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*Nov. 13.
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*Feb. 12.

J. A. FAULKNER (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF OTTAWA (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Negligence—Drainage—Capacity of drain—Vis major.

F. brought action against the City of Ottawa claiming damages for the flooding of his premises by water backed up from the sewer with which his drain pipe was connected.

Held, Idington and Duff JJ. dissenting, that according to the evidence the sewer is capable of carrying off a fall of 1½ inches of water per hour, which is considered as meeting the requirements of good engineering and is the standard adopted by all the cities of Canada and the Northern States; the city, therefore, was not liable.

Held, also, that a fall of rain at the rate of 3 inches per hour for nine minutes was one which could not reasonably be expected and for which the city was not obliged to provide.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the plaintiff and dismissing his action.

The appellant is a dry goods merchant, doing business at the corner of Clarence and Dalhousie Streets, in Ottawa. His premises are drained by a sewer running along Clarence Street from a point near Sussex Street, in an easterly direction, to King Street, or King Edward Avenue, a distance of four city blocks, when it connects with one of the main sewers of the city.

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

The Clarence Street sewer, as originally constructed, was for the two blocks nearer to King Street only. This sewer was constructed in or about the year 1885, and was in two sections, the one being of pipe 18 inches in diameter, and the other of pipe 15 inches in diameter. This sewer was of sufficient size to comply with the standard recognized by engineers at that date, when street sewers were not called upon to bear the heavier burdens placed upon them by the paving of street, the concreting of sidewalks, and other improvements now in vogue.

In or about the year 1891 a further sewer was constructed along Clarence Street, from a point near Sussex Street, and thence easterly for about two blocks, to a connection with the sewer already described. This was a 12-inch pipe, and it naturally brought down a large body of water to the lower sewer.

In the following years, up to and including 1903, a small part of Clarence Street, next Sussex Street, was paved with asphalt, and the old wooden sidewalks were replaced by concrete or granolithic sidewalks. A number of additional gullies were also constructed to conduct the surface water to the sewers in question. The result was that the surface waters were collected together and carried to the sewers in greater quantity and with greater rapidity, so that the sewer opposite the property of the appellant was required to accommodate a somewhat greater quantity of water and sewage material than had been contemplated by the original engineering plan. During the same period the corporation passed a by-law compelling, for the first time, all house drains to be connected with the street sewers, as well as all down spouts con-

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veying water from the roofs of the houses. Of these latter it was proved there were six in all, on Clarence Street, connected with the drain.

The trial judge found, that while that portion of the sewer opposite the premises of the appellant was, probably, sufficient for the territory intended to be served originally, the subsequent extension of it to Sussex Street, and the addition of many subsidiary drains leading into it, had completely overtaxed its capacity, so that when there was a heavy rainfall the contents of the sewer were backed up into adjoining cellars. He also found that, according to the weight of expert opinion, the capacity of the sewer was not more than two-thirds of what it should have been to accommodate the increased burden imposed by the acts of the respondents.

On the night of the 30th of June, or the morning of the 1st of July, 1903, the basement of the appellant's premises was flooded by backing up of sewage, and quantities of goods which he kept there were destroyed. There was also some slight flooding of the plaintiff's cellar on the 1st of August, and the 2nd of September, 1904, but the chief contest centered in the flooding of the 30th of June, 1903, when the greater part of the damage claimed was caused. The trial judge found that these floodings were the result of negligence of the respondent in so increasing the facilities for running-water and sewage into the sewer in question as to cause the backing up, which resulted in the damage to the appellant, and that while the rainfalls on the occasions in question were heavy, they were not so heavy or extraordinary as not to have been reasonably anticipated, and with ordinary prudence provided for by the respondent.

The Court of Appeal reversed these findings and dismissed the appellant's action.

G. F. Henderson K.C. for the appellant.

Shepley K.C. and *McVeity* for the respondent.

GIROUARD J.—I concur in the opinion of Mr. Justice Davies.

DAVIES J.—Owing to the great importance of the questions raised in this case as to the duty resting upon civic authorities in the provision made by them for the drainage of cities, and to the difference of opinion which has existed amongst the learned judges before whom the case has been argued in their appreciation of the evidence as to the facts proved, I have read all of the evidence most carefully and given the case much thought and consideration.

The result is to convince me that the judgment of the Court of Appeal is correct and that the appeal should be dismissed.

