

**THE EFFECT OF RECENT DECISIONS ON THE
LIABILITIES AND RIGHTS OF OWNERS
IN RESPECT OF THE DRAINAGE OF BUILDINGS.***

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I do not propose, in the course of this paper, to lay before you an exhaustive summary of the law relating to sewers and drains, but rather to direct your attention to certain important points which have been the subject of recent decisions. But I hope to do this in a connected way, indicating what the general law is, as I go along. One other word by way of preface: I do not propose to deal with the law in so far as it relates only to the Metropolis. I have found that it would be impossible to do so in the course of a single paper, and although I shall have to refer to decisions in cases arising in London, I shall do so only in so far as they bear upon points which are common both to the country at large and to the Metropolis.

Now, the first point which it is necessary to emphasize is the distinction between a drain and a sewer. Under the Public Health Act, 1875, which applies to the whole of the country outside of the Metropolis, a drain may be said to consist of a channel for the conveyance of drainage or sewage from one building, or from buildings within the same curtilage. The expression "sewer," on the other hand, is defined to include sewers and drains of every description, except such as fall within the definition of a drain. I pass by the now unimportant exception of highway drains. For most purposes it may be sufficient to bear in mind that a sewer is a channel for the conveyance of sewage or drainage from more than one building, or from houses not within the same curtilage. But it is not unworthy of remark that the language of the definition is exceedingly wide—so wide that it might even be held to include ordinary farm or field drains. Such an application of the Act may involve startling possibilities in the future.

I have made use of the expression "curtilage." On the meaning of this word there have been two recent decisions. In the first of these (*Vestry of St. Martin-in-the-Fields v. Bird*, 1895, 1 Q.B., 428) it was held that the houses in the Lowther Arcade were not buildings within the same curtilage, although they all opened into a common passage, the ends of which were closed by gates at night and on Sundays. In the other (*Pilbrow v. Vestry of St. Leonard's*,

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Shoreditch, 1895, 1 Q.B., 433) two blocks of industrial buildings within the same enclosure, but separated by a causeway from which only one of them was entered, were held to be within the same curtilage.

Both of these decisions relate to exceptional cases, which are not likely to recur. The Shoreditch case (in which, by the way, Lord Justice Rigby delivered a dissenting judgment) is not likely to be extended or followed except with reference to facts precisely similar.

It may be said that a curtilage is the enclosure in which a house stands, or perhaps the space of ground which would pass by a simple conveyance of a house and its appurtenances. The drain, therefore, from a dwelling-house and the stables adjoining it, and contained within the same enclosure, would be a drain. A similar channel for drainage from the same house would be a sewer if the drains from the stables of adjoining premises were let into it. It would become a sewer, however, only from the point at which it received the drainage of the second building. So much for the distinction itself as contained in the interpretation clause of the statute.

The importance of the distinction is obvious. The duty of repairing a drain, and keeping it in good order so as not to be a nuisance, is upon the owner or occupier of the premises drained. A sewer, on the other hand, belongs to, and is vested in, the local authority. The duty of repairing it, cleansing it, ventilating it, and keeping it so as not to be a nuisance, is imposed upon the local authority. Every owner of premises who can reach it without committing a trespass upon private land may lawfully connect the drains of his premises with it on the sole condition of giving notice to the local authority, and complying with their regulations as to the manner in which the communication is to be made. He has this right, even if the sewer discharges itself into a stream so as to be in contravention of the Rivers Pollution Prevention Act, or otherwise causes a nuisance, for it is for the local authority to provide an outfall for the sewer which belongs to them. These are some of the more important points of distinction between a drain and a sewer, and they will be illustrated later in this paper.

I proceed now to point out that a channel for receiving drainage—I use this expression because I know of no other which is quite neutral—a channel for receiving drainage, if it receives such drainage from more than one building, is none the less a sewer vested in the local authority because it is laid in private ground. On this subject a case, decided in the year 1894, may be regarded as having opened the eyes at once of local authorities and of the public to the im-

portance of the distinction already pointed out. The case is *Travis v. Uttley*, 1894, 1 Q.B., 233. In that case there were a number of houses in a street belonging to one owner. These houses had been drained in groups of three. The drain began, say, at No. 1, passed through No. 1 into the cellar of No. 2, where it received the soil and other pipes of that house, thence passed into No. 3, where it received similar pipes, and then was carried out through the front of No. 3 into the street, in which a main sewer was laid. The local authority had found defects in this common drain, and they had required the owner to abate the nuisance consequent upon such defects. The owner refused. The case came before the magistrates, and through them to the High Court, and it was held that the common drain was a sewer vested in the local authority, which they were bound to repair, and consequently that the nuisance complained of was one which they were bound to abate.

