LAW REPORTS.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

April 12th and 13th, 1899.

BEFORE DARLING AND CHANNELL, JJ.

SYKES AND ANOTHER v. SOWERBY URBAN DISTRICT COUNCIL.

Local Government—Sewer Made for “profit”—Discharge of Surface Water—Absence of Direct Profit—Vesting of Sewer in Local Authority—Public Health Act, 1875 (38 and 39 Vic., cap. 55), Section 13.

A sewer constructed by a landowner in order to prevent surface water from running into the workings of a stone quarry upon his land, but which is not directly profitable to him, is not a sewer made by him “for his own profit” within the meaning of Section 13, Sub-section 1 of the Public Health Act, 1875, and therefore vests in the local authority.

Appeal from the Judge of the Halifax County Court.

The plaintiffs, who were quarry-owners, had about twenty years ago constructed a drain to collect into one channel the surface and rain water which came down a lane, called Carr Lane, on to their land. The drain was constructed in order that the water might not run into the workings of the plaintiffs' quarry. Subsequently the plaintiffs altered the course of the drain, and afterwards made another drain for the same purpose across a field belonging to them. The defendants caused a current of polluted water to flow into the drain, and so into a public sewer in an adjoining road.

The plaintiffs alleged that the drain was their private drain, and that the discharge of water into it caused them damage by reason of percolation into their quarry, rendering the stone wet, and causing them greater expense in working the quarry.

The County Court Judge held that the drain was a sewer made for the “profit” of the plaintiffs within the meaning of Section 13, Sub-section 1 of the Public Health Act, 1875, and accordingly gave judgment for the plaintiffs.

The defendants appealed.

Lawson Walton, Q.C. (W. J. Waugh with him), for the defendants.—This sewer was not constructed for the plaintiffs' own “profit.” If a sewer is made for the purpose of relieving land of a burden of water, it is not constructed for the profit of the landowner. There can be no distinction for this purpose between house drainage and surface drainage. Section 308 of the Act of 1875 provides for compensation where damage is caused to any person by the local authority, but the procedure prescribed in the section must be followed. In *Acton Local Board v. Batten* [1884]* it was held that a sewer made by the owner of some of the houses in a street, though made for the purpose of draining

* 54 L. J., Ch. 251; 28 Ch. D., 283.

his own amongst the others, was not a sewer made by him "for his own profit" within the meaning of Section 13, Sub-section 1.

[He also referred to *Bonella v. Twickenham Local Board* (1887),* *Ferrand v. Hallas Land and Building Co.* (1893),† and *Croysdale v. Sunbury-on-Thames Urban Council* (1898).‡]

Butcher, Q.C. (T. F. Byrne with him), for the plaintiffs.—This sewer is within the exception in Section 13, Sub-section 1. If it were held to be a sewer vesting in the local authority, every drain for draining agricultural land would vest in them, and could not be altered without their consent, and the local authority would be bound for ever to repair it. There is no analogy between house drainage and surface water. The cases cited on behalf of the defendants were cases of house sewage. They are of an exceptional character, and different from the present. In the case of a house it is absolutely necessary to carry away the sewage, but that is not so in the case of surface water. In *Minehead Local Board v. Luttrell* [1894]§ it was held that sewers made by a landowner to drain a town, part of which stood on his lands, and for the use of which sewers he was paid a sewer rate, were sewers made by him "for his own profit." There is nothing either in the Act or in the cases cited to show that in order to bring a sewer within Sub-section 1 of Section 13 it is necessary that the article passing through the sewer should be utilized for any purpose after it has passed through.

Lawson Walton, Q.C., replied.