The action was brought by Faulkner, a storekeeper, whose shop fronted on the south side of Clarence Street in the City of Ottawa.

Clarence Street runs east and west and connects Sussex Street with King Edward Avenue.

One of the main sewers of the city runs along the avenue and the Clarence Street sewer discharged into this main sewer.

Clarence Street sewer does not connect with Sussex Street sewer, and is what was called a lesser or subsidiary sewer for the drainage of Clarence Street alone. There are 104 buildings on the street, but only

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nine down spouts from the houses, and of these six are directly or indirectly connected with the sewer. The roofs of most of the buildings face half towards the street, and half away from the street. In the opinion of the city engineer this was a very important factor resulting in only about fifty per cent. of the water falling on the houses reaching the sewer because the southerly roofs throw the water southerly, towards Murray Street, the general formation of the ground sloping towards that street, and the water naturally ran that way. There is a water shed there.

The Clarence Street drain was built in three parts and of three different sized pipes. The pipe next to King Edward Avenue and which discharged into the main drain there, was 18 inches in diameter. Next to that the pipe was 15 inches, and beyond that for a length of 700 feet was 12 inches. The total length of the drain was 2,200 feet. Faulkner's shop was opposite the 12-inch drain, about three or four hundred feet from Sussex Street.

The 18-inch and 15-inch drain was constructed in 1883 or 1885 and the 12-inch continuation in the year 1891. Some ten years afterwards (in the year 1901) 375 feet of Clarence Street next to Sussex Street by about 47 feet in width were paved with asphalt and granolithic sidewalks substituted for the old wooden ones.

There were complaints by Faulkner of three floodings, on the evening of 30th June, 1903, August 1st, 1904, and September 2nd, 1902. The two latter floodings caused comparatively little, if any, damage, and the substantial contest centered in that of 30th June, 1903, for which damages to the amount of $1,622 were claimed.

The contention on the part of the city was two-

fold; first that the Clarence Street drain was a local improvement constructed under the statute at the expense of the property owners whose lands bounded on Clarence Street, and that the city after complaint had been made to them of the flooding of certain cellars during an extraordinarily heavy rain storm had submitted to the ratepayers a proposition to take up the existing drain and relay it either with larger pipe or steeper grade (which the grade of the main sewer permitted) and that the ratepayers had voted the proposition down and refused to allow it to be carried out. It was submitted that under these circumstances the city was powerless to make the contemplated change at the expense of the general taxpayer, and that the residents or owners of land fronting on the street could not hold the city liable for negligence if by their own act they prohibited the change suggested.

The second ground of defence was that it was good engineering in the northern zone according to the considered opinions of engineers generally to construct drainage providing for a downfall of 1½ inches of rain per hour, and that this was the standard adopted by Ottawa and all the cities of Canada and the northern States, excluding Pennsylvania from that category; that while this Clarence Street drain was originally designed only to carry one inch it was mathematically capable of carrying off without any head 1¼ inches, and with a head of 18 inches of carrying off 1½ inches without damage to any one, and *as a fact demonstrated by numerous actual experiments* carried on by Mr. Ker, the city engineer, and his assistant, Mr. Parsons, did so safely and without damage to any one.

The learned trial judge, as I read his reasons and interpret them, was of the opinion that a rainfall at

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the rate of three inches per hour lasting continuously for 9 minutes, such as that which occurred on the evening when the damages were caused, was such a storm as "ought reasonably to have been anticipated and with ordinary prudence provided for by defendants." If he was right in that conclusion of course there was no defence to this action because Mr. Ker himself admitted that the sewage system of Ottawa, like other Canadian towns, was only designed to provide against a rainfall of 1½ inches, and that neither the general system nor the Clarence Street drain would carry off rain falling for nine minutes at the rate of three inches per hour, a downpour which he admitted would inevitably cause flooding all over the city.

The evidence of Mr. Found, the meteorological observer and keeper of the rainfalls at Ottawa, places it beyond doubt from the records shewn by his automatic machine, which, he stated, from its very construction and nature must be accurate, that while the rainfall was very heavy from 5 to 7.30 on the evening of the 30th June, 1903, from two minutes after five till eleven minutes after five, that is for nine minutes, the rain fell at the rate of three inches per hour.

