1953
February 24

LARNACA OIL WORKS LTD. v. THE MAYOR, DEPUTY MAYOR, COUNCILLORS AND TOWNSMEN OF LARNACA.

Significantly enough nothing is mentioned for the imposition of a fee in section 158. Moreover it would clearly amount to double taxation if a person is required to pay a substantial fee for his licence to keep a khan or a coffee-shop under section 158 and the same person is called upon to pay a trade or professional licence as a coffee-shop keeper or a khan keeper under section 159. In that case the law should be clear and unambiguous in order to lead one to the conclusion that the legislature intended from the same person for the same purpose to exact taxation twice for raising municipal revenue. The requirement of an annual licence on the payment of a nominal fee or a reasonable fee covering the expenses of periodical inspection by the Municipal Authorities of the buildings in respect of which licence is issued under section 158, might be regarded within the scope of that part of the Law; but the levy of £50 for an annual licence appears to me to be beyond the object and intention of the legislature.

1953
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THE AMERICAN EXPORT LINES INC. v. THE MAYOR, DEPUTY MAYOR, COUNCILLORS AND TOWNSMEN OF LARNACA.

[GRIFFITH WILLIAMS, J., AND ZEKIA, J.]

(February 24, 1953)

THE AMERICAN EXPORT LINES, INC.,

Appellants,

v.

THE MAYOR, DEPUTY MAYOR, COUNCILLORS AND TOWNSMEN OF LARNACA,

Respondents.

(Civil Appeal No. 3952.)

Trade or Professional Tax—Liability of Foreign Shipping Company—Meaning of "Carrying on trade or business for profit within Municipal limits"—Municipal Corporations Law (Cap. 252) section 159.

In an action by the Municipal Authorities, Larnaca, against an American Shipping Company whose ships call at irregular intervals at Larnaca, the District Court held that the American Company was "carrying on or exercising a trade or business for profit within the municipal limits of the town of Larnaca" and had thereby rendered itself liable to the trade or professional tax set out in section 159 of the Municipal Corporations Law, (Cap. 252).

The following judgment was delivered by:

ZEKIA, J.: I agree that the present appeal should be allowed. In doing so, however, I wish to confine myself to one ground only, namely that the Bye-law 227 of the Larnaca Municipal Bye-Laws is *ultra vires* because it is inconsistent with the provisions of the Municipal Corporations Law.

It seems to me that section 125 (1) (*c*) of the said Law coupled with section 123 (1) (*p*) empowers the Municipal Council to regulate the issue or grant of any licence which the Council is authorized to issue and to fix the fee for such licence, provided what it does is:

(*a*) consistent with the provisions of the said Law;

(*b*) has the approval of the Governor;

(*c*) and is published in the *Gazette*.

If the Council complies with these three requirements then the bye-law has the force of law. It is admitted that the last two requirements have been complied with. There remains whether the first requirement has also been fulfilled. In other words whether Bye-law 227 of the Larnaca Municipal Bye-Laws 1949 is or is not inconsistent with the provisions of the Municipal Corporations Law.

After a careful reading of the relevant parts of the said Law including sections: 156, 157, 158, 159, 160, 161, 164, 165, 166, 168, 169, 175, 183 and 188 in particular, I am inclined to believe that the provision in section 158 requiring a person intending to keep a khan, coffee-shop, factory, etc. to obtain a licence, was intended to control and restrict the establishment within the municipal limits of the offensive trades enumerated in the section with a view apparently to protect the amenity and health conditions of the town and for akin objects, but obviously not for raising revenue.

The respondent council in this case has imposed an annual fee of £50 for the appellant company for keeping a factory within the municipal boundaries. The intention is obviously to raise revenue for the municipality. In my view obtaining of a licence for the purpose of section 158 was never intended by the legislature to empower the council to raise revenue. It cannot reasonably be contended that it was the intention and within the object and scope of this part of the Law to empower the council to impose fees in the nature of taxation. The succeeding sections deal obviously with licences and fees to be paid for such licences with a view to raise revenue for the municipality. Care has been taken in these sections to make provision for the issue of licences as well as for the payment of fees. Read, for instance, sections 160, 161, 162, 163 and 164.

