LEVI LEWIS AND JULIA LEWIS (PLAINTIFFS) ..... } APPELLANTS;

AND

THOMAS ALEXANDER AND ROBERT W. PUDDICOMBE (DEFENDANTS) ..... } RESPONDENTS.

1895

*Mar. 15, 16.

*May 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Petition for drain—Use of drain as common sewer—Connection with drain—Nuisance—Liability of householder.

A petition by ratepayers of a township under s. 570 of the Municipal Act of Ontario, asked for a drain to be constructed for draining the property described therein. The township was afterwards annexed to the adjoining city and the drain was thereafter used as a common sewer, it being as constructed fit for that purpose. In an action against a householder, who had connected the sewage from his house with said drain, for a nuisance occasioned thereby at its outlet:

Held, affirming the decision of the Court of Appeal, Taschereau and Gwynne JJ. dissenting, that sec. 570, in authorizing the construction of a drain "for draining the property" empowered the township to construct a drain for draining not only surface water, but sewage generally, and the householder was not responsible for the consequences of connecting his house with said drain by permission of the city.

Where a by-law provided that no connection should be made with a sewer, except by permission of the city engineer, a resolution of the city council granting an application for such connection on terms which were complied with and the connection made was a sufficient compliance with said by-law.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Chancery Division in favour of the plaintiffs and dismissing their action.

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*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

(1) 21 Ont. App. R. 613.

1895

LEWIS v. ALEXANDER.

The action in this case was brought to abate a nuisance to plaintiffs' property by offensive matter being deposited thereon by drainage from the dwelling houses of the respective defendants. The sewage from the house of the defendant Alexander was carried through a drain constructed when that portion of the city was a separate township, and plaintiffs claimed that such drain could not be used as a common sewer. The defendant Puddicombe had obtained connection with the sewer after the township was annexed to the city, and as to him the contention was that permission to make such connection had not been given by the city engineer as required by a by-law of the city. The facts are more fully stated in the judgments published herewith.

McCarthy Q.C. and *Fraser* for the appellants.

Gibbons Q.C. and *Cameron* for the respondents.

The judgment of the majority of the court was delivered by :

SEDGEWICK J.– The parties to this action are residents of London, Ontario. In 1883, the plaintiffs owned lots in the township of Westminster, immediately outside of the corporate limits of the city. This portion of the township was all at that time laid off in town lots, with necessary streets and sidewalks, most of the lots having a frontage of eighty-four feet on the street. In the month of July of that year, in pursuance of the provisions of the Consolidated Municipal Act of 1883, a majority in number of the owners of the property affected petitioned the council of the township of Westminster, praying that a sewer be constructed for the purpose of draining the lots on both sides of Bruce Street. This petition having been considered by the council, a by-law was passed granting the prayer of

1895

LEWIS v. ALEXANDER.

Sedgewick J.

the petition and authorizing its construction in accordance with the report and plans of the engineer, the cost of the work to be paid by moneys borrowed in the first place by the township, but to be recouped by the proceeds of ten annual assessments upon the property benefited pursuant to the provisions of the Act. Under this by-law the drain was constructed, and it has since been paid for by the assessment referred to.

The principal question in controversy in this suit is as to whether the residents on both sides of Bruce Street have a right to connect their water-closets with the drain, or whether its use is limited to mere surface water, or in other words, whether it is a common sewer within the meaning of the statute, into which all sewage from the dwelling-houses affected may lawfully be turned, or only a drain limited in its use as above mentioned. Section 482, subsec. 15, of the Act (46 Vic. ch. 18) authorizes the council of every township to pass by-laws for opening and making drains, sewers, or watercourses within the jurisdiction of the council. Section 570 authorizes the council of a township to pass by-laws to provide for the draining of any property which may be benefited thereby, and for assessing the cost thereof upon that property by special rate, and it was under either one or other of these powers, or of both of them, that the work in question was constructed. The contention of the appellants is, that the work in question was not a sewer within the meaning of section 482 (15) but only a drain within the meaning of section 570; that the authority given by the latter section was not sufficient to enable a township council to construct a common sewer, the cost of which might be met by special assessment, and that any work done thereon was limited and confined in its purpose to surface drainage only for agricultural or other similar objects; and in support of this conten-

1895

LEWIS v. ALEXANDER.