I agree with the appeal court that no such duty rested upon the city as, if I interpret the judgment aright, was found by the trial judge, and that it was not negligence on its part to fail to provide against such an extraordinary and abnormal downpour as that which caused the damage.

I think that when there is such a general concensus of opinion amongst engineers as is shewn by the evidence that in the northern zone of America 1½ inches is the proper rate of fall to be provided against,

a municipality discharges its duty when it makes efficient provision for such a rainfall.

In the view I take of the proper conclusions of fact to be drawn from the evidence I do not desire to be understood as expressing any opinion upon the very interesting and important question whether in case a city seeking to substitute an effective system of drainage, for a particular street or locality for a system which had become or was claimed to have become obsolete or ineffective from accident or other cause is prevented by the adverse vote of the ratepayers entitled to vote on the proposal submitted to them from carrying out its object under the local improvement clauses of the Municipal Act, it still remains liable to any of these ratepayers in case they sustain damages to their property from the inefficiency of the system they refuse to have so remedied.

It was contended that in such case the city is liable because the corporation have general powers outside of the local improvement clauses to which they in the cases suggested are bound to resort, and that it is no answer to say that a resort to these general powers would create a burden upon the civic ratepayers generally. The point was not argued fully by Mr. Shepley who, however, challenged the existence of these general powers in the circumstances mentioned, but who relied upon the facts as proved by Mr. Ker and his assistant with regard to the efficiency of the existing drain as sustaining the judgment of the appeal court.

If the questions of fact still remaining open and to be determined were to be determined on theory alone, that is, given such a street with a pipe of such a size or sizes and of such length and grade to drain the usual

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area supposed to be required to be drained apart from special physical conditions affecting the area, I should probably find great difficulty in deciding between the conflicting opinions of engineers equally qualified and having had equal opportunities of forming their opinions.

But that is not the case here. It is true that the eminent engineers called upon for the plaintiff express the opinion that the size of the pipe on Clarence Street, 12 inches, 15 inches, and 18 inches, all alike shew the drain to be inefficient for a downpour at the rate of 1½ inches.

But they are very frank in admitting their conclusion to be a theoretical and general one which local conditions might materially modify, and they one and all admit that while they looked generally at the street they did not examine or study the local conditions with such care as would be necessary if they were themselves going to report upon or design a drain or system of drainage for that street. Mr. Lewis says that he "did not survey the ground, but looked at it simply," and he based his conclusion on the assumption that the 12-inch sewer would drain seven acres. Mr. Keefer said that he thought if the city

> provided for an inch and a half rainfall an hour they would be doing well.

He said that

> he had made a careful calculation, examined the tracings of the plans to ascertain the grade and then "took the drainage area."

He says

> of course there might be difference between engineers as to the exact limits of the drainage area that would be tributary to this sewer *but I took it as it is very often taken that is the centre of the block on each side of Clarence Street* that would be about 266 feet,

that would be the strip that would form the drainage area for this sewer, that would be the width of it; and the length of it I did not take down to King Street, say about 2,000 feet from Sussex down to within 250 feet of King Street which would be drained probably by this sewer.

This he said he made 12 acres

then for the discharge I took the different sections of the sewer by the usual formula.

Now I have given in his own words the data on which Mr. Keefer based his conclusions and the methods (the usual formula) by which he worked them out; not with the object of in any way discrediting him, but of shewing that his opinion was a theoretical one only and should not be preferred to the judgment of equally competent engineers formed upon actual survey of the existing area and based upon actual facts. As Mr. Keefer himself says in his examination "all depends on the physical condition of the area."

The competence of Mr. Ker, an engineer of very great experience, especially in drainage and municipal engineering, was frankly admitted at the argument by Mr. Henderson. Both he and Mr. Parsons, C.E., his assistant, made actual tests of the capacity of the Clarence Street drain under the existing conditions alike with regard to the asphalt pavement at the west end of Clarence Street, and also to the downspouts from the houses and the closet connections. He explains in the first place that *Faulkner's cellar floor was two and a half feet above or higher than the street sewer*. This was a vitally important matter and so far as the evidence goes (if known to the engineers called by the plaintiff which does not appear) does not enter into their calculations at all. Both Ker and Parsons base their conclusions largely upon that fact.