This decision is important, and involves serious consequences alike to the local authority and the owner of property. In the first place, the local authority must accept their liability to repair a common drain of this kind, although it is laid in private ground or even under private houses. On the other hand, the owner must give them free access to his premises at all times when it may be necessary for them to inspect, alter, or otherwise deal with the common drain, and he may not himself interfere with, or in any way deal with it, except with the consent of the local authority. In an urban district he cannot lawfully build over it without such consent.

In the course of his judgment upon the case, Mr. Justice Wills made use of some expressions which seemed to imply that, in his opinion, the entire drain, in *Travis v. Uttley*, from the first house to its termination in the street, was a sewer. But the same learned judge had afterwards reason to reconsider this in the case of the *Beckenham Urban District Council v. Wood*, 60 J.P., 490, decided in 1896, which now establishes that a common drain such as this is only a sewer from the point at which it receives the drainage of the second house.

This leads me naturally to bring to your notice a curious fact, namely, that in general, while a local authority have ample authority over private persons with reference to the making of drains from private houses, they have little or none in respect of the making of sewers except under private streets. In a rural district there is nothing to prevent a private person from making a drain to receive the drainage of two or more houses, and making it as he may think fit, yet, however badly it may be made, it will vest in the local

authority, and be repairable by them. There is no means by which such a person can be prevented from making it or required to make it properly. This is undoubtedly the law in a rural district. It is also the law in an urban district, but with this important qualification—that, with regard at least to a new house, a district council may prescribe the manner in which that house is to be drained under Section 25, and in this way may defeat the intention of an owner to make a combined system of drainage, with the result that the common drain would be a sewer of which they would have the burden of repair; but however it may be made, if it is ever allowed to be made, it vests in the local authority.

There was at one time some doubt whether a secret or a wrongful connection made with what would otherwise be a drain would have the effect of converting the drain into a sewer. In such a case the owner of the original drain would probably have a remedy against the trespasser, but, so far as the local authority were concerned, it is now well established that they must accept the *status quo*, and that, as between them and the private owners, the drain to which a secret or wrongful connection has been made is a sewer. The cases which establish this are, taking them in order of time: *Kershaw v. Taylor*, 1895, 2 Q.B., 208; *Holland v. Lazarus*, 1897, 66 L.J., Q.B., 285; and *Geen v. Newington Vestry*, 1898, 2 Q.B., 1.

One other point while dealing with the subject of what is a sewer may be mentioned. It is, that there may be a sewer which is not covered, and that the common expression “open sewer” is one which is recognised in law as well as in common talk. Thus, where the sewage of a number of houses drained into a pipe, and thence into an open water-course, which in its turn ran into a brook, it was held that, under the circumstances, the open water-course was a sewer within the meaning of the definition, that the local authority were charged with the duty of keeping it in proper condition, and might therefore enter upon the land where it was for the purpose of piping it in and cleansing it. That was the case of *Wheatcroft v. Matlock Local Board*, 52 L.T., N.S., 356. It has since been decided that even a natural stream may have its character so altered by the sending of drainage into it from a large number of houses that it becomes a sewer. Such was the decision in *Falconer v. South Shields*, 11 T.L.R., 223. It is obvious, however, that with regard to a natural water-course the question must always be one of degree. It would be absurd to say that a considerable river or stream became a sewer merely because several houses drained directly into it. The true rule would appear to be that the stream must have lost its character of a natural stream, and become sub-

stantially, if not exclusively, a conduit for the drainage of buildings in a district. I may here point out, however, that a conduit or channel may be a sewer, although it does not convey sewage in the ordinary sense of that term. The definition says that the expression "sewer" includes sewers and drains of every description with the single exception of drains as already defined—that is to say, drains receiving the drainage of one building or premises within one curtilage. It is manifest therefore that a pipe or channel may be a sewer within the meaning in this definition though it receives surface-water only, and accordingly this was so decided. In a recent case, *Ferrand v. Hallas Land and Building Company*, 1893, 2 Q.B., 135, Lord Justice Smith made use of the following language: "It will be noticed that a sewer need not necessarily convey sewage matter in order to constitute it a sewer. It would be none the less a sewer within the Act if it conveyed only rain- or surface-water. The draining off of rain- or surface-water collected from different premises or different feeders into one main drain would constitute that main drain a sewer within the meaning of the Act."

