

1917.

GIRJA-
HANKAR
DAYA
SHANKARv.
B. B. & C. I.
RAILWAY
Co.

provision..." So here; the earlier special provision must be held to control the general provision *quoad* the particular case specially provided for.

On these grounds I come to the conclusion that for the offence for which defendants' servants arrested the plaintiff the defendants themselves would have had no authority to arrest him, and, consequently, that the defendants are not liable for the assaults committed by their servants. The appeal, therefore, fails and must be dismissed with costs.

SCOTT, C. J. :—I concur.

Solicitors for the plaintiff: Messrs. *Bhimji & Co.*

Solicitors for the defendants: Messrs. *Crawford, Bayley & Co.*

Appeal dismissed.

G. G. N.

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice Maarten.

EMPEROR v. RAMRAO VISHVANATH AND OTHERS.*

1918.

March 20.

City of Bombay Municipal Act (Bombay Act III of 1888), sections 305 and 3 (w), (x) and (y)†—Private street—Sewer pipe laid by Municipality before the Act of 1888 came into force—Sewer pipe carrying sullage from houses abutting on the street—Street includes houses on either side—Requisition by the Municipality to level and drain such streets.

*Criminal Appeal No. 487 of 1917.

† The sections run as follow :—

305. If any private street be not levelled, metalled or paved, sewered, drained, channelled and lighted to the satisfaction of the Commissioner, he may, with the sanction of the standing committee, by written notice, require the owners of the several premises fronting or adjoining the said street or abutting thereon to level, metal or pave, drain and light the same in such manner as he shall direct.

Along two lanes known as the Hanuman Cross-lanes in the city of Bombay, the Municipality of Bombay laid a sewer pipe in 1880 or 1883 for the purpose of carrying sullage from houses on either side of the lanes. Under the provisions of section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888), the Municipality issued a notice calling upon owners of the houses to level, metal, drain and light the lanes in question. The owners having failed to comply with the notice, the Municipality prosecuted them contending that the notice was properly issued since the sewer laid in the lanes did not make them public streets and the street did not include houses on either side of the streets:—

Held, that the lanes in question having been sewered since 1883, they were public streets, and section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888) had no application.

Held, further, that the term "street," as used in the Act, included houses on either side of the street.

THIS was an appeal by the Government of Bombay, from an order of acquittal passed by Chunilal H. Setalvad, acting Chief Presidency Magistrate of Bombay.

The accused, thirty-eight in number, were owners of houses abutting on two lanes known as Hanuman Cross-lanes Nos. 1 and 2 in the City of Bombay. In 1880 and 1883, the Municipality of Bombay laid a sewer pipe along the whole length of those lanes, for the purpose

Section 3. (u) "Drain" includes a sewer, pipe, ditch, channel and any other device for carrying off sewage, offensive matter, polluted water, sullage, waste water, rain water or subsoil water, and any ejectors, compressed air mains, sealed sewage mains and special machinery or apparatus for raising, collecting, expelling or removing sewage or offensive matter to the sewage outfall:

(w) "Street" includes any highway and any causeway, bridge, viaduct, arch, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years; and, when there is a footway as well as a carriageway in any street, the said term includes both:

(x) "Public street" means any street heretofore levelled, paved, metalled, channelled, sewered or repaired by the corporation, and any street which becomes a public street under any of the provisions of this Act:

(y) "Private street" means a street which is not a public street.

1918.

EMPEROR
v.
RAMRAO
VISHVANATH.

1918.

EMPEROR
v.
RAMRAO
VISHVANATH.

of carrying away sullage from the houses abutting on the lanes. There were no channels or storm-water drains to carry the water or sewer of the streets in question. In the monsoon, the rain-water overflowed the lanes, a portion of it reached the sewer pipes through gullies between the houses, while the bulk flowed on to the main road. The lanes in question were levelled, paved, metalled, channelled or repaired by the Municipal Corporation before the passing of Bombay Act III of 1888.

