[HIGH COURT OF AUSTRALIA.]

COUNCIL OF THE CITY OF BRISBANE . APPELLANTS;

AND

HIS MAJESTY'S ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (AT THE RELATION OF JAMES THOMAS ISLES, A RATEPAYER OF THE CITY OF BRISBANE) . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Oct.* 5, 6.

Griffith C.J., Barton and O'Connor JJ.

Local Authorities Act (*Queensland*) (1902, *No.* 19), *secs.* 191, 192, 209, 210, 261, 265, 371—*Duty of Council to keep separate accounts of rates from separate divisions—Duty to expend rates in division where raised—Declaration and injunction, claim of—Notice of action—Period of limitation—Demurrer.*

Sec. 371 of the *Local Authorities Act* (Queensland) (1902, No. 19), which provides (*inter alia*) that no action shall be brought against a local authority for "anything done or intended or omitted to be done" under the Act until one month after notice in writing to the local authority, and that any such action must be brought within six months of the accruing of the cause of action, has no application to a claim relating to the future, and a claim for a declaration of right or for an injunction is a claim of that nature.

The words "anything . . . intended . . . to be done" in that section mean anything done which at the time it was done was intended to be done in obedience to the Act.

A ratepayer brought an action against a local authority alleging that a duty was imposed on the authority by sec. 265 of the Act to expend the rates collected in any ward upon that ward, and that the authority had not fulfilled that duty, and claiming a declaration of his rights under that section, an injunction, and an account of the past transactions of the authority. The authority pleaded the two defences permitted by sec. 371, to which the plaintiff demurred.

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Held, that the demurrer, so far as it related to the claim for a declaration of rights and an injunction, should be allowed, but that, so far as it related to the claim for an account, it should be over-ruled.

Judgment of Supreme Court (*Attorney-General, at the relation of Isles* v. *The Council of the City of Brisbane*, (1906) St. R. Qd., 289), varied.

APPEAL from the Supreme Court of Queensland.

The City of Brisbane is divided into seven wards. The Council collected rates from these wards, and expended the funds generally upon the management and upkeep of the city. The ratepayers of the two most central and wealthiest wards, conceiving that the rates levied from them were being largely expended for the benefit of the outlying wards, formed an association, whose president was the relator in the present case. They claimed that the Council was bound by the *Local Authorities Act* (1902, No. 19), secs. 209, 210, 261, 265, to expend the general rates collected in any ward upon works in such ward, and to keep separate accounts of general rates collected and expended in each ward; and prayed for a declaration and injunction to that effect, and an account also to be taken back to 1st April 1903, when the *Local Authorities Act* 1902 came into force. The Council in their statement of defence pleaded (paragraph 10) that no notice in writing had been given of the action as required by sec. 371 of the Act, and (paragraph 11) that the action had not been commenced within six months of the time when the right of action accrued. These pleas were demurred to, and the demurrer was allowed *in toto* by the Supreme Court, on the ground that, as this was not an action against the municipality for "anything done or intended or omitted to be done under the Act," sec. 371 did not apply. (*Attorney-General, at the relation of Isles* v. *The Council of the City of Brisbane* (1).

From this decision the Council appealed to the High Court.

Lilley (with him *Shand* and *Woolcock*), for the appellants. The requirements of sec. 371 as to notice of action and limitation of time of action bind the respondent. It is conceded that a rule of procedure cannot bind the Crown in the person of the Attorney-General; nor can a Statute of Limitations. But in the present

(1) (1906) St. R. Qd., 289.

case the Attorney-General merely represents the relator, and in that capacity is bound by sec. 371. A Statute of Limitations is inapplicable only to prerogative rights; but where the Attorney-General has no independent rights, nor any rights higher than those of the relator, the Statute applies: *St. Mary Magdalen* v. *Attorney-General* (1); *Attorney-General* v. *Wilson* (2). This is substantially an action by the ratepayers of the two wards to recover their money from the other wards where it was expended, and to have it restored to the credit of the wards where it was levied. The facts are similar to *Midland Railway Co.* v. *Withington Local Board* (3), which was a case on a similar section in the English *Public Health Act* 1875 (sec. 264).

Notice of action was necessary here, because the claim is for remedy of something past. *Chapman, Morsons & Co.* v. *Guardians of the Auckland Union* (4); and *Attorney-General* v. *Hackney Local Board* (5) were suits for an injunction to prevent future dangers, and were also nuisance cases. The relator's claim for past relief and for accounts back to 1903 is not taken out of sec. 371 by the claim for a declaration of right and an injunction, and notice should therefore have been given.

