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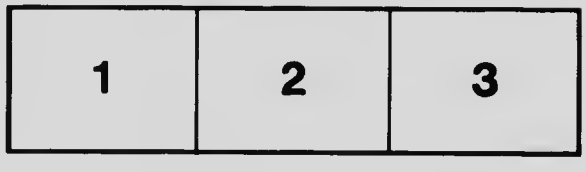

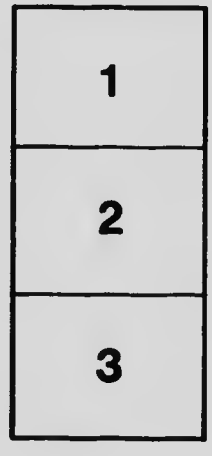

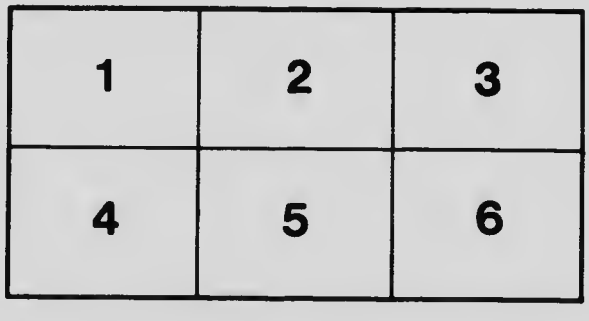

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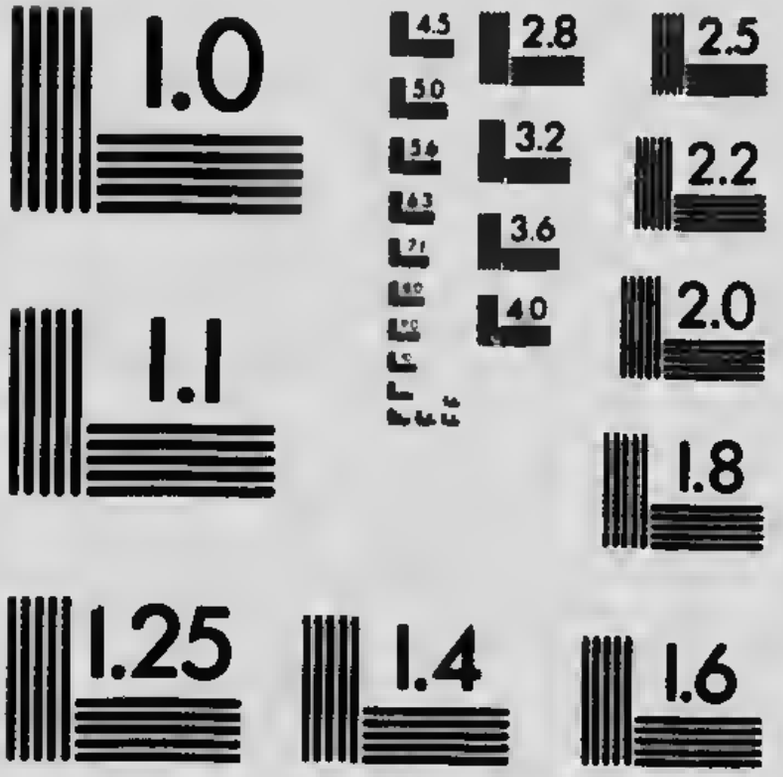

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City of Toronto Sewage Menace

APPEAL

of Residents in Districts Affected to Members of the Legislature of the Province of Ontario.

WHY

the Legislature Should Not Interfere with the Consequences Arising upon the Judgments Pronounced by all Divisions of the Supreme Court of Ontario.

Sewage System Condemned

After Judicial Inquiry. Mandatory Injunction Ordered Against the City of Toronto to Abate Pollution of Atmosphere Breathed by Thousands of East End Citizens.

Published by
The Joint Committee of Six Ratepayers' Associations and Political Associations in the District Affected

To the Members of the Legislature of the Province of Ontario:

The residents of the Eastern Section of the City of Toronto, and those who visit or pass through that locality, beg respectfully to call attention to a Bill being promoted by the City of Toronto, one object of which is to validate the action of the city in having established a Sewage Disposal Plant in the centre of a densely populated part of the City, the operation of which constitutes a serious nuisance, is a grave menace to the health of thousands of citizens and young children, and is an injury to all the surrounding property.

CITIZENS' HEALTH IMPAIRED

[illegible]al years the residents have suffered untold inconvenience a[illegible] by reason of the nauseous smells emanating from the plant. [illegible]ad their health seriously impaired, and owners of property w[illegible]ested all their capital therein have found the premises de[illegible] value to such an extent by reason of the nuisance, that they have been unable to sell out and leave the neighborhood.

NO OPEN WINDOWS

In the summer months the people are compelled to keep all their windows closed in the hottest weather, or breathe the vitiated air if any attempt is made to cool down their houses.

DR. BELL'S CERTIFICATE

Dr. Bell, of the Provincial Board of Health, reported in 1915 as follows:—

"I have no hesitation in pronouncing the complaints as well-"founded, as the pollution of the atmosphere by this plant cannot "help but be a nuisance and a menace to the health of the nearby "residents who are compelled to breathe it."