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Again and again in his main examination, his cross-examination and in reply to questions put to him by the trial judge Mr. Ker explains (and Parsons is equally positive on the point) that *when under a slight head* the drain was fully equal to carry off 1½ inches without damage to any one. He says (in answer to a question as to the capacity of the entire sewer from Sussex Street):

As I said before that it will carry an inch and a quarter almost inch and a half,

this, as he explains is "when running free and without any head." Then he goes on,

Take an inch and a half it will run under the lower section eighteen inches a foot and a half head; fifteen inches eleven inches head; the twelve inch pipe at Faulkner's would be running free. His Lordship.—"No head?" A.—No, that is to make myself plain on this sewer there are man holes in the centre of the street and the water will back up in these man holes the same as if you have a water tap in a water works system a foot and a half until it gets sufficient pressure to clear itself it will run under a foot and a half head on the eighteen eleven inches on the fifteen and nothing on the twelve.

And he again repeats in answer to a question from the Bench whether it will carry away a rainfall of an inch and a half an hour that it will do so and

according to the calculations and gauges and experience in a rainfall *it has done that.*

Then after explaining about Faulkner's cellar being above the sewer 2½ feet he states *there is absolutely no danger of flooding under an inch and a half storm.* He also explains to the judge "the length of the storm makes no difference, it may last an hour, two hours or three hours." Mr. Ker then explains that "the general formation of the ground slopes towards Murray Street," in other words, does not run up hill.

Now these two important and controlling facts, namely, the fact that the Clarence Street drain was two feet six inches below the floor of Faulkner's cellar; and the fact that all rain water carried from the southerly slopes of the roofs of the houses fronting on the south side of Clarence Street ran not into the main drain, but away south to Murray Street were not known to or at any rate did not enter into the calculation of the engineers Lewis, Keefer and McDougall. Ker's conclusions were not theoretical, but his and Parsons' were mathematical conclusions based as they say upon the size of the drain, and the actual existing local conditions agreed *with the actual tests they made in the man holes of the drain during the storms.* In other words, the practical tests absolutely proved the correctness of their mathematical calculations.

Mr. Ker frankly admits that when it rained at the rate of three inches, as it did on the date of the flooding which caused the damage, or if it rained at any greater rate than 1½ inches the drains were not sufficient and flooding would occur. But unless we are to refuse to accept the sworn statements of himself and his assistant engineer as to the actual tests and observations made by them when the storms were on, there was not and there could not be any flooding of Faulkner's cellar unless one of two things occurred, an artificial obstruction getting into the drain as it once did before according to the evidence of the former city engineer, Edward Perrault, or an extraordinary downfall of rain exceeding that which in this northern zone the concensus of civil engineering opinion says it is reasonable and proper to provide against, 1½ inches per hour. The tests if made as sworn to

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would seem to be conclusive as to the capacity of the drain.

The conclusion I have reached is that there is really no absolute conflict between the engineers; "everything depends upon the actual physical conditions," says Mr. Keefer. Neither he nor Mr. Lewis surveyed or examined closely the physical conditions of the area south or north of Clarence Street—"they just looked at it." They did not know, therefore, that the land sloped from Clarence Street to Murray Street and that all the water flowing from the southerly roofs of the houses facing on the south side of Clarence Street, ran, not into the drain, but away towards Murray Street. Neither do they appear to have known that the drain was two and a half feet lower than the floor of Faulkner's cellar, thus allowing nearly that head of water before any flooding could take place. And yet these are the two facts which controlled very largely Mr. Ker's opinion as to the capacity of the drain, an opinion which repeated practical tests only served to confirm.

Holding, therefore, as I do, that the existing drain conforms so far as its practical capacity is concerned to the standard exacted by the highest engineering skill with respect to this northern part of the continent and that it is capable under existing condition of receiving and carrying off without damage any rainfall up to and including one of an inch and a half per hour and does actually carry off such rainfall I am of opinion that the appeal should be dismissed.

Since writing the foregoing opinion, concurred in by my brethren Girouard and Maclennan JJ., I have had the opportunity of reading the dissenting opinion

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of my brother Duff. To obviate possible misconceptions I desire to add a word to what I have already written with reference to the decision of the majority of this court on the crucial question of the capacity of the sewer to carry off the water and sewage discharged into it during a rainfall of 1½ inches per hour. That decision is to the effect that the sewer in question did satisfy this requirement. My learned colleague is of the opinion that the majority of the Court of Appeal had found with the trial judge to the contrary. I do not so understand their findings. The trial judge did, of course, but not the Court of Appeal. On the contrary, their findings and those of the majority of this court fully agree on the point stated, and it was because of such agreement and because we also agreed with them as to abnormal downpour of rain on the occasion when the plaintiff's goods were damaged that we dismissed the appeal.