Sedgewick J.

tion they point out that it was by subsequent legislation only that township councils were authorized to construct sewers to be paid for by special assessment. The Municipal Act of 1883 did not particularly define the meaning to be given to the words "drain" or "sewer" as used in that Act, and we cannot of course resort to definitions given to those words in the English statutes relating to drainage, sewerage and other matters connected with public health. The question to be considered is: What is the meaning of the words "for draining of the property"? In my view these words are wide enough to include the draining of property for all purposes, whether these purposes be agricultural or sanitary. The word "drain" has no technical or exact meaning; it has, however, a much wider meaning than the word "sewer." A sewer is in every case a drain although a drain is not in every case a sewer. A sewer is, I suppose, that kind of a drain which is constructed in thickly populated areas for the purpose of carrying off, not merely inoffensive surface water, but also foul water, and all excrementitious and other filthy matter. I see no reason why the power given to the council to provide for the draining of any particular property confines that power solely to the draining of inoffensive or surface water. One area may be drained in one way for one purpose, while another area may be drained in another way for other purposes as well. Without possessing the knowledge of a hydraulic or sanitary engineer, in my view it is a matter of common knowledge that in order to properly drain an area of farm land for agricultural purposes, a drain of a cheap and simple character may be all that is necessary, whereas, if that same area is laid off and built upon as a city, town or village, altogether irrespective of the question of incorporation, a drain of a much more expensive character is necessary. In the

1895

LEWIS v. ALEXANDER.

Sedgewick J.

first case the drain need not be a sewer ; in the second case, in order to effectually drain the property it must be a sewer, that is, a structure with capacity to carry off all liquid matter the necessary concomitant of human dwellings which is usually carried off by means of a sewer. I am unable to find any satisfactory reason for narrowing the wide meaning of the word "drain." The plaintiff Levi Lewis, himself, in his evidence states that the drain was constructed "for the purpose of surface water, sewers and cellars," but not for the drainage of offensive matter from water-closets. There is no authority, it seems to me, for limiting the purposes of the drain. Who is to determine the character of the matter that may be carried off, the degree of its offensiveness or inoffensiveness ? The drainage of an area covered by human habitations must, in my judgment, necessarily include the drainage or carrying off from those habitations of all matter that is usually carried off by means of drains or sewers in areas of that description. Some evidence was adduced at the trial to show that it never was intended by the petitioners that their water-closets should be connected with this drain, and this evidence not only impressed the trial judge but seems to have affected the learned judges of the Court of Appeal.

Neither the petition for the drain nor the by-law itself affords any evidence that such was the object of the drain. If it were to be so limited, either the by-law itself or the plans and specifications of the work which formed part of the by-law, should have made apparent that limited purpose, and no reliance in my view can be placed upon oral testimony, even if admissible, as to its purposes many years after the work was constructed. It appears to me, however, that the evidence is conclusive that the drain was intended to be a drain for all purposes. The petition and the bill refer to it

1895

LEWIS v. ALEXANDER.

Sedgewick J.

as a sewer. It was precisely the same kind of a drain as had for years before been constructed within the limits of London, adjoining it, for sewage purposes. It was a glazed tile drain, fifteen inches in diameter, with facilities for connecting it with the buildings, lots and dwellings on each side of it. It was deep enough and perfect enough to carry off all the sewage of the locality, and I believe that it was constructed for those purposes—purposes for which it was perfectly adapted.

It was in 1888 that the defendant Alexander connected the water-closets in his house on Bruce Street with the drain in question, and from that time until shortly before this action commenced, January, 1894, he had enjoyed it without interruption or objection on the part of any one.

