that section 10A was enacted, and it would be idle to suggest that the evils which this Court pointed out could have been in any way met by a section which is not retrospective in its operation. With all respect to the learned pleader who has raised this point, it is not, in my opinion, arguable.

Appeal dismissed.

R. R.

CRIMINAL APPELLATE.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

THE MUNICIPAL CORPORATION OF BOMBAY, APPELLANT *v.* L. R. MALLANDAINE, RESPONDENT*.

1923.

October 12.

The Municipal Corporation of the City of Bombay (Bombay Act III of 1888), section 515†—Abatement of nuisance—Erection of stables with permission of

*Criminal Appeal No. 385 of 1923.

†The section runs as follows:—

"515 (1) Any person who resides in the City may complain to a Presidency Magistrate of the existence of any nuisance, or that, in the exercise of any power conferred by section 224, 244, 245, 246 or 367, more than the least practicable nuisance has been created.

(2) Upon receipt of any such complaint, the Magistrate, after making such inquiry as he thinks necessary, may, if he sees fit, direct the Commissioner—

(*a*) to put in force any of the provisions of this Act or to take such measures as to such Magistrate shall seem practicable and reasonable for preventing, abating, diminishing or remedying such nuisance;

(*b*) to pay to the complainant such reasonable costs of, and relating to, the said complaint and order as the said Magistrate shall determine, inclusive of compensation for the complainant's loss of time in prosecuting such complaint.

(3) It shall be incumbent on the Commissioner to obey every such order.

(4) Nothing in this Act contained shall interfere with the right of any person who may suffer injury or whose property may be injuriously affected by any act done in the exercise of any power conferred by section 224, 244, 245, 246, or 367 to recover damages for the same.

1923.

MUNICIPAL CORPORATION OF BOMBAY v. MALLANDAINE.

Municipal Commissioner—Stables near dwelling house—Application by residents in the house for abatement of nuisance—Magistrate—Power of Magistrate to issue directions to Municipal Commissioner.

The scheme of section 515 of the City of Bombay Municipal Act, 1888, is to give the right to any person to make a complaint where there is any nuisance or where in the exercise of any of the powers conferred by the respective sections, more than the least practicable nuisance has been created. The extent of the power of the Court is indicated in sub-section 2. The whole of clause (*a*) of sub-section 2 applies to the case of nuisance, as well as to the case where in the exercise of powers under certain sections of the Act more than the least practicable nuisance is created.

Under the section the Magistrate has jurisdiction to direct the Municipal Commissioner not to issue a licence under section 394 of the Act.

The person who is alleged to have caused the nuisance complained of should ordinarily be made a party to the proceeding under section 515, as well as to an appeal from the Magistrate's order.

THIS was an appeal from an order passed by Chunilal H. Setalvad, Acting Chief Presidency Magistrate of Bombay, under section 515 of the City of Bombay Municipal Act, 1888.

The applicant, Mallandaine, lived in a bungalow in Mazagaon, belonging to one Ali Mahomed, as a paying guest of the latter's tenant, Webster. The locality in question was inhabited by Europeans and Anglo-Indians. Ali Mahomed himself lived there.

In July 1922 Ali Mahomed, acquired on a long lease the open land round the bungalow, and, thereafter, with the permission of the Municipal Commissioner began to erect stables for the accommodation of 400 horses and 200 hack conveyances. The stables in question surrounded the bungalow on its three sides, and were at a distance of only 24 feet.

When the residents of the locality came to know of Ali Mahomed's intention to build stables on the open land, they protested against the construction. Their protests were renewed from time to time; but the erection of the stables continued uninterrupted. In February 1922, although the necessary licence had not yet

been obtained, the stables were in fact occupied. In December 1922, the owner had complied with all the requisitions laid down by the Municipal Commissioner, and the latter was ready and willing to grant licence for the stables.

Meanwhile, the applicant Mallandaine applied to the acting Chief Presidency Magistrate of Bombay to abate the nuisance under section 515 of the City of Bombay Municipal Act, 1888.

