REPORTS

OF THE

DECISIONS OF THE REFEREES APPOINTED FOR THE PURPOSE OF THE DRAINAGE LAWS,

AND OF THE

COURT OF APPEAL FOR ONTARIO,

IN CASES WHERE THE REFEREES' DECISIONS
HAVE BEEN APPEALED FROM, AS WELL AS
OF SOME OTHER IMPORTANT DECISIONS OF THE COURTS RELATIVE
TO THE DRAINAGE LAWS.

AND INCLUDING "THE MUNICIPAL DRAINAGE ACT" (R. S. O. 1897, CHAPTER 226)
AND "THE DITCHES AND WATERCOURSES ACT" (R. S. O. 1897, CHAPTER
285), ANNOTATED, WITH THE NAMES OF THE CASES BEARING
UPON THEM, REPORTED IN THIS VOLUME.

WITH A TABLE OF THE NAMES OF THE CASES REPORTED, A TABLE OF THE
NAMES OF THE CASES CITED AND A DIGEST OF
THE PRINCIPAL MATTERS.

By ALFRED HENRY CLARKE,
BARRISTER-AT-LAW,

AND

EDMUND I. SCULLY,
STENOGRAPHER FOR TRIALS BEFORE THE REFEREE.

WINDSOR.
1898

ECHO PRINTING CO.

I.

REFEREES

APPOINTED FOR THE PURPOSE OF THE DRAINAGE LAWS DURING THE PERIOD OF THESE REPORTS.

BYRON MOFFATT BRITTON, Q. C., of the City of Kingston; Appointed June 1st, 1891; resigned, 19th September, 1896.

THOMAS HODGINS, Q. C., of the City of Toronto; Appointed October 1st, 1896.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

CASES REPORTED.

TABLE

OF THE

NAMES OF CASES CITED IN THIS VOLUME.

CASES CITED.

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Names of Cases.	Where Reported.	Page of Vol.
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ERRATA ET ADDENDA.

The sign — following the number indicating the line signifies that it is to be reckoned from the bottom of the page.

Page 8, Line 11—for "Megarmvey" read "McGarvey."
" 8, " 10—after Stratford add "16 A. R. 5."
" 16, " 6 after company add "L. R."
" 16, " 18 for "Barm" read "Bann," and the same throughout the case.
" 16, " 16—add "s" to "case," and also "193."
" 46, " foot note (2) for "178" read "187."
" 46, " foot note (6) for "1 App. Cas. 384" read "2 A. C. 168."
" 58, " 7—for "claims" read "chains."
" 62, " 9 for "Maybee" read "Mabee."
" 62, " 10 for "Idlington" read "Idington."
" 145, " 19 after "counse" add "l."
" 226, " 14 for "vs." read "&."
" 279, " 9 for "action" read "section."
" 340, " 7—for "statuary" read "statutory."
" 340, " 1—after R. add "368."
" 340, " 14 for "McCummon" read "McCrimmon."
" 356, " 17 for "Wear" read "Weir."
" 410 11 for "intering" read "interfering."

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(PRIVY COUNCIL.)

Present—The Earl of Selborne, Lord Hobhouse, Lord Macnaghten and Sir Richard Couch.

Judicial Committee, 1893.
July 13, 14, 15; August 3.

CORPORATION OF RALEIGH, Defendants.
WILLIAMS AND ANOTHER, Plaintiffs.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Ontario Municipal Act of 1887 (R. S. O. Cap. 184)—Construction—Damages for Non-feasance—Mandamus—Notice in Writing—Remedy by Arbitration.

Under the Ontario Municipal Act of 1887 (R. S. O., Cap. 184) an action for damages lies against a municipality at the suit of any person who can show that he has sustained injury from the non-performance of the statutory duty of maintaining and repairing its drainage works.

Held, that sec. 583, sub-sec. 2, applies to a case which falls within sec. 586, and while prescribing a notice in writing as a condition precedent to a mandamus, does not on its true construction preclude an action for damages without such notice.

In an action brought without notice in writing against a municipality for damages for injury caused to the plaintiffs' lands and for a mandamus to prevent a recurrence of the injury:

Held, that so far as such injury was occasioned by the municipal drain and embankment being out of repair, or from their not being kept in such a state as to carry off in relief of plaintiffs' land all the water which the drain was capable of carrying off as originally constructed, the action was maintainable.

Held, further, that so far as the injury was occasioned by the negligent construction by the municipality under its statutory powers of another drain the action must be dismissed. The remedy in such case (see sec. 591) was by arbitration as directed by the statute.

Appeal by special leave from the Supreme Court (June 28, 1892) reversing a decree of the Court of Appeal for Ontario (June 30, 1891) and restoring the judgment of Ferguson, J., (Sept. 4, 1890), which was in favor of the respondents.

The following judgments were given by the Referee and by the different Courts:

REPORT AND FINDINGS OF THE SPECIAL REFEREE, A. BELL, DATED 20TH FEBRUARY, 1890.

I, Archibald Bell, of the Town of Chatham and County of Kent, Esquire, Judge of the County Court of the County of Kent, having taken upon me the burthen of the reference to me herein made and having heard all the evidence adduced by or on behalf of the said parties or either of them, and having in the presence of counsel for both of said parties made two personal examinations and inspections of the drains and premises and localities in question in this cause and having heard the parties by their respective counsel, do make this my report and findings on the matters so to me referred.

1. I find that the plaintiff, Sarah Anna Williams, is and has been for the past nine years lessee of the northerly one hundred and sixty acres of lot 12, in the fourth concession of the Township of Raleigh, in the County of Kent.

2. I find and report that a drain known as Government Drain Number One was constructed in the years 1870 to 1873 inclusive, along the easterly side of the road allowance between lots twelve and thirteen in the said township, commencing in the rear of the Lake lots and ending in the River Thames and lying immediately east of said lot Number twelve; and I find and report that as a part of the plan or scheme of said drain the earth taken thereout was to be thrown up (and as a matter of fact was thrown up) on the west side of said drain as an embankment in order thereby to prevent the water from said drain and the water flowing into it from the easterly or south-easterly direction from escaping westward on to the lands of said plaintiffs and others. And I find and report that it was the duty of said defendants to keep said drain properly cleaned out and free from obstruction and to keep said embankment in a fit and proper condition.

3. I do further find and report that for some years after the completion of said drain Number One and of said embankment the land of said plaintiffs heretofore mentioned was greatly benefited thereby and was rendered and became more fit for cultivation and that good crops were grown thereon.

4. I do further find and report that after the completion of said drain, and from time to time for the next ten years thereafter, the defendants constructed a number of other drains leading into said drain Number One and thereby brought down into the latter immense quantities of water, far beyond its capacity to carry off, and that as a result it became surcharged and from time to time overflowed the embankment on the west side thereof and that particularly in the years 1885, 1886, 1887 and 1889, and frequently several times in each of said years, the water thus brought down flowed on to and over the plaintiffs' said land and damaged and injured said lands and the crops thereon growing.

5. I do further find and report that said drain Number One has been allowed and permitted to become and has become and now is, through the sixth, fifth and that part of the fourth concession lying south of the Grand Trunk Railway, badly filled up with earth and silt and badly overgrown with grass and willows, and that its capa-

city has thereby become much diminished and impaired and is not and has not for the past five years been one-half of what it was when first completed, and that as a result of this condition and overflow of water on to and over plaintiffs' said lands and the damage and injury thereto has been much increased.

6. I do further find and report that by the construction of the Bell drain by the defendants in the year 1884, and particularly by the construction of an embankment on the westerly side thereof (and I find the construction of said embankment to have been a part of the plan of said Bell drain) a large body of water was brought down to the drain known as the Raleigh Plains drain, that would not otherwise have come there, and that the Raleigh Plains drain was thereby overcharged with water, and that in time of high water every year for the past five years (except the year 1888), and in some of these years several times in the year, the water thus brought down has flowed on to and over the plaintiffs' land, or by raising the general level of the water has caused other waters to flow on to and over the plaintiffs' said land that would not otherwise have gone there, and the plaintiffs' said land and crops have thereby been injured and damaged every year for the past five years (except the year 1888).

7. I do further find and report that for the additional waters brought down as mentioned in paragraphs 4 and 6 of this report, the defendants have provided no sufficient or proper outlet.

8. I do further find and report that the defendants have not kept the embankment on the westerly side of said No. 1 drain up to its original height, nor have they kept it up to the height that it was after the earth thrown up as aforesaid had become firm and settled, and when breaks have been made in the said embankment by the water overflowing as aforesaid, the defendants have permitted these breaks to remain for a long time wholly unrepaired, and when repaired they were repaired in an inefficient and inadequate manner and still left lower than the road bed on the north-west or south-east of said breaks, thereby enabling or permitting water to escape on to and to flow over the plaintiffs' said land and damage and injure the crops thereon that would otherwise have been carried down Number One drain to the River Thames.

9. I do further find and report that the defendants had sufficient notice from the plaintiffs to repair said drain Number One and said embankment, and that they failed and neglected so to do.

10. I do further find and report that the plaintiffs have failed to prove that they have sustained any injury caused by the construc-

tion by the defendants of the King drain, and do not award plaintiffs any damages therefrom arising.

11. I do further find and report that in times of very high water in the River Thames, the water therefrom was backed up Number One drain, or has risen so high as to prevent the water escaping therefrom and has thereby caused the water to overflow the said embankment, but I find that the defendants are not responsible for any damages or injury so caused, inasmuch as it would have taken place had said drain and embankment been properly constructed and maintained, and I award no damages for any injury so caused.

12. And I assess the damages of the plaintiff, Sarah Anna Williams, caused by the said wrongful acts and negligence of the defendants during the years 1885, 1886, 1887 and 1889 at the sum of eight hundred and fifty dollars, and I find and report that she is entitled to recover that sum from the said defendants.

13. And I do further find and report that the said plaintiff is entitled to a mandamus directing the said defendants to properly repair said drain Number One and to enlarge it sufficiently to provide for the additional water brought down as aforesaid, or to provide a proper and sufficient outlet by some other method, and to stop the additional flow of water brought down by the Bell drain as aforesaid, or provide for its escape by some other sufficient method, and to maintain the embankment on the west side of Number One drain at its original and proper height.

JUDGMENT OF THE HONORABLE MR. JUSTICE FERGUSON, DELIVERED 4TH SEPTEMBER, 1890.

The plaintiff Sarah Anna Williams claims damages from the defendants on the ground that the defendants, under the provisions of the various Drainage Acts and what is called the Government Drainage Act constructed large drains in the Township of Raleigh, and amongst others a large drain between lots 12 and 13 in the said township which runs into the River Thames from the 7th concession of the township, and adjoining the road on the east of the plaintiffs' farm, for which the land was assessed and taxed a large sum, which drain brought down a very large body of water that would not have come to the place naturally; that for four years prior to the commencement of this action the defendants negligently and improperly impeded and obstructed this drain and allowed the same "to be and to become" filled up and impeded and obstructed and out of repair, and incapable of carrying off the water brought down by it through the fifth, sixth and seventh concessions of the township: that the defendants made other drains leading large quantities of water into this drain which it was not capable of carrying off, and did not carry away, and that the defendants also destroyed, wore away, cut down, and impaired and caused, and suffered to be destroyed, worn away, cut down, and impaired the embankment of this drain on the east side of the plaintiffs' land, whereby the same was overflowed every year during the four years to the plaintiffs' injury, which the plaintiff states more or less in detail. And that the defendants also about three years before this action constructed another drain known as the Bell drain whereby water which would not otherwise have come upon the plaintiffs' land was drawn from a drain known as the Raleigh Plains drain, whereby a large quantity of water overflowed the plaintiffs' land, and rendered the same unfit for cultivation, etc., etc.

Damages are also claimed on the ground of negligence in the construction of a drain, known as the King drain, but the findings are against the plaintiff as to this, and there is now no contention about it.

As well as damages, a mandamus is also claimed. The action, the matter in dispute therein, and the trial therefor were referred to the Judge of the County Court of the County of Kent, under the provisions of the section corresponding to section 48 of the former Judicature Act, with full powers, etc., and, amongst others stated in the order, power to view the premises, report the same, and make his findings and base the same on his view, and on evidence, etc.

And having, as appears, twice inspected the *locus in quo* and taken a very large volume of evidence, the learned Referee made his report, embracing his findings, and awarding or assessing damages to the plaintiff, Sarah Anna Williams, $850.00. The report also finds that the plaintiff is entitled to a mandamus.

Lest any question or doubt should arise or be considered to exist, by reason of the general words of the order of reference, it was agreed before me that each of the matters in contention should be considered and taken to be "a question or issue of fact" within the meaning of section 102 of the present Act, and that the order of reference should be deemed sufficient for all purposes appertaining to the reference.

The present motion is made by the plaintiff to have judgment upon the report of the Referee. The defendants give notice of a motion opposing the motion for judgment, and also notice of a motion to set aside the report or award, stating grounds most voluminously. These motions were argued by counsel for the defendants with great vigour, and for a period of more than three days. The plaintiffs' counsel supported the award or report, saying that the whole matter was embraced in a small compass, and claimed judgment.

After having heard these oral arguments, I was calmly and modestly invited to peruse written arguments, that apparently were made use of before the learned Referee, which I have accordingly done, and I have also perused and examined the evidence and the whole case, as well as I have been able.

So far as the matters of fact have concern, my position seems to me to be this. As the learned Referee took the evidence, saw the witnesses, he had an opportunity to observe their respective demeanours, and inspected the premises. As I have said, before arriving at his conclusions, I shall not disturb, or attempt to disturb, his findings, unless I can see clearly that they are erroneous.

As to the matters of inference of fact, from facts admitted, proved beyond doubt, or undisputed, and as to questions of law, the position may be, and, I think is, quite different, for in these respects I may, I think, act upon my own opinions, without considering myself at a disadvantage.

The report finds that the plaintiff, Sarah Anna Williams, was, and had been for the then past nine years, lessee of the premises. As to this there was contention, it being asserted that, as the written lease or indenture of lease had expired, such was not the fact. Stating generally, what appears it is this. This plaintiff had undoubtedly been lessee in possession and cultivating the farm.

The time had expired, but the possession and cultivation, or endeavour to cultivate, continued, as also did the rent, and afterwards another lease was executed by the owner, showing the assent and willingness of the owner to her being considered throughout the lessee of the land. It was said then this lease was ante-dated, and was intended for the purposes of this action, and affidavits and letters were read on this subject, and charges of fraudulent intent made. I did not think, and I do not think, the matter of so great importance as was thought to be attached to it. As a matter of strict law as between landlord and tenant, the position might at one time perhaps be considered as that of a tenant from year to year, but I think it manifest that the parties did not so understand it or so consider it. This plaintiff was in possession farming, or endeavouring to farm the land, and paying rent the whole time, having entered under an Indenture of Lease, the landlord afterwards executing another one, adopting, to say the least of it, the position of landlord for the period in question. And I am not now trying a case made for setting aside an Indenture of Lease for alleged fraud, or the like, and I think this finding of the learned Referee should not be disturbed.

The second finding in the report has respect to the drain known as Government drain Number One. It is not, I think, needful that I should repeat the words of it here. I am not able upon the evidence, and all that appears before me, to say that this finding is wrong or erroneous, and I think it should not be disturbed. And so in regard to the third finding, which has reference to benefits to the plaintiffs' land derived from the construction of this Government drain Number One, for a period of years after its construction.

The fourth finding is that, after the completion of this drain, Government drain Number One, and from time to time for the next ten years thereafter, the defendants constructed a number of other drains leading into it, and thereby brought down into it immense quantities of water far beyond its capacity to carry off, and that as a result it became surcharged, and from time to time overflowed the embankment on the west side thereof, and that particularly in the years 1885, 1886, 1887 and 1889, and frequently several times in each of these years, the water thus brought down flowed on and over the plaintiffs' land and damaged and injured the same, and the crops theron growing. In my opinion the evidence in support of or rather supporting this is ample. I think there could not be any other finding upon the evidence, so far as this matter is concerned.

The fifth finding has reference to this drain being allowed and permitted to become badly filled up with earth and silt and badly overgrown with grass, weeds, and willows, its capacity being thereby much diminished and impaired, and the Referee finds that it has not for the past five years one half its capacity when originally constructed, the result being an overflow upon and injury to the plaintiffs' lands. This finding rests, I think, upon evidence that is entirely sufficient, and I cannot disturb it.

The sixth finding is in regard to the construction of the drain called the Bell drain, and is in plaintiffs' favor. I need not, I think repeat the words of it here. The evidence no doubt I think supports this finding. During the argument, however, a matter of law was urged particularly in regard to this drain, but it was the same as the contention or one contention as to the whole case, namely, that the drain had been constructed according to the by-law under the authority of which it was made, and this being so the defendants were not liable for any of the consequences of such construction. I entirely agree that if a drain be constructed, or any other act done according to lawful authority so to do, without negligence or other wrong in doing it, an action cannot be maintained for doing the act, and that in such a case, the matter being one of damage under the provisions of the Statutes, the person feeling himself aggrieved would be left for any remedy he might have to the compensation clauses, and arbitration under the provisions of the Acts. But where there is negligence in the construction of a drain or in the doing of a perfectly lawful work which operates an injury to a person, such person has his action for the negligence notwithstanding the compensation and arbitration clauses, and where a drain constructed, even though the work of constructing it in fact should be done in strict accordance with the by-law for its construction, the report of the Engineer, and with every other thing constituting a guide in its construction, yet if the effect is to bring down waters upon or direct or cast waters upon a man's land to his injury, and no sufficient or proper outlet or means of taking away such waters is provided for or made, so that the injury actually takes place, this is negligence in the construction of the drain. A corporation cannot in my opinion construct a drain, though in strict accordance with authority so to do so far as the actual construction is concerned, which has the effect of throwing waters upon a man's land to his injury without providing a proper outlet, and when he complains answer him by saying the work was constructed according to a by-law and therefore you have no remedy except perhaps by arbitration under the provisions of the Statutes. I think this proposition is supported by the cases Derinzy vs. Ottawa, 15 Ap. R. 712; Megarmvey vs. Strathroy, 10 Ap. R. 631; Coughlin vs. Ottawa, 1 Ap. R. 54; Pratt vs. Stratford; Preston vs. Camden, 14 Ap. R. 85, and other cases. On this subject I have perused every authority that counsel referred to and some others, and I think the proposition that I have stated is plainly to be extracted from these cases.

I think it shown that the construction of the Bell drain had the effect of diverting water and casting it upon the plaintiffs' land and that no proper outlet was provided for, and that in this there was negligence on the part of the defendants, and that for such negligence when it occasions an injury an action does lie. And I think that in constructing the drains that brought down the water to surcharge

Government drain Number One without providing a proper outlet for the same, there was negligence, and this occasioning an injury an action lies for it.

The seventh finding is that no proper outlet was provided for the additional waters referred to in the fourth and sixth findings or either of them. This finding cannot be disturbed.

The eighth finding has regard to the work of repair of the embankment of Government drain Number One, and the ninth finding is that the defendants had sufficient notice as to the repair of this and of the drain itself. The defendants' contentions on these subjects were, or were mainly (1) that the defendants were not bound to repair the embankment at all; (2) that they had received written notice to repair it, and had done so as far as required, and had received no subsequent notice; (3) that the notice given was not sufficient; and (4) an involved argument touching the subject of the Raleigh Plains drain intersecting and being lower than this drain. As to the first of these I take the view of the learned Referee that the drain and the embankment are to be considered to an extent at least as one, and I think the defendants were bound to keep the whole in repair.

As to the second I think it is not proved that the defendants repaired according to the written notice.

As to the third what is required is reasonable notice in writing, and although written notice was not given month after month or year after year, I think it sufficient. The law does not seem to require that such a notice should be of technical accuracy. It says "reasonable" notice in writing. The Referee has thought this notice reasonable and I am not prepared to say that he is wrong.

As to the fourth of these it seems to me not of any materiality so long as the alleged mischief was done by the negligent acts or omissions of the defendants.

It was contended on behalf of the defendants that the plaintiffs could not succeed because they had not by their evidence separated the sum of their damages into parcels corresponding to and occasioned by each one of the large number of drains constructed by the defendants, or not repaired by the defendants, which were the cause of the alleged injury, so that the defendants might be in a convenient position to raise the necessary amount of money by a rate upon those benefited by each drain, etc. But I cannot give effect to this contention. No authority was referred to in support of it, and it seems plain to me that in the circumstances of this case where the action is for a wrong, or several wrongs, this is matter entirely for the defendants themselves, and a thing with which the plaintiff has no concern.

During the elaborate and prolonged argument for the defence there were several other minor contentions, to none of which can I give affect, and I do not see that I am called upon to follow them out seriatim here.

It was, however, contended that even assuming that the plaintiffs are entitled to succeed on the merits, the amount to be recovered would be only the damages actually sustained less the value of the amount of benefit derived by the plaintiffs' land from or by reason of the system of drainage in the construction and maintenance of which was the alleged negligence of the defendants. The authority I apprehend relied on for this contention is the latter part of the Judgment in Northwood vs. Raleigh, 3 Ont. R. at 359 where the learned Judge expressed the opinion that the principle of the Acts relating to compensation for lands taken or used or injurously affected by the exercise of Municipal powers had its application to the claim in that case, that claim being so far as I can see of the same character as the claim in the present case. The Act there referred to was 36 Vic. ch. 48 section 373. A similiar enactment has since been and is still in force. The case Purpelly vs. Green Bay Co. 13 Wallace, 166, is referred to in support of the proposition that a serious interruption of the common and necessary use of property may be equivalent to the taking of it. This being apparently a reason or one of the reasons inducing the conclusion.

This opinion of the learned Judge does not appear to me to have been upon what was considered any one of the important points of the matter in contention there, but stated rather in concluding his judgment granting the substantial relief asked, and the facts of that case were not precisely the same as the facts in the present case. If it is assumed however that this judgment of that authority is a judgment upon the point, I shall be led to say that great as is my respect for the attainments and accuracy of the learned Judge who decided the case, I am unable to adopt the view or arrive at the same conclusion. I am not aware that there has been any decision of a Full Court or of an Appellate Court or any line of cases in support of the view. It is, in the present case, of very grave importance, for if I were to give effect to that view the consequence would be that the report would have to be referred back to have a very large volume of additional evidence taken, and judging from what appears of the past of the case, a very large expense, which should it happen or turn out that the view is not the correct one, would be money thrown away, and besides there would be much delay. These considerations induce me to offer my own opinion on the subject and for the present to act upon it, I thinking that I am not actually bound by the element of that decision to which I have alluded.

I think there is a very great difference between cases falling under the provisions for compensation for lands taken, &c., in the exercise of Municipal powers, and cases such as the present case is. In the former cases the owner is simply owner of the lands having paid or become liable to pay nothing respecting the works, &c., the subject of the exercise of the power by the Municipality. He is simply the owner of the property and it is as it appears to me perfectly fair and just when he seeks the compensation to say to him that the value of the advantage or benefit derived or to be derived from the work or contemplated work should be deducted, as the real injury to him is manifestly the difference between the two amounts if it be assumed that the wrong exceeds the benefit. But in the latter cases, that is cases such as the present one is, the owner in addition to having been or being the proprietor of the land has paid, or has been assessed and rendered liable to pay, and for all present purposes is in the same position as if he had paid his proper proportion of the cost of the work, and this on the ground that there is an estimated proportionate advantage to his land derived or to be derived from the proper execution of the work; and even if it be assumed that the amount of advantage to his land actually exceeds the amount that he thus pays or is bound to pay, he is nevertheless entitled to the whole advantage or benefit at this price, so that in a case such as the present one is, the proprieter is the owner of the land plus all the advantages or benefit derived or to be derived from the proper construction of the works, and I am entirely unable to see how he can properly be made to pay for this benefit or advantage again by having it deducted from the amount of the damages which he has suffered or sustained by reason of negligence or a wrong or several wrongs, and I cannot see that the principle of the Act relating to compensation for lands taken, etc., etc., can apply. I think the plaintiff entitled to the whole of the damages sustained without any deduction on this ground. In such a case the owner's property is the land improved or enhanced in value by the advantage or benefit that he has paid for, and to this the injury occurs by reason of the negligence or wrong.

The defendants held another contention, which was this. They said it was shown by the evidence that the landlord had made certain deduction from the rent to be paid by the plaintiffs for the premises;

that these deductions were made on account of the injuries in respect of which the defendants are now sued; that the plaintiffs were therefore compensated for their losses, and have now no claim against the defendants, even assuming that the defendants would otherwise have been liable to the plaintiffs.

At the argument I failed to see, and I cannot now see, the force of this contention, if any it has. As the matter appears to me the plaintiffs were entitled to the proper use of these premises, and even if I assume that such deductions were made by the landlord, a thing which I think is not made very clear, I cannot see how it should make any difference. The plaintiffs had the right on same terms as between them and their lessor, and I do not see that these terms or any change made respecting them can change or make any difference in the position of the defendants. If the defendants were able to show a privity, and that the lessor as their agent or for them, they adopting his act, compensated the plaintiffs in part, the matter might be different. But nothing of the kind appears. My opinion is against this contention of the defendants.

I do not feel called upon to pursue the matter in contention further or with greater particularity. I am of the opinion that the report of the learned Referee should be affirmed, and that both motions of the defendants should be dismissed with costs. I think judgment should be entered for the plaintiffs against the defendants and for the sum of $850 damages to the plaintiff, Sarah Anna Williams, as found and assessed by the 12th paragraph of the report.

As to the mandamus, counsel for the plaintiff said that owing to certain contemplated improvements in respect of the Raleigh Plains drain which it is expected will have a very salutary effect, and probably accomplish or bring about all that is desired by the plaintiffs, he would not now press for the mandamus, but only require that if need be he should have leave to apply reserved. I did not think there was any necessity for reserving such leave, but counsel still desiring it, for greater certainty at least, there is if necessary leave to the plaintiffs to apply.

The plaintiffs are entitled to the costs of the action to be paid by the defendants. If, however, any costs have been specifically incurred by the plaintiffs in respect of the claim made, but not sustained, in regard to the King drain referred to in the seventh paragraph of the statement of claim, and the tenth clause of the report, these should be deducted, or rather not allowed, to the plaintiffs, and if the defendants have specifically incurred proper costs in regard to this subject it appears to me that they are entitled to be allowed such costs, which may conveniently be set off *pro tanto*.

Order accordingly.

JUDGMENT OF THE COURT OF APPEAL FOR ONTARIO, DELIVERED ON THE 30TH DAY OF JUNE, 1891.

Hagarty, C. J. O.:—I am of opinion that a Corporation adopting and carrying out a drainage scheme, duly presented to them by a surveyor under the statute, cannot be held responsible in damages, because the scheme may prove erroneous and inefficient in some important particular—e.g., the not providing a sufficient outlet for the waters which it is designed to carry off. They are held responsible by action for negligence in the execution of the work; but having duly executed it according to its provisions, it is not negligence in them that it turns out to be wholly inefficient or useless.

In other words, the statute does not make them responsible for the errors or unskilfulness of the drainage scheme duly adopted by them.

In the late case of Township of Sombra vs. Chatham this principle was fully recognised.

Parties injured must resort to the arbitration process.

I am unable to agree with the learned trial Judge, who held that even where the work was done in strict accordance with the by-law, and the report of the engineer, "Yet if the effect is to bring down water upon a man's land to his injury, and no sufficient or proper outlet or means of taking away such water is provided or made, so that the injury actually takes place, this is negligence in the construction of the drain."

This doctrine would thus make the Corporation and the ratepayers at large responsible for the wisdom of the surveyor's scheme.

I do not think any of the cases cited can support this view.

The case is widely different when a council of its own motion initiates and carries out a work which in its result may operate injuriously to a property owner, and the case (as here) of their carrying out the statutable powers conferred by the drainage legislation under the special machinery provided for the improvement of a specified area of land—on the petition of the majority—which area, for better or for worse, has to risk the profit or the loss of the proposed project.

It is the surveyor who has to devise the scheme of improvements, and it is for the Corporation to carry it into execution. Its failure to answer its purpose cannot in itself be urged as negligence by the Corporation.

I agree in allowing the appeal. I think, also, that the notice to repair was insufficient.

Burton, J. A.:—As I understand the admissions made for the purpose of this Appeal and the course taken on the argument, there are only now two points for our consideration. 1st. Whether an action will lie for negligence against the defendants "in the construction of the Bell drain" in consequence, as the Referee has found, "of a large body of water being brought down by it to the "Raleigh Plains drain that would not otherwise have come there, "and the latter drain being in consequence overcharged with water "and in time of high water the water then brought down having "flowed on to and over the plaintiffs' land, or by raising the general "level of the water having caused other waters to flow on to and "over the plaintiffs' land that would not otherwise have gone there "to the injury of the plaintiff"?

In other words, that the defendants are guilty of actionable negligence, because, although duly authorized by by-law to make the Bell drain in the way they have constructed it, they did not enlarge the Raleigh Plains drain to the extent requisite to take off this additional flow of water which it is admitted could only be done at an expense of many thousands of dollars and which the defendants had no power to do, or resort to some other mode of relieving the Raleigh Plains drain of that additional flow of water.

2nd. Whether they are liable for non-repair of the embankment of Government drain Number One upon the facts in evidence?

Upon the first of these contentions it is conceded that the plaintiffs are entitled to proceed for compensation by arbitration under the Act, but it is contended that they are not confined to that remedy.

The learned Judge has found, upon his reading of certain cases decided in this Court, that even though the works were done under competent authority, the defendants are liable to an action if their effect is to bring waters upon a man's lands which would not otherwise have come there. I differed from the rest of the Court in two of the cases referred to, but they are nevertheless binding upon me, and if I thought that this case was governed by those decisions I should be bound, of course, to follow them.

Whether those cases were rightly or wrongly decided I do not think with great respect that they are authority for the position that a company or corporation, empowered to execute a work that in its operations may do damage to others, is liable to an action unless it has exceeded the powers it possessed or has negligently exercised those powers.

The case of Coghlan vs. Ottawa (1 O. A. R. 54), which is the one most favorable to the plaintiff's contention as I understand it, decides nothing more than this—that the defendants, not under a by-law but under their general jurisdiction, undertook to connect two drains with the plaintiff's drain, which was too small to carry off the water thus brought to it. They might have avoided the plaintiff's drain altogether, but they chose to bring the water directly on to the plaintiffs' land under the erroneous belief that his drain was large enough to take it away, in which they were mistaken, and the jury found it was such a mistake as amounted to negligence. If they had been expressly authorized by Act of Parliament to carry off the water in that way, and had strictly pursued the authority, such a question could not properly have been submitted to the jury.

In McGarvey vs. Strathroy (10 O. A. R. 631), it was held not to be a case for compensation, as if the work had been done properly and carefully, and not as the learned Judge found, in a negligent and unskilful manner, the injury to the plaintiff would not have occurred.

The by-law, not having been moved against, the case may be considered precisely in the same way as if the work had been done under the provisions of a special Act of Parliament defining the work as it has been done here.

The law appears now to be well settled that when a corporation or individuals have done no more than the Legislature have authorized them to do, and damage results, no action lies, even although there may be no clauses in the Act affording compensation. No action at law will lie unless there be a legal injury and resulting damage; the only obligation must be found directly or by necessary implication in the language of the law under which they are acting. The injury cannot be in making the drain and bringing down the water, for that was what was intended and what they are expressly authorized to do. It is said that they should have gone to a very large expenditure of money, which they have no means of raising, in order to carry off this water by enlarging another drain, which they have no authority under this or any other by-law to do.

I think the same answer can be given to that contention as was given by the Exchequer Chamber in England to Mr. Justice Hannen's suggestion in the Court below in Dunn vs. The Birmingham Canal Company (8 Q. B. 51), that that was not a case for compensation but for action.

The remark attributed to him was:—"It was, therefore, a wrongful act on their part to keep the water in the canal without having taken the means in their power, by the expenditure of a certain sum of money, to prevent the mischief which has happened. The defendants knew, or ought to have known, that the probable result of working the mines would be to let the water through."

That answer is that there was no obligation to incur such expenditure, and that the party sustaining damage must resort to the compensation clause for his remedy, if any he has.

The books abound with cases to show that mere private inconvenience or loss is not to be made the subject of an action when the act from which it arises has been authorized by Act of Parliament. I refer, among others, to—The British Plate Company vs. Meredith, 4 T. R. 794; The Caledonian Railway vs. Ogilvy, 2 Macq. Sc. App. 229; Vaughan vs. The Taff Vale Railway Company, 5 H. & N. 679; Geddes vs. The Barm Reservoir Company, 3 App. Cases 430; Hammersmith Railway Company vs. Brand, L. R. 4 H. of L. 171.

The case of Hill vs. Metropolitan, 6 App. Case, decides merely that the Statute did not authorize the appellants to create a nuisance for the purpose of, and as incidental to, the maintenance of a small-pox hospital in a particular locality.

In truth, that case is a very strong case against the plaintiffs.

Lord Selborne there says:—

"If the Legislature had authorized some compulsory interference with private rights of property within local limits which it might have thought fit to define for the purpose of establishing this asylum to be used for the reception of patients suffering from small-pox or other infectious disorders, and had provided for compensation to those who might be thereby injuriously affected, the case might be like Regina vs. Pease and Hammersmith vs. Brand. No person outside the Statutory line of compensation, even if the use of the asylum in the manner authorised by the Statute, had been productive of serious damage to him, could then have obtained any relief or remedy upon the footing that what the Statute authorised was a legal nuisance to himself or in itself an actionable wrong."

Geddes vs. The Barm Reservoir cited by Mr. Douglas does not seem to me to be any exception to the general rule.

The Act of Parliament in that case was very inartificially framed, and led to the difference of opinion which existed among the Judges of the several Courts before which it came, but which in the Exchequer Chamber was narrowed to the one point of whether or not the defendants had power under their Act to cleanse, deepen and scour the River Muddock, into which they were bound to restore the waters previously taken from that and other rivers to form their reservoir; if they had no power to deepen or cleanse that river, then, although the effect of their bringing the additional water into it was to injure the plaintiff and other proprietors on the side of the river, they would not have been liable for damages for doing that which the Act of Parliament authorised, namely, pouring part of the water of the reservoir into the Muddock in order that it might go to the Barm. If, however, as the House of Lords decided, they had such power, it was held to be negligence within the rule not to exercise that power and avoid the injury.

I have not overlooked Mr. Walker's argument as to the effect of S. 585 and the power given by it to the municipality as he contends to deepen and enlarge the plaintiff's drain, but I think that contention is not tenable—the outlet of this drain was intended to be the plaintiff's drain; if the effect of that is to overcharge that drain causing damage, resort must be had to the compensation clause or further legislative action on the part of the Council.

The other case cited by him of Gilbert vs. The Corporation of Trinity House (17 Q. B. D. 795) establishes no new principle, but merely affirms the principle that whosoever undertakes the performance of or is bound to perform duties, whether they are duties imposed by reason of the possession of property or however they may arise, is liable for injuries caused by the negligent discharge of those duties.

Here it is not shown that there has been any excess of authority on the part of the defendants or that they had any power under this or any other by-law to widen or deepen the Raleigh Plains drain, and therefore the remedy is misconceived.

The other question as to the non-repair of the embankment of the Government drain Number One.

Their liability upon this point depends upon S. 31 of chap. 36, ss. 3.

It is contended by the defendants that the embankment in question forms no part of the works, that the earth thrown from the drain was thrown upon the highway, and that the only liability of the defendants was to keep that highway in repair; but however that may be, and assuming for the present that such a liability exists, it is only on a refusal or neglect to repair after reasonable notice in writing by some one interested, and who is injuriously effected thereby, that any liability arises.

The only written notice proved was given in June, 1883, and the defendants complied with that notice by making repairs which presumably were sufficient at the time.

The learned referee has indeed found that there was sufficient notice to repair, and a refusal and neglect, but it is found without any evidence to warrant it, and cannot be sustained.

I am of opinion therefore that the action fails, and that the appeal should be allowed.

This objection should have been urged at the trial, and a ruling obtained upon it, and thus the expenses of the reference avoided. These have been thrown away and ought not to be allowed to the defendants, and for the same reason we should disallow them the costs of the appeal.

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Maclennan, J.A., concurred in the foregoing reasons for judgment.

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Osler J.A.:—The plaintiff goes upon two causes of action; one arising out of the non-repair of the Government drain Number One, and the other for damage caused by the construction of the Bell drain.

On the case coming on for trial an order was made by consent of parties, that “the action and the matters in dispute therein, and “the trial thereof should be referred to Judge Bell, who should try “the same as if referred under the section corresponding to Section “48 of the Judicature Act, and make his report and assess damages, “and have all the powers conferred by Rule of Court for a referee or “arbitrator under said section, and might view the premises and re-“port the same, and make his findings and base the same on view “and on evidence.” Costs were reserved until the Judge should have made his report, and he was to be paid his fees for said reference as an arbitrator, in the first instance by the plaintiffs.

It is very much to be wished that parties would exercise more care in drawing orders of reference at the trial. The order I have just set out is not in terms or in substance authorised by sections 101 or 102 of the Judicature Act, R. S. O. (1887), ch. 44, the latter being the one "corresponding to section 48 of the (former) Judicature "Act." What the section provides is that any question or issue of fact, or any question of account arising in the action, may, by consent, in any action be referred for trial. Here the consent is that the action and the matters in dispute therein, that is all questions of fact and of law, shall be referred. But for the remarkable Rule of Court, No. 550, which is one of those new rules for which the judges are not responsible, but which were adopted by the Legislature when confirming the Revised Statutes, I should have had no difficulty in holding this to be a reference by consent, directed by the judge at the trial, a form of reference with which we are all perfectly familiar; which was extremely simple and very easily enforced. But the Rule I have noticed declares that "the Court will not refer to arbitration," and in the face of this and of the reference in the order to section 102 of the Judicature Act and of the subsequent conduct of the parties, we cannot deal with the award as if made upon submission by consent. It is said in the Judgment of my Brother Ferguson, that in order to prevent doubts it had been agreed before him "that each of "the matters in contention should be considered and taken to be a "question or issue of fact within the meaning of section 102, and that "the order of reference should be deemed sufficient for all purposes "appertaining to the reference." The case, therefore, takes the shape of an appeal from the referee's findings upon the facts, and a motion to set aside his report, and there is also a motion by the plaintiff to enter judgment in his favor for the damages assessed.

So far as the referee's findings of fact are concerned I am of opinion, after fully considering the evidence, that we ought not to disturb them. He has given the case much attention; has viewed the premises as he was required to do, and I think the evidence warrants the conclusions he has arrived at. There are, however, great obstacles in the way of the plaintiffs' recovery as the case at present stands.

She has, or rather presents, two distinct causes of action; one connected with the Bell drain, the other with the Government drain Number One. With regard to the former I fear it must be said that she has followed it in a forum which has no jurisdiction to entertain it. It is expressly found by the referee and it admits of no controversy, that the construction of an embankment on the westerly side of the Bell drain which is complained of as causing water to overflow the plaintiffs' land, was a part of the drainage scheme or plan presented to the council in the report of the engineer and adopted by the by-law under the authority of which the drain was constructed. Such a scheme and such a by-law the council has power under the Municipal Act to adopt and to pass, and for the consequences, allowing that the work itself was carried out without negligence, an action lies not against them. If no remedy has been given the party suffering must submit to his loss. If there is a remedy it must be followed in the prescribed manner. As Lord Hatherley said in the well known case of Geddes vs. Proprietors of Barm Reservoir, three Appeal Cases, 430, 438 : "If a company has done nothing but what the Act "authorised" to "execution of those powers." Then it is expressly enacted by section 591 that if a dispute arises between an individual and a municipality as to damages alleged to have been done to his property in the construction of drainage works or consequent thereon then the individual complaining may refer the matter to arbitration as provided in the Act.

This is a clear declaration of the intention of the Legislature that an action is not to be brought to recover such damage. I am unable with deference to my learned Brother Ferguson to agree that it is the duty of the municipality to revise, as it were, the scheme or plan of drainage presented by their engineer. They are asked by petition to do certain work, and they set their officer in motion to prepare a plan and estimates for carrying it out. If damage results in carrying out, without negligence, the scheme or plan devised by him and adopted by their by-law it appears to me to be such damage as is contemplated by section 591, and to be the subject of arbitration. Therefore, as regards the damages arising from the construction of the Bell drain, the action fails. I cannot help saying that when the course which this case has taken is looked at, it is painful to be compelled so to decide. It is admitted (subject to an utterly indefensible objection which has been made to the principle on which the damages have been assessed) that the plaintiff has sustained the damages found by the referee. These damages have practically been ascertained by arbitration, though no doubt not by three arbitrators, but that is not a matter of principle as the parties can agree upon one, as they have done here. Nothing is really wrong, but the form in which the remedy has been followed and no extra costs have been incurred except in carrying on the action to the hearing. The defence has been raised on the record, but its decision has been reserved until after the whole costs of the reference have been incurred. This is a thing which ought not to be. It is not the first time it has occurred, and it is a reproach to the administration of justice.

The notion that claims of this nature should be the subject of arbitration, and not of an action, is, though it has apparently as yet the sanction of the legislature, a mere fetish, an adherence to a now useless relic of a time, when arbitrations were less expensive than they now are, and when they could not be pursued from court to court after award made as slowly and as far as proceedings in an action. If there still be virtue in the term arbitration there can be no reason why, when parties have commenced their proceedings by action, they should not at any stage before or at the trial be referred, or why the error should not be sufficiently corrected by a proper disposition of the costs.

The other branch of the plaintiffs' case stands on another footing. She complains of the neglect of the defendants after due notice to make proper repairs to the Government drain Number One. I agree, as I have said, with the Referee's findings of the fact in the 2nd, 4th, 5th, 8th and 9th paragraphs of his report, and the plaintiff is entitled to recover whatever damages she can prove to have resulted from the omission to repair this particular drain after notice. The difficulty is that the learned Arbitrator has not severed the damages, and so it does not appear what part of the sum which has been assessed is properly attributable to the damage caused by drain Number One, and for which the municipality will be liable under section 31 R. S. O. (1887), ch. 36, The Ontario Drainage Act. Whether our recent decision in the case of Sombra vs. Chatham applies in the case of a drain constructed under that Act seems not necessary to consider in view of the fate of the appeal. I think the proper order to make is to allow the appeal in part, declaring the defendants not liable in this action in respect of the damage caused by the construction of the works connected with the Bell drain and referring the case back to the Referee to find and report what damage has been sustained by the omission to repair the Number One drain, reserving further directions and costs.

If the appeal is to be allowed I thing there should be no costs of the proceedings before the Referee or of this appeal.

ARGUMENT OF COUNSEL AND JUDGMENT OF THE SUPREME COURT OF CANADA, DELIVERED THE 28TH OF JUNE, 1892; REPORTED IN THE SUPREME COURT REPORTS, VOL. 21, PAGE 103.

Christopher Robinson, Q. C., and Douglas, Q. C., for the appellants, cited the following authorities: Rowe vs. The Township of Rochester (1); Mallot vs. Township of Mersea (2); McGarvey vs. Town of Strathroy (3); Coghlan vs. City of Ottawa (4); Coe vs. Wise (5); Geddis vs. Proprietors of Bann Reservoir (6).

Wilson, Q. C., for the respondents. As to liability generally for negligence see In re McLean and Township of Ops (7); Beer vs. Stroud (8).

The by-law justified the council in the construction of the work. Hopkins vs. Mayor of Swansea (1); Heland vs. City of Lowell (2); The Queen vs. Osler (3).

Plaintiffs are not entitled to a mandamus. Scott vs. Corporation of Peterboro' (4).

As to necessity of notice see Chrysler vs. Township of Sarnia (5); Luney vs. Essery (6).

See also Drummond vs. City of Montreal (7); Preston vs. Camden (8); Derinzy vs. City of Ottawa (9).

Sir W. J. Ritchie, C. J.—I concur in the judgment prepared by Mr. Justice Patterson and in the conclusion at which he has arrived.

Strong, J.—I concur in the judgment of my brother Gwynne.

Taschereau, J.—I will not take part in the judgment.

Gwynne, J.—A drain known as Government drain Number One in the Township of Raleigh was commenced in the year 1870 and completed in 1873, on the side line between lots 12 and 13, commencing in the 12th concession and extending northerly until it had its outlet into the River Thames in the 3rd concession of the said township. This drain was constructed under the provisions of the Ontario Drainage Act, 33 Vic. ch. 2. By that Act it was enacted that after the completion of a work made under the provisions of the Act the arbitrators acting under the Ontario Public Works Act, 32

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(1) 29 U.C.Q.B. 590; 22 U.C.C. P. 319.
(2) 9 O.R. 611.
(3) 10 Ont. App. R. 631.
(4) 1 Ont. App. R. 54.
(5) L. R. 1 Q. B. 711.
(6) 3 App. Cas. 430.
(7) 45 U.C. Q.B. 325.
(8) 19 O. R. 10.

(1) 4 M. & W. 640.
(2) 3 Allen (Mass.) 408.
(3) 32 U.C.Q.B. 332.
(4) 19 U.C.Q.B. 473.
(5) 15 O. R. 182.
(6) 10 P. R. Ont. 285.
(7) 1 App. Cas. 412.
(8) 14 Ont. App. R. 85.
(9) 15 Ont. App. R. 712.

Vic. ch. 28, should make an award, which should be deposited with the Commissioner of Public Works and a copy with the registrar of the county in which the lands to which the award relates are situate, and another copy with the clerk of the township or other municipality in which such lands are situate, to remain forever deposited with the records of such municipality, in which award should be specified the proportions of the total amount of the sums expended in and about the works as executed and which should be payable in respect of the several parcels or lots of land drained or improved, and also the proportion in which the said several parcels or lots and the proprietors thereof should in future be annually charged towards the costs and expenses which might from time to time be incurred in maintaining, cleaning and keeping in repair the drains and drainage works executed under the provisions of the Act. By an amendment of this Act passed on the 15th February, 1871—34 Vic. ch. 22—it was enacted that the municipal council of any township, etc., whose roads might be benefited by the drainage or improvements referred to in the Act or the works incidental thereto, and such roads, should be deemed to be within the provisions of the Act. The effect of this clause was to make municipal councils and their roads liable to contribute to the original cost of a work and also to the annual charge for maintenance and repair equally as the lands of individuals benefited by the work and their proprietors were. By an Act passed on the 29th of March, 1873—36 Vic. ch. 38—the Act 33 Vic. ch. 2 was repealed, except as to drainage works executed thereunder in respect of which an award has been made, and new provisions were made enabling the Commissioner of Public Works to undertake drainage works, on the application of the council of any municipality, or on the petition of the majority of all the owners, or of a majority of the owners as shown by the last revised assessment roll in any municipality to be resident on the property described in the petition, the whole or a part of which is to be benefited by the drainage, and to continue drainage works begun in one municipality into another; and making provision for charging the cost of constructing and maintaining such works upon the lands in both which are benefited by a drain begun in one municipality and continued into another, or by a drain constructed wholly within the limits of one municipality, but along the town line separating it from another municipality.

The drain Number One, when it reached the 6th concession of the township, crossed a small watercourse known now as the Raleigh Plains drain, which coming from an easterly and south-easterly direction crossed the side line between lots Nos. 12 and 13, and crossing the 6th, 5th and 4th concessions in a north-westerly direction discharged its waters into a stream called Jeanette's Creek. The drain Number One was constructed on this side line, but on its eastern side, and the earth from the drain was thrown up and spread on the western part of the side line to form an embankment to the drain, whereby the part of the road reserved for travel was raised in height; where this watercourse known as the Raleigh Plains drain crossed the side line that watercourse was stopped up by the embankment of the drain Number One, and the waters coming down from the east were conducted down the drain Number One into the Thames. This stopping up of the Raleigh Plains drain at its junction with drain Number One does not appear to have answered the purpose intended or expected to have been attained by it, for in 1875 the council of the municipality re-opened the Raleigh Plains drain there and deepened it and enlarged and strengthened it on the west of the side line between lots 12 and 13, under a by-law passed under the provisions of the Municipal Act, 36 Vic. ch. 48, and thereby provided better means of carrying off the waters coming down the Raleigh Plains drain from the east and down the drain Number One from the south than had been provided by drain Number One as constructed.

By this Act, 36 Vic. ch. 48, the provisions of which were consolidated in ch. 174 of the R. S. O. 1877, and re-enacted in 46 Vic. ch. 18, and consolidated again in ch. 184 of the R. S. O. of 1887, it was enacted that upon a petition presented to the council as provided in the Act, petitioning the council

> for the deepening or straightening of any stream, creek or watercourse, or for the drainage of any property, or for the removal of any obstruction, &c., &c., the council may procure an engineer or provincial land surveyor to make an examination of the stream, creek or watercourse proposed to be deepened or straightened, or of the locality proposed to be drained, and may procure plans and estimates to be made of the work by such engineer or surveyor and an assessment by such engineer or surveyor of the real property to be benefited by such deepening or drainage, stating as nearly as may be in the opinion of such engineer or surveyor the proportion of benefit to be derived by such deepening or drainage by every road and lot or portion of lot, and if the council be of opinion that the proposed work, or a portion thereof, would be desirable, the council may pass a by-law for providing for the deepening of the stream, creek or watercourse or the draining of the locality.

The Act then gave a form of by-law to be passed which contained a recital:

> That the council are of opinion that the drainage of the locality described, or the deepening of such stream, creek or watercourse, as the case may be, is desirable.

Then by sec. 586 of 46 Vic. ch. 18, as amended by 48 Vic. ch. 39, sec. 27, now sec. 585 of ch. 184 of R. S. O. of 1887, it was enacted as follows:

> In any case wherein the better to maintain any drain constructed under the provisions of the Ontario Drainage Act, 33 Vic. ch. 2, and amendments thereto, or of the Ontario Drainage Act of 1873, or of the revised statute respecting the expenditure of public money for drainage works, or to prevent damage to adjacent lands, it shall be deemed expedient to change the course of such drain or make a new outlet or otherwise improve or alter the drain, the council of the municipality or of any of the municipalities, whose duty it is to preserve and maintain the said drain, may, on the report of an engineer appointed by them to examine and report on such drain, undertake and complete the alterations and improvements specified in the report under the provisions of sections 570 to 583 (of the Act of 46 Vic. ch. 18) inclusive, without the petition required by section 570.

That is to say without any petition for such alteration. Then by section 587 of 46 Vic. ch. 18 it was enacted that :

> In any case wherein, after such work is fully made and completed, the same has not been continued into any other municipality than that in which the same was commenced, or wherein the lands or roads of any such other municipality are not benefited by such work, it shall be the duty of the municipality making such work to preserve, maintain and keep in repair the same at the expense of the lots, parts of lots and roads as the case may be as agreed upon and shown in the by-law when finally passed.

And by section 589, it was enacted that :

> Where the repairs required to be made under section 587 are so extensive that the municipal council does not deem it expedient to levy the costs thereof in one year the said council may pass a by-law to borrow upon debentures of the municipality the funds necessary for the work, and shall assess and levy upon the property benefited a special rate sufficient for the payment of the principal and interest of the debentures, and the by-law shall not require the assent of the electors.

Then by 48 Vic. ch. 39, section 26, the provisions of these sections 587 and 589 of 46 Vic. ch. 18 are declared to apply to drains constructed under the provisions of the Ontario Drainage Act, 33 Vic. ch. 2, and amendments thereto, or of the Ontario Drainage Act, 1873, or of the revised statute respecting the expenditure of public money for drainage works, as well as to the work to which the said sections now apply ; and, further, it was by the section enacted that :

> The deepening or widening of a drain in order to enable it to carry off the water it was originally designed to carry off, shall be deemed to be a work of preservation, maintenance or keeping in repair within the meaning of sections 584 and 587.

These sections, 587 and 589 of 46 Vic. ch. 18, as amended by 48 Vic. ch. 39, section 26, are now to be found in section 586 and 587 of ch. 184 of the R. S. O., 1887.

Lot No. 12 in the 4th concession of the Township of Raleigh, was assessed for and contributed to the construction of the above Government drain Number One, and to the deepening, enlarging and straightening of the Raleigh Plains drain as made under the municipal by-law in that behalf in 1875. From the time of the completion of these two drains the lot No. 12 continued to be dry and capable of cultivation until year 1883 ; but in the interval between the completion of the Raleigh Plains drain improvement and the year 1883 the municipal corporation of the Township of Raleigh constructed, under divers by-laws passed by the municipal council under the provisions of the Municipal Institutions Act, divers other drains which were made to empty their waters into the said drain Number One, the effect of which in progress of time was that by reason of the new drains bringing down more water, and at a greater speed, into the said drain Number One than that drain could retain the embankment of drain Number One was broken down and the lot 12 in the 4th concession of Raleigh, of which the plaintiff was tenant, became flooded and unfit for cultivation and continued so to be for some time. The defendants, upon a notice given to them on behalf of the plaintiff, proceeded to repair the breach so made but never restored the embankment to the height and efficient condition in which it was originally constructed. Like breaches from the same cause took place in divers places of the embankment in the years 1885-6 and 7, attended with like consequential flooding upon and damage to the plaintiff's land on said lot 12. In the year 1884 the municipal council of the Township, under the provisions of the Consolidated Municipal Act of 1883, 46 Vic. ch. 18, passed a by-law for the construction of, and constructed thereunder in 1885,

a tap drain from a certain other drain called Government Drain Number Two along the line of lots 10 and 11 in the 6th concession of Raleigh and along the line between the lands of Mr. Dunn and Mr. Huthnance in the 5th concession to the Raleigh Plains drain, and made a dam on lot 9 in the 7th concession to separate the waters of the Kersey drain from the water brought down the Buxton road.

This tap drain so constructed was little short of a mile in length, and is called the Bell drain. In the month of January, 1888, the plaintiff, then still being lessee of the lot 12 in the 4th concession of Raleigh, brought an action against the defendants for injury to her land occasioned by the waters coming down the said drain Number One breaking through the embankment of that drain on to the plaintiff's land in the years 1885-6 and 7, and by the waters brought down by the Bell drain into the Raleigh Plains drain in excess of what the Raleigh Plains drain in its then condition could carry off and which were thereby backed up the Raleigh Plains drain against the stream and caused to overflow the plaintiff's land in 1886 and 1887. The plaintiff's action was founded upon the contention that the drains which the defendants were under a statutory obligation from year to year to cleanse, preserve, maintain and keep in repair had been, by the negligence of the defendants and the disregard of their statutory duty, suffered to become so obstructed, choked up, impeded and out of repair as to be incapable of carrying off the extra waters brought into them by the said drains constructed since 1875 by the municipal council of the township, and that therefore the defendants were liable to the plaintiff for the injury thereby occasioned to her. She also made claim for a mandamus to compel the defendants to restore, clean out and repair the said drains so suffered to become obstructed, and to maintain the said drains and the embankments thereof in an efficient condition. This action was referred to the county judge of the County of Kent to take evidence and make his report thereon. The learned judge, after a careful inspection upon the ground and taking evidence upon the matters involved, made his report, wherein he found among other things that the said Government drain Number One was constructed in the years 1870 to 1873 inclusive, along the easterly side of the road allowance between lots 12 and 13 in the said Township of Raleigh, commencing in rear of the lake lots and ending in the River Thames and lying immediately east of lot No. 12 in the 4th concession of said township, and that as part of the plan or scheme of said drain the earth taken thereout was to be thrown up and, as a matter of fact, was thrown up on the west side of the said drain as an embankment in order thereby to prevent the water from the said drain, and the water flowing into it from the easterly or south-easterly direction, from escaping westward on to the lands of said plaintiff and others; and that it was the duty of the said defendants to keep the said drain properly cleaned out and free from obstructions, and to keep the said embankment in a fit and proper condition; that for some years after the completion of the said drain Number One and of the said embankment the said land of the plaintiff was greatly benefited thereby and became more fit for cultivation, and that good crops were grown; that from time to time during the ten years next after the completion of the said drain the defendants constructed a number of other drains leading into said drain Number One, and thereby brought down into the latter immense quantities of water far beyond its capacity to carry off, and that as a result it became surcharged, and from time to time overflowed the embankment on the west side thereof, and that particularly in the years 1885, 1886, 1887 and 1889, and frequently several times in each of said years, the waters thus brought down flowed on to and over the plaintiff's said land and damaged and injured said land and the crops thereon growing; and that the said drain Number One has been allowed to become, and has become and is, through the 6th, 5th and that part of the 4th concession lying south of the Grand Trunk Railway, badly filled up with earth and silt and badly overgrown with grass and willows, and that its capacity has thereby become much diminished and impaired, and is not and has not been for the last five years one-half of what it was when first completed, and that as a result of this condition the overflow of water on to and over the plaintiff's said lands, and the damage and injury thereto have been much increased; and that by the construction of the Bell drain a large body of water was brought down to the drain known as the Raleigh Plains drain that would not otherwise have come there, and that the Raleigh Plains drain was thereby overcharged with water, and that in time of high water every year except the year 1888, and in some years several times in the year, the water thus brought down has flowed into and over the plaintiff's land, or by raising the general level of the water has caused other waters to flow on to and over the plaintiff's land that would not otherwise have gone there, and the plaintiff's lands and crops have been thereby injured and damaged every year except the year 1888; and that for the water so brought down by the said drains into drain Number One, and by the said Bell drain into Raleigh Plains drain, the defendants provided no sufficient or proper outlet; and that the defendants have not kept the embankment on the westerly side of the said drain Number One up to its original height, nor have they kept it up to the height that it was after the earth thrown up as aforesaid had become firm and settled; and when breaks have been made in the embankment by the water overflowing as aforesaid the defendants have permitted these breaks to remain for a long time wholly unrepaired, and when repaired they were repaired in an inefficient and inadequate manner, and still left lower than the road-bed on the north-west or south-east of said breaks, thereby enabling or permitting water to escape on to and flow over the plaintiff's said land, causing damage and injury to the crops thereon, that would otherwise have been carried down Number One drain to the River Thames; and he assessed the plaintiff's damage at the sum of $850.00, which sum he found that the plaintiff was entitled to receive, and he found also that the plaintiff was entitled to a mandamus directing the defendants to properly repair the said drain Number One, and to enlarge it sufficiently to provide for the additional water brought down as aforesaid or to provide a proper and sufficient outlet by some other method and to stop the additional flow of water brought down by the Bell drain as aforesaid or provide for its escape by some other sufficient method and to maintain the embankment on the west side of Number One drain at its original and proper height. Mr. Justice Ferguson affirmed this report and finding of the learned county judge and rendered judgment thereon in favor of the plaintiff for the said sum of eight hundred and fifty dollars and for the said mandamus, but directed that said mandamus should not issue until further order on a subsequent application or until the defendants should have an opportunity to make such improvements as they may deem sufficient.

The Court of Appeal for Ontario reversed this judgment and ordered judgment to be entered for the defendants upon the grounds that the court were of opinion that the plaintiff had no cause of action against the defendants unless upon default committed after a notice in writing under sub-sec. 2 of sec. 583 of ch. 184 R.S.O. of 1887, and that no sufficient notice had been given; that the defendants are not liable for damages arising from their not providing a sufficient outlet for the waters carried through a drain constructed by them under the statutes relating to the drainage of lands; that when a surveyor has devised a scheme of drainage work it is for the corporation simply to construct it as designed without incurring any responsibility in so doing. In effect the judgment of the Court of Appeal was that the evidence disclosed no wrongful act, neglect or default of the corporation subjecting them to an action at suit of the plaintiff, whose only remedy, if any she had, was confined to an arbitration under the Municipal Institutions Act. Mr. Justice Ferguson had expressed the opinion that if a municipal corporation passed a by-law for the construction of drainage work upon a report of an engineer or surveyor employed by them under the statute to examine a proposed work, and constructed the work thereunder, and if the effect of such drainage work should be to deposit the waters carried off from one man's land upon another man's land and there leave them without providing any outlet, or means of carrying the waters from the land upon which they were so deposited, this would constitute such wrongful conduct as would render the corporation liable in an action for damages at the suit of the person injured by such conduct. From this proposition the Court of Appeal expressed their unqualified dissent.

The question raised by this difference of opinion seems to be simply: Do the drainage clauses of the Municipal Institutions Act require or authorize municipal corporations to carry off the waters on lands proposed to be drained under the statute and to deposit such waters upon lands in a lower position belonging to other persons from which they cannot be removed at all, unless it may be by evaporation, or at least at great cost for which no provision is made? If the drainage sections of the statute do not require or in any express terms authorize that to be done the proposition as stated by Mr. Justice Ferguson seems to me to be well founded in law, and applying it to the present case the only question would be whether the evidence establishes that what was done in the present case was equivalent to the condition of things stated in the proposition of Mr. Justice Ferguson. Now it is to be observed that the drainage clauses under consideration do not require the corporation or its municipal council to do anything whatever for the purpose of draining drowned lands. They simply empower the council of the corporation to employ an engineer or surveyor to make an examination of the lands proposed to be drained, and to make a plan and to report as to whether, and in what manner, in his opinion, the lands proposed to be drained can be drained; and if the council shall be of opinion that the work as proposed by such engineer or surveyor is desirable they may pass a by-law for the purpose. There is no compulsion whatever imposed upon the council to adopt the plan as proposed by their engineer or surveyor. The person so employed is their servant. He may be an ignorant and unskilled person, and if he be, or whether he be or not, the council cannot shirk the responsibility cast upon them of exercising their own judgment in determining whether they shall or shall not adopt the plan as suggested by their servant. If they do adopt it, it is their own work for all the consequences attending which they must be responsible, except in so far as they are protected by the statute authorizing them to use their discretion in the matter. I cannot concur, therefore, in the opinion expressed by the Court of Appeal to the effect that when the surveyor suggests the scheme of a drainage work it is for the corporation simply to carry it into execution. They must distinctly exercise their judgment as to adopting or refusing to adopt the scheme suggested, and if they do adopt it it becomes their work and scheme and not their servant's. We must, I think, in the language of Lord Watson in Metropolitan Asylum District vs. Hill (1) hold that:

> Where the terms of a statute are not imperative but permissive, when it is left to the discretion of the persons employed to determine whether the general powers committed to them shall be put into execution or not, the fair inference is that the legislature intended the discretion to be exercised in conformity with private rights, and did not intend to confer a license to commit nuisance in any place which might be selected for the purpose.

And again:

> The justification of the defendants depends upon their making good these two propositions: In the first place that such are the imperative orders of the legislature:

That they should do what they have done and is complained of:

> And in the second place that they could not possibly obey those orders without infringing private rights

of the plaintiff as they have done.

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(1) 6 App. Cas. 213.

If the order of the legislature can be implemented without nuisance they cannot plead the protection of the statute, and it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance unless they are also able to show that the legislature has directed it to be done.

As laid down also by Lord Blackburn in the same case (P. 203) we must hold that :

What was the intention of the legislature in any particular Act is a question of the construction of the Act.

Now what is the plain inference to be drawn as to the intention of the legislature in enacting the drainage clauses of the Municipal Institutions Act? The clauses are permissive, not imperative. They do not require or direct any works to be executed at all; whether they shall be executed or not is left to the untrammelled judgment and discretion of the municipal councils. The object of the clauses is to enable lands to be drained for the purpose of cultivation and to provide means of paying the expense of doing so, and of preserving and maintaining them when constructed in an efficient state of repair to perform the purpose for which they designed. There is nothing whatever in any of those clauses to justify the inference that the legislature contemplated or countenanced the idea that water taken from the lands of one person should be so conducted as to be deposited upon the lands of another person. The rational and natural inference is that the intention of the legislature was that the water taken from the lands proposed to be drained should be conducted either directly into some lake, or into some natural or artificial watercourse having an outlet in some lake which the waters taken from the drained lands could reach without any injury being done to the lands of anyone. Such, as I think, being the manifest intention of the legislature to be gathered from their drainage clauses, if a municipal corporation while professing to act under the provisions of the statute should, by a drain or drains constructed by them, conduct such a body of water and at such a rate of speed into a natural or artificial watercourse that such last mentioned natural or artificial watercourse could not resist the rush of the extra water so brought into them and had not sufficient capacity to retain such extra waters so brought down, and to carry them off, and if the consequence should be that the sides of such artificial or natural watercourses into which such extra waters should be so conducted should be broken down or overflowed by the rushing waters and adjacent lands should be thereby flooded with water which there were no means of carrying off, doing thereby injury to owners of the lands so flooded, I cannot doubt that such conduct would constitute a private nuisance not at all warranted by the statute, and would be an actionable wrong which could not be justified under the statute.

In the present case the plaintiff's right of action stands, as it appears to me, upon a still firmer foundation for the statute imposed an imperative duty upon the defendants to preserve, maintain and keep in an efficient state of repair the said drain Number One and the Raleigh Plains drain into which they conducted the waters brought down by the several drains constructed by them since 1875. For the purpose of keeping these drains, Number One and Raleigh Plains drain, in a thoroughly efficient state they were given most ample power annually to levy upon the lands and roads benefited by these respective works a sufficient sum to discharge the imperative duty so imposed upon them. We have seen that to prevent damage to adjacent lands they were empowered, if they should deem it expedient, to change the course of any drain whether constructed under 33 Vic. ch. 2, or under the Ontario Drainage Act of 1873, or under any other Act, or to make a new outlet, or otherwise improve, extend or alter any such drain (on the report of the engineer appointed by them under sections 569 to 582 of the said ch. 184, R. S. O. of 1887), without the petition required by said section 569, and the deepening, extending or widening of a drain in order to enable it to carry off the water it was designed to carry off was, by sub-section 4 of section 586 of the said ch. 184, declared to be a work of preservation, maintenance and keeping in repair of the drains which the statute made it the imperative duty of a municipality, making a drainage work within their own limits without benefiting lands or roads in an adjoining municipality, to discharge. Now the finding of the learned County Court Judge, and the evidence upon which that finding proceeds, establish beyond all controversy that the drain Number One, and the Raleigh Plains drain, which the defendants were by statute imperatively bound to preserve, maintain and keep in repair, had by the mere neglect of the defendants to discharge such their imperative duty been suffered to fall into and continue in such a state of disrepair and inefficiency to do the work required of them that they had respectively lost about two-thirds of their original capacity and were utterly incapable of carrying off the quantity of water brought down to them respectively by the drains constructed by the defendants. This was the cause of the injuries sustained by the plaintiff on her lands, and not the mere construction of the said last mentioned drains by the defendants since the year 1875, and this conducting by the defendants into the drain Number One and the Raleigh Plains drain so become inefficient, and deprived of their original capacity by the utter neglect of the defendants to discharge the statutory duty imposed upon them, of a greater body of water than the said drains in such their inefficient condition had capacity to retain was, in my opinion, an unlawful act not at all warranted by the statute, and constituted an actionable wrong for the injuries resulting from which the plaintiff is entitled to recover in the present action. To injuries arising from such a cause the arbitration clauses of the statute have, in my opinion, no application; they apply only to injuries consequential upon the mere construction of drains authorized by the statute and not to injuries which, as in the present case, as already shown, arise from acts in themselves unlawful which constitute a private nuisance, and which the statute has not only not directed but has not authorised to be committed. The defendants have not attempted to excuse themselves nor can they excuse themselves on the ground of ignorance of the fact that drain Number One and Raleigh Plains drain had become quite incapable of receiving and carrying off the waters conducted into them by the drains or some of the drains constructed by them since 1875. As to drain Number One the contention of the defendants is that they did repair it annually, but the evidence is that they did not, and that whatever work they did upon it was done in such an imperfect and inefficient manner as to be quite useless; moreover, it was not pretended that the defendants had done anything to remove the obstruction and damage done to either of the above drains by reason of their being filled up, choked and incapacitated by silt and dirt brought down to them by the other drains constructed by the defendants, and by earth from embankments washed away. That the defendants were, in point of fact, made aware of the utter inefficiency of the drains from such causes there was abundant evidence to show; there was also abundant evidence to show that the drains could have been made efficient and at reasonable cost, ("that," says G. H. Dolsen, who has been a member of the council almost every year since 1871, "is a fact generally conceded"); and that the drains are wholly inadequate, in the condition into which they have fallen by reason of the neglect of the defendants to discharge their statutory duty, to carry off the extra waters brought down into them by the defendants, was clearly established. J. C. McNab, a surveyor employed by the defendants to examine Raleigh Plains drain and drain Number One, says that both of them are altogether inadequate to the work now required of them; that the Raleigh Plains drain is in a very bad condition, and that it should be very much improved. In 1887 the defendants employed their surveyor McGeorge to make an inspection and report upon that drain, and he reported to them that the improvement and enlargement of the Raleigh Plains drain was a pressing necessity and demanded the best attention of the council. They, however, did not act upon his report.

The liability of the defendants in the present case cannot, in my opinion, be held to depend upon their having or not having had given to them the notice mentioned in sub-section 2 of section 583 of ch. 184 R. S. O. of 1887, which is identical with sub-section 2 of section 584 of 46 Vic. ch. 18 as amended by 47 Vic. ch. 32 section 18. The Raleigh Plains drain is a drain coming under the provisions of section 586 of said ch. 184, which is identical with section 587 of 46 Vic. ch. 18, that is to say, a work completed within the limits of the municipality in which it was commenced and which did not benefit any lots or roads in another municipality. To such a case sub-section 2 of section 583 of said ch. 184 is not by the statute made to apply. That sub-section is limited to works constructed within the provisions of the preceding sections from section 575, which are identical with sections from 576 to 583 in 46 Vic. ch. 18, that is to say, works commencing in one municipality and continued into another, or benefiting lots and roads in another municipality. Drain Number One was constructed under 33 Vic. ch. 2, which had no such clause as sub-section 2 of section 583 of ch. 184, but by section 587 of the latter Act section 586 of that Act is made to apply to drains constructed under 33 Vic. ch. 2, while no such provision is made as to section 583. So that by this section 587 the legislature seems to me in an unequivocal manner to recognize the fact that that section 586, as its language seems in plain terms to convey, applies to cases quite different from those to which section 583 applies. But if sub-section 2 of section 583 did apply to the present case it could not, in my opinion, be construed as divesting the plaintiff of the common law right of action which every one has for injuries occasioned by a plain neglect on the part of the defendants to perform an imperative duty imposed upon them by statute. The section must rather be read as conferring a benefit additional to such common law right, and as providing that any person sustaining injury after such notice shall have a right to the mandamus besides the right to recover pecuniary damages for the injury consequential upon neglect after notice. The happening of such injury after such notice may well be held to be conclusive evidence of negligence, but such a provision cannot be construed as divesting a plaintiff of a right of action theretofore accrued by continued neglect of an imperative duty imposed upon the municipality by statute to preserve, maintain and keep in repair the drain when constructed, of the necessity of repairing which the council may have had abundant evidence while the party injured may have been wholly ignorant. However, for the reasons already given, I am of opinion that the plaintiff is entitled to recover apart from any question as to the notice referred to in said sub-section 2 of section 583. It was argued that the damages should be separated, namely, those arising from the Raleigh Plains drain having been surcharged from those arising from drain Number One, upon the suggestion that the defendants are entitled to levy any damages recovered against them upon the lands chargeable with the maintenance of the said respective drains. It may be very questionable whether damages recovered by a plaintiff by reason of neglect of the defendants to maintain in an efficient condition the drains constructed by them, or by the wrongful introduction into them of more water than in their neglected and inefficient state they are capable of retaining, can, under section 592 of ch. 184, R. S. O., 1887, be levied upon the lots chargeable with assessment for the maintenance of the drains. That section would rather seem to be limited to damage occasioned by proceedings taken under the Act and so authorized by the Act by the parties engaged in the construction of the work authorized. It would seem to be an unnatural and a forced construction of the section to hold that a person made liable to contribute to the construction and maintenance of a drain authorized by the Act, because of the benefit it confers upon him, should also be held to be liable to contribute to recompensing himself for damage and injury occasioned to his land by the illegal, wrongful conduct of the municipality and its officers by proceedings not authorized by the statute, or by negligence in the construction of a work which the statute did authorize, or by neglect to discharge the duty of maintenance in repair imposed by the statute. This, however, is a matter with which the plaintiff is not at present concerned. There is no law which makes it imperatively incumbent on a court or jury, where two causes may have contributed to occasioning the injuries complained of, to say how much they attribute to one cause and how much to the other, or which requires the verdict or judgment to be set aside for default of such severance of the damages. In my opinion the appeal must be allowed with costs and the judgment of Mr. Justice Ferguson should be restored; the mandamus is, in my opinion, maintainable, not under section 583 of the Municipal Institutions Act, which, in my opinion, has no application in the present case, but under the provisions of the Ontario Judicature Act, ch. 44 R. S. O., 1887.

Patterson, J.—The Government drain Number One was constructed between the years 1870 and 1873, and for some years thereafter the plaintiff's land was greatly benefited by it; but the defendant corporation from time to time during the ten years following the completion of that drain constructed a number of other drains leading into it, and thereby brought down into drain Number One immense quantities of water far beyond its capacity to carry off, with the result that drain Number One became surcharged and from time to time overflowed the embankment on its west side, particularly in the years 1885, 1886, 1887 and 1889, and frequently several times in each of those years, and the water thus brought down flowed on, to and over the plaintiff's land and damaged her land and crops. The defendants provided no sufficient outlet for the additional waters so brought down.

Those are facts found by the learned referee, whose findings of fact were acquiesced in by the High Court and the Court of Appeal, although those courts differed as to the legal result.

Similar facts were found with respect to the Bell drain, viz., that by its construction by the defendants in 1884, and particularly by the construction, as part of the plan of the drain, of an embankment on the westerly side of the drain, a large body of water was brought down to the Raleigh Plains drain that would not otherwise have come there; that the Raleigh Plains drain was thereby overcharged with water; and that in time of high water in the years 1885, 1886, 1887 and 1889, and in some of those years several times in the year, the water thus brought down flowed on to and over the plaintiff's land, or by raising the general level of the water caused other waters to flow on to and over the plaintiff's land that would not otherwise have gone there, damaging the land and crops; and for the additional waters so brought down the defendants provided no sufficient outlet.

We are not expected to go behind these findings. The same facts were substantially embodied in the following extract from a formal statement agreed upon, for the purpose of avoiding a certain amount of printing, when the case was before the Court of Appeal:

> It is now admitted by all parties that the drains so constructed at or after the dates of the respective by-laws put in, since Number One, have not and never had a sufficient outlet to drain the plains and carry the waters running down in their courses past the plaintiff's lands and other lands in the plains, so as to protect them and the crops thereon from injury, and that the drains constructed since Number One was made have increased the flow of water brought down.

The drainage clauses as now found in the Municipal Act, R. S. O. 1887, ch. 184, do not differ in any respect at present material from those in force when the drains were made. We shall have to glance, though as rapidly as may be, at some of them.

Section 569 enacts that in case the majority in number of the owners of the property to be benefited in any part of any township, etc., petition the council for, *inter alia*, draining the property (describing it) the council may procure an engineer or provincial land surveyor to make an examination of, *inter alia*, the locality proposed to be drained, and may procure plans and estimates to be made of the work by such engineer or surveyor, and an assessment to be made by such engineer or surveyor of the real property to be benefited by such work, and if the council is of opinion that the proposed work or a portion thereof would be desirable the council may pass by-laws:

1. For providing for the proposed work, or a portion thereof, being done, as the case may be;

2. For borrowing on the credit of the municipality the funds necessary for the work;

3. For assessing and levying on the real property to be benefited a special rate to pay for the work;

4 to 21. For purposes which we need not now stop to notice.

Section 570 gives a form of by-law which is recite the prayer of the petition, the examination by the engineer or surveyor of the locality to be drained, or as the case may be, his report thereupon, and the opinion of the council that the work is desirable, and to enact that the report, plans and estimates be adopted and the drain (or as the case may be) and the works connected therewith made and constructed in accordance therewith, and to provide for the borrowing of the money and the levying of the special local rate.

The by-laws for the construction of these drains followed the statutory form. The one that related to the Bell drain has been printed as a specimen of the whole. It recited a petition, not for the draining of a locality in the mode which the council may be advised by its engineer to adopt, but for a specified work.

> Whereas, a majority in number of the owners as shown by the last revised assessment roll of the property hereinafter set forth to be benefited by the construction of the Bell drain, have petitioned the council of the said Township of Raleigh praying that the Government drain Number Two be closed up at a point east from and near to the outlet of the Kersey drain, and that a tap drain be constructed from said Government drain Number Two at or near to the line between lots 10 and 11 in the 6th and 5th concessions to the Raleigh Plains drain. Also, that the Dyke drain be closed up west of said proposed drain.

The report of the engineer, also recited, states that he has made an instrumental examination over the route of proposed drain, and reports that the work will comprise the making of a tap drain, etc.,

etc., adding, "The tap drain will greatly benefit lands assessed," and giving estimates, with schedule of lands and roads benefited which are to be assessed for the work.

If the Raleigh Plains drain, into which the council thus, at the request of William Bell and others the petitioners whose property was to be benefited, ran the tap drain called the Bell drain, had been sufficient to carry off the water thus poured into it no harm would have been done. It was not sufficient, and the consequence was the flooding of the plaintiff's land which lay beyond the Raleigh Plains drain.

I am not able to see on what principle the intervention of the engineer, whose advice as to the propriety of running the Bell drain into the other seems neither to have been asked or given, affects the liability of the council to the persons, strangers to the work, who were injured by it. The engineer's report merely shows how the waters may most effectually be turned into the Raleigh Plains drain, and takes no account of what is then to become of them. The capacity of the Raleigh Plains drain, and of Jeanette's Creek into which it ran, to receive the waters and carry them to the Thames, which was the outlet, appears to have been assumed without examination. I do not understand the defendants to contend that upon any construction of their statutory powers they had a right to drain any locality by merely conveying the waters to a lower level, without providing an outlet by which they would ultimately be carried to a river or lake. It is plain that the drainage authorized by the statutes is drainage by way of such an outlet. In the case of Malott vs. Township of Mersea (1), the question was incidentally discussed before the Court of Appeal in 1886. The judgment of that court does not appear in the reports, but it was before us in Mss. on the argument of this appeal. The council may have honestly taken it for granted that the Raleigh Plains drain afforded a sufficient outlet for the waters brought down by the Bell drain in addition to the waters with which it was already charged. They may be credited with having honestly thought so if they gave any thought to the matter, but all the same they were creating the nuisance from which the plaintiff's suffered. They brought the water there without providing an outlet for it, and it matters little to the plaintiffs whether that was due to miscalculation, or to the assumption without any calculation that the drain would carry the water, or even to simple recklessness. The general rule of law on the subject seems to me to be well expressed by Mr. Justice Denman in Humphries vs.

(1) 9 O. R. 611.

Cousins (1), when speaking of the right of every occupier of land to enjoy that land free from invasion of matters coming from the adjoining land.

> Moreover, he said, this right of every occupier of land is an incident of possession and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it.

The divisional court (Denman and Lindley, JJ.,) considered these rights of an occupier established by the cases of Smith vs. Kenrick (2); Baird vs. Williamson (3); Fletcher vs. Rylands (4) and the older authorities there referred to; and the then recent decision of Broder vs. Saillard (5). The first three of these cases were, seven years earlier, commented on by the late Sir Adam Wilson in his judgment in Rowe vs. Corporation of the Township of Rochester (6), the head note of which case is as follows:

> The defendants, in order to drain a highway, conveyed the surface water along the side of it for some distance by digging drains there, and stopped the work opposite the plaintiff's land which was thus overflowed. Held that the defendants were liable even without any allegation of negligence.

The facts which are, thus far, in discussion resemble those in the case of Coghlan vs. Ottawa (7) where the city corporation, adopting an existing sewer as part of the drainage system, connected with it two others of greater capacity which brought more water than the first could carry away, in consequence of which water escaped and injured the property of the plaintiff. The city was held liable.

In Furlong vs. Carroll (8) I had occasion to examine the law with more particular reference to fire communicated from one man's land to that of another man, but the principle of liability is the same when damages are caused by water. I refer to my judgment in that case.

I shall not refer to further authority on the subject of the plaintiff's right of action upon the facts as I have stated them, beyond a quotation, which I may adopt as expressing my own conclusion on this branch of the present case, from the language of the present Chief Justice of Ontario in McGarvey vs. Strathroy (9).

> The defendants have in the exercise of their municipal powers caused a larger quantity of water to flow on the plaintiff's land to her injury than would naturally have flowed thereon. From the early days of our municipal system I think it has been uniformly held that such proceedings give a cause of action.

What I have said with respect to the Bell drain and its effects

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(1) 2 C.P.D. 239, 244.
(2) 7 C. B. 515.
(3) 15 C. B. N. S. 376.
(4) 3 H. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(5) 2 Ch. D. 692.
(6) 29 U. C. Q. B. 590.
(7) 1 Ont. App. R. 54.
(8) 7 Ont. App. R. 145.
(9) 10 Ont. App. R. 631, 635.

applies equally to the various other drains that discharge into and overcharge the Government drain Number One.

The common law right of the plaintiff against these defendants has not, in my opinion, been taken away by anything in the statute.

The argument to the contrary is that when drainage works are authorized by a by-law passed in accordance with the statute the corporation incurs no liability to an action for damage caused by the work unless there has been negligence in the execution of it, but that if damages are claimed the procedure to recover them must be by arbitration. The question is not the soundness of the principle thus relied on, which may be conceded, but its bearing upon the facts of the case. The provision of the statute which enables disputes to be settled by arbitration does not of itself cut off the remedy by action when, as in this case, the right infringed is a common law right and not one created by the statute; but if the act that injures you can be justified as the exercise of a statutory power you are driven to seek for compensation in the mode provided by the statute, or if (as has sometimes happened) no such provision is made you are without remedy. But the justification, if otherwise capable of being established, may be displaced, and the right of action maintained, by proof of negligence which caused the damage. The law is stated in terms at once comprehensive and concise in a passage which I shall read from Lord Blackburn's judgment in Geddis vs. Proprietors of Bann Reservoir (1).

> For I take it, he said, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the legislature has authorized if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers.

I do not doubt that the learned Chief Justice of Ontario correctly applied this principle to the statute before us, considered with reference to the general scope of the drainage provisions, when he said in this case:

> I am of opinion that a corporation, adopting and carrying out a drainage scheme duly presented to them by a surveyor under the statute, cannot be held responsible in damages because the scheme may prove erroneous and inefficient in some important particular, e.g., the not providing a sufficient outlet for the waters which it is designed to carry off. They are held responsible by action for negligence in the execution of the work; but having duly executed it according to its provisions it is not negligence in them that it turns out to be wholly inefficient or useless.
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> In other words, the statute does not make them responsible for the errors or unskilfulness of the drainage scheme duly adopted by them.

But I do not think the facts bring this case within the rule so

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(1) 3 App. Cas. 430, 455.

enunciated. The council has obviously a discretion to exercise with regard to the adoption, rejection, or modification of any projected scheme of drainage. The initiative is taken by the owners of real property who may petition for the execution of the kind of work they desire, within the classes enumerated in section 569, some of which works do not, while others do, involve the diversion of waters from their natural channels. The petition may be for the deepening or straightening of any stream, creek or watercourse, or for the draining of property (describing it), or for the removal of any obstruction which prevents the free flow of the waters of any stream, creek or watercourse, or for the lowering of the waters of any lake or pond for the purpose of reclaiming flooded land or more easily draining any lands. The council on receiving the petition may procure an engineer or surveyor to make an examination of the stream, creek or watercourse, or of the lake or pond, or of the locality proposed to be drained, and may procure plans and estimates to be made of the work by the engineer or surveyor, and an assessment of the property to be benefited; and then, if of opinion that the proposed work, or a portion thereof, would be desirable, may pass the by-law.

To what extent or upon what information the discretion of the council as to the adoption of the report of the engineer is to be exercised we need not exhaustively consider. They must at least be satisfied that the scheme is one which the statute authorizes. When the drainage of described property is to be undertaken it is the clear intention of the statute that the waters shall be carried to some river or lake, or to a waterway by which they may reach that destination. Large powers are given to engineers and councils with the object of securing in every case a proper outlet. The corporation may not be responsible for the mistake of an engineer respecting the sufficiency of the outlet designed or selected by him, but the report and plans which may be procured for the information of the council, when the drainage of a described area is proposed, would be incomplete if they did not indicate an outlet which, in the judgment of the engineer, was sufficient.

We know from the Bell drain by-law, which is before us as a specimen of the by-laws relied on, that the petition, though it may have been practically sufficient, was not in terms for any of the works specified in section 569, inasmuch as it asked, not for the draining of certain lands, though that was really the object aimed at, but for doing specified work, viz.: making a tap drain from one existing drain to another; and we know further that the engineer's report merely set out the works that would be required in order to turn the waters from the one drain to the other. We cannot say, from anything that is before us, that the council acted upon any skilled advice of the engineer as to the sufficiency of the Raleigh Plains drain as an outlet for the water proposed to be diverted into it.

Similar remarks may be made concerning the overcharging of Government drain Number One.

I am of opinion that these drainage works cannot properly be held, under the circumstances, to be such a reasonable exercise of the statutory powers of the council as to free the municipality from actions for damages for injuries caused by the waters, but that the action can be maintained on the grounds stated in the passage I have quoted from the judgment of Chief Justice Hagarty in McGarvey vs. Corporation of Strathroy (1).

I am further of opinion that it was undoubted negligence to discharge the waters collected from the areas newly drained into the inadequate waterways, called the Raleigh Plains drain and Government drain Number One, without examination of their condition and capacity.

On these grounds I think the judgment of the court of first instance, sustaining the award of damages for flooding the lands occupied by the plaintiff, was correct.

I have now to consider the other branch of the case, which relates to the embankment on the west side of Government drain Number One, which embankment constitutes the travelled part of the road allowance along which the drain is constructed.

It is found as a fact that the earth taken from the drain when it was first dug was thrown upon the road so as to form this embankment as part of the plan of the drain, and not merely by way of making a better road. The embankment has been worn down and perhaps washed away in some places, permitting water to run over which ought to have been kept in the drain. In the High Court a writ of mandamus was awarded to compel the corporation to restore the embankment to its original height, by way of enforcing the duty cast upon the municipality to maintain the drain. The drain is wholly within the municipality in which it is commenced, and does not benefit the lands or roads in any other municipality. Sec. 586 declares that it shall be the duty of the municipality making "such a work" to preserve, maintain and keep in repair the same at the expense of the lots, parts of lots and roads, as the case may be, as agreed upon and shown in the by-law when finally passed.

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(1) 10 Ont. App. R. 631, 635.

The question whether the duty of keeping in repair drains which do not extend into, or benefit, the lands or roads of another municipality is created by this section 586, or by section 583, is of importance, because section 583 gives the right to a mandamus to compel performance of the duty it imposes only after a reasonable notice to repair, and also, as I read it, makes the notice essential to the liability of the municipality to pecuniary damages for injuries caused by neglect or refusal to repair, while section 586 is silent on those subjects.

Section 583 is wide enough in its terms to include both classes of drains, those extending into or benefiting more than one municipality and those to which section 586 relates. The language is :—

> After such work is fully made and completed it shall be the duty of each municipality, &c.

What is meant by "such work"? I understand those words to mean any of the works authorized by section 569. We find the same expression in section 586 which commences thus :—

> In any case wherein after such work is fully made and completed, the same has not been continued into any other municipality, &c.

In both sections the term "such work" means the same thing, and that is, as seems to me very evident, any work done under section 569.

Section 583 casts upon each municipality the duty of preserving, maintaining, and keeping in repair the work within its own limits, either at the expense of the municipality or parties more immediately interested, or at the joint expense of such parties and the municipality, as to the council upon the report of the engineer or surveyor may seem just. Now, this discretion as to the apportionment of the cost of maintenance and repair was not considered necessary in the case of works that were entirely local in their effect as well as in their situation. Section 586 accordingly declares by whom the expense of maintaining works of that class is to be borne, giving the council no discretion in the matter.

The office of section 586 I take to be not to impose the duty or declare what shall be the consequence of neglecting it,—those things being already done by the earlier section,—but to declare at whose cost the duty is to be performed. In the case of White vs. Gosfield (1), in the Court of Appeal, I gave my reasons for so reading the statutes as they stood at the date of that decision, and I do not think the effect of the clauses as now found in the R. S. O., 1887, even with a slight amendment made in 1889, is different from what

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(1) 10 Ont. App. R. 555.

I then considered it to be, notwithstanding some ambiguities that have been allowed to creep in. The most serious of these ambiguities occurs in sub-section 9 of section 569, in the last part of the sub-section, which represents an amendment made in 1886 (1). If I am right in my understanding of the effect of those sections 583 and 586, the provision of sub-section 9 to which I refer may perhaps fail in its intended effect, while, if I am wrong, an unexpected and not very creditable anomaly will appear. It would have to be held that a person complaining of the want of repair of a drain lying wholly within his municipality is free from the restrictions prescribed for his neighbor, whose drain is in all respects like the other, but happens to benefit some land across the township line, while the first has not that effect.

No such an anomaly can have been intended, nor does it, in my opinion, arise upon the proper reading of the statute.

The duty to repair thus arising under section 583 the plaintiffs are not entitled to their mandamus unless they gave a reasonable notice to repair as required by that section. I cannot agree with the learned arbitrator that the notice given in 1883, and which was at that time complied with, whether sufficiently or not, can support the claim now pressed, and I agree with the Court of Appeal that the mandamus ought not to have been ordered. Other objections to the writ, or to the terms of the order granting it, I need not consider.

Section 583, as I understand it, further makes the notice a necessary preliminary to the liability of the municipality to pecuniary damage to any person who or whose property is injuriously affected by reason of neglect or refusal to repair according to the notice, but this does not, in my opinion, affect the right of the plaintiff to the damages now awarded to her.

The work of preservation, maintenance and keeping in repair, under sections 583 and 586 includes (by the express terms of those sections) the deepening, extending or widening of a drain in order to enable it to carry off the water it was originally designed to carry off. *A fortiori* the duty to maintain according to the original plans and dimensions of the drain is to enable the drain to carry off the waters it was originally designed to carry off. But this Government drain Number One, which is a work to the cost of which the plaintiff contributed, was not originally designed to carry off the waters that in later years were turned into it. Those are the waters which, if I correctly understand the findings, overflowed from the drain. The duty of the council towards the plaintiff was to prevent those

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(1) 49 V. c. 37 s. 21.

waters from injuring her land. Whether or not that could have been done by clearing out or enlarging or otherwise repairing the drain, the purpose of the repairs not being to enable the drain to carry off the waters it was originally designed to carry off, section 583 does not stand in the way of the recovery of the damages in question.

In my opinion the appeal should be allowed and the judgment of the High Court restored as to the award of damages, and the appeal should be dismissed as far as it asks for a restoration of the writ of mandamus.

I think the plaintiff should have her costs in this court and in the Court of Appeal.

Appeal allowed with costs.

ARGUMENT OF COUNSEL AND DECISION OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, REPORTED IN LAW REPORTS APPEAL CASES, 1893, PAGE 540.

Matthew Wilson, Q.C. (Ontario), and Avory, for the appellant, contended that the decree of the Court of Appeal was right and should be restored. The drainage works in question were authorized by the statutes, viz., Ontario Drainage Act (36 Vic. ch. 38), now consolidated in the Revised Statutes of Ontario, 1887, ch. 36, and the Municipal Act (46 Vic. ch. 18), now amended and consolidated in the Revised Statutes of Ontario, 1887, ch. 184, and by certain by-laws passed thereunder. The council of the municipality merely adopted plans and specifications of an officer designated in the statute to make the same; and after such adoption passed a by-law authorizing the work so particularly located and laid out. Such action on its part cannot constitute negligence. Nor can the doing of such work so authorized constitute negligence; and accordingly any person whose property is injuriously affected thereby must follow the provisions of the statute when he claims compensation. The engineer or officer designated by the Act is a quasi-judicial officer, and not a servant of the municipality for whose acts and omissions it is in any way responsible. The function of the municipality is to decide whether a scheme of drainage is desirable in the locality, and not as to the particular plans or the merits of the scheme put before them by the statutory officer. Reference was made to Hopkins vs. Mayor, etc., of Swansea (1); President, etc., and Ratepayers of Colac vs. Summerfield (2); Misener vs. Township of Wainfleet (3); Re Clark and the Corporation of Howard (4); Beven on Negligence, pp. 222, 225, 235; Cowley vs. Newmarket Local Board (5), on which latter case it was contended that the municipality was not liable to maintain Number One drain or the embankment beside it as part of the drainage scheme, that its duty, if any, was as a road authority, and that for non-feasance no action lay. See also Mayor, etc., of Montreal vs. Brown (6). The sole remedy, if any, under the circumstances, accrued to the respondents was by arbitration under the Ontario Drainage Act, and the Municipal Act (R. S. O.), ch. 36, ss. 31 (3), 61; ch. 184, s. 483. Under the Acts a reasonable notice to repair was a condition precedent to imposing upon the appellant any liability to the respondents so to do; whether that liability was enforceable by action or by arbitration. The Court of Appeal was right in holding that no such notice had been given. Such reasonable notice (see section 583, sub-section 2) was also a condition precedent to any right to proceed against the appellant either by action, mandamus or arbitration.

H. T. Scott, Q.C. (Ontario), and William Douglas, Q.C. (Ontario), for the respondents, contended that the judgment of Ferguson, J., was right, and should be restored. The negligence complained of was that the municipality constructed a large number of drains, and made no outlet for the water brought down thereby from lands on a higher level than that of the respondents, so that the respondents' lands were overflowed and their crops destroyed. In so doing the municipality alleged that it was acting under sections 569, 602, of the Revised Statutes of Ontario, ch. 184. The water was not surface water, which would naturally have overflowed the respondents' lands, but was brought thereon by the appellant's system of draining the higher lands, in which it persisted, although there was nothing to prevent it from providing a proper outlet for the waters, and so avoiding injury to the respondents. This was the damage complained of, and the negligence alleged was the making no outlet; the mandamus sought was for the purpose of restoring the embankment which had been swept away by the water brought down by these drains. The evidence showed that it was quite possible for the appellant to have constructed its drains without injuring the respondents, and that the injury was caused by negligence. The powers given by the statutes were discretionary and permissive, and

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(1) 4 M. & W. 621, 640.
(2) [1893] A. C. 178.
(3) 46 U. C. Q. B. 457.
(4) 14 Ont. Rep. 598, 606.
(5) [1892] A. C. 345.
(6) 1 App. Cas. 384.

not imperative or compulsory. It was the duty of the appellant under the statute to exercise its own judgment on the plans and report of the engineer, if not as to its scientific details, at least as to their practical result and consequences. It was its duty to remit the plans and report to the engineer to be revised, so that their execution would not occasion injury to the respondents. In that way it would have controlled the mode of construction with reference to consequences, without interfering in those details which it was the province of the engineer to decide upon; and its omission so to do was actionable negligence. The respondents' right of action for negligence is distinct from that of compensation for injuries legitimately caused by works authorized by statute. Their remedy in such case—that is, for the consequences of negligence—was not limited to arbitration. Nor is a notice in writing a condition precedent under the statute to an action of that character.

Wilson, Q. C., replied.

1893. Aug. 3. The judgment of their Lordships was delivered by

Lord Macnaghten :—The respondents who were plaintiffs in the action sued the municipality of the Township of Raleigh, claiming damages for injury caused by flooding to certain lands in the occupation of the respondent Sarah Ann Williams, and also asking for a mandamus to prevent recurrence of the injury.

The municipality pleaded various defences, and among others they took the objection that the plaintiffs ought to have proceeded by arbitration and not by action.

Without determining this point the learned judge of first instance by consent of the parties referred to the action and the matters in dispute to Mr. Bell, the judge of the County Court of the County of Kent. Mr. Bell heard evidence at considerable length and viewed the premises on two occasions. He made a careful and elaborate report and determined the action in favor of the plaintiffs. Their Lordships may observe in passing that there is nothing in the terms of reference or in the reference itself to preclude the municipality from relying upon any of the defences which they raised in their pleadings.

Motions were made on the one side to vary and on the other to confirm the report. On the 4th of September, 1890, Ferguson, J., confirmed the findings of fact of the referee and gave judgment in favor of the plaintiffs for $850, the amount found by the referee, and awarded a mandamus, which was not, however, to issue until further order on a subsequent application.

From this judgment the municipality appealed. On the 30th of June, 1891, the Court of Appeal unanimously reversed the decision of Ferguson, J., and dismissed the action. The plaintiffs then appealed to the Supreme Court, who on the 28th of June, 1892, allowed the appeal with costs and restored the judgment of Ferguson, J., except so far as it awarded a mandamus. As regards this part of the relief sought by the action, the view of the Supreme Court, in which their Lordships concur, was that the plaintiffs were not in a position to claim a mandamus because they had not given the notice prescribed by the statute under which they were proceeding.

The municipality obtained special leave to appeal to Her Majesty in Council on the ground that the appeal involved serious questions of public importance depending on the true construction of the Ontario Statute relating to the powers and duties of municipalities.

These statutes have from time to time been re-enacted with amendments. The Municipal Institutions Act of 1873 (36 Vic. ch. 48), which itself was a Consolidation Act, was followed by the Consolidated Municipal Act, 1883 (46 Vic. ch. 18). Then came the Municipal Act of 1887 (R. S. O. ch. 184), and that again has been superseded by the Consolidated Municipal Act, 1892 (55 Vic. ch. 42). For the purposes of this judgment it will be convenient and sufficient to refer to the Act in the Revised Statutes.

For the purposes of this appeal their Lordships are of opinion that the findings of fact of the referee which have been confirmed by the Supreme Court must be accepted as conclusive.

The lands alleged to have been injured are situated in Raleigh near the River Thames, in a low-lying district known as the Plains.

The injury of which the plaintiffs complained was alleged to have been occasioned substantially by two causes—(1) the neglect of the municipality in breach of their statutory duty to repair a drain known as Government drain Number One, and (2) the negligent construction by the Corporation of another drain known as the Bell drain.

It appears to their Lordships that these two matters of complaint give rise to distinct considerations and must be dealt with separately.

Government drain Number One was the first drainage work in the district now known as the Township of Raleigh. It was constructed by the Government before the municipality of the township was incorporated. It may be described shortly as a straight cut running from the comparatively high ground bordering on Lake Erie, which is the southern boundary of Raleigh, to the River Thames, which is its northern boundary. The referee found that it was constructed in the years 1870 to 1873 inclusive along the easterly side of the road allowance between lots 12 and 13 in the Township of Raleigh, commencing in the rear of the Lake lots and ending in the River Thames and lying immediately east of lot No. 12 in the fourth concession (in which lot the plaintiffs' lands are situated), and he found and reported—

"That as a part of the plan or scheme of said drain the earth taken thereout was to be thrown up (and as a matter of fact was thrown up) on the west side of said drain as an embankment, in order thereby to prevent the water from said drain and the water flowing into it from the easterly or south-easterly direction from escaping westward on to the lands of said plaintiffs and others."

And he found and reported—

"That it was the duty of said defendants to keep said drain properly cleaned out and free from obstructions, and to keep said embankment in a fit and proper condition."

And then, after finding and reporting that after the completion of the said drain the defendants had constructed a number of other drains leading into it and thereby brought down immense quantities of water far beyond its capacity to carry off, the referee found and reported—

"That said drain Number One has been allowed and permitted to become and has become and now is, through the sixth, fifth and that part of the fourth concession lying south of the Grand Trunk Railway, badly filled up with earth and silt and badly overgrown with grass and willows, and that its capacity has thereby become much diminished and impaired, and is not and has not for the past five years been one-half of what it was when first completed, and that as the result of this condition and overflow of water on to and over plaintiffs' said lands, the damage and injury thereto has been much increased."

The referee also found and reported—

"That the defendants have not kept the embankment on the westerly side of said Number One drain up to its original height, nor have they kept it up to the height that it was after the earth thrown up as aforesaid had become firm and settled, and when breaks have been made in the said embankment by the water overflowing as aforesaid the defendants have permitted these breaks to remain for a long time wholly unrepaired, and when repaired they were repaired in an inefficient and inadequate manner and still left lower than the road-bed on the north-west or south-east of said breaks, thereby enabling or permitting water to escape on to and to flow over the plaintiffs' said land, and damage and injure the crops thereon that would otherwise have been carried down Number One drain to the River Thames."

The Municipal Act in express terms imposes upon every municipality the duty of preserving, maintaining, and keeping in repair drainage works within its own limits, and that whether the drainage work is a work constructed by the municipality or a work constructed by the Government before the municipality was incorporated (sections 583, 586, 587, 589). Sub-section 3 of section 583 declares that the deepening, extending, or widening of a drain in order to enable it to carry off the water it was originally designed to carry off is to be deemed to be a work of preservation, maintenance, or keeping in repair, within the meaning of the section. Section 583 seems to apply when the drainage work is carried into or benefits lands in two or more municipalities. Section 586 seems to apply where the work and the lands benefited are within the limits of one and the same municipality, as is the case in the present instance.

It was not disputed, and their Lordships see no reason to doubt, having regard to the purview of the Legislature of Ontario in the Municipal Act, and the language there employed, that an action for damages against the municipality lies at the suit of any person who can show that he has sustained injury from the non-performance of this statutory duty. But it was argued that sub-section 2 of section 583 makes a notice in writing a condition precedent to the bringing of an action either for a mandamus or for damages. It was said that the present case falls under section 583. Their Lordships think that it falls under section 586. But even so, it may be contended that sub-section 2 of section 583 must be treated as applying also to section 586. Their Lordships are disposed to think that this view is probably correct, though singularly enough section 586 repeats sub-section 3 of section 583 and does not repeat sub-section 2.

Sub-section 2 of section 583 is in these terms:

"Any such municipality neglecting or refusing so to do upon reasonable notice in writing being given by any person interested therein, and who is injuriously affected by such neglect or refusal, may be compellable by mandamus to be issued by any court of competent jurisdiction, to make from time to time the necessary repairs to preserve and maintain the same, and shall be liable for pecuniary damage to any person who or whose property is affected by reason of such neglect or refusal.''

It seems to their Lordships most reasonable that no action should be brought for a mandamus to compel a municipality to execute repairs until after notice in writing has been given to them. But it would be very unreasonable to enact that a municipality is bound to repair all drainage works within its limits, and at the same time to say that a municipality is not to be liable for any breach of that statutory duty, however gross the breach may be, unless previous notice in writing is given. Damage by floods for the most part is sudden and unexpected. A man's property may be entirely ruined before it is possible for him to give any notice to the municipality, and yet if the contention of the appellants is correct he would be left without remedy; for there is no provision for arbitration in the statute relating to such a case. There are two arbitration clauses in the Municipal Act providing for compensation to lands injuriously affected (sections 483 and 591). But section 483 only applies to damages ''necessarily resulting'' from the exercise of the municipality's statutory powers, and section 591 applies to damages alleged to have been done ''in the construction of drainage works or consequent thereon.''

It seems to their Lordships that the reference to damages in sub-section 2 of section 583 was probably inserted in order to preserve the right of the applicant to damages during the currency of the notice and the construction of the required repairs, and to negative the possible contention that his remedy against the municipality would be exhausted by obtaining a mandamus.

However this may be, their Lordships do not think that the language of sub-section 2 of section 583 is so clear as to take away the right to bring an action for damages without notice—a right to which a person injured as the plaintiffs in this case have been injured would prima facie be entitled. So far, therefore, as relates to the damage occasioned by the overflow which might have been prevented if Government drain Number One and its embankment had been preserved, maintained, and kept in repair, their Lordships are of opinion that the plaintiffs are entitled to maintain the action, and they do not think that this right is prejudiced or affected by the fact that the municipality have poured into Government drain Number One excessive quantities of water by means of other drains constructed under by-laws duly passed. It may be, and perhaps it ought to be, inferred from the referee's report that there was at times some overflow from the latter cause, which, even if the drain and embankment had been preserved, maintained, and kept in repair, would not have been prevented. But this in their Lordships' opinion can make no difference as to the duty of the corporation to keep the drain in such a state as to carry off in relief of the plaintiffs' land all the water which it was capable of carrying off as originally constructed, nor as to the plaintiffs' remedy by action for the damage which (as the report expressly finds) was caused by the non-performance of that duty. It is not necessary to determine the question whether the municipality under the circumstances are bound to deepen or widen Government drain Number One in accordance with sub-section 3 of section 583.

The case as to the Bell drain stands on a very different footing.

The finding of the referee as regards the Bell drain is in these words:

"I do further find and report, that by the construction of the Bell drain by the defendants in the year 1884, and particularly by the construction of an embankment on the westerly side thereof (and I find the construction of the said embankment to have been a part of the plan of the said Bell drain), a large body of water was brought down to the drain known as the Raleigh Plains drain that would not otherwise have come there, and that the Raleigh Plains drain was thereby overcharged with water, and that in time of high water every year for the past five years (except the year 1888), and in some of these years several times in the year, the water thus brought down has flowed on to and over the plaintiffs' land, or by raising the general level of the water has caused other waters to flow on to or over the plaintiffs' said land, that would not otherwise have gone there, and the plaintiffs' said land and crops have thereby been injured and damaged every year for the past five years (except the year 1888)."

It appears that the Bell drain was constructed under a by-law duly passed. It was therefore constructed under the statutory powers of the municipality, and not the less so because it has in the result injuriously affected the lands of the plaintiffs. The statute itself clearly contemplates that a drainage work which benefits certain lands may injuriously affect others. For any damage "necessarily resulting" from the exercise of the statutory powers of the municipality (section 483), and for any damage done to the plaintiffs' property "in the construction of drainage works or consequent thereon" (section 591), the plaintiffs must seek their remedy by arbitration. So far the action is incompetent.

It was argued on behalf of the respondents that if a drainage work constructed under a by-law duly passed turns out in the result not to answer its purpose by reason of the insufficiency of the outlet, or by reason of some other defect which a competent engineer ought to have foreseen and guarded against, or if the result of a drainage work is to damage a person's land by throwing water upon it which would not otherwise have come there—that is actionable negligence on the part of the municipality. This argument in their Lordships' opinion is wholly untenable. On the other hand, their Lordships do not agree with the argument of the appellants that municipalities are helpless instruments in the hands of the engineers they employ. They cannot indeed modify the engineer's plan themselves. That is no part of their business. But they may return the plan for amendment if they think that it is not desirable in the shape submitted to them. If, however, acting in good faith, they accept the engineer's plan and carry it out, persons whose property may be injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute.

Their Lordships regret that they are unable to affirm the judgment of the Supreme Court in all respects, because they cannot help seeing that the plaintiffs have been seriously injured by the construction of the Bell drain, as well as by the breach of the statutory duty imposed upon the municipality. As far as the evidence goes there is no reason to suppose that the municipality would have been able to cut down the damages if the respondents had proceeded by arbitration. There is nothing whatever to suggest that the lands of the plaintiffs have been benefited in the slightest degree by the Bell drain. And although their Lordships are of opinion that the appellants have not waived their right to insist upon arbitration as regards the Bell drain, they think that the appellants ought to have insisted upon the question as to the competency of the action being determined before the matters in dispute were referred to the county court judge.

In the result their Lordships will humbly advise Her Majesty that the order of the Supreme Court ought to be discharged, except as to costs (with which their Lordships do not propose to interfere), and that the order of the Court of Appeal and the judgment of Ferguson, J., ought also to be discharged, and that it should be referred back to the county court judge to determine the amount of damages occasioned by the overflow from Government drain Number One, and that the action as regards the Bell drain ought to be dismissed without prejudice to any claim on the part of the respondents to have the amount of the damages to their property occasioned by the construction of the Bell drain and consequent thereon determined by arbitration, and that the further consideration of the action should be reserved.

There will be no costs of this appeal.

HARWICH *vs.* RALEIGH—TILBURY EAST *vs.* RALEIGH.

R. S. O. (1887) Cap. 184, Secs. 585 and 590 Considered—Distinguishing Assessments.

A single assessment for one entire scheme made up partly for work that should be done under Section 585 and partly for work under Section 590 is void, where it appears that one element of the assessment is not warranted.

October 3rd, A. D. 1891. B. M. BRITTON, Q. C., Referee.

This is an appeal, first, by the Township of Harwich, and, secondly, by the Township of Tilbury East, against the report, plans, specifications and estimates made by Richard Coad, Esquire, P.L.S., bearing date the 18th day of May, A. D. 1891, for deepening, widening, extending and otherwise improving the Raleigh Plains drain and outlet thereof.

Pursuant to appointment made by me, court for the trial of this case was opened at the Court House, in the Town of Chatham, on Thursday, the 24th day of September, A. D. 1891, at 10 o'clock in the forenoon, and all the parties were represented by their respective counsel.

Mr. Wilson, Q. C., and Mr. Rankin appeared for the Township of Harwich, and Mr. Pegley, Q. C., for the Township of Tilbury East, and Messrs. Houston and Scane for the Township of Raleigh.

Service of the notice of appeal was admitted. The report and the by-law provisionally adopted by the Township of Raleigh were put in and admitted by counsel for the Townships of Harwich and Tilbury East. Publication of the provisional by-law was admitted.

Counsel for the Township of Raleigh stated that under the decision lately given by the Court of Appeal in "Orford vs. Howard," the report and by-law could not be upheld under sections 569 and 585, or any section of the Municipal Act other than section 590, and only under the second part of that section, but it was contended by the Township of Raleigh that the report and by-law could and ought to be held valid under the second part of section 590.

It was then admitted for the sake of argument by counsel for Harwich and Tilbury East, but the admission to be only on this branch of the case and without prejudice to said townships giving evidence if necessary as to the facts of how and under what circumstances the water flows from Harwich and Tilbury East upon Raleigh, if it does so flow.

The plans and profile and specifications were then put in and admitted.

The case was argued by counsel upon the facts before me, as above stated.

I am of opinion that the report of Richard Coad, Esquire, appealed against and the by-law provisionally adopted by the Township of Raleigh ~~cannot~~ be sustained.

I have simply to consider whether or not the Township of Raleigh is authorized by section 590 to do the work and enforce the assessment according to the report against the Townships of Harwich and Tilbury East, and I think the Township of Raleigh is not so authorized for the following reasons:

The circumstances under which Mr. Coad made his report are all set out in the first six paragraphs of the preamble to the by-law in question.

Mr. Coad made his report—it is full and complete and exhaustive in reference to the work as stated in the first paragraph of that report.

The scheme was a large work to be done by Raleigh and to cost according to the report $59,000.

I have carefully read the report, and can find in it no work, that can properly be called work, to be done under latter part of section 590, except so far as such work would be included in the much larger work, namely, that of deepening, widening, extending and otherwise improving the Raleigh Plains drain and the outlet thereof, and for deepening and widening part of the Number Two Government drain.

This large work is not authorized by section 590, but it is authorized by section 585.

I am therefore of opinion, without considering or deciding any other point raised by the appealing townships, that this assessment being single in respect of one entire scheme and made up partly for deepening, widening, extending and otherwise improving existing drains, and partly for other purposes—partly for work that should be done under section 585 and partly for work under section 590—is void.

This case, in my view, falls directly within the language of Mr. Justice Osler in "Orford vs. Howard," lately decided in the Court of Appeal. Mr. Justice Osler says in that case:

"Assuming that there is evidence that might have justified the "engineer in reporting and the arbitrators in confirming the report "in respect of a drain constructed for the purpose of carrying away "from land in Howard water which Orford had within the meaning "of section 590 caused to flow, yet the assessment being single in "respect of one entire scheme, but made up partly for benefit, partly "for outlet and partly for relieving lands injured by water cast upon "them by Orford, and no distinction being made as to lots assessed "for benefit, injury or outlet, I think the whole must fail, when it "is shown that one element of the assessment, that, viz., for outlet, "made under the first part of section 590, is not under the circum"stances warranted by that section."

It seems quite clear here that several items of the assessment are not for purposes to which section 590 refers, and as it is conceded that the assessment must stand, if at all, under section 590, I think it can not stand.

I therefore allow the appeal of the Township of Harwich and of the Township of Tilbury East.

And pursuant to the power vested in me by section 3 of "The Drainage Trials Act, 1891," I decide that the by-law provisionally adopted by the Township of Raleigh on the second day of June, A. D. 1891, is invalid, and I order that the same be quashed.

Upon the question of costs I feel some difficulty in this case. Generally the successful party should get costs, but it must be borne in mind that the case is before me without having all the evidence that the different townships could offer. If all the evidence were taken, it is possible that upon some of the objections taken by notice of appeal the costs would go against appealing townships. I know that the members of municipal councils have onerous duties to discharge, and in attempting to provide for the proper drainage of townships under the clauses of the Municipal Act, the members of the council of Raleigh have a particularly difficult task.

When they have been reasonably careful in undertaking a very large work, of which by far the greater part of the expense was to be borne by their own township, and when in having a survey made and plans and estimates prepared they have gone to very large expense, and, as alleged by the engineer, the proposed work was to some extent rendered necessary by the appealing townships, and when all this work is rendered useless for the reasons above given by me, I do not think I should compel the Township of Raleigh to pay costs.

I order and direct that each township should bear its own costs of appeal.

I order that the sum of $10 for one day's trial be paid in stamps by the Township of Raleigh.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION.

SEEBACH *vs.* TOWNSHIP OF FULLERTON.

Overflow—Damages—Injunctions—Payment in Court—Costs.

Where Defendants by means of a road ditch caused water to flow upon Plaintiff's lands they were held responsible for damages, and required either to provide an outlet or close up the ditch so as to prevent the further overflowing of Plaintiff's lands. The Plaintiff held entitled to costs of the action, although a sufficient sum to cover the damages was paid into court.

April 29th, 1892. B. M. BRITTON, Q. C., Referee.

This action was commenced in the Chancery Division of the High Court of Justice and referred to me as referee under the "Drainage Trials Act, 1891," pursuant to the provisions of that Act, and pursuant to the provisions of sections 101 and 102 of the Ontario Judicature Act.

The case was tried and heard before me at the City of Stratford on the 18th and 19th days of February, A. D., 1892, in presence of J. P. Maybee, counsel for the plaintiff, and John Idington, Q. C., counsel for the defendants, and having considered the evidence and what was said by counsel, I now find, decide, report and give reasons for my decision as follows:—

The plaintiff is the owner of part of lot 11, 4th concession of the Township of Fullerton, subject to a mortgage thereon to one W. G. Wills. A considerable portion of this land is low. The south eastern portion of it has never been of much beneflt to the plaintiff for farm or garden purposes.

In 1886 the defendant and certain land owners, pursuant to the award of one Davis S. Campbell, the defendant's engineer, made and completed or enlarged two ditches along the concession line between the 4th and 5th concessions, one on the north side of the concession road and the other on the south side of said concession road, as is set out in plaintiff's statement of claim.

The plaintiff after the award ditch was completed made a ditch commencing upon the side road two or three claims northerly from the concession, and, running it south westerly, cutting off about three acres of his land, connected it upon the concession with the award ditch running along the northerly side of said concession road.

The defendants then made a ditch along the side road between lots 10 and 11 in the fourth concession on the easterly side of plaintiff's land, and as stated in the eighth paragraph of plaintiff's statement of claim. This ditch was commenced in September, 1887, and was finished in the spring or early summer of 1888. It was five feet wide at the top and two and a half feet deep.

The south east corner of plaintiff's land is used as a mill yard and garden, the garden itself being a small patch of land considerably less than an acre.

In 1888 the plaintiff was able to use this garden and he raised vegetables of some value. In 1889 the plaintiff prepared the ground in his garden, planted potatoes and set out cabbage plants, but by reason of the water these came to nothing and he lost his labor and seed and use of the ground. He says he also lost some young fruit trees and was otherwise damnified, all by reason of the water brought down by this side line ditch, which water could not get away because the concession award ditches had become partly filled with sand and earth and silt, and was entirely insufficient for the purpose for which these ditches had been made.

I find as a fact that more water was brought upon plaintiff's land, by reason of this sideline ditch, than would otherwise have come there. The plaintiff did not object to the making of this ditch; on the contrary he was willing it should be made.