In 1916, the Municipality issued a notice to the owners of the houses abutting on the lanes in question, under section 305 of the City of Bombay Municipal Act, 1888, as follows:—

Pursuant to the provisions of section 305 of the City of Bombay Municipal Act, 1888 (as amended), I give you notice that whereas the private street known as old Hanuman 1st Cross-lane, is not levelled, metalled or paved, sewered, drained, channelled and lighted to my satisfaction, and whereas you are the owner of the premises Nos. 121—125 fronting or adjoining the said street or abutting thereon, I hereby and by separate notices addressed to the other owners of premises fronting or adjoining the said street or abutting thereon require you and them within sixty days from the date hereof—

To level, metal, drain and light the said street in the following manner:—

To open and excavate the said street and properly level and prepare the surface thereof to receive the layers of rubble stone packing and metal and side slab stones as hereinafter provided and in accordance with the general cross section thereof prepared by the Executive Engineer, Municipality, so that the finished surface of the said street when completed shall be at its centre of the level and grade shown on the longitudinal section thereof also prepared by the said Executive Engineer. (The said drawings together with a ground plan of the said road, can be examined at any time during office hours in the Executive Engineer's Office.)

1. To lay along each side of the street slab stones or water tables of blue trap 18 inches wide on a bed of concrete 4 inches thick; the stones to be sloped crosswise $1\frac{1}{2}$ inches as shown on the cross section.

2. To lay over the surface of the street rubble stone packing to an average thickness of 10 inches with a slope of 1 in 40 from the centre line of the said street to each side thereof.

3. To lay over the whole surface of the rubble packing and properly consolidate six inches of road metal and properly finish the surface with two coats of tarpaint and sand.

4. To construct an underground S. W. masonry drain 1 foot 6 inches \times 1 foot 6 inches and construct water entrances connected to the drain and manholes as shown on the plan which can be seen in the Executive Engineer's Office.

5. To erect cast iron lamp posts at the positions shown on the ground plan fitted with the Municipal pattern incandescent gas lamps complete with all accessories and 1½ inches supply gas main connected to the gas main in the nearest Municipal road.

The printed form in which the notice was given contained a clause, which ran thus : " To provide 6 inches pipe sewer in a portion of the street as shown on the plan which can be seen in the Executive Engineer's Office." This clause was scored out from the notice.

The accused failed to carry out the requisitions contained in the notice. They were, thereupon, prosecuted.

The trying Magistrate acquitted the accused on the ground that section 305 had no application to the lanes in question, they having become public streets within the meaning of the Act.

The Government of Bombay appealed against the order of acquittal.

Strangman, Advocate General, instructed by *Crawford & Co.*, for the Municipality :—The first question to be considered in this case is whether the street in question is a public or a private street, for section 305 of the City of Bombay Municipal Act, under which the notice has been issued, refers only to a private street. The Act contains no separate definition of a "private street", but it merely says what is not a public street is a private street. The term "public street" is defined in the Act as "any street heretofore . . . sewered . . . by the Corporation . . ." In the street in question a sewer was constructed by the Corporation sometime in

1918.

EMPEROR

v.

RAMRAO

VISHVANATH.

1918.

EMPEROR,
v.
RAMRAO
VISHVANATH.

1880 and 1883 ; and it is connected with houses on either side of the street ; this was done under section 187 of Bombay Act III of 1872 as amended by Bombay Act IV of 1875. The Magistrate has reasoned that the street under the Act includes houses on either side of the street ; that as the sewer laid by the Municipality is connected with these houses, the street in question is sewered by the Corporation ; and that the street, therefore, is a public street.

We submit that the street in question is a private street. The term "street" as used in the Act does not include houses on either side of the street. No doubt in ordinary parlance, a street does include houses on either side of the street. But it is not so under the Act. The Act keeps up a distinction between the roadway and houses on its sides ; and the houses cannot form part of that on which they front or adjoin : see sections 222, 289, 296, 297, 298, 299, 300, 302-304, 308, 310, 317, 318, *et seq.*, 327, 330. There is no section in the Act where street is regarded as including houses on either side.

* Setalvad referred to *G. I. P. Railway v. The Municipal Corporation of Bombay*⁽¹⁾.

