
(1909) 12 BOM CK 0006
In the Bombay High Court
Case No : Suit No. 871 of 1909

The Advocate-General of Bombay

APPELLANT

Vs

Haji Ismail Hasham

RESPONDENT

Date of Decision : 17-12-1909

Acts Referred:

Bombay Municipal Corporation Act, 1888 — Section 349A
Civil Procedure Code, 1908 (CPC) — Section 79, 91

Citation : (1910) 12 BOMLR 274

Hon'ble Judges : Beaman, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Beaman, J.—The defendant in this suit, one Haji Esmail, has put up a large building at the corner of Hornby-road and Church-gate Street. The plans were submitted to the Municipal authorities in 1907, and on the 23rd November 1907 the Engineering Department informed the defendant that there was no objection to the proposed extension as shown on the amended plans, provided the work was carried out in accordance with the provisions of the Municipal Act and Building Bye-laws. The plans which were then submitted to the Municipal authorities give an all round height of 70 ft. But the permission granted by the Engineering Department is qualified and the defendant is warned that he must conform with the provisions of the Municipal Act and Building Bye-laws. Apparently at that time it had not occurred to the Municipal authorities that the proposed extension, meaning I suppose down Churchgate Street, would infringe any of those provisions or Bye-laws. The work progressed up to April 1909, when the defendant wrote to the Commissioner through his attorneys Payne & Co., requesting permission to raise his building for architectural purposes above the prescribed limit of 70 ft.. Mr. Shepherd endorsed his permission on Payne & Co.'s letter and subsequently on the 1st May 1909 wrote to the defendant granting him the required permission. Taking Payne's and the Commissioner's letters together, I think it is clear that whether on a misunderstanding or not, the

Commissioner sanctioned the height of the building at 70 ft. all the way round with ornamental pillars at the south-west and south-east corners exceeding that height. The plans of the building show that it was then in contemplation to give it an all round height as well in Churchgate Street as Hornby Road of 70 ft. Dubash, one of the relators, in this suit owns a house to the east of the defendant's house and for a very long time he had been taking exception to the proposed elevation of the building. It is clear that his grievance was that his windows on the west-face of his house would be obstructed by the eastern wall of " the defendant's house, should it be raised to the height of 70 ft. " It is also clear that this is a purely personal matter between Dubash and Haji Esmail. For the east and west-faces of their houses respectively do not abut upon any public street, but are divided by narrow gulley in which the public have no interest. The evidence shows that Dubash contemplated suing the defendant for the protection of his ancient lights. He abandoned the idea probably because those lights were not ancient. He then associated himself with Sir Cowasji Jehangir, the other relator on the record, and put the Advocate-General in motion. The Advocate-General has brought this suit at the instance of his relators u/s 91 of the new Civil Procedure Code. He asked the Court to grant a mandatory injunction against the defendant ordering him to pull down so much of his building in Churchgate Street as exceeds the height of 49 ft., roughly for a length of 24 ft., on the ground that it is a public nuisance. The building has been virtually completed to the height of 70 ft. over the disputed portion. The corner towers which were to be carried to a greater height have not yet been erected. It is first to be noted that the suit is restricted to the extreme eastern portion of the building in Churchgate Street for a length of 24 ft. In respect of the remainder of the building, it is not alleged that any public nuisance has been committed. The foregoing facts are, I believe, undisputed.

2. The case raises somewhat novel and important questions and in disposing of it I will take up the various points upon which the dispute centres in much the same order they were dealt with by counsel in their concluding addresses. And I take this opportunity of acknowledging my indebtedness to learned counsel for the parties concerned, particularly to Mr. Raikes for his deep, thoughtful and thorough argument. I will consider first the true construction of Sections 349A and 3498 of the Bombay City Municipal Act.

3. The plaintiff's contention is that Section 3496 is in all its terms imperative and that the Commissioner has in no circumstances the power to sanction the elevation of a building in height beyond the corresponding width of the street facing it.

4. The defendant, on the other hand, contends that the whole of Section 3496 is subject to Section 349 A and that in any proper case the Commissioner has a discretion to permit buildings to exceed in height, the height prescribed ordinarily by Section 3496. That would appear to have been the Commissioner's view but when the dispute threatened to become acute, the Commissioner consulted the

Corporation Solicitors, as I believe in such cases he is bound . to do. Under their advice he wrote to Payne & Co. on the 16th of August, intimating that when he granted his pier-mission on the 1st of May, it had not been brought to his notice that the south east extremity of the building was beyond the 80 ft. limit prescribed by Section 3496 (4), adding that he was advised he had no power to permit buildings to exceed the height prescribed in Section 349 B (3). Notwithstanding this, the Commissioner, on being further applied to, refused to take steps to have so much of the building as exceeded the 80 ft. limit reduced in height to the width of the street facing it. And it may be doubted whether his own opinion coincided with that of his legal advisers-Had he done so, it may be presumed that he would have rectified that which had been done under a misapprehension and in excess of his powers. It does not appear to me, however, that I am much concerned with the Commissioner's opinion. I have to ascertain for myself and declare what I believe to be the true construction of Sections 349A and 349B.

5. The plaintiff strenuously pressed the Court to accept his view. Stated compendiously, it amounts to this. In no circumstances shall any building exceed 70 ft. in height except with the written permission of the Commissioner. In streets less than 26 ft in width no building shall be raised to a height greater than 1, 1/2 times the width of the street. In streets exceeding 26 ft. but not exceeding 40 ft. no building shall be higher than 40 ft. and in streets exceeding 40 ft. in width no building shall exceed in height the width of the street. The effect of this is that the written permission of the Commissioner could only be required and be given for the erection of buildings facing streets more than 70 ft. in width and then only could such permission be given to raise a building in height to the width of the street

6. On a first reading of the section that is the view which would probably be adopted and that is the view which apparently was recommended to the Commissioner by his legal advisers. But I am by no means sure that it is right. The defendant as strenuously contends that the discretion vested in the Commissioner to grant permission covers all cases provided for in Section 349B. There is a great deal to be said in favour of that construction. In the first place there is the position of the sections. The natural inference from that would be that Section 349A was meant to govern and control Section 3496. Taking them together, the two sections certainly appear to me to afford an instance of singularly infelicitous drafting. If the legislature had intended what the plaintiff contends that it did intend, that might have been " so easily expressed without any ambiguity at all. So too, if it had intended what the plaintiff contends that it did intend, it would have been as easy to express that unambiguously. But as the sections stand, they are almost equally open to either construction. I must therefore be guided partly at least by a consideration of the general policy underlying the whole Act. This Act is intended for the Municipal Government of the City of Bombay. If we turn to Section 66 there can be no mistaking the intention of the legislature to confer generally upon the Commissioner the entire

executive power for the purpose of carrying out the provisions of the Act. And as a corollary, we may safely conclude that in a matter so important as regulating street front-ages where it is a question whether or not discretion is vested in the Commissioner, the intention of the legislature was that it should be. Turning again to Section 349A and Section 349B, a very natural way of construing them in their practical application would be to take the words "except with the written permission of the Commissioner" out of Section 349A and apply them not only to the special case mentioned in that section but to each of the following cases provided for in Section 3496. Thus, stated compendiously again, the sections would mean that (a) no building shall exceed 70 ft. in height; (b) in streets not exceeding 26 ft. in width no building shall exceed in height $1\frac{1}{2}$ times the width of the street > (c) in streets exceeding 26 ft. but not 40ft. in width no building shall exceed 40 ft. in height and in all other cases no building shall exceed the width of the street in height except with the written permission of the Commissioner. And that means that, provided permission is given to build at all, any person may as a matter of right build to the prescribed heights relatively to the streets on which the buildings face, without having recourse to the Commissioner at all. But if, in any case in which permission to build has been granted, it is desired to exceed those prescribed heights or the general maximum height, the Commissioner's written permission must be obtained. Such a construction appears to me to be far more consonant with the general scope and spirit of the whole Act than the rigid construction which the plaintiff would have me put up on Section 3496. I find it difficult to believe to give a concrete instances that if a street is 70 ft..6 in. wide, a citizen may build his house to the full height of 70 ft. but may not, even though in the opinion of all competent persons such additions by way of facade, turrets or minarets would greatly beautify it and be a A public gratification, make such ornamental additions even with the Commissioner's written permission. The plaintiff argues that the chief object of the Act was to secure the safety, health and convenience, of the citizens and that with that object in view it laid down rigid rules regulating the height of the buildings with the sole object of maintaining a free circulation of air and without paying any regard to architectural and aesthetic requirements. I feel very grave doubt whether the legislature had any such intention when Section 349 A and Section 3496 were framed.

