Present : Mr. Justice Middleton.

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SILVA *v.* RAJENDRA.

M. C., Colombo, 5,593.

Public health—Neglecting to obey an order to fill up or disinfect a well—Requisites of proof—Mode of proof—" Owner "—Person holding power of attorney—Regulation 25 made under Ordinance No. 3 of 1897.

In a prosecution for neglecting to obey an order made under regulation 25 of December 16, 1901, by authority of Ordinance No. 3 of 1897, there must be proof that the Chairman is satisfied, on proper materials, that the water is so polluted as to be dangerous to the public health.

The various ways of proving this indicated.

A person who holds a power of attorney from a person absent in England, and who manages the property of such person in the Island, is an " owner " within the meaning of the above regulation.

APPEAL from a conviction by the Municipal Magistrate (R. W. Byrde, Esq.). The accused was charged as follows:—" That he, being the owner of premises bearing assessment No. 18, Kew

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street, within the Municipality of Colombo, did on June 29, 1907, and thereafter, without lawful authority or excuse, omit to fill up the well in the said premises, which well he was required to fill up by a written notice served on him on May 18, 1907, and issued by the Chairman of the Municipal Council of Colombo under regulation No. 25, made under Ordinance No. 3 of 1897 and published in *Ceylon Government Gazette* No. 5,970 dated February 19, 1904, and that the said accused did thereby commit an offence punishable under section 7 (1) of the said Ordinance No. 3 of 1897."

The Magistrate convicted the accused and fined him Rs. 50.

The accused appealed.

Bawa, for appellant.—There is no evidence to prove that the Chairman in fact arrived at the conclusion that the water in the well was unfit for human consumption, nor that he came to such a conclusion on the report of a properly qualified analyst. The notice served on the accused is no proof (*Leembruggen's Reports*, 1905, *p.* 27). The accused is not an " owner " or " occupier " as required by the Ordinance. " Owner " means owner in the sense understood by the Civil Law. Finally, no option is given by the notice either to disinfect the well or to close it.

F. J. de Saram, for respondent.—The case in *Leembruggen's Reports* can be differentiated from the present, and does not apply. The notice states that the Chairman was satisfied on the report of the Public Analyst, and the latter must be presumed to be properly qualified for the post he holds. Owner is not defined for the purpose of the Ordinance No. 3 of 1897, but a definition can be sought for in analogous Ordinances, viz., from the Ordinance No. 7 of 1897, section 3; Nuisances Removal, 18 and 19 V., c. 121, section 2; and the Public Health Acts. The provisions of the Ordinance should be construed so as to give effect to the intention of the Ordinance and not furnish a means of evasion (*Maxwell on the Interpretation of Statutes*, *pp.* 26, 72, *and* 405). The accused holds his father's power of attorney, and collects the rents in his absence. He accepted notice as owner, and is estopped from denying the fact now. The section gives the Chairman the option to order either the disinfection or the closing of wells.

10th September, 1907. MIDDLETON J.—

This was an appeal from a conviction by which defendant was fined for neglecting to obey an order of the Chairman of the Municipal Council made under regulation 25 of December 16, 1901, by authority of Ordinance No. 3 of 1897.

It was agreed by counsel appearing in two other cases, Nos. 369 and 379, M. C., Colombo, 5,326 and 5,053, respectively, that, subject to any supplementary argument that they might be called on to add, the argument of Mr. Bawa in this case and the decision therein given should be, so far as it affected the other cases, decisive of them.

The regulation under which the prosecution is instituted runs as follows:—

"Whenever the proper authority is satisfied from either the written report of a qualified analyst or the certificate of a health officer that the water of any well is so polluted as to be dangerous to the public health, the proper authority may give written notice to the owner or occupant of the land or premises in which such well is situated to fill up or to disinfect the well to the satisfaction of the proper authority, and the owner or occupant shall thereupon forthwith cause the well to be filled up or disinfected, as the case may be. In places where there is a Municipality the term 'proper authority' in this regulation means the Chairman of the Municipal Council."

The first point taken was that the Chairman must prove that he is satisfied, and that the evidence on which he is satisfied is that of a qualified analyst or the notice is *ultra vires*.

In the present case all that the prosecution has attempted to prove is that the notice was given to the defendant, and that he is the owner within the meaning of the regulation. The copy of the notice said to have been served on defendant purports to be signed by the Chairman, and expresses the fact that he is satisfied from the written report of a qualified analyst. No evidence has been tendered or given that the water analyzed came from the well in question. nor has the analyst's written report been put in. The ground for the Chairman's order is that he is satisfied that the water is so polluted as to be dangerous to the public health. If the Chairman is satisfied of this on the grounds set out in the regulation, he can order the well to be filled up or disinfected. If the owner disobeys, he is liable to punishment for breach of the regulation. He may obey, showing his acquiescence in the propriety of the order. If he disobeys, it then becomes incumbent, in my opinion, on the Chairman to prove to the Court that he has complied with the regulation as a condition precedent to the exercise of the Court's penal coercive powers. To do this, in the ordinary course of evidentiary procedure, it would be necessary for the Chairman to appeal to and produce the analyst's report and state his satisfaction with it on oath. This would cause great inconvenience and demand on the time of the Chairman, and is not absolutely essential.

The Court accepts the signature of the Attorney-General or of a public officer under section 147 of the Criminal Procedure Code as evidencing their sanction to criminal proceedings under certain

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sections of the Penal Code, and a copy duly certified by the legal keeper thereof of Municipal proceedings is evidence thereof under section 78 (5) of the Evidence Ordinance. I think, therfore that a duplicate or the original notice marked A in these proceedings might well be received in evidence by the Magistrate to show the Chairman's satisfaction. A copy duly certified by the Chairman himself or the clerk of the Municipal Council I should also have no objection to receive in evidence. Proof also that a notice in the terms of A was duly signed by the Chairman, of which a copy was produced to the Court and sworn to as being a true copy of the notice served, would also, in my opinion, be sufficient.

