

knew that in the ordinary course of affairs there would be an accumulation of that material in the bottom of the ditch sufficient to cause an overflow. As a matter of fact there was an overflow there as soon as the water came down the drain, and I agree with Mr. Rogers that the cause of that overflow was the accumulation of this sand which had already occurred, following previous accumulations which had occurred while the contractor was doing his work and which had been removed by the contractor.

The specifications under which the work was being done gave the engineer power to change minor details in the work as it progressed. The contractor says that he and Mr. Rogers spoke of this material, that he was doing the work by the cubic yard, and that he had his scrapers and other plant there and that he would have been very pleased indeed to have lowered the grade of the ditch if the engineer had so instructed him. It was a matter for the engineer whether or not to give any such instructions before he consulted the council and obtained further authority from them. I would not have thought it necessary to do so in this case, where the cost would have been comparatively trifling.

I am satisfied upon the evidence that had the engineer then lowered the grade of the ditch as he proposes to lower it now the parties would not be in litigation, that by the expenditure of a comparatively trifling amount all this trouble could have been obviated.

The engineer knew that the drain was not going to work. As a matter of fact the drain was not of sufficient capacity, having regard to the soil at that particular point, and the extent of that particular class of soil there. These being the facts, I find that there was that kind of negligence on the part of the township in the original construction of the drain which is referred to in the several cases collected by Mr. Proctor in his book at pp. 170 and 171, and that the township is responsible for damages occasioned to the plaintiff by reason of such negligence in the original construction of the work.

Mr. Thompson argues that the plaintiff cannot recover for damages for original construction because of the fact that the work was completed more than two years before the commencement of the action, and he refers to *Thackeray v. Raleigh*, 25 A. R. 226. The distinction between that case and this is, that the *Thackeray Case* was one for damages for the taking of land and its injury and severance by the