7. The opening words of Section 3496 "subject to the maximum pre. scribed by Section 349A, the height to which a building might be erected or raised shall be regulated by the width of the street on which it abuts, in accordance with the following rules namely" suggest to my mind at any rate that those rules were intended to be a guide to the Commissioner in the exercise of his discretion rather than an imperative command. The plaintiff urged against any such liberal view that if it were adopted the purpose of the legislature might be entirely frustrated by a perverse Commissioner. Notwithstanding the obvious intention to prevent congestion and maintain a free circulation of air, the Commissioner, it was said, might allow houses a hundred feet high to be erected along every

narrow street. The answer to that is when Government appoints a high and responsible officer to carry out the purposes of such an Act as this, it takes it for granted that he will endeavour to the best of his ability to do so and will not act perversely. Such an argument, as I am now considering, implies that the chief executive officer of the Municipality would deliberately, perversely or corruptly set himself to frustrate rather than promote the interests for the special protection of which the Act was passed. A danger of that kind is so remote and chimerical that it is quite outside the range of practical discussion. Should the Commissioner be found to be so conducting himself I apprehend that the Corporation itself would abruptly put a term to the period of his office. On my reading of the sections a considerable discretion doubtless vests in the Commissioner. But that is not incommensurate with the confidence which Government must in the last resort always repose in high officers, and I do not believe that, except for the purpose of theoretical argument, the plaintiff or anybody else believes that that confidence has been or ever will be deliberately abused,

8. Upon this question then, after very long and anxious deliberation, I come to the conclusion that the intention of the legislature expressed in Sections 349A and 3496 was to confer upon the Commissioner a power to grant permission in writing in all exceptional and proper cases for the erection of buildings beyond the prescribed heights. If I am right so far, there would be an end of the case. But the question is so open and so many other points have been raised and argued that I do not think it right to leave my decision there.

9. Assuming I am wrong, I will proceed to consider whether this is a case within the purview and intention of Section 91 of the new Civil Procedure Code. That is a new section and this, I believe, is the first case in India which has been brought under it. Further, it is the first case in the history of Indian Law, I believe, in which, quite apart from that section, the Advocate-General has asserted his inherent powers of bringing actions to redress public grievances and public nuisances.

10. Section 91 says:

In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

11. Now, if the action be confined to the terms of that section, those terms must, I think, be defined as they are defined in the Acts of the Indian legislature, and the only definition we obtain of public nuisance is through the General Clauses Act, that which is to be found in Section 268 of the Indian Penal Code. That section says that " a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger, or annoyance, to the public or to the people in general who dwell or occupy

property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance, to persons who may have occasion to use any public right."

12. By invoking a definition of injury" in Section 44, Indian Penal Code, the word " injury" denotes " any harm whatever illegally caused to any person in body, mind, reputation or property,"" the plaintiff seeks to bring the erection of this house in contravention of the term of Section 3496 within the scope of a public nuisance. The argument briefly is that these provisions of the Act are intended to protect the safety and health of the public. Therefore any infringement of them, however seemingly innocuous, must necessarily cause a common injury. Else the legislature would not have forbidden the act to be done. This is really importing a doctrine of some of the English cases into this branch of the discussion. I shall have occasion later to comment on those cases. It is enough here to say that very subtle and evasive distinctions seem to be discernible between the exercise of the powers of the English Attorney-General to check public grievances on the one hand and abate public nuisances on the other. His activities flow in these two distinct channels and are referable, no doubt, to the same source. But while the two channels sometimes seem to overflow into each other, there does appear to me to be a real possible line of separation. The Attorney-General representing the King or parens palrio has not only the welfare of all the King's subjects in his keeping in the sense that he is their protector against public nuisances but also in a somewhat different sense in that he will compel the maintenance of the law. And there are many instances in which the Attorney-General had intervened successfully in England which could only be by an excessive straining of language, almost to the verge of metaphor, called public nuisances. Such, for example, as monopolies and compelling companies to keep within the terms of their special Acts. In the present case the Advocate-General, arrogating all the powers of the English Attorney-General, claims to be clothed with a like authority and so to be empowered to interfere in this matter because it is a breach of the law, even though it may not be, in the common sense, a public nuisance. A consideration of that claim is proper to another branch of this case. For the present, I will consider whether it falls within the intention and meaning of Section 91 of the Civil Procedure Code. Now I think that no one, were it not for the provisions of Section 3496, would have dreamt of calling the elevation of this building down twenty-four feet of Church-gate Street a public nuisance.

13. Suppose, as the defendant puts it, there had been no Municipal Act, would any indictment of the defendant for causing a public nuisance have had the remotest chance of success. Would any criminal Court have convicted him? I think we must all agree to answer those questions emphatically in the negative. No common injury, danger, or annoyance is caused to the public or to the people in general who dwell or occupy property in vicinity. Nor would this slight additional elevation necessarily cause obstruction, danger, or annoyance to persons who have occasion to use any public right. The latter words are clearly aimed at embracing cases of high-ways, water-ways, and the like. The only person who really feels that he is injured in the least is Dubash and he is not

injured by the construction of the building facing on the public road Churchgate Street. Nor would he take any benefit even were this action, successful, for by sloping back the roof of the building in the manner provided for in Section 3496 the defendant would almost as effectually interfere with Dtibash's enjoyment of lights. And merely as a side light upon the true character of the alleged public nuisance complained of, it is worth noting that defendant stated to the Court, and was not contradicted, that Dubash's own building is considerably in excess of the height prescribed by Section 3496. Leaving the Municipal Act entirely aside, then it comes to this that the person who has committed the very public nuisance complained of is moving the Advocate-General to prevent his neighbour doing the same. The hollowness of this position may further be tested by supposing that the defendant had commenced his building before the Act came into operation. Then although its structure had been precisely the same, its influence upon all the surrounding populace precisely the same, no one would have contended for a moment that it was a nuisance. That is to say, that on this allegation of the plaintiff, that which was not a public nuisance one day is a public nuisance the next because in the intervening hours a Regulative Act has been passed. I am not denying that some of the English cases lend considerable colour to what, thus stated, looks like an absurdity but that is because in those cases the Attorney-General was not avowedly suing upon a narrower worded section in an Indian Code like Section 91 of our new Civil Procedure Code. My present point is that assuming there were no Municipal Act at all, the conclusion would be obvious and indisputable, that there was no ground for a suit u/s 91. The question then arises whether because there are these provisions in the Municipal Act, that which would otherwise not be, becomes a public nuisance for the simple reason that it contravenes them. The authority for this proposition is to be found in Farwell J.'s judgment in *Attorney-General v. The Wimbledon House Estate Building Company* [1904] 2 Ch. 34. That is one of a considerable number of cases upon which the Advocate-General relies, and very naturally I think relies, in support of his action. But I shall presently show that there is a broad distinction between all those cases and the present case.

14. Before taking up and disposing of that matter and so answering the question I have just stated, it may be convenient to consider whether the Advocate-General in Bombay has all the powers of the Attorney-General in England. This is a claim put forward now in a perfectly definite form for the first time in the history of our Indian Courts.