The requisites of the Act as to notice apply to all forms of actions; it is only in case of injunction, where great and irreparable injury might be inflicted unless prompt intervention can be obtained, that the month's notice may be dispensed with. But the present is certainly not a case where the sudden intervention of the Court is necessary.

Even if sec. 371 does not apply to the future relief claimed, yet the Supreme Court was wrong in allowing the demurrer as to both defences. When a demurrer is allowed, the whole matter demurred to is struck out of the pleadings—Order XXIX., r. 11. The appellants are entitled to judgment as to the claim for an account of transactions more than six months old.

Lukin (with him *Stumm* and *Graham*), for the respondent. The objection that sec. 371 requires a month's notice of action and imposes a six months' limitation is only a technical objection. It

(1) 6 H.L.C., 189.
(2) 70 L.J. Ch., 234.
(3) 11 Q.B.D., 788.
(4) 23 Q.B.D., 294.
(5) L.R. 20 Eq., 626.

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is desired to have the substantial issue tried, and to have the provisions of the Act, as to expenditure and accounts, interpreted. Sec. 371 was never intended to apply to cases where an injunction or declaration is sought, nor in any cause where the jurisdiction was equitable, especially where brought by *cestuis que trustent* against their trustee. There should be no analogous treatment of sec. 371 to that applied to sec. 264 of the English *Public Health Act*, because that was passed since the *Judicature Act*. In a claim for injunction for nuisance, it was held that no notice was necessary: *Cooper* v. *Municipality of Brisbane* (1); *Bateman* v. *Poplar Board of Works* (2); *Attorney-General* v. *Hackney Local Board* (3). The legislature in enacting sec. 371 must be taken to have known the interpretation of the Courts as applied to actions in the form of injunction and declaration. There is a statutory right to have separate accounts kept, so that credit may be given for the amounts that should have been expended in each of the wards, and so that a ward may not be wrongfully charged with overdrafts. The words in sec. 371, "unless the notice is proved, the jury shall find for the defendant," and "tender amends," are clearly inapplicable to this class of action. *In Flower* v. *Local Board of Low Leighton* (4) the similar section (264) was held inapplicable to a suit for injunction and subsidiary relief. *See* also *Sellors* v. *Matlock Bath Local Board* (5); *Bateman* v. *Poplar Board of Works* (6). There is nothing as to the future in sec. 371; "intended to be done" does not refer to future aims, but to something that has been done in supposed pursuance of powers given by the Act: *Chapman, Morsons & Co.* v. *Guardians of the Auckland Union* (7).

If the wards of the respondent ratepayers are in credit on a proper system of accounts, they are entitled to a remission of rates leviable on them: sec. 210 (5).

[GRIFFITH C.J.—Can a Court entertain a suit for an account except as incidental to a pecuniary obligation to which it can give effect?]

There is a statutory right to be credited with the balance of

(1) 10 Q.L.J., 120, at p. 126.
(2) 33 Ch. D., 360.
(3) L.R. 20 Eq., 626.
(4) 5 Ch. D., 347, at p. 352.
(5) 14 Q.B.D., 928, at p. 934.
(6) 33 Ch. D., 360, at p. 368, *per North* J.
(7) 23 Q.B.D., 294, at p. 303.

rates paid and not expended in the wards. This is essential to the right of separated accounts which the Act gives.

Sec. 371, as a Statute of Limitations, does not apply to the relationship of trustee and *cestui que trust* between Council and ratepayers: *Bradford* v. *Municipality of Brisbane* (1); *Attorney-General* v. *Brecon Corporation* (2); *Leith Council* v. *Leith Harbour and Docks Commissioners* (3).

The Full Court in allowing the demurrer expressly said that the Judge at the hearing would leave out of consideration anything in the accounts covered by the six months limitation; but the appellants had the judgment now under appeal drawn up in this particular way, for which the respondent is not answerable.