DARLING, J.—I have come to the conclusion that this appeal ought to be allowed after great hesitation and great difficulty in endeavouring to reconcile the decisions with the language of the Act. But, on the whole, I think that this sewer was not a sewer made by the owners for their own "profit," so as to bring it within the first exception in Section 13. It appears to have been a sewer constructed in order to prevent the surface water coming down Carr Lane from running into the plaintiffs' quarry, and there can be no doubt that if the water had got into the quarry it would have rendered the quarry less profitable to the plaintiffs. The difficulty I have felt arises from the fact that the sewer was clearly not directly profitable to the plaintiffs, because the water was not capable of being sold at a profit; but there can be no doubt that there must have been a detriment to the plaintiffs if the water had been allowed to flow down into their quarry. I have only come to the conclusion that this sewer was not made for the plaintiffs' own profit, because of the cases which have been cited. In *Ferrand v. Hallas Land and Building Co.*, Lord Justice A. L. Smith said: "It is, however, not necessary to speculate what would or would not be a sewer made by a person for his own profit, for I am clearly of opinion that a sewer made merely for the purpose of draining premises and for no other purpose, as in the present case, is not a sewer made 'for profit' within the meaning of the exception; first, because it does not come within the ordinary meaning of the terms used; and secondly, because, as was pointed out by Mr. Justice Kay in *Acton Local Board v. Batten*, and by Lord Justice Fry in *Bonella v. Twickenham Local Board*, if it did, 'the exception would almost eat up the rule.'" That is the language which gives rise to the difficulty which I feel in holding such a sewer as the one in question to be a sewer made by the

* 56 L. J., M.C., 73; 18 Q.B.D., 577.

† 62 L. J., Q.B., 479; [1893] 2 Q.B., 135.

‡ 67 L. J., Ch. 585; [1898] 2 Ch. 515.

§ 63 L. J., Ch. 497; [1894] 2 Ch. 178.

plaintiffs for their own profit. It would be making the word "profit" equivalent to "benefit," and, if so, every drain would be included in the exception. A restricted meaning must therefore be placed upon the term. The case of *Minehead Local Board v. Luttrell* caused me some difficulty. Mr. Justice Romer there said: "This is a case where the defendant has laid out money for the purpose of making sewers, intending to be compensated and paid directly for his expenditure on the sewers by receiving payments from all persons, whether they are his tenants or not, who avail themselves of the benefit of his sewers, and where he intended to receive, and did receive, payment direct to him from the persons using his sewers for the benefit of his sewers, and where he has, by reason of his expenditure, received direct remuneration for the expenditure in the way I have indicated." There Mr. Justice Romer held that it was a sewer within the first exception in Section 13, but he seems to have done so on the ground that the sewer brought profit directly to the defendant, and not merely indirectly. Applying that to the present case, this drain did not give a direct, but only an indirect, profit to the plaintiffs, and is not therefore within the principle of that decision. It seems to me that the decision most in favour of the plaintiffs' contention is *Croysdale v. Sunbury-on-Thames Urban Council*. Mr. Justice Stirling there said: "When the object of making the sewer is not either for sanitary or ordinary drainage purposes, but to enable the land to be occupied more profitably or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, it seems to me that the sewer is made for the profit of the occupier." If taken alone, those words are wide enough to cover the present case. This sewer was not made for sanitary or for ordinary drainage purposes, and would seem to come within the expression "to avoid an expenditure" which would otherwise have had to be incurred. The learned Judge, however, was dealing with a case where a former tenant of the land in question had put in the pipes for the conveyance of water, not only to get rid of it, but to carry it to a pond for the use of cattle, so obviating an expenditure there, and therefore the case is more within the cases where a person has carried something through a drain for the purpose of using it at the other end. The decision does not therefore cover the present case.

CHANNELL, J.—I agree. The decided cases have established that the word "profit" in Section 13, Sub-section 1, means some advantage to a person other than using the pipe simply as a sewer or drain. If a drain is made in order to take away water somewhere else, that is an ordinary drainage purpose, and the cases have decided that such a drain is not for the "profit" of the person making it within the meaning of Section 13, Sub-section 1, because, if so, all drains would be drains made for profit. The cases are clear where the drain carries sewage, but it was said that, although that might be the rule where there was what may be called a necessity, it did not apply to other cases. It seems to me, however, that no such distinction can be drawn. If it were an open question, we might perhaps have thought that this sewer was made for the plaintiffs' own profit; but we cannot so hold in view of the authorities. I think that the County Court Judge was wrong, and that we are bound to allow the appeal.

Appeal allowed.