15. The defendant strenuously contends that the Advocate-General has not all the powers of the English Attorney-General. I incline, however, to think that he has. These powers are derived from Section in, c. 155, Geo. III. re-enacted in Section 2 of 3 & 4 William IV. c. 85 and again in s.i.c. 95, 16 & 17 Victoria. It is true that on a first reading of that section and having regard to the existing conditions, it might appear as though it were intended merely to empower the Advocate-General, or principal law officer for the time being of the Company, to act in all the Company's Courts for and on behalf of the King to recover debts

due to the Crown. And it is to be remembered that at that time the Government of this country was not in the hands of the King but was delegated to and in the hands of the Company. There was therefore a very strong reason for empowering some officer to move in the Company's Courts for the recovery of the King's debts. It is quite conceivable that the interests of the King and the Company in such matters might have been conflicting. And in view of these considerations it might well have been thought that such powers as were conferred upon the Advocate-General of Bombay could not, without further special enactment when the King took over the Government of the country, have constituted him either at that time, or since virtually, the Attorney General, in the English sense, of the Bombay Presidency. Relatively to the Company this clearly could not have been so. But when the Company disappeared, and the Government of India was taken over by the Crown, we might have expected that some special legislature would have cured the somewhat anomalous position held by the Advocate-General u/s in, c. 155, Geo. III., and have definitely and unambiguously created him in all respects the King's Attorney-General of Bombay. In attempting to trace his lineal descent from the King's Advocate under the Company, the Advocate-General has not, as far as I can see, been able to bridge this chasm. As a mere matter of constitutional law, the point possesses some importance and certainly a curious interest. The Advocate-General, who treated this part of the case very lightly, appears to have thought that enough had been done when he referred the Court to Section 111, c. 155, Geo. III., and mentioned, I think, without comment, Section 79 of the Civil Procedure Code. Later, his learned junior, Mr. Setalvad, sensible perhaps of the incompleteness of this demonstration, sought to supply what was wanting by laying greater stress on Section 79 of the Civil Procedure Code. But, in the first place, that section does no more than recognise the powers conferred by Section in of the East India Company's Act, 1813, and, in the next place, it may be doubted whether any Act of the the Indian legislature would suffice to create an officer, corresponding in all respects with the English Attorney-General, and holding his office under the Letters Patent. While such considerations have much academic interest, and while I still entertain doubts whether the Advocate-General of Bombay was ever intended to have in this Presidency all the powers exercised by the Attorney-General in England, I am bound by the decision of the Privy. Council in Attorney-General v. Brodic (1846) 4 M I.A. 190 as far as that decision reaches. I doubt, however, whether it covers the whole ground. That judgment was delivered in 1846, before the .sovereignty of the Crown was substituted for the old East India Company. The facts of the case itself were curious. It would be observed that the suit, which was a charity suit, was brought by His Majesty's Attorney-General, not by the Advocate-General of Madras. It appears that the Advocate-General intervened and claimed to be heard. The Supreme Court of Madras rejected his petition, whereupon he appealed to the Privy Council. After a long and elaborate argument, much concerned with whether the Supreme Court like the English Court of Chancery is competent to deal with charity matters, as also with the point whether the Advocate-General of Madras had the right to be heard, Lord Langdale, in

delivering the judgment of the Court, said: "Now it appears to us, if we are to rely upon the statute alone, the words of the enactment are quite sufficient and the effect of them is not abridged by the statement of the particular purpose which is set forth in the preamble." And it was ordered that the Advocate-General had a right to be heard. As far as I "am aware that is the only case in the Indian Courts in which this point has been raised and decided. And it is, to say the least of it, singular that, if the Advocate-General in India has all the powers of the Attorney-General in England, not once during the last hundred years has he attempted to exercise those powers in matters of the kind with which I am now dealing. Upon the question whether the words of Section .in, c. 155 of Geo. III., really do empower the Indian Advocate-General in all respects as fully as the Attorney-General in England, Mr. Rallies delivered a very exhaustive and able argument. He much relied on the words-" And that thereupon such proceedings shall be had, as fur as the circumstances of the case and the course and practice of the said Courts of Judicature at the said several Presidencies will admit." And he maintained that not only was the power of the Attorney-General in England to proceed against public nuisances at that time by no means settled, hardly even recognized, but that assuredly no such idea had ever been prevalent either in the Mayor's Court or the Supreme Court of Bombay, while the uninterrupted course of judicial history thence to the present day shows that the course and practice of the Courts certainly would not have admitted any such action by the Advocate-General. It certainly does appear that up to and about the year 1813, in which the East India Company's Act was passed, the powers of the Attorney-General in this respect were very far from being clearly defined and recognised in England. The earliest case to which I have been referred came before Lord Hardwicke in 1750. Anonymous (0. The case is anonymous and it does not appear at whose instance the motion was brought or who was in charge of it. As late as 1799 an information was laid before the Lord Chancellor (1752) 3 Atk. 750 by The Mayor and Commonalty and Citizens of the City of London v. Bolt (1799) 5 Ves. 129 and accepted without demur. It would thus appear that so far the Advocate-General's exclusive power to move in such matters for the protection of the public had not become a settled principle of the English law. In 1811 an information was filed by the Attorney-General at the relation of several inhabitants of Battersea and Chelsea to restrain the defendant Cleaver from manufacturing soap or Black Ash &c. Attorney-General v. Cleaver (1811) 18 Ves 211. The case is singular because it originated in an indictment upon which the Grand Jury found a true bill but the consequences were evaded by the defendant getting the case removed into the King's Bench by certiorari. I notice that in the argument it was stated by Sir Samuel Romilly that in the case of Baines v. Baker (1752) 1 Amr 158 Lord Hardwicke admits that against a public nuisance this Court will injoin and says the application should be by the Attorney-General. Turning back to that case, which is reported as Baines v. Baker (1752) 1 Amb 58 and which was decided in the year 1752, I find that it was a bill for injunction against one Baker apparently brought by one Baines and the Lord Chancellor said: " I cannot make any order

in this matter." He went on : " Two things are to be considered : First, whether it is a nuisance at common law? Secondly, if it is, whether it is a public or a private nuisance ? . There was lately an indictment at the Summer Assizes 1750 in Sussex against Frewon for such an hospital. Defendant was acquitted; cannot call this a private nuisance; if any, it is a public one; the former is to one person only; as building against lights; nuisance ad meindum is a public nuisance...If a public nuisance, it should be an information in the name of the Attorney-General and then it would be for his consideration, whether he would file such an information or not; and that was the case for stopping a way behind the Exchange in the Gity. Lord King recommended it to the Attorney-General, to prefer an information in the King's Bench, to try whether it was a nuisance or not." From which it appears that underlying the power and judicial discretion of the Attorney-General to file informations in the King's Bench, lay the general principle that there a question to be tried would be whether in fact the thing complained of was a nuisance ad vicinctum,

16. Returning now to Attorney-General v. Cleaver (1811) 18 Ves. 211 Lord Eldon said : " What is nuisance, considered with reference to carrying on a trade, is a question of fact"; and he goes on to mention the dictum of Lord Hale in his Treatise DC Porlibus Maris u that upon the ground of public nuisance, and not as an obstruction upon the King's soil, it is a question of fact which must be tried by a Jury." Again, " Admitting the jurisdiction, the question comes at last very much to this; whether, if the Court may grant an injunction, but ought not without a trial by Jury, I am authorized to interpose by granting an injunction in the interval; considering the defendants as standing precisely in the same situation as if such a trial had taken place." The result of the matter was that Lord Eldon, holding that the defendant could not be in the same situation as though a verdict had been given against him by a Jury, refused to grant the injunction at that time, the matter stood over and was finally compromised. Apart from their historical value as showing a growth and development of the Attorney-General's power, these cases are very illuminating upon the fundamental question then very clearly before the minds of the most eminent Judges who have ever adorned the English Bench, namely, whether or not in all such cases it ought not to be found as a fact by a verdict of the Jury that the thing complained of is a public nuisance. For my present purpose I have said enough, I think, to show that the more modern form of the Attorney-General's activity in respect to true, or quasi public nuisance was at that period very far from being clearly defined. And it may be, as Mr. Raikes has contended, that even though Section 111 of the East India Ctmipaity's Act did intend to clothe the Advocate-General with all the powers of the Attorney-General in England, this special and later developed power was .not then in contemplation. But I agree with the argument advanced by the plaintiff that if it was the intention to clothe the Advocate-General with all the powers of the Attorney-General in 1813, then effect must be given to that intention touching all powers which were then patent in the Attorney-General and have since developed and received judicial

recognition.