We have next to see what is the meaning of the word "sewer". In general, it means a drain : see *Sutton v. The Mayor and Aldermen of Norwich*⁽²⁾. The word "sewer" is derived from the verb "sew", which means "to drain". The term "sewage" includes drainage in the widest sense ; it is not necessarily limited to the carrying away of foul matter or liquid.

Nicholson, Public Prosecutor, for the Crown.

Setalvad with *Kanga*, instructed by *Payne & Co.*, for the accused.—The notice here was issued under

(1) (1913) 16 Bom. L. R. 104.

(2) (1858) 27 L. J. Ch. 739.

section 305 of the City of Bombay Municipal Act. It makes a distinction between drain and sewer.

The whole question is whether the street in question is a private street. It is a street with regard to which the Corporation has in the past done any one of the acts, enumerated in section 3 (x) of the Act, and treated it as property with which they are concerned. It is admitted here that between 1880 and 1883, the Corporation has constructed a sewer running through the whole length of the street. We say, by doing so, they have rendered the street a public street. The contention of the other side is that as houses on the side of a street are not included in the street, this is sewerage, not of the street but of the houses only. We submit, that the word "street" does not mean the actual open roadway only, but it includes houses abutting on the road also. It follows that the street is sewered by the Corporation; and it is a public street. If the word "street" is confined to open roadways only, even then, that roadway is sewered here. When you speak of a street being sewered, you really mean that the sewerage of houses is included in it. What other foul matter can go into the sewer unless it be of the houses abutting on the street? Sewerage of a street means the removal of foul matter from the houses on the street.

The term "sewer" is not defined in the Act at all. It is not as comprehensive as drain. The term "drain" includes "sewer". The term "sewer" is associated with the carrying of foul and excrementitious matter. The Act itself makes such a distinction. The word "drain" is used for storm water and the word sewer is used for foul and excrementitious matter: see sections 233 (b), 239, 245; *Dattatraya v. The Municipal Commissioner of Bombay*⁽¹⁾.

(1) (1907) 9 Bom. L. R. 1321.

1918.

EMPEROR
v.
RAMRAO
VISHVANATH,

1918.

EMPEROR
v.
RAMRAO
VISHVANATH.

The term "street" includes houses on either side of it. It is defined in section 3 (w) of the Act. The definition is inclusive. It means all that it ordinarily means and something more which would not come within its ordinary interpretation : see *Municipal Commissioner of Bombay v. Mathoorabai*⁽¹⁾; *Handsworth District Council v. Derrington*⁽²⁾ and *Robinson v. Local Board of Barton-Eccles*⁽³⁾.

Strangman, in reply :—The intention of the Corporation in laying the sewage in this street was only to drain the houses.

The definition of "street" in section 3 (w) is very wide indeed. If it stood alone, it would include houses also. But all through the Act, the term "street" is used as meaning the roadway and not the houses. It is nowhere used in its extended sense. Then, if we examine section 305, we find that the street there excludes houses abutting on either side of the street.

SHAH, J. :—We have heard an interesting argument in this appeal. The question involved in the appeal is narrow, and the facts are few and undisputed.

Under section 305 of the City of Bombay Municipal Act (Bom. Act III of 1888) several house-owners in the First and Second Cross Hanuman lanes were required by the Municipal Commissioner to level, metal, drain and light the two streets in the manner described in the written notices. The house-owners refused to carry out the work which they were required to do under the notices with the result that they were prosecuted under the Municipal Act.

The learned Presidency Magistrate came to the conclusion that the two cross lanes were not private

(1) (1906) 8 Bom. L. R. 457 at p. 466. (2) [1897] 2 Ch. 438, p. 447.

(3) 1883) 8 App. Cas. 798 at pp. 800, 801

streets, but public streets within the meaning of the Act, and on that footing acquitted the accused. The present appeal is preferred by the Government of Bombay, and the correctness of the conclusion arrived at by the trial Court is impugned before us.

It is an admitted fact that there is a sewer running along the two lanes, which carries the sullage water of the houses on the two sides of the streets, and that this sewer was constructed in the year 1883 or thereabout, long before the Act of 1888 was passed.