I have said that a sewer vests in the district council. Such is the general rule, but to this rule there are three statutory exceptions: First, sewers made by a person or company for his or their own profit; second, sewers made for the purposes of land drainage or irrigation under a local Act; and third, sewers under the authority of Commissioners of Sewers.

It is only to the first of these exceptions that attention need be drawn here. It was at one time thought that, where a person made a sewer for the benefit of his own estate with the intention of draining into it only such houses as he or his lessees or licensees might erect, the sewers so made were private property, and came within the first exception. This notion has long been exploded. The first case was *Acton Local Board v. Batten*, 28 Ch. D., 283, decided by Mr. Justice Kay. It has since been followed in a number of cases, among which I may mention *Ferrand v. Hallas Land and Building Company* (to which I have already referred), and *Vowles v. Colmer*, 1895, W.N., 42. In the last case the owners of a building estate, on one side of which was a roadway, constructed a sewer in the soil of that moiety of the roadway adjoining the boundary of their own estate—that is to say, in that part of the road of which presumably they were the owners. They made this sewer for the purpose of draining the houses which it was proposed to erect upon the building plots upon their estates, and as the plots were sold the purchasers in every case entered into agreements to

pay a sum of money in respect of the right to connect with the sewer. The defendant was the owner of a house on the other side of the road, and he claimed the right to connect the drains of his house with the sewer without payment. It was held that he was so entitled; that the sewer could not be said to have been made by the plaintiffs for their own profit within the meaning of the section; and the true meaning of the exception seems therefore narrowed down to this: that a sewer made for profit is one which is made not merely for the purposes of disposing of drainage, but for the purpose of realizing some profit beyond and independent of any sanitary purpose. The most recent illustration of what is meant by a sewer made for profit is to be found in the case of *Croysdale v. Sunbury District Council* (W.N., 1898, p. 70), decided by Mr. Justice Stirling in the present year. In that case the owner of a field adjoining a highway had laid a drain from a ditch by the side of the highway to a pond in his field for the purpose of supplying water to his cattle. It was held that this drain was a sewer, but that it was made for profit, and therefore did not vest in the district council.

The most important decision, however, on the subject of a sewer made for profit was that of Mr. Justice Romer in *Minehead Local Board v. Luttrill*, 1894, 2 Ch., 179. In that case a landowner, for the purpose of draining a town, the greater part of which stood on his own land, made sewers, and for the use of those sewers he levied and was paid a sewer rate by all persons whose houses were connected with his sewers. It was held that the sewers were made for profit, and were not vested in the local authority. It is, however, difficult to now distinguish this case from the latter one which I have already mentioned, and many doubts have been expressed as to whether it was correctly decided. This much may be said: the decision will probably be limited to facts exactly similar, and these are not likely again to recur.

A recent case of some importance has been decided with reference to the second exception, the *London and North-Western Railway v. Runcorn Rural District Council*, 1898, 1 Ch. 34, 561. In that case the railway company had made sewers for the purpose of draining the land adjoining their line. These were made under powers contained in their local Acts. After they were made, the rural district council had, without the knowledge of the company, connected houses with them. It was held that, although they were sewers, yet they were made and used for the purpose of draining land under a local Act, and did not vest in the local authority. I have mentioned this decision in passing, but to the general public it is one of little importance.

Up to this point I have dealt only with the question, What is a drain and what is a sewer?

I have now to point out what are the rights and liabilities of local authorities in connection with sewers admitted or determined to be such. Now, the first is, that they are bound to keep them in repair, to keep them cleansed, ventilated, and in such a condition as not to be a nuisance or injurious to health. That duty is imposed in express terms. It becomes important to the owner of property in this way: he may have a notice served upon him to abate a nuisance consisting of an alleged defective drain, but if he can show that that drain is in fact a sewer, he is clearly under no liability to comply with the notice, for the nuisance exists by reason of the act or default of the local authority in failing to perform their statutory duty. But this liability of the local authority may not be an unmixed benefit to the owner, for, as I have already pointed out, the local authority have the right of access, and the existence of a sewer upon his land, with which he cannot interfere, and over which he cannot build, may be a serious drawback from the owner's point of view.