Lilley, in reply. All the cases cited as to injunction are cases of nuisance where immediate injury was to be feared. Sec. 371 obviously could not apply there, because the injury would be complete before the month was over; and the section refers only to something "done or intended or omitted to be done." But there were no cases where notice was held unnecessary where damages and injunction were claimed together. The "jury" in sec. 371 could be omitted where juries were not used; in fact, "jury" there could only mean "the tribunal." Similarly, "tender amends" should be read distributively, and left out in cases where it would not apply. Notice of action was necessary, and the action also is too late: *Midland Railway Co.* v. *Withington Local Board* (4); *Waterhouse* v. *Keen* (5); *Selmes* v. *Judge* (6); *Cree* v. *St. Pancras Vestry* (7).

GRIFFITH C.J. This is an action by the Attorney-General on the relation of a ratepayer of the City of Brisbane against the Municipal Council claiming a declaration of rights under the *Local Authorities Act* 1902, an injunction to restrain the defendants from committing in future what are alleged to be mistakes that they have made, and an account of their transactions in the past. Such an account can only be claimed as ancillary to

(1) 11 Q.L.J., 44.
(2) 10 Ch. D., 204.
(3) (1899) A.C., 508.
(4) 11 Q.B.D., 788, at pp. 794-5.
(5) 4 B. & C., 200.
(6) L.R. 6 Q.B., 724.
(7) (1899) 1 Q.B., 693.

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some substantial relief which the Court has jurisdiction to give. The foundation of the action is this: By the Act it is provided in sec. 265: "When an Area is divided the Local Authority shall in all cases keep a separate and distinct account of all moneys received in respect of General Rates levied upon the rateable land in the several divisions, and of any moneys received by the Local Authority by way of endowment upon such rates respectively, so that the moneys so received shall be credited to the same accounts as the rates in respect of which they were respectively received.

"And save as hereinafter provided all moneys expended upon works within the limits of a division shall be debited to the account of that division;" &c.

The municipality of Brisbane is divided into wards, or divisions as they are called in the Act. The plaintiff's contention shortly is this, that each ward is to be regarded as a financial unit, that the general rates levied on the property within that ward, and any contributions received from the Government in respect of those rates are to be treated as a separate fund, distinct from the funds raised in a similar manner in respect of other divisions; and that in like manner the expenditure of each ward is to be debited to that ward, so that one ward may be in credit, and may have more money than is required to carry out municipal works within it, while another may be unable to provide enough money for carrying on its works. In one sense the case may be regarded as analogous to a partnership action, that is, as an action between partners in which the plaintiff complains that the distribution of the profits of the partnership has not been made according to the partnership deed, and asks for an account, and that he may get what he ought to have received if a proper distribution had been made. That is substantially the case made. Whether an action will lie for that purpose having regard to the provisions of the Act relating to the auditing of accounts, or whether it is not a matter to be finally determined by the Local Authority itself, in other words, whether, assuming the plaintiff's contention to be well-founded, an action will lie, so that the Court can control and investigate the matter, are questions which arise upon the face of the statement of claim. That point has not

been argued before us, but for the purpose of to-day, I assume that the Supreme Court can declare the proper construction of the Act in a suit framed as this one is, and can control the defendants in the performance of their duties with respect to expending the moneys received in each of the different wards. The defendants have pleaded, among other things, that no notice of this action was given to them, and that the action was not commenced within six months of the accruing of the cause of action. Those defences are both founded upon sec. 371, which provides, so far as is material in the present case, that an action shall not be brought "against a Local Authority, or any member thereof, or any officer of a Local Authority, or person acting in his aid, for anything done or intended or omitted to be done under this Act, until the expiration of one month after notice in writing has been served on such Local Authority, member, officer or person, clearly stating the cause of action, and the name and place of abode of the intended plaintiff, and of his solicitor or agent.

"On the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served.

"Unless such notice is proved, the jury shall find for the defendant.

"Except in the case of a registered proprietor of or other person having any estate or interest in land who claims to have been wrongfully deprived of such land or such estate or interest by reason of the sale of such land in pursuance of the provisions of Subdivision VI. of Part XII. of this Act, every such action shall be commenced within six months next after the accruing of the cause of action, and not afterwards, and shall be tried in the circuit, district, or place where the cause of action occurred, and not elsewhere.

"Any person to whom any such notice of action is given may tender amends to the plaintiff, his solicitor, or agent at any time within one month after service of the notice, and, in case the same is not accepted, may plead such tender."