The applicant examined a large number of witnesses, inclusive of two doctors, who testified that the stables were a nuisance. The Municipality relied mainly on the testimony of the Health Officer who deposed that the stables were not a nuisance.

The trying Magistrate came to the conclusion that the stables were a nuisance and passed the following order:—

"I direct the Municipal Commissioner—(1) That he should not grant any license to any owner or occupier of these stables, to keep or allow to be kept in or upon the premises, horses, cattle or other four footed animals (i) for sale, (ii) for letting out for hire, (iii) for any purpose for which any charge is made or any remuneration is received, (iv) for sale of any produce thereof (see section 394 of the Bombay Municipal Act).

(2) To take action and to act under all the provisions of the Municipal Act that may enable him to prevent the occupation or the continuance of the occupation of the stables for the purposes in (1) above after a period of four weeks."

The Municipality appealed to the High Court.

Coltman, with him *Kanga*, Advocate General, and *Campbell*, for the Municipality:—Section 515 of the City of Bombay Municipal Act deals with two things: (1) abatement of nuisance which can be dealt with by the Municipal Commissioner under the powers given to him by the Act; and (2) nuisances which arise from the power exercised by the Commissioner under any of the sections, that is, which are under his entire control.

1923.

MUNICIPAL CORPORATION OF BOMBAY v. MALLANDAINE.

The section is aimed at an ascertained and existing nuisance. The first part of sub-section 1 is a corrollary to the first part of sub-section 2 (*a*).

The Magistrate can interfere under the section only when there is a breach on the part of the Municipal Commissioner to put into force any of the provisions of the Act. Even then the Commissioner can only be asked to do any act which the Act compels him to do. The second part of the section enables the Magistrate to step into the shoes of the Municipal Commissioner and to direct him to carry out the provisions of the Act: but it does not enable the Magistrate to ask the Commissioner to do things outside the provisions of the Act. In other words, the section does not empower the Magistrate to substitute his discretion for that of the Municipal Commissioner. The section does not profess to be an exhaustive remedy for nuisance. [*Campbell* addressed the Court on facts.]

G. N. Thakor, who appeared with *R. J. Thakor*, for the complainant, was not called on on the law point, but was heard on facts.

C. A. V.

SHAH, AG. C. J. :—[His Lordship, after referring to certain preliminary matters, proceeded :] As this appears to be the first case of its kind, we may point out that the person, who is said to have caused the nuisance, should be made a party to the proceedings, both in the inquiry which may be made by the Magistrate under section 515 of the Act, and on the appeal in this Court. As I have already pointed out, in the present case the formal absence of the owner from the record is not material. But ordinarily he should be treated as a necessary party to such proceedings. As regards the Crown I do not wish to be understood as holding that the Government Pleader is entitled to be heard in a

case of this kind. It may be a point to be dealt with when the rules contemplated by sub-section (2) come to be framed, as I think they should be framed.

Coming now to the merits of the case, I shall deal first with the points of law which have been raised on behalf of the appellant. So far as I have been able to follow the arguments of Mr. Coltman, the objection is that the order made by the Magistrate directing the Municipal Commissioner not to issue a licence under section 394 of the Bombay Municipal Act is outside the scope of the authority of the Magistrate under section 515. It is urged that it is not likely that the Legislature could have intended to confer such extensive powers upon the Court under section 515 of the Act, as would enable it to regulate the discretion of the Municipal Commissioner under the Act.

This section enables any person who resides in the City to complain to a Presidency Magistrate of the existence of any nuisance, or that in the exercise of any power conferred by section 224, 244, 245, 246 or 367, more than the least practicable nuisance has been created. Sub-section (2) provides that upon receipt of any such complaint, the Magistrate, after making such inquiry as he thinks necessary, may, if he sees fit, direct the Commissioner to put in force any of the provisions of this Act or to take such measures as to such Magistrate shall seem practicable and reasonable for preventing, abating, diminishing or remedying such nuisance.

It is not suggested in the present case that the order, so far as it falls under clause (*b*) of sub-section (2) of section 515, is not within the scope of the authority of the Magistrate.

