site of an old wall including the old foundations, the Municipality pulled the wall down Plaintiff thereupon sued the Municipality for damages The Judge rejected the claim for damages Held, that the building of a new wall on the site of the old wall including the old foundations was not an addition to the existing building within the meaning of s 33 of the District Municipal Act (Bombay Act VI of 1873) The Municipality was, therefore, liable in damages for any expenses which the plaintiff was put to by their pulling down the wall. **Krishnaji v the Municipality of Tasgaon, 18 Bom. 547.**

Suit brought to enforce payment of compensation for land taken by the Municipality—Notice not necessary —In 1891, the Municipal authorities of Bombay gave notice to the plaintiffs under s 299 of Bombay Act III, of 1888

that they required 23 30 square yards of the plaintiffs' land for street improvements On the 14th December, 1891, the plaintiffs gave possession of the land to the Municipality, and on 27th January, 1892, claimed Rs 50 per square yard as compensation By letter dated 23rd February, 1892, the Municipal Commissioner (without prejudice) offered Rs 50 per square yard as compensation and stated that on the plaintiffs producing the title-deeds and papers to establish their title the necessary documents in connection with the payment would be prepared Nothing further took place in the matter until the 14th February, 1894, on which date the plaintiff wrote a letter to the Municipal Commissioner in which, without mentioning any sum, he requested the payment of the amount which might be due to him as compensation for his land taken by the Municipality The Commissioner refused to pay the compensation, contending that the plaintiffs' claim was time-barred The plaintiffs thereupon brought this suit claiming Rs 1,165 (being at the rate of Rs 50 per square yard) as compensation for the land taken up by the defendant or in the alternative for that sum as damages for the breach of contract to pay purchase money for the land The defendant pleaded (1) that notice under s 527 of the Municipal Act III of 1888 was necessary before suit filed and (2) that the suit was barred by limitation The Chief Judge of the Small Causes Court found for the defendant with costs and dismissed the suit contingent on the opinion of the High Court On a case stated Held, (1) that notice under s 527 of Bombay Act III of 1888 was not necessary, that section not being applicable to suits brought to enforce payment of compensation under s 301 of the Act, (2) that the suit was not barred by limitation

Per FARRAN, J —A suit against the Municipality of Bombay for compensation for land acquired by the Municipality under s 299 of Act III of 1888 is not an action of tort or quasi-tort but a simple action for the price of land, which the terms of s 301 of the Act impose upon the Commissioner to pay The obligation to pay that price is of the same nature (1) whether the owner assents to the valuation of the land placed upon it by the Commissioner, (2) whether the value is determined by the Chief Judge of the Small Causes Court, or (3) whether it is left undetermined Section 527 does not apply to any of these three cases In all of them the obligation to pay is imposed by s 301 and does not arise from the manner in which the amount of the price to be paid is arrived at

2 Section 504 prescribes the only mode in which in case of dispute the value of the land can be determined If the owner of land disputes the Commissioner's valuation he must apply to the Chief Judge of the Small Causes Court within a year If he does not do so, the result is that he loses the power of effectually disputing the Commissioner's valuation but does not lose his right to the amount of the valuation

3 The owner of land has a remedy independent of the provisions of s 504 The section only deals with cases where there is a dispute as to the value of the land, and leaves untouched those cases where there is no such dispute but where the Commissioner for some reason declines to pay In such cases the owner is left to his ordinary remedy, no special mode of procedure being prescribed Cases in which there has been a dispute, but in which the owner abandons his claim to dispute the valuation of the Commissioner, fall within the latter category" **Manekial Motilal v the Municipal Commissioner of Bombay, 19 Bom. 407**

Valuation of houses—Civil court's jurisdiction ousted —A Civil Court has no power to interfere in the matter of valuation of houses made by a municipality **Morar v Borsad Municipality, 2 B L R 417** In course of the judgment Their Lordships observed "The rules imposing the house-tax define 'estimated value' to mean with reference to a house or a shop (a) the market value of the site thereof, and (b) the present value of the buildings, arrived at by the committee appointed for this purpose by the Municipality by computing the probable cost of erecting the same and making a fair deduction on account of deterioration Thus the valuation in the first instance is placed in the hands of a committee By a subsequent rule a remedy against over-valuation by this committee is provided in the shape of an appeal to the general committee It is we think clear that a Civil Court cannot put itself in the place of, or over, either the committee or the general committee and revise the valuation made by them The case is exactly similar to the case of **The Municipality of Wai v Krishnaji Gangadhar** decided by us on the 5th September, 1898, for, although in that case we dealt with the powers of a Magistrate, the powers of a Civil Court are no greater It is bound to accept as conclusive the valuation come to by the only authority in whom the power of making the valuation is placed by law, and it cannot substitute for that valuation one made by itself"

Tax assessed on a wrong basis—jurisdiction of civil court not ousted:— The Western India Turf Club at Poona was taxed at Rs 201 per year up to 1908 upon an estimated gross letting value of Race Course property at Rs 5,038 A notice was served upon them, on the 6th October, 1908, by the Cantonment Magistrate, Poona, that the said property was, under the Poona Cantonment Taxation Regulations, valued at Rs 2,46,000 and rated at Rs 9,840 per annum The notice further required that if any complaint was to be made against the taxation, it should be made to the Cantonment Magistrate within three days from the receipt thereof The rules regulating the Magistrate's action in this respect required that the complaint against his valuations should be made to him within the three days before the date fixed in the public notice, and that the date so fixed must not be less than fifteen days from the publication of the notice The Magistrate confirmed the assessment The plaintiffs appealed to the Cantonment Committee, but the appeal was rejected The plaintiffs thereupon paid under protest, on the 28th November, 1908, a cheque for Rs 4819-3-10 being assessment for one half year The cheque was cashed on the 27th May 1909 The plaintiffs filed the present suit, on the 28th March 1912, to have it declared that the increased assessment was illegally levied from them and to recover back the increase paid by them under protest The lower Court decreed the claim The Secretary of State appealed contending that the Court had no jurisdiction to entertain the suit and that a portion of the claim was barred by Art 62 of the Limitation Act, 1908 Held, (1) that the action of the Cantonment Magistrate was not warranted by the Regulations, inasmuch as reasonable time was not given to the plaintiffs to take advice as to the increase in the rate from Rs 201 to Rs 9,840 and that he had wholly disregarded the basis upon which the rate was to be assessed and that, therefore, the jurisdiction of the Civil Court was not ousted, the money having been claimed and received from the plaintiff without the shadow of a right (2) That the claim to have a refund of the excess in the payment of Rs 4,813-3-10 was not barred by the provisions of Art 64 of the Limitation Act, 1908, for the limitation ran, not from the date of the delivery of the cheque, but from the date of the receipt of the money by the payee **The Secretary of State for India v. Hughes, 16 B. L. R. 121**

Rule providing appeal to the Municipality—rule permissive and not mandatory—suit lies even though no appeal is filed —The plaintiffs having sued the Municipality of Sholapur for damages and for an injunction restraining the municipality from stopping the supply of water to their house, the first Court allowed the claim, but the Judge in appeal dismissed the suit, holding that it was permature, and that the plaintiffs had no right to sue the municipality for damages under Rule 16 of the Rules framed by the municipality under s 14 of the District Municipal Act (Bom Act VI of 1873), that rule providing that parties dissatisfied with a decision of the managing committee or of any sub-committee may prefer an appeal to the municipality whose decision shall be final Held, reversing the decree, that the rule must be construed as permissive and not mandatory It referred to departmental procedure only and did not debar the institution of the civil suit **Vasudevacharya v. the Municipality of Sholapur, 22 Bom 384**

Illegal tax—Suit lies even though no appeal is filed before the Magistrate under s 86, B D M. Act, 1901 (s 110, B M B Act, 1925) —Where a Municipality imposes a tax, a person contending that it is illegally levied can at once file a suit therefore against the Municipality in a Civil Court Section 86 of the Bombay District Municipal Act, 1901 does not provide a preliminary which one must necessarily resort to, before he can file an action in a Civil Court There is neither principle nor authority for restraining by injunction one who alleges that he has a money claim against another from enforcing that claim in the manner sanctioned by law **Chunilal v Surat City Municipality, 5 B L R 267**

In every case of assessment the procedure laid down by the Act should be strictly followed and the finality of the decision, when not in conformity with the statutory provisions may be challenged in a court of law Where a committee to deal with objections to assessment confirms the assessment without giving the assessee opportunity to be heard and the assessee without filing an appeal to the Magistrate pays the amount under protest and sues for recovery of the amount in a Civil Court, the suit is maintainable as one of the essential conditions expressly laid down by s 65 (3) is not compiled with and the order passed by the assessing committee is without jurisdiction and 'ultra vires' And s 86 is no bar to such a suit For s 86 is an enabling section which empowers an assessee who is aggrieved by an order passed with jurisdiction by the assessing committee to appeal to a magistrate on facts In the absence of this section it would not be open to an assessee to attack the decision of the assessment committee on merits But that does not mean that where the attack goes to the very root of the assessment fixed on the ground of non-compliance by the assessment committee with the preliminaries laid down by the statute, which they are required to comply with before they give their decision the assessee may not resort to the ordinary tribunal It is an elementary principle of law that a provision contained in a statute which purports to restrict the common right of a party of access to a Civil Court must be interpreted with the utmost strictness Section 86 is not impliedly intended to bar the right of a party aggrieved by the excessive levy of a tax to resort to a court of law But that section is only intended to give to the aggrieved party a summary remedy by way of appeal to a Magistrate against an assessment of facts which would otherwise be barred A municipality assessed a tax for the year without complying with the provisions of the law The assessee paid it under protest and sued for refund of taxes It was contended that the assessment fixed and levied during the previous year was good and hence he was entitled to refund of excess over that amount Held, that the mere fact that the municipality failed to comply with the provisions of the

section was not by itself sufficient to enable the assessee to escape payment of the proper assessment Before he could recover the excess which he had paid he must satisfy the court that it was not payable **Karsondas v Karachi Municipality, A I R 1936 Sind 114**

There is nothing to prevent a suit being filed under s 206 of the City Municipalities Act even though the assessee may not have followed in its entirety the *procedure for appealing to the Magistrate laid down in s 110 of the Act* **Hari Govind v the City Municipality of Belgaum, 31 B L R 1249**

A Civil Court has jurisdiction to entertain a suit in respect of any liability to municipal taxation Such a suit is an independent suit, and need not be filed *after exhausting the other remedies provided in ss 110 and 111 of the Bombay* Municipal Boroughs Act ,1925 Article 14 of the Indian Limitation Act, 1908 applies only to orders which require to be set aside in a regular suit before any relief inconsistent with the order can be obtained It does not refer to a judicial order An order passed by a Magistrate under ss 110 and 111 of the Bombay Municipal Boroughs Act is a judicial, and not a quasi-judicial or an executive order **Bhopshetti v Bhat, 42 B L R 223**

Suit to recover tax illegally levied with interest as damages—outside the scope of Small Causes Courts —A suit to recover the amount of tax illegally recovered by a Municipality coupled with a claim to interest on the amount as damages, *falls under Articles 35 (1) of the second schedule of the Provincial* Small Causes Courts Act, and is thus exempted from the jurisdiction of that Court **Kalyan Municipality v Govind, 27 B L R 447**

Amount of compensation for damage—whether a Court other than District Court (under s 198 B M B Act) can determine the amount of compensation — The Calcutta Municipal Act, 1899 provides that the Corporation shall compensate every person who suffers damage by the removal of fixtures erected before June 1, 1863 The Corporation served J with notices under s 341 to remove certain structures and thereafter obtained orders from the Magistrate for their demolition but took no steps to enforce these orders J brought a regular suit in the Court of the Subordinate Judge against the Corporation claiming (1) *declaration that the fixtures were erected before June 1, 1863, (2) declaration that* she was entitled to compensation for loss she would suffer by their removal, (3) declaration that the corporation could not remove them till compensation was paid, (4) that the Court should fix the amount of the compensation and (5) an injunction restraining removal till the compensation was paid Held, (1) that, on the true construction of s 341 (3), the assessment of compensation was not a condition precedent to the demolition of the structures, (2) that Courts other than the Small Causes Court were by s 617, debarred from fixing the compensation, and therefore as the suit sought relief under any but the first two heads, it was misconceived, but that J was entitled under s 42 of the Specific Relief Act, 1 of 1877, to a declaratory decree for the first two claims, the Corporation having denied her right to compensation until the hearing of the appeal against the decree of the Subordinate Judge **Mrs A J S Joseph v the Corporation of Calcutta, 18 B L R. 873**

Suit for refusal of permission to build—Starting point for limitation — *The plaintiffs were owners of a house site at Rander which is 13 feet by 120 feet* On December 11, 1918, they gave notice to the Municipality of their intention to build a house on this site through their attorney Ismail Hussen Jiva On December 23, at a meeting of Managing Committee of the Municipality at which the application was considered it was resolved that the Committee were unable

to interfere with the resolution previously passed by the General Board in the matter On March 11, 1919, the matter came before a special general meeting of the Municipality, when it was decided (Exhibit 68) that the Board was of opinion that permission could be granted on the applicants undertaking to leave off building on both sides of the land namely, the east and west, that is to say, on their leaving a set-back on the east and west to the streets on which the land abutted Accordingly it was resolved that a letter should be written to the Collector and permission should be given on receiving a reply The Collector replied on July 22, stating that he had seen the land and agreed with Mr Anderson's order that the land should not be allowed to be built upon except on the conditions made by him According to those conditions 5 feet from the northern side and 5 feet from the southern side had to be left vacant, so that the owner would only be able to build on a strip 3 feet wide That was really a refusal to permit the owner to build on his land So the General Board resolved on July 24, 1919, that Ismail Hussan should be informed that they could not make any alteration in the permission note granted by the General Board on July 19, 1915 That order was communicated to the plaintiffs on August 8, 1919, and it is really that order against which the plaintiffs have applied to the Court for relief The history of the previous application for building on this land is as follows One Fatma had given notice to build on the land in 1913 and the Municipality gave her permission, but the order passed on that application by the Municipality was cancelled by the Collector acting under the powers given him under s 174 of the Bombay District Municipalities Act (Exhibit 53) The Collector said 'the Municipality should effect this (the prevention of excessive congestion) by requiring the landholder to leave a margin of five feet not built upon on each side of his proposed building (which is impossible) Since he cannot do that he cannot build at all' As a matter of fact Fatma who made the application was not the owner of the land Then in 1915, one Mahomed Suleman Jiva, purporting to be a co-sharer in the land, had given notice to the Municipality of his intention to build, and on July 19, 1915, a resolution was passed that permission could be given on the condition that the building should be within the alignment in front, and 5 feet of space should be left open on each side Before that order was passed Suleman died, and it is to that order to which the Municipality referred in their letter of August 8, 1919, addressed to the plaintiff's attorney The learned Judge in the Court below held that the suit was barred by limitation because it was not brought within six months from the orders of the Municipality in 1913 and 1915, and the resolutions of the Managing Committee dated December 23, 1918, and of the general board dated July 24, 1919 On the other issues it was held that the Collector had power under s 174 of the Bombay District Municipal Act to suspend the permission granted by the Municipality and that the resolution of the Municipality dated July 24, 1919, adhering to its order of 1915, was not illegal and ultra vires **Ahmed v Rander Town Municipality, 27 B L R 429** In the course of the judgment Macleod C J observed "It seems to us that the real point which lies within a very small compass has not been perceived by the District Judge The order on the resolution of July 24, 1919, was only communicated to the plaintiffs on August 8, 1919, and from that date the plaintiffs had six months' time within which to appeal to the Court for relief, and therefore the suit was within time It is not a suit to set aside an order of the Collector The only order of the Collector which we have before us was made in September, 1913 on the application of Fatma who was not the owner, to build on the land. It is true that the Municipality in 1919 before passing their order referred the matter to the Collector for his advice. The Collector advised that the pre-

vious order passed by Mr Anderson should be adhered to, and this was incorporated in the terms of the order made on the plaintiffs' application This advice given by the Collector in 1919 could not be an order under s 174 of the Act, which only gives the Collector power to suspend an order which a Municipality has actually made"

