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SERASINGHA *v.* IBRAHIM SAIBO.

M.C., Colombo, 8.

Public market established by Municipal Council of Colombo—By-law 14 of chap. XIX. of by-laws in schedule A to Ordinance, No. 16 of 1881—Municipal Council's Ordinance, No. 7 of 1887, s. 232—Ordinance No. 8 of 1901—Lease of public market—Right of Council to issue licenses to stall holders.

The by-laws as to public markets contained in chapter XIX. of the by-laws in schedule A to the Ordinance No. 16 of 1881 are not consistent with the provisions of sections 226 to 232 of Ordinance No. 7 of 1887, which deal with public markets, and were not legally in force at the date of the framing of the Ordinance No. 8 of 1901.

Therefore, a conviction under by-law 14 cannot be sustained.

A lease of a building used as a public market, unless let subject to the provisions of chapter XVIII. of the by-laws, would vest in the lessee an estate for the time being, the due enjoyment of which would be incompatible with the use of that building as a public market; and no licenses from the Chairman of the Municipality or its Secretary for the occupation of its stalls is necessary during the existence of the lease.

Therefore, a conviction under section 232 of the Ordinance No. 7 of 1887 is bad.

THE accused was till the end of December, 1902, a stall-holder in the public market at Slave Island established by the Municipal Council of Colombo. He occupied two stalls under monthly licenses issued to him. When the Council leased the market for the year 1903, he was given notice to quit on or before the 1st January, 1903, but he continued to hold over and sell mutton. Thereupon he was charged with a breach of the by-law 14 of chapter XIX. of the by-laws in schedule A to the Ordinance No. 16 of 1881, and also with selling mutton in breach of section 232 of the Ordinance No. 7 of 1887.

The Municipal Magistrate (Mr. E. F. Ondatje) acquitted the accused on 4th February, 1903. As to the first alleged offence, he held that by leasing the market the Council had divested itself of the right to issue licenses, and could therefore require the accused to hold a license; that the leasing of markets would create a monopoly, and all by-laws which would restrain trade were *ultra vires;* and that by-law 14, chapter XIX. which empowers the Council to deprive a person of the right to carry on his trade in a public market, was unreasonable and therefore *ultra vires*. As regards the second offence, he held that section 232 of the Ordinance No. 7 of 1887, was a dead letter, and not applicable to the

accused; and that as it was wrong to refuse to allow the accused to continue in occupation, the accused was not guilty under section 232.

The complainant (a Municipal Inspector) appealed, with the sanction of the Attorney-General.

Van Langenberg, for appellant.

Dornhorst, K.C., and *Walter Pereira*, for respondent.

Cur. adv. vult.

19th August, 1903. LAYARD, C.J.—

The accused was up to the end of December, 1902, a stall holder in the public market at Slave Island established by the Municipal Council, and occupied two stalls therein. He was charged in this case with breach of the by-law 14 of chapter 19 of the by-laws in schedule A to the Ordinance No. 16 of 1881, and also with the offence of selling mutton in breach of section 234 of the Ordinance No. 7 of 1887. The Magistrate has acquitted the accused on the first charge on the grounds (1) that by leasing the market the Council had divested itself of the right to issue licenses and could not therefore require the accused to take out a license; (2) that the leasing of markets would create a monopoly and all by-laws which tend to restrain trade are *ultra vires;* (3) that the by-law which allows the Council to deprive a person of the right to carry on his trade in a public market is unreasonable, and therefore *ultra vires*. And as to the second offence, on the ground (1) that section 232 of the Ordinance was a " dead letter "; and (2) that it was wrong to refuse to allow the accused to continue to use the public market.

The prosecutor being dissatisfied with the judgment of the Magistrate acquitting the accused, appealed to this Court. His counsel at some length argued that the Municipal Council had not leased the market. I do not think it is open to the prosecution to now raise that question; the case before the Magistrate was conducted on the premise that the Council had leased the market for the year commencing from the 1st January, 1903. This statement of fact is the foundation of the petition of appeal to this Court, and the prosecutor urges in his appeal that the Magistrate is wrong in holding that " by leasing, the Council ceased to have control over the market ". It is clear that his counsel cannot be allowed by this Court now to argue in contravention of that statement of fact, and of the main ground on which the petition of appeal is based to this Court.

To arrive at a correct decision in this case it will be necessary for me to try and ascertain what by-laws are now in force in Colombo with respect to public markets. As far as I can see the

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whole subject is in a state of chaos. I will therefore endeavour to investigate it to the best of my ability.