Dogs are not referred to in section 123 or section 124 and consequently any bye-law prescribing the fees for dog licences could only be made under section 125 (1) (*c*), as (1) (*a*) and (1) (*b*) deal only with the provisions of sections 123 and 124.

Hawkers' fees are fixed by law but if a bye-law is to be made to lower the scale of fees this could if at all only be done by bye-law under section 125 (1) (*c*).

Section 125 (1) (*c*) therefore is not confined to regulating licences under section 158. Indeed it is needed for the making of bye-laws for the regulation of theatre licences and prescribing fees therefor, for prescribing fees for dog licences and fees for hawking.

The only power given the council to make bye-laws is under section 125 and it would appear that it may only make bye-laws under this section where such are specifically required to be made by other sections of the Law. Sections 123 and 124 in which the duties and powers of the council are specified, are exceptions to this and these sections are specifically provided for in section 125 (1) (*a*) and (*b*). In view of this it cannot be said that section 125 (1) (*c*) was intended to provide a bye-law for the purpose of licences under section 158. Indeed though it may make a bye-law under that paragraph to regulate and control the grant of a licence as required under para. 158, it cannot alter the nature of the licence to be granted, so as to turn it into a yearly licence, nor can it prescribe fees where no fees are payable under the section.

It must not be forgotten that section 125 is the only one under which bye-laws can be made and that for the purpose of regulating, controlling and prescribing fees for the various licences to be issued under the different provisions of the Law and sub-section (1) (*c*) is the only part of it which describes sufficiently widely the purposes for which bye-laws can be made so as to regulate and control the issue of and prescribe the fees for all the various licences to be issued under the different provisions of the said Law. All the purposes contained in 125 (1) (*c*) are required for bye-laws to regulate etc. licences under sections of the said law other than section 158.

There is therefore no reason to suppose that the wording of section 125 (1) (*c*) was made merely to enable the council to frame a bye-law to tax the trades enumerated in section 158. Such a supposition would be entirely contrary to the fact that the paragraph is needed to create bye-laws to deal with other sections—and the powers the council assumes it possesses by virtue of this paragraph—to levy a heavy tax, by way of licence fee, on the trades set out in section 158 (1) is contrary to the whole tenor of the said Law and inconsistent therewith. It also amounts to double taxation.

I am therefore of opinion that bye-law 227 is ultra vires, unreasonable and void and that this appeal ought to be allowed.

single performance or for any period not exceeding one year. Section 169 (1) also deals with granting a theatre licence and empowers the council to impose special conditions. Section 169 (2) is illuminating, as it authorises the council to charge " such fee for any such licence as they may by bye-laws made in that behalf prescribe ".

Section 175 deals with the licensing of dogs. It provides that dogs are to have a yearly licence expiring on 31st December, and that the fees for licences are not to be less than 1*s*. or more than 5*s*. as the council may by bye-laws made in that behalf prescribe.

I cannot find any other forms of licences separately provided for in the Law, but from the above three cases it can be seen what is meant in section 125 (1) (*c*) by the words " which by this Law the council is empowered to issue and grant ". It means not only licences under section 158 (1) but licences for theatrical performances, dogs and hawkers. The para. 125 (1) (*c*) continues " and to prescribe the fees to be paid for any such licences or permits ".

Section 125 (1) (*c*) cannot refer to granting, regulating or prescribing fees only for licences under section 158; because (1) Section 167 (2) regarding hawkers' licences empowers the council to fix the fees by bye-law, if the scale of fees set out in the eleventh schedule to the Law was considered too high. (2) Section 169 (2) regarding theatre licences expressly states that the council may charge such fee for any such licence as they may by bye-laws made in that behalf prescribe. (3) Section 175 (4) contemplates the making of bye-laws to prescribe the fee to be payable every year on the issue of a dog licence.

