[JACKSON, C.J., AND MELISSAS, J.]

(May 27, 1950)

In the matter of section 79 (2) of the Municipal Corporations Laws, 1930 to 1948,

and

In the matter of the Council of the Municipal Corporation of Limassol.

(*Application No.* 4/1950.)

Order by Governor in Council to Municipal Council—Enforcement of order by Supreme Court—Court has no power to review.

Section 79 (1) of the Municipal Corporations Laws, 1930 to 1948, empowers the Governor in Council, upon complaint made to him, when he is satisfied that a Municipal Council has been guilty of a default in the performance of one of the duties imposed on it by the said Laws, to make an order limiting a time for the performance of such duty.

Section 115 (1) (*y*) of the said laws prescribes that a Council shall " with the approval of the Governor name or rename where necessary all roads, streets, lanes and squares, such names to be affixed in a conspicuous place therein".

By order of the Governor in Council of 17th February, 1950, to the Municipal Council of Limassol setting out that it had made default in its duty of affixing in a conspicuous place in certain streets certain names given to those streets by a previous council with the approval of the Governor, the said Council was directed to affix the names given in the order in a conspicuous place in the streets concerned within one month of the date of the order.

This order not having been complied with the Supreme Court on 25th April on *ex parte* application made to it to enforce the order of the Governor in Council made an order under section 79 (2) of the Municipal Corporations Laws, and on the 27th April this order was endorsed with a notice to the Municipal Councillors warning them that if they failed to carry out the order of Court within the time specified they would be liable to arrest and to have their property sequestered.

The present application was brought by the Municipal Council of Limassol to set aside or vary the above-mentioned order of Court.

Held: this Court is not a Court of Appeal from an order of the Governor in Council made under section 79 (1) of the Municipal Corporations Laws. The Court cannot examine the merits of the decision of the Governor in Council upon an issue of fact which the law has committed to him.

John Clerides for the applicants.

Criton Tornaritis, Solicitor-General, for the Crown.

The judgment was delivered by the Chief Justice.

JACKSON, C. J.: This was an application by the Municipal Council of Limassol to set aside or vary an order of this Court made *ex parte*, on the application of the Solicitor-General, on the 25th April last. That order directed the removal into the Supreme Court of an order of the Governor

in Council, dated the 17th February, requiring the Municipal Council to perform, within a specified time, certain duties in regard to the naming of two streets in their township. The order of Court further directed the Municipal Council to carry out the duty which they had been ordered by the Governor in Council to perform. On the 27th April the order of Court was endorsed, under section 6 of the Courts of Justice (Supplementary Provisions) Law, 1949, with a notice to the Municipal Councillors warning them that if they failed to carry out, within a specified time, the order of this Court made on the 25th April, they would be liable to be arrested and to have their property sequestered.

On the 12th May, the Municipal Council applied to this Court to set aside or vary its order of the 25th April on the ground that, for reasons which will be mentioned later, the order of the Governor in Council, dated the 17th February, was invalid and should not therefore be enforced.

The proceedings by which this Court was asked by the Solicitor-General to enforce the order of the Governor in Council were based on section 79 of the Municipal Corporations Law, 1930. The first sub-section of that section reads as follows :—

" 79.—(1) Where a complaint is made to the Governor that a council has made default in the performance of any of the duties mentioned in this Law, or in enforcing any of the provisions of this Law which it is their duty to enforce, the Governor in Council, if satisfied after due enquiry that the council has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint ".

The second sub-section goes on to provide that if a Municipal Council fails to perform, within the time limited by the order of the Governor in Council, the duty which that order required them to carry out, the order may be removed into the Supreme Court and enforced as if it had been an order of this Court.

Thus the application of the Municipal Council raised the question of the extent to which this Court, when asked to enforce an order of the Governor in Council made under section 79 (1), can examine the grounds upon which the order was made and pronounce upon its legality.

The application was accompanied by an affidavit, sworn by the Mayor of Limassol, setting out the facts upon which the Council relied to support their contention that the order of the Governor in Council was invalid. An affidavit sworn by the Assistant Commissioner of Limassol was filed by the Solicitor-General with his notice of opposition to the Municipal Council's application. At the hearing the Solicitor-General argued that we had no power to entertain the Council's application and, having heard Mr. Clerides,

for the Municipal Council, in reply, we stated our conclusion shortly and said that we would give our reasons for it more fully today. We then said only that we had come to the conclusion that the application must be dismissed, no ground having been put before us upon which we could hold that, in the particular circumstances of this case, we had any jurisdiction to review the order of the Governor in Council. Consequently, we said, the function of this Court must be limited to its enforcement.

It is now necessary to state briefly the circumstances from which the application arose.

