NOTES ON LEGISLATION AND LAW CASES.

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HIGH COURT OF JUSTICE—CHANCERY DIVISION.

Before Mr. JUSTICE ROMER.

STRETTON'S DERBY BREWERY *v.* MAYOR OF DERBY.

(*L. T. Rep.*, Vol. *lxix.*, n. s. 791.)

This case elucidates the construction of section 19 Public Health Act, 1875, and bears also on section 15.

By the latter section "Every Local Authority shall keep in repair all sewers belonging to them and shall cause to be made sewers as may be necessary for effectually draining their district for the purposes of the Act."

Section 19 provides that:—"Every Local Authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied."

The action was brought against the Mayor, Aldermen, and Burgesses of Derby, acting as the Urban Sanitary Authority, by the Brewery Company for an injunction to restrain the defendants from allowing sewage-water or noxious matter to be discharged from their sewers on to the plaintiffs' land or premises or from continuing the said sewer so as to cause a nuisance to the plaintiffs.

The facts of the case are sufficiently embodied and detailed in the decision of Mr. JUSTICE ROMER, as follows:—

Many years ago in exercise of their statutory duties the defendants provided a system of sewage drainage for their district, and as a part of that system made the sewer that passes under the road in which the plaintiffs' brewery is situated. The brewery was erected some years after the sewer was made, part of it having been built in 1869, and other parts in 1876, 1880, and 1881.

As the different parts of the brewery were erected the owners for the time being exercised their statutory right and drained into the sewer by communications which had to be and were first approved of by the defendants. These communications, respectively, run to the sewer from the floors of the cellars of several parts of the brewery, which floors are slightly above the crown of the sewer, so that the cellars cannot be flooded from the sewer until the sewer gets filled and a pressure is caused, which forces the contents of the sewer up the communications through the cellars.

On the 26th of June, 1891, a heavy storm occurred which blocked the sewer and drove the sewage up the the plaintiffs' communications through the cellars and flooded the cellars for a short time for a depth of about three feet, and after the flood retired left some two inches or so of sewage matter on the floors of the cellars. This undoubtedly caused damage to the plaintiffs and they complained to the defendants. On the 25th of May, 1892, another but slighter

flooding occurred, and on the 28th of June, 1892, there was another heavy storm and a flooding to the extent of about fourteen inches which left a deposit of sewage, whereupon the plaintiffs made further complaints of the damage which they had sustained, the defendants not admitting liability, this action is brought in August, 1892, for an injunction and damages. After the action was commenced there was another flooding on the occasion of a heavy storm which took place on the 11th of July, 1893. Now in considering the liability of the defendants for these floodings and consequent damage it appears to me material to decide some questions of fact. In the first place I find the defendants in constructing their existing system of drainage and in constructing the sewer exercised due care and were not guilty of any negligence: that system as constructed reasonably provided for the district and for the buildings which would have to drain into it. In the next place I find that when the communications between the brewery and the sewer were made and for some years afterwards the sewer was well constructed and sufficient for the purposes of draining the district and could cause no flooding or probability of flooding to the brewery. I also find that the floodings arose not from any want of repair in the defendants' sewer, but owing to the large increase in the last few years in the number of buildings and places in the district which drain into the sewer, if a very heavy fall of rain occurs in a short space of time the existing sewer has become insufficient in size to carry off the sudden influx of water and gets choked and so drives the contents of the sewer up the plaintiffs' communications and into the floors of their cellars, it seems to me that such floodings arising from heavy falls of rain are likely as matters now stand to occur about once a year and more frequently in the future as the number of drains increases with the further buildings which may be erected in the district drained. I further find that if (as the plaintiffs insist) the floors of their cellars are to remain as low and their communications are to continue to run from those floors then the only way to prevent the liability to flooding is by the defendants constructing a new sewer or a new system of drainage for the district.