It has been suggested by the respondents that these several licences have no connection with section 125 (1) (*c*), if I understood aright, because there is already in the Law power to regulate them. The regulating has to be done by bye-law and these three quoted sections each contemplates the making of a bye-law, and bye-laws cannot be made except under and in accordance with Section 125.

It has been suggested that as regards licences for theatres these must, if they come under section 125 at all, come under sub-section 125 (1) (*a*) because there is a power given under section 123 (*x*) to grant licences for the use of theatres and section 125 (1) (*a*) contains the following purpose for bye-laws " to enable or assist a council to perform any of the duties assigned to it by section 123 hereof, and to provide for the payment of any fees or charges in connection therewith ". There is no power under 125 (1) (*a*) to make a bye-law to carry out the full control and regulation necessitated by sections 168 to 171 relating to theatres, and only bye-laws made under section 125 (1) (*c*) could give them the necessary powers.

the person who carries on the trade that is taxed, and if he is taxed for the premises because he is carrying on his trade there he is taxed twice for carrying on the same trade. This can be no other than double taxation.

To consider some of the other sections under which licences are made necessary, section 164 provides that a professional or trade licence is to be either yearly or half-yearly. There is no similar provision relating to the trades enumerated in section 158 (1); and, in view of the fact that such provision is made when required, there is a necessary implication that the licences to be obtained under section 158 (1) are not renewable yearly.

It is interesting to note that section 158 (2) provides a penalty for not obtaining a licence under section 158 (1), and that penalty must not exceed £5. Such a penalty for non-payment of a yearly fee of £50—under bye-law 227—is surely incongruous and indicates some inconsistency, between section 158 and the bye-law. If section 158 (2) is compared with section 165 it will be seen that for not obtaining a licence to carry on a trade or profession or apply for renewal within a month of expiry, the offender shall be liable to a penalty of £20. That is to say, four times as much as under section 158.

It is argued by respondents that section 125 (1) (*c*) by giving power to " regulate and control the grant and issue of any licences or permits which by this Law the council is empowered to issue or grant " thereby enables the council in granting a licence to one of the trades enumerated in section 158 (1) to make that licence a yearly one or attach to it any other conditions. They further argue that the words that follow, namely, " and to prescribe the fees to be paid for any such licences or permits ", enable the council to charge a yearly fee for the issue of such yearly licence.

To decide whether such an interpretation of this paragraph is consistent with the Law, it will be relevant to look at those sections of the Law which deal with the issue of licences for other purposes. There are very few sections to consider. Section 167 provides for the issue of licences to hawkers without fee therefor, but making the hawker pay a fee fixed by the law itself for every day upon which he hawks. In this case no power is left in the council to regulate hawkers' fees and they may not charge for this licence. They cannot claim such a power under section 125 (1) (*c*).

Section 168 prohibits the use of any building or tent for a theatre without a licence first obtained. The section itself empowers the council to grant a licence either for a

doubt. I cannot myself agree with the respondents' argument that this section merely lists those trades generally alluded to as offensive in section 156 since the list cannot be exhaustive. If such had been the intention of the legislature it would have been so easy to make it clear; and there is nothing obviously offensive in most of them. Section 156 prohibits the establishment of any offensive trade within municipal limits without the written consent of the council; while section 158 makes it unlawful for any person to keep within any municipal limits a place or building for the purpose of one of the enumerated trades without a licence first obtained therefor from the council. If the submission of respondents is correct it is difficult to see the object of getting the consent in writing of the council under section 156 if in any case a licence has to be obtained from the council under 158—one would naturally consider the licence to be a sufficient " consent in writing ". It is indeed difficult to believe that these enumerated trades were one and all intended to be included under the general description of offensive trades in section 156. Some of them—such as a tannery—might properly be regarded as offensive, but if not specifically mentioned in section 158 trades such as pastry cook, restaurant, etc., could hardly be so regarded. It seems to me therefore that section 158 must be taken by itself, and the trades therein not be all branded or stigmatized as " offensive ". But though not offensive in the ordinary acceptance of the word, it might be advantageous to regulate them, by restricting their activities to certain areas of the town or excluding them from other areas. I do not agree with the proposition that all these trades require the written consent of the council under section 156 before they are entitled to obtain a licence under section 158. But whether this is the case or not the object of the section is quite clear. It is to prevent the establishment of these trades in unsuitable areas of the town. Just as in the case of building permits and the like a licence of this nature must be granted once and for all, as otherwise it would become an instrument of oppression, as there would be no security of tenure for anyone attempting to establish one of the trades enumerated in section 158 (1). Indeed the treating of what must have been intended by the legislature to be a permanent licence as a mere yearly licence for which a fee must be paid is to my mind unreasonable and oppressive, especially when the fee is so high as to amount to a tax. It has been pointed out by the appellants that all those who carry on the trades enumerated in section 158 (1) pay the trade or professional tax imposed by sections 159 and 160 and that bye-law 227 has the effect of imposing a second tax on those engaged in those trades. This appears to be the case, as the retort of the respondents that the trade or professional tax is levied on the person who carries on the trade whereas the licence granted under section 158 is in respect of the premises where the trade is carried on is to my mind pure sophism. It is