Act done—Suit to restrain a threatened act—Notice not necessary:— A suit for an injunction to restrain a municipality from removing a certain building or construction is not an action "for anything done, or purporting to have been done in pursuance of the Act" within the meaning of s 48 of Bombay Act II of 1884 Such a suit can, therefore, be brought without giving previous notice to the municipality Apart from the provisions of s 33 of Bombay Act VI of 1873, it is only if the site of a building is vested in a municipality under s 17, that this body is empowered, whether by s 42 or by any other section, to take steps for the removal of the building The discretion of taking action or otherwise under the 3rd clause of s 33 is vested in the municipality, which alone can determine whether or not the removal of a building erected contrary to the provisions of s 33 is not a measure likely to promote the public convenience If the municipality adopt 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 **Patel Panachand and others v The Ahmedabad Municipality, 22 Bom 230**

A suit will lie at the instance of individual tax-payers for an injunction restraining a municipality from misapplying its funds **Waman v The Municipality of Sholapur, 22 Bom 646**

Section 48 of the Bombay District Municipal Act, 1873, requires notice only when the suit is for an act already done or purporting to have been already done, under the power conferred, but no notice is required when the suit is not for an act already done but to prevent an act from being irremediably and irrevocably done The Court has for the purposes of Section 48, only to look to the real object of the suit **The Municipality of Parola v Laxmandas, 2 B. L R. 857** The same view was taken in **Virji v Karachi Municipality, A. I. R. 1920 Sind 9**

Section 527 of the City of Bombay Municipal Act does not apply to a suit to restrain a Municipality by injunction from doing an act which is threatened but not done **Dewkabai v the Municipal Commissioner of Bombay, 6 B.L R. 1028**

Suit for injunction—Notice —*S 80*, Civil Procedure Code 1908, applies to all officers of Government and to all their official acts, and imposes a statutory and unqualified obligation upon the court It provides for a fixed and obligatory interval of two months between the required notice and the commencement of any suit in respect of the official's action The Act must be read in accordance with the natural meaning of its words Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions A suit in which 'inter alia' an injunction is prayed is still 'a suit' within the words of the section, and to read any qualification into it is an encroachment on the function of legislation In the case of suits against officials for acts purporting to be done in discharge of their duties, *s 80* of the Civil Procedure Code is to be strictly complied with It is applicable to all forms of action and all kinds of relief The mere circumstance that part of

whole of the relief claimed is an injunction, does not oust the application of the section **Bhagchand v Secretary of State for India, 29 B L R 1227.** In this case the decisions of the Calcutta, Madras and Allahabad High Courts were approved and the view taken by the Bombay High Court that 'in the case of suits to restrain by injunction the commission of some official act prejudicial to the plaintiff, if the immediate result of the act would be to inflict hardship or irremediable harm, s 80 Civil Procedure Code, does not compel the plaintiff to wait two months before bringing his suit,' was not approved Viscount Sumner delivering the judgment of the Board observed "For many years there has been a marked difference of opinion between the High Court of Bombay, on the one hand, and all the other High Courts in India, on the other, as to the true application of s 80 of the Civil Procedure Code (Act V) of 1908 and of s 424 of the Code (Act X) of 1877, which it superseded, in the case of suits against officials for acts purporting to be done in discharge of their duties, when part or the whole of the relief claimed is a perpetual injunction After some differences of opinion among their subordinate Courts, the High Courts of Calcutta, Madras and Allahabad have now agreed in deciding that these sections are to be strictly complied with and are applicable to all forms of action and all kinds of relief (See the cases of **The Secretary of State for India in Council v Rajlucki Debi** and **Dakshina Ranjan Ghosh v Omar Chand Oswal**, of **Secretary of State v Kalekhan** and **Koti Reddi v Subbiah**, of **Eachchu Singh v The Secretary of State for India in Council** and **Abdul Rahim v Abdul Rahman**) In Bombay, on the other hand, in the cases of **Secretary of State v Gajanan Krishnarao, Naginlal Chunilal v The Official Assignee, Bombay,** and **Secretary of State for India v Ghulam Rasul,** which were suits to restrain by injunction the commission of some official act prejudicial to the plaintiff, it has been intimated or held that, if the immediate result of the act would be to inflict irremediable harm, s 80 does not compel the plaintiff to wait two months before bringing his suit, though, if nothing is to be apprehended beyond what payment of damages would compensate, the rule is otherwise and the section applies As the Code of Civil Procedure is applicable to all the High Courts in India, and as s 80 is intended to afford a protection (whatever exactly it may be), to all officials, high and low, it is certainly undesirable that a difference of opinion such as this should be left unresolved What appears to have influenced the learned Judges is, firstly, their assumption as to the practical objects with which it was framed (see **Shahebzadae Shahunshah Begum v Fergusson, Peary Mohan Das v D Weston** and **Raghubans Sahai v Phool Kumari**), and, secondly, is the fact that this protection takes the form of providing for a fixed and obligatory interval of two months between the required notice and the commencement of any suit in respect of the officials' action It is only right to observe in this connection that, under s 80 (2) of the Bombay District Police Act, at any rate, and it may be under other similar provisions, damages would not be recoverable from a public servant, who gave effect in good faith to orders issued with apparent authority It appears therefore, to have been due to anxiety not to expose a plaintiff to the risk of the execution of an invalid order without practical redress, that they adopted a construction, which is not in accord with that accepted generally The point has been put in this way Section 80 is but a part of a Procedure Code, passed to provide the regulations and machinery, by means of which the Courts may do justice between the parties A construction which may lead to injustice is one which ought not to be adopted, since it would be repugnant to the whole tenor and purpose of the Act, and the implication of a suitable exception or qualification is, therefore, justifiable and even necessary In effect, however, their decisions are not altogether recon-

cilable with one another, either as to the extent to which they go, or as to the reasoning on which they are based Whether the section should be read as if it ran 'no suit other than a suit in which an injunction is claimed', or as if it ran 'no suit shall be instituted except when serious or irreparable damage might be occasioned to the plaintiff if not prevented by the previous grant of an injunction', does not appear to have been settled In the one case all suits falling within the section could safely anticipate the prescribed delay by the simple device of adding a claim for an injunction at the end of the plaint In the other it would depend on the view which a Judge might take of the elastic and indefinite expression 'serious or irreparable damage', whether the official should have or should lose the benefit of the statutory interval of two months, nor can this difficulty in the least depend on the intention, which may be speculatively attributed to the Legislature in prescribing any interval at all To some extent the Bombay decisions purport to rest on the authority of English cases, of which the principal are —**Attorney-General v Hackney Local Board** and **Flower v Local Board of Low Leyton** These were decided respectively upon the Metropolis Management Act, Amendment Act, 1862 and on the Public Health Act 1875, and turned on the construction then put on the Public Authorities' protection clauses therein contained The Public Authorities' Protection Act, 1893, has now repealed these clauses, and has adopted another form, to which the authority of Flower's case has not been considered applicable (**Harrop v Ossett Corporation, Fielding v Morley Corporation**) In the Hackney case Bacon V C held that the words any act done or intended to be done under their Parliamentary powers' could not apply to a nuisance to which such powers could not in any case extend The difficulties of this construction are shown in the judgment of Bowen L J in **Chapman, Morsons & Co v Guardians of Auckland Union,** where he endeavours, but without much confidence, to find a less unsatisfactory basis in the words 'writ or process', within which a bill for an injunction might not fall In Flower's case the Court of Appeal held that the Public Health Act 1875 s 264 did not extend to a bill in Chancery, but only to an action at law, a consideration inapplicable to s 80 of the Civil Procedure Code, and assumed that the object of the delay provided by the section was to give time for a tender of amends It is to be noted that the Public Health Act, 1875, the previous Act of 1848, and the Metropolis Management Act were cases where a subordinate statutory authority had been entrusted with specific and limited powers, and it would seem from **Davies v The Mayor, Alderman, and Burgesses of Swansea** that the profession had long taken s 139 of the Act of 1848 to be applicable only to actions of tort Similarly in Flower's case, counsel hardly contested that an exception of 'cases of necessity' as mentioned in the Court below by Malins V C must be understood A view, therefore, about a bill for an injunction 'against serious and irreparable damage requiring the intervention of the Court' almost undisputed in the Court of Appeal, would not be any guide to the meaning of the Civil Procedure Code, where the clause applies to all officers of Government and to all their official acts, and where the words 'in respect of', a form going beyond 'for anything done or intended to be done' show it to be wider than the statutes, on which the English authorities were decided On the other hand, the view which has been taken in the other High Courts may be shortly summarised thus The argument that a statutory provision as to procedure is subject to some exception of cases, where hardship or even irremediable harm might be caused, if it were strictly applied, might be used with equal cogency in connection with a code fixing the admissibility of evidence or with a limitation section, recognising rights but barring remedies For this, however, there is no authority The Act, albeit a Procedure Code,

must be read in accordance with the natural meaning of its words Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions A suit in which 'inter alia' an injunction is prayed is still 'a suit' within the words of the section, and to read any qualification into it is an encroachment on the function of legislation Considering how long these and similar words have been read throughout most of the Courts in India in their literal sense, it is reasonable to suppose that the section has not been found to work injustice, but, if this is not so, it is a matter to be rectified by an amending Act Their Lordships think that this reasoning is right To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while s 80 is mere procedure, is fallacious, for s 80 imposes a statutory and unqualified obligation upon the Court So, too, the contention that the 'act purporting to be done by the Collector in his official capacity, in respect of which' the suit was begun, was his threatened enforcement of payment is fallacious also, since the illegality, if any, is in the order for recovery of the tax If that was valid, there was nothing to be restrained Hence, though the act to be restrained is something apprehended in the future, the act alone 'in respect of which' the suit lies, if at all, is the order already completed and issued " Although this case was under s 80 of the Civil Procedure Code 1908, the principles laid down therein equally apply to a case under s 206 of the Boroughs Act or s 167 of the District Act or s 136 of the Local Boards Act and the true position is that whether a suit is for an injunction or otherwise, if it is for an act done or purporting to have been done under the Act, notice will be necessary No notice will be necessary if the suit is not for an act done but for a threatened act The criterion is not as to whether the suit is for an injunction but the criterion is whether it is for an act done or merely for an act threatened

Following the case of **Bhagchand v the Secretary of State for India, 20 B. L. R. 1227,** it was held in **the Municipal Borough of Dhulia v Mahomed Isac, 37 B. L R 1027,** that although it was a suit for injunction, as it was for an act done under the Act notice under s 206 of the Act was necessary Dealing with the question of notice Wadia J observed "I am, however, unable to accept the finding of the lower appellate Court that no notice under s 206 of the Bombay Municipal Boroughs Act was necessary It was contended on behalf of the appellant Municipality that, in view of the decision of their Lordships of the **Privy Council in Bhagchand Dagadusa v Secretray of State for India,** a notice under s 206 was necessary The question in **Bhagchand Dagadusa v Secretary of State for India** was one of notice under s 80 of the Civil Procedure Code Prior to this case there had been a marked difference of opinion between the view taken by this High Court on the one hand and the High Courts of Calcutta, Madras and Allahabad on the other, with regard to s 80 of the Code of Civil Procedure It had been held by this Court that in suits to restrain by injunction the commission of some official act prejudicial to the plaintiff where the immediate result of the act would be to inflict irremediable harm, s 80 did not compel the plaintiff to wait for two months before bringing his suit Their Lordships of the Privy Council agreeing with the view taken by the other High Courts held that the provisions of s 80 were express, explicit and mandatory, and admitted of no implications or exceptions Both the lower Courts have taken the view that the ruling in **Bhagchand Dagadusa v. Secretary of State for India** was not applicable to the facts of the present case, because it was a ruling with regard to s 80 of the Civil Procedure Code and not with reference to s 206 of the Bombay Municipal Boroughs Act But in two recent decisions of this Court—**Patel Mathurbhai Barbadbhai v Patel Ambalal**

Samaldas and Genesh Shripad Chitnis v the Belgaum City Municipality,— the decision of their Lordships of the Privy Council in **Bhagchand Dagadusa v Secretary of State for India** was held applicable to suits coming under s 206 of the Bombay Municipal Boroughs Act In **Patel Mathurbhai Barbadbhai v Patel Ambalal Samaldas** it was held by Madgavkar and Barlee JJ that s 206 of the Bombay Municipal Boroughs Act did not limit the requirement of notice to particular kinds of suits for damages or money, and that the decisions in **Patel Panachand v Ahmedabad Municipality** and **Harilal v Himat**, in so far as they purported to limit the necessity of notice to particular kinds of suits according to the relief claimed, could not, in view of the decision in **Bhagchand Dagadusa v Secretary of State for India**, be supported In **Ganesh Shripad Chitnis v the Belgaum City Municipality**, Murphy J held that the reasoning in **Bhagchand Dagadusa v Secretary of State for India** must be held applicable to suits coming under s 206 of the Bombay Municipal Boroughs Act, and pointed out that there were two decisions of this Court holding that the view taken in **Bhagchand Dagadusa v Secretary of State for India** applies also to suits in which a notice was required under s 206 of the Bombay Municipal Boroughs Act The decision in **Patel Mathurbhai's case** is a decision of a division bench and is binding on this Court It has been contended on behalf of the respondent that s 206 is not applicable to this case because the action of the Municipality in retaining the names on the list of voters in spite of the order of the District Judge was not an act which was done or which purported to have been done in pursuance of the Act The words 'purporting to be done' used in s 80 of the Civil Procedure Code were interpreted in **Koti Reddi v Subbiah**, and it was held by a full bench of the Madras High Court that the question of the good faith or the bad faith of the public officer either as regards his belief in the legality or propriety of his act, or the limit of his powers, or the existence of facts justifying the exercise of such powers, is irrelevant in the consideration of the question whether the officer is entitled to notice under s 80 of the Civil Procedure Code In the course of his judgment Mr Justice Sadasiva Ayyar said (p 810) —'But if the act done is so outrageous and extraordinary that no reasonable man could detect in it any resemblance to any act which the powers of such an officer could allow him to do on the facts as represented and declared by such officer, his mere allegation that he did the act in his official capacity would not suffice' It is contended on behalf of the respondent that the act of the Municipality in the present case was so outrageous and extraordinary that it could not be said that it acted or purported to act in pursuance of the Bombay Municipal Boroughs Act I am unable to accept this contention That the Municipality had an honest doubt as to the interpretation of the order passed by the District Judge is clear from the application which was made by it to the District Judge on November 7, 1930, asking for directions on this particular point The District Judge unfortunately refused to pass any order on ground that there was no ambiguity in the language of his judgment After this, as appears from exhibit 18 the Municipality made a reference to the Collector asking for his orders in the matter It seems clear from this that the Municipality was honestly under the impression that the District Judge's order did not prevent it from amending the roll so as to enter on it the names of persons who it thought had been through oversight omitted from the electoral roll, and whose qualifications under s 11 sub-s (1), had not been considered at all The act of the Municipality was clearly one which purported to have been done under rr 10 and 11 of the Rules under the Municipal Boroughs Act In my view, therefore, notice of the suit was necessary, and the plaintiff having brought his suit without such notice, the suit must fail"

A material part of the cause of action in every suit for an injunction is the doing of an act or the omission to do an act which raises an apprehension in the mind of the plaintiff that unless the defendant is restrained by an injunction he will do or omit to do further acts resulting in an injury to the plaintiff, and therefore a suit for an injunction is primarily a suit for or arising out of something done or omitted to have been done, and if such act or omission is done or purported to have been done in pursuance of the Bombay District Municipal Act, it clearly falls within s 167, and hence a suit for an injunction brought against a municipality without previous notice is liable to be dismissed **Daily Gazette Press Ltd v Karachi Municipality, A I R 1930 Sind 287**

The giving of a month's notice under s 167 of the Act is essential before instituting a suit against a Municipality for an injunction restraining it from doing a certain thing The suit must be dismissed in the absence of such notice **Daily Gazette Press Ltd v Karachi Municipality, A I R 1932 Sind 104**