At this point I may refer to some cases in which a local authority have given notices to abate nuisances in drains, and it has afterwards turned out that the so-called drains were sewers which the authority themselves should have kept in order. In these cases the notices have been assumed to have been given *bonâ-fide*—that is to say, in the belief that the drains were drains and not sewers; but I fear there are some cases in which this cannot safely be said. It is too much the custom of sanitary officers to give such notices without much inquiry, on the chance that the owner will do what is necessary rather than contest his liability. But, assuming the notice to be given *bonâ-fide*, what is the position of the owner who does the work? It seems now to be decided that he can treat the notice as a request by the local authority to do the work for them, they being the parties really compellable by law to do it, and that he may then recover from them the amount he has expended. This seems to be the result of *Andrew v. St. Olave's District Board*, 1899, 1 Q.B., 775, and *North v. Walthamstow Urban District Council*, 15 T.L.R., 6, decided by Mr. Justice Channell, on the 27th October last.

The importance of these decisions to owners is obvious, for they enable an owner to get rid of an existing nuisance without waiting for any adjudication of liability. All he has to do is to act on the notice given, and if the drain turns out to be a sewer he may recover the expenses he has incurred.

The liability to repair, however, brings me to the consideration of an attempt which has been made to amend the law in the Public Health Amendment Act, 1890, Section 19. The consideration of this section is important, and I propose, therefore, to read the exact terms of it. It provides that "where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under Section 41 of the Public Health Act, 1875, relating to complaints as to nuisances from drains, and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of houses, in such shares and proportions as shall be settled by their surveyor, or, in case of dispute, by a Court of Summary Jurisdiction. For the purposes of this section, the expression 'drain' includes a drain used for the drainage of more than one building."

There can be little doubt what the intention of the Legislature was in enacting this section. It was intended to provide for cases where sewers had been laid by private persons in private land for their own purposes, to prevent an unnecessary and probably improper burden being cast upon the public purse; for, as I have already pointed out, once you can establish that a channel for drainage is a sewer, the local authority must repair it. Such being the intention of the Legislature, it is a little unfortunate that they did not employ some person in the drafting of the section who had some elementary acquaintance with the law of the subject. To begin with, the section applies only where there are two or more houses belonging to *different* owners. Why the section should not have applied to the case where two or more houses belong to the same owner, I am unable to conceive. But the fact remains, for what it is worth, that the section with which I am now dealing may be put in force against the owners, say, of three houses draining into one common drain, while, if all three houses belonged to the same person, but the other circumstances were identically the same, the section would not apply. In the next place, the section makes use of two expressions which up to that time were quite unknown to the law. It deals with the case of "two or more houses connected with a public sewer by a single private drain." Now, a sewer which is vested in the local authority is a public sewer, and all sewers are so vested, with the trifling exceptions to which I have already referred. But there is no such thing known to the law, or, rather, there was no such thing known to the law up to 1890, as a single private drain receiving the drainage of two or more houses, for such a drain was a sewer. But there the section is, and the Courts had to give some

interpretation to it. After two somewhat unsatisfactory and, indeed, contradictory decisions, viz. : *Self v. the Hove Commissioners*, 1895, 1 Q.B., 685, and *Hill v. Hair*, 1895, 1 Q.B., 906, a Divisional Court, consisting of the Lord Chief Justice and Mr. Justice Wills, have arrived at an interpretation of the section which is at least intelligible. They have decided in effect that the section is intended to apply to what would otherwise be a sewer draining two or more houses belonging to different owners, but laid in private land so that the public could not have access to it. This decision was in *Bradford v. the Mayor, etc., of Eastbourne*, 1896, 2 Q.B., 205, and it has since been followed in *Seal v. Merthyr Tydvil*, 1897, 2 Q.B., 548.

It must not, however, be imagined that the new enactment has transferred from the local authority to the owners of houses all liability in connection with what is referred to as the "single private drain." If I may again refer to the words of the section, which I have already quoted, they merely enable the local authority to have recourse, in the case of such a drain, to the powers which they possess under Section 41 of the Public Health Act, 1875, relating to nuisances in ordinary drains. Translated into intelligible language, their power is limited as follows: There must be a written complaint from some person that the drain is a nuisance. The local authority must then authorize their officer to enter and examine the drain. If he reports it to be in bad condition, the local authority may then give notice to the owners concerned to do the necessary work, and upon their default the local authority may do the work and recover the expenses. The amendment of the law effected by the Act of 1890 is therefore of a very limited character. In the restricted class of cases to which it applies, it enables the local authority to compel the owners to bear the cost of repairs which, but for the Act, they would themselves have to bear. But unless they follow the procedure which I have mentioned, their duty in respect of the "single private drain" is exactly the same as if the Act had never passed. In other words, it is a sewer which they are bound to repair, and which, if necessary, they can be compelled to repair. This was pointed out by the Court in the case of *Regina v. the Mayor of Hastings*, 1897, 1 Q.B., 46, where the local authority were ordered to do repairs to a common drain, although, had the appropriate procedure been adopted, it is possible that the owners might have been compelled to do them.

