§ 1049. **Same subject. Liable for Neglect to repair.** — In *accordance with the above distinction between legislative or judicial duties on the one hand, and ministerial duties on the other* (a distinction plain in theory, but oftentimes difficult of application to particular cases), a municipal corporation *is liable for negligence in the ministerial duty to keep its sewers* (which it alone has the power to control and keep in order) *in repair*, as respects persons whose estates are connected therewith by private drains, in consequence of which such persons sustain injuries which would have been avoided had the sewers been kept in a proper condition.[1] If the sewer is *negligently permitted to become obstructed or filled* up, so that it causes the water to back-flow into cellars connected with it, there is a liability therefor on the part of the municipal corporation having the control of it, and which is bound "to preserve and keep in repair erections it has constructed, so that they shall not become a source of nuisance" to others.[2] The *work of constructing gutters,*

Leonard's Par., 11 C. B. (N. S.) 192; Parsons *v.* Bethnal Green, 17 L. T. (N. S.) 211; Harrison Munic. Man. (5th ed) 522. In *Indiana* it is held that "in actions against municipal corporations for injuries resulting from the negligent construction or maintenance of sewers, the plaintiff must show that he was free from *contributory negligence*." Fort Wayne *v.* Coombs, 107 Ind. 75, and cases cited, disapproving Roll *v.* Indianapolis, 52 Ind. 547, on this point.

[1] Child *v.* Boston, 4 Allen, 41 (1862); *supra*, secs. 980, 1045, 1046, 1047. There is considered to be no liability in *Massachusetts* on the part of a city for failing to keep a public cesspool and sewer in repair, in consequence of which waste water accumulates and flows into neighboring cellars *not connected with the sewer*. Barry *v.* Lowell, 8 Allen, 127 (1864), distinguished from Child *v.* Boston, *supra*. But where the reason on which this distinction rests does not apply, and where the work would be regarded as a *corporate* one, the duty to prevent it becoming a nuisance might be such, we think, as to impose a liability on the corporation for injuries which would not have been suffered had it been kept in order. *Supra*, sec. 986. See Searing *v.* Saratoga, 39 Hun (N. Y.), 307. Municipal *liability in respect of sewers* is very fully discussed by *Biddle*, J., in Roll *v.* Indianapolis, 52 Ind. 547 (1876). But see this case criticised in Fort Wayne *v.* Coombs, 107 Ind. 75. Text approved by *Wagner*, J., in Thurston *v.* St. Joseph, 51 Mo. 519 (1873); s. c. 11 Am. Rep. 463; and in Kranz *v.* Baltimore, 64 Md. 491; Hitchins *v.* Frostburg (approving text), 68 Md. 100 (1888); Semple *v.* Vicksburg, 62 Miss. 63.

[2] Barton *v.* Syracuse, 36 N. Y. 54 (1867); Smith *v.* New York (sewer of adequate size obstructed by mud and sand of which city had notice; held liable), 66 N. Y. 295 (1876); McCarthy *v.* Syracuse, 46 N. Y. 194; Hines *v.* Lockport, 50 N. Y. 236; Nims *v.* Troy, 59 N. Y. 500 (1875); New York *v.* Furze, 3 Hill (N. Y.), 612 (1842), explained in Wilson *v.* New York, 1 Denio (N. Y.), 595 (1845), and in Mills *v.* Brooklyn, 32 N. Y. 489 (1865), and the ground of the decision stated as in the text. Seifert *v.* Brooklyn, 101 N. Y. 136, reviewing and distinguishing previous New York cases; *infra*, sec. 1051, note; s. p. Thurston *v.* St. Joseph, 51 Mo. 510 (1873); Imler *v.* Springfield, 55 Mo. 119, 128 (1874); Denver *v.* Capelli, 4 Col. 25. City cannot discharge drainage into a mill-race owned by others (Columbus *v.* Hydr. Woolen Mills Co., 33 Ind. 435, 1870), but may connect its sewerage with any natural flow of water, and is not liable for the falling in of a sewer (with which it has connected its own) which it did not build, and which, being on private property, it has no right to enter to repair, and where the injury is not shown to have resulted from the connection of the city's sewer with the old sewer, the fall of which caused the injury. Munn *v.* Pittsburgh, 40 Pa. St. 364 (1861). *Supra*, sec. 1047. To establish a liability for defect in sewer, the plaintiff must show fault in construction or negligence in removing obstructions. Smith *v.* New York, 66 N. Y. 295 (1876); s. c. 23 Am. Rep. 53. Seifert *v.* Brooklyn, *supra*.