Act done or purporting to have been done in pursuance of this Act:— The chairman of a District School Board constituted under the Bombay Primary Education Act 1923, is a public servant within the meaning of s 21 (10) of the Indian Penal Code, 1860 He is not removable from office save by or with the sanction of Government and cannot be prosecuted for any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty without the previous sanction of the Local Government under s 197 of the Criminal Procedure Code 1898 **Nhanesaheb Ahmedsaheb In re 38 B L R 956** In this case a complaint was filed by a member of the District School Board against its chairman charging him with having forged the minutes of a meeting of the School Board and thereby committing an offence under s 465 of the Indian Penal Code It was held that the offence was committed by him while acting or purporting to act in the discharge of his official duty

The President of a Taluka Local Board being a statutory public servant under s 135 of the Bombay Local Boards Act, 1923, and being removable from his office only by Local Government for misconduct, neglect of or incapacity to perform his duty, the court has no jurisdiction to take cognizance of any offence committed by him while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Local Government under s 197 of the Criminal Procedure Code, 1898 Where the Court acted without jurisdiction with regard to a part of the trial, the whole proceedings are vitiated by the illegality committed, and any conviction based on such proceedings cannot stand **Emperor v Rudragouda Rachangouda Patil 39 B. L. R 70** In this case accused were charged for offences of criminal breach of trust and forgery under ss 409, 409 read with s 109, 466, 466 read with s 109 and 467 of the Indian Penal Code, in connection with the funds of the Taluka Local Board with which they were entrusted It was held that sanction of Local Government was necessary as the accused acted or purported to act in discharge of their official duty in respect of the charge of forgery at any rate

An officiating Kulkarni collected money on account of land revenue and instead of sending it to the Government treasury used it for his own purposes He was prosecuted for an offence punishable under s 409 of the Indian Penal Code, 1860, without obtaining sanction of the Local Government under s 197 of the Criminal Procedure Code, 1898 —Held, that the offence was not committed

by the accused while acting or purporting to act in the discharge of the official duty and therefore no sanction of the Local Government under s 197 of the code was necessary The officiating Kulkarni of a village is a public servant, not removable from his office save by or with the sanction of the Local Government, within the meaning of s 197 of the Criminal Procedure Code, 1898 However, a sanction of the Local Government to his prosecution is necessary only where he is charged with an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, and not otherwise **Emperor v Gurushidayya Shantiviravya Kulkarni, 40 B L R 1286**

In s 142 of the Calcutta Port Act, 1890, the words 'purporting or professing to be done' postulate that work which is not done in pursuance of the statute may nevertheless be accorded its protection, if the work professes or purports to be done in pursuance of the statute The section affords protection not only in respect of a claim based on alleged breach of a statutory duty but also in respect of one based on an alleged omission to perform such a duty **The commissioner for the Port of Calcutta v The Corporation of Calcutta, 40 B L R 6**

An illegal omission on the part of the Municipal Commissioners comes within the expression 'for any act purporting to be done under this Act' and a suit against a Municipality for non-feasance of a duty is bad, if no notice as required by s 535 is served upon the Municipal Commissioners, prior to the institution of the suit **Jogendra Nath Banerjee v Tollyganj Municipality, A I R 1939 Cal. 178**

A prosecution against an administrative officer of a local board for an *offence punishable under s 420 of the Indian Penal Code, 1860, for submitting* a false travelling allowance bill to the board, can lie in absence of a notice given under s 136 of the Bombay Local Boards Act, 1923, inasmuch as the delivery of his travelling allowance bill is not a duty imposed upon him by the Act **Emperor v R K Naik, 41 B L R 1227** In the course of the judgment, Beaumont C J observed "It is argued that the rule makes it compulsory upon the Administrative Officer to deliver a travelling allowance bill But, in my opinion, the rule only means that the travelling allowance bill must be delivered if travelling allowance is being claimed There is nothing in the rules which compels the Administrative Officer to claim travelling allowance if he does not desire to do so Therefore the delivery of his travelling allowance bill was not a duty imposed upon him by the Act In the second place it seems to me clear that the charge of cheating by suppression of the fact that the accused owned a motor car involves an act outside the accused's official duties He was not under any statutory duty to refrain from stating to the board that he possessed and used his own car The charge is more analogous to a charge under s 409 than to a charge under s 477A, because a part of the ingredients of the charge is not in any way concerned with the official duties of the officer"

Accused No 1 was a Sub-Overseer in the employ of a District Local Board, and it was a part of his duty to report to his employers through the Works Committee the progress of the Works in his charge carried out by a contractor and their measurements, and also to sign bills prepared by the contractor in authentication of the measurements given and the charges made therein Accused No 2 was an elected member of the Board, the Chairman of the Works Committee, and a statutory public servant not removable from his office except with the sanction of the local Government He was charged with the

duty of supervising the works, take their measurements, and to countersign the bills of the contractor by way of authenticating the measurements given and the charges made A bill prepared by a bogus contractor stating measurements and charges of work done and signed by accused No 1 and countersigned by accused No 2 was submitted to the President of the Board, and payment was obtained from him The two accused, having been prosecuted for offences of cheating and falsification of accounts and abetment thereof under ss 420 and 477A read with s 114 of the Indian Penal Code, contended that their acts were purported 'to have been done in pursuance of' the Bombay Local Boards Act, 1923, and they could not be prosecuted by virtue of s 136(2) of the Act, without giving them one month's notice, and accused No 2 further contended that he could not be prosecuted in the absence of sanction from the Local Government under s 197 of the Criminal Procedure Code, 1898 Held (1) that the accused in submitting the bill were purporting to act, though not actually acting, in pursuance of the Bombay Local Board Act, even if they appended to the bill a statement which was false to their knowledge, (2) that it having been the duty of the accused to sign and countersign the bill respectively in order to enable the contractor to claim, and the District Local Board to pay, the amount of the bill, the preferring of the bill was an official act, and it made no difference that in the discharge of the official duty a fraudulent statement was inserted in the bill, (3) that therefore the act complained of, namely, the fraudulent and dishonest representation by means of the bill and measurement sheet were protected by s 136 of the Bombay Local Board Act, (4) that accused No 2 having been a statutory public servant according to s 135 not removable without the sanction of the Local Government under s 31 of the Act and the act complained of having been done in the exercise of his official duty, sanction of the Government was necessary to his prosecution under s 197 of the Criminal Procedure Code, 1898 **Emperor v Vishnu, 42 B L R 1193**

The general test applicable in cases of the kind, as for instance a case falling under s 136 Bombay Local Boards Act is, whether the act complained of is an act done by the protected person in his public capacity in relation to the public or whether it is done in relation to a private individual The protection applies only to the performance of duties towards the public The words of sub-s (2) of s 136 of the Act, as applicable to prosecutions can be compared with the corresponding words in s 197 (1), Criminal Procedure Code In s 197 (1) of the Code occur the words 'while acting or purporting to act in discharge of his official duty' It is true that in s 197(1) occurs the word 'offence' while in s 136 (2) of the Act occurs the word 'act,' but the word 'prosecution' as introduced into that sub-section by the amendment, by necessary implication, gives to the word 'act' in reference to a prosecution the meaning of 'offence' and as an official acting or purporting to act in discharge of his official duty must of necessity act or purport to act in pursuance of statutory duties conferred on him by law, there is in this respect no difference of substance between the relevant words of s 197 (1) Criminal P C and s 136 (2) of the Act If, therefore, for the words 'acting or purporting to act in the discharge of his official duty' in s 197 (1), the words 'acting or purporting to act in pursuance of this Act', are substituted the analogy between the two is clear Official duty is something done in pursuance of some Act or statutory authority The words used in the Act are merely a variation of the words used in s 197 of the Code considered necessary by the legislature to apply the same principle of protection to the members or officers or servants of a Local Board acting or purporting to act under the particular statute which governs them S 136(2)

of the Act can apply only to acts done by the protected persons in discharge of their public duties towards the public A president and a servant, who was sub-overseer of a certain Taluka Board, were charged with conspiring with a contractor to commit criminal breach of trust (s 120-B read with s 406 or s 409 Penal Code) and with the commission of criminal breach of trust and falsification of accounts (s 406 or s 409 read with s 477-A of the Code) No notice as required by sub-s (2) of s 136 of the Act was served on the accused and the proceedings were commenced more than three months after the acts complained of Held that it could not be said that the President was not acting or purporting to act in exercise of his statutory duties towards the public when in pursuance of the Act he got measurement book and got bills prepared by the sub-overseer or that the sub-overseer was not acting or purporting to act in pursuance of the Act when he recorded measurements, prepared bills, signed a certificate and wrote a cheque It being alleged that they committed the acts complained of to defraud the public the acts complained of could not fall outside the scope of s 136 (2) of the Act S 136 (2) of the Act as amended by Act 13 of 1935 was therefore applicable to the offences with which the accused were charged The general rule of construction is **nova constitutis futuris formam imponere debet, non praeteritis** This rule does not apply to statutes relating to procedure and the Law of Limitation being held to be a law of Procedure, had retrospective effect unless the legislature has made a distinct provision to the contrary The amending Act lays down rules of limitation and they are prima facie rules of procedure The amending Act has therefore a retrospective effect **Nurallhaqshah v Emperor, A I R 1937 Sind 129**

A part of the duties of a sub-overseer under Local Board was taking of measurements of repair and other work done and the preparation of bills in respect thereof The overseer prepared false bills and overcharged the Board —Held that the acts which were alleged to constitute offence on his part were acts done by him, or in any case purported to have been done by him, in pursuance of the Local Boards Act and whether they were bona fide or otherwise, he was immune from prosecution after a lapse of three months from the date of the act complained of **Tarachand Pribhdas v Emperor, A I R 1938 Sind 116(2)**

If the prosecution is defective for want of proper consent the proceedings would be void and hence the proper order to pass is that the complaint should be dismissed Order directing acquittal is wrong The question of good faith or bad faith is expected to be decided by the court after trial and according to sub-s (2) (s 270 Government of India Act, 1935) the proceedings will be dismissed by the court unless it is satisfied that the acts complained of were not done in good faith It is not right to introduce the question of good faith or bad faith at the stage to which sub-s (1) of the section relates Having regard to the ordinary and natural meaning of the words 'purporting to be done' it is difficult to say that it necessarily implies 'purporting to be done in good faith for a person who ostensibly acts in execution his duty still purports so to act, although he may have a dishonest intention The test is not that the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of his duty The section cannot be confined to only such acts as are done by public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as

to the existence of such duty The section is not intended to apply to acts done purely in a private capacity by a public servant It must have been ostensibly done by him in his official capacity in execution of his duty, which would not necessarily be the case merely because, it was done at a time when he held such office, nor even necessarily because he was engaged in his official business at the time Moreover, an act is not less one done or purporting to be done in execution of a duty because the officer concerned does it negligently When a public servant simply embezzles some property entrusted to him and thereby commits a criminal breach of trust under s 409, he is not doing an act, nor even purports to do an act in execution of his duty, when he commits the act, he does not pretend to act in the official discharge of his duty A case like that would not ordinarily fall under s 270 (1) But an offence under s 477-A, Penal Code, is committed if an officer or servant or anyone employed or acting in such capacity, wilfully and with intent to defraud falsifies any book or account Thus, where it is his duty to maintain a record or a register and in maintaining that register he makes some entries which are false to his knowledge, he is certainly purporting to act, though not actually acting in the execution his duty, because he is making certain entries in the register knowing them to be false Hence for prosecution under s 409 the consent of Governor is not necessary, but for prosecution under s 477-A consent is necessary As the consent of the Governor, provided for in s 270 (1) is a condition precedent to the institution of proceedings against a public servant, the necessity of such consent cannot be made to depend upon the case which the accused or the defendant may put forward after the proceedings had been instituted, but must be determined with reference to the nature of the allegations made against the public servant, in the suit or criminal proceedings If these allegations cannot be held to relate to 'any act done or purporting to be done in the execution of his duty' by the defendant or the accused 'as a servant of the crown' the consent of the authorities would, 'prima facie' not be necessary for the institution of the proceedings If in the course of the trial, all that could be proved should be found to relate only to what he did or purported to do 'in the execution of his duty' the proceedings would fail on the merits, unless the court was satisfied that the acts complained of were not in good faith Even otherwise the proceedings would fail for want of the consent of the Governor, if the evidence established only official acts Though a reference to the capacity of the accused as a public servant is involved both in the charge under s 409 and in the charge under s 477-A, there is an important difference between the two cases, when one comes to deal with the act complained of In the first the official capacity is material only in connection with the 'entrustment' and does not necessarily enter into the latter act of misappropriation or conversion, which is the act complained of In the charge under s 477-A, the official capacity is involved in the very act complained of as amounting to a crime, because the gravamen of the charge is that the accused acted fraudulently in the discharge of his official duty **Dr Hori Ram Singh v Emperor, A I. R 1939 F C. 43**

The words 'purporting to be done' in s 270 (Government of India Act, 1935) are important, and must be given their full meaning Clearly used in their context they mean something more than 'done' Where a public servant withdraws money from the cash in his keeping and misappropriates it and makes false entries in the cash book, sanction for the prosecution of an offence under s 477-A, Penal Code, is necessary, but it is not necessary for an offence under s 409, Penal Code **A. I. R 1939 F C 43** *followed* Where a person misappro-

priates certain money entrusted to him and makes false entries on the cash book, the two offences being part of the same transaction can be tried together **Emperor v Mangharam Ghumanmal Thadhani, A I R 1941 Sind 204 (2).**

A person accused of offences under s 409, Penal Code is not protected by s 136, Bombay Local Boards Act, as the act done by him cannot be said to have been done in his official capacity The addition of the proviso to s 136 (2) recognises for the purpose of time and notice, a distinction between public prosecutions and prosecution on private complaints The purpose of the proviso is to exclude from the protection of the section, prosecutions by or under the orders of the Provincial Government The Provincial Government acts either through the Advocate-General or its Public Prosecutors Hence, the prosecutions instituted by the Public Prosecutor are instituted by the Provincial Government within the meaning of the proviso **Nabibux v Emperor, A I R 1942 Sind 45** In the course of the judgment Davis C J observed "We have ourselves considered the judgment of the Federal Court **(A I R 1939 F C 43)** and the distinction that it has drawn between acts done or purporting to be done within the meaning of the section and acts not so done or purported to be done We have for instance in **Emperor v Mangharam Ghumanmal Thadani, (A I R 1941 Sind 204)** which we decided on 4th October, 1940 and which will be reported in the law reports, in due course, distinguished between an offence under s 409 and an offence under s 477-A, Penal Code, holding that in the former case sanction was not necessary while in the latter case sanction was necessary following the judgment of the Federal Court We did not then have to consider the effect of this Federal Court judgment on the Full Bench decision of this court only in so far as offences under s 409, Penal Code, are concerned and in so far as a distinction, though a fine distinction is drawn, between such acts as criminal misappropriation of money or criminal breach of trust and such acts as forged entries in diaries or accounts which it is the duty of the public servants concerned to keep It may indeed be said that the distinction is a fine distinction, when for instance, it is, in effect, held that if it is a public servant's duty to keep a diary and to make true entries therein he is protected by the section if he makes false entries in that diary, but if it is the public servant's duty, for instance, to put money in box A which belongs to his employer, he is not protected when he puts the money in box B which belongs to himself, but in view of the Federal Court judgment further argument on these lines is academic "

The Legislative Council can authorize a local authority to impose a ferry toll under s 117, and when such toll is imposed any sum due to the Local Board from a lessee can be recovered as an arrear of land revenue Hence any act purporting to recover such sum would be an act purporting to have been done in pursuance of the Act, and so a month's notice would be necessary before filing a suit **Chelaram v District Local Board of Karachi, A I R 1930 Sind 176**

Where the relief sought is that the particular person should become a member of the School Board and he should perform the functions of that Board and deal with money allotted to that Board, the case falls under s 136 and notice is necessary **Mahomed Azam v District Local Board, A I R 1930 Sind 246**

