1915. *September* 13, 15, 20. MASON, BRISTOWE and CURLEWIS, JJ.

Constitutional law.—Provincial Councils.—Power in relation to municipal institutions.—South Africa Act 1909, *sec.* 85 (VI).—*Prosecution by town councils for breach of bye-laws.—Ord.* 9 *of* 1912, *sec.* 113.

Section 85 (VI) of the South Africa Act empowers Provincial Councils to make Ordinances in relation to municipal institutions, *Held*, that Provincial Councils could endow municipal corporations with all such powers as might enable them to deal fully and effectively with reasonable municipal requirements in accordance with the social and economic conditions of the present time. *Held*, further, that sec. 113 of Ord. 9 of 1912 empowering municipal councils to institute prosecutions by any person authorised in writing by the Mayor or Town Clerk for a breach of their bye-laws or regulations was *intra vires* the Provincial Council.

Appeal from a conviction by the A.R.M., Pretoria.

The accused were charged with contravening sec. 191 (3) of Ord. 9 of 1912, on two counts: (1) for exposing for sale, and (2) for selling at their place of business, portions of a pig which was diseased and unfit for food. One punishment was imposed on each of the accused in respect of the two counts; the first accused was sentenced to a fine of £10 or 14 days' imprisonment with hard labour, and the second accused to a fine of £5 or seven days' imprisonment with hard labour.

B. de Korte, for the accused: The prosecution by the municipality is illegal. Sec. 113 of Ord. 9 of 1912 is *ultra vires*, sec. 139 of the South Africa Act, 1909, which vests the prosecution for crimes and offences in the Attorney-General. "Offence" is defined by Ordinance 1 of 1903. Sec. 114 of Ordinance 9 of 1912 has been held to be *ultra vires*: see *Germiston Municipality* v. *Angehrn and Piel* (1913, T.P.D. 135). The municipality is a private party, not a corporation, and even if it is a corporation its power to prosecute cannot be delegated: see *Hunt* v. *Hoare* (1 S.C. 379); *Queen* v. *Mitchell* (14 S.C. 119). Private prosecutions have not been allowed in Roman-Dutch law. See Van der Linden, *Koopmanshandboek* (3, 2, 2); Wassenaar, *Jud. Pract.* (Ch. 27); Plakkaat of 1570 (2 Gr. Pl. B., p. 1047). See also Erskine's *Law of Scotland* (p. 1173).

E. V. Adams, for the respondent: Sec. 139 of the South Africa Act does not affect prior rights of private prosecutions by munici-

palities; sec. 135 provides that the existing laws should continue to be in force. A municipality is a person: see Act 5 of 1910, sec. 3. As to the power of prosecution by municipalities: see Proc. 7 of 1902, sec. 63; *Middelburg Municipality* v. *Gertzen* (1914, A.D. 544); Proclamation 39 of 1902, sec. 14; Ord. 58 of 1903, sec. 49; Ord. 3 of 1905, sec. 6; Ord. 7 of 1906, sec. 2. Section 181 of Ord. 9 of 1912 imposes the duty to carry out bye-laws; even if sec. 113 be *ultra vires* secs. 49 and 58 would still be in force. The power to prosecute for contravention of bye-laws is essential for a municipality.

de Korte replied.

Cur. adv. vult.

Postea (September 20).

MASON, J., delivered the following judgment of the Court: The appellants were convicted of contravening sec. 191 (3) of the Transvaal Local Government Ordinance No. 9 of 1912, on two counts: one for exposing for sale, and the other for selling at their place of business, portions of a pig which was diseased and unfit for food. One punishment was imposed on each of the appellants in respect of the two counts; the first appellant being sentenced to a fine of £10 or 14 days' imprisonment with hard labour, and the second to £5 or 7 days' imprisonment with hard labour.

The conviction was attacked on the merits, but there can be no doubt upon the facts that the accused were guilty of the charge, and that even if they did not actually know that the pig was diseased, they could with reasonable care have easily discovered that it was in such a condition.

But the main ground of appeal urged in this Court, though not mentioned in the Court below, was that it was not competent for the Municipality to prosecute, on the ground that section 113 of Ord. 9 of 1912, which empowered a council to prosecute by any person authorised in writing by the Mayor or Town Clerk, was *ultra vires*.