17. Another branch of the defendant's argument depends upon a consideration of certain earlier Bombay cases, of which one instance (*Satku v. Ibrahim I.L.R* (1877) Bom. 457) may suffice, and certain sections in the Indian Statutes. It is contended that because the High Court of Bombay, in the case cited, made no reference whatever to any power vested in the Advocate-General to control public nuisances, no such power had up to that period been recognized in India. The learned Chief Justice, who delivered that judgment, had himself been Advocate-General and it was said that he would surely have adverted to the power had he believed himself ever to have possessed it. Similarly, it is contended that Section 91 of the new CPC and analogous sections in the Criminal Procedure Code would never have been enacted had the Advocate-General really possessed all the powers of the English Attorney-General, for in that case there would have been no need of them. It is further pointed out that no form of plaint for an action of this kind is to be found in the old CPC while the new CPC contains one, the inference being that this is an entire! v new departure and not merely a statutory expression of powers which have always existed and been fully recognised. Last, reading Section 44 of the amended Letters Patent with 3.56 (K) of the Specific Relief Act, it is contended that any such power -as the Advocate-General now claims is expressly barred by the Statute. Ingenious though all these arguments are, I still feel bound by the dictum of Lord Langdale in *Attorney-General v. Pedie* (1846) 4 M.I.A. 190. Their Lordships of the Privy Council in that case seem to entertain no doubt that as the East India Company's Act was remedial, no restricted construction should be placed on Section 111. The concluding portion of that section, Lord- Lang-dale said, was not abridged by any words in its pre-amble. And although as a mere matter of historical jurisprudence I still entertain considerable doubt whether the missing link in the present Advocate-General's lineal descent from the principal law officer of the Company has been supplied, or can be supplied, except by an Act of Parliament, I am prepared to hold, resting on the case of *Attorney-General v. Brodie* ((1846) 4 M.I.A. 190) that the first proposition the plaintiff laid before the Court is established, that is, that the Advocate-General represents in this Presidency the Attorney-General in England and has all his powers. The effect of that finding is to considerably widen the field of argument. For, had the Advocate-General's powers in this respect been restricted to the language and, I think, to the intention of Section 91, I should have had no hesitation in saying that this was not a proper case for the exercise of those powers. But I am now compelled to go more deeply into the question. For, as I have said, the Attorney-General's power in England covers many cases which could not fairly be called public nuisance within the meaning of Section 91. It is not always easy to draw a sharp line of cleavage between his operations in redressing public grievances and abating nuisances. It is easy, for instance, to understand how a monopoly may be a public grievance but it can hardly be a public nuisance. It is also easy to understand how the obstruction of high-ways, harbours and navigable rivers, as

well as the pollution of streams may be in strictness, public nuisances as well as public grievances. But there are cases, the classification of which is more difficult. It is, for example, by no means easy to understand how the manufacture of rolling stock by railway company ultra vires of its Act could be either a public nuisance or a public grievance, yet so great a Judge as Sir George Jessel held that it was. On appeal, however, it was held by a majority, James and Bramwell L. JJ., Baggallay L. J. dissenting, that the decision was wrong. *Attorney-General v. Great Eastern Railway Company* (1876) 11 Ch.D. 449. James L. J., who treated the case very lightly and almost seemed to ridicule the rigid construction adopted by the Master of the Rolls, held that if it had been ultra vires on the part of the railway company, no such case of public mischief was shown as would entitle the Attorney-General to interfere: the mere fact that a proceeding is ultra vires not being sufficient for that purpose unless injury to the public is shown. Baggallay L. J., on the other hand, held that when a company acts in contravention of its powers, it is the interest of the public that the law should be observed, and the duty of the Attorney-General to enforce it.

18. It may be doubted, however, whether the modern opinion has not veered round to that of Sir George Jessel. *London County Council v. The Attorney-General* [1902] A.C. 165. There the action was brought by the Attorney-General at the relation of an omnibus company," to restrain the London County Council from running omnibuses by certain roads in England. Lord Halsbury said : " One question has been raised...which I confess I do not understand. I mean the suggestion that the Courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction...In a case where as apart of his public duty he has a right to intervene, that which the Courts can decide is whether there is the excess of power which he, the Attorney-General, alleges." And that is an answer to all objections of the *de minimis nan curat lex* order. But strongly though the view is expressed, I do not think that it goes the length of laying down that in all such cases the Court is bound to grant every mandatory injunction which the Attorney-General or the Advocate-General in India may ask for. I have no intention of throwing any reflection upon the jurisdiction of the Advocate-General. I have not the slightest wish to derogate from the powers of his high office. And I entirely agree that it is not for a Court to say that because in its opinion the matter is trifling, the Advocate-General has no jurisdiction or has exceeded his jurisdiction. But there may be cases in which, while the Court is ready to admit that the Advocate-General is within his jurisdiction, it may think that in relation to the circumstances of the case the remedy he asks for is excessive. For, although the Advocate-General holds a high office and is the chief law officer of the Crown, he is after all subject, like any other suitor, to the control and authority of the Court(*Queen v. Prosser* (1848) 11 Beaven 306 and

may be restrained from continuing a merely vexatious suit. So in earlier days when the Court was of opinion that the suit was misconceived or of a kind not justifying the relief prayed for, it was suggested by one eminent Judge that the case may be referred back to the Attorney-General to give him an opportunity of further considering it and deciding whether he would continue. I have felt at some stages during the progress of this litigation that I should much like to have adopted that course. For, without denying or even challenging the Advocate-General's jurisdiction, there are features in this case which, when fully revealed, distinguish it from almost any other case I have been able to discover from the English Reports and might well therefore have induced the Advocate-General to reconsider his position. It is certainly singular and suggestive that after a lapse of a hundred years during which no Advocate-General has ever claimed this special power, it should be first exercised in a case to which, I believe I am correct in saying, no exact parallel can be found in the long and prolific history of the English Attorney-General's activities. Perhaps the nearest to it is *Attorney-General v. Barker* (1900) 83 L.T. 245. For there the relators were private persons while the defendants appear to have obtained the permission of the surrounding local authorities to the extent of their lawful authority. Farwell J. laid down the principle that in such cases what was to be answered was a question of fact. "Is this, or is it not, a nuisance of which the Attorney-General, on behalf of the public, is entitled to complain. That is a question of fact." He went on, "Because I cannot quite accept Mr. Hughes' ingenious suggestion in reply that I should regard this as forbidden by statute so as to say I can grant an injunction irrespective of any nuisance being proved. I am not aware of any case that has gone that length and, I think, I shall be bound to take the view that the common law Courts have taken in cases of indictment, and to decline to grant a mandatory injunction if I find this was in fact no nuisance. Now, I propose to give myself the same direction which the learned Judge Martin B. gave to the jury in the case of *Reg. v. The United Kingdom Electric Telegraph Company Limited* (1862) 6 L.T. 378. The particular proposition which his Lordship put to the jury is this, and the Court held this was a proper and right direction. "That permanent obstruction erected on a high way, placed there without lawful authority, which renders the way less commodious &c., and if the jury believed that the defendants placed for the purposes of profit to themselves, posts with the object and intention of keeping them permanently there ...and the posts were of such size and dimensions and solidity as to obstruct and prevent the passage of carriages and horses.... the jury ought to find the defendants guilty upon this indictment." His Lordship held that the local authorities had no power to give the consent they had given to the defendant and finding as a fact the defendant's Tramways across the high-ways were a public nuisance, granted the mandatory injunction sought. But even that is essentially, I think, a different case from this. For it was not pretended that the local authorities had any power either to forbid or grant the concession. They had mistaken the limits of their statutory authority and allowed under reservation that to be done which, that reservation further showed, they were not competent to allow. And as the act was found to be in the