Purely as a matter of construction there is nothing in the terms of the section to justify the contention

1923.

MUNICIPAL CORPORATION OF BOMBAY v. MALLANDAINE.

that the second part of clause (*a*) of sub-section (2), which relates to the direction to the Municipal Commissioner to take such measures as to such Magistrate shall seem practicable and reasonable, applies only to the exercise of the powers under any one of the sections mentioned in sub-section (1).

The scheme of the section clearly is to give the right to any person to make a complaint where there is any nuisance, or where the exercise of any of the powers conferred by the respective sections, more than the least practicable nuisance has been created. The extent of the power of the Court is indicated in sub-section (2), and in my opinion, the whole of clause (*a*) of sub-section (2) applies to the case of nuisance, as well as to the case where in the exercise of powers under certain sections of the Act more than the least practicable nuisance is created.

In the present case, we are not concerned with the second part of sub-section (1) of section 515, but we are concerned only with the case of a nuisance, and in such a case it is clear to my mind that after making such inquiry as the Magistrate thinks necessary, he may, if he seems fit, direct the Commissioner to put in force any of the provisions of the Act or to take such measures as may seem practicable and reasonable to the Magistrate for preventing, abating, diminishing or remedying any such nuisance. Looked at from that point of view, apart from the question of the propriety of the order, it is clear to my mind that the order made by the Magistrate is within the scope of his authority under section 515.

As regards the argument that the Legislature could not have contemplated that a Court should control and regulate the discretion of the Municipal Commissioner as to matters, about which the Municipal Commissioner would possess special knowledge, I am quite unable to

accept it. This section appears to me to have been enacted for the protection of persons residing in the City ; and it provides a remedy which is open to any resident of the City. It provides that the measures for preventing, abating, diminishing or remedying the nuisance may be taken, by directing the Municipal Commissioner to do certain things, and the extent of the power of the Court is to be found in the words of clause (*a*) of sub-section (2), namely, that the Magistrate may direct him to put in force any of the provisions of the Act or to take such measures as shall seem practicable and reasonable to the Magistrate for preventing, abating, diminishing or remedying the nuisance. That provision undoubtedly implies some limitation upon the powers of the Commissioner and some control over his acts where a proper case for giving directions to him in connection with a nuisance is made out. It is not for us to consider whether the Legislature should have conferred such powers upon the Court or not. It may be that the absence of proceedings under this section has tended to create an impression as to the meaning and scope of this section which is not accurate. I am quite satisfied that there is no substance in the argument urged by Mr. Coltman on behalf of the Municipal Commissioner as to the construction of the section. The section is fairly clear. It provides a special and expeditious remedy for the protection of the residents of the City. The exercise of the powers conferred upon the Magistrate is purely a matter of discretion ; and the powers are confined to the giving of directions to the Municipal Commissioner to put in force any of the provisions of the Act or to take such measures as shall seem practicable and reasonable to the Magistrate for preventing, abating, diminishing or remedying the nuisance referred to in sub-section (1). I am not speaking of the powers under

1923.

MUNICIPAL CORPORATION OF BOMBAY v. MALLAIN-BAINE.

clause (*b*) of sub-section (2) as to which no point is raised in appeal.

[His Lordship then considered the evidence and continued:] I am, therefore, not prepared to treat this nuisance merely as a technical nuisance; but I consider it to be a nuisance which cannot reasonably be tolerated, if the protection which section 515 of the Act is enacted to extend to the residents in the City is not to be illusory." I hold that it is a nuisance with reference to the residents of the house in relation to the particular circumstances of the case. I do not say generally that any stables properly licensed, and kept according to the terms of the licence, would necessarily be a nuisance. My finding has relation to the particular facts of the case including the situation of the stables and the extent to which the stabling accommodation is allowed on this land....

It is open to the Court to consider whether the existence of these stables, having regard to all the facts, is or may be dangerous to life or injurious to health, even apart from the question of malaria.