There is one important subject connected with sewers which time will only now permit me to mention.

One of the duties of a local authority imposed by the Public

Health Act of 1875, Section 15, is that of making such sewers as may be necessary for effectually draining their district for the purposes of the Act. A number of recent decisions relate to the liability of a local authority to carry out this obligation. They are cases of this character: Sewers are, or have become, insufficient to carry away the volume of drainage sent into them, particularly in cases of storm. The sewers become overcharged, and flood the basements of premises which they ought to drain, occasioning, in many cases, much damage, as well as discomfort to the occupiers. Claims have thereupon been made against local authorities for damages, and in some instances an attempt has been made to obtain a writ of mandamus to compel the local authority to enlarge their sewers, or to construct such additional sewers as are necessary to give the desired relief. Up to the present time the Court has dealt with such cases by applying to them a technical rule of law. The rule may be thus stated: Where a statute creates an obligation, and also provides a means of enforcing that obligation, no other remedy is open to a person aggrieved by the failure to perform that obligation. Now, the Public Health Act, 1875, contains, in Section 299, a provision for enforcing the obligation of providing a district with sufficient sewers, and of maintaining existing sewers. The procedure is by complaint to the Local Government Board, who, upon inquiry, make an order limiting the time for the performance of the duty, and such order may be enforced by mandamus. Acting upon this rule, the Courts, including the House of Lords, have held that where persons are damaged by floods caused by the insufficiency of sewers to take away the drainage from a district, they have no remedy in damages or by mandamus, and can only complain to the Local Government Board. I need only refer to the last of these cases, that, namely, in the House of Lords, which affirms the principle in all the others. It is *Pasmore v. Oswaldtwistle Urban District Council*, 1898, Appeal Case 387. This is a very important limitation of the rights of private persons. But it is worthy of note that it cannot apply in the Metropolis, where there is no Section in force corresponding to Section 299 of the Public Health Act, 1875.*

Closely connected with the point which I have just mentioned is another which I shall mention in conclusion. It is this: Suppose an owner wishes to lay out a building estate, what are the rights and liabilities of the owner on the one hand, and the local authorities

* Application for a mandamus against the London County Council has, we are informed, been recently made by one of the Metropolitan authorities, whose area is specially prone to flooding in times of storm.—Ed. P. H.

on the other, in respect of the provision of means of drainage, without which, of course, no estate can be successfully developed? That has been, I think, settled by the decision of the Court of Appeal in *Regina v. Tynemouth Rural District Council*, 1896, 2 Q.B., 219. I may summarize what has been there decided: The local authority are under no obligation to bring their sewers up to the new estate for the purpose of enabling the owner to develop it for building. On the other hand, they cannot refuse to pass his plans because these do not disclose how the drainage of the streets and buildings he proposes to construct and erect will eventually be disposed of. They cannot, in other words, insist upon his showing on his plans a means of sewage disposal for the estate once the buildings have been erected. What will happen is this: When the new streets are laid out, the local authority will be in a position to require sewers to be laid in them under Section 150. These sewers, however, will only be sewers in the streets. As soon as connections are made with these sewers an outfall will have to be provided, but that duty will fall upon the local authority.

It is obvious that many difficult questions are likely to arise in connection with this branch of the law. Can an owner, in anticipation of his liability, lay sewers under his new streets, which end nowhere, and then, by connecting one or two of the houses with them, force the local authority to find an outfall for him? Such a result might be very unreasonable in many cases. On the other hand, at what point of time can the duty of the local authority to provide an outfall be said to arise? Can they compel the owner for an indefinite time to drain house after house into cesspools, regardless of the fact that at some period or another these will have to be abolished and a system of sewers provided? I do not trust myself to speculate as to the liabilities on either side of these matters. In many cases, no doubt, such difficulties will disappear by mutual arrangement. Until they are fought and decided by the Courts, I should hardly care to venture an opinion on the points to which I have referred.

There are one or two important points connected with the subject of this paper which regard for your time and patience compels me at present to leave unnoticed. I can only trust that you have not, by reason of the disconnected character of my observations, found them tedious or uninteresting.

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