SEWAGE IN TORONTO DRINKING WATER

Dr. Hastings, the Medical Health Officer of the City of Toronto, in a report which he made to the Provincial Board of Health, stated that sewage gets into the drinking water of the people of Toronto, as is seen from the following extract from his report:—

"Careful laboratory investigations have been conducted to deter-"mine why it is difficult to chlorinate East wind water efficiently "without producing objectionable tastes. The conclusion has been "reached that the taste susceptibility of East wind water is due to "the imperfectly purified sewage effluent discharged into the lake "from the Sewage Disposal Works on Eastern Avenue. The actual "material that gives a taste under these circumstances is probably "not chlorine itself, but certain organic compounds. These com-"pounds while objectionable from a taste standpoint are non dan-"gerous."

PROMISES OF COUNCIL

Deputations to the City Council and Board of Control made year after year by Local Ratepayers resulted in resolutions being passed over and over again that the nuisance be abated, but nothing tangible ever resulted.

FIELDHOUSE v. TORONTO

The people having suffered for years, at last had recourse to the Courts of Justice. Samuel Fieldhouse, a resident and owner of property in the district, commenced an action against the City in 1915 asking for damages and for an injunction.

TRIAL DECEMBER, 1917

After great delay, Mr. Fieldhouse forced the City to trial in December, 1917, and after a hearing, which occupied six days, the Chief Justice of the Exchequer, Sir William Mulock, delivered judgment granting an injunction to restrain the City from continuing the nuisance, and directed a Reference as to damages which Mr. Fieldhouse had sustained to his property.

CITY'S APPEAL DISMISSED

The City appealed to the Appellate Division of the Supreme Court, and after a very lengthy hearing, the whole Court, consisting of four Judges, agreed that the Appeal should be dismissed.

APPLICATION TO THE LEGISLATURE

Finding itself defeated in the Courts, the City—in spite of the resolutions of the City Council and the Board of Control to abate the nuisance—is now having recourse to the Legislature, and is endeavoring to put through an Act, which, if passed, would have the effect of depriving the citizens affected of the benefits to be derived by the Judgment.

FINDINGS OF FACT BY THE COURT

The texts of the various Judgments of the Supreme Court are printed below, and it will be seen therefrom that the following facts were proved to the satisfaction of the Courts:—

(1) The Legislature when giving powers to the Municipal Authorities for the establishment of Sewage Disposal Plants directed that By-laws should be passed for the purpose.

NO BY-LAW was ever passed for the erection of the Toronto Sewage Disposal Plant.

(2) The Public Health Act requires that all plans for the erection of a Sewage Disposal Plant shall be enquired into and approved by the Provincial Board of Health before acted upon.

NO SUCH APPROVAL was obtained for the erection of the City of Toronto Sewage Disposal Plant.

(3) Section 122 of the Public Health Act provides as follows:—

"No person shall within this Municipality suffer the accumulation "upon his premises or deposit or permit the deposit upon any lot "belonging to him, of anything which may endanger the public "health, or deposit on or into any street, square, lane, river, stream,

"sewer or water, any manure or other refuse, or vegetable or animal "matter, or other filth."

The City has operated the plant in contravention of this Act.

THE JUDGMENTS OF THE COURTS SHEW:

(a) That practically all of Toronto's sewage excreta is sent to this plant through a screen which takes out the larger solids and then into settling tanks, the top of which is drawn off into Lake Ontario and the semi-fluid bottom is run into open areas extending over 19 acres, and these are covered with shavings, lime, etc.

(b) That the areas of excreta constitute an open shaving-covered cesspool of 19 acres in a residential part of the City of Toronto.

(c) That the plant is not constructed in accordance with the advice of the engineers, and in consequence that it had not capacity to take care of all the City sewage, and over 12 million gallons a day are run into Ashbridge's Bay and the lake.

(d) That the plant has been negligently operated.

(e) That certain of the solids are screened from the sewage and thrown on the ground and not properly covered.

(f) That no proper steps were taken to destroy the offensive odor that arose from the settling areas, although the City's own expert engineer gave it as his opinion that at a comparatively low cost they could be rendered innocuous.

(g) That a break occurred several years ago in the pipe intended to carry the sewage across Ashbridge's Bay into the lake, whereby over one-half a million gallons of the sewage per day has ever since escaped from the break.

(h) That upon the marsh land within a few hundred feet from Queen Street, excreta is deposited, thereby polluting the water and causing an intolerable stench.

(i) That the operation of the plant, in fact, constitutes a nuisance which must be abated.

(j) That the health of several people has already been impaired by the nauseous smells emanating from the plant.

(k) That the nuisance created by the plant is a serious injury to property.

TORONTO'S TACTICS

The City of Toronto has negligently and defiantly pursued a course contrary to law and in contravention of the Municipal Act, and the Public Health Act, thereby injuring the public health and depreciating the value of property.

RESIDENTS' APPEAL

The residents of the district affected earnestly submit that this state of affairs should not be allowed to continue, and the City should not be permitted by the Legislature to persist with impunity in the course which it has hitherto adopted.

Sir William Mulock, Chief Justice, says:

This is an action to restrain the defendants from maintaining a nuisance and for damages. The defences are:—Denial of the nuisance and statutory authority to do what is complained of.

At the opening of the case the plaintiffs, Martin and Fazackerley, were added as co-plaintiffs.

The circumstances giving rise to the plaintiffs' complaints are as follows:

The defendants in professed exercise of the powers conferred on municipal corporations by the Municipal Act, established a sewage disposal plant in the vicinity of Ashbridge's Bay, within the city limits, and the plaintiffs contend that the plant when in operation has given off odors so offensive as to injure the properties of the plaintiffs Fieldhouse and Fazackerley, to interfere with the reasonable enjoyment of the properties of the plaintiffs, and to be injurious to the health of themselves and of their families.

