

Such an event is then a phenomenon which is to be expected, against which the City should be protected by precautionary measures.

Those to whom is confided the administration of the City's affairs, cannot therefore meritoriously plead against the plaintiff's demand, that these yearly visits from the elements that recur repeatedly about the same time every summer, are of their nature fortuitous events, unforeseen and caused by superior force, (1) against which human prudence can devise no means of protecting the cellars of citizens from being flooded.

It is furthermore alleged on behalf of the defendant, that the City cannot be held responsible, because the Ontario Street sewer was of sufficient capacity when it was constructed, to meet all the ordinary needs of the locality in which the plaintiff's store was located, and that the mere fact of flooding is not *per se* evidence that the defendant has been guilty of negligence.

It is furthermore urged that where a sewer is free from structural defects, and is sufficient to answer all ordinary needs, the corporation is not liable for damages caused as the result of an extraordinary rain fall by water backing into a cellar of a person who is compelled to drain through the sewer, and that such a rain fall though not unprecedented may be treated as an act of God or *vis major*.

That would be a good argument had there been nothing in previous experience to make its recurrence probable. See Biggar (2). The contrary however is the case; not only the probable, but the certain recurrence has been proved by the professor's testimony. The plaintiff has suffered constantly from floods in his cellar during the

(1) 17 (24), C. C.

(2) *Municipal Manual*, p. 661.