By an Act of the legislature of Ontario (chapter 89, of the Acts of 1890) the area through which the drain was built became annexed to and thenceforward formed part of the city of London. From that time until the commencement of this action the authorities of that city in all respects treated the drain in question as one of the city's common sewers. At the time of the annexation the special assessment for the drain had not been wholly paid; the city authorities collected the balance of it as sewerage rates; the city likewise collected from residents on Bruce Street, water-closet rates, which was a tax for the privilege of draining excrementitious matter through this drain. The city authorities likewise looked after the repair and sanitary conditions of this drain. They flushed it. In addition to this they connected the water-closets in their public buildings with it as well as constructed a new sewer, the outlet of which was this drain. In every respect, so far as I can see, they dealt with it in exactly the same way as they dealt with any other common sewer in the city.

1895

LEWIS v. ALEXANDER.

Sedgewick J.

All this shows, in my judgment, conclusively, that the drain in question having become the property of the city by virtue of the annexing Act, was considered by it and dealt with as a common sewer, and not as a structure of the limited character and purpose contended for by the appellants; and in my view the judgment of the court below was perfectly right in holding that as between the defendant Alexander and the city, it was a common sewer.

There is, however, a by-law of the city which prohibits the property owner from connecting his buildings with a common sewer without the written consent of the city engineer. This by-law can in no way affect the defendant Alexander. There was no such by-law in the township of Westminster either at the time when the drain was built or at the time when he made connection with it. If that connection was lawfully made in 1888, as I think it was, his rights in that regard could not in any way be affected by the by-law referred to. In my judgment, therefore, the defendant Alexander is entitled to succeed upon two grounds: in the first place, because he was lawfully using the drain under his original rights as a property owner; and secondly, because having regard to the action of the city authorities it was at the time of the grievances complained of *de facto* a common sewer of the city of London and subject to its supervision and control.

The case of *Ferrand* v. *Hallas Land and Building Company* (1), is an express authority, in support of the defence. Lord Justice Smith there says:

> It appears to me that if the sewer be vested in the local authority, and the defendants have the sanction of that authority to do what they have done, then this action is not maintainable against them, for if it were, every householder whose house is drained into a sewer, which is vested in, and is under the control of the local authority, would be liable to be proceeded against for what the local authority might do

(1) [1893] 2 Q. B. 135

1895

LEWIS v. ALEXANDER.

Sedgewick J.

with the sewage which flowed out of the mouth of the sewer, although the householder is unable to direct as to how and in what way such sewage is to be dealt with. It is immaterial who originally constructed the sewer. When once the sewer was vested in the local authority, they are the persons liable for injury caused by the effluent from the sewer, and not the persons who drain into the sewer.

The case of the defendant Puddicombe is stronger even than that of the defendant Alexander. The city had constructed a sewer about July, 1892, on Henry Street which emptied into the Bruce Street drain. City by-law number 759 had provided that every lot abutting on a street through which a common sewer ran should be drained into it, and that it should be the duty of the owner to keep the connecting drain between his premises and the common sewer in good repair. It, however, further provided, that no person should connect with such sewer except on previous application in writing to and permission from the city engineer; and it appeared that as a matter of fact no actual application in writing had been made to the city engineer, nor had express permission been given by him to the defendant Puddicombe to make connection with this drain, and the plaintiffs contended that Puddicombe, at all events, had therefore no right to drain his premises into that sewer. But the evidence shows that he applied to the city council for leave to make the connection, and that the city council passed a resolution granting him such permission upon certain terms therein specified. These terms were complied with, and the connection was made, and he has since, as was proved, paid sewage rates and closet rates. I think the by-law has been substantially complied with, and it is not for the plaintiffs at all events to assert the contrary.

It is not necesssary in this case to discuss at length the question of the liability of the city for the injury of which the plaintiffs complain. If the amount of

sewage which overflows upon their property has been appreciably increased by reason of the connection of the Henry Street drain with the Bruce Street drain, and they have sustained damage beyond that which must be deemed to have been within the contemplation of the township authorities and the plaintiffs themselves at the time of the original construction of the latter drain, then doubtless they have either a cause of action or a claim for compensation against the city, but it does not appear to me necessary to do more than reserve this point.

