(1863) 14 Common Bench Reports (New Series) 180

***414 Cooper v The Board of Works for the Wandsworth District**

1863

April 21st, 1863.

[S. C. 32 L. J. C. P. 185; 9 Jur. N. S. 1155; 11 W. R. 646, Applied, Brutton v. St. George's, Hanover Square, Vestry , 1871, L. R. 13 Eq. 345. Distinguished, Cheetham v. Mayor of Manchester , 1875, L. R. 10 C. P. 265. Referred to, London and South Western Bailway v. Flower , 1875, 1 C. P. D. 86. Discussed, Smith v. R. , 1878, 3 App. Cas. 624. Adopted, Masters v. Pontypool Local Government Board , 1878, 9 Ch. D. 684; St. James and St. John, Clerkenwell, Vestry v. Feary , 1890, 24 Q. B. D. 709. Approved, Hopkins v. Smithwick Local Board of Health , 1890, 24 Q. B. D. 713. Considered, Attorney-General v. Hooper , [1893] 3 Ch. 483. Distinguished, Robinson v. Sunderland Corporation , [1899] 1 Q. B. 757.]

The 76th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, impowers the district board to alter or demolish a house, where the builder has neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation:—Held, that this does not impower them to demolish the building, without first giving the party guilty of the omission an opportunity of being heard; and that the 211th section, which gives an appeal to the Metropolitan board of works, does not prevent the builder or owner of the premises from suing them for so doing.

This was an action for pulling down a house of the plaintiff which was in the course of erection.

The defendants justified their act under the 76th section of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, which enacts that, "before beginning to lay or dig out the foundation of any new house or building within any such parish or district 1 , or to rebuild any house or building therein, and also before making any drain for the purpose of draining **[181]** directly or indirectly into any ***415** sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building or to make such drain; and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this act, and as the vestry or board shall order; and every such drain shall be made in such direction, manner, and form, and of such materials and workmanship, and with such branches thereto and other connected works and apparatus and water supply as hereinbefore [s. 73] mentioned, and as the vestry or board shall order; and the making of every such drain shall be under the survey and control of the vestry or board; and the vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received, within seven days after the receipt of such notice; and, in default of such notice, or if such house, building, or drain, or branches thereto, or other connected works and apparatus and water supply, be begun, erected, made, or provided in any respect contrary to any order of the vestry or board made and notified as aforesaid, or the provisions of this act, it shall be lawful for the

vestry or board to cause such house or building to be demolished or altered, and to cause such drain or branches thereto, and other connected works and apparatus, and water supply, to be re-laid, amended, or re-made, or, in the event of omission, added, as the case may require, and to recover the expenses thereof from the owner thereof in the manner hereinafter provided."

The cause was tried before Willes, J., at the sittings in Middlesex after last Michaelmas Term. It ap- **[182]** -peared that the plaintiff, a builder, was employed to build a house within the Wandsworth district, and had already reached the second storey, when the defendants, without giving him any notice, sent their surveyor and a number of workmen, at a late hour in the evening, and razed it to the ground.

There was conflicting evidence as to whether or not the plaintiff had given the notice required by the 76th section of the Metropolis Local Management Act, of his intention to build; he alleging that he had, and the officers of the board denying that any such notice had come to their hands: but it was admitted by the plaintiff that he had commenced digging out the foundations within five days of the day on which he alleged he had sent notice.

On the part of the plaintiff, it was submitted that the district board of works had no power under the circumstances to demolish his house; and that, assuming they had such power, they had improperly exercised it, by acting without notice to him or giving him an opportunity of being heard.

For the defendants it was insisted, that the 76th section of the statute gave them a discretion, against the exercise of which there was no appeal, except to the Metropolitan board of works under s. 211 2 ; and **[183]** that, inasmuch as they were acting ministerially, and not judicially, they were not bound to give any notice.