A municipal corporation cannot discharge its sewers upon private property; and where a city caused its sewers to empty into a small water-course running through the plaintiff's property, thereby conducting to and emptying upon such property a greater body of water than the natural flow through the water-course, to the injury of the property-owner, it is *prima facie* liable therefor. O'Brien *v.* St. Paul, 18 Minn. 176 (1872); s. p. Kobs *v.* Minneapolis, 22 Minn. 159 (1875), in which the city was held liable for cutting a ditch across a street, thereby causing an unusual quantity of water to be turned with destructive force upon the premises of the plaintiff. Presumption of authority in street commissioners to cut the ditch. *Ib.* In Waffle *v.* N. Y. Cent. R. R. Co., 58 Barb. 413, it was decided that a person may drain his own land into a running stream without liability, although such drainage may cause at times an increase of water in the stream to the damage of the owners below. This case distinguished in Gould *v.* Booth, 66 N. Y. 62, 65 (1876); *supra*, sec. 1048. Liability of city for drain at end of wharf. Richardson *v.* Boston, 19 How. 270; *ante*, sec. 110, note; *supra*, sec. 1048, and note.

[1] *Supra*, secs. 949, 983, 1040, 1046, 1048. In Child *v.* Boston, 4 Allen, 41 (1862), it is held that the mayor and aldermen of Boston, in building sewers, act as public statutory officers, and not as agents of the city; but generally the power to construct sewers is private or corporate, and it was admitted and held to be such in Child *v.* Boston, by *Hoar*, J., *Ib.* p. 52. This is very clearly explained by *Manning*, J., in Detroit *v.* Corey, 9 Mich. 165, 184 (1861); Mills *v.* Brooklyn, 32 N. Y. 489 (1865); Dermont *v.* Detroit, 4 Mich. 435 (1857); Ross *v.* Madison, 1 Ind. 281; Kensington Comm'rs *v.* Wood, 10 Pa. St. 93, 95; Bronson *v.* Wallingford, 54 Conn. 513; *ante*, sec. 58. The necessity for covered public sewers in streets in cities with compact populations, and their special uses, seem to the author to make the duties of cities in respect thereof *corporate* rather than *public*, as that distinction has been pointed out in other portions of the present chapter. *Ante*, secs. 966, 967, 974 *et seq.*

A city with express power to construct sewers and to provide drainage, in order to find an *outlet for sewage beyond the city*, was held, in the absence of any restriction, express or implied, to have the incidental right to make a contract with a land-owner, in order to secure such an outlet. Coldwater *v.* Tucker, 36 Mich. 474 (1877); s. c. 24 Am. Rep. 601.

[2] Same authorities cited in last note. *Supra*, secs. 983, 988, 990 *et seq.*; Brine *v.*

drains, and sewers is ministerial, and when, as is usually the case, the undertaking is a corporate one, the corporation is responsible in a civil action for damages caused by the careless or unskilful manner of performing the work.[1]

§ 1050. **Same subject.** — The principle, indeed, is a general one, that while there is no implied liability for damages necessarily occasioned by the construction of any municipal improvement authorized by law, yet *if the work thus authorized be not executed in a proper or skilful manner*, there will arise a common-law liability for all damages not necessarily incident to the work, and which are chargeable to the unskilful or improper manner of executing it.[2]

§ 1051. **Result summed up as to Municipal Liability for Injuries caused by Surface-water and defective Sewers.** — A review of the authorities, in the light of the true principles of law applicable to the subject of municipal liability for injuries caused by surface-water and defective sewers, justifies the author, he conceives, in laying down the following general propositions, leaving cases not covered by them to be determined upon their special circumstances: —

1. Where the municipality keeps within the limits of its streets and within the limits of its jurisdiction, and the injury caused by surface-water is wholly incidental to and consequential upon the exercise of its lawful powers, there is no implied or common-law liability. This is everywhere admitted.

2. Where the injury is occasioned by the *plan* of the improvement, as distinguished from the mode of carrying the plan into execution, there is not ordinarily any liability. This also is everywhere admitted to be generally true,[1] but it is subject, however, in the judgment of many courts, to the qualifications stated in the subsequent paragraphs of this section.