The following is a brief description of the plant and of its operation:

Trunk sewers convey large quantities of sewage to the plant. This sewage first passes through screens which intercept solids too large to pass through the meshes of the screens, and these solids are then thrown out on the ground in heaps and are intended to be covered with chloride of lime, hay and shavings in order to prevent offensive odors escaping. The sewage then passes into large settling tanks where much fecal matter settles to the bottom of the tanks. This concentrated sewage is called "sludge," and each night this sludge, by the opening of valves in the bottom of these tanks, flows by gravitation through a pipe into a settling area. In all, the defendants have about 19 acres for settling areas, and this acreage is divided [illegible]es into areas 80 feet x 250 feet in size and about 5 feet or 6 feet in depth. The acreage was part of Ashbridge's Bay, and after the piling was completed, each area remained full of water. The pipe carrying the sludge into the area discharged it under water, until the area is nearly full of sludge. Then the mouth of the pipe is suspended above the surface and the sludge falls into the area. The process of filling of the areas occupies about four or five weeks. During that period, for about five hours each night, sludge at the rate of 1,000 gallons a minute is discharged with considerable force into the area. During this discharge the contents of the area are in a violent state of agitation, "boiling" up to the surface and giving off offensive odors. The sludge entering the area causes the water in it to overflow into the adjoining area, and such overflow continues for about four or five weeks. By this time the contents of the area being full of the sludge, the sludge becomes semi-fluid. Then it is covered more or les effectually with chloride of lime, hay, shavings, etc., in order to prevent the escape of offensive odors. But, notwithstanding these measures, the mass for three or four months continues to give off odors.

When one area is thus filled, the sludge in like manner is discharged into the area which has already received the overflow. It was said that a scum would form on such second area, and that it assists in preventing the escape of gases whilst the area is being filled with sludge. But this scum is a very ineffective preventive to gases escaping. At times the wind breaks up the scum and drives it to the side; heavy rains also cause it to sink. Such conditions must have always been more or less present. As one area becomes filled, the sludge is discharged into area after area continuously; the filling never ceasing.

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 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.

SIR WILLIAM MULOCK, C.J., says *(Continued)*

According to the evidence of Mr. Hatton, Civil Engineer, one of the defendant's witnesses, it is probable that by a comparatively inexpensive treatment the gases can be rendered harmless. Mr. Hatton has for years made a special study of the treatment of sewage, and he impressed me as a most fair-minded and capable engineer; I attach great weight to his opinion.

It is not for the Court to direct what steps the defendants should take to abate the nuisance, but I think they would be well advised if they acted upon his advice.

I find that the operation of the plant since its inception has so polluted the atmosphere with foul and offensive odors, arising from fecal matter, as to create a nuisance, especially injurious to the plaintiffs.

As to Fieldhouse, he was, and still is the owner of two brick stores which he rents for business purposes. The odors in question have injured the rental value of the property and in consequence he has been unable to realize therefrom as much, but for the nuisance complained of, as he would have been able to obtain. I have not the evidence before me in sufficient detail to enable me to determine the exact extent of his loss, but it amounts, I think, to at least $600.00 up to the present time, and I award him damages to that extent; but if either party is dissatisfied with that amount, he may have a reference, the costs thereof to be in the discretion of the Master.

The plaintiff Fazackerley owns a store in which he resided and carried on business, but the odors injured his business and made his wife ill, and she was unable to withstand the injurious effects of the odors. In consequence he was compelled to remove elsewhere.

The plaintiff Martin owned a house within two or three hundred yards of the disposal beds, and his wife also became ill because of the odors, and he also was obliged to move elsewhere. Further, the odors made it difficult for him to keep his house rented, and in consequence at times it remained vacant and at others was let at reduced rates.

No evidence as to the extent of the pecuniary loss of the plaintiffs Fazackerley and Martin was given, and therefore I am unable to award them pecuniary damages, but I find that the odors were so injurious as to interfere with the reasonable enjoyment of their properties.

For these reasons, my judgment is that the defendants should be restrained by injunction from so operating their plant as to cause a nuisance to the plaintiffs; that they pay to the plaintiff Fieldhouse $600 damages or such sum, if any, as shall be awarded by the Master in the event of a reference, and such costs as the Master in his discretion may give; the defendants to have until the 1st of May, 1918, next in which to abate the nuisance with leave to them from time to time to apply for further extensions of time; the plaintiff Fieldhouse to be entitled to a reference from time to time for any further damages he may sustain during the continuance of the nuisance; costs of such reference to be in the discretion of the Master. The defendants to pay to the plaintiffs the costs of this action.

Hon. Mr. Justice Clute says:

Appeal from the judgment of the Honourable the Chief Justice of the Exchequer, dated 29th January, 1918.

This action is brought for damages and an injunction for the negligent installation and maintenance of a system of sewerage in the City of Toronto and the negligent, defective and inadequate disposal of the same, whereby the plaintiff suffered special injury.

The defendant denies that they were guilty of negligence and plead statutory authority to do what is complained of.

The facts are fully set forth in the reasons for judgment of the Trial Judge.