carrying on of professions and businesses, but limited the amount of the fees by the law itself; but in spite of this the respondents argue that in the case of the trades enumerated in section 158 the legislature left them completely free to regulate and control those businesses and impose on them whatever fees they liked—and that they have done this by bye-law 227.

They claim to derive their authority for making this bye-law from section 123 (1) (*p*) and section 125 (1) (*c*) of the law.

Section 123 (1) (*p*) is as follows :—

"(1) Subject to the provisions of this Law and of any *other law in force for the time being the council shall* within the municipal limits—

(*p*) grant licences and permits, and, subject to the provisions of this law, attach to such licences or permits such terms and conditions as to the council may seem necessary or desirable, and suspend or revoke such licences and permits whenever the council on good cause shown considers it advisable so to do."

The respondents have argued that this section empowers them to attach to the licence the term or condition that the licence shall be renewable every year and that a specified fee must be paid before it is issued or renewed.

Now the payment of duty or fee is not a term or condition that normally can be imposed on the issue of a licence. It is in effect the imposition of a tax, and this cannot be done without specific authority. There is nothing in section 158 or in this section to authorise it. The principle involved is expressed by Bertram J. in *Dianello* v. *The King's Advocate*, VIII C.L.R. at p. 9, in the following passages of his judgment occurring at p. 17 :—

" The imposition of this licence duty is in effect the imposition of a fresh tax and the question naturally suggests itself whether the powers committed to the High Commissioner are wide enough to embrace the power to impose taxation." .....

" Now it is not of course impossible that the legislature should depute to the Executive the power to impose financial burdens on the subject. An instance of such subordinate legislation is the Customs and Excise Amendment Ordinance, 1879 ..... But as a general rule, where it is intended to depute to the Executive the power to impose financial burdens on the subject—whether these burdens take the form of taxes, or fees of office or penalties—it is usual for that power to be conferred by express words."

He continues :

" Statutes imposing burdens on the subject, both in England and in Cyprus are on a special and peculiar footing, and according to English Law statutes which

Matthew, J., continued :—

" The validity of the bye-laws must be determined by the Judges when they are brought properly before them. This duty has been cast on the Superior Courts where any restriction is sought to be imposed on personal liberty, and is traceable to the clause in the Great Charter, "*Nullus liber homo disseisiatur de . . . libertatibus suis . . . . . nisi . . . . . per legem terrae* ". This rule has been followed and acted upon down to the present time ".

Further on he continues :

" From the many decisions upon the subject it would seem clear that a bye-law to be valid must, among other conditions, have two properties—it must be certain—... and it must be reasonable ".

From these quotations it can be deduced that the bye-law which is under consideration in this case before it can be held invalid must be found to be either *ultra vires* or unreasonable and that it is the duty of the Court to consider carefully the relevant sections of the Municipal Corporations Law from which the Council derive their authority to see whether the bye-law is *intra vires* irrespective of whether or not it had received the approval of the authority named in the law.