As the case at present stands, in my judgment, the appeal should be dismissed as against both the defendants.

I have referred to the contention that because, subsequent to the Act of 1882, the Ontario Legislature has by express enactment given to township councils authority to build sewers, the cost of which might be defrayed by special assessment imposed upon the property benefited, the drain in this case cannot be held to be a sewer. But this contention is nothing more than an argument depending for its force upon the circumstances in each case. If we think that the statute of 1882 covers the case, the fact that the legislature has made certain what might before, to some minds, have been doubtful, cannot effect an alteration of that opinion, nor compel us to decide that that opinion must necessarily be erroneous. The amending Act is not declaratory. It has no retroactive operation and while it may indicate some doubt in the mind of the draftsman and even of the legislature as well as to the breadth of the Act amended, it can in no way alter its meaning, and we are bound to give it what we consider its meaning is, independently of and uninfluenced by that doubt.

1895

LEWIS v. ALEXANDER.

Gwynne J.

TASCHEREAU J.—I concur in the judgment of Mr. Justice Gwynne.

GWYNNE J.—The appeal of the plaintiffs, as against the judgment of the Court of Appeal for Ontario in favour of the defendant Puddicombe, must in my opinion be dismissed with costs. At the time of the passing by the municipal council of the corporation of the city of London, in the month of July, 1892, of the by-law 659 for the construction of a tile drain upon and along that part of Henry Street which lies between James Street and Bruce Street both Henry Street and Bruce Street were within the limits of the city of London, and were under the jurisdiction and control of the municipal council of the city corporation. By that by-law the municipal council authorized the construction of a tile drain on Henry Street, between James Street and Bruce Street, at the cost of the parties benefited thereby, under the provisions of sections 612, 616 and 618 of the municipal Act, ch. 184 of the Revised Statutes of Ontario of 1887. The drain so authorized was constructed in the manner usual in the construction of common sewers in the city, and for the purpose of being used as a common sewer, and when constructed was the property of the city corporation and wholly under the control of the city council. By the municipal Act then in force, R.S.O. ch. 184, sec. 466, subsec. 49, *et seq.* jurisdiction was absolutely vested in the city council to regulate the construction of cellars, sinks, water-closets, privies, and private vaults, and the manner of draining the same, and to make any regulation for sewerage or drainage that might be deemed necessary for sanitary purposes, and to charge all persons owning or occupying property which is drained into a common sewer (or which is required by any by-law to be so drained) with a reasonable rent

1895

LEWIS v. ALEXANDER.

Gwynne J.

for the use of such sewer. A Mr. Abraham Puddicombe, father of the defendant, R. W. Puddicombe, owns property on Henry Street which is benefited by the Henry Street sewer, and as a person so benefited was assessed for the construction thereof under the provisions of the said sections of the municipal Act in that behalf. The defendant, R.W. Puddicombe, occupies a house situate, not on Henry Street, but on the corner of James Street and a road called the Wortley Road, adjoining his father's property situate on Henry Street, and he applied to the city council for permission to connect a drain from his house with the sewer on Henry Street through his father's drain, the one opening from the drain on his father's property into the Henry Street sewer serving for both of them, and he deposited with the city treasurer the sum of ten dollars for such permission to connect with his father's drain, undertaking at the same time to the effect mentioned in a receipt given to him by the city treasurer for such sum which is in the terms following:

$10. London, Ont., Sept. 15th, 1892.

Received from R. W. Puddicombe the sum of ten dollars (being nominal rental commuted) for the use of Henry Street sewer for the property leased by him on the Wortley Road, Mr. Puddicombe agreeing not to oppose the construction of a sewer on Wortley Road opposite the property occupied by him, if at any future time the property owners in that neighbourhood petition for one.

Sgd. JNO. POPE,
Treasurer.