I am of opinion upon the evidence that he did not ask to have it made. He was complaining of the road between lots 10 and 11 and asked to have this road improved. The defendants in making the road, made the ditch, placing the earth taken from the ditch upon the road, and the plaintiff did suggest that this ditch be put upon the eastern side of the road instead of the west, as defendants apparently at first intended, but the plaintiff supposed the award ditches on the concession were sufficient, or would be made sufficient to take care of the additional water to be brought down by the sideline ditch being constructed, and so I find that the plaintiff is not by his acquiscence or conduct in reference to this sideline ditch, estopped from complaining of the injury he sustains by reason of it. If I am correct in my view of the evidence that the defendants caused more water to flow down the sideline ditch than would otherwise have come there, then they are bound to see to it that such water does not remain upon plaintiff's land, and so they must provide a proper outlet for it, either by these award ditches along the concession or in some other way. If they can not do this they must close up the sideline ditch.

In the view I have taken of the case I am not called upon to decide whether the award of the engineer under which the concession ditches were made or improved is *ultra vires* the power of the engineer or not.

The plaintiff asks for an injunction restraining the defendants from further allowing the water coming down the side road to overflow upon the lands of the plaintiff, and I think the plaintiff is entitled to this so far as this water comes down through the ditch made by the defendants on the eastern side of said side road.

The plaintiff is not upon the case made entitled to an injunction restraining the defendants from allowing the waters accumulating upon the concession road to back up and overflow the plaintiff's land. Unquestionably from the evidence a great deal of water come down in its natural flow from the north and east, that the defendants are in no way responsible for, and it is in the interest of the plaintiff that he co-operate with the defendants and with the land owners along the concession in perfecting the drainage system.

The plaintiff was apparently not unwilling to go to law, and as appears by the letter of the Reeve (exhibit 4) a little delay might have resulted in a settlement of the matters in dispute. This letter was written on the 14th November, 1890, and the writ issued only four days later. The plaintiff, however, in my opinion, is entitled to recover, but as it was stated during the trial and upon the argument by counsel for plaintiff that the wrongful act of the defendants had ceased or that steps had been taken to complete the system, I make no order for injunction, but in lieu of it assess the damages down to this date under rule 680.

I assess the damages of the plaintiff at the sum of $50, that is to say, I find no more damages than the defendants have paid into court and I order and direct that the said $50 so paid into court belong to the plaintiff and be paid out to him.

If this were only a question of damages, the defendants would, upon the finding of the issue, upon the payment into court in their favor, be entitled to judgment, upon the authority of Wheeler vs. the United Telephone Co. 13 Q. B. D. 597.

It is true that the defendants have pleaded by way of alternative defence that the sum paid into court is sufficient to satisfy all damages which the plaintiff has suffered in respect of the whole of the causes of action set forth in his statement of claim, but I think it does not go to the whole cause of action. The plaintiff wants a declaration of his rights, he wants an injunction and he wants damages. The defendants say they bring in $50, and without being liable for anything, they say that sum is sufficient to satisfy all damages. So it is—but, was the plaintiff obliged to accept that sum and discontinue his action altogether, or if not, be put to the peril of having judgment go against him and have his action dismissed if no more damages could be established? I think not. In pursuance of the discretion vested in me by section 19 of "The Drainage Trials Act, 1891," I direct that the plaintiff is entitled to and that the defendants do pay the costs of the action and the costs of the reference except as hereinafter stated, the cost of the reference to be according to the tariff of the County Court.

I direct that all costs of the reference as to damages alone, be paid by the plaintiff to the defendants, that is to say, the plaintiff shall not be entitled to tax against the defendant the expense of any witness who was called merely upon the question of damages, and the plaintiff shall pay to the defendants the cost of any witness for the defendants who was called merely upon that question.

On the 15th day of January, 1892, the trial was postponed on the application of the plaintiff and the decision as to costs was reserved. I now order and direct that the plaintiff shall not be entitled to any costs for the attendance of counsel or witnesses on that day, and that the plaintiff shall pay to the defendants the cost of any witness of the defendants who attended on that day in this case alone.

I direct that the sum of $20 be paid in stamps by the defendants, being $10 for each day of the trial, and if the defendants do not affix the stamps then the plaintiff shall do so and add the amount to the costs to be taxed against and paid by the defendants.

I further direct that the costs are to be taxed by the Local Registrar of the County of Perth.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION.

M'LELLAN *vs.* TOWNSHIP OF ELMA.

Overflow—Damages—Onus.

The onus is upon the Plaintiff to establish that the water which caused the damage was brought upon his lands by the Defendants. It is not sufficient to show that the ditch as constructed does not bring about the result expected from it, or that it does not relieve the lands from water.

J. P. MAYBEE and F. W. GEARING for Plaintiff.
JOHN IDLINGTON, Q. C., for Defendants.

April 29th, 1892. B. M. BRITTON, Q. C., Referee.

This is an action brought by Peter McLellan, who is a farmer residing upon and who owns lot No. 1 in the 3rd concession of Mornington, against the defendants for bringing water upon his land and causing the same to be flooded and injured.

The act complained of on the part of the defendants is that they dug a ditch or drain from a point on the townline road at the intersection thereof with the 14th concession of the Township of Elma, along the easterly side thereof in a southerly direction upwards of 2,000 feet to a culvert in the said road opposite the plaintiff's land, by means of which ditch or drain the water complained of was brought upon the plaintiff's land. The plaintiff also charges that the defendants were guilty of negligence in the construction of that ditch, and that there is no outlet for the water brought down by this ditch, and that the water is allowed to remain on the plaintiff's land to his injury and damage.

The plaintiff asks for damages and for a mandatory injunction directing the defendants to take steps to remove the water illegally brought down.

The defendants set up in their statement of defence that upon petition duly signed by the requisite majority of those to be benefited the engineer was sent on; that he made his report; that his report was adopted; that the Township of Mornington appealed from this report; that the arbitrators appointed made an award; that in pursuance of that award this ditch or drain was made; and that the plaintiff was one of the moving parties in procuring this award, and so is estopped from complaining of the ditch or drain so made.

The defendants deny that they were guilty of any negligence, and they deny that any water is brought through that ditch or drain upon the plaintiff's land.

The plaintiff in reply says that the award is wholly illegal and unauthorized, the arbitrators having no jurisdiction to make such an award.

This action, and all questions arising therein, was referred to me by an order of the Hon. Mr. Justice Falconbridge, dated the 19th day of October, 1891.

Pursuant to my appointment the trial took place before me at the Court House, in Stratford, on Tuesday the first, and Wednesday the second days of December, A. D. 1891.

Having heard the evidence and the parties by their counsel, and having considered the matter, I now report and find as follows:

The facts set out in paragraphs 1 and 2 of the statement of defence were not in dispute at the trial.

The ditch or drain complained of was made by defendants in pursuance of, and in compliance with, an award as set out in the statement of defence. It is 2117 feet in length; the plan, profile and specifications of it were prepared by the engineer, Lewis Boulton, and as shown in exhibit No. 8.

There is no doubt that the defendants were acting in the most perfect good faith, and at considerable expense they caused this ditch or drain to be made in the full expectation and belief that water would be carried by it northerly away from the plaintiff's land to the large drain called the 14th Concession drain and afterwards westerly to the Maitland river.

The contest at the trial upon the question of fact was entirely as to whether this drain collected and carried water north as was intended away from the plaintiff's land, or south, leaving it so that it would flow upon the southern part of plaintiff's land.

There was a good deal of conflicting evidence, and this is not to be wondered at, as the plaintiff's land is low, part of it 18 or 20 acres very low, and with low lands all about it, and considering all the circumstances under which this ditch or drain was made, as disclosed by the evidence, I am not surprised that the witnesses did not wholly agree.

The plaintiff undertakes in this action to establish that the defendants have brought water upon his land to his damage. The onus is upon him. It is not a question of whether the ditch or drain as constructed will or will not bring about the result expected from it by the arbitrators or by plaintiff or by defendants. This award ditch or drain may be of no value to plaintiff; it may not in fact relieve him of any water that flows upon his land, but does this ditch or drain cause water to flow upon plaintiff's land that would not otherwise flow there? Weighing the evidence as well as I am able, I am of opinion that the plaintiff has failed to make out his case. In order to succeed in this action he must establish beyond a reasonable doubt that the defendants brought the water of which he complains upon his land, and I think the evidence falls short of this.

The plaintiff gave his own evidence in a candid way, and from that evidence as given before me and from the parts of his deposition put in by defendants, it is difficult to see how it can be said with certainty that any more water is brought upon plaintiff's land to his damage than would have come upon it had this ditch not been constructed.

The engineer of the defendants, who was called by the plaintiff, says in substance that although he would not have made such a drain, because the results to be accomplished by it in removing water from plaintiff's land would be small compared with the cost of the work, yet this drain could not injure the plaintiff. Even if only left in doubt as between the evidence of witnesses for plaintiff and for defendants in regard to the flow of water in the drain complained of, I would be obliged to give the benefit of the doubt in favor of the defendants.

Upon the evidence I feel that I am able to find as a fact that the defendants did not as alleged bring large quantities of water down upon the lands of the plaintiff, causing the same to be flooded and injured; and further, that the defendants did not in the construction of the ditch or drain take water out of its natural course and carry it down and deposit it upon the plaintiff's land, which water otherwise would never have reached there.

Owing to the view I have taken of the evidence it is unnecessary to deal with the question of the legality of the award or with the question of how far the plaintiff is estopped from complaining of a work that he was, upon the evidence, a moving party in bringing about.

I report and find that the action should be dismissed and that judgment should be entered for the defendants. Costs up to and including the order of reference to be according to the tariff of the High Court of Justice; costs of the trial to judgment to be according to the County Court tariff; and I direct that such costs be taxed by the local registrar for the County of Perth.

I order and direct that the plaintiff do pay in stamps $20, being $10 each day for two full days that the trial occupied, and that if the defendants pay the same in the first instance the said sum of $20 shall be included in and taxed to the defendants as part of their costs herein.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION.

HILES *vs.* TOWNSHIP OF ELLICE.

Action for Damages—Reference—Drainage Trials Act, 54 Vic. ch. 51 —Powers of Referee—Negligence—Petition.

The Defendants having by means of a drainage work caused water to flow upon and injure Plaintiff's lands are liable in an action for the damages sustained, and where there was no sufficient petition for the work a by-law authorizing it is illegal, though not moved against, and affords no defence. The referee has jurisdiction upon a reference to him of a damage action to award damages whether payable under section 591 of the Municipal Act or otherwise.

April 29th, 1892. B. M. BRITTON, Q. C., Referee.

This action (commenced on the 18th day of November, A. D. 1890) together with all questions arising therein, was referred to me pursuant to the provisions of "The Drainage Trials Act, 1891," on the 19th day of October, 1891, by the order of the Honorable Mr. Justice Falconbridge, at the assizes at Stratford.

It came on for trial pursuant to my appointment, and was tried and heard at the Court House, in the City of Stratford, on the 3rd, 4th. 16th, 17th and 18th days of December, 1891, and 15th day of January, 1892—when having heard the evidence on the part of plaintiff and defendants, and having heard the argument of counsel, I reserved my decision.

This action, together with all matters in question arising therein, was by consent tried and heard together with an action in the Chancery Division, brought by one George Crooks against the same defendants, and all the evidence given so far as applicable and admissable was by said consent to be used in each case.

And now having considered the whole matter, I find, order, direct and report, and give reasons for my decision as follows:

The plaintiff is a farmer residing in the Township of Elma, and was the owner of lot 21 in the 14th concession of said township.

The defendants having on the 18th of May, 1885, passed By-law No. 198, for the purpose of draining a certain part of their township, entered upon their work of constructing a ditch or drain, commencing at a point in the Township of Ellice, continuing said ditch or drain in a westerly direction through said Township of Ellice, and then along the boundary of the Townships of Elma and Ellice and the boundary of the Townships of Logan and Elma, and thence northerly through a portion of the Township of Elma—they brought the same to a point situate on the sideroad between lots 25 and 26 in the 14th concession of Elma, and about 45 rods from the northerly limit of said lots.

The plaintiff says the ditch or drain was not carried to a proper outlet, or to any outlet, and the waters collected by said ditch or drain were "turned loose," and after flowing over intervening lands, flowed upon the land of the plaintiff, by which he lost certain crops and hay and pasture and the use of his land. The plaintiff says that this By-law No. 198 was wholly unauthorized—that the defendants had no jurisdiction to pass it; and the plaintiff further charges negligence in locating and making this drain or ditch and other negligence.

Then the plaintiff further complains that the defendants, to get rid of the trouble caused by the improper and unlawful construction of this ditch or drain, and to provide an outlet for it, in 1890 passed their By-law No. 265, and under it constructed an outlet drain across lots 25, 24, 23, 22 and 21 in the 14th concession of Elma, and thence into what is called a branch of the Maitland river.

The plaintiff says that this last ditch or drain in crossing plaintiff's lot 21 is a permanent injury to him, and the plaintiff claims damages for his land taken, and for fencing and bridging that will be necessary, and other damages.

The defendants say they passed their By-laws according to law, and that as these by-laws have never been quashed the defendants are not liable.

They deny all allegations of negligence and improper conduct, and they also deny that the plaintiff has sustained any damage, and they further say that even if plaintiff has sustained damage it is not the subject of an action, but the plaintiff could only proceed to recover it by arbitration under the Municipal Act.

Although a great deal of evidence was given, both sides being determined to get everything in that could possibly have any bearing upon the case, the questions of fact are in the main easily disposed of, and indeed, as to many of the facts, there is after all very little dispute between the parties.

The questions of law that arise are of great importance, and in dealing with these questions there is difficulty.

The petition presented to the defendants, in pursuance of which they sent on their engineer and afterwards passed By-law No. 198, was signed only by persons in defendants' own township, whilst the scheme embraced, and the defendants assessed for benefit, a large number of persons in the Townships of Elma and Logan.

I am in full sympathy with the language of the learned Chancellor in the case of West Nissouri vs. North Dorchester 14 O. R. 294—used in reference to the sections of the Municipal Act now under consideration. He says "these sections have been character-"ised in a late case by the Court of Appeal as 'difficult and obscure,' "and the elucidation of them has not been aided by the diametrically "opposite opinion of the judges of the Supreme Court in the same "case 'Corporation of Dover vs. Corporation of Chatham, 11 A. R. "248, and 12 S. C. R. 321.'"

I confess that if deciding this case on first impression and not governed by authority, I would suppose that section 575 of the Municipal Act applied to such a case as this, and that the engineer continuing the drainage work into Elma for outlet, could properly do so and assess in the same manner as provided for by section 576; I feel, however, that I am unable to distinguish this case on the facts before me from the principle of the decision in West Nissouri vs. North Dorchester, and so I come to the conclusion that the defendants had no authority or jurisdiction to pass this by-law. The facts are very different in this case from the facts in Stephen vs. McGillivray, 18 O. A. R. 516, but I think this by-law is bad on the authority of that case, as here the work affects more than one municipality and so would come under section 698 of the Act.

I find as a fact and so report that the defendants commenced the ditch or drain mentioned in By-law No. 198 and carried the same into the Township of Elma as alleged; but they did not carry the same to any proper outlet or to any outlet. The oral evidence is clear enough upon this point, but apart from and in addition to all other testimony given, the defendants' By-law No. 265 passed in 1890, after reciting By-law No. 198, further recites as follows: "And whereas it was subsequently found that the outlet provided by said by-law was insufficient, and suits for damages were brought by the owners of low-lying lands in the Township of Elma against the Corporation of the Township of Ellice, for damages by water in consequence of the said drain not having been carried to a proper outlet."

Then the evidence of Thomas Cheeseman, the engineer of defendants, on whose report this drain was made, and the evidence of Mr. VanBuskirk, the engineer afterwards employed by defendants, shows that this drain should not have been located where it was located, and should not have been left as it was, before the extension drain was made.

I also find as a fact upon the evidence and so report, that by the said drain the defendants collected waters which would not otherwise have flowed upon the plaintiff's land, and caused these waters to flow there, to the damage of the plaintiff.

Mr. Cheeseman in his report (exhibit 2) says: "As the water from Ellice seems to flow without any particular direction over several lots in the 16th, 17th and 18th concessions to the sideroad between 25 and 26 in the said Township of Elma, I concluded it would be better to arrest its progress at the sideroad between lots 30 and 31 in Ellice at the boundary line between Ellice and Elma, and carry it west down the said boundary line to the sideroad between lots 25 and 26, thence down the east side of the said sideroad to a branch of the Maitland river on concession 14 in Elma. This will not only carry the Ellice drainage, but will collect the water on many lots on the 16th, 17th and 18th concessions of Elma, besides discharging the water brought down by Mornington drains and left on adjacent lands."

It is to be borne in mind that this drain was a large and costly one, being about eight miles long and estimated to cost $10,181, and that it was intended to drain about 9,000 acres of land.

Upon carefully weighing the evidence the conclusion is irresistible that a very considerable quantity of water, on coming from Ellice and elsewhere, was by means of this drain brought to plaintiff's land, which water would not otherwise have reached it but would have gone to the south and emptied into the Maitland river to the west of plaintiff's land.

I am satisfied upon the evidence that the drain complained of was not properly constructed; "the work was not properly or skilfully performed;" it was left for a long time unfinished at lot 25 in the 15th concession of Elma, with a flood of waters pouring through it and spreading upon adjacent lands.

The water was "turned loose" upon lands in Elma and by reason of these facts some of this water came upon the lands of the plaintiff.

Upon the evidence before me I am of the opinion that the drain ought not to have been taken north on the road allowance between lots 25 and 26 farther than the 17th concession of Elma. According to the evidence of Lewis Boulton, who prepared plan exhibit 12, there is a fall of 23 feet from the eastern limit of lot 23 in the 18th concession of Elma to the point where the waters flowing through the westerly drains, marked on exhibit 12, empty into the Maitland river on lot 18, 14th concession Elma, and upon the evidence I am of the opinion that none of the water in its natural flow, coming from lot 25 in the 18th concession Elma, or from the south and easterly from that lot, or through this westerly system of drains, would reach plaintiff's land.

Mr. Idlington, in his very able argument for the defendants, pressed the objection that as this work was done by the defendants under By-law 198, and as this by-law was never quashed, the defendants were protected by section 338 of the Municipal Act.

That section is as follows:

"In case a by-law or resolution is illegal in whole or in part "and in case anything is done under it which by reason of such "illegality gives a person a right of action, no such action shall be "brought until one month has elapsed after the by-law, order or "resolution has been quashed or repealed, or until one month's "notice in writing of the intention to bring such action has been "given to the corporation, and every such action shall be brought "against the corporation alone, and not against any person acting "under the by-law order or resolution."

I have carefully read all the cases I can find on the subject. These cases are nearly all collected by the Chief Justice of Ontario in his judgment in the cases of Connor vs. Middagh and Hill vs. Middagh 16 O. A. R. 356, ; two other cases are Rose vs. Wawanosh, 19 O. R. 294, and Mallott vs. Township of Mersea, 9 O. R. 611.

I am of opinion that in this case the defendants are not protected by section 338. The by-law is illegal. The defendants had no authority to pass it, as without the proper petition, signed by at least the majority of persons in the drainage area, the defendants could not legally authorize the work to be done in Elma.

But does the plaintiff's right of action depend upon the illegality of the by-law? If the majority of all the land owners within the drainage area had signed and if all necessary formalities had been complied with, and yet if the drain had not been continued to a proper outlet, but on the contrary had brought water and left it so that it flowed upon the lands of the plaintiff to the plaintiff's injury, when without the action of the defendants such water would not have flowed upon the land of the plaintiff, the plaintiff has his right of action, and need not have the by-law quashed under which the defendants were assuming to act.

On the question of liability I merely refer to the following cases without making any extracts from them :

Northwood vs. Raleigh, 3 O. R. 347.
McGarvey vs. Strathroy, 10 O. A. R. 631.
Derinzy vs. Ottawa, 15 O. A. R. 712.

I am of opinion that such damages as plaintiff complains of on the first branch of his case, and arising from the drain referred to in defendants' By-law No. 198, are not necessarily such as are contemplated by section 591 of the Municipal Act, and which must be determined by arbitration, but even if they are, under this reference and under "The Drainage Trials Act, 1891," sections 5, 9 and 11, I have power to deal with the whole matter.

In reference to damage by reason of the water brought by the defendants in constructing the drain and by reason of the drain under By-law No. 198, I find for the plaintiff.

The plaintiff is certainly not very clear in his statement of damages, and no such amount as he claims and as he puts in exhibit 5 is supported by the other evidence. The parts of the plaintiff's examination before trial which the defendants put in show that the plaintiff had no clear knowledge of the exact particulars of the amount of damage he had sustained. He has, however, sustained some damage during the years since 1885, which upon the evidence he should recover from the defendants, and I assess such damages at the sum of $160 upon this branch of the plaintiff's case.

As to the new outlet drain built under By-law No. 265 of defendants : this drain is called "A new outlet drain" or "Maitland extension drain," and is shown in the report of the witness VanBuskirk. (See exhibit 15).

I am not called upon to say anything about the right of defendants to build it. That drain or some such drain or some relief, was absolutely necessary by reason of the facts recited in By-law 265, and that drain has been acquiesced in by the Township of Elma and by the people interested.

I find as a fact that there was no negligence in the construction of that drain, and that the plaintiff has sustained no damage by reason of that drain, other than for loss of land and the necessity of fencing and bridging and other work forced upon plaintiff by reason of the drain going through his land.

Apart from any question that might arise in case By-law 265 should be held invalid, and assuming that by-law to be valid, these damages were not such as plaintiff could sue for, but they were only such as would be determined by arbitration under section 591, etc., of the Municipal Act, but such damages are now referable to me under "The Drainage Trials Act, 1891." I think I have authority to deal with the matters upon this reference.

I find the plaintiff's damage to be upon this branch of the case $110, made up as follows:

$80 for loss of land, $40 for fencing and clearing up and grading banks of the drain, and $30 for one substantial bridge, making in all the sum of $150; and I find the plaintiff's farm is directly benefited by this outlet drain to the extent of $40 over and above the amount assessed against it for construction. Taking this $40 from the $150, I find plaintiff's damage on this branch of the case $110 as above mentioned. I find upon the evidence and so report that only one bridge is necessary.

The entire amount of damages on both branches of plaintiff's case I find to be $270, which amount I order and direct the defendants to pay to the plaintiff.

I order that the defendants do pay the costs of this action (costs of entering the same for trial to be costs in the cause) and costs of the reference—the costs of the reference to be according to the tariff of the County Court.

I further order that the sum of $30 be paid in stamps, being $5 a day for each day for six days of trial; this small amount being ordered, as two cases were tried together and a similar amount is ordered in the other case. This sum to be paid by defendants, and if the plaintiff pays the same he is to add that amount to his costs, and have the same taxed against the defendants.

I further order and direct that the taxation of costs shall be by the local registrar of the County of Perth; all of which I report and certify.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION.

CROOKS *vs.* TOWNSHIP OF ELLICE.

April 29th, 1892. B. M. BRITTON, Q. C., Referee.

This action was referred to me by the order of the Divisional Court of the Chancery Division on the Thirteenth day of October, 1891, and pursuant to my appointment it came on for trial and was tried and heard before me at the Court House, in the City of Stratford, on the 3rd, 4th, 16th, 17th and 18th days of December, 1891, and on the 15th day of January, 1892.

It was by consent tried and heard together with an action at the suit of Samuel R. Hiles, plaintiff, against the same defendants in the Common Pleas Division and the evidence given, so far as applicable and admissable was by said consent to be used in each case.

Having heard the evidence for both plaintiff and defendants, and having heard counsel for the parties, I reserved judgment. and now, having fully considered the matter, I find, order, direct, decide and report, and give the reason for my decision as follows :—

The plaintiff is a farmer residing in the Township of Elma and was tenant of forty acres of the north half of lot 20 in the 14th concession of said township.

The defendants having on the 18th day of May, 1885, passed By-Law No. 198 for the purpose of draining certain parts of their township entered upon their work, constructing a ditch or drain, commencing at a point in the Township of Ellice, continuing said ditch or drain in a westerly direction through said Township of Ellice, and then along the boundary of the Townships of Elma and Ellice and the Townships of Logan and Elma, thence northerly through a portion of the Township of Elma, they brought the same to a point situate on the sideroad between lots 25 and 26 in the 14th concession of Elma, and being about 45 rods from the northerly limit of said lots.

The plaintiff says this ditch or drain was not carried to a proper outlet or any outlet, and the waters collected by said ditch or drain were turned loose, and after flowing over intervening lands, flowed upon the lands of the plaintiff to his injury.

The plaintiff also charges the defendants with other negligence in and about the locating and construction of said ditch or drain.

The plaintiff alleges that his crops were injured and that he was prevented from cropping and using his lands as he otherwise would, and claims for other damages growing out of his covenant with his lessor.

The defendants by way of defence set up the By-Law No. 198, which they say is in force, never having been quashed, and no motion having been made to quash it, Section 338 of the Municipal Act protects the defendants, and no action will lie against them for anything done under this by-law.

That the debentures were issued and sold to pay for the work, that the work was done under the engineer without the interference of the defendants, who acted solely as trustees or agents so constituted by the parties interested under the Municipal Act, and so this by-law must be held valid ; and they allege other matters by way of defence.

I have fully considered the evidence and have come to a conclusion, and I have given the reasons for my decision in my report in the case of Hiles against the defendants, before referred to, tried with this case ; and all I have said there in reference to the matter of this drain and the liability of defendants and the right of the plaintiff there to maintain that action, is applicable to this action and to the right of this plaintiff to maintain this action for damages resulting from the construction of this drain.

That part of my report in the case of Hiles vs. these defendants is to form part of this my report in the present case.

I find as a fact and so report, that the defendants in making said drain provided for by their By-Law No. 198 did not carry that drain to a proper outlet or to any outlet, and by reason of that, a very considerable quantity of water coming from Ellice was by means of this drain brought to the plaintiff's land that would otherwise not have reached it, but would have gone to the south and reached the Maitland River to the west of plaintiff's land.

I am satisfied upon the evidence before me that the drain complained of was not properly located or constructed, and the defendants by their engineer were guilty of negligence and by reason of that some of the water brought by said drain flowed upon the land of the plaintiff.

Upon the evidence I find that the plaintiff is entitled to recover, and I assess the damages for his labor, loss of seed and loss of crops during all the time and down to the date of this my report, at the sum of one hundred and seventy dollars, which amount I order and direct the defendants to pay to the plaintiff.

I direct that the defendants do pay to the plaintiff the costs of the action and costs of the reference—such costs of reference to be according to the tariff of the County Court.

I order and direct that the defendants do pay in stamps, affixing the same to this my report, the sum of thirty dollars, being $5 each day for six days occupied in the trial, as the two cases were tried together I order only $5 each day in each case.

I order and direct that the costs be taxed by the local registrar of the County of Perth.

IN THE COURT OF APPEAL.

HILES *vs.* ELLICE—CROOKS *vs.* ELLICE.

Drainage—Municipal Corporations—By-law—54 Vic. ch. 51 (O.)

Under the "Drainage Trials Act, 1891," 54 Vic. ch. 51 (O.), the referee has power to award either damages or compensation whether the case before him be framed for damages only or for compensation only, and on such a reference it is unnecessary to consider whether the by-laws in question are or are not invalid.

Reports of the referee upheld, Burton, J. A., dissenting on the ground that in the one case there was a reference of the action and not a transfer under 54 Vic. ch. 51, section 19, and that in the other case the reference was not within the Act.

Held by Burton, J. A., that an action for negligence is not maintainable against the municipality unless the Council has interfered in or undertaken the construction of the work, and quære whether in such a case the members of the Council might not be personably liable.

These were appeals from reports of B. M. Britton, Q.C., Referee under the Drainage Trials Act, 1891.

The plaintiff Hiles was a farmer living in the Township of Ellice, in the County of Perth, and was the owner of lands in the Township of Elma in that county.

The plaintiff Crooks was a farmer also living in the Township of Ellice, and was tenant of a farm in the Township of Elma, his lease being dated the 21st March, 1887.

Hiles brought his action on the 18th November, 1890, claiming payment of damages alleged to have been sustained by him by reason of the defective construction of a drain, which had been built under the authority of a by-law (No. 198) passed by the defendants on the 18th of May, 1885, from a point in the Township of Ellice into the Township of Elma. The plaintiff's contention was that the drain was not carried to a proper outlet, and that the waters collected by it were brought down upon his land; that the by-law was unauthorized and passed without jurisdiction, and that there had been actual negligence in the construction of the drain. The defendants afterwards built, under authority of a by-law (No. 265) passed on the 4th of August, 1890, an outlet to the drain, carrying its waters into the river Maitland.

This outlet drain crossed part of the land of the plaintiff Hiles, and he claimed damages for land that was taken, and also for the expense of fencing and bridging.

The petition upon the authority of which the defendants passed the first by-law was signed only by persons residing in the Township of Ellice, whilst the scheme affected a large number of persons residing in the Townships of Elma and Logan.

The action came on for trial at Stratford, on the 19th of October, 1891, before Falconbridge, J., who "referred the action and all questions arising therein to B. M. Britton, the Referee appointed under the 'Drainage Trials Act, 1891,' pursuant to the provisions of the said Act."

Crooks brought his action on the 14th of August, 1891, claiming damages for crops destroyed and for interference with cultivation; and on motion of the defendants, made on the 17th of October, 1891, before Boyd, C., "this action was referred to the Referee appointed under the 'Drainage Trials Act, 54 Vic. ch. 51.'"

The actions were then tried together before the Referee, who held that the defendants had no jurisdiction to pass the by-law in question; that they had not carried the drain to any proper outlet; that the drain caused waters to flow on the lands of the plaintiffs; that the work was not properly done; that as the by-law was illegal the defendants were not protected by section 338 of the Municipal Act, R. S. O. ch. 184; that the damages caused by the first drain were not such as were contemplated by section 591 of the Municipal Act, R. S. O. ch. 184, so as to necessitate the assessment thereof by arbitration; and that even if they were, there was power under the Drainage Trials Act to assess them; that the plaintiff Hiles was entitled to $270 as damages with costs, and that the plaintiff Crooks was entitled to $170 and costs.

The defendants appealed and the appeal was argued before Hagarty. C. J. O., Burton, Osler, and Maclennan, JJ.A., on the 21st, 22nd and 23rd of November, 1892.

M. Wilson, Q. C., and E. Sidney Smith, Q. C., for the appellants. When this work was done, there was no power to continue the drain for outlet purposes, and the defendants did all that they could. If any injury was caused by the want of an outlet, then the Township of Elma must raise the question and not ratepayers in that township. See section 581. Crooks at all events cannot raise any objection to the first by-law, as he took his lease after the by-law had been passed and the work had been partially done. If the by-law is valid, there is clearly no right of action at all but merely a right to compensation, and even if the by-law is invalid, there is no right of action until it is quashed. Williams vs. Raleigh, has not changed this rule but turned on the point that the by-law was wholly illegal. Here the defendants employed competent engineers and contractors, and cannot be held responsible. The referee had power only to try the questions in issue in the actions, and was not in fact acting under the Drainage Trials Act, and could not arrogate to himself the right to give compensation as under the Municipal Act, if no right of action existed.

J. P. Mabee, and F. W. Gearing, for the respondents. The petitions upon which the by-laws were founded were not properly signed. There was not a majority of ratepayers living in the drainage area, and the township had no jurisdiction whatever to pass the by-laws, and being wholly illegal, there was no necessity for quashing them. Moreover there is a right of action because of the actual negligence of which the defendants have been guilty. It is, however, immaterial whether there is or is not a right of action, as under the Drainage Trials Act the referee has the power to give either damages or compensation. The plaintiffs are either entitled to damages strictly so called, or to an allowance by way of compensation, and the result arrived at will be precisely the same; and, as the amounts allowed are certainly reasonable, the reports ought not to be interfered with.

M. Wilson, Q. C., in reply.

Hagarty, C. J. O.:—These suits are against the corporation of the Township of Ellice for damages to the respective lands of the plaintiffs, who both reside in the adjoining Township of Elma, and were tried and argued together.

The complaint in each is for injuries from overflow of water brought down by Ellice into Elma.

The plaintiff Hiles claims as owner of lot 21, 14th concession of Elma, that under a by-law 198, the defendants cut a drain in Ellice going into Elma. He sets out certain objections to the by-law as to the insufficiency of the petition. He then alleges that he had no notice of this work, and that his lands were not assessed therefor; that there was no proper outlet, or any outlet, but that the defendants stopped their work, leaving the water collected from a large area "turned loose," and that by the result of this negligence, it flowed over his land; that actions for damages from overflow having been brought by other proprietors in Elma, the defendants passed another by-law, reciting that the first drain had not been brought to a proper outlet, and thereby providing to carry the drain to some outlet and get rid of the waters, and for the continuance of the drain across certain named lots including his lot; that thereunder they have entered on his land and excavated, etc., etc., thereon so as to require bridges, etc.; that they are trespassers, not having observed the legal formalities; no petition for the last drain; no Court of Revision held, etc.

The plaintiff is assessed for this last drain.

He claims for injuries to and loss of crops, and for permanent injury by reason of defendants' neglect resulting in their having to cut this outlet across his lot instead of in its proper course.

Defence:—That by-law was duly made and has not been quashed; that there was no negligence, and so that they are not responsible; that after the drain was made, it became necessary and was held expedient on a report of surveyors recommending it, to extend the drain to a new outlet, and therefore defendants lawfully passed the second by-law (No. 265); that there had been no application to quash or appeal, and that defendants proceeded with the work, and having done only their duty without negligence they are not responsible, etc.

That no compensation having been agreed on nor settled by arbitration, action is not maintainable, compensation is the only remedy, etc.

That the benefit to the plaintiff will largely exceed any loss.

The claim in Crooks' case is exactly the same as Hiles, with the additional statement that he is tenant of this lot (20 in the 14th concession) and that as lessee he was bound to clear for cultivation, but by reason of this overflow he was prevented from so doing, that his crops were injured, and that he sustained other loss. The defence is in substance the same as in Hiles' case; by-law not quashed, and no liability, even if engineer did not furnish any proper outlet; action does not lie, only compensation; that plaintiff took his lease with notice of all the risks he ran from the operations complained of.

The Act, 54 Vic. ch. 51, passed some months before these references, in May, 1891, gives very large powers. Section 3 gives the referee all the powers of the High Court, and of arbitrators under the Municipal Act as to determining the legality of all petitions, including the original petition for the work. Section 2 gives him all the powers of arbitrators as to compensation for lands taken or injured. Section 9 provides that in case of disputes, etc., the municipality or individual may refer the same to the referee as to damages done to property of the municipality or individual. Section 11 allows any action for damages to be referred by Court or Judge. Section 17 gives an appeal to this Court. Section 19 provides that in actions for damages, if the Court thinks that the proper proceeding is under this Act, the Court or Judge may order its transfer to the referee at any stage, etc. In case no application therefor be made, the Court or Judge may dispose thereof as a matter within the jurisdiction of the Court, subject to appeal, and notwithstanding any Act or Acts, the jurisdiction shall be deemed to include all relief within the powers of the referee as well as any other relief within the powers of the High Court.

I consider that, under this Act, the referee has power to award either damages or compensation in all claims before him, and this, whether the case be framed as for damages only, when the referee finds it to be properly only a claim for compensation under the statutes; and that both the cases before us must be so treated, and if they had not been referred, the trial Judge could have so disposed of them.

In holding the original by-law to be illegal for insufficiency of the petition, the referee has opened up a very large field of enquiry. If invalid on its face in a Court of Justice it could not be supported. An objection like this requires some consideration.

In my view the plaintiffs are entitled to damages, whether the by-law can or cannot be supported.

I think the learned referee had ample ground for holding as he did.

He finds all the damages to have been caused by the work done under the first by-law; that it was not properly or skilfully done; that it was left for a long time unfinished at lot twenty-five, with a flood of water pouring through it and spreading on adjacent lands; that it was "turned loose" upon lands in Elma, and by reason thereof some of it reached these lands causing damages.

I am unable to accept the argument that one township can collect the water from a large area and discharge it just inside the line of another township, where it is let loose, without being liable for damages to those injured.

In 1885, when the by-law was passed, it is said there was no power to carry it into an adjoining township. The additional power was given in the following year by the Act 49 Vic. ch. 37, section 27 (O.), so as to get sufficient outlet for water.

The defendants' engineer, Cheeseman, says that the water was brought to the townline of Elma, where it was up to November, 1886; and that he considered he had done his duty under the Act; that getting rid of it from Ellice was sufficient.

The contract was let in August, 1885. The contractor seems to have abandoned or left the work, and a delay of a year took place.

Cheeseman's statement seems clear that the water was kept back all 1886 to the townline.

We may gather from the evidence that the execution of the first by-law caused a very large amount of damage to land in Elma, including the lots of these plaintiffs.

In March, 1886, the additional power was given by statute, and the defendants could then by reasonably prompt action have averted much of the evil consequences. But the matter was allowed to drag on, and the second by-law was not passed till August, 1890. An outlet was finally obtained, but not completed till 1891 or later.

The damage claimed was in 1887, 1888, 1889 and 1890. The tenant Crooks did not enter on his farm till April, 1887, and his claim began as to his crops of that year.

I can see no objection to his right to damages on the evidence. He is not claiming compensation for any permanent injury legalized by the legislature, and necessarily inflicted by the exercise of municipal powers. It is not necessary to discuss the position of a tenant for years as to permanent injury. Our legislature has not, I think, specially provided for compensation to tenants as has been done in England.

The Imperial Lands Clauses Act, 8 and 9 Vic. ch. 18, sections 119, 120, 121 and 122, provides for compensation in the case of tenants. See 1 Hodges on Railways, 7th ed., p. 243.

It is not necessary here to determine the right as to tenants. I may say, however, that I do not see why they should not be entitled under the words of our Act, section 483, which directs compensation to be made to "the owners, occupiers of, or other persons interested in, real property entered upon, etc., or injuriously affected by the exercise of its powers."

Words to a like effect are in the Railway Act, R. S. O. ch. 170, as to owners and occupiers and all persons interested.

In Hiles' case an allowance is made to him by the referee for damages and permanent injury, charging against that the resulting benefit from the works, in all $270. Crooks gets $170 for damages alone. I can see no reason for interfering with the learned referee's decision in either case, and I think both appeals should be dismissed.

I cannot but lament the enormous amount of costs involved in these appeals.

It seems a matter of regret that a man cannot venture on a complaint of this character, involving two or three hundred dollars, without running the terrible risk, if unsuccessful, of becoming liable for thousands.

We have an appeal book here running up to 500 pages. I feel bound to notice the unjustifiable printing of a large amount of matter of no possible interest in the discussion.

A question was asked as to Crooks' relation to his landlord, and we have printed *in extenso* his lease, notices formally given to him by his landlord, writ of summons, and notices from him, a bill of sale of several printed pages, with full inventory of chattels attached and affidavit of execution. All utterly useless.

Then the schedule of lands in Cheeseman's report to be assessed, running over five pages, is set out in the first by-law in Ellice, Elma, Mornington, and Logan, and all again repeated in the enacting part of the by-law.

Then Cheeseman's report already set out in the by-law, is printed with the same list of lands, covering several pages.

Then comes the second by-law with seven pages of lots in the different townships.

Then another schedule of lots and assessments of many pages in Van Buskirk's report.

Then a by-law of Elma with another dreary list of lots assessed.

Then a by-law of Logan with a similar list of lots; and another Elma by-law with another list of lots of several pages.

We thus find six schedules of lots printed. It is difficult to understand the motive of this vast addition to the costs; or how the insertion of these schedules bears on our consideration of the case. A few lines of statement could have explained all that was required, as for instance, whether plaintiffs, or either of them, had been assessed, and when and under which by-law.

I think we should mark our direct disapprobation by directing that at least 100 pages should be disallowed in each of these books, and be wholly disallowed on taxation to any party.

The taxing Master can also see as to necessity of an appeal book in full being necessary in each of these cases, both being tried together.

—

Osler, and Maclennan, JJ.A., concurred.

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Burton, J. A.:—

HILES *vs.* ELLICE.

The first important question is as to the validity of by-law number 198, which was passed in July, 1885, with the usual notice appended that any person moving to quash must within ten days give notice of such intention.

The learned referee has held this by-law illegal, on the ground, as I understand it, that it was not petitioned for by a majority of the ratepayers in each of the townships of Ellice, Elma and Logan ; feeling himself bound by a decision of the Chancellor in West Nissouri vs. Dorchester, 14 O. R. 294, but with great respect I think that case is not applicable.

I~~n that~~ case the by-law was for the construction of a drain extending through the adjoining townships, forming one entire scheme of drainage through both townships.

Here the work petitioned for was wholly within the Township of Ellice, and the only interference with any other township, except as provided for by section 576 of the Act of 1883, 46 Vic. ch. 18 (O.), now section 575 of R. S. O. ch. 184, was to enable the municipality to carry the water beyond the limits of their own municipality. As the law then stood, Ellice had no authority (since granted by the legislature) to carry it sufficiently far in that township to obtain a sufficient outlet.

It is true lands in other townships were benefited, and were assessed for benefit, but that was not within the area which the petitioners proposed to be drained. The property proposed to be drained, and the drain itself, were wholly, except as I have mentioned, within the limits of the Township of Ellice ; the benefits that landowners obtained in the other townships were mere incidents for which the engineer was entitled to charge them under section 577 of the Act of 1883, now section 576 of R. S. O. ch. 184. But however that may be, I think that that question could only arise upon a motion to quash the by-law, and that the by-law was not so wholly void that it can be impeached in this way.

Those cases in which the courts have held that the validity of a by-law could be collaterally impeached are cases in which there was an express prohibition to pass such a by-law, as in the case of opening highways when "no council shall pass a by-law" until certain formalities are complied with. Here is a by-law as to which no such statutory prohibition exists, and under which debentures for a very large amount have been issued.

I think that the view that the learned referee would have taken, if not, as he thought, fettered by authority, was the correct one, viz.: that the work was authorized under section 576 of the Act of 1883, and that the engineers could properly assess under section 577 of that Act.

I do not think that Stephen vs. McGillivray, 18 A. R. 516, decides otherwise, although there are some *obiter dicta* in that case which might lead to such a conclusion.

I am of opinion, therefore, that the by-law 198 was a good and valid by-law. But the learned referee holds that there was negligence in the construction of the work, and if so, the by-law would afford the municipality no protection. But he proceeds to point out in what he considers this negligence to consist:

1st. Because the drain was not properly located;

2nd. Because there was no sufficient outlet or no outlet;

3rd. Because it was left unfinished at some portion for an unreasonable time.

With great respect, I do not think that the defendants could be made liable as for negligence under either of the heads numbered one or two; the employment of a competent engineer is all that can be reasonably required of the defendants, and the council are properly not authorized to interfere with the discretion of the engineer in any matters of detail in the construction of the work. Their discretion is confined to the adoption of the engineer's report as a whole or its rejection; and the council in such a matter, acting upon the advice of the engineer appointed by law, is not liable for error of judgment of such engineer who is in such a matter acting judicially.

As to the second head, in addition to its being a matter for the engineer, he had no power at that time to do what it is said he should have done, that is, continue the drain through the adjoining township until he found a sufficient outlet.

If, as the learned referee finds, the waters were "turned loose" upon lands in Elma, that could not be an actionable wrong if the defendants had authority, as they undoubtedly had in my opinion, to do the very act complained of, viz.: to continue the survey and levels into the adjoining municipality until they find fall enough to carry the waters beyond the limits of Ellice. That may have been faulty legislation, and was evidently so considered, as in 1886 the law was amended; but it gave no ground of action, although the party would not be without remedy.

The defendants might possibly under certain circumstances be liable to an action under the third head of negligence, if any evidence had been offered of interference by them as a corporation in works causing injury to the plaintiff; but no such injury is alleged or proved; on the contrary, the injury complained of is for damage done after the completion of the drain; but there is the additional fact that the work was let to an independent contractor, which would seem to furnish a complete answer to such an action: Duncan vs. Findlater, 6 Cl. & F. 894; Reedie vs. London & North Western R. W. Co., 4 Exch. 244.

No sufficient reason has been alleged for holding the second by-law, number 265, invalid.

The law had in the meantime been amended so as to enable the Township of Ellice to do what presumably they would have done at first, if they had then had authority; and thereupon the Township of Ellice, on the request as is alleged of Elma, passed the by-law in question so as to obtain a sufficient outlet for the water. The by-law was never moved against, and for the reason I have already mentioned was, in my opinion, fully warranted without any fresh petition.

The plaintiff does not claim that he had suffered any injury under this work beyond the taking of his land, and the learned referee has so found and has decided that it is a case for compensation only under the statute.

If the interpretation of the Act of 1891, and the manner in which this case was referred, were less open to doubt than I fear they are, I should have contented myself with saying that the plaintiff was entitled to recover either in the action or for compensation. But the defendants contend that if this had been a claim for compensation, then the mode of procedure is pointed out under section 5, by notice stating the grounds; if on the other hand the party has mistaken his remedy, and brought an action instead of proceeding under the arbitration clauses, then on application to a judge, he may order the action to be transferred to the referee on such terms as to costs or otherwise as he may see fit; in which case the order should properly recite the fact that the remedy had been misconceived, and it was transferred to the referee to be dealt with as a case for compensation, but the referee has also the powers of an official referee under the Judicature Act.

What the defendants contend is that the reference in this case was a reference of this kind under the Judicature Act, and when we read the order, there is much force in the contention. The reference does not proceed on the ground that the case is not one for damages, but for compensation—two widely different things. But on the case being opened and on reading the pleadings, the action and all questions arising therein are ordered to be referred to the Referee pursuant to the provisions of the Act, one of which provisions is, that an action may be referred to him instead of an official referee.

If the contention of the defendants be correct, it follows that the only powers conferred upon the referee in this particular case was to try the action so referred, and after some fluctuation of opinion, I have been unable to bring myself to the conclusion that the defendants' contention is not well warranted. I come to this conclusion with great regret, the more so as, if proper steps had been taken, full jurisdiction could have been conferred on the referee, and a very large amount of expense has been incurred in reference to a very small claim. But although one's sympathies in such a case have a tendency to induce one to strain the law, I think it far better that the precise directions of the Act should be adhered to than to encourage a loose mode of administering it, which in most cases leads to future and unforeseen troubles and difficulties.

The legislature fully recognized the difference between are ference and a transfer.

By section 11 any action for damages may at any time after the issue of the writ be referred, but in cases where the remedy has been misconceived the Court does not refer the action, but under section 19 orders the action to be transferred ; and the Referee on such transfer is to give such directions as to the prosecution of the claim before him as may seem just and convenient and subject to the order of transfer in that behalf the costs are to be in the discretion of the referee.

The latter part of that section caused me at first to hesitate about the powers of the referee. That section proceeds to confer upon the judge trying the case the power to convert the action into a claim for compensation ; a jurisdiction not theretofore possessed. But on consideration, I think those words must be confined to their plain and literal meaning. The legislature has not thought fit to say that a referee to whom an action has been referred shall have a similar wide discretion, but has provided a machinery which is to be worked out in the way pointed out. If it is a claim, a proper subject for a reference, a notice is to be given and filed ; if the party has misconceived his remedy, the Court has the power to transfer the case from the Court in which the action is brought to the Referee.

If no application is made to transfer, the Judge may refer the action to an official referee or to the Drainage Referee, the powers of each in such a case being the same.

I am, for the reasons I have mentioned, and for reasons which I have given at greater length in the other case, of opinion, that the action so referred was not maintainable, and that, by the express terms of the reference, that and that only was referred, and that the learned referee exceeded his jurdisdiction in awarding compensation on either part of the plaintiff's claim. Even if negligence were established, it would apply only to a portion of the claim, and the damages claimed under the last by-law are only the subject of compensation.

I have referred to the recent judgment of the Supreme Court in Williams vs. Raleigh,* now in appeal to the Judicial Committee, to see if there is any decision of that Court to the effect that a municipal corporation can be made liable in an action for negligence, such as is here alleged, as although I may not agree in that decision, it would be my duty to follow it. Mr. Justice Patterson's judgment proceeds chiefly on the ground that the work proposed to be done under the by-law was not such a work as the statute contemplated—a point not argued or considered in this Court, as it would have been directly opposed to the admission signed by both parties and made part of the case, that the drain and work in question were done under a by-law duly made under the drainage clauses of the Municipal Act. The late Chief Justice agreed in that judgment.

On the other hand Mr. Justice Gwynne proceeded chiefly on the ground that, as the statute was not obligatory but permissive, the corporation were liable, if the effect of the work was to cause injury to any one—the engineer being their servant. Whilst I disagree entirely from that view, it is sufficient at present to say that it was not the judgment of the Court.

Burton, J. A.:—

CROOKS *vs.* ELLICE.

If the by-law is illegal and void, or if the township can be made liable as for negligence on any of the grounds on which the learned referee has found negligence, the awards should, according to the decisions in this country, be upheld. I have pointed out in the other case why, in my opinion, the municipality cannot be held liable; but I go further, and whilst it is now, I suppose, too late to hold, until the question has been finally decided by the ultimate Court of Appeal, that an action for damages is not maintainable under the circumstances of this case, I desire, as the point may possibly come up for decision in the case of Williams vs. Raleigh, now in appeal before the Judicial Committee of the Privy Council, to intimate that the decisions in the cases in the Courts of this Province ought not to be taken as the unanimous judicial consensus of opinion of the Courts of this country on this subject. Speaking for myself, and I think may say the same for several other members of the bench, I joine

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* Now Reported, 21 S. C. R. 103.

in the decisions affirming the view that an action was maintainable because I felt bound by prior decisions, not because I agreed in them.

I have always been of opinion that, except in cases where an action is expressly given after the completion of the work, as in section 583, sub-section 2, no action is maintainable.

The position of the municipality under these clauses is peculiar; it is no part of the duty of the municipal council in such a case as the present to undertake the construction of the work.

I do not at all dispute that, if it had been the duty of the municipal council to construct these works, they would be liable, even though gratuitous agents, and without any benefit to themselves, if the work they were directed and empowered to do was negligently or unskillfully performed; and that they could not in such a case evade responsibility by employing a contractor.

But there is no such duty imposed upon the municipality in these cases; their duties (except after the completion of the work) are partly of a legislative, and partly of a judicial character, and in no case warrant them undertaking the work.

The work itself affects only a small area, and a small number of the ratepayers; they are interested in having their own property drained, and if they can procure a sufficient number of the parties interested to petition for it, they can present a petition to the council for leave to have it done at the expense of the parties interested.

The council thereupon can refer the matter to a competent engineer for his report on the feasibility of the scheme, and if feasible, to prepare plans and estimates of the work and the lots or property to be benefited; and upon that report the council is, "not to undertake the work," but to decide whether in their opinion the proposed work would be desirable. If they decide in favour of it they pass a law to legalize it and provide the ways and means from the owners of the property affected, and their duties end.

That the exercise of such a discretion in good faith is to create a liability for damages has always appeared to me to be founded on an erroneous view of the law.

The few people affected had to obtain a law, enabling them to proceed, from the governing body of the municipality before they could proceed; that obtained, the authority was equivalent to an Act of Parliament.

If the municipal council (as I believe is occasionally though I apprehend not frequently the case) should undertake to do the work by its own servants, the usual result would follow if any damages resulted from negligence, and it may perhaps be open to question whether the members taking part in it might not be personally liable. To hold that this local legislative body, for it comes to that in effect could be liable for the unskilful execution of the work so authorized appears almost like a "*reductio ad absurdum.*"

Here is a work in which only a small portion of the ratepayers are interested. The legislature feeling that in the interest of local self-government their wishes should be given effect to, if they obtain the assent of the governing body of the whole township, provide the machinery for giving effect to them; without that assent they are powerless, with it they are entitled to proceed at their own expense, the general rates not being in any way affected; if damages are sustained by reason of the inefficient mode of constructing the works the contractor is responsible, and presumably those interested would see to it that he should be not only competent but a person able in a pecuniary point of view to meet any claim made upon him for damages resulting from negligence. But how the general ratepayers of the township can be made responsible to make good losses incurred by certain individuals by reason of the negligence of a contractor employed under such circumstances I have never been able to understand.

Here is a large body of ratepayers in no way whatever interested in the particular work, and the council that they have elected to represent them has no interest in it either; but they have a right to say to the parties promoting the works, unless we are satisfied by the report of a competent engineer that it is desirable to proceed with it, we will not grant permission, but if so satisfied, we will give you a license to proceed.

How does that impose upon the general ratepayers a liability in the event of that work which they have merely sanctioned in this way being unskilfully performed?

There can be but one answer to such a proposition unless the Legislature has expressly made them liable, but so far from doing so, they have, I think, in section 592 declared that the liability, whatever it may be, shall be confined to those who initiated or are benefited by the works. Damages may be recovered under certain circumstances under section 583, and perhaps under other sections, and in such cases and in the case of awards under the Act the municipality is entititled to be indemnified by the owners of the lands and roads liable to assessment for the local work by the imposition of a rate.

This view of the law brings into harmony all these sections of the Municipal Act, whilst a contrary view would be attended with great inconvenience, and it is difficult to see what authority there would be to levy a general rate or assessment upon the ratepayers generally for such a purpose.

The creation of our municipal corporations by the legislature is for the convenient and efficient administration of local government and not for the purpose of conferring any peculiar benefit upon the township or other corporation or its inhabitants. The English authorities hold, I think, that the parties bound at common law to repair the highways being liable to indictment only for neglect to repair, whenever that duty is transferred by statute to a municipal corporation or a board incorporated for the purpose, such corporation or board is not liable to a private action unless the statute transferring the duty clearly manifest an intention on the part of the legislature to impose the additional liability. See Cowley vs. Newmarket Local Board, 8 Times L. R. 788. That is done in this Province in express terms in the case of highways and in case of nonrepair after notice under section 583, sub-section 2, but I see no such indication of any such intention in such a case as the present.

As to a claim to compensation that presupposes that the work was authorized and done without negligence. I am not at all prepared to say that the person who was tenant during the construction of the work, and who sustained damages in consequence, might not be entitled to compensation, on the contrary I think the compensation, clauses include such a person, but this claimant was not in such a position. The owner was then entitled to claim for all damage which was then capable of being foreseen, and in respect of such damage the compensation is assessed once for all, and if he had then only a reversion, his damage as owner would presumably be assessed, less, speaking generally, the value of the compensation awarded to the tenant; if there was no tenant he would get the whole compensation, but no action could afterwards be maintained by him or any person claiming through him as this tenant does.

I feel clear that the plaintiff is not entitled to compensation under the statute; in any other view each successive tenant for all time could claim compensation in each and every year as frequently as the damage occured.

Whether this objection was or was not taken in the Court below appears to me to be unimportant; the facts here are not in dispute, and it is a pure question of law; and in such a case we have the authority of the Judicial Committee for holding that it is not only competent but expedient in the interests of justice to entertain it : Connecticut Fire Ins. Co. vs. Kavanagh, 8 Times L. R. 752.

Appeals dismissed with costs.

Burton, J. A., *dissenting*.

IN THE SUPREME COURT OF CANADA.

Present—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

THE CORPORATION OF THE TOWNSHIP OF ELLICE (Defendants) - - - - - - - Appellants ;

AND

SAMUEL R. HILES (Plaintiff) - - - - - Respondent.

THE CORPORATION OF THE TOWNSHIP OF ELLICE (Defendants) - - - - - - - Appellants ;

AND

GEORGE CROOKS (Plaintiff) - - - - - - Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporation—Drainage—Action for Damages—Reference—Drainage Trial Act, 54 Vic. ch. 51—Powers of Referee—Negligence—Liability of Municipality.

Upon reference of an action to a referee under the Drainage Trials Act of Ontario (54 Vic. ch. 51) whether under section 11, or section 19, the referee has full power to deal with the case as he thinks fit and to make of his own motion, all necessary amendments to enable him to decide according to the very right and justice of the case, and may convert the claim for damages under said section 11 into a claim for damages arising under section 591 of the Municipal Act.

In a drainage scheme for a single township the work may be carried into a lower adjoining municipality for the purpose of finding an outlet without any petition from the owners of land in such adjoining township to be affected thereby, and such owners may be assessed for benefit. Stephen vs. McGillivray (18 Ont. App. R. 516) ; and Nissouri vs. Dorchester (14 O. R. 294.) distinguished.

One whose lands in the adjoining municipality have been damaged cannot, after the by-law has been appealed against and confirmed and the lands assessed for benefit, contend before the referee to whom his action for such injury has been referred under the Drainage Trials Act that he was not liable to such assessment, the matter having been concluded by the confirmation of the by-law.

The referee has no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by by-law, the only remedy, if any, being by appeal against the project proposed by the by-law.

A municipality constructing a drain cannot let water loose just inside or anywhere within an adjoining municipality without being liable for injury caused thereby to lands in such adjoining municipality.

Where a scheme for drainage work to be constructed under a valid by-law proves defective and the work has not been skilfully and properly performed, the municipality constructing it are not liable to persons whose lands are damaged in consequence of such defects and improper construction, as tort feasors, but are liable under section 591 Municipal Act for damage done in construction of the work or consequent thereon.

A tenant of land may recover damage suffered during his occupation from construction of drainage work, his rights resting upon the same foundation as those of a freeholder.

Appeal from a decision of the Court of Appeal for Ontario (1) affirming the report of a referee to whom the action was referred under the Drainage Trials Act, 1891.

The facts of the case are fully set out in the judgment of the court delivered by Mr. Justice Gwynne.

Wilson Q. C. and Smith Q. C. for the appellants. The referee was wrong in the opinion he expressed, on the authority of Stephen vs. McGillivray (2), and West Nissouri vs. Dorchester (3), that the by-law was invalid for want of a petition from ratepayers in Elma. In those cases the drains were not carried into adjoining townships to find an outlet but for other purposes and so section 576 of the Municipal Act did not apply. In the present case that section distinctly authorizes the proceedings. See Chatham vs. Dover (4).

The Court of Revision confirmed the assessment for benefit on plaintiff's lands which precludes him from obtaining compensation. Re Price and City of Toronto (5); James vs. Ontario & Quebec Railway Co. (6).

Hiles has been allowed compensation for damage to yearly crops to which he was not entitled. Injury is only to be estimated as on the date of the by-law. Re Prittie and City of Toronto (7).

If the work is constructed under a valid by-law there is no liability as for negligence. That is held by our courts and, we submit, by the Privy Council, in Williams vs. Township of Raleigh (8). See also London, Brighton & South Coast Railway Co. vs. Truman (9).

The by-law must be quashed before an action can be brought and notice of action should be given. Hill vs. Middagh (10).

If the work has been lawfully done the only liability of the corporation is to be compelled by mandamus to levy an assessment. Quaintance vs. Howard (11); Smart vs. Guardians of West Ham Union (12); Frend vs. Dennett (13).

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(1) 20 Ont. App. R. 225.
(2) 18 Ont. App. R. 516.
(3) 14 O. R. 294.
(4) 12 Can. S. C. R. 321.
(5) 16 O. R. 726.
(6) 15 Ont. App. R. 1.
(7) 19 Ont. App. R. 503.
(8) 21 Can. S.C.R. 103; [1893] A. C. 540.
(9) 11 App. Cas. 45.
(10) 16 Ont. App. R. 356.
(11) 18 O. R. 95.
(12) 10 Ex. 867.
(13) 4 C. B. N. S. 576.

Plaintiffs have no right of action as it is not given by the statute. Cowley vs. Newmarket Local Board (1); Municipality of Pictou vs. Geldert (2).

Christopher Robinson Q. C. and Mabee for the respondents. The Drainage Trials Act deals only with matters of procedure and does not interfere with vested rights or matters of substance. It may therefore be retrospective in its operation. Mayor, etc., of Montreal vs. Drummond (3).

The petition for the by-law was not properly signed which makes it invalid. Judgment of Mr. Justice Henry in Dover vs. Chatham (4).

It is not necessary to have the by-law quashed before bringing an action if the defect appears on its face. Connors vs. Darling (5). Appleton vs. Lepper (6); Cleland vs. Robinson (7).

As to the liability of the municipality for negligence see Williams vs. Raleigh (8); Sombra vs. Chatham (9).

Wilson Q. C. in reply. The whole matter should be settled by assessment. Re County of Essex and Rochester (10).

As to the petition for a by-law see In re White and Township of Sandwich East (11).

Gwynne, J.:—These actions are founded almost wholly upon the same grounds, the former for injury to lot No. 21 in the 14th concession of the Township of Ellice, of which the plaintiff Hiles is seised in fee, and the latter for injury to lot No. 20 in the same concession of the same township, of which the plaintiff, Crooks, at the time of the injuries complained of, was in possession as tenant. The statement of claim of the plaintiff Hiles, in short substance, is to the effect that: On the 18th May, 1885, the defendant passed a by-law, No. 198, for draining parts of the Township of Ellice, under which, and the schedules thereto attached, they assumed to tax not only lands in the Township of Ellice, but also lands in the Townships of Elma and Logan; that professing to act under the said by-law they constructed a drain commencing in the Township of Ellice, thence along the boundaries of the Townships of Elma and Ellice, and of Logan and Elma, into Elma to within about 45 rods from the northerly limit of lots 25 and 26 in the 14th concession of Elma; that the defendants, though professing to construct the drain under the drainage clauses of the Municipal Act, did not observe the legal require-

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(1) [1892] A. C. 345.
(2) [1893] A. C. 524.
(3) 1 App. Cas. 384.
(4) 12 Can. S. C. R. 321.
(5) 23 U. C. Q. B. 541.
(6) 20 U. C. C. P. 138.
(7) 11 U. C. C. P. 416.
(8) [1893] A. C. 540.
(9) 18 Ont. App. R. 252.
(10) 42 U. C. Q. B. 523.
(11) 1 O. R. 530.

ments necessary to give them jurisdiction, in that they did not require a petition to be presented to them signed by a majority of the owners of the lands to be taxed, or whose lands would be benefited by the said works; that the defendants did not carry the drain to a proper or any outlet, but brought in the water from Ellice and deposited it on the land in Elma, from whence it spread over lots 25, 24, 23 and 22, in the said 14th concession, into plaintiff's land, where it remained to the damage of the plaintiff's lands and crops; that the defendants were guilty of negligence in the construction of the drain in that they provided no proper outlet for the water of the drain, and that they improperly brought large quantities of water from their natural flow into and upon the lands of the plaintiff; that after the said drain was alleged to be completed, and upon the 4th August, 1890, the defendants passed another by-law, No. 265, whereby, after reciting that it was found that the outlet provided by said by-law No. 198 was insufficient, they provided for the construction of a new drain as an outlet from the outlet as provided by by-law 198, across lots 25, 24, 23, 22 and 21 in the said 14th concession of Elma, into a river called the Maitland. That the defendants have assumed to proceed under such last-mentioned by-law and have entered upon plaintiff's land in lot 21, and have taken part of his land for excavating and constructing said drain therein; that said drain, when constructed, will prove a permanent injury to the land of the plaintiff, and will necessitate the construction and maintenance of many small bridges and crossings; that the said last-mentioned by-law is illegal in that the defendants did not comply with the legal formalities necessary to enable them to continue the said drain; that no petition was presented for the construction or continuation of the same, and the plaintiff further alleges that by reason of the said by-law, No. 198, being bad for the reasons aforesaid, the by-law No. 265 is of necessity void also; and lastly, that the outlet provided is insufficient and improper in that a much better outlet could have been obtained without injuring the plaintiff's land, and the plaintiff claims $400 damages by the flooding of his land, caused by the work done professedly under by-law No. 198, and $600 damages for injury to his land by the work done professedly under by-law No. 265.

To this statement of claim the defendants set up their defence, which it is unnecessary to set out at length, or further than to say that it insisted upon the sufficiency and validity of both by-laws, which the defendants rely upon as their sufficient defence and justification, to which the plaintiff replied by joining issue.

The plaintiff, Crooks, in his statement of claim based his action precisely upon the same grounds as the plaintiff Hiles had, in respect of the injuries alleged to have been suffered by him for what was done professedly under By-law No. 198.

The defendants relied upon the sufficiency of that by-law and the legality of the work done thereunder, and they insisted that the damages, if any were suffered by the plaintiff, were the proper subject of arbitration under the Municipal Act, and that no application was ever made for such arbitration; that the plaintiff accepted a lease of the land for injury to which the action is brought after the construction of the drain complained of, and with knowledge of all the risks he ran from the operations complained of, and they insisted that he was therefore estopped from making the claim asserted in the action, and finally the defendants claimed the benefit of section 338 of ch. 184 R. S. O. 1887.

Upon the 18th October, 1891, upon motion made by the defendants in the action at the suit of Crooks, an order was made by the court in which it was pending that the said action should be and it was thereby referred to the referee appointed under the Drainage Trials Act, 54 Vic. ch. 51. Now this act appears to me to have been passed for the express purpose of removing obstructions to the administration of justice which sometimes occurred where parties, entitled to recover damages for injuries done to their property by drainage works, brought actions at law to recover such damages instead of proceeding under the arbitration clauses of the Municipal Institutions Act, as required by section 591 of the act of 1883, 46 Vic. ch. 18.

The act provides that the Lieut.-Governor of Ontario may appoint a referee for the purposes of the Drainage Acts, who shall be deemed to be an officer of the High Court and among other things (sec. 2, sub-sec. 4) shall have all the powers of an official referee under the Judicature Act; (sub-sec. 5) shall also have the powers of arbitrators under the said acts; and shall also have the powers of arbitrators under the Municipal Act with respect to compensation for lands taken or injured, and shall likewise have the powers of other arbitrators generally; and (sub-sec. 6) shall also have as respects proceedings before him the powers of judges of the High Court, including the production of books and papers, the amendment of notices of appeal, and of notices for compensation or damages, and of all other notices and proceedings, the rectification of other errors or omissions, the time and place of hearing, examination and viewing, the assistance of engineers, surveyors or other experts, and as respects all matters whatsoever incident to the trial and decision of matters before him, or proper for doing complete justice therein between the parties.

By section 4 the referee is substituted for the arbitrators provided by the Drainage Acts aforesaid.

By section 5 claims, matters and disputes which the said enactments provide for referring to arbitration shall be instituted by serving a notice of appeal, or notice claiming damages or compensation, as the case may be, upon the other parties concerned; the notice shall state the grounds of the appeal or claim, etc., etc.

By section 11 any action for damages from the construction or operation of drainage works may at any time after the issue of the writ be referred to the said referee by the court or a judge thereof, and by section 19:

> Where a party brings an action for damages in a case in which, according to the opinion of the court in which the action is brought, or a judge thereof, the proper proceeding is under this act, the court or judge on the application of either party, or otherwise, may order the action to be transferred to the said referee at any stage of the action and on such terms as to costs or otherwise as the court or judge sees fit; and the referee shall thereupon give such directions as to the prosecution of the claim before him as may seem just or convenient, etc., etc.

I cannot doubt that under this act the referee has the fullest powers of amendment which are possessed by the High Court itself, and that upon the reference of an action to him by the court or a judge, whether it be referred under the 11th or the 19th section, he has full power to deal with the case as he thinks fit, and to make, without any application of any of the parties, all such amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the respective parties, and the real question in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case, and so if necessary to convert the claim for damages as stated in the statement of claim, if that should be filed before the transfer or reference of the action to the referee, into a claim for damages under section 591 of the act of 1883, as consequential upon the construction of a work authorized by a by-law duly passed under the authority of the statutes in that behalf, and to cause his adjudication thereon to be entered of record for the plaintiff for his damages, if any awarded him, as damages recovered under that section.

On the 19th of October, 1891, an order was made by the Common Pleas Division of the High Court in the action of Hiles vs. The Township of Ellice whereby it was ordered that that action and all questions arising therein be referred to the referee appointed under the Drainage Trials Act of 1891, pursuant to the provisions of the said act. Accordingly both cases were brought down for trial before the said referee, and evidence of a most exhaustive and much of an irrelevant character appears to have been entered into, for the plaintiffs were allowed to enter into evidence for the purpose of establishing a pretension which they respectively asserted, that it was competent for them to show, either as avoiding the by-law No. 198 altogether, or as establishing negligence making the defendants liable as wrongdoers even if the by-law should be held to be valid, that the route adopted for the drain as constructed was much inferior to another route which if selected the lots 20 and 21 in the 14th concession of Elma would not have suffered damage ; this evidence was apparently offered for that sole purpose, but was wholly irrelevant, for assuming the fact to have been established, it could neither have the effect of avoiding the by-law nor of fixing the defendants with liability as for negligence in construction of the work authorized by the by-law. The petition which was the foundation of the by-law could not be produced, having been lost, but the evidence established beyond doubt, that the work petitioned for was simply the drainage of certain lands in the Township of Ellice, and that the petition was signed by a majority of the owners of the lands the draining of which was petitioned for. By the surveyor's report, which is recited in and made part of the by-law, it appears that he found it necessary to carry a drain constructed for draining the said lands in Ellice into the Township of Elma, and he set out the course which he considered to be best for that purpose, "to a branch of the Maitland river in the 14th concession of Elma," which route, commencing at the said branch of the Maitland river in the said 14th concession, he marked by stakes back to the lands in Ellice proposed to be drained, and being of opinion that certain lands in Elma would be benefited by the construction of such drain he assessed them respectively with amounts which appeared to him to be just and reasonable. No appeal having been taken by the Municipality of Elma against his report, plans, assessments or estimates, the council of that municipality passed a by-law for levying from the lands in Elma the amounts so assessed upon them respectively. Thus it appeared that all the proceedings necessary to be taken under sections 570, 576, 578, 579, 580 and 581 of the said act of 1883, which sections have been in force ever since the passing in 1882 of 35 Vic. ch. 26, in order to make the by-law and the work thereby authorized valid were taken and the work was completed as contemplated by the by-law and the surveyor's report ; but upon completion it proved that the branch of the Maitland in the 14th concession which the surveyor designed as and made the outlet of the waters brought down thereto by the drain was inadequate for that purpose, and that in consequence the waters spread over several lots in the 14th concession, and by reason thereof the municipal council of the Township of Ellice, upon the 4th day of August, 1890, provisionally passed a by-law numbered 265, whereby, after reciting therein that after the completion of the drain authorized by by-law 198 it was found that the outlet provided by that by-law was insufficient, it was enacted, "pursuant to the provisions of the Municipal Act," *i. e.* section 585 of ch. 184 R. S. O. 1887, which is the same as section 586 of said act of 1883, as amended by section 19 of 47 Vic. ch. 32 (1884), that a new outlet drain from the outlet of the Maitland drain in the creek, that is to say, the outlet of the drain constructed under by-law No. 198, should be constructed to the main Maitland river, crossing several lots, including lot 21 in the 14th concession of Elma, the property of the plaintiff Hiles, according to the report, plans and estimates recited in the by-law. By this by-law lot 21, the land of the plaintiff Hiles, was assessed for benefit in the sum $38.56. Against this by-law, and the assessment made therein upon the lands in Elma, the municipal council of that township appealed, but the by-law and assessment were confirmed by the arbitrators to whom the appeal was referred under the provisions of the act in that behalf, and thereupon the by-law was finally passed on the 28th September, 1890. Subsequently, and upon the 30th May, 1891, the municipal council of Elma passed a by-law to levy upon the lands so assessed in Elma the amount of such respective assessments. The only question now arising under this by-law is one in the case of Hiles vs. Ellice, and the claim of the plaintiff Hiles therein is solely for the land taken for the drain and for damages occasioned by severance of the land by the drain, and the necessity of erecting and maintaining a bridge or bridges across the drain, &c., &c.

Upon these actions, so referred to him, the learned referee has adjudicated and determined to the effect that if he was deciding those cases upon the first impression, and not governed by authority, he would consider the above section 576 of the act of 1883, 46 Vic. ch. 18, to apply to cases like those before him, and that therefore the engineer could properly continue as he did the drainage work into Elma, and assess the lands therein which would be benefited by such work under the provisions of the said section, but that he thought he was concluded by the judgments of the courts in West Nissouri vs. Dorchester (1), and Stephen vs. McGillivray (2), and upon what

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(1) 14 O. R. 294.

(2) 18 Ont. App. R. 516.

he understood to be the authority in those cases he thought the said by-law, No. 198, to be utterly invalid, as passed without any jurisdiction in the municipal council of Ellice to pass it. But he also adjudged and determined that, assuming the by-law to be vaiid, the defendants were liable as wrong-doers for negligence, as I understand his report, in not providing a proper outlet for the waters brought down by the drain; and because the work was not properly or skillfully performed, but was for a long time left unfinished at lot 25 in the 15 concession of Elma, with a flood of water passing through it and spreading on adjacent lands, whereby some of the water spread upon the lands of the respective plaintiffs; and because he was of opinion that the drain should never have been constructed upon the route adopted, but should have been taken on a wholly different route to the main river Maitland as it passes through lot No. 18 in the 14th concession of Elma. But he further was of opinion, that even though the above findings should be erroneous, and assuming that all damages arising from the construction of the drain constructed under said by-law No. 198 were only recoverable by arbitration under the provisions of the statute, and not by action, he still had power, upon the references made to him under the Drainage Trials Act of 1891, to deal with the cases in that light, and he so adjudicated, and he assessed the damages sustained by the plaintiff Hiles, in consequence of the construction of the drain constructed under by-law No. 198, whether recoverable by proceedings in action or by arbitration under the statute, at the sum of $160, as to the amount of which,, assuming the defendants to be liable, there is no complaint, and he assessed the damages sustained from like causes by the plaintiff Crooks at $170, as to which amount neither is there any complaint or objection, assuming the defendants to be liable.

As to the damages claimed by the plaintiff Hiles in his action, as sustained by him by reason of the drain constructed under the said by-law No. 265, he found and adjudged as follows. He says:

> Apart from any question that might arise in case by-law No. 265 should be held invalid, and assuming these damages were not such as the plaintiff could sue for, but were only such as could be determined by arbitration under section 591, &c., of the Municipal Act, but such damages are not referable to me under the Drainage Trials Act, 1891, I think I have authority to deal with the matters upon this reference.
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> I find the plaintiff's damage to be, upon this branch of the case, $110, made up as follows: $80 for loss of land, $40 for fencing and clearing up and grading banks of the drain, and $30 for one substantial bridge, making in all the sum of $150, and I find the plaintiff's farm is directly benefited by this outlet drain to the extent of $40, over and above the amount assessed against it for construction; taking this $40 from $150 I find the plaintiff's damage upon this branch of the case $110, as above mentioned.

Upon appeal from these judgments and reports of the referee a majority of the Court of Appeal for Ontario has maintained the judgments of the referee in both cases *in omnibus*, and without pronouncing any judgment as to the validity or invaldity of the by-laws, or of either of them, has concurred in the judgment of the referee that upon the proceedings taken before him under the Drainage Trials Act of 1891 it was competent for him to award and adjudge damages to the plaintiffs for the injuries sustained by them respectively, whether prior to the passing of that act such damages could have been recovered only by process in arbitration under the act, or by action at law as for tort. From this judgment the present appeal is taken, the defendants still contending that they are not at all liable, but if they are, that is still a substantial point which they have a right to insist should be determined, namely, whether they are liable as tort feasors, upon the ground of their by-law being *ultra vires*, or whether they are only liable under the provisions of the statute as for damages consequential upon the construction of a work legally authorized to be constructed, for that if their liability be only of the latter character the assessments authorized by by-law No, 198 of Ellice, to enforce recovery of which a by-law was passed by the Municipal council of Elma, are still recoverable, whereas if the defendants are liable as tort feasors upon the ground of the invalidity of their by-law, the work constructed thereunder is illegal and the assessments made for payment of the construction of the work are void also, and not only not recoverable in future, but that those already paid may possibly be recoverable back.

With the first impression of the learned referee, and with the opinion expressed upon that point by Mr. Justice Burton in the Court of Appeal for Ontario, I must say that I entirely concur, namely, that the work contemplated and authorized by the by-law No. 198 was authorized by section 576 of the act of 1883, and that the engineer, to give effect to whose report, plans, &c., the by-law was passed, had authority to assess as he did the lands in Elma, and that the said by-law and the by-law passed by the municipal council of Elma to enforce the levying of such assessments upon the lands assessed in Elma are perfectly valid and binding in all respects. Neither Stephen vs. McGillivray (1) nor Nissouri vs. Dorchester (2) warrants the conclusion drawn from them by the learned referee. Both of these cases rest in great measure upon the same ground, although that in Stephen vs. McGillivray (1) is more extended than in Nissouri vs. Dorchester (2). In the former the low lands, to drain which the scheme of drainage proposed was designed, extened over several townships situate in three different counties, not as here in

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(1) 18 Ont. App. R. 516.

(2) 14 O. R. 294.

Ellice alone to drain which the necessity arose to carry the drain into Elma, and thereby an incidental benefit was conferred upon lands in Elma. Then the drain in Stephen vs. McGillivray (1) was not proposed to be, nor could it have been, carried into McGillivray at all, that township lying higher up than Stephen and ten miles from the proposed drain, which was designed to drain the low lands lying in Stephen and the other adjoining townships in different counties, and the engineer who devised the scheme of drainage which Stephen sought to enforce upon McGillivray, assessed McGillivray as for a benefit which he conceived justified that township being made to contribute towards the expense of the work, because, McGillivray being higher up than Stephen, water descended naturally from it into the low lands in Stephen and the other townships proposed to be drained, for which reason, as he conceived, McGillivray would derive benefit; just as in Chatham vs. Dover (2), the engineer had assessed the Township of Dover and lands therein as for benefit in giving it an outlet, as he termed it, such benefit and outlet consisting only in enlarging the capacity of a natural water course in Dover, by which the lands there assessed were already sufficiently drained, so as to enable it to carry off the extra waters brought down into it by the drain proposed to be constructed in Chatham. In Nissouri vs. Dorchester (3), the low lands to drain which the drainage scheme there was designed, lay in both of the above-named townships, instead of, as in Stephen vs. McGillivray (4), in three townships in different counties, but the principle upon that point is the same, and is that section 576 only applies where the lands proposed to be drained lie in one township only, and that for the drainage of these lands the scheme designed requires that the drain should be carried into a lower township, which work incidentally benefits the lands in such other township. If it does not so benefit such other township the lands in that township cannot be assessed for, or charged with, any portion of the cost of the work; but if it does they can to the extent, but only to the extent, of the benefit so conferred; and the time and place for contesting the question as to benefit or no benefit is before arbitrators, as provided by section 582 of the act of 1883. This, as it appears to me, is the effect of the judgment of this court in Chatham vs. Dover (5).

Then as to the finding of the learned referee that the work done under the by-law 198 was not properly or skilfully performed; that it never should have been constructed upon the route upon

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(1) 18 Ont. App. 516.
(2) 12 Can. S. C. R. 321.
(3) 14 O. R. 294.
(4) 18 Ont. App. R. 516.
(5) 12 Can. S. C. R. 321.

which it was constructed, as provided in the by-law; that it was not continued to a proper outlet; that it was left for a long time unfinished at lot 25 in the 15th concession of Elma, with a flood of water passing through it and spreading upon adjacent lands, by which means the water was turned loose upon lands in Elma, and some came upon the lands of the respective plaintiffs.

By these findings of the learned referee, and the manner in which he subsequently deals with them in his report, I understand him to mean that these circumstances either constitute negligence in the construction of the drain, for which the defendants would be liable in an action at common law, as wrong doers, even if the by-law No. 198 be valid, or at any rate they would be liable, under section 591, as for damage "done to the property of the plaintiffs in the construction of the drainage works or consequent thereon." So understanding the learned referee I concur with him, but think that the proper conclusion to be drawn is that the liability of the defendants is under section 591, and not as tort feasors at common law.

The fact that an outlet as designed by an engineer for a drainage work and reported by him to a council, and adopted by the council, should prove to be insufficient constituted negligence in the municipality in the construction of the work when adopted by by-law has never, so far as I am aware, received countenance in the courts in this country, if indeed the contention has ever been raised. No case, so far as I am aware, has arisen wherein it appeared that any engineer or surveyor prepared for the adoption of a municipal council a scheme of drainage work which did not propose an outlet which at least seemed to be sufficient to carry off the waters from the lands proposed to be drained. It has never, I think, been considered by any engineer that the drainage clauses of the Municipal Institutions Act, at any time, authorized the construction of a drainage work which, while taking off water collected on the low lands of A. B. C. and D. provided no outlet whatever for such waters, but proposed to deposit them, or "turn them loose," to use the expression of the learned referee, upon the lands of other persons, as E. F. G. &c. &c. If Mr. Cheeseman ever entertained that opinion he certainly did not act upon it in the report and plans made by him upon which by-law No 198 was passed, for in them he plainly designated a stream called by bim a branch of the Maitland river in the 14th concession of Elma as the outlet, and as a sufficient one, for carrying off the waters to be brought into it by his proposed drain. In the judgment of the learned Chief Justice of Ontario, pronouncing the judgment of the majority of the Court of Appeal for Ontario in the present case, I entirely concur, and I have always held the opinion that one township cannot discharge the waters collected within its area, either just inside of, or anywhere in, another township, there to be let loose, without being liable for damages to the parties thereby injured. But in such case the liability would, in my opinion, arise as for an act done without any jurisdiction whatever, utterly *ultra vires*, and not merely as for negligence in the mode of performing an act legal in itself. I cannot see therefore that section 27 of 49 Vic. ch. 37 (1886), which added some words to the text of section 576 of the Municipal Act of 1883, conferred any power or imposed any duty upon an engineer designing and laying down a scheme for a drainage work which had not already been conferred and imposed by the said section 576, as it had always been, or did anything more than make perfectly plain to the most humble capacity of the lay mind, what to the professional mind was sufficiently plain by section 576 as it previously stood in the act of 1883, and in the statutes of which that act was but a repetition and consolidation. The object appears to me to have simply been to remove any doubt there might be in the minds of any person of the humblest capacity engaged in the administration of the act. Then as to the water suffered to overflow the adjacent lands during the construction of the work, it is to be observed that the work was let by the corporation to an independent contractor, and if any part of the injury done arose from his negligence in the execution of the work authorized by the by-law, the corporation cannot in respect of such injury be held liable as tort feasors. I see no intention in the learned referee to distinguish between any overflow during the construction from that which occurred after the completion of the work. All injuries caused from overflowing lands by the waters brought down by the drain are placed upon the same footing, and all, as it appears to me, fall under section 591 of the act as damage done "in the construction of the work and consequent thereon."

Finally, as to the route selected by the engineer and adopted by the by-law No. 198 not having been the one which, in the opinion of the learned referee, should have been adopted, that is a matter which was not within the jurisdiction of the learned referee to adjudicate upon. That was a point which should have been raised, if at all, as I think, by an appeal against the project as proposed by the by-law 198, and cannot be raised after the passing by the Municipal Council of Elma of a by-law for the purpose of levying the amounts of the assessments upon the lands in Elma to pay their share of the cost of the particular work as defined in the report and plans of the engineer as adopted by the by-law No. 198. In so far, therefore, as concerns the amounts adjudged by the learned referee to the respective plaintiffs for damages done to their lands during construction, and subsequently to the completion of the work, I am of opinion that judgment should be entered for those respective sums, namely, $160 in the case of Hiles, and $170 in the case of Crooks, as for damages sustained by them "in the construction of the drain authorized by the by-law No. 198 and consequent thereon;" and that the record of the judgment should express the recovery as being for such damages.

I entirely concur in the judgment of the Court of Appeal that Crooks, as a tenant, is as much entitled to recover damages for injury done to him during his occupation as a freeholder would be for like damage. His claim is not at all based upon section 393 of the act of 1883; his right to recover is established upon section 591, which does not qualify his right of redress for any damage done to the land to his injury during his occupation, but affects only the mode in which such redress should be obtained when, and so often as, the injury occurs. His right to recover rests precisely upon the same foundation as does the right of Hiles, in respect of the like damage done to him.

As to the amount awarded to Hiles in respect of damage done to his land under by-law No. 265, that by-law, as already pointed out, was passed under, and derives its authority from, sec. 585 of ch. 184 R. S. O. 1887, which is identical with sec. 586 of the act of 1883, after the passing of the act 47 Vic. ch. 32, sec. 19, and not under 49 Vic. ch. 37, sec. 27. Section 576 of the act of 1883, equally after the passing of section 27 of ch. 37 of 49 Vic. as before, related solely to an original by-law passed in adoption of the report of an engineer for constructing a drainage work upon a petition presented under the statute, by owners of lands in a higher township, in effecting which purpose the engineer found it to be necessary to carry his drain into a lower township; it had no relation to a by-law passed for the purpose of making a new outlet, or improving one already adopted for a drain already constructed under the authority of the act which was the purpose and object of the by-law 265, and which was authorized solely by section 586 of the act of 1883, as amended by 47 Vic., ch. 32 section 19, and without any petition being presented therefor. What the learned referee has done in respect of this matter, was to increase the amount imposed upon the plaintiff Hiles by the by-law 265, for benefit, and then to deduct such increased amount from what the learned referee has estimated to be the damage done to him by the drain, making the amount of such damages to be in excess, not only of such increase in assessment for benefit but of that amount added to the assessment for benefit made by the by-law. The statute which confers jurisdiction upon the learned referee gives him no authority to reopen matters which had already been closed by the provisions of the law as it existed prior to the passing of the Drainage Trials Act; and this matter was, as I think, concluded by the judgment on the appeal taken by the municipality of Elma to the by-law 265, and the assessment on lands on Elma made thereby and by the by-law passed by Elma to levy upon the landholders in Elma those assessments so confirmed by the arbitrators on such appeal. While the case was pending in appeal was, as it appears to me, the time when Hiles should have insisted that he was not assessable for benefit, as I think he was not if the damage done to his property exceeded all benefit conferred upon it by the proposed drain. Hiles cannot, I think, under the circumstances, now claim under section 393 as for land taken or injuriously affected by the corporation in the exercise of its powers. In respect, therefore, of this part of the learned referee's judgment, I think the appeal of the defendants in Hiles' case must be allowed with so much of the costs in the courts below and upon the reference as relates to such portion of the plaintiff's claim, and that as to the residue, that as the defendants succeed in their appeal partially, viz., as regards the maintenance of the validity of the by-laws and the variation in the judgment, that it should, in both of the cases, be entered for the plaintiffs respectively as for "damage done in the construction of the drain as authorized by the by-law No. 198 and consequent thereon." I think there should be no costs of this appeal on either side.

I may be excused if I add a few lines for the purpose of correcting an erroneous impression as to my judgment in Williams vs. Raleigh (1) which appears to be entertained by my learned brother Mr. Justice Burton, of the Court of Appeal for Ontario.

That learned judge, in his judgment in the present case (2), says:

> Mr. Justice Gwynne proceeded upon the ground that as the statute was not obligatory, but permissive, the corporation were liable if the effect of the work was to cause injury to any one, the engineer being their servant. While I disagree entirely from that view it is sufficient at present to say it was not the judgment of the court.

Now, although this court was divided in Williams vs. Raleigh (1) upon the construction and application of section 583 of ch. 184 R. S. O., and being so divided no judgment was given thereon, I am not aware that there was any substantial difference of opinion in the court upon the main point upon which the judgment of the court proceeded, namely, that the corporation by reason of their wilful neglect

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(1) 21 Can. S. C. R. 105.

(2) 20 Ont. App. R. 239.

to keep in an efficient state of repair the drain, called the Raleigh Plains drain, which they had made to serve as an outlet to carry off the water brought down into it by the "Bell drain," and by the "Drain Number One" they were liable for the damage done to the plaintiff in an action at law, and that the plaintiff was not driven to seek redress by process of arbitration under the statute. The observations in my judgment which are alluded to by my learned brother were made in answer to an argument addressed to us, which appeared to me to receive countenance from some passages in the judgment of the Court of Appeal for Ontario when reversing the judgment of Mr. Justice Ferguson, namely:

> That when a surveyor has devised a scheme of drainge work it is for the corporation simply to construct it as designed, without incurring any responsibility in so doing.

The question to which my observations were so addressed is with preciseness stated at page 116 of the report, and after arguing the point raised by such question, and referring to the clauses of the statute, I wound up at page 118 in these words:—

> The object of the clauses is to enable lands to be drained for the purpose of cultivation, and to provide means for paying the expense of so doing, and of preserving them (that is the drainage works) when constructed in an efficient state of repair to perform the purpose for which they are designed; there is nothing whatever in any of those clauses to justify the inference that the legislature contemplated or countenanced the idea that water taken from the lands of one person should be so conducted as to be deposited upon the lands of another person.

And I concluded that if they adopted a project having such an object in view they would be responsible for the consequences of such a work, for that as the statute gave them no jurisdiction to pass such a by-law, they could not appeal to the statute for protection.

I am not aware that my late Brother Patterson, or any of my learned brothers, differed from me in this view, and it is a matter of gratification to find a passage in the judgment of the majority of the Court of Appeal in the present case, delivered by the learned Chief Justice of Ontario, concurring in it, where he says: "I am unable to accept the argument that one township can collect the water from a large area and discharge it just inside the line of another township where it is let loose, without being liable for damage to those injured."

By adding after the words "just inside" as above used, the words "or anywhere within," this is the precise conclusion to which my observations led, and I then, at page 117 *et seq.*, proceeded to show that the judgment in favor of the plaintiff needed no such foundation, for that it had a much firmer foundation to rest upon, namely, that the Raleigh Plains drain into which the waters both of the drain No. 1 and of the Bell drain were conducted, were by the wilful neglect and default of the defendants permitted to fall into such a state of disrepair and inefficiency as to be quite incapable of carrying off the waters so conducted into them and to have thereby in fact lost two-thirds of their original capacity; and so that however perfect the Raleigh Plains drain may have been to carry off the waters of the Bell drain when the latter was originally constructed, the defendants, by their wilful neglect to perform the duty imposed upon them by statute to keep the Raleigh Plains drain, which they had made the outlet of the Bell drain and other drains, in an efficient condition to do the work imposed upon it, were liable in an action at law, and that damage done to the plaintiff's land by the overflowing of the Raleigh Plains drain could not, under the circumstance, be fairly said to be "damage done in the construction of the Bell drain or consequent thereon" so as to drive the plaintiff to seek redress by arbitration under the statute. Their Lordships of the Privy Council, however, have thought otherwise, and have thereby, should the plaintiff feel disposed to incur the expense of the inquiry directed, imposed upon the court of first instance a difficult if not impossible task, namely, where a natural or artificial water course is made the channel of outlet for several streams of water brought down into it from various different sources, and where such channel of outlet, by reason of the neglect of the defendants to fulfil the obligation imposed upon them by statute of keeping it in an efficient condition of repair to carry off the waters so conducted into it, becomes quite inadequate for the purpose and has thereby lost two-thirds of its original capacity, from which cause it overflows its banks and causes much damage to neighboring lands, to determine how much of the damage so done is attributable to the waters brought down into such channel of outlet from one only, of such sources as distinguished from the damage attributable to the waters brought down from the other sources. Without venturing to call in question the soundness of this judgment, it cannot but appear to the lay mind to be marvellously strange that a party should fail to obtain redress for an admitted injury, upon the ground that he had not pursued the proper course to obtain such redress, although of four of the courts of this country before which the question came, three of them, including the learned trial judge who had the peculiar advantage of viewing the premises and observing the precise cause of the damage done, were of opinion that the course pursued was the right one. It is matter, however, of congratulation that in future the effect of the Drainage Trials Act of 1891 will be to prevent parties suffering damage from drainage works being prejudiced by any such conflict of opinion in the courts as to the proper mode in which redress should be sought for the injuries inflicted. If it has not that effect I cannot see what is its *raison d'etre*, and I cannot entertain a doubt that such is the object of the act,

Appeal in Hiles' Case allowed in part without costs and dismissed without costs in Crook's Case, but judgment varied.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION.

WICKENS *vs.* TOWNSHIP OF SOMBRA.

Non-repair—Notice—Sufficiency of Proof—R. S. O. (1887) Cap. 36, Sec. 31, ss. 3.

Held that there was sufficient evidence of a reasonable and satisfactory notice having been given by Plaintiff to entitle him to damages for nonrepair of a Government drain.

J. S. FRASER for Plaintiff.

W. R. MEREDITH, Q. C. and F. W. KITTERMASTER for Defendants.

November 2nd, 1892. B. M. BRITTON, Q. C., Referee.

This is an action brought by the plaintiff, who is the owner of part of lot 26, 8th concession of Sombra, against the defendants for damages resulting, as it is alleged, from flooding, owing—

1st. To the defendants not keeping in proper repair a certain drain which runs from the 7th concession line obliquely across lot 26 in the 8th concession of Sombra ; and

2nd. To the defendants' negligence in constructing another drain along the side road between lots 26 and 27, from the south half of 26 in the 8th concession northerly, without providing any outlet.

The plaintiff also asks for an injunction restraining the defendants from continuing to injure the plaintiff in the way mentioned in the statement of claim.

It was conceded on the argument that the plaintiff had not made out any case against the defendants upon the second branch as above stated, that is to say, by reason of what is alleged in the 5th paragraph of the statement of claim.

The drain, the nonrepair of which is complained of in the first branch of the plaintiff's case, viz: that mentioned in the 3rd paragraph of plaintiff's statement of claim, is the one known as Government Drain Number Nine, sometimes called the Clarke drain.

The defendants, besides a general denial of all the material facts as set up by plaintiffs, plead a want of notice as required by ss. 3, s. 31, ch, 36, R. S. O. The drain complained of, is one, such as is referred to in this sub-section.

Sub-section 3 is as follows:—

"A municipality liable to keep in repair such drainage works and neglecting and refusing to do so upon reasonable notice in writing being given by any person interested therein and who is injuriously affected by such neglect or refusal, may be compelled by mandamus to be issued from any court of competent jurisdiction to make from time to time the necessary repairs, to preserve and maintain the same. And shall be liable to pecuniary damage to any person who, or whose property, is injuriously affected by reason of such refusal."

This requires, first, a notice in writing, and second, that the notice shall be given by some person interested therein and who is injuriously affected by the neglect or refusal.

Constructive notice or implied notice will not do. If such notice, "in writing" is given, then the township is liable to pecuniary damage to any person, who, or whose property, is injuriously affected by reason of the neglect or refusal of the township. The case of Crysler vs. Sarnia, 15, O. R. 180, decides that such a notice must be given by the plaintiff. Was the notice given in this case? The evidence upon that point is, first, the evidence of the plaintiff, that is somewhat unsatisfactory, but he swears positively, in either 1888 or 1889 and during the first year after he got from Clarke, the place where the mill stands, he signed a notice written by Thomas J. Clarke and which notice was also signed by Thomas J. Clarke; that this notice was put into an envelope and handed to the postmaster at Wallaceburg at the post office there, to be addressed by the postmaster, to the clerk of the defendant township. He says "I mailed the letter to the clerk of the township." In cross-examination Mr. Meredith put the question, "Will you swear that you ever saw it after you handed the blank envelope with the letter in to Mr. McDonald?" and the plaintiff replied, "Well I won't swear any such thing: I won't swear that for anybody." But further on in his examination the plaintiff said, that to his knowledge the address put upon this envelope was "Orra Bishop" the clerk of the Township of Sombra, and that the plaintiff put the stamp upon the envelope. He then affirms that the answer he gave to Mr. Meredith was quite correct, but goes on to say, upon further questioning: "I saw Mr. McDonald throw it into the box; I saw him writing the name upon it; he wrote it right in front of me."

The witness, William Wood, knows that Mr. Thomas Clarke wrote out what purported to be a notice of some kind, and that he gave it to the plaintiff, as Wood says, to send to the Reeve. Wood says he saw both Clarke and the plaintiff put their names to this notice.

Mr. Orra Bishop, the Clerk of the Township, was called and he is not able to produce any such letter, and has no recollection of ever receiving any such. He will not swear positively that he never did receive such a letter, but believes that he did not.

The only other evidence upon this point is found in the recital on the by-law passed by the council of defendants on the 7th November, 1891. This recital is as follows:—"Whereas Thomas Clarke and others interested in No. 9 drain in the township of Sombra have complained to the council that said drain was out of repair, and that their lands were injuriously affected thereby, and asking said council to repair said drain."

Mr. Orra Bishop says he drew this by-law, but his recollection is apparently not very clear as to how he came to refer to Clarke as a complainant. He simply says in reply to this question put by Mr. Meredith: "Q. I see this (the by-law) contains a reference to Thomas Clarke and others about the drain being out of repair; who had made this complaint and what did they refer to?" "A. I can't say that there were any others more than the Clarks through Mr. Fraser." "Q. And that is what is referred to in this by-law?" "A. Yes, sir."

There is no suggestion by the defendants that the Thomas Clarke mentioned in the by-law is any other than the one to whom plaintiff refers as the Thomas Clarke who drew up the notice.

Taking the evidence together I am not satisfied that this by-law refers to any other complaint than the one in writing mentioned by plaintiff. And upon the evidence, although not without some hesitation, I come to the conclusion that the plaintiff did sign a notice written and signed by Thomas Clarke and that although there is no record of such a letter in the defendants' minutes of the Council proceedings and the letter itself cannot be found, the defendants did receive such a notice, and I find as a fact that such notice was such a reasonable and satisfactory notice as to comply with the statute above referred to. There is evidence in the by-law for repair of this drain, and other evidence that Government Drain Number Nine was out of repair, and by reason of this the plaintiffs land was overflowed more than it would otherwise have been.

I am therefore of opinion that the plaintiff is entitled to recover such damages as he has sustained by reason of the defendants' neglect and refusal to repair the drain. What the amount of such damage is, it is not easy to determine. It is difficult to say from the evidence, what damage the plaintiff has sustained in all; and still more difficult to say just what damages the defendants are responsible for.

The plaintiff in my opinion greatly exaggerates the amount. His mill was a small, cheap one, built upon a low place, a place almost sure to be overflowed in a wet season; and it is absurd to say that he has sustained damages for which defendants are liable to the amount he states; but having regard to all the evidence I think the plaintiff is entitled to receive some damages from the defendants, as a part at least of the overflow and flooding complained of is attributable to the non-repair of this Government drain, and it was not disputed that the defendants were liable to keep that drain in repair. I find as a fact upon the evidence that water brought down by Government Drain Number Nine was not carried away as fast as it would have been if this drain had been kept in repair; and by reason of the neglect of the defendants to repair, some of the water so brought down backed up and overflowed a part of plaintiff's land. I assess the damages of the plaintiff against the defendants at the sum of one hundred and fifty dollars. I therefore order and direct that judgment be entered for the plaintiff against the defendants for the sum of one hundred and fifty dollars damages, and costs of action and of all proceedings therein and of the reference. Such costs, both of the action and reference, to be according to the tariff of the County Court. And that such costs be taxed by the Clerk of the County Court of the County of Lambton, and that there be no costs allowed to the defendants to set off against the plaintiff.

As to the defendants have taken steps to repair the drain complained of, I make no order as to mandamus.

Pursuant to Drainage Trials Act, 1891, I order and direct that the sum of $10 be paid in stamps by the defendants as for one day's trial, and that if the plaintiff do affix said stamps the said sum of $10 for the same shall be taxed and allowed to him in his costs against the defendants, said stamps be affixed and cancelled by either plaintiff or defendants before this, my order for judgment or report, shall be given out.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION.

LINTON CLARKE *vs.* TOWNSHIP OF SOMBRA.

Non-Repair—Want of Notice—R. S. O. 1887, Cap. 36, sec. 31, ss. 3.

A notice in writing of the non-repair of a Government drain must be given by the party complaining to entitle him to damages caused by non-repair. He cannot take advantage of a notice given by other persons affected by the neglect to repair.

J. S. FRASER for Plaintiff.

W. R. MEREDITH, Q. C., and F. W. KITTERMASTER for Defendants.

November 2nd, 1892. B. M. BRITTON, Q. C., Referee.

The plaintiff is the owner of north half lot 25, 7th concession of Sombra, and complains that he has been greatly damaged by the flooding of his land, which flooding was occasioned by the defendants' negligence in not keeping in repair Government Drain Number Nine, which drain crosses the north half of 25 in the 7th concession and north half 26 in the 8th concession of Sombra.

The plaintiff alleges that in or about the year 1888, through his agents, and especially through Charles Wickens, he gave to the defendants notice in writing that this Government Drain Number Nine was out of repair and that he, the plaintiff, and others were injured by its so being out of repair.

The plaintiff in his statement of claim, paragraph 8, complains of damages resulting from the construction by the defendants of a drain along the sideroad between lots 26 and 25, from the south half of lot 26 in the 8th concession of said township. But in my opinion there was no evidence to support the action on this branch of the case, and it was, upon the argument, conceded by counsel for plaintiff that he was not entitled to recover for anything in reference to this last mentioned drain. Plaintiff claims to recover, if he can recover at all, only by reason of defendants negligence in not repairing Government Drain Number Nine.

The defendants deny any liability, and plead want of notice, relying upon R. S. O. chap. 36 sec. 31, ss. 3.

This action was tried before me at Sarnia on the 30th day of September, 1892.

It was agreed between the parties that any evidence given in the case of Charles Wickens, applicable to this case, should be considered as given in this case.

The plaintiff's land adjoins that of Charles Wickens.

In that case I have already found that Wickens did give notice to the defendants, and that the defendants are liable to him for the damages he has sustained.

If that notice enures to the benefit of the plaintiff in this case, then the plaintiff is entitled to recover and for the amount of such damages as found by me.

I am of opinion that this plaintiff can not recover, as he has not given any notice in writing as required by the Statute, and he has not shown any damage apart from the injury flowing from the non-repair of the Government Drain Number Nine.

The plaintiff did not himself give any notice in writing, but he says that Wickens and Thomas J. Clarke did give a notice in writing, and that they were persons interested in, and injuriously affected by, defendants' neglect and refusal to repair.

I do not think that notice, if given, is a notice the plaintiff can avail himself of.

Both Wickens and Thomas J. Clarke were complaining of damage to other lands than that owned by this plaintiff, and it seems to me that "Chysler vs. Sarnia, 15 O. R. 180," decides that the notice must be given by the plaintiff.

The Chancellor says in that case :—"The proper construction of the Ontario Drainage Act (same words in section under consideration as R. S. O. ch. 36, sec. 31, sub-sec. 3) is that as a prerequsite to the maintenance of an action for damages arising from neglect to repair, there should be reasonable notice in writing given by the plaintiff to the municipality alleged to be in default."

Ferguson J., says, p. 188 :—"I agree in the conclusion arrived at by other members of the Court, that such a notice was necessary to enable the plaintiff to maintain the action for that cause. There having been no such notice given by the plaintiff, I am of the opinion that the action fails on this ground also."

I do not find any evidence that either Wickens or Thomas J. Clarke was the agent of the plaintiff. Neither of these men, so far as appears, had this plaintiff or his land in mind at all when they gave their notice.

It is not a case of constructive notice, or implied notice. I was asked by counsel for plaintiff to infer from the by-law, which recites that Thomas Clarke and others had given notice, that the plaintiff had given such ; but I cannot do this, and so for want of notice the action must be dismissed with costs.

I was asked, in case I came to the conclusion that the action must be dismissed, that, for the purpose of preventing another trial before me in the event of my being wrong in regard to notice, to assess the damage of the plaintiff.

In this case, as in the case of Wickens, I feel very strongly that the plaintiff has not sustained any such damage as he claims, His garden stuff lost amounted to comparitively little, and, from the manner in which his evidence was given, I think the amount of damage named by him was greatly exaggerated.

For the purpose of this action, and in the event of my decision upon the question of notice being set aside, I assess the damages of the plaintiff at $200; and am of opinion that if he had given a notice in writing, as required by the staute, he would be entitled to recover against the defendants damages to the amount of $200 and no more, and costs of the action down to the order referring the case to me, according to the tariff of the High Court, and costs of reference and all subsequent costs according to the tariff of the County Court.

From the evidence given before me, and upon hearing counsel, and having considered the matter and for reasons given above, I order and direct that this action be dismissed with costs to be paid by the plaintiff to the defendants, costs of the action and all proceedings therein, down to and including order referring the action to me, according to the tariff of the High Court, and costs of the reference and all costs subsequent to the order referring the action to me, according to the County Court tariff. And I order that judgment may be entered for the defendants accordingly.

I order that the plaintiff pay the sum of $5 in stamps, and that if the defendants pay the same, that that sum shall be taxed to the defendants and allowed to them upon taxation, against plaintiff.

The stamps to the amount of $5 to be affixed and cancelled before this, my order for judgment or report, is given out to either party.

NOTE:—See Williams vs. Ralegh, L. R. Appeal Cases, 1893, page 540, decided August 3rd, 1893, which holds that notice is not necessary to entitle a party to damages for non-repair.

ROMNEY *vs.* TILBURY NORTH.

TILBURY EAST *vs.* TILBURY NORTH.

IN THE MATTER OF APPEALS (FIRST) BY THE TOWNSHIP OF ROMNEY AND (SECOND) BY THE TOWNSHIP OF TILBURY EAST AGAINST THE REPORT OF JOSEPH M. TIERNAN, ESQ., C. E., DATED THE 20TH DAY OF AUGUST, 1892, RESPECTING THE REPAIR AND ENLARGEMENT OF A DRAIN KNOWN AS THE BURGESS DRAIN AND FOR THE CONSTRUCTION OF A NEW OUTLET THEREFOR.

Distinguishing Assessments for Benefit and for Outlet.

The assesssment should be so particular and specific that every person whose land is charged, can ascertain precisely why he is charged, as well as for what amount. In the absence of information, showing how much was assessed for benefit and how much for outlet, the report was declared illegal and the provisional by-law quashed.

February 7th, 1893. B. M. BRITTON, Q. C., Referee.

Pursuant to appointment made by me and with consent and at the request of the parties, these appeals were tried together at Chatham, on the 17th, 18th and 19th days of January, A. D. 1893.

C. R. Atkinson, Q. C., appeared for the Township of Romney; C. E. Pegley, Q. C., appeared for the Township of Tilbury East; and Matthew Wilson, Q. C., for the Township of Tilbury North.

It was by counsel agreed that the evidence given should, so far as applicable, be used in the case of each appeal.

After admission by the appellants of service by the initating township of the report, plan and profile, and admission by the respondents that the notice of appeal in each case was duly served within the time required by law, the case for the respondent proceeded.

At the close of the case for the respondent, counsel for each appellant objected that upon the evidence given, the report appealed against and the assessments made by the engineer against the appellant townships could not stand. One objection of the many urged was that upon the evidence of the engineer, Joseph M. Tiernan, he had assessed the lands in the Township of Tilbury North for outlet and for benefit and does not distinguish one from the other, nor does it appear how much he assessed each parcel for outlet or how much for benefit.

Upon hearing counsel I intimated that in my opinion this objection was fatal to the report and must prevail.

Counsel for the appellants then declined to call their witnesses or to put in any further evidence.

Under the circumstances I do not feel called upon to decide any other of the points raised.

Upon further consideration and upon reading the evidence given, I am of opinion that the report of Joseph M. Tiernan, C. E. appealed against, and the by-law provisionally adopted by the Township of Tilbury North, cannot be sustained for the following reasons :

The proposed work was undertaken by the Township of Tilbury North under section 585 of the Municipal Act for the repair and enlargement of the Burgess drain in the township and for the construction of a new outlet therefor. It was not necessary that there should be any such petition as is required by section 569 for this work, but a notice signed by several ratepayers of Tilbury North was served upon the council of that township on the 25th July, 1892, requiring a better outlet for the Burgess drain and claiming damages for their loss by flooding if that was not provided, and also threatening the council with an application to the court for a mandamus to compel the making of a better outlet.

The council thereupon authorized Joseph M. Tiernan to make the necessary examination and report. This report was duly made and the by-law for the work pursuant to this report was provisionally adopted on the 17th day of September, A. D. 1892.

The engineer under section 585 in the work he was authorized to do had all the power to assess that is conferred by sections 569 to 582 inclusive, and by section 590 of the Municipal Act.

The engineer assumed to assess for benefit and also for the other purposes contemplated by section 590. Dealing with the report only so far as is necessary to determine the point under consideration, I quote this passage from it: "I have assessed and charged all lands and roads and municipalities that will be benefited by the proposed drainage works, and for which the work will provide an outlet or that will use as an outlet the proposed drainage works, or from which waters are so caused to flow upon and injure lands in your municipality in pursuance of the provisions of the Municipal Act and amendments thereto."

He then charges certain lands and roads in the Township of Tilbury North with $10081.35, without stating whether this amount is for benefit or otherwise.

He charges certain lands and roads in Tilbury East with $7253.05, as the amount these lands and roads should bear of the entire cost of the work, because this work provides "An outlet for the water from the said lands and roads which will use the proposed work as an outlet and which, with the owners thereof, cause water to flow upon and injure the lands adjacent to said drain in Tilbury North, and for the removal and prevention of which injury the proposed work is necessary." But in the schedule he places the assessment as "Value of improvement for outlet." He charges certain lands and roads in the Township of Romney with $4943.00, as the amount these lands and roads should bear of the entire construction of this work for the same reason, and in the schedule uses the same words "Value of improvement for outlet."

He also charges for same reason a small amount upon the lands and roads in the village of Tilbury Centre. Tilbury Centre does not complain and is not a respondent in this appeal.

Then the engineer, in his evidence given at the trial, says he assessed the lands and roads in Tilbury North for benefit and for outlet, but he cannot tell how much for outlet and how much for benefit.

If he assessed for both, he should be able to tell how much for each, and I think all the persons assessed are entitled to know how much he assessed for benefit and how much for outlet. It is the only way a comparison can be made between the amount charged upon lands in townships other than the initiating township, and in such initiating township. If the lands in Tilbury North should pay as much per acre for outlet alone as the lands charged in Romney and Tilbury East and if in addition these lands in Tilbury North are directly benefited so that they can be properly assessed for benefit, and if the aggregate amount would be larger than the engineer put it at, the Townships of Tilbury East and Romney would be entitled to have their assessment reduced. And in order to see precisely what the engineer intends to do, he should, in my opinion, where he made the distinction in fact, be able to say how much he assessed for outlet and how much for benefit.

This may be a case of great hardship upon some land owners in Tilbury North. According to the evidence a large quantity of water comes down from Romney through Tilbury East upon them to their damage. This water is much expedited by the improved drainage works in Tilbury East; but both Romney and Tilbury East stand, as they have a right to do, upon their strict legal rights. I cannot go outside of the legal question.

The proposed work is an expensive one, and, however necessary it may be, however advantageous to all the townships or to any of them or to any part of them, the Township of Tilbury North has no right to do this work and compel the land owners in Romney and Tilbury East to pay unless what is done is strictly in accordance with law.

I think the assessment should be so particular and specific that every person whose land is charged can ascertain precisely why he is charged as well as for what amount. I do not say that a report should be voided for a trifling error, or omission, but it is an entirely different thing when it omits to state, and when the engineer is not able to state in the case of an assessment made for benefit and for outlet, how much the assessment is for either.

The work is being done at the instance and for the benefit of the lower township and against the will of the upper, and it must therefore appear beyond any reasonable doubt that no injustice will be done by the proposed charge. The assessment in such a case, imposed by the engineer, an officer of the initiating township, must be carefully scrutinized, and in order to enable those in the upper townships, whose lands are assessed for outlet, to ascertain whether such assessment is fair and right, they are entitled to know what amount, if any, for the same reason is placed upon lands in the lower or initiating township.

In this case as the engineer did place some assessment upon lands in Tilbury North for outlet, the others are entitled to know how much; and in the absence of that information, either furnished by the report or in any other way, the assessment can not be enforced against them.

An attempt is being made to charge Romney and Tilbury East with a part of the cost of a work which, even if it would be of advantage to these townships, was certainly not asked for by them, and is now being strenuously objected to by them. Before this can be done, there ought to be such full and complete information as to satisfy me beyond reasonable doubt that they should be charged with either the amounts named in the report or some other amounts which can be ascertained with reasonable certainty.

I therefore allow the appeal of the Township of Romney and of the Township of Tilbury East, and, pursuant to the power vested in me by section 3, of the Drainage Trials Act, 1891, I decide that the report appealed against and the by-law provisionally adopted by the Township of Tilbury North on the 17th day of September, A. D. 1892, are illegal, and I order that the said by-law provisionally adopted as before mentioned be quashed.

This is not a case where I think the appellants should get full costs. The objection insisted upon at the trial, and to which effect has been given, was not particularly stated in either notice of appeal. The many objections mentioned in the notice of the Township of Tilbury East, and the particular grounds set out in the notice of the Township of Romney, naturally led the respondent to incur large expense in preparing to meet these, which expense would perhaps have been unnecessary if the appellants had, at an earlier stage, stated more fully the objection afterwards relied on.

I allow to each appellant as against the respondent, the costs of one day's trial, exclusive of witness fees.

I order and direct that the Township of Tilbury North do bear and pay its own costs of this appeal, and do pay so much of the costs of the appellants (the Township of Tilbury East and Township of Romney) exclusive of witness fees, as are incurred in one day's trial, except the stamps to be put upon my report, and that the Township of Tilbury North do pay for such stamps.

I order and direct that the sum of $25 for two and one-half days' trial being in full for both appeals be paid in stamps by affixing the same to this my report and that said sum be paid by the Township of Tilbury North; and if affixed by the appellants, or either of them, the amount so affixed shall be included in the costs of the appellant affixing the same and be paid by the Township of Tilbury North.

Except as aforesaid I order that the appellants pay their own costs.

THE TOWNSHIP OF CHATHAM AND NORTH GORE *vs.* THE TOWNSHIP OF DOVER.

Section 585, Municipal Act, 1892—Second Assessment.

An engineer, where a drainage work is authorized by section 585, may exercise all the powers to assess and charge land conferred by any of the sections from 569 to 582 inclusive, and by section 590.

Section 585 may be invoked from time to time whenever the facts according to the altered circumstances of the case, render work necessary the better to maintain any such drain or to prevent damage to adjacent lands.

March 13th, 1893. B. M. BRITTON, Q. C., Referee.

This is an appeal by the Township of Chatham and North Gore, against the report of A. McDonnell, Esq., C. E., dated the 13th day of August, A. D. 1892, for improving and enlarging the Boyle drain outlet.

This report is embodied in the by-law of the Township of Dover, provisionally adopted on the 8th day of September, A. D. 1892.

Pursuant to an appointment, this case was tried before me at Harrison Hall, in the Town of Chatham on the 19th, 20th and 21st days of January, A. D. 1893. Mr. Pegley, Q. C., appeared for the appellants, and Mr. Wilson, Q. C., and Mr. Kerr appeared for the respondents. Upon hearing all the evidence given on behalf of the appellants and respondents, and upon hearing counsel, and having duly considered the matter, I report, find, and determine as herein contained and I herewith submit the reasons of my decision.

This Boyle drain was constructed by the Township of Dover under the Drainage Clauses of the Municipal Act, pursuant to the report of W. G. McGeorge, C. E., dated the 24th day of September, 1877, and adopted by a by-law finally passed on the 29th day of December, 1877. This drain began on the easterly side of the Chatham and Dover townline on the southerly side of a road between concessions 6 and 7 and terminating at lot 6 in the 10th concession of Dover at a point there, which the engineer called "The lake."

The Township of Chatham was assessed for part of the original construction and paid about the sum of $675.

This drain was very much enlarged and deepened by the Township of Dover under the Municipal Act in 1886, pursuant to the report of A. McDonnell, C. E., dated the 28th day of June, 1886. The work in 1886 also included an improvement to the Hind drain and a new outlet for the Hind drain, which drain brought a large quantity of water to the Boyle drain, the Township of Chatham was assessed for, and paid a large amount towards this work.

Again in 1890, this Boyle drain was further enlarged and repaired by the Township of Dover, under the Municipal Act, pursuant to the report of A. McDonnell, C. E., dated the 14th day of July, 1890, and the Township of Chatham was again assessed for and paid a part of the cost of this work.

The appellant township not only contributed to the cost of the Boyle drain, and its improvement and enlargement, but as to the work in 1886, they were some time before actively moving to have it done. On the 22nd of August, 1883, Chatham formally notified Dover to deepen the Boyle drain so that Chatham would get the benefit for which Chatham was assessed.