The learned Judges were of opinion that that section had no application to an action of this kind. Now, the claim in this action is partly in respect of the past, that is, as to mistakes

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alleged to have been made by the defendants in improperly appropriating the moneys that they have received in the different wards, and partly it is a claim in respect of the future. With respect to the account it cannot be said that what is complained of is not something that has been done under the Act. What is alleged is that the moneys that the defendants have received, and which they were bound by law to expend in one part of the municipality, have been expended in another. That is a complaint of something done. The complaint that money has been received in one ward and has not been credited to that ward or expended in it is a complaint of something omitted to be done. There can be no doubt whatever that, whatever was done or omitted to be done, it was done or omitted to be done with the intention of obeying the law within the meaning of sec. 371. The word "intended," as pointed out by *Bowen* L.J. in a case which I will directly mention, clearly relates to the state of mind of a party when he does an act or omits to do an act, and not to the intention to do something in the future. But, so far as the claim for a declaration of right and an injunction are concerned, the action relates to the future, and it, therefore, does not fall within the grammatical language of sec. 371, because that section, as I have pointed out, refers to the past, to something that has been done or omitted to be done before the action was brought, or intended to be done in the sense of referring to an act done with the intention of complying with the Act. So that, so far as relates to the future, the section apparently has no application, and that is, I think, concluded by authority. I refer to the case of *Chapman, Morsons & Co.* v. *Guardians of the Auckland Union* (1). That was an action for an injunction against a local authority which was protected by Statute in precisely similar language to the section now under consideration. The action was for an injunction to restrain a nuisance. The learned Judge at the trial thought the nuisance was proved, but that there was no case for granting an injunction, and he awarded damages. Objection was taken that no notice of action was given, and that the action had not been brought within six months. It was held by the Court on the authority of a previous case, that this section

(1) 23 Q.B.D., 294.

has no application to an action for an injunction to restrain a future nuisance. As to the damages, it was pointed out in the course of the judgment that the damages given were not damages for a past wrong, but were damages in lieu of the prospective injunction. Lord *Esher* M.R. said (1):—"I take it that the view expressed by *Fry*, L.J. in *Fritz* v. *Hobson* (2) (on *Lord Cairns' Act* under which these damages were awarded) is correct, viz., that the Act gave the Court of Chancery power not only to give damages in respect of the past injury, but to give them alternatively instead of an injunction, and therefore in respect of damage which was prospective when the writ issued."

It was pointed out by *Bowen* L.J. still more clearly in his judgment that in a case of this kind the Judge should see whether it is a *bonâ fide* claim for an injunction to obtain future protection. He said (3):—"As to the claim for future protection I think a Judge would have to consider whether the action is really brought for the purpose of obtaining an injunction, and, if so, he has further to consider whether the plaintiff can be adequately protected without an injunction. He must look for one purpose to the state of things at the time when he is giving judgment, for the other to the moment of time when the action was brought. He must look to the existing state of things to see whether protection by injunction is then needed, and if not he will not grant an injunction; but he must also look to the initial stage of the action to see whether, when it was brought, a *bonâ fide* claim for an injunction existed. If he comes to the conclusion that, though there was a *bonâ fide* claim for an injunction at the time when the action was brought, an injunction is not necessary and that damages are an adequate relief in substitution for an injunction, he may give such damages. The question which the Judge must consider in order to determine whether notice of action is necessary is whether the real object of the action is protection for the future, or merely damages for the past.

"The learned Judge in the present case seems in effect to have disposed of the case upon the principles which I have mentioned.

(1) 23 Q.B.D., 294, at p. 298. (2) 14 Ch. D., 542.
(3) 23 Q.B.D., 294, at pp. 303-4.

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He appears to me to have declined to grant an injunction because he thought that, under the circumstances, the plaintiffs would be adequately protected in the future without one; and he has not felt himself prevented from giving the damages he has given, by reason of there having been no notice of action. Why? Because the damages so given by him were given in substitution for an injunction, and to afford complete relief in respect of a part of the action, the object of which was not the recovery of damages for the past but protection for the future."

I am of opinion, therefore, both on the authority of that case, and on the verbal construction of the section, that it has no application to a claim only relating to the future, and, in my opinion, a claim for a declaration of right and a claim for an injunction are of that nature. So far, therefore, I think that the demurrer was well founded.

But with respect to the claim in respect of past acts and omissions other considerations arise. This branch of the case, I think, is also concluded by authority—authority antecedent to the passing of the Act—so that the legislature must be taken to have been aware that they were adopting language which had been the subject of judicial interpretation.