It is argued by the learned Advocate General that the streets in question are private streets and not public streets, as the streets are not sewered within the meaning of the "public street" as defined by the Act. It is further argued that in deciding the question whether the street is sewered or not, the fact of there being a provision for sewerage of the houses in the street should be left out of consideration and the point whether the street apart from the houses in the street is sewered should be considered. It is, however, not seriously contested by the learned Advocate General, and as I understand his argument it is practically conceded, that the word "street" would ordinarily include the houses in the street, subject to the context. It is argued that with reference to the context in section 305 the word "street" indicates only the road-way and not the houses on the road-way. We have been referred to a number of sections in the Act to show that according to the context the word "street" may mean the road-way quite independently of and apart from the houses on the two sides. It is not necessary in my opinion to pursue this line of argument. It cannot help the appellants.

It seems to me that the whole argument proceeds upon the assumption that if the work contemplated by

1918.

EMPEROR
v.
RAMRAO
VISHVANATH.

1918.

EMPEROR
v.
RAMRAO
VISHVANATH.

section 305 relates to the road-way only and not to the houses, the expression "private street" must be understood in a restricted sense. But whatever the nature of the work to be done by the house-owners may be, it is clear that the section applies only to private streets. The meaning of the expression, according to the definition in the Act, is a street which is not a public street; and under the Act unless there be something repugnant in the subject or context, "public street" means any street heretofore levelled, metalled, channelled, sewer-ed or repaired by the Corporation. There is nothing in the subject or context to show that if these streets are sewer-ed within the meaning of the definition of "public street", they are private streets for the purposes of section 305. It seems to me that if these streets in the ordinary acceptation of the meaning of the word "street" are sewer-ed, the streets would be public streets under the Act, and section 305 would have no application to such streets.

It has been held in several cases that a street includes the houses on either side of it, and that it does not merely mean the road-way. There is no reason why for the purpose of the definition the word should not be understood in that popular and generally accepted sense. There is no force in the argument that in order to decide whether these streets are sewer-ed or not, we must consider whether there is any sewer for the road-way to carry rain-water and should leave out of consideration the sewer-ing of the houses. There is nothing in the context to justify such an interpretation of the word "street" or of the word "sewer-ed". In the present case there can be no doubt that the streets in question have been sewer-ed since 1883. The view taken by the trial Magistrate is right, and the streets in question are public streets as they are sewer-ed within the meaning of the definition of that expression.

The result, therefore, is that the order of acquittal must be affirmed, and that this appeal must be dismissed.

MARTEN, J.:—I am of the same opinion. The point in this case is whether this lane, or rather I should say, these two lanes are private streets within section 305 of the City of Bombay Municipal Act of 1888. That in itself depends on the definitions of "public street" and "private street" in section 3 (x) and (y) of the Act. Assuming for a moment that the word "street" should be given its ordinary meaning, the question resolves itself into whether within sub-section (x) these lanes or streets were sewered by the Corporation prior to the date of the Act, for if they were so sewered, they are public streets, and if they were not so sewered they are private streets. The answer to that question must I think be that each of these lanes or streets was sewered by the Corporation prior to the Act inasmuch as the Corporation between the years 1881 and 1883 laid under the whole length of each lane or street a pipe which took the drainage from the houses on both sides. That really disposes of the case if the word "street" is given its ordinary meaning.

It is, however, said on behalf of the Municipality that in this Act or at any rate in section 305 the word "street" is confined to the road-way proper and does not include the houses on either side of the road, and that the lanes in question were not sewered because the pipe I have referred to did not take the surface water of the road-way proper. Consequently it is said there was no sewerage of the "street", because there was no sewerage of the road-way proper. In considering this argument one must ascertain what is the meaning of the word "street" in sub-section (x). We have the high authority of Lord Blackburn, if authority is needed, for saying that in the ordinary and popular

1918.

EMPEROR
v.
RAMRAO
VISHVANATH.

1918.