The first point to notice in connection with the bye-law is that the word " licence " does not occur in it, and the only indication that fees are for licences to be granted under section 158 (1) is that it applies to all the trades enumerated in section 158 (1) of the said Law and to them only. It ignores the fact that a licence has to be obtained to keep each of these businesses, if the council is to have power to collect the prescribed fee ; and treats the necessity under which these trades are put to obtain a licence, as an opportunity for imposing on them a heavy yearly tax. It is difficult to believe the legislature would intentionally give Municipal Corporations the power to levy what amounts to a second or additional trade or professional tax—like that imposed under section 159—on the particular selected trades and occupations specified in section 158, all of which trades are already liable to professional tax—without some clear indication in the said Law of its intention. Without such indication the tax imposed by bye-law 227 might be considered unreasonable. Lord Russell in *Kruse* v. *Johnson* in the passage already quoted says :—

" But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes,..... the Court might well say Parliament never intended to give authority to make such rules ".

In the case of the trade and professional tax the legislature did not think fit to grant the Municipalities a free hand to fix the amount of the yearly fee payable for licences for the

The case of *Kruse* v. *Johnson*, 1898, 67 L.J. 782, was referred to on the question of the Court holding bye-laws invalid on the ground of unreasonableness. The bye-law in question in that case was made by the County Council of Kent, a statutory Corporation. Lord Russell of Kilowen, the L.C.J., at pages 785–786 after stating that most cases in which the question of bye-laws has been discussed are those of railway and dock companies and like companies which carry on their business for their own profit continues :—

"But when the Court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described . . ., I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported, if possible. They ought to be, as has been said, "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them and in the manner which to them shall seem meet, I think Courts of justice ought to be slow to condemn as invalid any bye-laws so made under such conditions on the ground of supposed unreasonableness."

Then further :

"I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn bye-laws made under such authority as these were made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes,.... the Court might well say Parliament never intended to give authority to make such rules."

In the same case Matthew, J., at page 790 says :—

"It was decided in very early times that the approval of the bye-law by the authorities mentioned in the statute did not give it validity if not otherwise legal."

And he referred *inter alia* to the Ipswich Tailor's case (1614) 11 Co. Rep. 53a, 77 Eng. Rep. 1218. In this case it was resolved (1) that at common law no man could be prohibited from working at any lawful trade. (2) The Corporation of the Tailors at Ipswich cannot by any ordinance made by them prohibit anyone from exercising his trade until, etc. (3) That Statute 19, H.7, Cap. 7, leaves the ordinances of Corporations allowed, etc., according to that Act to be affirmed as good or disaffirmed as unlawful by the Law.

infringe the statutory regulations and limitations which have been imposed upon them : to that extent they, like statutory corporations, are directly subject to the doctrine of *ultra vires* so as to enable proceedings to be taken to restrain them from infringing the limitations imposed. But in respect of all matters not expressly prohibited by statute these corporations retain the characteristics of common law corporations free from the doctrine of *ultra vires* ".

I have set this passage out at length because it is on the principle applying to these English municipal corporations that the respondents have claimed that the law of *ultra vires* should not be held to apply to them.

The sentence of the work just quoted which immediately follows the above quotation puts rather a different complexion on the matter. It is as follows :—

" Accordingly it has been held that, so long as statutory prohibitions are not infringed, municipal corporations may, simply by virtue of their chartered existence, validly do acts which they are not expressly or impliedly empowered to do by statute."

The significant words in this passage are " simply by virtue of their chartered existence." The necessary inference to be drawn from them is that were it not that Municipal Corporations derived their authority actually or presumptively from royal charter they would not have these wide powers, but would be subject to the same limitations as statutory corporations like county councils and district councils.