Acts done bona fide or mala fide —Section 206 of the Bombay Municipal Boroughs Act 1925, applies both to acts done bona fide by the Municipality or its officers as well as to acts done mala fide If a prosecution is launched by the Municipality for an ,alleged infringement of some provisions of the Act then the prosecution purports to be in pursuance of the Act, whether the action

is a bona fide one or not Therefore, a suit against the Municipality for malicious prosecution, either in respect of acts done bona fide or in respect of acts not done bona fide under any of the powers contained in the Bombay Municipal Boroughs Act, is governed by s 206 of that Act, and not by either art 2 or by art 23 of the Indian Limitation Act, 1908, and such a suit must be brought within six months from the date of the act complained of The effect of s 206 of the Bombay Municipal Boroughs Act is to protect the Municipality or its officers in respect of anything done or purporting to have been done in pursuance of the Act The protection thus afforded is not an absolute one, it does not bar suits, it only requires that they must be brought within six months The plaintiff was prosecuted on June 26, 1930, for contravening some provision of the Bombay Municipal Boroughs Act, 1925, and was acquitted on December 3, 1930 On April 13, 1931, he gave a notice to the Municipality under s 206 of the Act of his intention to file a suit for damages for malicious prosecution, and he eventually filed the suit on August 31, 1931 —Held, that the suit was governed by s 206 of the Bombay Municipal Boroughs Act and not by art 23 of the Indian Limitation Act, and that as it was filed more than six months after the plaintiff's acquittal, it was barred by limitation under s 206 of that Act **Parvateppa v The Hubli Municipality, 39 B L R 831**

Suit for damages for malicious prosecution —A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or if spontaneous as having been commenced under a bona fide belief in the guilt of the accused, may, nevertheless, become malicious in any of the stages through which it has to pass if the prosecutor, having acquired positive knowledge of the innocence of the accused perseveres **malo animo** in the prosecution, with the intention of procuring per nefas a conviction of the accused Where the question of reasonable and probable cause depends entirely on the proof of the facts and circumstances, which gave rise to and attended the prosecution, no doubt has ever existed from the time of the earliest authorities, but that such question is purely a question of law to be decided by the Judge To succeed in an action of malicious prosecution, the plaintiff has also to prove that there was a want of reasonable and probable cause for the prosecution, or (as it may be otherwise stated) that the circumstances of the case were such as to be, in the eyes of the Judge, inconsistent with the existence of reasonable and probable cause. **The Town Municipality of Jambusar v Girjashanker, 7 B L R 655** In the course of the judgment, Jenkins C J observed "First we will take the case of the Secretary We are clear that as against him the suit is misconceived; he was no party to the proceedings, for they were instituted by, or on behalf of, the Municipality He is simply the servant of the Municipality, to whom he reported the arrears and made a suggestion as to the steps to be taken It was not for him to determine whether the plaintiff should be prosecuted, and neither was it in his power to institute, nor did he in fact institute the proceedings; so that as the case is framed the first essential element of a suit of this class against him is absent"

In a suit for malicious prosecution, the cause of action arises, not on the date of the institution of the proceeding complained of, but on the date the proceeding terminates in favour of the plaintiff An action for malicious prosecution can lie against a corporation In order to succeed in an action for malicious prosecution, the plaintiff must show not only that the prosecution was instituted against him without any reasonable or probable cause, but that it was instituted maliciously The term "malice" means an indirect or wrong motive **Chhaganlal v. The Municipality of Thana, 34 B L R 143**

An action for false and malicious prosecution can lie in respect of a prosecution under the Municipal Act To support an action for malicious prosecution, there are three sorts of damages First, damage to a man's fame, as if the matter whereof he is accused be scandalous Secondly, damage to his person as where he is put in danger to lose his life, limb or liberty Thirdly, damage to his property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused A corporation can be deemed to be actuated by that kind of malice which is essential to the maintenance of an action for malicious prosecution, instituted by its officers in the scope of their duty, provided the necessary ingredients of such a prosecution are made out A corporation may, in the assertion of its rights render itself liable for malicious prosecution **The Municipality of Ahmedabad v Panubhai, 37 B L R 468**

In a suit for malicious prosecution the plaintiff has to prove (1) that he was prosecuted by the defendant, (2) that the defendant acted without reasonable and probable cause, (3) that he acted maliciously, and (4) that the criminal prosecution terminated in the plaintiff's favour No suit for malicious prosecution, however malicious, will lie unless the criminal proceedings were instituted without reasonable and probable cause Reasonable and probable cause means a genuine belief based on reasonable grounds that the proceedings are justified **Bhaguji v The Alandi Municipality, 38 B L R 1098**

Section 206 of the Bombay Municipal Boroughs Act, 1925, applies both to acts done bona fide by the Municipality or its officers as well as to acts done mala fide If a prosecution is launched by the Municipality for an alleged infringement of some provisions of the Act, then the prosecution purports to be in pursuance of the Act, whether the action is a bona fide one or not Therefore, a suit against the Municipality for malicious prosecution either in respect of acts done bona fide or in respect of acts not done bona fide, under any of the powers contained in the Bombay Municipal Boroughs Act is governed by s 206 of that Act, and not by either art 2 or by art 23 of the Indian Limitation Act, 1908, and such a suit must be brought within six months from the date of the act complained of The effect of s 206 of the Bombay Municipal Boroughs Act is to protect the Municipality or its officers in respect of anything done or purporting to have been done in pursuance of the Act The protection thus afforded is not an absolute one, it does not bar suits it only requires that they must be brought within six months The plaintiff was prosecuted on June 26, 1930, for contravening some provision of the Bombay Municipal Boroughs Act, 1925, and was acquitted on December 3, 1930 On April 13, 1931, he gave a notice to the Municipality under s 206 of the Act of his intention to file a suit for damages for malicious prosecution, and he eventually filed the suit on August 31 1931 —Held, that the suit was governed by s 206 of the Bombay Municipal Boroughs Act and not by art 23 of the Indian Limitation Act and that as it was filed more than six months after the plaintiff's acquittal it was barred by limitation under s 206 of that Act **Parvateppa v The Hubli Municipality 39 B L R 881**

In **Purshottam Vithaldas Shah v Ravji Hari Athavale, 24 B L R 507** it was held that a suit for malicious prosecution must be brought within a year from the date when the plaintiff was discharged The cause of action is not suspended merely because further proceedings may be taken either by Government or by the complainant in order to get the order of discharge set aside This was not a case against a municipality and hence the limitation was one year under art 23 of the Indian Limitation Act, 1908 In a case against a borough municipality the limitation would be six months under s 206 from the date of discharge The cause of action will not be suspended in circumstances mentioned above

Cause of action —starting point for Limitation —Section 33 of the Bombay Municipal Boroughs Act, 1925, (corresponding with s 182 of the Bombay District Municipal Act, 1901) provides, inter alia, that no Chief Officer of a Municipality shall be removed from office, reduced or suspended unless by the votes of at least two-thirds of the whole number of councillors The plaintiff was the Chief Officer as well as Engineer of the defendant Municipality drawing a salary of Rs 350 per month and serving from April 17, 1922 On April 12, 1929, the Municipality resolved by a majority of fifteen to eleven (the total number of councillors being thirty-one) to separate the two offices of the Chief Officer and Engineer and offer them to two persons on lower salaries On July 10, 1929, the President of the Municipality required the plaintiff to elect one of the two posts he would like to hold, but the plaintiff gave no reply The President then gave a notice to the plaintiff on September 23, 1929, that his services would be dispensed with from December 31, 1929, or any subsequent date Eventually his services were dispensed with from February 1, 1930 The plaintiff was then fifty-three years of age, and under the rules of the Municipality he was entitled to serve till he completed fifty-five years (r 188) At the suit of the plaintiff the trial Court held that the resolution of the Municipality dated April 12, 1929, was unlawful and unenforceable and that the plaintiff was wrongfully dismissed, and awarded to the plaintiff as damages the pay he would have drawn had he served for the full period The defendant Municipality having appealed —Held, (1) that the resolution dated April 12, 1929, constituted a breach of the provisions of s 33 of the Bombay Municipal Boroughs Act because its effect undoubtedly was that the plaintiff was removed from the office held by him and relegated to an inferior position if he had accepted the offer made to him, (2) that s 182 of the Act of 1901 and s 33 of the Act of 1925 took the case out of the general rule that a Crown servant might be dismissed at pleasure, even if it did apply to the plaintiff and prevented his removal from office except in accordance with the provisions of those sections, (3) that the contravention of the statutory provision contained in s 33 gave the plaintiff a right of action, (4) that the plaintiff, was, therefore, entitled to recover damages from the defendant for the injury sustained by him by reason of the non-compliance with the statutory provision contained in s 33, (5) that the effect of r 188 and s 182 read together seemed to be that the Chief Officer was entitled like any other Municipal Officer or servant to one month's notice before discharge, (6) that, therefore, the only damages which the plaintiff could claim were wages for the period of notice, viz Rs 350 **The Municipal Borough of Dhulia v Ramchandra, 39 B L R. 1269** In the course of the judgment Broomfield J observed "As far as I can see the cases of **Wright v Zetland (Marquis)** and **Shenton v Smith** do not support the proposition based upon them in **Roshan Lal v District Board, Aligarh,** that the employee of a local body has no right of action in case he is dismissed from office or removed from office in contravention of provisions such as those in s 33 of Act XVIII of 1925 It cannot be denied, I think that the provisions in question are binding on the Municipality The argument of the learned counsel for the appellant in this case that no suit lies in case of breach of the provisions would really make them almost a dead letter No right of appeal is provided under our Municipal Acts such as is provided in the Act dealt with in the Allahabad case There is nothing but s 214 of Act XVIII of 1925 which gives the Collector power to suspend the execution of municipal orders or resolutions, and this provision is one which is not likely to be put in force in favour of an individual The removal of plaintiff contrary to the provisions of s 33 must be regarded as an infringement of the plaintiff's right to hold office unless or until he is lawfully removed It cannot be denied that the infringement of his right has caused

him damage There is therefore **injuria and damnum** It seems to me to be unreasonable to hold that under the circumstances the plaintiff has no right of action Section 206 of the Act contemplates suits against the municipality 'for anything done or purporting to have been done in pursuance of the Act' The section requires previous notice in writing of the intended suit and prescribes a period of limitation It is not necessary in my opinion that a right of suit should be expressly given by statute The maxim **ubi jusibi remedium** may fairly be applied As I have mentioned s 206, I may say that it was contended on behalf of the appellant that the plaintiff's suit was barred by limitation because it was not brought within six months of the municipal resolution finally separating the two offices or within six months of the intimation given to the plaintiff that he would have to hand over charge But I think until the plaintiff was actually forced to vacate his office by the appointment of his successors he was entitled to say that he was not actually damnified The cause of action for the suit did not arise until he handed over charge"

Starting point for notice —Section 167 does not require that the notice should be one month's notice commencing on the date of the act complained of, but one month's notice in writing of the intended suit **Naraindas v Karachi Municipality, A I R 1933 Sind 258**

Notice—how to be addressed —The plaintiffs gave a notice of suit under s 136 of the Bombay Local Boards Act and addressed it to '(1) The President District Local Board, Satara, (2) President elected in the meeting of the District Local Board, Satara, held on April 13, 1928, and (3) Chairman of the meeting' It was held that the notice under section 136 of the Bombay Local Boards Act should have been addressed to the District Local Board simpliciter or to the District Local Board by its president, though the misdirection was under the circumstances immaterial **Pandurang v Ramchandra 32 B L R 1252**

Period of notice to be excluded—Date of cause of action in a suit for malicious prosecution —Section 167 of the Bombay District Municipal Act, 1901 is subject to s 15(2) of the Indian Limitation Act A plaintiff is, therefore, entitled to exclude the period of one month of notice from the period of limitation of six months prescribed by s 167 In a suit for malicious prosecution, the cause of action arises, not on the date of the institution of the proceeding complained of, but on the date the proceeding terminates in favour of the plaintiff An action for malicious prosecution can lie against a corporation In order to succeed in an action for malicious prosecution, the plaintiff must show not only that the prosecution was instituted against him without any reasonable or probable cause, but that it was instituted maliciously The term 'malice' means an indirect or wrong motive **Chhaganlal Sakerlal v The Municipality of Thana, 34 B L R 143**

Under s 167, District Municipal Act, read with sections 29 and 15(2), Limitation Act, a plaintiff is entitled to add the period allowed him for notice to the six months within which he has to sue **Rewachand v Karachi Municipality, A I R 1930 Sind 93** This was an appeal from the decision of Rupchand Bilaram A J C reported at **A I R 1925 Sind 322** wherein he had taken a contrary view

Notice necessary for a suit against members of the managing committee for negligence —The defendants, who constituted the managing committee of the Chiplun Municipality during their term of office, ordered for the Municipality dustbins and paid for them out of the municipal funds The Municipality sued to recover the money so paid from the defendants on the ground that they had

issued the completion certificates negligently and had misapplied municipal funds in paying for the dustbins —Held, that the suit was not barred by s 42 of the Bombay District Municipal Act, 1901, on the ground that Government was not a party to it, since the Municipality could itself sue for misapplication of its moneys, (2) that the suit was bad for want of notice under s 167 of the Act, which applied to an action by the Municipality against the members of its managing committee for negligence in giving completion certificates Section 42 of the Bombay District Municipal Act, 1901, does not deprive the Municipality of the right which it possesses under the ordinary law of suing any person, whether or no he be a councillor, who misappropriates the Municipality's property The section enables Government to take action in cases in which the Municipality neglects to sue **Govind v Chiplun Municipality, 34 B L R 1216** In the course of the judgment, Beaumont C J observed "The cause of action against the defendants being, in my opinion, for damages for negligence, the next question which arises is whether s 167 of the Act applies to the case The trial Court and also the Lower Appellate Court disposed of that issue by saying that inasmuch as this was a case of misapplication of the Municipality's money it was not an act done or purporting to be done under the terms of the Act of Parliament and therefore s 167 had no application But if the cause of action be for negligence, the question assumes a different aspect Section 167 is in these terms —'No suit shall be commenced against any Municipality, or against any officer or servant of a Municipality, or any person acting under the orders of Municipality, for anything done, or purporting to have been done in pursuance of this Act, without giving to such Municipality, officer, servant or person one month's previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act complained of' It is not disputed that no notice was given in this case to the defendants Two of the completion certificates complained of were given more than six months before the suit was commenced, though the third certificate was given within six months The question is whether that section applies to an action by the Municipality against the members of its managing committee for negligence in giving completion certificates In my opinion the section does so apply I think that such a suit is one against officers of a Municipality, and also against persons acting under the orders of the Municipality, for something done in pursuance of this statute The act of the defendants in giving the completion certificates was done in pursuance of their obligations arising under this statute and the rules made thereunder, and was done as officers of the Municipality, and acting under the orders of the Municipality That being so it seems to me that the suit is one within s 167, and that notice ought to have been given, and as notice was not given I think the suit must fail"

Suit for damages for wrongful dismissal—whether notice necessary—A suit to recover damages from a District Municipality for wrongful dismissal from service, is a suit "for anything done or purporting to have been done in pursuance of" the Bombay District Municipalities Act, 1901, and is barred under s 167 of the Act if instituted more than six months after the date of the dismissal **The Municipality of Ratnagiri v Vasudev, 17 B L R 652** A contrary view was taken in **Municipality of Tatta v Asanmal Chandoomal, A I R. 1914 Sind 125** by Fawcett J C following **Ranchhoddas Morarji v Municipal Commissioner for the City of Bombay, 3 B L R 158** and **Municipality of Faizpur v Nanak Dulat Sheth, (1897) P J. 140** In this case it was held that section 167 Bombay District Municipal Act 1901 does not apply to an action brought on a contract In the course of the judgment Fawcett J C observed "As regards the plea that the suit is

barred by s 167 Municipal Act I hold that, that section does not apply as this is an action brought on a contract following the ruling in **Ranchhoddas Morarji v Municipal Commissioner for the City of Bombay, 3 B L R 158** and **Municipality of Fairpur v Nanak Dulab Sheth, (1897) P J 140** I do not agree with the sub-judge that the plaintiff's dismissal or removal can be said to be something done or purporting to have been done in pursuance of the Municipal Act It was not an act done under any power conferred on the Municipality by the Municipal Act, but under the general rule relating to contracts of service to which I have referred above" In **District School Board of North Kanara v Parmeshwar Gattu Naik, 45 B L R. 480** which was also a suit for damages for wrongful dismissal Divetia J observed "It is also to be noted that the present action is for damages for a breach of contract committed by the School Board and as has been held in **District Local Board, Poona v Vishnu, 35 B L R 55**, Section 136 Bombay Local Boards Act has no application to a suit to recover damages for breach of contract For this reason also the present suit is not governed by s 136" See notes under s 33 under the head 'wrongful dismissal