In order to take care of the effluent of the sewage from the settling tanks, 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 case of emergency, was expected to take care of all the effluent from the tanks, but the Trial Judge found that 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 to meet emergencies, but owing to the insufficient capacity of the overflow 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 there deposit 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 this action will not lie. They also contend that it is being operated with reasonable care in order to prevent nuisance, and if such is the case they are doing all that they are required to do.

The Trial Judge found that the nuisance is traceable, largely if not entirely, to the negligence of the defendants, whereby they have created a nuisance injurious to the plaintiff's property in the pleadings mentioned, the particulars of which are fully set forth in the reasons for judgment.

These findings are, in my opinion, fully supported by the evidence and justify the judgment pronounced against the defendants in this case.

It is quite clear that while the plant was intended to provide for the disposal of thirty-three millions of gallons per day, it is called upon for the disposal of forty-five millions of gallons per day. This caused the overflow and shortened the time allowed for settling.

The serious breakage in the outfall pipe has continued for a long time without any attempt to repair, and in this way a steady stream of sewage to an amount of a half-million gallons per day found its way into the bay, increasing the nuisance to a very considerable extent.

No excuse is offered for the city's failure to repair the break or to provide a sufficient outfall pipe to the lake.

This negligence is established quite apart from the statutory right claimed by the City, and the Judgment may well be supported on that ground, but the plaintiff denies that the city has a right in this case to rely upon any statutory authority, even if that would be an answer to the plaintiff's claim, for the reason that no by-law was passed to authorize the installation of the plant and that no approval for the plant as installed was obtained from the Board of Health. It is admitted by defendant's counsel that no by-law can be found.

HON. MR. JUSTICE CLUTE says *(Continued)*

During the argument permission was given, if such by-law existed, to put in the same as part of the evidence, and counsel said that after every effort and care to ascertain whether such by-law had been passed no trace could be found, and I think it may well be taken that no by-law was, in fact, passed. This point was not taken, as I am informed, before the Trial Judge.

Section 398 of the Municipal Act provides that by-laws may be passed by the councils of all municipalities for the construction of sewers, providing an outlet for a sewer or establishing works or basins for the interception or purification of sewage and making all necessary connections therewith and acquiring land in or adjacent to the municipality for any such purposes.

Section 94 (1) of the Public Health Act provides: "Whenever the construction of a common sewer or of a system of sewerage, or an extension of the same, is contemplated by the council of any municipality, the council shall first submit the plans and specifications of the work, together with such other information as may be deemed necessary by the Provincial Board for its approval.

"(2) The Board shall inquire into and report upon such sewer or system of sewerage, as to whether the same is calculated to meet the sanitary requirements of the inhabitants of the municipality, and as to whether such sewer or system of sewerage is likely to prove prejudicial to the health of the inhabitants of the municipality liable to be affected thereby. (It does not appear that the inquiry and report was made in compliance with sub-section (2).)

"(3) The Board may make any suggestion or amendment of the plans and specifications or may impose any condition with regard to the construction of such sewer or system of sewerage or the disposal of sewage therefrom as may be deemed necessary or advisable in the public interest.

"(4) The construction of any common sewer or system of sewerage shall not be proceeded with until reported upon and approved by the Board, and no change in the construction thereof or in the disposal of sewage therefrom shall be made without the previous approval of the Board.

"(5) The Board may from time to time modify or alter the terms and conditions as to the disposal of sewage imposed by it, and the report or decision of the Board shall be final, and it shall be the duty of the municipal corporation and the officers thereof to give effect thereto."

Certain extracts from the Minutes of the City Council and copies of by-laws were, by consent, produced and put in upon argument.

From these it appears that By-law No. 5167 was passed on the 14th July, 1908, which recites that in the opinion of Council it has become desirable that the sewage of the city shall be prevented from overflowing into the waters of Toronto Bay, Ashbridge's Bay, and the lake in the immediate vicinity of Toronto, and a system of sewage disposal should be adopted.

In the Report No. 15 of the Board of Control it is recommended that by-laws be submitted to the qualified ratepayers to vote thereon to authorize debentures for trunk sewers and sewage disposal plant on the 26th of May, 1908, by By-law No. 5167, which enacts provisions for raising the money required, but no by-law is passed authorizing the construction of the plant.

HON. MR. JUSTICE CLUTE says *(Continued)*

By-law No. 5194 provides for the purchase of certain tracts of land as a site for the sewage disposal plant.

The trunk sewer proposition provides for the construction of high and low level intercepting sewers and clarification of the sewage by means of septic tanks. These works to be constructed south of Queen Street and in close proximity to Ashbridge's Bay, and it gives the estimated cost of the trunk sewer.

The Report further recites that the Vice-Chairman of the Board of Health and the Medical Health Officer and Deputy City Engineer were authorized to visit Philadelphia and other cities in the United States, where extensive plants had been recently installed, and efficiently operated, and their Report is appended.

The Report of this Committee is signed by Charles Sheard, M.D., C. L. Fellows, Deputy City Engineer, and W. S. Harrison, M.B., representative of the Board of Control, and is set forth in said Report No. 15.

On the 15th December, 1908, the City Engineer Rust wrote a letter to Dr. Charles Sheard, Chairman of the Board of Health, stating that on the 15th of December, 1908, the Board approved the plans for the construction of two intercepting sewers and for the construction of septic tanks in the neighborhood of the Woodbine.