broadest sense a public nuisance interfering as it did with the use of the high-ways by the public and as it was done without any lawful authority, a mandatory injunction was granted. But what appears to me to be the broad distinction between this and every other case in the English books is that in all those cases where the enforcement of the provisions of the particular act were entrusted to a local authority and that local authority had found itself impotent to compel compliance it was the local authority that moved the Attorney-General to file the information. Here the act complained of has been done with the permission of the local authority. And as a mere matter of principle I should have thought that considering the local authority has given that permission unqualifiedly and refuses to revoke it, the Advocate-General's proper course would have been by suit against the local authority. In *Attorney-General v. Barker* (1900) 83 L.T. 245 though the local authorities had granted their permission they had done so with the distinct reservation and if that reservation had not been exceeded, there can be no question that the Attorney-General's suit would have failed. It has, of course, been contended in this case that in the same way the permission granted by the Commissioner was beyond his lawful authority-But this is plainly distinguishable from *Attorney-General v. Barker*. For the permission complained of was given under a section of the Municipal Act without any qualification, the defendant, having received it, had every reason to believe that he was within his rights in acting up to it. He has availed him self of it. Even when doubt was thrown upon the Commissioner's power to grant it, that officer refused to revoke/ it, and unlike *Barker's* case the act done under that permission could not possibly, treated as a fact apart from the provisions of the Municipal Act, be held to be a public nuisance. The principles governing the two cases appear to me plainly distinguishable. In the event of a public body or a local authority wilfully misusing or exceeding their statutory powers, the Attorney-General might very well proceed by information against them to compel them to keep within the law. But private individuals, who could not possibly know whether the statutory powers of " such local authorities had been exceeded, and had acted upon the faith of their executive orders, could hardly form, I think, the proper object of the Advocate General's suit, the basis of which was that the local authorities had perfectly bonafide but by reason of lack of intelligence acted ultra vires and the object of it was to obtain a mandatory injunction of a ruinous character against an innocent individual. And this distinction seems to me to run through all the English cases to which I have been referred.

19. So far as those are cases of the Attorney-General, I do not find one in which such a relief as is now asked for against a private individual has ever before been asked for and granted in the like or anything like the same circumstances. Such cases as the *Yabbicom v. King* [1899] 1 Q.B. 444 and *McIntosh v. Pontypridd Improvements Company* (1891)61 L.J. (Q.B.) 164 are on a somewhat different footing. They appear to be cases brought by private individuals and the relief granted, such as it was, seems to have been granted on the ground that plans purporting to have been lawfully approved were not lawfully approved. No doubt

that principle goes very near the principle contended for by the Advocate-General in this case, for, he might say that, on his construction of Section 3496, the permission granted by the Commissioner was an illegal permission and so the result would be on all fours with the result in *Yabbicom v. King*. I do not find from the report of *Yabbicom v. King* what relief the plaintiff asked for, and I have not the Bristol Corporation Act to refer to. All that I am able to say, on consideration of this class of cases to which may be added *Kerr v. Corporation of Preston* (1876) 6 Ch. D. 463, is that they seem to indicate the right of private individuals when aggrieved, to compel obedience to local Acts. Confining myself, however, to informations by the Attorney-General, my examination of the case-law suggests the following conclusions The cases fall naturally into two classes : (i) cases in which there has been an actual public nuisance for which there would be a common law remedy; (2) cases in which there has been only a constructive public nuisance for which there would be no remedy at common law. In the former class of cases to which *Attorney-General v. Barker* (1900) 83 L.T. 245 belongs, the Attorney-General has acted at the relation of private individuals. In the latter class of cases the Attorney-General, unless proceeding against a Corporation or company itself, always, as far as I can see, acts at the relation of the local authorities. Cases on the border line which are difficult to classify are typified by *Attorney-General v. Great Eastern Railway Company* (1879) 11 Ch. D.449. Those are cases in which, although nothing in the nature of a public nuisance is caused, private persons are aggrieved by a plain breach of the law and I presume that it is only by reference to the underlying principle of such cases and the group of cases represented by *Yabbicom v. King* [1899] 1 Q. B, 444 that the Advocate-General has thought it his duty to move in the present case. But there again the distinction is plain. For the defendant is always, when the Attorney-General moves, the offending corporation, company, or local authority, whereas in this case he passes over the local authority and asks for relief against a private individual. And it appears to me that the ground of all the decisions is reducible to equally clear principles. Where the act complained of is found to be in fact a public nuisance, as in *Attorney-General v. Barker*, private individuals suffering from the nuisance have obtained redress by mandatory injunctions on the information of the Attorney-General. This is clear from Farwell J's judgment in *Attorney-General v. Barker*. And it is equally clear that had the act not occasioned a public nuisance as interfering with the rights, safety, or health, not of single individuals but of the public generally, no redress would have been granted. There are, therefore, to be considered, what I may call, actual and constructive public nuisance, or public nuisances in fact contrasted with public nuisances in law, and it is over the latter class of cases that the Attorney-General's special power in England extends. No such power can, I think, be derived from Section 91 of the CPC which is in terms restricted to public nuisances in fact. What I mean by constructive or public nuisance in law is that which is only wrong because it contravenes the provisions of an Act and the test in all those cases is whether if there were no Act the public nuisance complained of would exist at all. The language used by many most eminent

Judges in dealing with cases of constructive nuisance certainly lends colour to the notion that remedies are available because these in contemplation of law are actual nuisances. And the reasoning is this. Where there is an Act in the nature of a Public Health Act, disobedience of its provisions must be presumed to tend towards impairing the public health and therefore in its consequences indirectly would be a public nuisance. But that process of reasoning appears to me to confound the dual function of the Attorney-General and to be entirely inapplicable to such peculiar cases as the Attorney-General v. Great Eastern Railway Company (1879) 11 Ch. D. 449. In that as in all other cases, where the Attorney-General moves to compel obedience to the provisions of an Act, the true ground of his jurisdiction appears to me to be the care reposed in him of seeing that the law is obeyed and this has nothing necessarily in common with public nuisances. Further, in all such cases, if I am right in theory, the Attorney-General's activity ought to be applied (a) either against the offending local authority, corporation, or company; or (b) where powers conferred upon the local authority are inadequate for enforcing compliance with the provisions of their Act to supplement those powers by his special remedies. And neither of those cases in the least resembles the present case.

20. Having thus briefly stated what I take to be the teaching of all the English authorities to which I have been referred, I will deal with some of the more important a little more in detail.

21. It may be convenient to begin with Cooper v. Wliittingham (1880) 15 Ch. D. 501 because, although that is not an Attorney-General's suit, it contains some very useful and illuminating observations upon one of the chief principles which must, I think, govern my decision here I mean the principle that where the act complained of is only an offence because it is the creature of a statute, and where that statute provides a remedy, the offence is only to be corrected by the statutory remedy. A point of this kind seems to have been raised in Cooper v. Whittingham and Jessel M.R. observes upon it as follows : " It was said that the 17th Section of the Act created a new offence...And it was argued that where a new offence and a penalty for it had been created by statute a-person proceeding under the statute was confined to the recovery of the penalty, and that nothing else could be asked for That is true as a general rule of law but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which if done would be an offence. Wherever an act is illegal and is threatened, the Court will interfere and prevent the act being done-and as regards the mode of granting an injunction, the Court will grant it either when the illegal act is threatened but has not been actually done, or when it has been done and seemingly is intended to be repeated." I need not deal with the second exception which has no bearing upon what I am now discussing. But that dictum of the Master of the Rolls clearly contemplates one ancillary remedy and one only-. a preventive injunction. Further, he was considering only the case of a penalty provided by the statute and presumably inadequate. Had the case before

him been of a statute, which while creating an offence provides not only for a penalty but ample and complete remedy, it is very doubtful whether that most learned Judge would not have amplified his observations.

22. In *The Wolverhampton New Water Works Company v. Haw. kcsford* (1859) 6 C.B.N.S. 336, which was again an action against a private individual by a company for calls, Willes J. said; " There are three classes of cases in which a liability may be established founded " upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which " gives a special and peculiar form of remedy different from the remedy which existed at common law : there,. unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely but provides no particular form of remedy : there, the party can only proceed by action at common law. But there is a third class, namely, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class." Now that statement of the law would exactly cover and conclude the question I am now discussing, had the litigation been between private parties.

