

The proceedings were initiated by the township of Malden. The township of Colchester did not appeal either to the Referee or this Court.

The instructions to the engineer are contained in the following resolution passed by the council of the township of Malden:—"Moved by Mr. Campbell, seconded by Mr. Young, that, whereas 'in a certain drainage action brought by one Mary E. Bondy and Gordon Bondy against the townships of Colchester South and Malden, the Drainage Referee held that the Long Marsh drain had not been carried to a sufficient outlet, and the said townships were therefore held liable in damages for overflow. That therefore, Alexander Baird, C.E., be and he is hereby instructed to make an examination and report upon the said drain, providing for the putting of the said drain in a proper state of repair, and carrying it to a sufficient outlet, so as not to further damage the lower lands.' Carried."

Fault is found by counsel for the appellant with the inclusion in this resolution of the enquiry as to the state of repair of the old drain, a subject provided for in the former by-law which could only be changed as pointed out in the Statute, see 10 Edw. VII. ch. 90, sec. 72. And the objection extends to what was subsequently done by the engineer under the resolution, which it is said has varied the provisions as to maintenance contained in the former by-law.

The mere reference in the resolution to the question of repair was at least harmless, and may even have been quite proper as being involved in the larger question of improved outlet. If, however, it had been followed by a variation of the former provisions as to maintenance a different and more serious question would have arisen. But, as is set out in the judgment of the learned Referee, whatever foundation the objection ever had was entirely removed before him by an amendment to the report, made with the consent of the engineer, so as to more clearly confine the provisions as to maintenance to the new work, which he said was what he had intended, but failed to clearly express.

The Bondy litigation had established that the Long Marsh drain had not been carried to a sufficient outlet and it was conceded on all hands that something should be done to correct the then existing state of affairs.