After approval by the Board, opposition developed on the part of the property owners in the neighborhood of the location of the tanks, and the City Council engaged the services of J. G. Watson, C.E.M.I.E., of Birmingham, England, and Mr. Rudolph Herring, of New York, to advise some change in the methods of constructing the tanks. The City Engineer then submits for the approval of the Board the plans as amended. The receipt of this letter is acknowledged on the 25th of January, 1910, stating that the same will be submitted to the Board at the next meeting, and in the meantime he asks that a copy of the plans be forwarded to the Health Office for fyling.

The City Engineer the next day acknowledges receipt of the letter and asks that the plans be returned to have copies made of them. The amended plans were approved by the Board and returned to the City Engineer on the 11th February, 1910, but it does not appear that the Board did more than approve of the plans.

No description of the method proposed was presented to the Board for their approval, nor did they give any approval of such methods beyond that disclosed by the plans, and it does not appear that any further or other report and approval by the Board was made or given.

The letter from the City Health Officer to the City Engineer Rust of the 11th February, 1908, states that the plans are returned, and "I am instructed to inform you that same were duly approved of by the Board at a special meeting held yesterday. You will note certificate of approval on each plan."

Neither these plans with the certificate, nor a copy of the certificate, were produced in evidence at the trial. I understood counsel to say that changes were made in the plans which were not approved, and certainly the approval of the Board was not obtained for the discharge of the effluent into the bay, nor did the Board approve of the defendant's loading the system with a larger quantity of sewage than it was made to carry, thus causing the overflow.

It was said by counsel that this increased quantity of sewage began at, or very nearly, after the time the works were completed, and on July

HON. MR. JUSTICE CLUTE says *(Continued)*

3, 1913, complaint was made of the nuisance, and the Council adopted a resolution "that the Board of Control and city officials be requested to at once abate the nuisance caused by the sewage being taken into the Morley Avenue septic tanks," and on the 19th of July this resolution was forwarded to the Commissioner of Works.

On the 4th of May, 1914, a deputation of property owners residing in the vicinity of the Kingston Road and Queen Street appeared before the Board and protested against the unsatisfactory operation of the sewage disposal works, at the foot of Morley Avenue, claiming that the steneh arising therefrom was almost intolerable at times.

The Board ordered that the foregoing be referred to the Commissioner of Works, with the request that he make a thorough investigation and "advise if there is anything that ean be done," etc.

On the 6th of May the Board forwarded to the Commissioner of Works Minutes of the meeting held on that day, and he was asked to report:—

(a) Is there any likelihood that the sewage disposal plant at Morley Avenue will be less of a nuisanee during the present summer than it was last summer?

(b) Are any steps being taken or can any steps be taken to abate the nuisanee?

(e) Are sewage plants of a like character in other eities equally objeetionable?

(d) Are there any steps that ean be taken, or ean the city by the expenditure of additional moneys during the present summer, abate this nuisanee?

(e) If the nuisance cannot be abated, is the eonstruction sueh that the plant ean be abandoned and the sewage disposed of as formerly until sueh times as an improved system can be installed?

On the 12th of May following the plaintiff refers to his letter of April 23rd to Commissioner Harris, to whieh he had reeeived no reply, and complains that unless something is done at onee to make this a safe place to live, and eompensate him for the damage up to the present time, he will bring action. This letter was sent by the Commissioner of Works to the City Solieitor. On the 16th of June, 1914, the Board of Control passed a resolution that the Commissioner of Works be asked to report forthwith the names of the experts who advised the eonstruction of the sewage disposal plant at the foot of Morley Avenue and that he forward to the Board a eopy of the reports made by them in relation thereto. The Reports are dated March 9th, 1909, made by Messrs. Rudolph Hering, C.E., of New York, and John D. Watson, C.E., of Birmingham, England, with reference to the Sewage Disposal Plant, and were forwarded to the Mayor.

It is pointed out in this letter that the experts replied to a series of questions propounded by Mr. Rust, the City Engineer, in the eommunication to them dated 2nd of March, 1909, and attention is drawn to question No. 2: the experts suggest that the sludge should be pumped daily to the western end of Ashbridge's Marsh, there to be mixed and eovered with refuse deposited by the Street Commissioner's Department. They state that in their opinion, if this eourse were followed with ordinary care, no offensive odor would be perceptible more than a short distanee from the site of depositions. It is further stated that this plan was not followed, but instead a large area was enclosed with piling, adjoining the Sewage

HON. MR. JUSTICE CLUTE says *(Continued)*

Disposal Works, for the deposition of the sludge therein and it is from this that the offensive odor emanates.

In reply to question 3, the experts state that no nuisance will arise from the tanks if they are properly constructed and operated. "This has been borne out by our experience. The offensive odor comes from the sludge, and not from the tanks."

Replying to question 4, they state that residents in the neighborhood of the tanks will experience no odor from them, but if the sludge were deposited in proximity to them, they are of opinion that cause for complaint would arise. The condition which they predicted in this reply is now evident.

"I have consulted with the City Solocitor herein, and he advises that the City has no remedy as against the experts, even had they advised that the present system in its entirety would be inoffensive. It is but just to point out in this connection that the advice of the experts, relative to sludge disposal, was not followed, and the condition which they foresaw, if sludge were deposited contiguous to the premises, has eventuated."

It thus appears that the defendants having taken the advice of eminent experts, this advice was not followed, and in adopting a different plan they were forewarned by the experts as to what would follow and what did follow, namely, the creation of a nuisance intolerable to property owners, that has continued to this day and still continues, and this in spite of repeated protests of property owners residing in that vicinity. Such a deputation waited on the Board on the 2nd of July, 1914, and on the 8th July, 1914, the Board ordered that the Commissioner of Works be requested to submit a report showing the necessary "Improvement which in his opinion should be made to the Morley Avenue Sewage Plant in order to render the system satisfactory."