The Municipal Corporation of Larnaca was not established by royal charter nor could it claim any prescriptive right to powers not given to it by the Municipal Corporations Law. It is a statutory Corporation. To quote again from Hart's " Introduction to the law of local Government and Administration " at page 273 :—

" Statutory Corporations are, on the contrary, subject to the doctrine of *ultra vires*. They are mere creatures of the statutes creating them, and the law will not suppose that they were created for any purposes other than those which induced the legislature to act. Consequently they have only the powers which the statutes creating them expressly confer upon them and those which are fairly incidental to the powers expressly given."

This disposes completely of the submission of counsel for the respondents that the Council *qua* Municipal Corporation had powers to do anything not expressly forbidden unless that act were unreasonable. Whether any provision in the Law itself gives them such power will be considered later in this judgment.

	From	*To*
	s.	*s.*
(*i*) for any restaurant ..	10	100
(*j*) for any barber's shop ..	5	40
(*k*) for any drinking shop ..	5	100
(*l*) for any pastry shop ..	5	100
(*m*) for any confectioner's shop	5	100
(*n*) for any pharmacy ..	5	100
(*o*) for any shoemaker's shop	5	100
(*p*) for any printing office ..	20	100

(2) The fee shall be in respect of the period ending on the 31st December of each year, irrespective of the time when it becomes chargeable."

It has been argued for the respondents that the bye-laws of municipal corporations which are public representative bodies, and before publication have received the approval of the Governor, must be treated by the Courts as on a different footing from other bye-laws, and should not be held invalid as *ultra vires* or unreasonable except in extreme cases.

The position of Municipal Corporations under English law is clearly set out in Hart's " Introduction to the law of local Government and Administration " 4th edition, at pp. 274–275. He says :—

> " In this matter we must notice that some local authorities are statutory and some are common law corporations. County councils, district councils and parish councils are all directly incorporated by Acts of Parliament and are therefore statutory corporations directly subject in all its implications to the doctrine of *ultra vires*. Legally they can only do what statutes have given them power to do."

Mr. Hart then goes on to contrast their position with that of Municipal corporations as follows :—

> " Municipal Corporations are, however, in a different category, and the principles applying to them are more complex. Boroughs are incorporated by royal charter and so are classed as common law corporations, which, *prima facie*, should be entirely free from the direct application of the doctrine of *ultra vires*. In fact, however, legislation expressly imposes limitations on the powers they would otherwise possess, and so they form, as it were, a hybrid class of common law corporations, limited in some of their actions by express statutory regulation. It has been judicially decided that corporations in this position are not permitted to

The District Court held that bye-law 227 was *intra vires* and dismissed the claim; and from this dismissal the plaintiff company has appealed to this Court.

The Municipal Corporation of Larnaca established under the Municipal Corporations Law—now Cap. 252 of the Laws of Cyprus 1949—(hereinafter referred to as the said law) acts through a Council elected every four years, which has all the powers of the corporation.

It is admitted that the business carried on by the appellants is one of those included in section 158 of the said Law and comes under paragraph (*e*) and sub-section (1) of that section. The relevant part of the section is as follows:

"158.—(1) It shall not be lawful for any person to keep within any municipal limits a place or building—

(*e*) as a factory where steam, electric or mechanical power is used or in which any explosive substance is used;

without a licence first obtained therefor from the council."

The only question for decision is whether the Council was entitled to treat the licence to be obtained under the above section 158 (1) as renewable yearly, and to refuse to grant a new yearly licence until payment of the appropriate fee prescribed under bye-law 227, or whether that bye-law is *ultra vires* and of no legal effect. Bye-law 227 is as follows:—

"227.—(1) There shall be paid to the Treasurer in every year by any person keeping any of the following places or buildings within the municipal limits the fee determined by the Council set out against each such place or building, that is to say:—

	From	*To*
	s.	*s.*
(*a*) for any khan or public stable	10	40
(*b*) for any tannery	100	500
(*c*) for any place or building kept for the purpose of drying or storing skins ..	20	100
(*d*) for any farrier's shop ..	5	20
(*e*) for any factory where steam, electric or mechanical power is used or in which any explosive substance is used	20	1,000
(*f*) for any coffee-house ..	5	60
(*g*) for any kiln	5	100
(*h*) for any oven in a bakery	20	60