IDINGTON J. (dissenting).—The appellant's cellar on three different occasions within about fourteen months was flooded with sewage that came into it from a sewer with which he was bound by the city by-laws as well as the needs of his premises to form a connection.

Mr. Justice Teetzel, the learned trial judge, found as fact that this was caused by the city after its construction of the sewer having so constructed the neighbouring streets by means of new cement sidewalks and asphalt pavement as to pour into this sewer a greater volume of water and filth than the sewer's limited capacity would serve to carry away. He therefore adjudged the city liable and assessed the plaintiff's damages at $1,700.

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Idington J.

From this judgment the city appealed to the Court of Appeal for Ontario, and by a majority that court reversed this judgment and dismissed the action. Hence this appeal, which I think should be allowed.

The action rests on the palpable negligence of the city.

The sewer in question was constructed under and by virtue of two separate applications of the local improvement sections of the "Municipal Act."

In the view adopted by the learned trial judge and in which I agree it is quite unnecessary to determine whether or not either piece of work constituting this sewer was of the capacity required for the purposes intended.

It may have served the immediate purposes of its construction in the condition of things years ago, but before the city took the liberty of afterwards increasing, as it did, the volume of water poured into it within a given space of time, it was in duty bound in law (as I conceive it) and in accordance with elementary principles of justice and common sense to see that the turning in of such increased volume of water would not have the effect of thereby pouring filth into the cellars known to be rightly connected with and served by this sewer. It is not pretended this was done. It is not denied that this increased burthen alone unprovided for is sufficient to have produced the results in question.

The following passages from the evidence of the city engineer explain this clearly, and as he put it this is the key to the whole:

> Mr. Henderson.—Can we not put it in any way like this; that the sewer as originally built was not designed to accommodate these changed conditions? A.—Yes, you are right there.
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> * * * * * * *

Q.—Take question 142, where you say it was only in the last four or five years that this thing had occurred. 143. "Then how do you account for it? What made the change?" A. "The place is built up more, and people like Mr. Faulkner have downspouts connected, and the water that used to run away and soak in the yard now finds its way to the sewers, and that has changed the conditions."

* * * * * * *

Q.—The construction of the asphalt pavement on Clarence Street —what additional burden would that impose on the sewer? Any appreciable addition or burden? A.—It would result in draining a larger percentage of water more quickly into that section.

Q.—Would it be appreciable? A.—Yes, it would.

Q.—To what extent?

His Lordship.—Before, with the ordinary macadam, what proportion of water would get in? A.—About a third.

Q.—And on the pavement about what? A.—About 75 per cent., and the appreciable difference would be as to the ratio between the paved portion and the unpaved portion: that is the ratio that that paved area would bear to 11 acres.

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Mr. Henderson.—The whole difficulty is caused by the paving and these manholes? A.—That is the key note.

Q.—So that these recent changes are the cause of the whole trouble? A.—Yes.

Why in the face of so simple a case we are troubled in appeal with a mass of law and fact that departs from the simple lines of the learned trial judge's findings and needs no consideration to determine the real issue I cannot understand.

Of course I understand those concerned may at the trial have partly, as foundation for their claim, before the evidence of the engineer cleared the issue, and partly with an eye to the ulterior use of such an exhibition of the law and the fact have justification for this wandering afield. At present it only serves to becloud the real issue.

Then as to the unexpected storm feature of the defence the recurrence on at least the three occasions in question within so brief a period of the like results sweeps away the excuses sought in unexpected storms.

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And this is also shewn by a mass of evidence proving that in other years and almost yearly for some few years the flooding occurred though not attended with such serious results as on one of the three occasions directly in question herein.

Each furnished causes of action, and all that ever should have resulted from giving heed to the wonderful three-inch storm of nine minutes, of which so much has been made, was a diminution of the damages which is not now sought, nor at this stage could be listened to.

Sewers, drains and water courses are not merely for service in fair weather, but in rainy weather also, to that degree which long experience and observation will enable those concerned to know was likely to happen.