The order of the Governor in Council which we were, in effect, asked by the Municipal Council to declare invalid began by reciting that a complaint had been made to the Governor in Council that the Municipal Corporation (or Council) of Limassol had made default in the performance of duty imposed upon them by section 115 (1) (*y*) of the Municipal Corporations Laws, 1930 to 1948, that is to say, the duty of affixing, in a conspicuous place in certain streets, certain names given to those streets by a previous Council with the approval of the Governor. The order went on to say that the Governor in Council was satisfied, after due enquiry, that the Municipal Council was guilty of the alleged default and it concluded by directing the Municipal Council, under section 79 (1) of the Municipal Corporations Laws, 1930 to 1948, (the sub-section quoted above) to affix the names given in the order in a conspicuous place in the streets concerned within one month from the date of the order.

Section 115 of the Municipal Corporations Laws, to which the order of the Governor in Council referred, is a section prescribing the duties and powers of Municipal Councils and sub-section (1) (*y*) of that section prescribes that a Council shall " with the approval of the Governor name, or rename where necessary all roads, streets, lanes and squares, such names to be affixed in a conspicuous place therein...."

The order of the Governor in Council referred to two streets and the facts, as shown by the affidavits on both sides, are different in regard to each. In one case the Municipal Council maintained that the street in which they had been ordered to affix a particular name was not a part of the street which had originally borne, and still bore, that name, but, though a continuation of that street, was in fact a different street and had been given a different name, since removed by the police, by resolution of the previous Municipal Council in 1945. It was admitted that the new name had not received the approval of the Governor but it was claimed that the Council was not in default in declining to affix in this part of the street the name specified by the Governor in Council, because that name belonged to a different street.

On the other hand, the affidavit filed by the Solicitor-General stated that the street in which the Council had been ordered to affix the specified name was part of the same street which had been previously so named, and not a different street and that the part of it in which the Council has been ordered to affix that name had previously borne the same name and that the numbers throughout the whole length of the street were continuous. Other facts were given to indicate that the whole street had for many years been regarded as one.

The other street which was referred to in the order of the Governor in Council originally bore a certain name which was changed by resolutions of the Municipal Council in 1937 and 1938 to the name which the Governor in Council had ordered to be restored. The only statement in the Mayor's affidavit in regard to this street was that, on the 24th February, 1950, the resolutions of the former Council, by which the street had been renamed in 1938, had been cancelled by the present Council. The result apparently was that, in the opinion of the Council at any rate, the street resumed the name which it had borne before 1938. In the affidavit filed by the Solicitor-General it was pointed out that the resolution of the present Council, apparently purporting to restore the former name of the street, was passed two days after the Council had been served with the order of the Governor in Council, dated the 17th February, requiring the Council to affix the name which the street had borne since 1938. There could therefore be no suggestion that the Governor had approved of a change.

Such was the situation, as represented by the affidavits on both sides, in which the Governor in Council issued the order which we are now asked, in effect, to declare invalid.

We have already given the substance of section 115 (1) (*y*) of the Municipal Corporations Laws, 1930 to 1948 and it is clear that this provision, as it now stands and has stood since an amendment of the principal law in October, 1934, requires the Governor's approval of the naming or renaming of streets in a municipality. It is equally clear that in fact the Municipal Council of Limassol is endeavouring to give to a particular street, or part of a street, in the township a name which the Governor, acting in the discharge of a statutory responsibility, considers that it should not bear. It is also apparent that the Council wishes to remove from another street a name which the Governor considers that it should retain. That is the real issue between the parties but it is not the issue which, in form at any rate, these proceedings raise. The order of the Governor in Council is attacked, not on any question of the Governor's responsibility under section 115 (1) (*y*) of the Law, but on other grounds.

The first is that the Council, for the reasons given in the Mayor's affidavit, is not in fact in default in the performance

of the duty specified by the Governor in Council. The second ground is that the Governor in Council failed to make the " due enquiry " which he was by Law required to make before concluding that the Council was in default.

We can dispose at once of the second ground, quite apart from any question whether we were entitled to examine it or not, for no reason whatever was given in support of it. The Mayor's affidavit had simply stated, as though by an afterthought, and then only in relation to one of the two streets concerned, that no due enquiry had been made. Mr. Clerides said in Court that no enquiry had been made of the present Municipal Council, but the Solicitor-General at once produced a large file of correspondence which he said contained letters addressed to the present Council of the subject in dispute. Moreover, as everyone knows, the constitutional instruments of the Island require that the proceedings of the Executive Council shall be conducted under oath of secrecy and it would clearly be impossible for any Court to require the production of evidence as to the material which the Governor in Council took into consideration in coming to a conclusion on this subject or on any other.