Under the direction of the learned judge, a verdict was entered for the plaintiff, leave being reserved to the defendants to move to enter the verdict for them, or a nonsuit, if the court should be of opinion that the action was not maintainable. A rule nisi having accordingly been obtained, ***416**

G. Denman, Q. C., and Prentice, shewed cause. The provisions of the 76th section of the Metropolis Local Management Act are so stringent and arbitrary that the court will be slow to hold that they override that sound and universally-applicable principle of natural justice, that no man shall be condemned either in person or property without having had an opportunity afforded him of being heard in his own defence. This was most emphatically held in The King v. The Chancellor, &c., of Cambridge (Dr. Bentley's case), 1 Str. 557, 2 Ld. Raym. 1334, 8 Mod. 148, Fortescue, 202, and has been repeatedly enforced since: see The King v. Benn , 6 T. R. 198; Harer v. Carr , 7 T. R. 270; Capel v. Child , 2 C. & J. 558; Hammond v. Bendyshe , 13 Q. B. 869; Painter v. The Liverpool Oil Gas Light Company , 3 Ad. & E. 433, 6 N. & M. 736. In Capel v. Child , Bayley, B., says that he knows of no case in **[184]** which you are to have a judicial proceeding by which a man is to be deprived of any part of his property without his having an opportunity of being heard. The like doctrine is laid down in the Hammersmith Rent-Charge case , 4 Exch. 87. Under the Tithe Commutation Act, 6 & 7 W. 4, c. 71, s. 82, when the half-yearly payment of rent-charge on land shall be in arrear and unpaid for the space of forty days, and there shall be no sufficient distress upon the premises liable to the payment thereof, it shall be lawful for any judge of His Majesty's courts of record at Westminster, upon an affidavit of the facts, to order a writ to issue to the sheriff, requiring him to summon a jury to assess the arrears of the rent-charge remaining unpaid, and to return the inquisi-

tion thereupon taken to some one of the superior courts, &c.: and the court of Exchequer,—Parke, B., dissentiente,—held, that such order could be made on an ex parte application to the judge. Parke, B., in the course of his judgment, says: "It has long been a received rule in the administration of justice, that no one is to be punished in any judicial proceeding, unless he has had an opportunity of being heard." In Austin v. The Vestry of St. Mary, Lambeth , 27 Law J., Ch. 388, and in The Poplar District Board of Works, App., Knight, Resp. , 28 Law J., M. C. 37, notice was given by the board before any step taken by them under s. 76. In Tinkler v. The Wandsworth District Board , 27 Law J., Ch. 342, where the question arose upon the 81st and 85th sections of this statute,—the board having come to an arbitrary resolution that no privies or cesspools should be allowed in their district,—Lord Justice Knight Bruce says: "The question is not whether the board have power to cause or order privies within their district to be put in a proper and decent state, if not in that state: but it is, whether they have the right or power to force on **[185]** the plaintiff the mechanical contrivance of water-closets, with their requisite apparatus, for which he is to find water supply as best he may, instead of the privies (sufficient as privies, if kept in a condition proper for such conveniences, are) which are upon his land for the purposes of his cottages there. The claim of the defendants in that respect appears to me manifestly groundless. I should have thought so had they begun their operations by giving the plaintiff an opportunity of being heard, and of producing testimony, or in any event of hearing him, and if they had regulated themselves by analogy to judicial proceedings, and had deemed it reasonable to hear both sides: but, as matters were conducted, there has, perhaps, been a double error,—although upon this point I do not mean to speak as having formed an opinion; nor do I mean to intimate my impression how the case might possibly have stood had there been, as there has not been, any order of a justice or justices of the peace relating to the work or the privies. The right, however, or power to appeal given by ss. 211 and 212, c. 120, upon which stress was laid in the argument, appears to me not at all to prejudice or affect the plaintiff." And Lord Justice Turner says: "Whatever may be the powers given by this act to the local authorities to order water-closets to be provided instead of privies in particular cases in which that alteration may be required (I am assuming that, without in the least meaning to decide that the act gives that power), I think that, whatever may be the powers given, upon the true construction of the act, and viewing it in the light most favourable to these defendants, they were bound to exercise their jurisdiction in each particular case, and that it was not competent to them to lay down any such general rule as that upon which the defendants acted; and that, in acting upon that rule, they **[186]** have exceeded the powers given to them by the act." And further he says: "If a tribunal having a limited jurisdiction goes beyond that jurisdiction, it is unnecessary to resort to the appeal clause." It is submitted, therefore, that the defendants' justification wholly fails.