As regards the order to be made under the section, the question is more difficult. It must be remembered in connection with this point that ever since it came to be known to the residents in the locality that stables were likely to be put up by the owner of this land, protests were sent to the Municipal Commissioner with a view to impress upon him the desirability of not licensing the stables. It is not necessary to detail the history of the different protests from time to time; but it may be mentioned that objections were raised so far back as June 1921. The owner commenced his work somewhere in 1921, and in August 1921 he entered into a contract for the purpose of letting out the stables. It appears that the Sanitary Committee of the Municipality

favoured the view of those who were protesting against the putting up of these stables, and that Committee came to the conclusion in September 1922 that these stables should not be licensed. But the Municipality did not support the view of the Sanitary Committee, and decided, on November 9, 1922, not to take any action on the report of the Sanitary Committee. The residents then gave up all hope of relief from the Municipal authorities; and on November 24 the present complaint was made by Mr. Mallandaine.

I may here refer to the consideration which has been adverted to more than once in the argument that after all the complainant is not a tenant, but he lives as a paying guest with Webster who is a tenant in the house. Webster is an employee of the Municipality and is under the Municipal Commissioner. I do not think there is any justice in the observation made by the learned counsel for the appellant that he has not been examined as a witness. Under the circumstances of this case it appears to be quite natural that he would not like to be a witness. But whether the complainant is a paying guest or a tenant is not material. He resides in the house, and that is sufficient for the purposes of enabling him to complain of the nuisance.

As regards the owner, from the beginning he had knowledge of the fact that the residents in this house, which belongs to him, were opposed to the putting up of these stables. Before all the requirements of the Municipality could be satisfied, he allowed these stables to be occupied as stables in February 1922. This was quite contrary to the provisions of section 394, sub-section (1) (*c*), of the Act. It is common ground that from March 1922 up to December 1922, the occupation of the stables was unauthorised, and, from the point of view of the Municipal requirements as well as the requirements of the health of the residents in the

1923.

MUNICIPAL CORPORATION OF BOMBAY v. MALLAN-DAINE.

locality, improper. It is common ground, however, that, on December 5, 1922, all the conditions laid down in the license were satisfied. The Municipal Commissioner was then prepared to grant a license in pursuance of his previous assurance to the owner, and but for the pendency of these proceedings in the Magistrate's Court he would have done so.

The case has been considered in the trial Court on the footing that if these premises were properly licensed for stabling purposes, whether the stables would not amount to a nuisance. In the appeal before us, we are asked to consider the case on that footing, and we have considered the evidence on the basis whether the use of the premises for stabling purposes, if a proper license according to the rules applicable to the licenses for stables under section 394 is granted, would constitute a nuisance within the meaning of the Act. These are the circumstances under which we have to consider now whether the directions given by the trial Court are practicable and reasonable for abating or remedying the nuisance, and, if not, what directions we should give with a view to abate, diminish or remedy this nuisance.

It has to be considered also that the owner has incurred very heavy expenses in putting up these stables. He is also the owner of the house in which the applicant lives. It may be said fairly on his behalf that when the matter has gone so far, measures less drastic than those allowed by the lower Court would be sufficient to meet the justice of the case. On the other hand, it has to be remembered that he acted throughout with his eyes open, and though he may have felt assured in his mind on account of the support which he had of the Municipal Commissioner, so far as the license was concerned, he was not absolved from the obligation to

see that no nuisance was caused by him to any residents in the locality. It has also to be remembered that while under the Rent Act he may not be able to eject his present tenants, this nuisance itself, if allowed to remain, may be an effective means of enabling him to get possession.

I have referred to these several considerations as bearing more or less on this question. It entirely depends upon the discretion of the Court to be exercised with regard to all the circumstances of the case.

Some stress has been laid on the consideration that if the discretion of the Municipal Commissioner were interfered with in this manner, it would be impossible for him to satisfy the needs of the City as regards the accommodation for hack victorias. In the first place I am unable to hold on this record that that would be necessarily the result of the order that the learned Magistrate has made in this particular case. We are not directly concerned with general questions of policy as regards the stabling accommodation. I concede in favour of the appellant that it may be an element to be considered by the Court in exercising its discretion under section 515. But such general considerations cannot be allowed to override the main purpose of the section in dealing with a particular nuisance.