It is the duty of those having in charge the execution of such works to make the necessary observations, acquire the necessary knowledge that experience has brought those dwelling in or near to the locality which is to be served. Failure in that regard is negligence. It is not necessary to determine here the limit of range of time over which such an inquiry should be had.

An attempt by experiments later on after disasters resulting from improvidence or neglect in this regard have occurred to lay some sort of foundation for theory more or less plausible as an excuse is a poor substitute for the forethought that the occasion called for.

The argument that the construction of the streets in question had been done as the sewer itself under the local improvement clauses above referred to, and hence the city had no responsibility or means of recti-

fying a gross wrong, is absolutely without any foundation.

These street constructions being later in date than the sewer plaintiff uses ought not to have been entered on at all in such a way as to interfere with any prior existing right. The city council is not a mere machine but is in duty bound to exercise every care that a private owner would or should. Indeed, it has the right without giving any reason to refrain from executing any such work.

And on the other hand if through great need of the work the cost of a relief sewer or storm sewer were justifiable it could have been so made as to form part of the cost of the street formation.

Many times and for various reasons the storm waters have to be taken care of without resorting to the sewer proper.

Again, when through miscalculation, error or otherwise a local work has not fulfilled expectations and served the purpose, the city is in duty bound to rectify, at the expense of the city, its own mistakes.

The law is not so lame as to render this impossible.

I would like to see the man bold enough to apply to the court to restrain the city council from expending money to rectify such wrongs done and resulting from error in utterly unjustifiable destruction of property, health and comfort.

Some corporations have been willing to spend the money in litigation that costs as much as or more than some simple device to remedy the evil.

I think the trial judge's judgment should be restored with costs of the appeal to the appellant.

MACLENNAN J.—I agree with Mr. Justice Davies.

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DUFF J. (dissenting).—The appellant, who was the plaintiff in an action, is the tenant of premises on Clarence Street, Ottawa, which he uses as a dry goods shop. On three different occasions in the years 1903 and 1904, within a period of less than two years, his cellar was flooded by a discharge from a sewer constructed and maintained by the respondent, the City of Ottawa, and he thereby suffered damages to the extent — as found by the learned trial judge — of $1,700. At the trial, judgment was given against the municipality for this sum. The Court of Appeal by a majority of three to two reversed the judgment of the trial judge and hence this appeal.

The appeal raises two distinct questions. One question is whether or not, assuming the respondents to be answerable to the appellant for the absence of care in the construction of the works of which the injury suffered by him was admittedly the consequence, this injury was in fact the result of any such want of care. The other question is the question of law, whether or not under the "Ontario Municipal Act" the respondent municipality was, in point of law, under any duty to the appellant in the construction of the works, making it so answerable.

In considering the first question it is to be observed that upon some important points the facts are hardly matter of dispute. The sewer in question, which was constructed partly in the years 1885 and 1886 and completed in 1891, was designed to dispose of storm water in addition to sewage matter proper. It is not disputed that for many years before the commencement of the action the appellant's cellar had, with more or less regularity, at least once a year, been invaded by an offensive liquid discharged from

this sewer. It is clearly proved that his neighbours suffered in the same way, though not quite to the same extent. It is not open to question either that the facts were known through the complaints of the sufferers and the reports of the municipal inspectors at the office of the city engineer. It is also admitted that in these circumstances changes were made by the municipality in the condition of the area tributary to the sewer in the construction of new pavements which, coupled with a large increase in a number of catch basins connecting the surface of the street with the sewer, had the affect of greatly augmenting the volume of storm water discharged into it in any given storm.

These facts would seem in themselves to require some explanation from the respondent municipality when resisting a claim based on the occurrences mentioned at the outset. Sewers, designed with a sufficient capacity to carry the burden cast upon them, and at the same time properly constructed, do not periodically discharge their contents into the premises which as sewers they are intended to serve. *Primâ facie*—treating the question at issue as a question of negligence purely—the facts I have just stated would appear to put the municipality on its defence.

But before a municipality can raise the question of non-liability to a person on whose land their drains discharge water that would not otherwise be there discharged, they must at least shew that they have done their work without negligence; and that due care was used to discharge what they say was their statuteable duty in the drainage and management of this highway. *DeRinzy* v. *City of Ottawa* (1), at p. 716.