The Ordinance No. 17 of 1865 enacted that the public markets in any town and the lands at present used as such in any Municipality, were thereby vested in the Municipal Council of such town. I understand from the petition of appeal that the public market in question was not in existence in 1865 but was subsequently established by the Municipal Council of Colombo. Section 151 of the Municipal Councils Ordinance gave the Municipal Council of Colombo power to establish public markets within the Municipality of Colombo and to frame and make by-laws for the better control of such markets, and to prohibit the sale of cattle, meat, fish, poultry, vegetables, fruit, and the like in places other than the markets established by the Council. We are not informed as to the exact nature of the by-laws made by the Municipal Council of Colombo in pursuance of the Ordinance No. 17 of 1865. I gather, however, from the Legislation of 1881 that some difficulty had then arisen as the Municipal Council had from time to time passed by-laws which were in excess of the powers given to them by the then existing law, and the intervention of the Legislature was invited to sanction by legislative enactments such by-laws as had been made by the Municipal Council of Colombo. Thereupon the Legislature passed the Ordinance No. 16 of 1881, declaring the by-laws set out in the schedule to that Ordinance to be as legal and effectual as if they had been enacted by the Ordinance No. 17 of 1865.

One of the offences alleged to have been committed by the accused is a breach of one of those by-laws. It will be necessary therefore to consider whether the by-laws contained in chapter XIX. of the schedule to that Ordinance, which deal with public markets, are still in force, or to what extent they are in force in view of the repeal of the Ordinance No. 17 of 1865, and Legislation subsequent to the Ordinance of 1881.

The by-laws in chapter XIX. provide amongst other things for notice of the opening of public markets, for the fixing by the order of the Municipal Council from time to time of the rents and fees to be paid, and for the farming of the revenues of the rents and fees of a public market. By-law 4 appears to me to alleviate the hardship which would arise from the enforcement of the provision of the Statute Law enabling the Municipal Council to absolutely prohibit the sale of fresh meat in places other than the markets provided by the Municipal Council of Colombo. By that by-law all that the Municipal Council can prohibit, and then only with the sanction of the Governor and Executive Council, is

the sale by any person outside his own dwelling-house or shop of any article of food within an area to be defined in a notice to be published in the *Government Gazette*, leaving it open within such areas for butchers and others to carry on their trade in their own private shops, provided they comply with the requirements of by-law 12 and obtain a special license from the Council. Possibly the by-laws contained in chapter XIX. were all in force until the passing of the Ordinance No. 7 of 1887, they having been declared law by the Legislature. In 1887 it was considered desirable by Government to legislate afresh and to consolidate and amend the law relating to Municipal Councils in the Island. In legislating afresh the Legislature provided in the Ordinance No. 7 of 1887 for public markets and private markets. In dealing with the former it appears to have considered it undesirable to perpetuate the monopoly in favour of Municipal markets, so whilst re-enacting section 150, it was careful not to re-enact so much of section 151 as dealt with the prohibition of the sale of meat and the like in places other than Municipal public markets. It also expressly defined and limited by section 229 the purposes for which by-laws might be made in respect of Municipal markets. It gave by section 231 the power to the Municipal Council to sell and lease markets and to close them, and directed by section 232 that permission to sell in a public market must be obtained from the Chairman.

Now, if we compare the by-laws enacted in respect of public markets by Ordinance No. 16 of 1881 with the provisions of the Ordinance of 1887, we find that the by-laws contained in chapter XIX. are based on the assumption that the Municipal Council has the right to prohibit the sale of articles of food within certain areas in which Municipal public markets are situated, which is repugnant to the provisions of the Ordinance of 1887. The by-laws limit the disposing powers of the Council over public markets merely providing for the letting to farm the stallage rents of any public market, whilst the Ordinance No. 7 of 1887 provides for the out and out sale or lease of such market or any part thereof on such terms as the Municipal Council may think fit. The by-laws provide for notice in the *Gazette* of opening of a market, which is reasonable in view of the power given by such by-laws to prohibit the sale of food elsewhere than in a public market except with the express permission of the Municipal Council. The Ordinance requires no such notice. The by-laws provide for the recovery by distress of the rents and fees due in respect of any market by the Municipal Council or their lessees, the Ordinance distinctly provides (section 227) for the recovery

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of rents and fees by the Municipal Council alone, as if the amounts were taxes due under the Ordinance. The Ordinance nowhere provides that a stall-holder shall not use a stall without the license of the Secretary of the Municipal Council (by-law 14). On the contrary, the issue of such licenses is not required, but section 232 enacts a penalty for selling in a market without the permission of the Chairman, which apparently need not be reduced to writing, and which cannot be dispensed with by a resolution of the Council, though the issue of a license can be, by by-law 14. The by-laws require that the stallage rent and fees must be " appointed by special order of the Council ", and the Ordinance provides that the Municipal Council may charge such rent and fees as to them may seem fit.