3. In the case last supposed, there will be a liability if the *direct effect of the work*, particularly if it be a sewer or

Great Western Ry. Co., 110 Eng. Com. L. (2 B. & S.) 402, 411, *per Crompton*, J., cited 11 H. of L. Cases, 714; Sprague *v.* Worcester, 13 Gray, 193 (1859), *per Shaw*, C. J.; Perry *v.* Worcester, 6 Gray, 544 (1856), and cases cited; Proprietors of Locks, &c. *v.* Lowell, 7 Gray, 223; Flagg *v.* Worcester, 13 Gray, 601, 605; followed in Kennison *v.* Beverly, 146 Mass. 467 (1888); McGregor *v.* Boyle, 34 Iowa, 268 (1872); Emery *v.* Lowell, 104 Mass. 13 (1870); Murphy *v.* Lowell, 128 Mass. 396; City Council *v.* Gilmer, 33 Ala. 116 (1858); s. c. 26 Ala. 665; Barton *v.* Syracuse, 36 N. Y. 54 (1867); Conrad *v.* Ithaca, 16 N. Y. 158; Cowley *v.* Sunderland, 6 H. & N. 565 (1861); Carr *v.* Northern Liberties, 35 Pa. 324; Atchison *v.* Challiss, 9 Kan. 603; Judge *v.* Meriden, 38 Conn. 90; Denver *v.* Rhodes, 9 Col. 554. Further as to the *right to maintain actions against bodies executing public works* under legislative authority, for the improper mode in which their powers have been exercised, see opinion of *Blackburn*, J., in Mersey Docks Cases, 11 H. of L. Cases, 713 *et seq.*; Morse *v.* Worcester, 139 Mass. 389; Broom Comm. on Com. Law (4th ed.), 660, where the recent English cases are cited; Shearm. & Red. Neg. (4th ed.) chap. xiv.: "Incorporated Public Trustees."

[1] Gilluly *v.* Madison, 63 Wis. 518. In Weis *v.* Madison, 75 Ind. 241, the leading case in *Indiana* upon the subject of this section, *Earl*, J., after quoting paragraph 2, said: "If we are to understand that it refers to the mere plan of the improvement, without reference to the performance of the work under it, there can be no question as to the correctness of the rule as stated. There is, however, a broad and plain distinction between judicial or legislative acts and ministerial ones. The construction of a plan may be a judicial act; the performance of the work is certainly a ministerial act. This court has repeatedly recognized and enforced the doctrine, that a municipal corporation is not liable for the exercise of a legislative power, but that it is liable for the negligent performance of ministerial acts."

drain, is to collect an increased body of water, and to precipitate it or sewage on private property, to its injury.[1] But since surface-water is a common enemy, which the lot-owner may fight by raising his lot to grade, or in any other proper manner, and since the municipality has the undoubted right to bring its streets to grade, and has as much power to fight surface-water in its streets as the adjoining private owner, it is not ordinarily, if ever, impliedly liable for simply failing to provide culverts or gutters adequate to keep surface-water off the adjoining lots, *below grade*, particularly if the injury is one which would not have occurred had the lots been filled so as to be on a level with the street. The cases are not in harmony on the point last presented, but the above is believed by the author to be the correct doctrine.[2]

4. There is a municipal liability where *the property of private persons is flooded*, either directly or by water or sewage being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts, or sewers, or of the negligent failure to keep the same in repair and free from obstruction, and this whether the lots are below the grade of the streets or not. The cases support this proposition with great unanimity.[3]

5. Perhaps the adjudged cases have not always kept as closely in view as they ought the difference between drains as part of street improvements constructed to dispose of surface-water and common or public sewers constructed to provide for and dispose of the sewage of cities. Where such sewers are

[1] This sentence of the text is quoted in Seifert *v.* Brooklyn, 101 N. Y. 136 (1886), and upon the principle therein expressed, as applied to sewers in cities, the judgment in that case rests. Here the city built a main sewer in 1868. Experience showed, soon after it was completed, that its capacity was not sufficient, and it resulted in overflowing private property. Notwithstanding this the city continued to build and attach new lateral sewers until the inundations of private property occurred eight or ten times a year,— a fact well known to the corporation. The city corporation was, under these circumstances, held liable for inundations of the plaintiff's property in 1884 by sewage. The court rightly held, we think, that the case was not within the principle of exemption from liability for the mistaken exercise of functions of a judicial or legislative character, asserted in Mills *v.* Brooklyn, 32 N. Y. 489, 495; Wilson *v.* New York, 1 Denio, 595, 598; Lynch *v.* New York, 76 N. Y. 60. The review by *Ruger*, C. J., of these and the other principal cases in New York bearing upon the question clears the subject in the State of New York of some obscurity, and places it in a more certain light. *Ante*, secs. 1045, 1046.

[2] The text regarded "as a clear and correct statement of the rule, supported by the decided weight of authority." Weis *v.* Madison, 75 Ind. 241.