EMPEROR
v.
RAMRAO
VISHVANATH.

sense of the word, "street" means a high-way with houses on each side: see *Robinson v. Local Board of Barton-Eccles*⁽¹⁾. I see no reason to give any different meaning to the word "street" in sub-section (x), and I accordingly hold that it includes the houses on either side. That being so, it follows in my judgment that the lanes in question were sewered and that therefore they were public streets and that section 305 does not apply to them.

I have not overlooked the fact that the definitions in section 3 apply "unless there be something repugnant in the subject or context". But I see nothing repugnant in the subject or context in section 305. That section only applies to private streets. Before therefore one can apply section 305, one must first find out whether the street in question is a private street. The test for that is given in sub-section (x) and I see nothing in section 305 to indicate that some other test is to be adopted.

We were referred to several other sections of the Act but I see nothing in them which would lead to the conclusion that the definition of private street in section 3 should not be adopted in section 305.

The date of the Act is the date on which it is to be determined whether the heavy expense of sewerage, &c., is to be borne by the frontagers or the Municipality. That in its turn depends on what has been done in the past. If the Municipality sewered or repaired it in the past, they must do so in the future. If, however, the Municipality have done nothing to the road and it is a private street, then the frontagers must bear the cost of making up and sewerage the road before it is taken over by the local authority. I may observe that if the view of the Municipality is correct,

⁽¹⁾ (1883) 8 App. Cas. 798 at p. 809.

it would follow that in the case of a private street the cost of a sewer proper as opposed to a surface water-drain could not be thrown on frontagers under section 305. It is, therefore, somewhat surprising to find the local authority advocating a construction of the Act which normally and apart from the present case would benefit the individual frontager at the expense of the general body of rate-payers. It may, however, be that in past years so many pipes have been laid by the local authority, similar to the one in the present case, that in fact in Bombay there are very few private streets on our construction of the Act; and that consequently the present contention is in the financial interests of the rate-payers as a whole.

It is also noteworthy as pointed out by the learned Magistrate that in the printed notice, Exhibit B, the requirement No. 5 as to laying a 6 inches sewer has been struck out. Presumably therefore the Municipality thought that the street was already sewered, or else that they could not throw on the frontagers the expense of this sewer as opposed to the surface water-drain requirement No. 4.

In the view which I take it is unnecessary to consider whether even on the construction of the Act put forward by the Municipality the road-way was sewered. The road is very narrow being only 10 feet in places, and it would appear that in the monsoon the surface water of the roadway overflows into the house-drains or gullies and thence into the pipe I have referred to. Therefore in this indirect way the surface water of the road-way has been partially drained away. But whether this would amount to the road-way being sewered within the meaning of the Act is, as I have already indicated, a question which it is unnecessary to decide.

1918.

EMPEROR

RAMRAO
VISHVANATH.

1918.

EMPEROR
v.
RAMRAO
VISHVANATH.

In the result, therefore, I agree with my learned brother in holding that the judgment of the learned Magistrate in the Court below is right and this appeal must be dismissed.

Appeal dismissed.

R. R.

CRIMINAL APPELLATE:

Before Mr. Justice Shah and Mr. Justice Marten.

EMPEROR v. SOMYA HIRYA MAHAR.*

1918.
March 26.

Criminal Procedure Code (Act V of 1898), section 471—Acquittal of criminal lunatic—Court can order his detention in jail—Further orders to be passed by Government.

When a criminal lunatic is acquitted under the provisions of section 470 of the Criminal Procedure Code, the Court can order under section 471 of the Code that the accused be detained in custody in the jail where he then is until the further orders of Government and that the case be reported to Government for further orders.

THIS was an appeal from the conviction and sentence passed by C. C. Dutt, Additional Sessions Judge of Khandesh.

The facts were that the accused was charged with the offence of murder. The then Sessions Judge of Khandesh (Mr. Murphy) tried him for the offence; but the trial was not proceeded with as the learned Judge was of opinion that the accused was insane. The accused was accordingly kept in the Dharwar Lunatic Asylum. When it was ascertained that he was no longer insane, he was again tried for the offence by the Additional Sessions Judge of Khandesh (Mr. Dutt). The learned Judge was of opinion that the accused was able to understand

*Criminal Appeal No. 510 of 1917.