Assuming then that it had become the duty of the defendants, as the sanitary authority, to consider the question of constructing, and in due course to construct a new sewer, for a new drainage system, I have to consider whether the defendants, when this action was commenced, or up to the date of the trial of this action, were guilty of negligence, or (as it is sometimes expressed) of want of reasonable care and diligence in maintaining the existing sewer, and in not providing the new sewer or new system of drainage. As to this, I find that the defendants were not guilty of negligence or want of reasonable care. In the first place, it is clear that the defendants, so long as the the present sewer existed, and until its insufficiency owing to the increase of buildings rendered it necessary to construct a new sewer or new drainage system, were not guilty of negligence in maintaining the present sewer, or because until the new sewer was made the owners of the new buildings as they were erected exercised their statutory

rights to drain into the existing sewer, so that the question of negligence resolves itself into this, whether the defendants were guilty of negligence in not providing a new sewer or new sewer system, and as to this I come to the conclusion that there was no negligence for the following reasons, as observed by Baron Bramwell in "*Buck v. Williams*" (31 *L. T.*, o. s. 167-8, 27 *L. J.* 361 Ex.). Negligence is a relative term, and must mean negligence with reference to circumstances of time, place or person. Now the negligence of the defendants, if any, is not in omitting to do repairs or small works of that kind which could be speedily done, but in not constructing a new sewer or sewage system for the district in due time after its necessity had become apparent. I am satisfied on the evidence before me that the construction of a new sewer or sewage system, as is requisite, having regard to the size of the town and the configuration of the defendants' district, is a large, expensive and very difficult undertaking and one requiring considerable time before any plan or scheme for the new system could with propriety and in the exercise of reasonable care, be adopted or commenced, and the carrying out of such plan or scheme must of necessity occupy a considerable time. The difficulties in the way of the defendants are great. If for instance the sewer be lowered or enlarged, or if an additional or storm sewer be provided, a difficulty arises as to how the sewage or waters carried down, can be disposed of, and unless some new way were carefully thought out, it might happen that relief might be granted to the plaintiffs, only by flooding the lower part of the town through which the sewer runs, after passing the plaintiffs' premises.

Now it appears that more than a year ago, the defendants considered this question of a new sewer or drainage system, and consulted experts of great eminence who were to report as to what was the best thing to be done under the circumstances, but the report though expected very shortly, has not yet been sent in, owing to the difficulties and magnitude of the case. Under these circumstances I do not think that the defendants can be fairly said to have acted unreasonably or negligently in not proceeding with the construction of a new sewer or new drainage system. It was suggested that they might have suggested the expert sooner than they did, but the first complaint to them was only in June, 1891, when the flooding was caused by a storm of most unusual character, a storm which one of the plaintiffs' witnesses said, was the heaviest he ever saw, and the defendants might well regard this as not likely to recur. There was some evidence of overflows at the brewery before June, 1891, but no particulars were given or dates, except that the overflows were after 1885 and near the year 1890, and no complaint was made about them to the defendants though one of the plaintiffs' witnesses said that he verbally complained to a nuisance inspector. Then after the overflow of June, 1891, nothing occurs until the floodings of May and June, 1892, and though defendants refused to admit any liability for the damage thereby caused: it must have been shortly after this that they consulted the experts, and under these circumstances I cannot think they were guilty of negligence or of want of reasonable

care and diligence in not previously taking active steps in the matter. It is moreover noticeable that the plaintiffs' statement of claim does not expressly allege negligence on the part of the defendants and on behalf of the plaintiffs in opening their case, it was stated that they were not bound to allege or prove negligence.

The question now arises as to whether on the above finding of facts the defendants can be held liable. The plaintiffs put their case in this way, they say broadly that as the sewer was made by and belongs to the defendants, the defendants are liable for the nuisance caused by the sewer to the plaintiffs, whether they have been guilty of negligence or not and are not protected from such liability by any provisions of the Public Health Act or any other Act, and in support of this general proposition the plaintiffs contend: (1) that apart from any statutory duty cast upon the defendants and treating the defendants as strangers who have a private sewer of their own, the defendants must be held liable: (2) that the defendants are liable because they have infringed the provisions of Sec. 19 of Public Health Act 1875, which enacts *inter alia* that "every Local Authority shall cause the sewers belonging to them to be constructed . . . and kept so as not to be a nuisance."