This receipt would seem to have been given in pursuance of a report of a committee of the city council adopted by the city council on a day not stated in the appeal case, but the report is given, and is as follows:

Report No. 2 Committee City Council.—That Mr. R.W. Puddicombe be granted permission to connect with Henry Street drain from his property on Wortley Road on agreeing to pay a nominal rent for said privilege to be fixed by city engineer and on promising not to oppose the construction of a drain on Wortley Road fronting property at present occupied by him.

1895

LEWIS v. ALEXANDER.

Gwynne J.

Upon the 9th of January, 1893, the city council passed another by-law No. 759, "relating to sewerage and draining, and to provide for an annual sewer rental in certain cases," whereby it was enacted—

1. Every lot or parcel of land abutting on any street in the city through which a common sewer runs and which is opposite to such common sewer shall be drained into it, and it shall be the duty of the owner and occupier of every lot or parcel of land which is drained into such common sewer to cause the connecting drain between his premises and such common sewer to be in good repair. 2. No person shall connect any drain from his premises with any common sewer now made or constructed within the city, or with any private drain whereby his premises will be drained into any such common sewer, except on previous application in writing to and permission by the city engineer, and except there is first placed in the hands of the city treasurer a deposit of ten dollars in case of a macadamized street and fifty dollars in case of a paved street, as a guarantee to be used in the repair of the sewer or street, providing the work is not done without injury thereto. Such deposit to remain in the treasurer's hands for six months, and all such excavations and connections shall be made under the supervision of the city engineer or such other officer or person as committee No. 2 shall appoint, and if such officer or person be other than the city engineer, he shall be paid for his services by the person on whose behalf the said connection is made.

Now, upon the assumption that for the consideration of ten dollars so paid by way of commutation of rental the defendant Puddicombe had the permission of the city council to connect a drain from his house with his father's said drain, he did make such connection, and thereby water-closet matter was conveyed into his father's drain. Whether the connection was made in such a manner as to be binding upon the corporation as between them and the defendant is a matter with which the plaintiffs had nothing to do, and with which we are not at present concerned. When the connection was made does not appear; it was made, however, before the 17th November, 1893, upon which day the injury of which the plaintiffs complain was committed in manner following. Upon that day the officers

1895

LEWIS v. ALEXANDER.

Gwynne J.

of the city corporation flushed certain drains within the city, and among those the drain in Bruce Street with which their sewer in Henry Street was as aforesaid connected and thereby washed clean the Bruce Street drain, and in so doing forced a great quantity of water-closet filth down the drain and deposited it upon property of the plaintiffs near to their dwelling-house, thus causing a grievous and offensive nuisance to the plaintiff. Now the whole contention of the plaintiffs as regards the defendant Puddicombe, is that neither the corporation of the city of London, nor any individual had any right to cause water-closet filth to pass into and through the Bruce Street drain, and that as the defendant Puddicombe's drain connects a water-closet on his premises with his father's drain, which connects with the Henry Street drain which was constructed by the corporation so as to connect with the Bruce Street drain, the defendant is a person who is liable to the plaintiffs as a party contributing to the wrong done to them by the flushing of the drains by the corporation officers on the 17th November, 1893, and by the stuff falling into the Henry Street drain being still carried down through the Bruce Street drain upon the premises of the plaintiffs, so as to cause a nuisance to them. The whole damage of which the plaintiffs complain, in so far as Puddicombe is concerned, is caused by the act of the city corporation alone in connecting as they have done by by-law their Henry Street drain with the drain in Bruce Street, and for that act, if it be wrongful, the corporation alone are responsible. The defendant was no party to it and is under no responsibility in respect of it. In view of the constitutional character of these municipal institutions, and the absolute jurisdiction and control given to city municipalities over sewage and drainage within their several municipalities, the corporation of

1895

LEWIS
v.
ALEXANDER.