From the arguments it has become quite clear that no middle course is reasonably possible under the circumstances of this case. Neither party suggested it although invited by the Court to do so. I am satisfied that this nuisance cannot justly be allowed to continue. In view of the fact that no license has yet been granted, the terms of the order made by the lower Court are proper. If the license had been granted the order could have been differently worded so as to secure the same result. As it is, I would affirm the order made by the lower Court subject to the alteration that I would give two

1923.

MUNICIPAL CORPORATION OF BOMBAY v. MALLAN-BAINE.

months from this date instead of four weeks mentioned in the order.

The appellant to pay Rs. 500 (five hundred) by way of costs to the respondent.

We have fixed the amount of costs in this particular case after hearing the parties without attempting to lay down any general rule as to the scale of costs awardable under section 4 of Act XII of 1888.

CRUMP, J.:—The short facts of this matter are as follows:—

[His Lordship briefly summarised the facts and continued:] The Legislature has enacted section 515 of the Act. The words used are in no way ambiguous or difficult to construe. "The first and most elementary rule of construction is, that it is to be assumed...that the phrases and sentences are to be construed according to the rules of grammar. From this presumption it is not allowable to depart, where the language admits of no other meaning...If there is nothing to modify, nothing to alter, nothing to qualify, the language which the Statute contains, it must be construed in the ordinary and natural meaning of the words and sentences." (Maxwell on Interpretation of Statutes, 5th edition, p. 2.)

I have read and re-read section 515 and I find no difficulty in understanding it. For the purposes of the present case what is enacted is as follows:—

(1) Any person who resides in the City may complain to a Presidency Magistrate of any nuisance.

(2) Upon receipt of such complaint the Magistrate, after making such inquiry as he thinks fit, may direct the Commissioner to put in force any of the provisions of this Act or to take such measures as to such Magistrate may seem practicable and reasonable for preventing, abating, diminishing or remedying such nuisance. Those are the plain provisions of the section.

As to nuisance the definition in section 3 (2) of the Act makes no distinction between "public" and "private" nuisances. I see no ground of policy which would justify a Court in holding that any such distinction was intended. I have referred to similar Legislation elsewhere and I find no such distinction in The Public Health Act, 1875 (vide section 91). By that Act also a Court of summary jurisdiction is empowered to deal with nuisance of either sort on information given by any person aggrieved thereby (vide section 93). In view of the plain language used it is not possible to attribute any other intention to the local Legislature, nor can I follow the argument that any assistance is to be derived from the other sections of the local Act which were brought to our notice.

The second question is whether the existence of a nuisance is established. It has been conceded before us,—and in my opinion very properly conceded,—that in point of noise and smell these stables must constitute a nuisance within the meaning of section 3 (2) of the Act. It is only necessary to look at the plan to see that this must be so. One may say "*res ipsa loquitur.*" The proximity of stables has been held to constitute a nuisance on these very grounds in more than one case [*Ball* v. *Ray*[1]; *Broder* v. *Saillard*[2]; and *Rapier* v. *London Tramways Company*[3]]; and the circumstance that the wrongdoer is in some sense a public benefactor has never been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed: *Shelfer* v. *City of London Electric Lighting Company*[4]. The suggestion that the smell of stables is after all a pleasing smell need not be seriously considered. A nuisance plainly exists. The stables surround the bungalow on

(1) (1873) L. R. 8 Ch. 467.
(2) (1876) 2 Ch. D. 692.
(3) [1893] 2 Ch. 588.
(4) [1895] 1 Ch. 287 at p. 316.

1923.

MUNICIPAL CORPORATION OF BOMBAY v. MALLAN-PAINE.

three sides and the shortest distance between the two is twenty-four feet. They are intended to accommodate 400 horses and 200 victorias. There must be a large number of syces. The victorias go in and out at all hours. In my opinion it is impossible to avoid the conclusion that the noise would render life unbearable to those living in the bungalow, and though careful management may do something towards diminishing the smell, that too must inevitably cause serious annoyance or offence to the sense of smell. The evidence in the point is considerable and must be accepted.