The Johnson drain, which is really a continuation of the Boyle drain, was constructed by the Township of Chatham, pursuant to report embodied in a by-law provisionally adopted on the 30th day of September, 1879. It commenced at a point about 70 rods from the Prince Albert road and ran along the south-east side of the road between 5th and 6th concessions of Chatham to the townline between Dover and Chatham, and thence a short distance over the route of the Boyle drain in Dover until it enters what is called the creek near the Baldoon street. This so called creek was what was improved, and formed part of the Boyle drain. This work was done wholly for the benefit of Chatham and at Chatham's expense, and part of the style of the by-law is, "A By-law for draining part of the Township of Chatham," etc.

That the Township of Chatham considered the Boyle drain and the Johnson drain as part of one system and as both necessary to the drainage of Chatham lands, appears evident from the minutes of Chatham council, particularly from a resolution adopted June 16th, 1879. That the reeve of Chatham be instructed to notify the Dover council in regard to the completion of the Boyle drain as Chatham intends to proceed with the Johnson drain forthwith.

Then, on the 10th of September, 1883, Chatham council on the petition of James Waugh and others, resolved to have the Johnson drain cleaned and improved to its original depth, and this was done, as appears from the minutes of Chatham council of February 18th and August 20th, 1884.

In September, 1884, the Clerk of Chatham was instructed to notify the reeve of Dover to have the Johnson drain, known as the Boyle drain, in the Township of Dover cleaned out to its original depth, as this township (Chatham) has been threatened with a prosecution for damages if the drain is not cleaned out sufficient to carry off the water.

In 1889 Chatham again cleaned out the Johnson drain.

In 1892, about the same time that Dover was moving in the matter of the Boyle, Chatham was moving in the matter of the improvement of the Johnson drain, and on the 21st of September, 1892, the report of Messrs. McGeorge & Flater, their engineers, was adopted and a by-law for the further improvement of this Johnson drain was provisionally adopted. This by-law was afterwards passed and the repair of this drain was made by Chatham.

In the spring or summer of 1892, ratepayers in Dover complained of drainage.

The Township of Dover sent on Mr. McDonnell again and he made his report dated the 13th of August, 1892, which is the report in question. This report will be found with the provisional by-law of the township, a copy of which is filed and marked exhibit 5.

Mr. McDonnell says in his evidence that the statements in that report are true and no one on behalf of the appellant township denies any of the particular statements made. He says :—"The outlet of the drain is entirely too small and totally inadequate to perform the work it was intended to perform when constructed," and further, "It is a work of absolute necessity to enlarge the Boyle drain to enable it to carry the waters brought into it, harmless past the lands above mentioned.

A large part of the waters mentioned come from the appellant township, and the appellant township, from the evidence, has all along been quite alert in seeing that the Johnston drain was kept right and able to do all its work and this rendered it necessary for the Township of Dover to do what it has done.

I find as a fact and so report that the Boyle drain was a drain constructed under the Municipal Act, recognized as such by the appellant township, and that it was necessary to prevent damage to adjacent lands, to do the work described in the report appealed against. I am of opinion that the Township of Dover had the right under section 585 to do that work and no petition was necessary to give the Township of Dover jurisdiction in the matter.

If section 585 authorizes the work, then all the powers conferred by any of the sections from 569 to 582 inclusive, and by section 590, to assess and charge lands, may be exercised by the engineer. I find as a fact that this Boyle drain with its outlet is now used as an outlet by the Township of Chatham and that the proposed enlarged and improved outlet will, when constructed, provide an outlet for water of the lands of the Township of Chatham.

It may be that Chatham has, as was contended by Mr. Pegley, cut off some water that otherwise would enter Dover through the Johnson drain, but that in my opinion affords no answer to Dover's claim in reference to water not so cut off.

It was argued that any one township could not be assessed more than once by another township for the same kind of work in reference to any one drain. No authority was cited for the proposition and I am of opinion that section 585 may be invoked from time to time whenever the facts according to the altered circumstances of the case render work necessary the better to maintain any such drain or to prevent damage to adjacent lands. The assessment must be entirely bona fide, one strictly within the true meaning of 585.

Chatham was paid a good deal for work in reference to the Boyle drain and this proposed improvement should not be forced upon Chatham, unless there is clear authority in law and necessity in fact, for it. I am of opinion that Dover has the right to act upon the report appealed against and that the facts show a necessity for the proposed work.

It was argued that the majority of the tax-payers of Dover interested were not in favor of the work. That, if true, is a matter between them and their councillors, but the evidence before me was not sufficient to enable me to find one way or the other.

It was also argued, that even if any assessment was legal, the amount against lands and roads in Chatham should be materially reduced.

I find no evidence that would enable me to reduce that amount. There was no discrimination against Chatham. The lands in Dover were assessed on the same principle as were those in Chatham, and the witnesses called for the appellant almost admitted, that if liable at all, no fault could be found either as to the lands included, or the amount placed upon the respective parcels.

Notwithstanding the very able argument of Mr. Pegley, counsel for the appellant township, which I have carefully considered, I come to the conclusion upon the evidence that the appeal must be dismissed.

I hereby confirm the report of Augustine McDonnell, Esq., C. E. now appealed against, which report is dated the 13th day of August, A. D. 1892, and I confirm the assessments by him made.

I order and direct that the appellant, the Township of Chatham, do pay to the respondent, the Township of Dover, the costs of the said Township of Dover of this appeal, and do pay the further sum of $15 in stamps by affixing the same to this my report as of one and one half-days' trial of this appeal, and if the Township of Dover shall affix the stamps the amount thereof shall be included in the costs of Dover and that to that township and be repaid by the Township of Chatham.

IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.

SAGE ET AL. *vs.* WEST OXFORD—THORNTON *vs.* WEST OXFORD.

Negligence — Onus — Outlet — Engineer — Competency— Previous Recovery—Estoppel.

In an action for damages alleged to have been caused to lands and crops, and for an outlet, the onus is on the plaintiff to show negligence, whether actual or constructive, on the part of the defendants, and further that by reason of that negligence the plaintiff has suffered damage, or may suffer damage, which he is entitled to come into court for or prevent continuance of.

A person who signs a petition for a drain which asks that a certain engineer be appointed to make the necessary survey, etc., ought not to be allowed to say that such engineer is incompetent for the work he was employed to do.

A judgment obtained against the township for damages to crops by a former tenant of the plaintiff in respect of the same lands does not operate by way of estoppel.

March 20th, 1893. B. M. BRITTON, Q. C., Referee.

The first action was referred to me by the judgment and order of the court, dated the 25th day of October, 1892, and the second action was referred to me by the order of the Court dated the 13th day of February, A. D. 1893.

The cases coming on before me on the 14th day of February, A. D. 1893, at Ingersoll, in the County of Oxford, and it appearing that all the evidence in reference to the question of liability would be the same in both cases, and the defendants consenting that the evidence taken under a commission issued in the first case should be also used in the second case, I made an order consolidating the actions, so that all the evidence given was, so far as applicable, to be used in favor of or against the plaintiffs in each case, and in favor of or against the defendants in each case.

J. B. Jackson, Esq., appeared as counsel for the plaintiffs, and Matthew Wilson, Esq., Q, C., appeared as counsel for the defendants.

The taking of evidence and hearing of counsel occupied seven days, namely, from the 14th to the 21st day of February, A. D. 1893, both days inclusive, and having heard the evidence, and the arguments of counsel, I reserved judgment, and having considered the matter, I now give my decision and make this my report.

The first action was brought by Edgar E. Sage, as the owner of part of the east half of lot 13, 3rd concesssion of West Oxford, Almon Almas as the owner of another portion of the same lot, and Albert Fierheller as the tenant of Edgar E. Sage for the years 1890 and 1891, all joining as plaintiffs against the Township of West Oxford for damages. The claim is that the defendants so negligently constructed a ditch or drain, known as the Davis drain, that it caused plaintiffs' lands to be overflowed and their crops, etc., to be injured.

The plaintiffs further say that the defendants did not at the time of the construction of the Davis drain provide any suitable or sufficient outlet for the additional waters brought down by that drain and by reason of this the plaintiffs' land was rendered unfit for cultivation and their crops were destroyed and injured.

And the plaintiffs ask for an outlet and for damages.

The second action is brought by J. B. Thornton, who is the owner of the west half of the same lot 13, and he charges, as will more fully appear in the statement of claim, that the defendants constructed this Davis drain under the authority of the Municipal Act, but they did not provide any suitable or sufficient outlet for the waters brought down by it, and he further charges that it was the duty of the defendants having made this drain, to maintain it and keep it in repair, but they neglected their duty and allowed the drain to get out of repair, and by reason of the defendants' negligence in these matters the plaintiff has suffered damage.

The defence is substantially the same to each action, as will appear by looking at the statement of defence.

From the view I have taken of the case it will not be necessary for me to consider some of the points raised by way of defence.

The drain complained of is known as the Davis drain. It is a very small drain, commencing at a point on the south half of lot 13, 4th concession of West Oxford, thence across lot 13, along the line betwen 13 and 14, it crosses the concession road between the third and fourth concessions, then along the line between 13 and 14 in the 3rd concession to about the centre of the 3rd, thence north-easterly to the line in the centre of lot 13, thence north-westerly along this line to an outlet in the creek about three chains south of the allowance for road between the 2nd and 3rd concessions. It is only about one and three quarter miles in length, and its estimated cost was only $1163. It is intended to drain only about 350 acres of land. There are only nine parcels of land assessed for this drain, the owners of which all petitioned for its construction

Mr. McDonnell, one of the witnesses and an engineer of large experience in drainage works, stated, that he never knew a case in which section 569 of the Municipal Act was invoked for the purpose of draining so small a territory.

The propositions which, or one of which the plaintiffs undertake to prove, are :—

1. That the defendants are guilty of some negligence in the construction of this drain, apart from not providing a sufficient outlet, by reason of which negligence the water was caused to flood plaintiff's property to their damage ; or,

2. That the defendants in constructing this drain did not provide a sufficient outlet for the additional water brought down by it, by reason of which, the water in times of freshet spread over the plaintiff's lands to their damage ; or,

3. That the defendants having constructed this drain were bound to maintain it and keep it in repair and the township neglected to keep it in repair by reason of which the plaintiff suffered damage.

The onus is upon the plaintiffs.

They must not only show negligence either actual or constructive on the part of the defendants, but further, that by reason of that negligence the plaintiffs (or some of them) have suffered damage or may suffer damage, which they are entitled to come into court to recover for, or prevent continuance of.

There is no evidence of any negligence whatever in the construction of this drain, apart from the question of outlet, nor is there any evidence of non-repair of this drain which would entitle the plaintiffs or any of them to recover. Apart altogether from any question of notice in writing pursuant to section 583 of the Municipal Act, there was no evidence offered nor was it argued by counsel for the plaintiff's that the alleged damage was due to any such want of repair. The only contention of the plaintiffs as put by Mr. Jackson, their counsel, in his able management of the case and argument was that the defendants are guilty of negligence in not providing a proper and sufficient outlet for this Davis drain. The question of outlet and the defendants liability, is the one to be considered. If upon the evidence, the plaintiffs, or any of them, are entitled to any relief against the defendants by reason of making the outlet of the Davis drain where it was made, then such relief should be granted and if necessary to make any amendment in either statement of claim to harmonize the record with the evidence, I would allow such amendment so as to give full relief and do complete justice between the parties.

The plaintiffs' counsel says :

1st. By the petition asking for this drain the township was bound to make the outlet at the head of the mill dam, that is to say, at the mill pond, and the defendant township had no right whatever to stop upon Thornton's land and empty the water into the creek at that point ; and

2nd. Even if the petitioners asking for the drain were willing that the outlet should be at some point in the creek, to the south of the mill pond, the engineer of the defendants should have known better than to make the outlet there, and the defendants, in making the outlet complained of, did so at their own risk and are liable to the plaintiffs.

It is important to consider how the township came to make this drain. The township was not obliged to make it. The drain was of no benefit to the great majority of the ratepayers of the township. It was only of benefit to the nine persons who signed the petition asking for its construction.

Of the nine petitioners only three need now be mentioned namely,—John Davis, J. B. Thornton and Edgar E. Sage. Thornton and Sage are plaintiffs. John Davis afterwards sold his land to the plaintiff Almas, and the plaintiff Fierheller only claims as the tenant of Sage, so that all the parties plaintiffs in these actions are in this way connected with the drain in question.

The petitioners ask that the township will cause to be made a drain "beginning at a point on the south half of lot 13, in the 4th concession owned by John Rooney, thence through lots 13 and 14 in the 4th concession and lots and part of lots 13 and 14 in the 3rd concession to an outlet in the creek at the head of the mill dam owned by Ambrose French." They ask that this be done under the provisions of the Municipal Act, that the assessment be made under section 569 of that act and then they ask that F. J. Ure, P. L. S. be appointed to make the necessary survey and to let and superintend the work.

The John Rooney mentioned is one of the petitioners. The council, acting upon this petition, appointed Ure to make the necessary survey and to make his report, on the 12th of July, 1888.

In my opinion the true meaning of the petition is that "the outlet" should be at some point in the creek and not at French's mill pond. The words "at the head of the mill dam" are not apt words to describe the outlet of the creek but it appears to me clear that the petitioners simply intended to designate the creek as the creek emptying into the mill pond owned by Ambrose French. This construction is in accordance with the evidence, as the petitioners or some of them were of opinion that the drain would be made along the natural course of the water crossing the centre line of 13 in the 3rd concession and entering this creek upon the land of the plaintiff Sage, instead of at the present outlet upon the plaintiff Thornton's land. The petitioners never contemplated a work of such magnitude as deepening this creek from the point on Sage's land just referred to down to the pond and that would have been necessary if the drain had entered the creek at that point, if the plaintiffs present contention is correct. Nor do I think the petitioners contemplated deepening the creek at all.

It was assumed that the creek as a natural water course would in itself afford a sufficient outlet for the water from the comparitively small drainage area to be carried by the proposed drain. I find as a fact upon the evidence that the outlet of the drain, was intended to be as it was actually located, "in the creek" and that the words "at the head of the mill dam" were to designate the creek, and not the actual place where the drain should immediately empty its waters.

Then as to the next point, are the defendants guilty of negligence in terminating the drain at place of present outlet? That involves the following questions:—

1st. Is the present outlet a good and sufficient one, as good as could be obtained even by continuing the work to the pond, or, as put by the engineers, by bringing the dead waters of the pond, to the mouth of the present drain?

2nd. If it is not a good outlet was the engineer of the defendants guilty of negligence upon the facts in this case in not ascertaining that the outlet would not be a good and sufficient one.

Should the engineer have ascertained this and so reported to the council, leaving it to the council to refuse to undertake the work, or to do the larger work necessary to carry the drain to a sufficient outlet.

3rd. If the engineer was guilty of negligence are the defendants by reason thereof upon the facts in this case liable to the plaintiffs or any of them in these actions.

There was a great deal of contradictory evidence in this case. It is surprising how engineers of great experience who have gone on the ground and taken levels, can differ so much about this outlet and as to the effect of making a cut from the present outlet to the dead waters of the pond. It is not necessary for me in this, my report, to refer to the different measurements by these engineers, or to refer to the plans prepared by them; suffice it to say that for the plaintiffs William R. Burke, James A. Bell, William Davis and W. G. McGeorge, the last named gentleman being of great experience and eminence in his profession, say that the present outlet is very bad; that it is not sufficient; that it should go to the log called the "fisherman's log" in the pond. Mr. Burke says the drain empties into the creek at the point where there is the greatest fall, but, as he explained, it is not always best to have the drain strike a natural water course at the point where the fall is greatest; and apart from the one objection, namely, that the drain should have been carried down to the pond, he finds no fault with its location or construction.

An attack was made upon Mr. Burke by counsel for the Township, but nothing in Mr. Burke's evidence, or in his manner of giving it, would lead me to the conclusion that he was in any way incompetent or that he was not perfectly fair and honest in this matter. It is quite true that Burke and Ure, who were partners in business, are not now friends, and it may be that this bad blood between the engineer employed by the plaintiffs and the Township engineer has had something to do in preventing the amicable settlement of the matter which no doubt could have been settled at much less expense than this litigation will involve.

On the other hand Agustine McDonnell, an eminent engineer of very large experience, Richard Coad, and the Township engineer, F. J. Ure, support the outlet as it is, and say that it is the best possible outlet to be found for this drain in that creek, and that no advantage would be gained by carrying it to the dead waters of the pond. The defendants also call men of large practical knowledge, gained from experience, who are not engineers but who know the locality and who have carefully examined it for the purpose of giving evidence in this suit and they say the outlet is good and sufficient, as good as can be found for this drain, that no better drainage can be obtained for plaintiffs' land unless the mill dam be lowered, and it is not pretended that the Township has any right without the consent of the owner to interfere with this dam.

I am therefore of opinion that the plaintiffs have failed to prove that the outlet complained of is not suitable and sufficient for the additional waters brought down by the said ditch or drain. The onus being upon the plaintiffs, they must make out their case beyond a reasonable doubt, and upon the evidence I cannot come to the conclusion, considering the situation of the land of Sage, Almas and Thornton, the character of this creek and the facts in connection with the mill dam and the mill pond, that the township has failed to provide a suitable and sufficient outlet for this drain, and so the defendants are not guilty of negligence.

As to the second question; if the Engineer Ure in locating the outlet did precisely what other engineers of known skill and ability would have done under the same circumstances, I cannot find that he was guilty of negligence.

Having received the instructions he seems to have made careful measurements and to have considered the whole situation and made his report of July 12th, 1888.

The plaintiffs knew what he (Ure) was doing and where he had located the outlet. The plaintiff Thornton wished some changes in the location of the drain across his place. Ure was instructed to examine and report on the 27th of August, 1888, see exhibit 24. The plaintiff Thornton thought that report, if acted upon, would involve too much expense and he requested Mr. Ure to survey another course. This Ure did and reported to the council on the 29th of August, 1888, (exhibit 22). The council on the petition of Thornton (exhibit 20) adopted these changes proposed by plaintiff Thornton, and Thornton entered into a written agreement dated 29th of October, 1888, (exhibit 24) to pay to the township $41.04 the estimated extra cost consequent upon the changes desired by Thornton, and in addition Thornton agreed to maintain at his own cost that portion of this drain upon his lot between stakes 58 and 56. 6. The outlet was located then upon Thornton's own land and the drain became to a certain extent a private drain of his own. It seems to me that there is no evidence of negligence on the part of the engineer.

In 1891 there was talk about the outlet and the plaintiff Thornton notified the council (exhibit 5) to "clean out the outlet of the Davis drain as it has filled in with earth and backed the water onto my property," the council on the 24th of August, 1891, passed a resolution asking the engineer "to examine the outlet of the Davis drain and report as to the cost of continuing the same to a proper outlet." The mover and framer of this resolution knew nothing of the facts, and it would be going farther than I can go to say that this resolution is such an admission on the part of the council that the outlet was not a proper or sufficient one as to amount to proof of its really being improper and insufficient or as proof that their engineer had been negligent in its location.

The engineer did examine and report recommending the cleaning out of the water-cress and sticks from the creek below the outlet.

As to the third question I find as a fact that Mr. Ure was a competent engineer and the plaintiffs Sage and Thornton must have so considered him as in the petition they asked that he be employed, so that these plaintiffs ought not to be allowed to say, even if the the fact was so, that Mr. Ure was in any way incompetent for the work he was employed to do.

But even if the outlet was not suitable or sufficient the plaintiffs have failed to establish to my satisfaction that the damages complained of were occasioned by water backing up and flooding the lands of the plaintiffs or any of them, by reason of such insufficiency. From the evidence, and there was an enormous mass of evidence given, there are the gravest doubts, as to whether any damage was occasioned from the insufficiency of the outlet.

Other causes altogether may have occasioned the damage where any damage was really sustained. The claims for damages are not large. Sage did not suffer any damage that he could in any event recover in this action. His farm was really largely benefited by the Davis drain in having water cut off, that otherwise would flow upon it. He lost no crop and he bases his claim for damage upon some vague offer for his place, and upon an opinion that the proposed purchaser, if he bought, would want it for $200 less than he would give were this Davis drain outlet all right, this, it seems to me, is too remote.

Fierheller thinks he should get $50, and Almas thinks he should get $100—$25 a year for two years for loss of hay, and $25 a year for two years for loss of spring water. His damages were of a trifling kind, but the weight of evidence is that whatever damages if any sustained by Sage, Fierheller or Almas did not arise from the alleged insufficiency of the outlet, but from obstructions in the creek and from the fact that the land was so low that it was, apart altogether from any water brought down by the Davis drain, liable to be flooded in times of freshets.

As to Thornton, he complains of damage to his crops in 1892, and the weight of evidence in my opinion is, that the water which did him the damage did not come from the Davis drain or from water backed up and flooding by reason of the alleged insufficient outlet, but rather by water flowing from the west which it was not intended should be taken care of by the Davis drain, and by the great rainstorm of June the 3rd, 1892, a storm so exceptional in its character as to flood this whole section of country, many farmers losing their crops on comparatively high lands.

It cannot be said that Thornton has proved any more than any other of the plaintiffs that his damage may not have been occasioned by water that would have overflowed his land if the Davis drain had not been constructed.

As to Thornton it is worthy of note that while in 1891, he was complaining that the outlet required cleaning, in May, 1892, still finding his land wet, he notified the defendant council to clean out their portion of the Davis drain as he desired to clean out his part.

Having this low land liable to be overflowed by every freshet, he was himself unable to ascertain what would be a complete remedy even if any could be found.

After the extraordinary freshet of June 3rd, 1892, he for the first time asked for a new outlet and then as will be seen by his notice dated June 7th, 1892, (exhibit 10) he did not complain of the negligence of the defendants, but asked them "to deepen and widen the creek up to the Davis drain and charge the same to the different parties interested in the drain."

This would be an entirely new work and might or might not be useful to Thornton for draining his land.

I am of opinion that to entitle plaintiffs or any of them to succeed, some damage must be shown to have resulted from the negligence complained of.

In Northwood vs. Township of Raleigh 3 O. R. 347, which is as strong a case as can be found in favor of the plaintiffs the finding was express that the plaintiff's land was to some appreciable extent injuriously affected by flooding arising from the insufficient outlet.

And although in that case the balance as between damage and benefit to plaintiff, would be in favor of benefit, so that plaintiff would not be entitled to recover money compensation, still, to entitle a plaintiff to relief he must show some damage arising from something for which the defendant is liable, that is to say, as is stated on page 360 of above report, he must show that he "has derived less benefit from the drainage works than would have resulted to him if they had been properly carried out."

In Malott vs. Mersea, 9 O. R. 611, cited by counsel for plaintiffs, it was found as a fact that the water brought down by the "Dale" drain into "Two Creeks" would naturally increase the quantity that would flow upon the plaintiff's lands to the increased injury of the plaintiff's lands and crops.

Law vs. Town of Niagara Falls, 6 O. R. 467, is also in point and this latter case was referred to approvingly in Crysler vs. Sarnia, 15 O. R.

One Stokes, who was a tenant of the plaintiff Thornton, upon the west half of 13, 3rd concession, recovered judgment against the defendant for damages to his crops growing upon that land for the years 1890 and 1891, and the plaintiff Thornton in his action by way of reply sets up this judgment against the defendants. The exemplification of judgment was put in subject to objection. I am of opinion that this judgment cannot in any way be used to assist

Thornton's recovery in the present action. It does not operate by way of estoppel.

If, upon the same facts, His Lordship, the Chief Justice of the Queen's Bench Division, decided that as a matter of law, there must be a recovery against the defendants, I would of course follow that decision, but there was nothing before me to show what the facts were or what the decision was upon any question of law or why the defendants allowed such a judgment to be recovered.

I therefore decide and so report, that the said action and actions should be dismissed with costs as stated below. The plaintiff J. B. Thornton should not pay any costs occasioned by the action of Sage et al; and the plaintiff Sage et al should not pay any costs occasioned by the action of Thornton. The actions were consolidated to save the expense of double trial, and the result will be a great saving of expense to all parties, but it was not intended by me in consolidating the actions to make the parties in one action liable for the costs which the parties in the other action should pay. I decide and order that the plaintiffs, Edgar E. Sage, Almon Almas and Albert Fierheller, shall pay to the defendants the costs of their original action and all costs therein down to the 14th day of February, 1893, and one-half of all the costs of the said defendants, of the reference and trial before me and of all subsequent costs to judgment; and that the plaintiff J. B. Thornton, shall pay to the defendants the costs of his original action and all costs therein down to the 14th day of February, A. D. 1893, and one-half of all the costs of the reference and trial before me and of all subsequent costs to judgment.

I further order and direct that the plaintiffs, Edgar E. Sage, Almon Almas and Albert Fierheller, do and shall pay the sum of $35 by affixing law stamps to this my report, being one-half of the amount ordered by me for seven days' reference and trial in this matter, and if the said plaintiffs do not affix said stamps, then that the defendants do affix the same, and the amount shall be allowed to the defendants in their costs against said plaintiffs, and I further order and direct that the plaintiff J. B. Thornton do and shall pay the further sum of $35 by affixing law stamps to this my report, being one-half of the amount ordered by me for seven days' reference and trial in this matter, and if the said plaintiff does not affix said stamps, then that the defendants do affix the same and the amount shall be allowed to the defendants in their costs against the said plaintiff J. B. Thornton.

A formal report or judgment without my reasons may be settled and will be signed by me if necessary and if desired by the parties or either of them.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION.

WILKIE *vs.* THE VILLAGE OF DUTTON.

Spreading Earth—Protection of Land during Progress of Work—Negligence—Damage—Offset by Benefit—Independent Contractor—Costs.

In the work of improving and extending a drain where no provision was made for properly disposing of the excavated earth and it was piled up in little hills along the ditch and also where no provision was made for protecting plaintiff's pasture or "green" while work was being done, and the fences were thrown down, the defendants were found guilty of negligence. The contractors, to whom the work was given out, could not upon the facts of this case be deemed independent contractors so as to relieve defendants from liability.

It is improper for an engineer to omit lands from assessment as an offset to damage expected to result from the work.

Where no negligence is shown in an action referred to the Drainage Referee, plaintiff should not get the costs of the action and should only get such costs as he would be entitled to if he had instituted proceedings under section 591 of the Consolidated Municipal Act, 1892, for recovery of compensation.

May 31st, 1893. B. M. BRITTON, Q. C., Referee.

This action was brought by the plaintiff as the owner of the north half of lot 12, of concession 5 south of concession A, Township of Dunwich, for (1st) trespass, alleging that the defendants without any legal right in 1892 entered upon this land and did damage to the plaintiff; and (2nd) that even if the by-law under which defendants assumed to act was a legal and valid by-law, the defendants were guilty of such negligence (particulars of which are set out) as to entitle the plaintiff to recover. And the plaintiff claims $1000 damages and injunction, etc.

The defendants say they did what is complained of under by-laws which were regularly passed and which they had authority to pass, and they deny all allegations of negligence, and they say that if liable at all, they are liable only for compensation, and the plaintiff should not have brought his action but should have proceeded only for compensation under the arbitration clauses of the Municipal Act.

The action was by the order of the Honorable Mr. Justice Street transferred to me pursuant to section 19 of the Drainage Trials Act, 1891.

Pursuant to appointment the case came on for trial before me at

St. Thomas and was tried on the 28th and 29th days of April, A. D. 1893.

Mr. McDonald, counsel for plaintiff, and Mr. Glenn and Mr. Leitch, counsel for defendants.

The questions of fact are few and there is very little really in controversy between the parties.

In 1878 the Township of Dunwich passed a by-law for the construction of the Dutton drain. This drain was to cost $535 and proceedings for it were instituted by petition under what is now section 569 of the Municipal Act.

In 1885 owing to buildings being erected in Dutton the course of this drain was changed in the village for the purpose of facilitating cleaning out the drain. This was done at a cost of $178.05. Plaintiff's land was not assessed for this.

In 1889 the township passed a by-law for the purpose of improving the outlet of Brown and Dutton drain. This was done at the instance and because of the complaint of landowners including Brown and Hutton and was done for the express purpose of having the stagnant water under the dwellings and business places in the village of Dutton removed. The common outlet of the Brown and Dutton drain was to be deepened, widened and improved throughout its whole length. The drain itself was to be deepened and widened in part from the intersection of Main and Mary streets to its junction with the Brown drain and this was to be done for the drainage of the lands and cellars along its course. The cost of this was $1289.46, and plaintiff's land was assessed $20 for this.

In 1889 the Brown drain was deepened, widened and improved. This was done at a cost of $617.50 and of this a small sum of $8 was put upon the south part of north half of plaintiff's land.

After the work of 1889, according to the evidence of Harris, the drain worked well until the spring of 1890. During 1890, 1891 and the spring of 1892 water brought down from the cellars and low land of the then incorporated Village of Dutton, did not flow off but remained, owing to the outlet not being deep enough.

Complaints were made which resulted in the village undertaking the work now complained of, a work done under by-law 26, finally passed 19th September, 1892. This by-law recites complaints by persons interested and by Board of Health. This work cost $664.30. This is not material for present inquiry except to notice that in the cost no sum is included for spreading or disposing of earth taken out nor is any amount charged against plaintiff's land.

How far section 585 of the Municipal Act authorized this by-law

No. 26 and the work done under it is an important question. In dealing with these drainage cases I feel that there must be judicial decision of the highest court or legislation to define the limits beyond which a municipality cannot go in making and enlarging drains under section 585 and without any petition therefor by owners of lands to be assessed.

For the purposes of this action I decide and so report that the defendants had the right to pass by-law No. 26 and that it is a good and valid by-law, leaving it to the plaintiff in the event of an appeal to satisfy the court that the work done by the defendants does not come under section 585.

I am, however, of opinion that the defendants are guilty of negligence in the work of improving and extending this drain, and I so find and report.

The work to be done was not merely cleaning out the drain but the drain was to be deepened and widened. Some provision should therefor have been made for properly disposing of the earth to be taken out. No such provision was made. There was no plan or method provided by the contract or pursued by the contractors. The contractors were at liberty to remove the earth with spades, or with scrapers drawn by horses and they did remove it in both of these ways leaving it upon either side of the drain, some upon one side some upon the other, entirely to suit the convenience of the particular contractor at the place where the work was being done.

This was not a mere oversight upon the part of the engineer, nor was it something that he thought it quite right to do, but on the contrary he thought the earth removed should be spread upon the land, and he thought that the plaintiff's land would be benefited to the extent of $75, and as it would cost about $75 to spread the earth taken out, one would go against the other. This the engineer should not have done. If the plaintiff's land was benefited and if the engineer was entitled to assess for such benefit, he should have done so, and if the plaintiff did not accept such assessment he could have taken the necessary steps to have it struck off or reduced.

If the earth taken out of the bottom of the drain for the purpose of deepening it, was blue clay, or red clay, if it was barren earth and unproductive the defendants had no right to assume that the plaintiff would spread it or permit it to be spread upon his farm, and therefore there was all the more reason for making provision for properly disposing of the earth so taken out, and the defendants could at least have made provision for spoil-bank and for having the contractors so place the earth beside the drain as would interfere as little as possible with the plaintiff in his use of the farm, and the plaintiff then could not reasonably complain if he got compensation for land upon which the earth was carefully placed.

As it is, according to the evidence, it is thrown up in little hills, some places quite deep, and so as to some extent, although there was not evidence that it would to any great extent, prevent water from plaintiff's land draining into this ditch.

If the defendants had provided for the disposal of the earth it might well be said upon that point that the plaintiff's remedy against the defendants was only for compensation by arbitration and that he could not bring an action.

If the defendants were not guilty of negligence the plaintiff would not be in a position to bring an action. Preston vs. Camden, 14 O. A. R. 85, is authority for defendants upon that point. In that case the facts were in many respects similar to those in the present case, but the jury found that the defendants were not guilty of negligence, and so the judgment of the learned trials judge for the plaintiff was reversed by the Court of Appeal. I find as damages in this case the same amount that I would find and do find as the compensation to which plaintiff is entitled even if no negligence. It is, however, important to the parties, because if no negligence the plaintiff should not get the costs of the action, and should only get such costs as he would be entitled to if he had instituted proceedings under section 591 of the Municipal Act for recovery of compensation.

Then no provision was made for protecting plaintiff's pasture or green while work was being done, and these were not protected but on the contrary the fences were thrown down and the plaintiff did suffer damage.

I think the defendants are liable for this notwithstanding the work was given out to contractors. The contract is with the corporation. The work was given in sections to different contractors, and the contract is simply that the contractor shall "Well, truly and faithfully cut or dig, make and complete or cause to be done — rods or one section of a certain drain or ditch called the Dutton Drain." "Which the contractor hath hereby contracted to make according to the plans and specifications of Bell & Campbell, Engineers."

The work was done under the direction and supervision of the defendants' officers and the defendants knew or ought to have known what was being done. Upon the facts I do not think the work in this case was the work of an independent contractor so as to relieve the defendants from liability.

As to damages and compensation to the plaintiff, I find and report as follows: The plaintiff should recover for his land used in widening the ditch or drain the sum of $35, and for the land used and spoiled by earth thrown from the drain or ditch, and for damages by reason of the earth being so piled in places as to stop water to some extent from draining from plaintiff's land into the ditch, the sum of $80. Apart from the land occupied and damage found by me for this earth thrown out, the evidence is that it would cost about eighty dollars to properly spread the earth, the highest amount named was $100 and the smallest was $60. If therefore the plaintiff desires to remove the earth from the banks and spread it upon his land the sum of $80 now awarded will enable him to do so. The defendants were not at liberty to order it to be spread and it could only be spread with plaintiff's consent. If he spreads it, it may be taken for granted that he can do so in such a way as not to materially injure his land, and the evidence is that it will cost about $80.

I allow the further sum of $27.50 as a reasonable amount for the renewing of necessary bridges across this drain and I allow the further sum $27.50 for damages to the plaintiff's pasture and wheat and meadow. This last is an item which cannot be accurately determined. The plaintiff gave evidence of about $55 in all for these items; that is, in my opinion, too much. No evidence was given to show how plaintiff's other wheat turned out, and while not able to measure the exact amount of damage, I think the allowance of $27.50 will be doing substantial justice. These sums make in the whole the sum of $170 which amount I allow to the plaintiff.

The plaintiff is entitled to his costs of the action but only as for a verdict of $170, but I do not allow any set off of costs by defendants. I allow to the plaintiff the costs of the reference and order and direct that the same be paid by the defendants. I order and direct that the sum of $15 be paid in stamps by affixing the same to this my report and that this sum be paid by the defendants. If the plaintiff affixes the stamps the said sum shall be included by him in his costs against defendant sand repaid by them to him.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION.

FORD VS. TOWNSHIP OF MOORE.

Non-repair Evidence.

Want of repair of a drain may be proved by evidence other than that of an engineer. Statements contained in reports by engineers are evidence against the township to whom and by whose authority the reports were made.

May 31st, 1895. B. M. BRITTON, Q. C., Referee.

This is an action brought by the plaintiff for damages by flooding the west three-quarters of lot 18, fourth concession, Moore.

The complaint is that the defendants did not maintain and keep in repair a certain drain constructed under the provisions of "The Ontario Drainage Act" on the side-road between lots 18 and 19 through the first, second, third, and fourth concessions of Moore, by reason of which the plaintiff's land was overflowed during the years 1887, '88, '89, '90, '91, and '92; and plaintiff sustained damages as particularly set out in the statement of claim.

The plaintiff further complains that the defendants wrongfully and negligently constructed other drains and connected these with said side-road drain, and so caused to flow into that drain more water than it was capable of carrying off, by reason of which the plaintiff's land during the years mentioned was at times overflowed.

The plaintiff asks for a mandamus to compel the defendants to repair and an injunction to restrain defendants from causing certain water to flow into the said side-road drain.

The action was referred to me by order, and pursuant to my appointment, came before me for trial and was tried at the Court House, Sarnia, on the 9th day of May, 1893.

F. W. Kittermaster, counsel for the plaintiff, and J. F. Lister, Q. C., counsel for the defendants.

Upon hearing the evidence and what was said by counsel, I reserved my decision, and having considered the matter, I now decide and determine and make this my report as follows :—

The defendants admits the construction of this side-road drain. It is called Government Drain Number Four, and it is also called the Jarvis drain, and in referring to it I shall hereafter call it the "Jarvis Drain."

It is the duty of the defendants to preserve, maintain and keep in repair this drain. The plaintiff says the defendants did not do so, and the plaintiff has given a notice in writing to the defendants pursuant to sub-section 3, section 31, of "The Ontario Drainage Act," which notice I find to be reasonably sufficient under said Act.

The questions therefore for consideration are, (1st), was this Jarvis drain out of repair. (2nd). If so, has the plaintiff by reason thereof, sustained damage, and if damage, the amount of such damage.

I find upon the evidence that this "Jarvis Drain" south of the concession line between the 4th and 5th concessions of said township was out of repair. The counsel for defendants argued strongly that the plaintiff could only properly prove this by an engineer who had examined the drain for the purpose of this action, and that such engineer should be called to give evidence for the plaintiff before me. No doubt want of repair is generally proved in that way, but there is evidence in this case, and evidence just as convincing as if an engineer had been called and had given his evidence upon the stand. The plaintiff and witnesses for him, who are not engineers but who are competent to speak upon the subject, say this drain was out of repair. Then there are the important statements of the engineers who were appointed by the defendants and who reported to the defendants.

I think these statements are evidence against the defendants and for the plaintiff in this action.

In 1890 the defendants employed W. S. Davidson to examine this drain. The defendants say Davidson is a person competent for such purpose, and on the 20th of September, 1890, he reported to the defendants as follows: "I beg to report that in accordance with your instructions I have made an examination of the drain on side-road 18 and 19, across concessions 1 to 8, in your township. I find that the said drain is out of repair and that water brought down by the drain overflows and damages the low lying land along the drain."

In 1892 the defendants employed Mr. Richard Coad to make an examination of this Jarvis drain and the firm of Coad & Robertson made a report to defendants' council.

These engineers say: "We have made an examination of the Jarvis, or 18 and 19 side-road drain in your municipality and that of the adjoining municipality of Sombra to the south, from the head of the herein proposed work at the road allowance between the 4th and 5th concessions to about the centre line of the south half of east half of 14 in the 15th concession of Sombra, and thence to near the River Sydenham, we examined the creek. We find that the drain is filled in considerably along its entire length, etc.

In 1892 W. S. Davidson was again employed by defendants, and he made another examination of and report upon this drain. His report is dated 10th October, 1892, and states: "I beg to report that in accordance with your instructions I have made an examination of the Jarvis drain on side-road 18 and 19, from the road allowance between concessions 8 and 9 south to a point 72 rods south of the blind line between concessions 1 and 2, and thence through lots 18 and part of 17 in the first concession of the Township of Moore, and part of lot 14 in the 15th concession of the Township of Sombra, to a point about 70 rods south of the blind line of the 15th concession. I find that the said drain is out of repair and that the waters brought into the said drain overflow and damage the low lands lying along the drain."

The Plaintiff's land is "low land lying along the drain," and he says that the damage which the engineers speak of as likely to occur has actually occured to him. *Prima facie* damage resulted from the condition of the drain.

It is difficult to determine just what amount of damages the plaintiff is entitled to recover against the defendants; certainly he suffered no damage to the east 50 acres.

It appears that this Jarvis drain was never deep enough to thoroughly drain the plaintiff's land although it has been of great benefit to it.

On the 31st of May, 1890, the plaintiff by notice in writing, complained to the defendants. In his notice he states that this Jarvis drain is out of repair, but he also says that it required to be deepened as well as repaired.

I do not think that the plaintiff has, upon the evidence, made any case against the defendants for damages, by reason of defendants bringing more water into the Jarvis drain than it was originally intended to carry, and so put upon the defendants the obligation to deepen and improve the outlet. The defendants allowed the Jarvis drain to get out of repair. It was filled in, the flow of the water was obstructed and some damage has resulted to plaintiff for which he is entitled to recover. The plaintiff made no claim for any damages prior to 1890. He kept no account of his crops and he is not able to say now with any degree of certainty what he lost if he lost anything, by reason of flooding prior to 1890, and still less is he able to say that the defendants are in any way to blame for what occurred to him prior to 1890. The general evidence given by Mr. McCrea as to plaintiff's loss, and upon which the counsel for plaintiff so much relied, does not satisfy me either as to amount or as to defendants' liability for any year prior to 1890.

I think the plaintiff and his witnesses over-estimate the damage.

The evidence is unsatisfactory. The estimate made by Edward Shaw and Hutchinson (exhibit 7) was not, in my opinion, warranted upon the facts brought out on the examination of these witnesses.

The plaintiff himself estimated his loss for 1890 at $40, and that was, I think, more than the defendants would be liable for, if liable for any for that year. The statement made by plaintiff that he did not make up his mind to sue until 1892, and then he found out that he could sue for six years is a most important one in considering the question of damages. Upon the best consideration I can give to the evidence, I assess the damages of the plaintiff at $155, and I find and decide and report that he is entitled to recover the sum of $155 against defendants.

I order and direct that the defendants pay to the plaintiff the costs of the action and of the reference, and that judgment be entered for the plaintiff against the defendants for the sum of $155 with costs of the action and costs of reference. I direct that there be no set-off of costs by defendants by reason of the damage being only $155.

I made no order in reference to mandamus or injunction, as it appears the defendants have taken steps to repair the drain in question, and to prevent damage to lands lying alongside of it.

I order and direct that the sum of $10 as and for one day's trial be paid in stamps by affixing the same to this my report or order for judgment; that the same paid by defendants and if the plaintiff affix the same, the amount shall be included in his costs taxed against and paid by the defendants.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION.

GAHEN *vs.* TOWNSHIP OF MERSEA.

Negligence—Outlet—Injunction.

Where water was diverted from one drain to another without providing a proper outlet, the township was found guilty of negligence, and in default of a proper outlet being provided within a time fixed, injunction ordered to issue restraining defendants from discharging water into the new course to the damage and injury of plaintiff.

June 7th, 1893. B. M. BRITTON, Q. C., Referee.

Whereas by an order of reference herein, made by the court on the 18th day of April, A. D. 1893, it was ordered that pursuant to section 11 of the Drainage Trials Act, 1891, this action should be and the same was referred to me, Byron M. Britton, the referee appointed under the said Act, to be by me disposed of under the provisions of the said Act and the amendments thereto.

And whereas the case came on for trial pursuant to my appointment at the Village of Tilbury Centre, in the County of Kent, and was there tried on the 5th, 6th and 7th days of June, A. D. 1893, and having heard all the evidence adduced by the respective parties, and having heard what was said by counsel, J. B. Rankin, Esq., appearing for the plaintiff, and C. R. Atkinson, Q. C., appearing for the defendants, and having considered the same and tried the questions, I find and determine and report as follows :—

The defendants in the construction of the drain upon the 10th concession road in the Township of Mersea did so for the express purpose of bringing water down that drain to "Two Creeks" drain that otherwise would have gone north by the "North Dales" drain.

That being the case it was the clear duty of the defendants to see that there was a proper outlet for this water.

The case as it appears to me as made by the evidence cannot be distinguished on principle from Malott vs. Mersea, 9 O. R. 611, Northwood vs. Raleigh, 3 O. R. 347, and many other reported cases.

For this reason I think and so find and report that the defendants were guilty of negligence in the construction of the drain upon the 10th concession road in the Township of Mersea, in the pleadings mentioned in that they did not continue the same to a proper and sufficient outlet.

I find and so report that the plaintiff has sustained and is entitled to $100 damages with costs of suit, this sum the plaintiff is entitled to as compensation for the injury done to him.

In as much as since the making of the said 10th concession drain the outlet has been improved, and as there will probably be no further damage to the plaintiff, I do not make any order now for an injunction, but the defendants shall have six months from this date for the purpose of having the waters brought down by this 10th concession drain, conveyed to a proper outlet without injury to the plaintiff, and in default of their doing so, an injunction should issue restraining the defendants from discharging the waters from said 10th concession drain into the "Two Creeks" drain as at present to the damage and injury of the plaintiff.

I direct that the defendants pay the costs of the plaintiff of the action and of the reference. I order that $30 as and for three days' trial be paid in stamps to be affixed by the defendants, or if the plaintiff affixes the same, that he shall include the same in his bill to be taxed, and shall be paid by defendants.

The costs shall be taxed by the Clerk of the County Court of Kent.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION.

CARRUTHERS *vs.* TOWNSHIP OF MOORE.

Increased Flow of Water—Outlet—Award Drain—Non-repair—Injunction.

Where defendants brought more water upon plaintiff's land by a drain than it was originally reasonably intended to carry, they are bound to find an outlet for such water and to prevent damage being done by it.

It is no defence that damage would not have been caused to the plaintiff's land had he kept in repair, as it was his duty to do, an award drain through his lands which formed an outlet for the township drains. The award drain, being a private one, could not properly be made the outlet for new or enlarged municipal drains. If proper outlet not made injunction ordered to issue restraining defendants from bringing the additional water down the drain and using the award drain as an outlet therefor to the damage of plaintiff.

June 14th, 1893. B. M. BRITTON, Q. C., Referee.

This action was referred to me under the Drainage Trials Act, 1891.

Pursuant to my appointment it came on for trial at Sarnia on the 10th day of May, 1893.

F. W. Kittermaster, appeared for the plaintiff, and J. F. Lister, Q. C., appeared for the defendants.

Having heard and considered the evidence given before me and having heard what was alleged by counsel for the parties, I now make this my report and find and order as follows:—

The plaintiff is the owner of west half of lot 19, 12th concession, Township of Moore, and he claims damages because of flooding this land, which he alleges was caused by the defendants wrongful and negligent construction of a drain along the side road between lots 18 and 19, and by reason of defendants negligence in not providing any sufficient outlet for the waters brought down by this side road drain and in not keeping the side road drain in repair, etc.

The plaintiff also asks for an injunction and a mandamus.

The ditch or drain upon the side road between lots 18 and 19, is called the Lapeer drain and was made 30 or 40 years ago.

This Lapeer drain being there the plaintiff and others, owners of 19 and part of 20, wanted to make a drain across their lands and crossing the townline between Moore and Sarnia, taking water into the latter township.

The plaintiff, James Hossie, Joseph Cruise, the trustees of school section 14, and the defendants called upon the fence-viewers of the Township of Moore, and these fence-viewers on the 21st day of September, 1882, made an award locating a ditch or drain extending from the Lapeer drain, crossing plaintiff's land and across the townline taking the water brought down by Lapeer drain, and the surface water from 19 and 20 into the Township of Sarnia. Pursuant to this award the ditch or drain was made and by the award the defendants were bound to pay and did pay one-third of the cost of construction, but the duty of maintaining this ditch or drain was placed upon the owners of the lands through which it passed.

The plaintiff was a moving party and directly responsible for bringing across his land the water originally brought north by the Lapeer drain. It is clear, upon the evidence, that the award ditch or drain is very much out of repair upon the plaintiff's land. The plaintiff thought defendants were to blame for this want of repair, as he and others were of the opinion that the defendants were bound to maintain and keep in repair one-third of this ditch.

I do not think so, and so far as the question has, or can have any bearing upon this suit, I construe the award as casting upon the plaintiff the duty of keeping in repair that part of the award ditch made upon the plaintiff's own land.

The facts are comparatively few, and there is not much of fact really in dispute between the parties, the difficulty is in applying the law to the facts as found.

There is no evidence to sustain the fifth paragraph of the statement of claim. If the defendants allowed the Lapeer drain to be obstructed, the water kept back so far as appears by the evidence in this case would not injure the plaintiff. It is possible that the water kept back by reason of that drain being out of repair, might flood other lands to the east and south of the plaintiff, and might flow down upon and injure the plaintiff, but there is no evidence of anything of that kind, and the complaint is the very opposite, namely, that the Lapeer drain brought too much water to plaintiff's land.

I also find against the plaintiff as to the allegations in paragraph six of the statement of claim, as even if anything was illegally or improperly done by defendants at the mouth of the award drain, or on the townline between Moore and Sarnia, there is no evidence that any such work caused any damage to the plaintiff.

In my opinion there is no evidence to sustain the 7th paragraph of the statement of claim and even if the defendants have omitted to do anything it was their duty to do, or have done anything they ought not to have done, by reason of which water backed up from the townline to any extent, I cannot, upon the evidence, say that the plaintiff has been damaged or is likely to be damaged from that cause.

The only thing that remains is what is alleged in paragraphs 3 and 4 of the statement of claim, or what there may be in the facts given in evidence to create a liability on the part of the defendants to the plaintiff for. I would allow any amendment in the statement of claim if warranted by the evidence, and if necessary for the proper determination of the whole matter.

The argument of counsel for plaintiff that the defendants have no right to bring more water upon plaintiff's land to the damage of the plaintiff by reason of the sideroad drain than that drain was originally reasonably intended to carry is supported by plenty of authority. If the defendants are doing this, they are bound to find an outlet for such water. They are bound to see that no damage is done to plaintiff by reason of this additional water.

There is a good fall across plaintiff's land in the line and general direction of the award drain, so the plaintiff and others interested in that drain could if they would, do what is necessary to prevent any possible damage from the waters of the Lapeer drain.

I find as a fact, and so report, that the award drain is badly out of repair, and that the plaintiff has not done his part of the repairs pursuant to that award, and further that if the award drain had been maintained in good repair, no damage would have happened to the plaintiff by reason of the repairs to, and the enlargement of the Lapeer drain.

The defendants knew that the award drain was out of repair. That is not left in doubt for on the 10th July, 1889, the township clerk notified the plaintiff of that fact, and called upon all parties to repair their respective portions.

In 1890 the defendents say that application was made to them to repair the Lapeer drain. Apparently the work of repair was not undertaken under section 586 of the Municipal Act, *merely as a work of* deepening, extending and widening in order to enable it to carry off the water it was originally designed to carry off, nor was it undertaken under section 585 in order better to maintain it as a drain or to prevent damage to adjacent lands, but it was undertaken as set out in the report of Mr. Davidson, defendants' engineer, dated

May 9th, 1890, because it was not large enough properly to drain the locality and so it was to be enlarged, and the lands and roads benefited by this enlargement were assessed by the engineer, and the by-law embodying this report was finally passed the 16th day of August, 1890. Whatever may be said of defendants' right to do this without a petition, the plaintiff does not complain of this. His land is not assessed for the enlargement. Those who want the drain, whose land will be benefited by it, are willing to pay for it. I am however of the opinion and so report and decide that under the circumstances existing here, that the defendants even if right in assuming to enlarge the Lapeer drain, were wrong in continuing to use the award drain in its then condition as the outlet.

The defendants were notified on the 8th June, 1891, that the plaintiff objected and that there was no sufficient outlet by the award drain for repaired or renewed side-road drain.

On the 6th of September, 1891, plaintiff again complained and wanted an outlet.

On the 14th December, 1891, the writ issued.

On the 15th December, 1891, the defendants' counsel took action upon the complaint and referred it to a committee.

Afterwards it was referred to Mr. Coad who has reported what is necessary.

It is not necessary for me to follow what has since been done by defendants further than to say that they have shown themselves anxious to do what they reasonably can to make a proper outlet.

Although I find as above stated that if the award drain had been in good repair the plaintiff would have suffered no damage and that the part of the award drain upon the plaintiff's own land which he ought to have kept in repair was not so kept; I am however of the opinion that that affords no defence to this action as between the plaintiff and defendants.

The award drain is made a private one, and while the plaintiff could not complain so long as no more water is brought into it than was intended when constructed, it cannot properly be made the outlet for new or enlarged municipal drains.

The plaintiff's damages from any cause are not large. The plaintiff's own evidence upon the question of damages was not satisfactory, and in considering how much of this uncertain damage is really attributable to the enlargement of the Lapeer drain my difficulty is greatly increased.

Some parts of plaintiff's land are low. A good deal of water from that section of country leads north-west towards the Carruthers drain. A Mr. Hoser brought water into the Carruthers drain. Upon the evidence it is clear that a large quantity of water, apart altogether from what would come from the Lapeer drain, would in times of freshet find its way to the award drain and to plaintiff's land.

The plaintiff himself says he complained in 1889, and for five or six years before. This was before the improvement of the Lapeer drain. His land was overflowed before 1890. He cannot complain of anything that took place before the improvement of the Lapeer drain, and so I am not able to say that the plaintiff has really sustained damages by reason of the enlargement and repair of the Lapeer drain to any extent beyond what are little more than nominal damages and which I now assess at $20, and I find and report that the plaintiff do recover the sum of $20 damages from the defendants.

The plaintiff is entitled as of right to have the additional water brought down by the Lapeer drain, since the enlargement thereof, taken care of by the defendants and carried to a proper outlet.

As the matter has been carefully considered by Mr. Coad, an engineer employed by the defendants and as a report has been made, I make no order for an injunction now, but will allow the defendants 6 months from the date of my report, to have the water from the Lapeer drain carried to a proper outlet. If that is not done within that time, an injunction should issue restraining the defendants from bringing the additional water down the Lapeer drain and using the award drain as an outlet therefor, to the damage of the plaintiff.

I think the plaintiff should get the costs of the action but only upon the County Court scale and that he should also get the costs of the reference.

I order and direct that the defendants do pay the sum of $10 in stamps as and for one day's trial by affixing the sum to this my report and if the defendants do not affix the same that the plaintiffs do so and in that case the defendants shall pay the same to the plaintiff.

I direct that the costs be taxed by the Clerk of the County Court for the County of Lambton.

HARWICH *vs.* RALEIGH.
TILBURY EAST *vs.* RALEIGH.
No. 2.

IN THE MATTER OF APPEAL IN THE COUNTY OF KENT BY THE TOWNSHIP OF HARWICH AGAINST THE REPORT OF W. G. MCGEORGE, ESQ., P. L. S., DATED THE 30TH SEPTEMBER, 1892, FOR THE REPAIR OF THE RALEIGH PLAINS DRAIN. THERE WAS ALSO AN APPEAL BY THE TOWNSHIP OF TILBURY EAST AGAINST THE SAME REPORT ON SUBSTANTIALLY THE SAME GROUNDS.

Natural Watercourse—Outlet—Sections 585 and 590, 55 Vic. ch. 42.

Where a drain is constructed or improved by one municipality affords an outlet, either immediately or by means of another drain or natural watercourse, for waters flowing from lands in another municipaity the municipality that has constructed or improved the outlet can under section 590 of the Consolidated Municipal Act of 1892 assess the lands in the adjoining municipality for a proper share of the cost of construction or improvement. Section 585 is retroactive and applies to drains constructed under former Acts. The words "lands of another municipality," etc., in section 590 include roads.

September 13th, 1893. B. M. BRITTON, Q. C., Referee.

Pursuant to the appointment made by me, these appeals came on for trial at the Court House in the Town of Chatham on the 7th, and were continued on the 8th, 9th and 10th days of February, 1893, and the appeals by consent of all parties were tried together to the extent that the evidence given, so far as applicable is to be considered as given in each case, saving all just exceptions by either township as to the admissibility of evidence against said township.

Matthew Wilson, Q. C., and J. G. Kerr appeared for the Township of Harwich; C. E. Pegley, Q. C., for the Township of Tilbury East; and C. R. Atkinson, Q. C., for the Township of Raleigh.

Having heard the evidence given on behalf of the different townships and having heard counsel, I reserved my decision and now having considered the matter, I decide as appears herein, and make this, my report, and give my reasons therefor.

The Raleigh Plains drain is now well known to the courts, and from present indications its memory is likely to be still further perpetuated.

The many cases in which, in one way or another this drain has been considered, shows the large amount of litigation that has resulted from either the attempts of the Raleigh council to drain the lands of their township or the alleged neglect of the council to do something more than has yet been done.

I have given this very long case a great deal of consideration, and I have come to a conclusion after much hesitation.

As long ago as 1844 one William Billyard, a District Surveyor, prepared plans and took levels for a ditch through Raleigh Plains.

In 1864 Mr. Arthur Jones, P. L. S., was employed by the council to make the necessary examination and report for a drain. He did so apparently acting upon the plans of Mr. Billyard whose work he considered reliable, and upon the report of Arthur Jones and pursuant to by-law passed by Raleigh on the 5th September, 1864, what may be called the original Raleigh Plains drain was constructed,—completed in 1866.

On the 13th July, 1874, a by-law was passed by Raleigh (No. 254) to provide for the deepening of this drain. This by-law recites that the work was done upon a petition, and the lots that would be benefited are mentioned.

The report of W. G. McGeorge, P. L. S., embodied in that by-law states "that the deepening and widening of the said Raleigh Plains drain, shall commence on the south-easterly part of lot 15 in concession 7 and thence proceeding westerly across lots 15, 14 and part of lot 13 in the said 7th concession, and through lots 13 and 12 in the 6th concession, and through lots 12, 11, 10, 9 and 8 in the 5th concession, and through lots 8, 7 and 6 in the 4th concession," and that the cost of the work would be $6981.50.

In 1882, the people in Raleigh occupying plains land were troubled and complained and Mr. McGeorge was again sent to examine and report. His report was adopted and will be found in the by-law No 396, provisionally adopted the 15th January, 1883, and finally passed 26th April, 1883. It is called the "Raleigh Plains Outlet By-law." Mr. McGeorge reports in reference to this drain in part as follows: "I find the part of the outlet west of the Drake "road and near said road, has become very much filled with sedi-"ment carried down from the higher levels and that below this the "creek is not sufficiently wide and should be straightened in places "to a uniformity width of 70 feet. This work will extend westward "to a distance of 280 rods from the Drake road, and will, below this, "require to have the logs and brushwood and other jams removed "to a distance of about 300 rods. This work will, I believe, greatly "benefit lands at times flooded in the plains, and is a remedy that "should be adopted, as owing to the very large quantity of water "sent down from the higher lands to damage those near the Drake "road, every facility should be offered to the early escape of water." This work was estimated to cost $3689.15, of which cost a very small part, viz., $191.90 was put upon the Township of Tilbury East.

During late years complaints have been made, and actions for damages sustained by flooding, have been brought against the

Township of Raleigh, by the owners of lands adjacent to this drain and the township, as a matter of necessity, and in self defence, endeavored to ascertain what is the cause of the trouble, and if possible, to find a remedy.

Mr. McGeorge was again employed by the Township of Raleigh to examine and report, and he did so; his report dated 30th September, 1892, is found in the by-law provisionally adopted on the 24th October, 1892. This report is appealed against by the Townships of Harwich and Tilbury East respectively, and the grounds of appeal by each township are substantially the same. These are the appeals under consideration.

At the trial Mr. McGeorge was called and attested to the truth of what is stated in that report. The parts of the report to which I specially refer are clauses 4, 5, 6, 7 and 8. Then Mr. McGeorge recommends what is required to be done and he estimates the cost of the proposed work to be the very large sum of $56,190, and he puts

Against the Township of Raleigh - - -	$52543
Against the Township of Harwich - - -	2525
Against the Township of Tilbury East - -	1122
Total - - - - - - - - -	$56190

This work, extensive as it is, is considered necessary by the Township of Raleigh and they are willing to bear the lion's share of the cost, but the upper townships appeal against the report, attacking it as illegal.

The facts stated in Mr. McGeorge's report seem fully supported by other evidence.

The area assessed in Harwich is described by the witness, Mr. McDonnell, as being in 1855, "very wet swampy land in most of it." He further says, "I cannot say anything of the running waters at the time, I have no recollection of it, but I recollect it being a very wet country, and along the townline from the Blenheim ridge or Buckhorn ridge to the course of this drain on the townline I could not get through only by walking on the roads on the highway." And generally Mr. McDonnell in his evidence supports Mr. McGeorge, as to most of the material facts under consideration.

Gilbert Dolson speaks of the drains bringing water from Harwich into Raleigh, and he says that before the drains were made bringing water from Harwich into Raleigh the condition of the land in Harwich near the Raleigh townline was wet, he says "it was a low black ash swamp, that he had seen it when the water was one foot deep on a concession line near the townline." Speaking of the flats he says, "some portions there were no banks at all, it is a black ash swamp in places, and then you strike little ridges and there it would be drawn closer together and then it would spread out."

The Boyes Creek is described by Silas West as called the "West" Creek, the "Harvey" Creek and "Boyes" Creek, and when he first knew it forty years or more ago he says it was a swale.

Upon the evidence it seems clear enough that the natural trend or flow of water was from Harwich upon Raleigh. The flow between ridges, and the small natural runs have been called creeks. These so-called creeks spread out upon the plains and were completely lost. When the waters would subside, "runs" could be found very crooked, winding through the low lands and the general direction was from Harwich running south and west through Raleigh.

The Lewis drain was constructed in the course of the Drury Creek, and the Howard drain was constructed in the course of the McDowell Creek, and these creeks were called one when that part of the country was in a state of nature. Broadbent says in answer to the question, "What was the natural drainage of that assessed district when the Lewis and Howard drains were constructed? Well, it was down there what was called the Drury Creek or some called it the Boyes Creek and some the McDowell Creek. Again, he says, "It is all one creek, I have followed it."

The by-law for the construction of the Howard and Lewis drains by Harwich has been put in. It is Ex. 15. In constructing these drains the Township of Harwich did not take the surface water against the natural incline of the land, and so in that sense, they did not take water out of its natural course, but by these drains they caused more water to flow upon Raleigh than would naturally have flowed there, and they brought water more rapidly upon Raleigh than would naturally have come.

The Howard drain is said to enter McDowell Creek at the townline between Harwich and Raleigh. but the Howard drain is continued into Raleigh, and terminates at lot 24, 13 concession of Raleigh. This is not the case on the part of Harwich taking water to such a creek or stream as without any further work by this township would carry the water off "to the sea." Harwich simply makes McDowell Creek part of the drain, and so with other drains, they may be called "creeks," but they have been changed from their natural condition, and as drains they do more work and different work from what the "runs" did in their natural state. None of the "creeks" in the present case, can, as it seems to me, be compared with McGregor's Creek considered in Orford vs. Howard. The water between ridges or banks is called a creek, it then spreads out over low plain land and is again collected into a drain all done by the upper township with the intention of leading the water into a drain made by the lower township, so that it will finally get to Jeanette Creek.

I cannot bring myself to the conclusion that the waters of Harwich or Tilbury East are brought by these townships or either of them to a natural watercourse which is of itself a sufficient outlet for these townships within the meaning of the law as laid down in any of the cases cited.

It appears to me that land-owners in Raleigh are in this position —they must suffer the inconvenience of having to take care of any water that in a state of nature will flow from the higher land upon them. They are subject to the burden of this and must themselves bear the expense if they desire to improve their lands by getting rid of this water, but when owners of lands in the higher townships interfere with the water upon their lands and turn it into artificial channels even if in the general direction of the natural flow, when these owners of high lands, by taking advantage of the drainage laws, make drains that will carry more water down, than would naturally flow and when they greatly increase the velocity of the water so collected into drains, then the Raleigh landowners have the right to say, for this you are responsible, and the law intends that you shall share to some extent and in some fair proportion the cost of taking this water to a proper outlet, and of preventing its flooding and injuring our lands at all events to a greater extent than it would do if it came in its natural flow.

In the conclusion I have reached I distinguish these cases entirely from the case of a township making a drain through which the waters from lands of initiating township will go direct to a natural stream like the McGregor Creek. In Raleigh the water now complained of, and which the proposed work will be the outlet for, has been increased in quantity, and the velocity with which it has come into Raleigh has been increased by work done under the drainage laws, so those higher township lands which have been improved by using the drainage law to get rid of the water by having it removed to a certain distance, should be subject to a charge if reasonably and fairly imposed by the lower township for taking this same water further and to the proper outlet.

If the report and assessment are authorized at all, they are authorized by sections 585 and 590 of the Municipal Act.

The proposed work is necessary in order "to better maintain the

Raleigh Plains drain," a drain constructed under the Municipal Act; and the proposed work is necessary in order "to prevent damage to adjacent lands," and the proposed work, would, I think, be fairly included in what the township may do "whose duty it is to preserve and maintain the said drain." If the Township of Raleigh may do this, they can do so without the petition required by 569, and for all the "alterations, improvements or extension" all the power to assess and charge lands and roads conferred by "sections 569 and 582 inclusive and by section 590 are given."

The engineer assumed that under section 590 as amended and as it now stands he had the power to assess lands and roads in the Township of Harwich and Tilbury East for outlet, and he assessed them accordingly, the clauses in his report being as follows: Clause 12, "I find that about 2800 acres of land in Harwich use, by means of the Flook drain, the Raleigh Plains drain as an outlet for the waters drained off the same by the Howard and Lewis drains and branches and are chargeable for outlet for said improvement."

13. "I find that about 3400 acres of land in Tilbury East use, by means of the Hickey drain and Government drain No. 2 of Raleigh, the Raleigh Plains drain as an outlet for the waters drained off the same which are also chargeable for outlet for the said proposed improvements."

The termini of the Raleigh Plains drain are given and the course defined by Mr. McGeorge's report found in by-law of 13th July, 1874, from which I have already quoted.

The argument was pressed very strongly by Mr. Wilson that section 590, even as amended by the act of 1892 does not apply and never was intended to apply to such a case as this and it was argued that Orford vs. Howard is as much an authority against the right of Raleigh to do this work now and to assess Harwich as it was if the work had been done before the amendment.

No doubt there is difficulty in construing section 590 and it may be that it was not intended to apply to such cases as this. The Harwich lands are high and the draining by Harwich is in the direction of the natural flow of the water, whether into what may be called natural watercourses or not, but after the best consideration I can give the whole matter, I am of opinion that sections 585 and 590 as amended, apply, and that the facts stated in the report have been proved and that the assessment in reference to Harwich was authorized in law.

If the Raleigh Plains drain had not been constructed when section 590, as amended, was passed, but afterward this drain was made, and then certain lands in the Township of Harwich by means of drains constructed by that township, used (by the 'Flook' drain) the Raleigh Plains drain as an outlet, I think section 590 would authorize the assessment by Raleigh of such land in Harwich.

This not being the case of original construction, but of work performed under and authorized by section 585, I can not attach any meaning to the words giving power 'to assess and charge lands and roads conferred by section 590,' unless that power is given in a case of this kind.

These are settled canons of construction, "that a statute ought "to be so construed that if it can be prevented, no clause, sentence or "word shall be superfluous, void or insignificant," and also "that "words are to have their ordinary grammatical meaning," * * "they are to be read in their largest ordinary sense, unless restricted "by the context," and again, "if in subsequent laws other powers are "given and other modes of proceeding provided, the natural inference is that such new laws are auxiliary to the old."

Applying these I have come to the conclusion that if the amendments to sections 585 and 590 have any meaning, any practical bearing upon drainage works, they must apply to such a work as is now proposed by Raleigh.

In coming to this conclusion I have not overlooked the fact, and it is a fact which Harwich and Tilbury East are entitled to the benefit of, if I am wrong in my decision, that the work now proposed by Raleigh is not at all necessary for the higher townships. Mr. McGeorge himself says, "the Harwich lands are fifty feet above the "Raleigh lands, and there is a rapid fall;" that the drainage of these lands in Harwich or Tilbury East will not be improved, so there is no pretence that the lands in Harwich or Tilbury East could be assessed for benefit. If they cannot be assessed by Raleigh under section 590, they cannot be assessed by Raleigh at all. I have come to the conclusion that section 590 does now authorize an assessment for outlet upon lands that discharge their water through drains, whether these drains are wholly artificial or have been made in the bed of some natural watercourse, or run, or so-called creek, and where the water coming from these lands to be assessed, flows upon and injures the lower lands, and would continue to do so if outlet not made or improved.

It was urged very strongly for the appellants that this work, costing such a very large sum of money as $56190.08, could not be considered a work within the contemplation of section 585, as if it could, this anomaly would result, that while a small work costing only a few hundred dollars and benefiting only a few people must be initiated by petition, this could be followed by the large work costing thousands, assessing for benefit a much larger area, and assessing others for outlet, all without any petition. That a small drain would be made for the very purpose of afterwards when it could be done without a petition enlarging and extending it.

If my conclusion is right, this may be the result, if we can suppose that the members of a council would ever act in bad faith towards the landowners, and it may be that there must be legislation to prevent the possibility of an improper use of this section 585 in order ultimately to construct large drains that the owners of lands would not petition for.

The danger is not, I think, ever a very serious one, and the utmost good faith on the part of Raleigh in the present proposed work is apparent upon the evidence.

It was argued for appellants that section 590 must be confined strictly to a drain, and that it has no application to a case where the outlet is in any part a natural creek or stream, or in other words, that section 590 applies only where water is caused to flow out of its natural course. I do not think Orford vs. Howard is an authority and I do not find any authority for so broad a proposition and in the absence of authority I can not so limit the application of that section.

These lands in Harwich in the assessed area do now use by means of the Howard and Lewis drains, the Raleigh Plains drain as an outlet, and they will use it when improved. The waters from this area in Harwich do commingle with the water from some high lands in Raleigh and do flow upon and injure lands in Raleigh, and so I think an assessment upon these Harwich lands as well as upon high lands in Raleigh is proper and is authorized.

It was argued that Clark vs. Howard, 16 O. A. R. 72, is an authority showing that section 585 as amended, is not retro-active and so cannot be invoked to support the proposed work. I do not think that case so decides. Mr. Justice Osler, on page 83, says, "In my opinion, the new sections introduced by the act of 1869 and continued to the present time are confined to works instituted under them, except where special provision has been made with regard to works constructed under former acts" and on page 84, section 586 is referred to. This is section 585 of the present act, only amended since that decision, and the section is there cited as giving authority with regard to works constructed under former acts.

The assessment against roads in Harwich and in Tilbury East is objected to, but I think that objection cannot prevail.

Section 590 does not mention roads. The engineer is given by section 585, all the power to assess and charge lands and roads conferred by sections 569 to 582 inclusive and by 590.

None of the sections other than 590 would authorize any assessment upon roads except for benefit, but the general words 'lands of another municipality, company or individual,' are, I think wide enough to include and do include roads.

This section must be read in connection with the other sections of the act, and the reasoning of the majority of the Judges in the case of Dover vs. Chatham, applies to this point and satisfies me that the engineer may, if warranted by the facts, assess roads in Harwich and Tilbury East, even although the word road is not used in 590.

The principle upon which the engineer made his assessment is objected to. Any objection as to the amount against any particular lot or part of lot is for the Court of Revision.

The engineer is the proper person to make the assessment and the mode of arriving at the amount of assessment for outlet is for him. He is a sworn officer and a competent man. No way other than that adopted by the engineer was suggested. No general rule for outlet assessment was given, and I cannot say that he has adopted any erroneous principle.

Considering the whole evidence and how the engineer McGeorge was supported in the main in the assessment made by him, I thought it exceedingly fair, and one, that on the merits if authorized in law ought not to be interferred with.

It is urged by appellants that Orford vs. Howard is a conclusive and binding authority in their favor. I think not for these reasons amongst others:

1st. The section 590 under which Orford vs. Howard was decided, has been amended since that decision and under it the engineer has now assumed to assess, and I think has the right to assess lands in Harwich and Tilbury East.

2nd. The proposed work in this case on the part of Raleigh is not necessary merely to get rid of water that naturally flows into it but is necessary because of water brought into Raleigh by means of drains constructed by Harwich and by Tilbury East; water not conveyed to a natural outlet except so far as Raleigh drains are or may be used for the purpose; water which by coming through the drains so constructed by Harwich and Tilbury East is caused to flow upon and injure lands in Raleigh.

3rd. The work proposed by Raleigh now provides an outlet, which is used by Harwich and Tilbury East, and will, when improved and extended, provide an outlet for Harwich and Tilbury East.

It only remains to consider whether lands in Harwich have been assessed for outlet which do not in fact send their waters to the Raleigh Plains drain. Evidence upon that point was given for Harwich by Mr. Coad, Civil Engineer, in reference only to lots 11, 12, 13 and 14, 3rd concession of those in Harwich assessed by Mr. McGeorge.

Now as to some parts of some of these lands there is doubt about the watershed, but I think the weight of evidence is in favor of the assessment as in the report appealed from; errors if any as to particular lots will be corrected by Court of Revision upon evidence given there.

The witness Campbell thinks east half of 10, in 3rd concession, Harwich, should not be assessed, but Mr. Coad does not include this lot in his list.

Mr. T. Green speaks of lot 14 in 3rd concession, but his evidence hardly goes so far as to say that lot 14 does not in part at least send its water by the Harwich system to the Raleigh Plains drain. I have gone carefully over the evidence and without referring particularly to it, I simply say that the conclusion at which I have arrived is that the assessment is, upon the whole, supported rather than displaced by the evidence of witnesses who speak in regard to any of these particular lots.

I therefore dismiss the appeal of the Township of Harwich and confirm the report and assessments so far as they relate to the lands and roads in said Township of Harwich.

I direct that the costs of said appeal be paid by the Township of Harwich to the Township of Raleigh and as the appeals of Harwich and Tilbury East were tried together, I order and direct that the Harwich appeal be considered as of a two days' trial.

I order and direct that twenty dollars as and for two days' trial be paid in stamps by the Township of Harwich and if the Township of Raleigh pay the same that the amount be included in Raleigh's costs and be taxed against the Township of Harwich.

I order that the costs be taxed by the Clerk of the County Court of the County of Kent.

DECISION OF COURT OF APPEAL, 21, O. A. R., 677.

IN RE TOWNSHIP OF HARWICH AND TOWNSHIP OF RALEIGH.

Drainage—Municipal Corporations—55 Vic. ch. 42, sec. 590 (O.)

Held, per Hagarty, C.J.O., and Burton, J. A. :—Where a drain constructed or improved by one municipality affords an outlet, either immediately or by means of another drain or natural watercourse, for waters flowing from lands in another municipality, the municipality that has constructed or improved the outlet can, under section 590 of the Consolidated Municipal Act of 1892, 55 Vic. ch. 42 (O.), assess the lands in the adjoining municipality for a proper share of the cost of construction or improvement, and the Drainage Referee has jurisdiction to decide all questions relating to the assessment.

Per Osler, and Maclennan, JJ.A. :—The section applies only to drains properly so called, and does not extend to or include original watercourses which have been artificially deepened or enlarged, and In re Orford and Howard, 18 A. R. 496, still governs.

The Court being divided in opinion, the judgment of the Drainage Referee upholding the right to assess was affirmed.

This was an appeal by the Township of Harwich from the report of B. M. Britton, Q. C., referee under the Drainage Trials Act, 1891, and was argued before Hagarty, C. J. O., Burton, Osler and Maclennan, JJ.A., on the 9th of May, 1894.

The Township of Raleigh enlarged and improved a drain in that township, and assessed lands situate in the Township of Harwich for part of the cost, on the ground that the Harwich lands used the Raleigh drain for outlet purposes. Very much the same state of facts existed as In re Orford and Howard, 18 A. R. 496, and the point in question in this appeal was whether the amendment made by 55 Vic. ch. 42, section 590 (O.), gave power to do what had been done. The referee held that it did give this power.

M. Wilson, Q. C., for the appellants; C. R. Atkinson, Q. C., for the respondents.

November 13th, 1894. Hagarty, C. J. O. :—

Two main questions are raised in this dispute. First, on the law, as to the legal liability of the appellant township to be assessed for outlet.

The case In re Orford and Howard, 18 A. R. 496, in this court, was decided under section 590 and other sections of the Municipal Act, R. S. O. ch. 184.

The work here in question was constructed under the Municipal Act of 1892, and the authorizing section is altered and extended from that which governed the Orford case, making the direction more clear and explicit. I also refer to the amendment made to section 585 by the same numbered section in the Act of 1892.

Section 590 applies where a drain already constructed, or to be constructed, is used as an outlet or will provide an outlet for the water from the lands of another municipality or of a company, etc., or if from such lands water is by any means caused to flow upon and injure the lands of another municipality, etc., then the lands that use or will use such drain as an outlet either mediately or immediately or by means of another drain from which water is caused to flow upon and injure lands may be assessed in such proportion and amount as ascertained by the engineer, surveyor, etc., etc., under the formalities (except the petition) provided by the sections for the construction and maintenance of such drain or drains as may be necessary for conveying from such lands the waters so caused to flow upon and injure the same.

I think the evidence in this case brings the right of Raleigh to assess the Harwich lands for an outlet beyond reasonable question.

It is for an outlet and not for benefit that the right is claimed. The legislature has, I think, given the right.

If the right exist, we have to consider the award.

I have examined the very full and careful reasons adduced by the learned referee, not satisfying myself with only one perusal.

I am unable to see that any error has been committed to warrant our interference.

He finds that Harwich had made many drains, and by them "caused more water to flow upon Raleigh than would naturally have flowed there, and they brought water more rapidly upon Raleigh than it would naturally have come;" and again he finds that he cannot agree that Harwich or Tilbury East are brought to a natural watercourse, which is of itself sufficient outlet for these townships within the meaning of the law.

This is said in reference to the law of the Orford case. After full discussion of the arguments, he says: "I have come to the conclusion that if the amendments to sections 585 and 590 have any meaning, they must apply to such a work as is now proposed by Raleigh."

He adds: "I have come to the conclusion that section 590 does now authorize an assessment for outlet upon lands that discharge their water through drains, whether these drains are wholly artificial or have been made in the bed of some natural watercourse, or run, or so-called creek, and where the water coming from these lands to be assessed, flows upon and injures the lower lands, and would continue to do so if an outlet had not been made or improved."

The learned referee has discussed and disposed of all the objections and arguments on behalf of Harwich, and on the whole I do not see how we can differ from his conclusions.

I have examined the evidence of the acting surveyor, McGeorge, and also of Augustine McDonald.

Their evidence strongly supports the result. They are both old and experienced surveyors.

Objection was taken to the placing of a uniform assessment on a large number of lots.

The engineer expresses his view that this assessment was the most fair and just method of proceeding. This must be a question of judgment resting with the surveyor, and I do not see how we can hold it to be incorrect upon the evidence adduced.

I think the appeal must be dismissed.

We may regret the enormous bulk of the appeal, and the utterly useless printing of countless pages of figures and other wholly useless matter. This, it is to be hoped, will be duly considered on taxation.

Burton, J. A. :—

This case came before the referee as an appeal in substitution presumably of the former reference to arbitration under the Drainage Acts, and his right to deal with it as an appeal must depend, I fancy, on whether the subject matter was one with which the arbitrators could formerly have dealt, unless we can find in the amendments to the Municipal Act or in the Drainage Trials Act a distinct authority for such an appeal.

The report appealed from was that of the engineer appointed by the Township of Raleigh to report on the proposed work, a work to be performed wholly within that township with a short extension simply for an outlet through a portion of Tilbury.

As I understand the report it does not profess to assess any lands for benefit in Harwich so as to bring the case within section 576, but for outlet simply under the provisions of sections 585 and 590. But I gather from the papers that a copy of the report was served as required by section 579 on the head of the Township of Harwich.

Under the Consolidated Act of 1883, when the work was confined to one township, before any work could be proceeded with, surveys and estimates had to be made by an engineer, and an assessment on the real property to be benefited, after which the council could pass a by-law for *inter alia*, assessing and levying in the same manner as other taxes are levied on the property benefited (including roads held by joint stock companies or individuals) according to the benefit derived, and for determining what real property would be benefited, subject to an appeal to the Court of Revision and County Judge.

That Act also provided for extending the work beyond the limits of the municipality, and even where they did not extend beyond these limits, when they benefited lands in an adjoining municipality or greatly improved any road lying within that municipality, then the engineer could charge the lands so benefited, and the corporation, person or company whose roads were improved, with such proportion of the costs of the works as he might deem just.

In the two latter cases the council in which the drainage is commenced is to serve the head of the other council or councils with a copy of the report, etc., which is to be binding unless appealed from.

The council of such last mentioned municipality is thereupon within a named period to pass a by-law to raise the sum named in the report, or such sum as is determined on by the arbitrators.

These are the only cases in which a reference to arbitrators was allowed, shewing very clearly, I think, notwithstanding a dissentient opinion by one of the Judges of the Supreme Court, that the gross amount to be contributed by the municipality was alone subject to their award, the proper tribunal for adjusting the rights of the individuals whose lands were assessed being still the Court of Revision and the County Judge.

If this were a case in which Raleigh was assessing any lands in another municipality for benefit, I have no doubt that the referee would be the proper party to adjudicate upon the right so to assess and as to the gross amount.

This is not a case of that kind, and the question to my mind is, whether, in the recent enactment authorizing the assessment in another township for outlet, the legislature has intended to import the machinery created under sections 579 *et seq.*, or to give power to one township to levy assessments upon lands in another, or has failed to provide the proper means to enforce the provisions of these new enactments.

Section 585, as I read it, provides that in any case wherein the better to maintain any drain, or to prevent damage to adjacent lands, it shall be deemed expedient to change the course of such drain or make a new outlet, or otherwise extend, improve, or alter the drain, the council of the municipality whose duty it is to preserve and maintain the drain, may, on the report of an engineer, undertake and complete, the alterations or improvements or extensions specified in the report under the provisions of sections 569 to 582, without any petition; and the engineer, Court of Revision, County Judge or referee (as the case may be) shall have all the powers to assess and charge lands and roads conferred by those sections and section 590; that is to say, *reddendo singula singulis*, in cases where the work was entirely within the municipality, the whole of the machinery would be provided by passing a by-law to assess and levy, with a right to appeal to the Court of Revision and County Judge; where the drainage was carried into an adjoining township or lands therein were benefited, then by pursuing the course pointed out in section 579, and then the arbitrator's powers are transferred to the referee.

How then is section 590 to be construed? It would require, I think, much more definite language to warrant us in assuming that such a radical change was intended as giving power to one municipal body to levy taxes in another's limits without any provision being made for revising the assessment of the engineer. That view must, therefore, be rejected.

I think, therefore, it must be read as if the power to assess for outlet was placed in the same category as the power to assess for benefit, and that being so, the referee had jurisdiction to deal with this assessment to the same extent at least as the arbitrators could have done.

We have, therefore, to consider whether the amendment to section 590 authorizes this proceeding. That amendment was made, no doubt, in consequence of the division of opinion in this court in the case of In re Orford and Howard, 18 A. R. 496.

Some of the difficulties that arose in that case are dealt with. One of those is the doubt as to the Stover drain first finding an outlet in the Crouch drain and thence finding its way ultimately into the works of the Township of Howard. That is now remedied by providing that if a drain already constructed, hereafter constructed, or proposed to be constructed, by a municipality, is used as an outlet, or will provide, when constructed, an outlet for the waters of another municipality; or if from the lands of any municipality, company or individual, water is by any means caused to flow upon and injure the lands of another municipality, company or individual, then the lands that use or will use such drain when constructed as an outlet, either immediately or by means of another drain from which water is caused to flow upon or injure lands, may be assessed in such proportion and amount as may be ascertained by the engineer, under the formalities provided in the foregoing sections for the construction and maintenance of any such drain. I cannot help thinking that this system of legislation, by reference to other sections dealing with different subjects, is a vicious one and very embarrassing. It would add but little to the length of the enactment if it contained a sort of code, applying to each system, *ex. gr.* to the ordinary case where it is wholly within a municipality, or to the case where the works extend into another municipality, or where the work is undertaken by the county or under section 590, etc., and providing a separate machinery for each.

I have remarked that some of the difficulties which were supposed to exist in the Orford case have been overcome, and whether the difficulty arising from the construction placed by this Court on the words "cause to flow," has been overcome, it is not in this case necessary to enquire. The engineer has found, and the referee has approved of the finding, that about 2,800 acres of land in Harwich use, by means of the Flock drain, the Raleigh Plains drain as an outlet for the waters drained off by the Howard and Lewis drains and branches and are chargeable for outlet for said improvement.

That seems to bring this case within the statute.

Here is a drain already constructed and proposed to be improved, which is used as an outlet for the water of lands in Harwich, and those lands, therefore, are liable to be assessed in such proportion and amount as may be ascertained by the engineer for the construction and maintenance of the drain proposed to be constructed.

It is said that Harwich has done nothing since the amendment to the statute was passed, but at the time of the passing it was using this drain as an outlet and comes, therefore, directly within it, although roads are not mentioned in section 590. If I am right in my interpretation the sections referred to in it warrant the assessment.

On the whole, with some doubt as to the proper interpretation of the amended section, I agree with the learned referee in his conclusions and think the appeal should be dismissed.

Osler, J. A.:—

I am of opinion that the appeal should be allowed. I think that notwithstanding the amendments to sections 585 and 590 of the Municipal Act, R. S. O. ch. 184, which now (as amended) appear in the corresponding sections of the Municipal Act of 1892, 55 Vic. ch. 42 (O.), the case is governed by our decision in In re Orford and Howard, 18 A. R. 496.

I think that if the legislature meant to place such an extraordinary burden upon an upper township as is here sought to be placed by Raleigh upon Harwich, which neither needs, nor is benefited by, the proposed works, they would have said so in clear and unmistakeable language. If the respondents' contention prevails there seems nothing to prevent Raleigh from assessing Harwich for outlet, not merely anywhere along its border, wherever a drain from Harwich enters into one of Raleigh's drains, but also anywhere across the whole of that township wherever it can be seen that the Harwich waters are led or pass through it by means of Raleigh's drains until they leave it. I see not why Tilbury East and other lower townships may not do the same until the waters are finally discharged into the Thames. But proceedings of the kind which Raleigh now proposes to take are not, I think, in the contemplation of the Act.

Maclennan, J. A. :—

I do not see how, consistently with our judgment in In re Howard and Orford, 18 A. R. 496, we can uphold the decision of the learned referee.

The two cases are precisely alike in their circumstances. In the former case the Township of Howard sought to charge lands in Orford with a proportion of the cost of enlarging and deepening an original watercourse within the limits of Howard, not because the work would in any way benefit lands in Orford, but because the drainage of Orford reached the watercourse intended to be enlarged and deepened, above the proposed improvements, and would therefore necessarily use the improved channel as an outlet. Precisely the same thing is sought to be done in this case by the Township of Harwich. In the former case it was contended that the proposed assessment was authorized by section 590 of the Municipal Act, as found in the Revised Statutes of 1887 and amended by 52 Vic. ch. 36, sec. 37, and 53 Vic. ch. 50, sec. 37. In the present case the corresponding section (590) of the Municipal Act of 1892, 55 Vic. ch. 42 (O.), is relied on, but it is said that it has been so amended that what we decided could not be done by the Township of Howard can now be done by the Township of Raleigh, and I think the question which we have to determine is whether that is so.

In his judgment the learned referee admits that the proposed work is of no benefit to Harwich. He says : "I have not overlooked the fact, and it is a fact which Harwich and Tilbury are entitled to the benefit of, if I am wrong in my decision, that the work now proposed by Raleigh is not at all necessary for the higher townships." Mr. McGeorge himself says : "The Harwich lands are fifty feet above the Raleigh lands, and there is a rapid fall ; that the drainage of these lands in Harwich or Tilbury East will not be improved, so there is no pretence that the lands in Harwich or Tilbury East could be assessed for benefit. If they cannot be assessed by Raleigh under section 590 they cannot be assessed at all.''

At the outset it is a somewhat startling proposition to say that the legislature has enacted that landowners shall be chargeable with large sums for which there can be no pretence that they have received or can receive any benefit. Such legislation could hardly be called by any other name than confiscation, and before we can uphold the judgment of the learned referee we must be very clear that such is the meaning and intention of the language used by the legislature.

In his judgment in the Howard and Orford case the Chief Justice has pointed out the important difference between an original drain wholly artificial, and a drain which was originally a watercourse, which has been enlarged or deepened under the drainage laws. The first is a *quasi* private work for the use and benefit of those only who have constructed it, and into which other persons have no right to lead or turn their water. The other is still a watercourse, with all its legal incidents, and among others the right of all persons to use it as it passes by or through their land, for drainage purposes. Now, what the people of Harwich did was to make one of the creeks which naturally flowed through their township drain their land. That was their common law right, a right recognized by the provisions of the Ditches and Watercourses Act ever since the year 1834, and if they deepened and straightened their watercourses in their own territory, or even outside of their own territory, so long as they did it with proper legal authority, their right to use them for drains was thereby in no way impaired or lessened, nor was the legal character of that right in any way changed or altered. Their legal right to use the watercourses for drainage purposes remained and continued as it had been from the beginning.

It was, however, attempted to be shewn that what were called creeks, and through and along which the Harwich drains were made, were not legal watercourses at all, but were mere swales of stagnant water, which gave the Harwich people no legal right to turn their water down into Raleigh. I have considered the evidence on this point with great care, and I think it clear the creeks were legal watercourses. If there be a stream of flowing water with well defined banks at some points, but which at intermediate points spreads out into something like a pond or small lake, I cannot doubt the whole is a legal watercourse, and the owner of the pond or small lake may by excavation and embankment confine it to a narrow channel when it passes through his land, and it is still notwithstanding a natural watercourse. Before the country was cleared of the forest the water of all streams was obstructed and hindered in it's flow, more or less, by fallen timber, and the same thing often caused the water to spread over wide spaces, after heavy rains or freshets, and in applying the definitions of a watercourse to be found in the English books the difference between a country cleared and cultivated and one covered by the original forest may not be forgotten. The original condition of the territory in question in this case is well shewn in the copy of the original map of the Township of Raleigh, surveyed in the year 1821, which is in evidence, and which shews a great number of streams flowing towards and discharging in the Raleigh plains, which are stated on the face of the plan to be the outlet of all the waters of Raleigh with a trifling exception. While, therefore, it is true that when the report now in question was made the people of Harwich were draining their lands into channels which led the water to the Raleigh Plains drain and the Jeanette Creek where the proposed work is to be done, these channels were, and always had been, natural watercourses, which they had a legal right to use for that purpose; and they were not in any way concerned with what became of the water, or with its action far down the stream. That also was the condition of matters when section 590 was amended and enacted in its present form on the 14th of April, 1892; and it is not disputed that the people of Harwich have done nothing since the latter date to subject them to the assessment complained of.

The question then is whether section 590 authorizes that assessment. The work for which it is proposed to charge the people of Harwich is the enlargement and deepening of the Raleigh Plains drain and the Jeanette Creek, which together form the outlet for the greatest part of the drainage of Raleigh and a great part of that of Harwich, and while both the creek and the drain were originally natural watercourses, they were both a good many years ago deepened and enlarged under the drainage laws, so that they no doubt come within the description of the drains dealt with by section 585 of the Municipal Act; and it is under the authority of that section that the work is proposed to be done. The work is said to be necessary in order to prevent damage to adjacent lands, and the respondents are proceeding without petition. They claim, as expressed in that section, that the engineer has the power to assess which is conferred by the previous sections of the act, and also by section 590.

This amended section 590, as remarked by my brother Osler in the Howard and Orford case, provides for two classes of cases, though the cases are not the same as they were under the old section. The two which alone can be regarded as in any way bearing on the present appeal are these: 1. A drain already constructed used as an outlet for the water of the lands of another municipality; and 2, water from the lands of any municipality by any means causd to flow upon and injure the lands of another municipality. Now, taking the first case, let us see what the legislature says. Neglecting immaterial words, it is this: If a drain already constructed is used as an outlet for the water of the lands of another municipality, the lands that use such drain as an outlet either immediately or by means of another drain from which water is caused to flow upon and injure lands, may be assessed in such proportion and amount as may be ascertained by the engineer under the formalities provided in the foregoing sections for the construction and maintenance of the drain so used as an outlet, or for the construction and maintenance of such drain or drains as may be necessary for carrying from such lands the waters so caused to flow upon and injure the same.

Then taking the other case it will read thus: If from the lands of any municipality water is by any means caused to flow upon and injure the lands of another municipality, then the lands that use such drain as an outlet either immediately or by means of another drain from which water is caused to flow upon and injure lands may be assessed for construction and maintenance as before. It may as well be remarked at once upon this case that it seems altogether insensible, and that the words "if from the lands of any municipality," etc., must have been inserted into or allowed to remain in the clause from inadvertence and without perceiving that they did not harmonize with the rest of the section. If, therefore, the referee's judgement can secure any support from the section it must be from the first case provided for as above expressed.

Now, if the words "drain already constructed," be used in the widest sense, and to include original watercourses which have been improved by deepening or widening under the drainage laws, it must be conceded that they include the present case; because the drain proposed to be improved is in part the outlet for the Harwich waters. and the question is whether the words are so used, or ought to be so construed. In the first place the words themselves are not strictly appropriate to such a case. They do not naturally suggest to the mind an original watercourse which has been deepened or widened, but rather a drain which is wholly artificial. And so in section 569 the authority given to municipalities is expressed to be for the deepening or straightening of any stream, creek or watercourse, or for the draining of property, or for the removal of any obstruction which prevents the free flow of the waters of any stream, creek or watercourse, etc. So also the form of by-law, prescribed by section 570, distinguishes between deepening streams and drainage in the proper sense, and the same distinction is made in section 581, (2) no doubt it must be admitted that in some other sections of the Act as 583 (3) and 585, a larger meaning ought to be given to the word "drain," but that is to be done by construction, and not from the very force of the word itself. Then is there any good ground on which a meaning wider than the ordinary one should be given to the word "drain" in that section? I do not think there is, but on the contrary much reason for not doing so. In its ordinary meaning of an artificial drain, it is most just that all who use it should be assessed for its construction and maintenance, whereas, in the sense of an original watercourse, which has been deepened, only those who are actually benefited by the deepening, that is either where property is better drained thereby, or where property is thereby saved from flooding, should do so. It is evident, I think, that those whose lands lie near the low reaches of a stream are under a natural disadvantage, as compared with those whose lands are high up. The former lands are liable to be flooded by the water which comes down from the higher lands. That is their misfortune, and it is no fault of the owners of higher lands, and the former have no natural or legal claim upon the latter either for compensation for injury by flooding, or for contribution to the expense of works of protection. Therefore, I think the legislature did not intend, and could not have intended, to make every one who rightfully and lawfully drained into a natural watercourse liable to contribute to the works which landowners far down the stream might find it necessary to construct for their own protection, because their lands happened to be low and flat, and liable to be overflowed, merely because the watercourse was their common outlet. If the legislature had intended to do that I think they would have said so in clear and express terms.

There is another consideration which leads to the same conclusion. By the words of the section the assessment is to be in the proportion and amount ascertained by the engineer, etc., under the formalities provided in the foregoing sections, and section 585 says the engineer is to have all the powers to assess and charge lands and roads conferred by sections from 569 to 582 inclusive, and also by section 590. Now, when we examine the sections referred to we find that the assessment is required to be in proportion to the benefit to be derived from the work by each lot or portion of lot and road in the locality. See section 569, and sub-sections 3, 5, 6, 7, 15, 16, and 21, sections 570, 575, 576, 578, and 581 (1). There is not only no authority to assess lands which are not to be benefited by the work, but the only sum which can be laid upon any road or lot, or part of a lot, is the proportion of benefit which it is to derive from the work. That being so where there is no benefit no charge whatever can be made. Here it is admitted that there is and can be no benefit to the people of Harwich, and their lands can, therefore, not be charged with any sum whatever.

It was also contended that the Harwich people might be regarded as being benefited by the proposed work inasmuch as it would save them from liability for damages occasioned by overflow at Jeanette Creek and the Raleigh Plains of water coming, among other sources, from their township. But if I am right in holding that the Harwich people had a legal right to drain into the channels used by them, because they were legal watercourses notwithstanding the deepening and other improvements made upon them, it follows that they are under no liability for any such damages, and that no actions for such damages could be successfully maintained against them.

There were other objections to the report of the engineer which were ably urged by Mr. Wilson, but being of opinion, for the reasons which I have given, that section 590, as amended in 1892, is confined in its proper construction to drains properly so called, and does not extend to or include original watercourses which have been artificially deepened or enlarged, it is unnecessary to express any opinion upon them.

I think the appeal should be allowed.

The Court being equally divided
in opinion, the appeal was
dismissed with costs.

NOTE:—This decision has since been overruled by the following decision of the Supreme Court:—

IN THE SUPREME COURT OF CANADA.

Present—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

ALBERT BROUGHTON (Plaintiff) - - - - - Appellant;

AND

THE TOWNSHIP OF GREY AND THE TOWNSHIP OF ELMA (Defendants) - - - - - - } Respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal law—Drainage—Assessment—Inter-municipal obligations as to initiation and contributions—By-law—Ontario Drainage Act of 1873—36 V. c. 38 (O.)—36 V. c. 39 (O.)—R. S. O. (1887) c. 184—Ontario Consolidated Municipal Act of 1892—55 V. c. 42 (O.)

The provision of the Ontario Municipal Act (55 V. c. 42, s. 590) that if a drain constructed in one municipality is used as an outlet or will provide an outlet for the water of lands of another the lands in the latter so benefited may be assessed for their proportion of the cost applies only to drains properly so called, and does not include original watercourses which have been deepened or enlarged.

If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law.

Appeal from the decision of the Court of Appeal for Ontario (1) which affirmed the judgment of the Common Pleas Division of the High Court of Justice (2), maintaining the judgment of the trial court which had dismissed the plaintiff's action without costs.

The appellant is owner of certain lands in the Township of Elma, included amongst lands in the township sought to be affected by a by-law of the corporation of the Township of Grey under the provisions of the Ontario Consolidated Municipal Act, 55 Vic. ch. 42, section 585, by which taxes were charged and assessed upon these lands to raise funds for the construction and future maintenance of drainage works to be made by the said Township of Grey. He brought this action for the purpose of having the said by-law of the Township of Grey set aside as null and of no effect so far as his lands were concerned, and further to restrain the corporation of the Township of Elma from passing a proposed by-law to raise funds to be levied by rating said lands to meet the proportion of contribution towards said drainage works charged thereon by the report of the en-

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(1) 23 Ont. App. R. 601.

(2) 26 O. R. 694.

gineer on which the by-law of the Corporation of Grey had been passed.

Mabee for the appellant.

Garrow, Q. C., for the respondent, Township of Grey.

McPherson for the respondent, Township of Elma.

The judgment of the court was delivered by :

Gwynne J. :—Before adverting to the nature of the scheme of drainage work proposed to be executed by the municipality of the Township of Grey, so as to affect lands in the Township of Elma, in which township the land of the plaintiff is situate, it will be convenient to draw attention to the *status quo ante*, and to the acts of the legislature of Ontario, tracing them from their source, in virtue of which the municipality of the Township of Grey claims to be invested with power to assess lands in the Township of Elma for the purpose of compelling such lands to contribute to the cost of the construction and maintenance of a work necessary for the better draining of lands in the Township of Grey and proposed to be constructed wholly within that township, the nearest point of which proposed work to the township of Elma is about four miles from the boundary line between the two townships.

In or about the year 1873 a small drain was constructed in the Township of Grey under the provisions of secs. 3 and 4 of the Ontario Drainage Act of 1873—36 Vic. ch. 38. By the provisions of that Act, the drain so constructed having been a local one, constructed wholly within the limits of the Township of Grey, it became the duty of the municipality of that township to maintain the drain and to keep it in repair when completed, either at the sole expense of the municipality or of the parties more immediately interested, or at the joint expense of such parties and of the municipality.

By an Act passed in the same session of the Ontario legislature, viz. : 36 Vic. ch. 39, sec. 2—it was enacted that—

> In case the majority in number of the owners as shown by the last revised assessment roll to be resident on the property to be benefited in any part of the municipality, do petition the council for the deepening of any stream, creek or watercourse, or for draining of the property (describing it), the council may procure an examination to be made by an engineer or provincial land surveyor of the stream, creek or watercourse proposed to be deepened, or of the locality proposed to be drained, and may procure plans and estimates to be made of the work by such engineer or provincial land surveyor, and an assessment to be made by such engineer or surveyor of the real property to be benefited by such deepening or draining, stating as nearly as may be in the opinion of such engineer or provincial land surveyor, the proportion of benefit to be derived by such deepening or drainage by every road and lot and portion of lot, and if the council be of opinion that the deepening of such stream, creek or watercourse, or the draining of the locality described or a portion thereof, would be desirable the council may pass by-laws in form or to the effect set forth in the schedule for (among other things) determining what

> real property will be benefited by the deepening or draining and the proportion in which the assessment should be made on the various portions of lands so benefited,

subject to appeal as provided in the sections.

Then by section 7 it was enacted that :

> When the deepening and drainage do not extend beyond the limits of the municipality in which they are commenced, but in the opinion of the engineer or surveyor aforesaid benefit lands in an adjoining municipality or greatly improve any road lying within any municipality or between two or more municipalities, then the engineer or surveyor aforesaid shall charge the lands to be so benefited and the corporations, corporation or company whose road or roads are improved with such proportion of the costs of the works as he may deem just, and the amounts so charged for roads as agreed upon by the arbitrators, shall be paid out of the general funds of such municipality or company.

By sec. 10 it was enacted that :

> The council of the municipality in which the drainage was to be commenced shall serve the head of the council of the municipality whose lands or roads are to be benefited without the drainage being continued therein, with a copy of the report, etc., etc., of the engineer so far as they affected such last mentioned municipality, and unless the same is appealed from as hereinafter provided, shall be binding upon the council of such municipality.

Sec. 11 enacted that :

> the council of such last mentioned municipality shall within four months from the delivery to the head of the corporation of the report of the engineer or surveyor as provided in the next preceding section, pass a by-law in the same manner as if a majority of the owners resident on the lands to be taxed, had petitioned as provided in the first section of this Act, to raise such sum as may be named in the report, or in case of an appeal, for such sum as may be determined by the arbitrators.

Secs. 12 to 15 inclusive provided for the appeal to the arbitrators, and it was enacted by sec. 16 that:

> in case of difference between the arbitrators the decision of any two of them shall be conclusive.

Then it was enacted by sec. 18 that:

> should a drain already constructed, or hereafter constructed by a municipality be used as an outlet or otherwise by another municipality, company or individual, such municipality, company or individual using the same, as an outlet or otherwise, may be assessed for the construction and maintenance thereof in such proportion as shall be ascertained by the engineer, surveyor or arbitrators under the formalities provided in the preceding sections.

All of the above provisions are re-enacted in ch. 184 of R. S. O. 1887, by which all the previous Acts on the subject are repealed. In this ch. 184, the section in which the provisions of sec. 18 of 36 Vic. ch. 39 are re-enacted, is numbered 590, and is as follows:

> If a drain already constructed, or hereafter constructed by a municipality is used as an outlet by another municipality, company or individual, or if any municipality, company or individual, by any means, causes waters to flow upon and injure the lands of another municipality, company or individual, the municipality, company or individual using such drain as an outlet or otherwise or causing waters to flow upon and injure such lands, may be assessed in such proportion and amount as may be ascertained by the engineer, surveyor or arbitrators under the formalities (except the petition) provided in the foregoing sections for the construction and maintenance of the drain so used as an outlet as aforesaid, or for the construction or maintenance of such drain or drains as may be necessary for conveying from such lands the waters so caused to flow upon and injure the same.

Some amendments were made to this section by 52 Vic. ch. 36

sec. 37 (1889) and 53 Vic. ch. 50 sec. 37 (1890), but they are unimportant as regards the present case.

Now in 1891 it was decided by the Court of Appeal for Ontario in the case of Township of Orford vs. Howard (1), upon the construction of this sec. 590 of R. S. O. of 1887, that a drain to be regarded within the meaning of that section, as an outlet for the waters flowing from a township situated higher up than that in which *the drain has been constructed* must be *a drain artificially* constructed within the limits of the lower township *and must be used* by the upper township as an outlet for carrying off the waters reaching the drain from the upper township, and that a municipality from which surface water flows whether by drain or by natural outlets into a natural watercourse cannot be called on to contribute to the expense of a drainage scheme merely because the natural course is used as a connecting link between drains constructed under that scheme and because the drainage scheme is in part necessitated by the large amount of surface water brought into the natural watercourse in question. In that judgment and in the reasons given by the learned judges who pronounced it, I entirely concur. It proceeds much upon the same principle as it appears to me as did the judgment of this court upon one of the points decided in Chatham vs. Dover (2). In that case the Municipal Council of the Township of Chatham upon a report of their engineer adopted by the council passed a by-law for the construction of a drain within the limits of the Township of Chatham into a stream called Bear Creek for the drainage of certain lands in Chatham. This stream called Bear Creek flowed through the Townships of Chatham and Dover and by it all waters brought into it by drains constructed both in Chatham and Dover flowed down the natural stream into Lake St. Clair. In the engineer's report which was adopted by the by-law it was declared that for the purpose of making the drain proposed to be constructed effectual it would be necessary to deepen the stream, into which the waters coming down the drain would flow, not only in the Township of Chatham but also in the Township of Dover, and the by-law therefore to compel the lands in the latter township to contribute to the expense of the works assessed the lands in Dover *as for outlet.* The council of Dover appealed against this by-law, insisting, among other things, that the lands in Dover were not liable to contribute to the cost of such a work. The case came before us on appeal from an award of the arbitrators. In the case before the arbitrators the engineer who devised the scheme

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(1) 18 Ont. App. R. 496.

(2) 12 Can. S. C. R. 362.

which the by-law adopted gave evidence among other things *—that the lands in Dover could use the creek without the drain, and that he had assessed the lands in Dover not becaus ethey would derive any possible benefit, but because they used, and would use the natural stream* which he called *the outlet.* This court was, however, of opinion that the use by lands in Dover of the natural stream for the purpose of carrying off water brought into it by drains in Dover did not subject those lands to any obligation to contribute to the cost of the work proposed to be done under the Chatham by-law.

In the year 1892 the legislature by the Consolidated Municipal Act of that year, 55 Vic. ch. 42, altered the language of the section 590 of ch. 184 of R. S. O. 1887 in some respects. That section in the Act of 1892 reads as follows :

> 590. If a drain already constructed, hereafter constructed, or proposed to be constructed, by a municipality, is used as an outlet, or will provide when constructed an outlet for the water of the lands of another municipality, or of a company or individual, or if from the lands of any municipality, company or individual water is by any means caused to flow upon and injure the lands of another municipality, company or individual, then the lands that use or will use such drain when constructed as an outlet either immediately or by means of another drain from which water is caused to flow upon and injure lands, may be assessed in such proportion and amount as may be ascertained by the engineer or surveyor, Court of Revision, County Judge or referee, under the formalities, except the petition, provided in the foregoing sections, for the construction and maintenance of the drain so used or to be used as an outlet as aforesaid,

or for the construction and maintenance of such drain or drains as may be necessary for conveying from such lands the waters so caused to flow upon and injure the same. In The Township of Harwich vs. Raleigh (1), where a question arose identical with that which had arisen in Orford vs. Howard (2), the Court of Appeal for Ontario were divided in opinion upon the question whether the section 590 of the Consolidated Municipal Act of 1892, so differed in its language from section 590 of ch. 184 of R. S. O. 1887 under which Orford vs. Howard (2), was decided as to necessitate in Harwich vs. Raleigh (1), a different judgment from that which was pronounced in Orford vs. Howard (2).

The Chief Justice and Mr. Justice Burton were of opinion in the affirmative, Mr. Justice Osler and Mr. Justice Maclennan in the negative, these two learned judges being of opinion that section 590 of the Act of 1892, equally as that section in the Act of 1887, applies, upon the question of outlet, only to drains properly so-called, and does not extend to nor include original watercourses which have been deepened or enlarged. In this opinion, and in the reasons given in support of it, I certainly concur. Indeed, the contrary opinion appears to me to be wholly inconsistent with the principle upon which the whole of the legislation upon the subject is found-

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(1) 21 Ont. App. R. 677. (2) 18 Ont. App. R. 496.

ed. The language of all of the Acts is very express, and in my opinion very clear, that it is only where *a drain constructed by one municipality* within its own limits *is used* by lands in another municipality for the purpose of carrying off water from the lands in such other municipality that the term *outlet* is used. It is only in such a case that the lands in the latter municipality are subjected to the obligation of contributing to the cost of *the construction of a drain* in another municipality. *A natural stream* running through a municipality in which *a drain is constructed* by the municipality, and into which the waters brought down by the drain are discharged for the purpose of being carried off thereby, *is no part of the drain constructed* by the municipality ; and lands in another municipality situate higher up on the same stream into which the lands in such municipality are also drained by drains discharging their waters into the same stream within the limits of the upper municipality, can in no sense be said to use *a drain constructed* by the lower municipality within its own limits, and which discharges its waters into the same stream, and therefore such lands are not by any of the Acts subjected to the obligation of contributing to the cost of *the construction of a drain* in the lower municipality from which, as *not using it* they do not, and cannot, *derive any benefit.*

There does not appear in any of the Acts a scintilla of intent on the part of the legislature to legislate in such a manner as to enable one municipality by a by-law passed by its council to impose upon lands situate in another municipality an obligation to contribute to the cost of the construction and maintenance of a drain constructed within the limits of the former municipality for the drainage of lands situate therein, which work, in point of fact, contributed no benefit whatever upon the lands in the other municipality. The whole scheme of the legislation upon the subject is that they who derive benefit from such a work, and they only, shall bear the burden of its construction and maintenance. *Qui sentit commodum sentire debet et onus* is the principle upon which all legislation on the subject is expressly founded. The learned counsel for the respondents rested their defence to the present appeal wholly upon the above section 590, and upon section 585 of the Act of 1892. This latter section enacts as follows :

> In any case wherein the better to maintain any drain constructed under the provisions of this Act, or of the Ontario Drainage Act and the amendments thereto, or of the Ontario Drainage Act of 1873, or of any other Act respecting drainage works and local assessment therefor, or of the Municipal Drainage Aid Act, or to prevent damage to adjacent lands, it shall be deemed expedient to change the course of such drain or make a new outlet, or otherwise improve, extend or alter the drain, or to cover any portion of the said drain where it passes through a ridge of land, the council of the municipality or of any of the municipalities whose duty it is to

preserve and maintain the said drain, may, on the report of an engineer or surveyor appointed by them to examine and report on such drain, undertake and complete the alterations and improvements or extension specified in the report under the provisions of secs. 569 to 582 inclusive, without the petition required by sec. 569, and the engineer, or surveyor, Court of Revision, county judge, or referee, (as the case may be) shall for such alterations, improvements, or extension, have all the powers to assess and charge lands and roads conferred by said sections, and section 590.

Now in connection with this section all that we have to do with is the drain contructed under the Drainage Act of 1873 within the limits of the Township of Grey, and which had been constructed wholly at the expense of the municipality of Grey and the landowners therein who were alone benefited by the work.

Now by the by-law of the Township of Grey set out in the plaintiff's statement of claim, we see that this drain "commenced on the road allowance between the 17th and 18th concessions at about the line between lots 28 and 29, and was constructed from that point along the road westerly to Beauchamp Creek," where it terminated, having there its outlet into the creek by which the waters coming down the drain into the creek were carried to the River Maitland, where, as appears by the engineer's report adopted by the by-law, the engineer treated the outlet of the drain to be, thus regarding the Beauchamp Creek which is a natural stream into which drains in Elma also discharge their waters, to *be part of the drain which was constructed* under the Ontario Drainage Act of 1873, which very clearly it was not. Now what the engineer by the scheme suggested in his report recommended to be undertaken, was the improving this stream called Beauchamp Creek from the mouth of the drain No. 2 to the River Maitland, and so he says in his report :

> In order to make a proper outlet for this drain it will be necessary to improve this creek to the line between the 12th and 13th concessions, which is almost its intersection with the Maitland River. This creek as a whole is in a very bad state to form a proper outlet for the extent of country that drains into it. In places there is a well defined channel requiring little improvement, while in most of its courses it will require to be deepened, widened and straightened, and have all fallen timber taken out.

The main portion of the work so proposed to be done consists in deepening, widening and strengthening this natural stream called Beauchamp Creek to the junction of its waters, from the point of discharge into it of drain No. 2, the drain constructed under the Ontario Drainage Act 1873, with the Maitland river so as to give to this creek sufficient capacity to enable it to carry off all the water already discharged into it from drains constructed in Elma and Grey, and which upon the completion of the work the engineer has estimated will be drained into from lands in the Township of McKillop, which lands he has assessed (as for "outlet," also apart from any benefits). In another part of his report the engineer speaks of this proposed work in Beauchamp Creek as constituting almost the whole of the work proposed to be done. He says:

> The amount of fall in the proposed work being small, the effect of straightening and shortening the course of the proposed work is very important.

The fall in Beauchamp Creek from the mouth of the original drain No. 2 to the Maitland River being small, would doubtless make it very important that the stream should be deepened and its course straightened for the purpose of enabling it to carry off the waters flowing into it from drains situate low down upon the stream in the Township of Grey, but the sluggish character of the stream there points to the conclusion that the proposed deepening, etc., etc., of the stream where proposed to be done would have no sensible effect on the stream in the Township of Elma, the nearest point of which is distant four miles from the drain, and so an explanation is given by the engineer why he did not assess any lands in Elma as for any benefit whatever but solely as for "*outlet*," quite apart from any benefit being conferred by the work upon any lands in Elma. The engineer also shows upon his report, which the by-law has adopted, what that which he calls "outlet" is, for which he has assessed the lands in Elma to the amount of $4,013.24. He says:

> "In laying out the work I have endeavored as far as practicable to straighten the course of the Beauchamp Creek or outlet."

So that it is apparent that what the lands in Elma are assessed for is the outlet which Beauchamp Creek gives to them, and it is the lands and roads *naturally draining into the same*, which in another place the engineer says that he has assessed for *outlet*. Now as to this section 585 it is apparent that if any by-law is authorized to be passed under it, the section in express terms, by making the provisions of the section subject to the provisions in section 569 to 582, limits the jurisdiction as to any lands outside of the Township of Grey to such lands as are benefited by the work proposed to be undertaken and to the extent of such benefit. So as to section 590, as already observed, neither that nor any other section authorizes lands in Elma to be assessed for contribution under the *name* of "outlet" or otherwise for any work constructed wholly within the limits of the Township of Grey and which confers no benefit whatever upon the lands in Elma. That section in its terms expressly is limited to cases (1) where *a drain already constructed is used as an outlet*, or (2) to one which when "hereafter" *constructed* will *provide* an *outlet* for the water of the lands of another municipality, etc., then *the lands which use* or *will use* such *drain* when *constructed* as an *outlet*, either *immediately or by means of another drain from which* water is caused to flow upon and injure lands *may be assessed.*

Now the government drain No. 2 as originally constructed terminated at the point where it discharged the waters coming down it into Beauchamp Creek—and it will still continue to be in precisely the same spot when the work proposed to be undertaken under the by-law of the Township of Grey shall be completed. That drain never has been used as *an outlet* for waters on lands in Elma whether brought into the drain either *immediately* or *by means of another drain*, nor is it suggested that the drain so originally constructed when the work proposed to be undertaken shall be completed *will provide such an outlet* for any lands in Elma. What the by-law regards as an *outlet* for which the lands in Elma have been assessed, plainly is, the natural stream called Beauchamp Creek as proposed to be deepened, etc., which the engineer's report which is adopted by, and made part of the by-law calls *the outlet of the drain No. 2.* Well, it is equally so of all the waters draining into it from lands in Elma; but such an outlet provided by a natural stream for all waters drained into it by drains in the several townships through which it flows is a very different thing from *a drain constructed* in Grey which conducts its waters to the stream being an outlet provided by Grey which is used by lands in Elma, when in point of fact no water from any lands in Elma *passes through the drain* in Grey into the stream, but all waters from lands in Elma reach the stream within the limits of the Township of Elma by drains constructed in that township.

If the deepening, straightening and widening of Beauchamp Creek, where it is proposed to be deepened, etc., etc., within the Township of Grey, benefited lands in Elma for drainage purposes, they might be assessed by a proper by-law for that purpose to the extent of the benefit conferred by such work; but that is a very different case from the present, where it is apparent on the engineer's report adopted by the by-law that the proposed work does not benefit the lands in Elma. But moreover, the by-law assesses the lands in Elma to the amount of $604.12 *for the cost of the original construction of the drain No. 2 constructed in* 1873, and has credited the parties originally assessed for that work in Grey with such amount upon the assessments made against the lands in Grey for the work proposed to be undertaken. For this charge there is no pretence of there being any authority whatever.

Thus it appears by the by-law that lands in Elma are charged with the sum of $4,617.36, which with interest added for twenty years during which debentures will run, which are contemplated to be issued to raise the necessary funds, amounts to $6,796.60 as the contribution assessed upon lands in Elma for the execution of work from which those lands do not derive any benefit whatever.