It is only necessary to refer very briefly to the provisions of the Act with respect to accounts. The Act contains very elaborate provisions on that subject. Secs. 251, 252 and 253 make provision for the selection of competent auditors. By sec. 252 the Minister is empowered to appoint a properly qualified person as auditor for each municipal area, who is to receive out of the local funds such remuneration as the Minister may fix. Sec. 255 requires him annually to examine the accounts, and directions are given as to the mode of examination and the information he is to receive, and he is to give a certificate. Any person interested in the accounts, either as a creditor or a ratepayer, may be present at the audit and make any objection, in writing, to any part of them. By sec. 256 it is provided:—"(1) The accounts so balanced and audited as aforesaid, and either allowed or disallowed by the auditor, together with any written objections made by creditors or ratepayers, shall be produced at the first ordinary meeting of the Local Authority after such audit or at some adjournment

thereof, at which meeting any person who has made any such objection may be heard in support thereof.

"(2) The accounts shall then be finally examined and settled by the Local Authority, and if the same are found just and true they shall be allowed, and certified accordingly under the hand of the chairman of such meeting.

"(3) After such accounts have been so allowed and signed by such chairman, and also by the auditor, as hereinbefore provided, the same shall be final as against all persons whomsoever."

As to what will be the effect of those sections upon the plaintiff's alleged cause of action it is not necessary to express an opinion. I only allude to the point now, because the claim to re-open accounts for past years is, as I have already pointed out, a claim in respect of something that has been done, or omitted to be done in the past. The case that I referred to as concluding this point is *Midland Railway Co.* v. *Withington Local Board* (1). The learned Chief Justice in this case referred specially to the provision that the defendant may tender amends, and thought that, since the jury is required under certain circumstances to find for the defendant, the section could not have been intended to apply to an action of this kind. In that case *Brett* M.R. said (2):—"I incline to think that the draftsman of this section had his mind directed to actions of tort; it rather applies to actions sounding in damages; but the question is what is the meaning of the whole section? I am prepared to say that it applies to everything intended to be done or omitted to be done under the powers of the Act." And, again (3):—"It is suggested that the use of the term 'tender of amends' in sec. 264, is decisive in favour of the argument for the plaintiffs: no doubt it is a matter worthy of observation. But I do not think that this expression is sufficient to outweigh other considerations." *Fry* L.J. expressed his approval of the construction adopted by the Master of the Rolls, and said (4):—"It is said that previous decisions do not apply, because here no physical power has been put in force, such as distress or the like, and that only actions of tort are within the section. I think that a vicious argument, and

(1) 11 Q.B.D., 788.
(2) 11 Q.B.D., 788, at p. 794.
(3) 11 Q.B.D., 788, at p. 795.
(4) 11 Q.B.D., 788, at p. 796.

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I cannot follow it." In my opinion that case is conclusive on the construction of the section. The learned Judges of the Supreme Court did not advert to the case in their judgment, but I think we are bound by it. I think that sec. 371 applies to every action brought in respect of something done or omitted to be done, and which, when done or omitted to be done, was intended to be done or omitted in a belief that the party was acting under the provisions of the Act. In the case of *Chapman, Morsons & Co.* v. *Guardians of the Auckland Union, Bowen* L.J. interpreted the word "intended" as meaning "not a thing intended to be done in the future, but which, at the time of doing it, is supposed to be done under the provisions of the Act" (1). I think, therefore, that so far as this is an action for re-opening past transactions, it is an action that comes within the express provisions of sec. 371.

The formal order should be: Order appealed from varied as follows: demurrer to 10th paragraph of the defence allowed, so far as the paragraph is pleaded to a claim for a declaration of right and an injunction, and over-ruled so far as it is pleaded to a claim for an account; demurrer to the 11th paragraph allowed so far as it is pleaded to a claim for a declaration of right and an injunction and claim for an account of matters arising within six months before the commencement of the action, and over-ruled as to the residue of the claim; each party to bear his own costs.

BARTON J. I quite agree upon the construction of the Act, and upon the authorities, and I do not think I can make the matter clearer by anything I can add.

O'CONNOR J. I am entirely of the same opinion.

Judgment varied accordingly.

Solicitors, for the appellants, *MacPherson, Macdonald-Paterson & Co.*

Solicitors, for the respondent, *Atthow & MacGregor.*

N. G. P.

(1) 23 Q.B.D., 294, at p. 303.