[3] Gilluly *v.* Madison, 63 Wis. 518; Hitchins *v.* Frostburg, 68 Md. 100 (1888), approving text.

built and solely controlled by a municipality, many cases, as shown in the sections of the text relating to this subject, have held that the *municipality is liable for direct inundations of connecting property with water, filth, and sewage*, where the sewer, although it may have been built pursuant to a *plan* adopted by the municipality, is negligently maintained by it after the sewer has been shown by experience to be insufficient, under ordinary conditions, to prevent such a nuisance and direct injury to the plaintiff's property. In view of the purpose of sewers, their indispensableness to property owners in cities, their vital relation to the public health, the exclusive nature (as the power is usually conferred) of the municipal authority to construct and to control them, the power and means (where these exist in the municipality) to provide a remedy, and the utter helplessness of the property owner, if no remedy is provided, liability to a private action for negligence is doubtless a salutary rule, and one which in the author's judgment is, under the conditions above stated, and where no contrary legislative intent appears, entirely consistent with legal principles.

§ 1051 *a*. **Same subject.** — In such case the injury to the property owner is manifest. It is caused by the sole act or neglect of the municipal authorities. They alone have the power to remove the cause. The property owner is substantially remediless unless he can quicken and secure corporate action by means of a civil suit for damages. The city as the corporate representative of the fasciculus of local interests which make sewers a necessity for the benefit of all of the inhabitants of the municipality, is the author of the injury which the plaintiff in the case supposed sustains in the attempt to benefit all. The dictate of justice is that no person should suffer unequally, and, if he does, that all should make compensation. If the city has the power and the means by taxation or otherwise to remedy the defective sewer, and yet, under the conditions above defined and limited, continues such sewer, it must on legal principles be liable, unless it can justify its act or omission by its legislative powers and duties relating thereto. Certain it is that these powers were not given with any such intent. Under the usual constitutional limitations on legislative action it is at least doubtful whether powers so injurious to, and so destructive of, private rights could be directly conferred, and if not, how can they be held to be obliquely granted, or to be embraced in large and general grants of authority? Such delegations of authority are to

be construed favorably to the rights of the citizen, and may, we think, reasonably be considered as implying a condition that it shall not be exercised so as to inflict unnecessary or at all events negligent injuries upon private property.

§ 1052. **Conclusion.** — And here, according to its plan, this work is brought to a close. Mr. WILLCOCK, in concluding a similar treatise upon the Municipal Corporations of England, before the Reform Act, disgusted with their petty disputes, intrigues, and corruptions, declared that they had long since ceased to have any beneficial operation, and added: "I have travelled through this work as a merchant from Medina to Damascus, — a weary waste of way; there is as little to gratify the mind in the investigation as to please the eye in the desert." Such has not been our experience in the present work: on the contrary, the extensive field over which we have passed has presented at every turn new and interesting subjects for contemplation. Our municipalities, in their creation and operations, stand closely related both to the States and to administrative law. They offer to the statesman, the legislator, and the jurist questions of perplexing intricacy and deepest moment. How thoroughly our municipal institutions are wrought into the framework of our government and administration, how important the functions they are made habitually to perform, how closely, in the exercise of their diversified powers, and in the discharge of their varied duties, they touch the daily life and affect the most important interests of the citizen and of the property owner, cannot fail to impress the most inattentive observer. They are quickened by the spirit of modern times, and in all their multiform purposes, both public and corporate, they illustrate its activity, enterprise, and progress. Walled towns belong to a past age. The violence and insecurity of that age have passed away, but, in their place, our chartered corporations, particularly our large cities, are encountering the perils, not less alarming, of corruption and fraud on a gigantic scale, engendered by the large revenues and official patronage at their disposal, aided by the disinclination, often the steady refusal, of the substantial citizens to take an active part in the management of municipal affairs. How best to govern our cities is a problem in statesmanship not yet fully solved; but it is clear that for many of the excesses to which municipal bodies are prone the courts afford in the usual state of legislation, the most effectual, and frequently the only, remedy. It is impossible to rise from the survey of the authority of the judicial tribunals over them, to keep them within their chartered limits, to enforce their rights on the one

hand, and to enforce rights against them on the other, without profound admiration for the learning and conservative wisdom of the judges, as displayed in their reported judgments, the principles whereof we have sought to extract, arrange, and embody in these pages.

INDEX.

The references are to the sections. Sections 1 to 555, inclusive, are in Volume I.; sections 556 to 1052, inclusive, are in Volume II.