If the analyst is the Government Analyst, his report is receivable in evidence under section 406 (3) of the Criminal Procedure Code. If he is not the Government Analyst, his report should show that he is a properly qualified analyst, and if so, it would be admissible under the regulation itself to show the ground on which the Chairman was satisfied. I think, therefore, the analyst's report duly signed by him manifesting his qualification would be put in evidence.

In most cases it would not be necessary to call either the Chairman or the analyst, but this might be done, if required, under and by analogy to the provisions in sub-sections (4) and (5) of section 406. The analyst's report must show that the water it refers to was said to be taken from the well in question by identification of the vessel containing it. There must also be evidence that the water sent to the analyst was in fact taken from the well in question. This is, I think, the most important requirement under the regulation, owing to the possibility of fraud or negligence on the part of every subordinate person. At least three samples ought to be taken, and the vessels containing them carefully sealed, marked, and identified, one to be sent to the analyst, one to be retained by the Sanitary Inspector who draws them to be produced before the Court, and the other to be given, if required, to the owner or occupier.

The Magistrate being satisfied that the Chairman has good reason from the analyst's report or from the certificate of the health officer to be satisfied that water taken from an accused's well is so polluted as to be dangerous to public health must enforce the Chairman's decision, and I would hold, following my decision in 129, M. C., Colombo, 9,982, that the Chairman's decision so founded cannot be impugned. To hold that the Chairman's mere satisfaction is the only thing to be proved would open out a dangerous avenue to injustice by way of negligence or chicanery, if not fraud.

Again, a man is not to be punished unless it is clear to the Court that he has discharged an order which the Chairman has made on the grounds permitted to him by law.

On the first point, therefore, I must hold that the prosecution have not furnished the necessary proof to entitle them to succeed.

Following on this first point comes the third raised by Mr. Bawa, viz., whether the option of deciding if the well is to be filled up or disinfected rests with the proper authority, *i.e.*, the Chairman. In my opinion it was the intention of the regulation to give the proper authority that option. It is absolutely necessary for the purpose of the Ordinance, in the interests of the public safety, that such arbitrary powers should be within the province of the Executive Government, and the Legislature has accorded to it power to make regulations for this purpose. It is incumbent, however, that they should be exercised wisely and with due regard to the rights of property and persons. These powers cannot be conveniently exercised by the Governor and the Executive Council, and they are delegated to a Government official occupying a responsible position as Chairman of the Municipal Council, in whose hands their exercise is looked for as attended with discretion and judgment.

If the Governor, with the advice of the Executive Council, considered that a qualified analyst or a health officer were competent persons to advise the Chairman as to whether the polluted condition of water in a well was dangerous to public health, I must assume that they are persons qualified and competent to advise the Chairman in such a matter. If they are competent there is no danger to the public interest in acting on their scientific advice, or in giving the Chairman the option which, in my opinion, he was intended to have and has.

The second question raised, which comes last in the order of my consideration of the whole matter, is (1) whether the defendant here is estopped from denying the ownership which he originally impliedly admitted; (2) whether he must not be deemed under the circumstances to be the owner within the meaning of the regulation. The defendant held his father's power of attorney while the latter was in England, accepted service of the notice, and wrote to the Sanitary Inspector on July 23 in regard to taking samples in the well without any objection made that he was not the owner. It was only upon the hearing of the evidence for the defence that the defendant raised the question of his liability.

The prosecution acted on the belief that he was the owner in prosecuting him, and he has only himself to thank for the position he has been placed in. I have some doubt, however, if the law of estoppel should be applied to the case of a person charged with a *quasi* criminal offence, who is entitled, I think, to prove the truth if he can.

As regards the second sub-point, it is said there is no definition of "owner" in the Ordinance, and argued for the defence that this Court will not extend the meaning of the word beyond that implied by *dominus* under the Roman-Dutch Law.

On the other hand, counsel for the prosecution argues that the meaning should be derived by analogy from that given to it in

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English or Ceylon Public Health Acts, and relied on certain *dicta* in *Maxwell on the Interpretation of Statutes*. The regulations, like Ordinances, are not to be construed so as to furnish chance of escape and a means of evasion (*Maxwell, p.* 405), and the evident meaning should be given when needful to effectuate the intention of the Legislature.

While the defendant's father was in England, the defendant collected the rents and managed the property on which the well was situate, and was for the time being acting as its beneficial owner. To allow him to evade the responsibility connected with the sanitary management of the property on the ground that he was merely *de facto* and not *de jure* owner would, I think, be inconsistent with, if not contrary to, the intentions of the framers of the regulation. To hold the contrary would give a patent means of evasion to a permanently non-resident owner, whose property was managed by a duly authorized attorney. I therefore hold that a person in the position of the defendant as regards property must be deemed to be an owner for the time being within the meaning to be assigned to that word under the regulation in question. In my opinion, therefore, the appellant must succeed practically only on one point, the first raised by Mr. Bawa.

The Sanitary Inspector Davidson has sworn here that he served the notice A on the defendant, but that can hardly be so, as it is in the record and it is not in evidence that he returned it. He intended to say no doubt that he served a document, of which A is a true copy, on the defendant, but he omitted to state that the document he served was in fact signed by the Chairman. There is no proof here, therefore, of the Chairman's satisfaction. Sanitary Inspector de Silva does not cure this by saying that the notice was issued by the proper authorities. The notice further does not identify the analyst.

I shall therefore direct that the conviction be quashed for want of proper proof.

Appeal allowed, conviction quashed.