For the above reasons I am of opinion that the lands in Elma purported to be affected by the by-law are not assessable for, nor liable to contribute any part of the cost of, the proposed work, and that as regards these lands the by-law of the Township of Grey is absolutely *ultra vires*.

Now it appears that the Township of Elma not only have not appealed, as they might have done, but although requested by the plaintiff to do so have insisted upon acting under it, and have passed a provisional by-law for that purpose which they intend finally to pass unless prevented by process of law, and as the lands of the plaintiff or his title thereto would in the event of the Municipal Council of Elma passing such by-law and issuing debentures thereunder, be prejudiced until the cloud affecting them by such by-law should be judicially removed, the plaintiff has, I think, an undoubted right to appeal now to the courts by the proceeding which he has taken instead of waiting until after the passing of the Elma by-law. Greater difficulties might be raised to his seeking redress if the by-law should be, as it might, and no doubt would be, registered under sections 351 *et seq.* of the Municipal Act of 1892.

I am of opinion, therefore, that the plaintiff is entitled to the relief prayed in his statement of claim, and that therefore his appeal must be allowed with costs in this court and in the Court of Appeal for Ontario, and that a decree be ordered to be made in the action in the court wherein the action has been brought, to the effect that the by-law No. 53 of the Township of Grey, in the pleadings mentioned, is void and *ultra vires*, as affecting or purporting to affect lands in the Township of Elma, and that the defendants, the Township of Elma be enjoined from passing the proposed by-law No. 321 already provisionally passed, and from taking any steps for the purpose of giving effect in the Township of Elma to the said by-law of the Township of Grey—with costs against the said Township of Elma.

The defendants, the Township of Grey, to have no costs of defence to the said action.

Appeal allowed with costs.

WICKWIRE *vs.* ROMNEY—SUSKEY *vs.* ROMNEY.

Compensation—Demand—Proceeding by Notice—Referee—Jurisdiction.

In a proceeding to establish a claim for compensation for damages caused by drainage works, where no negligence is charged, the Drainage Referee has the jurisdiction formerly possessed by arbitrators under the Municipal Act. Such proceeding is properly instituted by a Notice under section 5 of the Drainage Trials Act, 1891. A previous demand is not necessary.

November 9th, 1893. B. M. BRITTON, Q. C., Referee.

These persons, Wickwire and Suskey, claim compensation for damages alleged to have been done to their property in the construction of what is known as the "Tunnel Drain" or consequent on the construction of that drain.

They file their claim pursuant to section 5 of the Drainage Trials Act, 1891, as amended by the Act of 1892.

The township demurs and objects to the jurisdiction of the referee, as the alleged matters complained of in the notice of claim are matters on which the parties might have a cause of action in a proper court for damages on account thereof, and are not matters contemplated as matters of reference under the drainage laws or under the Drainage Trials Act.

Mr. Atkinson, Q. C., supports the objections and demurrer; Mr. Wilson, Q. C., contra.

So far as stated by the notice of these claimants, the compensation asked is for damages alleged to have been done to their property in the construction of drainage works, or consequent on drainage works, constructed by the Township of Romney under the provisions of the Drainage Sections of the Municipal Act and amendments thereto.

This brings the matter directly within section 591 of the Consolidated Municipal Act, 1892.

How far the claimants can establish by evidence the facts stated in their notice is not now under consideration, nor do I now consider what answer, if any, the township can make to the alleged facts, or any of them, further than what is raised by the objection to the jurisdiction of the referee.

Section 591 of the Municipal Act, ch. 184, R. S. O. 1887, is as follows:

"591. If any dispute arises between individuals, or between individuals and a municipality or company, or between a company and a municipality, or between municipalities, as to damages alleged to have been done to the property of any municipality, individual or company, in the construction of drainage works, or consequent thereon, then the municipality, company or individual complaining may refer the matter to arbitration, as provided in this Act; and the award so made shall be binding on all parties."

Before the passing of the Drainage Trials Act of 1891 any person claiming damages such as are contemplated by section 591, must proceed as provided under section 387 and the following sections of the Act, in reference to arbitration.

Then the Drainage Trials Act of 1891 was passed. Section 2, sub-section 1, of that Act says: "The Lieutenant Govenor in Council may appoint a referee for the purpose of the Drainage Laws, that is to say, the Ontario Drainage Act, the provisions of the Municipal Act on the same subject, sections 569 and following sections," etc.

Sub-section 5: "The referee shall have all the powers of arbitrators under the said Act; he shall also have the powers of arbitrators under the Municipal Act with respect to compensation for lands taken or injured; and he shall likewise have powers of other arbitrators generally."

Section 4: "The said referee is hereby substituted for the arbitrators provided for by the Drainage Enactments aforesaid."

Section 5 provides for the institution of claims.

The consolidated Municipal Act of 1892 was passed.

Section 568*a* is as follows:

"568*a*—The word 'Referee' wherever the same occurs in this Act from sections 569 to 612 inclusive shall mean the referee appointed under the Drainage Trials Act, 1891, and the word 'reference' in the said sections shall mean a reference to the said referee, and the provisions of the said Act shall apply to all proceedings instituted under the drainage clauses of this Act according to the true intent and meaning thereof."

"Section 591: In case a dispute arises between municipalities or between a company and a municipality, or between individuals and a municipality or company or between individuals, as to damages alleged to have been done to the property of the municipality, company or individual, in the construction of drainage works, or consequent thereon, the municipality, company or individual complaining may refer the matter to the arbitration and award of the said referee, who shall hear and determine the same and give in writing his award and decision, and his reasons therefor."

So if the claims are really within section 591 the referee has jurisdiction.

These claims are alleged to be such as are contemplated by the section, and so are correct in form whether they are really so or not, and if within the section, whether or not such claims have been barred by effluxion of time or whether or not there is any other defence must be determined upon the evidence.

Mr. Atkinson, for the township, says the claimants must sue. If these parties do not complain of negligence—or that the Act was unlawful—on the part of the township, and they do not in their notice, the cases of Preston vs. Camden, 14 O. R. 85, and Pratt vs. Stratford, 16 O. A. R., 5, would be authority against their right to recover in any way other than by arbitration.

I am dealing merely with the statement of claim and the objections thereto. The claimants assume that the township has a perfect right to do all that it did do. The township is not charged with any negligence or any wrongful act. But Mr. Atkinson further says that no demand has been made, therefore no dispute.

In cases properly within section 591, before the referee was substituted for the arbitrators, there was no provision for a formal demand or for a formal issue showing the dispute. A person claiming compensation named an arbitrator ; the township named another, and the two named a third. Now by section 5, of the Drainage Trials Act, 1891, the claim is instituted by a notice, such as is before me in this case, claiming compensation.

I overrule the demurrer and dismiss the objections of the township so far as the same relate to the jurisdiction of the referee. And I order and direct that the reference be proceeded with, costs to be costs in the cause to the claimants in any event.

GOSFIELD NORTH *vs.* ROCHESTER.

MERSEA *vs.* ROCHESTER.

IN THE MATTER OF APPEAL BY THE TOWNSHIP OF GOSFIELD NORTH FROM REPORT OF JOSEPH M. TIERNAN, C. E., UPON THE REPAIR OF THE RIVER RUSCOM DRAIN AND THE SILVER CREEK BRANCH THEREOF.

Referee—Jurisdiction—Repair of Drain constructed under County By-law—Right to Assess Lands in Other Municipalities.

Where drainage works affecting several minor municipalities are constructed by the county, each minor municipality must keep in repair the part of the works within its own limits and cannot call upon the other minor municipalities to contribute to the expense of repairs; and a provision in the County Engineer's report, that the drain shall be kept in repair by a tax on the lands and roads in the same relative proportion as for the cost of construction, is illegal. The Drainage referee has jurisdiction to set aside a by-law of a minor municipality charging other minor municipalities with a portion of the expense of such repairs.

January 30th, 1894. B. M. BRITTON, Q. C,, Referee.

This appeal and an appeal upon the same evidence by the Township of Mersea came before me at the Court House, Town of Sandwich, and was heard on the 13th and 14th days of November, A. D. 1893.

A. H. Clarke, Esq., counsel for Township of Gosfield North.

M. Cowan, Esq., counsel for Township of Mersea.

J. B. Rankin, Esq., counsel for Township of Rochester.

Having heard the evidence and the argument of counsel, and having considered the same, and all matter submitted to me upon the trial, and hearing of this appeal, I now make this my report and give the reasons of my decision as follows:

The first question to be determined is one of jurisdiction. Is there an appeal to me from this report under sections 580 or 581 of the Municipal Act, or under section 7 of the "Drainage Trials Act 1891," or under any other section of either Act?

Mr. Rankin for the Township of Rochester contends that there is no appeal in a case like this.

On the 9th of October, 1893, the County of Essex finally passed a by-law to provide for the deepening of the River Ruscom in the County of Essex. The work proposed would affect more than one municipality, so the county undertook it under section 598 of the Municipal Act of 1883. That section, for the purpose of this enquiry, may be considered the same as section 598 of the Act of 1892. The addition of the section 591 in sub-section 2 of section 598 of the Act of 1892, as applicable, is not material to any point to be considered in this appeal.

The proposed work under this by-law was undertaken upon the report of James S. Laird, which report is set out in full in the by-law.

The estimated cost of that work including building bridges with incidental expenses was $38,977.00 and of which amount lands in

Rochester had to pay - - - - - - -	$ 7,290
Rochester, for its roads - - - - - -	3,412
	$10,702
Lands in Gosfield had to pay - - - - -	$ 9,312
Gosfield, for its roads - - - - - -	5,566
	$14,878
Lands in Mersea had to pay - - - - -	$ 8,931
Mersea, for its roads - - - - - -	4,016
	$12,947

The schedules accompanying that report and adopted by the by-law show the lands to be benefited in each township, and the amount assessed against each parcel.

By this county by-law each township was required to pass a by-law for collecting the amount assessed against the lands and roads in the township and pay the same to the County Treasurer.

This work was completed.

Section 585 of the Act of 1883 (section 584 of the Act of 1892) provides: "After any works undertaken under section 598 are fully made and completed it shall be the duty of each minor municipality to preserve, maintain and keep in repair the same within its own limits in accordance with the requirements of the preceding section which shall be applicable thereto."

In 1893 the River Ruscom drain and the Silver Creek branch thereof in the Township of Rochester had become much out of repair and certain bridges across this drain and branch had been carried away, and other bridges had been damaged so the council of Rochester "for the purpose of ascertaining with greater accuracy the true condition of the said drain and branch and the nature and extent of the repairs required" etc., procured Joseph M. Tiernan, C. E., to make an examination and to prepare plans, profiles and estimates and to report.

Mr. Tiernan reported that the work was necessary and that it would cost $9,744.25 to do the work required to be done, all within the Township of Rochester.

Mr. Tiernan does not in his report say anything about lands being benefited in any other township, nor does he pretend at all to assess any lands. He simply gives to the Council of Rochester information as to what that township ought to do in respect to the drains and bridges.

The Council of the Township of Rochester having got the information act upon it, and pass the by-law No. 179. This by-law passed 21st September 1893, after reciting the county by-law, condition of drain and report, affirms the necessity of repairing the drain, adopts the report, provides for its own share of the cost which it fixes at $2,675.50 and then enacts, *inter alia*, that :

1. "The Municipal Councils of the Townships of Gosfield, Mersea, and Tilbury West, being corporations interested in and liable to contribute to the cost of said proposed drainage work repairs, be notified of this by-law and the proceedings to be taken thereunder."

2. That Gosfield be charged with, and contribute and pay to Rochester $3,719.50 (on lands and roads) as the proper proportion to be borne by it in making the proposed repairs.

3. That Mersea be charged with and contribute and pay to Rochester $3,236 (on lands and roads) as the proper proportion to be borne by it in making the proposed repairs.

4. And that the Treasurer of Rochester do forthwith request the council of each of these corporations to raise and pay these respective sums.

A copy of Mr. Tiernan's report and of the plans, profiles, and of the by-law was served upon Gosfield North and Mersea.

The Township of Rochester says that there was no need of any assessment by their engineer, because the report of the County Engineer, adopted by the county by-law provides that this drain shall be kept in repair by a tax on the lands and roads in the same relative proportion as for the cost of construction, and that can be easily determined.

The entire cost of construction was $38,977, and the proportions of construction were :

Rochester - - - - - - - - - -	$\frac{10702}{38977}$
Gosfield - - - - - - - - - -	$\frac{14878}{38977}$
Mersea - - - - - - - - - -	$\frac{12947}{38977}$

The entire cost of repairs is $9744.25, so Gosfield's part or proportion would be 14878-38977 of $9744.25-$3719.50, and the amount for the others can easily be found in the same way.

The appellants say the engineer for the county had no right whatever to say anything about repairs; that was provided for by section 585 of Act of 1883 (section 584 of 1892) and that they have the right to appeal from the report of Mr. Tiernan and from the assessment of their townships by Rochester, and to have this by-law of Rochester quashed.

The respondent township says it is perfectly right in the action taken, but whether right or wrong there is no appeal to me.

It is necessary to refer to sections 579, 580 and 581 of the Municipal Act of 1892 and to sections 3, 6, and 7 of the Drainage Trials Act of 1891.

Section 579, 1892—"The council of the municipality in which the deepening or drainage is to be commenced shall serve the head of the council of the municipality into which the same is to be continued or whose lands or roads are to be benefited without the deepening or drainage being continued, with a copy of the report, plans, specifications, assessments and estimates of the engineer or surveyor aforesaid, and unless the same is appealed from as hereinafter provided it shall be binding on the council of such municipality."

Section 580—"The council of such last mentioned municipality shall within four months from the delivery to the head of the corporation of the report of the engineer or surveyor as provided by next preceding section pass a by-law or by-laws to raise and pay over to the treasurer of the initiating municipality such sum as may be named in the report or in case of an appeal for such sums as may be determined by the referee," etc., etc.

Section 581—"The council of the municipality into which the work is to be continued or whose lands, road or roads, are to be benefited without the work being carried within its limits, may within 20 days from the day in which the report was served on the head of the municipality appeal therefrom to the referee," etc.

Section 3 of Drainage Trials Act, 1891, is as follows:

"In all matters before the referee he shall, subject to appeal, have all the powers heretofore possessed by the High Court and by the arbitrators respectively as to determining the legality of all petitions, and of all resolutions, reports, and provisional and other by-laws where the objections thereto are stated as grounds of appeal or not."

Section 6 of the Drainage Trials Act, 1891, provides for an appeal from the report of the engineer or surveyor referred to in sections 580 and 581 of the Municipal Act.

Section 7 Drainage Trials Act, 1891, reads:

"In case of an appeal from an assessment by the council of a municipality into which drainage works have been continued or whose land or roads are benefited without the drainage works being carried into the municipality, the council may within 20 days from the day on which the copy of the engineer's report was served on the head of the municipality as by law provided, appeal therefrom," etc.

The contention of Rochester is this:—While that township admits its liabilty to repair under section 584, it says it shall do so according to section 583, which section is applicable in all respects to the work here proposed, and, that being so, no report was necessary; if a report was obtained for their own information it was not necessary to serve it; that there is no assessment by the engineer of Rochester and so no appeal.

A copy of the plans, profile, specifications and estimates of the engineer was served; but no amount was named in the report payable by Gosfield as is required by section 580 of the Municipal Act before Gosfield could be called upon to raise and pay over the sum said to be its proportion.

I do not look only to the sections of the Municipal Act in determining the question of the referee's jurisdiction. By section 7 of the Drainage Trials Act, 1891, there is given an appeal from an assessment by serving a notice within 20 days from the service of a report. In this case the following facts are in evidence:

1. That the proposed work is to be done wholly in Rochester.

2. That although it is a work of repair the lands and roads in Gosfield and Mersea are to be benefited by this work.

3. That Rochester by reason of this, and by reason of an alleged liability on the part of Gosfield and Mersea, created (as it is said) by the report of County Engineer at the time of the construction of the River Ruscom drain, assumes to assess lands in Gosfield to the amount of $2328 and the roads in Gosfield $1391 as the proper proportion to be borne by Gosfield in making these repairs, and the Township of Gosfield is called upon to raise these sums and pay the same over to the Treasurer of Rochester. Upon these facts and endeavoring to understand and apply a law not very clearly expressed, I have, with great hesitation, come to the conclusion that there is an appeal from the report which is made the basis by Rochester of an assessment upon the appellant townships.

The work was done by the county under section 598. These works undertaken under that section were fully made and completed, and so by section 584, it becomes the duty of each minor municipality to preserve, maintain and keep in repair the same within its own limits according to the requirements of section 583, which shall be applicable thereto.

The requirements of 583 adopted by section 584 are, I think, that the minor municipality may be compelled by mandamus to preserve, maintain and repair, and in default shall be liable to pecuniary damages.

I do not think that sub-section 1 of 583 applies to the extent contended for by Mr. Rankin in his very strong argument, namely, that the cost of maintenance and repairs must be in accordance with the report of the County Engineer, made when the drainage works were constructed, and I am of opinion that that part of the report which provides for maintenance and repairs was not authorized by law.

The first section of the Municipal Act which compels the engineer or surveyor in the construction of drainage works to provide for their maintenance and repair is 577. The application of that section is limited to work done under section 576, or at all events to work done under preceding sections.

It is true that section 576 is one of the sections made by section 598 to apply to any work done under 598. That is necessary in order to remove any doubt as to the power of the County Engineer, where in his opinion the works benefit lands in an adjoining municipality without extending into it, or improve roads lying in any municipality or between two or more municipalities, to charge lands benefited and the corporation whose roads are improved with such proportion of the costs of the works as he may deem just. But section 577 is not by section 598 made applicable to works constructed under the latter section. In reading 577 I cannot in any way apply it to other than works constructed under preceding sections.

This appeal is not an attempt to set aside the county by-law, but is an appeal against the action of Rochester in attempting to make an assessment upon adjoining municipalities based upon what I think was an unauthorized clause which appears in the County Engineer's report. If this was unauthorized then, there should be nothing now to prevent Gosfield or Mersea, whose lands and roads are being assessed by Rochester, successfully objecting, and saying to Rochester that if their lands must pay, and if these townships must pay for the improvement of their roads, that they are at least entitled to have an assessment and a report; they are entitled to have the work, if done under section 583, "done under the same formalities as nearly as may be as provided in the preceding sections." So that those whose lands are benefited, those who are "more immediately interested," those whoever they are who are to be called upon to pay shall have an opportunity to go to the Court of Revision.

Although the words in sections 583 and 585 are very general, I think those in 583 are more restricted than those in 585, and I come to that conclusion not only from sub-section 3 of section 583, but from the reading of sub-section 1, of section 583: "After such work is fully made," etc., seems to limit the scope of the section to work done as provided for in preceding sections and by similiar sections in any former or other Act respecting drainage. Work done under a subsequent section by a different authority is, by implication, excluded.

Section 585 is more comprehensive.

It was pressed with great force by Mr. Rankin, for Rochester, that if that township cannot repair under section 583 and have repairs paid by same lands in same proportion as for construction they cannot repair at all. It would be most unfair to repair out of general funds of the township, when so many in Rochester would not be benefited and when so many outside of that township would be benefited by the work.

If I am correct in my view of the law that may be an unfortunate result not contemplated by the Act. There is, however, in every municipality a great deal of work necessarily done that is of no benefit to many of the ratepayers and that must be paid for out of the general funds. In the view I take of this it is not necessary to hold that the Township of Rochester must necessarily preserve, maintain and keep in repair this work out of the general funds of the township.

I think also that there is a great deal of force in the argument of Mr. Clarke, for Gosfield, that even if under section 577 the County Engineer had the right to say how and in what proportion those drainage works were to be maintained and if his report does determine this, that is a very different thing from what is referred to in section 583. That section contemplates the repairs being done in the proportion determined by the engineer, either at the expense of the municipality or parties more immediately interested, or at joint expense as to the council upon the report of engineer may seem just.

That certainly is a different thing from saying that the work is to be kept in repair by the lots originally assessed. Section 583 is not an easy one to construe. It may mean that a proportion is to be determined as between townships, and each township shall say whether it shall bear the expense itself out of general funds or shall collect from interested parties within its own limits.

In Clarke vs. Howard, 16 O. A. R. page 82, Mr. Justice Osler has construed section 583. Applying that to this case Rochester could have adopted one of three courses, as upon the report of the engineer they might deem just.

1. They might assume the cost of maintenance as a township work.

2. They might throw it wholly upon the parties more immediately interested whatever that may mean, or

3. They might maintain it at the expense of such parties and the municipality.

In this case Rochester has done neither. Without the report of an engineer of theirs it has assumed to put a large part of the cost of maintenance and repair upon the lands originally assessed for construction.

If that could be the meaning, then this assessment could not stand, as this is an assessment by Rochester upon Gosfield and Mersea, Gosfield and Mersea having no voice in the matter.

It is argued by counsel for respondent that no report was necessary and therefore no report need be served.

I am of opinion that neither Gosfield nor Mersea without such report could raise the sum demanded of them respectively. Any by-law passed by Gosfield to assess the lands originally assessed for a sum demanded by Rochester without any report by Rochester's engineer would in my opinion be bad.

If there is any doubt as to the right to assess, the doubt would be given in favor of the township and land-owners charged. Rochester should not be permitted to call upon another township to provide by assessment a large sum of money, to be expended by Rochester unless beyond all question there is the clearest legal sanction for it.

Having come to the conclusion that the whole assessment by Rochester upon Gosfield and Mersea is unauthorized I do not need to consider the other questions raised.

I allow the appeal of the Township of Gosfield North.

As the point is new, this being the first time the question has been brought before me of the right of a minor municipality to repair at the expense in part of other municipalities, a drain made under section 598, I do not allow costs.

The appellant Township of North Gosfield is entitled to a declaration that the township is not liable to pay the assessment made against it by the by-law of the Township of Rochester now in question, on the ground that the assessment is an illegal and void proceeding.

I order and direct that the Township of Rochester do not proceed with the proposed repairs in pursuance of the report appealed from, assuming to charge against or collect from the Township of Gosfield North any part of the cost of such repairs.

I order and direct that each party shall bear and pay its own costs of the appeal and reference to me except as to the amount to be paid in stamps.

I order and direct that the sum of $10 be paid in stamps to be affixed to this my report as and for one day's trial (being one-half of the two days occupied in the trial of the two cases) of which amount the Township of Rochester shall pay $5 and the Township of Gosfield North shall pay $5, and if either township shall affix the whole amount the sum of $5 (one-half) shall be paid to that township by the other.

JUDGMENT OF THE COURT OF APPEAL, AFFIRMING THE REFEREE, REPORTED IN 22 O. A. R., PAGE 110, THE COURT BEING EVENLY DIVIDED UPON THE QUESTION OF THE REFEREE'S JURISDICTION.

January 15th, 1895. Hagarty, C. J. O. :—

The County of Essex in 1883 passed a by-law for the deepening of the River Ruscom as a drainage work affecting several municipalities, Rochester, Gosfield, Mersea and Tilbury West. This was on the report of their enigneer, Mr. Laird, the cost being about $38,000. He distributed the proportion of cost as to each township for lands and roads.

The county council, in the usual manner, raised the money and executed the work, assessing under the statute the amounts required from the different townships for the payment of interest and sinking fund, etc.

Their surveyor, in his report, directs: "This drain shall be kept in repair by a tax on the lands and roads mentioned in the schedule, assessments in the same relative proportions as for the construction, under the provisions of section 585, Consolidated Municipal Act, 1883. The estimated cost of constructing the drain, building bridges, etc., with incidental expenses, is $38,977, distributed on the several municipalities interested in the drain, as follows:

"On lands in Rochester as benefited	-	$7,290 00
"On roads	-	3,412 00
"Lands, Gosfield	-	9,312 00
"Roads, Gosfield	-	5,566 00
"Lands, Mersea	-	8,931 00
"Roads, Mersea	-	4,016 00
"Lands, Tilbury West	-	353 00
"Roads, Tilbury West	-	97 00

"Accompanying you will find plans and specifications, estimates, assessments, all the papers requisite for your guidance in the construction of the River Ruscom drain."

The drain in question fell out of repair, and the Rochester corporation passed a by-law in September, 1893, reciting the necessity for repair in their township, and reciting also the above scale of assessment in Laird's report to the county council and his direction as to how it was to be kept in repair, and that a report had been made to them by their surveyor Tiernan, that $9,744.25 were required for such repairs in Rochester. The by-law then provided for raising $2,675, which, with $3,719 to be contributed by Gosfield, and $3,236 by Mersea, and $112.50 by Tilbury, were the funds necessary.

It then directed that each of the municipalities be notified of this by-law; that Gosfield is hereby charged with and required to contribute and pay to Rochester the sum of $3,719, their proportion; the same as to Mersea and Tilbury West. They then gave a schedule of the lands in Rochester to be assessed pursuant to the report of Laird set forth in the county by-law.

Tiernan's report merely states the amount and nature of repairs, and makes no assessment on any lands either in Rochester or elsewhere.

The usual notices were given to the other townships by the Township of Rochester, and they appealed to the drainage referee from the report and by-law of Rochester, and the estimates, plans and profiles accompanying same, on the ground, in substance, that there was no authority in law for assessing or calling for contribution, with many other objections.

The learned referee has stated the whole case in a very careful and lucid manner. He held on objection to his jurisdiction in favor of its existence, and second, against the validity of the attempt of

Rochester to charge the other townships. As to jurisdiction, I have come to the conclusion in favor of the referee's view.

By the Act of 1891, 54 Vic. ch. 51 (O.), the referee was appointed. He is to have all the powers of an official referee and of arbitrators under the Municipal Acts, etc., to have power to grant an injunction or a mandamus, and by section 3, as amended by 55 Vic. ch. 57 (O.): "In all matters before the referee, he shall, subject to appeal, have all the powers heretofore possessed by the High Court and by arbitrators respectively, as to determining the legality of all petitions, * * and of all resolutions, reports and provisional and other by-laws, whether the objections thereto are stated as grounds of appeal or not."

The consolidated Municipal Act of 1892 [55 Vic. ch. 42 (O.)] recognizes the referee in many sections as an officer for the settlement of matters in dispute.

I read many of these drainage sections as indications of the general design of the legislature to extend the referee's powers as far as legitmately may be done for the general arrangement of disputes between municipalities.

I refer to such sections as 581 and 583; the last section, referring to works done under this or any former Act, directs that each municipality in the proportion determined by the engineer, surveyor, or referee (as the case may be), or until otherwise determined by the engineer, surveyor, or referee, is to preserve, maintain and keep in repair the same within its own limits, either at the expense of the municipality, or parties more immediately interested, or at the joint expense, etc., as to the council upon the report of the surveyor or engineer may seem just. And any municipality neglecting or refusing upon notice, etc., may be compellable by mandamus issued by the referee or any competent court, etc., to do the repairs, and the municipality so called on may apply to the referee to set aside the notices, etc. I refer to such sections as indicative of an apparent intention to extend and enlarge the class of cases in which the referee may interfere. See also sections 590, 591. Then there is a general clause, section 568*a*: That in sections from 569 to 612, the word "referee" shall mean the drainage referee, "and the word 'reference' in the said sections shall mean a reference to the said referee, and the provisions of the said Act (*i. e.*, Drainage Trials Act), shall apply to all proceedings instituted under the drainage clauses of this Act, according to the true intent and meaning thereof."

The clause already cited, as amended, in the Drainage Trials

Act, comprehends appeals to the referee to determine the legality of all resolutions, reports, and provisional or other by-laws.

I am of opinion that this matter was properly within his jurisdiction.

Then as to his conclusions: It may be quite true that Mersea or Gosfield was not bound to take any action when required to provide moneys, and could have answered an application for mandamus on the grounds taken before the referee. But that is no reason why they should not take the course adopted here of applying at once to the referee to hear and decide on their objections to the Rochester proceedings.

I must refer to the report for the very full statement of the whole case and the arguments on either side. Rochester insists that the county by-law of 1883 fixed for all time the proportion to be contributed by each township for repairs based on Mr. Laird's apportionment. On the other side it is urged that the county engineer had no authority to make any such provision as to maintenance and repairs; that all the county council could do was to execute the work and charge on each municipality and its specified lands the proportion of its liability for the repayment to the county of the debt incurred therefor, and that the statute, section 599, provided for the liability of each municipality. Section 584 directs that where the works are done under section 598 (under which the county does the work), it shall be the duty of each minor municipality to preserve, maintain and keep in repair the same within its own limits in accordance with the requirements of the preceding section 583. As the learned referee remarks, this section 583 may not be easy to understand, but whatever view may be taken of it, it cannot support the appellants' contention. The Rochester engineer affects to assess or charge no specified lands.

I agree with the learned referee, that the county engineer had no authority to prescribe (apparently for all time to come) the liability of named lands in the several townships.

I think this direction was beyond the powers conferred on the county council by the legislature. It would be most inconvenient and unwise to infer the existence of such a power when not expressly given. The circumstances of the whole drainage system and maintenance may be changed in the course of a number of years, and it may be well supposed that when the county had, on request, assumed the duty of executing the work, that its future might be safely left to the several municipalities interested. At all events, Rochester had no right in any view of the case on such a report as Mr. Tiernan's, to make any demand or requisition on either Mersea or Gosfield, and the latter, in my judgment, had the right to bring the by-law, report and demand before the referee for his decision, and were not bound to wait until a mandamus might be issued from the High Court.

I think that the appeal must be dismissed and the referee's judgment be upheld.

Burton, J. A. :—Whilst strongly inclined to the view that the referee was right upon the merits, I give no judgment upon that point, as I have come to the conclusion, after considerable fluctuation of opinion, that he had no jurisdiction.

It appears perfectly clear to me, that arbitrators would have had no power to deal with this question, nor would the High Court. If the township itself had no power to deal with such a question, the by-law which is impeached was a mere *brutum fulmen* and hurt nobody.

If I am right in supposing that neither the arbitrators nor the High Court could have interfered, it was not properly before the referee on appeal.

I agree with my brother Osler, and cannot usefully add anything to his very able judgment.

The appeal, therefore, should, in my opinion, be allowed, for want of jurisdiction in the referee.

Osler, J. A. :—The three townships in question are in the County of Essex.

On the 9th of October, 1883, the county, under the provisions of section 598 of the Consolidated Municipal Act of 1883, and relative sections, passed a by-law for the deepening of the River Ruscom in that county, a work which affected all three municipalities, and also the municipality of Tilbury West. The cost of the work, as set forth in the report of the county engineer, was $38,977, which was distributed between and upon the several municipalities as therein specified. The report also stated that the work should be kept in repair by a tax on the lands and roads mentioned in the schedule in the same relative proportions as for the construction under the provisions of section 585 of the Consolidated Municipal Act, 1883.

The by-law enacted that the report, plans and estimates of the engineer be adopted, and that the several townships should, and they were thereby required to pass by-laws in their respective municipalities for collecting the amounts assessed for construction against lands or roads therein and pay the same over to the county treasurer with the county rates.

The work was duly constructed and paid for, and the Townships of Mersea and Gosfield kept the same in repair thereafter within the limits of their jurisdiction.

On the 21st of September, 1893, the Township of Rochester passed a by-law reciting the county by-law of 1883, and that part of the drain within the said township had fallen into disrepair, and that they had procured a surveyor to examine it and to prepare plans, profiles and estimates of the work necessary to put it into repair, and that he had reported that it was necessary to raise the sum of $9,744.25 for that purpose. It was then enacted that $2,675, being the share or proportion of that sum to be contributed by Rochester, should be raised in the manner provided. That the other townships already mentioned being corporations interested in and liable to contribute to the work, be notified of the by-law and of the proceedings to be taken thereunder. That Gosfield be charged with $3,719, as the proper proportion to be borne by it in the making of the proposed repairs, and that the Township of Rochester do forwith request the Corporation of Gosfield to raise and pay the same. There were similar clauses as to the Townships of Mersea and Tilbury West, the former being charged with $3,236, and the latter with $112.50. The repairs for which the whole of this expenditure was required were to be done entirely upon that part of the drain which was within the Township of Rochester. The surveyor upon whose report the by-law was founded assessed the lands in Rochester as scheduled in the county by-law, but made no report as to an assessment upon the lands in the other townships, the council of the Township of Rochester assuming that they had nothing to do but to charge those townships with and require payment of the proportion of the whole cost of the repairs ascertained in the manner mentioned in the report of the county engineer, as set forth in the by-law of 1883. Notice of the by-law was given to the other townships, but no copy of the report, plans, specifications, assessments and estimates were delivered to them.

Thereupon the Townships of Mersea and Gosfield North appealed to the referee upon various grounds, but chiefly on the ground that Rochester had no legal authority to assess or call upon them to contribute anything to cost of repairs to be done within the former township; that the drain constructed under the authority of the county by-law must be kept in repair by each of the townships severally as to that part thereof within its own jurisdiction at its own expense, and that so much of the county engineer's report embodied in the county by-law as assumed to provide that the drain should be kept in repair by a tax on the lands and roads marked in the schedule in the same relative proportion as for construction was unauthorized and void, in so far as it was intended to give to any of the townships interested a right to call upon the other or others for a share of the cost of keeping in repair that part of the drain within its own jurisdiction. The referee determined and reported that ~~the~~ clause referred to in the county by-law was unauthorized, and that the appellant townships were entitled to a declaration that they were not liable to pay the "assessment" made against them by the by-law of the Township of Rochester, on the ground that such assessment was an illegal and void proceeding.

On the appeal from that report, it was contended before us on behalf of the Township of Rochester, that the learned referee had no jurisdiction to entertain the appeals to him; and second, if he had, that the township by-law was valid and based upon the right arising out of the county by-law to charge the other townships with a share of the cost of repairs to that part of the drain within the Township of Rochester, proportional to the cost of the original construction.

The Municipal Act in force when the county by-law was passed was the Act of 1883, but it will be more convenient in considering the case to refer to the sections of the Consolidated Act of 1892, [55 Vic. ch. 42 (O.)] which, so far as all the proceedings now in question are concerned, are substantially the same as those of the former Act.

The section which authorized the county by-law is section 598. It enacts that where any works proposed to be constructed in any locality, under section 569, affect more than one municipality, either (1) on account of such works passing or partly passing through two or more municipalities; or (2) on account of the lowering or raising of the waters of any stream contemplated in the proposed scheme of drainage, draining or flooding lands in two or more townships, then the county to which such municipalities belong, on the application of the council of any of the townships affected, and without any preliminary petition from the owners of the property benefited, may pass by-laws for the purposes authorized by the section 569.

Sub-section 2 then declares that unless where contrary to the provisions of the Act, certain specified sections shall apply to the works constructed by the county, and it provides for the constitution of a special Court of Revision for the trial of complaints in the first instance, instead of the Court of Revision, mentioned in section 569, sub-section 10, that court being composed of three persons, to be nominated by the county council. All complaints against the assessment are to be lodged with the clerk of the county. The sections specially applied are sections 569 (except as modified in regard to the Court of Revision), to 574, and sections 576, 590 and 591. Section 599 provides that the county shall raise the money necessary for the construction of the works, but each township shall be liable to the county for the amount payable in respect of all the lands within the township, and each township shall pass such by-laws as may be requisite for collecting the amounts assessed against lands or roads within its jurisdiction.

It is not easy to see where any appeal has been given to the referee in the case of a county by-law affecting only minor municipalities within the same county. In the case of such a by-law affecting municipalities within several counties, there are special provisions for the appeal by one county against the other, and the referee then determines as well the proportion of the cost of the work that is to be borne by each of the minor municipalities affected as the proportion to be borne by the counties as between themselves: sections 603, 609. Where the minor municipalities are all within the same county, it would rather seem that (sections 579, 580 and 581 not having been applied) the whole area affected is treated as being a single municipality in which the engineer's assessment is only dealt with in the special Court of Revision, without any appeal as between the municipalities themselves. This, however, is a point not necessary to be decided here.

It may be noticed that section 576, though applicable to works to be constructed under a county by-law, does not affect the present case. It did not apply to the works constructed by the county, nor was it acted upon even if it could have been, by Rochester in passing their by-law.

The works then having been constructed and paid for under the county by-law, where is the authority for either of the townships to charge or assess the others with a proportion of the cost of repairs done to the drain within its own limits?

Section 584 enacts that after any works undertaken under section 598 are fully made and completed, it shall be the duty of each minor municipality to preserve, maintain and keep in repair the same within its own limits in accordance with the requirements of the next preceding section 583, which shall be applicable thereto.

This section I shall refer to in a moment, but first point out that section 577 is one of those which, like the four sections which follow it, has not been made applicable to the case of work done under a county by-law. This section, referring to works constructed under sections 575 and 576, extending beyond, or benefiting other municipalities than the originating municipality, provides that the engineer or surveyor shall determine and report to the council by which he was employed, whether the works shall be constructed and maintained solely at the expense of such municipality, or whether they shall be constructed and maintained at the expense of both municipalities, and in what proportion.

The County Engineer, whose report formed the basis of the by-law of 1883, evidently considered that this section warranted him in reporting that the drain should be kept in repair by a tax on the lands and roads scheduled in each township in the same relative proportion as for the cost of construction. In this I think he was wrong, and that the clause of his report dealing with repairs and maintenance of the drain is of no force or validity whatever. The section is confined to the case of works originated by and carried on between minor municipalities alone. The engineer is required to report to the council by which he was employed, in the alternative, viz., whether the works shall be constructed solely at the expense of that municipality or at the expense of both municipalities, and what proportion. Here the council by whom he was employed was the county council. Clearly it is not contemplated that the county shall in any event bear the expense of construction and maintenance, and if one alternative is not within the power of the engineer in the case of a county by-law, so also must be the other. The section, therefore, is strictly confined to the case of an initiating minor municipality.

The respondents, however, rely upon the reference in section 584 to section 583, as overcoming the difficulty caused by the non-application of section 577 in terms to works undertaken under section 598.

Section 583 is the section which regulates primarily the duties of the several municipalities as between themselves where the work is originated as a township work. Sub-section 1 enacts that after such work, *i. e.*, a township work to which, of course, section 577 applies, is fully made and completed, it shall be the duty of each municipality in the proportion determined by the engineer or referee (as the case may be), or until otherwise determined by the engineer or referee, under the same formalities, as nearly as may be, as provided in the preceding sub-section, to maintain and keep in repair the same within its own limits, either at the expense of the municipality or of parties more immediately interested, or joint expense of such parties and the municipality as to the council upon the report of the engineer may seem just. Then follow a number of sub-sections, dealing with the mode in which the corporation may be compelled to make the necessary repairs, notices, mandamus, appeal, etc. It is contended by the appellants that these words "in the proportion determined by the engineer, surveyor or referee, as the case may be," draw in and make applicable to the report of the engineer for the purpose of a county by-law under 598, the provisions of section 577. I do not think, however, that we can so construe section 584, which in enacting that the county work shall be kept in repair by the several minor municipalities within their own limits, in accordance with the requirements of section 583, merely imports a reference to those provisions of that section which relate to procedure, mandamus, notices, appeals, etc., and the formalities by which each municipality is to raise the money which may from time to time be required to pay for repairs. A clause which is expressly omitted, and as I have pointed out, for a very good reason from section 598, in the enumeration of those applicable to a county work, cannot consistently with ordinary rules of construction be treated as having been made applicable by the indirect or referential language of section 583. If section 577 is not made applicable to the case of a county work, then, so far as section 583 speaks of "the proportion determined by the engineer," it fails of affect in reference to a county by-law in which there is no power to provide for any apportionment of the cost of repairs and maintenance of the drain.

I am, therefore, of opinion, that those clauses of the by-law of the Township of Rochester which assume to assess upon or charge against the other townships any proportion of the cost of works of repair done within their own limits were wholly illegal and unauthorized.

There remains the question as to the referee's jurisdiction to entertain the appeal of the townships from the charge thus sought to be imposed upon them.

This question seems to me to be one of considerable difficulty, and the learned referee arrived at the conclusion that he had jurisdiction "with great hesitation."

Had the case before him been one in which, under some circumstances, or by taking proper proceedings, procuring the report and assessment, etc., by their engineer, etc., upon lands in the other townships, Rochester could have charged or assessed upon those townships a proportion of the cost of the repair of the drain constructed under a county by-law, I think the referee would have had jurisdiction under section 2, clause 5, of the Drainage Trials Act, [54 Vic. ch. 51 (O.)] which confers upon him the powers which the arbitrators formerly possessed under the Municipal Act and the Ontario Drainage Act. It is under that clause, if at all, that the proceedings before him must be supported, and the respondents must shew that he was asked to do something which, if he had not been substituted for the arbitrators, they might have been asked to do. But could they or could he have varied the report of the engineer so that the proportion of the cost of repair sought to be imposed upon the other townships might have been increased or diminished? See section 8 of 54 Vic. ch. 51 (O.). Clearly this could not have been done if I am right in holding that section 577 does not apply to the case of a county by-law, and therefore that under no circumstances could Rochester have charged the other townships with any part of the cost of repairs to that part of the drain lying within its own limits. The referee's jurisdiction, in short, depends upon the jurisdiction of the township. If they have exercised it wrongly or mistakenly he may review it. But I do not understand that he can entertain an application to set aside or review proceedings which the township had no power under any circumstances to take.

Section 3 of the Drainage Trials Act enacts that "*in all matters before the referee* he shall, subject to appeal, have all the powers heretofore possessed by the High Court and by the arbitrators, respectively, as to determining the legality of all petitions, etc., and of resolutions, reports and provisional and other by-laws: [55 Vic. ch. 57, section 1 (O.)]. This, however, must be taken to mean in all matters in which jurisdiction has been conferred upon him or which he may lawfully take cognizance of under the Drainage Trials Act or the Municipal Act. And the same observation applies to section 2, clause 6 of the former, and to section 568*a* of the latter Act. The jurisdiction which he has under these clauses is incidental merely to his principal jurisdiction.

Sections 6 and 7 of the Drainage Trials Act, and sections 579, 580 and 581 of the Municipal Act, are also referred to by the referee, but I do not see that there is anything in them to support his jurisdiction. These clauses of the Municipal Act are not, as I have already said, applicable to the county by-law any more than section 577, and sections 6 and 7 of the former Act relate only to proceedings which may be taken thereunder. Section 7 seems to provide for the same case as that provided for by section 6. I have, at all events, been able to discover nothing else to which it can apply. The "assessment" mentioned in that section is not an assesssment by the council, but the assessment by the report of the engineer, the very same thing, and in the very same case, that is referred to by the previous section.

The appeal ought, therefore, to be allowed, on the ground that the proceedings before the referee were without jurisdiction, though I agree with his conclusion upon the merits of the case.

As the court is equally divided upon the former point, the result is that the appeal is dismissed. But as the general merits of the case are with the respondents, I have no objection to concur in the motion that it shall be dismissed with costs.

Maclennan, J. A. :—

The great question in this appeal is whether Mersea and Gosfield are bound to contribute to the cost of repairs to be done to the drain in question within the limits of the Township of Rochester.

The work was done by the county under section 598, in the year 1883, and in the county engineer's report upon which the by-law for doing the work was founded, he declared that the work should be kept in repair by a tax on the lands and roads mentioned in the schedule in the same relative proportions as for the construction under the provisions of section 585 of the Consolidated Municipal Act, 1883. The lands and roads in the schedule included lands and roads in the three Townships of Rochester, Mersea and Gosfield. The appellants contend that the county engineer was authorized by the section referred to by him, section 585 (now section 583), to make that declaration, and that it is binding on the townships accordingly. Section 584 is very clear that work done under section 598, that is by the County Council, shall be kept in repair within its own limits by each minor municipality, and it declares that this shall be done in accordance with the requirements of section 583, which is made applicable thereto. Of course, the obligation to repair necessarily involves the obligation to pay, and unless we can find some power or right to do so within the statute, one municipality cannot call for any contribution to the cost of repairs done within its own limits from any other municipality. It is contended that such a power and right are to be found in section 583.

After a prolonged consideration of the section I am unable to find in it any authority or power for one municipality to claim contribution from another in such a case. The words which it is contended give the right are the words "in the proportion determined by the engineer, surveyor or referee (as the case me be)," etc., down to the words "as provided in the preceding section." Leaving these qualifying words out for the moment, the section says: "Each municipality shall preserve, maintain, and keep in repair the same within its own limits." The meaning of that is very plain. Each is to do all the work within its own limits. Applying that to the present case, Rochester shall do all the repairs required in that township, and so of Mersea and Gosfield. In other words the drain is divided into three defined parts, and one of these defined parts is assigned to each township. Then apply the qualifying words, each is to do it in the proportion determined by the engineer, surveyor, or referee. What proportion is the engineer to determine? The clause has already determined the proportions of the work which each is to do. Each is to do all that is required within its own limits, and there can be no question of proportion as to the work to be done. The suggestion is that proportion means proportion of cost as between the different municipalities. I think it would be stretching the power of construction far beyond any allowable or authorized limit to hold that such is the meaning of the words, and thereby cast a large part of the expense of repairs done in and by one municipality upon another. There is not a syllable of express reference to such a right of contribution, and the plain words used import the contrary, for they say that the municipality shall keep the same in repair within its own limits either at the expense of the municipality or parties more immediately interested, etc. Then what is the meaning of the words "in the proportion," etc. The section is difficult to construe, and it is strange that it has not been amended since its original enactment in the Drainage Act of 1872, notwithstanding that its obscurity has been pointed out more than once: White vs. Gosfield, 10 A. R. 560.

The best solution which I can suggest is, that these words, that is "in the proportion determined by the engineer," etc., refer to the distribution of the expense between the municipality and the parties more immediately interested. But whether that be the true meaning or not, I find it impossible to hold that it is what is contended for by the appellants.

The section goes on to provide for the manner in which each township shall provide the funds for the work it is to do. It is to do it at the expense of the municipality, or parties interested, or at the joint expense of the parties and municipality as to the council upon the report of the engineer or surveyor may seem just. Now, it is said, this means only its own proportion of the expense. If that be granted, then while the township which does the work has these alternative methods of paying for it, there is no similar provision for the contributing municipalities, and the strange result would arise that while Rochester could provide their share of the money in several alternative ways, the other townships have no such privilege. But these are not the only difficulties. The proportion is to be determined by the engineer. What engineer? Is it the county engineer in a case like the present under section 598, or the engineer of the township doing the repairs, and is it the same engineer who is mentioned throughout the section, in the words, "or until otherwise determined by the engineer," and in the last line, "upon the report of the engineer or surveyor, as may seem just"?

If I could think it possible to hold that proportion meant proportion of cost, I should feel bound to hold that engineer did not mean the engineer of the original work, but an engineer employed with reference to the works of maintenance and repair. I think that is indicated by the whole language of the clause. It is providing for something to be done after the work is fully made and completed, and for all time to come. It says the proportion is to be determined by the engineer, not once for all, but, "or until otherwise determined by engineer, surveyor, or referee," indicating a new or fresh determination of proportions with an appeal to the referee.

Now, if we could find anything in any other part of the Act to assist the contention that the legislature intended to give a right to call for contribution, we are bound to consider it. I have searched in vain for any such assistance.

It is said that section 577 affords such assistance, but I do not think so. By sub-section 2 of section 598, certain antecedent sections are made applicable to county works, but section 577 is not one of them. That section does apply to the case of works in which more than one municipality is concerned, initiated by a minor municipality, and it very clearly authorizes the engineer to determine and report both as to construction and maintenance, whether they shall be at the expense of the constructing municipality, or of both municipalities. But we have no authority to extend section 577 to work under section 598, and so to supply a defect in the legislation.

The remaining question is as to the jurisdiction of the referee in the appeal before him.

Upon the whole I agree that our judgment must be in favour of the jurisdiction. The foundation of the claim is the report and by-law of 1883, and section 3 of the Drainage Trials Act of 1891 as amended by section 1 of 55 Vic. ch. 57 (O.), extends his jurisdiction to all reports and by-laws relating to drainage, and therefore I think he had power to entertain the appeal and to deal with it as he has done.

The appeal should, therefore, in my opinion, be dismissed.

The Court being divided in opinion,
the appeal was dismissed with costs.

NOTE:—Since this decision the law as to repair of county drains has been altered. See sec. 70, chap. 226, R. S. O., 1897.

IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.

COULTER VS. TOWNSHIP OF ELMA, AND JOHN REID.

Sufficiency of Petition—Estoppel.

In determining the question of lands to be benefited the referee is bound by the engineer's report and should not go outside of the report and bring in other lands said to be benefited; nor should he, contrary to the report, reject lands said not to be benefited. Where the work laid out by the engineer was in a different course from that described in the petition which the plaintiff had signed, and afterwards withdrew from, he was not estopped from attacking the validity of the by-law.

February 27th, 1894. B. M. BRITTON, Q. C., Referee.

This action was brought according to the amended statement of claim to set aside by-laws numbers 286 and 294 of defendants' council, and for an injunction restraining the defendants from proceeding with the construction of a drain called the Wilson drain across plaintiff's land, viz.: the southerly part of the west half of lot 16 in the 10th concession of Elma, and for damages.

By the judgment and order of the court, dated 24th April, 1893, all matters in question herein, including all questions of costs, pursuant to the provisions of the Drainage Trials Act, 1891, and amending Acts, and pursuant to section 102 of the Ontario Judicature Act, R. S. O. 1887, chap. 44, were referred to me to be dealt with by me in such manner and at such time as I should appoint.

Pursuant to my appointment the case came on before me at Stratford, and was tried and heard on the 11th, 12th and 13th days of July, 1893.

Mr. Garrow, Q. C., appeared for the plaintiff, and John Idington, Q. C., appeared for the defendants.

Having heard the evidence, and the argument of counsel, I reserved my decision, and now having considered the matter, I make my report and decide as follows:

By a petition dated the 10th day of January, 1891, signed by the plaintiff and several others, a certain drainage work was asked for.

One D. S. Campbell, P. L. S., was employed by the defendants and he made his report. He brought the water westerly across the east half of lot 10 and then down the center of said lot. His report is dated the 16th May, 1891.

While Mr. Campbell was making his survey the plaintiff ascertained how it was intended to bring the water, and where Mr. Campbell intended to locate the ditch, so without waiting for the report, and as early as the 24th April, 1891, the plaintiff asked to have his name taken from the petition, giving as his reason that the water was being taken out of its proper course. It will be noticed that the petition, in this case, was *for the deepening or widening of a creek or natural watercourse.* The work laid out by the engineer was in a considerable part an artificial work, bringing the water in a different way from that suggested by the petitioners, so the plaintiff was prompt and consistent in asking to withdraw his name and in objecting to the proposed work.

The report was adopted by defendants' council and the by-law was provisionally passed on the 13th day of June, 1891.

The plaintiff then appealed to the Court of Revision. The grounds of appeal, as stated by him, were, 'assessment too high' and 'water taken out of its course.'

The decision of the Court of Revision on 18th July, 1891, was, *that the location should be changed.* The location of the drain however was not changed because the council, much as they thought the change desirable, considered that they had no power to do so. The plaintiff appealed to the judge of the County Court again on the ground, and only on the ground "that the said drain is taken out of the proper watercourse," etc.

The County Judge did not allow the appeal.

The plaintiff on the 5th September, 1891, served the defendants with notice that he would hold them responsible for all damages that he might sustain by reason of flooding or overflowing of water brought upon his premises by this Wilson drain, unless the present location thereof is changed in accordance with the resolution passed on the 18th July, 1891. The plaintiff's solicitor also wrote on 4th September, 1891, threatening suit if location was not altered.

On the 8th June, 1892, the plaintiff, by his solicitor, Mr. Darling, wrote to the reeve complaining that the council instead of adhering to their resolution to alter the location had let the contract for construction upon original location, and threatening an action, but asking for an amicable settlement.

The plaintiff was constantly complaining, and the defendants' council seemed sincerely anxious to get it settled, but apparently for the reason above mentioned, or fearing additional expense, or for some other reason, they made no change in the location but let the contract to the defendant John Reid, and the work proceeded according to original plan.

On 11th July, 1892, the writ issued herein. Up to that time, and even up to the time of the amended statement of claim, the plaintiff was not complaining of the want of a proper petition, or of anything except that the water was brought out of its natural course, and that the work being done was not in fact the work petitioned for.

Assuming that the by-law was illegal, is the plaintiff estopped from complaining? I do not think he is, and I do not think that the fact of his not complaining until after the commencement of this action or the want of a proper petition, deprives him of his right to press that objection now. He has never assented to what the council are *doing on the ground* in this particular drainage work. He has all along objected to this work. This is not at all like the cases of Dillon vs. Raleigh 22 O. R. 53 or Forsythe vs. Bury 15 S. C. R. 543 which were cited. Plaintiff petitioned for a particular work. If that work was being done there would be more force in the argument, but as the work according to plaintiff's view of it, is a different one, and as he withdrew his name from the petition and objected almost from the first, he cannot now be bound by the action of defendants if that action is illegal.

I will dispose of the questions of fact upon the evidence.

It is not necessary to discuss the general powers of any municipality in regard to drainage work and the repair and maintenance of drains.

The work complained of here was undertaken by the defendants and only so undertaken at the instance of certain persons who represented that their lands would be benefited, and the proposed work, whether exactly what was petitioned for or not, was to be paid for by an assessment upon the lands to be benefited. A petition was therefore necessary and such a petition as the one presented to the defendants' council, was said to be, viz., one signed by the majority in number of the owners as shown by the last revised assessment roll of the property to be benefited by the proposed works.

Was this petition in fact sufficient to give jurisdiction to defendants' council to pass by-law 286 for the construction of the drain complained of?

The petition is dated the 10th January, 1891, and was first presented to the council on the 19th of the same month. The council did not then commit itself to the work, but adopted a resolution reciting that a difference of opinion existed "in reference to the proper course to the most suitable and proper outlet for said water and appointing D. S. Campbell, P. D. S., to make a careful survey, in view of locating said drain to be constructed in the proper place and carrying the said water to the most suitable and proper outlet," and instructing him to report to the council at as early a date as possible.

Mr. Campbell made the survey and reported. This report is dated the 16th day of May, 1891, and it states that 59 parcels of land would be benefited by, and should be assessed for, the work.

The petition describes only 27 parcels as lands to be benefited and the petition when first presented had only 18 names.

It does not clearly appear just when the other names were affixed to this petition, but upon the evidence I think they were all there before the by-law 286 was provisionally adopted.

This was done on the 13th June, 1891, and was done after the final revision of the assessment roll for 1891, so that roll is the one to govern. That is the roll recited in this by-law (see Gibson vs. North East Hope).

According to the report there were 59 parcels of land to be benefited. I am of opinion and so decide for the purposes of this suit that each of these 59 parcels must be considered as land to be benefited, and in reference to which we must consider the owner in determining whether or not the petition contains the requisite majority.

I am also of the opinion and so decide, that in determining the question of lands to be benefited I am bound by the engineer's report, that is to say, in considering the sufficiency of the petition, I should not go outside of the report and bring in other lands said to be benefited; nor should I, contrary to the report, reject from it lands said not to be benefited.

These 59 parcels are owned by only 52 persons, as each of seven persons on the roll is assessed for two of the parcels of land to be benefited. These persons are: John Young, Singleton Wilson, Jane Keating, John MacIntyre, Robert Laing, James Laing, and Charles McMain.

Then it was argued that although the engineer in his report put only one owner for each of certain parcels, the assessment roll for

1891 gives other names as owners for distinct parts of these parcels, and that these additional names must be added to the 52. I think Scott Peebles and George Peebles, numbers 637 and 639 on the roll, should both count; one for west half of lot 20 in the 10th concession, and the other for east half of lot 20 in the 10th concession.

I think W. I. Mixon and James Mixon, numbers 557 and 558 on the roll, should both count; one for west half of 26, 9th concession, and the other for east half of 26, 9th concession.

William Wilson and S. Wilson are assessed as number 495, one for 25, 8th concession, and the other for 26, 8th concession, and they should both count.

Without deciding as to other names about which there was a great deal of argument, I add these three to the 52, making 55 in all.

Of these owners there should therefore be at least 28 upon the petition.

The petition had originally 32 names, 31 without the plaintiff's, but the following names upon the petition are not owners: Robert Cleland, reeve, not the owner of any of these lands, and E. I. Hammond, Sarah J. Hammond and Anne Hammond, not on the roll at all.

In determing the question of majority these must be struck out. Taking these four from the 31, and only 27 are left, and it therefore becomes unnecessary to decide in reference to other names attacked. The defendants' counsel almost conceded that the name of the clerk should not be considered, it having been placed there, not in reality as a petitioner, but placed there at the request of the reeve and others and "to strengthen the majority."

He says in his evidence that he will not swear he signed the petition before the by-law was finally passed. I should think him not a *bona fide* petitioner. Then if forced to decide I think the name of Thomas E. Gibson would have to come off, and if so there would only be 25 names left, three less than the required majority.

Defendants' counsel relies upon sec. 7 ch. 37, R. S. O., 1887.

This section prevents the debentures being questioned by the township and makes such debentures valid, but it does not, in my opinion, protect the township from an action of this kind.

So far as appears from the evidence before me, the plaintiff is the only one who can complain, and I cannot say upon the evidence that he has been or will be very seriously injured.

There was a good deal of evidence that the plaintiff's land not only would not be damaged, but would really be benefited by the drain as at present laid out. I think that the weight of evidence is that the plaintiff has sustained a small amount of damage, but as the work has been contracted for, and as the landowners are in the main satisfied, and as the money must be provided to pay the debentures, it would be very unfortunate if there should be a decision invalidating the by-law.

The learned counsel for plaintiff intimated upon the argument that the plaintiff would accept my finding as to damages, and that the plaintiff would acquiesce in the work and be bound by the assessment and all that the defendants have done in the matter.

I think that the plaintiff is entitled to recover the sum of seventy-five dollars, and no more, for all damages and for all compensation which he can in any way claim by reason of the construction of the drain complained of, and I order and direct that judgment be entered for plaintiff against the defendants, the corporation of the Township of Elma, for the said sum of seventy-five dollars, and for costs of suit and of this reference.

And I order and direct that the plaintiff accepting said sum shall be bound by all that the defendants have done in the construction of said drain and in the assessment of his land, and all assessments made for such construction.

I order and direct that the defendants, the corporation of the Township of Elma, do pay the plaintiff's costs and also the costs of the defendant, John Reid.

I order and direct that the sum of fifteen dollars be paid in stamps to be affixed to this my report, to be paid by the defendant, the corporation of the Township of Elma, in part as and for three day's trial, and if the plaintiff affixes said stamps he shall be at liberty to include the amount in his bill of costs to be taxed against said township.

I order and direct that the costs be taxed by the Clerk of the County Court of the County of Perth, at the City of Stratford.

IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.

ARN VS. TOWNSHIP OF ENNISKILLEN.

Damages from Overflow—Purchase with Knowledge.

It is not an answer to a claim for damages caused by overflow that the plaintiff when purchasing was aware of the flooding of the land in previous years by reason of the drain complained of.

March 1st, 1894. B. M. BRITTON, Q. C., Referee.

This action was referred to me by His Honor Judge Robinson, Local Judge at Sarnia, by order dated 30th day of August, A. D. 1893.

It came before me for trial pursuant to appointment, and was tried at Sarnia and Petrolia, together with the following other cases against the same township, namely: In the Common Pleas Division, M. & H. O'Donnell, and three in the County Court of the County of Lambton, Richard Johnson, J. C. Shaw and Andrew Scott.

By consent of parties the evidence in each case, so far as admissable and relevant, was to be used in each of the other cases.

A. Weir, Esq., appeared for the plaintiff, and George Moncrieff, Q. C., for the defendants.

Having heard the evidence and arguments of counsel, I reserved my decision, and now, having fully considered the matter, I decide and report as follows:

The plaintiff, Cornelius Arn, is the owner of west half of lot 1 in the 4th concession of Enniskillen, and the case he makes in his statement of claim is that the defendants, by the construction of the ditch between the 4th and 5th concessions in their township, and the ditches along the townline between Moore and Enniskillen, have brought large quantities of water out of its natural course, without having provided any sufficient outlet for it, and this water has overflowed and injured the plaintiff's land. The plaintiff does not in his statement of claim attack the by-law under which this ditch or drain was constructed, but at the trial evidence was allowed to be given upon this point, and such amendments are asked as may be necessary if upon the whole evidence the plaintiff is entitled in law to succeed.

I think the plaintiff has failed to show that the defendants have brought large quantities of water out of its natural course down upon the plaintiff's land, but it has been proved that this ditch or drain made by the defendants along the concession line between the

4th and 5th concessions, brings more water near to the plaintiff's land than would naturally flow there, and that the drains upon the townline between Moore and Enniskillen, which drains were the only outlet for the water coming down the 4th and 5th concession drain, were allowed to get out of repair, by reason of which some of this water overflowed plaintiff's land to his damage.

The plaintiff has attacked, and I think successfully attacked, the by-law under which the drain between the 4th and 5th concessions was constructed.

The defendants did not assume to make this drain under any general authority by which they could construct it and pay for it out of the general funds of the township, but they undertook it at the instance of a few persons who petitioned, and they paid for it by means of a special assessment upon lands which, according to the report of the engineer, would be benefited..

The petition, even if sufficiently signed, did not ask for the draining of any property, describing it, as required by the statute, but it asks "to have a drain of sufficient capacity, if cut from the townline between Moore and Enniskillen, to side-road between lots 6 and 7, on line between concessions 4 and 5 and that you will have the work done under the act known as the 'Local Drainage Act.'"

Then if it be assumed that the work asked for was to drain the area represented by the lands owned by the petitioners, these petitioners leave nothing to the discretion of the council or to the skill of the engineer as to locating the drain. They asked for a particular drain, locating it precisely. The termini are given and its course is defined.

The petition was presented to the defendants' council on 10th June 1882, and a resolution was passed granting the prayer of the petitioners and instructing the engineer to take the necessary levels. The defendants did not in express terms procure an engineer to make an examination of the locality proposed to be drained, but it seems to have been taken as a matter of course by the petitioners, by the members of the council and the engineer that this particular drain was to be made and they proceeded accordingly.

The engineer was Mr. W. M. Manigault. On the 15th July, 1882, he made his report in part as follows: "I beg to report that I have in compliance with your instructions made a survey and taken the levels for the proposed new drain along the road allowance between concessions 4 and 5, from the townline of Enniskillen and Moore to the side-road between the lots 6 and 7," and then he gives the cost of the work, and assesses the lots from 1 to 6, inclusive, in each concession for its construction. This report was adopted and is recited in the by-law passed by the defendants for the construction of this drain.

When the petition was presented, the last revised assessment roll was the roll of 1881, and it was conceded at the trial by counsel for the defendants that there was not upon that petition a majority in number of the persons as shewn by that assessment roll to be owners, whether resident or non-resident of the lands benefited. In fact a part altogether from the non-resident land owners, there was at least six names of resident owners on the roll for lands to be benefitted and only one person so assessed was a petitioner.

If the roll of 1882 ought to govern, there are 22 names on that roll, and only 11 names on the petition, not a majority even if all the names on the petitions are really on the roll of 1882.

The plaintiff in his notice to the defendants of 21 October, 1892, given by Messrs. Gurd & Kittermaster complains of this 4th concession drain being out of repair. Unless it was out of repair at or near its mouth the plaintiff need not complain. He says this ditch does not drain his land; it brings water to it. Therefore the more it was out of repair above and some distance from plaintiff's land, the less water it would bring and the less plaintiff would be injured. The witness Young negatives the want of repair of this drain.

Upon the whole case I think the plaintiff is entitled to recover, but his claim must be limited to such damage as he has sustained by reason of the additional water brought down by this concession line drain, and not carried away, but allowed to back up and overflow plaintiff's land because of insufficiency of outlet and the want of repair of townline drain.

The evidence establishes at least this, that if townline drains were in good condition and repair they would carry off so much more water, that plaintiff, if damaged at all, would suffer less than at present. It is of course impossible to measure exactly the damages which plaintiff has sustained and for which defendants are liable. The plaintiff went to that locality in 1882, and worked for one Mitchell, the then owner of this land. Plaintiff knew this land to be flooded in 1884, 1885 and 1886 and yet he bought in 1887. It is very reasonable to suppose that when he purchased, he took into consideration the character of the lot, and the probability of its being flooded in times of freshet, but is that an answer to any claim by the plaintiff?

I do not think it is. In so far as plaintiff has been injured by reason of anything illegally done by defendants, or by reason of any neglect of their duty to repair and maintain the outlet drains, he is entitled to recover. The difficulty is to ascertain the proper amount.

The plaintiff's claim is, in my opinion, much too large. His land is low, and in times of freshet likely to be to some extent flooded, irrespective altogether of what defendants have done or neglected. The defendants are now doing what can reasonably be done to remedy the evil of which plaintiff complains, so that there is no case either for injunction or mandamus, and only such damages must be given as beyond any reasonable doubt, the defendants are liable for. The amount of damages as made up by plaintiff, and at his request by George Young, while in my opinion much too large, and assessed upon an entirely wrong principle, are much smaller than the amount claimed by plaintiff when in the witness box.

I have carefully gone over all the evidence and have come to the conclusion that the plaintiff should recover the sum of $170.

In this amount nothing is allowed for the year 1889, as the evidence does not satisfy me that the damage which the plaintiff complains of can be attributed to the defendants. Nothing is claimed for the year 1891.

I assess against the defendants the damages of the plaintiff to the amount of the said sum of $170 down to and including the year 1893.

I report, order and direct that the defendants pay the said sum of $170 to the plaintiff and that judgment be entered for the plaintiff against the defendants for said sum and costs of action and of reference.

I order and direct that the sum of $20, as and for two days' trial, be paid in stamps by the defendants, to be affixed to my report and cancelled, and if plaintiff affixes the same, that sum shall be included in the costs of the plaintiff to be taxed to him.

I order that the costs be taxed by the Clerk of the County Court of the County of Lambton.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION.

SORENSON VS. TOWNSHIP OF COLCHESTER SOUTH.

Contract—Final Certificate—Neglect of Engineer—Equitable Assignment.

Where it is found as a fact that the work was completed and the engineer in charge omitted for a long time after notice of completion to inspect the work, the plaintiff may recover without the engineer's certificate and without showing collusion between the engineer and the defendant or fraud on the part of the engineer.

Orders given by the contractor in respect of a fund actually in being or about to arise in the ordinary course of events out of an existing arrangement amount to equitable assignments of so much of his claim as is represented by them so as to prevent the contractor from recovering in an action where he is not suing on behalf of the payees of the orders.

May 14th, 1894. B. M. BRITTON, Q. C., Referee.

This action was referred to me by order made the 10th day of January, 1894, by His Honor Judge Horne, Local Judge, County of Essex.

Pursuant to appointment it came on for trial before me at the Court House, Town of Sandwich, on the twelfth, thirteenth and fourteenth days of February, A. D. 1894.

Delos R. Davis, Esq., counsel for plaintiff, and A. H. Clarke, Esq., counsel for defendants.

Having heard the evidence and the arguments of counsel I reserved my decision, and now, having considered the matter, I decide and report as follows:

This action is brought for the recovery of the balance due upon a contract made between plaintiff and defendants for the construction of the lower section of the Richmond drain in defendants' township, 584 rods of that drain for the contract price of $1,950, and for extras in and about said drain and in making the culvert mentioned in the contract.

The defendants paid before action $1000.65.

They say by way of defence that the drain was never completed; that the obtaining by plaintiff of a certificate of the commissioner is a condition precedent to the plaintiff's right to recover, and that he has not obtained such certificate; and the defendants plead certain orders given by plaintiff and certain attaching orders which more than exhaust the amount to which plaintiff is entitled, if entitled at all. The defendants deny any liability for extras.

The contract under the seal of defendants, dated the 28th July, 1891, is that the plaintiff will make 584 rods of the Richmond drain according to plans, report and specifications of the said drain on file with the Township Clerk, and these are made part of the contract. Profile is not mentioned, but it must be considered, as in fact it is part of the plan, and is necessary for the guidance of contractor in making the drain.

The specifications and profile were filed with the clerk and were seen by the plaintiff. It is only necessary to refer to the specifications in dealing with the claim for extras. The plaintiff says there was a a change of the location of the ditch or drain in many places and that he was thereby compelled to do extra work. I do not think that he did any work that he can properly charge for as extras, except a small amount of work on McGill's lane.

The specifications say as to straightening "south of the 5th concession road, the drain or creek channel is to be straightened in accordance with the stakes set by the engineer in charge."

On McGill's lane, Mr. Newman, the engineer's assistant, set the stakes upon the curve, and the plaintiff did some work in accordance with the first setting ; the commissioner changed the course and the plaintiff made the ditch upon the straightened line. He did, to some extent, double work and he is entitled to be paid for the part abandoned and for any loss of time occasioned by the change. I fix that amount at $40, and allow that sum as an extra to the plaintiff.

As to other changes, if any any, they were before plaintiff entered upon the work and were only in accordance with the plan and specifications. If stakes were not set when plaintiff signed the contract, or if he did not know where they were to be, or did not clearly understand profile or specifications he should have made enquiry before signing the contract. All the other alleged extras were simply done by plaintiff in the performance of his contract. He did not at the time complain or object, he was not doing as extra work what he now asks additional pay for, but he was doing, and willingly doing, what at the time, he considered part of his contract. He was not doing what he calls extra work with the expectation of being paid for it, he was not authorized to do work as extras, and there was no notice, express or implied, to defendants that they would be called upon to pay any more than the contract price.

Plaintiff was not being paid at so much for each cubic yard of earth excavated, nor did the contract provide that he should only take out a certain quantity, so that he could claim pay for any excess necessarily taken out in making the ditch. Plaintiff was making a ditch 584 rods long of a certain width and depth, and sometimes he made it deeper than required, in one case, according to the evidence, by mere accident, but in no case can he get additional pay.

Then I do not think it has been clearly proved that the plaintiff, upon the whole, really did more work than he was bound to do by his contract.

As to the extra work claimed upon the culvert, I think the plaintiff cannot recover. The contract provides that the plaintiff shall make all necessary repairs to the culvert over the drain on the 4th concession road to the full satisfaction and requirements of the engineer. The engineer required the plaintiff to do all that he did. The engineer was not unreasonable. It would never do, merely because a difference of opinion between engineers, to go in the very teeth of a contract like this, and set aside the requirements of the engineer in charge and adopt those of another.

Now as to the contract and the work done under it :

For this work plaintiff was to be paid $1950 ; four-fifths of the amount as the work progressed, if performed to the satisfaction of the engineer, and that was to be shown by the engineer's certificate ; and the balance of one-fifth on the completion of the contract according to the plans and specifications.

The covenant to pay on part of defendants goes farther and provides that they shall pay only if the work is done to the satisfaction of the engineer, and upon production of his certificate as the work progressed and at the end the production of his final certificate.

The questions here are :

1st. Was the work done substantially and reasonably and practically in accordance with plans and profile and specifications?

2nd. Is it necessary, *i. e.*, is it a condition precedent to plaintiff's recovery that he produce the final certificate of the commissioner? or as plaintiff has not obtained this, has he any remedy upon the evidence before me, and is he entitled to any relief ?

The work was stated by plaintiff to be completed about December, 1891, or 1st January, 1892. No question is raised by defendants as to time or disposal of the earth excavated and practically no question is raised about the width or about the depth, except in certain places which I shall refer to later.

It is important to notice that the contract price payable to plaintiff is only $1950, for work that the defendants' engineer estimated at $2800, so the defendants should, if they can legally do so, deal liberally with the plaintiff.

It is further to be noticed that by the terms of the contract—a contract in which substantial sureties joined—this work was to be received if complete, within 10 days after notice of its completion, and the duty was cast upon the commissioner of so watching the work during its progress as to see and know how plaintiff was getting on, and in the event of the work not being properly prosecuted so that in the opinion of the commissioner there was not a reasonable probability of the work being completed within the time specified, he could have reported the same to the defendants, and have recommended that the work be resold ; and if that report had been made by the commissioner and adopted by the council the plaintiff would have forfeited his right to prosecute the work further, and would have forfeited any claim he had for any work then already performed.

The work was considered by plaintiff complete in December, 1891. The commissioner then caused the plaintiff to be notified that the drain required deepening at certain points. Plaintiff did some work after which he alleged was sufficient to fulfill the contract, but defendants took no action.

In April, 1892, plaintiff caused the defendants to be notified by his solicitor that his contract was complete, and still no action by defendants.

On the 10th September, 1892, a formal notice was given to defendants that drain was completed, and then certain measurements were made by defendants, and complaints made as to a comparatively small part of the drain.

On the 5th October, 1892, writ was issued.

The witnesses for the plaintiff show that there is a substantial performance of the contract.

Mr. Baird, the commissioner, says it may be considered all right to station 188.

Mr. DeGurse says that from station 201 to 225 are deep enough. The only ones to deal with upon the evidence are 189 to 200 and 226 to 233, inclusive, and from a careful consideration of the evidence and comparing the evidence of the different engineers as to their different measurements at divers times, I come to the conclusion and now find as a fact and so report that the ditch, whatever may be its condition now in parts, was practically and substantially completed on the 1st of January, 1892, and ought to have been accepted by the defendants, and paid for by them.

As to the necessity for the certificate of the commissioner, I am of the opinion that in this case the plaintiff is entitled to succeed and recover without that certificate.

The commissioner was the servant of the defendants. He was required to receive this work from the plaintiff within ten days after notice of its completion, if complete. If the commissioner upon the notice of its completion after the additional work was done by plaintiff, had examined and found it not complete and had charged the plaintiff with the extra cost of his examination, and had told him then precisely what was complained of, and that the final certificate would be withheld until the dispute, if there was a dispute, had been determined, I would think the absence of certificate would stand in plaintiff's way of recovery herein. The commissioner does nothing; the defendants will do nothing, and all the time they have had the benefit of plaintiff's work.

If I am right in my finding that the work has been completed by plaintiff and that he ought to be paid for it and that the commissioner should if necessary certify then the plaintiff must have some remedy. It was suggested that the proper remedy in such a case would be by an action for a mandamus to compel the commissioner to certify.

The commissioner and the defendants in this case for the purpose of this action should be treated as one, and to allow the defendants to escape liability would be allowing them to take advantage of their own wrong, for as I said before, the commissioner is merely their servant in this matter.

The cases cited by Mr. Clarke, for the defendants, are very strong indeed, and may establish the point so ably contended for by him, but I think them distinguishable from the present case, and I think here the plaintiff should succeed notwithstanding the absence of the final certificate of the commissioner and that to entitle him to succeed it is not necessary to shew collusion between the commissioner and defendants, or to shew fraud on the part of the commissioner.

I think there is no proof of collusion or fraud. There was a difference of opinion between plaintiff and the commissioner about a small portion of the work. There was no attempt on the part of the commissioner to reconcile this difference and after the first notice to the plaintiff of what was deficient, and after the plaintiff attempted to remedy that, and after plaintiff stated it was remedied no particulars were given to shew what was complained of, and certainly the commissioner did not give the work of the plaintiff that prompt and fair consideration to which it was entitled, and while he did not do as he had ought to have done, to limit the dispute between him and the plaintiff and to bring that to a speedy determination as he could have done, I do not think there is any evidence that he acted corruptly.

He is certainly mistaken when he says that plaintiff did not ask him for a certificate. The plaintiff did ask him and, according to the very terms of the contract, and upon the undisputed evidence the plaintiff was entitled to progress certificate, that is to say for a certificate for some amount more than the plaintiff received, for work done to the satisfaction of the commissioner.

The next question is as to the orders given by plaintiff. Do they amount to an equitable assignment of so much of plaintiff's claim as is represented by them, so as to prevent the plaintiff from recovering in an action where he is not suing on behalf of the payee of these orders?

All of these orders of the plaintiff are upon the defendants in respect of a fund either actually in being, or about to arise in the ordinary course of events out of an existing arrangement.

See judgment of Mr. Justice Osler in Brown vs. Johnson, 12 O. A. R. 197. Upon the authority of that case and of Lane vs. Dungannon, Ag. D. P. Ass'n., 22 O. R. 264, and cases there cited, I think that each of these orders amounts to an equitable assignment of so much of plaintiff's claim as is mentioned therein, and so to that extent the plaintiff cannot recover in this action against the defendants if these orders are still outstanding and unsatisfied by the plaintiff. Upon the evidence and upon what was admitted at the trial, or rather what was to be taken as proved at the trial, all of the orders named were given by the plaintiff and were outstanding, although the original orders given to Straith were not produced.

I do not think I should take into consideration the garnishee proceedings, except as follows:

If of the debt due by the defendants, any part of it has been properly attached in the Division Court to answer any debt owed by plaintiff then that amount shall no doubt be paid to the primary creditor instead of the plaintiff. There was evidence that attaching orders to the amount of $56.14 were lodged against what the defendants owed to the plaintiff. As the defendants disputed any debt, that must be a matter to be dealt with hereafter and to be kept out of the amount now found against the defendants if the defendants are legally liable for same as the primary creditors.

I find, and so report, that the plaintiff is entitled to recover from the defendants in this action the sum of $139.44. Made up as follows:

Contract price	$1950.00
Less paid before action	1000.65
	$ 949.35
For extras as above stated	$ 40.00
	$ 989.35
The defendants are entitled to set off the taxes for 1890 which plaintiff owes to defendant	$ 44.45
	$ 944.90

Then for the reasons above given, I think the plaintiff has assigned by the others hereinafter mentioned, part of his claim, namely to the amount of $805.46, which amount he is not entitled to recover against the defendants in this action. Deducting that amount from the $944.90 leaves $139.44, as above.

The orders are as follows:

In favor of J. C. Iler	$ 93.00
" " " S. Straith	200.00
" " " " "	150.00
" " " " "	50.00
" " " " "	75.00
" " " John McCarty	45.00
" " " D. Mayhew	67.65
" " " C. Ford	70.49
" " " R. Balkwell	54.32
	$805.46

It would have been better so that all rights could have been determined in this action if the plaintiff had been in a position to sue for the benefit of the parties in whose favor the orders had been given or some of them, or if the persons holding those others had been made parties to this action, but I can only deal with the facts as they are before me, and no one's rights as to these orders are in any way affected or attempted to be adjudicated upon, further than to prevent plaintiff from recovering the amount thereof in the present proceeding.

I think the plaintiff is entitled to full costs of suit and of this reference.

I order and direct that judgment be entered for the plaintiff for the sum of $139.44 and for his costs, the costs to be taxed by the Clerk of the County Court of the County of Essex.

The right is expressly reserved to the defendants to set off against said judgment for debt the amount of the garnishee orders in the Division Court so far as I have power to so reserve, if these orders are legally binding upon the defendants and an order to pay over has been obtained or shall be obtained against the defendants.

I order and direct that the sum of $10 be paid in stamps to be affixed to this my report, and that the same shall be paid by defendants, and if the plaintiff pays the same, he shall be at liberty to include the amount in his costs to be taxed against the defendants.

IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.

DESMONDE VS. ARMSTRONG, ET AL.

Natural Watercourse—Diversion—Abandonment of Easement.

A natural watercourse is not created by the overflow of water in times of freshet upon lands of lower level than the adjacent lands. The diversion of a watercourse with the acquiescence of all interested parties for a long period of time entitles the owner of lands relieved by such diversion to say the original course shall not be restored. The diversion of water raises a legal presumption of an intention to abandon the right to have it flow in the original course.

May 21st, 1894. B. M. BRITTON, Q. C., Referee.

This action was commenced by writ of summons issued on the 23rd day of May, 1893. It was brought down for trial at the sittings of the High Court at Chatham, and on the first day of November, A. D. 1893, an order was made by the Honorable Mr. Justice Meredith, referring this action to the referee under the Drainage Trials Act, 1891, but giving the plaintiff the privilege of having the action disposed of by an official referee under the Judicature Act.

The plaintiff not electing and no other agreement having been arrived at between the parties, judgment was signed on the 29th day of November, 1893, as follows:

The first day of November, 1893.

This action coming on for trial this day in presence of counsel for plaintiffs and defendants, upon hearing read the pleadings, and what was alleged by counsel on both sides, this court under the provisions of the Drainage Trials Act and amendments thereto, and all matters in issue herein including the question of damages be transferred to Byron M. Britton, Esq., Official Referee, under the Drainage Trials Act, to be by him adjudicated on, and disposed of, and it was further ordered that the costs of the day be costs in the cause.

Pursuant to my appointment the case came on for trial before me at Ridgetown, in the County of Kent, and was tried and heard on the 8th and 9th days of December, A. D. 1893, in presence of all parties, they consenting thereto.

Hon. David Mills, Q. C., counsel for plaintiff, and J. B. Rankin, Esq., counsel for defendants.

Having heard all the evidence and what was argued by counsel, I reserved my decision, and now, having considered all the evidence and arguments of council, I make this my report and decide as follows :

The plaintiff is the owner of the west half of 78, south of Talbot road, in the Township of Howard. The defendant Armstrong is the owner of the east part of 79, south of Talbot road, and the defendant Finlayson is the owner of west part of 78, north of Talbot road.

Water came from the farm of Finlayson to Talbot road and thence ran westward along the north side of Talbot road, crossed Talbot road to the south, and ran across the land of Armstrong.

It is alleged by plaintiff that the defendants intercepted this water at a point several rods easterly from the point where it had crossed Talbot road and so diverted it from the course in which it had flowed that it was discharged upon plaintiff's land, to his damage.

The defendant Armstrong says that he has not interfered with the natural flow of the water, that he has not caused more water to flow upon plaintiff's land than would have flowed there in a state of nature. He further says that the water originally did not naturally flow westerly along the northerly side of the Talbot road but its natural course was to and upon plaintiff's land ; that it only flowed westerly and entered upon Armstrong's land by reason of an obstruction placed several years ago in the watercourse at the point where it crosses Talbot road, and that the waters were by this obstruction diverted out of their natural course and so caused to flow westerly along Talbot road ; that in 1891 the said diverson was stopped and the waters restored to their natural course, which he says was perfectly right, and if any damage has thereby been occasioned to plaintiff, he, Armstrong, is not liable therefore.

The defendant, Finlayson, puts in a general denial.

Upon questions of fact there is not very much seriously in controversy between the parties.

I do not think the defendant, Finlayson, is liable in this action for anything which plaintiff complains of.

The defendant, Armstrong, says in his evidence that in 1890 he told the plaintiff that he was going to bring the water down the easterly course, that is, the course now complained of by plaintiff, and plaintiff objected to this. Then both defendants were acting together, and defendant, Finlayson, cut across Talbot road and dug 15 or 16 rods in Armstrong's orchard. Plaintiff says he served him with a notice, and he, Finlayson, not only desisted, but "He filled up the portion he dug on the road." He has done nothing since. Plaintiff himself says that he joined him in the action because he did not fill up the part dug by him (Finlayson) in Armstrong's orchard. That is not the cause of damage to plaintiff.

Finlayson evidently did not want to do anything that was contrary to law or that would involve him in a law suit. It does not matter whether in the first instance Finlayson was acting of his own mere mortion, for his own supposed benefit and within his rights, or was acting at the request of Armstrong and indemnified by Armstrong; he did not persist when plaintiff objected. Then Armstrong says "After Finlayson abandoned I dug across the road, and the council was to furnish tile for the road." Plaintiff was complaining of what was done after Finlayson ceased. If nothing more had been done after Finlayson filled up the cut he made across Talbot road, this action would not have been brought. I do not find any evidence on the part of the plaintiff to connect Finlayson with what plaintiff complains of, and I accept as perfectly true what Finlayson says, that when plaintiff told him to stop he said he would stop and did stop, and that he never has had anything to do with it since. Finlayson owned only about two acres and even this parcel he sold to his son in 1891. This action should be dismissed as against the defendant, Finlayson, and with costs.

Then as to Armstrong it is not necessary to discuss the question as to the existence of a natural watercourse north of Talbot road. The plaintiff in his statement of claim says there was one, originating upon the farm of the defendant, Alexander Finlayson, and extending into the Talbot road, and it is part of the defendant's case that there was such a watercourse. Armstrong says this natural watercourse extended across Talbot road and the water would have flowed naturally where he now wishes it to go, but for the obstruction placed in the watercourse where it crosses Talbot road. Is he correct?

In Beers vs. Stroud, 19 O. R. 10, the head note is: "A watercourse entitled to the protection of law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel." It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character.

This definition of a watercourse is perhaps a little modified or limited by Williams vs. Richards, 23 O. R. 651. The head note of that case is: "That cannot be called a channel or watercourse which has no visible banks or margins within which the water can be confined; and an occupant has no right to drain into neighbor's land, the surface water from his own land not flowing into a defined channel."

I do not think that the evidence establishes that the natural watercourse extended across Talbot road at the point where the defendant, Armstrong, contends that it did. Unquestionably the land south of the road just opposite the point where the defendant, Armstrong, says the obstruction was placed, is lower than immediately to the east or immediately to the west, and water in time of freshet has flowed from lot 78 north of the road, and flowing south westerly has flowed upon lots 78 and 79 south of the road; but such overflow at such times will not in my opinion create a watercourse within the definition given above. Upon the evidence I find that the natural watercourse did not extend south of Talbot road, as contended for by the defendant Armstrong.

But even if this natural watercourse did extend across Talbot road, and enter upon the east half of lot 79 south of the road, as the defendant, Armstrong, alleges, I think the diversion of it for so long a time and under the circumstances as given in the evidence, gives the plaintiff the right to say that this water shall not be restored to its original course. If the doing this will bring water upon plaintiff's land to his damage, which would not otherwise flow upon it.

It is an undisputed fact that the plantiff and those under whom he claims have for over 40 years enjoyed the west half of 78, south of Talbot road, free from the flow of water from the highway entering upon Armstrong's land at the point where defendant says it would naturally flow. To enable defendant Armstrong after so long a time to disturb the existing state of things to plaintiff's prejudice, his right would require to be clearly established. The defendant Armstrong upon his own showing, knew of what he calls the obstruction, and he and those under whom he claims have acquiesced in its being there for over 20 years. Has he now a right as against the plaintiff to remove the obstruction and put upon the plaintiff a burthen the plaintiff has been free from for more than 20 years?

Many of the cases cited by the learned counsel for the plaintiff are not in point, but apply rather to the converse of this case. If the natural flow was across plaintiff's land, could the plaintiff in the case of such a diverting of the water as Armstrong says took place, against the wish of Armstrong, remove the obstruction and restore the water to its original course? I do not think he could. The cases cited seem to me to establish that the use by Armstrong would have ripened into a right to have the water flow as it does flow, and plaintiff could not interfere with it. That is a different case. If it is a natural watercourse has the plaintiff here acquired any right against the defendant Armstrong to keep the water out of, and to prevent Armstrong from returning it to its natural course? I have not found any case just like this. The canal cases cited do not for obvious reasons assist in determining the question. In this case the defendant Armstrong and those under whom he claims have accepted this water diverted from its natural course, and it may be considered as if plaintiff or some one of his predecessors had diverted it. Armstrong has acquired a right to its flow in its present course, and the plaintiff has lost the right to its flow in its former course. If the plaintiff ever was a riparian proprietor with riparian rights he has ceased to be so, and has lost these rights; and the stream must be considered as a natural stream flowing westerly along Talbot road, as it did before defendant's interference with it, or as an entirely artificial watercourse, made by an appropriation or diversion of the water with the intention on the part of all concerned that the changed course should be permanent, and so the defendant has no more right to remove from the highway the obstruction which caused the diversion of water than he would have to make a ditch upon his own land to conduct the water directly from it to the land of the plaintiff. The defendant's enjoyment of the water so far as it was a benefit was as of right, and the right to so use it became an absolute right as against the plaintiff.

The principle applies to some extent in such a case as this as applies in the case of a person abandoning his rights upon a stream or natural watercourse. If a mill owner on a stream pulls down his mill and abandons his mill site and an adjoining land owner builds a mill conducting to it the relinquished water, in the event of the former mill owner wishing to rebuild, it would be a material enquiry whether he had completely abondoned the use of the stream or left it for a temporary purpose only. Liggins vs. Inge, 7 Bing 682. Admitting for the sake of argument that the defendant Armstrong had the right to the flow of this water south of the road as he claims, upon the evidence there was an evident intention to renounce this right, and now rights have been acquired by defendant as to the new watercourse westerly along the highway, and by plaintiff to obstruct the water and have it flow westerly instead of upon his land.

If the defendant Armstrong and those under whom he claims had the right to the flow of the water as now set up, then diverting the water raises the legal presumption of an intention to give up the right, and it lies upon Armstrong to show that the giving up of the right was of a temporary nature only. See Gale on Easements 594.

If the plaintiff was in the position of a riparian proprietor of lower lands he has by the uninterrupted enjoyment for over 20 years of throwing back the waters upon the lands above, acquired the right to do so.

See Coulson vs. Forbes, p. 107.

Enckly vs. Owan, 6 Ex. 353.

Wright vs. Howard, 1 Simmons vs. Stuart, 203.

The damages already sustained by the plaintiff, clearly attributable to what is complained of, are not large.

Upon the evidence I think I should not allow damages for 1891. It is difficult to see how the wheat winter-killed as plaintiff says, can be charged to the defendant, and I find equal difficulty in allowing for the hay said to have been damaged in May or beginning of June, 1891. The year 1892 was very wet, and some of the damages plaintiff sustained was damage in common with other farmers in that vicinity. I think the plaintiff entitled to a small amount of damages for 1892. In 1893 the evidence establishes that some of the damage sustained, was by reason of the water brought upon plaintiff's land as the plaintiff alleges. The action was brought to try a right and for an injunction as well as for damages. The plaintiff is entitled to an injunction to restrain the defendant from continuing the diversion of the water complained of and from bringing the water upon plaintiff's land, but in view of the attempts that have been made to settle I direct that no injunction issue if the defendant Armstrong complies with this my report and removes what is complained of within three months from the date of filing the report.

I find and so report that the damage which the plaintiff should recover against defendant, Thomas Armstrong, amount to fifty dollars and I direct that judgment be entered for the plaintiff against the defendant Thomas Armstrong for the sum of fifty dollars and costs.

The defendant Thomas Armstrong should pay the costs of the action upon the High Court scale and of the reference on the County Court scale. What defendant Armstrong did was not hastily done but was well considered by him. The plaintiff repeatedly notified him to desist from bringing the water upon plaintiff's land.

Armstrong was advised by John Crowder on New Year's day, 1891, not to put the new culvert in, and Armstrong said "He was not afraid, that he was not going to be bluffed off." John Lagg heard Armstrong say that Finlayson objected to go on with the proposed change, and that if Finlayson objected, he, Armstrong, would stand between him and all harm; that there were notices sent around but that he did not take any more notice of these than he would of a dog barking.

I order and direct that the defendant Thomas Armstrong do pay full costs of action and reference as above stated.

I order and direct that the defendant Thomas Armstrong do pay the sum of $10 in stamps to be affixed to this my report, and if the plaintiff affixes the same, the sum paid therefore be included in the plaintiff's costs to be taxed against the defendant Thomas Armstrong.

I direct that the costs be taxed by the Clerk of the County Court for the County of Kent.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION.

FEWSTER VS. TOWNSHIP OF RALEIGH.

Evidence—Creek—Vis Major—Damages—Neglect to Repair—Onus—Maintenance—Negligence.

A provisional By-law containing the report of an engineer employed by the council is evidence of the facts stated in it. No distinction should be drawn between deepening a creek and constructing a ditch, the former being to all intents and purposes a new drain. It is a condition precedent to getting the benefit of the "Act of God" that the party pleading it shall have performed its duty.

If the Court can see upon the whole evidence that a substantial, ascertainable portion of the damages is attributable solely to the excess of water which would have overflown if the defendant had performed its duty of keeping drains in repair then there ought to be a proper reduction in that respect, but the burden of proof is upon the defendant to show beyond a reasonable doubt that if it had done its duty the same damages would have resulted. The deepening, widening and extending of drains so as to carry away all the water they were originally designed to carry away, is a work of maintenance and repair within the meaning of the Drainage Act; and persons injured by neglect to so maintain and repair are entitled to damages. An action lies for doing what the legislature has authorized if it be done negligently and if by the reasonable excercise of the powers given the damage could be prevented; it is within this rule "Negligence" not to make such reasonable exercise.

November 1st, 1894. B. M. BRITTON, Q. C., Referee.

This action was commenced in the life time of Richard Fewster by writ issued on the third of March, 1890.

After issue joined and at the sittings of the Chancery Division at Chatham on the 23rd day of May, A. D. 1892, by the judgment and order of the Chancery Division of the High Court of Justice this action was referred to me to be disposed of under the provisions of the Drainage Trials Act of 1891 and the amendments thereto, and by that order the costs in the action not before then disposed of, and all other costs, including the cost of the reference, were to be in my discretion.

Pursuant to appointment given by me, the trial commenced at the Town of Chatham on the eleventh day of November, A. D. 1892, and was adjourned from time to time at the request of the parties or one of them until concluded.

C. R. Atkinson, Q. C. appeared for the plaintiffs, and Matthew Wilson, Q. C., Mr. Kerr and Mr. Rankin appeared for the defendants.

After the reference to me the plaintiff died and the suit was revived by the executors above named.

On the 14th day of November, 1892, on the application of the defendants, and upon hearing counsel for all the parties, and with the consent of all the parties, I made an order that this action and the following actions all in the High Court of Justice Chancery Division, viz.:

1. Dolson vs. Township of Raleigh;
2. Hitchcock *et al.* vs. Township of Raleigh; and
3. Huthnance vs. Township of Raleigh;

and all referred to me should be tried together so far as the question of liability of defendants to the plaintiffs or any of them is concerned, and that the evidence so far as applicable, and saving all just exceptions, should be used and considered as given for each or all the plaintiffs, against the defendants, and for the defendants against any one or more or all the plaintiffs.

The actions were tried together, all parties consenting.

Mr. Douglas, Q. C., and Mr. Walker appeared for the plaintiffs in the actions other than the Fewster case.

Having considered the evidence and the arguments of counsel I now make my report and give my reasons therefor:

Richard Fewster was the tenant of lot 13, 5th concession of Raleigh under a lease dated May 1st, 1886, for the term of six years, at a rental of $200 for the first year and $300 after. His title was admitted.

The complaint is that defendants have not kept in repair three large drains in their township, namely: Government Drain Number One, Government Drain Number Two, and Raleigh Plains drain, and by reason thereof damage by water was done to the crops on this lot 13, 5th concession.

It is also charged by plaintiffs, (1) that Government Drain Number One, unless deepened and widened, and Government Drain Number Two and Raleigh Plains drain, unless deepened, widened and extended so as to increase their capacity sufficiently to convey the waters that would naturally have flowed into same when constructed, are inadequate, even if repaired to their original capacity, to carry off the waters brought into the same by the other drains constructed by defendants, and by others with defendants' permission, and as a result these drains overflow plaintiff's land and crops are injured. (2). That the defendants during the construction of Government Drain Number One interfered with, and departed from, the government plans and thereby negligently overcharged the drain to the damage of the lands of the plaintiff. (3). That the defendants have been guilty of gross negligence in the construction of the main drains and in allowing to be constructed contributary drains, etc., and in that they have not kept in repair the Government drains Nos. 1 and 2 and the Raleigh Plains drain.

And the plaintiffs claim damages and a mandamus to compel defendants to repair and enlarge, and an injunction to restrain the defendants from sending waters or allowing waters to flow into these drains to such an extent as will cause them to overflow.

The defendants in answer, not only deny liability but set up everything that can possibly be pleaded as a defence.

At the request of the parties, and in presence of counsel for plaintiffs and defendants, I visited Number One Government drain, Number Two Government drain, Raleigh Plains drain and the premises then occupied by Richard Fewster. I found these drains in places considerably out of repair, and I am, by the view, better able to deal with such evidence as relates to want of repair in a way satisfactory to myself. At the time of my visit there was no freshet on. I made no measurements and as I then stated to the parties I was not proceeding on any special knowledge or skill of my own. What I saw, as to want of repair, is in accordance with the weight of evidence given before me, and the conclusions reached by me are the conclusions I would have arrived at upon the evidence alone if I had not visited these drains.

The experience of the Township of Raleigh, in its many attempts to reclaim and improve lands, is a most interesting one ; but much as lands have been benefited the experience has proved, and is likely to prove, very expensive. Only about thirty years ago the principal settlers in that township upon lands regarded as valuable, were upon the lands by the Thames and in the 11th concession and south to Lake Erie. There were settlers also upon knolls and "islands" upon what is now called "plains." The first drain in the township under any drainage law was the "Raleigh Plain" made under a by-law passed 5th September, 1864, and the area thereby then to be drained was all that part of the township lying north of the northerly limit of the 8th concession, east of the line between lots 6 and 7, west of the line between lots 18 and 19 and extending north to the Thames. This Fewster lot was assessed as one of the lots to be benefited by this original drain. From that time the township council has been kept busy in passing drainage by-laws. Over 100 of these have been put in as exhibits or otherwise referred to, during these trials. I do not refer particularly to many of these, but notice that as early as 1869, and before the making of the Government drains, the defendants by by-law No. 193, provided for the deepening of Flook's drain. This then proved to be, and always has been, a great feeder to Raleigh Plains drain. In 1870 the defendants provided for two drains the "Howard" and "Lewis," which commenced in the Township of Harwich but terminated in Raleigh and were taken by defendants to the "Flook" as an outlet. Then owing to the above and other drainage works, Government Drains Numbers One and Two were made. Number One was commenced in 1870 and completed in 1873. Passing over what was done by defendants during the years from 1870 to 1874, in 1874 and 1875 the Raleigh Plains drain was deepened and widened. Contemporaneously with the enlargement of Raleigh Plains drain, and afterwards, work was continued by defendants which brought largely increased quantities of water down, and brought it with greater velocity.

The Doyle drain was made by deepening and widening a creek in 1876, and in the same year the Moody and Bavin drains were made. The "Mummery" was made in 1877. In 1878 the "Ferguson" and "Lawrie" drains and the "Miller" and "Dalrymple" were widened and deepened. In 1879 the "Vail" and "Four-Rod" were widened and deepened, and so on, without further enumerating, the work was continued down to the commencement of these actions.

During all this time the occupiers of farms along the drained area owing lands assessed for those new and enlarged and improved drains, were, as they had a right to do, making new and improving old farm drains, thus contributing additional water so as to render improved and larger outlet drains an absolute necessity.

The plaintiffs complain that the defendants did not provide for what, by their own acts, was rendered necessary to the proper cultivation of these lands.

What plaintiff Fewster really complained of is best shewn by what his solicitors wrote to defendants on 4th February, 1886. They say they are instructed to take proceedings for the flooding of 13, 5th concession, Raleigh, etc., and they say: "You are charged with opening new drains into, and putting water into the above mentioned drains (that must mean Government drain Number One) far beyond its capacity and the result is that for years past every flood overflows the farm and ruins the crops. We seek damages and an injunction to stay you from continuing the overflow or a mandamus to compel you to take the extra water elsewhere."

And again on the 3rd July, 1889, Fewster's solicitors write: "We have written you several times about the drains hereafter mentioned, and lastly, on August 31st, 1887, stating that proceedings were then stayed * * in the expectancy that a drain would be constructed or proper steps taken by you to prevent the flooding of 13, 5th concession," etc. * * they have delayed taking proceedings until now but feeling, etc., * * we have been instructed to proceed at once to compel you to provide some remedy for the damage done to said farm and crops and to seek for a mandamus to compel you to repair your drainage system by deepening and widening in particular the drains called the Government drain and the Raleigh Plains drain and others leading into them and to make proper outlets for same so as to prevent the flooding of our lands," etc., etc.

Richard Fewster was not complaining so much of want of repair of Government Drain Number One, by putting it simply in the same condition as at first, but he was complaining of their bringing more water down, opening new drains and taxing the outlet drains beyond their capacity.

No evidence has been given to shew that if, in the years 1887, '88, '89, '90, '91 or '92 Government Drain Number One or Raleigh Plains drain had simply been as they were when completed they would in that condition and state of repair have been sufficient to have prevented any damage to the plaintiffs.

These drains are out of repair and are therefore less efficient. It has been stated by witnesses and it is a fair inference from undisputed facts that damages have been increased by reason of this want of repair, but the main complaint and contention is that the defendants by opening new drains and cleaning out and repairing old drains have brought more water down and brought it more quickly, and they have done this without in any way providing an outlet or having regard to the capacity or condition of the outlet drains.

There is no doubt upon the evidence as to what was the condition of affairs as to drainage in the area in question at the time of the commencement of the Fewster action. This is shewn by the by-law of defendants provisionally adopted 9th June, 1891. The admission of this as evidence was objected to by Mr. Wilson. It is in my opinion good evidence. It is an act, a deliberate act, of defendants' council. Mr. Coad was employed by defendants to make an examination and report and did so. His report to the council is the statement of the defendants servant in the course of his employment and in reference to the subject matter about which he was then employed, but even if the by-law is not evidence of the facts stated in it, these facts are substantially proved otherwise by the evidence of Mr. Coad, Mr. McGeorge and of others.

Mr. Coad says, and there is plenty of evidence to the same effect, (1) that Raleigh Plains drain is out of repair, and even if in a good state of repair at its present size is totally insufficient to carry the large volume of water imposed upon it by drains having much greater fall, and whose united cross-section is more than double that of it; (2) that Government Drain Number Two which enters Raleigh Plains drain is also much out of repair and is insufficient to carry waters brought into it through drains of greater fall, and (3) that Jeanette Creek, the common outlet of these two, in its present condition, forms a very insufficient outlet.

Mr. McGeorge told the defendants by his report to them of 10th November, 1887, that "the Raleigh Plains drains along the portion from the Drake Road to the 12 and 13 side road is much in need of improvement, as the lands in its vicinity are flooded and damaged by waters caused to flow from the higher lands in a portion of Raleigh and Harwich which are drained by the Raleigh Plains drain as an outlet." "The improvement and enlargement of the Raleigh Plains drain is a pressing necessity, and demands the best attention of your honorable body, as the land owners in its vicinity are liable to great loss and inconvenience from the water overflowing its banks at frequent intervals even during the summer season and caused by the ever increasing drainage going on in the upper lands."

It has been clearly established in the cases before me, as was admitted by the parties in the case of Williams vs. Raleigh, that even if both Government Drain Number One and the Raleigh Plains drain were of the same size respectively as they were when constructed or enlarged, they would be wholly insufficient to carry off the water now brought down to them.

The cause of the increased quantity of water I have stated above. The evidence is so voluminous as to the construction of other drains that I do not stop to further particularize.

The defendants say that they have not constructed any drains, that creeks have been deepened. I do not think any distinction should be drawn between deepening a creek, so called, so that more water will flow down it than would naturally flow, and making a ditch to take water from a higher point to a lower. By the deepening more water is brought down, and it is brought down with greater speed. It is to all intents and purposes a new drain although made in the low ground, in what is called a "run" or creek. These creeks are not creeks with well defined banks, creeks that are the natural outlet for the water in such quantities as these "creeks" carry, after drainage work is done upon them.

I find and so report that each of these drains, namely: Government Drain Number One, Government Drain Number Two and Raleigh Plains drain is out of repair, and has been since 1886, and that these drains have not since then nor has any of them been maintained and kept in repair by the defendants, although some work has been done in the way of cleaning out and repair.

I am not able to say upon the evidence and I do not say that any damage would have resulted to the plaintiffs, or any of them, by reason of want of repair of these three drains, if no more water had been brought to them than when these drains were originally constructed, or as to the Raleigh Plains drain, than when enlarged and improved in 1875. I find and so report that by reason of the increased quantities of water brought by the defendants to Government Drain Number One and to the Raleigh Plains drain, these drains did overflow and did damage the crops on adjacent lands, and these drains would overflow in times of freshet even if these drains had been of their original size and condition and that owing to the reduced capacity of these drains and of Government Drain Number Two by reason of their being out of repair they overflowed sooner and the water remained longer upon adjacent lands to the great damage of the owners.

The judgment of the Privy Council on the appeal of Raleigh against Williams, determines "That an action for damages against the municipality lies at the suit of any person who can show that he sustained injury from the non-performance of the statutory duty" of preserving, maintaining and keeping in repair, drainage works within its own limits, whether the work is a work constructed by the municipality or under the Government Drain Act, and that in order to maintain such an action for damages it is not necessary that any previous notice in writing be given. That judgment also decides that the municipality is liable, although not in an action but by arbitration, for any damage "necessarily resulting from the excercise of the statutory powers of the municipality and for any damages done in the construction of drainage works or consequent thereon."

I think these cases, except as hereafter stated, must follow Williams vs. Raleigh. The facts are very similar. As to the lands east of that drain, no such difference exists as can relieve the defendants from liability. In Williams vs. Raleigh a good deal of stress was laid upon the fact that the embankment on the western side of Government Drain Number One was allowed to get out of repair, and it is said in Fewster's case the more that embankment was out of repair the better for Fewster. That is true, but there seems to have been plenty of water for all that, and it came upon Fewster by coming from the south. All the outlet drains being surcharged, his land was overflowed by reason of the excessive quantity of water brought down, without Government Drain Number One or Raleigh Plains Drain being of sufficient size or in sufficient repair to carry it off.

I can adopt the language of the referee, quoted in Williams vs. Raleigh, as to drain Number One. The bad condition of Number Two and the Raleigh Plains drain was so clearly established before me that my finding is the same in regard to these. In that case their Lordships say: "So far, therefore, as relates to the damage occasioned by the overflow which might have been prevented, if Government drain and its embankments had been preserved, maintained and kept in repair, their Lordships are of opinion that the plaintiffs are entitled to maintain the action, and they do not think that this right is prejudiced or affected by the fact that the municipality have poured into Government Drain Number One excessive quantities of water by means of other drains constructed under by-laws duly passed. It may be, and perhaps it ought to be, inferred from the referee's report that there was at times some oveflow from the latter cause which, even if the drain and embankment had been preserved, maintained and kept in repair, would not have been prevented, but this, in their Lordships' opinion, can make no difference as to the duty of the corporation to keep the drain in such a state as to carry off in relief of plaintiff's land, all the water which it was capable of carrying off, nor as to the plaintiff's remedy by action for the damage which was caused (as the report expressly finds) by the non-performance of that duty."

I am of opinion, and so report, that some of the damage complained of resulted directly from the want of repair of Government Drains Numbers One and Two and the Raleigh Plains drain. The first water that flowed upon the lands of these plaintiffs to their damage, flowed there by reason of the want of repair of these three drains. But the defendants say, admitting this, we are excused upon two grounds: 1st. We are excused altogether, because if these drains had been in perfect repair the drains by which plaintiffs were damaged were of so exceptional a character that the damage may be considered as an "Act of God"; and, 2nd, we are excused to the extent of having a defence to the action and of compelling plaintiffs to seek compensation under section 591 of the Act, by the fact that all the damage would have resulted to the plaintiffs by the waters lawfully brought down, even if these drains had been in a perfect state of repair.

As to the first assuming that what is necessary to constitute an excuse within the meaning of "Act of God," is only that the freshet should be extraordinary, and such as could not reasonably be anticipated, I do not think, upon the evidence, all the freshets come within that description. Some do; and I have considered these, and although I have considered these and will refer to such, is that an excuse in the face of the neglect by the defendants of their statutory duty?

As to the second, I deal with it later, merely mentioning here, that I do not think the evidence establishes that all the damage would in any event have resulted to the plaintiffs. In these cases the defendants say, even if we are responsible for the first few inches of waters that overflow by reason of these three drains being out of repair we are not responsible for the large quantity in excess that afterwards came down.

Upon these points I refer to Nitro Phosphite Co. vs. London and St. Katharine Dock Co., 9 Ch'y Div. 503. In that case defendant's duty was to maintain a sea wall four feet high. They neglected their duty. But the water which overflowed the plaintiff's premises rose to the height of four feet five inches. At page 518 Mr. Justice Fry, says: "The defendants say we are exonerated from the five inches of rise above the four feet. How do the plaintiffs meet that? They say you are relying upon the "Act of God" and no man who has a duty cast upon him, and who does not perform that duty, can rely upon the "Act of God" as any excuse at all. It is a condition precedent to pleading the "Act of God," or getting the benefit of the "Act of God," that you who seek the benefit of it shall have done everything which it is your duty to do." Now there is, it seems to me, great force in that contention and for this reason: that if the defendants had done their duty the exact experiment would have been tried which was requisite in order to see what damage would have followed to the plaintiffs from the "Act of God" whereas the defendants by not doing their duty, have, if they are right, compelled the court to try a much more difficult question, viz.: What would have been the result of an experiment which they did not choose to try?

In the one case the question would have been, what has actually happened? In the other case it is: What would have happened in a state of circumstances different from that which actually existed? And I need hardly say that the second is a much more difficult question to answer than the first.

I also cite from the judgment of Lord Justice James, in Appeal, page 527: "And moreover long before the tide rose even to four feet, it began to flow over towards and into the plaintiff's works; and of course the defendants cannot escape their damage so occasioned because the tide afterwards went on swelling and swelling, even if it could be shewn that the same damage would have been occasioned by that additional height of water, if the banks of the defendants had been in proper condition. They had been guilty of neglect and had done damage before that extra height had been reached and their liability to the plaintiffs was complete when the damage was done. But however it was further suggested that the whole damage was not due to the defendants neglect and that as there was a tide supposed to be four feet five inches, that tide might have occasioned, and it is contended, by the defendants, did occasion a substantial and ascertainable portion of the plaintiffs damage. No doubt if the court can see on the whole evidence that there was a substantial and ascertainable portion of the damage fairly to be attributed solely to the excess of the tide above the proper height which it was the duty of the defendants to maintain occuring after the excess had occurred and which would have happened if the defendants had done their duty, then there ought to be a proper deduction in that respect."

It is difficult in this case to see how any substantial and ascertainable portion of the damage fairly to be attributed solely to the excess of the waters beyond what would have been taken care of, had those three drains been properly maintained. As the defendants have neglected their duty the burden of proof is upon them to shew, beyond a reasonable doubt, that if they had done their duty the same damages would have resulted to the plaintiffs. I do not think these defendants have discharged that burthen and I think plaintiffs are entitled to recover.

But further, and upon the other contentions of plaintiffs, I think it may fairly be assumed that Government Drain Number One and Raleigh Plains drain were orginally designed to carry away all the water from the drainage area to the south and east of these drains in the Township of Raleigh, and if so, then the work of deepening, widening and extending these was a work of maintenance and repair within the meaning of the statute and the defendants have neglected the statutory duty imposed upon them, and the plaintiffs are entitled to maintain this action by reason of this neglect. The weight of evidence is that no substantial benefit would result from any deepening or widening of Government Drain Number One.

There is evidence that Number One was never sufficient, that it never was a practical means of draining as the water should not have been taken to the north but to the west by Raleigh Plains drain, and that no more money should be spent in repairs upon it; that Government Drain Number Two was also a mistake. I think the evidence as to these two drains amounts to this: that they were never worth their cost, and that for the same money or less, more effective drainage could have been had by enlarging the old Raleigh Plains drain and improving its outlet, but the weight of evidence is that these two drains did, at the outset, some good work in relief of adjacent lands, and that Number One did for years actually benefit this land of Fewster's.

The weight of evidence as to the Raleigh Plans drain is that defendants could so improve it at its outlet as to give to land owners the relief they ask and to which they are entitled.

In the case of Geddis vs. Bann, Reservoir proprietors, 3 Appeal cases, 430, Lord Blackburn says: "It is now thoroughly well established that no action will lie for doing that which the legislature has authorized if it be done without negligence, although it does occasion damage to anyone, but an action does lie for doing that which the legislature has authorized if it be done negligently, and I think if, by a reasonable exercise of the powers either given by statute to the promoters or which they have at common law, the damage could be prevented, it is within this rule: 'Neligence' not to make such reasonable exercise of its powers."

The defendants could, as it seems to me, "by a reasonable exercise of the powers given them by sections 583, 585 and 586 so have deepened, widened and extended Raleigh Plains drain as to have prevented some of the damage which plaintiffs have sustained.

The case was cited and followed in Northwood vs. Raleigh 3, O. R. 347, and I refer to the judgment of the Chancellor, pages 357, 358 and 359.

Mr. Northwood was the owner of lot 6 in the 4th concession of defendant township, and the three drains now considered were considered and discussed in that case. The facts in evidence in these cases were to a considerable extent brought out in Northwood vs. Raleigh. See Malott vs. Mersea, 9 O. R. 611.

These cases seem to me clearly distinguishable from Danard vs. Chatham, 24, U. C. C. P. 590 which was cited by counsel for defendants.

Mr. Wilson cites the case of Oliver vs. Horsham Local Board and Thompson vs. Brighton Corporation, 9 R. (1894) as an authority for the defendants, that there is no liability here for what is complained of.

I have carefully read the judgment of Lord Justice A. L. Smith in these cases, and it seems to me these cases can only possibly apply to the present cases if it shall be held, 1st, that plaintiffs are not entitled to recover because no damages have been shewn to have resulted from neglect or repair, and that omitting to deepen and widen and extend is not neglect to repair, and, 2nd, that the damages plaintiffs have from time to time sustained are not damages to their property consequent on the construction of drainage works within the meaning of section 591.

The defendants in the cases cited occupied the position of 'Sewer authority' and 'Road authority'. The gratings over which the horses stumbled had been put in by defendants as 'Sewer authority' and had been inserted and were in good order and condition. The road around the gratings had been worn away, in consequence of which the gratings projected and formed a stumbling block.

It was the duty of the defendants as road authority to repair the roads and that duty had been neglected. The judgment in these cases was in favor of the defendants because in England there is no liability on the part of surveyor of highways for damages, and no action will lie for damages for injuries received by reason of highway being out of repair: "His sole remedy is by indictment against the parish which has made default, or he may proceed against the surveyor under section 94 of the Highway Act for penalties." Damages he can recover against no one if his injury be caused by reason of mere non-repair.

Plaintiff could not recover against defendants as 'Sewer authority' because as such they had done no wrong, been guilty of no negligence, and he could not recover against them as 'Highway authority' because as the law is there, there is no liability for damages, no matter how much they may neglect their duty.

In this case the defendants do not occupy a dual position. They are charged with a duty and are liable if they neglect that duty and damage results. If not guilty of negligence the same defendants must make compensation to persons whose property suffers damage consequent upon the legal acts of defendants in the construction of drainage works.

Beyond question, without any drainage works some water would have come from Harwich upon Raleigh. The defendants would not be responsible for water naturally so flowing. This is a question of the operation of the drainage clauses of the Municipal Act. In the view I take of it, the defendants in the early history of their township availed themselves of these clauses to do work for the benefit and at the expense of certain lands, and having done this they are bound to maintain and keep in repair the drains made, and the law having regard to altered circumstances says plainly what shall be deemed work of repair.

I have not seen the full report of the decision of Mr. Justice Rose in Bell vs. Township of Brooke, but from a short note of it as reported in 30 C. L. J. 361, he held, *inter alia*, that defendants were liable: "For neglect of duty in not keeping the townline in repair, that is for not deepening, extending and widening it sufficiently to carry off the water which was brought down to the townline drain."

It was argued very strongly on behalf of defendants that all damages that happened to plaintiffs, or any of them, would have happened anyway. Assuming for the sake of argument that the defendants have been guilty of negligence, that they have not kept Number One and Raleigh Plains drains in repair, even if they had not been guilty of such negligence, and if these drains had been in good repair, the plaintiffs would, under the circumstances, have suffered just as much, and so defendants cannot be liable. As stated before I do not think the evidence goes so far as to show that the plaintiffs would have suffered just the same even if defendants had not been guilty of negligence.

The judgment of the Supreme Court of Canada in the recent case of Hiles vs. Ellice is authority that the jurisdiction of the referee when the matter is before him, either by transfer under section 19, or reference under section 11 of the Drainage Trials Act, 1891, is such that he may deal with the claims whether for damages by reason of the non-performance of the statutory duty or for such damages as are contemplated by section 591.

If the plaintiffs are not entitled to recover for neglect by defendants of the statutory duty, and if it shall be held that deepening, widening and extending Raleigh Plains drain is not a work of keeping in repair within the meaning of the statute, then I think the plaintiffs should be entitled to recover as compensation for damages sustained consequent upon the construction of drainage works, and the amount I find as hereinafter stated, or as stated in the reports in the other cases, is the amount to each, to which the plaintiffs are respectively entitled under section 591.