Gwynne J.

the city of London can alone be made responsible for the connection, so as aforesaid authorized by by-law, and if in the exercise of their jurisdiction they have been guilty of any actionable wrong by making the connection, they and not the defendant Puddicombe must answer for it. There is no connection between the wrongful act of the corporation, assuming it to be wrongful, and the act of the defendant Puddicombe in connecting his drain with his father's drain, which in the circumstances under which that connection was made as aforesaid was, in so far at least as the plaintiffs are concerned, perfectly lawful. There needs no authority to be cited in support of this proposition, but if any be necessary the principle laid down in *Ferrand* v. *Hallas Land & Building Co.* (1), upon which the Court of Appeal in Toronto proceeded is sufficient. As against the defendant Puddicombe, therefore, the appeal must be dismissed with costs.

The case of the defendant Alexander gives rise to somewhat different considerations. He has a drain which connects a water-closet on his premises on Bruce Street directly into the Bruce Street drain; that drain was constructed in 1883, in the township of Westminster, outside of the city of London, under a by-law of the municipal council of the township, passed under secs. 570 and 571 of 48 Vic. ch. 18, upon the petition of the plaintiffs and others, owners of land to be benefited by the drain. The drain authorized by the by-law was expressed to be a sewer for draining the lots on both sides of Bruce Street, which lots, by the engineer's report incorporated in the by-law, were shown to be 59 building lots, whose frontages on Bruce Street were of dimensions varying from 42 to 84 feet in width. The locality, although in the township of Westminster, just outside of the city of London, was then a suburb of the

(1) [1893] 2 Q. B. 135.

city, and has since by an Act passed in 1890 been made part of the city. The drain so authorized was a 15-inch glazed tile drain, with 14 gully holes in the street itself, and was of a character and dimensions in every respect suitable and proper for a public and common sewer in a street in a city, save only that it wanted the most essential requisite, namely, a suitable and proper outlet of a sewer into and through which the offensive and nuisance creating matter from sinks and water-closets and such like filth is intended to pass. It is upon the evidence clear, I think beyond all doubt, that notwithstanding the capacity of the sewer, it never was contemplated by the persons petitioning for it, nor intended by the municipal council which authorized its construction, that it should be the receptacle of filth proceeding from water-closets. The plaintiffs, who were among the petitioners, never contemplated consenting, and in point of fact never did consent, to their premises being made a place of deposit of such filth. Moreover, when constructed, the sewer was the property of the township municipality, and the township council had not vested in them the jurisdiction which by 46 Vic. ch. 18, sec. 496, subsecs. 39 and 40, was vested in the councils of cities, towns and incorporated villages for regulating sinks, water-closets, privies, and privy vaults, and the manner of draining the same. That jurisdiction was first vested in township municipalities by ch. 184, sec. 489, subsec. 47, R. S. O., 1887, and, indeed, assuming township councils to have had such jurisdiction in 1883 over water-closets, &c., and the manner of draining them, they would not have been authorized, even by by-law, to commit the wrong to the plaintiff of depositing filth from water-closets upon his premises in such a manner as to create a nuisance to him. We need not go further back than

1895
LEWIS
v.
ALEXANDER.
Gwynne J.

Humphries v. *Cousins* (1), for the doctrine that it is *primâ facie* the right of every occupier of a piece of land to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound by prescription or otherwise to receive such matter, but the burthen of showing that he is so bound rests upon those who seek to impose the easement upon him. Now there is nothing in the municipal institutions Acts of Ontario, or any Act, which ever authorized the committal of such a nuisance as that of which the plaintiff complains. In *Attorney General* v. *Colney Hatch Lunatic Asylum* (2), Lord Hatherley said that he entertained a very strong opinion, that when a nuisance is established all the court has to do is to say that it must cease, unless at least that be physically impossible, in which case the party must be left to his remedy by an action for damages. In *Charles* v. *Finchley Local Board* (3), the law is approved as it is laid down in the last edition of Addison on Torts, by Mr. Justice Cave, in these words:

> Where a person who is entitled to a limited right, exercises it in excess so as produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within its proper limits. "Thus if a man," says Baron Alderson, "has a right to send clear water through my drain and chooses to send dirty water, every particle of water may be stopped because it is dirty."