The summons was issued upon the complaint and information of Henry Walter Adams, prosecuting in the name and on behalf of the Municipality of Innesdale. An authority from the Town Clerk was lodged in the magistrate's court.

Counsel for the appellant argued that the Municipality had under common law no right of private prosecution, and that as questions of prosecution appertained to the administration of justice, they

were outside the powers of Provincial Councils under section 85 of the Act of Union. Stress was also laid upon section 139 of the same Act.

There can be no doubt that under Roman-Dutch law, more especially after the Criminal Ordinance of 5th July, 1570, the right of prosecution vested solely in the State. This was recognised in various statutory enactments in the Cape, and the whole subject was fully dealt with in the Criminal Procedure Ordinance No. 40 of 1828, the provisions of which upon the question of prosecution were reproduced in the Transvaal by Law 9 of 1866 and in the Criminal Procedure Code No. 1 of 1903.

These Ordinances provide that the only persons entitled to prosecute privately are those who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which they have suffered by the commission of the alleged offence.

Rule 63 of the Magistrates' Courts Proclamation, 21 of 1902, provides that any private persons entitled to prosecute may prosecute summarily in the magistrate's court without any certificate that the public prosecutor declines to prosecute, but there is no definition of the right to prosecute privately, and we must, therefore refer to the Law 9 of 1866. Under that law it seems to me clear that the Municipality would not be entitled to prosecute in respect of what might be called public offences, even though the fines for those offences are paid to the Municipal Treasury, because it has no peculiar interest, and because it does not suffer any injury from the alleged offences; so that the Municipality cannot prosecute for offences against the Local Government Ordinance 9 of 1912, unless section 113 is valid, or unless some other legislation confers upon it the right of prosecution.

There is no doubt that the right of private prosecution is a matter appertaining, generally speaking, to the administration of justice. Unless, therefore, section 113 comes within the powers of a Provincial Council to legislate in relation to Municipal institutions, it is invalid.

The scope of this legislative authority has been discussed in the cases of *Germiston Municipality* v. *Angehrn and Piel* (1913, T.P.D. 135); *Williams and Adendorff* v. *The Germiston Municipality* (*supra*, p. 105); and *Middelburg Municipality* v. *Gertzen* (1914, A.D., p. 544).

The general principle has been laid down that the Provincial Council may not only constitute municipal corporations as legal

bodies, but also endow them with all such powers as may be necessary or properly required for the working of municipal institutions. This is not a principle of self-evident application, and the language in which it has been expressed in the various judgments is not identical.

In *Germiston Municipality* v. *Angehrn and Piel* the JUDGE-PRESIDENT stated that all powers which were reasonably necessary and incidental to the working of municipal institutions would be included, and in the *Middelburg Municipality* v. *Gertzen* the CHIEF JUSTICE said the Provincial Council would have authority to exercise all such legislative powers as were reasonably required to deal fully and effectively with the subject assigned to it. Sir JOHN WESSELS in the same case considered that a benevolent interpretation to this authority should be given, so that Provincial Councils would be entitled to legislate in accordance with the new requirements of the Provinces in the matter of municipal institutions.

These decisions were based upon the well-known maxim, "*quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest.*"

The maxim was considered in the case of *Kielley* v. *Carson* (4 Moore P.C., p. 63), where the Privy Council, in discussing the question whether a Colonial Legislative Assembly had the power of commitment for contempt, stated that the establishment of a legislature implied all such powers as were necessary to its existence and a proper exercise of the functions which it was intended to execute; but they came to the conclusion that the power of commitment for contempt was not necessary for these purposes, and they illustrated this inference by references to other bodies.

In the case of *Fenton and Fraser* v. *Hampton* (11 Moore P.C. 347), and in which *Kielley* v. *Carson* was upheld, the judgment of the CHIEF JUSTICE of Tasmania, from which Court the appeal was brought, discussed the maxim very fully (p. 360). Broome's *Legal Maxims* (7th Ed., p. 357) has an interesting commentary on the same subject.