Suit by Crown —Section 29, Lim Act, applies even to the Crown Therefore a suit by the Secretary of State against the Municipality for damages for injury caused to a police sowar's horse which put its foot into a manhole belonging to the Municipality which had been left open in breach of a statutory duty cannot be instituted without giving notice as contemplated by s 167 Bombay District Municipal Act, and the suit must be brought within six months from the date of the injury caused to horse **Secretary of State v Municipality of Karachi, A I R 1931 Sind 55**

Suit for declaration and injunction—Pleader's fees —In a suit for a declaration that a municipality is not entitled to pass a certain resolution and for an injunction to restrain it from spending certain amounts of money, the pleader's fees should be calculated on the amount of money involved **Kasanji Kuverji v The Surat Municipality, 30 B L R 673**

Suit for compensation —See notes under s 198

Powers of Police-Officers

207 (1) Any Police-officer may arrest any person committing in his view any offence against any of the provisions of this Act or of any by-law thereunder, if the name and address of such person is unknown to him, and if he declines to give his name and address or if the Police-officer has reason to doubt the accuracy of such name and address if given, and such person may be detained at the station-house until his name and address has been correctly ascertained

Provided that no person arrested shall be detained without the order of a Magistrate longer than shall be necessary for bringing him before a Magistrate, or than twenty-four hours at the utmost

(2) It shall also be the duty of all Police-officers to give immediate information to the municipality of the commission of any offence against the provisions of this Act or of any by-law thereunder and to assist all municipal officers and servants in the exercise of their lawful authority •

Accounts to be kept

208 Accounts of the receipts and expenditure of every municipality shall be kept in accordance with the Municipal Account Code subject to such modifications as the Provincial Government may in each case direct

Amendments:—The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

CHAPTER XI

MUNICIPAL ACCOUNTS

Presentation of accounts Budget Estimates

209 (1) A municipality shall have prepared and laid before it, at its periodical general meetings, complete accounts of the receipts and expenditure of the municipality since the 1st day of April last preceding, and at a general meeting which shall be held on such day between the 10th January and the 1st of March as may be fixed in this behalf by the rules of the municipality, a complete account of the actual and expected receipts and expenditure for the financial year ending on the 31st March next following, together with a budget estimate of the income and the expenditure of the municipality for the financial year to commence on the 1st April next following

(2) The municipality shall thereupon decide upon the appropriation and the ways and means contained in the budget of the year to commence on the 1st April next following The budget so sanctioned may be varied or altered from time to time, as circumstances may render desirable, at a special general meeting called for the purpose

Provided that the standing committee or any other committee appointed under the Act may, within the budget so sanctioned, sanction re-appropriations not exceeding Rs 500 from one sub-head to another or from one minor head to another minor head under the same major head and controlled by the same committee A statement of such re-appropriations shall be submitted to the municipality at every quarterly general meeting

(3) The municipality shall at the general meeting in April, or after audit of the past year's accounts, if such audit has not before that general meeting taken place, pass the accounts of the past years

Special general meeting called for the purpose —The plaintiffs rate-payers of the Municipality of Surat, prayed that a certain resolution passed by the Surat Municipality on the 15th of March 1883 be declared illegal and void The First Class Subordinate Judge of Surat dismissed the suit on the ground that the resolution of the 15th March 1883 was a valid one The High Court on appeal observed "Passing to the question as to the legality of the resolution of 15th March 1883, it is clear that its object was to sanction an expenditure not provided for by the current budget of the year, in other words, to 'vary or alter' the current budget appropriations which by-s 88, Bombay Act VI of 1873, clause 2, is to be done at a 'special general meeting' called for the purpose It was argued

that by section 12, the Vice-President has the power, whenever he may think fit, of circulating propositions amongst the commissioners instead of convening a general meeting That section, however, following immediately upon s 11 clearly applies to the special general meetings as contemplated by s 11 and which the Vice-President may call when he thinks fit, and cannot, we think, be intended to apply to a special general meeting which the Act expressly requires to be called for a particular purpose, as is the case by s 88 when the budget is sought to be varied It may be reasonably inferred that the legislature intended that as the budget for the general year is passed at a general meeting, it should not be departed from without the same opportunity being afforded of open and full discussion We are of opinion, therefore, that the resolution of 15th March 1883 could not of itself have the effect of giving legal sanction to the expenditure mentioned in it" **Ratanlal v Surat City Municipality, P. J. 1887 P 137**

Audit of accounts

210 (1) Independently of the audit provided for under the provisions of the Bombay Local Fund Audit Act, 1930, the municipal accounts may be audited at such intervals and by such agency as may be prescribed in the rules of the municipality

Bom XXV of 1930

(2) The auditor shall, for the purposes of his office, have access to all the accounts and other records of the municipality

Amendments —Sub-section (1) was substituted for the original sub-section by **Bom Act 25 of 1930**, s 16 (3)

Transmission of accounts to Provincial Govt

211 A municipality shall as soon as the accounts of the past year have been finally passed by it transmit to the Provincial Government or any officer duly authorised by it in this behalf, a copy thereof, or an account in such form as the Provincial Government may prescribe, and shall furnish such details and vouchers relating to the same as the Provincial Government or such officer may from time to time direct

Amendments —The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

Publication of accounts.

212 The quarterly and annual accounts, receipts and expenditure, and the budget when sanctioned, shall be open to public inspection, and shall be published in such manner as the municipality may prescribe in this behalf

CHAPTER XII

CONTROL

213. (1) The Commissioner, Collector or any officer of Government authorized by the Provincial Government by a general or special order shall have power— Power of inspection and supervision

(a) to enter on and inspect, or cause to be entered on and inspected any immovable property occupied by any municipality or any institution under its control or management or any work in progress under it or under its direction,

(b) to call for or inspect any extract from any municipality's or any committee's proceedings and any book or document in the possession of or under the control of a municipality.

(2) The Collector shall have power—

(a) to call for any return, statement, account or report which he may think fit to require such municipality to furnish,

(b) to require a municipality to take into its consideration any objection which appears to him to exist to the doing of anything which is about to be done or is being done by or on behalf of such municipality or any information which he is able to furnish and which appears to him to necessitate the doing of a certain thing by the municipality, and to make a written reply to him within a reasonable time, stating its reasons for not desisting from doing, or for not doing, such thing

Amendments —The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

Interpretation of s 24 (1) (d) and s 173 of the B D. M Act, 1901 (s 34 (1) (d) and s 213 of the B M B Act).— See notes under this head under s 34

214 (1) If, in the opinion of the Collector, the execution of any order or resolution of a municipality, or the doing of anything which is about to be done or is being done by or on behalf of a municipality is causing or is likely to cause injury or annoyance to the public or to lead to a breach of the peace or is unlawful, he may by order in writing under his signature, suspend the execution or prohibit the doing thereof Collector's Powers of suspending execution of orders, etc, of municipalities

(2) When the Collector makes any order under this section, he shall forthwith forward to the Commissioner and to the municipality affected thereby a copy of the order, with a statement of the Collector's order to be reported to Commissioner, who may confirm or modify it.

reasons for making it; and it shall be in the discretion of the Commissioner to rescind the order, or to direct that it continue in force with or without modification permanently or for such period as he thinks fit

Every case under this section to be reported to Provincial Government for their final orders

(3) The Commissioner shall forthwith submit to the Provincial Government a report of every case occurring under this section, and the Provincial Government may revise or modify any order made therein, and make in respect thereof any other order which the Commissioner could have made

Provided that no order of the Collector or the Commissioner passed under this section shall be confirmed, revised or modified by the Provincial Government without giving the municipality reasonable opportunity of showing cause against the said order

Amendments:—The words 'the Provincial Government' in sub-section (3) were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council The words 'the Provincial Government' in Proviso were substituted for the word 'Government,' ibid

Collector's advice not an order under this section:—The plaintiff who owned a house-site thirteen feet in width, applied to the defendant Municipality for permission to build on the site The Municipality referred the matters to the Collector who advised, in view of the previous orders passed on the subject, that the plaintiff should be asked to leave open a strip of five feet on either side and as he could not build on the remaining three feet of the site, he should be asked to keep the land open The order was in due course communicated to the plaintiff The plaintiff having sued for a declaration that the order was ultra vires and void —Held, (1) that the advice given by the Collector was not an order under s 174 of the Bombay District Municipal Act 1901, (2) that the order passed by the Municipality was outside their powers under s 96 of the Act, for though they were only entitled to direct that the proposed building should be set back to a certain distance from the street, yet they were not entitled to order that on each side of the building open spaces should be left with the object of preventing the applicant from building at all **Ahmed v Rander Town Municipality 27 B. L. R. 429.**

Extraordinary powers of Collector in case of emergency

215 (1) In cases of emergency the Collector may provide for the execution of any work, or the doing of any act, which may be executed or done by or on behalf of a municipality and the immediate execution or doing of which is, in his opinion, necessary for the health or safety of the public; and may direct that the reasonable expense of executing the work or doing the act, with a reasonable remuneration to the person appointed to execute or do it, shall be forthwith paid by the municipality

(2) If the expense and remuneration are not so paid, the Collector may make an order directing any person, who for the time

being has custody of any moneys on behalf of the municipality, as its officer, treasurer, banker or otherwise, to pay such expense and remuneration from such moneys as he may have in his hands or may from time to time receive, and such person shall be bound to obey such order

(3) The provisions of sub-sections (2) and (3) of section 214 shall apply, so far as may be, to any order made under this section

Powers of Commissioner to prevent extravagance in the employment of establishment

216 If in the opinion of the Commissioner the number of persons who are employed by a municipality as officers or servants, or whom a municipality proposes to employ or the remuneration assigned by the municipality to those persons or to any particular person is excessive the municipality shall, on the requirement of the Commissioners, reduce the number of the said persons or the remuneration of the said person or persons

Provided that the municipality may appeal against any such requirement to the Provincial Government whose decision shall be conclusive

Amendments:—The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

Inquiry into municipal matters by Provincial Government

217 The Provincial Government may order an inquiry to be held by any officer appointed by it in this behalf into any matters concerning the municipal administration of any municipal borough or any matters with respect to which its sanction, approval or consent is required under this Act

(2) The officer holding such inquiry shall for the purposes thereof have the powers which are vested in a Court under the Code of Civil Procedure in respect of the following matters:— V of 1908

(a) discovery and inspection,

(b) enforcing the attendance of witnesses, and requiring the deposit of their expenses

(c) compelling the production of documents,

(d) examining witnesses on oath,

(e) granting adjournments,

(f) reception of evidence taken on affidavit

and

(g) issuing commissions for the examination of witnesses;

and may summon and examine suo motu any person whose evidence appears to him to be material, and shall be deemed to be a Civil V of 1908

Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898

Explanation —For the purpose of enforcing the attendance of witnesses the local limits of such officer's jurisdiction shall be the limits of the Bombay Presidency.

(3) The reasonable expenses incurred by any person in attending to give evidence may be allowed by the officer holding the inquiry to such person and shall be deemed to be part of the costs

(4) Costs shall be in the discretion of the Provincial Government and the Provincial Government shall have full power to determine by and to whom and to what extent such costs are to be paid, and to allow interest on costs at a rate not exceeding 6 per cent. per annum, and such costs and interest shall be leviable as an arrear of land revenue

Amendments:—The words 'The Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

Power of Provincial Government to provide for performance of duties on default by municipality

218 (1) When the Provincial Government is informed, on complaint made or otherwise, that default has been made in the performance of any duty imposed on a municipality by or under this Act or by or under an enactment for the time being in force, the Provincial Government, if satisfied after due inquiry that the alleged default has been made may direct the Commissioner to fix a period for the performance of that duty

(2) If that duty is not performed within the period so fixed, the Commissioner may appoint some person to perform it, and may direct that the expense of performing it, with a reasonable remuneration to the person appointed to perform it, shall be forthwith paid by the municipality.

(3) If the expense and remuneration are not so paid, the Commissioner may make an order directing the bank in which any moneys of the municipality are deposited or the person in charge of the local Government Treasury or of any other place of security in which the moneys of the municipality are deposited to pay such expense and remuneration from such moneys as may be standing to the credit of the municipality in such bank or may be in the hands of such person or as may from time to time be received from or on behalf of the municipality by way of deposit by such bank or person; and such bank or person shall be bound to obey such order Every payment made pursuant to such order shall be a sufficient discharge

to such bank or person from all liability to the municipality in respect of any sum or sums so paid by it or him out of the moneys of the municipality so deposited with such bank or person

Amendments —The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of the Indian Laws Order in Council Sub-section (3) was substituted for the original sub-section (3) by Bom Act 23 of 1931, s 4 (ii)

Non-compliance with rule requiring inspection by Government staff of Primary Schools—Default in performing a duty—Commissioner's order enforcing compliance —Under the rules made by the Government of Bombay under s 58 of the Bombay District Municipal Act, all Municipal schools were open to inspection and examination at all times by the Government Inspecting Staff The Nadiad City Municipality having resolved to discontinue inspection of their primary schools by the Government Inspecting Staff the Government of Bombay acting under s 178 of the Bombay District Municipal Act resolved that the Municipality were guilty of default in performing their duty, and directed the Commissioner, N D, to fix a period, but the Municipality still continued in its default On December 17, 1921, the Commissioner appointed the Deputy Educational Inspector to perform the duty of managing, administering and maintaining the schools and called upon the Municipality to pay Rs 9,000 to the officer for defraying the expenses of performing that duty The order about payment was directed to the Sub-Treasury Officer who had the custody of the Municipal funds The plaintiffs, rate-payers of the Municipality, sued, on March 5, 1923, to have it declared that the order passed by the Commissioner was illegal —Held, (1) that, under s 178 of the Act, there was an obligation on the Municipality to observe the rules framed by the Governor in Council under s 58 for the purpose of prescribing the extent of the independent authority of the Municipality in respect of public education (2) that the Governor in Council was entitled under s 178 to direct the Commissioner to fix a period for performance of their duty by the Municipality, provided the Municipality had made a default in performing any duty imposed on them by or under the Act, (3) that the order passed by the Commissioner in pursuance of the resolution was within his powers conferred by s 178 (2), (4) that the plaintiffs' suit was barred by limitation under Art 14 of the Indian Limitation Act **Manibhai v The Nadiad City Municipality, 28 B L R 1465**

Power of Provincial Government to dissolve or supersede municipality in case of incompetency, default or abuse of power

219 (1) If, in the opinion of the Provincial Government, a municipality is not competent to perform, or persistently makes default in the performance of the duties imposed on it by or under this Act, or otherwise by law, exceeds or abuses its powers, the Provincial Government may, after giving the municipality an opportunity to render an explanation, by an order published, with the reasons therefor, in the Official Gazette declare the municipality to be incompetent or in default, or to have exceeded, or abused its powers, as the case may be, and may dissolve such municipality or supersede it for a period to be specified in the order

Consequences of dissolution or supersession

(2) When the municipality is so dissolved or superseded, the following consequences shall ensue —

(a) all councillors of the municipality shall, in the case of supersession as from the date of the order of supersession, and in the case of dissolution as from the date specified in the order of dissolution vacate their offices as such councillors,

(b) all powers and duties of the municipality shall, during the period of dissolution or supersession, be exercised and performed by such person or persons as the Commissioner from time to time appoints in this behalf,

(c) all property vested in the municipality shall, during the period of dissolution or supersession, vest in His Majesty

(d) The person or persons appointed under clause (b) may delegate his or their powers and duties to an individual or to a committee or sub-committee,

(e) When more than one person are appointed under clause (b) they may sue or be sued by any one of them who has been duly authorised to sue and be sued on behalf of the rest by a resolution duly passed by them in this behalf

Re establishment of municipality after dissolution

(3) On the issue of an order of dissolution under sub-section (1) elections of councillors shall be held under the provisions of this Act or of the rules made thereunder or before a date to be specified by the Provincial Government in the order, and the municipality shall be re-established by the election or appointment of councillors under the aforesaid provisions on such date as may be specified by the Provincial Government in the aforesaid order

Power after inquiry to continue period of supersession.