Now with respect to the first contention I cannot see how the plaintiffs can say they are entitled to treat the defendants as strangers. The nuisance to the plaintiffs would not have been caused but for the communications opened by their predecessors in title with the defendants' sewer. No part of the sewage or water in the sewer would have got on the plaintiffs' premises but for those communications which the plaintiffs' predecessors made in exercise of the rights given to them by Sec. 21, Public Health Act, or the corresponding section in a prior Public Health Act (Section 8, Sanitary Act, 1866). It was because the defendants were not strangers, but a public body making and maintaining a sewer for public purposes, and for the benefit of the inhabitants of the district that the above rights were given and that the defendants were bound to allow the communications to be made subject to the mode in which the communications were made being approved. It appears to me, when under and by virtue of statutory duties, works are made and maintained by a public body for the benefit of the public, or a section of the public and a member of the public in exercise of the statutory rights given to him, uses those works and thus suffers damage, the rights of that member and the liability of the public body in respect to such damage are to be ascertained not by considering how matters would stand if the parties could be regarded as strangers but by reference only to the statute under which the works were made, maintained and enjoyed. And to make the public body liable under the circumstances you must find that liability passed upon the public body by the statutes in question either by express provision or reasonable intendment. This brings me to a consideration of the plaintiffs' second contention and the statutes governing the case, and the only statute I need consider is the Public Health Act, 1875.

Now Sect. 19 on which the plaintiffs rely, is in point of wording

unlimited as to the liability it casts on the defendants. But it has long since been held—and I take it to be now settled—that by reasonable construction of an Act, such as this, the liability in circumstances like the present, though in form not limited is in fact limited to cases where the Local Authority has been guilty of negligence, or as it is sometimes expressed, of want of reasonable care and diligence, see *Hammond v. Vestry of St. Pancras* (ubi. sup. and *Bateman v. Popular District Board* ubi. sup. cases under Sect. 72, *Met. L. Man. Act*, 1855) which section is substantially the same as Sec. 19 of Public Health Act. See also *Brown v. Sargent* (1 F. & F. 112) a case under Public Health 1848, Sect. 46, which is for present purposes practically identical with Sect. 19 of the present Act. See also on the question of the general principle governing cases like the present, *Blyth v. Co. of Proprietors of the Birmingham Water Works* (II. Ex. 781). *Whitehouse v. Birmingham Canal Co.* (30 L. T. o. s. 156 27 L. J. 25 Ex.) and the above-mentioned case of *Buck v. Williams*. This being so as I have found as a fact no negligence on the part of the defendants, they cannot in my judgment be held liable under Sect. 19. Nor do I find from any other provision of the Public Health Act, nor can I reasonably gather that the defendants are to be liable in a case like the present in the absence of negligence. This disposes of the action, for as no legal wrong doing by the defendants has been established, the plaintiffs are entitled neither to damages nor to an injunction, nor are they (as suggested by plaintiffs' counsel) to call upon the defendants for any such undertaking as was voluntarily given by the defendants in the case of *Att. Gen. v. Clerkenwell Vestry* (ubi. sup.).

The action was dismissed with costs.

QUEEN'S BENCH DIVISION.

Before LORD CHIEF JUSTICE COLERIDGE and Mr. JUSTICE DAY.

BLAKER v. TILLSTONE.

(70 L. T. Rep. n. s. 33.)

Under section 117 Public Health Act, 1875, the absence of positive proof that the owner of diseased meat knew of its condition is no bar to his conviction.

This was a Brighton case and was stated by the stipendiary and other magistrates for the borough. The appellant was a manufacturer of german sausages. The inspector had seized meat unfit for food, and it was afterwards found to be so by a justice of the peace.

There was no evidence that the meat had been seen by the appellant, the purchase and the dealing with regard to the meat having been effected by the machine man in the employ of the appellant. The justices found that at all events the machine man knew of the condition of the meat and if the appellant had no personal knowledge of its condition he might and would have had if