It follows that the by-laws contained in chapter XIX. of the Schedule A to the Ordinance No. 16 of 1881 are not consistent with the provisions of sections 226 to 232 of Ordinance No. 7 of 1887, which deal with public markets. Now, in enacting the Ordinance No. 7 of 1887 the Legislature by section 2 provided the repeal of the Ordinances in the Schedule A thereto to the extent in the third column of that schedule mentioned. Schedule A in the third column expressly provides for the repeal of the whole Ordinance No. 16 of 1881, excepting section 9 and such of the by-laws in schedule A to that Ordinance as are not inconsistent with the Ordinance No. 7 of 1887. The by-laws in chapter XIX. of Schedule A of the Ordinance No. 16 of 1881 are manifestly inconsistent with the sections of Ordinance No. 7 of 1887 above-mentioned, and are consequently repealed by the provisions of section 2 of that Ordinance.

Our attention has been invited to section 2 of the Ordinance No. 8 of 1901. That section only saves such by-laws contained in the schedule to the Ordinance No. 16 of 1881 as were in force at the date of the passing of the Ordinance No. 8 of 1901, but for the reasons given above in my opinion the by-laws contained in chapter XIX. of Ordinance No. 16 of 1881 were not legally in force at that date. It follows from the above, that the accused cannot be convicted of the breach of any by-law therein contained.

The question remains, is accused guilty of an offence under section 232 of Ordinance No. 7 of 1887? That section has not been repealed, and it is impossible for this Court to treat it as a " dead letter " as the Magistrate appears to consider it should be. The Attorney-General has sanctioned this appeal on the understanding that the Municipal Council had leased the market for a year, and because that Council wished to contend that notwithstanding that lease the Council still continued to have control thereof. The

appellant therefore, as I said before, cannot argue before this Court that the Municipal Council was still in possession of the premises not having leased them. The position is this: that for the purpose of this appeal we are bound to assume that the Municipal Council has leased the premises for a year. We do not know what conditions have been attached to the lease in question. Section 231 of Ordinance No. 7 of 1887 gives large powers of leasing to the Municipal Council, and it appears to me that they can by leasing the premises under that section give up all control over the market, and thereby the market would cease to be a public market for the period of the lease, and if used as a private market by the lessee the provisions of section 233 to 245 would then come into operation in respect of such market and the public health would be thereby safeguarded. The Municipal Council has apparently taken the same view of the provisions of section 231, for when in 1900 they leased these premises they left to their lessee the discretion as to who should occupy the stalls in the market, subject to the condition merely that the occupants hold a butcher's license and that the stall holders in possession should continue in possession under the lessee. Again, when the accused asked for a license to sell in the market, he received the reply from the Chairman that a license could not issue as the market was leased for twelve months. The reason why the provisions of section 232 have not been enforced from time to time appears to be that it has been the custom for many years to lease the market under the preceding section, and the Municipal Council have recognized that in so doing they have lost the control of the market. In my opinion when a market is sold under section 231 or leased thereunder it becomes closed as a public market, and there is no necessity for any one to obtain permission from the Chairman under section 232 to sell in the premises sold or in the premises demised during the continuance of such demise.

Such being my opinion, I cannot see my way to reverse the acquittal of the accused.

I would dismiss this appeal.

WENDT, J.—

I have had the advantage of perusing the judgment of the Chief Justice. He has referred so fully to the facts of the case that I need not recapitulate them. It appears to me that the by-laws of chapter XIX. of the schedule to Ordinance No. 16 of 1881 are in material particulars inconsistent with the provisions of the Ordinance No. 7 of 1887, and that to that extent those by-laws are repealed by section 125 of the Ordinance. The Ordinance No. 17