But it has been strenuously urged that this nuisance is not dangerous to life or injurious to health. The words used in section 3 (*2*) are "which is or may be dangerous to life or injurious to health". It is not, therefore, necessary to establish positively such danger or injury. It is enough to make out a reasonable probability. The point to which the evidence has been largely directed is the danger of malaria. We had the benefit of an elaborate argument displaying much learning upon this matter. The only evidence which is of any value on the point is that of three expert witnesses, Col. Gordon Tucker and Dr. Nunan for the applicant, and Dr. Sandilands for the Municipality. Their conclusions, as is not uncommon in such cases, cannot be reconciled. But there is one salient fact upon this matter, and that is that there is no proof that a single "anopheles" mosquito, either larva or perfect insect, has been traced to these stables. I doubt whether any elaborate analysis of this evidence will assist a conclusion. In the absence of the definite proof which I have indicated I am not convinced that a stable, if properly managed, is necessarily a source of danger on this score. The evidence of the other witnesses on this matter is plainly of negligible importance. The conjectures of laymen as to the sources of disease are more curious than instructive.

But there is one further source of danger which is disclosed by the evidence which demands consideration. It is a reasonable inference—indeed a matter of common knowledge—that stable litter is likely to cause a large increase in the number of flies in a neighbourhood. There is evidence that this is so were evidence required and Dr. Sandilands says "Flies are commonly said to be carriers of a number of diseases. In the City flies are carriers of diseases where they have access to human excreta otherwise not". It is in the conditions which prevail in this country highly probable that flies in such a place as this will have access to human excreta...

I find myself somewhat embarassed by the unfamiliar procedure in this case. Were this a civil litigation between the parties the question would be on the facts found whether the case is one for damages or for an injunction or for both. But here the relief by way of damages is not within our power, and unfortunately there has been no serious disposition to settle the matter by any amicable arrangement. Were this matter before a Court in the exercise of its ordinary civil jurisdiction the judgment of Beaman J. in *Bai Bhicaiji* v. *Perojshaw Jivanji*[1] would be a valuable guide. Much of that judgment might be applied *totidem verbis* to the case before us though in two important particulars the facts here are different. The nuisance here is more formidable for we have a stable of 400 horses as against one of 75, and the neighbourhood here is of a better class and approximates more closely to those "select residential quarters" outside what may be called the native limits, which, in the opinion of the learned Judge in *Bai Bhicaiji's case*[1], stand on a somewhat different footing. No doubt then that in a civil Court the applicant would get relief.

[1] (1915) 40 Bom. 401.

1923.

MUNICIPAL CORPORATION OF BOMBAY v. MALLAN-DAINE.

I have already indicated that the supposed utility of these stables is not a matter which we can consider, a view which is also emphatically expressed by Beaman J. in the judgment cited. Here we are bound by the terms of the special Legislation but within the four corners of the Act considerations appropriate to the general law on the question of nuisance are no doubt relevant, and as the Act gives a remedy the applicant is entitled to seek that remedy upon principles so applicable.

It is to be regretted that either party insists upon the extreme view. For the Municipal Commissioner it is urged that this is a fit and proper place for these stables, and that the conditions of the license which it is proposed to issue contain the maximum of what need be conceded. The applicant on the other hand urges that nothing will give him relief but the total abolition of these stables. In such a case it is extremely difficult for this tribunal, which can hardly be said to be specially fitted to deal with questions of stable management, to discharge the duty which the Legislature has imposed on us, *viz.*, to contrive "reasonable and practicable measures" for dealing with a nuisance such as this. We did indeed tentatively put forward certain suggestions as a basis for discussion but it was apparent that neither party at heart desired anything but the extreme limit of his claim.

After a full consideration of the history of this matter and of the evidence and of the arguments advanced before us I think the case is one on which we should exercise our discretion to make an order for the prevention of this nuisance. I am further of opinion that the only appropriate order in the case is that directed by the learned Chief Justice in the judgment just delivered.

Appeal dismissed.

R. R.