

## SIR WILLIAM MULOCK, C.J., says: (Continued)

I now return to trace the effluent of the sewage from the settling tanks. In order to take care of it, an outfall pipe was laid from the plant across the marsh to Lake Ontario, a distance of about one mile. This outfall pipe, except in cases of emergency, was expected to take care of all the effluent from the tanks, but it is of insufficient capacity, and in consequence much of it passes by what is called the storm overflow passage into Ashbridge's Bay. This storm overflow passage was intended only to meet emergencies, but owing to the insufficient capacity of the outfall pipe, it is obliged to receive continuously a part of the normal volume of effluent; further, there are two serious breaks in the outfall pipe and through them large quantities of sewage, instead of passing into the lake, escape into the bay, and have there deposited much fecal matter from which offensive gases escape into the atmosphere.

The defendants contend that they have statutory authority to establish and operate the plant and that in consequence this action will not lie. They also contend it is being operated with reasonable care in order to prevent a nuisance, and if such is the case that they are doing all that they are required to do; they have statutory authority to establish a sewage plant but no authority to create a nuisance by its operation, and inability to operate it without causing a nuisance does not, in my opinion, furnish an excuse for their creating a nuisance. While I am of the opinion that the operation of the plant causes a nuisance, the absence of negligence would not furnish a defence; I think the facts show that the nuisance is traceable largely, if not entirely, to negligence, e.g., fecal matter, called "screenings," being dumped on the surface of the ground, is at times insufficiently covered or disinfected and in consequence offensive smells are given off. The evidence shows that when properly covered no offensive odors escape from these screenings.

Further, no serious attempt has been made to destroy or render innocuous the odors that arise nightly from the sludge being discharged into the areas. For over five hours each night it runs into the areas in large volume and with great force, stirring up the mass, making it boil, as witnesses describe it, and throwing off foul and sickening odors and so polluting the atmosphere that frequently in the hot summer season people living in the neighborhood have in consequence been unable to sleep and have been obliged to close their doors and windows, preferring the stifling air of the closed house to the foul and disgusting smell from the sewage.

Further, the break in the outfall pipe has been allowed to continue a long time without any attempt to repair it, and there has escaped in this way into the bay a steady stream of sewage at the rate of probably a half-million gallons each twenty-four hours, and there is now in the bay a large quantity of fecal matter, which, in the course of putrefaction during the warm weather, throws off sickening odors. No excuse has been given for the City's failure to repair this pipe. The engineers who designed this plant contemplated this pipe being maintained in efficiency, and tested from this standpoint alone the City's failure to so maintain it is an act of great negligence.

The settling tanks are frequently flushed and during the period of flushing give off most offensive odors, but no steps appear to have been taken to carry off these odors or to render them inoffensive.

Whilst the odors complained of have their origin in these various sources, I think the chief source is the settling areas, and no reasonable steps have been attempted in order to prevent or minimize the nuisance arising therefrom.