Legal Department.

J. M. GLENN, Q. C., LL. B.,
OF OSGOODE HALL, BARRISTER-AT-LAW.

Re Township of Mersea and Gosfield North Gosfield South and Township of Rochester.

Judgment on appeal by the township of Rochester from the report of J. B. Rankin, Esquire, referee under the drainage laws, allowing an appeal of the other townships from the report, assessment, etc., of the appellants' engineer in respect of the cleaning out, enlarging, extending and straightening of the River Ruscomb drain in the township of Rochester, and which recommends the construction of a drainage work to cost $33,088, and assesses the cost in certain proportions against the said townships. The referee set aside the report of the engineer and directed the abandonment of the work. Held, that the referee went too far in directing that the proposed drainage work should be abandoned, and the township of Rochester should be allowed to initiate and carry on a fresh proceeding for the same purpose as the proposed drainage work. Per Armour, C. J. O., the construction placed by Gwynne, J. S. C. C., in Sutherland, Innes Co. vs. Romney, 30 S. C. R., 495, upon the words "drainage work" in 57 Vic., ch. 56, sec. 75, now sec. 75 of the municipal drainage act, was erroneous. In arriving at such a construction sec. 3 (of both acts) has been overlooked and is not adverted to, and it in effect defines "drainage work" to mean the construction of a drain or drains, the deepening, straightening, widening, clearing of obstructions or otherwise improving any stream, water or watercourse, and the lowering of waters of any lake or pond, and the words are used throughout the act to signify these subjects and as applicable to each and every one of them. The referee should not therefore have held that the engineer had no power to assess for injuring liability any lands or roads for any part of the proposed work north of the junction of Silver Creek and Ruscomb River. The Engineer was not, however, guided in making his report by the foregoing principles, and his report could not have been upheld by the referee, and the evidence was not sufficient to enable him with the consent of the engineer to amend so as to make the report conform to the principles. Per Osler, J. A. It is not necessary to vary the report of the referee. He was right in holding that the assessment could not stand in view of the decision in the Sutherland case, supra, which he and this court is bound to follow. I agree with the judgment of Gwynne, J., whose familiarity with the drainage laws of the Province, their growth and operation is well known. I think it is right to refer to the fact that a private act 1, Edw. VII., ch. 72, O., was recently passed to validate the by-law and assessment in question in the Sutherland case, notwithstanding the judgment of the Supreme Court of Canada, as well as the by-laws of other townships in conection with the drainage scheme, of which the Romney by law and assessment and form part. The general law as to the construction of the clauses of the drainage act expounded in the judgment of the Supreme Court is left unchanged, and while reasons of policy and peculiar circumstances may have existed sufficient to invite the interference of the legislature in the particular case, it cannot but be thought that (though we must not say that the legislature was inopis consili) it was nevertheless magnas interopes inops in permitting some of the recitals which are found in the preamble of the act to appear there ; such, for an example, as the statement that the action in Sutherland vs. Romney was brought by a joint stock company owning lands in the township, "not engaged in agricultural pursuits, but solely in the manufacture of cooperage stock," and setting forth the names of the Judges whose judgments were reversed by the Supreme Court, and of all the judges who took part in the judgment of the latter court, and of those who were absent and took no part in it. Statements of this kind have a novel appearance in the preamble even of a private act, as it is or should be impossible to suppose that the reasons suggested by them can have had any influence with the legislature. There is one precedent in Ontario legislation for counting the judges where the object has been to nullify a decision, but the precedent is a vicious one and ought not to be followed. Per Maclennan, J. A. The referee is bound by the decision in the Sutherland case, and, moreover, part of the drainage work which it is proposed to enlarge, improve and extend, and which lies wholly within the township of Rochester, is out of repair, while the other townships have kept the parts of the work within their limits in repair. It is clear that the latter townships cannot be assessed for benefit, and, if at all, only for outlet or injuring liability. Therefore they have a right to require the work in Rochester to be put in repair before the engineer is called upon to make an assessment for enlargement or extension. The report should be varied and appeal dismissed. Per Moss, J. A. The case of Sutherland vs. Romney must be accepted as governing in the similar cases arising under the same statutory enactment, but to quote the language of the Lord Chancellor in Quinn vs. Leatham. 1 Times L. R. at p. 75 : "There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found ; the other is, that a case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." Per Lister, J. A. The Sutherland case is a conclusive against the right of the appellants to in any way assess lands in the other townships for any part of the proposed work. Why s c. 75 should have been so framed as to make a difference between a purely artifical drainage work and one constructed in a natural watercourse I am unable to perceive. It may be that the legislature will, upon consideration, alter the section so as to bring the latter class of works within its provisions. I cannot assent to the view that a municipality failing to keep a drain within its own limits in repair, as required by sec. 70, sub-sec. 2, must, before proceeding under sec. 75, repair. Both classes of work may be authorized and provided for in a single by law. Report varied as above and appeal dismissed with costs.

Watson vs. Township of Dunwich.

Watson, Q. C., for plaintiff, appealed from judgment of Armour, C. J. O., in action to perpetually restrain defendants from cleaning out extension of outlet to and improvement of a ditch known as the Dunwich and Aldborough Government Drain number one north, passing plaintiff's land, in the latter township. The chief justice held that an injunction could not be obtained restraining defendants from proceeding under their by-law, as it was properly and legally passed and within their jurisdiction, and has not been quashed ; that the plaintiff's remedy was in damages as compensation for injury he might sustain. It was contended for plaintiff that he should have been allowed to produce evidence to show that in accepting the engineer's report, which is embodied in their by-law, the defendants were accepting a drainage scheme which did not provide a sufficient outlet, and that it is a condition precedent to accepting and confirming the engineer's report that there be an outlet *prima facie* sufficient ; that the plaintiff is not bound to wait until his lands are damaged before taking proceedings, and that he is not bound to arbitrate, nor to show that the by-law has been quashed. Order made that upon payment of costs of trial and appeal within one month plaintiff may amend and set up fraud. Plaintiff also to undertake to bring the action on for new trial at next sittings at St. Thomas. In default of payment and bringing on for new trial, motion dismissed with costs.