On the 18th of July, 1914, Council following up the order of the Board, resolved:

"That the Works Commissioner be requested to report at the earliest possible time a way of remedying the smells at the Morley Avenue sewage disposal works."

And a resolution was passed by the Board on the 20th July to the same effect.

On the 16th of November, 1914, following, the City Council passed the following resolution:—

"That the Board of Control be requested to undertake at once, through the Works Department and the Medical Health Department, a comprehensive enquiry into the most effective method of abating the nuisance caused by the Morley Avenue sewage disposal plant, securing whatever expert advice is necessary, and reporting to the Council at the earliest possible date a plan with details and estimates of cost."

On the 12th December the Commissioner of Works replied that "conditions have been such since last summer as to practically obviate complaint. This was accomplished by reducing the area over which the sludge was deposited, thereby decreasing the surface over which gas might be evolved."

This is a partial abatement of the nuisance for the time at least mentioned by Council. But the abatement would seem to have continued for only a short time, for, on the 5th of May, 1915, the residents of that neighborhood made complaint to the Provincial Board of Health, through their solicitors, "of the unbearable stenches and stink given out at times from the city's sewage disposal plant on the shore of Ashbridge's Bay in that locality." They say the plant is a "bungle," the operation of it an

HON. MR. JUSTICE CLUTE says *(Continued)*

unbearable nuisance, and Ashbridge's Bay there, where it is used, a seething cesspool and menace to public health, and they want proceedings taken to abate the nuisance or indict the city for creating it. "Before taking steps we would like to ask you to visit the place."

The Provincial Inspector of Health, Dr. R. M. Bell, was sent to examine, and made a report, in which he said: "I have no hesitation in pronouncing the complaints as well founded, as the pollution of the atmosphere by this plant cannot help but be a nuisance and menace to the health of the nearby residents who are compelled to breathe it. Undoubtedly some different method of treating and disposing of the sludge is required and should be insisted upon without unnecessary delay." Inspector Bell fully confirmed this report in his evidence at the trial. This report was brought to the attention of the City authorities, and after delay for one cause or another and further deputations of ratepayers had visited the Council, the City Health Officer and Commissioner of Works made their report on the 21st July, 1915, in which they state:—

"The sewage tanks were not designed for the storage of sludge, the intention being to discharge the accumulation of fresh sludge into Ashbridge's Bay for reclamation purposes. If this method had been adopted, serious consequences would have followed."

Upon the completion of the plant it was deemed advisable to "confine the sludge within a definite area, contiguous thereto, and for the purpose a portion of Ashbridge's Bay immediately to the south was enclosed. After considerable sludge had been deposited in this area the ebullition of gases caused odor. In order to minimize this, about eighteen months ago, we split the aforementioned area into comparatively small pockets which virtually act as separate digesting lagoons. Sludge was deposited in each of these until filled—in this way, the sludge depth was increased and the superficial area exposed to the atmosphere reduced, thereby retarding the rate of gas ebullition. Immediately upon the discharge of fresh sludge, the deposit is covered with shavings, and lime or bleach spread thereon. This method has proved quite effective, and is being continued."

It will be observed that the principal causes referred to by the Trial Judge as creating the nuisance, namely, not sufficiently protecting and covering the piles of screenings, the overflow of the effluent into the bay caused by breaks in the outfall pipe, and the plant not being sufficiently large to carry off the increased amount of sewage, and other matters referred to in the evidence and by the Trial Judge, are not mentioned in this Report.

Upon receipt of this Report the Board of Control passed an order asking the Commissioner of Works "what should be done to remedy matters at the ---------- plant?"

The matter was taken up from time to time by the Council, and by the Board, but nothing has been done, the breakage has not been repaired, the overflow continues to the extent of half a million gallons per day, and the evidence is overwhelming that the operation of the plant creates an intolerable nuisance.

It is quite clear that the Board of Health never approved of the plant as it has been operated. It thus appears upon the evidence and findings that the defendants, without the authority of a by-law and without the approval of the Board of Health, have constructed, maintained and operated a plant causing a nuisance and thereby causing damage to the plaintiff's land. Having taken the advice of experts, the defendants did not

HON. MR. JUSTICE CLUTE says *(Continued)*

follow same, and in departing therefrom created the nuisance complained of. The works as now established and operated were not authorized by Statute and under the facts and circumstances in this case the defendants cannot rely upon the Statute as an answer to the plaintiff's claim.

The general rule of law is that if the thing complained of through an act, which would otherwise be actionable, be authorized by Statute, then no action will lie in respect of it if it be the very thing that the Legislature has authorized.

See the Corporation of Raleigh v. Williams et al. (1893), A.C. at 543; East Fremantle v. Annois, (1902), A.C. at 213; Faulkner v. City of Ottawa, 41 S.C.R., at pp. 190-213.