As to damages generally, I have no hesitation whatever in saying that the estimate on the part of all the plaintiffs has been much too high. Having suffered to some extent they have seemed anxious to put all the actual loss and some imiginary loss upon the defendants. The best of farmers upon the best of farms must often be content with only partial crops, or must lose entirely the crop from some particular sowing. It is often too wet and sometimes too dry. Sometimes the sowing was too early and sometimes too late for the particular year, and all this without any negligence on the part of anyone or blame to any person for the loss or shortage.

I have endeavored as far as possible, in looking at the evidence as to the particular years, to disallow any claim on the part of any plaintiff, unless the loss is clearly attributable to the fault of the defendsnts. I have endeavored to eliminate from the claim any loss, that, in my opinion, resulted from causes for which the defendants are not responsible. I confess to the greatest possible difficulty in determining the amount of damages. There is no way of measuring it with anything like mathematical accuracy. I do not refer to the rules that should govern in measuring the damage, but to the difficulty, even on the part of the witnesses called, in determining whether or not the damages claimed were occasioned by the act or default of defendants. It is not the case at all of simple ascertaining all the damage, it is ascertaining as one best can the damage for which defendants are liable on land that is uncertain and precarious as to crops.

These lands are all reclaimed lands, brought into a state of cultivation from their natural state of being covered with water some times to the depth of 18 inches or two feet ; lands that by artificial drainage have increased in value from $2 and $3 an acre to $40 or $50 an acre. The owners of all these lands must know that they are even yet more or less uncertain and they take their chances as to some freshets against which defendants could not provide even if they did all that plaintiffs say they ought to do in the way of improving and enlarging the outlet of Raleigh Plains drain.

As to the 'Fewster' land, there is evidence that the water used to stand on it from 6 inches to two feet deep.

I cannot say that the water from 'Indian Creek' did not contribute to the damage of Fewster. I think it did contribute to some extent, and, in my opinion, defendants are in no way responsible for the surface water which, in times of freshet, is collected into Indian Creek, and part of which, from about the line between 20 and 21, flows westerly down to this lot; and in my estimate of damages I have taken this into consideration and so far as I have been able to distinguish I have not allowed against the defendants anything for damages done by Indian Creek water. If, as a matter of law, the plaintiffs are not entitled to recover in the actions, as I think they are, and if they are not entitled to recover compensation, unless it can be ascertained just how much damage has been sustained by the construction or improvement of each drain of the many new drains, so that the damages can be assessed against the particular limited drainage area, then there can be no recovery before me, because I am unable to say upon the evidence, and the plaintiffs did not, nor did any of the witnessess, pretend to be able to say that any particular drain, leading to these drains Numbers One and Two and Raleigh Plains drain or either of them, could be charged. It was the general result brought about by non-repair and over-charging, without improving outlet drains, that was complained of.

Situated as the Township of Raleigh is, that township cannot be expected to provide such complete drainage as will insure a crop from every farm each year. The evidence is that no matter how large the outlet for Raleigh Plains drain may be made, and no matter how much these outlet drains may be enlarged and improved by the township at any reasonable cost that the township can provide for, there will be freshets that will more or less interfere with the cultivation of some parts of these low-lying farms. The township is not required to provide, and I think it cannot provide, against such exceptional freshets as the cloud-burst of 1890 or such an exceptional rainfall as more than once has occurred within the last eight years.

The township is, in my opinion, bound to widen and extend the outlet of the Raleigh Plains drain, and to keep that and the other outlet drain in such repair that they will carry away the water now brought to them, by the ordinary freshets, and by the rainfall that may be fairly looked for each year; and because the defendants have not done this, I think they are liable for such damages as the plaintiffs have sustained by reason thereof.

I assess the damages of Richard Fewster, for which the plaintiffs are entitled to recover against the defendants, at the sum of five hundred and ninety seven dollars; and I report, order and direct that judgment be entered for plaintiffs for said sum and costs of action and of the reference. The reference in this case shall be considered as a trial of five days and the costs shall be taxed accordingly and I direct that the sum of $25 be paid in stamps to be fixed by plaintiffs to this my report and be paid for by defendants and that the sum be included in the costs of plaintiffs to be taxed against the defendants.

I direct that the costs be taxed by the Clerk of the County Court of the County of Kent.

I have held over my decision for some time pending the appeal of the Township of Harwich against the defendant township, but as the parties are entitled to the report so that they can take what action they deem neccssary, I do not feel at liberty to hold it longer. Considering the attempts which the defendants have made, and are now making in good faith to provide a remedy for what is complained of, I do not think any order should be made now for an injunction or a mandamus.

MALAHIDE *vs.* DEREHAM.

In the Matter of the Bear Creek Drain in the Township of Dereham, County of Oxford, and in the Appeal by the Township of Malahide from the Report, Plans, Specifications, Assessments, and Estimates of F. J. Ure, Esquire, dated the 18th day of September, A. D. 1894.

Report of Engineer—Service—By-law—Notice of Appeal—Adoption of Service—Outlet, Section 63, Sub-section 2 (a)—Petition.

Service of report, plans, etc., upon the clerk of an adjoining municipality, instead of upon the reeve, though unauthorized by by-law or resolution of the council of the initiating municipality, was held a sufficient compliance with section 61. Notice of appeal signed by the reeve and clerk of the appealing municipality was served upon the clerk (instead of the reeve) of the initiating municipality who reported the service to his council. The notice being acted upon and no objection made to the mode of service till the hearing of the appeal it was held to be a sufficient compliance with section 63.

It is open to the appealing municipality to object to the sufficiency of the outlet provided by the engineer where the assessment against it exceeds the estimated cost of the work in the initiating municipality.

The onus is upon the initiating municipality to shew its legal right to assess lands in another municipality and where the petition was not signed by a majority of owners of lands in the initiating township to be benefited, the petition was declared invalid. The petition must define the area proposed to be drained. The township served with report, plans, etc., cannot ignore them, though no by-law has been passed for doing the proposed work.

February 14th, 1895. B. M. Britton, Q. C., Referee.

Pursuant to an appointment made by me this case came on for trial and hearing on Tuesday, the 29th day of January, A. D. 1895, at the Town Hall in the Town of Aylmer.

A. H. Backhouse, Esq., appeared for appellant, and J. B. Rankin, Esq., appeared for respondent.

The case was continued on the 30th day of January, A. D. 1895, and at the close of the argument, I reserved my decision. Having considered the evidence and the arguments of counsel, I now decide and give the reasons for my decision and make this my report:

A petition dated 24th day of July, 1894, signed by six landowners was presented to the Municipal Council of the Township of Dereham. This petition states that the petitioners are desirous of having a certain ditch or drain cut through certain lands mentioned, and asks that the Council of the Township of Dereham have a survey of the proposed drain and plans and specifications made with estimates of the proposed work to be done under the provisions of the Municipal Drainage Act.

The Township of Dereham employed F. J. Ure, C. E., and he completed his report, plans, specifications, assessments and estimates, which were duly filed with the clerk of that township. The report is dated 18th September, 1894, and was received and filed by the Clerk of Dereham on the 20th September. Without waiting for a meeting of the council, the Clerk of Dereham served the Clerk of Malahide and the Clerk of South Dorchester with a copy of the report, plans, etc.

There was at first some dispute as to the date of this service upon the Clerk of Malahide, but I find as a fact that the service was made on the 27th day of September, A. D. 1894.

Notice of appeal was served by the Township of Malahide. This notice was served by the Clerk of Malahide upon the Clerk of Dereham on the 25th October.

The notice of appeal pursuant to section 63 of "The Drainage Act 1894" was also on the same day served upon the Reeve of the Township of South Dorchester.

Objection was taken by Mr. Rankin, for the respondent, to the appeal and to my jurisdiction on the following grounds:

1st. That the report, plans, specifications, assessments and estimates of the engineer were not served "by the Council of Dereham," but only by the clerk. The council did not order it. The Council of Dereham has not yet passed any by-law, and so far there is no reason for an appeal;

2nd. That the report and other papers were served upon the Clerk of Malahide, and not upon the reeve;

3rd. That the notice of appeal by Malahide was served upon the Clerk of Dereham, and not upon the the reeve; and

4th. That the copy of the notice of appeal with the affidavit of service upon the reeve was not filed with the Clerk of the County Court of the County of Oxford, as required by section 91.

When the report, plans, etc., were served upon the Clerk of Malahide he brought the matter before his council. The reeve got these papers and the council acted upon them, and the reeve as well as the clerk signed the notice of appeal, in which it is stated that the Municipality of the Township of Malahide has been served by the Municipality of the Township of Dereham. For this reason, and for the reasons given by me in dealing with the other objections, I am of opinion, and so decide, that the Township of Dereham cannot now complain of their own failure to literally comply with the requirement of section 61. That section has been substantially complied with.

At the meeting of the Council of Dereham on the first Monday in October, the clerk of that township reported the service upon Malahide, and South Dorchester.

At the meeting of that council on the first Monday in November the clerk reported service of notice of appeal by Malahide. No objection was taken to that service. No notice was given to Malahide that there was anything irregular either as to the service of the report, plans, specifications, etc., or that any objection would be taken, or could be taken to the service or filing of the notice of appeal by Malahide. The service upon the Clerk of Dereham was adopted and acted upon by that township going on to have the appeal disposed of by the referee. The appointment pursuant to the notice of appeal was taken out at the instance of the Township of Dereham and served upon Malahide for the hearing of the matter by the referee; and as no application was made to set aside notice of appeal, and no notice given that objection would be taken to the service being upon the clerk instead of the reeve; and as the notice of appeal was actually before the Reeve and Council of Dereham; I am of opinion and so decide and report that I have jurisdiction to hear and dispose of the matter. Sections 61, 63 and 91 have been substantially complied with.

A great many questions, and some of them difficult, have been raised by the appellants township against the engineer's report, assessment, etc., but it seems to me that the matter should be decided by determining as to the validity of the petition and as to jurisdiction of Dereham to pass any by-law for assessing lands in the Townhip of Malahide based upon this petition and upon the report and assessment now appealed from.

This question comes at once to the front, as one of the objections stated in the notice of appeal is that the proposed drain is not carried to a proper outlet.

That objection is open to the appellant township in this case under Sec. 63, sub-section 2, A., as here the assessment against the appealing township exceeds the estimated cost of the work in the initiating township. The assessment against Malahide is $529.60. The estimated cost of the work in Dereham, exclusive of preliminary expenses, is $490.

When the Township of Dereham undertakes to assess lands in Malahide the onus is upon Dereham, of showing very clearly the legal right to do so.

The petition to that township in this case does not purport to be signed by the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shewn by the last revised assessment roll to be the owners of the lands to be benefited in any described area within the Township of Dereham. It was not shewn that the petition was in fact so signed by such majority. The assessment roll was not produced.

Looking at what is in evidence before me, this petition was not so signed.

The report shows eleven owners of lands in the Township of Dereham to be benefited by the proposed drainage work.

There are 13 parcels, but four of these parcels are down to two owners, leaving 11. The petition therefore required six of these, but it has only four. There are six names to the petition but two of these names are not owners of any of the lands to be benefited in Dereham. They are owners of lands in Malahide, but in no way help to make this petition valid under section 3 of the Drainage Act.

Again the petition is not for the draining of any area described in the petition. It is simply a petition for the survey of a proposed drain which the petitioners want, and to have plans and specifications with estimates of the proposed work to be done under the provisions of the Municipal Drainage Act, the drain to commence at the south one-half of lot 28, in the 11th concession of Dereham, to cross certain lots in Dereham, to enter Malahide and cross certain lots in that township and to terminate in the Catfish Marsh drain in the Township of Malahide. This is not for the drainage of any particular area in Dereham. It is something persons in Dereham and Malahide wish to have done, but it does not give authority to Dereham to have it done and assess lands in other townships for its cost.

It is true the Township of Dereham has not passed a by-law for doing the proposed work, but that township has not in any way expressed an intention of not proceeding with the work. The Township of Malahide could not ignore the service upon them of the reports, plans, etc.

That report if allowed to stand could be acted upon, and if acted upon, by Dereham, and if my view of the law is correct, that township would be liable for damages, if any, at the instance of any person whose lands, without the consent of such person, would be flooded by reason of the construction of this drain.

I must allow this appeal and set aside the report appealed from, so far as said report can be the basis of any by-law to be passed by the Township of Dereham adopting the same and ordering the construction of the drainage work as therein indicated and set forth to be paid for by any assessment upon and lands in Malahide; and by virtue of the powers vested in me as referee I report and determine that the said petition filed is invalid.

I allow the appeal with costs. I order and direct that the costs of the Township of Malahide be paid by the Township of Dereham to the Township of Malahide. And that such costs shall be taxed by the Clerk of the County Court of the County of Oxford.

I order and direct that the trial shall be considered as a trial of two days and that the sum of eight dollars in stamps be affixed to this my report, to be paid for by the Township of Dereham, and if affixed by the Township of Malahide the amount thereof shall be included in the cost of that township to be taxed against the Township of Dereham and be paid to said Township of Dereham.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION.

TINDELL VS. THE TOWNSHIP OF ELLICE.

Admissions—Section 585, Municipal Act—By-law—Want of Registration—Negligence—Section 591, Municipal Act—Acceptance of Compensation—Purchase with Knowledge—Assessment of Damages—Section 483, Municipal Act, 55 Vic. ch. 57, sec. 2—Amendments—Disposition of Costs.

An admission contained in a statement of defence must be taken as a whole. A municipality is authorized under section 585 of the Municipal Act to improve a drain though the work extends into an adjoining municipality. The omission to register, as required by section 351 of the Municipal Act, does not make invalid a by-law otherwise valid. If by-law is valid defendants are not liable in an action as tort feasors or for negligence, but upon a reference of the action the referee has most ample powers to deal with the case as one for compensation under section 591. Where plaintiff's predecessor in title accepted a sum in full compensation for all damage that might result from the construction of a drain, the plaintiff, who purchased with full knowledge of all the facts, cannot recover. The plaintiff is entitled to have his damage assessed once for all. Section 483 of the Municipal Act does not apply to claims under section 591, and if it did apply the issue of a writ may be treated as a claim within the meaning of said section 483. In order to comply with section 2, ch. 57, 55 Vic., it was ordered upon delivery of judgment that the claim be then filed with the proper County Court Clerk. The referee has power to permit an amendment enabling plaintiff to claim for damages sustained since the commencement of the action. The plaintiff having brought an action, where he should have proceeded by filing a notice under section 5 of the Drainage Trials Act, 1891, was ordered to pay the costs of the action.

April 2nd, 1895. B. M. Britton, Q. C., Referee.

The writ was issued in this case on the 5th day of May, A. D. 1893, and after issue joined the action and all questions arising therein were transfered to me by the Honorable Mr. Justice McMahon by order dated the 4th day of October, A. D. 1893.

Pursuant to my appointment the case came on for trial and was tried and heard by me at the City of Stratford on the 24th, 25th, 26th, 27th, 29th and 30th days of October, 1894, the same being tried with other cases against the same defendants, certain parts of the evidence being applicable to the different cases.

J. P. Maybee, Esq., appeared for the plaintiff, and M. Wilson, Esq., Q. C., and E. Sidney Smith, Esq., Q. C., appeared for the defendants.

At the close of the plaintiff's case the defendants' counsel objected that the action could not be maintained, and I then gave my decision as follows: The plaintiff in his statement of claim sets out certain facts to show that he is in a position to recover damages from the defendants for their negligence, and he claims against the defendants as *tort feasors*.

For the purpose of this decision all the recitals or preliminary allegations may be taken as proved.

The plaintiff alleges that defendants on the 18th day of May, 1885, passed by-law No. 198 providing for the construction of the Ellice drain; that they did the work contemplated by this by-law, that is, they made the drain.

For reasons set out in the statement of claim it is contended that this by-law is invalid and that defendants were trespassers in constructing this work. It is further contended that the defendants did not, by this drain, go to a proper outlet for the waters brought down by it, and so the defendants, in the construction of the drain, are guilty of negligence.

The plaintiff alleges that after the first drain was completed, the defendants, on the fourth of August, 1890, provisionally passed by-law No. 265, and that, after the passing of that by-law, there were obtained in certain suits, mandatory injunctions against the defendants, compelling the defendants to take the water off the lands of the plaintiffs in these suits, viz., William Taylor and William Caxon, and to carry these waters to a proper outlet, and afterwards the defendants finally passed by-law No. 265, for doing this, and after passing this by-law the defendants did the work, that is, made the Ellice outlet or Ellice extension drain.

The plaintiff alleges that this by-law is illegal, and that the defendants, in doing the work provided for by it, are trespassers, and that defendants are guilty of negligence in improperly locating all their drainage works in the Township of Elma.

The plaintiff alleges that on the 27th April, 1891, the defendants provisionally passed, and afterwards finally passed by-law No. 278, to provide for improving the Maitland drains in the Township of Ellice, and along the townline between the Townships of Ellice and Elma and between the Townships of Elma and Logan, and along the allowance for road between lots 25 and 26 in the Township of Elma ; that they did the work provided for by that by-law ; that the by-law is illegal, the Township of Ellice having no jurisdiction to pass it ; and that the defendants in doing the work are trespassers.

Counsel for the defendants ask for my ruling now upon the case, as made by the pleadings and evidence and contend that the plaintiff's action must fail.

As to by-law No. 198, it is admitted by counsel for plaintiff that the objections to it cannot prevail.

The decision in Hiles vs. Ellice in the Supreme Court is in reference to this by-law. It is valid.

As to by-law No. 265, this by-law is not put in. The defendants object that there is no evidence that the defendants did the work contemplated by that by-law, and as set out in the statement of claim. The most that can be said upon the evidence is that the drain, called the Ellice outlet drain, was made by some persons.

Plaintiff replies the work is done, and the statement of defence, paragraphs three, four and five, admit that it was done by the defendants.

I do not think there is such evidence in the case as would enable plaintiff to recover against the defendants as trespassers or for negligence.

The plaintiff cannot avail himself of any partial admission of the defendants in the statement of defence. It is not an admission that the work was done in any other way, or under any other circumstances, than as pleaded. The admission as to this by-law and the work done under it must be taken as a whole and the pleading is a justification and defence to any action by the plaintiff. If the plaintiff had proved contracts by defendants for doing this work, or had proved the active interference by members of the defendants' council, or officers of the defendants' corporation, the defendants would have been obliged to put in by-law No. 265 to prove their plea.

I now rule that there is no evidence that the defendants, as a corporation, did the work connected with the Ellice outlet or extention drain in any other way, or under any authority, or pretended authority, than as pleaded by them, and, so far as the action is concerned as to matters complained of in regard to this drain, the plaintiff fails.

As to by-law No. 278, Mr. Maybee contends that this is an invalid, as section 585 only authorizes such a by-law for the purpose of better maintaining a drain after it has been constructed, and that, by section 583, it is the duty of every municipality to preserve, maintain and keep in repair such a drain within its own limits, and therefore, that Ellice, as to this work, after fully constructed, could not pass any by-law for doing any work in the Township of Elma at the expense of land owners in Elma.

Mr. Maybee contends that the clear meaning of section 585 is that it should read as if it said only: "The Council of any of the municipalities whose duty it is to preserve and maintain the said drain, may," etc.

I think the section is broader than that and means more, for the following reasons:

1st. It provides for any case wherein the better to maintain any drain, etc., or to prevent damage to adjacent lands it shall be deemed expedient, first, to change the course; second, to make a new outlet; third, or otherwise improve, extend or alter the drain; and fourth, or cover the drain.

2nd. The municipality, that is, the municipality that constructed it, or any municipality whose duty it is to preserve and maintain it, may, etc.

3rd. If undertaken, it may be done under the provisions of sections 569 to 582 inclusive. That includes 575.

Then, it seems to me necessary that the initiating municipality should have this power and that the statute intended to give the power.

It is done to prevent damage to adjacent lands; if damage from construction, the initiating township is liable, and to prevent liability and loss, that municipality should have the power given by section 585.

Further, if by-law 265 is valid then by-law 278 is valid. Hiles vs. Ellice is authority in favor of by-law 265.

I am of opinion that the want of registration does not invalidate any of these by-laws. A by-law, where there is such informality as to render it invalid, may for certain purposes be validated by registration, but the mere neglect of the plain duty of the clerk to register as required by section 351 of the Municipal Act, will not make invalid an otherwise valid by-law.

If by-laws are valid then defendants are not liable in this action, either as *tort feasors*, or for negligence. See Williams vs. Raleigh, Privy Council, and Hiles vs. Ellice, Supreme Court.

But while plaintiff cannot recover in an action, I have, according to Hiles vs. Ellice, Supreme Court, the most ample powers to deal with the case as and for compensation under section 591, so I shall hear all the evidence and make all necessary amendments to enable the case to proceed for compensation under section 591. I reserve the question of costs.

The case then proceeded, and, having heard all the evidence and the arguments of counsel, I reserved my decision, and now, having considered the matter, I make my report and give my reason therefor.

I allow the plaintiff to amend, and to file any claim in accordance with the evidence and with my findings thereon.

For the purpose of finally disposing of this case as far as I am concerned, so that, in any event, it will not come back to me upon the question of damages, I assess the plaintiff's damages sustained as to both lots 19 and 20 in the 14th concession of Elma.

I find, and so report, that the plaintiff sustained damages to his crops upon said lot 20, for the years 1892, 1893 and 1894 to the amount of $70, and that this damage was all consequent upon the construction of the Ellice drain and of the outlet or extension thereof, which drains are really one constructed under by-laws numbers 198 and 265. In finding this amount of damage and also as to the amount of damages for loss of crops upon said lot 19, I have taken into consideration the exceptional character of the spring freshet of 1892, and also that during 1892, the plaintiff was only working lot 20 upon shares with his brother. Although I have assessed the damages I do not think the plaintiff should recover anything for any loss in regard to said lot 20 or as to the crops grown thereon.

This lot was purchased by the plaintiff from his brother, W. A. Tindell, and while owned by W. A. Tindell, he, W. A. Tindell, was paid the sum of $50 by the defendants in full compensation, and he accepted that sum in full compensation for any and all damage that might result from the construction of the Ellice Outlet or Extension drain. The plaintiff purchased after the construction of this drain, after the payment mentioned, and with full knowledge of all the facts. He knew this lot was liable to be overflowed, and if he did not pay less for it on that account, it was worth less, and he took all his chances as to any damages and he cannot now complain.

If W. A. Tindell had not sold he would not be entitled to recover for any damages upon the facts before me, so this plaintiff cannot recover.

I find that the plaintiff sustained damages to his crops during the years 1892, 1893 and 1894 upon said lot No. 19 to the amount of $52, and that this damage was consequent upon the construction of the Ellice drain and the outlet or extension thereof, and that the plaintiff should recover from the said Township of Ellice this sum by way of compensation for such damages.

In addition to the plaintiff's right to recover the sum of $52, for damages actually sustained for loss of crops, upon said lot 19, I think he is entitled to have his damages assessed once for all, and that, if he accepts the same in full compensation, he should recover the sum of $75 additional for the permanent injury to said lot 19, said sum being the amount determined by me as the amount of compensation to the plaintiff for damages to said lot 19, in the construction of said drainage works and consequent thereon, and in ascertaining said damage I have considered that a part of said lot is actually damaged by the increased overflow of water upon it, and that a larger part of the low land of said lot is injuriously affected by reason of its liability to be overflowed and to remain covered with water for a longer period in times of freshet by reason of the construction of said drains.

If the plaintiff accepts said sum of $75 in full satisfaction then he is to recover $127 in all as above stated, but if he declines to accept the said sum of $75 in full satisfaction of any claim that can hereafter be made by him, as the owner of said lot 19, against the Township of Ellice, for any damage by reason of the construction of said drains and consequent thereon, then the plaintiff's claim is limited to the sum of $52, being for the loss of crops upon lot 19 as assessed by me.

Lot 19 was not taken into account in the assessment for the construction of this outlet drain. It could not be assessed for benefit, for, upon the evidence, it was injured, and yet, the Township of Ellice did not, as they did in the case of lot 20, pay anything for, or attempt to ascertain the loss or damage that the owner would sustain.

I do not think section 483 of the Municipal Act applies to claims under section 591, but suppose 483 does apply. The first damages plaintiff complains of are those of 1892. The writ in the action was issued fifth day of May 1893, and within a year. That writ may be treated as a claim within the meaning of section 483, and as the action was pending and was being carried on, there was from time to time down to the time of the trial, the claim as at present put forward, only it was in an action instead of by arbitration. As stated above I shall allow the statement of claim to be amended and to stand as a claim under section 591, and lest there should be any difficulty by reason of the statement of claim being filed with the local registrar, whereas section 2, cap. 57, 55 Vic. requires the claim to be filed with the clerk of the County Court, I now order and direct that the claim as amended, be now filed with the clerk of the County Court of the County of Perth.

At the close of the case Mr. Wilson strongly argued that there was no power to amend, and cited amongst others the following cases: Adams vs. The Watson Manufacturing Company, 15 O. R. 218. In that case the amendment was allowed, and it was only a question of terms.

In Welden vs. Neal, 19 (Q. B. D.) 394, the plaintiff was not allowed to amend by setting up fresh claims which, since the issue of the writ, had become barred by the statute of limitations.

The claims here are not fresh. It is the same claim, the question is only as to mode of recovery; one as to procedure.

After a careful reading of all the cases cited, I am of opinion not only that I have power to make the amendment, but that I should, in the exercise of that power, allow the amendment, and it becomes only a question of costs.

I report, order and direct that the plaintiff do not recover against the defendants any costs of the action, and that defendants do recover against the plaintiff the costs of the action down to the time of the reference of the same to me.

I order and direct that the plaintiff do not recover against the defendants any costs so far as the same relate to the trial of the action before me, but that the plaintiff, as claimant, do recover against the said Township of Ellice all costs of the reference and incidental thereto, as and for a claim made for compensation under section 591 of the Municipal Act of 1892.

I further order and direct that the said Township of Ellice do bear their own costs of the action after the same was referred to me, and that they pay to the claimant the costs of said reference in so so far, and only so far, as said costs were incurred in relation to the claim of the claimant as prosecuted for compensation under section 591 of the Municipal Act of 1892.

I order and direct that the sum of $8, as and for two days' reference, be affixed to this my report, and that the same be paid by the Township of Ellice.

I order and direct that the costs of both parties and all the costs mentioned in the report be taxed by the clerk of the County Court of the County of Perth.

IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.

ANDREW BUCHANAN *vs.* TOWNSHIP OF ELLICE.

Writ issued May 16th, 1892.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION.

WILLIAM BUCHANAN *vs.* TOWNSHIP OF ELLICE.

Writ issued May 16th, 1892.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION.

GEEN *vs.* TOWNSHIP OF ELLICE.

Writ issued 25th May, 1892.

Permanent Injury—Assessment for Benefit—Damages—Remoteness.

The purchaser of land cannot recover damages for permanent injury caused by drainage works constructed prior to the purchase, nor can a person assessed for benefit by the engineer recover damages for permanent injury to the land so assessed. Damages for loss of the use of land which but for the water could have been logged and cleared up are too remote.

April 2nd, 1895. B. M. BRITTON, Q. C., Referee.

These actions after issue joined were severally referred to me by the order of the Honorable Mr. Justice Street on the 3rd day of October, A. D. 1892, under "The Drainage Trials Act, 1891," and by the order of reference it was directed that such reference should not be proceeded with until after the decision by the Court of Appeal in the cases of Hiles vs. Ellice and Crooks vs. Ellice.

After the decision of said cases by the Court of Appeal, they were taken by the defendants to the Supreme Court, and after the decision in that court, these three cases, pursuant to my appointment, came before me at the City of Stratford in the County of Perth for trial, and they were tried with other cases, on the 25th, 26th, 27th and 29th days of October, A. D. 1894.

J. P. Maybee, Esq., appeared for the plaintiffs, and Matthew Wilson, Esq., Q. C., and E. Sydney Smith, Esq., Q. C., appeared for the defendants.

Having heard the evidence and the argument of counsel, I reserved my decision, and now, having considered the matter, I make my report and give my reasons therefor as follows:

The cases by consent and by my order, were consolidated and tried together as one action, and it was agreed by counsel that the evidence given in these cases should be used so far as applicable in the cases of W. A. Tindell and W. H. Loney, and in the matter of a reference of S. R. Hiles against the same defendants, and that the evidence in the last mentioned cases and reference should be used in these cases, saving all just exceptions.

Andrew Buchanan was the owner of lot 24, William Buchanan of lot 23, and William Geen of lot 22, all in the 14th concession of the Township of Elma, and the complaint in each case is in reference to the construction by the defendants of the drain known as the Maitland drain, or Ellice Outlet drain, which drain the defendants made under a by-law passed on the 18th day of May, 1885, known as by-law No. 198, and which drain was extended and continued under a by-law passed by the defendants in 1890, known as by-law No. 265.

At the close of the case, and following the cases of Williams vs. Raleigh, decided by the Privy Council, and Hiles vs. Ellice, decided by the Supreme Court, I gave my decision that in as much as what was complained of was done under valid by-laws no action will lie. See my report in the case of Tindell vs. The Corporation of the Township of Ellice, and above referred to, and which report to that extent I now make part of my report in these cases.

It now remains to determine under section 591 of the Municipal Act of 1892, whether any one of these plaintiffs is entitled to recover for damage done to his property in the construction of this drain or consequent thereon:

1st. As to Andrew Buchanan; he purchased lot 24 in 1889, after the work provided for by by-law No. 198 was completed. If any permanent injury was done by that work to this farm it was not to the property of the plaintiff.

If any permanent injury was done to this land by the work provided for by by-law 265 this plaintiff cannot recover as this lot was assessed for benefit by the engineer, and I can not go behind his report. Damages are also claimed for loss of use of parts of this lot in 1890, 1891 and 1892, and for the loss of four acres of lot 23 in 1892, as that year he leased 23 from his brother, William Buchanan.

Upon the whole evidence, and taking into consideration the character of the land, the nature of the claim, the exceptional character of the freshet of 1892, and the natural effect of such a freshet upon this land, I am of opinion that the plaintiff has failed to establish any claim, and no amendment would at all assist him, so his action should be dismissed and with costs to be paid to him by the defendants.

2nd. As to William Buchanan; he purchased lot 23 in the year 1888. This lot is not assessed for benefit for the work under by-law No. 198, but it is for the work under by-law No. 265, and for the reasons given above there can be no recovery for permanent injury to land by either work.

Damages are also claimed by him as to this lot for 1890:

1. A job of logging was let to one Aikins; he did part of the work and quit, and for this part plaintiff paid Aikens $34, and the work was of no use. If such work was done it ought to be of value. If not done, even if plaintiff paid, I fail to find upon the evidence reason to charge this item to the defendants.

2. The claim upon the evidence for loss of use of land in 1890 and 1891 is put in this way by the plaintiff; if it had not been for water, he could have logged up and cleared it up, and so the use of land was lost. I think these alleged damages are too remote.

3. As to 1892, loss of land same as in 1891, and loss of timothy. It will be remembered that the spring freshet of 1892 was exceptionally great, and for this and other reasons upon the whole evidence I think the defendants are not liable. As to 1893, there was evidence as to loss of bridge, but apart from the doubt about this being consequent upon the drainage work, if this plaintiff had no claim when writ issued, for which he is entitled to recover, no amendment should be allowed to enable him to attempt to recover a very small subsequent doubtful claim.

I think the plaintiff, William Buchanan, has not established any claim for which he is entitled to recover against the defendants, and that his action should be dismissed with costs.

As to William Geen, he purchased lot 22 in 1888, and sold it in the winter of 1893, so that at the time of the trial he was not the owner.

What I have said before as to damages for permanent injury to land applies to this lot as to the others. Geen complains that he suffered damages in 1889. He lost four acres of peas. The field was about 130 rods from the north end of his lot, on the east side of it, and near the Cleaver Award drain. He also had two acres of flax injured, and he lost the use of one acre of land.

This action was not commenced until 25th May, 1892. The rainfall of 1889 was heavy. The Cleaver Award drain was not completed. The plaintiff himself made part of that drain in the fall of 1889, and it was completed in 1890. The evidence does not satisfy me beyond reasonable doubt that whatever damages were sustained in that year were consequent upon the construction of this drain.

This plaintiff makes no claim for 1890, 1891 or 1892. That being so he had no claim at the time the action was brought. His claim for 1893 is for damages for a road that was washed away and as the plaintiff sold the land before the next season the loss of road was no damage to him and as he has not shown that he sold the farm for any less by reason of this road being washed away I do not think the claim should be allowed, and holding this view, there is no case for making any, so the action will simply be dismissed with costs to be paid by him to the defendants.

I report, order and direct that the costs of the several actions be paid by the plaintiffs respectively to the defendants and that the said plaintiffs do pay the cost of the reference and trial before me and such reference and trial shall be considered as a trial of three days and that the said plaintiffs do affix in all the sum of $12 in stamps to this my report as and for such trial, and if the defendants affix such stamps the same shall be paid for by the plaintiffs and the defendants shall be at liberty to include the amount in their costs to be taxed to them, one third against each plaintiff respectively.

I order and direct that the costs be taxed by the clerk of the County Court of the County of Perth, at the City of Stratford.

THE DRAINAGE ACT OF 1894.

THE TOWNSHIP OF MORNINGTON *vs.* THE TOWNSHIP OF ELLICE.

Section 114 of the Drainage Act, 1894—Assessment—Independent Judgment.

A report and assessment made by an engineer under the Act of 1892, while in force, was referred back by the council for amendment so as to conform to the Act of 1894, which was done in form. Held that the report and assessment could not be supported under the Act of 1892, nor could it be supported under the Act of 1894, no new assessment having been made and the engineer in making the amendments not acting of his own motion and upon his independent judgment.

April 2nd, 1895. B. M. BRITTON, Q. C., Referee.

This is an appeal from the report and assessment of William Mahlon Davis, C. E., dated the 5th day of July, A. D. 1894, in reference to the better maintenance of "Whirl Creek drain."

Pursuant to my appointment the case came on for hearing and argument on the 2nd day of April, A. D. 1895, at the Court House, in the Town of Stratford.

J. P. Mabee appeared for appellants, and G. G. McPherson appeared for respondants.

Having heard the evidence given and the arguments of counsel I now give my decision and make my report and give my reasons for the same.

The beginning of this matter so far as the Township of Ellice is concerned was on the 10th day of July, 1893, when the council having been threatened with actions for damages by the owner of lot 17 in the 15th concession of their township, instructed their clerk to write to Wm. M. Davis, C.E., authorizing him "to examine the Whirl Creek drains with a view to their improvement so as to give the interested parties the full benefit intended by the construction of said drains, and the lands and roads assessed therefore as soon as possible."

This, according to the evidence, the council intended and the engineer understood as the initiation of proceedings under section 585 of the Act of 1892 for the better maintenance of the drains mentioned and to prevent damage to adjacent lands.

A report and assessment were made by the engineer dated 9th of March, 1893, in which the cost of the proposed work was estimated at $6751, and for which the lands and roads in the Township of Ellice were assessed at $5362.21 and the lands and roads in Mornington at $1388.79.

This report was considered by the council of Ellice on the 8th day of May, 1894, and adopted, but the clerk of that township had become aware of the passing of the Drainage Act of 1894 and so questioned whether this report, made wholly in reference to the Act of 1892, could stand.

The members of the council met as a Court of Revision on the 28th day of May, 1894, at Hill's hotel, and although there are no minutes of what was done this report was sent to an eminent counsel for advice. He sent a letter stating what in his opinion should be done. This letter was sent with the report and assessment to Mr. Davis and he, without making any new survey or any further examination, amended and made some alterations in his assessment, not in the amount but in the division of it under different heads.

This report came before the council of Ellice at the meeting held on the 25th day of June, 1894, and the council then resolved to return the report to the engineer and to have him change the heading to that of the Act of 1894, and to distinguish between outlet liability and injuring liability so as to make his assessment conform to the Act of 1894.

The engineer did this and without making any new examination simply took the amount of his assessment for outlet liability and divided it into two parts putting one half in the column for outlet liability and one half in the column for injuring liability. He added the following words to his report :

"The lands near the new work are assessed for benefit but the greater portion of the lands are assessed for outlet liability or injuring liability in accordance with the Drainage Act of 1894, because the proposed work is rendered necessary by the action of the owners of the outlying lands both in Ellice and Mornington in constructing open and tile drains by means of which water is caused to flow upon and injure the lands contiguous or near to the proposed drains or creek." The engineer then redated his report and handed it in bearing date the 5th day of July 1894.

This last report and the plans and assessment accompanying the same were adopted by Ellice on the 16th day of July, 1894.

The Drainage Act of 1894 did not come into operation until 1st June, 1894.

The original instructions to the engineer were given prior to this and the assessment and report were all made under the Act of 1892.

It is admitted by counsel for the respondent township that to sustain this assessment it must be considered as made under the Act of 1894, and is not authorized in form or in substance and cannot stand as an assessment under the Act of 1892.

From the 1st of June, 1894, the provisions of the Act of 1894 are substituted for sections 568*a* to 611*b*, both inclusive, of the Act of 1892, but such substitution shall not affect the validity or legality of any act, matter or thing done under the Act of 1892 while that Act was in force.

Everything that the Council of Ellice authorized the engineer to do and that was done by him in this case was done under the Act of 1892 and would be valid and could be enforced if authorized by that Act.

Under the Act of 1894 the council of the Township of Ellice never did appoint an engineer to examine and report on these drains, and he did not act in the examination of these drains and did not in fact of his own motion and upon his own judgment assess and charge lands and roads liable to assessment under the Act of 1894.

The engineer simply did clerical work after his report and assessments were completed under the Act of 1892 and he did it under the express direction of the Township of Ellice or of the clerk of that township or of some person acting with or without authority on behalf of the township. If the assessment of the lands and roads in Mornington is to stand under the authority of the Act of 1894, that assessment must be the independant work of the engineer regularly appointed, and there must be no interference with him in the doing of his particular work. As to this assessment the clerk of Ellice might just as well in his own office have put in the added column for "injuring liability" and have as he thought it necessary, made the report and assessment in form under Act of 1894.

It is with regret that I feel obliged to dispose of this appeal in this way.

The Township of Ellice in May last should, if they thought the Act of 1894 gave more ample powers to the engineer to assess for the desired work, have waited a few days and upon the coming in force of this act started the proceedings anew. I do not say that the engineer's work already done would be wasted; his measurements would be as good after as before but he certainly should carefully consider the question of assessing in accordance with that Act and use his own judgment upon the matter.

That will, in my opinion, be the only safe course now if the Township of Ellice intends to proceed with any such work as was intended. It may be that from the further and more full consideration which the engineer and the members of the council have been obliged to give to the matter by reason of this appeal the scheme may be so modified as to make it less objectionable or even acceptable to landowners whose lands are benefited or whose lands have an improved outlet or whose lands contribute to the injury by water of other lands.

I allow the appeal of the Township of Mornington and I set aside the report and assessment so far as the same affects said Township of Mornington and I order and direct that no proceedings be taken by said Township of Ellice for the doing of the proposed work under the report and assessment now appealed from with the intention of attempting to collect from the Township of Mornington the said sum of $1388.79 or any part thereof.

I order and direct that the Township of Ellice shall pay the costs of the appellants the Township of Mornington and that the same shall be taxed at the Town of Stratford by the clerk of the County Court of the County of Perth.

I order that the sum of $4 in stamps shall be paid by the Township of Ellice as and for one day's trial and hearing, such stamps to be affixed to this my report.

TILBURY EAST *vs.* ROMNEY.

TILBURY NORTH *vs.* ROMNEY.

IN THE MATTER OF APPEAL FROM THE REPORT, PLANS, SPECIFICATIONS, ASSESSMENTS AND ESTIMATES OF AUGUSTINE MCDONNELL, C. E., DATED THE 29TH DAY OF SEPTEMBER, A. D. 1894.

Appointment of Engineer—By-law—Notice of Appeal—Corporate Seal —Right of Municipality not Assessed to Appeal—Road Ditches —New Work—Petition—Injuring Liability.

Appointment of engineer by resolution held valid when ratified by the adoption of his report, and the report adopted by a provisional by-law.

Notice of appeal need not be under the seal of the corporation appealing. It is not necessary to show that the appeal was authorized by by-law. If necessary the council could by by-law adopt what had been done.

A municipality into which it is proposed to continue a drainage work may appeal although not assessed. Section 75 of "The Drainage Act 1894" does not authorize the construction of new work or the improvement of road ditches, though connected with a drainage work constructed by local assessment without a petition and the other formalities of a new work. Power of assessment for injuring liability discussed.

May 8th, A. D. 1895. B. M. BRITTON, Q. C., Referee.

These appeals pursuant to my appointment came on before me and were tried and heard on the 26th, 27th and 28th days of February last, and on the 7th day of May instant.

J. B. Rankin appeared for Tilbury East, M. Wilson, Q. C., appeared for Tilbury North, and C. R. Atkinson, Q. C., appeared for Romney.

After the hearing I reserved my decision, and now, having considered the matter, decide and report as follows:

The notice of appeal by each of the appellant townships sets up a great many objections to the report and assessment.

I do not deal with these objections specifically and in detail, and some of them I have not considered for reasons which will appear in my report.

After the evidence was given on behalf of Romney for the purpose of supporting the report and assessment of their engineer, counsel for appellants declined to put in any evidence for the appellant townships and urged their legal objections to the proposed work, taking the entire responsibility for this course and the risk of a decision as it might be given, or as to its being affirmed or reversed in case of an appeal therefrom.

For the purpose of these appeals the facts recited in Romney's resolution passed the 30th day of June, 1894, may be considered as established.

At the time Romney determined to send on an engineer the following drains as mentioned in their resolution had been made, viz.:

The 'Tunnel drain' which extends from the east side of the side-road between lots 30 and 31, thence westerly along the southerly side of the 3rd concession road to the side-road between lots 24 and 25, thence north along the easterly side of the side-road to the 3rd concession on the westerly side of the side-road, thence along the southerly side of said 3rd concession to the side-road between lots 18 and 19, with an outlet commencing at the easterly side of the 3rd concession where the line between lots 21 and 22 intersects the 3rd concession, thence southerly along said line 21 and 22 to the southerly side of the 2nd concession; thence westerly along the southerly side of said 2nd concession to the road between lots 198 and 199, thence southerly along the east side of said road to Lake Erie.

Number Four drain commences at the northeast corner or side of lot 30, 2nd concession of Romney, and extends westerly to the side-line between lots 24 and 25, and then along that side-road northwesterly to the townline, and thence westerly along the townline, keeping 12 feet south of centre of townline road to the townline road between Romney and Tilbury West, thence into 'Big Creek' and along the same 196 rods to stake 129 in Campbell drain in Big Creek to Tilbury West.

Cooper drain (or No. 5 drain), is east of 30 and 31 side-road with two outlets and since Tunnel drain, three outlets.

The Campbell drain, constructed under by-law No. 169, February 19th, 1873, extends from south of 3rd concession to the townline between Romney and Tilbury North, and goes into Tilbury North to within 40 rods of 9th concession. This drain is also called No. 3.

In addition to these drains mentioned in the resolution, the "Coatsworth and Robinson" drain had been made. This drain has its head at the line between lots 198 and 199 of Talbot road lots on the southerly side of the road between the Talbot road lots and the 2nd concession, and extends to about the centre of lot 14, 2nd concession, a distance of 1104 rods, for which drain lots on Talbot road and in 2nd concession were assessed.

The Smith drain was also there. This extends from the line between lots 190 and 191, Talbot road east to the east side of lot 188, and which seems to be an extension of No. 4, or a bi-section of that part of 4 along the concession line between 1st and 2nd concessions.

It is in evidence that the Township of Tilbury East in 1875 intended to make a drain upon the townline between that township and Romney from the point between lots 24 and 25 extending easterly to the point between lots 177 and 178, Talbot road lots. This work was not done, and the fact that it was contemplated seems to me not material in the consideration of the present appeal.

It is also in evidence that the assessors under the Ontario Drainage Act, on the 20th July, 1878, assessed for Tilbury West lands in Romney from lots 16 to 30 in the different concessions of Romney, placing upon them $2,127, an amount which was reduced by arbitrators to $1200.

Complaints were rife. The recitals in the resolution have been substantially proved. Exhibit 21 is a batch of letters complaining of damage from Number Four drain, from the Tunnel drain, the Campbell drain, and road ditch along side-road between lots 30 and 31 in Romney. One of these complaints is by Tilbury East, formally stated by their clerk on the 17th April, 1893, as follows: "By direction of the Municipal Council of the Township of Tilbury East, I beg hereby to notify you that certain drains and road ditches, constructed in a careless manner and without proper outlets are collecting and conducting to the townline between the Township of Tilbury East and Romney, and causing to flow into the Township of Tilbury East and injure lands and roads therein, a large body of water, and to require you to take immediately such steps as shall prevent such injury in the future."

Tilbury East again on the 28th May, 1894, at its regular meeting, instructed their clerk to notify Romney to repair the breaches in the road grade of the townline road between Tilbury East and Romney, caused by the overflowing of No. 4 drain of said Township of Romney. Romney was given until the 12th of June to do as requested, and in default the reeve was instructed to take legal proceedings to compel such repairs.

As long ago as March 2nd, 1885, Tilbury East complained of Romney discharging its water upon and across the townline. On May the 11th, 1885, there was another complaint by Tilbury East and Romney was told to find an outlet for its drains.

On December 10th, 1885, there was another reminder from Tilbury East that certain drains of Romney, without naming them, were without proper outlet, and this letter enclosed a copy of a resolution: "Moved by Mr. Wilson, seconded by Mr. Powell, that the clerk be instructed to notify the Romney Council to use the proper means at once to prevent the surplus water of their township from flowing into Tilbury East, as they will be held responsible for all damages arising from such overflow; carried." Passed 28th November, 1885.

It was the duty of Romney to take action, and to the performance of this duty it was urged on by the complaints of individuals, and by the Township of Tilbury East.

I hold for the purpose of this appeal that the appointment of Mr. McDonnell by resolution was valid. In this case, in addition to the original resolution, the appointment was ratified by the adoption of his report, and this was adopted by by-law provisionally adopted on the 12th day of November, 1894.

I also hold that the notice of appeal need not be under the seal of the corporation appealing, and that it is not necessary to shew that the appeal was authorized by by-law of each appellant municipality.

The appellants appear before me by counsel, and being so represented I cannot, by reason of any omission to record, or even to pass a by-law, turn them out of court. Even if by-law was necessary and if none was passed, the council of the appealing township could by by-law adopt what has been done. The notice required by law has been given. The respondents do not move to set that aside, but answer it by coming here to sustain the report. The appellants are here ready to attack, so I assume that all is regular, and that the case is properly before me. Tilbury North was served by Romney with the report appealed from.

Tilbury North, although not assessed, appeals, and with many other reasons of appeal sets out as one "that the initiating municipality should not be permitted to do the work within the limits of the appealing municipality."

Whatever disposition has to be made of the appeal of Tilbury North upon the merits I cannot dismiss it because of want of jurisdiction. There is a right of appeal.

From a careful reading of the report of the engineer, and upon the evidence, so far as it has been given before me, no evidence of engineers having been given by the appellant townships, I approve of the scheme in the report for meeting the difficulties in the way of Romney's getting good drainage. What the engineer suggests is what ought to be done, and I would uphold his work, if I could see that it is under the circumstances authorized by law. My difficulty is in satisfying myself that Romney can, upon report without petition, as a mere matter of maintenance and repair of any one drain in Romney, do the work upon the townline between Romney and Tilbury East as provided for by that report, and assess lands in Tilbury East for benefit. Under section 75 of the Drainage Act of 1894, if the Township of Romney deemed it expedient, *for the better maintenance* of any of the drainage works which we may group and consider as all the drains above mentioned, whether mentioned in the resolution of the council of Romney passed June, 1894, or not, or for the prevention of damage to any lands or roads by reason of any of these drains:

1st. To change the course of any such drain.

2nd. To make a new outlet for the whole or any part of the work; or

3rd. To improve, extend or alter the work; that township could, without the petition, but upon the report of an engineer, 1st, undertake and complete the change of course, 2nd, undertake and complete the new outlet, 3rd, undertake and complete the improvement, extension or alteration, etc., and the engineer would, for any of this work, without the petition required by section 3, have all the powers to charge lands and roads in any way liable to assessment under this Act for the expense thereof.

How can this work upon the townline be fairly said to be a work changing the course of, or making a new outlet for, or improving or extending any one of the drains mentioned?

The engineer did not, as I interpret his report, so regard this work; but to do what, as I have said, ought to be done, to give satisfactory drainage, he accepts the resolution, and instead of limiting his enquiry to what is necessary for the better maintenance of any of the drains mentioned, or as to how far water is, by any of these drains, caused to flow upon and injure lands, he proceeds to investigate the cause of complaint in respect to the overflow of water generally and includes in the drainage system he is to deal with, the road ditches along the 30 and 31 side-road in Romney.

These ditches upon that side-road are not mentioned in the reslution, and they cannot, in my opinion, be called drains or drainage works constructed under the provisions of the Drainage Act, or of any Act respecting drainage by local assessment, and they are not drains in reference to which the course can be changed, or outlet provided, or improvement, alteration or extension be carried out as now proposed within the meaning of section 75.

These road ditches are classed with the regular municipal drains. Sections 8 and 13 of the report deal with them as part of the system.

What is called as the extension of Number Four drain from the 24 and 25 side-road to the 30 and 31 side-road, along the southerly side of the north townline, is to all intents and purposes a new work, and a work which benefits lands in Romney and Tilbury East, and for which lands in Romney and Tilbury East are by the engineer assessed for benefit.

I refer also to page 4 of the engineer's report, where he says this townline drain is "to carry off the surface waters from the lands to the south thereof, flowing across said townline into Tilbury East, towards the angle of the 24 and 25 side-road, giving them direct benefit by drainage and by cutting off the natural flow of said waters on to the adjacent lands in Tilbury East greatly benefiting the same." "I have assessed all these lands for the benefit so to be derived by same," etc. In his evidence Mr. McDonnell says the townline drain is to benefit lands in Romney and Tilbury East.

If this drain upon the townline can within the meaning of the Act be called part of Number Four, then it seems to me the argument of Mr. Wilson is unanswerable, that given any municipal drain in any township, that drain can be used as a base of operation so that the most extensive work which can in any way be connected with it, may be done upon the report of an engineer, without the necessity of a petition.

With great reluctance I allow the appeal of Tilbury East. I agree to the fullest extent with the language of the Chancellor in Stephens vs. Moore, 25 O. R. 605, where he says: "In matters of drainage and other business of local concern, the policy of the legislature is to leave the management largely in the hands of the localities, and the court should be careful to refrain from interference, the meaning of which is always a large outlay for costs, unless there has been a manifest and indisputable excess of jurisdiction, or an undoubted disregard of personal rights."

In this case I think there has been an excess of jurisdiction, and where there is an attempt by one municipality to assess lands in another, if there is any reasonable doubt about the right, it must be given against the assessment, so I allow the appeal of Tilbury East as to so much of the report as assesses lands in that township for the construction of the drain on the townline between lots 24 and 25, to the line between lots 30 and 31. The cost of that work is $3662, and the assessment upon lands and roads in Tilbury East is $3662.52. I see no way of amending the report, even if Romney desired an amendment, and if the engineer consented, so that this work can be done at the expense of Tilbury East.

The counsel for respondent township contends that under sub-section 3 of section 3, the engineer's report can be upheld. I do not think so. I do not think sub-section 3 applies to such a case as this at all. That sub-section applies, as it seems to me, where in doing a work under sub-section 1, or where a work has been done under that sub-section, water is caused to flow from the lands or roads of any municipality, company or individual, upon and injure lands or roads of any other municipality, company or individual, then the lands and roads from which the water is so caused to flow may be assessed and charged for the construction of the drainage works, for relieving the injured lands or roads from such water, and to the extent of the cost of the work necessary for such relief.

If such is rendered necessary in doing the work petitioned for, then such lands as are made liable do not count for or against the petition unless within the area therein described.

If such is rendered necessary after the completion of a work petitioned for, or giving that sub-section a wider meaning, if such a work is rendered necessary by any drainage work that has caused from any lands or roads, etc., water to flow upon and injure the lands or roads of any other municipality or individual, this work of relief may be undertaken and the lands and roads from which the water was caused to flow may be charged.

That is not what has been done here. The work which I think was unauthorized was a work far in excess of what was to be paid for by an assessment called "injuring liability." It is a work which would benefit other lands. It is to all intents and purposes new, and is in no way confined to a work simply in relief of lands of Tilbury East, from damage by the water of the lots assessed for injuring liability.

Sub-section 3 of section 3 may possibly be restricted to narrower limits than I am giving it. It may be confined to the water in a state of nature upon land, or a road, being by the owner by some means caused to flow upon and injure other land or road; but in any view that may be taken, it would not authorize the work in question.

The appeal of Tilbury East should be allowed.

Tilbury North is not assessed, but that township by this report is asked to submit to additional water being brought into it by a new drainage work, constructed by another municipality, and as to which Tilbury North is in no way a consenting party. It follows that the appeal of Tilbury North must also be allowed, to the extent of my setting aside so much of the report as provides for the work upon the townline between Romney and Tilbury East, between the side-road between lots 24 and 25 and the side-road between lots 30 and 31.

If I could properly, upon any well settled principle, compel the appellants to pay their own costs I would do so. Upon a more full consideration of the facts I think the general rule must be followed and the appeals must be allowed with costs.

I order and direct that that part of the work provided for by the engineer's report, and described therein as "that section of the proposed drainage works along the townline road between Romney and Tilbury East, extending from the line of the 24 and 25 side-road to the line of the 30 and 31 side-road in Romney," be not proceeded with.

I further order and direct that the Township of Romney do pay to the Township of Tilbury East and to the Township of Tilbury North respectively the costs of the appeal and of the reference herein.

I order that the sum of $12 be paid in stamps to be affixed to this my report, and paid for by the Township of Romney, as and for three days' trial, considering the trial as one and one-half days' for each appeal.

I direct that the costs be taxed at the City of Chatham, by the Clerk of the County Court of the County of Kent. I make no order at present for any injunction.

GOSFIELD SOUTH *vs.* MERSEA.

In the Matter of "The Drainage Act, 1894," and of an Appeal from the Report, Plans, Specifications, Assessments and Estimate of Alexander Baird, O. L. S., dated the 7th day of November, A. D. 1894.

Assessment for "Outlet Liability"—And for "Benefit"—Cost in Excess of Benefit—Description of Lands—Amendment.

When sub-section 3 of section 3 of the Drainage Act, 1894, is invoked there must be some relation between injury and benefit.

Where the work necessary to benefit petitioners cannot be done except at a cost far in excess of the benefit, it ought not to be proceeded with and the referee has jurisdiction to prevent it.

Assessment for "outlet liability" and for "benefit" discussed. The referee may amend defective descriptions of lands with the consent of the engineer.

May 16th, 1895. B. M. Britton, Q. C., Referee.

Pursuant to appointment this appeal came on for trial and was tried and heard before me at the Town of Leamington, in the County of Essex, on the 6th and 7th days of February A. D. 1895.

A. H. Clarke, Esq., appeared for the appellants, and M. K. Cowan, Esq., appeared for the respondents.

At the close of the argument I reserved my decision, and now having considered the matter, I make my report, giving my reasons therefor :

William Armstrong, Tolbert Armstrong and Henry Armstrong, being the owners of lot 11, concession "A" in the Township of Mersea and Wesley Quick, Solomon Quick and C. H. Quick, being the owners of lot 12 in the same concession, on the 18th of June, 1894, presented their petition to the council of Mersea asking that the area of lots 11 and 12, concession "A," be drained "by means of a drain through said lots sufficient to relieve said lots from injury caused by the waters brought down upon them from the higher lands to the ~~North and~~ East, by the drains constructed in what is known as Sturgeon Creek, north of said concession, and by what is known as the Coulson drain and other drains emptying therein, by deepening, straightening, widening and otherwise improving Sturgeon Creek through said lots from the south side of the first concession road southerly through said concession "A" to concession "B" or further south down said creek, if found necessary to obtain a sufficient outlet."

The council of Mersea instructed Mr. Baird, their engineer, to go on and make the necessary examination, plans and assessment, and present his report. He reported a work that would cost $1026, and of this amount he assessed lands and roads in Mersea for $890, and lands and roads in Gosfield South for $136.

The assessment is apportioned as follows, lots 11 and 12, concession "A," being the whole drainage area:

For benefit - - - - - - - -	$20.00
For outlet liability - - - - - - -	10.00
For injuring liability - - - - - -	12.00

making the entire sum against the lands owned by the petitioners only $42.

All the other lands and roads in Mersea which are charged are assessed for benefit $10, for outlet liability $5, and for injuring liability $833. The assessment upon lands and roads in Gosfield South is altogether for "injuring liability" and amounts to $136.

For reasons which do not appear, the council of Mersea are apparently willing to proceed with this work, putting upon their own landowners the "lion's share" of the cost, and claiming from Gosfield South only the sum of $136, but even this amount the latter township objects to pay, and by the notice of appeal attack the legality of the assessment on many grounds. Some of these were abondoned after evidence given, and the consideration of others is not necessary for the decision in this case.

I have come to the conclusion that this is not a case for which the Statute was intended to provide; that the assessment and report ought not to stand and that the work ought not to be proceeded with, unless those assessed in Mersea are willing, and the owners of lots 11 and 12, concession "A," will assume as against their lands the $136 now assessed against lands in Gosfield South.

If section 3 applies so as to permit the engineer to report in favor of such a work, then it would apply in a case of a smaller number, say three persons, owning in the whole one acre which could by drainage be reclaimed and benefited, but which, when so benefited and made entirely fit for cultivation, would not exceed in value $100. These three, or two of the three owners, could ask to have this area of one acre drained and if the engineer reports favorably, and the council thinks proper, the work may be done, although at a cost of $10,000 to be paid for in the main by lands miles distant, that may, through a drainage work of their township, have contributed to the body of water, be it lake, pond, or marsh, by which the acre was rendered too wet for cultivation.

Under section 3, when sub-section 3 is invoked by reason of an "injuring liability" there surely must be some relation, some correspondence between injury and benefit:

Land cannot be benefited more than to convert it from worthless land into land that may be cultivated or used as other tillable land is used; from land of no market value to land of the highest market value of the best land in the locality, land cannot be injured to a greater amount estimated in money, than the entire value of such land, and the injuring liability estimated in the same way cannot exceed that.

Whenever a case occurs where the work to benefit petitioners cannot be done except at a cost far in excess of the benefit directly upon, and by furnishing an improved outlet for, any and all lands assessed, such work ought not to be proceeded with merely for the sake of such benefit.

It may be answered that is a matter of judgment and discretion to be exercised by the council, and if such is within the statute, the referee has no jurisdiction to prevent it. I am of opinion that the referee has jurisdiction and should deal with it on appeal by another municipality.

Assume that a council, upon the receipt of a petition, correct in form and properly signed, is obliged to send on an engineer to make an examination and report, and I do not now express any opinion upon that point, the council is certainly not obliged to proceed with the work. Section 19 says "Should the council of the municipality in which the lands and roads described in the petition lie, be of the opinion that the drainage work proposed in said petition or a portion thereof would be desirable, the council may pass a by-law, etc., but if the initiating township should insist that such a work is desirable another municipality which cannot take part in the deliberation and whose lands or roads are assessed, can, in my opinion, appeal as provided by section 63, Vic. 4, instead of moving to quash the by-law that the initiating municipality may pass.

Again what was asked for in this petition was not what was really contemplated by section 3, sub-section 1. That provides for the case of lands useless, or comparatively useless, by reason of surface water naturally upon it. Such lands may be benefited, 1st, by the construction of a drain; 2nd, by the improving of a stream, creek or watercourse as therein stated; or 3rd, by the lowering of the water of a lake or pond, or by all of these together.

This petition, although the first part of it is in the form prescribed by section 4, asks for a drain to relieve said lots (11 and 12, from injury, caused by the water brought down upon them from the higher lands to the north and east, by the drains constructed in what is known as Sturgeon Creek and Coulson drain and other drains.

The council cannot do such a work merely because it is petitioned for. The council may, as authorized by sub-section 3 of section 3 under certain circumstances and in a proper case, without any petition proceed with the construction of a drainage work required for relieving lands and roads injured by water caused to flow upon them. An engineer's report would be necessary, but that report would be different from the present. The engineer would require to determine under what circumstances such water was caused to flow upon and injure. It is not merely a question of water being brought down from higher lands to lower, waters that might come without any drainage work, but it is to be determined what water by any means by man employed, is caused from lands and roads to flow upon and injure other lands and roads where no compensation has been paid, and no corrseponding benefit conferred, and having ascertained that, to assess and charge the lands from which the water was caused to flow and injure, for the construction and maintenance of the drainage work necessary for the relief of the injured lands and to the extent of the cost of such work.

There was no such examination in this case as would enable him to limit the assessment upon higher lands as he was bound to limit it under sub-sec. 3 of sec. 3. His attention was not especially called to the matter as it would have been had he been called upon by the council to act either in consequence of a petition for the drainage of marsh land or directly without a petition under that sub-section.

But assuming that the act applies and that the petitioners are entitled to have some such work done as is proposed by the report of the engineer, I am of opinion that the assessment as made cannot be upheld. The undisputed facts as disclosed by the evidence in this appeal are as follows:—Both townships front upon and have drainage to Lake Erie. Gosfield lies to the west and is much higher than Mersea. A portion of lots 11 and 12, concession "A," consists of a low, flat marsh and pasture land through which Sturgeon Creek passes. There are no high banks, but the so-called banks are about four chains apart on lot 12, and a little wider apart on lot 11, and still further apart in places, especially near the concession road. The object of the work, according to the evidence of Mr. Baird, was not to deal with water falling from the clouds and draining into this basin from the lands immediately adjacent, but to prevent the flooding of the flats by the water brought down through Sturgeon Creek from the higher lands some distance away. Taking the two lots mentioned there would be only 30 or 40 acres, say 35 acres flooded. In addition to the natural watercourse (Sturgeon Creek) bringing waters down, Coulson Drain was constructed in 1882 and 1883 and brings water from the east to Sturgeon Creek, depositing this water a little north of the 35 acres now under consideration. The distance from the point in the Gosfield townline where the water crosses into Mersea down to the point of commencement of the proposed work is about six miles and there is a fall of 120 feet in that distance. These facts must all be considered when there is an attempt to assess a large quantity of higher lands a long distance away for "injuring liability" in respect to the 35 acres situated as above.

These facts were apparently not taken into consideration. Mr. Mr. Baird says that having received instructions he made an examination and estimated the cost of the work, and then approximated as closely as he could the quantity of land that would drain into it from Mersea and Gosfield and found what would be required per acre to pay for it. The $10 dollars for benefit against each lot 11 and 12, was a mere opinion or 'guess.' He arbitrarily takes a certain small amount for outlet liability and benefit and then simply strikes a uniform rate per acre for entire residue, calling it "injuring liability." There was no attempt to ascertain the amount for which lots 11 and 12 should be assessed for benefit, and that was necessary whatever meaning may be attached to the word "benefit." Mr. McGeorge, an engineer of large experience, says he would first ascertain what the assessment should be for benefit, and that, in his opinion, would be the amount required to take away the water that runs upon these lots 11 and 12 in a state of nature. He does not think that benefit means all the advantage that is to accure to land by reason of taking the surface water away. If this water had been taken away by the work of the Coulson drain, and if these lots had paid for that work in Mr. McGeorge's opinion these should not be assessed for benefit, but all this shows the necessity of an engineer classifying the land, and of ascertaining what facts are necessary to enable him to make a proper assessment. Mr. Baird admits that the Coulson drain lands should not contribute to this work the same as other lands. It is argued that the effect of this would be to further increase the assessment upon Gosfield, but that is not the point. The point is that nothing has been taken into account but cost and quantity. There was no distinction between lands far from and near to the lands of petitioner. There was no asseesment based upon the volume and in regard to the speed of the water artifically caused to flow upon these lands, no attempt to distinguish between the effect that would be produced by water naturally flowing down Sturgeon Creek and the water artificially caused to flow down that watercourse.

For all these reasons I must allow the appeal of the Township of Gosfield South.

It was also objected by appellants that some of the lots are not sufficiently described.

Section 6 provides that the engineer need not confine his assessment to the part actually affected but may place such assessment on the quarter, half or whole lot containing the part affected, if the owner of such part is also the owner of such lot or other said subdivision. That does not touch this case as to the parcels to which objection is taken. The description is, in my opinion, not sufficient in the following cases: In the report and assessment appealed from

Part of north part 13, 2nd concession, 48 acres;
Part of north part 13, 3rd concession, 45 acres;
Part of north part 13, 3rd concession, 30 acres;
East part 13, 3rd concession, 17 acres;
North part 23 and 24, 4th concession, 200 acres;
North east part 24, 4th concession, 50 acres;
North east corner 24, 4th concession, 6 acres.

Wherever described as north part and the number of acres given, I should hold it sufficient and as meaning the northerly acres of the lot or parcel. If the engineer had furnished me the necessary evidence, with his consent I should at once amend the report in that respect, but nothing was before me by which I could amend.

The form of by-law, see section 20, shows, that there must be reasonable certainty in the description. See dictum of Mr. Justice Street in Jenkins vs. Enniskillen, 25 O. R. 405.

For the purpose of dealing with all the evidence as fully as possible, and so far as questions of fact may be material in the event of an appeal from my report, I find as follows:

1. That the work as proposed in the engineer's report would be of practical benefit to lands of petitioners, and that such lands, namely lots 11 and 12, concession "A," would be benefited to a much greater extent than the $20 for which these lands are assessed for benefit.

2nd. I find as a fact there was an artificial cut many years ago leading waters from the Township of Gosfield into the "Sturgeon Creek" and such water would then flow down through the Township of Mersea into Lake Erie and that some of the Gosfield waters lying to the north of the 3rd concession would not, in a state of nature, flow into Sturgeon Creek.

3rd. I find that the Sturgeon Creek is a natural watercourse, and that its rise is from a spring or springs about 60 rods to the east of the townline between Gosfield South and Mersea.

I report, order and direct that the appeal of the Township of Gosfield South be allowed, and that the assessment by Alexander Baird upon lands and roads in the Township of Gosfield South be set aside, and that the work proposed and provided for, by the report of the said Alexander Baird appealed from, be not proceeded with by the Township of Mersea at the expense of the said Township of Gosfield South upon the assessment made in said report.

As there is no reason to question the good faith of the council of Mersea in acting upon the petition, I should be glad, if, consistent with the ordinary rule, I could relieve Mersea of costs, but the general rule is that costs should be given against the party failing, and that rule must govern here.

I report, order and direct that the costs of the Township of Gosfield South of this appeal and reference be paid by the Township of Mersea to the said Township of Gosfield South, and that such costs be taxed by the clerk of the County Court of the County of Essex, at the City of Windsor, in said county.

I order and direct that the trial be considered as a trial of two days, and that stamps to the amount of $8 be affixed to this, my report, and paid for by the Township of Mersea, and if affixed by the Township of Gosfield South, the amount shall be included in the costs to be taxed to said township.

SOUTH DORCHESTER AND DEREHAM *vs.* MALAHIDE.

IN THE MATTER OF THE CATFISH DRAIN, AND IN THE MATTER OF APPEAL FROM THE REPORT, PLANS, SPECIFICATIONS, ASSESSMENTS AND ESTIMATES OF JAMES A. BELL, C. E., DATED THE 6TH DAY OF MAY, A. D. 1895.

Appointment of Engineer—Resolution—Amending Report—Allowance for Previous Assessment—Jurisdiction of Referee—Sections 13 and 38, ch. 56, 1894—Description of Lands.

The appointment of an engineer to examine and report upon a drainage work need not be by by-law in the first instance. Where a report after being adopted by the council was recalled and substantially varied by the engineer, the amended report having been adopted by a provisional by-law, was held to be authorized by the council.

Section 13 of the Drainage Act, 1894, does not permit an assessment for outlet liability which will recoup a lower township for an expenditure made for its own benefit years before. The law was amended to render the higher lands liable to assessment.

The referee has jurisdiction to entertain an appeal from the judgment of an engineer even in cases where he has power to take into consideration prior assessments and to make allowances therefor, and, if the evidence warrants it, to set aside the report.

Sections 13 and 38 considered. Instances given of sufficient and insufficient description of land for assessment.

The referee may correct a defective description with the engineer's consent.

September 16th, 1895. B. M. BRITTON, Q. C., Referee.

The report now appealed against was made at the instance of the Township of Malahide, by their engineer, James A. Bell, C. E., and he assesses lands and roads in the Township of Malahide, in the Township of Dereham (including Brownville in that township), in the Township of Bayham, in the Township of South Dorchester and in the Village of Springfield.

The Townships of South Dorchester and Dereham appealed, but pursuant to section 63 of "The Drainage Act 1894," the Municipalities of Bayham and Sprinfield were served, and they appeared by counsel, merely admitting service, but took no part in the appeal, either in supporting or resisting the assessment upon their lands and roads.

Pursuant to my appointment, these appeals came on for trial and hearing before me at the Town Hall, in the Town of Aylmer, County of Elgin, and they were tried and heard together on the 26th, 27th and 28th days of June, 1895.

Norman McDonald, Esq., appeared for South Dorchester, J.

B. Rankin, Esq., appeared for Dereham, and J. M. Glenn, Esq., appeared for Malahide.

Having heard the evidence and the arguments of counsel, I reserved my decision. and now having fully considered the matter I give my decision and make this my report, giving my reasons for the conclusions arrived at :

The report appealed against is set out in full in Malahide's by-law No. 631 of 1895, provisionally adopted on the 6th day of May, 1895. The preamble of this by-law recites section 75, of "the Drainage Act, 1894," the existence of Catfish Creek drain, and that the township had procured an examination by James A. Bell, C. E. The printed copy of this by-law, including the report, was filed, and is exhibited. The engineer finds that the total cost of improving, enlarging and extending to a proper outlet this

"Catfish Drain" will be - - - - -	$15,536.16
To which the engineer has added - -	3,006.07

for work previously done in the Township of Malahide and for which lands in Malahide were formerly assessed making the total cost of the work according to former expenditure and present estimate the sum of $18,542,23.

This sum of $3,006.07 is raised to refund to certain landowners in Malahide part of the amount assessed against these lands, and it is in effect paid back by being deducted from the present proposed assessment.

This sum of $18,543.23 is assessed against the townships as follows :

Lands and roads in Malahide - - - -	$ 8,883.74
Lands and roads in Dereham - - - -	6,547.47
Lands and roads in Bayham - - - -	187.08
Lands and roads in South Dorchester - -	2,741.41
Lands and roads in Springfield - - - -	182.53
Total - - - - - - - - - - -	$18,542.23

Each appellant township states many grounds of objection to the report in question. Without mentioning these in detail, and in the order set out in notice, I deal with most of these in rendering my decision.

The engineer was acting under section 75 of "The Drainage Act, 1894," and Catfish drain was a drainage work constructed under prior Acts respecting drainage by local assessments within the meaning of section 75. He has not assessed any of the lands or roads in either of appellant townships for benefit, but only for outlet. The reason for such assessment as stated in the report, is that the drain would "effectually form an outlet for about 4000 acres of land," and that it is used as an outlet for the drainage of 7359 acres in Dereham, 5762 acres in South Dorchester, 199 acres in Bayham, 461 acres in the Village of Springfield and 7257 acres in the Township of Malahide, and that, as a large amount of the land above mentioned is thoroughly drained, both by tile and open drains, the result is that the waters of these lands are rapidly carried to the low lands and to the Catfish drain; this drain not being of sufficient size to carry off the waters thus brought to it, overflow and causes damage and injury to the adjacent lands and roads.

The proposed drain is to prevent damage to lands and roads so it is distinctly within section 75, and the work, or some such work, can be done on the report of an engineer without the petition required by section 3 of the Drainage Act.

This brings me to the question of the authority of the engineer for making any assessment for the proposed work upon lands in the upper townships, and if he had, has the assessment been properly made?

It being the duty of Malahide to maintain Catfish drain in that township, the council could appoint an engineer to examine and report on the same, and on a report could undertake the work as is mentioned in section 75. The report states that this appointment was by resolution passed 15th October, 1894. I am of opinion that the appointment may be by resolution and that a by-law is not necessary in the first instance to authorize a report.

It is further objected that, as the engineer in pursuance of the appointment of the 15th October, 1894, made a report, which was filed, he could not afterwards withdraw it and substitute for it another report; that as soon as the report was filed the engineer was "*functus officio*" and could not alter or amend or make another until again appointed and requested to do so by the council. There certainly was a report filed in March, 1895, No copy of this can be produced but it was adopted by the council by resolution on the 1st day of April, 1895. The engineer says that after this report was sent in, he discovered that he had made a mistake, and he recalled the report through the solicitor for the Township of Malahide. Having got possession of the report he made the necessary changes, correcting what he thought were errors, and returned it to the council. It is not material in determining the authority of the engineer, to consider the particular changes made. The report was substantially different, different in important particulars from present report.

There is a great deal of force in the objection that a report once made and filed cannot be recalled and amended on the mere motion of the engineer; but giving the matter the best consideration I can, I am of the opinion that the council, in accepting the amended report, which they did on the 6th day of May, 1895, and by provisionally adopting by-law No. 631, ratified what the engineer had done, and that I must for the purpose of this appeal consider the report as authorized by the council.

The report shows that the portion of Catfish drain through the 9th and 10th concessions of Malahide was made under by-law No. 160 passed 9th December, 1867, the object being to afford an outlet for what is known as the Catfish Marsh drain in the Township of Dereham. This cost $1600 and lands in Malahide were assessed for the whole of it. The portion of this drain through the 8th concession of Malahide was made under by-law No. 266 passed 30th March, 1874, an extension of the drain then being necessary for carrying off the surplus waters let down by Dereham and by the northerly lands of Malahide. The cost of this extension was $3560, and the whole amount was assessed upon low lands in Malahide adjacent to the drain. The entire amount of both assessments was for benefit.

By-law 160 was passed pursuant to a report made by W. C. Wonham, an engineer appointed by Dereham, and the work in Malahide authorized by this by-law was at the instance of Dereham and made necessary by the action of Dereham.

By-law No. 266 was after another report by the same engineer, Wonham, but this time appointed by the council of Malahide, and necessary for the reasons stated in that by-law. There was no power to assess lands in upper townships for outlet.

Of this old work the engineer, Mr. Bell, finds that 42740 cubic yards will be incorporated in present work, and this he considers worth $5556.20 as estimated cost of 13 cents a yard. He finds that the lands now to be assessed for the proposed work, were assessed for the existing work to the extent of $5010.12. The engineer, under section 13 of "The Drainage Act 1894" takes this into consideration, and allows to these lands 60 per cent. of the former assessments. That seems to him just, and he states it in his report as follows:

"I have allowed a deduction of 60 per cent. of this amount ($5010.12) or $3006.07; this amount I have added to the cost of the proposed work, and assessed it against the lands and roads that use the drain, and did not contribute to its construction."

1. Can the engineer do this as a matter of law?

2. If what the engineer has done was authorized by section 13, was the doing of it just and right under the circumstances in evidence before me?

3. If the engineer was authorized by section 13, he having taken into consideration these prior assessments on lands in Malahide, and having made the allowance as seemed just and right to him, can the referee interfere with it in appeal?

I am of opinion that Section 13 is not intended to apply to such a case as this. If it can be held that the words of this action are wide enough to permit its application to the assessments for proposed drain, it would permit the opening up and reversal of assessments made years ago, when the law was very different. It would permit the engineer of a lower township in the work of maintenance and repair of a drain constructed wholly by and at the expense of the lower township, and which the lower township is bound to maintain, to assess upper townships by way of outlet assessment for enough to cover the entire cost of original construction. Why not in some cases the whole original cost as well as 60 per cent of it? In such a case one engineer may exercise a wise discretion wholly fair to the upper township and another may go wrong and do a great injustice to to the upper township. Without going so far as to say that Section 13 has no application when the engineer is dealing with lands in different municipalities, I am strongly of the opinion that the engineer cannot take into consideration and make an allowance for a prior assessment for benefit, charging the amount of such allowance to other lands which are only assessed for outlet or injuring liability. In applying this section it must be only when assessments are of same kind, as for example when certain lands are assessed for benefit and other lands omitted which were also benefited, then in subsequent work of construction or maintenance these prior assessments may be taken into consideration and allowance made therefor; and similarity in cases of outlet and injuring liability. I cannot understand why land benefited by a drainage work and assessed for this benefit should be relieved of this benefit assessment by charging it upon lands in the same or other townships for outlet liability.

At the time the drain was constructed and repaired by Malahide as above stated, there was no power to assess lands in Dereham or South Dorchester for outlet. There is power now, but the legislature in giving that power did not intend to authorize, nor did it in fact by section 13 authorize, the lower municipality under the name of outlet liability to recover now for work done for the lower municipality 25 years ago. This power to assess for outlet was first given in 1881 by section 22 of chap. 24-44 Vic. That section was continued as section 590 in the consolidated Municipal Act of 1883. In 1886 section 30, chap. 37, amended section 590 by allowing such assessment in drainage works constructed without the petition. As so amended section 590 appeared in chap. 184, R. S. O. 1887, and this section was considered in Orford vs. Howard, 15 O. A. R. 496. If the law had remained as it was when Orford vs. Howard was decided it would not be argued that the upper townships could be assessed for the proposed work.

Section 590 was amended in 1890 (chap. 50, sec. 37, 53 Vic.) by making it applicable to unimproved as well as improved lands. In the consolidation of the Municipal Act, 1892, this section 590 was again amended and as amended the powers are continued by sub-sec. 4 of sec. 3 of "The Drainage Act, 1894." This section gives ample powers of assessment where the drainage work is used as an outlet, or when the work is constructed, an improved outlet will be provided, but it certainly does not go far enough to permit an assessment under outlet liability, which will re-coup a lower township for an expenditure by the lower for its own benefit years before the law was as it now is.

The engineer says as to certain lands in Malahide you should be assessed for my proposed work, but this will be made up to you by my allowing your lands 60 per cent. of the amount these lands formerly paid. Present owners of Malahide get a benefit for which they are not obliged to pay and present owners of South Dorchester and Dereham lands pay for a drain made in the time of their predecessors but for which these predecessors were not liable.

Upon the evidence before me, and for reasons given, I am of opinion that even if the engineer had the power he should not have made the allowance to lands in Malahide for the prior assessments, charging the amount of this allowance against lands in South Dorchester and Dereham for outlet.

Having assessed the lands in Malahide for benefit, which I assume was just and right, there is no reason in such a case as this to arbitrarily add to outlet assessment of certain lands an amount sufficient to wipe out the assessment for benefit. It so happens that the amount was only 60 per cent. of original cost. If assessment for benefit had been greater, the assessment for outlet liability would have been correspondingly greater.

I decide and so report that the referee has jurisdiction to entertain the appeal from the judgment or decision of the engineer even in cases where he has power to take into consideration prior assessments and to make allowances therefore, and on such appeal if the evidence warrants it, to set aside the report.

I am of opinion that upon the evidence some of the lands in South Dorchester and Dereham are assessable for the proposed work for outlet liability, but the present assessment, although supported by the testimony of the engineer who made it, and of other able witnesses, apart from the improper charge for outlet to compensate lands in Malahide for prior assessment, is according to the weight of evidence, too high.

Before taking leave of section 13 I may mention that it is new. The first time any authority was given to consider prior assessments was by the Act of 1890 when S. S. 11*a*, was added to section 569 of ch. 184, R. S. O. 1887, but that was power given only to the Court of Revision, and to the Judge and the Court of Revision and the Judges still have this power by section 38, of the Act of 1894. Section 13 has a much wider application in the work of the engineer than section 38 has in the work of the Court of Revision.

I am of the opinion that the report as to the maintenance should not stand. There is no reason why the assessment for benefit should be omitted in arriving at the proportion each Township should pay. The principle introduced is that the burden of maintenance should be mainly borne by the upper townships. Why should the township having the advantage of situation be obliged to pay the larger share for maintenance? The evidence of the engineer is almost all against Mr. Bell's report on this point.

The difference is of great importance against the upper townships and in favor of Malahide.

It is further objected that many of the lands assessed are not sufficiently described. I hold that where the assessment is of the north, south, east or west part of any lot or half or quarter lot, giving the number of acres, that is sufficient, as, in the absence of any evidence to the contrary, it must be considered as the north, south, east or west —— acres as the case may be. In a very few instances, as to lands in Dereham and South Dorchester, the description may be insufficient, for example, south-west corner of north half, 14, 11th concession, 2½ acres. East centre part of south half of 16, 11th concession, 30 acres; part of centre part of north half 23, 12th concession, 30 acres, and so on; but these are so few that I would not set aside on account of them the report; but with the consent of the engineer, and upon the evidence which could be furnished, would have the correction made. I mention this so that in event of appeal the appellant may have the benefit of their objection if I am wrong.

I would be very glad if I could see my way, with the consent of the engineer, to amend the report as to get rid of the objection above considered, and so to have a work considered necessary by Malahide, proceeded with without that township being obliged to commence *de novo*. But I can not. The appellants have strongly pressed the objections taken in their notice of appeal, so that I must allow the appeal in each case, and with costs.

I report, order and direct that the report and assessment of James A. Bell to lands and roads in the Township of South Dorchester and in the Township of Dereham be set aside and that by-law No. 631 of the Township of Maladide, provisionally adopted on the 6th day of May, 1895, be quashed, and that the drainage work provided for by said report, assessment and by-law, be not proceeded with by the Township of South Dorchester or Dereham.

I report, order and direct that the municipality of the Township of Malahide do pay to the municipalities of the Townships of South Dorchester and Dereham, respectively, the costs of these appeals and of the reference.

I order and direct that the sum of twelve dollars in stamps, as and for three days' trial be affixed to this my report and be paid for by the Township of Malahide, and that either of the other townships affixing said stamps, or part thereof, may include the amount in the costs to be paid by said Township of Malahide.

I order and direct that the costs be taxed by the Clerk of the County Court of the County of Elgin at the City of St. Thomas in said County.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION.

STEPHENS VS. TOWNSHIP OF MOORE.

Repairs to Drain—Agreement with Third Party—"Person Injuriously Affected"—Mandamus—Drainage Act, 1894—57 Vic., Chap. 56, sec. 73 (O.)

A municipality is not liable for the repair of a drain constructed by it under an agreement with a person not a party to the action.

Held per Court of Appeal, reversing on this point the Drainage Referee, that under 73 of the Drainage Act, 1894 (57 Vic., ch. 56 (O.), a ratepayer whose property has been assessed for the maintenance and repair of a drain, as deriving benefit from it, is a person injuriously affected by its want of repair even though he has not suffered any pecuniary loss or damage by reason thereof, and he may be awarded a mandamus to compel the municipality, whose duty it is to keep the drain in repair, to do such work as may be necessary unless the municipality can show that even if the drain were repaired it would, from changes in the surrounding conditions, be useless to the applicant's property.

January 31st, 1896. B. M. BRITTON, Q. C., Referee.

Whereas by an order made in Chambers by the Honorable Mr. Justice Rose on the 9th day of September, 1895, this action, under the provisions of 57 Vic., ch. 56, was referred to me, Byron Moffatt Britton, Drainage Referee; and

Whereas it was by said order further ordered that such examinations of the parties hereto for discovery, as had already been had and taken, and the depositions taken thereon, and such examinations for discovery as were pending when said order was made might be used before said Referee in the same manner and to the same extent as the same would be admissable at the trial of the action before a Judge of this Court, and that the costs of this action and of said motion to refer, and of the said reference, should be in the discretion of the said Referee.

Now I, the said Byron Moffatt Britton, having duly heard and considered the evidence relating to the questions in this action, and having heard the argument of counsel and considered the same, do make my report as follows:

Pursuant to my appointment this case came on for trial at Hayne's Hall in the Village of Brigden, Township of Moore, on Wednesday, the 6th day of November, 1895, and the trial was continued on the 7th, 8th and 9th days of November aforesaid. Matthew Wilson, Q. C., appeared as counsel for the plaintiff, and James F. Lister. Q. C., for the defendants.

At the close of the argument I reserved my decision, and now render it, on this, the date of my report:

The plaintiff is the owner of the southerly 195 acres of lot 5 and the southerly 195 acres of lot 6, in the 3rd concession of the Township of Moore. His complaint is that defendants have neglected to keep in repair the drain along the northerly side of the road between the 2nd and 3rd concessions of said township in front of plaintiff's land to the Parr drain, and that they do not open and keep open and in repair a drain along said concession road westerly from the Parr drain to what is known as the McGill outlet. The plaintiff says that the defendants have not only neglected their statutory duty to repair, but by cutting off the water from the Parr drain, so that it cannot flow westerly to the McGill outlet, they are depriving him of a right.

The plaintiff applied to amend his statement of claim by adding paragraphs 7*a* and 7*b*. A copy of the proposed amendment is in notice of motion filed as exhibit No. 2, and a copy is now attached to the record. By this amendment the plaintiff alleges a right to the use of the McGill outlet, by reason of a bond or agreement between the defendants and one Ezra Stephens, and by reason of user of it, for the water from lands of the plaintiff from the date of its construction down to the year 1894.

For the purpose of having the whole matter before the court I allow the amendment.

The plaintiff claims:

(1). A declaration of his rights.

(2). A mandatory order compelling the defendants to forthwith clean out and repair the Second and Third Concesssion drain and the McGill outlet and to restore them to their original capacity and usefulness; and

(3). Damages.

The questions for my determination are:

1st. Is the plaintiff entitled, under the circumstances shewn in evidence, to compel the defendants to open up and repair a drain on the 2nd and 3rd concession road from the Parr drain, a distance of six or eight rods westerly, so as to carry the water to the McGill outlet brought from the north of the Parr drain or from the east across the Parr drain;

2nd. If plaintiff is so entitled, has any damage resulted from the filling up of the ditch, such as it was, for this distance of six or eight rods;

3rd. Is the Second and Third Concession drain, from the Parr drain easterly, in a reasonable state of repair, and, if not, has the plaintiff sustained any damage, and, if so, what damage by reason of want of repair?

I must at the outset express my regret—considering the length of time this case has taken, the number of witnesses, professional and lay, called, and hence the large amount of costs involved—that the members of the defendants' council did not at once accept the good advice of their solicitor and, for the sake of avoiding expensive litigation, even if not obliged to do it and even if, as the defendants contend no benfit would result to the plaintiff from the doing of it—make the cutting or a cutting from the Parr drain for six or eight rods westerly. This could have been done for about $15. The entire cost of doing all the plaintiff asked, so far as I can gather from the evidence, would not have exceeded $130. However this action may eventually terminate, the cost to the defendants will necessarily exceed the larger of these amounts.

No harm could have come to the defendants from doing the work asked. No other case was depending upon this, and as a former council, either with or without authority, had assumed to confirm an agreement with plaintiff's brother and to do some work in pursuance of this agreement, this was certainly a case for settlement and not one for litigation to the bitter end. The matter, however, is before me and I must to the best of my ability determine the rights of the parties.

The drainage work now under consideration was begun under by-law No. 6 of 1872 upon the report of John H. Jones. This report, dated 28th September, 1872, provides for:

1st. What is now known as Parr drain from its outlet in Sombra northerly between lots 6 and 7 to allowance for road between 4th and 5th concession in Moore;

2nd. For a drain along the north side of the 4th and 5th concession road from the northerly end of the first drain to the townline between Moore and Enniskillen;

3rd. A drain along the north side of the road between the 2nd and 3rd concession from the west side of lot 7 to the Township of Enniskillen;

4th. A drain on the east side of the side line between lots 3 and 4 from the road between the 4th and 5th concessions south to the blind line and thence east to Plum Creek;

5th. A drain along the north side of the 4th and 5th concession road from sideline between lots 6 and 7 to the sideline between 7 and 8 in the 4th concession, thence southwest into a ravine running into Bear Creek;

6th. A drain from the 4th concession line north along the line between lots 5 and 6 in the 5th concession into Bear Creek.

The third of these drains is the one plaintiff complains about.

The engineer intended, and the report shews, that the water was to be taken easterly from the west side of lot 7 to the townline of Enniskillen.

Ezra Stephens, the brother of the plaintiff, and then the owner of divers parcels of land in the Township of Moore, and, amongst other lots, lot 6 in the 1st concession, commenced proceedings to quash by-law No. 6, on the 6th day of May, 1873. A settlement was arrived at which the rule *nisi* to quash was to be discharged without costs and Robert Fleck, the reeve, and Mr. Whittet, a member of the council of Moore, gave their personal bonds to Ezra Stephens for $1,000, the condition of which was that the obligors would cause the corporation of the Township of Moore within six months from that date to construct and dig a drain from the Parr drain along the concession line between the 2nd and 3rd concessions, across lot No. 8 in the 3rd concession so as to carry a portion of the water brought down from the Parr drain into a ravine leading into Bear Creek, and that they would cause a reduction to be made upon the lands of the said Ezra Stephens in the Township of Moore assessed under by-law No. 6, and that the drain to be constructed should be "of a uniform size with the other drains and with fall sufficient to carry off a proportionate part of the water which may be brought down the first mentioned drain." Whatever this bond may mean it was something that Fleck and Whittet personally agreed to have done.

On the 6th of September, 1873, the council of Moore passed a resolution confirming the settlement made with Ezra Stephens. That settlement is not set out, as in bond.

On 15th of January, 1876, the defendants' council passed a by-law, called by-law number 9 of 1875, confirming the resolution and confirming the agreement and making a 10 per cent. reduction in the amount of rates charged upon the lands of Ezra Stephens in the Township of Moore. This by-law does not at all assist in enabling me to find out what this drain was to be that was to carry the proportionate part of the water then brought down by the Parr drain. According to the evidence the work provided for by by-law 6 of 1872 was done and there was a surplus of $897.88. Part of this money was expended in doing work pursuant to, or in consequence of, this agreement with Ezra Stephens. On the 29th of November, 1873, the council made a grant of $178.50 out of general funds presumably for this work, as it is called the McGill extension. The details of this expenditure are not shewn but the clerk, Mr. Watson, who was clerk in 1873, says the extension was an open ditch in front of part of 9 and of 8 and 7 in the 3rd concession and that it included the culvert at the junction of the Second and Third Concession drain with the Parr drain. How much was actually expended upon this, or what the dimensions were of this ditch then made from the Parr drain west, I am unable to ascertain from the evidence.

I find as a fact that to some extent the original intention of Mr. Jones was departed from, and the ditch was extended westerly and that there was a connection made with the Parr drain so that at the times of freshet some water would flow from the Parr drain westerly to the McGill outlet. But I have no means from the evidence of determining what proportion of the water would in time of freshet so flow westerly, but I am of opinion that a comparatively small portion so flowed when water was confined to the ditches. In many of the freshets the water overflowed all the ditches, and the general flow was south westerly.

Whatever might be accomplished by a larger and more extensive drainage scheme making Bear Creek, instead of Black Creek, the outlet, apparently very little good resulted from the work authorized or from the work actually done, whether legally authorized or not, upon the McGill Extension outlet. The excavation made for the six or eight rods westerly from the Parr drain was allowed to fill up and all subsequent work on the McGill outlet was westerly from these six or eight rods. The connection between the Parr drain and the McGill drain was not for a long time insisted upon or asked for or considered necessary. The plaintiff did not come to reside in Moore until 1885. About 1890 he began to talk about the opening of the McGill Extension outlet. In 1890 the Parr drain was enlarged and the McGill outlet repaired, but these repairs were only from the six or eight rods above mentioned. It was no part of the scheme in repairing to carry any water from the Parr drain westerly by that course.

On the 31st of May, 1892, Messrs. Wilson & Company, solicitors for plaintiff, wrote to the reeve of Moore asking for repairs to the Second and Third Concession drain to the McGill outlet. They called attention to the fact that under sections 585 and 586 of the Municipal Act then in force, the deepening, extending and widening of a drain in order to enable it to carry off the water it was originally designed to carry is a work of maintenance and repair. Upon the evidence I find it imsible to asctertain what water from the Parr drain, or east of it, the drain was really intended or did in fact carry. It must be borne in mind that the fair inference from the agreement with Ezra Stephens, is that he was then more concerned about his lot 6 in the 1st concession than about the drainage of lots 5 and 6 in the 3rd concession. He desired to cut off some of the water coming from the 4th and 5th concession so that it would not flood this lot 6 in the 1st. It would certainly have been difficult, if not impossible, with the money that could be reasonably have been levied after enlargement of Parr drain to apply these sections 585 and 586 so as to benefit the plaintiff to any extent.

On the 10th August, 1892, the plaintiff having before then conveyed small parcels of land to different members of his family, served upon the defendants council a motion signed by himself, two of his sons, two of his daughters and three other persons, requiring the defendants to have this Second and Third Concession drain repaired across lots 4, 5 and 6 in the 2nd and 3rd concessions into the McGill outlet. On this trial no question was raised about lot 4. That certainly drains to the east into what is called Dodd's outlet.

On the 9th of August, 1893, the plaintiff presented a petition to defendents' council dated the 29th of June, 1893, stating that the system of drainage between the 2nd and 3rd concessions of the township from lot 4 was out of repair and is not sufficient for the proper drainage of the lands originally assessed therefor, and the petitioners asked that the council will construct a ditch or drain of sufficient capacity to drain the lands, commencing the said drain at a point between the west halves of lot 4 in the 2nd and 3rd concessions and proceeding westerly along the allowance for roads between said concessions to a ravine forming an outlet into Bear Creek opposite to the east half of lot number 9.

The plaintiff can have no cause of action because the defendants did not comply with that petition. At that time this would be practically and substantially a new work, and I think the plaintiff so regarded it and that he then thought he could not insist, as a mere work of repair, upon getting such a ditch between the Parr drain and the McGill outlet as would be of any benefit to him.

1. I am of opinion, and so decide, that the plaintiff is not entitled to have the relief he asks in regard to the McGill outlet. (a) Upon the evidence, to make any such order as would benefit the plaintiff, even if Parr drain and other drains were now as they were when constructed, would be an attempt to enforce specific performance by the defendants of the agreement made between Ezra Stephens and Fleck and Whittet. The court would not do this at the instance of Ezra Stephens, and the plaintiff is not in as good a position as Ezra Stephens was. (b) Assuming that the work defendants did outside of the by-law and by reason of the agreement of Ezra Stephens must be regarded as drainage work under the Municipal Act, and having

made it they are bound to keep it in repair, I am unable from the evidence to find out just what kind of a drain was made from the Parr drain six or eight rods westerly, and so am not able to make an order for its restoration. (c) Although a court at this stage would be slow to consider as wholly illegal the work done in 1873 not provided for by an engineer's report, and would not hold the councillors of that day personally responsible as for the wrongful expenditure of money, it is a very different thing to say that the defendants must now go on and enlarge and extend the work as a work of maintenance and repair, treating the drain to all intents and purposes as one constructed under some Drainage Act respecting drainage work and local assessment. The work done on McGill Extension outlet in 1873 was not such a drain; that part of this drain west of the six or eight rods in question owing to what has been done since 1873 under authority of the by-law of the council is in a different position from the part complained of, and in respect to which a mandamus is asked.

2. But even if the plaintiff has the right to have McGill outlet repaired and made as it was in 1873, from the Parr drain westerly, the evidence does not shew that he has sustained any appreciable loss or damage by reason of its being out of repair. The strongest that the plaintiff himself puts it is, that if made as it was in 1873 his drainage would be improved, and from his knowledge of the ground and what he had been told by engineers, there would be no difficulty in giving them complete drainage. He admits that the Parr drain is not large enough to take all the water down, and while he says that the restoration of the McGill outlet would give his lands relief, what is really wanted is to have the Parr drain deepened and to have all the drains correspondingly deepened and improved; in short, what the witness, Mr. McDonnell, called a new scheme and fully described. The plaintiff says that the drain west from the Parr drain, should be made deeper and wider in order to give him relief. That, taken with the evidence that the Parr drain must be considerably enlarged to give plaintiff relief, and the evidence of the engineers, satisfy me that the plaintiff has not been injured by the action or neglect of the defendants in regard to the McGill outlet.

I find that the Second and Third Concession drain was out of repair. Recently repairs were made upon it for a short distance east of the Parr drain and that part is now reasonably sufficient, but the part further east is now out of repair. No doubt the opening up of a drain to Dodd's outlet is in relief of plaintiff's lands. The great difficulty I have is to ascertain what damage, if any, the plaintiff has sustained solely by reason of non-repair of this drain. The plaintiff himself did not attach much importance to this unless it could be extended to the McGill outlet. He fought for this outlet and was unwilling to be taxed for any other. So far as any water would be carried down the Parr drain or west to the Parr drain he was not complaining loudly. The plaintiff has certainly not sustained damage to the extent he supposes at all and if any damage by reason of the non-repair of this concession drain, it is very small. There is no damage to this lot 5; and as to 6 the evidence of damage to crops is of the most unsatisfactory character. The loss of the use of the land is because of the low situation and the swampy character of the plaintiff's farm; and what these lots require to give them anything like thorough drainage is a much larger work than any yet paid for or projected. The defendants are not responsible for this. It is quite impossible for any council to do what would satisfy every landowner.

In 1893 or 1894 plaintiff says that he and others, eight in all, were willing to accept $75 damages, but they wanted the water taken to the McGill outlet. This goes far to satisfy me that the plaintiff is not injured solely by reason of the Second and Third Concession drain being out of repair. As I stated in the former part of my report, in dealing with the other branch of the case, the Parr drain would require deepening and all would require to be enlarged to give plaintiff's land sufficient drainage. I refer to the evidence of McDonnell, Robertson, C. A. Jones, and other engineers. All speak of the necessity of a larger work. Upon the evidence I cannot say that the plaintiff has sustained any damage by reason of the non-repair of this Second and Third Concession drain. The weight of evidence is against the plaintiff. The most I could give upon the evidence of witnesses of the plaintiff would be nominal damages. If in doubt, defendants are entitled to the benefit of it. This is a case in which I think owing to the conduct of defendants in regard to the McGill outlet extension and in dealing with the plaintiff's complaint, and by reason of the Second and Third Concessions drain east of the Parr drain being in part out of repair that the plaintiff should not be obliged to pay the defendants' costs. I order and direct that the plaintiff's action be dismissed without costs.

I order that the sum of $12.00 in stamps be affixed to this my report by the defendants and paid for by them.

I order and direct that each party shall bear and sustain his own costs of the action and of the order of reference and of this reference.

5

JUDGMENT OF THE COURT OF APPEAL FOR ONTARIO ON APPEAL FROM THE JUDGMENT OF THE DRAINAGE REFEREE, REPORTED 25 O. A. R., PAGE 42 :

The appellants were the representatives of one D. T. Stephens, who brought the action and died after the trial. Stephens was a ratepayer of the defendant township, and was the owner of land in the township assessed for the cost of drains constructed therein. He complained that some of the drains had not been kept in proper repair, and claimed damages and a mandamus. The case was tried at great length before the Drainage Referee, who held that though one of the drains in question was out of repair, the plaintiff had suffered no pecuniary damage, and was not entitled to a mandamus.

The appeal was argued before Burton, C. J. O., Osler, Maclennan and Moss, JJ. A., on the 15th and 16th of September, 1897. The only question of general interest was whether pecuniary damage had to be made out to justify the granting of a mandamus.

M. Wilson, Q. C., for the appellants, Aylesworth, Q. C., and Lister, Q. C., for the repondents.

January 11th, 1898. Osler, J. A. :—

At the close of a very full and clear argument by the learned counsel engaged in this case, I formed the opinion, which a subsequent examination of the evidence and exhibits has confirmed, that the only question which deserved further consideration was whether the judgment of the learned referee should be so far varied as to award the plaintiff a mandamus requiring the defendants to repair the 4th and 5th concession drain, flowing into the Parr drain from the east, constructed under the by-law of 1872. I quite agree with the Referee that the plaintiff has made out no cause of action in respect of the McGill Extension outlet into Bear Creek. That was not a piece of drainage work constructed under any of the provisions of the Municipal Act, however reasonable and proper it may have been for the council to make it in carrying out the settlement of their litigation with the late Ezra Stephens. It was made in pursuance of their agreement with him, not for the purpose of benefiting the property of this plaintiff, but for relieving Stephens' lot from waters that might be brought down through the Parr drain from the 2nd and 3rd concessions. As to this branch of the case, upon which the main contest between the parties centred, the plaintiff fails.

Then as to the non-repair of the Fourth and Fifth Concession drain in front of the plaintiff's lots 5 and 6, I find it quite as difficult, as did the learned referee, to say that the plaintiff has proved any calculable pecuniary loss or damage attributable to such non-repair and as to this part of the case the judgment must also stand. The claim for a mandamus is in a different position. I do not think it is necessarily bound up with or dependent upon proof that actual damage has been sustained by means of the non-repair. It is the duty of the defendants to keep the drain in repair. The plaintiff is not bound to wait until actual damage has been caused by their default, nor to sue for both modes of relief. His right is to have the drain he has paid for kept in a reasonable state of repair. It was made for the purpose of draining his property, and that of others interested in it, and if the defendants refuse or neglect to repair it, I do not think they can escape from their obligation, or be excused from performing it, short of proof that, even if it were repaired, it would, from changes in the surrounding conditions, be entirely useless to the plaintiff's property.

They may, of course, prove on motion before the referee to set aside the notice, which is a summary method provided by the Act for trying the right, that the notice was given maliciously or vexatiously, or without any just cause, and these would also be grounds of defence to an action; but if the defendants fail to establish them, the plaintiff in my opinion is entitled to say that his property is injuriously affected by the non-repair, and to have the drain put in a proper state of repair. To this extent, therefore, the judgment of the Referee must be varied, and the plaintiff declared entitled to the order for mandamus in accordance with the second branch of the notice given on the 16th of July, 1894.

Maclennan, J. A. :—

After a very careful examination of the evidence, I have been unable, notwithstanding all that was urged with great force by Mr. Wilson, to see, with one exception, that the learned referee came to a wrong conclusion in this case. I agree with him that the plaintiff can not avail himself of the agreement made with his uncle, Ezra Stephens, nor of the bond, in consideration of which that gentleman consented to the dismissal of his motion to quash the by-law of 1872, under which the original drainage works were executed. I am also of opinion that the work done by the council upon the McGill outlet, in pursuance of the agreement with Ezra Stephens, is not a work within the sections of the Municipal Act which the plaintiff can compel the defendants to maintain and repair. I also agree with the learned referee that the plaintiff has not made out any claim for damages for non-repair of the Second and Third Concession drain eastward to the Dodd's outlet. I think, however, that the right of the plaintiff to a mandamus to compel the repair of that drain is not concluded by that finding. I think there is evidence that although the damage may be merely nominal, the plaintiff is injuriously affected within the meaning of the Statute. The plaintiff is entitled to have his land as free from water as that drain in a proper state of repair would make it, whether his land is under cultivation or in a state of nature. If for want of such repair water stands upon his land or any part of it, either in greater quantity or for a longer time than it otherwise would, that is something he is not obliged to submit to, even although it has done him no actual pecuniary damage. It is an injury to a right; for his right is to have it otherwise. I think there is evidence of such an injury, and that the Referee ought to have awarded a mandamus.

I think to that extent the appeal should succeed, but there should be no costs, and sufficient time should be allowed to the respondents to do the work.

Moss, J. A. :—

Section 583 (2) of the Municipal Act, 1892, 55 Vic. ch. 42 (O.), does not in terms require that in order to entitle a person to give notice and on non-compliance therewith to apply for a mandamus, he should be in a position to establish pecuniary damage resulting from neglect or refusal.

The words are: "any person * * who is injuriously affected," not whose property is injuriously affected. The distinction is made in the section itself between the case of a person seeking a mandamus and one seeking in addition the remedy of damages. Under section 583 a person whose property is injuriously affected, is no doubt a person injuriously affected, but it does not follow that a person whose property is not injuriously affected may not be a person injuriously affected. This seems to be made plain by the introduction of the words "or whose property," in section 73 of the Drainage Act, 1894, 57 Vic. ch. 56 (O.), substituted for section 583 of the Municipal Act, 1892, and now forming section 73 of "The Municipal Drainage Act," R. S. O. (1897) ch. 226.

A municipality neglecting or refusing after proper notice to make the necessary repairs is compellable to do so at the instance a person who is injuriously affected by such neglect or refusal. But in addition it shall be liable in pecuniary damages to any person "who, or whose property, is injuriously affected by reason of such neglect or refusal."

And where pecuniary damage is suffered it may be recovered, although no notice has been given and no case is made for a mandamus, as was held by the Judicial Committee in Raleigh vs. Williams, (1893) A. C. 540. The cases under the compensation clauses of English Land Clauses Act, or Railway Clauses Act, do not apply to the section in question here, for, as pointed out in many of them, it seems to follow necessarily from the mere words of the Acts that to entitle any person to compensation there must be injury to land.

It seems therefore that to entitle a person interested to maintain a claim for a mandamus he is not necessarily required to shew that he has suffered tangible pecuniary loss, which is interpreted by Lord Herschell, in The Greta-Holme, (1897) A. C., at p. 604, as meaning a definite sum of money out of pocket.

Here it is plain that Stephens was, and the appellants are, interested in the drain in front of lots 5 and 6, and the evidence shews sufficiently, I think, a condition of personal inconvenience, trouble and drawback in the use and enjoyment by the appellants of the property as a whole, traceable to the want of repair to bring them within the definition of persons injuriously affected. Their strict right, as owners of lands assessed for the construction of the drain, is to have the drain maintained in its original condition.

The referee has found that this has not been done by the defendants. He has also found upon the whole evidence that there has been no pecuniary damage by reason of the neglect or refusal of the defendants, and, therefore, there can be no award of damages against them.

But the right to a mandamus to compel the necessary repairs to the drain in front of lots 5 and 6 is, I think, established. I think the letter of the 16th of July, 1894, was a sufficiently specific demand upon the defendants to make the necessary repairs to the drain in front of lots 5 and 6, without reference to the McGill outlet portion. At all events it was quite open to the defendants to have applied to the referee, whose jurisdiction is not confined to confirming or setting aside the notice. He has authority to determine what, if any, part of the work shall be done, and to dispose of the costs.

I think that while the referee properly refused the other relief claimed, he should have awarded a mandamus to compel the defendants to make the necessary repairs to the drain in front of lots 5 and 6. In view of the much larger claim unsuccessfully made, I agree that it was proper that there should be no costs of the action. The appellants have asserted in this appeal their right to the whole relief originally sought, and have only succeeded as to what now appears the least important part. I would give no costs of the appeal to either party.

Burton, C. J. O. :—

I agree.

Appeal allowed in part.

R. S. C.

TOWNSHIP OF CARADOC *vs.* TOWNSHIP OF EKFRID.

IN THE MATTER OF APPEAL BY THE CORPORATION OF THE TOWNSHIP OF CARADOC FROM THE REPORT OF JAMES ROBETRSON, O. L. S. AND FROM THE PLANS, SPECIFICATIONS, ASSESSMENTS AND ESTIMATES OF THE SAID JAMES ROBERTSON, DATED THE 10TH DAY OF MAY, 1895, RESPECTING THE IMPROVEMENT AND BETTER MAINTENANCE OF GOVERNMENT DRAIN NUMBER ONE IN THE TOWNSHIP OF EKFRID.

Section 75, Drainage Act—Notice—Section 72—Varying Assessment—Outlet Liability—Mode of Assessment—Section 3, sub-section 5—Volume and Speed—Assessment for Maintenance of Work under Section 75—Sections 14, 70 and 72 Discussed—Benefit—Omission of Lands.

A council has jurisdiction to act under section 75 of the Drainage Act 1894 without either petition or notice. Repairs under section 75 are not limited to cases where the duty of maintaining the whole work is upon the initiating municipality. Section 72 of the Drainage Act provides for mere repairs, not for the case of new outlet, extension or improvement such as contemplated under section 75.

An assessment per acre upon all lands receiving an improved outlet is a proper way to arrive at the amount the township should be called upon to contribute for outlet liability. Basis of assessment for outlet upon volume and having regard to speed of water under section 3, sub-section 5, discussed.

An engineer acting under section 75 has no authority to vary the proportion of assessment for maintenance which should be at the expense of the lands and roads assessed for the construction and for the work proceeding under section 75.

The engineer's report need not state how or in what way particular lands assessed for benefit would be benefited. The omission of lands from the assessment is for the Court of Revision.

February 10th, 1896. B. M. BRITTON, Q. C., Referee.

Pursuant to the notice of appeal filed and served herein and to my appointment, this case came on for trial and hearing before me at the Court House, City of London, on Wednesday, the 18th day of

December, 1895, and was tried and heard on the said 18th and on the 19th and 20th days of December aforesaid.

By consent the appeal of the corporation of the Township of Metcalfe against the Township of Ekfrid from the same report was tried with this, the evidence given for or against any township appellant or respondent to be used so far as applicable or admissable for or against any other township of the three named.

B. B. Osler, Q. C., and T. G. Meredith appeared as counsel for Caradoc, and Matthew Wilson, Q. C., and J. B. Rankin as counsel for Ekfrid.

Having heard the evidence and the arguments of counsel I reserved my decision, and now, having considered the whole matter, I give my decision and the reasons therefor, and make this my report herein.

Government Drain Number One was constructed under The Ontario Drainage Act of 1873. It extends from a point in the 2nd concession of Ekfrid, through part of Ekfrid, part of Caradoc, and into Metcalfe. Metcalfe is north or north-west of, and below Ekfrid, and Caradoc lies to the north-east of Ekfrid.

Upon the evidence this drainage work is, in parts along its whole length, out of repair. It is the duty of each municipality through which the drain passes to maintain and keep in repair its own portion.

By-law No. 524 provisionally adopted by the Township of Ekfrid on the 18th day of May, 1895, recites that one George Kittlewell, the owner of the south part of lot No. 1 in the 7th concession of Caradoc complained to the council of Ekfrid and claimed damages for the non-repair of this Government drain and of its insufficient capacity to carry off the water brought into it by Ekfrid and Caradoc. Looking at the situation of Kittlewell's land, this complaint, if well founded, must mean that Government Drain Numer One had not sufficient outlet for the water it was bringing down. The mere non-repair of that part of this drain above Kittlewell would be a benefit to him rather than an injury, as it would keep water back and prevent it flowing over Kittlewell's land. The complaint was want of sufficient outlet and so Kittlewell complained to Ekfrid, but desired this drainage work should be kept in repair ("and enlarged if necessary") by Ekfrid, "together with the councils of the Townships of Caradoc and Metcalfe."

The by-law also recites that one John Dillon the owner of the north half of lot one, 3rd concession of Caradoc, complains of the non-repair of this drain; Dillon lives at the very head of the drain.

The council of Ekfrid moved in the matter, as one of the municipalities whose duty it was to maintain the drainage work and they did so for the "better maintenance" of it. The engineer was sent on, and he seems to have assumed that the object of the proposed work was to prevent damage to lands. Damage to land will be prevented by the better maintenance of the drain, so no doubt both the council and the engineer were right and whatever work was to be done was to be such a work as is authorized by section 75 of the Drainage Act of 1894.

That section provides that "whenever (1) for the better maintenance of any drainage work constructed under any act respecting drainage by local assessment, or, (2) to prevent damage to any lands or roads, it shall be deemed expedient 1, to change the course of such drainage work, or, 2, to make a new outlet for the whole, or any part of the work, or, 3, otherwise improve, extend or alter the work, etc., etc., the council of the municipality or any of the municipalities whose duty it is to maintain the drainage work, may without the petition—but on the report of an engineer—undertake and complete

1, the change of course; 2, new outlet; 3, improvement; 4, extension; or 5, alteration, etc., and the engineer for such, shall have all the power to assess and charge lands and roads in any way liable to assessment under this act, for the expense thereof, in the same manner etc., as is provided with regard to any drainage work constructed under the provisions of this Act.

The engineer by his report of 10th May, 1895, describes the drainage work as he found it, and then recommends its repair—proposes an additional outlet for part of it, and an extension of the work to "Bear Creek," a distance of about 667 rods further than originally constructed.

The entire cost of the work he estimates at $9900, which sum is provided for, by an assessment upon the lands and roads in Ekfrid of $2200, upon lands and roads in Metcalfe of $1750, and the lands and roads in Caradoc of $5950. By far the larger part of this assessment is for outlet.

Ekfrid,	lands benefit -	$903.50	Outlet -	$1098.55
	roads benefit -	87.00	" -	110.95
		$990.50		$1209.50
Metcalfe,	lands benefit -	$876.00	Outlet -	$ 685.59
	roads benefit -	97.00	" -	81.41
		$973.00		$ 777.00

Caradoc, lands benefit -	$462.00	Outlet -	$4880.55
roads benefit -	140.00	" -	467.45
	$602.00		$5348.00

Total for benefit -	$2565.50
for outlet -	7334.50
	$9900.00

This report was accepted by the Township of Ekfrid and by-law No. 524 was on the 18th day of May, 1895, provisionally adopted. Copies were served upon Metcalfe and Caradoc, and each of these townships has appealed.

Caradoc gives 18 specific reasons for the appeal in the notice by that township. Many of these are only formal and not in any way applicable to a work proposed to be undertaken under section 75, and for which no petition is necessary.

The important question on this appeal is whether or not, Ekfrid has the right to do the proposed work under section 75. It is admitted that no other section of the act authorizes it. Does this? I think it does.

Government Drain Number One is a drainage work authorized under the provisions of an act respecting drainage by local assessment. For "the better maintenance" of it, (as stated by the council) "and to prevent damage" to land (as stated by the engineer) the council of Ekfrid, being one of the municipalities whose duty it is to maintain the drainage work, had the right, without the petition, to send on an engineer, and on his report to undertake the work ; and the engineer had for any "change of course, new outlet, improvement, extension, or alteration all the powers to assess and charge lands and roads in any way liable to assessment under the Act, for the expense thereof in the same manner and to the same extent, etc., as are provided with regard to any drainage work constructed under the provisions of the Drainage Act." I do not think it a matter of importance or that it at all effects the question of jurisdiction of Ekfrid : how the council was put in motion, whether by Kettlewell or Dillon, or either of them.

The council could act without being called upon by petition or notice. No threat of action was necessary to give the council jurisdiction. If the facts were known to the members of the council enabling them to say that a work had become necessary for "better maintainance" or "to prevent damage to any lands or roads," the council could send on an engineer and upon his report could undertake the work.

The engineer has assessed under section 3, s. s. 1, and s. s. 4. He has not assessed under s. s. 3, for "injuring liability." If he ought to have assessed for injuring liability, there is no evidence before me to show it, nothing to show that any lands in either township should be assessed for any particular amount for injuring liability. He has assessed for "outlet liability" those lands using the drainage work as an outlet, or for which when the work is constructed an improved outlet will thereby be provided.

It was argued by Mr. Osler that repairs under section 75 could be only when the duty of maintaining the whole work is upon the initiating municipality. The argument seems to me untenable, because section 75 in providing for change of course, extension, new outlet, etc., does not limit the work to that part of the drain within the bounds of any one municipality, and it permits it being undertaken by any one of the municipalities whose duty it is to maintain.

Then it is said that this is an attempt to vary the assessment as provided in section 72 without complying with the provisions of that section. Section 72 provides for mere repairs, not for the case of new outlet, extension or improvement, such as contemplated under section 75. If mere repair would be sufficient it was for the appealing township to show it.

The fair inference from the evidence of the engineer of Ekfrid is that the proposed work was reasonably necessary, having regard to the interests of all within the drainage area served by this drain. I could not set aside the report and assessment merely because there was no evidence that repair would not be sufficient to remedy certain evils complained of. It certainly is not usual to find an upper township with so little to complain of as Ekfrid had in this case, initiating so costly a work of extension and repair against the wish of the lower township and assessing the lower township for so large a sum. I must, however, assume that Ekfrid is acting in good faith, and as the engineer is a competent man and a sworn officer of the township, so long as he has not exceeded his authority I cannot see my way clear to setting aside his assessment.