The defence is two-fold: First, it is said that the sewer was constructed in accordance with the re-

(1) 15 Ont. App. R. 712.

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quirements of good engineering, having regard to the conditions existing at the time of the occurrence upon which the appellant's claim is based; that is to say, given the pavements and openings which, as I have mentioned, so largely added to the original burden of the sewer, it is contended that the sewer, at the time the various causes of complaint arose, was nevertheless adequate, according to the standard set by approved engineering practice, to cope with the additional demands arising from the altered conditions. The second defence is that every one of the three floodings, for the consequences of which the appellant seeks to make the municipality responsible, was due to a rainfall of such excessive intensity that the municipality could not reasonably be expected to anticipate it, and consequently cannot be held answerable as being negligent in not providing for it.

The first of these defences rests upon a certain rule touching the capacity of sewers intended to dispose of storm water as well as of sewage which admittedly is accepted by engineers as a working rule governing the construction of works of that character within a zone known as the northern zone, in which Ottawa is situated. This rule requires that such sewers when designed for places where street paving is extensively used shall be of sufficient capacity to dispose safely of the surface water collected and discharged into them during a rainfall having an intensity of $1\frac{1}{2}$ inches per hour continued indefinitely.

The principal contention on behalf of the respondent municipality was that the sewer in question satisfied this requirement. The learned trial judge found that it did not. A majority of the members of the Court of Appeal seem to me to have found that it did

not. There was at the trial conflicting evidence on the point. It should, perhaps, in these circumstances, be sufficient to say that it is not in accordance with the practice of this court to set aside a finding of fact in which both the trial judge who saw the witnesses and the majority of the first Court of Appeal have concurred; and I should leave the matter there were it not that the majority of this court do not agree with my interpretation of the reasons given by the Chief Justice of Ontario; and in these circumstances I have thought it better to state the result of my own independent examination of the evidence, which examination has led me to the same conclusion, upon this point, as that reached by the other courts.

* * * * * *

(The learned judge after an examination of the evidence in detail concluded that, on this point, it fully confirms the opinion of the learned trial judge.)

* * * * * *

As regards the second defence, that is a defence in which the onus is on the respondents. To establish it the respondents must prove that on each of the three occasions in question the storm was one which in Ottawa, to borrow language used by Lord Chelmsford in delivering judgment of the Privy Council in *Great Western Railway Co.* v. *Braid*(1) would not "be expected to occur." Has this been shewn? The professional witnesses called by the appellant said that in many places within the zone to which the standard above mentioned is applied the most severe of the three storms—there being an exact record of the rainfall on that occasion—would be regarded as

(1) 1 Moo. P.C. (N.S.) 101.

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an ordinary storm; and that the rule was designed to provide for and does provide for such a storm. On what ground is that evidence to be rejected? Mr. Ker hardly disputes the first statement that such storms frequently occur on the southern part of the zone. He can only escape the natural inference from that by taking refuge in the trying position already mentioned that the rule is not designed to protect people along the route of the sewer from periodical overflows —once a year or so.

Moreover, it seems difficult, in view of the admitted facts, to regard the contention seriously. These three storms occurred within the space of fourteen months, yet every one of them is said to be a storm which could not reasonably be expected in Ottawa. Still another of this class of storms is added to the list, in 1905, more violent even than the three earlier ones, making four of these unforeseeable deluges within two years. Earlier than 1903, unfortunately for the appellant, the records are silent. Can it really be argued that in face of all these facts the respondent municipality has acquitted itself of the onus upon it to shew that each of these storms was of such a character as reasonably careful persons establishing a means for the disposal of storm water would not provide for? The true answer, I think, is to be found in Mr. Ker's repeated excuse, "it is a matter of expense."

There remain the arguments that what the municipality did was done under its statutory powers and that the appellant's remedy (if any) is under the compensation clauses of the "Municipal Act" and a further argument based upon the local improvement clauses of that Act.