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of 1865 did not authorize the Municipal Council to lease or temporarily alienate any public market, and the only power of this nature which the Council possessed was that conferred by by-law No. 3 of chapter XIX. which authorized the Council to " demise or let to farm " for any term not exceeding twelve months all or any of the stallages, rents, and fees from time to time payable in any public market. This by-law, although in excess of the powers conferred by the Ordinance of 1865, was rendered valid by the Ordinance No. 16 of 1881. The later by-laws in chapter XIX. speak of the farmer of the rents and fees as " the lessee ", though the term imports something very different from what is contemplatd by section 231 of the Ordinance of 1887. By-law No. 14, under which the first count in the charge is laid, might perhaps be capable of being read as applicable as well to markets demised or let under by-law 3 as to markets conducted by the Council itself, but I think it is *primâ facie* inapplicable to a public market leased under section 231. If it were applicable to markets leased it would be equally so to markets sold under that section. Looking at the provisions as to the issue of licenses to persons using the market, I think that by-law 14 is inconsistent with section 232 so far as they both refer to public markets under the control of the Council, and in the first place I am unable to draw any distinction in substance between the act of holding or occupying a seat or stall in a public market (which is an act requiring to be licensed under by-law 14) and the act of selling or exposing for sale any article in a public market, for which section 232 renders the permission of the Chairman necessary. Both enactments are aimed at making a license necessary for the use of the market. In the second place, I think the effect of section 232 is to substitute the Chairman as the licensing authority in place of the Secretary who is designated in the by-law. Although in a sense the two enactments may be said to be consistent inasmuch as a person may obtain both the Secretary's license and the Chairman's permission, I cannot think that the Legislature intended that the two requirements should co-exist, and that a person in order to use a public market should obtain both the permission of the Chairman and the license of his subordinate officer, the Secretary. I am therefore of opinion that no conviction could be sustained under by-law 14. But even if this by-law were consistent with the provisions of the Ordinance, I think that it cannot be made to apply to a case in which the Council has leased the market, as they must be taken to have done in the present instance.

Then, as to the second count, I think section 232 has effect only in the case of a market not leased. The lease contemplated by

section 231, like the analagous case of sale, is a lease of a public market or any part thereof for which the Council has no further use, and this is shown by the power which the section proceeds to confer of closing such market or any part thereof. By the sale or lease it ceases to be a public market, and therefore section 232 ceases to be applicable.

For these reasons I agree in dismissing the appeal.

MIDDLETON, J.—

I have had the great advantage of perusing the judgments of the Chief Justice and my brother Wendt, and I do not propose therefore to set out the facts.

The case before the Magistrate proceeding on the footing that the Municipality had granted a lease of the meat market, including the stall, it is sought to punish the respondent for holding over without a license contrary to the terms of by-law XIV. of chapter XIX. of the by-laws rendered statutory by section 9 of Ordinance No. 16 of 1881.

The petition of appeal recapitulated the existence of a lease, and it is deducible from the evidence of a clerk, that a license was refused to the accused on the ground there was a lease, although there was not directly stated.

If there was a lease, it seems to me there would be an alienation *pro tanto*, and consequently the building must necessarily be deprived of its character as a public meat market, and be at the disposal and under the control of the lessee to sublet as lodgings, or otherwise subject to the conditions of the lease.

What those conditions are we do not know, and it is conceivable that they might have the effect of retaining the character of the place let as a public meat market, but we have it in evidence from the Secretary that during the period there were " leases no stallage license was issued by the Council ", and from the clerk that no licenses have been issued to the present lessee or any one else.

It is clear therefore that the Municipality did not consider that the sub-lessees of their lessees of the market were bound to obtain licenses under rule 14, and in that view I agree. The leased market, in my opinion, might be used for sleeping rooms or offices, and would thus lose its character as a public market, and no licenses would be required for occupying its stalls.

I think therefore on the ground that a lease of a building used as a public market, unless it were let subject to the provisions of chapter XIX. of the by-laws, would vest in the lessee an estate for the time being, the due enjoyment of which would be incompatible with the user of the property leased as a public market,

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that no licenses for the occupation of its stalls as a public market could be exacted or required during the existence of the lease, and on this ground I would hold that neither under rule 14 of the by-laws, nor under section 232 of the Ordinance No. 7 of 1887, has the accused committed any offence rendering him amenable to punishment.

I had some doubt as to whether I could agree that all the by-laws under chapter XIX. made under the Ordinance of 1881 are repealed as being inconsistent with the terms of certain sections in Ordinance No. 7 of 1887, but having carefully considered the question it is clear that the inconsistencies pointed out by the Chief Justice exist.

It was also clear that rule 4 was leased upon Legislation which has been repealed, and not re-enacted in Ordinance No. 7 of 1887, and that the terms of section 232 of the Ordinance are not in accord with rule 14.

I agree therefore that in respect to the inconsistencies mentioned by the Chief Justice the Ordinance has in each case over-ridden and repealed the by-laws including rule 14, and to this extent I agree that chapter XIX. has been repealed by the Ordinance, and consequently that accused for this reason cannot be convicted under rule 14, and that the acquittal must be upheld.