And in that case a local board was restrained by injunction from discharging or permitting to be discharged sewage or other offensive matter into a watercourse, so as to create a nuisance to the plaintiff, although it appeared that the nuisance was in fact caused by a person not a party to the action, who had

(1) 2 C. P. D. 239.
(2) 4 Ch. App. 157.
(3) 23 Ch. D. 775.

1895

LEWIS v. ALEXANDER.

Gwynne J.

passed the sewage from his house into a watercourse opposite the plaintiff's house, by a pipe which by agreement with the defendants he was only entitled to use for surface or rain water.

In *Lewis* v. *The City of Toronto* (1), the Court of Queen's Bench in Ontario held, that it is not in the power of a municipal corporation to pass a by-law which would legalize the acts complained of in that case in the manner in which they were done, namely, the piling large quantities of filthy rubbish so near to a cellar of the plaintiff as to cause filthy water, earth and stuff to flow into his cellar and into his well.

In *Van Egmond* v. *Seaforth* (2), the municipal corporation of the town of Seaforth were restrained by injunction from letting foul water from salt-works of a third person to pass through a sewer constructed by the corporation into a stream passing through the plaintiff's land.

Now, it cannot be doubted that a person aggrieved has his remedies against all persons contributing to causing him the injury of which he complains. It is necessary, therefore, to consider whether the defendant Alexander contributes in any, and if any what, manner to the injury of which the plaintiffs complain. In 1885 he purchased one of the lots on Bruce Street for the benefit of which the Bruce Street drain was constructed. In 1888 he apparently made some arrangement with the city of London Waterworks Company under the provisions of 45 Vic. ch. 25, sec. 28, for the supply of water to his dwelling-house, and he applied that water supply to a water-closet in his house, and carried the filth therefrom into the Bruce Street sewer, for which disposal of such filth he had no authority in law, and he thereby no doubt in some measure contributed to the nuisance caused to the

(1) 39 U.C.Q.B. 352. (2) 6 O. R. 599.

1895
LEWIS
v.
ALEXANDER.
Gwynne J.

plaintiffs by the flushing of the sewer by the city corporation in 1893. 'By an Act of the legislature of Ontario, passed on the 7th April, 1890, 53 Vic. ch. 89, that part of the township of Westminster whereon was the locality for draining which the Bruce Street sewer had been constructed in 1883, was incorporated with and made part of the city of London, and thereby the sewer in Bruce Street became the property of the city of London in the same condition and character as it was held by the municipality of the township of Westminster, but subject for the future to the exercise by the municipal council of the city of London of their legal jurisdiction over it as conferred by statute. They have passed no by-law since having the effect of subjecting the sewer to an obligation to which it was not subject when the property of the municipality of the township of Westminster, namely, to be the receptacle of water-closet filth, nor have they done any act to remove the nuisance to the plaintiffs which the passing of such filth through it creates with its outlet as at present existing. The conduct of the defendant Alexander therefore in using the sewer for the purpose of carrying off the filth from his water-closet is still as illegal as it was while the property in the sewer was vested in the municipality of the township of Westminster, and although the damage done thereby to the plaintiff may be, and no doubt is, very trifling as compared with the damage caused by the connection by the city corporation of other sewers in the city with the Bruce Street sewer, as the conduct of the defendant Alexander is not shown to be authorized by any law and contributes to the nuisance caused to the plaintiffs, the plaintiffs are entitled to the injunction against him as granted by the learned trial judge. The appeal must therefore be allowed with costs, and that judgment as against the defendant Alexander restored; while for their substan-

tial redress of the wrongs of which the plaintiffs complain they must be left to their remedy against the city corporation.

1895

LEWIS v. ALEXANDER.

Gwynne J.

Appeal dismissed with costs.

Solicitors for the appellants: *Fraser & Fraser.*

Solicitors for the respondent Puddicombe: *Gibbons, McNab & Mulkern.*

Solicitors for the respondent Alexander: *Meredith, Cameron, Judd & Dromgole.*