In this case the order of the Governor in Council declared that due enquiry was made and no reason has been given to us to think that it was not. We can therefore dispose of this particular ground of objection to the order without deciding what our position would have been if there had been any substantial reason to suppose that no due enquiry was made.

It remains to consider whether we are entitled to examine the grounds for the Council's contention that, having regard to the statements in the Mayor's affidavit, the Council has not in fact defaulted in its duty.

A number of English authorities were quoted to us by the Solicitor-General. All except one, to which we shall refer later, were cases in which interested parties sought to question in the courts orders made by an executive authority, generally a Minister, in the exercise of a statutory discretion. In every case it was the exercise of the discretion to make the order which it was sought to question and the grounds upon which it was alleged that the Minister's discretion had been improperly exercised varied in every case. In so far as it may be possible to express very shortly the general conclusion to be drawn from those cases, it may be said to be that when an executive authority exercises a statutory discretion to make an order of the kind with which those cases dealt, he acts in an administrative and not in a judicial or quasi-judicial capacity. He acts in accordance with what he considers the public interest requires and as to this no objective test is possible. Provided that he acts *bona fide* and within the limits of his statutory authority, his exercise of his discretion cannot be questioned in the Courts.

A short passage from a judgment in one of the cases quoted will illustrate that statement. The title of the case is *Robinson and others* v. *Minister of Town and Country Planning* (All Eng. Rep. 1947, Vol. 1, p. 851). In that case the Minister had made an order subjecting certain land in Plymouth to compulsory purchase and the order was made in the exercise of a statutory discretion to make an order of that kind if the Minister was satisfied that it was requisite, for the purpose of dealing satisfactorily with extensive war damage, that the land should be laid out afresh and developed as a whole. It is unnecessary to state the grounds upon which the Court of Appeal was asked to declare the order invalid but, in rejecting that contention, Lord Green, then M.R., gave a judgment from which the following passage is taken (p. 859 of the report):—

"The enquiry (i.e. a public enquiry held by direction of the Minister before his order was made) is only a step in the process which leads to that result, (i.e. the making of the order) and there is, in my opinion, no justification for saying that the executive decision to make the order can be controlled by the courts by reference to the evidence or lack of evidence at the inquiry which is here relied on. Such a theory treats the executive act as though it were a judicial decision (or, if the phrase is preferred, a quasi-judicial decision) which it most emphatically is not. How can this Minister, who is entrusted by Parliament with the power to make or not to make an executive order according to his judgment and acts *bona fide* (as he must be assumed to do in the absence of evidence to the contrary) be called on to justify his decision by proving that he had before him materials sufficient to support it? Such justification, if it is to be called for, must be called for by Parliament and not by the Courts, and I can see no ground in the language of the Act, in principle or in authority, for thinking otherwise."

Now let us look once more at the language of section 79 (1) of the Municipal Corporations Law, 1930, under which the order of the Governor in Council was made. For this purpose we must repeat the sub-section:—

"79.—(1) Where a complaint is made to the Governor that a council has made default in the performance of any of the duties mentioned in this Law, or in enforcing any of the provisions of this Law which it is their duty to enforce, the Governor in Council, if satisfied after due enquiry that the council has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint".

It will be seen that the only issue which the Governor in Council is empowered to determine is an issue of fact; that is to say, the question whether or not the Municipal

Council has been guilty of the default alleged in the complaint and has failed in the performance of a duty mentioned in the Law. If, after due enquiry, the Governor in Council is satisfied that the alleged default has been made, he is bound to make an order on the Municipal Council. The word is " shall " and not " may ". The time within which the default must be made good may, of course, vary according to discretion, but there is no discretion whether to make or not to make the order requiring the Municipal Council to make good the default.

In all the English cases of the class to which we have referred, the view of the Court was determined by the language of the statute under which a particular order was made and it seems to us that the language of the Cyprus Law, under which the order of the Governor in Council with which we are concerned was made, distinguishes this case from all the English cases quoted to us and prevents us from deriving any help from them. There is no question here of a statutory discretion to make, or not to make, an order requiring something to be done if an executive authority is satisfied that the public interest so requires. The only issue which the Law empowers the Governor in Council to determine is the issue whether or not an alleged default has been made.

We realise, of course, that in actual practice a good deal more may be involved and that before deciding whether or not to act upon a complaint and to order a Municipal Council to make good a default, a good many considerations may have to be weighed by the Governor in Council. Many were doubtless weighed in this case. But we are bound by the language of the Law, which applies alike to simple issues and to complicated ones, and it is clear that this case is in a different class from the English cases quoted to us.