23. In *Attorney-General v. Ashborne Recreation Ground Company* [1903] 1 Ch. 101, Buckley J. said: " The fact therefore is that the statute has enjoined something; has itself imposed no penalty; but has provided machinery by the use of which a penalty may be imposed, and that that machinery has been employed. The defendants say that, because by-laws have been made and there is a remedy u/s 251 to recover the penalty in a summary manner, there is no jurisdiction in the High Court to grant an injunction." The learned Judge then proceeds to quote Willes J. at supra and goes on, " I will assume that the present case comes within the third class. In cases within that class the statutory remedy must in general be followed, but there is at least one exception to the general rule. There may co-exist a remedy by injunction to protect a right. It cannot be disputed, after *Cooper v. Whittingham* (1880) 15 Ch. D. 501t if a plaintiff is suing in respect of a right personal to himself he may be protected by injunction." After commenting on *Cooper v. Whittingham* the learned Judge proceeds : " The Attorney-General suing in respect of the invasion of public rights has at least as large a right to invoke the protection of the Court as a private owner suing in respect of his rights." The learned Judge, after discussing *Attorney-General v. Hatch* [1893] 3 Ch. 36 and *Attorney-General v. Rufford and Company* [1899] 1 Ch. 537 gives as the reason for the rule in those cases that " there may be good reason why an injunction should be granted although a penalty is imposed. If there were no remedy except the statutory remedy, a public authority might by circumstances be rendered singularly impotent although it had made by-laws. u/

s 158 of the Act of 1875 works contravening by-laws may be pulled down or removed, but only where the work is commenced after notice of disapproval, or before the expiration of one month after the delivery of notice to the public authority, without the approval of such authority; so that, if the public authority is inert, it may become powerless to pull down or remove; and, if the defendants are right, its only remedy would be to proceed by way of penalty. That cannot be the intent of the statute. Another reason is that there are many cases where a public authority can interfere in which pulling down would be an inappropriate remedy...The Act did not intend that the public right to have these things done should be guarded only by a penalty in case they are not done."

24. I take that to be a singularly clear and useful exposition of principle for my present purposes. It is true that Buckley J. uses the words "remedy" and "penalty" as almost interchangeable but the reason why he interfered at the suit of the Attorney-General and the only reason was that the local authority might otherwise be impotent to enforce compliance with the provisions of its own Act and that is why it is necessary to insist upon the distinction between remedy and penalty. If in this class of cases the statutory offence can only be punished and not remedied, then the principles of *Attorney-General v. Ashbourne Recreation Ground Company* [1903] 1 Ch. 101 plainly applies, as plainly it would not apply had the local authority complete powers to remedy the wrong. While therefore it may appear to form an exception to the third of Willes J.'s classes, it does not in fact do so. In *Cooper v. Whittingham* [1880] 15 Ch. D. 501 what Jessel M.R. laid down was that, notwithstanding a statutory penalty, there might be an ancillary remedy by injunction to prevent an act being done or repeated and what Buckley J. lays down in *Attorney-General v. Ashbourne Recreation Ground Company* is that where an offence is created by a statute and there is no remedy but only an inadequate penalty, the Attorney-General can remedy the offence and compel compliance with the statute by means of a mandatory injunction. Strictly speaking a mandatory injunction giving a complete remedy in itself can scarcely be called an ancillary remedy in the sense in which Jessel M.R. used those words, and, as I have pointed out, Jessel M.R. is clearly not contemplating, cases of this kind. In such cases, assuming that local authorities have not sufficient powers to compel obedience to their acts where those acts are public acts of health, safety and convenience, the Attorney-General supplements the defects of their authority by calling upon the Courts to issue mandatory injunctions to compel complete obedience to the law.

25. In *Attorney-General v. Wimbledon House Estate Company* [1904] 2 Ch. 34 the facts were that the defendant company had disobeyed the orders of the Urban Council and had infringed the provisions of the Public Health Act, 1875, by projecting a portion of a new building beyond the building line. The Urban Council had no power to demolish the building. The building had been persisted in, notwithstanding the disapproval of the Urban Council. The defendants had been prosecuted and fined ? 20. Nevertheless the Urban Council as relators moved the Attorney-General to ask for a mandatory injunction. Farwell J. in

disposing of the case said : " Now the first point taken by the defendants is that there is one remedy only, namely, the remedy given by the statute which provides &c...In my opinion that point is concluded by the decision of Buckley J. in Attorney-General v. Ashbourne Recreation Ground Company [1903] 1 Ch. 101, approved by the Court of Appeal in Devonport Corporation v. Tozer [1903] 1 Ch. 759. I am clear that there is not one remedy only, namely, the statutory remedy. There is, first of all, the statutory obligation not to build without the written consent, and if that is disobeyed-apart from any question of penalty-there is a remedy by injunction, because it is a public general Act prohibiting certain matters in the interests of public health and in order to preserve uniformity in the width of the public streets, and that is a matter for which the Attorney-General can sue." And he goes on, " if the offence is committed, I see no reason why the Attorney-General should not be heard to say in the Court, " the defendants have done that which the Act of Parliament has forbidden them to do and I appeal to the Court to make them take it down again." I think there is nothing in the point that, inasmuch as the defendants have been fined once, they cannot now be ordered to take down the building so as to avoid the necessity of multiplicity of indictments or prosecutions that would otherwise follow." In dealing with the question of laches, the learned Judge makes the following important observation: " The Court no doubt has a discretion in the case of Attorney-General actions as well as other actions. It is not sufficient for the Attorney-General simply to come to the Court and say, "-I call attention to the fact that there has been a breach of this statute, and it follows as a matter of course that the mandatory injunction which I ask for must be granted."" Then, upon the facts of the case, the learned Judge held that there was no ground for imputing laches to the Attorney-General or to excuse the defendant's conduct. He said; "I can only see a bold determination on the part of the defendants to insist upon going on their own way in spite of everything, hoping for the best, and trusting that nobody would compel them to pull down what they had put up." Far-well J. then quotes Lord Halsbury in London County Council v. Attorney-General and Ors. and concludes : " I cannot say that the Attorney-General ought not to have initiated this litigation; and, having initiated it, I cannot say he is not justified in pressing the Court to grant a mandatory injunction, because there is no-other remedy open. I see no other way of protecting the public in giving them the benefit of this section except by granting a mandatory injunction. There is no one to whom I can give damages, and there are no other means I can see of giving effect to the Act of Parliament." The whole of this judgment and particularly some of the passages I have quoted were strongly relied "upon by the plaintiff. In my view, however, the case is quite as good an authority for the principle upon which I found my decision. For what does it come to? Here was a Public Act intended to protect the health and safety of the public. Executive bodies were appointed to enforce its provisions but the particular case shows that a bold and determined law breaker could set them at defiance. The most that they could exact by way of penalty was a fine of ? 20. If the payment of that fine ended the matter, it meant that every rich man could contravene the Public

Health Act with virtual impunity. This, said Farwell J., could not have been the intention of the legislature. Reluctant though he was to order the building to be pulled down, he felt that he could not say that the Attorney-General had no power to initiate the action and was not justified in pressing him for a mandatory injunction, because there was no other remedy. I, too, have emphatically said that I do not think the Advocate-General had no power to initiate this action, but I am not prepared, in the circumstances of this case, which are altogether different from the circumstances in *Attorney-General v. Wimbledon House Estate Company* [1904] 2 Ch. 34, to go the length of holding that the Advocate-General is justified in pressing for a mandatory injunction. There is not the same reason. True, in the particular case, there is no other remedy but that in itself is nothing. What Farwell J. meant was that there was no other remedy for any number of the like infringements of the provisions of the Public Health Act. And the reason for that again was that the Urban Council, who were charged with the duty of enforcing that Act, had not sufficient power to do so.