(4) If, after inquiry made, the Provincial Government so directs the period of supersession with all the consequences aforesaid shall, from time to time be continued by an order published as aforesaid until such date as may be fixed by the Provincial Government for the re-establishment of the municipality

(5) After the municipality is superseded it shall be re-established by the election or appointment of councillors under the provisions of this Act or the rules made thereunder applicable thereto,

(a) if no direction has been made under sub-section (4) on the expiration of the period specified in the order of supersession under sub-section (1), and

(b) if a direction has been made under sub-section (4) on such date as is fixed under that sub-section for the re-establishment of the municipality

Amendments —The words 'the Provincial Government' were substituted for words 'the Government' by the Adaptation of Indian Laws Order in Council The words 'Official Gazette' were substituted for the words 'Bombay Government Gazette', ibid

Procedure is not 'power and duty':—A committee of management appointed under s 179 (B D M. Act, 1901) is not precluded from exercising the powers of the municipality under s 186A Procedure is not 'power and duty' The exercise of power and duty is the goal, procedure is the road by which we reach it The whole of the procedure laid down in the Act need not be followed in its entirety and it is not verbally incumbent upon any person or persons appointed by Government to carry on the functions of the municipality It is enough that the persons who are delegated to do the duty of the municipality carry out their functions in a reasonable and equitable manner keeping an eye, so far as possible, on the provisions of the Municipal Act, but not being bound by them with the same strictness as the elected municipality would be Section 24 (2) of the B D M Act has no application to the chairman of a committee of management appointed under s 179 **Santdass Mangharam v. Secretary of State, A. I. R 1921 Sind 125.** In the course of judgment Kennedy J C said "Briefly, the main part of the plaintiff's case is that the Committee of Management appointed under Section 179 has no power to act under Section 186A, Clause 1(b) Now it is admitted that Hyderabad has a population less than one lac, therefore, a Municipal Commissioner cannot be appointed in this city unless there is an application of the Municipality to that effect Plaintiff says, as the Municipality is under suspension, no application can be legally made He says to make such application is not a power or duty of the Municipality and therefore, the Committee of Management appointed under Section 179 cannot exercise and perform the function of permitting the appointment of a Commissioner under Section 186A, Clause (b) It is in his opinion solely the privilege of Municipality constituted under the Act I can see nothing in Section 179 to support this theory If we assume that the appointment of a Municipal Commissioner is for the benefit of a town and that no such appointment can be made unless the Municipality has supported this action it seems to be within the power and duties of the Municipality to ask for such an appointment On the other hand if a Municipal Commissioner is appointed as a sort of penal measure for the city the power of the Municipality to empower the Government-in-Council to make such an appointment is a power So far as this goes, I cannot see, how the Committee of Management under Section 179 can be precluded from exercising the power of the Municipality under Section 186A —Of course, the difficulty does arise in view of the clause in Section 186A providing that this application must be supported by not less than 2|3rds of the whole number of the Councillors. It might perhaps be argued that this proviso applies only in the case where the municipality was functioning and was inapplicable to a condition of things when a Committee of Management was in existence But it is not necessary to discuss or decide that question Taking the more liberal view adopted by the learned District Judge namely that the Committee of Management must as far as possible be considered bound by the procedure laid down in the Municipal Act, we find in this case 2|3rds of the Committee of Management did support this application"

Right of person appointed to exercise the powers and perform the duties of a superseded Municipality to appeal.—Where a Municipality was superseded and the Assistant Collector was appointed under s 43 of the Municipal Act, 1884, it was held that he had the same right to appeal from decrees against the Municipality as it had before it was superseded Where the Vice-President against whom there was no decree and who had no authority to represent the municipality appealed, it was held that the more regular course would have been for the Assistant Collector after being appointed as a substitute for the Municipality either to have presented a separate appeal or to have applied to be made a party appellant, held also that this defect of procedure was a mere irregularity under s. 578 of the Code of Civil Procedure **Patwari v Dhandhuka Town Municipality, P. J 1894, p 444**

Administrator—Absence of appointment—Orders passed by de facto Administrator—Validity of the order —On December 20, 1941, the Governor-General of India made and promulgated an Ordinance called the Essential Services (Maintenance) Ordinance, 1941, which by its s 3 empowered the Central Government or a Provincial Government to apply its provisions to any employment or class of employment in their discretion Section 5 provided that any such employee disobeying any lawful order given to him was guilty of an offence under the Ordinance, which was made punishable by s 7 On August 8, 1942, a new rule (38B) was added to the Defence of India Rules, 1939, which enabled the Provincial Government to supersede any Municipality for all or any of the reasons specified therein On August 21, 1942, the Provincial Government accordingly superseded the Ahmedabad Municipality and appointed the Collector of Ahmedabad as its Administrator On September 7, 1942, one W took over the charge of the Administrator from the Collector, but at that time there was no order of the Provincial Government appointing W to the office On September 12, 1942, Government issued three notifications, by one of which the provisions of the Ordinance were applied to the Ahmedabad Municipal Service The second one authorised the Administrator to pass orders under s 4, while the third one authorised him to file complaints under s 7. On September 15, W passed an order calling upon the Municipal employees "to work properly and carefully and to dispose expeditiously of all work assigned to them" The accused who was one of the employees disobeyed the order by refusing to do the work, for which a complaint was made by W under s 7 of the Ordinance On October 5, 1942, Government issued a notification directing that in supersession of the previous orders, the powers and duties assigned to the Collector of Ahmedabad as regards the Municipality were to be exercised and performed by W The accused having been convicted and sentenced by the trying Magistrate, applied in revision —Held, setting aside the conviction and sentence, that no order of appointment of W prior to October 5, 1942, having been produced, the only possible presumption was that no such order existed, that as W was not properly appointed at the material time, he was not the person who could issue orders to the employees, and that therefore he was also not the person to whom authority had been given to file a complaint **Emperor v. Shankerbhai Kashibhai Patel 45 B L. R 572.**

New Councillors:—The word 'New Councillors' in cl (5) of s 179 (B D M Act, 1901) does not mean that persons who were members of the superseded Municipality are ineligible for re-election **(R L. A.'s opinon no. 467-P dated the 25th October 1924 in G. R. G D. no 5839 dated the 3rd November 1924).** It may be noted that the word 'new' is omitted from cl (5) of s 219 of the B.M B Act, 1925.

Powers of Provincial Government and of the Commissioners over Collectors, etc

220 In all matters, connected with this Act, the Provincial Government, Commissioners and Collectors shall, respectively, have and exercise the same authority and control over Commissioners, Collectors and their subordinates as in matters of general and revenue administration

Amendments:—The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council

All rules made by Provincial Government or Commissioner to be laid before each Chamber of the Provincial Legislature

221 All rules made by the Provincial Government or the Commissioner under this Act shall be laid before each Chamber of the Provincial Legislature for one month previous to the session thereof, and shall be liable to be rescinded or modified by a resolution in which each of the said Chambers concurs during its next session

Amendments —The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council The words 'before each chamber of the Provincial Legislature' were substituted for the words 'on the table of the Bombay Legislative Council', ibid The words 'in which each of the said chambers concurs during' were substituted for the words 'of the said Council tabled at', ibid

SCHEDULE I.

(See section 4).

MUNICIPAL BOROUGHS

Northern Division.

1. Ahmedabad
2. Nadiad
3. Broach
4. Surat
5. Thana
6. * * *

Bombay Suburban.

7. Bandra
   Kurla

Central Division.

8. Ahmednagar
9. Jalgaon
10. Bhusaval
11. Amalner
12. Dhulia
13. Nasik.
14. Poona City
15. Poona Suburban
16. Lonavla
17. Satara City
18. Sholapur
19. Pandharpur
20. Chalisgaon
21. Barsi

Southern Division

22. Belgaum
23. Bijapur
24. Dharwar
25. Hubli
26. Gadag-Bettigeri
27. Ratnagiri

Sind

28. Hyderabad
29. Sukkur
30. Shikarpur
31. Larkana

Amendments.—Godhra Municipal Borough was repealed by Government Notification in the General Department No 371 dated the 29th September 1927, published in the Bombay Government Gazette, 1927, Part I-A, P 56 Kurla Municipality was included in this schedule by Government Notification in the Central Department No 5107, dated the 19th April 1929, published in the Bombay Government Gazette, 1929, Part I-A, p 65 Entry 20 was added by G N G D, No 9029 dated 28th September 1932 Entry 21 was added by G N G D, No 1408/33, dated 6th July 1936

SCHEDULE II.

(See clause (b) of section 75).

Notice is hereby given to the inhabitants of the municipal borough of that the municipality desire to impose the tax, rate, toll, octroi or cess (as the case may be) defined in the rules appended (in lieu of the tax known as the which is published at page of the sanctioned rules *)

*To be inserted if the tax is to be substituted for any existing tax

Any inhabitant of the municipal borough objecting to the proposed tax may, within one month from the date of this notice, send his objection in writing to the municipality

RULES

(The rules approved by the municipality under clause (a) of section 75 are to be appended here)

SCHEDULE III.

(See section 88).

FORM OF NOTICE OF TRANSFER TO BE GIVEN WHEN THE TRANSFER HAS BEEN EFFECTED BY INSTRUMENT.

To

The CHIEF OFFICER,

Municipality

I, A. B., hereby give notice as required by section 88 of the Bombay Municipal Boroughs Act, 1925, of the following transfer of property.

Date of Notice.	Date of instrument.	Name of Vendor or Assignor	Name of Purchaser or Assignee.	Amount of consideration.	DESCRIPTION OF THE PROPERTY						If any instrument has been registered, the date of registration.	Remarks
					Of what it consists.	Situation.	Number in Assessment Book	Chief Officer's No	Dimensions of land.	Boundaries.		

Dated (Signed)

Amendments:—The words 'Municipal Boroughs' were substituted for the words 'City Municipalities' by Bom 24 of 1936, s 2, Schedule

SCHEDULE IV.
(See section 88).

FORM OF NOTICE OF TRANSFER TO BE GIVEN WHEN THE TRANSFER HAS TAKEN PLACE OTHERWISE THAN BY INSTRUMENT

To

THE CHIEF OFFICER,
Municipality

I, A.B., hereby give notice as required by section 88 of the Bombay Municipal Boroughs Act, 1925, of the following transfer of property —

Date of Notice	Name in which the property is at present entered in the Chief Officer's record	To whom it is to be transferred	DESCRIPTION OF THE PROPERTY						Remarks
			Of what it consists	*Situation*	Number in Assessment Book	Chief Officer's No	Dimensions of land	Boundaries	

Dated (Signed)

Amendments —The words 'Municipal Boroughs' were substituted for the words 'City Municipalities' by Bom 24 of 1936, s 2, Schedule

SCHEDULE V

(See sub-section (3) of section 104)

FORM OF NOTICE OF DEMAND.

To

A B., residing at

Take notice that the municipality of demand from the sum of due from on account of

Here describe the property or other thing in respect of which the tax is leviable)

leviable under rule No for the period of commencing on the day of 19 , and ending on the day of 19 , and that if, within fifteen days from the service of this notice, the said sum is not paid into the municipal office at , and sufficient cause for non-payment is not shown to the satisfaction of the Chief Officer, a warrant of distress or attachment will be issued for the recovery of the same with costs

Dated this day of 19

(Signed)

Chief Officer

SCHEDULE VI.

(See sub-section (1) of section 105)

FORM OF WARRANT

(Here insert the name of the officer charged with the execution of the warrant)

Whereas A B of has not paid, and has not shown satisfactory cause for the non-payment of, the sum of due for the tax* mentioned in the margin for the period commencing on the day of 19 , and ending with the day of 19 , and leviable under rule No

*Here describe the tax

And whereas fifteen days have elapsed since the service on him of notice of demand for the same

This is to command you to distrain, attach subject to the provisions of section 105 of the Bombay City Municipalities Act, [ ] the goods and chattels any property of the said A B to the amount of being the amount due from him, as follows —

	Rs.	a	p
On account of the said tax			
For service of notice			
For issue of warrant			

and forthwith to certify to me together with this warrant all particulars of the goods distrained property attached by you thereunder

Dated this day of 19

(Signed)

Chief Officer.

Amendments.—The words 'For issue of warrant' were inserted by Bom 12 of 1931, s 3(v)

SCHEDULE VII

(See clause (c) of sub-section (4) of section 105 and sub-section (1) of section 98).

FORM OF INVENTORY AND NOTICE

To

A. B., residing at

Take notice that I have this day distrained / attached the goods and chattels / property specified in the inventory beneath this, for the value of due for the tax* mentioned in the margin for the period commencing with the day of 19 and ending with the day of 19 together with Rs due as for service of notice of demand and Rs due as for issue for warrant and that unless within five days of the date of this notice you pay into the municipal office at the said amount together with the costs of recovery, the said goods and chattels / property will be sold.

*Here describe the tax.

Dated this day of 19 .

Signature of officer executing the warrant / collecting octroi

Inventory.

(Here state particulars of goods and chattels / property seized)

Amendments:—The words 'and Rs due as for issue of warrant' were added by Bom 19 of 1936, s 15

SUPPLEMENT OF CASES REPORTED FROM JANUARY, 1944 TO JUNE, 1945.

SECTION 3.