The first of these contentions must stand or fall upon the construction of the statute. The general rule of law is clear. If the thing complained of, although an act which would otherwise be actionable, be authorized by statute then no action will lie in respect of it; that is to say, if it be the very thing the legislature has authorized. Because, of course, no court can treat as *injuria* that which the legislature has sanctioned. Examples of the rigid application of the principle will be found in *Williams* v. *Corporation of Raleigh*(1), and in *East Freemantle Corporation* v. *Annois*(2). The principle is equally applicable to persons and bodies acting under legislative authority for their own profit and to public bodies exercising powers conferred upon them for the public benefit. In both cases where the authority is in general terms merely it may be inferred from the general scope and provisions of the statute that the powers conferred are not to be exercised to the prejudice of private rights. This was the view taken of the statute under consideration by the House of Lords in the *Metropolitan Asylum District* v. *Hill*(3), and of that construed by the Privy Council in *Canadian Pacific Railway Co.* v. *Parke*(4). It is, nevertheless, entirely a question of the true meaning of the statute. In *Westminster Corporation* v. *London & North Western Railway Co.*(5), Lord Halsbury said:

> Assuming the thing done to be within the discretion of the local authority no court has power to interfere with the mode in which it has exercised it. When the legislature has confided the power to a particular body with a discretion how it is to be used it is beyond the power of any court to contest that discretion. Of course this

(1) [1893] A.C. 540.
(2) [1902] A.C. 213.
(3) 6 App. Cas. 193.
(4) [1899] A.C. 535.
(5) [1905] A.C. 426.

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assumes that the thing done is the thing which the legislature has authorized.

This, however, must be read subject to two important observations, that is to say, that in the absence of some provision (either express or clearly implied) to the contrary it must be taken that in carrying out works authorized by a statute or in exercising powers conferred by a statute you are not to act negligently and you are to act reasonably, that is to say, you are to prosecute the work or you are to exercise the power, as the case may be, in such a manner as not to do unnecessary injury to others. Lord Macnaghten, at p. 430, said:

> It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second if not in the first.

It is not necessary for the purposes of this case to decide the question whether the rule applied in *Canadian Pacific Railway Co.* v. *Parke*(1), and in *Metropolitan Asylum District* v. *Hill*(2) is applicable to the conduct of a municipality constructing, under the authority conferred by the "Ontario Municipal Act," a work such as that which has given rise to the present litigation. Upon that point conflicting opinions would appear to have been expressed at different times in Ontario courts. Compare, for example, the judgment of Street J. in *Weber* v. *Town of Berlin*(3) with the judgments of the Court of Appeal in *Garfield* v. *City of Toronto*(4), and the judgment of Hagarty C.J. in

(1) [1899] A.C. 535.
(2) 6 App. Cas. 193.
(3) 8 Ont. L.R. 302, at p. 305.
(4) 22 Ont. App. R. 128.

Derinzy v. *City of Ottawa*(1). The point has not been argued, and I express no opinion upon it, but only observe in passing that, reading the statute as it now stands, the legislature would appear to have anticipated that works constructed by a municipality under the powers conferred by the statute might affect injuriously the property of private individuals; and in some cases to have made provision for compensation in respect of such injuries.

On the other hand, it has been held in a long line of authorities, beginning with *Brown* v. *Municipal Council of Sarnia*(2), the statute does not protect the municipality from responsibility in an action for damages caused by the negligent construction of works of a kind authorized by the statute; I think these authorities have been well decided; but, even if I doubted that, it would be a grave question whether it is not now too late to depart from the rule established by them.

In this case the corporation by reason of making and maintaining an excessive number of conduits leading to the sewer passing appellant's property periodically conducts into his neighbourhood quantities of water and liquid filth for which they have provided no proper means of escape except into the premises abutting upon the street. This cannot be said to be the result of any mere error of judgment; but on the contrary was a consequence of what the municipality did, if not actually foreseen at least foreseeable by the most ordinary forethought.

That does not seem to me to be a reasonable exercise of the powers vested in the municipality in re-

(1) 15 Ont. App. R. 712. (2) 11 U.C.Q.B. 87.

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spect of the control of streets or of the control of sewers.

The last point arises upon the contention that the municipality is not liable because it has no funds which can properly be applied to remedy the mischief. This point with great respect seems to me to beg the question. If the mischief is the result of an actionable wrong it is hardly conceivable that means are not within the power of the council to remedy it. I do not, however, enlarge upon the question, but agree with the view expressed by my brother Idington upon it.

The appeal should be allowed and the judgment of the trial judge restored.

Appeal dismissed with costs.

Solicitors for the appellant: *McCracken, Henderson, McDougall & Greene.*

Solicitor for the respondent: *Taylor McVeity.*