The general result of the decisions referred to seems to be that the maxim cannot be extended so as to introduce by implication ancillary powers which are not necessary to the exercise of the authority expressly granted, where such ancillary powers would curtail adversely the liberties or interests of others.

Sir JOHN WESSELS expressly decided in the *Middelburg Munici-*

pality v. *Gertzen* that the powers conferred by section 85 of the Union Act were to be benevolently interpreted. No express opinion on this point is contained in the judgment of the CHIEF JUSTICE, but it is quite clear that he does not limit the powers of the Provincial Council to matters which are absolutely necessary for municipal institutions.

It seems to me, therefore, that we are justified in holding that the Provincial Council may endow municipal corporations with all such powers as may enable them to deal fully and effectively with reasonable municipal requirements in accordance with the social and economic conditions of the present time. To ascertain whether any particular power comes within this principle, it is, of course, necessary to examine the subject matter and the course of legislation dealing with it in South Africa and in other countries whose municipal institutions we have copied.

Owing to the complexity of modern life there is an enormous mass of regulations dealing with all sorts of subjects affecting citizens of towns. These regulations it is necessary to enforce by means of penalties, which the Provincial Council is expressly authorised to impose by sub-section 11 of sec. 85. The fines accruing from convictions form part of the borough funds (sec. 110 of Ordinance 9 of 1912).

There can be no question that it would be highly inconvenient if all these offences had to be prosecuted at the expense of the Union Government by its various legal officers, whilst all the benefits of those prosecutions went to the Council. Indeed I think it is hardly too much to say that in the case of large municipalities the position would become almost impossible. The responsibility for administrating the affairs of the town rests with the Council. It would be difficult to execute this responsibility effectively if the entire control of all municipal prosecutions vested in Union officials.

A consideration, therefore, of the general subject matter leads one to the conclusion that the power of prosecuting for municipal offences is a reasonable, if not necessary, requirement of municipal institutions. Such being the case, it will be convenient, as was done in *Gertzen's* case, to examine the history of legislation in South Africa upon this subject.

The Cape Ordinance No. 9 of 1838, dealing with municipalities, enacted that all fines for contraventions of the statute or the bye-laws should go to the Colonial Treasury. This is amended by Law No. 14 of 1864 by awarding the fines to the municipality. In

neither Ordinance is anything said expressly about prosecutions being conducted by the Municipality except with reference to nuisances in respect of which the Municipal Commissioners might prosecute, but there is a general clause that in all actions or proceedings for the recovery of any penalty under the Ordinance or for any matter relating to the Ordinance the Commissioners may sue and be sued under the style of the Commissioners for the Municipality of————. These Ordinances did not include the Municipality of Cape Town, in respect of which a special statute, No. 1 of 1840, was enacted. Section 68 provides that all fines for offences against the Ordinance or Municipal Regulations should be paid to the Treasurer of the Municipality, and there is the same provision as to nuisances and as to the style under which the Commissioners may sue and be sued. It is, I think, quite possible that this provision was intended to confer the right of private prosecution upon the Commissioners. Then comes a long series of Acts, beginning with No. 14 of 1868, by which various municipalities were constituted. They all expressly provide that fines for municipal offences should go to the Council, and that the Council was entitled to direct proceedings to be taken for contraventions of the law or bye-laws. (Acts 30, 1877; 12, 1878; 39, 1879; and Acts 10 and 23, 1880). The general Cape statute, No. 45 of 1882, as to municipalities contains similar provisions.

I have not been able to refer to the Cape statutes dealing with Divisional Councils prior to the Act No. 40 of 1889. Section 289 of this Act provides that Divisional Councils may order proceedings for the recovery of any penalties and for the punishment of any persons offending against the Act or the regulations under the Act; and section 295 awards these penalties to the Divisional Council concerned.

The first Natal statute dealing with municipal corporations to which I have access is No. 19 of 1872. This provides in section 74 that the Superintendent of Police or any person appointed by the Council may prosecute for contravention of bye-laws, and section 123 awards the fines to the borough funds.