Sub-Section (2)—Screen of corrugated iron sheets whether a wall and therefore a Building—In **Emperor v Nurulla mia Aminsaheb Kadri** (Criminal appeal No 526 of 1937 decided by N J Wadia and Divetia, JJ on February 18, 1938 unreported), it was held that a screen of corrugated iron sheets was a wall and therefore a building for the purposes of S 123 of the B M B Act This decision was referred to and followed in another unreported judgment namely **Emperor v Sheth Ratanji Pallanji**, by Broomfield, Ag C J and Sen J (Criminal appeal No 85 of 1939 decided on June 26, 1939) The same view was adopted in **Emperor v. Budhabhai, 46 B L R. 477** by Wadia J

SECTION 8

Libel by a municipality —A resolution passed by a municipality to take legal advice and to take steps under the Bar Councils Act against any person, if so advised, is the first essential step so far as the Municipality is concerned for invoking the judicial machinery of the Act and is also privileged absolutely **Govind v. Gangadhar, 46 B L R 417**

SECTION 15

Whether disqualification under s 12 can be raised as a ground in an election petition under s. 15—whether s 15 (5) is otiose —A judge holding an election enquiry under s 15 of the Bombay Municipal Boroughs Act, 1925, has no power to unseat a candidate on the ground that the candidate was disqualified by reason of s 12 of the Act Under s 15 (3) (a) the Judge is bound to unseat a candidate who has been guilty of corrupt practices But in any case to which cl (a) does not apply the Judge simply scrutinises the votes and awards the election to the candidate who has the greatest number of valid votes In other words, if there is corrupt practice, the candidate is unseated If there is no corrupt practice, the Judge simply scrutinises the votes, decides which votes are valid, counts up, and declares the result accordingly **Hifzurraheman v Hasansaheb 46 B L.R 371** In the course of the Judgment Macklin J said "I have omitted to mention one argument derived from sub-s (5) of s 15 It is that sub-s (5) does not in any way govern the provisions of sub-s (3) and must be regarded as quite independent of sub-s (3) So far I am inclined to agree It is then pointed out with a good deal of truth that sub-s (5) is otiose unless it implies that the Judge has powers outside those specified in sub-s (3) and for this reason should be deemed to imply that the Judge has in fact powers outside those specified in sub-s (3) I prefer to take it that sub-s (5) is in fact otiose, which it appears to be" This view is in conflict with the view expressed by us in our notes under s 15 under the heading 'scope' and is also in conflict with s 15 (5) In view of this decision the section requires to be amended and so long that is not done the position remains unsatisfactory

Revision lies to the High Court if the Judge goes beyond his powers:— The High Court can exercise its powers of revision in a case in which the Judge *though acting as a persona designata goes beyond the powers given to him by*

the Legislature **Hifzurraheman v Hasansaheb 46 B.L.R 371** In this case the High Court entertained a revision application on the ground that the learned Judge had entertained the election petition on a ground which was not covered by s 15

High Court cannot issue a writ of certiorari to the Judge holding election inquiry under s 15 outside the area of the High Court's original civil jurisdiction :—The High Court of Bombay has no jurisdiction to issue writs of certiorari with regard to the decisions of tribunals outside the area of its Original Jurisdiction, namely the town and island of Bombay. **Raghunath v. Poona Municipality 46 B.L.R. 675**

Nomination paper bearing earliest serial number rejected on ground of proposer having subscribed other papers—rejection illegal —Where all the nomination papers are delivered in a bundle, it is just and reasonable to hold that the paper which bears the earliest serial number is the paper which was first received Held therefore that nomination paper No 9 must be taken to have been first received for the purposes of R 14 (2) (b) and it was entitled to the benefit of that rule and must be deemed to be valid in spite of the fact that the proposer named therein had subscribed his name as proposer in the other nomination papers received later i e No 14 The Returning Officer was thus wrong in rejecting paper No 9 **Solaiman v. Noor Mahomed A I.R. 1944, Cal 395.**

Wrong electoral number of the seconder in the nomination paper—Identity of the person is the test and not a mere error in the electoral number:—Rule 14 (1) (iv) does not contemplate a case where a seconder is by mistake given a wrong electoral number in the nomination paper It presupposes that the electoral number given in the nomination paper to the person named as seconder and the number of that person in the electoral roll tallies and enacts that if the seconder is not identical with the person who bears that electoral number then the nomination paper will be rejected, in other words, what the rule provides is that if the person bearing that electoral number comes forward and says he is not the seconder or if some one else proves that such person is not the seconder the nomination paper will be rejected The Sub-rule does not contemplate the rejection of a nomination paper merely because an erroneous number is given The identity of the person and not a mere error in giving his electoral number is the factor which the returning officer has to consider in deciding whether a paper should be rejected, **Solaiman v Noor Mahomed, A I.R 1944 Cal 395.**

Result of election—Candidate illegally excluded from contesting election—Result of election is affected and election must be set aside —The result of an election certainly includes the return of a candidate and this is one of the most important elements in the result but it does not constitute the whole result. The "result of the election" in its most comprehensive sense is the expression of the will or decision of the electorate If the candidate has been wrongfully and illegally excluded from contesting, the election has been materially affected It is not necessary for him to show that the returned candidate would not have been returned If a person has been illegally prevented from standing for election by reason of a non-compliance with the rules it is impossible for him to prove that the returned candidate would not have been returned without holding a mimic election in Court His difficulties would be still further increased if there were three candidates standing for election Voting is to be in secret and it could never have been intended that persons should come to Court and

declare for whom they would vote There can hardly be a more just ground for setting aside an election than the ground that a person has been illegally and wrongfully deprived of the right to contest the election **Solaiman v. Noor Mahomed A.I R 1944 Cal 395**

Bonafides of Returning Officer challenged—necessary party —If allegations are made against the Returning Officer challenging the correctness of his conduct and challenging his bonafides the proper course would be to make him a respondent to the election proceedings **Solaiman v Noor Mahomed A I.R. 1944 Cal. 395**

Reversal of order of circle and police station in the name of the constituency not a good ground for rejecting the nomination paper —In form No 7 prescribed for the nomination paper item 1 was "name of the Electoral Circle for which the candidate is nominated," The proper description of the electoral circle in question was "Electoral Circle No 9 Police Station, Barachatti" The Returning Officer's only reason for rejecting the nomination paper was that against item 1 in the form instead of the entry 'Electoral Circle No 9, Police Station Barachatti" the entry was "Police Station Barachatti (Gaya) Circle No 9" a mere reversal of the sequence Held that no significance whatever attached to the order of mentioning the circle and the police station Reversal of the order was a matter of no moment It could create no confusion nor, had the nomination paper been accepted, could it have affected the result of the election The rejection of the nomination paper on the ground of the mere reversal of the sequence of the circle and the police station was therefore illegal **Abdul Razak v. Kuldip A.I R. 1944 Patna 147.**

Jurisdiction of Civil Courts to interfere with decision of Returning Officer — The Returning Officer in deciding upon the validity of nomination papers acts judicially His decision has a certain finality a finality apart from the express provision in R 31 (3) that his decision shall be final The Civil Courts have power to interfere with his decision only where a question of jurisdiction arises This principle applies where there is no express provision for finality of his decision The position is stronger under the Bihar District Electoral Rules which contain a provision, namely R 31 (3) making the Returning Officer's decision final If the Returning Officer in deciding upon the validity of a nomination paper acts within his jurisdiction and bona fide his order whether right or wrong cannot be interfered with by the civil Courts The question whether there has been a substantial compliance with the provisions of law is one of fact to be determined according to the circumstances of each particular case The Returning Officer is a judge of fact and the fact in all cases within his jurisdiction is whether the requirements of the law with respect to the filling up, signature, and time of delivery of a nomination paper have in substance and in common sense, been complied with Thus, in deciding whether the provisions of law governing the validity of nomination papers have been complied with, the Returning Officer decides a question of fact within his jurisdiction Consequently his decision rejecting a nomination paper on the ground that the provisions of law were not complied with even if wrong cannot be interfered with by civil Court **Abdul Razak v Kuldip, A.I.R 1944, Patna 147**

SECTION 53

Misapplication of funds—Rate-payer can sue for injunction—Rate-payer can sue to set aside consent decree though not a party—A person who is not a party to a consent decree cannot sue to have that decree set aside He can,

however, sue for a declaration that he is not bound and his interests are not affected by that decree But different considerations apply where a rate-payer, though a stranger, sues to set aside a decree to which he is not a party, but as a result of which he suffers damage, and where a mere declaration that his interest are not bound or affected by the decree affords him no assistance or protection and will be of no avail It cannot be disputed that a rate-payer has such an interest in the affairs of the municipality as entitle him to come to Court and sue for an injunction restraining the municipality from misapplying its funds, a municipality cannot be protected from such a suit by rate-payers merely because it has taken the precaution to use a Court for the purpose of carrying out its object of misapplying municipal funds and has obtained the sanction of the Court to a consent decree ultra vires the powers of the municipality, or obtained as the result of collusion or fraud A municipality cannot be permitted to carry out successful misapplication of its funds merely because it has by a consent decree used the Court as an instrument for carrying out its improper purpose and has attempted by means of the seal of the Court to obtain protection for its improper or unlawful acts If a rate-payer can sue to obtain an injunction against a municipality from carrying out an unlawful agreement there is nothing in principle or precedent which should prevent that rate-payer from coming to the Court for relief when that agreement which the municipality intends to carry out has received the seal of the Court in the form of consent decree, and the improper and unlawful purpose of the municipality has been carried by so much further towards a successful conclusion **Lachmandas v. Chandumal, A I.R 1944 Sind 150.**

SECTION 63

Unauthorised use of a portion of a public street—rent for such use agreed upon between the municipality and the unauthorised occupier—Government not entitled to claim share of rent:—In **Municipal Borough of Ahmedabad v. Government of the Province of Bombay, 46, B.L.R 643** it was held (1) that the unauthorised use of the land by the lessee company did not either during its user or thereafter operate to revert the land to the Government, but remained vested in the Municipality, (2) that as there was no agreement between the Government and the Municipality as regards sharing the rent of the lease of the land and as there was no statutory provision under which the Government could claim a share in it, the Government had no claim on any amount recovered by the Municipality for the occupation of the street land

SECTION 68

Primary education grant made by Government a bounty—Government can make such deductions from it as they like—Interest only measure of deductions —The primary education grant annually made by the Government of Bombay to a Municipality is only a bounty and hence the Government can make deductions of whatever sums they like from the amount The fact that the amounts of interest which had accrued during any period on the amount granted or the unspent balance formed measures of the deductions made by Government from the annual payments for primary education does not show that it was the interest on the grant that the Government were seeking to deduct The amounts of interest in such a case are only measures of the deductions and nothing more **The Ahmedabad Municipality v. The Secretary of State, 46, B.L.R. 16.**

SECTION 73

Interpretation of statutes—Function and effect of Proviso—Adoption of percentage of Capital value of lands as method of ascertaining their annual value is valid:—The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect as confined to that case Where the language of the main enactment is clear and unambiguous, proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms The proviso to s 82 (2) does not say that the method of arriving at annual value by taking a percentage of capital value is to be utilized only in the case of the classes of buildings to which the proviso applies It leaves the generality of the substantive enactment in the sub-section unqualified except in so far as concerns the particular subjects to which the proviso relates Hence a Municipal Council is not precluded by the proviso to s 82 (2) from adopting a percentage of the capital value of the vacant lands of a railway company lying within the municipal limits as a method of ascertaining their annual value for the purpose of the imposition of property tax merely by reason of the fact that this method which is one of the recognized methods of ascertaining the annual rent likely to be paid by a hypothetical tenant referred to in the substantive part of s 82 (2) is specifically enjoined in the particular instances mentioned in the proviso and that the said railway lands are not included in those instances **M S. M Railway Company Ltd. v. Bezwada Municipality, A I.R. 1944 P C. 71.**

Refund of tax wrongfully levied—Interest cannot be allowed as such or by way of damages:—Where a municipality refunds, under an order of the Court, a sum of money wrongfully recovered from a rate-payer by way of rates, the latter is not entitled, under the Interest Act 1839, to claim interest upon the amount for the period during which he was deprived of the use of his money In a case which does not fall within the Interest Act, 1839, interest cannot be allowed by way of damages, it may be allowed where there is an agreement for the payment of interest, or it is payable by the usage of trade having the force of law **The Municipal Borough of Ahmedabad v Vadilal 46, B L.R. 408**

House connected with general drainage system—Provision of water closet or urinal in compound—Levy of drainage tax on each separate tenement in the house valid:—Under rule 352 of the Ahmedabad Municipality Rules it is competent to the Municipality to levy separate drainage tax on each of the tenements in a building which is connected with the municipal drainage system and which also contains a water-closet or urinal in its compound **Ahmedabad Municipality v. Kalyanbhai, 46 B L.R. 733.**

***Suit to recover money levied under illegal distress—claim for interest on amount of refund*—Jurisdiction of Small Causes Court** —A suit for refund of money paid under an illegal distress together with interest thereon is not a suit for compensation under cl 35 (j) of the Provincial Small Causes Courts Act, 1887, but the claim for interest is by way of damages for detention of the money levied, and as such is not excepted from the cognizance of a Provincial Court of Small Causes **Gurunathappa v. the Dharwar Municipality, 47 B L R. 38** In this case on this particular point the case of **Kalyan Municipality v Govind, 27 B.L.R. 447** was overruled and the decision in **Jodha v Maganlal 31, B L.R 1307** was approved

Goods manufactured within municipal limits taken out of such limits for want of direct passage to municipal limits liable to terminal tax when brought in again.—In rule 380 of the Ahmedabad Municipal Code, the word "import" means "to bring something within the Municipal limits from a place without its boundaries," irrespective of the consideration as to whether the goods were manufactured within the Municipal limits, how long they were outside those limits and for what purpose **Maganlal v Ahmedabad Municipality, 47, B L.R. 100.**

SECTION 114.

Compulsory acquisition—Local inspection and its evidentiary value—Compulsory powers should be carefully exercised where no continuity of plan or scheme:—Where local inspection becomes necessary, the Judge should carry out the inspection at any stage before the arguments are heard, and if he conducts the inspection at the request of the parties, it should be made clear whether the parties have left the matter to be decided as he thinks proper from his inspection or that he is merely inspecting under O XVIII, r 18, of the Civil Procedure Code, 1908 If the Judge records his impressions or opinions in his notes of inspection, the parties must have an opportunity to urge their arguments on those notes at the time when the case is generally argued before the Court In most cases it would be desirable for the Judge to confine his notes to the facts which he observes without recording his impressions or opinions He is entitled to form his impressions, but if he records them in the notes, the parties should have the opportunity to meet them in their arguments and he should not decide the case merely from his impressions without giving due weight to the evidence No doubt the Court of appeal would attach due weight to what the Judge observes in his inspection, but the purpose of local inspection is not to make it a substitute for the evidence but to assist in its appreciation Per Stone C J —In view of the construction which has been put upon s 114 (2) of the Bombay *Municipal Boroughs Act, 1925, in* **Parshottam v Secretary of State, 39 B.L.R 1257** enabling acquisitions to be made which have no continuity of plan or scheme for the construction of houses and buildings to form a new street, the compulsory powers should be very carefully exercised **Amratlal v Land Acquisition Officer, Ahmedabad, 47, B L.R. 95**

SECTION 123

Screen of corrugated iron sheets whether a wall and therefore a Building:—See notes under s 3 (2) in this **Supplement**

SECTION 198

Claim under s 198 can be compromised—Sanction necessary:—The Municipality has power to compromise a claim arising from the proceedings under s 198 by virtue of s 204 (2) But the proviso to s 204 (2) specifically provides that the same sanction which is necessary in the making of a contract is necessary in the compromise of any claim arising from such contract A compromise arising out of the proceedings of this nature relating to the purchase of land requires sanction by a municipal resolution **Lachmandas v Chandumal, A I.R. 1944, Sind 150**

Powers of the District Judge under s. 198 —It is for the District Court under s 198 (3) of the Act to determine the compensation to be paid and in determining this question of compensation the Court will have itself to consider and

decide whether the award of the chief officer is a proper award which it can accept for the purpose of its determination under s 198 (3) of the Act In deciding whether the award is a proper award, the Court will have necessarily to determine whether the reference appointing the chief officer was a valid reference within the powers of the municipality **Lachmandas v. Chandumal, A.I R 1944, Sind 150**

SECTION 204

Proceedings under s 198 can be compromised by virtue of s 204 (2) .— See notes under s 198 in this Supplement

SECTION 206

Suit to recover money levied under illegal distress—Claim for interest on amount of refund—Jurisdiction of Small Causes Court —See notes under this head under s 73 in this Supplement

SIND SUPPLEMENT

The Bombay Municipal Boroughs Act, 1925 has been amended by the Government of Sind in its application to the Province of Sind by various amending Acts The result of such amendments i e. the amended sections as they stand today are given below The rest of the sections are identical with those applicable to the Province of Bombay which have been given in the foregoing pages of the book.

Municipalities to consist of elected councillors

Section 9(1) Except as provided in sub-section (2) every such Municipality shall consist of elected councillors,

Failure to elect,

(2) Any vacancy due to failure to elect the full number of councillors which under this section might be elected and vacancy due to failure to elect a councillor under section 29 may, notwithstanding anything in this Act, be filled up by nomination by the Provincial Government

Continuance of councillor holding office at commencement of Act

(3) Councillors elected or nominated under the Bombay District Municipal Act, 1901, and holding office in a municipal district included or hereafter included in Schedule I, immediately prior to such inclusion, shall be deemed to have been elected or nominated, as the case may be, under this Act

Amendments:—The words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council.

The new sub-section (1) was substituted for sub-section (1) and the provisos thereto and the proviso to sub-section (3) was omitted by Sind Act No 7 of 1938, s 4

Sections 1 and 8 of Sind Act No 7 of 1938 read as under. Section 4 amends s 9 of the B M B Act, 1925 as above Sections 2, 3 and 5 of Sind Act No 7 of 1938 do not deal with the B M B. Act

Short title and operation.