26. All those considerations are wanting in the present case. If the Act had been infringed at all, it had not been wantonly infringed. The conduct of the defendant in this case has not, like the conduct of the Wimbledon House Estate Company, been an open and bold defiance of the local authority. On the contrary what he did, he did with the permission of the local authority. And put at the very highest, that permission if it contravenes the provisions of the Act, did so bona fide and upon a misunderstanding of two very ambiguously worded sections. It may have been ultra vires and it might be desirable, if that were so, to obtain a declaration from the Court that it was ultra vires. In that case it certainly never would be repeated -unless the legislature intervened to alter the wording of the sections. There is, therefore, no risk of any recurrent infraction of the Act to the detriment of the public. In *Attorney-General v. Wimbledon House Estate Company* [1904] 2 Ch. 34 it was the Urban Council who invoked the assistance of the law against a refractory citizen. In this case it is the Advocate-General who is indirectly impeaching the action of the local authority, in an attack upon a citizen who has done what he has done in strict obedience to the orders of that authority and in the full and reasonable belief that he was complying with the law. Had such facts been before Farwell J. I have not the slightest doubt that he would not have said that the Attorney-General was justified in pressing for a mandatory injunction. I particularly rely upon that passage of the learned Judge's judgment, quoted above, in which he insists upon the discretion of the Court, even where the Advocate-General may be right technically in law, to grant or refuse so very penal a relief.

27. The case of *Attorney-General v. Shrewsbury Bridge Company* (1881) 21 Ch. D. 752 was a suit by the Attorney-General at the relation of two share-holders to restrain the defendant company from doing illegal acts, which in their nature tended to the injury of the public such as interference with public high-ways or navigable streams. It was held that the Attorney-General could maintain the action without any evidence of actual injury to the public. The question mainly in

issue there was, as appears from the opening passage of Fry J.'s judgment, whether the Attorney-General had a right under the circumstances to intervene without showing substantial injury to the public. That is a point with which I am not very much concerned at present, though it approaches very closely cases which I have classified as merely constructive nuisances or nuisances in law. In the course of his judgment, Fry J. quoted the observations of Lord Romilly M. R. in *Attorney-General v. Oxford, Worcester and Wolver-hampton Railway Company* (1853) 2 W.R. 330-31 where that learned Judge said u It was properly said on the other side that in all such cases the Court required that the nuisance should be proved. But he was also of opinion that the Attorney-General as *parens patrie* might apply to the Court to restrain the execution of an illegal act of a public nature, provided it was established that the act was an illegal-act-and it affected the public generally." He continues; ""Again, in *Attorney-General v. Cockermouth Local Board* (1874) L.R. 18 the bill, because he came to the conclusion that there was no evidence of any nuisance resulting to the plaintiffs from the defendants" acts. Nevertheless, at the instance of the Attorney-General, he granted an injunction to restrain the defendants from polluting the water of the river, because that was expressly prohibited by Act of Parliament." And Fry J. goes on: " There, as in the present case, there was no evidence of any actual injury, but there was evidence that the defendants were doing certain illegal acts which tended in their nature to injure the public, and, accordingly, the injunction was granted with costs. In the more recent case of *Attorney-General v. Great Eastern Railway Company* (1879) 11 Ch. 502 the learned Lord Justices appear to have differed somewhat in their opinions. If they had expressed any decided view affecting the present case, I need not say that I should have followed it. But, having regard to that difference of opinion, it appears to me that the case furnishes no distinct guide to me. But, when I examine the judgment of Lord Justice James, who was the most adverse to the rights of the Attorney-General, I think that, even according to his view, the present action could be maintained, for, commenting on *Attorney-General v. Cockermouth Local Board* he said: " The board were doing works which would or might probably poison a running stream, in direct violation of the law which prohibited them from committing a nuisance." Just as there the acts which were restrained without proof of injury were acts which in their nature tended to injure the public, so, in the present case, the acts which the Attorney-General sought to restrain were in their nature such as tended to injure the public. It will be observed that although proof of injury to the public were dispensed with in this and in all cognate cases, the acts complained of were in their nature such as must tend independently of any particular statute to injure the public.

28. These cases, then, properly fall within the first class I have mentioned. That is to say, the act complained of is of such a kind that irrespective of statute it would be a public nuisance.

29. In *Attorney-General v. Ely, Haddenham and Sutton Railway Company* (1869) L.R. 4 Lord Hatherly said: " The question is, whether what has been done has

been done in accordance with the law: if not, the Attorney-General strictly represents the whole of the public in saying that the law should be observed." That is a case of the second class where the ground of the Attorney-General's interference is not apparently referable to the existence of a public nuisance in fact but to the rights of the public generally in seeing that the law is obeyed. But I apprehend that, in the latter class of cases, the furthest the Court would go would be to grant an injunction restraining the offending body from continuing to break the law and that is a very different thing from what I am now asked to do and the reason of the Court's action is also very different.

30. From a study of these and other cases, I deduce the conclusion that no mandatory injunction against a private individual, for what is, what I have called, a mere nuisance in law, would ever be asked for in England, much less granted, except where it had been created and persisted in in defiance of local authority and that local authority had not sufficient power to enforce compliance with the law. Now under the Municipal Act not only are penalties provided but the local executive is fully empowered to deal with all illegal acts done in contravention of the provisions of the law and in defiance of its authority. It will be observed that in all the cases I have examined, mandatory injunctions were granted in two cases only, the Attorney-General v. Barker and Attorney-General v. Wimbledon House Estate Company Limited. In the latter case because the legal authority, corresponding with the Municipal Commissioner in this case, had forbidden the act to be done and, when the act was done, had no power to abate the nuisance. That can never be the case under the Bombay City Municipal Act. If buildings exceeding in height the prescribed limit were erected in defiance of the Commissioner's orders, he has complete powers to pull them down and there can be no doubt that he would, where occasion required, exercise those powers. Where, however, believing that he is carrying out the intention of the legislature, he grants permission and it is found, as it quite possibly might be found in this case, that the permission was ultra vires, it would surely be the height of injustice to require persons who have erected stately and costly buildings under that permission to pull them down. If it is said that that in fact was what was done in Attorney-General v. Barker, the answer is simple. The local authorities there gave the defendant a qualified permission only. What they said amounted in effect to this : You may put up your tramway so far as we are concerned without any hindrance from us and at your own risk. But that has never been the understanding of the citizens of Bombay when they have obtained the Commissioner's written permission to erect their buildings to a _ stated height. There the permission is entirely unqualified and emanates from an authority in whom the public have, and have every reason to have, complete confidence. I am not saying, be it understood, that the Advocate-General has in any way exceeded his jurisdiction in drawing the Court's attention to what he considers to be a breach of the law; nor do I. think that in a proper case the Court would be precluded by the terms of Section 56 (k) of the Specific Relief Act from granting him a mandatory injunction. But I am as strongly of opinion that it is always for

the Court to decide what is a proper case before resorting to that extreme remedy.

31. Now, if we look to the general scheme of the Municipal Act, it becomes abundantly clear that the intention of the legislature was to confide in the Commissioner all powers of executive control. This is stated in the largest terms in Section 64. And it is only upon the supposition that the Commissioner has acted perversely or corruptly that a Court would be willing to interfere with him in the discharge of his executive functions. It would, I think, be still more-reluctant to penalize any individual citizen who had acted in strict conformity with the orders of the Commissioner. It has been said, on behalf of the defendant, that if the Advocate-General has jurisdiction in this suit, there is an end to the Commissioner's independent executive authority. For, in every case in which individuals were dissatisfied with the exercise of the Commissioner's discretion, they might move the Advocate-General, as the relators have moved him in this suit, to get acts undone which were done under the Commissioner's authority. Who, it was asked, would feel safe"? Building plans were submitted not to the Advocate-General but to the Commissioner and if they are approved by the Commissioner, if people on the strength of that approval complete their buildings, can it be right to allow the Advocate-General to intervene and obtain mandatory injunctions from the Court ordering those buildings to be demolished? I do not think that there is really very much in that Judgment. The Courts always have reposed, and always will repose, confidence in the discretion of the Advocate-General, and it is only in cases where he believes that local authorities have contravened the law that he would be at all likely to interfere. It is not really "of the exercise of the Commissioner's discretion that the Advocate General now complains. His contention is that the Commissioner had no discretion, and that is a point which, if once settled, would be settled for ever. It is likewise a point which could not be of frequent occurrence. It is not, therefore, upon any considerations of this kind that I rest my decision. I need not perhaps even advert to the strong personal interest which one of the relators has in getting the defendant's building demolished. Possibly considerations of that kind might weigh with a Judge in deciding whether or not, as a matter of discretion, he ought to grant a mandatory injunction. Strictly speaking, I think, they should be excluded from his mind. All I am concerned with is the merits of the case laid before me by the Advocate-General, and I am sure that I ought to assume that he is acting scrupulously in the discharge of what he feels to be his duty. On the other hand, I am not much influenced by the attitude later taken up by the Commissioner. There are passages in his deposition as well as in his letter of the 17th of August which suggest that his permission was obtained by misrepresentation and that, had he known the facts, he would not have granted it. His letter also appears to indicate that he shares the Advocate-General's views that in granting the permission he did, even had he done it with the full knowledge of all the facts, he would have exceeded his statutory powers. But what has that to do with the defendant ? All that the defendant knows is that he

obtained the Commissioner's permission, that he acted upon it, has completed his building, and that that permission has never been revoked. So far then as the equities attaching to the defendant go, when I consider whether I ought to order him to pull down a portion of his building, I can not see that the Commissioner's statements in evidence or his letters have any present bearing upon the question. But before I come to that I will resume in a sentence or two the result of what I have so far stated.