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Bovill, Q. C., and B. C. Robinson, in support of the rule. The statute in question is one of a series of recent acts giving large powers to local boards for the public benefit, the great safe-guard against abuses in the administration of which is that the members of which these boards are composed are elected by the rate-payers of the district. Many things are to be done, some requiring notice, others not: and in many cases the object to be attained would be utterly frustrated unless done promptly. Such are the matters referred to in sections 73, 82, 83, 108, and 112. [Willes, J. The old commissioners of sewers, acting under the commission created by the statute 23 H. 8, c. 5, s. 3, proceeded by presentment of a jury, which the party had an opportunity of traversing.] They were a court of record, and acted judicially 3 . Unless the local board have the power here exercised, there being no penalty provided for disobedience, the direction of the 76th section will never be complied with. What

necessity can there be for giving the party notice, when he well knows that he is doing an illegal act, and that the board have power to prostrate his house? It is not like a case where a judicial discretion is to be exercised. An arbitrary power is conferred upon the board, which is necessarily to be exercised without any control. In Bonaker v. Evans , 16 Q. B. 162, 171, Parke, B., says: "No proposition can be more clearly established than **[187]** that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary ." The defendants were guilty of no excess here: they did nothing beyond what was necessary for pulling down the house.

Erle , C. J. I am of opinion that this rule ought to be discharged. This was an action of trespass by the plaintiff against the Wandsworth district board, for pulling down and demolishing his house; and the ground of defence that has been put forward by the defendants has been under the 76th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. By the part of that section which applies to this case, it is enacted that, before any person shall begin to build a new house, he shall give seven days' notice to the district board of his intention to build; and it provides at the end that, in default of such notice it shall be lawful for the district board to demolish the house. The district board here say that no notice was given by the plaintiff of his intention to build the house in question, wherefore they demolished it. The contention on the part of the plaintiff has been that, although the words of the statute, taken in their literal sense, without any qualification at all, would create a justification for the act which the district board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognized, that no man is to be deprived of his property without his having an opportunity of being heard. The evidence here shews that the plaintiff and the district board had not been quite on amicable terms. Be that as it may, the district board say that no notice was given, and that con- **[188]** -sequently they had a right to proceed to demolish the house without delay, and without notice to the party whose house was to be pulled down, and without giving him an opportunity of shewing any reason why the board should delay. I think that the power which is granted by the 76th section is subject to the qualification suggested. It is a power carrying with it enormous consequences. The house in question was built only to a certain extent. But the power claimed would apply to acomplete house. It would apply to a house of any value, and completed to any extent; and it seems to me to be a power which may be exercised most perniciously, and that the limitation which we are going to put upon it is one which ought, according to the decided cases, to be put upon it, and one which is required by a due consideration for the public interest. I think the board ought to have given notice to the plaintiff, and to have allowed him to be heard. The default in sending notice to the board of the intention to build, is a default which may be explained. There may be a great many excuses for the apparent default. The party may have intended to conform to the law. He may have actually conformed to all the regulations which they would wish to impose, though by accident his notice may have miscarried; and, under those circumstances, if he explained how it stood, the proceeding to demolish, merely because they had ill-will against the party, is a power that the legislature never intended to confer. I cannot conceive any harm that could happen to the district board from hearing the party before they subjected him to a ***418** loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, **[189]** that they should hear the party before they inflict upon him such a heavy loss. I fully agree that

the legislature intended to give the district board very large powers indeed: but the qualification I speak of is one which has been recognised to the full extent. It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding, and that a district board ordering a house to be pulled down cannot be said to be doing a judicial act. I do not quite agree with that; neither do I undertake to rest my judgment solely upon the ground that the district board is a court exercising judicial discretion upon the point: but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down. The case of the corporation of the University of Cambridge, who turned out Dr. Bentley, in the exercise of their assumed power of depriving a member of the University of his rights, and a number of other cases which are collected in The Hammersmith Rent-Charge case , 4 Exch. 96, in the judgment of Parke, B., shew that the principle has been very widely applied. The district board must do the thing legally; there must be a resolution; and, if there be a board, and a resolution of that board, I have not heard a word to shew that it would not be salutary that they should hear the man who is to suffer from their judgment before they proceed to make the order under which they attempt to justify their act. It is said that an appeal from the district board to the metropolitan board (under s. 211) would be the mode of redress. But, if the district board have the power to do what is here stated, I am not at all clear that there would be a right of redress in that way. The metropolitan **[190]** board may not have a right to give redress for that which was done under the provisions of the statute. I think the appeal clause would evidently indicate that many exercises of the power of a district board would be in the nature of judicial proceedings; because, certainly when they are appealed from, the appellant and the respondent are to be heard as parties, and the matter is to be decided at least according to judicial forms. I take that to be a principle of very wide application, and applicable to the present case; and I think this board was not justified under the statute, because they have not qualified themselves for the exercise of their power by hearing the party to be affected by their decision.