(1) This Act may be called the Bombay District Municipal, Local Boards and Municipal Boroughs (Sind Amendment) Act, 1938

(2) Notwithstanding anything contained the said Acts, on the day this Act comes into force—

(a) all persons nominated to a municipality or a local board constituted under any of the said Acts shall cease to hold offices,

(b) for the term for which such persons would have held office, if this Act had not been passed, the provisions of the said Acts and the Rules made thereunder shall have effect as if for the aggregate number of elected and nominated members or councillors, as the case may be, therefore prescribed by or under the said Acts, there were substituted the number only of elected members or councillors as so prescribed, and

(c) any vacancy caused by the operation of clause (a) of this sub-section in the office of President or Vice-President or in a committee constituted under any of the said Acts shall be filled by election of a member from the general body of members or councillors who shall hold office so long only as the member or councillor, as the case may be, in whose place he is elected would have held it if the vacancy had not occurred

Power to remove difficulties

6 If any difficulty arises in giving effect to the provisions of this Act, the Provincial Government may, by order, as occasion may require do anything which appears to them to be necessary to remove the difficulty

See notes under sub-sections (1) and (2) of s. 9 ante

The Provincial Government shall determine number of councillors, fix proportion of elected and nominated councillors, and make rules for regulating election

Section 10(1A) The Provincial Government shall, from time to time, generally or specially for each municipality—

(a) determine the number of councillors

(b) make rules consistent with this Act prescribing the number of councillors to be elected, the number of wards to be constituted for Mahomedans and non-Mahomedans in each municipal borough, the extent of such wards and the number of councillors to be elected by each ward, providing for the preparation and revision of the lists of voters from time to time, fixing the date after which no application for enrolment in any such list under preparation or revision shall be received, declaring the manner in which the right to vote of any undivided family, or any company or firm, or any other association or body of individuals or any trustees of any building or land being two or more in number entered in such list may be recorded and exercised, and prescribing the restrictions, if any, on the number of votes which a voter may give;

determining the manner in which and the authority by whom any objection to such list in regard to the names entered therein or omitted therefrom may be heard and decided, and to what judicial authority the appeals as to such entries and omission shall lie,

prescribing the date for the publication of the Municipal Election Roll,

regulating generally such elections

(1B) The Provincial Government may direct that one or more seats out of those allotted to non-Mahomedans shall be reserved for depressed classes

Explanation—A depressed class for the purpose of this section shall be one which in the opinion of the Provincial Government is a depressed class and the number of which is sufficient to require representation

(1C) Rules made under this section shall be laid upon the table of the Sind Legislative Assembly at the session of the said Assembly next following and shall be liable to be modified or rescinded by a resolution of the said Assembly and the modification or rescission so made, shall, after publication by a notification in the Official Gazette, be deemed to have come into force

(2) The Provincial Government may from time to time delegate to the Commissioner any of the powers granted to the Provincial Government by clause (b) of sub-section (1A), subject to such restrictions or conditions, if any, as the Provincial Government may attach to the delegation and such powers shall not be exercised without first receiving the opinion of the municipality concerned.

Amendments:—In place of the old sub-section (1) new sub-sections (1), (1A), (1B) and (1C) were substituted by Sind Act No 10 of 1940, s 2(a) The new sub-section (1) introduced joint electorates but the said sub-section (1) was deleted by Sind Act No 16 of 1944, s 2(1)

Sub-sections (1A), (1B) and (1C) are not affected by Sind Act No 16 of 1944 except that the words 'for Mahomedans and non-Mahomedans' are inserted after the word 'constituted' in clause (b) of sub-section (1A)

In sub-section (2) the words 'the Provincial Government' were substituted for the words 'the Government' by the Adaptation of Indian Laws Order in Council.

For the words, brackets and figures, 'Clause (c) of sub-section (1)' the words, brackets and figure 'Clause (b) of sub-section (1A)' were substituted by Sind Act No 10 of 1940, s 2(b)

See notes under s. 10 ante.

Persons qualified to vote or be candidates at a municipal election. Electoral roll of tax payers.

Section 11 (1) Save as provided in section 16, every person who on the first day of April next preceding the date of publication of the electoral roll resided in a municipal borough and was qualified to be included in the electoral roll of the Sind Legislative Assembly for an area constituting or forming part of such borough by reason of his possessing any of the qualifications prescribed in paragraphs 2, 3, 4, 5, 6 or 7 of Part XII of the 'Sixth Schedule to the Government of India Act, 1935 (26 Geo 5 Ch 2)', shall be qualified to vote at a municipal election in such borough

Explanation—In this sub-section "electoral roll of the Sind Legislative Assembly" means the electoral roll of a territorial constituency of the Sind Legislative Assembly prepared and published under the Sind Legislative Assembly (Preparation, Revision and Publication of Electoral Rolls) Rules, 1936

(2) (a) Save as provided in section 16, every person—(1) who in any municipal borough, on the first day of April next preceding

the date of publication of the electoral roll, occupied as owner or tenant a house or building, or part of a house or building separately occupied, as a dwelling or for the purpose of any trade, business or profession of which the annual rental was not less than Rs 12 or of which the capital value was not less than Rs 200, or

(ii) who for a period of not less than three months next preceding the last day before the preparation or revision of the list of voters upon which under the rules applications for enrolment may be received has been assessed to the qualifying tax,

and who within the three months next preceding the date referred to in sub-clause (ii) has paid all arrears of taxes, if any, due from him to the municipality, shall be qualified to be entered in the list of voters for such municipal borough and to vote at a municipal election in such municipal borough

Explanation —A person shall be deemed to be in arrears of taxes if he has not paid within one month of the date of presentation any bill which has been presented under section 104

Provided that a person who—

(i) is not a British subject or a subject of an Indian State, or

(ii) has been adjudged by a competent court to be of unsound mind, or

(iii) is under 21 years of age,

shall not be entitled to have his name entered in such electoral roll

Explanation —For the purposes of this section, "the qualifying tax" means a tax, other than octroi, toll and the tax on vehicles and animals plying for hire or kept for the purpose of being let for hire, imposed in a municipal borough

(b) The electoral roll of tax-payers for the time being in force shall be conclusive evidence for the purpose of determining whether any person is entitled to vote under the provisions of this sub-section at any election If an electoral roll is not revised in accordance with the rules made under clause (b) of sub-section (1A) of section 10, the roll shall continue in force until such revision has taken place

(3) Every person so qualified to vote who for a period of not less than six months next preceding the last day before the preparation or revision of the electoral roll upon which under the

rules applications for enrolment may be received has been resident in such borough or within seven miles of the limits thereof shall, subject to the provisions of this Act and of any other law for the time being in force, be qualified to be a candidate at a municipal election in such municipal borough.

Explanation —For the purposes of this section a person shall be deemed to be resident in or within seven miles of the limits of a municipal borough if he ordinarily resides or has his principal place of residence in or within seven miles of the limits of such borough

Amendments :—Sub-section 2(a) (ii) was substituted for the original clause by Bombay Act 4 of 1930, s 4

For the old sub-section (1) the present sub-section (1) with its explanation was substituted by Sind Act No 17 of 1944 s 3

In clause (b) of sub-section (2) the words, brackets and figure 'Clause (b) of sub-section (1A)' were substituted for the words, brackets and figure' clause (c) of sub-section (1)' by Sind Act No. 10 of 1940, s 3

See notes under s. 11 ante.

Sections 13 and 15

Amendments:—In sub-section (1) of s 13 and sub-section (5) of s 15, the words, brackets and figure 'clause (b) of sub-section (1A)' were substituted for the words, brackets and figure ' clause (c) of sub-section (1)' by Sind Act No 19 of 1940, s 3 This amendment is necessitated on account of different number given to the old clause (c) of sub-section (1) of s 10 by Sind Act No 10 of 1940, s (a) and is merely formal Except for that formal change there is no difference between the sections 13 and 15 as applicable to Sind and Bombay The sections as applicable to Bombay are given ante

See notes under s. 13 and s. 15 ante

Section 19.

This section has been amended by Sind Act No 3 of 1942, s 3(a) but the amendment effected is identical with that carried out by the Government of Bombay by Bombay Act 8 of 1939, s 3 (b) (i) and (ii) Section 19 as amended by Bombay Act 8 of 1939 is given ante

See notes under s. 19 ante

Election of president and vice-president.

Section 19A. (1) When a new municipality is constituted after a general election or otherwise, the Collector shall call a meeting for the election of a new president and vice-president Such meeting shall be called within twenty-five days from the date on which the names of the councillors of the new municipality are published in the Official Gazette under section 17, but shall not be held on a date prior to the date on which the term of office of the retiring

councillors prescribed or extended, as the case may be, under sub-section (1) of section 25 expires, or on which the municipality is re-established under sub-section (3) of section 219 after dissolution or under sub-section (5) of section 219 after supersession, as the case may be

(2) The meeting called under sub-section (1) shall, until the municipality elects its own chairman for that meeting, be presided over by one of the persons appointed by the Collector in the manner hereinafter provided

(3) For the purposes of sub-section (2) the Collector shall select three persons who shall be councillors of the new municipality after obtaining their consent in writing to the selection, and shall arrange their names in a list in order of preference. The retiring president, if any, and the retiring vice-president, if any, shall, if they are councillors of the new municipality and if they consent, be among the persons selected and shall, if both of them consent, be placed respectively first and second in the list If either the retiring president or the retiring vice-president alone consents, he shall be placed first in the list The person whose name is placed first in the list shall preside at the meeting called under sub-section (1), but if such person is absent or is unable or fails for any reason to preside, the person whose name is placed second in the list shall preside If the persons whose names are placed first and second in the list are both absent or are unable or fail for any reason to preside, the person whose name is placed third shall preside If none of the three persons named in the list is present or able or willing to preside, the meeting shall not be held and the Collector shall, as soon as may be, call a fresh meeting, and shall select three other persons in the manner prescribed above, one of whom shall preside thereat in the order specified above

(4) If in the election of a chairman for the meeting called under sub-section (1) there is an equality of votes, the result of the election shall be decided by lot to be drawn in the presence of the person presiding in such manner as he may determine. As soon as a chairman is elected, he shall take the chair and the meeting shall proceed to elect, the new president The new president shall take the chair as soon as he is elected and the meeting shall then proceed to elect the new vice-president

Amendments:—This section is newly inserted by Sind Act No 3 of 1942, s 3(b) The new section is identical with s 19A inserted by Bombay Act 8 of 1939, s 3(c) by the Government of Bombay except for some insignificant verbal changes

See notes under s. 19A ante •

In this section a new sub-section (2) is substituted in place of the old one by Sind Act No 3 of 1942, s 3(c) The same amendment is made by the Government of Bombay by Bom Act 8 of 1939, s 3(8) and the section as amended by Bom Act 8 of 1938 is given ante

See notes under s. 23 ante

Section 23A

This section is deleted by Sind Act No 3 of 1942, s 3(d) In Bombay Province also it is deleted by Bom Act 8 of 1939, s 3

Application of municipal property and funds within and without the municipal borough

Section 66 The municipal fund and all property vested in a municipality, shall be applied for purposes of this Act within the limits of the municipal borough

Provided always that it shall be lawful for the municipality, with the sanction of the Provincial Government or any officer duly authorised by it in this behalf,—

(a) to incur expenditure in the acquisition of land or in the construction, maintenance or repair of works beyond the said limits for the purpose of obtaining a supply of water required for the inhabitants of the municipal borough, or of establishing slaughter-houses or places for the disposal of night soil or sewage or carcasses of animals or for drainage works, or for any other purpose calculated to promote the health, safety or convenience of the inhabitants of the said borough, or

(b) to make a contribution towards expenditure incurred by any other local authority or out of any public funds for measures affecting the health, instruction, safety or convenience of the public and calculated to benefit the residents within the limits of the contributing municipality, or

(bb) to contribute to any war fund organised outside the limits of the municipal boroughs, or,

(c) to create scholarships tenable outside the limits of the municipal borough·

Provided, further, that nothing in this section or in any other provision of this Act shall be deemed to make it unlawful for a municipality when with such sanction as aforesaid it has constructed works beyond the limits of the municipal borough for the supply of water or for drainage as aforesaid—

(a) to supply or extend to or for the benefit of any person or buildings or lands in any place whether such place is or is not within

the limits of the said borough, any quantity of water not required for the purposes of this Act within the said borough, or the advantages afforded by the sytsem of drainage-works, on such terms and conditions with regard to payment and to the continuance of such supply or advantages as shall be settled by agreement between the municipality and such person or the occupier or owner of such buildings or lands, or

(b) to incur any expenditure, on such terms with regard to payment as may be settled as aforesaid, for the construction, maintenance, repair or alteration of any connection pipes or other works necessary for the purpose of such supply or for the extension of such advantages

Amendments —The words 'the Provincial Government' were substituted for the words 'the Government by the Adaptation of Indian Laws Order in Council

The clause (bb) in the first proviso was inserted by Sind Act No 11 of 1941 s 5(1) This amendment was given retrospective effect from the 5th September 1939

See notes under s 66 ante

Section 70

This section has been amended by Sind Act No 25 of 1940, s 4 but the amendment effected is identical with that carried out by the Government of Bombay by Bom Act 15 of 1936, s 4

Section 70 as amended by Bom Act 15 of 1936 is given ante

Discretionary power of expenditure of municipalities

Section 71 A municipality may, at its discretion, provide either wholly or partly, out of the municipal property and fund for

(a) laying out, whether in areas previously built upon or not, new public streets, and acquiring the land for that purpose, and the land required for the construction of buildings or curtilages thereof, to abut on such streets,

(b) constructing, establishing, or maintaining public parks, gardens, libraries, museums, lunatic asylums, halls, offices, dharamsalas, rest-houses and other public buildings,

(c) furthering educational objects other than those setforth in clause (p) of sub-section (1) of section 68,

(d) planting and maintaining road-side and other trees,

(e) providing music for the people,

(f) taking a census, and granting rewards for information which may tend to secure the correct registration of vital statistics;

(g) making a survey,*

(h) paying the salaries and allowances, rent and other charges incidental to the maintenance of the Court of any stipendiary or honorary Magistrate, or any portion of any such charges;

(i) arranging for the destruction or the detention and preservation of dogs which may be destroyed or detained under section 157 of this Act or under section 49 of the Bombay District Police Act, 1890,

Bom. IV of 1890.

(j) securing or assisting to secure suitable places for the carrying on of the offensive trades specified in sub-section (1) of section 186;

(k) supplying, constructing and maintaining, in accordance with a general system approved by the sanitary board, receptacles, fittings, pipes and other appliances whatsoever, on or for the use of private premises, for receiving and conducting the sewage thereof into sewers under the control of the municipality;

(l) the acquisition and maintenance of grazing grounds; and the establishment and maintenance of dairy farms and breedings stud,

(m) establishing and maintaining a farm or factory for the disposal of sewage;

(n) the construction, maintenance, management, organisation or purchase of telephone lines, or for guaranteeing the payment of interest on money expanded for the construction of a telephone line subject to the previous sanction of the Commissioner when the line extends beyond the limits of the municipal borough,

(o) providing accommodation for any class of servants employed by the municipality;

(p) the construction of sanitary dwellings for the poorer classes,

(q) the construction, management and maintenance of light-railways and tramways,

(qq) contributions to any war fund;

(r) any other measure not specified in section 68 likely to promote the public safety, health, convenience or education, and

(s) by a resolution passed at a general meeting and supported by two-thirds of the whole number of councillors any public reception, ceremony, entertainment or exhibition within the municipal borough.

Amendments:—The clause (qq) was inserted by Sind Act 11 of 1941, s 5 (2) This amendment was given retrospective effect from the 5th September 1939

See notes under s. 71 ante.

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Note —This index should be read as supplementary to the CONTENTS at pages, 1-14 The figures in this index represent the page numbers

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