There are a great many Natal statutes imposing the administration of various laws upon corporations and granting them additional powers. Most, if not all, of these authorise the Town Council to prosecute for contraventions of the statute or of regulations made under it. (See Law 19 of 1872, secs. 71 and 74; Law 21, 1888; 23, 1891; 16, 1893; and Acts 22, 1894; 22, 1895 and 33,

1895.) A similar power of prosecution is vested in Local Boards in Natal by the Acts under which they have been established. (Law 11, 1881 and Law 39, 1884.)

In the Transvaal the Proclamations constituting the Pretoria and Johannesburg Municipalities both authorise the Town Council to take proceedings for the recovery of penalties and for the punishment of offences against the Proclamation. (Proclamation 16, 1901, sec. 44; 7, 1902, sec. 63; 39, 1902, sec. 14). The fines and penalties go to the municipal funds. The general Municipal Ordinance No. 58 of 1903 provides that the Town Clerk or any person authorized by the Mayor may prosecute summarily for all breaches of the bye-laws; and there is a similar provision in the private Ordinance of the Johannesburg Municipality, No. 2 of 1906. In both cases all penalties belong to the municipality.

It is doubtful whether Hospital Committees, constituted under Ordinances No. 3 of 1905 and 7 of 1906, have the power of private prosecution, and I know of no other local government bodies in the Transvaal prior to Union.

In the Free State, Ordinance 6 of 1904, sec. 124, authorises prosecutions for municipal offences either by the public prosecutor or by the Town Council or some person authorised by the municipality. Ordinance 14 of 1905 requires the Council to enforce all regulations. Ordinance 13 of 1904, constituting Village Management Boards, imposes on them the duty of prosecution. Under the Public Health Ordinance No. 31 of 1907, there is a provision that if the local authority does not prosecute, any inhabitant or the central authority may do so.

I have not referred to the practice in England. There, speaking generally, any person may prosecute and no difficulty would arise.

I gather that in the United States prosecutions are often conducted in the name of municipalities. (Arnold's *Corporations*, sec. 554.)

This survey of the history of legislation on the subject of private prosecutions by municipalities shows clearly to my mind that such a right is required for the due administration of municipal government, and that it is, both from the point of view of the central government as well as that of the urban inhabitants of the country, practically a necessary adjunct of municipal institutions.

The Provincial Council is not establishing any new principle or varying the usual course of judicial procedure; so that the case of the *Germiston Municipality* v. *Angehrn and Piel*, approved of by the Court of Appeal in *Gertzen's* case, is not applicable.

But if questions affecting the right of private prosecution are entirely beyond the powers of a Provincial Council, even when they affect municipalities, then it seems to me that the existing law is maintained by section 135 of the Act of Union. Under those laws the right of private prosecution is vested in the municipality. A repeal of them, so as to throw the cost of private prosecution upon the Union Government, would be ineffectual if the contention of the appellant be correct.

Objection was also taken that the summons was bad because it was in the name of Mr. Adams and not of the Municipality, but the form is in accordance with the practice and with Rule 68 of the Magistrate's Court Rules, and the objection must be disallowed.

I have come, therefore, to the conclusion that the respondent municipality in this case was entitled to prosecute, and that the appeal must, therefore, be dismissed.

[G. v. P.]

REX v. BLUMENTHAL.

1915. *August* 3, *September* 24. DE VILLIERS, J.P., MASON and CURLEWIS, JJ.

Magistrate's court.—Jurisdiction.—Geweld.—*Sec.* 35, *Proc.* 21 *of* 1902.

Geweld not being a crime now punishable by death, a magistrate has jurisdiction to try persons accused of committing it.

Appeal against a conviction by a magistrate at Johannesburg.

The accused was found guilty of *Geweld* and sentenced to a fine of £4 or 14 days' imprisonment with hard labour. The appeal was based upon the ground that the magistrate had no jurisdiction under sec. 35 of Proc. 21 of 1902 as the crime was one of those punishable with death.

J. Brink, for the appellant, referred to sec. 35 of Proc. 21 of 1902. *Geweld* is punishable with death or banishment: Moorman, *Over de Misdaden* (10, 2, 3); Van der Linden's *Institutes* (2, 4, 6).

[DE VILLIERS, J.P.: Should one not look at the facts charged under the name of *geweld* and see whether the death penalty is likely to be inflicted?]