The assessment being for "outlet liability" it is contended that it should not be a per acre assessment as in this case, but that it should be according to the value of each farm based upon what it produces or is capable of producing, etc. I do not say that, how a farm is used, as well as other circumstances connected with each parcel of land, would not be for the consideration of the Court of Revision, but the per acre assessment of all lands for which the drainage work will be an improved outlet, and charging such lands according to the cost of the part of the work used or that will be used by them is a proper way to arrive at the amount that the township should be called upon to contribute. It is quite impossible to make the assessment absolutely correct. The amount of evaporation and absorption cannot be so measured and determined as to enable the engineer to say how much less water one lot within the drainage area further away from the drainage work will send than another lot nearer to the work. If any erroneous principle has been adopted the matter is for me on this appeal, and should not be left to the Court of Revision, but I cannot say that the principle adopted by the engineer is wrong. It was argued that the engineer did not base his assessment for outlet upon the volume and speed of the water caused to flow into the drainage work pursuant to sub-section 5, of section 3, I have some difficulty in applying this sub-section. In every case where a drainage work is undertaken the quantity of water and the getting this water away quickly are considered, and when there is an assessment for the work it is necessarily to some extent based upon the speed and volume. I should not set aside an outlet assessment by a competent engineer merely because he is not able to give a formula shewing that the assessment was mathematically correct based upon speed and volume unless I am prepared to say that there is such a formula which ought to be adopted. I am not prepared to so say. I am of the opinion that this sub-section, reading it with the whole Act, does not mean more than that the engineer is to take into consideration the volume of water that should enter the drainage work at a given point, and the means taken by municipality or individual to speed it from lands and roads to that point. The engineer did take these things into consideration, and, having done so, placed an assessment according to the cost of the work.

By the report appealed from, the engineer assumes to determine how the drainage work shall be maintained and he charges Ekfrid with 220-990 of the cost of maintenance and Caradoc with 595-990 and Metcalfe with 175-990 of such cost. It is objected that the engineer cannot do this. I am of opinion that he cannot, and I now decide that part of his report to be *ultra vires* the engineer. It was argued by Mr. Wilson that sub-section 2, of section 70, provides for the case of varying cost of maintenance on report of engineer and so recognizes the authority of the engineer to vary when acting under section 75. I do not think so. Section 72, provides for varying assessment, but it was conceded by counsel for respondent, on the argument, that this section 72 refers only to work of repair, and not to new outlet or to such improvement, extension and alteration as is provided for in report under consideration. There is a great deal of force in the argument, that if power to vary is given in the minor work of mere repair, much more it should be given in reporting the larger work provided for by section 75, and so it should be assumed that the engineer has the power.

For so important a matter as largely relieving the initiating municipality, and putting the burden upon another, there must be clear authority, or it cannot be permitted.

I do not think in this work that section 14 gives any power to the engineer to determine and report as to maintenance.

This is a work done under section 75, and in assessing for the doing of the work the engineer has the same power as if the work was done under section 3, but he has not the same power to determine and report as to maintenance as he would have in the case of original construction under section 3.

If the engineer going on under section 75, had no authority to vary the assessment for maintenance, then my jurisdiction in appeal to make any order as to maintenance may be questioned. I certainly am not free from doubt, but so far as I have power to determine I do determine and order that the maintenance of this drain shall be by each municipality, of the part within that municipality, as described in section 70, at the expense of the lands and roads in any way assessed for the construction thereof and for the work now described in the report appealed from.

The engineer stated that the proposed work was more necessary for Caradoc than for Ekfrid. Landowners of Caradoc, as well as Metcalfe, have certainly availed themselves, as they had a right to do for drainage purposes, of Government Drain Number One, as an outlet, and the result is that the water, a great part of which if the lands were left in a state of nature, would flow into this drain, is brought down in a much shorter time in relief of lands from spring and other freshets. All this renders some such work necessary, and there was no evidence before me to satisfy me that the work should be abandoned or so modified as stated in the 11th objection in Caradoc's notice of appeal. One engineer thought that the work to be effective and sufficient should be a much larger work, and that would mean a much larger assessment. The engineer has shewn in the report with particularity and in detail the proposed work. It is not necessary to state how or in what way particular lands assessed for benefit would be benefited. The effect of the work is stated generally, the amount for which a lot is assessed is stated in the proper column, and that, in form, is sufficient, see sections 6, 7 and 12 of the Act.

The omission of the land of the railway companies, if objectionable, is for the Court of Revision. In so stating I am not expressing an opinion as to whether railways under Dominion charter are subject to the drainage laws of the Province of Ontario or not.

I hereby confirm the report appealed from and dismiss the appeal of the Township of Caradoc, excpt as to that part of said report which directs how the drainage work after completion thereof shall be maintained, which part of the report is in the words following:

"The drainage work shall after the completion thereof be maintained at the expense of the various municipalities and lands and roads therein, in any way assessed for construction and in the same relative proportion; that is, for any repairs in said drainage works the Township of Ekfrid shall contribute 220-990 of the cost thereof, the Township of Metcalfe 175-990 of the cost thereof, and the Township of Caradoc 595-990 of the cost thereof." And as to that part of the report I allow the appeal of the said Township of Caradoc.

By virtue of the power vested in me under the Drainage Act 1894, I determine, order and direct that the said drainage works shall after the completion thereof, pursuant to the report now appealed from be maintained and kept in repair by each municipality, of the part within that muhicipality, and upon the road allowance between that municipality and another municipality as mentioned and provided for in sub-section 2, of section 70, of "The Drainage Act 1894," at the expense of the land and roads in any way assessed for the construction thereof and for the better maintenance thereof as provided by the report now appealed from, and in the proportion following, that is to say: For any repairs in said drainage work the Township of Ekfrid shall contribute two-sixths of the cost thereof, the Township of Metcalfe shall contribute one-sixth of the cost thereof, and the Township of Caradoc shall contribute three-sixths of the costs thereof. This is, in round figures, according to the proportion of entire cost of original construction and of proposed work. The exact proportion would give a fraction less for Ekfrid and Metcalfe and a fraction more for Caradoc, but it seems to me just and right to all, to give Caradoc the slight benefit of calling its proportion one-half and that of Ekfrid one-third and of Metcalfe one-sixth.

The appellant township has not, according to the view I have taken of the law and evidence, succeeded as to many of the objections taken, but it has succeeded upon the question of maintenance. The costs should be apportioned. The trial occupied three days in all as to both appeals, and I think substantial justice will be done in the matter of costs if Caradoc pays its own costs and pays to the Township of Ekfrid the sum of $50 as and for part of the respondent's counsel fees on the trial. I order and direct that the Township of Ekfrid pay its own costs of the appeal by Caradoc, except as to the sum of $50 to be paid to said Township of Ekfrid by said Township of Caradoc.

And I further order and direct that the Township of Caradoc do pay its own costs of this appeal and do pay to the said Township of Ekfrid the sum of $50, being for two days' counsel fee on the trial of this appeal.

I further order and direct that the sum of $8.00 be paid in stamps to be affixed to this my report by the Township of Caradoc, and if affiixed by the Township of Ekfrid, the said sum shall be added to the $50, and the sum of $58 in the whole shall be paid by said Town- of Caradoc to said Township of Ekfrid.

IN RE TOWNSHIP OF CARADOC AND TOWNSHIP OF EKFRID.

IN RE TOWNSHIP OF METCALFE AND TOWNSHIP OF EKFRID.

Drainage—Enlargement of Drain—Work Done Beyond Limits of Initiating Township—Error in Mode of Assessment—Assessment for Future Maintenance—Drainage Act, 1894—57 Vic. ch. 56, sec. 75 (O.)

Under section 75 of the Drainage Act, 1894, 57 Vic. ch. 56 (O.), any municipality whose duty it is to maintain any part of a drainage work constructed under the provisions of any Act respecting drainage by local assessment may, without being set in motion by any complainant, initiate proceedings for its repair and improvement and for extending its outlet, although nearly the whole of the cost is assessable against adjoining townships.

Where, however, the engineer of the initiating township assessed lands in the adjoining townships for improved outlet upon the principle that all lands within the drainage area were liable, no matter how remote from the improved outlet, though such outlet was unnecessary for their drainage or cultivation, the original outlet being in fact sufficient, his report was set aside, Burton, C.J.O., dissenting.

Per Burton, C.J.O.—A question of this kind should be dealt with by the Court of Revision, and where the engineer acts in good faith his report cannot be set aside upon such a ground.

Per Burton, C.J.O.—There is no power to assess for the estimated cost of future maintenance of a drainage work.

Judgment of the Drainage Referee reversed.

These were appeals by the Township of Caradoc and Township of Metcalfe from the judgment of the Drainage Referee.

The Township of Ekfrid, which was the middle township, initiated proceedings for the enlargement and improvement of a drain running from a point in the Township of Caradoc through the Township of Ekfrid, and discharging in the Township of Metcalfe. The engineer appointed by the Township of Ekfrid assessed the greater portion of the cost against the Township of Caradoc, and his assessment was upheld by the Drainage Referee.

The appeals were argued before Burton, C. J. O., Osler, and Maclennan, JJ. A., on the 3rd and 4th of March, 1897.

Osler, Q. C., and T. G. Meredith, for the appellants, the Township of Caradoc; J. Folinsbee for the appellants, the Township of Metcalfe; M. Wilson, Q. C., and J. B. Rankin, for the respondents.

November 9th, 1897. Osler, J. A.:—

On the 22nd of June, 1894, the Township of Ekfrid passed a resolution instructing their engineer to examine and report upon the condition of Government Drain Number One, and to specify such change of course, or new outlet, improvement extension, or alteration thereof, as might seem proper for the purposes thereof. This resolution was, as appears therefrom, passed in consequence of complaints which had been made of the condition of the drain and requiring steps to be taken for its better maintenance and to prevent damage to adjacent lands. This drain was one which passed through parts of Ekfrid, Metcalfe and Caradoc, the appellant and respondent townships. It had been constructed under the Ontario Drainage Act, 1873, and it was the duty of these townships to maintain it as provided by section 70 (2) of the Drainage Act of 1894. Pursuant to the resolution referred to, the engineer made an examination of the drain, and on the 10th of May, 1895, reported the result to the township. By his report, after describing the course and condition of the drain, and stating that in his opinion it had become, through a great part of its course, from various causes, of insufficient capacity to carry away the ever increasing volume of water brought into it; that parts of it were out of repair, and that it did not form a sufficient outlet for the upper waters flowing into it, he recommended in substance that the whole course of the drain should be repaired and improved in the manner described in this report, and that for the purpose of obtaining a better outlet it should be extended to Bear Creek, a distance of about 667 rods further than it had been originally constructed. The cost of the work was estimated to be $9,900; assessed against lands and roads in Ekfrid, $2,200; Metcalfe, $1,750; and Caradoc, $5,950; partly for benefit and partly, and in the case of Caradoc nearly altogether, for outlet liability. Ekfrid was the middle and Caradoc the highest of the three. Caradoc and Metcalfe appealed from the report to the Drainage Referee on various grounds, but chiefly on this, that the whole proceeding as initiated by Ekfrid was one unauthorized by any provision of the Drainage Act. It was also contended that the engineer had based his assessment upon a wrong principle, omitting to assess for "injuring liability," and not making proper allowances in respect of the assessment for outlet liability. Further the appellants complained that the lands of a railway company had been omitted from the schedules of lands which are assessed, and that these should have been included and charged with their proper quota of tax, whether for benefit or outlet liability. The learned referee held that the case came within the powers conferred by section 75 of the Act; that no substantial error of principle had been commited in the assessments, and that so far as the railway lands were concerned it was a question to be raised on appeal to the Court of Revision.

The changes introduced into the drainage laws by the legislation of 1894 are so numerous and extensive, and the powers thereby conferred upon municipalities so largely increased, that in many respects we can now derive but small assistance from cases hitherto decided, and it is better, therefore, to take the words of the new Act and try from them to find out the intention of the legislature. We cannot, however, fail to observe that the general course of legislation seems to have been in favor of conferring increased powers upon one township or a lower township to affect other townships, and to impose very heavy burdens upon the latter where their waters, even merely as the result of gravitation, pass into drainage works constructed by the former.

Section 75 of the present Act, though founded largely upon section 585 of the Municipal Act of 1892, is practically a new section. It enacts, reading it for the purposes of the case at bar, that wherever for the better maintenance (that is to say, the preservation and keeping in repair), of any drainage work constructed under the provisions of any Act respecting drainage by local assessment, or to prevent damage to any lands or roads, it shall be deemed expedient

(*a*) To change the course of such drainage work,

(*b*) Or make a new outlet for the whole or any part of the work,

(*c*) Or otherwise improve, extend, or alter the work, the municipality or any of the municipalities whose duty it is to maintain the said drainage work may, without the petition required by section 3 of the act, but on the report of an engineer appointed by them to examine and report on the same, undertake and complete the change of course, new outlet, improvement, extension, or alteration, specified in the report, and the engineer shall, for such change of course, new outlet, improvement, extension, or alteration, have all the powers to assess and charge lands and roads in any way liable to asessment under the act for the expense thereof, in the same manner, and to the same extent, by the same proceedings, and subject to the same right of appeal, as are provided with regard to any drainage work constructed under the provisions of the Act.

We have then here a drain which comes within one of the classes of drains to which the section applies, and one of the municipalities, namely, Ekfrid, whose duty it was to maintain it. What are Ekfrid's powers? Clearly their exercise is not limited to the boundaries of its own municipality: sections 3-59, nor has it been contended. Section 75 is an extension and enlargement of the power or duty to maintain and repair, cast upon the municipality by section 70, sub-section 2, and it may, in my opinion, be acted upon in good faith by the municipality without being set in motion by any particular complainant where they deem it advisable, even though the result of their action is to cast the larger portion of the cost of the work upon some other municipality. We are not concerned with what may appear to us the apparent injustice of the proposed scheme to the latter municipality; all we have to see is whether what is done is within the scope of the powers which the legislature has conferred upon the initiating municipality. That, in my opinion, is the case here. For the better maintenance of the drain the council of Ekfrid, adopting the report of the engineer, has determined in part to change the course of the drain, to make a new outlet, and to extend and otherwise improve it. Their action in this respect seems to me to be within the very words of the section. We had to consider the section in the recent case of In re Stonehouse and Plympton, 24 A. R. 416, and the construction we then placed upon it embraces in principle the case before us, although there the drain in respect of which the council initiated the proceedings was one wholly within their own municipality. I therefore agree with the judgment of the referee on this part of the case.

Then as to the principle on which the engineer has gone in making his assessment.

I feel, I must say, great difficulty in adopting it. Section 3 requires him to make an assessment of the lands and roads to be benefited, and of any other lands liable to be assessed as thereinafter provided, stating, as nearly as may be in his opinion, the proportion of the cost of the work to be paid by every road and lot or portion of lot (a) for benefit, (b) and for outlet liability, and (c) relief from injuring liability as afterwards defined: section 3, sub-section 1, latter part.

This is also, again, by section 12, expressly required to be done by the engineer in his report.

I need not further refer to the assessment for benefit. Assessment for relief from injuring liability seems to be the same thing as assessment for what is defined, or rather described as "injuring liability" in sub-section 3 of section 3, viz., the assessment of lands from which water is "by any means caused to flow upon and injure" other lands; the assessment being for the cost of the drainage work necessary for relieving the injured lands from such water.

The engineer has not assessed any lands under this head of liability. A perusal of the evidence satisfies me that the referee was right in holding that the report was not open to substantial objection on this ground.

The bulk of the assessment in Caradoc is for "outlet liability." This is described or defined in sub-section 4 of section 3. The lands and roads of any municipality, company or individual, using any drainage work as an outlet, or for which, when the work is constructed, an improved outlet is thereby provided, either directly or through the medium of any other drainage work, etc., may be assessed and charged for the construction and maintenance of the drainage work so used as an outlet, or providing an improved outlet and to the extent of the cost of the work necessary for any such outlet, as may be determined by the engineer, etc. Such assessment may be termed "outlet liability."

The express power under section 75 is to assess for the expense of the works undertaken under that section the lands and roads in any way liable to assessment under the act.

Now, the lands in Caradoc which have been assessed by the engineer already had an outlet by means of Government Drain Number One, so far as they directly or intermediately drained through it. The great bulk of these lands needed no other outlet than that which they already had. Their lands lay high and the drainage they already had was sufficient for them. For that work they had already paid, and what they are now charged for is a new work not giving them any new outlet. It is plain from the evidence of the engineer that, so far as they are concerned, the work does not give them an improved outlet. I speak now of the large bulk of the property assessed, for there may be cases of a few lots along the course of the drain, the outlet of which is improved, or which are distinctly benefited by the new work. What I regard as objectionable in the principle which the engineer seems to have adopted is this, that, to use his own language, he has taxed the lands because they contribute water to the area drained, charging lands within that area with outlet expenses, no matter how remote they are, and although the new work, or perhaps the drain itself, is not necessary for the cultivation or drainage of the land.

Unless the work, when constructed, would provide an improved outlet for the lands in Caradoc directly, or as under the new Act may perhaps now be the case, indirectly, I cannot see what power the engineer had to assess them for such work, and this affects so large a proportion of the sum charged against that township that it appears to me the referee should have given effect to Caradoc's appeal, and overruled the report of the engineer. Where so extensive a scheme is proposed by a lower township, affecting in such a serious manner the lands in an upper township, which derive no benefit from it and which are not subject to be assessed for benefit or for injuring liability, I think it should be made to appear that what is done is clearly brought within the powers which the Legislature has conferred upon the initiating municipality. I am, therefore, of opinion that the appeal of Caradoc should be allowed, and inasmuch as the effect of doing so necessarily is under the circumstances to quash the proposed scheme, I think the appeal of Metcalfe must also be allowed.

Maclennan, J. A. :—

After a most careful consideration of this case, and the various sections of the Drainage Act, and of the arguments which were addressed to us, I have come to the same conclusions as my brother Osler upon the several matters dealt with in the judgment which he has just delivered.

Burton, C. J. O. :—

This appeal, and a similar appeal from the Township of Metcalfe, against the report of James Robertson, O. L. S., were, by consent, heard together by the learned referee, who decided the main question adversely to the two townships who are now appellants to this court, and the same were in like manner heard together before us.

Both of the present appellants contend that Ekfrid had no power under section 75 of the Act of 1894, to do the proposed work, and if I understand their contention, it is that jurisdiction only arises when it is established that the proposed works are neessary to prevent damage to lands or roads, or it is shewn that the proposed works will better maintain and keep in repair the whole work, and that they do not come within the section inasmuch as they were not bound to repair the whole work, but only that portion of it that is within their own confines. I think that would be too narrow a construction to place upon the section.

It appears to me that whenever we find a drainage work wherein several municipalities are interested, if any one of those bodies had reason to believe that a change was required for either of the objects above referred to, it may, of its own motion, initiate proceedings by appointing an engineer to examine and report, and if that report, on either of the grounds, is in favor of the proposed work, may proceed to assess and charge the lands and roads in any way liable to assessment for the expense thereof, in the same manner and to the same extent, by the same proceedings and subject to the same right of appeal, as are provided with regard to any other drainage work.

I agree, therefore, with the learned referee, that the Township of Ekfrid had jurisdiction to pass the by-law sought to be impeached.

I agree also with him that although it seems somewhat anomalous for a township having so little to complain of as the Township of Ekfrid initiating so costly a work against the wish of the objecting townships, and assessing them for so large a sum, we must, in the absence of evidence of bad faith and on the assumption that the officer upon whom the duty is thrown by Statute is a competent man and is acting within the scope of his authority, uphold his report.

In the absence of fraud, or evidence that any erroneous principle has been adopted by the engineer, it is not, I think, competent to us to review the grounds of his decision.

The assessment upon the Township of Caradoc appears to be very large in comparison with those of the other townships, and I agree with the learned referee that in a proceeding under this section, where the initiating municipality is relieving itself of a burden and placing it on others, the court ought to scrutinize the proceedings very carefully, and if they find that the engineer has exceeded his authority or proceeded to assess upon a wrong principle, his report should not be sustained; but for the reasons I have mentioned and upon the principle that in such circumstances the maxim "*Omnia rite acta presumuntur*," applies, I think the onus is upon the parties impeaching the transaction to shew this and not to leave it to inference. It is true that in some cases the drain already there furnished a sufficient outlet, but it is proved that it was found to be much too small for the purposes for which it was originally constructed, and the engineer testifies "that it is so much less than is really required to carry the water, that I cannot imagine that the drain was constructed near its proper size,'' and there is evidence that even the present proposed works are not extensive enough. I do not feel, therefore, that a case has been made out for our reversing the judgment of an engineer, presumably competent, which has been confirmed by the intermediate tribunal. If any particular lot has been improperly assessed for outlet that is a matter to be set right by the Court of Revision.

No ground, therefore, has, in my opinion, been shewn for interfering with the engineer's report upon this ground.

As to his assessing for future maintenance, no authority has been cited, or any section of the Act referred to, which, in my opinion, authorizes such assessment, and, I think, the learned referee was right in holding that portion of his report to be *ultra vires*.

But I am of opinion, after a careful perusal of the Act, that the referee is equally without jurisidiction, that the assessing for future maintenance is a ''*casus omissus*,'' and that it must be left to the Legislature to deal with the present case. No injury is likely to occur from this decision, as any assessment for maintenance may not arise for some time.

If I am right in assuming that the council of Ekfrid—*mero motu*—could initiate the proceedings, the objection as to the engineer not assessing for ''injuring liability'' falls to the ground.

On the whole, I am of opinion that the appeal against the judgment of the referee should be dismissed, but that the judgment should be varied by striking out that portion of it which deals with the assessment for future maintenance, but as the majority of the court think differently the appeal will be allowed.

Appeal allowed, Burton, C. J. O., *dissenting*.

IN THE HIGH COURT OF JUSTICE.

SEYMOUR *vs.* THE TOWNSHIP OF MAIDSTONE.

Ditches and Watercourses Act—Defective Requisition—Damages—Liability of Township—Acquiescence.

A township municipality within the limits of which a ditch is constructed under the provisions of "The Ditches and Watercourses Act" in accordance with the award of the township engineer made in assumed compliance with the requisition of the ratepayers interested is not liable for damages caused to a resident of the township by the construction of the ditch even though the requisition be in fact defective. The plaintiff cannot afterwards complain where he acquiesced in the work complained of.

May 30th, 1896. B. M. BRITTON, Q. C., Referee.

Present—Wm. Douglas, Q. C., and J. W. Hanna, Esq., counsel for plaintiff, and J. B. Rankin, Esq., counsel for the defendant.

Tried at Essex, in the County of Essex, May 29th and 30th, 1896.

This action was commenced by writ issued on the the 27th of November, 1895, and after issue joined it was, on the 4th of May, 1896, referred to me under the Drainage Act, 1894. It is simply an action for damages. The plaintiff claims $2000 and costs, with a general prayer for such other relief as to the court may seem just. No specific relief is asked, nor is it suggested that the plaintiff is entitled to any mandamus, injunction or order, or to anything other than damages. The damages are for the orchard as per paragraph 3, and the damages according to paragraph 20 are for loss of crops and use of lands for crops and not being able to improve his said farm owing to their having been drowned out and destroyed by water diverted from its natural course and brought to the plaintiff's farm.

The plaintiff's claim is under two heads and there are two specific causes of action: (First) In reference to the Highland drain. That is sub-divided into paragraphs 8 and 9. Paragraph 8: "The Highland drain was a much larger and deeper drain and capable of carrying a great body of water and in the spring of 1894 and in 1895 a very large quantity of water was brought down through the said Highland drain, much larger than the first constructed drain to the Malden road was capable of carrying off, and at the point where it connected with said last mentioned drain, being on the plaintiff's farm, it overflowed and flooded plaintiff's farm, blocking his outlet and destroyed his crops and orchard." Paragraph 9: "That extra water has been brought and kept upon the plaintiff's lands and crops to his damage that otherwise would not have been but for said Highland drain and for the same cause water remained longer on said plaintiff's farm and crops and prevented proper cultivation of same and the plaintiff lost the use of profits thereof." Then, as stated in paragraph 10: "The defendants were guilty of gross neglect in constructing the said drain and their embankments and leaving them incomplete and insufficient and in constructing the drains so that the outlet was much smaller than the Highland drain." And paragraph 14: "The plaintiff submits that the said Highland drain was not constructed according to the plans and specifications nor was it constructed according to law." This embraced all under the first head.

Then under the second heading the complaint is of the refusal of the defendants to allow the plaintiff to drain his land, viz., the west half of 26, 3rd concession, into the Fourth Concession drain, a municipal drain constructed in 1881. And these damages are subdivided: (a) Did not permit the plaintiff to drain as stated in paragraph 16; (b) did not permit a culvert to be made across the 4th concession road as stated in paragraph 17; (c) and causing earth to be thrown upon the road as stated in paragraph 18. The Highland drain was not constructed by the defendants in any sense of the word. It is not a municipal drain but it is one constructed under the Ditches and Watercourses Act.

Under the act, and for the purpose of allowing individuals to get necessary drainage, when their neighbors do not consent, there must be the necessary machinery to work out the remedy for an existing evil, and so an engineer must be appointed and he is an officer of the corporation for certain purposes. I will not refer to the different clauses of the act although I have read them carefully from beginning to end. The council and the officers of the council are merely the executive of the will of certain land owners, and for the benefit of those as distinguished from the general body of the municipality; and the council should be no more responsible than a judge or referee or any other officer of a court, if nothing more is done than the statute requires. It is conceded here that if the engineer had jurisdiction on the facts before me there would be no liability on this branch of the case on the part of the defendants. But it is said that the engineer had no jurisdiction because in this case it was necessary that the drain should pass through the lands of more than five owners in order to obtain an outlet; and so the requisition should not have been filed unless there was: (1st) Either consent in writing of a majority of the owners, or (2nd) a resolution of the council approving of the scheme or proposed work. See sec. 6, sub-secs. *a* and *b*, of the Ditches and Watercourses Act.

It is clear upon the evidence that there was no such consent in writing and no such resolution was passed by the defendants' council. Is it clear that there was a necessity for either? Does this drain pass through, or partly through, the lands of more than five owners?

Mr. Rankin stated during the argument, apparently with the assent of the engineer, who was a sworn witness, that this drain did not pass through the lands of more than five owners. I am not able to find upon the evidence that it does or does not. Upon whom is the burden of proof?

In an action of this kind I shall hold for the purposes of this action that the maxim, "*omnia praesumuntur rite acta esse*," should apply, and any facts necessary to negative jurisdiction which the engineer assumed to have should be shown by the plaintiff. If, however, the plaintiff can show this and if he thinks it material for the purpose of having the matter all before the court in appeal from my decision, I will allow that to be shown now, if the fact be so.

If the requisition which contains the eight names and the award which also apportions work to eight individuals make out a *prima facie* case for the plaintiff, he will of course be entitled to the benefit of that in appeal, if my decision is wrong.

After a great deal of consideration I adhere to my first impression, namely: that even if this is a case in which as the drain would pass through the land of more than five owners, the municipality is not liable in an action for damages at the suit of the plaintiff, for two reasons: (First) The defendants have not assumed the work or approved of the scheme or done any act, matter or thing so that they can be said to be liable for the work of the engineer or landowners. If they had passed the resolution, by sub-section *b* they would not be liable because they would then have been acting according to law and in good faith, and no action would lie. If they had passed any other resolution assuming or approving the scheme and authorizing the work, such as was done in the case of York vs. Osgood, they might be liable. York vs. Osgood is not, in my opinion, an authority at all in favor of the proposition contended for by the plaintiff. It will be seen that in that case, for some reason that does not now appear, the township acted very differently from the way the Township of Maidstone has acted in this case. What was done by that township appears on page 17 in the report, 24 O. R. Now that action by the township council, not professing to be any such action as a council might take under sub-section *b* of section 6, is very different from simply proceeding as the statute directs and in a way in which they would not incur any liability any more than passing an ordinary by-law would incur a liability for an ordinary drainage work. They did not in that case act only for the landowners but they did just the same as an individual might do, they assumed the work that this man, York was asking for and gave directions as to how it was to be done and who was to do it. So it was held in that case, not that the Township of Osgood was liable or would be liable for damages, but that they having assumed to do the work in that way might be enjoined by the court from doing it, and so the case although it went against the plaintiff in the court below by the trial judge and also went against him on the application in the divisional court, the Court of Appeal reversed it and granted an injunction, but allowed no damages. I can not think that case an authority for the proposition that an engineer is the agent, or authorized agent of the council so as to make the corporation liable for damages merely for doing what was done in this case. Whatever liability there may be on the part of the engineer or those who did the work, or who put the engineer in motion, or whatever remedy the plaintiff may have under the Ditches and Watercourses Act, I hold that upon the facts before me there is no liability on the part of the defendants for damages to the plaintiff by reason of the Highland drain. (Second) Upon the evidence I think the plaintiff acquiesced in what he now complains of, viz. : in allowing the Highland drain to be taken to the Seymour drain. The weight of evidence is against the plaintiff upon that point. It is true he afterwards objected but he did not then call attention to what he now claims to have been a fatal omission in order to give the engineer jurisdiction. In support of the evidence given against the plaintiff in that respect, is the plaintiff's own letter dated June 6th, 1892, exhibit 4. Now this is a most important letter in view of the evidence given by Mr. Highland. Mr. Highland states distinctly that the plaintiff was a consenting party to this Highland drain going to the Seymour drain, and he says that the plaintiff was anxious to explain his letter, and he did explain it by shewing what he meant; that if this Highland drain went straight into the Seymour drain it was all right, he was still a consenting party, but if on the other hand it diverged to the west as (I understood it) and entered it at an angle different from the straight line, that then the objection he was making would lie and he would expect reasonable compensation for the land which was to be taken.

That was a perfectly natural thing for him to do and perfectly right that he should make that explanation; but it seems to me to support very much the evidence as given by Highland and the evidence given by Mr. Stickwood on this question of consent. So that I think that there was acquiescence, and I don't think that the conduct of the plaintiff afterwards in objecting, as he unquestionably did object, would avail. The engineer was allowed by plaintiff's acquiescence to take some action in the matter, and it can only be a question as between the other landowners and Mr. Seymour, in which the township ought not in any way to be affected. Then the plaintiff instead of asking for an injunction restraining any further proceedings that were instituted under the Ditches and Watercourses Act he appealed against the award that was made. He appeared on the appeal and the appeal having been decided against him he simply refused to do his work and allowed the work to be sold and allowed it to be done, it is true, under protest, but he allowed it to be done upon the land; and he only comes now asking for damages after the work was all done under the circumstances as they appear in the evidence and that I have just mentioned. Then he wrote letters to the defendants, exhibits 12 and 13. His claims in these letters were entirely inconsistent with the claims that he is putting forward now, claiming illegality in the work done. The objection he has raised before me in this action appears to have been raised for the first time, so far as the parties are concerned. These claims for damages are very specificially written. His letters were written with care, and they are certainly the letters of a clever man, a man with an excellent memory and very careful in reference to all that he did. They seem to me to be entirely inconsistent with the claim that he is now putting forward. (Letter of 30th January read). Now all this time he was not objecting. I know that the drain was not made at that time but the initiatory steps had been taken for making this drain and there is no complaint. Then in 1895, February 20th, (exhibit 13) is a letter which I will designate as the plaintiff's ultimatum against the township in which there are no less than eight specific headings under which damages are claimed and none of these embraced what is now the subject of this action. No notice even then of what he was complaining in reference to this Highland drain. So that taking all these things together and considering the plaintiff, as I certainly do, a careful man, a man anxious for his rights I think on this particular part of it, if there had been any question as to his acquiescence, so far as the Highland drain is concerned, we would have heard of it in these letters or long before the trial of the action.

There is an instructive case of Gill vs. Edouin, 15 E. R. (1895) 354. That case decides that when damages result to an occupier of land from water collected on adjoining land, no action will lie: (1st). If the damage is the result of the act of a third party in reference to such water; (2nd). If damage results without wilfulness or neglect on his part whilst using land in an ordinary or reasonable manner; (3rd). If without negligence on his part the injured party consents to what was done; and (4th). If damage results from water stored for common benefit of both. That case deals with these four points and on the question of acquiescence it is I think in point as this case.

I think there was acquiescence on the part of the plaintiff.

Upon the second branch of the case the matter was not pressed, but I do not think the plaintff is entitled to recover. The plaintiff had a right to drain into the Fourth Concession drain or he had not. If he had no right of course no action will lie. If he had he should have paid no attention to the defendants' refusal but he should have insisted on doing what was necessary to drain to the Fourth Concession drain and if restricted he should have brought an action for the purpose ofestablishing his right.

Although permission was refused it does not appear (1st). That the plaintiff would have done anything; (2nd). That damage resulted by reason of refusal of the defendants to permit or by reason of the plaintiff's not doing anything; and (3rd). The defendants action in regard to the Fourth Concession drain was legal, and so no action will lie for anything done in respect of it.

Of course neglect to maintain would subject them to an action. This however is not for damages by reason of want of repair.

There is no claim for compensation by reason of plaintiff's land being injured or injuriously affected, by the construction of that drain, and so it seems to me that there is nothing in the facts before me, as applied to the statement of claim, which would entitle the plaintiff to come in under the second branch of the case, and therefore there is nothing left for me, if the case stops here, but to dismiss it with costs.

SEYMOUR *vs.* THE TOWNSHIP OF MAIDSTONE.

Ditches and Watercourses Act—Municipal Corporations—Damages—R. S. O. ch. 220.

A township municipality, within the limits of which a ditch is constructed under the provisions of the Ditches and Watercourses Act, in accordance with the award of the township engineer, made in assumed compliance with the requisition of the ratepayers interested, is not liable for damages caused to a resident of the township by the construction of the ditch, even though the requisition be in fact defective.

Judgment of the Drainage Referee, affirmed.

This was an appeal by the plaintiff from the judgment of Britton, Drainage Referee.

The following statement of the facts is taken from the judgment of Osler, J. A.

The statement of claim sets forth two causes of action: the first for the construction by the defendants of a ditch or drain under the provisions of the Ditches and Watercourses Act, R. S. O. ch. 220, and connecting it with another drain constructed under the drainage clauses of the Municipal Act, whereby more water was brought into the latter than it was able to carry away and the plaintiff's land was consequently flooded and overflown; and second for refusing to permit the plaintiff to drain his land into another municipal drain constructed near his land but not actually adjoining it, being separated from it by a township road or highway.

The action was referred to the Drainage Referee for trial on the 4th May, 1896, and was tried before him on the 29th and 30th May. Judgment was given on the last mentioned day dismissing the action.

The substantial question in the case is whether the defendants are liable for damages said to have been caused by the drain alleged to have been constructed by them under the Ditches and Watercourses Act.

It appeared that some time in the month of May, 1892, one James Hyland, the owner of the west halves of lots twenty-eight and twenty-nine in the 3rd concession of Maidstone, was desirous of having a drain made along the east end of his lots, to obtain a proper outlet for which it would have to be carried through or would affect the lots of several of his neighbors. A meeting of the parties interested was held pursuant to section 5 of the act but no agreement was arrived at as to how or by whom the drain was to be made. Hyland thereupon pursuant to section 6, filed a requisition with the township clerk describing the ditch required to be made specifying the lands which would be affected by the proposed drian and the owners thereof in order that the township engineer might be put in motion to award and determine the locality of the drain and what portions of it should be done by the respective parties interested.

The requisition having been communicated to the engineer by the clerk and notice having been given to the parties, the engineer met them at the time and place specified in the requisition and subsequently on the 23rd of June, 1892, made his award as required by the 8th section of the Act describing the course and extent of the drain and alloting the work thereon to be done by the parties interested including the plaintiff in the manner therein specified. The plaintiff and others appealed from the award to the County Judge in the manner provided by section 11 of the Act, but their appeal was dismissed and the award confirmed. With the exception of the plaintiff, the parties to the award complied with it, doing their prescribed portions of the work, and the plaintiff having failed to do his within the time prescribed, the engineer, as provided by section 15, contracted for the performance of that portion with a third person by whom it was done and the drain was thus completed, the defendants paying, as the statute requires, the cost of that part of the work which the plaintiff had refused to do and charging it back to and collecting it from him.

The drain as laid out by the engineer and specified in his award was connected with the drain constructed by the defendants in 1890, under their by-law 326, and there was evidence that this was done at the request and with the assent of the plaintiff.

The appeal was argued before Burton, Osler, and Maclennan, JJ. A., on the 1st and 2nd of December, 1896.

F. E. Hodgins for the appellant. The requisition and report are public documents and are *prima facie* proof of the facts therein stated: Warren vs. Deslippes, 33 U. C. R. 59; York vs. Osgoode, 24 S. C. R. 282. From these documents it is clear that more than five persons were interested and therefore there was no jurisdiction and the proceedings were void: York vs. Osgoode, 24 S. C. R. 282; 21 A. R. 168; 24 O. R. 12; and the fact that the appellant appealed from the award makes no difference. The referee was wrong in holding that the defendants were not liable because they were acting in an executive capacity and were carrying out the wishes of the owners. The defendants were liable to do the work and there is certain machinery by which repayment of the cost can be obtained: Hepburn vs. Orford, 19 O. R. 585; Dagenais vs. Trenton, 24 O. R. 343. The corporation alone can do the work, and doing it negligently are liable;

Stalker vs. Dunwich, 15 O. R. 342. In principle this is like a local improvement and unless there is a remedy against the corporation there is no remedy at all: Dagenias vs. Trenton, 24. O. R. 343. In York vs. Osgoode, 24 S. C. R. 282, an injunction was granted against the township. See also McSorley vs. St. John, 6 S. C. R. 531. The referee had jurisdiction and the plaintiff is entitled either to compensation or damages: Ellice vs. Hiles, 23 S. C. R. 429; Sage vs. Oxford, 22 O. R. 678; New Wesminister vs. Brighouse, 20 S. C. R. 520.

J. B. Rankin for the respondents. This is not like a local improvement work. The engineer is it is true appointed by the corporation but he is then put in action by the ratepayers, and is not the corporation's servant or in a position to impose liability on the corporation. Under the Ditches and Watercourses Act the work may be initiated by any owner and the municipality cannot interfere. The majority system does not obtain. The owner must start the drain on his own land and it must run from it. Under the Municipal Act it may start anywhere and go anywhere. Under the Municipal Act all the land benefited may be assessed. Under the Ditches and Watercourses Act (as in force at the time of the making of this drain) the assessable area is limited and defined: section 8, sub-section 2. Then under the Ditches and Watercourses Act the assessment is for work and under the local improvement clauses is for money; and under the latter is paid by the municipality. The drain did not pass through the land of five owners. The requisition is no evidence as to the course of the drain. It is signed by all the persons affected but more persons are affected than the owners of land through which the drain runs: see section 6. The plaintiff acquiesced in the work being done and cannot complain: Gibson vs. North Easthope, 21 A. R. 504; Gill vs. Edouin, 15 R. 109, at p. 112. The council did no work and never interfered and did not even know about the work. They did nothing but pay the engineer's fees, and are not liable: O'Byrne vs. Campbell, 15 O. R. 339; Hepburn vs. Orford, 19 O. R. 585.

F. E. Hogdins, in reply.

May 11th, 1897. Osler, J. A.:—

At the trial it was objected by the plaintiff that the engineer's award and all the proceedings before him were void for want of jurisdiction because the drain passed "through or partly through the lands of more than five owners" in order to obtain an outlet, in which case the requisition to the engineer could not have been filed without the assent in writing of a majority of the owners affected or interested or unless a resolution of the council of the municipality approving of the proposed work had been first passed after those interested had been heard or had had an opportunity of being heard by the council after due notice to them, and there had in fact been no assent in writing or resolution of the council. The learned referee states that he is unable to find upon the evidence whether the drain did or did not pass through the lands of more than five owners but looking at the terms of the award I think that it must be assumed in favor of the plaintiff that it did so, as eight persons are named therein who are ordered to do specified parts of the work and I do not see that these eight persons are not shown to be the owners of as many different parcels of land; and that being the case the absence of jurisdiction in the engineer to make the award would seem to be clearly established. This, however, does not determine the question of the defendants' liability for what was done. The question is whether it can be said that they did it. "On general principles, it is necessary, in order to make a municipal corporation impliedly liable on the maxim *respondeat superior* for the wrongful act or neglect of an officer, that it be shewn that the officer was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and, also, that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation": Dillon, 4th ed., section 974. And again: "If the duty though devolved by law upon an officer elected or appointed by the corporation, is not a corporate duty the officers of the corporation performing it do not act for the corporation and hence the corporation, unless expressly declared to be so by statute, are not liable for the omission to perform it or for the manner in which it is performed."

What liability if any the council might assume by passing a resolution under section 6 (*b*), approving of the proposed scheme or work, it is unnecessary to decide, but I am clearly of opinion, agreeing in this respect with the learned referee, that no liability is cast upon them merely in consequence of the action taken by the engineer in assumed compliance with the requisition of an owner. These proceedings are initiated by private persons, not set in motion by or subject to the control of the council or dependent upon any by-law of the municipality. The engineer is an independent officer, appointed, no doubt, by the council, but appointed in fulfilment of a statutory duty cast upon them, not to carry out the instructions of the council but those of the persons who require the drain to be made. His duties are fixed and prescribed by the statute. The council exercise no judgment, give him no instructions, and have no control over his proceedings. Though he files his award with the township clerk he makes no report of his action to the council, and, unless they happen to be affected by the award as landowners, they are no parties to the award and have no right of appeal therefrom. If the work is not completed as required by the award they do not set the engineer in motion to take the proceedings authorized by section 15 to let contracts for the unfinished sections of the drain. That is done by the engineer at the instance in writing of one or more of the parties interested. The duty of the council is limited to paying the fees and charges or costs awarded by the engineer or the contract price of those parts of the work which may have been let by him and then collecting them in the prescribed manner from those persons who ought to have paid the same or performed the work : secs. 9 (2), 13, 14, 18 ; 52 Vic. ch. 49, sec. 4. After the drain has been constructed the execution of any work of repair thereon appears to be under the authority and direction of the council : sec. 4, sub-secs. 4 to 9 ; but they do not stand in relation to the construction of a work of this kind under the Ditches and Watercourses Act in the position occupied by them in carrying out works under the local improvement clauses of the Municipal Act or the Drainage Act. These latter are executed under the direct authority of their by-laws and are done by them and not by those who set them in motion.

The case of York vs. Osgoode, 21 A. R. 168, 24 S. C. R. 282, which the plaintiff relied upon, is very different from the present. There the action was brought against the township and the engineer to restrain the performance of the work under the invalid award, an award to which the council were parties and which was being enforced by them or for their benefit. There is nothing in the decision of this court, or of the Supreme Court affirming it, to countenance the notion that the council would be responsible in damages for the execution of works under such an award as we are dealing with here.

The case of McSorley vs. St. John, 6 S. C. R. 531, does not help the plaintiff. The judgment of the majority of the court proceeds on the ground that the officer for whose acts the city corporation was held responsible was not only an officer of the corporation but that these acts—the arrest and imprisonment of the plaintiff—were done in collecting taxes which were received and applied for the benefit of the city and therefore in discharge of a duty imposed by law for the peculiar benefit of the corporation. The dissenting judgment of Ritchie, C. J., states the law applicable to the present case, regarding the engineer as an independent officer. It was contended that the defendants had ratified the illegal action of the engineer by collecting the sums awarded and certified by him to be payable. They might be liable for anything they did in enforcing payment to recoup themselves for what they had paid out, but no further. They certainly did not thereby adopt the drain and become responsible for all its consequences.

It seems needless to say anything as to the effect upon the action of the plaintiff's acquiescence in the proceedings, but I do not wish to intimate any dissatisfaction with the opinion of the learned referee on that part of the case.

As regards that branch of the claim relating to the alleged refusal of the defendants to allow the plaintiff to drain his land into the Fourth Concession drain constructed and repaired under by-laws 198, 218 and 347, I also agree with the judgment of the referee. I do not see what legal cause of action the plaintiff has proved. If he had a right to use that drain the defendants are not shewn to have prevented him from doing so and they did give him leave, on his requesting it, on the condition, which he did not choose to accept, of putting in the tile culvert (they giving him the tiles) at his own expense.

An objection to the referee's jurisdiction is taken by the reasons of appeal but it was not pressed or asserted on the argument. The order of reference was not appealed from ; the case appears to have proceeded before him without protest or objection, and even if, as Drainage Referee, he was not the officer for trial of the first branch of the plaintiff's claim under the Act of 1894, 57 Vic. ch. 56, sections 88 and 114 (O.), yet as an official referee under section 89 of that Act and 102 of the Judicature Act, I do not see why the case was not properly before him.

The appeal should, I think, be dismissed.

Maclennan, J. A. :—

A careful consideration of the whole case since the argument confirms the opinion which I then formed that no case whatever was made out against the defendants; and therefore the appeal should, in my opinion, be dismissed.

Burton, C. J. O.:—

I agree.

Appeal dismissed.

IN THE HIGH COURT OF JUSTICE.

PELTIER *vs.* TOWNSHIP OF DOVER EAST.

Damage from Water Caused by Plaintiff's Act or Neglect—"Maintenance"—Section 73, ch. 56, 1894 (O).

Where the plaintiffs constructed box drains between their land and a township drain through which water flowed and injured their crops; held that they could not recover damages from the township.

Persons are bound to use such precautions as will prevent, as far as possible, the flooding of their properties. "Maintenance" within the meaning of section 73 of the Drainage Act, 1894, includes whatever is necessary to put the drain in a proper condition to carry off the water flowing into it, having regard to the purpose for which the drain was constructed.

Though the plaintiffs failed in their claim for damages, the evidence shewed that the water remained on the plaintiffs' premises for an unreasonable length of time; held that they were persons whose property was injuriously affected by the condition of the drainage work, and that they were entitled to a mandamus against the defendant municipality to maintain the drain, pursuant to section 73 of the Drainage Act.

December 18th, 1896. THOMAS HODGINS, Q. C., Referee.
January 9th, 1897.

Judgment of the referee, delivered orally at Chatham:

I have considered the arguments presented yesterday and think it will not be necessary for the defendants to adduce evidence against the plaintiff's claim for damages. The evidence of the plaintiff, has not, I think, thrown any onus on the defendants to rebut a liability respecting such damages.

Mr. Justice Cresswell in the case of Smith vs. Kenrick, 7 C. B. 566, has well said that water—and I suppose his observation is apt when applied to this locality—that "water is a sort of common enemy to the community against which each man must defend himself." And assuming that the plaintiffs knew it to be so, they must be considered as bound to use such precautions as would have prevented, as far as possible, the flooding of their properties by this common enemy, water, as disclosed in the evidence. And they must also, I think, be held to know the operation of the ordinary laws of nature respecting water. The evidence shews that the plaintiffs had placed a number of box drains between the Township drain and their own land, and that at the times complained of, the plaintiff, Theodore Peltier, saw the water coming through these box drains into his land, but made no effort to close the boxes, or interpose any barrier to stop the inflow of the water complained of. It is common knowledge that water will find its level, and the plaintiffs must be held to have known that when the water rose in the Township drain above the level of his box drain it would flow in upon his land and damage it.

Having such knowledge, the law casts upon him the duty of preventing the operation of these ordinary laws affecting water by using such means as would have stopped the water from flowing in through his box drains and flooding his property. He did not do so, but stood by and allowed his box drains to give the water of the drain easy access to his property. I must therefore find that by his own act, and therefore with his own consent, the water from the Township drain flowed in upon his land, and caused the damage of which he now complains.

I have not had the opportunity of looking at many cases during the progress of this trial, but the case of Fletcher vs. Rylands, L. R. 3, H. L. 330, cited in a note in Angell on Watercourses, page 182, contains some observations which I think illustrate the law applicable to this case. It was an action by a mine owner against the owners of a reservoir to recover damages for injury caused to his mines by water overflowing into them, through old shafts from the reservoir of the defendants. In giving judgment, Lord Chancellor Cairns said: "The defendants (owners of the reservoir) treating them as owners or occupiers of the close on which the reservoir was constructed, might lawfully have used their close for any purpose for which it might, in the ordinary course of the enjoyment of the land, be used; and if in what I may term the natural user of the land, there had been any accumulation of water either on the surface or under ground; and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff (the owner of the mines) the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it it would have lain upon him to have done so by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the ordinary laws of nature."

There is another case Carstairs vs. Taylor, L. R. 6 Ex. 217, where it appeared that the defendant who owned a house, the ground floor of which he had rented to a merchant for a warehouse. The water from the roof was collected by gutters into a wooden box, and from thence was discharged by a pipe into the drains. Another common enemy of the community, a rat, gnawed a hole in the box; and on a heavy rainstorm the water escaped through the hole, and poured into the warehouse, and injured the plaintiffs' goods. It appeared that the defendant had used reasonable care in examining and seeing to the security of the gutters, and the box. In an action by the plaintiffs against the defendant for the damages so caused, it was held that the accident was due to *vis major*, and that the defendant was not liable either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it had entered the warehouse. Bramwell B. said: "The plaintiffs must be held to have consented to this collection of the water, which was for their own benefit, and the defendant can only be liable if he was guilty of negligence."

I think, therefore, the neglect of the plaintiff to interpose some barrier against the inflow of water through his box drains, must be held to debar him from claiming damages against the defendants for the loss of his crops.

With reference to the other branch of the case, I think, sitting as a jury, I must find on the evidence that the drainage works in question are insufficient and have not been properly maintained by the municipality. Whether any relief by mandamus can be given in view of the objection taken by the defendants to the notice (Ex. No. 2) or whether assuming such notice to be sufficient, the plaintiff is entitled to a mandamus or an injunction in view of the statutory term "neglecting or refusing to maintain any drainage work," I reserve for the present, and also the question of costs.

But a fact which, sitting as a jury, I find is also established by the evidence, and which must be considered on this question of a mandamus, is this: The water remained on the plaintiff's premises for some time. This long continuance of the water there, and the incapacity of the drain, it appears to me may bring the plaintiff within the definition of "a person whose property is injuriously affected by the condition of the drainage work," and though I have found that his act in allowing the water to come upon his land through the box drains has defeated his claim for damages against the municipality, I think the above facts may give him the right to a mandamus, and I reserve that question for further consideration. If it is necessary to amend the pleadings I will grant leave.

Mr. Rankin: Except that you should consider the question of costs in the matter.

The Referee: Certainly, if I find the plaintiffs or defendants are entitled to an amendment, the costs incident to such amendment will be reserved.

Judgment of the referee delivered at Toronto on the 9th January, 1897.

Having reference to the evidence respecting the questions reserved at the trial and my finding on that evidence, I consider that the notice (Ex. No. 2) given by Messrs. Pegley and Sayers to the Municipal Council was sufficient under section 73 of the act for the purposes of a mandamus.

The statute (57 Vic. c. 56) makes it the duty of the municipality undertaking any drainage work, to maintain the same; and in sections 2, 74, and 75 gives some indications of the legislative meaning of the expression "maintenance" of a drainage work. The observations of Sir G. Jessel, M. R., in Sevenoaks, Maidstone & Tunbridge R. Co. vs. London, Chatham & Dover R. Co., 11 ch. D. 625, interpreting a similar expression in a railway agreement also assist. He says, p. (634) "It is very difficult to define what works of maintenance are. It is a very large term, and useful or reasonable ameliorations are not excluded by it. For instance, if a company had power to maintain the banks of a river which were faced in a particular way, could it be supposed that they were restricted under the words of maintenance to keeping up the banks in precisely the same way, when the mode which might have been very good when the banks were originally formed had been very much improved on by the subsequent advance of science? So where a railway company have to maintain a railway, I should not at all doubt that in maintaining it they might use any reasonable improvement. If, for instance, the railway were originally fenced with wooden palings, and it were sought when they decayed to replace them by an iron fence, I should say that was fully within their powers. If the railway originally was made in a deep cutting, and it was thought desirable to face the cutting with brick to make it more secure, I should say that was fair maintenance. And if a railway station was found inconvenient, and it was desirable, when it required repairs, to alter the arrangement of the rooms, or to alter the access, or form of access, and so to ameliorate it at the same time that it was put in repair, I should say all that was within the powers of maintenance given by the legislature; that is, you may maintain by keeping in the same state, or you may maintain by keeping in the same state and improving the state, always bearing in mind that it must be maintenance, as distinguished from alteration of purpose. I have no doubt, therefore, that this work is authorized by the power to maintain.''

I therefore construe the statutory expression as meaning that the municipality should do whatever is necessary to put the Township drain in a proper condition to carry off the water flowing into it from the Rivard, Cadotte and Gowrie drains, having regard to the purposes for which the drain was constructed. And as the evidence shows that it has not sufficient capacity for that purpose, I hold that it is the duty of the municipality to repair, deepen, or widen it to the outlet, either under section 74, or, if the cost should exceed $400, under section 75 of the Act.

A mandamus may therefore issue to compel the municipality to maintain the said drainage work pursuant to section 73 of the Drainage Act.

As the plaintiffs fail in their claim for damages and the defendants fail in resisting a mandamus, I let each of the parties bear their own costs.

IN THE HIGH COURT OF JUSTICE.

THACKERY *vs.* TOWNSHIP OF RALEIGH.

Drainage—Land Injuriously Affected—Appeal to Court of Revision—Claim for Damages—Sufficiency of Notice—Filing Notice—Arbitration.

Under the drainage clauses of the Municipal Act of 1892, a landowner who is injuriously affected by a drainage work and who is assessed for part of the cost, is not bound to appeal to the Court of Revision for the allowance to him of damages to be set off against his assessment; he has his remedy by arbitration or action. Whether such a claim is made by application to the Referee or by action is immaterial; in either event the Drainage Referee has jurisdiction to deal with it. The provision of sub-section 3 of section 93 of the Drainage Act, 1894, requiring a copy of the notice of claim to be filed with the County Court Clerk is directory and not imperative, and recovery is not barred where notice of the claim is duly given to the municipality and an action commenced within the time limited, though a copy of the notice is not filed.

A notice that the claim is for damages sustained "by reason of the enlargement and construction" of the drain in question is sufficient to support a claim for damages for interference because of the drain, with access to part of the claimant's farm.

July 16th, 1897. THOMAS HODGINS, Q. C., Referee.

W. Douglas, Q. C., for plaintiff, and M. Wilson, Q. C., for defendants.

One of the chief defences in this action is that the plaintiff's claim for damages and compensation consequent upon the construction of the drainage works referred to in the pleadings should have been brought under the provisions of section 93 of the Drainage Act, 1894, which provides that such claims shall be referred to the arbitration and the award of the referee under the drainage laws, and be instituted by a notice claiming damages or compensation, stating the ground of the claim, which notice must be served upon the proper parties, and a copy of it, with an affidavit of service, filed with the Clerk of the County Court; such service and filing to be made within one year from the time the cause of complaint arose.

The municipal proceedings for the enlargement of the Raleigh Plains drain (originally constructed in 1864) were commenced in 1892, but owing to certain litigation were not completed until the 17th June, 1895, when the by-law No. 641 authorizing the work was finally passed by the council.

The plaintiff's claim was instituted by a writ of summons issued on the 6th day of April, 1897, followed by pleadings in which the defendants raise the defence above referred to and others.

Among the documents put in at the trial is a notice of his claim and of its reference to arbitration signed by the plaintiff, dated the 10th February, 1897, and served the same day on the reeve of the defendant municipality.

The first questions I have to consider are whether the provisions of sub-section 3 of section 93 of the Drainage Act bars the plaintiff's claim; and if it does not, whether the notice is sufficient under the statute and if not whether it is amendable under sub-section 2 of section 89.

There is, I think, a clear distinction between statutory directions which must be construed as imperative, and those which may be construed as directory—or as Lord Hale puts it—"directive," (2 Hale's P. C. 50) "I understand the distinction," says Mr. Justice Taunton, in Pearse vs. Morrice, 2 A. & E. 96, "to be that a clause is directory where the provisions contain mere matter of direction, and nothing more, but not where they are followed by such words as that anything done contrary to such provisions shall be null and void to all intents." The distinction was further pointed out by Lord Tenterden, C. J., in Rex. vs. Justices of Leicester, 7 B. & C. 6, where he held that negative words in a statute would have to be given effect to as imperative but that where words were used only in the affirmative, it would be proper to hold that the provision in the statute was merely directory. And Lord Coleridge, C. J., in Woodward vs. Sarsons, L. R. 10 C. P. 746, defined the general rule applicable to such provisions to be that an absolute or imperative enactment must be obeyed or fulfilled exactly, but that it is sufficient if a directory enactment be obeyed or fulfilled substantially.

The cases further shew that these statutes prescribe a particular time for the doing of an act and there are no negative provisions, indicating that the act if not done at the prescribed time shall be invalid, the act may be done at a later time. See Rex. vs. Sparrow 2 Strange 1123; Rex. vs. Loxdale, 1 Burr 455.

Thus—as decided in State vs. McLean, 9 Wis. 292, when there is no substantial reason why the thing to be done might as well be done after the time prescribed as before, no presumption that—allowing it to be so done, it may work an injury or wrong—the courts assume that the intent was that if not done within the time prescribed, it might be done afterwards.

Another canon of construction is that when it is contended that the legislature intended to take away the private rights of individuals, such an intention must appear in the statute by express words or necessary implication. See Metropolitan Asylum vs. Hill, 6 A. C. 193; Western Counties R. Co. vs. Windsor and Annapolis Ry. Co., 7 A. C. 188.

The plaintiff's claim is one which comes within the provisions of section 93, which if barred by the operation of sub-section 3 would in my judgment subject him to loss, and negative the maxim *ubi jus ibi remidium*. But his notice of claim and reference to arbitration though not strictly in the form by the act, may, I think, be considered sufficient for the purposes of my jurisdiction, and I give leave to amend the same and file it with the proper officer as directed by the Act *nun pro tunc*.

This enables me to exercise the jurisdiction vested in the referee under the act, and I find that the plaintiff is entitled to recover damages and compensation for the injury done to his property in the construction of the drainage works or consequent thereon. And the evidence warrants me in finding that the amount tendered to him for the quantity of land taken, and the damages caused by the dumping of the earth on his land being $102.50, covers all the damages he is entitled to, except the cost of the construction of a bridge across the drain, to connect the two severed portions on his farm. If the parties cannot agree as to the cost of that, the defendants may construct a bridge to be approved of by me. I will let parties put in affidavits giving the exact dimensions of the proposed bridge according to the estimates given at the trial, and I will then assess the amount to be allowed to the plaintiff for the construction of a bridge.

As the plaintiff's initiatory proceedings were irregular in not being instituted under section 93 of the Act, I think he must pay the defendant's costs up to and inclusive of the order of reference, subsequent costs, including the trial and entry of judgment, I allow to the plaintiff against the defendants and I allow one set of costs to be set off against the other.

JUDGMENT OF THE COURT OF APPEAL FOR ONTARIO, DELIVERED MAY 5TH, 1898.

Osler, J. A. :—

Appeal by the defendants from the judgment of the Drainage Referee.

The action was commenced by writ issued on the 6th April, 1897. Plaintiff sues as being the owner and occupant of the south east half of the north half of lot 12 in concession 6 Raleigh, alleging that the defendants have constructed a drain through his farm dividing it into two parcels and depriving him of access from one part to the other. The drain is 75 feet wide and about 9 feet deep with a bank filled up on each side of it 9 feet high. The base of the west bank is 46 feet wide and of the east bank 35 feet wide. The plaintiff's land has been heavily taxed for drainage, but he can obtain no advantage from this drain without constructing tile drains under these banks to carry off the water into the drain. He will be compelled to fence in the sides of the drain and to build a bridge across it to obtain access from one part of his farm to the other. Four acres and 69-100 of the plaintiff's land have actually been taken for the drain. The defendants refuse to pay him any adequate compensation, and he claims $500 damages and the costs of the action. The only parts of the statement of defence which need be noticed are those which plead that the action was not brought in time as required by the provisions of the Municipal Act and Drainage Trials Act; that an action is not maintainable at all; that if the plaintiff has any claim, which is denied, it is the subject only of arbitration; that the plaintiff did not serve the defendants with a notice claiming damages and the grounds thereof and file it in the office of the Clerk of the County Court of Kent within one year from the time the cause of complaint arose as required by the Drainage Trials Act; that the drain was constructed under the provisions of the Municipal law relating to drainage and of a by-law of the defendants authorizing its construction and making an assessment therefore; that plaintiff's land was assessed for benefit; that such assessment remains against the land as a legal adjudication and charge thereon and that plaintiff is now debarred and estopped from alleging that his land was injured and damaged and not benefited by such drainage.

Before any further pleadings in the action an order was made by the County Judge on the 5th June, 1897, on the plaintiff's application, referring the action and the matters at issue therein to the Drainage Referee, "preserving and reserving to the defendants the right and benefit of any and every defence and objection to the claims made by the plaintiff." This order was made under the authority of section 94 of the Drainage Trials Act. It has not been complained of and does not appear to be open to objection. The intention of the Legislature in passing that section evidently was that prosecuting a just claim for compensation or damage a claimant should no longer be liable to be defeated merely because he happened to have sued for it in an action instead of proceeding by arbitration. The action was accordingly tried before the Drainage Referee, Mr. Hodgins, in July, 1897, who found that the plaintiff was entitled to recover damages and compensation for the injury done to his property in the construction of the drainage works and consequent thereon; that the amount tendered to the plaintiff for the quantity of land taken and damage caused by dumping earth on his land, being $102.00, covered all the damage he was entitled to except the cost of the construction of a bridge across the drain to connect the two severed portions of his farm, which was to be afterwards determined by him on further evidence if the parties could not agree as to the same. I am not entirely satisfied that the report is complete or that the appeal is regularly brought before us in the shape in which the proceedings now stand, but as neither of the parties has raised any objection I think we may deal with the case *quantum valeat.*

It appears that in the year 1892 the defendants passed provisionally a by-law for deepening, extending, widening, straightening and otherwise improving an important drain known as the Raleigh Plains Drain which had been constructed many years previously. The report of the engineer set forth in the by-law shewed that lands in the Townships of Tilbury East and Harwich would be benefited by and were chargeable for outlet for the proposed improvement. The cost of the whole work was estimated at $56,190 which included a sum of $4,000 for five road bridges and an item of $1,765 for land and damages "as per list." This list was referred to in the report as annexed thereto as were also the specifications for the work and the schedules of the assessments on the land and roads in Raleigh, Harwich and Tilbury East benefited and using the drain as an outlet.

The plaintiff's land was scheduled as assessed for benefit and outlet and to cover interest on debentures for 20 years $166.16 payable by a yearly rate of $8.308.

The list of lands and damages in respect of which the item of $1765 was charged was not set forth in the by-law nor published, nor was it produced in the case. The evidence of one of the township officials was to the effect that the plaintiff was put down thereon as entitled to damages to the amount of $35. This did not include any allowance for the bridge across the drain from one part of his farm to the other. The engineer who made the examination and report, if living, was not called as a witness. Litigation ensued over the by-law in consequence of which it was not finally passed until the 17th June, 1895. In the meantime the Court of Revision for the trial of complaints against the assessment in Raleigh, notice of the sitting of which was duly published when the provisional by-law was published, was duly adjourned from time to time. The plaintiff did not appeal against his assessment. The work on the drain was done through the plaintiff's farm during the months of May, June and July, 1896. As originally constructed the drain was about 45 feet in width and there was a bridge crossing it from one part of the farm to the other. As widened and improved it was made 75 feet in width at the top and about 65 at the bottom and 9 feet in depth. Including the land at the side of the drain covered with earth taken from the drain and used in the embankment about 469-100 acres of the farm was made use of and about 4-5 of an acre more than in the old drain was taken up in the actual width of the new one from bank to bank. The old bridge was necessarily taken out, but the defendants refused to replace it by a new one and no allowance was made for a new one in the engineer's estimate for land and damages appended to his report. The defendants tendered the plaintiff $102.00 for damages. This was done some time before action but exactly when did not appear. It was probably some time in 1895. They had paid other ratepayers whose lands were affected, sums in several instances considerably in excess of those which the engineer had allowed in his damage list, but except in so far as they allowed these persons for bridges across the drain it was said that these sums were in the same proportion generally speaking to that which they had offered the plaintiff. On the 10th February, 1897, plaintiff served defendants with notice demanding $500 damages sustained by him by reason of the enlargement and construction of the drain through his property and thereby required them in case they rejected his claim to arbitrate and to appoint an arbitrator in respect of it. The defendants having taken no notice of the demand, the plaintiff on the 6th April, 1897, brought this action. The claim must be regarded in this action as limited to compensation for damage to land by depositing earth thereon taken from the drain and to damage caused by severance : a claim in other words for damage done in the construction of drainage works or consequent thereon. Act of 1891, 54 Vic. ch. 51, section 9 ; Municipal Act of 1892, section 591 ; Drainage Act, of 1894, section 93 (1). The Acts in force when the proceedings of the council were initiated were those of 1891 and the Amending Act, 55 Vic. ch. 57, and the Municipal Act of 1892. The Drainage Trials Act came into force 1st June, 1894. The question is whether the plaintiff is entitled to recover anything under either of the heads of damage claimed. So far as the amount actually awarded is concerned, apart from what may hereafter be allowed by the referee in respect of severance, the defendants seem to have no reason to complain as it is the amount they were willing to pay before action and is by no means an excessive sum for the injury caused to the plaintiff's farm by the dumping of soil thereon on the banks of the drain.

Sections 483 and 591 of the Municipal Act of 1892, are the landowner's charter. The first provides that the council shall make to the owners or occupiers of or other persons interested in real property entered upon, taken or used by the corporation in the exercise of its powers, due compensation for any damages, including the cost of fencing when required, necessarily resulting from the exercise of their powers, beyond any advantage which the claimant may derive from the contemplated work. This claim, if not mutually agreed on, is to be determined by arbitration under the Act; it is to be made within a year from the time when the alleged damages were sustained or became known to the claimant or in case of a continuance of damage from the time when the cause of action arose or became known to the claimant. That limiation, however, does not extend to real property taken or used by the corporation.

The Act provides machinery for ascertaining the value of the property by arbitration, sections 385, 396, but in case of disputes "as to damages alleged to have been done to property in the construction of drainage works or consequent thereon" which is what section 591 refers to, the complainant "may refer the matter to the award of the Drainage Referee who shall hear and determine the same and give in writing his answer and decision and his reasons therefor," section 591. The Drainage Referee was subsituted in this section for the arbitrators referred to in sub-sections 385, 396 by section 9 of the Drainage Trials Act, 1891, 54 Vic. ch. 51. See the Municipal, Act R. S. O. ch. 184, section 591 which provided that the claimant might "refer the matter to arbitration as provided in the Act and the award so made shall be binding, on all parties."

In the case of drainage works constructed under the local improvment clauses of the Municipal Act, of 1892, it is observable that there is no express reference in section 391 or elsewhere to the cost of the land through which the drain is actually made and which is expropriated for the construction of the drain itself. The council are to procure plans and estimates to be made of the work and an assessment of the real property to be benefitted by the work showing as nearly as may be in the opinion of the engineer the proportion of benefit to be derived thereform by each lot. And by sub-section 3 (a), (Drainage Act, 1894, section 86), the cost of any reference had in connection with the construction of any works, costs of publication of by-laws, and all other expenses incidental to the construction of the works and the passing of the by-laws shall be deemed part of the cost of the works included in the amount to be raised by local rate. Under this provision no doubt the cost of land necessary to be acquired for the construction of the drain would form part of the estimate, but it is needless to say that in the great majority of cases the land would be worthless to the owner for any purpose except that of constructing the drain for the improvement of the rest of the property. And it is on that in general well founded assumption, that the engineer's estimate of the cost of construction may be safely based. Nevertheless where land which has an independent value is taken for the purpose of the drain or is injuriously affected by reason of the construction of the drain, the owner's right to compensation is clear and it ought to be ascertained in the manner provided by the Act. The engineer is not the person to settle it, though he may place in his estimate, as he has done here, a sum which he thinks sufficient. If accepted the claim would thus be settled by mutual agreement. The engineer's duty is to assess against each lot, etc., that proportion of the cost of the work which he thinks it ought to bear for the benefit it will derive from the work. I do not see that any power has been conferred upon him to set off benefit against damage. The same observation applies to the Court of Revision. They are not, any more than is the engineer, the tribunal constituted by the Act to assess the owner's right to, and the amount of his compensation—were I free to do so I should be disposed to hold that the two subjects—compensation and benefit—were distinct, so far as assessment for the latter is concerned, for if benefitted at all the land must be treated as land liable to assessment and must bear its proportion of the cost of the work which necessarily includes all the land damages incurred in the construction of the work or consequent thereon whether ascertained by the engineer and accepted by the owner as I have already mentioned or subsequently ascertained by award of the referee or otherwise as provided by sections 592 and 483.

Suppose e. g. upon an appeal to the Court of Revision that court were to say: "It does seem that you are damaged to the extent of five times the amount you have been assessed for, therefore we strike off the assessment." The claimant then proceeds to recover his damage by arbitration, etc. As his land has thus not been assessed for benefit it cannot be charged with any portion of the damages, which as being benefitted in fact it ought to be (section 592). The proper procedure evidently is to assess the lands for whatever sum they appear to be benefited—the work of the engineer and Court of Revision—and to allow the owner his damages less any advantage he derives from the work from which advantage may be deducted the special assessment since to that amount the owner is already liable to pay for the improvement — the work of the arbitrator or referee—any sum thus allowed to the owner is then chargeable *pro rata* under section 592 upon all the lands liable to assessment for the drainage work.

I am of opinion, therefore, that the plaintiff did not lose his right to claim the damages sought in this action merely by neglecting to appeal to the Court of Revision, and I think the case quite distinguishable from Hiles vs. Ellice, 23 S. C. R. 429, on the ground that here the engineer shews that he has kept the assessment for benefit distinct from any claim for damages by allowing as he did in the land and damage list attached to his report a certain sum for damages, viz., $35.00. It was not, as I have shewn, for the engineer or the Court of Revision to assess or limit the damages, nor could the former bind him by his estimate. He might well, therefore, seeing that the damages were independent of the assessment for benefit, be content not to appeal against the latter assured that his rights in respect of the former were not affected.

The next question is whether the plaintiff's claim, which seems to be in all respects a meritorious and just one, fails by reason of any defect in the procedure adopted by him to enforce it. Whether he commences his proceedings by way of action, as he did here, or by way of reference to the arbitration and award of the referee under section 93 of the Act of 1894, seems now to be a matter of little or no importance, Hiles vs. Ellice, 23 S. C. R. 429, 435, 437.

I think the notice served on the defendants on the 10th February, 1897, was reasonably sufficient within section 93, sub-sec. 2, although the claim for damage by severance is not specifically referred to. It states generally that the claim is for damages sustained by reason of the enlargement and construction of the drain through the claimant's property. There is no reason to suppose that the defendants were in any way misled by it and it was given within one year from the time the cause of complaint arose, as required by sub-section 3 of section 93. The objection chiefly relied on by the defendants is that it was not also filed within that time with the Clerk of the County Court of the county in which the lands in question are situate as required by that sub-section. As to this, I entirely agree with the learned referee that the provisions of the sub-section are directory only and that we cannot infer therefrom that the owner's right to compensation was intended by the legislature to be dependant or conditional upon an exact performance of its requirements.

There are no negative words or any expressions which indicate that the act, if not done till a later time, would be invalid, such for example as are to be found in sections 606 and 608 of the Municipal Act, R. S. O. ch. 223, relating to the liability of the corporation for accidents arising from the non-repair of highways, or in section 9 of the Workmens' Compensation for Injuries Act, R. S. O. ch. 160.

The object of the enactment seems to be to facilitate the township in ascertaining what claims are being made against them, and where, as in this case, the action is brought within a few weeks after service of the notice and well within a year from the time the cause of complaint arose, the filing of the notice pending the litigation seems to be a matter of but trivial importance.

The authorities referred to in the findings of the referee fully support his conclusions on this part of the case. I would, therefore, dismiss the appeal.

It may be observed that by section 9, sub-sec. 3, of the Drainage Act, 1894, the engineer is now expressly required to provide for the construction or enlargement of farm bridges rendered necessary by the drainage works and to fix the value thereof to be paid to the owners of the land. And by sub-sec. 5, of the same section the engineer is to determine in his report in what mannner the material taken from the drainage work is to be disposed of and the amount to be paid for damage to land and crops occasioned thereby, and is to include these sums on his estimate of the cost of construction. Any one dissatisfied with the report in that respect may appeal to the referee (sub-sec. 6) who is required to proceed on such appeal in the prescribed manner. It is somewhat singular that no appeal is given to the referee in respect of the matters in which the landowner is interested under sub-sections 3 and 4 of the same section.

Maclennan, J. A.:—

When the engineer's report, dated the 30th September, 1892, was made, and when the by-law founded thereon was formally adopted by the court on the 24th of October afterwards, the engineer had not, by law, any power to bind landowners whose lands were to be taken for or injured by the proposed work, by any estimate made by him of value or damage. By section 569 of the Municipal Act of 1892, he was to assess the property to be benefited with its due proportion of benefit; and see also sub-secs. 5, 6 and 7. The power to value injury and damage was given for the first time by the Drainage Act of 1894, which went into effect on the first of June in that year. Sub-secs. 2 and 3 of section 9 of that act require him to estimate the cost of bridges required to connect farm lands with highways, or to connect different parts of an owner's land which have been severed by the work; and sub-sec. 5 requires him similarly to estimate the damages to lands and crops to be occasioned thereby. Sub-sec. 6 gives an appeal to the landowner if dissatisfied with his estimate of the land damages, but gives no such appeal in respect of his estimate for bridges. The by-law was not finally passed until the 17th of June, 1895, but the engineer's report was not affected by the Act of 1894, because section 114 declares that anything already done under the foamer Acts was not to be affected. By his report the engineer assessed the plaintiff for benefit $75, and for outlet $33. It is proved that he did not, on making these assessments, make any allowance for the value of land taken or land damaged or for the cost of a bridge rendered necessary by severance. In his report he includes a lump sum of $1,765 for "land and damages as per list," and he says he annexes to his report "a list giving an estimate for compensation for lands taken and damages." That list was not published with or as part of the by-law, nor has it been produced in the present proceedings, and the plaintiff denies ever having seen it, or having had any knowledge that it in any way included or affected his land. It is said that the plaintiff's land was set down in the list as damaged to the extent of $35. The plaintiff did not appeal from the report of the engineer against the assessment. He was probably wise in not doing so, for putting damages aside he could hardly have disputed that he was benefited to the extent assessed by the engineer. He might perhaps have got the assessment struck out altogether on the ground that his damage for land taken and injured and for severance exceeded the benefit, and he would then have been left to claim compensation under sec. 93, when the whole subject could be dealt with. It was strongly contended by Mr. Wilson that not having appealed from the report of the engineer, the plaintiff is barred of all further redress, and great reliance was placed on the case of Hiles vs. Ellice, 23 S. C. R. 429. I do not think that case stands in the plaintiff's way at all, it being proved clearly in the present case, and even expressed upon the report, that the engineer did not make any allowance for damages of any kind to the plaintiff or any other landowner, in making his assessment against them. I therefore think the plaintiff's damage was left altogether at large by the report and that he could pursue the remedy which the Act provided for its recovery. The further question is whether the plaintiff brought his action in time. It is objected that he is barred by sub-sec. 3, sec. 93, of the Act of 1894, which requires notice claiming damages to be filed and served within one year from the time the cause of complaint arose. It is said that the time should be computed from the 17th of June, 1895, when the by-law was finally passed. I do not think so. I think it should be computed from the time when the work was completed, which was the month of July, 1896. A drain such as this is not like a sewer constructed of brick and cement and does not become the property of the municipality, and the cause of complaint to the landowner arises when the work is complete and when the municipality has done all it intends to do for his protection. Therefore the notice served on the 10th of February, 1897, was in time, and I think it was reasonably sufficient in substance. The statute says that the proceedings shall be instituted by the service of such a notice, and then goes on to say that the notice shall be filed and served within one year, etc. The notice having been served within the year, the proceedings were instituted in due time, and although the notice is also required to be filed within a year, the statute does not say that unless that be done the proceedings shall cease to be effectual or that the claim shall be barred. The legislature has not said that the claim shall be barred for want of the filing within the time prescribed and I think the Court ought not to do so. I therefore think the learned referee was right in his conclusion on this point as well as upon the other, and I agree in the reasons which he has well expressed in his judgement.

I think the appeal should be dismissed.

Burton, C. J. O., and Moss, J. A., concurred.

IN THE HIGH COURT OF JUSTICE.

M'CULLOCH *vs.* THE TOWNSHIP OF CALEDONIA.

Vis Major—Damages—Notice—Section 93.

For damages caused to the crops of a farmer by an unusual rainstorm and the backing up of water from a large river a municipality is not liable. When a new drainage work constructed by the municipality through the plaintiff's farm induced the plaintiff to crop the lands adjacent to such work and the work proved to be insufficient for the purpose the municipality was held liable but the plaintiff is bound to concede the possibilities of damages to crops owing to proximity to the drainage work.

Damages caused by or consequent upon the construction of a drainage work cannot be assessed to the owner of the property damaged unless notice claiming such damages has been served upon the proper officer of the municipality within the time limited by section 93.

September 28th, 1897. THOMAS HODGINS, Q. C., Referee.

A. McCummon and McEvoy for plaintiff, O'Brien & Hall for defendants.

From a view of the property in question I find that the portion near the creek or drain is low and swampy and is very thickly covered with weeds. This finding from the view agrees with the statement made by the plaintiff in her examination for discovery that it is "soft" and also with that in the letter of the plaintiff's husband that it was "like a bog," etc.

I am satisfied from the evidence that the plaintiff's husband contributed some—though perhaps to a limited extent—to the insufficient capacity of the drain constructed by the defendants, in that he did not dig the new cut through the plaintiff's farm to the proper depth; for the engineer E. T. Wilkie proves that the cut at McCulloch's was not as deep as the drain above and below it. It is also clear from the financial dealings between the plaintiff and her husband that the husband manages the farm and did this work not entirely as plaintiff's agent, but for their joint benefit.

The drainage works on the plaintiff's farm were commenced in 1891, but were not completed until the fall of 1892. The damages were caused by the construction of the work. This fact I think brings the plaintiff's claim within the provisions of section 93 of the Drainage Act. In the absence of proof of service of the notice required by that section, and of service within the statuary time, I cannot consider the damages claimed for 1892.

The damage of 1893 I find was caused by an unusually heavy rainstorm and by waters of the Nation river backing up and flooding the plaintiff's farm and adjoining lands for which the defendants are not liable as the damage was caused by *vis major*. McArthur vs. Collingwood, 9 O. R., Noble vs. Toronto, 46 Q. B. 519.

The evidence warrants the assumption that the drainage work constructed by the defendants, induced the plaintiff to do what she had not done prior to that work, namely, to crop that portion of her farm adjacent to the creek. The drainage work proved to be insufficient for the purposes for which it was constructed, and the defendants must therefore be liable for the damages caused to the plaintiff's farm in 1894 and 1895. But in assessing such damages there are certain facts which must be taken into account in mitigation of the damages for which the defendants are liable. These are (1) the boggy and weedy character of the property affected, (2) the partial responsibility of the plaintiff's husband for the insufficient capacity of the drain, coupled with the joint financial interest of both plaintiff and her husband in the working of the farm and construction of the work as mentioned above.

Taking these facts into account and estimating the damages on a fair comparison of the estimates given in evidence, I assess the plaintiff's damages for 1894 at $91.25 and for 1895 at $37.00.

Respecting the claim for damages in 1896 I think the plaintiff had sufficient warning from the flooding of the two previous years that the drain was not of sufficient capacity to carry the water flowing into it; making it incumbent upon her so to use the portion of her farm affected by the yearly flooding complained of, that her loss and damage would owing to the considerations to which I have referred be less aggravated, until the drain was sufficiently enlarged, as it appears to have been in 1896. For these reasons I think the damages for 1896 should be assessed at $60.75.

I therefore find that the plaintiff is entitled to damages against the defendants for the wrongs complained of for the years 1894, 1895 and 1896 and I assess the same at $189.00 and direct judgment to be entered in her favor against the defendants for that amount.

The defendants are entitled to judgment in their favor in respect of the plaintiff's claims for damages in the years 1892 and 1893.

I do not think the expense of the proceedings before me has been increased by the claims made by the plaintiff for the years 1892 and 1893. But if the parties desire to speak to the question of costs I will hear what they have to argue. The damages and costs in this action should, I think, be borne as directed by section 97, subsection 1.

GOSFIELD SOUTH *vs.* GOSFIELD NORTH.

Assessment—Repairs—Different Drainage Areas having Common Outlet—Engineer's Report—Names of Owners—Description of Lands—Natural Drainage—Special Benefit.

Where it was proposed under one report to clean out and repair two drains constructed under separate by-laws and draining separate areas, and to enlarge and improve their common outlet and assess their combined drainage areas; held that as the benefit from the improvement of one drain could not be shared by lands formerly assesssed for, and using the other drain, though both would be liable for the improvement of the common outlet, the combined assessment of lands using only one of the drains for the improvement of the two drains, was unwarranted.

The names of the owners proposed to be assessed with a description of the lots, or parts of lots, respectively, in respect of which they are so proposed to be assessed, should be specified in the engineer's report.

Lands which have a natural drainage, and which are distant from and are neither immediately or artificially connected with a drainage work, are not assessable for the cost of its construction or repair. To justify their assessment there must be some special value or agricultural benefit accruing to them from the drainage work.

November 2nd, 1897. THOMAS HODGINS, Q. C., Referee.

J. H. Rodd for appellants, A. H. Clarke for respondents.

From the several reports, plans and by-laws produced in this case it appears that three township drains for the drainage of the lands in three separate areas have been constructed, and are known as the "Lovelace," "Orton Side-road" and "Orton" drains. And they appear to have been repaired and improved under separate by-laws in the years 1883 and 1891.

Each drain commences in a different locality, at or a little south of the townline which now divides the original Township of Gosfield into two municipalities; and each has a separate channel for some distance through its drainage area. The "Lovelace," or easterly drain, runs northerly and westerly until it meets the channel of the Orton Side-road, or Middle drain between lots 18 and 19 in the 8th concession of North Gosfield, from whence their mingled waters can flow either northerly, through a continuation of the Orton Side-road drain to its outlet at the Ruscom river, or westerly through a continuance of the Lovelace drain until they meet the waters of the Orton or Westerly drain, and with them flow northerly and westerly through two outlets into the Belle River.

During the present year (1897) the council of North Gosfield initiated proceedings for the repair and improvement of the Lovelace and Orton drain, omitting the Orton Side-road drain, except as to its share of liability for the continuous channel from its junction with the Lovelace and Orton drains to the outlets above mentioned.

Against these proceedings the council of Gosfield South has appealed.

For the purpose of a convenient comparison of former assessments with the proposed assessment of South Gosfield for the works in question the following table may be useful:

Lot	Con.	Lovelace drain		Orton drain		Orton Side-road drain		Lovelace and Orton
		1883 Acres.	1891 Acres.	1883 Acres.	1891 Acres.	1883 Acres.	1891 Acres.	1897 Acres.
10	3	25	15	——	——	——	——	15
11	"	50	40	——	——	——	——	40
19	4	——	——	175	54	70	90	90
20	"	——	——	64	——	64	182	200
21	"	——	5	100	——	100	150	200
22	"	200	200	200	——	200	——	50
16	5	——	——	——	20	——	——	——
17	"	——	——	144	153	——	——	——
18	"	——	——	175	175	175	——	——
19	"	——	——	200	——	200	200	200
20	"	100	15	200	——	200	185	200
21	"	171¼	200	174	——	174	——	200
22	"	50	50	64	——	64	——	50

In addition to the above it appears that for the repairs and improvements of the Orton drain in 1891, lots 258 (200 acres), 259 (175 acres), 260 (100 acres), 261 (200 acres), 262 (200 acres), and 263 (200 acres), were assessed—none of which lots are included in the present proposed assessment.

From an examination of the above table, it will appear that some of the lots have been assessed in former years for the Lovelace drain, and not for the Orton drain, and some have been assessed for the Orton drain and not for the Lovelace drain; while others have been assessed for both drains,—although not in all cases for the same quantity of acres for the respective drains, while the lots from 258 to 263 assessed for the Orton drain in 1891 are not called upon to contribute to the present proposed assessment.

It also appears that certain lots formerly assessed for only one of these drains are not called upon to contribute to the proposed improvement of both drains.

It is a well-settled canon of statutory construction that Acts imposing taxes or duties on the community must be construed strictly; and that every charge upon the subject must be expressed in clear and unambiguous language, so as not to make any member of the community chargeable, unless it is manifestly the intention of the legislature that he should be.

The intention of the taxation clauses in the Drainage Act is, I think, to authorize the drainage of specific areas of territory and to make the ratepayers benefited by and using drainage work liable for the necessary costs of the same. The expressions used in the Acts are "prescribed area," "area to be drained," "area to be benefited," and similar expressions. The Act localizes the area of the proposed drainage improvement, and also localizes the liability of those ratepayers at whose instance, and for whose special benefit, the drainage improvement is undertaken, and where such benefit or use cannot be shared by parties whose lands are either distant from, or separated by, natural impediments from it, they cannot be made liable to contribute either to its construction or repair.

The ratepayers within the Lovelace drainage area of South Gosfield cannot use, and therefore cannot derive any benefit from the Orton drain, within its special drainage area, nor until the waters of their drain unite with the Orton waters in the channels through which they pass to the outlets mentioned. And to impose on such ratepayers a tax for the repair or improvement of the Orton drain up to the place where its waters unite, is not, I consider, warranted by the Act.

It is conceded that the engineer in assessing the lands and roads in the appellant township for the proposed work, had charged the township with 9 cents per acre too much. And the appellants contend that in any event the engineer should have placed his assessment on the quarter, half, or whole lot, or other quantity, benefited as the case may be, and should have indicated how much of a lot each person occupied. Section 6, and the form of by-law given in section 20, seems to support this contention. And from the words of the latter part of section 6 and sub-section 6 of section 91, I think the names of the owners of the lots proposed to be assessed should also be entered in the engineer's report.

It may be proper to note that the general principles of law which governs the assessment of lands for the construction or repair of drainage works seems to require that some special benefit from such drainage works must accrue to the particular lands proposed to be assessed for the cost of such construction or repair, not some probable general benefit which may be equally applicable to adjoining or non-assessable lands in the locality. Lands which have a natural drainage of their own, which are some distance from, and are neither immediately benefited nor artificially connected with, the drainage work, are not, in the absence of some statutory rule clearly imposing upon them a liability, assessable for the cost of such construction or repair.

And in determining whether some special benefit will accrue to a particular lot not artificially connected with a proposed drainage work, it would be proper to consider primarily what, if any, enhanced financial value will accrue to it by reason of the proposed drainage work, or in other words, what the lot, without the proposed drainage improvement, is fairly worth in the market, and what, if any, enhanced value will accrue to it by reason of the proposed drainage improvement, or what higher price will it command in the market after the drainage work is in full operation. The special benefit or enhanced value should be based upon some actual money value accruing to the lot. Another and a secondary consid-deration may be the agricultural benefit which will accrue if the owner desires to underdrain his lot, and perhaps also the sanitary benefit which may accrue to the occupiers of the lot by reason of the more rapid removal of the surface waters from neighboring swampy or unhealthy territory.

The appeal will, therefore, be allowed with costs.

TOWNSHIP OF AUGUSTA *vs.* TOWNSHIP OF OXFORD.

Drainage Act 1894 Section 80—Mill Dam—Consent—Withdrawal—Appeal to Referee—Terms—Charge for Expenses—Section 97.

A council which has consented to acquisition of a mill dam as part of a drainage work proposed to be constructed by an adjoining township, pursuant to section 80 of the Drainage Act, may withdraw such consent before the passing of the by-law of the constructing municipality. Such withdrawal is sufficiently manifested by appealing to the Drainage Referee.

The withdrawal in such a case should only be allowed upon the appealing municipality indemnifying the originating municipality against the preliminary expenses which should be charged upon the lands and roads affected by the proposed improvement as provided by section 97.

October 26th, 1897. THOMAS HODGINS, Q. C. Referee.

B. M. Britton, Q. C., appeared for the appellant, and James A. Hutcheson appeared for the respondent.

I think the Township of Augusta has a legal right to withdraw the consent which section 80 provides should be given. Section 80 reads: "Wherever, in the construction of any drainage work any dam or other artificial construction exists in the course of or below the work, and is situate wholly within the municipality doing the work, the council shall have power, with the consent of the owner thereof and of the council or councils of the other municipalities liable to assessment for the costs of the work, and upon payment of such purchase money as may be mutually agreed upon, or in default of agreement be determined by the referee, to remove the same wholly or in part; and any amount so paid or payable as purchase money shall be deemed part of the cost of construction and be provided for in the assessment by the engineer or surveyor." The reason I hold that the council has the right to withdraw is from the authority which is given me from section 17 of the Act. Section 17 says: "The Municipal council shall at the meeting mentioned in such notice, immediately after dealing with the minutes of its previous meeting, cause the report to be read by the clerk to all the ratepayers in attendance and shall give an opportunity to any person who has signed the petition to withdraw from it by putting his withdrawal in writing, signing the same and filing it with the clerk, and shall also give those present who have signed the petition an opportunity so to do, and should any of the roads of the municipality be assessed, the council may, by resolution, authorize the head or acting head of the municipality to sign the petition for the municipality, and such signature shall count as one person benefited in favor of the petition." Now it would be a mere anamalous position to say that ratepayers who may set the council in motion under section 3, should have the right to withdraw and that the council who agreed to a certain other matter under section 80 have not a similiar right to withdraw. I think they have, and that that right may be exercised under the same condition of affairs under which section 17 authorizes the withdrawal of ratepayers, namely, before the by-law is passed. In this case no by-law has been passed, and I do not think it is material for me to consider whether there is a binding contract on the part of the Township of Oxford or a binding agreement between the owners of the mill and the Township of Oxford, because whatever there may be between those parties it is subject to the legal right that Augusta has of withdrawing from the agreement before it has become an absolute and binding arrangement under a by-law of the Township of Oxford. Now it should be remembered that in dealing with these drainage matters the councils are the trustees for the ratepayers. It is clear from the evidence given on behalf of Augusta that at meetings where this matter was brought before the ratepayers that when the question was proposed, there were no affirmatives in favor of the proposal at the meeting of about 100. I think that the evidence of the township clerk stated that there were more than 100 present and of the negatives there were 16. Well in addition to that there was the protest which has been proved of January signed by a large number under which the residents of the Township of Augusta proposed to be assessed for the improvements of the south branch of the Rideau River Drainage scheme expressed their disapproval for the reasons set over their respective names, and the Township of Augusta, as trustee for those ratepayers, have expressed their disapproval of the proposal. Then comes the question, and it seems to me that it is a very important factor, the legal right of the council of Augusta to withdraw from this consent which was given in August, 1896. The only point on which I had doubts while this matter was being argued was whether the proceedings here were in law a withdrawal of the consent. I come to the conclusion from reading section 64, the last sub-section and other analogies from the Act, that it is a withdrawal.

I therefore hold in view of all the circumstances that this appeal is a withdrawal of the consent of the Township of Augusta to the arrangement of 1896 for the acquisition of this mill dam for the purpose of the drainage work then proposed. The only point on which I would like to hear the parties is as to what terms and conditions this withdrawal should be subject to. I may say in regard to the costs, because I feel no doubt in regard to that, that though the Township of Augusta succeeds in my view of the law, this is a withdrawal which is subject to such terms as to the costs and otherwise as may be proper to impose, and the only matter now to be disposed of is as to how the expenses of the Township of Oxford and the Township of Augusta should be determined. I suppose the withdrawal of Augusta, and there being no by-law, causes the whole proceedings to fail. I think therefore that the Township of Augusta should indemnify the Township of Oxford against the preliminary expenses, and that those expenses should be charged upon the lands and roads affected by the proposed improvement as provided under section 97. Augusta withdrawing, renders the action that Oxford took up to the withdrawal, unnecessary, and the equitable rule is that where a party alters the position of the other by any act of his own which is within his rights but which imposes a burden on such other party he must as far as possible place that other party in the position in which he was before his position was altered. I therefore direct that the terms under which the withdrawal shall be operative are that Augusta shall indemnify the Township of Oxford against the preliminary expenses, and those shall be a charge on the lands and levied *pro rata* upon the lands and roads assessed for the drainage work in Augusta.

I may say in regard to costs I don't think there should be costs to either side. For this reason, in view of what I have said as to your duty to indemnify, I think your offer and your declaration to abandon should have been accompanied by an offer to indemnify the Township of Oxford for any expenses they had incurred up to the time of your withdrawal. You did not do that. The Township of Oxford did not demand them from you, and I think therefore that the Township of Oxford did not assent to your withdrawal. I think they should have assented and I think you should have offered to indemnify them for the expenses that they had incurred. And in view therefore of what ought to have been done but was not done by each of the parties I think there should be no costs awarded to one against the other.

TOWNSHIP OF RALEIGH *vs.* TOWNSHIP OF HARWICH.

Use of Drainage Works for Outlet—Estoppel—Drainage of Flats.

Where a municipality had in a previous year repaired and enlarged a drainage work which was to afford an improved outlet for the drainage system of its own and the respondent township's upper lands, and had taxed such township with a proportion of the cost of such work, it was held to be equitably estopped from objecting to the work necessary to insure the respondent township the proper user of the drainage facilities for which such improved outlet was repaired and enlarged, and for which they had been assessed by the appellant township.

Where nature has placed on certain lands in flats the burden of over-flow and back-flow, it is not expedient to sanction a drainage system the expense of which would be largely in excess of the value of the lands when relieved and benefited.

November 22nd, 1897. THOMAS HODGINS, Q. C., Referee.

J. B. Rankin appeared for the appellant, and M. Wilson, Q. C., for the respondent.

I make the following findings on the evidence :

1. That the Lock and Gregory drains are out of repair, and should be repaired and improved.

2. That the Mud and Indian Creek drains are a continuation of the Lock and Gregory drains, and connect their drainage system with McGregor's Creek.

3. That the appellant township in 1895 took proceedings to repair and enlarge the Mud and Indian Creek drains, and assessed lands in the respondent township for outlet.

4. That the engineer of the appellant township (Mr. W. G. McGeorge) whose scheme was adopted and carried out by both townships, reported that Indian Creek was "a continuation of the Gregory

drain into which a large area of land in Raleigh and Harwich was drained,'' and that the then proposed improvements would "necessarily afford an improved outlet for other drains flowing into it.''

5. That the same engineer was employed by the respondent township in 1897 to report on the Lock and Gregory drains, and recommended certain repairs and improvements to said drains to their junction with the Indian Creek drain, which he reported was designed as "a sufficient outlet'' for them, save as to the back flow of water from the river, which could not be remedied.

The evidence on both sides was chiefly directed to this latter branch of the case. The engineers of both parties agree that the flats at Mud and Indian creeks are flooded at every freshet; and that neither the present scheme, nor any scheme, except perhaps a very expensive one, could redeem these flats from such flooding so as to make them available for growing crops.

Other systems of drainage are put forward by the appellants; but in view of the greater difficulty and expense of their construction I do not feel warranted in allowing the appeal on that ground, especially when such expense would be largely in excess of the value of the land when relieved and benefited. All that can be expected from the proposed scheme of W. G. McGeorge, is that the upper lands will be relieved, but that the flats described by the witnesses must continue to bear the burden of over-flow or back-flow during freshets which nature has placed upon them.

Besides I think that the action of the appellant township in formulating and giving effect to the scheme proposed in 1895, and taxing the respondents for its construction under the representations contained in their engineer's report and affirmed by them that the scheme was intended to be a continuation of the Gregory drain, and would afford an improved outlet for the upper township drains flowing into it, brings them sufficiently within the equitable doctrine of estoppel so as to debar them from impeaching the proposed scheme of the respondents. Such action on the part of the appellants gave, I think, the respondents the right to have the benefit of the improved outlet for which they were assessed, and to have the upper drains put into a proper state of repair so as to insure to the respondents a proper user of the drainage facilities for which they had been assessed, and to which I declare them to be entitled.

The appeal must, therefore, be dismissed with costs.

IN THE HIGH COURT OF JUSTICE.

MURPHY *vs.* TOWNSHIP OF OXFORD.

Embanking Against Water—Overflow of Water from Highway—Compensation—Statutory Notice—Reference.

It is the right of the owner of a lot on a lower level to guard against the flow of water upon his lot by banking, or otherwise.

Where the plaintiff, the owner of a lot, with the assistance of his neighbors, constructed a ditch on his lot which brought the surface water to the roadway opposite a culvert on such roadway, through which, during freshets, water from lands on the other side of the roadway flooded the plaintiff's land; held that he had no cause of action for damages against the municipality.

Compensation for land taken and damages caused by and consequent upon the construction of a drainage work can only be dealt with under the arbitration proceedings prescribed by section 93.

A statement of claim in an action for damages cannot be treated as a notice claiming damages and compensation under sub-section 2 of that section.

January 22nd, 1898. THOMAS HODGINS, Q. C., Referee.

George E. Kidd for plaintiff, James A. Hutcheson for defendants.

The plaintiff's farm, lot 8 in the 4th concession of Oxford, lies within what may be termed a basin, or depression, in a portion of the territory within the 4th and 5th concessions, and his farm is the lowest in the basin.

The evidence shews that for a number of years prior to the Acts now complained of, the surface water from the higher lands have flowed onto the road in front of the plaintiff's farm and from thence over the plaintiff's and the adjoining farms. The council of the defendant municipality have at various times constructed culverts under the roadway, three of which are in front of the plaintiff's farm. The plaintiff complains that these culverts convey the surface water from the roadway onto his and the adjoining farms, and that the water so brought onto the adjoining farms flows from them onto his farm. In his evidence he says: "The great part of the water comes from the east and south and not from the road. A good deal comes from Malley's (adjoining) land. Their land is low, and it comes from them onto mine. Some water comes from my son's (adjoining) land. The eastern and western waters do not meet until they get to my outlet. The water comes from the culverts onto Malley's and then onto me." One of the culverts (No. 2) is opposite a ditch 3 feet wide by 18 inches deep, cut through the plaintiff's farm to Walsh's lot in the rear. This ditch was constructed some years ago under a local agreement between the plaintiff and his neighbors as the result of a "friendly meeting," called by the plaintiff about 1886, and was subsequently extended about 10 rods further to Walsh's lot, pursuant to a second "friendly meeting," also called by the plaintiff, but for which extension the township paid a certain amount. Some of the plaintiff's witnesses say that if the plaintiff had constructed an embankment at the places where the water from the road overflows onto his farm, he could have prevented the flooding from the roadway, but not the flooding from Malley's, or the other adjoining farms; and that if such an embankment had been constructed, the water would have run along the roadway to where the new drain has been made.

Angell on Watercourses says: "Town officers in repairing a highway may construct drains and culverts within the limits of a highway; and if the surface water, after flowing on them for some distance, turns upon the land of an adjoining proprietor, no action at law lies for the damage thereby occasioned. Towns are bound to make their highways safe and convenient for travellers; and they and their officers are protected in doing it, so long as they act within the scope of their authority and execute the work in a reasonably proper and skilful manner although their operations cause surface water to flow upon the adjacent proprietors to their injury." "When a highway exists as an ancient highway, the adjoining owners purchase their lands subject to the rights of the public. One of these rights is that of keeping the travelled road free from surface water, in such manner as the officers of the town think proper."

In this case from this it is clear that the public interest with respect to the highway is paramount to the private interest of the adjoining owners of land except in the case of negligent or unskilful construction of the highway, or of the necessary works thereon. There is no evidence of negligence or that the culverts have not been constructed in a reasonably proper and skilful manner for the necessary drainage of the public highway. In Smith vs. Kenrick, 7 C. B. 515, it was held that as between the upper and the lower owner of a coal mine, if the natural flow of the water from the upper to the lower did damage to the latter's mine, so long as such damage did not arise from the negligent or malicious conduct of such owner, the upper was not liable, for it was the right and duty of the owner working on the lower level to guard against the flow of the water upon him by banking or otherwise. And some observations of Lord Cairn's, in Ryland vs. Fletcher, 2 R., 3 H. L., 330, are to the same effect: "If by the operation of the laws of nature an accumulation of water had passed into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place.

If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or interposing some barrier between his close and the close of the defendant's, in order to have prevented that operation of the laws of nature."

The fact of the plaintiff, in conjunction with his neighbors, constructing a ditch through his farm as a continuation of culvert No. 2, has provided a means by which some of the water from the roadway flow onto his farm. And this fact and the general principles of law illustrated in the citations made above, satisfy me that as against the public right represented by the defendant, he has no cause of action for the damages complained of in his statement of claim, there being no proof of negligence against the defendants in their execution of the duty cast upon them by law. Nor can I give effect to his complaint that the construction of the new drainage work was not sanctioned by a sufficient number of petitioners; for I find that 22 out of 37 ratepayers within the drainage area petitioned for the work and in law the alleged irregularities of the council and engineer are not such as to affect the legality of the initiatory proceedings for the construction of the work.

The compensation claimed by the plaintiff for a portion of his land taken for a new drain, and the damages alleged to have been done to his farm in the construction of the drainage work, or consequent thereon, can only be dealt with by the arbitration proceedings prescribed by the 93rd section of the Drainage Act; and in view of the late decision of Raleigh vs. Williams, A. C. (1893) 540, and of the cases cited in the last edition of Harrison's Municipal Manual, (page 371) I am unable on a reference under section 94 to consider them in this action. And these cases shew that I cannot convert the statement of claim into the statutory notice presented by section 93.

The result is that the plaintiff's action must be dismissed with costs.

IN THE HIGH COURT OF JUSTICE.

M'KENZIE *vs.* WEST FLAMBORO.

Liability of Township to Provide Drainage for Exceptional Rainstorms —Vis Major—Discretionary Powers.

Where a municipality has constructed a drain sufficient according to the requirements of the locality for carrying off water flowing over lands from swamps and ordinary rainfalls, though apparently not sufficient for carrying off water caused by exceptionally heavy freshets from rainstorms: held a sufficient fulfilment of their statutory duty with regard to drainage.

Where an exceptionally heavy rainstorm caused waters from a drain to overflow and damage the plaintiff's crops: held that the damage was caused by vis major and that the municipality was not liable.

It is not usual for the court to review the discretionary powers of a municipal council, provided such discretionary powers are exercised within the limit of their statutory jurisdiction and without disregard of personal right.

The following Oral Judgment was delivered at the close of the trial at Hamilton:

February 7th, 1898. THOMAS HODGINS, Q. C., Referee.

G. L. Staunton, appeared for the plaintiff, and George H. Watson, Q. C., appeared for the defendant.

It appears to me that the plaintiff's claim for damages depends upon the fact whether the damage to his land and crops in 1897 was caused by the negligent construction or want of repair of the drain or the exceptional rainstorm which has been spoken of by the witnesses. Two things appear to be established from the evidence which may be preliminary to the finding as to the cause of damage to the plaintiff: First, on the evidence of the plaintiff's engineer, Tirrell, and other witnesses I find that the drain when constructed was made of sufficient capacity to drain the land. It is contended that the municipality should have constructed a drain sufficient for all possible or exceptional freshets and rainstorms. The law is not so unreasonable. The duty of the municipality is complied with when it provides a drain sufficient for the swamp lands and rain-falls and freshets and other drainage requirements of the locality. And having so provided in this locality I find that this municipality has sufficiently fulfilled its statutory duty.

No doubt the council had a discretion to make the drain sufficient for all possible extraordinary emergencies, but they were not bound to do so. These municipalities are clothed by the Municipal Act with legislative discretion in certain cases; and the Chancellor has lately held in Stephens vs. Moore 25 O. R. 600, that it is not for the courts to review that discretion where it has been exercised within the limits of their delegated powers; that in drainage matters the policy of the legislature is to leave the management largely in the hands of the local authorities, and the court should refrain from interference unless there has been a manifest and indisputable excess of jurisdiction, or an undoubted disregard of personal rights—and, perhaps evidence of such gross negligence as the law will take hold of and punish, or perhaps the ratepayers whom they represent.

The second fact which appears to be established is that the plaintiff McKenzie says he does not claim damages for any flooding in 1895 or 1896, but he does for 1897, which, he also says, was an exceptionally wet season, that there was a great deal of rain, and more water on the land by reason of the drains not taking away the water caused by that greater rain. Young Gordon in answer to questions which I put to him, said, that in the spring of 1897, the drain did carry off the water. The witness had prior to that stated to me that the spring of 1897 had been an unusually wet one, but that the drains carried off all the water and that none overflowed on to the land. It is also shewn that there was no overflow until the 26th of July, 1897. These facts satisfy me that the drain was not in such an inefficient state of repair as charged, and that it was not in such an inefficient state of repair as would, in an ordinary downpour of rain, cause the damage the plaintiff complains of. Then comes the question, as I intimated before: Was the damage to the plaintiff's crops in 1897 caused by the bad construction of the drain, the want of repair of the drain, or the negligent repair of the drain, or was it from such a rainstorm as may be designated *vis major?* Several witnesses have been examined and it is impossible for me, sitting as a jury, to ignore the facts they have sworn to. Their evidence was as follows: Tuffgard: "I know of no other cause of the loss of crops than this rainstorm." Cummings: "I say that the damage to the plaintiff's place was from the rainstorm." Shipman Cummings: "The rain was the cause of the damage to plaintiff's crops." Foster thought the fire on portions of the land and the heavy rain were the causes of the detruction of the crops on the plaintiff's farm. Chappell: "The loss of the tenant's crops was caused by the rain, heavy rain." Bingly: "The rainfall was the cause of the plaintiff's loss of crops that year. The drain did not contribute to the loss." Griffin: "Not possible to have saved crops during that storm." Markle: "The effect of the rain and saturation and sun coming on would scald the crops on this land." Taylor: "The quantity of rain was the cause of the loss of the crops of the plaintiff." This evidence I think leaves me no discretion as to my finding. All of these witnesses concur that the loss the plaintiff suffered was caused by this extraordinary rain-storm. Their evidence seems to bring the plaintiff's claim for damages within the case of Noble vs. City of Toronto, 46 Q. B. 519, where during severe rain-storms in Toronto certain sewers were flooded causing damage to houses on Queen street. There was a difference of opinion between the Judges. Chief Justice Hagarty, and Cameron, J., held that the mere proof of the flooding did not establish a *prima facie* case of negligence against the corporation. The court intimated that a specific fact of negligence must be proved, and of that there was not sufficient evidence. But although a new trial was ordered, yet the court was satisfied on the evidence so far as given, that it was *vis major*, and not negligence on behalf of the city, that had caused the damage. Similar to that is the case of McArthur vs. Town of Collingwood, 9 O. R. 368. There the court intimated that the findings of the jury—which was a case somewhat like this—should have been whether the damage was caused by negligent construction or by *vis major*, or, in other words, by an unusual flooding. The finding I must make on the evidence is that this damage complained of was caused by the exceptional rainstorm of July, 1897, and that the defendant corporation of the Township of West Flamboro is not therefore liable. As a result of these findings I must dismiss the action with costs.

IN THE HIGH COURT OF JUSTICE.

YOUNG *vs.* TUCKER.

Damages from Overflow—Private Drainage—Swamps—Natural Reservoir.

Where the defendant being the owner of an upper lot constructed a drain on his farm which carried the surface water to a swamp extending over portions of his own and his neighbor's lots, from whence another artificial drain on such neighbor's lots carried the water into another swamp which extended into the next lower lot, and from whence by another drain into a third swamp, and from whence it flowed into a drain connecting with a municipal drain the water from which overflowed and damaged the plaintiff's crops, it was held that there was no continuous artificial drain between the defendant's lands and those of the plaintiff and that the defendant was not liable for any damage done by the water so flowing on the plaintiff's lands.

The following Oral Judgment was delivered by the referee at the close of the plaintiff's case at Courtright:

April 27th, 1898. THOMAS HODGINS, Q. C., Referee.

F. W. Kittermaster appeared for the plaintiff, and A. Wear appeared for the defendant.

During the progress of the evidence I have been considering the question of law affecting the claim of the plaintiff and have satisfied myself that the plaintiff has not a right of action against the defendant. The evidence shews that the farm drains complained of are artificial only for a portion of their length. From the northern portion of the defendant's farm to a swamp which extends over portions of his own and his neighbor Campbell's land there is an artificial drain. The water is stated to be sluggish in its flow through that portion of the defendant's drain and is carried from the upper portion of his land into this swamp, which I find to be a natural reservoir. From this swamp, which extends into his neighbor's land for some distance, there is another artificial channel cut through two ridges. The evidence shews that the flow of water on Campbell's land is swift and is shewn on Exhibit No. 1 as "a swift current." The channel on Campbell's land is continued to another swamp, which, according to the evidence of John W. Young, is deeper than the upper one. The water from this swamp on Campbell's land is carried to another swamp which extends down into Mason's land and is also a natural reservoir. Mason, in order to drain this swamp or natural reservoir, has also constructed a drain which carries the waters down to what is called "the open drain." The evidence thus shews that there is no continuous artificial channel from the defendant's land to the plaintiff's land, which collects and carries the water direct to the plaintiff's land. In Angell on Watercourses, at page 120, 7th edition, speaking of the flow of surface water and the lawful right of an owner to enjoy his real property as he sees fit, the author says: "The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does not act inconsistent with the due exercise of dominion over his own soil. A party may improve any portion of his land, although he may thereby cause the surface water flowing theron, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damage to adjacent land, it is *damnum absque injuria*." Then on page 25 it says: "The owner of lower ground may, and good husbandry sometimes requires that he should, cover up and conceal the drains through his own land," or "may open drains on his own land, keeping the place of discharge unchanged. And as he may use running streams to irrigate his land, even though he does thereby, not unreasonably, diminish the supply of his neighbor, so also he may use proper means of draining his ground where it is too moist, and discharge the water according to the natural channel even though the flow of water upon his neighbor be thereby somewhat increased." Now I find upon the evidence that the swamp at the junction of Tucker's and Campbell's lands is a natural reservoir for the water which falls on Tucker's land and that the swamp at the junction of Campbell's and Mason's lands is also a natural reservoir for the water which comes from the upper swamp and Campbell's surface water and that Tucker, the defendant, had the right in good husbandry to cause the surface water from the upper portion of his land to flow into that natural reservoir or swamp, and having that legal right that he cannot be made liable in this action for damages to the plaintiff's land. I must therefore dismiss the plaintiff's action with costs.

TOWNSHIP OF EUPHEMIA *vs.* TOWNSHIP OF BROOKE.

Engineer's Report—Allowance for Award Drain Incorporated in Proposed Scheme—Highway—Drainage—Paramount Rights.

Where in a proposed drainage work a ditch or drain constructed under the Ditches and Watercourses Act was incorporated but the engineer made no estimate of its value for the drainage work, or allowance to the parties constructing it, as required by sub-section 4 of section 9 of the Drainage Act, an appeal from the engineer's report was allowed.

Of the two municipal interests confided by the legislature to municipal councils, highways and drainage, their duties with regard to highways being for the benefit of the public at large must always be paramount to their duties with regard to drainage schemes, which can only be exercised at the instance of, and for the benefit of, private persons or for the benefit of localities; and therefore where a proposed scheme did not provide for the protection of a highway which had been endangered by frequent washings-away by an existing dicth at a certain portion of such highway, the engineer's report was set aside.

June 10th, 1898. THOMAS HODGINS, Q. C., Referee.

W. J. Hanna, appeared for the appellant, and John Cowan, for the respondent.

The following is an Oral Judgment delivered at the close of the case at Sarnia:

The conclusion which I have arrived at I now state shortly: In view of the contention that recent legislation has affected the decision in the case of Nissouri vs. North Dorchester, 14 O. R., 294, I will not consider it in disposing of this case, though it seems appropriate, because it appears to me that there are two other grounds on which the report of the engineer cannot be sustained: The first is that his evidence shews he has disregarded the directions contained in subsection 4 of section 9 of the Drainage Act, which says: "The engineer or surveyor shall likewise in his report estimate and allow in money to any person, company or corporation the value for the drainage work of any private ditch or drain, or any ditch constructed under any Act respecting Ditches or Watercourses which may be incorporated in whole or in part into such drainage work or used therewith."

The proposed drainage scheme incorporates into it a ditch or drain constructed in 1884 by a number of parties as an "Award drain" under the Ditches and Watercourses Act.

It appears to me that the clause just quoted recognizes a proprietory right in the original parties who had constructed and paid for this ditch under the Ditches and Watercourses Act, and which the engineer makes part af the proposed drainage work. That proprietory right being thus recognized, it is not for the engineer, nor for me sitting in appeal from him, to disregard it. The value of that property must be ascertained, that is its present value for the purposes of the proposed drainage work. The Act does not say the original cost, but uses the word "value" which must be estimated by the engineer in view of its present condition and value in the proposed drainage work. The money value of that proprietory right is an asset to the parties who have spent their money on it; but how such money value is to be allowed, or paid, or adjusted, is not for me at present to determine. All I find is that the clause has not been observed and that no estimate and no allowance in money of the value to the drainage work of this ditch constructed under the Ditches and Watercourses Act has been made by the engineer. That value must be found by the engineer; for there is no evidence before me of its value or what should be allowed to the different parties who constructed or paid for it. All I can say is that its value has to be taken into account as part of the cost of the proposed scheme; and its "money value" is to be apportioned amongst and paid to the different parties who may be found entitled, according to their respective rights.

The other ground is one which is so clear that I think the mention of it will shew the necesssity of considering it in a scheme of this kind, and that is the condition of the highway at Adams'. Now of the two municipal interests which are confided by the legislature to municipalities, highways and drainage, the care of the highways must be their paramount duty; drains and drainage systems must be considered as the subordinate duty. Highways are for the benefit of the public at large. Drainage schemes can only be undertaken at the instance of and for the benefit of private persons, or sometimes for the benefit of localities. The public interest in regard to highways therefore must always be paramount to the private interest of the persons benefited, or to be benefited, by drainage systems and drainage schemes. This paramount duty of municipalities is thus affirmed in Angell on Watercourses, page 135: "Towns and Townships are bound to make their highways safe and convenient for travellers and they and their officers are protected in doing it, so long as they act within the scope of their authority and execute the work in a reasonably proper and skilful manner." The evidence in this case satisfies me, and I so find, that the highway at Adams' is in a dangerous condition. The witness for the respondents, Mr. Smale, says that two teams could not pass there unless driving in a careful manner, not driving at a trot; that the travelled portion is about 15 feet wide there, and he estimates it would require a space of eight feet for each team to drive on the ordinary track of a highway. Now 15 feet wide at the travelled portion of the road is not sufficient for the purpose of a public highway. The evidence of Bryan shews that an ordinary road is 66 feet wide, that the scraper ditch and the space between it and the farm fences takes off say 10 feet on each side, which gives for the travelled portion of an ordinary road 46 feet. Providing only 15 feet in place of 46 feet, to which the travelling public are entitled, I find that the highway at Adams' is in a dangerous condition. The municipality is not to wait for an accident, but it is their duty to have their highway put in such a state of repair, and this washout at Adams' remedied, so that the possibility of any such accident or danger to the travelling public shall be avoided.

The evidence is clear that there has been continuously a washing away there. All the witnesses speak more or less of that. The present width of the ditch at Adams', as the Reeve of Euphemia says, is now 24 feet, though originally it was 9 feet. Clements puts it about 20 feet. Adams puts it at 24 feet. Bryan puts it at 20 feet. So it is beyond question that there has been a washing away from the time the drain was originally constructed and that there is a probability that the washing will go on with the flow of water down the hill or slope at Adams'. The engineer says that he did not measure the width of the road where the washing-away appeared, and he seems not to have taken into account the duty which is, as I have said, a paramount one on the municipality, to provide against the washing away of the road so as not to endanger public travel. I think on these two grounds the report cannot be sustained, and I therefore find in favor of the appellants and with costs.