In this latter case it was held, Idington and Duff, JJ., dissenting, that damages being claimed for flooding of the plaintiff's premises by water backing up from the sewer, the city was not liable, where it was shown that the standard there adopted was recognized as sufficient to meet the requirements of good engineering, and is the standard adopted by the cities of Canada and the United States. It is said by Duff, J., one of the dissenting Judges: "that the principle is equally applicable to persons and bodies acting under legislative authority for their own profit and to public bodies exercising powers conferred upon them for the public benefit. In both cases, where the authority is in general terms merely, it may be inferred from the general scope and provisions of the Statute that the powers conferred are not to be exercised to the prejudice of private rights. This was the view taken of the Statute under consideration by the House of Lords in the Metropolitan Asylum District v. Hill, and of that construed by the Privy Council in Canadian Pacific Railway v. Parks (1899), A.C. 535. It is nevertheless entirely a question of the true meaning of the Statute."

He refers to Lord Halsbury's statement of the law in Westminster Corporation v. London & North Western Railway Co. (1905), A.C. 426, where he said: "Assuming the thing to be within the discretion of the local authority, no court has power to interfere with the mode in which it has exercised it. When the Legislature has confided the power to a particular body with a discretion how it is to be used, it is beyond the power of any court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorized."

Upon this passage Duff, J., observes that this must be read subject to important observations, that is to say, that in the absence of some provision (either expressed or clearly implied) to the contrary, it must be taken that in carrying out works authorized by a Statute, or in exercising powers conferred by a Statute, you are not to act negligently and you are to act reasonably, that is to say, you are to prosecute the work or you are to exercise the power, as the case may be, in such a manner as not to do unnecessary injury to others. Lord Macnaghten, at p. 430, said: "It is well settled that a public body invested with statutory powers such as those conferred upon the corporation, must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first."

McClelland v. Manchester Corporation (1912), 1 K.B. at p. 118, where Lush, J., said, quoting Lord Blackburn, in Geddis v. Proprietors of Bann Reservoir, 3 App. Cases, at p. 455: "It is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion

HON. MR. JUSTICE CLUTE says *(Continued)*

damage to anyone; but an action does lie for doing that which the Legislature has authorized, if it be done negligently, and I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

In Thompson v. Bradford Corporation et al. (1915), 3 K.B. at p. 13, McClelland v. Manchester was distinguished, and it was held that where the post office authorities had removed a pole and filled in a hole, shortly afterwards the corporation threw the road open for traffic, the defendants were liable; the corporation upon the ground that they were altering the character of part of an old road—that when they threw it open for public use it should be reasonably safe for the purposes for which it was intended to be used; the post office authorities, upon the ground that having done, perhaps voluntarily, a piece of work, they did it negligently. Ballbache, J., said: "If a person does a piece of work negligently, although he need not have done it at all, he is liable for the consequences of his negligence. If he undertakes to do it, he must do it with reasonable care, and the post office authorities appear to have neglected their duty in that respect, and on that simple ground, apart from the statute, it seems to me they are liable."

In re Brown v. City of Toronto, 36 O.L.R. at p. 189, the Official Arbitrator awarded damages for injuries to the plaintiff's land for the erection and maintaining upon and under the street upon which the land abutted, a public convenience. The Appellate Division, equally divided in opinion as to the right of the landowners to recover under section 325 of the Municipal Act, and the award for compensation was, in the result, affirmed. This section, 325 (1) of the Municipal Act, expressly provides that where land is injuriously affected by the exercise of any of the powers of a corporation under the authority of the Act, the corporation shall make due compensation where it is injuriously affected by the exercise of such powers, for the damages necessarily resulting therefrom. In such a case (2) the amount of compensation, if not mutually agreed upon, shall be determined by arbitration. It may be, probably is the fact in the present case, that a portion of the damages suffered by the plaintiffs necessarily resulted from the exercise of such powers, and so it might to that extent be a subject matter for arbitration, and it was urged by counsel for the city that the plaintiffs could only recover that portion of the damage occasioned by the negligence (if any) of the defendant. I am not of that opinion. Where, as here, the plaintiff has a right of action, and it is impossible to say what proportion, if any, of the damages necessarily resulted from the exercise of such powers, in that case the remedy is not confined to arbitration. The case is not within subsection (2). The appropriate remedy is by action where full damages may be recovered.

Compensation for injurious affection was first provided in the Municipal Act of 1873, section 373; re Yeomans and Wellington (1878), 43 U.C.R. 522, affirmed (1879), 4 A.R. 301.

Where no land has been taken the words "injuriously affected" are limited to loss or damage under the following heads:

(1) Damage or loss must result from an act made lawful by the statutory powers.

(2) The damage or loss must be such as would have been actionable for statutory powers.

HON. MR. JUSTICE CLUTE says *(Continued)*

(3) The damage or loss must be an injury to lands.

(4) The damage or loss must be occasioned by the construction of the authorized works and not by their user; Cripps on Compensation, 5th ed., p. 136, and see in re Collins and Water Commissioners of Ottawa (1878), 42 U.C.R. 378, 385.

It was held in Hull v. Bergeron (1913), 9 D.L.R. 28 (Que.), that where a statute provides for indemnity to be fixed by arbitration, that does not deprive the injured person of his common law resource, if he has any, and he may therefore sue for damages without any reference to arbitration, and reference was made to what was said by Patterson, J., in Williams v. Raleigh (1892), 21 S.C.R. 103, 131, but apparently it is overlooked that that learned Judge went on to say that, "if the act that injures you can be justified as the exercise of a statutory power, you are driven to seek for compensation in the mode provided by the statute; if, as it sometimes happens, no such provision is made, you are without remedy." Here in subsection (2) of section 225 the word "shall" is used, but subsection (1) gives the right to compensation where property is injuriously affected.

