

File No. 7858 Continued.

OPINION.

6042

In *Walter vs. Wicomico*, 35 Md., 385, it appeared that the Commissioners for Somerset County had erected certain obstructions to a stream where it crossed a public highway, and thus caused water to back upon the plaintiff's property. Afterwards this portion of Somerset County was made part of Wicomico County, and then Wicomico County was sued on the theory that the obstructions in question, constituted a nuisance, which it became the duty of Wicomico County to remove as soon as the vicinity in question became part of that County.

The case was tried on demurrer, and the court held that before an action can be maintained against a party who has not created the nuisance, it must be established that, he either failed, after request, to remove it, or has done some act amounting to a positive participation in its continuance, and since the Declaration contained no allegation of this effect, the demurrer was held properly sustained.

6043

In the present case, I understand from Mr. Fendall, that the City has never done any act which could possibly be construed to be an adoption of the nuisance in question, nor has the City ever, until now, been requested to abate it. If this is true, then I think that under the above case, the City is under no liability for any damages which may have already been incurred.

With respect to the future, the situation seems to me, this: inasmuch as the Kennedy Estate have now requested the City to remedy the trouble, the case now seems to me, therefore, to be one in which the City streets are so graded and paved as to constitute a nuisance in Jenkins Lane; that the City has been requested to abate this nuisance by making proper provision for the drainage, and that it is, therefore, the City's duty to do so; if it does not, then the City will be allowing the nuisance to continue after notice to abate.

6044

Of course, the Kennedy Estate can be compelled to clean out and repair the box drain, because the drain, itself, is theirs, and this will doubtless relieve the trouble to some extent at least; but I understand that this will not stop the overflows, because the box drain, even if in good condition, is not sufficient to take care of the drainage which flows to it. For these overflows, which I thus understand, are really not due to the non-repair of the drain, but are due to the fact that no proper provision has been made to take care of the water, the City has now, in my opinion, become responsible.