In disposing of this case I wish to guard against saying anything as to whether the scheme proposed by some of the parties of going down the Mayne drain or down this Concession road, is a proper one. I leave that to be considered by the engineer and councillors.

IMPORTANT DECISIONS

RESPECTING NATURAL WATERCOURSES AND SURFACE WATER.

CHANCERY DIVISION.

BEER *vs.* STROUD.

Water and Watercourses—Definition of Watercourse—Surface Water.

A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly-defined channel of a permanent character.

This was an appeal from the judgment of Ferguson, J., in an action brought by Josiah Beer against Alfred Stroud for an injunction to restrain defendant from banking up earth on his land, so as to prevent water running away from the plaintiff's land in the manner it had always done before.

The action was tried at Hamilton, on October 25th, 1887, before Ferguson, J.

Mackelcan, Q. C., and Gausby, for the plaintiff. Bell for the defendant.

The learned Judge delivered the following judgment.

October 27th, 1887. Ferguson, J.:

According to my understanding of what a watercourse is, I think it is proved here that there is a natural watercourse in regard to which there exist riparian rights.

There is a pretty large area of land a little above the head of what has been called the ravine that is nearly level. There was a point further on, in which in a state of nature there was a pond of water of some depth, excepting in very dry seasons; when the water raised in that pond it overflowed its margin on the side next to this ravine or creek, and formed a run of water down to what may be called the stream proper.

[The learned Judge after a *resume* of part of the evidence then proceeded as follows]: I find then as a matter of fact that several rods from the lane running between the plaintiff's land and that of the defendant, and on the plaintiff's land, there were by nature defined banks in the formation of the stream, a stream that had its source, that is the source of its waters from the drainage of this level area of land, and the overflow of this pond, to which I have referred; and upon the plaintiff's land waters were collected and were within defined banks, several rods from its eastern boundary. Then from that place across the lane, and through the defendant's land down to the Macklem survey, and finally into the waters of Lake Ontario where these waters went, I think there was a natural stream. The fact that in their course the waters passed through a sort of marsh below the lands of the parties makes no difference. There is a stream or current all the way, though not running the whole of the year, yet not limited to times of rain or melting snow, as sought to be made out. The banks were originally well defined.

It was urged that there was no spring or underground source of these waters—that it was merely surface water. I think that makes no difference whatever. The beginning of a defined stream may be surface water only, there need not be a spring shown to be from the depth or bowels of the earth to be the source whence the stream starts. In a basin the surface water may collect, and a stream may form running therefrom between defined banks.

This is a stream of that kind, being fed also by the overflow of a pond, until a ditch was cut in another direction draining the pond; and my opinion is, that it was a natural watercourse, in regard to which there were riparian rights.

The plaintiff then had a right to have the water pass in that natural watercourse between these banks that are yet apparent upon the land several feet high, approaching one another, no regard being had to the mould that has been thrown up on each side of the artificial ditch. They approach one another gradually, but tolerably rapidly. They come together at the bottom, and the evidence shews there was a water-way cut a foot and a half wide, or thereabouts, and some six inches deep where these banks met. There the plaintiff had a right to have the waters pass.

Now the defendant threw earth upon his land, and so raised it, that there is no doubt the waters at that place could not pass away from the plaintiff's land as they did when the place was in its natural condition.

The defendant has obstructed the flow in a natural watercourse, in my opinion. That obstruction the defendant must remove.

The relative height or the level of the bottom of the watercourse as defined by Mr. Kline, (whose evidence I thought most reliable) as compared with the height of the obstruction made by the defendant, is not proved. That the ground at that place: that the bottom is not now as it was in a state of nature, I have no doubt. It has been deepened by some means, by digging, I think, and I do not know what its original level was, but whatever that was, it was surely lower than the embankment or filling in that has been made by the defendant upon his land. He has obstructed the natural flow.

Then, if there were no more, I think the defendant should be ordered to remove the obstruction that he has placed there to the depth of this course mentioned by Mr. Kline, that is, to the level of that where it came to the defendant's land.

There may have been some considerable inclination in that course between one side of the lane and the other. The land falls away upon the defendant's property pretty rapidly; but if the plaintiff's right depends entirely upon the natural watercourse, the defendant will have to remove the obstruction to the depth of the bottom of the natural course, so that there will be no obstruction above the level of such bottom to the injury of the plaintiff.

It will not do for the defendant to dig a narrow trench upon his land through the embankment he has made to that depth, because that would probably not carry off the water to the same surface level at the time of high water that would have been done if he had not put the obstruction there.

The plaintiff is entitled to the full width of the stream, so that the surface of the water, in time of high water, will not be higher than it would have been if he (the defendant) had not put the embankment there; and the bottom of the stream were at its natural height or level. The plaintiff is entitled to have the waterflow from the southerly side or boundary of his land at no greater height than it would have done if the defendant had not put the embankment there, and the bottom of the stream were of the same height as the bottom mentioned by the witness Kline.

The plaintiff also contends that he has by prescription the right to the use of the stream as it is now, or rather as it was immediately before the obstruction complained of.

The natural depth I find not to be as low as the bottom of the ditch across the lane is now, but I cannot say how much the difference is. I am not given evidence on that subject.

I do not see that the plaintiff has established a prescriptive right to the use of the stream at the depth at which it is. There is evidence of cleaning out, which cleaning out I think was rather abundant, and being satisfied that the stream is now lower than it was in a state of nature, and not being given any evidence of any time when it was dug out to make it lower, I think it has been made lower by this so called "cleaning out."

The kind of material that appears on either side of the stream, where the bridge is now, manifestly taken out of the bottom, and the shape and formation of the banks as they approach down towards the stream indicate to me that the natural bottom was not as low as the bottom of the ditch is now. My view of the matter is, that there has been a deepening some time or other of the stream across the lane; that the natural bottom was not as low as the present one.

There is evidence of user by the plaintiff, and those who preceded him in title of that place as a ditch or stream for a period much over the twenty years, and I find that there has been such user; but the evidence does not reach the point of showing that the user was during all this period to the present depth.

The plaintiff has not shown that at any time the bottom of the natural stream was lowered by him or his predecessors in title and used thereafter for the purpose of his land for the necessary period. His contention is that it is no lower than it was by nature, so I cannot find that he has proved a user for more than twenty years of a stream there lower (having a bottom lower) than the bottom was by nature, and that bottom was not so low as the bottom is now. That is one of the difficulties that I see between the parties.

The difficulty in any judgment that I can deliver upon the evidence defining the exact right if it be a right, differing from that in respect to the natural stream, is the difficulty of showing just what the defendant must do to remove the obstruction, because the plaintiff cannot have the land of the defendant excavated one inch lower than his legal right demands. The difficulty is in defining what the defendant is to do.

The plaintiff has only shown this, that he is entitled to have the obstruction placed there by the defendant removed to a height or depth that will meet the level of the bottom of the natural stream, and to have the defendant remove his embankments to such a width that the surface of the water in time of high water will not be higher than if he had not put the embankments there, and the bottom were no lower than it was by nature—that is to give the stream a bottom and width to carry off the water as it would have flown, the place being in its natural condition. Now I cannot say on the evidence that the defendant is to do more than this.

The plaintiff's case in respect to the natural channel or watercourse is, I think, a stronger one than the one mentioned in the 7th ed. of Angell on the Law of Watercourses see p. 131, and referred to by plaintiff's counsel. There the surface of the plaintiff's land was somewhat elevated, and inclined gradually towards the defendant's land. The surface of the plaintiff's land was such as to collect, in wet times, and always after heavy rains, a large body of water on her land. This water collected into a narrow but well defined channel on the same land, and passed off through a like channel over the land of the defendant, and finally emptied itself into a creek. The channel was originally made, and was continued by the natural flow and force of the water and the same channel had always discharged the water as far back as the memory of the witnesses went. The defendants obstructed this channel, and caused the water to flow back on the plaintiff to her injury. The Chancellor said, "This water has run in the same course for more than twenty years, and the plaintiff, and those under whom she holds, having enjoyed it as a right during that period in its present channel, no one has a rignt to dam the channel or to divert the course of water to the injury of the plaintiff's land. It makes no difference whether it is a natural watercourse or an artificial ditch."

In the present case the plaintiff and his predecessors in title, unless there was the acquiescence in the interruption hereafter to be referred to, no doubt enjoyed as of right the flow of this water away from the plaintiff's land upon a level as low as the bottom of the natural channel for a period of more, much more than twenty years next before the commencement of this action, and this much to the advantage of the land. The plaintiff's case in regard to the stream seems to be sustained in two ways, by his right as riparian proprietor, and by prescription, but only to the extent that I have said.

I may here say, perhaps it is my duty to say, that there were many of the witnesses for the defendant to whose testimony I do not attach any weight. Some of them (after my having seen the place at the request of both parties) I cannot believe. Others appeared reckless in the witness box, and some did not seem to understand the subject, manifestly thinking that they were right, and justified in saying that there was not a watercourse there, because when they saw the place they did not perceive that there was a furrow dug out by the action of the water, although there were defined banks closely approaching one another between which the water ran, or had run. The authorities referred to by the counsel for the defendant, refer for the most part, if not solely to cases of surface water as such, and do not, I think, apply to or govern the present case.

What I have hitherto said has been without any reference to the statement in the defence that the interruption of the enjoyment by the plaintiff of the right in question has been acquiesced in for the period of more than a year before this action. No doubt more than a year elapsed after the interruption by the construction of the embankment or "filling in," as it was called, and before this suit.

In the case of Glover vs. Coleman, L. R. 10 C. P. 108, the question of acquiescence or not in the interruption, was much discussed. In that case the year had elapsed as in the present case, the fact was held not to be fatal to the plaintiff, and it was considered that it was a question proper to be left to the jury whether or not there had been a submission to or acquiescence in the interruption.

In the present case the plaintiff says that until he was injured, and sustained the damages of which he complains in the month of February last, he was not aware of what the defendant had done. He shews that although the place was near his property, he did not approach the property by that way, and that his intention was not called to the fact of what the defendant was doing. I need not say more respecting the evidence on this subject. I think it a proper finding to say that there was not notice of the interruption to the plaintiff until the time the injury was sustained, which was much less than one year before this action; and the statue says that no act or other matter shall be deemed an interruption within the meaning, etc., unless the same has been submitted to or acquiesced in for on year after the party interrupted has had notice thereof, and of the person making, or authorizing the same to be made.

I am of the opinion that the proper finding or conclusion in the case is, that the interruption had not been submitted to or acquiesced in by the plaintiff for one year after notice, etc., and that the plaintiff should succeed upon the issue.

I am of the opinion that the plaintiff is entitled to judgment in his favor, and to recover from the defendant the sum of $150 as damages, the amount of which is really not disputed, if it be assumed that the plaintiff is entitled to recover at all.

I am also of the opinion that the plaintiff is entitled to an order against the defendant for the removal of the obstruction, the embankment, or "or filling in," to the depth of the level of the bottom of the watercourse as it was naturally, and this in such a manner, that the water may flow away from the plaintiff's land as freely as it did when the place was in a state of nature. The evidence does not, so far as I can see, afford me, by comparison with existing objects or otherwise, the means of stating more precisely, or with more practical effect, what this order should be.

I also think the plaintiff entitled to an injunction restraining the defendant from obstructing the flow of the water as lastly above mentioned.

The plaintiff thus succeeds as to one branch of the case and the recovering damages. To this extent there is judgment in his favor, with costs. As to the other branch of the case* (that respecting the right of way) the action is dismissed, with costs.

From this judgment the defendant appealed to the Divisional Court, and the appeal was argued on February 27th, 1888, before Boyd, C., and Robertson, J.

Osler, Q. C., and Bell for the appeal. The evidence shews that the alleged watercourse was a mere valley or ravine for surface water. Any semblance of a stream has been destroyed by the defendant digging for brick clay, and the water is thus distributed. The evidence does not shew that this digging caused the penning back of the water. Angell on Watercourses, 6th ed. sec. 108*a*. There has been acquiescence for over a year R. S. O. (1877) ch. 108 section 37. We refer to Darby vs. The Corporation of Crowland, 38 U. C. R. 338; McGillivray vs. Millen, 27 U. C. R. 62; Crewson vs. The Grand Trunk R. W. Co., I*b*. 68; Murray vs. Dawson, 19 C. P. 314.

Mackelcan, Q. C., contra. The trial Judge saw the *locus in quo*. The plaintiff has the rights of a riparian proprietor, and also by prescription: Glover vs. Coleman, L. R. 10 C, P. 108; Earl vs. DeHart, 12 N. J. Eq., 1 Beasley Ch. (N. J.) 280; Briscoe vs. Drought 11 Ir. C. L. R. (1860) 250; Claxton vs. Claxton, Ir. R. 7 C. L. (1873) p. 23; Angell 108 *b*; Magor vs. Chadwick, 11 A & E. at p. 586; Beeston vs. Weate, 5 E. & B. at pp, 996-7; Bennison vs. Cartwright, 5 B. & S. at p. 17. No change of character affects the legal right to a watercourse.

Osler, Q. C., in reply. The plaintiff's claim is either as an easement or riparian proprietor, Angell § 42. It is claimed here as a natural watercourse. It is not an easement. See also Angell § 108, *i* and *o*.

June 11th, 1888. Boyd, C.:—

The whole of the evidence establishes that the natural drainage

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*A claim made to a right of way disposed of on the evidence, and omitted from the judgment.—Rep.

of the plaintiff's land has been always through the swale or ravine leading down to the defendant's land, and thence by a living stream into Lake Ontario. Some of the evidence shews that the course of the water has worn a way for itself with well-defined banks as it neared the defendant's boundary. The defendant's son spoke of it as a "gully," and I cannot doubt that the flow of the rain and surface water for the twenty-five or thirty years spoken of, has left distinctive and continuous traces of its course, which form a visible landmark from the plaintiff's into the defendant's property.

Any doubt raised by the evidence on this point would be dispelled by the finding of the trial Judge who, at the instance of the defendant, visited the premises, and so checked the opinions of witnesses by his own observation.

Rain and surface water has drained from the high lands of the plaintiff through this natural outlet during the thirteen years of his occupancy till it was interrupted by the defendant who, for his own purposes, blocked up the channel, if not entirely at least to such an extent as to cast back water to the plaintiff's loss. The very fact of the defendant having left some opening for the water as he made his alterations, is very suggestive of the actual existence of a water-course.

It was open, on the evidence, for the Judge to affirm the existence of a water-course entitled to the protection of the law. To this end it is not essential that the supply of water should be continuous, and from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly-defined channel of a permanent character. Thus a recognized "course" is obtained, which is originated and ascertained and perpetuated by the action of the water itself. For all practical definition, if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel, that constitutes a water-course.

In Briscoe vs. Drought, 11 Ir. C. L. at p. 264, Hughes B., is thus reported: "If it is proven that rain-water forms itself, from the nature of the locality upon which it decends, into a visible stream, and as far back as memory can extend has pursued a fixed and definite channel for its discharge, the 'volume' of the stream may be 'occasional' and 'temporary;' but its 'course' is neither 'occasional' nor 'temporary.' I am, therefore, of opinion that, in this case there was a water-course," etc.

By the civil law it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving without claim to compensation, the water naturally flowing down to it: Per Cresswell, J., in Smith vs. Kendricke, 7 C. B. at p. 566. Such is, I think, also the common law when the rain or surface-water has from the trend of the land formed itself into a defined channel, and so discharges itself through the servient tenement. The occupant below has no right in such a case to interfere with the natural outlet from the land above by the erection of obstructions or the filling in of the channel.

This question as to the rights in surface-water after getting into defined channels has been but little considered in England. The two cases usually cited to show that surface water may be interfered with, Broadbent vs. Ramsbotham, 11 Exch. 602, and the other case in the same volume at p. 369, Rawston vs. Taylor, both relate to surface water not flowing in any defined watercourse, as pointed out by Lord Chelmsford in Chasemore vs. Richards, 7. H. L. C. at p. 375.

Ennor vs. Barwell, 2 Giff. 410, is a useful case, decided contemporaneously with Briscoe vs. Drought, supra, and favoring the view I have now taken.

The greater bulk of later American authority is also in this direction, and of these cases I may particularly refer to Kelly vs. Dunning, 39 N. J. Eq. 482, 1885) and a well considered judgment in Boyd vs. Conklin, 54 Mich. 583 (1884) in appeal from 46 Mich 56.

As to the other points argued there is nothing to shew that the Judge's conclusion is not well founded. A good deal seems to have turned upon the credibility of witnesses, and it would appear to me to be most unsafe to interfere upon evidence so conflicting when at the request of both parties the Judge satisfied himself as to where the truth lay by ocular inspection of the *situs*.

The judgment should be affirmed with costs. The result of it is, as I understand, that the defendant may use his land as he likes so long as he does not obstruct the flow of water on the plaintiff's land. It was said that the effect of the decision was, to require the defendant to keep the sides of the ravine open. I do not so read the reasons for the judgment, nor do I think the law requires any such restriction on the defendant's user of the land.

Robertson, J.:—I concur in the views and conclusions come to by the Chancellor.

QUEEN'S BENCH DIVISION.

WILLIAMS *vs.* RICHARDS ET AL.

Water and Watercourses—Defined Channel—Surface Water—Right to Drain into Neighbouring Lands.

That cannot be called a defined channel or watercourse which has no visible banks or margins within which the water can be confined; and an occupant or owner of land has no right to drain into his neighbour's land the surface water from his own land not flowing in a defined channel.

The rule of the civil law that the lower of two adjoining estates owes a servitude to the upper to receive all the natural drainage has not been adopted in this Province.

McGillivray vs. Millin, 27 U. C. R. 62; Crewson vs. Grand Trunk R. W. Co., ib. 68; Darby vs. Crowland, 38 U. C. R. 338; and Beer vs. Stroud, 19 O. R. 10, considered.

The plaintiff by his statement of claim alleged (2) that he was and had been for two years the lessee and the tenant in occupancy of the southerly 147 acres of lot 12 in the 4th concession of the Township of Raleigh, under a lease unexpired; (3) that the defendants were and had been for two years occupants and in possession of the adjoining land to the west, being lot 11 in the same concession; (4) that a drain and natural watercourse ran across the lands of the plaintiff and defendants from east to west, carrying the surplus water from the lands of the plaintiff and those to the east, across the defendants' land, to the outlet and drains to the west; (5) that this drain and water course was the natural course for the water from the plaintiff's land, and for water coming from the east and south upon the plaintiff's land to flow and find an outlet across the land of the defendants; (6) that the defendants during the years 1890, 1891 and 1892, had continually and on various occasions constructed a dam upon their own land, and at the line between their land and the plaintiff's, across the drain and watercourse, immediately to the west of the plaintiff's land, thereby preventing the water flowing in and along the drain and watercourse to its proper outlet, and dammed the water back on the plaintiff's land, and thereby the plaintiff's land and crops became overflowed, he lost the use of his land, his crops were injured, he was prevented from cultivating his land, and lost the crops he had put into it; (7) that the defendants threatened to continue to dam and close up the drain and watercouse and to maintain their dam by force and prevent the water flowing naturally down the watercourse from the plaintiff's land across the defendants' land, as it naturally should flow and did flow until stopped by the defendants' dam. The plaintiff claimed an injunction to prohibit the defendants from so closing up and damming or obstructing the drain, and $1,500 damages, and costs.

The defendants by their statement of defence denied that the plaintiff was the lessee of the land as alleged, or that he had been for the past two years the tenant in occupation thereof, or that he had any *bona fide* interest therein. They also denied the allegations in the 4th and 5th paragraphs of the statement of claim, and said that the so-called drain and natural watercourse was not a natural watercourse, and averred that, some time subsequent to 1867, and prior to the plaintiff's occupancy, the person or persons then in occupation of the lands excavated and constructed the drain and extended it westward across the land claimed by the plaintiff to a point adjacent to the east of the line dividing that land from their lands. They further alleged that the excavation of the drain in the manner stated had the effect of diverting the flow of waters coming from the south and east of the land claimed by the plaintiff, in a course different from that in which they would naturally have flowed if such drain had not been constructed, and in a course different from that which would lead to their proper outlet if such drain had not been constructed. Further, that in 1890 and at divers times since, the plaintiff, unlawfully, maliciously, and without any warrant or authority from the defendants, caused such drain to be excavated and extended into and upon the defendants' land, and, for the purpose of effecting his object, broke down the line fence and entered and trespassed upon the defendants' land, and thereby caused the waters from the drain to flow into and upon the defendants' land, in consequence whereof such land became flooded and damaged, and the crops growing thereon were injured and destroyed. Further, that, in consequence of such acts, and in order to prevent further damage to their land and crops, the defendants in the autumn of 1890, acting in pursuance of their legal rights, constructed a dam on their own land near its easterly limit, and extending from the north to the south across their land, thereby preventing the further inflow upon their land of the waters from the drain, which was the damage complained of by the plaintiff.

Issue.

The action was tried before Robertson, J., at the Chatham Spring Sittings, 1893, for the trial of actions in the Chancery Division.

The following facts appeared.

The plaintiff was the lessee of lot 12, and the defendants were the owners of lot 11, in the 4th concession of the Township of

Raleigh, in which the concessions run and the lots are numbered from west to east.

In the original survey of the township, no lots were laid out in the 3rd concession between the side-road between lots 6 and 7 and the side-road between lots 12 and 13; and no lots were laid out in the 4th concession between the side-road between lots 6 and 7 and the side line between lots 17 and 18; and no lots were laid out in the 5th and 6th concessions between the side line between lots 8 and 9 and the side lines between lots 19 and 20; and on the plan of such survey a creek was shewn on the western boundary of the 3rd concession, and from this creek across the land not laid out into lots was this writing: "This large creek, as well as the hills and drains whose water it carries off, loses itself in this large open marsh, is the outlet of all the waters of Raleigh, excepting a few small springs along the banks of Lake Erie." It did not appear when this marsh was laid out into lots, but the plaintiff's and defendants' lots were in this marsh, and it was shewn that they were not capable of cultivation in a state of nature, but had only become so by artificial drainage. It was shewn that the waters of two creeks, Bulles and Indian, flowed into this marsh from the eastward, and before they reached the marsh flowed in well defined banks, but these defined banks ceased when they reached the marsh; that the natural trend of the waters of the marsh was in a westerly direction, with a fall of about thirty inches in a mile; and that there were depressions in the land running from east to west, through which the waters which were wont to cover the whole marsh, as they subsided were finally drained off towards the west; and there were depressions on the plaintiff's lot through which the waters were drained from the east to the west, carrying the waters from the plaintiff's to the defendants' lot; that, following the course of the most northerly depression, the defendants had cut a drain for the purpose of draining their lot, and the defendants had made an embankment on the easterly limit of their lot, which prevented the waters running across the plaintiff's lot in this depression going into this drain. A surveyor stated that he took the levels on the plaintiff's lot from the north-east angle of it to the south-west angle of it; that there was very little depression, very gradual, about the centre of the lot, a little more south if anything; that the depression was, taking the levels between those points, not more than a couple of inches, and it was the water running through this depression that the embankment made by the defendants obstructed. By the public system of drainage which had been adopted in that locality, all the water which flowed on to the plaintiff's land from the east and south had been cut off, and no water flowed on to it from the north or west, so that the only water that came upon the plaintiff's land was what fell from the clouds.

The learned Judge held that the depression referred to was not a watercourse ; that it did not flow in any defined channel ; and that the embankment made by the defendants was lawful ; and he dismissed the action with costs.

At the Easter Sittings of the Divisional Court, 1893, the plaintiff moved to set aside this judgment and to enter judgment for him, on the ground that the judgment was against law and evidence and the weight of evidence ; and that the plaintiff had proved that a natural watercourse existed across his property, and crossed into and over the defendants' property, which the defendants admitted they obstructed ; and that the plaintiff was entitled to the use of the said watercourse and damages for such obstruction ; and the finding of the Judge that the plaintiff had not proved that the said watercourse had any apparent banks was no reason for dismissing the action ; and that whether the plaintiff did not or could not prove the existence of banks to the said watercourse was immaterial, so long as the water was proved to flow across said land in a defined channel or depression in the land.

The motion was argued before Armour, C. J., and Street, J., on the 18th May, 1893.

Douglas, Q. C., for the plaintiff. I contend that it is not necessary to shew banks. So long as there is a defined and certain channel, though the water is surface water, an action will lie for stopping the flow of it and damming it back. I rely on Beer vs. Stroud, 19 O. R. 10. McGillivray vs. Millin, 27 U. C. R. 62, and Crewson vs. Grand Trunk R. W. Co., *ib.* 68, were relied on by the trial Judge ; but Murray vs. Dawson, 19 C. P. 314, was subsequent to these cases. I refer to the judgment in that case at p. 319 ; Boyd vs. Conklin, 54 Mich 583.

M. Wilson, Q. C., for the defendants, contra, relied on Darby vs. Crowland, 38 U. C. R. 338 ; Gould on Waters, sections 275,41, 263, 264 ; Coulson and Forbes on Waters (ed. of 1889), pp. 53, 105 ; and also contended that the plaintiff's remedy was under the Ditches and Watercourses Act.

Douglas, in reply. The plaintiff is not an owner and cannot apply under the Ditches and Watercourses Act. On the main question I refer, in addition, to Kelly vs. Dunning, 39 N. J. Eq. 482 ;

Palmer vs. Persse, 11 Ir. R. Eq. 616; Claxton vs. Claxton, 7 L. R. C. L. 23.

June 10, 1893. The judgment of the court was delivered by

Armour, C. J.:—

I am of the opinion that the judgment was right and must be affirmed.

Neither the lands of the plaintiff nor those of the defendants were capable of being cultivated in their natural state, owing to their being situated in a large marsh, and it was only owing to the system of artificial drainage which had been adopted in the locality in which they were, that they had become capable of being cultivated.

By this system the water was prevented from coming upon the plaintiff's land from the adjoining lands on the east and south by means of drains and embankments formed for that purpose, and no water flowed upon the plaintiff's land from the adjoining lands upon the north and west; so that what we have to deal with is simply the case of surface water upon the plaintiff's land caused only by what falls from the clouds, and not flowing in any defined channel, for that cannot be called a defined channel which has no visible banks or margins within which the water can be confined.

The courts of some of the states of the United States have adopted the rule of the civil law that the lower of two adjoining estates owes a servitude to the upper to receive all the natural drainage, and the lower owner cannot reject, nor can the upper withold, the supply, although either, for the sake of improving his land according to the ordinary modes of good husbandry, may somewhat interfere with the natural flow.

But other of such courts have refused to adopt the rule of the civil law, and have followed English authority which does not recognize any such right with respect to surface water as such.

The decisions in our own courts are based upon English authority, and we are bound by them. They are McGillivray vs. Millin, 28 U. C. R. 62: Crewson vs. Grand Trunk R. W. Co., *ib.* 68; and Darby vs. Crowland, 38 U. C. R. 338; and we do not see anything in Beer vs. Stroud, 19 O. R. 10, which conflicts with them.

The motion will, therefore, be dismissed with costs.

QUEEN'S BENCH DIVISION.

ARTHUR *vs.* GRAND TRUNK RAILWAY COMPANY.

Water and Watercourses—Diversion of Watercourse by Railway Company—Remedy—Compensation—Arbitration Clauses of Railway Act, 51 Vic. ch. 29 (D.)—Plan—Riparian Proprietors—Infringement of Rights—Cause of Action—Damages—Permanent Injury—Definition of Watercourse—Permanent Source—Surface Water—Misdirection—New Trial.

By section 90 (h) of the Railway Act of Canada, 51 Vic. ch. 29, a railway company have power to divert any watercourse, subject to the provisions of the Act; but in order to entitle themselves to insist upon the arbitration clauses of the Act, they must, having regard to sections 123, 144, 145, 146 and 147, shew upon their registered plans their intention to divert.

The defendants built an embankment which entirely cut off the plaintiff's access to the water of a stream by diverting it from his farm:

Held, that the diversion, not the damage sustained therefrom, gave him his cause of action; and the proper mode of estimating the damages was to treat the diversion as permanent and to consider its effect upon the value of the farm.

McGillivray vs. Great Western R. W. Co., 25 U. C. R. 69, distinguished.

The alleged watercourse was a gully or depression created by the action of the water. The defendants disputed that any water ran along it, except melted snow and rain water flowing over the surface merely. The plaintiff contended that there was a constant stream of water, only, if ever, ceasing in the very dry summer weather:

Held, per Street, J., that without a permanent source, which, however, need not necessarily be absolutely never failing, there cannot be a watercourse; and that, as the attention of the jury was not expressly called to the difference in effect between the occasional flow of surface water and the steady flow from a source, and as a passage read to the jury from the judgment in Beer vs. Stroud, 19 O. R. 10, divorced from its context, might have misled the jury, there should be a new trial.

Per Armour, C. J., that what the Judge told the jury could not be held to be misdirection without reversing the decision in Beer vs. Stroud; and the objection to the charge was too vague and indefinite.

This was an action brought by the plaintiff against the defendants to recover damages owing to their having diverted a watercourse running through his farm in the Township of Cramahe, and was tried before Falconbridge, J., at Cobourg, on 25th and 26th October, 1893, with a jury. The defendants denied the existence of a watercourse and pleaded not guilty by statute: R. S. C. ch. 66, section 83; also the Railway Act, 51 Vic. ch. 29, section 287 (D.) public Acts.

The evidence shewed that the plaintiff was the owner of and in occupation of a farm through which the alleged watercourse ran; that about the year 1890 the defendants had altered their line of railway and built an embankment to the north of the plaintiff's land, and that in so doing they had obstructed the flow of the water, which, the plaintiff claimed, had formerly run from thence through his land. The defendants insisted that there were no regular or defined banks to the alleged watercourse, and that the water which ran through it was derived merely from melting snow and heavy falls of rain, and was therefore of so intermittent a character as not to constitute a watercourse.

Under an order made by Sir Thomas Galt, C. J., in Chambers, the jury were taken to view the *locus in quo*.

Being asked by the learned trial Judge to assess the damages for the six months next before the bringing of the action, and to assess also the whole damage to the plaintiff's farm by the cutting off of the watercourse, they assessed the first mentioned damages at $12 and the second at $350. Thereupon the learned Judge ordered judgment to be entered for the plaintiff for $350 and costs.

During the Michaelmas Sittings, 1893, the defendants moved by way of appeal from this judgment, upon the ground that a non-suit should have been entered, because the plaintiff, if entitled to compensation, should have proceeded under the arbitration clauses of the Railway Acts, and not by action; and upon the ground that no watercourse was proved, and that if proved no diversion of it to the injury of the plaintiff was proved; or to reduce the damages to $12, on the ground that the plaintiff was entitled to succeed only for the damages found for the six months preceding the bringing of the action; or for a new trial upon the ground of misdirection and non-direction.

That portion of the charge of the trial Judge objected to and the nature of the objection appear in the judgment of Street, J.

The motion was argued before the Divisional Court (Armour, C. J., and Street, J.) on 24th November, 1893.

Osler, Q. C., for the defendants. The question is whether there was a living stream passing to the north of the Kingston road through the old track of the defendants to the plaintiff's land, and, if so, whether the construction of the defendants' new line has interfered with the flow to the plaintiff's land. We contend that the alleged stream has no defined channel, and that the Judge's charge was wrong. The plaintiff's claim is not really to a right of watercourse, but to a right of ravine or gulch. Even if Beer vs. Stroud, 19 O. R. 10, is a good law, it is not applicable to this case. In Williams vs. Richards, 23 O. R. 651, it is said that Beer vs. Stroud does not enlarge the law. The Judge's charge was too broad. I refer to Crewson vs. Grand Trunk R. W. Co., 27 U. C. R. 68; McGillivray vs. Millin, *ib.* 62; Darby vs. Crowland, 38 U. C. R. 338. Damages can be recovered only for six months before action : McGillivray vs. Great Western R. W. Co., 25 U. C. R. at page 76. At all events the action does not lie ; the plaintiff's remedy, if any, is arbitration for compensation.

Wallace Nesbitt, on the same side. There was here no vital life in the source of supply. It is enough if the flow arises periodically from natural causes, and the learned Judge should have told the jury that it must so arise. The defendants are not liable for interrupting the flow of mere soakage. There must be a living stream, as distinguished from water from the clouds, though there may not be a perennial flow. As to the six months' limit, I refer to McArthur vs. Northern and Pacific Junction R. W. Co., 15 O. R. 733 ; 17 A. R. 86. As regards these defendants, the clause has never been repealed.

Clute, Q. C. (with him J. W. Gordon), for the plaintiff, referred to 51 Vic. (D.) ch. 29, section 90 (h) ; Re Shade and Galt and Guelph R. W. Co., 13 U. C. R. 577 ; Ross vs. Grand Trunk R. W. Co., 10 O. R. 447 ; Scanlon vs. London and Port Stanley R. W. Co., 23 Gr. 559 ; Beer vs. Stroud, 19 O. R. 10 ; Williams vs. Richards, 23 O. R. 651 ; Dudden vs. Guardians of Clutton Union, 1 H. & N. 627 ; Chamberlain vs. Baltimore and Ohio R. W. Co., 29 Am. & Eng. R. R. Cas. 533.

March 3, 1894. Street, J. :—

By sub-section (h) of section 90 of the Railway Act, 51 Vic. ch. 29, (D.), the defendants have power to divert the course of any watercourse, subject to the provisions of the Act, but we are of opinion that in order to entitle themselves to insist upon the arbitration clauses of the Act, they must shew upon their registered plans their intention to do so. See sections 123, 144, 145, 146 and 147 of the Act. See also Ware vs. Regent's Canal Co., 3 DeG. & J. 212 ; Parkdale vs. West, 12 App. Cas. 602. No evidence was given at the trial of the filing of any such plan, and we think that the objection that compensation should have been sought under the Act, and not by way of action, cannot be sustained.

The learned Judge has ordered judgment to be entered for the whole injury to the value of the land caused by the diversion of the watercourse, treating the injury as a permanent one, and assessing the damages for all time to come. The defendants object that such a judgment will be no bar to a future action, and that the damages can properly only be assessed from time to time as they are sustained. The rule itself is clear enough, that a judgment recovered upon any cause of action is a bar to any further claim upon the same cause of action. It is in the application of the rule to particular cases, and the ascertaining in each case what is the precise cause of action, that the difficulty arises. In the present case, was it the fact of the defendants having diverted the watercourse or the fact of the plaintiff having sustained damage from their doing so, that gave the plaintiff a cause of action? If it was the former, then a recovery now will be a bar to any further action; if the latter, the damages only can now be assesed which the plaintiff has sustained, and he may bring a new action for any future damage which he may sustain; because each fresh happening of damage will be a new cause of action: Darley Main Colliery Co. vs. Mitchell, 11 App. Cas. 127; Clegg vs. Dearden, 12 Q. B. 576.

I am of opinion that in the present case the defendants, when they diverted the watercourse, did an act which was wrongful, and that it was this act, and not the damages flowing from it, which gave the plaintiff his cause of action.

Every proprietor on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of other riparian proprietors, but so soon as he uses it in such a way as to diminish the quantity or quality of the water going on to the lower proprietors, or to retard or stop its flow, he exceeds his own rights and infringes upon theirs, and for every such infringement an action lies: Sampson vs. Hoddinott, 1 C. B. N. S. 590; Kensit vs. Great Eastern R. W. Co., 27 Ch. D. 122.

The defendants here have done an act which has entirely cut off the plaintiff's access to the water of the stream by diverting it away from his farm. That is an infringment of the natural right which he possessed to the flow of the water; the diversion is not temporary in its character, and we are not at liberty to treat it as other than permanent. The proper mode of estimating the damages is to treat it as permanent, and to consider the effect upon the value of the farm that the permanent abstraction of the water will have. This the jury have done, and I see no reason for reducing the amount.

The case of McGillivray vs. Great Western R. W. Co., 25 U. C. R. 69, cited to us by the defendants' counsel, is plainly distinguishable, the damages being there given for the negligent construction of a culvert which the court thought the defendants had agreed to make.

The objection to the charge is that the definition given by the learned trial Judge to the jury of a watercourse was likely to mislead them. The learned Judge told them that a watercourse was "a stream of water ordinarily flowing in a certain direction through a well defined channel with bed and banks; that the law has always been considered in Ontario to be that a channel made by mere surface water and snow is not a watercourse, unless there is ordinarily and most frequently a moving body of water flowing to it," then he read to them an extract from the judgment of the Chancellor in Beer vs. Stroud 19 O. R. 10. telling them that that case seemed to carry the law further in favor of the plaintiff than any former judgment of our courts. The extract he read was as follows: "It is not essential that the supply of water should be continuous, and from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of permanent character. Thus a recognized 'course' is obtained, which is originated and ascertained and perpetuated by the action of the water itself." He had already told the jury that "the principles which are applicable to streams of running water do not extend to the flow of mere surface water spreading over the land." The objection to the charge is evidently not correctly reported, but I think it may be gathered from the report to have been that the jury might understand from the charge that mere surface water coming two or three times a year during wet seasons and making a channel for itself during those seasons, would in law create a watercourse.

In order to consider the view which the jury may have taken of the charge, it is necessary to look at the evidence to see what questions were in dispute with regard to the alleged watercourse. Both parties appear to have agreed that there was a gully or depression through the plaintiff's farm, which had been created by the action of the water—at all events, upon this part of the case the jury are not likely to have been misled by any ambiguous language in the charge, because they had themselves been over the ground and had a view of it. What was disputed by the defendants was that any water ran along this gully excepting mere surface water, that is to say, melted snow in the spring and during the winter thaws, coming from an accumulation of snow and ice upon the higher land to the north, and rain water after heavy rains at other seasons of the year flowing over the surface merely, and ceasing with the rain which produced it. The plaintiff, on the other hand, contended that there was a constant stream of water having its source in the high grounds to the north, and only, if ever ceasing in the very dry summer weather. It is plain, I think, that mere surface water flowing during short intermittent periods as the result of the melting of snow and ice, or of a sudden shower or succession of showers, and ceasing to flow at all other times of the year, even though the flow be through a channel cut by the water itself, cannot convert the channel into a watercourse. Without a permanent source, which, however, need not necessarily be absolutely never failing, there cannot be a watercouse. Such a source may be under ground or above ground; it may be a spring, or a swamp, or a lake, or a glacier; the flow from it may vary in volume with the seasons, and may entirely cease from temporary causes; but it must be sufficient to act as a reserve, to prevent the flowing of the water from depending upon the happening of a thaw or a storm, and to create a stream which shall be reasonably constant in its flow.

It appears to me that the attention of the jury was not expressly called to the difference in effect between the occasional flow of surface water and the steady flow from a source; the language quoted from the judgment in Beer vs. Stroud is to be taken in connection with the facts of the case and with other language used in the same judgment and modifying the quotation. Taken without the context, it may have misled the jury here, and I am of opinion that there should on this account be a new trial. The costs of the last trial and of the motion to be taxed to the successful party.

Armour, C. J.:—

I agree with the judgment of my learned brother except in respect of the alleged misdirection of the learned Judge.

The learned Judge read to the jury the law as laid down in Beer vs. Stroud, 19 O. R. 10, from the report of that case, and I think, therefore, that we cannot hold what he thus told them to have been a misdirection without reversing the decision of the Court in that case, which it is not our province to do, but that of an appellate Court.

Besides, I think that the objection, if such it can be called, as taken, was too vague and indefinite to form a ground for setting aside the verdict.

The motion should, in my opinion, be dismissed with costs, but no proceedings are to be taken to enforce the judgment, unless and until the plaintiff delivers to the defendant a release by himself and the mortgagees of his land of any further claim in respect of the cause of action herein sued for, and for damages in respect of such cause of action, and if the parties differ as to the form of the release, it will be settled by the registrar of this division.

IN THE COURT OF APPEAL.

ARTHUR *vs.* GRAND TRUNK RAILWAY COMPANY OF CANADA.

Water and Watercourses—Surface Water—Diversion of Watercourse—Railways—Arbitration and Award—Damages—Injunction—Continuing Damage.

If water precipitated from the clouds in the form of rain or snow forms for itself a visible course or channel and is of sufficient volume to be serviceable to the persons through, or along, whose lands it flows, it is a watercourse, and for its diversion an action will lie.

Beer vs. Stroud, 19 O. R. 10, considered.

Where such a watercourse has been diverted by a railway company in constructing their line without filing maps or giving notice the landowner injurously affected has a right of action and is not limited to an arbitration.

For such diversion the landowner, in the absence of an undertaking by the company to restore the watercourse to its original condition, is enittled to have the damages assessed as for a permanent injury.

The mode of computing damages to be allowed in lieu of an injunction, considered.

Judgment of the Queen's Bench Division, 25 O. R. 37, affirmed.

This was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 25 O. R. 37, and was argued before Hagarty, C. J. O., Burton, Osler, and Maclennan, JJ. A., on the 27th and 28th of November, 1894.

Osler, Q. C., for the appellants. Clute, Q. C., and J. W. Gordon, for the respondent.

The facts are stated in the report of the case in the court below, and the line of argument is there indicated. The following cases, in addition to those there mentioned, were cited: as to the plaintiff's remedy being by arbitration: New Westminster vs Brighouse, 20 S. C. R. 520; North Shore R. W. Co. vs. Pion, 14 App. Cas. 612; as to the question of "watercourse": Morrissey vs. Chicago, etc. R. W. Co., 58 Am. & Eng. R. W. Cas. 628; Hill vs. Cincinnati, etc. R. W. Co., 29 Am. & Eng. R. W. Cas. 502; Chamberlin vs. Baltimore, etc. R. W. Co., 29 Am. & Eng. R. W. Cas. 533; Chicago, etc. R. W. Co. vs. Benson, 20 Am. & Eng. R. W. Cas. 96.

January 15th, 1895. Hagarty, C. J. O.:—

I have examined the evidence on either side produced at the trial, and I am of opinion that the learned Judge was right in submitting the disputed question of fact to the jury, as to the existence or non-existence of the alleged watercourse claimed by the plaintiff and obstructed or stopped by the defendants' railway. I am not prepared to hold that there was any misdirection or non-direction in the charge reported to us sufficient to warrant our interference.

The learned Judge directed the jury in the language used in the case of Beer vs. Stroud, 19 O. R. 10. The facts of that case were, perhaps rather stronger in the plaintiff's favour than in the present, but the general rule of law there expressed as to what constitutes a watercourse was fully given to the jury. Unless we find that rule of law incorrect, we must treat the case as one simply of fact to be decided by the jury. I do not think that the defendants can justly complain of the charge or its statement of the law. The jury on that might properly have found against the plaintiff if they were of opinion on the evidence that there was no defined channel course or banks where the water flowed—in other words, that "there was not a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel" constituting a watercourse. I use the language of Beer vs. Stroud.

The late case of Bunting vs. Hicks, 7 R. (Aug.) 53, notices the general law as to surface and spring water. Previous authorities are referred to in these cases, and in our own courts we may refer to McGillivray vs. Millin, 27 U. C. R. 62; Crewson vs. Grand Trunk R. W. Co., *ib.* 68: see also a large collection of American authorities in Morrissey vs. Chicago, etc. R. W. Co., 58 Am. & Eng. R. W. Cas. 622.

I cannot see any definition to be properly given to a jury of a watercourse than has been here presented to them. There was evidence proper to be submitted to them. The injury to the plaintiff was, I think, proved with reasonable certainty, arising from the construction of the new railway track instead of the old.

I do not think that from anything appearing in the case the defendants are in a position to defeat the action by insisting on arbitration as the only remedy. The defence is not guilty by statute, and the references are: C. S. C. ch. 66, section 83, and 51 Vic. ch. 29, section 287 (D.). These sections are merely as to the times within which suits "for any damage sustained by reason of the railway" are to be brought. The damage here was caused by the recent change of the line of railway from the original line it followed for many years, and I do not think the defendants were in a position, on the evidence before the Court, to claim any right (if any exist) to insist on arbitration as the plaintiff's only remedy. He prays alternatively in his claim for a mandamus to the defendants to take the proper proceedings to ascertain the amount of compensation. I do not discuss the question whether this kind of injury, not on the plaintiff's land, is a proper subject for compulsory arbitration.

It is further objected that the plaintiff can only recover for twelve months' damage. The injury (if any) is certainly a continuing injury caused by the permanent erection of a line of railway, not an intermittent act, but an injury sustained once for all, to persons or property.

On the general merits of the case on the evidence, the view taken by the jury may not be such as will commend itself to all minds. But I hardly see our way to interfere.

Osler, J. A. :—

I think the judgment should be affirmed. There was evidence on which the jury might properly find, as they have done, that there was in fact an actual watercourse as distinguished from a mere casual and undefined flow of surface water, and if there was any over-statement in the charge of the learned trial Judge as to what might be sufficient to constitute a natural watercourse in law, the diversion of which might give rise to a cause of action, I think it was such as not to be likely to mislead the jury in dealing with the evidence as a whole. If, in short, there was misdirection no substantial wrong or miscarriage has been occasioned thereby, and it thus becomes unnecessary to review the case of Beer vs. Stroud, 19 O. R. 10, as the appellants have invited us to do. Bunting vs. Hicks, 7 R. (Aug.) 53, discusses the point dealt with in that case.

The defendants having diverted the watercourse in constructing the deviation of their line, the plaintiff was clearly entitled to some remedy, and he brought this action. The defendants have not pleaded that his remedy was by arbitration under the provisions of the Railway Act, and though they said so at the trial it was not in fact proved that they had taken the requisite steps under the Railway Act by filing maps and plans, or giving notice, to put the matter of the plaintiff's claim in train for ascertainment by means of proceedings for compensation. The case was fought out at the trial, any evidence given on both sides as to the plaintiff's actual damage by the diversion of the stream. The defendants now propose that the verdict shall be limited to $12, the amount found by the jury as damages for the diversion of the stream for six months, and that for anything else the plaintiff shall be left to what may be recovered upon an arbitration under the Act. For this purpose, however, it would be necessary that the defendants should now be permitted to put in evidence of their maps, plans, etc., relating to the deviation; and this, I think, is an indulgence which should not be granted. It could serve no purpose but a new assessment of the damages which have already been assessed by the jury as for a permanent diversion of the stream. It would be most unreasonable to prolong the litigation between the parties for this purpose. It was strongly urged that the defendants could by a very slight expenditure turn the stream as it was before, and therefore that they should not be fixed with damages as for a permanent obstruction. Had the damages awarded been extremely large it might have been proper to accede to this view upon terms, but where no more than $350 have been given by the jury the injustice to the defendants of allowing the verdict to stand is not apparent, especially as they would seem to have brought the litigation upon themselves by disregarding all the plaintiff's complaints and requests for a settlement.

In cases of this kind where the plaintiff is clearly entitled to relief in one forum or the other, and where the defendants have not pointedly and conclusively shewn him to be wrong in the forum of his selection, the cases of Parkdale vs. West, 12 App. Cas. 602, and North Shore R. W. Co. vs. Pion, 14 App. Cas. 612, are authority for holding that the whole damage may be assessed once for all, and that the plaintiff wlll not be confined merely to damages down to the trial leaving future damages as for a continuing injury to be recovered in a subsequent proceeding. In the case of West vs. Parkdale (No. 2), in this court (13th November, 1888) not reported, the question was considered and the authorities referred to.

The Pion case, though an appeal from the Province of Quebec, was concerned with an Act containing provisions substantially similar to those to which the present defendants are subject, and dealt with the questions of liability and damage on principles entirely applicable here. The action was against a railway company for cutting off by means of an embankment the plaintiffs' access from their manufactory to the river St. Charles. It was held that as the defendants had not taken the proceedings necessary under their Act, to vest in them the power to exercise the right or do the thing for which compensation would have been due under the Act, an action would lie for damages and for removal of the obstruction, in which, if the obstruction were not ordered to be removed, damages as for a permanent injury to the land might be recovered. By this it is meant not merely such damages as a reversioner would have been entitled to recover at law under the old practice for a permanent injury to the reversion, which were only assessed up to the time of the commencement of the action and which might be, and usually were, in the first action at all events, nominal merely, but damages once for all in the nature of the compensation which might have been awarded had the proceedings been taken under the Act by arbitration. This, too, is in accordance with the provisions of the Judicature Act, section 53 (9), which enables the Court to give damages in addition to or in substitution for an injunction: Holland vs. Worley, 26 Ch. D. 578; Sayers vs. Colyer, 28 Ch. D. 103. And for an instance in which complete and final relief was given in an action by a reversioner, by awarding damages in lieu of an injunction, the case of Mayfair Property Company vs. Johnston, [1894] 1 Ch. 508, may be noticed.* See also as to the measure of damages where they are not awarded in lieu of an injunction: Battishill vs. Reed, 18 C. B. 696; Bell vs. Midland R. W. Co., 10 C. B. N. S. 287.

The appeal will, therefore, be dismissed, the plaintiff filing either here or with the registrar of the Court below a release or other acquittance from the mortgagee of the premises.

Maclennan, J. A.:—

The first question in this appeal is, whether there was evidence for the jury of a legal watercourse, and I am of opinion that there was, and that the charge of the learned Judge on that point was unobjectionable. I do not find any fault with anything that is said by the learned Chancellor in Beer vs. Stroud, 19 O. R. 10, and I think that is all warranted by the authorities which he cites. A watercourse must always have some point of commencement, and it may not be quite easy in every case to say just precisely where that point is. If a stream is traced up towards its source a point will always be reached where it ceases to be definable by a bed and banks; but until that point is reached it must be a watercourse, whether its origin be a spring, or several springs, or the rain or snowfall of a district collected naturally, and flowing away for the first time in a visible course or channel. All our lakes, rivers, and streams have their source in the clouds of the sky precipitated in the form of rain or snow, and the sole question in every case is, whether the water thus precipitated has formed for itself a visible course or channel, and is of sufficient magnitude or volume to be serviceable to the persons through or along whose lands it flows. It is immaterial that it may be intermittent in its flow, or that at certain seasons of the year there may be little or even no flow of water. In this country, where we have no mountain streams supplied by melting snow, and where we have long periods with but little rainfall, streams of considerable magnitude become nearly dry in sum-

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* See Shelfer vs. City of London Electric Lighting Company, [1895] 1 Ch. 287.—Rep.

mer, and yet no one would hesitate to call them watercourses. Most of the latter decided cases are referred to by the learned Chancellor in Beer vs. Stroud, 19 O. R. 10, and need not be mentioned here again, but I cite the following passage from the judgment of Alderson, B., in Broadbent vs. Rambsbotham, 11 Exch. at p. 615, cited with approval by Chelmsford, L. C., in Chasemore vs. Richards, 7 H. L. C. at p. 376: "No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel." That passage, I think, marks the distinction which required to be attended to in this case, and I think that having regard to the evidence and the way in which the law was presented to the jury, the verdict in that respect ought not to be interfered with.

The next question is whether the plaintiff can obtain redress by action or whether he must resort to arbitration. Upon this point I am unable to distinguish this case from North Shore R. W. Co., vs. Pion, 14 App. Cas. 612. The provisions of the Railway Act of Quebec which were applicable in that case are identical with those of the Railway Act of Canada by which the defendants are governed, and that case shews that the mere filing of plans, etc., is not sufficient to deprive a landholder, whose land is injuriously affected, of his remedy by action. That being so, it would not help the defendants if we granted the indulgence asked for on the argument of supplying an omission at the trial by proving the filing of the company's plans and book of reference. The injury to the plaintiff by cutting off and diverting the watercourse was obvious, and not one that could be foreseen, and therefore it cannot be regarded as outside the requirements of the statute with reference to compensation.

The remaining question is as to the assessment of the damages. It was contended that being in their nature continuing damages they could not be assessed as for a permanent injury, and that the judgment should be only for the $12 assessed for the period of one year next before action brought and not for $350 as for permanent injury.

I think that question must also be decided in the plaintiff's favour. The plaintiff being entitled to damages for a continuing injury, was also entitled to an injunction to restrain its continuance. By section 53, sub-section 9 of the Judicature Act, however, damages may be awarded in lieu of an injunction in such a case. If the defendants had offered or undertaken to restore the watercourse to its original condition of usefulness, no doubt the court would have restricted the damages to such time as that might be done. But the defendants not having offered to do so, the assessment of damages as for a permanent injury was entirely proper. The same thing was done in Parkdale vs. West, 12 App. Cas. 602, a case very like the present; and also in the case already referred of North Shore R. W. Co. vs. Pion, 14 App. Cas. 612.

I therefore think that the appeal should be dismissed.

Burton, J. A.:—

I agree.

Appeal dismissed with costs.

IN THE COURT OF APPEAL FOR ONTARIO.

OSTROM *vs.* SILLS.

Water and Watercourses—Surface Water—Easement—Lands of Different Levels.

The doctrine of dominant and servient tenement does not apply between adjoining lands of different levels so as to give the owner of the land of higher level the legal right as an incident of his estate to have surface water falling on his land discharged over the land of lower level although it would naturally find its way there. The owner of the land of lower level may fill up the low places on his land or build walls thereon although by so doing he keeps back the surface water to the injury of the owner of the land of higher level.

Judgment of a Divisional Court reversed.

This was an appeal by the defendants from the judgment of a Divisional Court [Boyd, C., Ferguson, and Meredith, JJ.]

The following statement of the facts is taken from the judgment of Moss, J. A.

The locus of this litigation is the unincorporated Village of Frankford, situate in the Township of Sidney, in the County of Hastings, at the confluence of the river Trent and its tributary, Cole creek. It is not shewn when the farm lots on which the village is situate were first laid out in streets and building lots, but in some of the conveyances put in there is reference to a plan of part of the village made in 1837, by one G. S. Clapp, P. L. S., and to a plan of the village made by one J. D. Evans, P. L. S. The evidence shews this latter plan to have been made in 1870.

The plaintiff and the defendants are the proprietors of adjoining parcels of land fronting on the south side of a highway called Mill street, and extending south to the waters of Cole creek. The plaintiff's premises have a frontage of about 20 feet on Mill street, and are wholly covered by a building used by him as a chemist's shop and dwelling.

At a distance of 68 feet from the north-east corner of the plaintiff's building is Trent street, a highway running north and south and intersecting Cole creek, at a distance 43 feet from the corner of Mill and Trent streets. Immediately to the west of the plaintiff's building are the premises of the defendants. They consist of a considerable parcel of land with a frontage of about 166 feet on Mill street, on which are now erected two buildings, one a storehouse or warehouse, the other a grist mill. When the plaintiff acquired his property—in the year 1872—the defendants' land was vacant, though there had been on the westerly portion a grist mill which had been burned down. When the defendants purchased, there was a covered ditch or drain crossing Mill street from the north side, and discharging upon the defendants' premises at a place to the east of the site of the old grist mill.

It conducted water, which was collected on the north side of Mill street by means of ditches and drains constructed by the municipality and land owners, across the highway and discharged it upon the premises now owned by the defendants over which it flowed to Cole creek. The covered drain was constructed of floats or logs placed atop of one another, forming a box or pipe about 18 inches wide and 8 or 10 inches in height, covered over by planks on which were put earth and gravel to the level of the highway. It had been placed there probably 20 or more years before. There had been on the ground at this place a shallow depression into which the surface waters from the surrounding lands flowed.

This depression extended from north of the highway, across it and on to the lands now owned by the defendants, and the construction of the box drain was the work of the township authorities done for the purpose of improving the highway by gathering the waters into a convenient conduit and levelling the highway. By these means the waters were concentrated and brought to the defendants' lands in enchanced volume and discharged with increased force. The land sloped gradually from the south side of Mill street to Cole creek, and the water coming through the covered drain cut away the earth and formed a sloping course along which it was found convenient for persons in vehicles to drive down to Cole creek, and there ford the stream. In 1875, considerable alterations and improvements were put upon the drain by the township authorities. It was thought to be of insufficient capacity to carry away all the water collected on the north side of Mill street. It was too near the surface, and was liable to freeze up in cold weather. The bottom of a ditch running along the north side of Mill street from the west, which took and conveyed surface waters from lands to the north of the street and west of where the box drain crossed the highway, had become worn to a level below that of the bottom of the box drain. To remedy these defects, a wider and deeper excavation was made. A trench more than two and a half feet wide was cut down to the rock. The sides were built up with loose stone to a height of about 20 inches, and the top was covered with two inch planks, upon which was put earth to the level of the crown of the highway, thus producing a culvert two and a half feet wide by about 20 inches high, with its bottom something more than four feet beneath the surface of the highway. It connected with the ditch or drain on the north side of Mill street, and extended beyond the south limit of the highway for a distance of 12 or 15 feet into and upon the defendants' premises. The discharge from its mouth was into the same place as the discharge from the box drain, and the water from it found its way to Cole creek in the same direction and along the same course as formerly; but the quantity of the discharge was apparently materially increased, and the effect of its action was to cut a much more defined channel from the mouth of the culvert through the defendants' premises to the creek; and if there was a servitude in respect of the former drain, it was largely increased by the new culvert. The water formerly brought to and discharged through the box drain and thereafter through this culvert, was chiefly surface water collected by means of drains or ditches and conducted to a ditch or drain constructed by the Municipality of Sidney, along the north side of Mill street, which at one time conducted water from west of King street, but for the past 15 or more years only from a point to the east of the eastern side of King street. At one time there was an occasional accession of water from an overflow in times of freshet of a pond situate on the corner of Albert and Scott streets, some distance to the north and west of the corner of King and Mill streets, but this was cut off about the year 1890, by a drain constructed by the municipality. There was also an occasional overflow from a spring situate some distance to the north of Mill street, nearly on a line with the point where the culvert crosses Mill street, but about the year 1884 this also was cut off, and the waters drained to the Trent river.

One Chapman who owns a parcel of land on the north side of Mill street directly opposite the defendants' premises and through whose premises was the natural depression above spoken of, put down a drain from his premises and cellar about the year 1868, and thereby conducted to the drain on the north side of Mill street the waters collected by means of his drain. But these and nearly all the other waters that flowed through the culvert were waters cast upon the surface of the ground in the shape of either rain or melted snow, and the quantity consequently varied very considerably, there being sometimes a very considerable volume, while at others, and for the most part, the discharge was comparatively small and intermittent.

This was the state of things when in 1887 the defendants commenced the erection of the building in respect of which the controversy has arisen and which is generally spoken of in the evidence as the storehouse or warehouse. It is a brick structure upon a stone foundation, its eastern wall coming within a few inches of the western wall of the plaintiff's building and extending south to Cole Creek. The south wall extends to the west about thirty-four feet. The western wall extends northward from the south wall to within about ten feet of the south line of Mill street. It is then turned to the east a distance of about ten feet, and is then turned to the north about ten feet to the south line of Mill street. The north or front wall extends easterly along or slightly over the street limit to the east wall. There is thus formed at the north-west corner of the building what is spoken of as an "L," about ten feet square. There is left between the warehouse and the grist mill an alleyway about ten feet wide. The culvert came upon the defendants' premises near the corner formed by the west wall of the "L." In excavating for the foundation of the warehouse, the defendants cut away the planks covering the culvert and removed its stone walls for some distance, and built the foundation wall across its course, from the rock upwards to some distance above the level of the street, but did not move the culvert back to the line of the street, and its point of discharge was still upon the defendants' premises. The superstructure was completed 1888, and then the defendants, in order, as they say, to protect their foundation wall from the waters coming through the culvert and to conduct them to Cole Creek, removed the stone walls of the culvert to the line of the street, and made an excavation in a diagonal line from the corner of the "L" fronting on Mill street, to the lower corner on the alleyway and placed a barrier of planks across the base of the "L" from the rock up to above the level of the street. The space behind this barrier, and between it and the foundation wall, was filled up with earth and gravel. The space in front was not filled in, but on the contrary, the defendants say they caused a cutting to be made from the drain to the alleyway so as to conduct the water coming from the culvert to the alleyway, and enable it to flow down it to the creek. Whether this provision for carrying off the water would have been sufficient if it had continued, is not known, for before long the space in front of the barrier began to be filled up with earth, stones, ashes, and other debris thrown or collected there without the action or consent of the defendants, so that in less than a year the mouth of the culvert was completely covered and stopped up, and the space became filled almost if not wholly to the level of the ground. The effect of this was to entirely stop the flow of water from the culvert. In 1890, upon occasion of heavy rains, water began to come into the plaintiff's cellar through the walls at the north-west corner of his building, more particularly in the west wall, and this continued from time to time up to the time of the commencement of this action on the 6th of September, 1892.

The plaintiff says that at first he was under the impression that this was due to surface water collecting on the street in front in consequence of the construction of certain crossings and the heightening of the crown of the roadway. With a view to protecting his building from such surface water, he dug a drain commencing in front of his building and going in the direction of the culvert, intending to conduct the surface water to it. In the course of the excavation he says he discovered for the first time that the flow through the culvert was stopped, and that water was collected about its mouth. He now claims that some of this water found its way along by the front foundation wall of the defendants' building, and thence to the walls of the plaintiff's building, and by oozing through them led to some of the damage he now complains of.

He also claims that by reason of the stoppage of the mouth of the culvert, surface water is forced through the windows into his cellar, and to this he appears to attribute the greater portion of his damage. In his evidence he thus states his theory of the cause of the trouble:—

[The learned Judge read extracts from the plaintiff's evidence and continued :]

From these extracts it is apparent that the plaintiff's own chief complaint is of the obstruction or prevention of the flow of surface water from in front of the plaintiff's premises and building, into the culvert and through it over the defendants' premises.

Some of the witnesses on behalf of the plaintiff attribute the trouble to the soakage of the water brought through the culvert from across Mill street, arising from its flow being blocked and thereby prevented from going down over the defendants' premises. It is said that it percolates through the soil along the front of the defendants' building until it reaches the foundation wall of the plaintiff's building, a distance of twenty-four feet. In either aspect the trouble seems to come from the arrest of the flow of surface water brought by artificial means to the defendants' premises. And the plaintiffs contention is that the defendants are not at liberty to block up on their own premises the outlet of the culvert, so as to interrupt or prevent the flow of water through and from it over their premises to Cole creek, if the result is to occasion damage to the plaintiff's premises.

The defendants counterclaimed for damages alleged to have been caused to them by the plaintiff's interference with Cole creek, but it is not necessary to set out the facts as to this.

The action was referred to the Master at Belleville, who found in the plaintiff's favor on his claim, assessing the damages at $100, and found against the defendants' counterclaim.

On appeal, Falconbridge, J., reversed the Master's finding as to the claim, and dismissed the action, and he affirmed the finding as to the counterclaim.

The Divisional Court restored the Master's finding as to the claim, and also affirmed his finding as to the counterclaim.

The defendants then appealed to this court against both findings, and the appeal was argued before Burton, C. J. O., and Osler, Maclennan, and Moss, JJ. A., on the 25th and 26th of May, 1897.

Clute, Q. C., and J. Williams for the appellants.

C. J. Holman, and E. Guss Porter for the respondants.

September 14th, 1897. Maclennan, J. A. :—

On the argument we disposed of the defendants' appeal on their counterclaim by dismissing it deciding that there was no evidence of injury to their riparian right. The other appeal, against the judgment for the plaintiff for injury to his walls and cellar by the ob-

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struction to the flow of water from the culvert, remains to be considered.

The action was commenced in September, 1892, and the complaint is, that four years before the action the defendants obstructed a drain or sewer by which surface water and drainage of a street and adjoining lands had been accustomed to flow, whereby it was backed up and caused to flow towards the plaintiff's land, and to percolate through the walls of his dwelling house and shop, and into his cellar, to his injury. There is no allegation of any natural watercourse, but what is alleged is, that "the natural and regular flow of surface water of the plaintiff's land and of the street upon which both the plaintiff and the defendants' land abut, was over and through the defendants's land, and that such flow has existed from time immemorial, or for such length of time for the plaintiff and others enjoying the street and lands on a higher level to acquire, and that they did acquire, an easement for drainage over the defendants' lands." The learned referee has found as a fact that what the statement of claim calls a drain or sewer was a natural gully or watercourse which had existed for many years on the north side of Mill street, and extending diagonally across it, and which emptied into Cole creek, and which was formed by the natural action of the water; and that for at least fifty years this gully or watercourse has been the natural outlet for water forming on the land lying to the north of Mill street. The witnesses called upon this point were very numerous, and, without referring to their evidence in detail, I am bound to say that in my opinion it falls far short of establishing anything that can properly be called a legal watercourse, or anything more than a mere ditch, or drain, or sewer artificially constructed on the north side and across the street. The witnesses speak of it as a ditch or drain, and those who speak of its condition before work of excavation, say there was a depression. In my judgment there is no evidence whatever of the existence of a watercourse before the excavation made for the purpose of improving the street. That being so, the defendants had an undoubted right to object to having the water coming from or across the highway cast upon their land: McGillivray vs. Millin, 27 U. C. R. 62, and other cases; and to protect themselves against it by a wall or other obstruction. No case of prescription has been made against the defendants: Gale's Law of Easements, 6th ed., p. 589; Goddard's Law of Easements. 4th ed., pp. 198-9; Parker vs. Mitchell, 11 A & E. 788; Lowe vs. Carpenter, 6 Exch. 825; even if the plaintiff could avail himself of it.

The judgment of Mr. Justice Falconbridge ought, therefore, to be restored, and the defendants should have their costs, both of their appeal to the Divisional Court and to this court, the plaintiff being entitled to the costs of those appeals in respect of the counterclaim, to be set off against those of the defendants.

Moss, J. A. :—

The plaintiff's contention appears to be based on the propositions that he has an absolute legal right to require the defendants to submit to the flow from the culvert of the water coming through it from the surrounding lands, as in the case of a natural watercourse, or that a prescriptive right to require the defendants to permit the continuance of the flow of such water over their lands has been acquired against the defendants, of which the plaintiff can avail himself, or that the defendants have no right to block the flow of the water through the culvert in such manner as to cast it or some of it on the plaintiff's premises to his damage.

The subject of the right of an upper proprietor to have the surface water from his lands flow upon those of his lower neighbor, has been a matter of much discussion and difference of opinion, especially in the American Courts.

The doctrine of the civil law that the right of drainage of surface water as between the owners of adjacent lands of different elevations, is governed by the law of nature, and that the lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude, has been accepted and followed by the Courts of Pennsylvania, Illinois, California, and Louisiana, and some other States. On the other hand, the Courts of New Jersey, New York, Massachusetts, New Hampshire, Wisconsin, and some other states, reject it and hold that the relation of dominant and servient tenements does not by the common law apply between adjoining lands of different owners so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land, discharged over the land of the lower proprietor, although it naturally finds its way there, and that the lower proprietor may lawfully, for the improvement of his estate, and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs or prevents the surface water from passing therein from the premises above, to the injury of the upper proprietor.

In Washburn on Easements, 4th ed., p. 489, the learned author, referring to and commenting on many cases in which the conflicting views are set forth, notices the tendency there has been of late and since former editions of the work, to limit the servitude which a lower field owes to an upper one in respect to water, to such as flows in a defined watercourse, and not to extend it to such as falls upon the surface in the form of rain or melting snow, although from the nature of the surface such water, when it does fall, flows in a uniform course or direction.

It is also to be noted that, even in the Courts where the doctrine of the civil law prevails, a distinction has been made in the case of building lots in cities, towns, and villages.

The case of Bentz vs. Armstrong, 8 Watts & S. 40, is illustrative of this exception. It was there determined by the Supreme Court of Pennsylvania, that "in the purchase of lots of ground laid out and sold for the purpose of building up towns or cities thereon, it has been understood, and such has been the practice and usage, that the natural formation of the surface will, and indeed must, necessarily undergo a change in the construction of the buildings and other improvements that are designed and intended to be made; and that in doing this, an owner of a lot ought to be permitted to form and regulate the surface of it as he pleases, either by excavation or filling up, as may be requisite to the convenient enjoyment of it, taking care. however, not to produce any detriment or injury to his neighbor in the occupation of his adjoining lot."

In that case, Bentz and Armstrong were owners of adjoining lots fronting on Quarry street in Pittsburg. Upon Armstrong's lot there was a spring, and, in consequence of a natural descent in the ground, the water from this spring and from Armstrong's house and lot, ran over the lot of Bentz, who placed an obstruction on his own lot so as to prevent the water running on it from Armstrong's lot.

The consequence was the obstruction caused the water to run back into Armstrong's cellar. For this he brought action, and succeeded in the Court below, but the Supreme Court held he had no cause of action.

Many American authorities on this subject are collected in the American and English Encyclopœdia of Law, vol. 24, p. 896.

In the case of Inhabitants of Franklin vs. Fisk, 13 Allen 211 (1866), there was a bill in equity to restrain the defendant from obstructing a culvert built by the plaintiffs across a highway.

The highway in question had been laid out more than 40 years, and led up a steep hillside, over which large quantities of surface water flowed. It had usually flowed down on the upper side of the highway, but, apparently not long before the commencement of the suit, the plaintiffs built a stone culvert across the highway, extending to the inside of the wall between the highway and the defendant's land, and dug a slight trench from the mouth of the culvert two or three feet into the defendant's land to carry off the water. The defendant made a dam on his own land at the end of the culvert and stopped up so much of the culvert as was under his wall, and thereby prevented much of the surface water from flowing through the culvert and caused it to flow over the highway and injure the travelled road. It was held by the Supreme Court of Massachusetts that the defendant was entitled to do the acts complained of. The court affirmed the doctrine previously held in Gannon vs. Hargadon, 10 Allen 106, that as against an adjoining owner of the fee, the defendant would have had the right to raise the surface of his land or build a structure upon it so high as to prevent any surface water from coming upon it from the adjoining land, and held that the public had no greater right to restrain him in the use of his land than they would have had if they had been absolute owners of the land included in the highway.

In conclusion, it said: "The right of adjoining proprietors to erect structures upon their land up to the line of their highway is exercised every where; and the defendant has the same rights in this respect as if his land were in the midst of a village or city. If by legal acts, done upon his own land, he has prevented the water from passing off the highway through the plaintiffs' culvert, their only remedy is to dispose of their surface water in some other way."

This doctrine was again affirmed by the same court in Bates vs. Smith, 100 Mass. 181 (1868).

In Swett vs. Cutts, 50 N. H. 439 (1870), the plaintiff and defendant were adjoining owners of land by the side of a highway, in the ditch of which water was accustomed to accumlate, and for many years it found its way off through a depression in the defendant's lands. The defendant built an embankment in front of his highway fence which caused a portion of the water, which would otherwise have gone over his land, to go over the plaintiff's land, causing damage to the plaintiff's land. The Supreme Court of New Hampshire held that in the absence of a prescriptive right the plaintiff had no cause of action against the defendant. In support of its conclusions the court makes reference to many English and American authorities.

In Hoyt vs. City of Hudson, 27 Wis. 656 (1871), the Supreme

Court of Wisconsin had to deal with the case of an action against a municipality for damages occasioned by the obstruction of the flow of surface water down a ravine or hollow on the plaintiff's premises, by reason whereof the water was cast back and retained on the plainiff's lands.

The court concluded upon the evidence that there was no stream or watercourse through which the water flowed in and upon the plaintiff's premises. It adhered to the views expressed by the same court in Pettigrew vs. Village of Evansville, 25 Wis. 223 (1870), which "rejected the doctrine of dominant and servient heritage of the civil law, and adopted the very opposite doctrine of the common law of England, as held and expounded by the courts of that country, and also by those of our own American States" It stated the doctrine of the common law to be that (page 659) "there exists no such natural easement or servitude in favour of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting of snow; and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or off on to or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion. This is the rule in England, and in Massachusetts, New York, Connecticut, Vermont, New Jersey and New Hampshire."

The doctrine of the civil law has not been adopted by the courts of this Province. As regards mere surface water precipitated from the clouds in the form of rain or snow, it has been determined that no right of drainage exists *jure naturæ*, and that as long as surface water is not found flowing in a defined channel with visible edges or banks approaching one another and confining the water therein, the lower proprietor owes no servitude to the upper to receive the natural drainage: McGillivray vs. Millin, 27 U. C. R. 62; Crewson vs. Grand Trunk R. W. Co., 27 U. C. R. 68; Darby vs. Crowland, 38 U. C. R. 338; Beer vs. Stroud, 19 O. R. 10; Williams vs. Richards, 23 O. R. 651; Arthur vs. Grand Trunk R. W. Co., 25 O. R. 37; 22 A. R. 89.

Generally speaking the upper proprietor may dispose of the surface water upon his land as he may see fit, but he cannot, by artificial drains or ditches, collect it or the water of stagnant pools or ponds upon his premises and cast it in a body upon the proprietor below him to his injury. He cannot collect and concentrate such waters and pour them through an artificial ditch in unusual quantities upon his adjacent proprietor.

If, however, he does so for a sufficient time, and under appropriate circumstances, he may acquire a prescriptive right as against his lower neighbor, which would prevent him from doing any act to put a stop to the easement thus acquired.

But as respects the plaintiff's claim in this action, it is not a case of a natural watercourse flowing through or from his premises, nor of prescriptive right of which he can take advantage, The Master's findings shew that the surface of the ground, in the locality served by the culvert, has not been left as in a state of nature; much has been done both by individuals and the municipality in the way of gathering and concentrating the waters and conducting them into artificial channels, and for that purpose the natural channels have been altered, enlarged, or entirely displaced by other provisions for carrying away the waters which in a natural state came into the depression where it crossed Mill street. They also shew that the portion crossing Mill street was substantially altered. The Master finds that the covered portion was originally covered to improve the roadway on Mill street, there being a depression where such watercourse crossed the street, which interfered with the user of the street, and, as originally constructed, was composed of floats or logs laid down on either side and covered over with planks and earth; the centre of the watercourse being down to the rock with the sides or banks sloping; and that in 1875, when the grant was obtained from the municipal council, the original construction, or what was left of it (it having been repaired often before), was taken away, and in place of the floats or logs along the sides, the sloping banks were dug out or squared up and a dry stone wall laid in their place upon which timbers were placed, and plank covering and earth placed over them. This is the culvert before spoken of, and there is no doubt it was a considerable enlargement of the former covered drain in width and depth, and consequent carrying capacity. Being constructed in 1875, there was not a lapse of twenty years before the commencement of this action. So that as regards it, neither the municipality nor the proprietors on the north side of Mill street had gained any prescriptive right against the defendants. Besides, there had been an interruption, acquiesced in so far as appears by these parties, for more than a year before the action. The defendants' obligation, if any, was to refrain from stopping up the natural watercourse while it remained such. But that servitude could not be increased and made obligatory upon them except by lapse of time, and, on the footing of prescription could only be enforced by the parties by whom the easement was gained. The water from the plaintiff's premises did not naturally flow to the defendants' premises in a defined channel, thereby casting them upon the defendants' premises, nor did the plaintiff, or those through whom he claims, gain a right by prescription to cast them upon the defendants' premises.

The plaintiff's right, if any, to maintain this action, depends therefore upon whether he has a right to complain of the effect upon his premises of the defendants stopping or preventing the flow onto their premises of water brought there by other persons than the plaintiff, and from other lands than those owned by him.

The Master has found that some portion of the damage which the plaintiff has suffered from water in his cellar, was caused by the defendants' building obstructing the outlet of the culvert, and thereby causing the water coming from it to back, and some of it to find its way to the plaintiff's cellar wall and into his cellar, and that some of the damage has been caused by the surface water of the street coming into the cellar windows : and he has assessed the whole damage to the plaintiff arising from the former cause since the erection of the defendants' building in 1888, to the date of the report (see Con. Rule 680. now, 552), at the sum of $100. Accepting this finding upon the conflict of testimony as conclusive of the fact that the plaintiff has sustained some, though not much damage, by reason of the defendants' building on their own lands, the question of legal liability remains.

I have given the matter much anxious consideration, but I have been unable to come to the conclusion that the plaintiff is entitled to judgment on this ground any more than on the other grounds.

I think that the defendants are entitled to judgment, because in doing what is complained of they are protecting themselves against the acts of other parties by means of something put up on their own land as a barrier, and not as a medium for conducting the waters from their premises to, and casting them upon, the plaintiff's premises; and because the defendants are making a reasonable and natural user of their own premises in building upon their lands, and in doing so they are not exceeding their proprietary rights; and because, if the plaintiff is suffering damage, it is by reason of the attempt of the municipality, and others not parties to this action, to dispose of their surface waters and drainage by unwarrantably casting them on the defendants, thereby seeking to impose a burden upon them, which they are properly resisting.

The water now gathers, not on the defendants' lands, but in the culvert under the highway, and thus apparently some of it finds its way by soakage through the stone sides of the culvert, for a distance of twenty-four feet or thereabouts, from where it formerly entered the defendants' lands, to the cellar walls of the plaintiff's building; but the defendants, not being bound to permit the discharge of the culvert on to their premises, owe no responsibility to the plaintiff for the want of proper provision by the municipality for an outlet.

It does not appear that either the municipality or any upper proprietor along the line of the watercourse is objecting to the defendants' acts; and for all that does appear they may be acquiescing in the defendants' claim of right to block the outflow of the culvert, and prevent the acquisition of an easement. And I do not think that the plaintiff is entitled to assert as against the defendants the rights which the municipality or the upper proprietors may have possessed.

I think that the appeal ought to be allowed, the judgment of the Divisional Court reversed, and the judgment of Falconbridge, J., restored with costs here and in the Divisional Court.

Burton, C. J. O., and Osler, J. A., concurred.

Appeal allowed.

JUDGMENT OF THE SUPREME COURT OF CANADA AFFIRMING THE FOREGOING JUDGMENT OF THE COURT OF APPEAL.

Gwynne, J.:—

Mr. Justice Moss has in his able judgment so fully stated the facts of the case that it is unnecessary to repeat them.

It is sufficient to say that whatever may have been the condition 50 or 60 years ago of the premises where the culvert in question across Mill street in the Village of Frankford is situate, that is to say, whether there was anything which could be called a natural watercourse, it is unnecessary to inquire, for it is clear upon the evidence that for nearly 20 years before the defendants in 1888 completed their building which is complained of, and perhaps ever since the village municipality came into existence the only waters passing through the culvert in question were the waters brought down from a drain constructed by Mr. Chapman upon his lot on the north side of Mill street about 30 feet distant from the mouth of the culvert and the rain and melting show fallen on the street and land in the vicinity of a ditch along the north side of Mill street from Chapman's drain to the culvert. These waters were discharged through the culvert on to the defendant's land and what the defendants have done which is complained of is that in 1888 they completed the erection of a building of stone and brick on their own land on the south side of Mill street the north wall of which is distant 10 feet from the southern limit of the street and they have cut off the walls of the culvert which projected over the line of the street whereby the waters passing through the culvert soak partly through the street and partly through the 10 feet of the defendants' land between their building and the street and so possibly have done some damage to the plaintiff. But the defendants in so erecting their building and cutting off that part of the culvert which projected over their land have only exercised their right and if the plaintiff has been damnified thereby, his remedy is not against the defendants but rather against the municipality who maintain the drain in an insufficient condition.

The appeal must be dismissed with costs.

IMPORTANT DECISION

RESPECTING LIMITATION OF ACTIONS.

IN RE RODEN AND THE CITY OF TORONTO.

Statutes—Construction—Amendment—Retroactive Effect—Limitation of Actions—54 Vic. ch. 42, section 16 (O.).

Unless there is a clear declaration in the Act itself to that effect, or unless the surrounding circumstances render that construction inevitable, an Act should not be so construed as to interfere with vested rights.

Section 16 of 54 Vic. ch. 42 (O.), limiting the time for the enforcement of claims for compensation by persons injuriously affected by the exercise of municipal powers of expropriation does not apply to a claim existing at the time of the passage of the Act.

Judgment of the Official Arbitrator affirmed.

Appeal by the City of Toronto, and cross-appeal by Roden, from an award of the Official Arbitrator.

Roden claimed compensation for land alleged to have been injuriously affected by the work done by the City of Toronto in the improvement of the river Don. The main claim—for loss of frontage—was disallowed, but the Official Arbitrator awarded the claimant $500 damages for interference with a right of way. The claim arose in October, 1887, but the demand for compensation was not made till the 13th of October, 1896.

The appeal and cross-appeal were argued before Burton, C.J.O., Osler, Maclennan and Moss, JJ.A., on the 28th and 29th of September, 1897.

Fullerton, Q. C., and W. C. Chisholm, for the city of Toronto. The claim for damages for interference with the right of way is not within the scope of the reference, and there is no evidence to support it. The Official Arbitrator took a view of the place in question and founded his award on that view but he has not complied with the provisions of section 401 of the Act of 1892. Apart from this the claim is barred. It is governed by section 483, as amended by section 16 of 54 Vic. ch. 42 (O.). That amendment is general in its terms and must apply to all claims then existing, or thereafter to arise, especially in view of the fact that the Act did not take effect for some time after it was passed: Maxwell, 2nd, ed., pp. 269, 271; Pardo vs. Bingham (1869), L. R. 4 Ch. 735; Regina vs. Leeds and Bradford R. W. Co. (1852) 18 Q. B. at page 346; Towler vs. Chatterton (1829), 6 Bing., at page 264; Bell vs. Walker (1873), 20 Gr. 558; Grey vs. Ball (1876), 23 Gr. 390.

H. M. Mowat, for the claimant. The special act for the improvement of the river Don governs this case, and in it there is no limitation clause. At any rate the amendment is not retroactive. A statute is if possible to be construed so as not to interfere with existing rights: Gardner vs. Lucas (1878), 3 App. Cas. 603; Moon vs. Durden (1848), 2 Exch. 22.

Fullerton, Q. C., in reply.

January, 11th, 1898. Burton, C. J. O.:—

The only point we think really calling for consideration is as to the effect of the 16th section of 54 Vic. ch 42 (O.), limiting the time for making a claim for compensation.

The claim arose under a special act passed in 1886, enabling the Municipal Council of Toronto to straighten the River Don, which provided that any claim for damages or compensation by persons whose lands were injuriously affected by the exercise of the powers conferred by the act should be settled and determined by arbitration under the provisions of the Consolidated Municipal Act of 1883, and amendments thereto, if any, in that behalf. No amendments had been made at the time the claim in this case arose, which was in the year 1887.

At that time the claimant had a vested right or claim to compensation, although he did not prefer his claim until some years afterwards, and the award which is appealed against was not made until February, 1897.

There was under the acts which were in force when the claimant's rights accrued no limitation as to the time for preferring and enforcing his claim.

The claim arises under the special act for improving the River Don, the mode of enforcing it being provided for by the Municipal Act then existing, the Act of 1883, and the question is whether the amendment made by the Act of 1891 to section 483 of the Consolidated Municipal Act, imported from the Act 46 Vic. sec. 486 (O.), has any application to a claim for compensation under the special Act.

The inclination of my mind is to hold that the limitation was not intended to apply to claims for compensation under the special act, but was applicable only to the general exercise of the power of municipal councils, but if I am wrong in that construction I am of opinion that the limitation was only intended to apply to cases arising after the enactment came into operation.

The amendment added these words to the section : " and such claim shall be made within one year from the date when the alleged damages were sustained, or became known to the claimant." This act was passed on the 4th of May, 1891, but was not to take effect, or come into force, until the 1st of July following.

The general rule, as laid down in the courts, is that unless there is some declared intention of the legislature, clear and unequivocal, or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an act is prospective and not retrospective, or, as expressed in one case by Lord Justice Bowen, except in special cases the new law ought to be so construed as to interfere as little as possible with vested rights.

Cockburn, C. J., expresses the same idea in this way : " It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the act" : Regina vs. Ipswich Union (1877), 2 Q. B. D. 269.

And Lord Justice Bowen, in a recent case, again expressed the opinion that statutes should be interpeted if possible so as to respect vested rights ; and in a Scotch case, still more recent, the same idea is expressed in these words : " For it is not to be presumed that interference with existing rights is intended by the legislature, and if a statute be ambiguous the court should lean to the interpretation which would support existing rights."

There are some cases in which judges have refused to allow statutes to have a retroactive operation, although their language seemed to imply that such was the intention of the legislature, because, if the statutes had been so construed, vested rights would have been defeated : see Gardner vs. Lucas (1878), 3 App. Cas. 603 ; Moon vs. Durden (1848), 2 Exch. 22 : and although in the latter of these two cases the parties to suffer were successful gamesters not much the object of favour with the legislature.

In the House of Lords, Lord Selbourne, in a case then before them, Main vs. Stark (1890), 15 App. Cas. 384, at p. 387, said : " Their Lordships of course do not say that there might not be something in the context of an Act of Parliament, or to be collected from its language, which might give to words *prima facie* prospective a larger operation, but they ought to not to receive a larger operation unless you find some reason for giving it."

There is, of course, a well-known exception to this rule, viz., where the enactments merely affect procedure and do not extend to rights of action. In such case the rule is reversed and the statute is retrospective, unless there is some good reason or other why it should not be; the rule is usually expressed by saying that there is no vested right in procedure or costs.

There is also another ground on which it has been sometimes held that a statute is intended to have a retrospective effect, namely where it contains a proviso that it is not to come into immediate operation upon its passing.

That was one of the grounds relied on for the decision of the Court in Towler vs. Chatterton (1829), 6 Bing. 258; but that was unnecessary to the decision, and that ground was commented upon adversely by Rolfe, B., in Moon vs. Durden (1848), 2 Exch. 22.

No doubt in a subsequent case, Regina vs. Leeds and Bradford R. W. Co. (1852), 18 Q. B. 343, 21 L. J. M. C. 193, Lord Campbell spoke approvingly of that portion of the decision in Towler vs. Chatterton, and he uses this language: "If the Act had come into operation immediately after the time of its being passed the hardship would have been so great that we might have inferred an intention on the part of the legislature not to give it a retrospective operation; but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal."

That case was reversed upon another ground so that the present question was not considered on the appeal.

Now I concede that if the amendment itself to section 483 had stood alone with such a proviso the argument would not be without weight, but that was not the case here. The Act of 1891 contained a great number of amendments of various kinds, and it was provided that the whole act, with the exception of one clause, should not come into effect until the 1st of July, some few weeks later. In that view the delay has but little significance.

We were referred to two cases under the registry law—Bell vs. Walker (1873), 20 Gr. 558, and Grey vs. Ball (1876), 23 Gr. 390, but it seems to me those cases do not apply. I think that the judgment of Blake, V. C., in the former case, put the decision on the right ground, that by the express words of the statute no equitable lien should be deemed valid in any court after the act came into operation as against a registered instrument; it contained no exception. The Vice-Chancellor refers to the act not coming into operation for two months. The fact seems to have been questioned in the subsequent case, but it does not seem to be of much significance, the parties having the equitable liens, could not, in the majority of cases, improve their position, their claims not being capable of registration, and in other cases their claims not being due they could not seek the aid of the Courts.

I do not think in the present case anything has been shewn to induce us to break in upon the rule which has been laid down not to construe a statute as retrospective which interferes with vested rights unless compelled to do so by the language used.

The award itself seems to be supported by the evidence and ought not to be interfered with.

The appeal and the cross-appeal should be dismissed.

Osler, J. A. :—

I think this award may be supported. The claim for which the arbitrator has allowed the respondent $500, though not in terms expressed, was yet, as an item of damage included in the general claim, and I cannot see that any injustice has been done to the appellants in the way in which the learned Official Arbitrator has dealt with it. The absence of the statement in writing, required by section 401 of the Municipal Act, where the arbitrator has proceeded partly on a view, as he has done here, would merely be a ground for referring the case back, if there were not, looking at the whole of the proceedings, sufficient to allow the court to form a judgment of the weight which should be attached to the value of the information acquired by the arbitrator by means of the view : In re Northumberland and Durham and Cobourg (1860), 20 U. C. R. 283.

I cannot agree that the limitation clause added to section 483 of the Municipal Act by 54 Vic. ch. 42, section 16 (O.), is a defence. It certainly is not unless we give it a retrospective operation. In the case of Cerri vs. Ancient Order of Oddfellows (25 O. A. R. 22), before us during this term, I have referred to many authorities which shew how general and stringent is the rule which forbids such a construction unless the intention of the Legislature is unmistakably manifested in favour of it. As Mr. Sedgwick observes in his treatise upon the Construction of Statutory and Constitutional Law, 2nd ed., page 164 : "The effort of the English Courts appears always to be to give the statutes of that kingdom a prospective effect only, unless the language is so clear and imperative as not to admit of doubt."

The most recent decisions shew that this principle has been in no way relaxed.

No doubt in the case of an Act dealing with a single subject such an intention has been inferred from the fact that the period of its coming into operation has been postponed: Towler vs. Chatterton (1829), 6 Bing. 258; Re Edmundson (1851), 17 Q. B. 67; Regina vs. Leeds and Bradford R. W. Co. (1852), 18 Q. B. 343;—overruled in effect, though not on this point, in Regina vs. Edwards (1884), 13 Q. B. D. 586; Hardcastle's Construction of Statutes, 2nd ed., pp. 377-380.

But this is by no means laid down as an inflexible rule, and where the provision in question is found in an "omnibus" Act of 43 sections dealing with a variety of subjects having no relation to each other, except as being comprised in a general municipal amendment Act, it becomes very difficult to infer, merely from the commencement of the Act having been postponed, an intention that a particular section shall from that time have a retrospective operation. More especially is this the case when most of the sections cannot, from the very nature of the subjects dealt with, operate in that manner, and where, in one instance at all events, namely section 42, the language, quite apart from any inference of intention drawn from the postponement of its coming into operation, is plainly retrospective.

The respondent's cross-appeal is a very hopeless one. I have read the evidence and am clearly of opinion that it justifies the arbitrator's finding.

The appeal and cross-appeal should therefore both be dismissed with costs.

Maclennan, J. A. :—

I am of opinion that both appeal and cross-appeal should be dismissed.

The respondent's claim is clearly not barred by the amendment in 1891 of section 483 of the Municipal Act, or by R. S. O. ch. 60, or by the statute of James. The amendment of section 483 is inapplicable, because the claim had accrued and was more than a year old when the Act was passed. The other statutes do not apply because they apply only to actions, which the present proceeding is not.

I think the arbitrator was quite warranted in the allowance which he made for loss of the way from the mill road to the river, along the south limit of the respondent's land; and I do not think there is any ground established for the conclusion that the right of way had been in any way lost by non-user.

I also think the respondent's cross-appeal cannot succeed.

Moss, J. A. :—

The claim in this matter is made solely for compensation in respect of lands alleged to be injuriously affected by reason of work done by the corporation of the City of Toronto upon what is generally known as the Don River Improvements. The Official Arbitrator disallowed the main claim, which was made in respect of an alleged loss of frontage upon the Don river through the removal of its eastern bank some distance to the west of its original position, but allowed to the claimant the sum of $500 in respect of a right of way to the river bank which was cut off by reason of the change. The city was also directed to pay the stenographer's and arbitrators' fees, and to bear its own costs of the arbitration.

Both parties appeal from the award, the city complaining of the allowance of any compensation, and of the directions with regard to the costs and the stenographer's and arbitrator's fees, and the claimant complaining that the arbitrator erroneously disallowed the other claims, and awarded no costs to the claimant. The Official Arbitrator found and stated in his award that the injury in respect of which the claimant seeks compensation was complete in or about the month of October, 1887. The notice of claim was served on the city on the 13th of October, 1896. It is objected on behalf of the city that the claim is barred under the provisions of section 16 of 54 Vic. ch. 42 (O.), now forming the latter part of section 483 of the Consolidated Municipal Act, 1892. But these provisions do not, I think, apply to the claim presented in this matter. It arose by reason of the exercise by the council of the city of the special powers conferred upon it by those provisions of the Act, 49 Vic. ch. 66 (O.), relating to the Don River Improvements, and not by reason of the exercise of its general powers under the Municipal Act.

And, as already stated, it is a claim for compensation in respect of lands injuriously affected, and not in respect of lands entered upon, taken or used.

The right to compensation in this matter, and the mode of its ascertainment, are provided for by 49 Vic. ch. 66, section 1, subsection 6 (O.). And it is only for the purpose of settling and determining the amount that recourse is to be had to the arbitration clauses of the Municipal Act. Such is the effect of the decision in In re McColl and Toronto (1894), 21 A. R. 256, and the opinion therein expressed by my brother Osler, that lands entered upon, taken or used under the special Act, 49 Vic. ch. 66 (O.), may be treated as lands entered upon, taken or used in the exercise of the general powers possessed by the municipality, for the purpose of giving effect to section 404 of the Municipal Act, 1883, now section 402 of the Consolidated Municipal Act, 1892, is not opposed to this conclusion. These latter sections apply only to claims for lands entered upon, taken or used, and not to claims in respect of lands injuriously affected. There is no occasion in dealing with this claim to refer for any purpose to section 483 of the Municipal Act and its provisions do not affect the proceedings herein.

Upon the other branches of the appeal I agree with the conclusions of the Official Arbitrator. The claim in respect of the right of way over the thirty foot road to the Don is sufficienlty embraced in the notice of claim served upon the city.

That it was granted as an easement appurtenant to the half-acre parcel known as the peak comprised in the deed of the lands conveyed by John Scadding to Francis Collins is undoubted. The right to it was never lost or abandoned, and it existed when the city did the work which resulted in the removal of the stream, and the cutting off of the access by the roadway which the deed gave, and the claimant's land was thereby injuriously affected. There is in the award a statement of the view made by the arbitrator, of the property and its surroundings, including the site of the thirty foot roadway, quite sufficient to satisfy the requirements of the Act in that respect: In re Colquhoun and Berlin (1880), 44 U. C. R. 631.

The amount awarded, through liberal, is not so excessive as to call for interference, and the appeal as to it should be dismissed.

The claimant's cross-appeal with regard to the loss of frontage on the Don also fails. His paper title does not carry the lands to the Don. The description clearly separates them from the stream by a roadway lying between their western boundary and the eastern bank. And the claim of title by possession fails upon the evidence.

It is clear that at the time when the city did the acts complained of there had been no such possession by the claimant or those under whom he claims as would transfer to him as owner the right to the lands between those embraced in the deeds and the bank of the stream.

It is not necessary to decide whether if a possessory title had accrued to him it would have conferred upon him the rights ordinarily possessed by riparian proprietors or any rights over the water to the thread of the stream, or whether the removal of the stream would give him any cause of action or complaint. It may be that in such a case there would be ground for applying the doctrine which was applied in regard to a land-locked parcel of land in Wilkes vs. Greeenway (1890), 6 Times L. R. 449, reversing Vaughan Williams, J., at page 290 of the same volume. See also Ecroyd vs. Coulthard, [1897] 2 ch. 554. But the claimant having failed to make out a title either by deed or possession the Official Arbitrator rightly disallowed the claim.

I see no reason for intering with the disposition of the costs made by the Official Arbitrator.

The appeal and cross-appeal should be dismissed with costs, with the right of set-off.

Appeal and cross-appeal dismissed.

REVISED STATUTES OF ONTARIO, 1897.

CHAPTER 226.

AN ACT RESPECTING THE CONSTRUCTION OF DRAINS.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Short title.

1. This Act may be cited as "The Municipal Drainage Act." 57 Vic. ch. 56, section 1.

INTERPRETATION.

Interpretation.

2 Where the words following occur in this Act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:

"Construction."

1. "Construction" shall mean the original opening, making, excavating or completing of drainage work;

"County Judge."

2. "County Judge," and "Judge" shall mean the senior, junior, or acting Judge of a County Court to whom appeals lie under the provisisions of this Act from a court of revision, but shall not include a Deputy Judge;

"Court of Revision."

3. "Court of revision" shall mean a court of revision constituted under the provisions of this Act, for the trial of complaints respecting assessments for drainage work;

"Initiating Municipality."

4. "Initating Municipality" shall mean the municipality undertaking the construction of any drainage work to which this Act applies;

"Maintenance."

5. "Maintenance" shall mean the preservation and keeping in repair of a drainage work;

Fewster vs. Raleigh, 227; Peltier vs. Dover, 323.

"Municipality."

6. "Municipality" shall not include a county municipality:

"Owner," "actual owner."

7. "Owner" or "actual owner" shall include the executor or administrator of an owner's estate, the guardian of an infant owner, any person entitle to sell and convey the land, an agent of an owner under a general power of attorney, or under a power of attorney empowering him to deal with lands, and a municipal corporation as regards highways under their jurisdiction;

"Referee." 54 Vic. ch. 51.

8. "Referee" shall mean the referee appointed under the provisions of The Drainage Trials Act, 1891, or of this Act, for the trial of disputes under the drainage laws of the Province of Ontario;

"Reference."

9. "Reference" shall mean a reference or transfer to the said referee under the provisions of this Act;

"Relief."

10. "Relief" shall mean relieving from liability for causing water to flow upon and injure lands or roads;

"Sufficient outlet."

11. "Sufficient outlet" shall mean the safe discharge of water at a point where it will do no injury to lands and roads. 57 Vic. ch. 56, section 2.

CONSTRUCTION OF DRAINAGE WORK.

What work may be undertaken on petition.

3.—(1) Upon the petition (*a*) of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shewn by the last revised assessment roll to be the owners of the lands to be benefited in any described area within any township, incorporated village, town or city, to the municipal council thereof, for the draining of the area described in the petition by means of drainage work, that is to say, the construction of a drain or drains, the deepening, straightening, widening, clearing of obstructions, or otherwise improving of any stream, creek or watercourse (*b*) the lowering of the waters of any lake or pond, or by any or all of said means as may be set forth in the petition, the council may procure an engineer or Ontario land surveyor (*c*) to make an examination of the area to be drained, the stream, creek or watercourse to be deepened, straightened, widened, cleared of obstructions or otherwise improved, or the lake or pond, the waters of which are to be lowered, according to the prayer of the petition, and to prepare a report, plans, specifications and estimates of the drainage work, and to make an assessment of the lands and roads within said area to be benefited and of any other lands and roads liable to be assessed as hereinafter provided, stating as nearly as may be, in his opinion, the proportion of the cost of the work to be paid by every road and lot or portion of lot for benefit, and for outlet liability and relief from injuring liability as hereinafter defined (*d*).

Council to order examination and report by engineer.

(*a*) Hiles vs. Ellice, 65, Coulter vs. Elma, 204, Malahide vs. Dereham, 243.

(*b*) Fewster vs. Raleigh, 227.

(*c*) Sage vs. West Oxford and Thornton vs. West Oxford, 122, Mornington vs. Ellice, 257, Tilbury East vs. Romney and Tilbury North vs. Romney, 261, and South Dorchester and Dereham vs. Malahide, 275.

(*d*) Harwich vs. Raleigh and Tilbury East vs. Raleigh, 55, Romney vs. Tilbury North and Tilbury East vs. Tilbury North, 113, Gosfield South vs. Mersea, 268, Caradoc vs. Ekfrid, 295, Gosfield South vs. Gosfield North, 342.

When work requires pumping, embanking, etc.

(2) The provisions of this Act shall apply and extend to every case where the drainage work can only be effectually executed by embanking, pumping or other mechanical operations, but in every such case the municipal council shall not proceed except upon the petition of

at least two-thirds of the owners of lands within the area described according to the preceding sub-section.

When lands may be assessed by engineer for "injuring liability."

(3) If from the lands or roads of any municipality, company or individual, water is by any means caused to flow upon and injure the lands or roads of any other municipality, company or individual, the lands and roads from which the water is so caused to flow may, under all the formalities and powers contained herein, except the petition, be assessed and charged for the construction and maintenance of the drainage work required for relieving the injured lands or roads from such water, and to the extent of the cost of the work necessary for their relief as may be determined by the engineer or surveyor, Court of Revision, County Judge, or referee; and such assessment may be termed "injuring liability;"

Tilbury East vs. Romney and Tilbury North vs. Romney, 261; Gosfield South vs. Mersea, 268.

(*a*) The owners of the lands or roads thus made liable for assessment shall neither count for nor against the petition required by sub-section 1 of this section unless within the area therein described.

When lands may be assessed for "outlet liability."

(4) The lands and roads of any municipality, company or individual using any drainage work as an outlet, or for which when the work is constructed, an improved outlet is thereby provided, either directly or through the medium of any other drainage work or of a swale, ravine, creek or watercourse, (*a*) may, under all the formalities and powers contained herein, except the petition, be assessed and charged for the construction and maintenance of the drainage work so used as an outlet or an improved outlet, and to the extent of the cost of the work necessary for any such outlet, as may be determined by the engineer or surveyor, Court of Revision, County Judge or referee; and such assessment may be termed "outlet liability." (*b*)

(*a*) Desmonde vs. Armstrong, 221.

(*b*) Harwich vs. Raleigh and Tilbury East vs. Raleigh, No. 2, 147, 157; Broughton vs. Grey and Elma, 169, South Dorchester and Dereham vs. Malahide, 275, Caradoc vs. Ekfrid, 295.

(*a*) The owners of the lands and roads thus made liable to asessment shall neither count for nor against the petition required by sub-section 1 of this section, unless within the area therein described.

Basis of assessment for outlet and injuring liability.

(5) The assessment for injuring liability and outlet liability provided for in the two next preceding sub-sections shall be based upon the volume, and shall also have regard to the speed, of the water artificially caused to flow upon the injured lands or into the drainage work from the lands and roads liable for such assessments. 57 Vic. ch. 56, section 3.

Caradoc vs. Ekfrid, 295.

PETITION FOR CONSTRUCTION.

Form of petition.

4. The petition shall be in the form or to the effect of Schedule A. to this Act. 57 Vic. ch. 56, section 4, part.

DUTIES OF ENGINEER OR SURVEYOR.

Oath or engineer or surveyor.

5. Any engineer or surveyor employed or appointed by any municipal council to perform any work under the provisions of this Act, including the assessment of real property for the purpose of drainage work, shall, before entering upon his duty, take and subscribe the following oath (or affirmation) before the clerk of the municipality, a Justice of the Peace or a commissioner for taking affidavits, and shall leave the same with, or send it by registered letter to the clerk of the municipality :

In the matter of the proposed drainage work (or as the case may be) in the township of (name)

I (name in full) of the town of in the county of Engineer (or Surveyor) make oath and say, (or do solemnly declare and affirm):

That I will, to the best of my skill, knowledge, judgment and ability, honestly and faithfully and without fear of, favour to, or prejudice against any owner or owners, or other person or persons whomsoever, perform the duty assigned to me in connection with the above work and will make a true report thereon.

Sworn (or solemnly declared and affirmed)
before me at the of
in the county of this
day of A. D. 189

A Commissioner, etc. (or Township Clerk, or J. P.

57 Vic. ch. 56, section 5.

Assessment of whole lot or sub-division.

6. The engineer or surveyor, in assessing the lands to be benefited or otherwise liable for assessment under this Act, need not confine his assessment to the part of the lot actually affected, but may place such assessment on the quarter, half or whole lot containing the part affected as the case may be, if the owner of such part is also the owner of such lot or other said sub-division. 57 Vic. ch. 56, section 6.

Gosfield South vs. Mersea, 268; South Dorchester and Dereham vs. Malahide, 275, Gosfield South vs. Gosfield North, 342.

Assessment may be shown in money.

7. The assessment upon any lands or roads for any drainage work may be shewn by the engineer or surveyor placing sums of money opposite the lands or roads, and it shall not be necessary to insert the fractional part of the whole cost to be borne by the lands or roads. 57 Vic. ch. 56, section 7.

Plans, specifications and estimates.

8. The engineer or surveyor, when required by the council, shall make plans, specifications and detailed estimates of the drainage work to be constructed and charge the same to the work as part of its cost. 57 Vic. ch. 56, section 8.

Bridges and culverts on highways.

9.—(1) The engineer or surveyor shall in his report and estimates provide for the construction, enlargement or other improvement of any bridges or culverts throughout the course of the drainage work rendered necessary by such work crossing any public highway or the travelled portion thereof; and he shall in his assessment apportion the cost of bridges and culverts between the drainage work and the municipality or municipalities having jurisdiction over such public highway as to him may seem just.

Bridges between highways and private lands.

(2) The engineer or surveyor shall also in his report and estimates provide for the construction or enlargement of bridges required to afford access from the lands of owners to the travelled portion of any public highway, and he shall include the cost of the construction or enlargement of such bridges in his assessment for the construction of the drainage work, and they shall, for the purposes of construction and maintenance, be deemed part of the drainage work.

Farm bridges.

(3) The engineer or surveyor shall in the same manner provide for the construction or enlargement of bridges rendered necessary by the drainage work upon the lands

of any owner, and shall fix the value of the construction or enlargement thereof to be paid to the respective owners entitled thereto, but the land assessed for the drainage work shall not nor shall any municipal corporation be liable for keeping such bridges in repair.

Allowing for private ditches, etc.

(4) The engineer or surveyor shall likewise in his report estimate and allow in money to any person, company or corporation the value to the drainage work of any private ditch or drain, or of any ditch constructed under any Act respecting ditches or watercourses which may be incorporated in whole or in part into such drainage work or used therewith.

Euphemia vs. Brooke, 358.

Disposal of material taken from drainage work.

(5) The engineer or surveyor shall further in his report determine in what manner the material taken from any drainage work, either in the construction or repair thereof, shall be disposed of, and the amount to be paid to the respective persons entitled for damages to lands and crops (if any) occasioned thereby, and shall include such sums in his estimates of the cost of the drainage work or the repairs.

Wilkie vs. Dutton, 132.

Appeal to referee.

(6) Any owner of lands affected by the drainage work, if dissatisfied with the report of the engineer in respect of any of the provisions of the next preceding sub-section, may appeal therefrom to the referee, and in every such case the notice of appeal shall be served upon the head of the council of the initiating municipality and the clerk thereof within 10 days after the adoption of the engineer's report by the council, and the further proceedings on such an appeal shall be as hereinafter provided in other cases of appeals to the referee. The referee, on an appeal under this sub-section, may make such order as to him seems just, and his decision shall be final. 57 Vic. ch. 56, section 9.

Thackery vs. Raleigh, 328.

Notice of assessment.

(7) Forthwith upon the filing of the engineer's report with the clerk of the municipality, the clerk shall by letter or postal card, notify the parties assessed of such assessment, and of the amount thereof. 59 Vic. ch. 66, section 1.

Spreading earth and removing timber on road allowances.

10. When a drainage work is to be constructed on or along a road allowance the engineer or surveyor shall, upon the application of the municipal council controlling such road allowance, place in his estimate of the cost of the work a sum sufficient to close chop, or grub and clear not less than 12 feet of the middle of the road allowance (if required) and to spread thereon the earth to be taken from the work, and shall charge the cost thereof to the municipality, together with its proportion of the cost of the drainage work. 57 Vic. ch. 56, section 10.

COVERING DRAINAGE WORK.

Report on covering drains.

11. Where the engineer or surveyor reports in favour of covering the whole or any part of a drainage work constructed under this Act, he shall determine and state in his report the size and capacity thereof and also the material to be used in its construction, and all the provisions of this Act shall apply thereto in the same manner and to the same extent as to an uncovered or open drainage work, but in no case shall the improvement of a creek, stream or natural watercourse be made into a covered drainage work unless it provides capacity for all the surface water from lands and roads draining naturally towards and into it, as well as for all the waters from all the lands assessed for the drainage work. 57 Vic. ch. 56, section 11.

DISTINGUISHING ASSESSMENTS.

Engineer to distinguish assessments.

12. The engineer or surveyor shall in his report, assess for benefit, outlet liability and injuring liability, and shall also in his assessment schedule, insert the sum charged for each, opposite the lands and roads liable therefor respectively, and in seperate columns. 57 Vic. ch. 56, section 12.

Harwich vs. Raleigh and Tilbury East vs. Raleigh, 55, Romney vs. Tilbury North and Tilbury East vs. Tilbury North, 113.

Prior assessments to be taken into consideration.

13. In fixing the sum to be assessed upon any lands or roads, the engineer or surveyor may take into consideration any prior assessment on the same lands or roads for drainage work and repairs and make such allowance or deduction therefor as may seem just, and he shall, in his report, state the allowance made by him in respect thereof. 57 Vic. ch. 56, section 13.

South Dorchester and Dereham vs. Malahide, 275.

Engineer to report as to whether or not other municipalities are interested and how.

14 The engineer or surveyor aforesaid shall determine and report to the council of the municipality by which he was employed, whether the drainage work shall be constructed and maintained solely at the expense of such municipality and the lands assessed therein, or at the expense of all the municipalities interested, and the lands therein assessed, and in what proportions. 57 Vic. ch. 56, section 14.

Caradoc vs. Ekfrid, 295.

FILING REPORT.

Engineer to file report.

15 As soon as the engineer or surveyor has completed his report, plans, specifications, assessments and estimates, he shall file the same with the clerk of the municipality by which he was employed. 57 Vic. ch. 56, section 15.

NOTICE TO PERSONS ASSESSED.

Clerk to notify parties assessed.

16. The clerk of the municipality shall notify all parties assessed within the area described in the petition, by mailing to the owner of every parcel of land assessed therein for the drainage work, a circular or postal card upon which shall be stated the date of filing the report, the name or other general designation of the drainage work, its estimated cost, the owner's lands and their assessment, distinguishing benefit, outlet liability and injuring liability, and the date of the council meeting at which the report will be read and considered, which shall be not less than 10 days after the mailing of the last of such circulars or postal cards, and the determination of the council as to the sufficiency of notice or otherwise shall be final and conclusive. 57 Vic. ch. 56, section 16.

CONSIDERATION OF REPORT.

Proceedings at meeting for consideration of report.

17. The municipal council shall at the meeting mentioned in such notice, immediately after dealing with the minutes of its previous meeting, cause the report to be read by the clerk to all the ratepayers in attendance, and shall give an opportunity to any person who has signed the petition to withdraw from it by putting his withdrawal in writing, signing the same and filing it with the clerk, and shall also give those present who have not signed the petition an opportunity so to do; and should any of the roads of the municipality be assessed, the council may by resolution authorize the head or acting head of the municipality to sign the petition for the municipality, and such signature shall count as that of one person benefited in favour of the petition. 57 Vic. ch. 56, section 17.

EFFECT OF WITHDRAWAL FROM PETITION.

Withdrawing from petition.

18. Should the petition at the close of the said meeting of the council contain the names of the majority of the persons shewn as aforesaid to be owners benefited within the area described, the council may proceed to adopt the report (*a*) and pass a by-law authorizing the work, and no person having signed the petition shall after the adopting of the report be permitted to withdraw; but if after striking out the names of the persons withdrawing, the names remaining, including the names, if any, added as provided by section 17 of this Act, do not represent a sufficient number of owners within the area described to comply with the provisions of section 3 of this Act, then the persons who have withdrawn from the petition shall on their respective assessments in the report with one hundred per centum added thereto, together with the other original petitioners on their respective assessments in the report, be, *pro rata*, chargeable with and liable to the municipality for the expenses incurred by said municipality in connection with such petition and report, and the sum with which each of such owners is chargeable shall be entered upon the collector's roll for such municipality against the lands of the person liable, and shall be collected in the same manner as taxes placed on the roll for collection. 57 Vic. ch. 56, section 18.

(*a*) South Dorchester and Dereham vs. Malahide, 275.

BY-LAWS.

What by-laws may be passed by council.

19. Should the council of the municipality in which the lands and roads described in the petition lie, be of the opinion that the drainage work proposed in said petition, or a portion thereof, would be desirable, the council may pass a by-law or by-laws :

Doing Work and Borrowing Money.

1. For providing for the proposed drainage work or a portion thereof being done as the case may be.

Providing for work.

2. For borrowing on the credit of the municipality, the funds necessary for the work, or the portion to be contributed by the initiating municipality when the same is to be constructed at the expense of two or more municipalities, and for issuing the debentures of the municipality to the requisite amount, including the costs of appeal, if any, and any amount payable in respect of work on railway lands, in sums of not less than $50 each, and payable within 20 years from date, (except in case of pumping and embanking drainage work, the debentures for which shall be payable within 30 years from date,) with interest at a rate of not less than 4 per centum per annum.

Borrowing funds.

Assessing Lands and Roads.

3. For assessing and levying, in the same manner as taxes are levied, upon the lands and roads (including roads held by joint stock companies, railway companies, private individuals, counties or county councils) to be benefited by the work and otherwise liable for assessment under this Act in the municipality passing the by-law, a special rate sufficient for the payment of the principal and interest of the debentures, and for so assessing, levying and collecting the same as other taxes are assessed, levied and collected, in proportion as nearly as may be, to their respective liability to contribute.

Assessing lands and roads.

4. For regulating the times and manner in which the assessments shall be paid.

Fixing time for paying assessment.

Determining Assessment Liability.

5. For determining what lands and roads will be benefited by or otherwise rendered liable for assessment for the drainage work, and the proportion in which the assessment should be made, subject in every case of complaint by the owner or any person interested in any lands

Determining property to be benefited.

or roads to appeal as hereinafter provided. 57 Vic. ch. 56, section 19.

FORM OF BY-LAW.

Form of by-law.

20. The by-law shall, varying with the circumstances, be in the form or to the effect of the form given in Schedule B. to this Act. 57 Vic. ch. 56, section 20.

PUBLICATION OF BY-LAW.

Publication of by-law and notice of sitting of Court of Revision.

21.—(1) Before the final passing of the by-law, it shall be published once in every week for four consecutive weeks in such newspaper published either within the municipality or in the county town, or in a newspaper published in an adjoining or neighbouring municipality, as the council may by resolution designate, with a notice of the time and place of holding the Court of Revision, and also a notice that any one intending to apply to have the by-law or any part thereof quashed, must, not later than 10 days after the final passing thereof, serve a notice in writing upon the reeve or other head officer and the clerk of the municipality, of his intention to make application for that purpose to the High Court of Justice during the six weeks next ensuing the final passing of the by-law.

Newspaper to be sent to each person assessed.

(2) The clerk shall furnish the publisher of the newspaper with the names and post office addresses of all persons within the municipality whose lands are asssesed for the drainage work, and the publisher shall mail or cause to be mailed to each owner, to such post office address, the first two issues of the newspaper containing the by-law, and the publisher or person mailing such newspapers shall make a statutory declaration of such mailing, and file the same with the clerk of the municipality publishing the by-law. 57 Vic. ch. 56, section 21.

Service in lieu of publication.

22. The municipal council may, at its option, instead of publishing in a newspaper, by resolution direct that a copy of the by-law, including said notice of the sitting of the Court of Revision and notice as to proceedings to quash, written or printed, or partly written and partly printed, be served upon each of the assessed owners, or their lessees or the occupant of their lands, or the agent of such owner, or be left on the lands, if occupied, with some grown up person; and if the lands are unoccupied and the owner or his agent does not reside within the municipality, the council may cause a copy of the by-law and notices to be sent by registered letter to the last known address of such owner; and a statutory declaration shall be made by the person effecting any service or mailing any such registered letter, shewing the manner and date of effecting the service or mailing the registered letter; and the said declaration shall be filed by the person making the same, with the clerk of the municipality passing the by-law. 57 Vic. ch. 56, section 22.

If by-law or part thereof not quashed within time limited.

23. In case no notice of the intention to make application to quash a by-law is served within the time limited for that purpose in the notice attached to the by-law, or where the notice is served, then if the application is not made or is made unsuccessfully in whole or in part, the by-law, or so much thereof as is not quashed, so far as the same ordains, prescribes or directs anything within the proper competence of the council to ordain, prescribe or direct, shall, notwithstanding any want of form or substance, either in the by-law itself or in the time or manner of passing the same, be a valid by-law. 57 Vic. ch. 56, section 23.

COURT OF REVISION.

Court of Revision where council consists of five or less than five.

24. If the council of the municipality consists of not more than five members, such five members shall be a Court for the revision of the assessments for the drainage work. 57 Vic. ch. 56, section 24.

Where council contains more than five members.

25. If the council consists of more than five members, it shall appoint five of its members to constitute the the Court of Revision. 57 Vic. ch. 56, section 25.

Oath of member of court.

26. Every member of the Court of Revision shall, before entering upon his duties, take and subscribe before the clerk of the municipality the following oath, or affirmation in cases where by law affirmation is allowed:

I,   , do solemnly swear (or affirm,) that I will, to the best of my judgment and ability, and without fear, favour, or partiality, honestly decide the appeals to the Court of revision from the assessments appearing in a by-law (here set out title of by-law), which may be brought before me for trial as a member of said Court.

