

of Cornwall. On a lot a short distance west of his lot is built a furniture factory. Some years ago the town constructed a tile or covered drain opposite this factory, on the south side of Ninth street, from the west nearly to the east line of lot 9—then dug an open ditch or drain east on the south side of Ninth street, past the plaintiff's lot, and on down to Fly creek. The plaintiff complains that his lot has been overflowed by water from this drain from time to time.

In 1905 a committee of the town council reported as follows: "Your committee begs to report having investigated Mr. Wm. Moore's claim to have suffered damage through water flowing over his lot No. 7 s.s. 9th St. As the principal damage was alleged to have been caused by the flow of hot water from the Cornwall furniture factory, your Committee asked Mr. Edwards and Mr. Moore to meet them and discuss the matter. As a result of this Mr. Moore consented to modify his claim of \$40. Your committee now recommend that Mr. Moore be paid \$20 for the hay destroyed in the years 1903 and 1904, the amount to be divided equally between this municipality and the Cornwall Furniture Company, the Company to be relieved from any further liability."

The plaintiff accepted this proposition; he was paid \$10 by the municipality and \$10 by the company.

But the trouble continued and the plaintiff brings his action.

At the trial it was to my mind proved beyond controversy by witnesses to whom the learned Judge gave a high character, that the difficulty is that the town constructed the open drain in such a way as that it will fill up, and they neglect to clean it out. It is true that the plaintiff might a little diminish the evil effects of the defendants' negligence by himself digging a watercourse; but he is not called upon to do that. And while it is true that some little of the damage to his lot is done by the occasional backing-up of Fly creek, it is clear that most is due to the negligence of the town.

The neglect of the town to clean out the open drain has caused the plaintiff's lot to be overflowed from time to time by the waters of the drain, and also a more continuous seepage into the plaintiff's land.

For this an action lies *Smith v. Eldon* (1907), 9 O. W. R. 963, and cases cited.