I am of opinion that where, as here, the major part, if not all, of the damage arose from the negligence in the operation of the plant, and it seems impossible to define any particular portion of the injury to the lawful exercise of the powers given, the plaintiff is not precluded on the facts in this case from recovering full compensation in the action which he is compelled to bring in order to seek an adequate remedy.

The fourth heading as quoted above from Cripps "that the damage of loss must be occasioned by the construction of the authorized works and not by their user," may not have full application to the present case under the Municipal Act, but if it has, the damage here was occasioned by the user of the plant and might under that heading not be protected by the statute.

For authorities bearing upon this case see Meredith's Municipal Manual, 24, 25, 353.

As to the weight of evidence in a case of this kind, see Great Central Railway v. Doncaster, Rural District Council, 15 Local Government Reports, 1917, Part 1, page 813. This was a case of sewage refuse. A large number of witnesses for the plaintiff stated that the smells were dangerous to health. An equal number of witnesses for the local authorities swore that the smells were not serious and not detrimental to the public health, and that they had greatly diminished or ceased altogether since the tip had been covered by a layer of earth. Held, that where, as in Bainbridge v. Chertsey Urban District Council, 13 L.G.R. 835, a strong weight of reliable, positive evidence is produced by the plaintiff, such evidence cannot be set aside by reason of mere negative testimony on the part of the defendants. Here the plaintiff's evidence was to my mind overwhelming against the evidence offered by the defence.

In the present case the defence under the statute fails, in my opinion, because (1) the requirements of the statute in regard to by-law and sanction by the Board of Health were not complied with; (2) the damages suffered by the plaintiff were caused by the defendants through their negligence; (3) that while the evidence is conclusive that the plaintiff suffered damages, it is impossible to say if any portion of such damages necessarily resulted from the exercise of such powers.

The appeal should be dismissed with costs.

Hon. Mr. Justice Magee says:

I agree.

Hon. Mr. Justice Maclaren says:

This is an appeal from a judgment of Mulock, C.J., Ex., rendered on the 29th of January, 1918, whereby he held that the City of Toronto had created a nuisance by the establishment and operation of a sewage plant in the vicinity of Ashbridge's Bay near the property of the plaintiffs, and condemned the city to pay the plaintiff $600, or such other sum as might be ordered in case of a reference; the city to have until May 1st, 1918, to abate the nuisance.

I quite agree with the findings of the learned Chief Justice upon the mass of evidence brought before him, and I do not see how he could have found otherwise. The neglect of the city in not repairing the broken waste pipe and in allowing the enormous escape of fetid sewage seems to be inexplicable.

There is in addition what I consider to be even a stronger ground, and which does not appear to have been brought to the attention of the learned Chief Justice. Such a work comes under the provisions of section 94 of the Public Health Act, R.S.O. Ch. 248. It has not been shown that the provisions of this Act were complied with, and no by-law of the City Council ordering it has been produced.

I am consequently of opinion that the appeal should be dismissed.

The time for the abatement of the nuisance should be extended to the 1st of March, 1919.

Hon. Mr. Justice Hodgins says:

I agree with my brother Clute in his analysis of the evidence in this case. This sewage disposal work may have been done and maintained in the way described therein under the pressure of necessity and with every desire to minimize its unpleasant results. But while recognizing this, the Court is bound to enquire why the provisions of the Public Health Act were not followed; or, if followed, why that fact was not properly proved.

I regard that Act (R.S.O. 1914, ch. 218, sec. 94) as intended to modify the usual powers of a municipality with regard to a system of sewage or of sewage disposal by making the approval of the Provincial Board of Health a prerequisite to their exercise. Before that approval is given, the Board is charged with the duty of ascertaining whether the system "is calculated to meet the sanitary requirements of the inhabitants of the municipality and as to whether such system of sewerage is likely to prove prejudicial to the health of the municipality, or any other municipality likely to be affected thereby."

It is also empowered to make suggestions and impose conditions in regard to the construction of the system "or the disposal of sewage therefrom as may be deemed necessary or advisable in the public interest."

The work cannot be proceeded with until approved of, and no change in the construction of the system or disposal of the sewage therefrom is to be made "without the previous approval of the Board."

While the Board may modify or alter the term and conditions which it has laid down as to the disposal of the sewage, its decision, while standing, is final and the duty of giving effect to it is directly laid on the municipal corporation itself as well as on its officers.

This very reasonable and extremely simple method of proceeding puts the responsibility upon the Provincial Board of Health, where it properly belongs. It supplies the corporation with an answer to complaints, because the statute declares it to be the duty of the corporation to give effect to the decision of the Board. There is also eliminated the need for considering whether the corporation has adopted the best system, because the exact proposals are required to be set out on plans and specifications which the Board may modify, and the execution of which may be subject to conditions imposed by the Board in the public interest.

It is not to be presumed that the Provincial Board of Health would proceed with its enquiry without some notice to those immediately concerned from the point of view of health— or [illegible] execution of the plans so approved prevent the work being one [illegible] done in the exercise of the powers of the corporation.

The provisions of sec. 97 of the Public Health Act impose the further duty of such proper repair "as may be necessary for the protection of the public health." In this respect want of repair was proved sufficient to justify the judgment under appeal.

Having failed to comply with these provisions, the appellants cannot in my judgment rely upon statutory authority justifying the acts complained of.

I think the appeal should be dismissed, but the time for abating the nuisance should be extended till the 1st of March, 1919.