There was, however, one English case of another kind among those quoted by the Solicitor-General which much more closely resembles the case before us. That was the case of the *Queen* v. *Staines Union* (L.J. 1893, Vol.62, Q.B.D. p. 542). That case was decided in 1893 upon the meaning of section 299 of the Public Health Act, 1875. That section provided that—

> " where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers.....or has made default in enforcing any provisions of the Act which it is their duty to enforce, the Local Government Board, if satisfied, after due enquiry, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performane of their duty in the matter of such complaint. If such duty is not performed by the time limited in the order, such order may be enforced by writ of mandamus....."

It will be seen how closely the language of that section resembles the language of section 79 (1) of the Cyprus Law which has been quoted. Indeed it would be difficult to escape the conclusion that the English section was the model for the provision of the Cyprus Law. There is one important difference, namely, the manner in which an order, in the one case, of the Local Government Board, and in the other, of the Governor in Council, could be enforced. We shall refer to that difference again.

In the Staines case the Queen's Bench Division was asked to make absolute two rules *nisi* calling upon the sanitary authorities for the urban and rural districts of Staines to show cause why writs of mandamus should not issue commanding them to obey two orders of the Local Government Board requiring them to provide proper drainage in their areas. The sanitary authorities objected that the Local Government Board had not made due enquiry as required by the statute before issuing its orders. The Court declined to consider that objection and there being no legal error or omission of legal form, the rules were made absolute.

There was another English case in which the House of Lords supported the enforcement, by way of mandamus, of an order of the Board of Education, made under statutory authority, requiring certain local authorities to make certain payments. This was the case of the *Attorney-General* v. *The West Riding of Yorkshire County Council*, and was determined in 1906 (1907 A.C. p. 29). In that case, which was not quoted to us, the House of Lords, as well as two Courts below, went fully into the merits of an order of the Board of Education, which the King's Bench Division had ordered to be enforced and, having done so, the House of Lords supported that decision.

It would appear, therefore, that if the method by which a Court is empowered to enforce the performance of an order by another authority is mandamus, the Court has a discretion whether to issue the mandamus or not and can, if it thinks proper, go into the merits of the order. Mandamus is familiar to the law of Cyprus and we have a special Law which deals with it, the Mandamus Law, 1890. But mandamus is not the method by which an order of the Governor in Council, made under section 79 (1) of the Municipal Corporations Laws, is to be enforced by the Supreme Court under sub-section (2) of the same section. The legislature could, of course, have prescribed that method if it had so chosen and it must be presumed to have had some purpose in mind when it departed, in that respect alone, from the provisions of section 299 of the Public Health Act of 1875, while adopting the exact language of that section on other matters.

We are accordingly driven back once more to the wording of our own Law and away from the English authorities.

The closest analogy to the provision for the enforcement of an order of the Governor in Council under section 79 (2) of the Municipal Corporations Laws is to be found in the provision made by section 95 of the Civil Procedure Law, 1885, for the execution by District Courts of the judgments of Sheri Courts. For the purposes of enforcement by the District Court, a judgment of a Sheri Court is treated "as though the judgment had actually been given by the District Court".

Now it has long been established in our Courts that this provision for the enforcement of judgments of Sheri Courts by District Courts does not make a District Court a Court of Appeal from the Sheri Court. There are reported cases in which it has been held by the Supreme Court that there are circumstances in which a District Court can properly decline to enforce a judgment of a Sheri Court; for example, when it is shown that a Sheri Court had no jurisdiction to make the order which the District Court is asked to enforce. In the absence of a ground of that nature, the order of the Sheri Court will be enforced and the District Court will not examine its merits.

The question before us is entirely one of the construction of a Cyprus Law, namely, section 79 (2) of the Municipal Corporations Law, 1930, and we are of opinion that we are bound to construe it in the same way in which section 95 of the Civil Procedure Law, 1885, has long been construed in relation to the enforcement by District Courts of the judgments of Sheri Courts.

This Court is not a Court of Appeal from an order of the Governor in Council made under section 79 (1) of the Municipal Corporations Laws. If it could be shown that such an order was in excess of jurisdiction, other considerations would arise, but we must decline to do what we are asked to do by the applicants in this case and to examine the merits of the decision of the Governor in Council upon an issue of fact which the Law has committed to him and not to us. If we did so we should be obliged to determine which of two conflicting affidavits was to be believed and we should almost certainly have to hear both the deponents and a number of other witnesses. To do that would be to go considerably further than a Court of Appeal will normally go on an appeal which is to be treated as a re-hearing. And a Court of Appeal is something which, in this particular matter, we emphatically are not.

Upon these reasons we based our decision, already announced, that this application by the Municipal Councillors of Limassol must be dismissed with costs.

Application dismissed.