Willes , J. I am of the same opinion. I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice. Now, is the board in the present case such a tribunal? I apprehend it clearly is, whether we consider it with reference to the discretion which is vested in it, or whether we look at the analogy which exists between it and other recognised tribunals (and no one ever doubted that such tribunals are bound by the rules which a court of justice is bound by), or whether you look at it with reference the estimation in which it is held by the legislature, as appears from the language used in the statute.

First, with regard to the powers the board exercises with respect to sewers, and so on with respect to nuisances, and the power to remove certain excrescences in the public streets, or of insisting upon houses being provided with certain conveniences, and that they **[191]** shall be built at a certain level, and so on; all these are powers which are to be exercised with a due discretion. With respect to nuisances, the board exercises the power of a criminal court of high jurisdiction, because it has a discretion as to whether it will abate that which is a nuisance altogether, or whether it will simply direct that there shall be a modification of the works which in its opinion are necessary for the health of the neighbourhood. I apprehend it is clear that the powers thus exercised by the board under the act are powers which have always been considered judicial, and which could not be exercised without giving notice to the party who is to be proceeded against. In this very section, 76,

the legislature speaks of coming "under the jurisdiction of the vestry or board;" and it is clear that these boards do exercise judicial powers. The power here is one that, probably more than any, requires that the party to be affected by it should be heard, because of its extent, and because the board may be satisfied with a modification of that which has been ***419** done. The form of the section is peculiar. Notice is to be given; and, if the notice is given, then it is to be considered by the district board; and, if they think proper to make an order with reference to the manner in which the house is to be built, "the vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received, within seven days after the receipt of such notice; and, in default of such notice," certain things may be done. The object of the notice is simply that the board may have an opportunity of directing how the work is to proceed; and, at the end of seven days, if there is no desire of the board emanating from them, the person may proceed according to the act of parliament. The section proceeds,— **[192]**

"And in default of such notice, or if such house, building, or drain, or branches thereto, or other connected works and apparatus and water supply be begun, erected, made, or provided in any respect contrary to any order of the vestry or board, made and notified as aforesaid, or the provisions of this act, it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to cause such drain or branches," &c., &c. The matter to be considered by the board before they make that order is, first of all, has any notice been given? And then the party clearly ought to be allowed to shew, either that he has given a notice which may have been overlooked, or, if the notice has not been received by the board, to shew that he did his best towards doing so, in order to induce them to look on the case favourably,—not to demolish the house, but to see whether any and what qualification is necessary for the purpose of bringing it within what should be done if the notice had been regularly served. In either of those cases, I apprehend, it is clear that it would be the right of the party to be heard. But there is a third case; and that is where, by wilfully disregarding the order, or by the act of some third person, whom he did his best to control, the owner of the house may have subjected his house to demolition by the board, or to be dealt with severely by reason of its defects. That is a case in which judicial power is to be exercised, and in which clearly the party sought to be affected should be heard. Then, as to the appeal section, 211, what light does that throw upon the matter? There is an appeal from the district board, not to any judicial tribunal in the sense of any tribunal more judicial in its form than the local board of works, but to the metropolitan board of works, which is just as much and just as little judicial in its acts as the board whose conduct **[193]** we are now considering. What is to take place upon such appeal? "And all such appeals shall stand referred to the committee appointed by such board for hearing appeals, as herein provided; and such committee shall hear and determine all such appeals." Nothing can be more clear than that the legislature thought that the matters which might come before the board upon appeal, that is, the same matters which came before the local board of works in the first instance, were proper, not only to be determined, but also to be heard; and, if fit to be heard upon an appeal, à fortiori fit to be heard in the first instance, before a wrongful decision can make an appeal lie. With respect to the remark of Mr. Robinson, that this is an appeal against an act, and that it may be that there may be an appeal against an act, and no appeal against an order,—the appeal against the act is introduced in favour of the party who is appealing, so as to give him a further time to appeal, if he should happen to miss the time for appeal after the order is made, if that order is acted upon to his prejudice. I apprehend, therefore, that that would not at all affect the construction of the section unfavourably to the plaintiff. There is another remark to be made with reference to these parties' proceedings. The board are not only to do the work of demolishing the

house, if they think proper, or modifying it, but they are to charge the expenses on the person who has erred against the act. His property is affected and his purse is further affected. What happens upon that? and how is the money to be got? That is a proceeding under the 225th section, which is a section giving jurisdiction to the justices before whom the costs are to be ascertained and recovered; and it is clear that under that section the justices could not proceed without having before them the person against whom the expenses are to be **[194]** adjudged. And it does seem an absurdity to say that, in determining the amount of expenses, the party shall be heard, but that, in determining whether proceedings should be taken, his mouth should be closed. I cannot help thinking that a board exercising this large power should follow the ordinary rule, that the party sought to be affected should be heard; and I think that the verdict for the plaintiff ought to stand. ***420**