32. I have found that the Advocate-General in India has all the powers for the purpose of filing informations of this kind possessed by the Attorney-General in England.

33. The second of the plaintiff's propositions was that a suit of this kind could be brought by the Attorney-General in England. I have already said that in the most general language. I think it could. But having regard to the dicta of very eminent Judges and the underlying principles of their decisions, I very much doubt whether it ever would, where the offence is a creature of the statute and the statute provides a complete remedy. I believe in all such cases that the Attorney-Genera] in England would leave the local authority to deal with the constructive public nuisance.

34. Against that, plaintiff has argued that all these remedial powers conferred upon the Commissioner are entirely discretionary and that if the Commissioner refuses to exercise them, the public are helpless. How could we, said Mr. Setalvad, ask for a mandamus ? We should be met at once with the answer that this was in the Commissioner's discretion. Implied in this is, I think, the answer to the whole action. For, in so far as the acts are offences merely because they contravene the provisions of the Act, it is plain that the intention of the legislature was to leave the remedy entirely in the hands of the Commissioner. I do not think that the Act could be taken to pieces in this way. I think that it must be read as a whole and for the purposes of this case, the whole is governed by Section 64. If, however, it is the Commissioner himself who is said to be in error and that is what is implied in Mr. Setalvad's argument, then surely the action of the Advocate-General should be directed against him as has been invariably the case in England.

35. So far then I have assented to the first two of the Advocate-General's propositions.

36. His third proposition was that the same result would be arrived at u/s 91 of the Civil Procedure Code. That is to say, that whether or not, he had the same powers as the Attorney-General in England, he would still be entitled to maintain and succeed in this suit. In my opinion, as stated- in the earlier part of this judgment, that would not be so.

37. I come now to the last question, namely, whether assuming if I am wrong in holding that Section 349 A read with Section 349B empowers the Commissioner to grant his permission, assuming therefore that the permission was a nullity, as

in *Yabbicom v. King* [1899] 1 Q.B. 445, and consequently the erection of the building is illegal, assuming I am wrong in my belief that considering the Act provides complete remedies, this is not a suit that would in England ever have been brought by the Attorney-General against a private individual, I will state my reasons for holding that in any view of the facts of this case, it is not a proper case for granting a mandatory injunction.

38. First of laches on the part of the Advocate-General. The Courts in England have on more than one occasion expressed different views on the point whether laches disentitles the Attorney-General to maintain such a suit. I do not propose to go into that question but I do think that delay on the part of the plaintiff which has contributed to the defendant continuing and completing at very great cost the building which is now sought to be demolished must be a very material factor in deciding whether the Court will or will not exercise its discretionary power. It has been said that there was no laches on the part of the Advocate-General and that is perfectly true. The Advocate-General acted with the greatest promptitude in the matter. But though he is in charge of the carriage of these proceedings, though he is responsible for them, it is not so much his knowledge, it is not so much his laches, as the knowledge and laches of his relators that are important. It is in evidence that Dubash, who is the principal mover in this matter, and is the only person who has any real interest in obtaining the demolition of the defendant's building, was watching the whole of its construction from day to day with the utmost vigilance-I need only refer to the evidence of his architect Taraporewalla in support of these statements. Up to May 1909, according to that witness, the building had not exceeded, or if it had exceeded, had not much exceeded, the height prescribed by Section 3496. Section 91 of the CPC was then in force. Dubash knew perfectly well that it was the intention of the defendant to raise the whole of his building facing on Churchgate Street to the height it has now attained. It was open to him then to move the Advocate-General, as he moved him four months later. Judging by the promptitude with which the Advocate-General acted, it may be inferred with tolerable certainty that had his relators approached him in May, a further erection of the building would have been at once stopped. In j that case, assuming the Court had adopted the plaintiff's view, no hardship would have been inflicted upon the defendant by enjoining him not to raise his building to a greater height. But what is the position now ? I began by stating and may here repeat that it is only a very small fraction of that building 24 ft. in length at the most in Churchgate Street to which the Advocate-General takes exception as a public nuisance. And while I am upon that point I may as well give my decision upon the question of fact whether the building extends 104 ft. or 94 ft. down Churchgate Street. I agree here with the argument of the plaintiff. What has happened is that the defendant has cut off a corner of his building so that the point of abuttal on Churchgate Street is a very obtuse instead of a right angle. And the defendant's contention is that the measurements of the Churchgate Street face should start from the point of actual abuttal. The plaintiff contends that it should start from a

point at right angles to the face of the buildings on Hornby Road. And that is I think clearly right. Another small point, which I may forget if I do not mention it now, was taken by the defendant. Assuming he said that his construction of Section 3496 was wrong, still the terms of that section taken literally permitted the face of his building on Churchgate Street to be as high as the width of the street. Now, while the width of the street opposite his building is less than 50 ft., parts of Churchgate Street exceed 80 ft. in width and the defendant contends that if a penal section of this kind is to be applied against him, he is entitled to have it interpreted in the most liberal way possible. There is nothing in the section itself to militate against that contention. But common sense repudiates it. It certainly could not, I think, have been the intention of the legislature to allow the maximum width of a street to govern the height of the building facing upon it. A street might be a mile long and not more than 40 ft. wide for half a mile, after which it might gradually widen out to 80 ft. And it appears to me plain that what the legislature meant was that houses abutting on the street where it was only 40 ft. wide should not exceed 40 ft. in height, irrespective of the fact that half a mile further on the street was 80 ft. wide.

39. After this digression let me revert to the question what is the position now. The defendant with the written permission of the Commissioner has been allowed without interruption or threat of any suit of this kind to complete the whole of his building including the 24 ft. in dispute. Almost from the first, according to the evidence, Dubash had protested against the projected building and had warned the defendant that it was in contravention of the building by-laws. But armed with the Commissioner's permission, the defendant had every right to disregard personal and individual complaints of that kind. The most he had to fear was a suit for ancient lights. It appears in the evidence that Dubash contemplated filing such a suit and against that the defendant probably felt he had a complete defence. So that he was, as I say, allowed to complete his building without being apprized of the new and special danger which now threatened him. That building is in no sense a public nuisance in fact. So far from that being the case, it is an imposing and on the whole ornamental structure, which is a credit to the streets upon-which it faces. If for a merely technical reason that the Commissioner has blundered, I were now to grant a mandatory injunction and direct 24 ft. of the south-eastern portion of that building to be pulled down, I think that I should be inflicting a real injustice upon an innocent man out of all proportion to any public good or convenience which might be so secured. And it is upon that ground that I have no hesitation whatever in refusing to grant the injunction prayed for. If my reading of Section 3496 had been the same as the Advocate-General's, if I had thought that this was a suit in all respects proper to be brought, I should still have held my hand and contented myself with construing the sections, refusing the mandatory injunction and leaving each party to bear his own costs. That I think is the very most to which the Advocate-General is entitled in this suit.

40. Holding, however, the view I have expressed of the true construction of Section 3496 read with Section 349A and further, gravely doubting whether in

regard to all the facts of this case it is a suit which ought to have been brought at all, I must dismiss it with all costs upon the plaintiff.