The action was tried without a jury at Toronto.

Shirley Denison, K.C., for the plaintiffs.

Irving S. Fairty, for the defendants.

MIDDLETON, J., in a written judgment, after setting out the facts at length, said that the action failed for want of proof that the flood came from the city sewer or was caused by anything the defendants did or were responsible for.

The legal foundation for liability on the part of the municipality in cases such as this is far from clear. Where there is negligence in the construction of a sewer in the first place, there is liability; and where there is negligence in the maintenance of a sewer, there is liability; but where a sewer is adequate in every sense at the time it is built, and becomes inadequate by reason of the growth of the city, the foundation of liability is not so clear. What is the duty of the defendants of which there has been a breach? The construction of adequate sewers to afford drainage and to take care of surface-water is not a duty cast upon the municipality by the Act; the construction of the sewer in each case is based upon a legislative and not an administrative act. When a sewer is constructed under the local improvement system, each lot served has a proportion of the cost charged to it, and the owner of each lot has a right to use the sewer as a drain for his lot; there does not appear to be any way in which an owner could be refused the right to use the sewer simply because it was running full from the contributions of others.

There may be a duty to warn the applicant for construction of the condition of affairs and let him make connection at his own peril. Or it may be that in cities where there is a general by-law requiring sewers to be built on the local improvement system, the only thing the land-owner can do is to construct a larger sewer under that system.

The learned Judge stated his views as to damages, to meet the event of an appeal. The sum of $3,000 was claimed by the plaintiffs. The largest item was the cost of building a dining-room for the plaintiffs' employees—or rather the cost of changes in the buildings to enable that to be done—instead of having a dining-room in the basement. The damage was too remote.

The actual clearing-up after the flooding cost $5 at most.

If the water wet the barrels of steel as suggested, that could have been remedied by wiping and oiling the steel at a cost of $100.

The other items did not depend on disputed evidence, and could be readily dealt with if there was a right to recover.

Action dismissed with costs.