Byles , J. I am of the same opinion. This is a case in which the Wandsworth district board have taken upon themselves to pull down a house, and to saddle the owner with the expenses of demolition, without notice of any sort. There are two sorts of notice which may possibly be required, and neither of them has been given: one, a notice of a hearing, that the party may be heard if he has anything to say against the demolition; the other is a notice of the order, that he may consider whether he can mitigate the wrath of the board, or in any way modify the execution of the order. Here they have given him neither opportunity. It seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with Dr. Bentley's case4 , and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The judgment of Mr. Justice Fortescue, in **[195]**Dr. Bentley's case , is somewhat quaint, but it is very applicable, and has been the law from that time to the present. He says, "The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also." If, therefore, the board acted judicially, although there are no words in the statute to that effect, it is plain they acted wrongly. But suppose they acted ministerially,—then it may be they were not bound to give the first sort of notice, viz. the notice of the hearing; but they were clearly bound, as it seems to me, by the words of the statute, to give notice of their order before they proceeded to execute it. Section 76 contains these words: "The vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified" (observe what follows) "to the person from whom such notice was received, within seven days after the receipt of the notice." The plain construction of those words, as it seems to me, is this: the order is to be notified, and, in the case of a person who has given a notice, that notification is to be conveyed to him within seven days from the date of his notice. That has not been done. There has been neither notice of the one sort nor of the other; and it seems to me, therefore, that, whether the board acted judicially or ministerially, they have acted against the whole current of authorities, and have omitted to do that which justice requires, and contravened the words of the statute. I **[196]** entirely agree with what my Brother Willes has said about section 211, which clearly shews that, if the board acted ministerially, they ought to give a notice of the latter character. I cannot entertain any doubt that in this case the board have exercised their power wrongfully.

Keating , J. I quite agree with the rest of the court. I think it is impossible to read the 76th section of the statute without seeing that the district board of works are to exercise a discretion of a very important character indeed; because they are authorized, where there has been no notice, or where their order has been contravened in any way, to demolish or to alter, as the case may require. Therefore, they are to form a judgment as to how far and to what extent demolition or alteration is required. That being so, surely it must be intended that they are, by means of hearing the party against whom their order is to be made, to ascertain the facts so as to be able to form a judgment upon the matter in question. If an illustration were required of the necessity for it, it seems to me this case would furnish it; because, just suppose that the district board of works here had issued a notice to the party to hear what he had to say, and that he had come before them and stated what was the fact, as established in this case, "I did not give you notice: I have contravened the statute: but, although I have done so, I can satisfy you that the house has been built and the drains have been made strictly in accordance with the requirements of the statute,"—can any one suppose for a moment that the board would have proceeded to inflict upon the man the grievous injury of demolishing his house I cannot conceive it for a moment. ***421** I think the case itself furnishes the strongest illustration of the necessity of the applica- **[197]** -tion of that rule to which the other members of the court have already referred. I quite agree, therefore, that the rule ought to be discharged.

Rule discharged [5] .

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1. Mentioned in Schedules A. and B. to the act.

2. "Any person who deems himself aggrieved by any order of any vestry or district board in relation to the level of any building, or any order or act of any vestry or district board in relation to the construction, repair, alteration, stopping, or filling up, or demolition of any building, sewer, drain, water-closet, privy, ashpit, or cesspool, may, within seven days after notice of any such order to the occupier of the premises affected thereby, or after such act, appeal to the Metropolitan board of works against the same; and all such appeals shall stand referred to the committee appointed by such board for hearing appeals, as herein provided; and such committee shall hear and determine all such appeals, and may order any costs of such appeals to be paid to or by the vestry or district board by or to the party appealing, and may, where they see fit, award any compensation in respect of any act done by any such vestry or district board in relation to the matters aforesaid: Provided that no such compensation shall be awarded in respect of any such act which may have been done under any of the provisions of this act on any default to comply with any such order as aforesaid, unless the appeal be lodged within seven days after notice of such order has been given to the occupier of the premises to which the same relates."

3. See The Queen v. Warton , 2 Best & Smith, 719.

4. The King v. The Chancellor, &c., of Cambridge , 1 Stra. 557, 2 Ld. Raym. 1334, 8 Mod. 148, Fortescue, 202.

5. The question of damages was referred.

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