57 Vic. ch. 56, section 26.

Quorum.

27. Three members of the Court of Revision shall constitute a quorum, and the majority of a quorum may decide all questions before the Court. But no member of the Court shall act as a member thereof while any appeal is being heard respecting any lands in which he is directly or indirectly interested, save and except roads and lands under the jurisdiction of the municipal council. 57 Vic. ch. 56, section 27.

Members not to sit on appeals when interested.

Clerk of Court.

28—(1) The clerk of the municipality shall be the clerk of the Court, and shall record the proceedings thereof and shall issue summonses to witnesses to attend any sittings of the Court.

Form of summons.

(2) The summons to any witness issued by the clerk under this section may be in the following form :

You are hereby required to attend and give evidence before the Court of Revision at   on the   day of   189   , in the matter of the drainage work (naming or describing work) and of the following appeal.

Appellant (name of).

A. B.

Clerk of the township of

Witness fees.

(3) The fees payable to any witness on an appeal to the Court of Revision shall be according to the scale of witness fees in the Division Court. 57 Vic. ch. 56, section 28.

Meeting and adjournments.

29. At the time appointed, the Court shall meet and try all complaints in regard to owners wrongfully assessed or omitted from assessment, or assessed at too high or too low an amount, and the Court may adjourn from time to time as required. 57 Vic. ch. 56, section 29.

Administering oaths and summoning witnesses.

30. The evidence of witnesses shall be taken on oath and any member of the Court may administer an oath to any party or witness. 57 Vic. ch. 56, section 30.

Witness failing to attend when summoned.

31. If any person summoned to attend the Court of Revision as a witness fails, without good and sufficient reason, to attend (having been tendered the proper witness fees) he shall incur a penalty of $20 to be recovered with costs, by and to the use of any person suing for the same, either by suit in the proper Division Court, or in any way in which penalties incurred under any by-law of the municipality may be recovered. 57 Vic. ch. 56, section 31.

PROCEDURE FOR TRIAL OF COMPLAINTS.

Who may give notice of appeal.

32 Any owner of land, or, where roads in the municipality are assessed any ratepayer, complaining of overcharge in the assessment of his own land, or of any roads of the municipality, or of the undercharge of any other lands, or of any road in the municipality, or that lands or roads within the area described in the petition which should have been assessed for benefit, have been wrongly omitted from the assessment, or that lands or roads which should have been assessed for outlet liability or injuring liability have been wrongly omitted, may personally, or by his agent, give notice in writing to the clerk of the municipality, that he considers himself aggrieved for any or all of the causes aforesaid. 57 Vic. ch. 56, section 32.

Caradoc vs. Ekfrid, 295; Thackery vs. Raleigh, 328.

Time for holding Court of Revision.

33. The trial of complaints shall be had in the first instance by and before the Court of Revision of the municipality in which the lands and roads assessed are situate, and the first sitting of such Court shall be held pursuant to notice on some day not earlier than 20 nor later than 30 days from the day on which the by-law was first published, or from the date of completing the services or mailing of a printed copy of the by-law, as the case may be; notice of the first sitting of the Court shall be published or served with the by-law, but the Court may adjourn from time to time as occasion may require; and all notices of appeal shall be served on the clerk of the municipality at least 10 days prior to the first sitting of the Court; but the Court may, though such notice of appeal be not given, by resolution passed at its first sit-

Notice.

ting, allow an appeal to be heard on such conditions as to giving notice to all persons interested or otherwise as may be just. 57 Vic. ch. 56, section 33.

Form of notice of complaint.

34. If any complaint is made on the ground that any lands or roads have been assessed too low or wrongly omitted from assessment by the engineer or surveyor, the clerk shall give notice of the complaint and the time of the trial to the owner or person interested in such lands or in the case of roads to the reeve or other head of the municipality; which notice shall be in the form following or to the like effect:

> Take notice that you are required to attend before the Court of Revision at on the day of 189 , in the matter of the following appeal:—
>
> "Appellant (name of).
>
> Subject—That you are assessed too low (or as the case may be) for drainage work (naming the drainage work).
>
> "To J. K.
>
> (Signed,) X. Y.
> Clerk."

57 Vic. ch. 56, section 34.

Serving notice.

35. The notice in the preceding section mentioned shall be sent by letter addressed to such person and to his post office address or to his last known address, at least seven days before the first sitting of the Court for the trial of complaints. 57 Vic. ch. 56, section 35.

Entry of appeals.

36. The clerk of the Court shall enter the appeals on a list in the order in which they are received by him, and the Court shall proceed with the appeals in the order, as nearly as may be, in which they are so entered, but may grant an adjournment or postponement of any appeal. 57 Vic. ch. 56, section 36.

Form of list of appeals.

37. Such list may be in the following form:

Appeals from the assessment of the engineer on drainage work, to be heard at the Court of Revision to be held at commencing at 10 o'clock in the forenoon on the day of 189 /

Appellant	Omitted or wrongfully assessed.	Matter complained of.
A. B.	Self	Overcharged for benefit.
C. D.	Self	Overcharged for outlet.
E. F.	Self	Overcharge for injuring.
G. H.	J. R	Undercharge for benefit.
L. M	N. O	Undercharge for outlet.
P. Q.	R. S	Undercharge injuring.
T. U	V. W	Wrongly omitted.
X. Y.	Self	Wrongly assesssed.
etc.	etc.	etc.

57 Vic. ch. 56, section 37.

Court of Revision may take into consideration prior assessments.

38. In case any lands or roads have been assessed for the construction or repair of a drainage work, and the same property is afterwards assessed by the engineer or surveyor for the construction or repair of any other drainage work, the Court of Revision or Judge may take into consideration any prior assessment for drainage work on the same property and give such effect thereto as may be just. 57 Vic. ch. 56, section 38.

South Dorchester and Dereham vs. Malahide, 275.

Adjournment of Court to notify persons affected by alteration of assessment.

39. When the ground of complaint is, that lands or roads are assessed too high, and the evidence adduced satisfies the Court of Revision or Judge that the assessments on such lands or roads should be reduced, but no evidence is given of other lands or roads assessed too low or omitted, the Court or Judge shall adjourn the hearing of such appeal, for a time sufficient to enable the clerk to notify by postal card or letter all persons affected of the date to which such hearing is adjourned; the clerk shall so notify all persons interested, and unless they appear and show cause against the reduction of the assessment appealed against or the increase of their own, the Court or Judge may dispose of the matter of appeal in such manner as may be just, and the sum by which the assessment appealed against is reduced (if any) may be distributed *pro rata* over the assessments of its own class or otherwise so as to do justice to all parties. 57 Vic. ch. 56, section 39.

Notice of result of appeal.

40. The clerk shall by registered letter immediately after the close of the Court, notify all appellants of the result of their appeals and also of the date of the closing of the Court of Revision. 57 Vic. ch. 56, section 40.

APPEALS FROM COURT OF REVISION.

Appeal to County Judge.

41. An appeal from the Court of Revision shall lie to the County Judge of the county within which the municipality is situate, and not only against a decision of the Court of Revision but also against the omission, neglect or refusal of said Court to hear or decide an appeal. 57 Vic. ch. 56, section 41.

Time for giving notice of appeal.

42. The person appealing shall, in person or by solicitor or agent, file with the clerk of the municipality within ten days after the date of the closing of the Court of Revision, a written notice of his intention to appeal to the Judge. 57 Vic. ch. 56, section 42.

Clerk to notify Judge and Judge to fix time and place for hearing appeals.

43. The clerk shall immediately after the time limited for filing appeals, forward a list of the same to the Judge, who shall then notify the clerk of the day he appoints for the hearing thereof and shall fix the place for holding such hearing at the town hall or other place of meeting of the council of the municipality from the Court of Revision of which the appeal is made unless the Judge for the greater convenience of the parties and to save expense fixes some place for the hearing. 57 Vic. ch. 56, section 43.

Notice to persons appealed against.

44. The clerk shall thereupon give notice to all the parties appealed against, in the same manner as is provided for giving notice on a complaint to the Court of Revision, but in the event of failure by the clerk to give the required notice, or to have the same given within proper time, the Judge may direct notice to be given for some subsequent day upon which he may try the appeals. 57 Vic. ch. 56, section 44.

Time for giving judgment.

45. At the Court so holden the Judge shall hear the appeals and may adjourn the hearing from time to time, but shall deliver judgment not later than 30 days after the hearing. 57 Vic. ch. 56, section 44.

Clerk of Court.

46.—(1) The clerk of the municipality shall be the clerk of such Court, and shall record the proceedings thereof and shall have the like powers as the clerk of a Division Court as to the issuing of subpœnas to witnesses upon the application of any party to the proceedings or upon an order of the Judge for the attendance of any person as a witness before him.

Witness fees.

(2) The fees to be allowed to witnesses upon an appeal to the Judge under this Act shall be those allowed to witnesses in an action in the Division Court. 57 Vic. ch. 56, section 46.

Powers of Judge on appeal.

47. In all proceedings before the County Judge as aforesaid, he shall possess all such powers for compelling the attendance of and for the examination on oath of all parties, and all other persons whatsoever, and for the production of books, papers and documents, and for the enforcement of his orders, decisions and judgments as belong to or might be exercised by him in the Division Court or County Court. 57 Vic. ch. 56, section 47.

Fees and Costs of Appeals.

Apportionment of costs—enforcing payment.

48. The costs of any proceeding before the Court of Revision, or before the Judge as aforesaid, shall be paid or apportioned between the parties in such manner as the Court or Judge thinks fit, and the same shall be enforced when ordered by the Court of Revision by a distress warrant under the hand of the clerk and the corporate seal of the municipality, and when ordered by the Judge, by execution to be issued as the Judge may direct, either from the County Court or any Division Court within the county in which the municipality is situate. 57 Vic. ch. 56, section 48.

What costs may be awarded—taxation of.

49. The costs chargeable or to be awarded in any case may be the costs of witnesses and of procuring their attendance and none other, and the same shall be taxed according to the allowance in the Division Court for such costs, and in cases where execution issues, the costs thereof as in the like Court, and of enforcing the same may also be collected thereunder. 57 Vic. ch. 56, section 49.

Fees and expenses of Judge.

50. The Judge shall be entitled to receive from the municipality as his expenses for holding court in any place in the municipality, other than the County Town, for the hearing of appeals from the Court of Revision, the sum of five dollars per day and disbursements necessarily incurred. 57 Vic. ch. 56, section 50.

Decision to be final.

51. The decision of the County Judge as aforesaid shall be final and conclusive. 57 Vic. ch. 56, section 51.

Clerk to alter assessments, comformably with result of appeals.

52. Any change in the assessment of the engineer or surveyor made by the Court of Revision or Judge in appeal therefrom shall be given effect to by the clerk of the municipality altering the assessments and other parts of the schedule to comply therewith, and the by-law shall before the final passing thereof be amended to carry out any changes so made by the Court of Revision or Judge. 57 Vic. ch. 56, section 52.

ISSUE OF DEBENTURES.

Debentures may include principal and interest in one sum.

53. Any municipal council issuing debentures under this Act, may include the interest on the debentures in the amount payable, in lieu of the interest being payable annually in respect of each debenture, and any by-law authorizing the issue of debentures for a certain amount and interest, shall be taken to authorize the issue of debentures, in accordance with this section, to the same amount with interest added. 57 Vic. ch. 56, section 53.

Payment of assessment before debentures issue.

54. Any owner of lands or roads, including the municipality, assessed for the work, may pay the amount of the assessment against him or them, less the interest, at any time before the debentures are issued, in which case the amount of debentures shall be proportionately reduced. 57 Vic. ch. 56, section 54.

Informalities not to invalidate debentures.

55. No debentures issued or to be issued under any by-law for the construction or maintenance of any drainage work, shall be held to be invalid on account of the same not being expressed in strict accordance with such by-law, provided that the debentures are for sums in the aggregate not exceeding the amount authorized by the by-law. 57 Vic. ch. 56, section 55.

When debentures to be valid and binding to extent of amount advanced.

56. Any debentures issued and sold to provide any sum of money for the construction or repairs of any drainage work, shall be good in the hands of the purchaser, and be binding upon the corporation issuing them, to the extent of the money actually advanced on the security, and interest thereon, according to provisions of same, provided no application to quash be made within six weeks from the final passing of the by-law authorizing the issue thereof notwithstanding the by-law be afterwards quashed or declared illegal in any proceedings. 57 Vic. ch. 56, section 56.

WORK NOT CONTINUED IN ANOTHER MUNICIPALITY.

Drainage work not continued into another municipality.

57.—(1) Where any drainage work is not continued into any other than the initiating municipality, any lands or roads in the initiating municipality or in any other municipality, or roads between two or more municipalities, which will, in the opinion of the engineer or surveyor, be benefited by such work or furnished with an improved outlet or relieved from liability for causing water to flow upon and injure lands or roads, may be assessed for such proportion of the cost of the work as to the engineer or surveyor seems just.

(2) A drainage work shall not be deemed to be continued into a municipality other than the initiating municipality, merely by reason of such drainage work or some part thereof being constructed on a road allowance forming the boundary line between two or more municipalities. 57 Vic. ch. 56, section 57.

Construction of drainage work on road allowance.

58. Where it is necessary to construct any drainage work or any part thereof on a road allowance used as a boundary line between two or more municipalities, the municipal council or councils of the adjoining municipalities may, on the petition of the majority of owners in the area therein described and within its own limits, authorize the same to be constructed on the allowance for road between the municipalities, and may make the road as provided by section 10, and the engineer or surveyor may assess and charge the lands and roads benefited or otherwise liable to assessment in the adjoining municipality or municipalities, as well as the road allowance, with such proportion of the cost of constructing the said work as he may deem just. 57 Vic. ch. 56, section 58.

WORK CONTINUED INTO ANOTHER MUNICIPALITY.

Continuing work beyond the limits of municipality.

59. Where it is required to continue any drainage work beyond the limits of the municipality, the engineer or surveyor employed by the council of such municipality may continue the survey and levels on or along or across any allowance for road or other boundary between any two or more municipalities, and from any such road allowance or other boundary into or through any municipality until he reaches a sufficient outlet; and in every such case he may assess and charge regardless of municipal boundaries, all lands and roads to be affected by benefit, outlet or relief, with such proportion of the cost of the work as to him may seem just; and in his report thereon he shall estimate separately the cost of the work within each municipality and upon the road allowances or other boundaries. 57 Vic. ch. 56, section 59.

Charging neighbouring municipality when work does not enter same.

60. Whenever any lands or roads in or under the jurisdiction of any adjoining or neighboring municipality, other than the municipalities into or through which the drainage work passes, are, in the opinion of the engineer or surveyor of the initiating or other municipality doing the work or part thereof, benefited by the drainage work or provided with an improved outlet or relieved from liability for causing water to flow upon and injure lands or roads, he may assess and charge the same as is provided in the next preceding section. 57 Vic. ch. 56, section 60.

Harwich vs. Raleigh, Tilbury East vs. Raleigh, No. 2, 147-157; Broughton vs. Grey and Elma, 169; Gosfield South vs. Mersea, 268; Gosfield South vs. Gosfield North, 342.

SETTLING ASSESSMENTS, ETC. BETWEEN MUNICIPALITIES.

Council of initiating municipality to serve other municipalities to be affected.

61. The council of any initiating municipality shall serve the head (*a*) of the municipality or municipalities into or through which the work is to be continued, or whose lands or roads are assessed without the drainage work being continued into it, with a copy of the report, plans, specifications, assessments and estimates of the engineer or surveyor on the proposed work, and unless the same are appealed from as hereinafter provided, they shall be binding on each and every corporation whose council is so served, and the council of the initiating municipality shall be entitled, in the event of no appeal, to proceed with the by-law, and authorize and construct or procure the construction of the whole drainage work in accordance therewith. 57 Vic. ch. 56, section 61.

(*a*) Malahide vs. Dereham, 243.

Municipality served to raise and pay over its proportion of cost.

62. The council of the municipality so served, shall in the same manner as nearly as may be, and with such other provisions as would have been proper if a majority of the owners of the lands to be taxed had petitioned as provided in section 3 of this Act, pass a by-law or by-laws to raise, and shall raise and pay over to the treasurer of the initiating municipality within four months from such service, the sum that may be named in the report as its proportion of the cost of the drainage work, or, in the event of an appeal from the report, the sum that may be determined by the Referee or Court of Appeal, and such council shall hold the Court of Revision for the adjustment of assessments upon its own ratepayers in the manner hereinbefore provided. 57 Vic. ch. 56, section 62.

Broughton vs. Grey and Elma, 169.

Appeal to referee from report of engineer.

63.—(1) The council of any municipality served as provided by section 61 may, within thirty days after such service upon its head, appeal to the Referee from the report, plans, specifications, assessments and estimates of the engineer or surveyor, by serving the head of the council from whom they received the copy, and also the head of the council of any other municipality assessed by the engineer or surveyor with a written notice of appeal, setting forth therein the reasons for such appeal.

Malahide vs. Dereham, 243; Tilbury East vs. Romney, Tilbury North vs. Romney, 261.

Grounds of appeal.

(2) The reasons of appeal which shall be set out in such notice may be the following or any of them :—

(*a*) Where the assessment against the appealing municipality exceeds $1,000, or exceeds the estimated cost of the work in the initiating municipality,—

1. That the scheme of the drainage work as it affects the appealing municipality should be abandoned or modified, on grounds to be stated;
2. That such scheme does not provide for a sufficient outlet ;
3. That the course of the drainage work, or any part thereof, should be altered ;
4. That the drainage work should be carried to an outlet in the initiating municipality or elsewhere.

Malahide vs. Dereham, 243, Gosfield South vs. Mersea, 268, Raleigh vs. Harwich, 348.

(*b*) In any case not otherwise provided for,—

1. That a petition has been received by the council of the appealing municipality, as provided by section 3 of this Act, from the majority of the owners within the area described in the petition, praying for the enlargement by the appealing municipality of any part of the drainage work lying within its limits, and thence to an outlet, and that the council is of opinion that such enlargement is desirable to afford drainage facilities for the area described in the petition ;
2. That such appealing municipality objects to paying over its proportion of the cost of the work to the treasurer of the initiating municipality ;
3. That the initiating municipality should not be permitted to do the work within the limits of the appealing municipality ;
4. That the assessment against lands and roads within the limits of the appealing municipality and roads under its jurisdiction is illegal, unjust or excessive. 57 Vic. ch. 56, section 63.

Powers of referee on appeal.

64.—(1) Upon an appeal under the preceding section the referee shall hear and adjudicate upon all questions raised by the notice of appeal, and the reasons for such appeal stated therein as they may affect any municipality assessed for the drainage work ; and he may give to any municipality through or into which the proposed work will be continued, leave to enlarge the same, pursuant to petition in that behalf and according to the report, plans, specifications, assessments and estimates of an engineer appointed by the referee for that purpose, and may make such order in the premises and as to costs already incurred, and as to costs of the appeal, as may seem just.

Appeal to Court of Appeal.

(2) The order of the referee upon such appeal shall be subject to appeal to the Court of Appeal, as in other cases, and the decision of the Court of Appeal shall be final and conclusive as to all corporations affected thereby.

(3) The council of the initiating municipality may, by resolution passed within 30 days after the decision of the referee on the appeal to him or in case of an appeal therefrom after the hearing and determination thereof, abandon the proposed drainage work, subject to such terms as to costs and otherwise as to the referee or the Court of Appeal may seem just. 57 Vic. ch. 56, section 64.

Abandonment of work by initiating municipality.

ASSESSMENT FOR CUT OFF.

65. Any lands or roads from which the flow of surface water is by any drainage work cut off, may be assessed and charged for same by the engineer or surveyor of the municipality doing the work; and such assessment shall be classified and scheduled as benefit. 57 Vic. ch. 56, section 65.

Benefit by cut off.

AMENDING BY-LAW.

66.—(1) Any by-law heretofore passed or which may be hereafter passed by the council of any municipality for the assessment upon the lands and roads liable to contribute for any drainage work and which has been acted upon by the doing of the work in whole or in part, but does not provide sufficient funds to complete the drainage work or the municipality's share of the cost thereof, or does not provide sufficient funds for the redemption of the debentures authorized to be issued thereunder as they become payable, may from time to time be amended by the council, and further debentures may be issued under the amending by-law in order to fully carry out the intention of the original by-law.

Amendment of by-law when insufficient funds provided.

(2) Where in any such case lands and roads in another municipality are assessed for the drainage work, the council of the initiating municipality shall procure an engineer or surveyor to make an examination of the work and to report upon it with an estimate of the cost of completion for which sufficient funds have not been provided under the original by-law, and shall serve the heads of the other municipalities as in the case of the original report, plans, specifications, assessments and estimates; and the council of any municipality so served shall

When lands and roads in another municipality assessable.

have the same right of appeal to the Referee as to the improper expenditure or illegal or other application of the drainage money already raised and shall be subject to the same duty as to raising and paying over its share of the money to be raised, as, in the case of the original by-law, is provided by sections 62 and 63.

Amendment of by-law which provides more than sufficient funds and distribution of surplus.

(3) Any by-law already passed or hereafter passed for the assessment upon the lands and roads liable to contribute for any drainage work and acted upon by the completion of the work, which provides more than sufficient funds for the completion of or proper contribution towards the work or for the redemption of the debentures authorized to be issued thereunder as they become payable shall be amended, and if lands and roads in any other municipality are assessed for the drainage work the surplus money shall be divided *pro rata* among the contributing municipalities, and every such surplus until wholly paid out shall be applied by the council of the municipality *pro rata* according to the assessment in payment of the rates imposed by it for the work in each and every year after the completion of the work. 57 Vic. ch. 56, section 66.

Amendment of by-law not providing sufficient funds.

Issuing debentures for completion of county drainage works commenced before 57 Vic. ch. 56.

(4) Any by-law passed prior to the 1st day of June, 1894, by the council of any county or union of counties for the assessment of the cost of any drainage work upon the lands and roads liable to contribute therefor which has been acted upon by the doing of the work in whole or in part and which does not provide sufficient funds to complete the drainage work, or the share of the said county or union of counties of the costs thereof, or does not provide sufficient funds for the redemption of the debentures issued under such by-law, as they became payable, may from time to time be amended by the council and further debentures may be issued under the amending by-law in order to fully carry out the intention of the original by-law; provided that every such drainage work shall, when fully completed, be maintained as provided in section 70 of this Act. 58 Vic. ch. 55, section 1.

Publication of amending by-laws.

67. It shall be in the discretion of the council whether an amending by-law passed under any of the pro-

Rev. Stat. ch. 40.

visions of the preceeding section shall be published or not, and the provisions of The Municipal Drainage Aid Act shall apply to any debentures issued under the authority of the said section, which have heretofore been or may hereafter be purchased by direction of the Lieutenant-Governer in Council. 57 Vic. ch. 56, section 67: 58 Vic. ch. 55, section 2.

MAINTENANCE OF DRAINAGE WORK.

Maintenance of work not continued into another municipality.

68. Any drainage work which has been heretofore constructed under a by-law of any municipality passed in pursuance of any Act relating to the construction of drainage work by local assessment, or which is hereafter constructed by a municipality under the provisions of this Act, and which is not continued into any other municipality, shall after the completion thereof be maintained (*a*) by the initiating municipality,

(*a*) If no lands or roads in any other municipality are assessed for the construction thereof, then at the expense of the lands and roads in the initiating municipality in any way assessed for such construction, according to the assessment of the engineer or surveyor in his report and assessment for the original construction of such drainage work, or,

(*b*) If lands or roads in any other municipality, or roads between two or more municipalities are in any way assessed for the construction of such drainage work, then at the expense of all the lands and roads in any way assessed for such construction in the municipalities affected, and in the proportion determined by such report and assessment, or in appeal therefrom by the award of arbitrators or order of the Referee,—

Unless or until such assessment or proportion as the case may be, is varied or otherwise determined from time to time by the report and assessment of an engineer or surveyor for the maintenance of the drainage work, or in appeal therefrom by the award of the arbitrators or order of the Referee. 57 Vic. ch. 56, section 68.

(*a*) Fewster vs. Raleigh, 227.

Maintenance of drainage work passing into another municipality.

69. Any drainage work heretofore constructed under a by-law of a municipality, passed in pursuance of any Act relating to the construction of any drainage work by local assessment, or hereafter constructed under the provisions of this act, which is continued into or through more than one municipality, or which is commenced by the initiating municipality on a road allowance adjoining such municipality and is continued thence into the lands of any other municipality shall after the completion thereof be maintained (*a*) by the initiating municipality from the point of commencement of the drainage work in the municipality or upon such road allowance to the point at which the drainage work crosses the boundary line between any road allowance and lands in another municipality, and by such last mentioned municipality and by every other municipality through or into which the drainage work is continued from the point at which the drainage work crosses the boundary line between a road allowance and lands in the municipality to an outlet in the municipality or on a road allowance adjoining the municipality, or to the point at which the drainage work crosses the boundary line between any road allowance and lands in another municipality, as the case may be, at the expense of the lands and roads in any way assessed for the construction thereof and in the proportion determined by the engineer or surveyor in his report and assessment for the original construction or in appeal therefrom by the award of arbitrators or order of the Referee, unless and until, in the case of each municipality, such provision for maintenance is varied or otherwise determined by an engineer or surveyor in his report and assessment for the maintenance of the drainage work or in appeal therefrom by the award of arbitrators or order of the Referee. 57 Vic. ch. 56, section 69.

(*a*) Fewster vs. Raleigh, 227.

Maintenance of drains constructed by government or under county by-laws.

70.—(1) Where a drainage work constructed before the 5th day of May, 1894, under the provisions of the Ontario Drainage Act or any act in amendment thereof or under a by-law passed by a county council does not extend beyond the limits of one municipality, such drainage work shall be maintained and kept in repair (*a*) by

Rev. Stat. 1887, ch. 36.

such municipality at the expense of the lands and roads in any way liable to assessment under the provisions of this Act.

When such drains extend into another municipality.

Rev. Stat., 1887, ch. 36.

(2) Any drainage work constructed before the 5th day of May, 1894, under The Ontario Drainage Act or any act in amendment thereof or under a by-law passed by a county council, (*b*) which continues from the municipality in which the drainage work commences into or through one or more other municipalities, shall be maintained and kept in repair by the municipality in which the drainage work commences, from the point of commencement to the point at which the drainage work crosses the boundary line between any road allowance and lands in another municipality, or to the outlet on such road allowance as the case may be, and by every other municipality through or into which the drainage work is continued, from the point at which the same crosses the boundary line between any road allowance and lands in the municipality and enters upon such lands to an outlet in the municipality, or on a road allowance adjoining the municipality, or to the point at which the drainage work crosses the boundary line between any road allowance and the lands in an adjoining municipality, as the case may be, at the expense of the lands and roads in any way assessed for the construction thereof, and in the proportion determined by the assessors or engineer or surveyor in their assessment roll or report as the case may be, for construction, or in appeal therefrom by the award of arbitrators or order of the Referee, unless and until in the case of each municipality such provision for maintenance is varied or otherwise determined by an engineer or surveyor in his report and assessment for the maintenance of the drainage work or appeal therefrom by the award of arbitrators or order of the Referee. (*c*).

(3) A drainage work which commences on a road allowance between two municipalities, shall, for the purposes of this section, be deemed to commence in the municipality next adjoining that half of the road allowance upon which the drainage work is begun. 57 Vic. ch. 56, section 70.

(*a*) Fewster vs. Raleigh, 227. (*b*) Gosfield North vs. Rochester and Mersea vs. Rochester, 182. (*c*) Caradoc vs. Ekfrid, 295.

Service of by-law on municipality in which lands are assessed without drain being continued into it.

71.—(1) The council of any municipality undertaking the repair of any drainage work under sections 68, 69 or 70 of this Act, shall, before commencing the repairs, serve upon the head of any municipality liable to contribute any portion of the cost of such repairs under the provisions of this Act, a certified copy of the by-law for undertaking the repairs, as the same is provisionally adopted, which by-law shall recite the description, extent and estimated cost of the work to be done and the amount to be contributed therefor by each municipality affected by the drainage work; and the council of municipality so served may, within thirty days thereafter, appeal from such by-law to the Referee on the ground that the amount assessed against lands and roads in such municipality is excessive or that the work provided for in the by-law is unnecessary, or that such drainage work has never been completed through the default or neglect of the municipality whose duty it was to do the work, in the manner provided in the case of the construction of the drainage work; and the Referee on such appeal may alter, amend or confirm such by-law, or may direct that the same shall not be passed as to him may seem just.

Appeal.

Council served to raise and pay over amount required.

(2) The council of every municipality served with the provisional by-law shall, within four months after such service, pass a by-law to raise, and shall within said period of four months, raise and pay over to the treasurer of the initiating municipality the amount assessed against lands and roads in the municipality, as stated in the provisional by-law or as settled on appeal therefrom by the order of the Referee. 57 Vic. ch. 56, section 71.

VARYING ASSESSMENT.

Varying assessment for maintenance.

72.—(1) The council of any municipality liable for the maintenance of any drainage work may from time to time as the same requires repairs vary the proportions of assessment for maintenance, on the report and assessment of an engineer appointed by the council to examine and report on the condition of the work, or the portion thereof, as the case may be, which it is the duty of the municipality as aforesaid to maintain and on the liability to contribute of lands and roads which were not assessed for construction, and have become liable to assessment under this Act; and the engineer or surveyor may in his report upon such repairs assess lands and roads in the municipality undertaking the repairs and in any other municipality from which water flows through the drainage work into the municipality undertaking the repairs; but he shall not, except after leave given by the referee on an application of which notice has been given to the head of every municipality affected, assess for such repairs any lands or roads lying in any municipality into which water flows through the drainage work from the municipality undertaking the repairs.

Proceedings on report of engineer.

(2) The proceedings upon such report and assessment shall be the same, as nearly as may be, as upon the report for the construction of the drainage work.

Appeal from report of engineer.

(3) Any council served with a copy of such report and assessment may appeal from the finding of the engineer as to the proportion of the cost of the work for which the municipality is liable to the referee, and the proceedings on such appeal shall be the same as in other cases of appeals to the referee under this Act.

Appeal to Court of Revision.

(4) Any owner of lands and any ratepayer in the municipality as to roads assessed for such repairs may appeal from such assessment in the manner provided in the case of the construction of the drainage work, and the council of every municipality affected by the report of the engineer or surveyor made under this section shall appoint a Court of Revision for the trial of any appeals in the manner hereinbefore provided. 57 Vic. ch. 56, section 72.

Caradoc vs. Ekfrid, 295.

Power to compel repairs by mandamus.

73. Any municipality neglecting or refusing to maintain (*a*) any drainage work as aforesaid, upon reasonable notice in writing (*b*) from any person or municipality interested therein who or whose property is injuriously affected by the condition of the drainage work, shall be compellable, by mandamus, (*c*) issued by the referee or other Court of competent jurisdiction, to maintain the work, unless the notice is set aside or the work required thereby is varied as hereinafter provided, and shall also be liable in pecuniary damages (*d*) to any person or municipality who or whose property is injuriously affected by reason of such neglect or refusal (*e*).

Proviso.

(*a*) Provided nevertheless, that any municipality, after receiving such notice, may, within 14 days thereafter, apply to the referee to set aside the notice; such application may be made upon four days' notice to the party who gave the notice to the municipality, and the referee shall, after hearing the parties and any witnesses that may be called or other evidence, adjudicate upon the questions in issue, confirm or set aside the notice, as to him may seem proper, or order that the said work of maintenance shall be done wholly or in part; and the costs of and concerning the said motion shall be in the discretion of the referee except as hereinafter mentioned, and may be taxed upon the County or Division Court scale, as the referee may direct.

Giving notice to repair maliciously.

(*b*) Should the referee find that the notice to the municipality was given maliciously or vexatiously, or without any just cause, or to remove an obstruction which under this Act it was the duty of the party giving the notice to remove, he shall, notwithstanding anything hereinbefore contained, order the costs to be paid by the party giving the notice.

Costs to be paid out of general funds.

(*c*) Any costs which the municipality may be called upon to pay, by reason of any proceedings in these clauses mentioned, shall be paid out of its general funds.

Appeal to Court of Appeal.

(*d*) Any party to such proceedings may, except on a question of costs, by leave of the referee or special leave of the Court of Appeal or a Judge thereof, appeal to the Court of Appeal from the decision or judgment of the referee; and the proceedings in and about such appeal shall be the same, as nearly as may be, as upon an appeal from the decision or judgment of the referee as is hereinafter provided.

Powers of Court of Appeal.

(*e*) Upon any such appeal the Court may determine whether a mandamus shall issue or otherwise, and may make such order as may seem just.

Thirty days' notice to be given.

(*f*) A mandamus against the municipality shall not, in any case, be moved for until after the lapse of 30 days from the date of the service of the notice upon the municipality. 57 Vic. ch. 56, section 73.

(*a*) Fewster vs. Raleigh, 227; Peltier vs. Dover, 323.
(*b*) Wickens vs. Sombra, 106; Clarke vs. Sombra, 110.
(*c*) Gahen vs. Mersea, 140; Carruthers vs. Moore, 142.
(*d*) Raleigh vs. Williams, 1.
(*e*) Ford vs. Moore, 137; Stephens vs. Moore, 283.

REPAIRING WITHOUT REPORT.

Deepening, widening or extending without report of engineer.

74. The council of any municipality, whose duty it is to maintain any drainage work for which only lands and roads within or under the jurisdiction of such municipality are assessed, may, after the completion of the drainage work, without the report of an engineer or surveyor upon a *pro rata* assessment on the lands and roads as last assessed for the construction or repair of the drainage work, deepen, widen or extend the same to an outlet, provided the cost of such deepening, widening and extending is not above one-fifth of the cost of the construction, and does not exceed in any case $400; and in every case where the cost of repairs exceeds such proportion or amount, the proceedings to be taken shall be as provided in section 75 of this Act. 57 Vic. ch. 56, section 74.

REPAIRING UPON REPORT.

Repairing upon examination and report by engineer.

75. Wherever, for the better maintenance of any drainage work constructed under the provisions of this Act or any Act respecting drainage by local assessment, or to prevent damage to any lands or roads, it is deemed expedient to change the course of such drainage work, or make a new outlet for the whole or any part of the work, or otherwise improve, extend, or alter the work, or to cover the whole or any part of it, the council of the municipality or of any of the municipalities whose duty it is to maintain the said drainage work, may, without the petition required by section 3 of this Act, but on the report of an engineer or surveyor appointed by them to examine and report on the same, undertake and complete the change of course, new outlet, improvement, extension, alteration or covering specified in the report, and the engineer or surveyor shall for such change of course, new outlet, improvement, extension, alteration or covering. have all the powers to assess and charge lands and roads in any way liable to assessment under this Act for the expense thereof in the same manner, and to the same extent, by the same proceedings and subject to the same rights of appeal as are provided with regard to any drainage work constructed under the provisions of this Act. 57 Vic. ch. 56, section 75.

Chatham and North Gore vs. Dover, 117, Harwich vs. Raleigh and Tilbury East vs. Raleigh, No. 2, 147, 157, Tindell vs. Ellice, 247, Tilbury East vs. Romney and Tilbury North vs. Romney, 261, Caradoc vs. Ekfrid, 295, Gosfield South vs. Gosfield North, 342.

REPAIRING WORK CONSTRUCTED OUT OF GENERAL FUNDS.

Assessment for repair of work constructed out of general funds.

76. Any new drainage work heretofore or hereafter constructed out of the general funds of any municipality, or out of the general funds of two or more municipalities or out of funds raised by a local assessment under a by-law which is afterwards found to be illegal or which does not provide for repairs, need not be repaired out of such general funds, but the council of any of the contributing municipalities may, without the petition required by section 3, on the report of an engineer or surveyor, pass a by-law for maintaining the same at the expense of the lands and roads assessable for such work, and may assess the lands and roads in any way liable to assessment under this Act, for the expense thereof in the same manner, and to the same extent, by the same proceedings and subject to the same rights of appeal as are provided with regard to any drainage work constructed under the provisions of this Act. 57 Vic. ch. 56, section 76.

PAYING BACK ADVANCES.

Repayment of advances from general funds on receipt of assessments.

77. Any moneys which have been or may hereafter be advanced by the council of any municipality out of its general funds for the purpose of any drainage work, in anticipation of the levies and collections therefor, shall be repaid into the general funds of the municipality as soon as the moneys first derived from the assessments are collected. 57 Vic. ch. 56, section 77.

MINOR REPAIRS.

Persons responsible for obstruction to remove same on notice.

78.—(1) When any drainage work, heretofore or hereafter constructed, becomes obstructed by dams, low bridges, fences, washing out of private drains, or other obstructions, for which the land adjoining the drainage work or the owner or person in possession thereof is responsible, so that the free flow of the water is impeded thereby, the persons owning or occupying the land shall, upon reasonable notice in writing given by the council or by an inspector appointed by the council for the inspection and care of drains, remove such obstructions in any manner caused as aforesaid, and if not so removed within the time specified in the notice, the council or the said inspector, shall forthwith cause the same to be removed.

Inspector of drains.

(2) The council may, by by-law, appoint an inspector for the purposes mentioned in the preceding sub-section, and shall in the by-law regulate the fees or other remuneration to be received by him.

Collection of cost of removal by municipality.

(3) If the cost of removing such obstruction is not paid by the owner or occupant of the lands liable, to the municipality forthwith after the completion of the work, the council may pay the same, and the clerk of the municipality shall place such amount upon the collector's roll against the lands liable, with ten per cent added thereto, and the same shall be collected like other taxes, subject, however, to an appeal by the owner or occupant, in respect of the cost of the work, to the Judge of the County Court of the county in which the lands are situate. 57 Vic, ch. 56, section 78.

CUTTING EMBANKMENTS, BANKS, ETC.

Penalty for injury to embankments, etc.

79. Any person who obstructs, fills up or injures any drainage work, or destroys, cuts or injures any embankment of any pumping works, or of any other drainage work, shall, in addition to his liability in civil damages therefor, upon the complaint of the council of the municipality or of any person affected by such obstructing, filling up, destroying, cutting, or injuring, be liable upon summary conviction thereof, before a Justice of the Peace, to a fine of not less than $5 nor more than $100 and costs of conviction, or to imprisonment with or without hard labour for any term not exceeding six months, or in default of payment of such fine and costs or costs only to imprisonment for any term not exceeding three months. 57 Vic. ch. 56, section 79.

REMOVING ARTIFICIAL OBSTRUCTIONS.

Removal of dams, etc., on construction of work.

80. Wherever, in the construction of any drainage work any dam or other artificial obstruction exists in the course of or below the work, and is situate wholly within the municipality doing the work, the council shall have power, with the consent of the owner thereof and of the council or councils of the other municipalities liable to assessment for the cost of the work, and upon payment of such purchase money as may be mutually agreed upon, or in default of agreement be determined by the Referee, to remove the same wholly or in part; and any amount so paid or payable as purchase money shall be deemed part of the cost of construction and be provided for in the assessment by the engineer or surveyor. 57 Vic. ch. 56, section 80.

Augusta vs. Oxford, 345.

OPERATING PUMPING WORKS.

Appointment of commissioners for pumping works, etc.

81.—(1) For the better maintenance of drainage work by embanking, pumping or other mechanical operations, the council of the municipality initiating the work may pass by-laws appointing one or more commissioners from among those whose lands are assessed for construction, who shall have power to enter into all necessary and proper contracts for the purchase of fuel, erection or repairs of buildings, and purchase and repairs of machinery, and to do all other things necessary for successfully operating such drainage work, as may be set forth in the by-law appointing them; and the council may pass by-laws for defraying the annual cost of maintaining and operating the work by assessment upon the lands and roads in any way liable for assessment under the provisions of this Act. 57 Vic. ch. 56, section 81.

Commissioners of pumping works.

(2) Upon the petition of two-thirds of the resident owners in the drainage territory, the council of the municipality may pass by-laws empowering the commissioner or commissioners appointed under this section to use all buildings, machinery and equipments belonging to and in connection with any drainage pumping works, and to operate the same for such purposes and upon such terms as may be set forth in such by-laws upon the condition that the profits or benefits of such user shall accrue to the owners. 59 Vic. ch. 66, section 2.

Assuming pumping works, etc., constructed by private persons.

82. Upon the petition of two-thirds of the persons interested in any drainage work constructed by embanking, pumping or other mechanical operations, and not constructed by the municipality, the council of the municipality in which the work is situate may assume the work and maintain and operate the same, in the same manner and to the same extent and if the said drainage work had been constructed under the provisions of this Act, but at the cost of the lands and roads liable to be assessed for the work. 57 Vic. ch. 56, section 82.

DEBENTURES FOR MAINTENANCE.

Powers to issue debentures for cost of maintenance.

83. Where the maintenance of any drainage work is so expensive that the municipal council liable therefor deems it inexpedient to levy the cost thereof in one year, the said council may pass a by-law to borrow, upon the debentures of the municipality, payable within seven years from the date thereof, the amount necessary for the work, or its proportion thereof, and shall assess, and levy upon the lands and roads liable therefor a special rate sufficient for the payment of the debentures. The provisions of The Municipal Drainage Aid Act, shall apply to any debentures issued under the authority of any such by-law, which has before its final passing been published or of which the ratepayers have been notified in manner provided by this act or which has, after its passing been promulgated as required by section 375 of The Municipal Act. 57 Vic. ch. 56, section 83.

Rev. Stat., ch. 40.

Rev. Stat., ch. 223.

MAKING AWARD DRAINS MUNICIPAL.

Power to bring drains constructed under Rev. Stat., 285, within this Act.

84. Upon a petition presented to the council of any municipality as provided for in section 3 of this Act, having within the area described therein any drain constructed under The Ditches and Watercourses Act or any other act providing for assessment in work, signed by a majority of the owners interested in such ditch or drain, the said council may assume the same and proceed thereon in the same manner and to the same extent as for the construction of any drainage work under the provisions of this act, and the passing of the by-law under the provisions of this act shall in every such case be a bar to any further proceedings upon the award or under the provisions of the act upon which such award is based. 57 Vic. ch. 56, section 84.

WORK ON RAILWAY LANDS.

Work on railway lands.

85—(1) The council of any municipality may enter into an agreement with any railway company for the construction or enlargement by the railway company of any work on the lands of such railway company into or through which a drainage work constructed under this Act may pass, and for the payment of the cost of such work, after completion, out of the general funds of the municipality, and the amount so paid shall be assessed against the lands and roads liable for the construction or maintenance of the drainage work, and shall be deemed part of the cost of the drainage work, and be included in the amount chargeable against lands and roads liable therefor according to the report and estimates of the engineer or surveyor.

(2) No agreement shall be entered into by a municipal council under this section without the consent in writing, filed with the clerk of the municipality, of a majority of the owners liable for the construction or maintenance of the drainage work in respect to which such work on railway lands is to be undertaken. 57 Vic. ch. 56, section 85.

COST OF REFERENCE AND INCIDENTAL EXPENSES.

86. Except where otherwise provided by this Act, the cost of any reference had in connection with the construction or maintenance of any drainage work, the cost of the publication or service of by-laws, and all other expenses incidental to the construction or maintenance of the work and the passing of the by-laws, shall be deemed part of the cost of such work, and shall be included in the amount to be raised by local rate on all lands and roads liable therefor. 57 Vic. ch. 56, section 86.

Certain expenses to be deemed part of the cost of the work.

LANDLORD AND TENANT.

87. Any agreement on the part of any tenant to pay the rates or taxes in respect of the demised lands, shall not include the charges and assessments for any drainage work unless such agreement in express terms so provides; but in cases of contracts to purchase or of leases giving the lessee an option to purchase, the said charges and assessments for drainage work in connection with which proceedings were commenced under this Act, after the date of the contract or lease, and which have been already paid by the owner, shall be added to the price and shall be paid by the purchaser or the lessee in case he exercises his option to purchase; but the amount still unpaid on the cost of the work or repair, and charged against the lands shall be borne by the purchaser unless otherwise provided by the conveyance or agreement. 57 Vic. ch. 56, section 87.

Tenant's covenant to pay taxes—when to include drainage assessments.

DRINAGE TRIALS.

88.—(1) The Lieutenant-Governor in Council may from time to time appoint a referee for the purpose of the drainage laws, that is to say, The Ontario Drainage Act, the provisions of this Act and all other Acts and parts of Acts on the same subject, for which this Act is substituted.

Appointment of referee.

Re[illegible]Stat. 1887, ch. 36.

(2) Such referee shall be deemed to be and shall be an officer of the High Court.

To be deemed an officer of High Court.

(3) He shall be a barrister of at least 10 years' standing at the bar of Ontario.

To be a barrister of ten years standing.

Tenure of office. Rev. Stat., ch. 51.

(4) He shall hold office by the same tenure as an official referee under the Judicature Act.

Not to practise in drainage matters.

(5) He shall not practise as a solicitor or barrister or act in any capacity as a legal agent or adviser in any matter arising under this Act. 57 Vic. ch. 56, section 88 (1-5); 60 Vic. ch. 14, section 77.

Salary.

(6) He shall be paid a salary of such amount as may be appropriated by the Legislature for that purpose (not exceeding $3,500 a year), to be paid monthly, and reasonable travelling expenses. 57 Vic. ch. 56, section 88.

POWERS OF THE REFEREE.

Referee to have powers of an official referee under Rev. Stat. cc. 51 and 62.

89—(1) The referee shall have the powers of an official referee under The Judicature Act and The Arbitration Act and of arbitrators under any former enactments relating to drainage works, and the referee is substituted for such arbitrators.

Powers as to compelling production, amending notices, etc.

Granting a mandamus or injunction.

(2) In respect to all proceedings before him or which may come before him under the provisions of this Act, or any former Act relating to drainage works, he shall have the powers of a Judge of the High Court of Justice, including the production of books and papers, the amendment (*a*) of notice of appeal, and of notices for compensation or damages, and of all other notices and proceedings; he may correct errors, or supply omissions, fix the time and place of hearing, appoint the time for his inspection, summon to his aid engineers, surveyors or other experts, and regulate and direct all matters incident to the hearing, trial and decision of the matters before him so as to do complete justice between the parties; he may also grant an injunction (*b*) or a mandamus in any matter before him under this Act.

(*a*) Tindell vs. Ellice, 247.
(*b*) Gahen vs. Mersea, 140; Carruthers vs. Moore, 142.

Power to determine validity of proceedings and amend report.

(3) The referee shall have power, subject to appeal as hereinafter provided, to determine the validity of all petitions, resolutions, reports, provisional or other by-laws, (*a*) whether objections thereto have been stated as grounds of appeal to him or not, and to amend and correct any provisional by-law in question; and, with the en-

gineer's consent and upon evidence given, to amend the report (*b*) in such manner as may be deemed just, and upon such terms as may be deemed proper for the protection of all parties interested, and, if necessary by reason of such amendments, to change the gross amount of any assessment made against any municipality, but in no case shall he assume the duties conferred by this Act upon the Court of Revision or a County Judge. 57 Vic. ch. 56, section 89.

(*a*) Gosfield North vs. Rochester and Mersea vs. Rochester, 182.

(*b*) Gosfield South vs. Mersea, 268; South Dorchester and Dereham vs. Malahide, 275.

90. All interlocutory applications for any of the purposes mentioned in sub-section (2) of the last preceding section shall be made to the referee and his order thereon shall be final and conclusive. 57 Vic. ch. 56, section 90.

Interlocutory applications, no appeal from referee thereon.

Appeals from Assessment.

91. A copy of the notice of appeal by any municipality from the report, plans, specifications, assessments, and estimates of an engineer or surveyor or from a provisionally adopted by-law, with an affiidavit of service thereof shall, within the time limited by this Act for the service of the same, be filed in the office of the Clerk of the County Court of the county or union of counties in which the drainage work commenced. 57 Vic. ch. 56, section 91.

Notice of appeal from assessment to be filed.

92. The by-law of the initiating municipality and of any other municipalities interested shall be amended so as to incorporate and carry into effect the decision or report of the referee or such decision or report as varied on appeal, as the case may be. 57 Vic. ch. 56, section 92.

Amendment of by-law to carry out decision of referee.

Damages, Compensation, etc.

93.—(1) In case a dispute arises between municipalities or between a company and municipality, or between individuals and a municipality or company, or between individuals as to damages alleged to have been done to the property of the municipality, company or individual,

Reference of claims for damages, etc., to referee.

in the construction of drainage works or consequent thereon, the municipality, company or individual complaining may refer the matter to the arbitration and award of the said referee, who shall hear and determine the same and give in writing his award and decision and his reasons therefor.

Raleigh vs. Williams, 1; Hiles vs. Ellice, 65; Ellice vs. Hiles, 89; Buchanan vs. Ellice and Geen vs. Ellice, 254; Thackery vs. Raleigh, 328.

(2) Proceedings for the determination of claims, matters and disputes and for the recovery of damages for the referring of which to arbitration, any of the said drainage enactments provide, other than an appeal from the report of an engineer or a provisional by-law, shall be instituted by serving a notice claiming damages or compensation or a mandamus or injunction as the case may be, upon the other party or parties concerned, and the notice shall state the ground of the claim.

Wickwire vs. Romney and Suskey vs. Romney, 179; McCulloch vs. Caledonia, 340; Murphy vs. Oxford, 350.

(3) A copy of the notice with an affidavit of service thereof shall be filed with the Clerk of the County Court of the county or union of counties in which the lands in question are situate, and the notice shall be filed and served within one year from the time the cause of complaint arose. 57 Vic. ch. 56, section 93.

Tindell vs. Ellice, 247; Thackery vs. Raleigh, 328; McCulloch vs. Caledonia, 340; Re Roden and Toronto, 402.

Courts may refer actions for damages, etc., to referee.

94. Where an action for damages is brought and in the opinion of the Court in which the action is brought or of a Judge thereof, the proper proceeding is under this Act, or the action may be more conveniently tried before and disposed of by the referee, the Court or Judge may on the application of either party or otherwise and at any stage of the action, make an order transferring or referring it to the referee and on such terms as the Court or Judge deems just, and the referee shall thereafter give directions for the continuance of the action before him and subject to the order of transfer or reference, all costs shall be in his discretion, (*a*) and should no application or order be made as aforesaid the Court or Judge shall have jurisdiction to try the action subject to appeal, and such jurisdiction shall include all the relief within the powers herein given to the referee as well as those of the High Court (*b*). 57 Vic. ch. 56, section 94.

(*a*) Wilkie vs. Dutton, 132; Tindell vs. Ellice, 247.
(*b*) Hiles vs. Ellice, 65; Ellice vs. Hiles, 89; Thackery vs. Raleigh, 328.

Assessing damages and costs payable by municipalities.

95.—(1) Save as provided by sub-sections 2 and 3 of this section all damages and costs payable by a municipality and arising from proceedings taken under this Act shall be levied *pro rata* upon the lands and roads in any way assessed for the drainage work according to the assessment thereof for construction or maintenance, and may be assessed, levied and collected in the same manner as rates assessed, levied and collected for maintenance under this Act.

(2) Where such damages and costs become payable owing to an improper action, neglect, default or omission on the part of the council of any municipality or of any of its officers in the construction of the drainage work or in carrying out the provisions of this Act, the referee or Court may direct that the whole or any part of such damages and costs shall be borne by such municipality and be payable out of the general funds thereof.

(3) Where in any such proceedings by or against a municipality an amicable settlement is arrived at and carried out by the advice of counsel, the damages and costs payable under the terms of such settlement by any municipality shall be borne and paid as directed by the referee on application to him on behalf of the council of the municipality or any owner of lands assessed for the construction or maintenance of the drainage work, and in making such direction the referee shall have regard to the provisions of the next preceding sub-section. 57 Vic. ch. 56, section 97.

McCulloch vs. Caledonia, 340; Augusta vs. Oxford, 345.

Proceeding with Reference.

Referee to direct procedure.

96.—(1) The Referee at any time after an appeal or reference is made to him as hereinafter provided, may give directions for the filing or serving of objections and defences to such appeal or reference and for the production of documents and otherwise, and may give an appointment to either or any party to the appeal or reference, to proceed therewith at such place and time and in such manner as to him may seem proper, but the hearing shall be in the county or one of the counties in which the drainage work or proposed drainage work is situate or in which lands are assessed.

Clerk of Court.

(2) The Clerk of the County Court shall be the Clerk of the Court of the Referee, and shall take charge of and file all the exhibits and shall be entitled to the same fees for filings and for his services and for certified copies of decisions or reports as for similar services in the County Court; which fees shall be paid in money and not by stamps.

Referee's clerk.

(3) In the absence of the Clerk of the County Court the Referee may appoint the Referee's clerk or some other person to act as Deputy Clerk of the County Court for the purpose of the trial and for taking charge of and filing all exhibits, and the person so appointed shall while so acting have the same power and be entitled to the same fees as the Clerk of the County Court would have and be entitled to if personally present.

Subpœnas.

(4) County Court subpœnas for the attendance of witnesses at the hearing tested in the name of the Referee may be issued by the Clerk of the County Court of the County in which the case is to be heard. 57 Vic. ch. 56, section 95.

When referee proceeds on view or special knowledge.

97. When the Referee proceeds partly on view or on any special knowledge or skill possessed by himself, he shall put in writing a statement of the same sufficiently full to allow the Court of Appeal to form a judgment of the weight which should be given thereto; and he shall state as part of his reasons the effect by him given to such statement. 57 Vic. ch. 56, section 97,

Shorthand writer.

98. A shorthand writer may from time to time be appointed by the Lieutenant-Governer in Council to report hearings or trials before the Referee, and every such officer shall be deemed to be an officer of the High Court, and shall be paid in the same manner as shorthand writers in the High Court are paid and the

Rev. Stat. ch. 51.

several sections of The Judicature Act respecting shorthand writers shall apply to any shorthand writer appointed under this Act. 57 Vic. ch. 56, section 98.

Clerk of Court to forward notice of filing report, etc., to parties.

99. The decision or report of the Referee on appeals from assessment or claims for damages or compensation under section 93 with the evidence, exhibits, the statement (if any) of inspection or of technical knowledge and the reason for his decision shall be filed in the office of the Clerk of the County Court aforesaid, and notice of the filing shall forthwith be given by the Clerk, by post or otherwise, to the solicitors of the parties appearing by solicitor, and to other parties not represented by a solicitor, and also to the clerk of the municipality or other corporation. 57 Vic. ch. 56, section 99.

Report to be sent to clerk of each municipality interested.

100. A copy of the decision or report certified by the Referee or Clerk aforesaid, shall be sent or delivered to the clerk of every municipality interested in the drainage work in question upon receipt of the sum chargeable therefor, as hereinbefore provided and shall be kept on the file as a public document of the municipality. 57 Vic. ch. 56, section 100.

Decision to be in form of order for judgment.

101. The decision of the Referee in all cases other than appeals from assessment or on claims for damages or compensation under section 93 of this Act, shall be in the form of an order for judgment and may be delivered as decisions by the Judges of the Supreme Court of Judicature are, and need not be in the form of a report; and unless appealed from to the Court of Appeal, as herein provided, judgment may be entered in the proper office without any further or other application or order. 57 Vic. ch, 56, section 101.

Use of court house.

102 When an appointment is given by the Referee for the hearing of any matter of reference under this Act in any city, town or place wherein a court house is situated, he shall have in all respects the same authority as a Judge of the High Court in regard to the use of the court house, or other place or apartments set apart in the county for the administration of justice. 57 Vic. ch. 56, section 102.

Sheriffs, etc., to assist referee—fees therefor.

103. Sheriffs, deputy-sheriffs, constables and other peace officers shall aid, assist and obey the Referee in the exercise of the jurisdiction conferred by this Act whenever required so to do, and shall, upon the certificate of the said Referee, be paid by the the county or counties interested, like fees as for similar services at the sittings of the High Court for the trial of causes. 57 Vic. ch. 56, section 103.

Rules and practice.

104. Except as in this Act otherwise provided and subject to the provisions thereof, the rules and practice for the time being of the High Court of Justice shall be followed so far as the same are applicable. 57 Vic. ch. 56, section 104.

Evidence taken before referee need not be filed or written out.

105. In cases brought before the Referee in pursuance of the powers conferred by this Act, or by any other Act, the evidence taken before him need not be filed, and need only be written out at length by the shorthand writer, if required by the Referee or by any parties to the reference; and if required by any of the parties to the reference, copies shall be furnished upon such terms as may be fixed by the Lieutenant-Governer in Council. 58 Vic. ch. 55, section 3.

Taxation of costs.

106 Costs shall be taxed by the Referee; or he may direct the taxation thereof by the Clerk of the County Court with whom the papers are filed, or by any taxing officer of the High Court. 57 Vic. ch. 56, section 110.

Fees, how payable.

107. Fees shall be paid in stamps or otherwise in the same manner as in the case of other proceedings in the said courts respectively, until other provision is made in that behalf by competent authority. 57 Vic. ch. 56, section 111.

Referee's fees.

108. To provide a fund for or towards the payment of the Referee's salary and other expenses, there shall be further payable a sum which shall be determined by the Referee and mentioned in his decision or report or in a subsequent report; the said sum not to exceed the rate of four dollars a day for every full day the trial occupies, and shall be paid in stamps by one or the other of the parties, or dis-

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Reports to be stamped.

109. The decision or report of the Referee shall not be given out until stamped with the necessary stamps. 57 Vic. ch. 56, section 113.

Time for appealing to Court of Appeal.

Rev. Stat. ch. 62.

110. The decision or report of the Referee, on any appeal or reference under this Act, or on a reference under sections 28 or 29 of The Arbitration Act or in any action or proceeding transferred or referred to him under this Act shall be binding and conclusive upon all parties thereto, unless appealed from to the Court of Appeal within one month after the filing thereof, or within such further time as the Referee or the Court of Appeal or a Judge thereof may allow, save as otherwise provided by this Act in any case where it is declared that the decision of the Referee shall be final. The decision or report may be appealed against to the Court of Appeal in the same manner as from a decision of a Judge of the High Court sitting in Court. 57 Vic. ch. 56, section 106; 60 Vic. ch. 3, section 3.

Rules and Tariff of Costs.

Judges of Supreme Court may make rules.

Rev. Stat. ch. 51.

111. The Judges of the Supreme Court shall have the same authority to make general rules with respect to proceedings before the Referee and appeals from him as they have with respect to proceedings under the Judicature Act; and sections 122 to 125 of the Judicature Act shall apply thereto. 57 Vic. ch. 56, section 107.

Referee may make rules.

112.—(1) Subject to any such general rules the Referee shall have power, with the approval of the Lieutenant Governor in Council, to frame rules regulating the practice and procedure to be followed in all proceedings before him under this Act, and also to frame tariffs of fees in cases not governed by the County Court tariff.

(2) Such rules and tariffs, whether made by the Judges or the Referee, shall be published in the Ontario Gazette and shall thereupon have the force of law; and the same shall be laid before the Legislative Assembly at

its next session after promulgation thereof. 57 Vic. ch. 56, section 108.

Tariff of County Court adopted until rules made.

113. Until other provisions are made under the last two preceding sections the tariff of the County Court shall be the tariff of costs and of fees and disbursements for solicitors and officers under this act and the Referee shall have the powers of a County Judge with respect to counsel fees, and may also allow further counsel fees in case of a trial occupying more days than one. 57 Vic. ch. 56, section 109.

SCHEDULE A.

FORM OF PETITION FOR DRAINAGE WORK.

(*Section 4*).

The petition of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners), as shown by the last revised assessment roll of the township of in the county of to be the owners of the lands to be benefited within said township, and hereinafter described, sheweth as follows:

Your petitioners request that the area of land within the said township and being described as follows: that is to say, lots numbered 1 to 10 inclusive in the first concession; lots lettered A to H inclusive in the second concession; north-west halves of lots numbered 4 to 12 inclusive in the third concession; the side-road between lots numbered 7 and 8 in the first concession, and the road allowance between concessions 1 and 2 and between 2 and 3 (as the case may be, or describing the area by metes and bounds), may be drained by means of:—

1. A drain or drains.

2. Deepening, straightening, widening, clearing of obstructions or otherwise improving the stream, creek or watercourse, known as (name or other general designation).

3. Lowering the water of lake or the pond known as (name or other general designation), (or by any or all of said means.)

And your petitioners will ever pray:—

57 Vic. ch. 56, section 4.

SCHEDULE B.

FORM OF BY-LAW.

(Section 20).

A by-law to provide for drainage work in the of in the county of and for borrowing on the credit of the municipality, the sum of for completing the same (or the sum of the proportion to be contributed by said municipality for completing the same).

Provisionally adopted the day of A. D. 189 .

Whereas the majority in number of the resident and non-resident owners (exclusive of farmers' sons not actual owners), as shown by the last revised assessment roll, of the property hereinafter set forth to be benefited by drainage work (as the case may be) have petitioned the council of the said of praying that (here set out the purport of the petition, describing generally the lands and roads to be benefited).

And whereas, thereupon the said council has procured an examination, to be made by , being a person competent for such purpose, of the said area proposed to be drained and the means suggested for the drainage thereof, and of other lands and roads liable to assessment under the Municipal Drainage Act, and has also procured plans, specifications and estimates of the drainage work to be made by the said and an assessment to be made by him of the lands and roads to be benefited by such drainage work, and of other lands and roads liable for contribution thereto, stating as nearly as he can the proportion of benefit, outlet liability and injuring liability, which in his opinion will be derived or incurred in consequence of such drainage work by every road and lot, or portion of lot, the said assessment so made being the assessment hereinafter by this by-law enacted to be assessed and levied upon the roads and lots, or parts of lots hereinafter in that behalf specially set forth and described; and the report of the said in respect thereof, and of the said drainage work being as follows: (here set out the report of the engineer or surveyor employed.)

And whereas the said council are of opinion that the drainage of the area described is desirable :—

Therefore the said municipal council of the said of , pursuant to the provisions of the Municipal Drainage Act, enacts as follows :—

1st. The said report, plans, specifications, assessments and estimates are hereby adopted, and the drainage work as therein indicated and set forth shall be made and constructed in accordance therewith.

2nd. The reeve (or mayor) of the said may borrow on the credit of the corporation of the said of the sum of dollars, being the funds necessary for the work not otherwise provided for (or being said municipality's proportion of the funds necessary for the work), and may issue debentures of the corporation to that amount in sums of not less than $50 each, and payable within years from the date thereof, with interest at the rate of per centum per annum, that is to say: (insert the manner of payment annually and whether with or without coupons, and if the latter, omit the last clause of this paragraph) such debentures to be payable at , and to have attached to them coupons for the payment of interest.

3rd. For paying the sum of ($410), the amount charged against the said lands and roads for benefit, and the sum of ($108) the amount charged against said lands and roads for outlet liability, and the sum of ($135), the amount charged against said lands and roads for injuring liability, apart from lands and roads belonging to or controlled by the municipality, and for covering interest thereon for years, at the rate of per centum per annum, the following total special rates over and above all other rates shall be assessed, levied and collected (in the same manner and at the same time as other taxes are levied and collected) upon and from the undermentioned lots and parts of lots and roads, and the amount of the said total special rates and interest against each lot or part of lot respectively shall be divided into equal parts, and one such part shall be assessed, levied and collected as aforesaid, in each year, for years, after the final passing of this by-law, during which the said debentures have to run.

Concession.	Lot or part of lot.	Acres.	Value of benefit.	Value of outlet liability.	Value of injuring liability.	To cover interest for years at per cent.	Total special rate.	Annual assessm'nt during each year for years.
			$ c.	$ c.	$ c.	$ c.	$ c.	$ c.
10	5	200	100 00	23 00				
10	S. ½ 6	100	50 00	10 00				
10	N. ¼ 6	50	30 00	5 00				
10	S. W. ½ 8	100	80 00	13 00				
10	S. W. ½ & N. ¼ 9	150	150 00	20 00				
10	4	200	. . .	24 00				
10	S. ½ 3	100	. . .	13 00				
9	W. ½ 5	100	. . .	. .	40 00			
9	N. ¼ 6	50	. . .	. .	25 00			
9	N. E. ½ & N. ½ 7	150	. . .	. .	70 00			
Total for benefit . . .			410 00	108 00	135 00			
" outlet . . .			108 00					
" injuring . .			135 00					
Roads (and lands) of municipality			100 00					
Total			$753 00					

4th. For paying the sum of ($100), the amount assessed against the said roads and lands of the municipality, and for covering interest thereon for years at the rate of per centum per annum, a special rate on the dollar, sufficient to produce the required yearly amount therefor shall, over and above all other rates, be levied and collected (in the same manner and at the same time as other taxes are levied and collected) upon and from the whole rateable property in the said of in each year for years, after the final passing of this by-law, during which said debentures have to run.

5th. This by-law shall be published once in every week for four consecutive weeks in the , newspaper, published in the town of (or printed and served or mailed as described), and shall come into force upon and after the final passing thereof, and may be cited as the " By-law."

57 Vic. ch. 56, section 20.

REVISED STATUTES OF ONTARIO, 1897.

CHAPTER 285.

AN ACT RESPECTING DITCHES AND WATERCOURSES.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :

1. This Act may be cited as "The Ditches and Watercourses Act." 57 Vic. ch. 55, section 1. **Short title.**

2. This Act shall not affect the Acts relating to municipal or government drainage work. 57 Vic. ch. 55, section 2. **Certain Acts not affected.**

3. Where the words following occur in this Act they **"Interpretation."**

shall be construed in the manner hereinafter mentioned, unless a contrary intention appears :

"Engineer."

"Engineer" shall mean Civil Engineer, Ontario Land Surveyor, or such person as any municipality may deem competent and appoint to carry out the provisions of this Act

"Judge."

"Judge" shall mean the senior, junior or acting Judge of the County Court of the county in which the lands are situated in respect of which the proceedings under this Act are taken.

"Owner."

"Owner" shall mean and include an owner, the executor or executors of an owner, the guardian of an infant owner, any person entitled to sell and convey the land, an agent under a general power of attorney, or a power of attorney authorizing the appointee to manage and lease the lands and a municipal corporation as regards any highways under its jurisdiction.

"Clear days."

"Clear days" shall mean exclusive of the first and last days of any number of days prescribed.

"Ditch."

"Ditch" shall mean and include a drain open or covered wholly or in part and whether in the channel of a natural stream, creek or watercourse or not, and also the work and material necessary for bridges, culvert catch-basins and guards.

"Non-resident."

"Non-resident" shall mean a person who does not reside within the municipality in which his lands, affected by proceedings under this Act, are situate.

"Maintenance."

"Maintenance" shall mean and include the preservation of a ditch and keeping it in repair.

"Construction."

"Construction" shall mean the original opening or making of a ditch by artificial means.

"Written," "writing."

"Written," "writing," or terms of like import shall include words printed, engraved, lithographed or otherwise traced or copied. 57 Vic. ch. 55, section 3.

Appointment of engineer.

4.—(1) Every municipal council shall name and appoint by by-law (Form A) one person to be the engineer to carry out the provisions of this Act, and such engineer shall be and continue an officer of such corporation until his appointment is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead, who shall have authority to commence proceedings under this Act or to continue such work as may have been already undertaken.

Fees of clerk and engineer.

(2) The council of every municipality shall, by by-law, provide for the payment to the clerk of the municipality of a fair and reasonable remuneration for services performed by him in carrying out the provisions of this Act, and the council shall also by by-law, fix the charges to be made by the engineer of the municipality for services performed by him under this Act.

Oath of engineer.

(3) Every engineer appointed by a municipal council under this section shall, before entering upon his duties take and subscribe the following oath (or affirmation) and shall file the same with the clerk of the municipality :—

In the matter of The Ditches and Watercourses Act.

I (name in full) of the town of in the county of , engineer (or surveyor) make oath and say, (or do solemnly declare and affirm), that I will to the best of my skill, knowledge, judgment and ability, honestly and faithfully and without fear of, favour to, or prejudice against, any owner or owners perform the duties from time to time assigned to me in connection with any work under The Ditches and Watercourses Act, and make a true and just award thereon.

Sworn (or solemnly declared and affirmed)
before me at the of
in the county of this
day of A.D.

A Commissioner, etc., (or Township Clerk, or J. P.)

57 Vic. ch. 55, section 4.

Limit of work.

5.—(1) Every ditch to be constructed under this Act shall be continued to a sufficient outlet, but shall not pass through or into more than seven original township lots exclusive of any part thereof on or across any road allowance, unless the council of any municipality upon the petition of a majority of the owners of all the lands to be affected by the ditch passes a resolution authorizing the extension thereof through or into any other lots within such municipality, and upon the passing of such resolution the proposed ditch may be extended in pursuance of such resolution, but subject always to the provision of sub-section 2 of this section. 57 Vic. ch. 55, section 5 (1); 59 Vic. ch. 67, section 1.

Limit of cost.

(2) No ditch, the whole cost whereof according to the estimate of the engineer or the agreement of the parties will exceed $1,000, shall be constructed under the provisions of this Act. 57 Vic. ch. 55, section 5, (2).

Seymour vs. Maidstone, 311, 317.

What lands to be liable for construction.

6.—(1) The lands, the owners of which may be made liable for the construction of a ditch under this Act, shall be those lying within a distance of 75 rods from the sides and point of commencement of the ditch, but the lands through or into which the ditch does not pass and which lands also adjoin any road allowance traversed by the ditch shall not be liable except when directly benefited and then only for the direct benefit.

(2) Provided nevertheless that the council of any county lying east of the county of Frontenac may pass a by-law declaring that within said county the lands lying within a distance of 100 rods from the sides and point of commencement of the ditch may be made liable instead of 75 rods as mentioned in sub-section 1 of this section. 57 Vic. ch. 55, section 6.

Declaration of ownership.

7.—(1) Any owner other than the municipality shall, before commencing proceedings under this Act, file with the the clerk of the municipality in which the parcel of land requiring the ditch is situate, a declaration of ownership thereof (Form B) which may be taken before a Justice of the Peace, a commissioner for taking affidavits, or the clerk of the municipality. 57 Vic. ch. 55, section 7.

(2) In case of omission to file such declaration through inadvertence or mistake at the time aforesaid, the Judge may in case of such ownership at said time permit the same to be filed at any stage of the proceedings upon such terms and conditions as he may impose or direct. 58 Vic. ch. 54, section 1.

Notice to other owners affected.

8. The owner of any parcel of land who requires the construction of a ditch thereon shall, before filing with the clerk of the municipality the requisition provided for by section 13 of this Act, serve upon the owners or occupants of the other lands to be affected a notice in writing (Form C) signed by him and naming therein a day and hour and also a place convenient to the site of the ditch at which all the owners are to meet and estimate the cost of the ditch, and agree, if possible, upon the apportionment of the work, and supply of material for construction among the several owners according to their respective interests therein, and settle the proportions in which the ditch shall be maintained, and the notices shall be served not less than 12 clear days before the time named therein for meeting. 57 Vic. ch. 55, section 8.

Form of agreement—filing.

9.—(1) If an agreement is arrived at by the owners, as in the next preceding section is provided, it shall be reduced to writing (Form D), and signed by all the owners, and shall within six days after the signing thereof be filed with the clerk of the municipality in which the parcel of land the owner of which requires the ditch is situate; but if the lands affected lie in two or more municipalities the agreement shall be in as many numbers as there are municipalities and filed as aforesaid with their respective clerks; and the agreement may be enforced in the like manner as an award of the engineer as hereinafter provided.

(2) It shall be the duty of the municipality to keep printed copies of all the forms required by this Act. 57 Vic. ch. 55, section 9.

Informalities not to invalidate proceedings.

10. No proceedings taken or agreement made and entered into under the provisions of sections 8 and 9 of this Act shall in any case for want of strict compliance with such provisions be void or invalidate any subsequent proceedings under this Act, provided the notices required by section 8 of this Act have been duly served, and any such agreement may with the consent in writing of the parties thereto (which consent shall be filed in the same manner as the agreement), or by order of any Court, or of the Judge on an appeal under this Act, be amended so as to cause the same to conform to the provisions of this Act. 57 Vic. ch. 55, section 10.

Adjourning meeting for purpose of adding parties.

11. If at or before the meeting of owners provided for in section 9 of this Act, it appears that any notice required by section 8 has not been served, or has not been served in time, or duly served, the owners present at such meeting may adjourn the same to some subsequent day in order to allow the necessary notices to be duly served,

and such adjourned meeting shall, if such notices have been given and served as provided by section 8, be a sufficient compliance with the provisions of this Act. 57 Vic. ch. 55, section 11.

Reeve to sign on behalf of municipality interested.

12. The Reeve or other head of the municipal council of any municipality shall have power on behalf of the municipal council thereof to sign the agreement aforesaid, and his signature shall be binding upon the corporation. 57 Vic. ch. 55, section 12.

Requisition for appointment by engineer when no agreement arrived at.

13. In case an agreement as aforesaid is not arrived at by the owners at the said meeting or within five days thereafter, then the owner requiring the ditch may file with the clerk of the municipality in which such parcel is situate, a requisition (Form E), naming therein all the several parcels of land that will be affected by the ditch and the respective owners thereof, and requesting that the engineer appointed by the municipality under this Act be asked to appoint a time and place in the locality of the proposed ditch at which the said engineer will attend to make an examination as hereinafter provided. 57 Vic. ch. 55, section 13.

Notice to engineer and notice of appointment made by engineer.

14. The clerk, upon receiving the requisition, shall forthwith enclose a copy thereof in a registered letter to the engineer; and on the receipt of the same by the engineer he shall notify the clerk in writing, appointing a time and place at which he will attend in answer to the requisition, which time shall be not less than 10 and not more than 16 clear days from the day on which he received the copy of the requisition; and on the receipt of the notice of appointment from the engineer the clerk shall file the same with the requisition and shall forthwith send, by registered letter, a copy of the notice of appointment to the owner making the requisition, who shall, at least four clear days before the time so appointed, serve upon the other owners named in the requisition a notice (Form F), requiring their attendance at the time and place fixed by the engineer, and shall, after serving such notice, indorse on one copy thereof the time and manner of service and leave the same with the indorsements thereon with the engineer not later than the day before the time fixed in the notice of appointment. 57 Vic. ch. 55, section 14.

Mode of serving notices.

15.—(1) Notices under the provisions of this Act shall be served personally, or by leaving the same at the place of abode of the owner or occupant, with a grown up person residing thereat, and in case of non-residents, then upon the agent of the owner, or by registered letter addressed to the owner at the post office nearest to his last known place of residence, and where that is not known, he may be served in such manner as the Judge may direct.

Occupant to notify owner.

(2) Any occupant not the owner of the land, notified in the manner provided by this Act, shall immediately notify the owner thereof, and shall, if he neglects to do so, be liable for all damages suffered by such owner by reason of such neglect. 57 Vic. ch. 55, section 15.

Examination by engineer.

16.—(1) The engineer shall attend at the time and place appointed by him in answer to the requisition, and shall examine the locality, and if he deems it proper, or if requested by any of the owners, may examine the owners and their witnesses present, and take their evidence, and may administer an oath or affirmation to any owner or witness examined by him. If upon examining the locality the engineer is of opinion that the lands of owners upon whom notice has not been served will be affected by the ditch, he shall direct that the notice required by section 14 shall be served on such owners by the owner making the requisition and shall adjourn the proceedings to the day named in the notice for continuing the same for the purpose of allowing such owners to be present and to be heard upon the examination and taking of evidence.

(2) The engineer may adjourn his examination and the hearing of evidence from time to time, and if he finds that the ditch is required he shall, within 30 days after his first attendance make his award in writing (Form G), specifying clearly the location, description and course of the ditch, its commencement and termination, apportioning the work and the furnishing of material among the lands affected and the owners thereof, according to his estimate of their respective interests in the ditch, fixing the time for performance by the respective owners, appor-

tioning the maintenance of the ditch among all or any of the owners, so that as far as practicable each owner shall maintain the portion on his own land; and stating the amount of his fees and the other charges and by whom the same shall be paid.

(3) In any case where a ditch is to be covered, the engineer shall in his award specify the kind of material to be used in the covered portion of such ditch. 57 Vic. ch. 55, section 16.

Engineer may order opening of ditch across land of a person not benefited.

17. Should the engineer be of the opinion that the land of any owner will not be sufficiently affected by the construction of the ditch to make him liable to perform any part thereof, and that it is necessary or not, as the case may be, to construct the ditch across or into his land, he may, by his award, relieve such owner from performing any part of the work of the ditch and place its construction on the other owners; and any person carrying out the provisions of the award upon the land of the owner so relieved shall not be considered a trespasser while causing no unnecessary damage, and he shall replace any fences opened or removed by him. 57 Vic. ch. 55, section 17.

Filing award, notice to persons affected.

18. The engineer shall forthwith, after making his award as hereinbefore provided, file the same, and any plan, profile or specifications of the ditch, with the clerk of the muicipality in which the land requiring the ditch is situate, but should the lands affected lie in two or more municipalities, the award and any plan, profile or specifications shall be filed by the engineer with the clerk of each municipality, and may be given in evidence in any legal proceedings by certified copy, as are other official documents; and the clerk of the municipality or of each of the municipalities, shall forthwith upon the filing of the award, notify each of the persons affected thereby within the municipality of which he is clerk, by registered letter or personal service, of the filing of the same, and the portion of work to be done and material furnished by the person notified as shewn by the award, and the clerk shall keep a book in which he shall record the names of the parties to whom he has sent notice, the address to which the same was sent, and the date upon which the same was deposited in the post office or personally served. 57 Vic. ch. 55, section 18.

Powers of engineer of municipality in which proceedings commenced.

19. If the lands affected by the ditch are situate in two or more municipalities, the engineer of the municipality in which proceedings were commenced shall have full power and authority to continue the ditch into or through so much of the lands in any other municipality as may be found necessary, but within the limit of length as hereinbefore provided, and all proceedings authorized under the provisions of this Act shall be taken and carried on in the municipality where commenced. 57 Vic. ch. 55, section 19.

Certificates relating to lands or roads in adjoining municipalities.

20. In every case where lands or roads in two or more municipalities are affected the clerk of the municipality in which proceedings were commenced shall forward to the clerk of each of the other municipalities a certified copy of every certificate affecting or relating to lands or roads therein respectively, and the municipal council thereof shall pay the sum for which lands and roads within its limits are liable to the treasurer of the municipality in which proceedings were commenced, and unless the amounts are paid within fourteen days after demand in writing by the parties declared by the certificate liable to pay the same, such council shall have power to take all proceedings for the collection of the sums so certified to be paid, as though all the proceedings had been taken and carried on within its own limits. 57 Vic. ch. 55, section 20.

Culverts, etc., on railway lands.

21.—(1) The council of any municipality may enter into an agreement with any railway company for the construction or enlargement by the railway company of any ditch or culvert on the lands of such railway company, and for the payment of the cost of such work after completion out of the general funds of the municipality, and the council shall have power to assess and levy the amount so paid exclusive of any part thereof for which the municipality may be liable under the award as to the cost of the work in the same manner as taxes are levied upon the lands mentioned in the award and in the relative proportions of the estimated cost of the work to be done and materials furnished by the respective owners in the construction of such ditch; and such assessment shall in every case be determined by a supplementary award made by the engineer, and subject to appeal to the Judge in the same manner as other awards made under this Act.

(2) No agreement with a railway company shall be entered into by a municipal council under this section which will impose a special liability on the owners without the consent in writing, filed with the clerk of the municipality, of two-thirds of the owners liable for the construction of the ditch in respect to which such work on railway lands is to be undertaken.

(3) The cost of any such work on railway lands shall be exclusive of the sum fixed as the limit of the cost of the work imposed by section 5 of this Act. 57 Vic. ch. 55, section 21.

Appeals from award to County Judge.

22.—(1) Any owner dissatisfied with the award of the engineer, and affected thereby, may, within fifteen clear days from the filing thereof, appeal therefrom to the Judge, and the proceedings on the appeal shall be as hereinafter provided.

Notice of appeal.

(2) The appellants shall serve upon the clerk of the municipality in which proceedings for the ditch were initiated, a notice in writing of his intention to appeal from the award, shortly setting forth therein the grounds of appeal.

Clerk to notify Judge and Judge to fix time and place for hearing.

(3) The clerk, in the next preceding sub-section mentioned, shall, after the expiration of the time for appeal, forward by registered letter or deliver a copy of the notice or notices of appeal and a certified copy of the award, and also the plans and specifications (if any) to the Judge, who shall forthwith upon the receipt of the registered letter, or documents aforesaid, notify the clerk of the time he appoints for the hearing thereof, and shall fix the place of hearing at the town hall or other place of meeting of the council of the municipality in which proceedings for the ditch were initiated, unless the Judge for the greater convenience of the parties and to save expense fixes some other place for the hearing. The Judge may

if he thinks proper order such sum of money to be paid by the appellant or appellants to the said clerk as will be a sufficient indemnity against costs of the appeal; and the clerk upon receiving notice from the Judge, shall forthwith notify the engineer whose award is appealed against, and all parties interested, in the manner provided for the service of notices under this Act.

Inspection of premises by another engineer.

(4) Any appellant may have the lands and premises inspected by any other engineer or person who, for such purposes, may enter upon such lands and premises, but shall do no unnecessary damage.

Clerk of the Court.

(5) The clerk of the municipality to whom notice of appeal is given shall be the clerk of the court, and shall record the proceedings.

Judge to hear and determine within two months.

(6) It shall be the duty of the Judge to hear and determine the appeal or appeals within two months after receiving notice thereof from the clerk of the municipality as hereinbefore provided.

Powers of Judge on appeal.

(7) The Judge on appeal may set aside, alter or affirm the award and correct any errors therein; he may examine parties and witnesses on oath, and may inspect the premises and may require the engineer to accompany him; and should the award be affirmed or altered, the costs of appeal shall be in his discretion, but if set aside he shall have power to provide for the payment of the costs in the award mentioned, and also the costs of appeal, and may order the payment thereof by the parties to the award, or any of them, as to him may seem just, and may fix the amount of such costs.

Depriving engineer of fees when guilty of misconduct.

(8) In case the Judge on an appeal finds that the engineer has through partiality or from some other improper motive, knowingly and wilfully favoured unduly any one or more of the parties to the proceedings, he may direct that the engineer be deprived of all fees in respect to the award or of such part thereof as the Judge may deem proper. But such order shall not deprive any party to the proceedings of any remedy he may otherwise have against the engineer.

Fees and disbursements of Judge.

(9) The Judge shall be entitled to charge for holding court for the trial of appeals under this Act, and for the

inspection of the premises the sum of five dollars a day, which charge shall be considered part of the costs of appeal under the provisions of the next preceding sub-section.

Enforcement of award as amended.

(10) The award as so altered or affirmed shall be certified by the clerk together with the costs ordered, and by whom to be paid, and shall be enforced in the same manner as the award of the engineer, and the time for the performance of its requirements shall be computed from the date of such judgment in appeal; and the clerk shall immediately after the hearing, send by registered letter, to the clerk of any other municipality in which lands affected by the ditch are situate, a certified copy of the changes made in the award by the Judge, which copy shall be filed with the award, and each clerk shall forthwith by registered letter notify every owner within his municipality of any change made by the Judge in the portion of work and material assigned to such owner. 57 Vic. ch. 55, section 22.

Judge may amend or refer back award.

23. No award made by an engineer under this Act shall be set aside by the Judge for want of form only or on account of want of strict compliance with the provisions of this Act, and the Judge shall have power to amend the award or other proceedings, and may in any case refer back the award to the engineer with such directions as may be necessary to carry out the provisions of this Act. 57 Vic. ch. 55, section 23.

When award to be binding notwithstanding defects.

24. Every award made under the provisions of this Act shall after the lapse of the time hereinbefore limited for appeal to the Judge, and after the determination of appeals, if any, by him, where the award is affirmed, be valid and binding to all intents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act. 57 Vic. ch. 55, section 24.

Powers of Judge as to taking evidence.

25. In all appeals under this Act from the engineer's award the Judge shall possess all such powers for compelling the attendance of, and for the examination on oath, of all parties and other persons as belong to or might be exercised by him in the Division Court or in the County Court. 57 Vic. ch. 55, section 25.

Clerk may issue subpœnas.

26.—(1) Upon any appeal to a Judge under this Act, the clerk of the municipality shall have the like powers as the clerk of a Division Court as to the issuing of subpœnas to witnesses upon the application of any party to the proceedings, or upon an order of the Judge for the attendance of any person as a witness before him.

Witness fees.

(2) The fees to be allowed to witnesses upon an appeal under this Act shall be upon the scale of fees allowed to witnesses in any action in the Division Court. 57 Vic. ch. 55, section 26.

Municipalities to pay costs, etc., and collect same from persons liable.

27. The municipality or each of the municipalities shall within 10 days after the expiration of the time for appeal or after appeal, as the case may be, pay to the engineer and Judge and all other persons entitled to the same, their charges and fees or a portion thereof awarded or adjudged to be paid by the owners therein, and shall, if the same be not forthwith repaid by the persons awarded or adjudged to pay the same, cause the amount, with seven per cent. added thereto, to be placed upon the collector's roll as a charge against the lands of the person so in default, and the same shall thereupon become a charge upon such lands, and shall be collected in the same manner as municipal taxes. 57 Vic. ch. 55, section 27.

Letting work on non-compliance with award.

28.—(1) The engineer at the expiration of the time limited by the award for the completion of the ditch, shall inspect the same if required in writing so to do by any of the owners interested, and if he finds the ditch or any part thereof not completed in accordance with the award, he may let the work and supply of material to the lowest bidder giving security in favour of the municipality by which he was appointed, and approved by the engineer, for the due performance thereof within a limited time, but no such letting shall take place:

(*a*) Until notice in writing of the intended letting has been posted up, in at least three conspicuous places in the neighborhood of the place at which the work is to be done, for four clear days.

(*b*) And until after four days from the sending of the notice by registered letter, to the last-known address of such persons interested in the said award as do not reside in said municipality or municipalities, as the case may be.

Extension of time for compliance.

(2) If however, the engineer is satisfied of the good faith of the person failing in the performance of the award, and there is good reason for the non-performance thereof, he may, in his discretion, and upon payment of his fees and charges, extend the time for performance.

Liability of person in default of doing work after proceedings begun.

(3) Any owner in default, supplying the material and doing the work after proceedings are begun to let the same, shall be liable for the fees and expenses occasioned by his default, and the same shall form a charge on his land, and if not paid by him on notice, the council shall pay the same on the certificate of the engineer, and shall cause the amount with seven per cent. added thereto to be placed on the collector's roll against the lands of the person in default to be collected in the same manner as municipal taxes.

Power to re-let.

(4) The engineer may let the work and supply of material or any part thereof, by the award directed, a second time or oftener, if it becomes necessary in order to secure its performance and completion. 57 Vic. ch. 55, section 28.

Certificates of engineer upon completion or work let.

29 The engineer shall, within ten days after receipt of notice in writing of the supplying of material and completion of the work let, as in the next preceding section mentioned, inspect the same, and shall if he find the material furnished and the work completed, certify the same in writing, (Form H,) stating the name of the contractor, the amount payable to him, the fees and charges which the engineer is entitled to for his services rendered necessary by reason of the non-performance, and by whom the same are to be paid. 57 Vic. ch. 55, section 29.

Payment of amounts named in certificate of engineer.

30. The council shall at their meeting next after the filing of the certificate or certificates as in the next preceding section mentioned, pay the sums therein set forth to the persons therein named, and unless the owners within the municipality upon notice pay the sums for which they are thereby made liable, the council shall have power to cause the amount each owner is liable for, together with seven per cent. added thereto, to be placed upon the collector's roll, and the same shall thereupon become a charge against his lands, and shall be collected in the same manner as municipal taxes. 57 Vic. ch. 55, section 30.

Letting contracts for rock-cutting or blasting.

31.—(1) If it appears to the engineer that rock-cutting or blasting is required, the engineer may cause the work of cutting or blasting and removing the rock to be done by letting the same out to public competition by tender or otherwise, instead of requiring each owner benefited to do his share of the work; and the engineer shall, by his award, determine the fractional part of the whole cost which shall be paid by each of the owners benefited, and upon completion of the rock-cutting or blasting and removal, shall certify to the clerk of the municipality by which he was appointed, the total cost thereof including his fees and charges, and the said clerk, and the clerk of any other municipality affected shall notify all the owners liable to contribute under the award, within their respective municipalities of the said total cost and the part to be paid by him, and unless forthwith paid, the same with seven per cent. added thereto, shall be placed on the collector's roll of the municipality in which his lands are situate, and the same shall thereupon become a charge against the land of the owners so liable, and shall be collected in the same manner as municipal taxes.

Payment of contractor and engineer.

(2) It shall be the duty of the municipality in which proceedings for the work were commenced, through the treasurer thereof, to pay the contractor for the rock-cutting or blasting and removal as soon as done to the satisfaction and upon the certificates of the engineer, and also to pay the fees and charges of the engineer in connection therewith. 57 Vic. ch. 55, section 31.

Owners desiring to avail themselves of ditch after construction.

32. In case any owner during or after the construction of a ditch desires to avail himself of such ditch for the purpose of draining other lands than those contemplated by the original proceedings he may avail himself of the provisions of this Act, as if he were an owner requiring the construction of a ditch; but no owner shall make use of a ditch after construction, unless under an agreement or award, pursuant to the provisions of this Act. 57 Vic. ch. 55, section 32.

Deepening, widening or covering ditch.

33. This Act shall apply to the deepening, widening or covering of any ditch already or hereafter constructed, and the proceedings to be taken for procuring such deepening, widening or covering, shall be the same as the proceedings to be taken for the construction of a ditch under the provisions of this Act, but in no case shall a ditch be covered, unless when covered it will provide capacity for all the surface and other water from lands and roads draining naturally towards and into it as well as for the water from all the lands made liable for the construction thereof. 57 Vic. ch. 55, section 33.

Maintenance of ditches heretofore or hereafter constructed.

Rev. Stat. 1877, c. 199; 46 V. c. 27; Rev. Stat. 1887, c. 220; 57 V. c. 55.

34. The maintenance of any ditch, whether covered or open, constructed, or of any creek or watercourse that has been deepened or widened, under the provisions of any former Act respecting Ditches and Watercourses, or constructed, deepened, widened or covered under this Act, shall be performed by the respective owners, in such proportion as is provided in the original or any subsequent award; and the manner of enforcing the same, shall be as hereinafter provided. 57 Vic. ch. 55, section 34,

Enforcing maintenance.

35.—(1) If any owner whose duty it is to maintain any portion of a ditch, neglects to maintain the same in the manner provided by the award, any of the owners parties to the award whose lands are affected by the ditch, may, in writing, notify the owner making default, to have his portion put in repair within 30 days from the receipt of such notice; and if the repairs are not made and completed within 30 days, the owner giving the notice may notify the engineer, in writing, to inspect the portion complained of.

(2) The inspection by the engineer and the proceedings for doing and completing the repairs required and enforcing payment of costs, fees and charges shall be as hereinbefore provided in case of non-completion of the construction of a ditch; but should the engineer find no

cause of complaint he shall certify the same with the amount of his fees and charges to the owner who complained and also to the clerk of the municipality, and the owner who made complaint shall pay the fees and charges of the engineer, and if not forthwith paid by him, the same shall be charged and collected in the same manner as is provided for by this Act, in the case of other certificates of the engineer.

(3) Any owner interested in or affected by any ditch heretofore or hereafter constructed, which has not been constructed under any of the Acts mentioned in section 34 of this Act, nor under this Act, nor under any Act relating to the construction of drainage work by local assessment, may take proceedings for the deepening, widening, extending, covering or repair of such ditch in the same manner as for the construction of a ditch under this Act; provided always that the extent of the work and costs thereof and assessment therefor shall not exceed the limitations imposed by sections 5 and 6 of this Act. 57 Vic. ch. 55, section 35.

Reconsideration of agreement or award.

36. Any owner party to the award whose lands are affected by a ditch, whether constructed under this Act or any other Act respecting ditches and watercourses, may, at any time after the expiration of two years from the completion of the construction thereof, or in case of a covered drain at any time after the expiration of one year, take proceedings for the reconsideration of the agreement or award under which it was constructed, and in every such case he shall take the same proceedings, and in the same form and manner, as are hereinbefore provided in the case of the construction of a ditch.

Proviso.

Provided that in case any ditch, after its construction, proves insufficient for the purposes for which it was constructed so as to cause an overflow of water upon any lands along the said ditch and causes damage to the same, any owner party to the award may at any time after the expiration of six months from the completion of the ditch take proceedings as aforesaid for the reconsideration of the agreement or award under which such ditch was constructed for the purpose of remedying the defect in that particular respect. This proviso shall apply only to that portion of the Province lying east of the County of Frontenac. 57 Vic. ch. 55, section 36; 58 Vic. ch. 54, section 2.

Penalty for engineer failing to inspect.

37. Any engineer who wilfully neglects to make any inspection provided for by this Act ~~for 30~~ days after he has received written notice to inspect, shall be liable to a fine of not less than $5 and not more than $10, to be covered with costs on complaint made before a Justice of the Peace having jurisdiction in the matter; and in default of payment the same shall be recoverable by distress, and every such fine shall be paid over to the treasurer of the municipality in which the offence arose. 57 Vic. ch. 55, section 37.

Actions for mandamus etc., not to lie.

38. No action, suit or other proceeding shall lie or be had or taken for a mandamus or other order to enforce or compel the performance of an award or completion of a ditch made under this Act, but the same shall be enforced in the manner provided for by this Act. 56 Vic. ch. 55, section 38.

se of forms.

39. In carrying into effect the provisions of this Act, the forms set forth in the schedule hereto may be used, and the same or forms to the like effect shall be deemed sufficient for the purposes mentioned in the said schedule. 57 Vic. ch. 55, section 40.

SCHEDULE.

FORM A.

(*Section 4*).

BY-LAW FOR APPOINTMENT OF ENGINEER.

A by-law for the appointment of an engineer under the Ditches and Watercourses Act.

Finally passed , 189 .

The municipal council of the of in the county of enacts as follows:

1. Pursuant to the provisions of section 4 of The Ditches and Watercourses Act, (name of person) of the town (or township of , in the county of , is hereby appointed as the engineer for this municipality to carry out the provisions of the said Act.

2. The said engineer shall be paid the following fees for services rendered under the said Act (or as the case may be).

3. This by-law shall take effect from and after the final passing thereof.

Reeve.
Clerk.
[L.S.]

57 Vic. ch. 55, Sched. Form A.

FORM B.

(*Section 7.*)

DECLARATION OF OWNERSHIP.

In the matter of The Ditches and Watercourses Act, and of a ditch in the township (or as the case may be) of in the county of

I, of the of , in the county of , do solemnly declare and affirm that I am the owner within the meaning of The Ditches and Watercourses Act, of lot (or the sub-division of the lot, naming it) number , in the concession of the township of , being (describe the nature of ownership).

Solemnly declared and affirmed
before me at the
of , in the county
of , A.D. 189 .

a Commissioner.
(J. P. or Clerk.)

57 Vic. ch. 55, Sched. Form B.

FORM C.

(*Section 8.*)

NOTICE TO OWNERS OF LANDS AFFECTED BY PROPOSED DITCH.

To

Township of , (date) 189 .

Sir,—

I am within the meaning of The Ditches and Watercourses Act, the owner of lot (or the sub-division, as in the declaration) number in the concession of , and as such owner I require a ditch to be constructed (or if for reconsideration of agreement or award to deepen, widen or otherwise improve the ditch, state the object) for the draining of my said land under the said Act. The following other lands will be affected: (here set out the other parcels of land, lot, concession and township and the name of the owner in each case; also each road and the municipality controlling it).

I hereby request that you, as owner of the said (state his land) will attend at (state place of meeting), on the day of , 189 , at the hour of o'clock in the noon, with the object of agreeing, if possible, on the respective portions of the work and materials to be done and furnished by the several owners interested and the several portions of the ditch to be maintained by them.

Yours, etc.,

(Name of owner.)

57 Vic. ch. 55, Sched. Form C.

FORM D.

(*Section 9.*)

AGREEMENT BY OWNERS.

Township of , (date) 189 .

Whereas it is found necessary that a ditch should be constructed (or deepened or widened, or otherwise improved) under the provisions of The Ditches and Watercourses Act, for the draining of the following lands (and roads if any): (here describe each parcel and give name of owner as in the notice, including the applicant's own land, lot, concession and township, and also roads and by whom controlled.)

Therefore we the owners within the meaning of the said Act of the said lands (and if roads proceed and the reeve of the said municipality on behalf of the council thereof) do agree each with the other as follows: That a ditch be constructed (or as the case may be) and we do hereby estimate the cost thereof at the sum of $, and the ditch shall be of the following description: (here give point of commencement, course and termination, its depth, bottom and top width and other particulars as agreed upon, also any bridges, culverts or catch-basins, etc., required). I, , owner of (describe his lands) agree to (here give portion of work to be done, or material to be supplied) and to complete the performance thereof on or before the day of A. D. 189 . I, , owner of, etc. (as above, to the end of the ditch).

That the ditch when constructed shall be maintained as follows: I, , owner of (describe his lands) agree to maintain the portion of ditch from (fix the point of commencement) to (fix the point of termination of his portion), I, , owner of (describe his lands) agree to maintain, etc., (as above, to the end of the ditch).

Signed in presence of } (Signed by the parties here).

57 Vic. ch. 55, Sched. Form D.

FORM E.

(Section 13.)

REQUISITON FOR EXAMINATION BY ENGINEER.

Township of , (date 189 .

To (name of clerk,)
Clerk of
(P. O. address).

SIR,—I am, within the meaning of The Ditches and Watercourses Act, the owner of lot (or sub-division, as in the declaration), number , in the concession of , and as such I require to construct (deepen, widen, or otherwise improve as needed), a ditch under the provisions of the said Act, for the drainage of my said land, and the following lands and roads will be affected: (here describe each parcel to be affected as in the notice for the meeting to agree and state the name of the owner thereof), and the said owners having met and failed to agree in regard to the same, I request that the engineer appointed by the municipality for the pursoses of the said Act, be asked to appoint a time and place in the locality of the proposed ditch, at which he will attend and examine the premises, hear any evidence of the parties and their witnesses, and make his award under the provisions of the said Act.

(Signature of the party or parties.)

57 Vic. ch. 55, Sched. Form E.

FORM F.

(Section 14.)

NOTICE OF APPOINTMENT FOR EXAMINATION BY ENGINEER.

Township of , (date) 189 .

To (Name of owner).
(P. O. Address).

SIR,—You are hereby notified that the engineer appointed by the municipality for the purposes of The Ditches and Watercourses Act, has, in answer to my requisition, fixed the hour of o'clock in the noon of day, the day of to attend at (name the place appointed) and to examine the premises and site of the ditch required by me to be constructed under the provisions of the said Act (or as the case may be), and you, as the owner of lands affected, are required to attend, with any witnesses that you may desire to have heard, at the said time and place.

Yours, etc.,

(Signature of applicant).

57 Vic. ch. 55, Sched. Form F.

FORM G.

(*Section 16.*)

AWARD OF ENGINEER.

I, the engineer appointed by the municipality of the of in the county of under the provisions of The Ditches and Watercourses Act, having been required so to do by the requisition of owner of lot number in the concession of the township of (describe as in requisition), filed with the clerk of the said municipality and representing that he requires certain work to be done under the provisions of the said Act for the draining of the said land, and that the following other land (and roads) would be affected ;—(here set out the other parcels of lands or roads affected as in the requisition), did attend at the time and place named in my notice in answer to said requisition, and having examined the locality (and the parties and their witnesses if such be the case) find that the ditch (or the deepening or widening of a ditch) is required. The location, description and course of the ditch, and its point of commencement and termination are as follows :

(Here describe the ditch as to all above particulars.)

The said work will affect the following lands:—(here set forth the other lands and their respective owners.) I do, therefore, award and apportion the work and the furnishing of material among the lands affected and the owners thereof according to my estimate of their respective interests in the said work as follows :—

1. (Name of owner and description of his land) shall make and complete (here fix the point of commencement and ending of his portion) and shall furnish the material (state what material) all of which, according to my estimate, will amount in value to $, and I fix the time for the performance of such work and providing such material on the day of A. D. 189 , at furthest.

2. (Name of owner and description of his land and so on as above to the end.)

I do further award and apportion the maintenance of the ditch as follows :—

1. (Name of owner and description of his land) shall maintain (here fix the point and commencement and ending of his portion).

2. (Name of owner, etc., as above.)

My fees and the other charges attendant upon and for making this award are (here give fees and other charges, including clerk's fees in detail) amounting in all to $, which shall be borne and paid as follows :—(state by whom and by what lands respectively.)

Dated this day of , A. D. 189 .

Witness, } Signature of Engineer.

57 Vic. ch. 55, Sched. Form G.

FORM H.

(*Section 29.*)

CERTIFICATE OF ENGINEER.

To

Clerk of the of

I hereby certify that , has furnished the material and completed the work (as the case may be) which under my award made in accordance with the provisions of The Ditches and Watercourses Act, and dated the day of A. D. 189 , one owner of lot number (describe his land giving township or otherwise) was adjudged to perform, and having failed in the performance of the same it was subsequently let by me to the said for the sum of $, and as he has now completed the performance thereof he is entitled to be paid the said amount.

I further certify that my fees and charges for my services rendered necessary by reason of such failure to perform are (give items) $, and said amount payable to the said contractor and the said fees and charges are chargeable on (describe property to be charged therewith) under the provisions of The Ditches and Watercourses Act, unless forthwith paid.

Dated this day of A. D., 189 .

(Signature of Engineer.)

Engineer for

57 Vic. ch. 55, Sched. Form H.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME.

ABANDONMENT.

See NATURAL WATERCOURSES, 1.

ACQUIESCENCE.

See DITCHES AND WATERCOURSES ACT.

ACTION.

See REFERENCE—COSTS, 2.

ADMISSIONS.

Pleadings.

An admission contained in the statement of defence must be taken as a whole.

Tindell vs. Ellice, 247.

AMENDMENT.

Claim for Damages since Writ.

The referee has power to permit an amendment enabling plaintiff to claim for damages sustained since the commencement of the action.

Tindell vs. Ellice, 247.

See ASSESSMENT, 6, 7, 8.—ENGINEER, 3—LIMITATION OF ACTIONS.

APPEAL.

1. *Notice of—Service—Adoption of Service—Outlet.*

Notice of appeal signed by the reeve and clerk of the appealing municipality was served upon the clerk (instead of the reeve) of the initiating municipality who reported the service to his council. The notice being acted upon and no objection made to the mode of service till the hearing of the appeal, it was held to be a sufficient compliance with section 63.

It is open to the appealing municipality to object to the sufficiency of the outlet provided by the engineer where the assessment against it exceeds the estimated cost of the work in the initiating municipality.

The *onus* is upon the initiating municipality to show its legal right to assess lands in another municipality, and where the petition was not signed by a majority of owners of lands in the initiating township to be benefited, the petition was declared invalid. The petition must define the area proposed to be drained.

The township served with the report, plans, etc., cannot ignore them, though no by-law has been passed for doing the proposed work.

Malahide vs. Dereham, 243.

2. *Notice—Corporate Seal—Municipality not Assessed—Road Ditches—New Work—Petition—Injuring Liability.*

Notice of appeal need not be under the seal of the corporation appealing. It is not necessary to show that the appeal was authorized by by-law. If necessary the council could by by-law adopt what had been done.

A municipality into which it is proposed to continue a drainage work may appeal although not assessed.

Section 75 of the Drainage Act, 1894, does not authorize the construction of new work or the improvement of road ditches though connected with a drainage work constructed by local assessment without a petition and the other formalities of a new work.

Power of assessment for injuring liability discussed.

Tilbury East vs. Romney—Tilbury North vs. Romney, 261.

ARBITRATION.

1. *Construction of Drain—Statutory Powers.*

Held: That so far as the injury was occasioned by the negligent construction of a drain by the municipality under its statutory powers, the action must be dismissed. The remedy in such case (see section 591) is by arbitration as directed by the Statute.

Raleigh vs. Williams, 1.

2. *Defective Drainage Work—Negligence.*

Where a scheme for drainage work to be constructed under a valid by-law proves defective and the work has not been skilfully and properly performed, the municipality constructing it are not liable to persons whose lands are damaged in consequence of such defects and improper construction, as *tort feasors*, but are liable under section 591 of the Municipal Act for damage done in the construction of the work or consequent thereon.

Ellice vs. Hiles—Ellice vs. Crooks, 89.

See COMPENSATION—NOTICE, 5—NATURAL WATERCOURSES, 4.

ASSESSMENT.

1. *R. S. O. (1887) ch. 184, sections 585 and 590 Considered—Distinguishing Assessments.*

A single assessment for one entire scheme made up partly for work that should be done under section 585 and partly for work under section 590, is void, where it appears that one element of the assessment is not warranted.

Harwich vs. Raleigh—Tilbury East vs. Raleigh, 55.

2. *Benefit—Confirmation of By-law—Action for Damages.*

One whose lands in an adjoining municipality have been damaged cannot, after the by-law has been appealed against and confirmed and the lands assessed for benefit, contend before the referee to whom his action for such injury has been referred under the Drainage Trials Act that he was not liable to such assessment, the matter having been concluded by the confirmation of the by-law.

Ellice vs. Hiles—Ellice vs. Crooks, 89.

3. *Distinguishing for Benefit and for Outlet.*

The assessment should be so particular and specific that every person whose land is charged can ascertain precisely why he is charged, as well as for what amount. In the absence of information, showing how much was assessed for benefit and how much for outlet, the report was declared illegal and the provisional by-law quashed.

Romney vs. Tilbury North—Tilbury East vs. Tilbury North, 113.

4. *Section 585, Municipal Act 1892—Second Assessment.*

An engineer, where a drainage work is authorized by section 585, may exercise all the powers to assess and charge lands conferred by any of the sections from 569 to 582 inclusive and by section 590.

Chatham and North Gore vs. Dover, 117.

5. *Omission of Lands to Off-set Damage.*

It is improper for an engineer to omit lands from assessment as an off-set to damage expected to result from the work.

Wilkie vs. Dutton, 132.

6. *Section 114 of The Drainage Act 1894—Engineer—Independent Judgment.*

A report and assessment made by an engineer under the Act of 1892, while in force, was referred back by the council for amendment so as to conform to the Act of 1894, which was done in form. Held: that the report and assessment could not be supported under the Act of 1892, nor could it be supported under the Act of 1894, no new assessment having been made and the engineer in making the amendments not acting of his own motion and upon his independent judgment.

Mornington vs. Ellice, 257.

7. *"Outlet Liability,"—"Benefit"—Costs in Excess of Benefit—Description—Amendment.*

When sub-section 3 of section 3 of the Drainage Act 1894, is invoked, there must be some relation between injury and benefit. Where the work necessary to benefit the petitioners cannot be done except at a cost far in excess of the benefit, it ought not to be proceeded with and the referee has jurisdiction to prevent it.

Assessment for "Outlet Liability" and for "Benefit" discussed.

The referee may amend defective descriptions of lands with the consent of the engineer.

Gosfield South vs. Mersea, 268.

8. *Allowance for Previous Assessment—Jurisdiction of Referee—Sections 13 and 38, Ch. 56, 1894—Description of Lands.*

Section 13 of the Drainage Act 1894, does not permit an assessment for outlet liability which will re-coup a lower township for an expenditure made for its own benefit years before.

The law was amended to render the higher lands liable to assessment.

The referee has jurisdiction to entertain an appeal from the judgment of an engineer even in cases where he has power to take into consideration prior assessments and to make allowances therefor, and, if the evidence warrants it, to set aside the report.

Sections 13 and 38 considered.

Instances given of sufficient and insufficient description of lands for assessment.

The referee may correct a defective description with the engineer's consent.

South Dorchester and Dereham vs. Malahide, 275.

9. *Mode of--Improved Outlet--Volume and Speed—Future Maintenance of Work under Section 75—Omission of Lands.*

Where the engineer of the initiating township assessed lands in the adjoining townships for improved outlet upon the principle that all lands within a drainage area were liable, no matter how remote from the improved outlet, though such outlet was unnecessary for their drainage or cultivation, the original outlet being in fact sufficient, his report was set aside.

Basis of assessment for outlet upon volume and having regard to speed of water under section 3, sub-section 5, discussed.

An engineer acting under section 75 has no authority to vary the proportion of assessment for maintenance, which should be at the expense of the lands and roads assessed for the construction and for the work proceeding under section 75. Per Burton, C. J. O. :—There is no power to assess for the estimated cost of future maintenance of a drainage work under section 75.

The engineer's report need not state how or in what way particular lands assessed for benefit would be benefited.

The omission of lands from the assessment is for the Court of Revision.

Caradoc vs. Ekfrid, 295, 303.

10. *Repairs—Different Drainage Areas--Common Outlet--Engineer's Report—Names of Owners—Description of Lands —Natural Drainage—Special Benefit.*

Where it was proposed under one report to clean out and repair two drains constructed under separate by-laws and draining separate areas, and to enlarge and improve their common outlet and assess their combined drainage areas, held : that as the benefit from the improvement of one drain could not be shared by lands formerly assessed for, and using the other drain, though both would be liable for the improvement of the common outlet, the combined assessment of lands using only one of the drains for the improvement of the two drains, was unwarranted.

The names of the owners proposed to be assessed with a description of the lots, or parts of lots, respectively, in respect of which they are so proposed to be assessed, should be specified in the engineer's report.

Lands which have a natural drainage, and which are distant from and are neither immediately or artifically connected with a drainage work, are not assessable for the cost of its construction or repair. To justify their assessment there must be some special value or agricultural benefit accruing to them from the drainage work.

Gosfield South vs. Gosfield North, 342.

See OUTLET, 1. 3. 4.—REFEREE—APPEAL, 1—DAMAGES, 2, 3—REPORT OF ENGINEER.

ASSIGNMENT OF FUND.

Drainage Contract—Orders.

Orders given by the contractor in respect of a fund actually in being or about to arise in the ordinary course of events out of an existing arrangement amount to equitable assignments of so much of his claim as is represented by them so as to prevent the contractor from recovering in an action where he is not suing on behalf of the payees of the orders.

Sorensen vs. Colchester South, 214.

AWARD DRAIN.

See REPORT OF ENGINEER.

BENEFIT.

See ASSESSMENT, 2—DAMAGES, 2—ASSESSMENT, 7. 10.

BY-LAW.

1. *Validity of.*

Under the Drainage Trials Act 1891, 54 Vic. ch. 51, (O) the referee has power to award either damages or compensation whether the case before him be framed for damages only or for compensation only, and on such a reference it is unnecessary to consider whether the by-laws in question are or are not invalid.

Hiles vs. Ellice—Crooks vs. Ellice, 74.

2. *Registration—Negligence—Section 591 Municipal Act.*

The omission to register as required by section 351 of the Municipal Act does not make invalid a by-law otherwise valid. If by-law is valid defendants are not liable in an action as tort feasors or for negligence, but upon a reference of the action the referee has most ample powers to deal with the case as one for compensation under section 591.

Tindell vs. Ellice, 247.

See SERVICE—APPEAL—ENGINEER, 2. 3.

CERTIFICATE.

See CONTRACT.

COMBINING DRAINAGE AREAS.

See ASSESSMENT, 10.

COMPENSATION.

1. *Demand—Proceeding by Notice—Referee—Jurisdiction.*

In a proceeding to establish a claim for compensation for damages caused by drainage works, where no negligence is charged, the drainage referee has the jurisdiction formerly possessed by arbitrators under the Municipal Act. Such proceeding, is properly instituted by a notice under section 5 of the Drainage Trials Act, 1891. A previous demand is not necessary.

Wickwire vs. Romney—Suskey vs. Romney, 179.

2. *57 Vic. ch. 56, section 93—Statement of Claim—Notice.*

Compensation for land taken

and damages caused by and consequent upon the construction of a drainage work can only be dealt with under the arbitration proceedings prescribed by section 93.

A statement of claim in an action for damages can not be treated as a notice claiming damages and compensation under subsection 2 of that section.

Murphy vs. Oxford, 350.

See BY-LAW, 2—NOTICE, 5.

CONSENT.

See WITHDRAWAL.

CONSTRUCTION.

See LIMITATION OF ACTIONS.

CONTINUING DAMAGE.

See NATURAL WATERCOURSES, 4.

CONTRACT.

Final Certificate—Neglect of Engineer.

Where it is found as a fact that the work was completed and the engineer in charge omitted for a long time after notice of completion to inspect the work, the plaintiff may recover without the engineer's certificate and without shewing collusion between the engineer and the defendant or fraud on the part of the engineer.

Sorensen vs. Colchester South, 214.

CONTRACTOR.

See NEGLIGENCE, 1.

CONTRIBUTION.

See. OUTLET, 2. 4—MAINTENANCE AND REPAIR, 6.

COSTS.

1. *Negligence—Action—Reference—Compensation.*

Where no negligence is shewn in an action referred to the Drainage Referee, plaintiff should not get the costs of the action and should only get such costs as he would be entitled to if he had instituted proceedings under section 591 of the Consolidated Municipal Act, 1892, for recovery of compensation.

Wilkie vs. Dutton, 132.

2. *Action–Notice--Drainage Trials Act 1891—Section 5.*

The plaintiff having brought an action, where he should have proceeded by filing a notice under section 5 of the Drainage Trials Act, 1891, was ordered to pay the costs of the action.

Tindell vs. Ellice, 247.

See ROAD DITCH.

COUNTY BY-LAW.

See REFEREE.

COURSE OF DRAIN.

Interference with Route.

The referee has no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by by-law, the only remedy, if any, being by appeal against the project proposed by the by-law.

Ellice vs. Hiles—Ellice vs. Crooks, 89.

See PETITION, 2.

COURT OF REVISION.

See ASSESSMENT, 9–DAMAGES, 3.

CREEK.

Artificial Work.

No distinction should be drawn between deepening a creek and constructing a ditch, the former being to all intents and purposes a new drain.

Fewster vs. Raleigh, 227.

CROPS.

Drainage Work—Adjacent Lands.

When a new drainage work constructed by the municipality through the plaintiff's farm induced the plaintiff to crop the lands adjacent to such work and the work proved to be insufficient for the purpose, the municipality was held liable but the plaintiff is bound to concede the possibilities of damages to crops owing to proximity to the drainage work.

McCulloch vs. Caledonia, 340.

DAMAGES.

1. *Acceptance of Compensation—Purchase with Knowledge.*

Where plaintiff's predecessor in title accepted a sum in full compensation for all damage that might result from the construction of a drain; the plaintiff, who purchased with full knowledge of all the facts, cannot recover. The plaintiff is entitled to have his damage assessed once for all.

Tindell vs. Ellice, 247.

2. *Permanent Injury—Assessment for benefit—Remoteness.*

The purchaser of land cannot recover damages for permanent injury caused by drainage works constructed prior to the purchase, nor can a person assessed for benefit by the engineer recover damages for permanent injury to the land so assessed. Damages for loss of the use of land which but for the water could have been logged and cleared up are too remote.

Buchanan vs. Ellice—Geen vs. Ellice, 254.

3. *Land Injuriously Affected—Appeal to Court of Revision—Drainage Referee.*

Under the drainage clauses of the Municipal Act of 1892, a land owner who is injuriously affected by a drainage work and who is assessed for part of the cost, is not bound to appeal to the Court of Revision for the allowance to him of damages to be set off against his assessment; he has his remedy by arbitration or action. Whether such a claim is made by application to the referee or by action is immaterial; in either event the Drainage Referee has jurisdiction to deal with it.

Thackery vs. Raleigh, 328.

4. *Private Drainage—Overflow—Swamps—Natural Reservoir.*

Where the defendant being the owner of an upper lot constructed a drain on his farm which carried the surface water to a swamp extending over portions of his own and his neighbor's lots, from whence another artificial drain on such neighbor's lots carried the water into another swamp, which extended into the next lower lot and from whence by another drain into a third swamp, and from whence it flowed into a drain connecting with a municipal drain the water from which overflowed and damaged the plaintiff's crops, it was held that there was no continuous artificial drain between the defendant's lands and those of the plaintiff. And that the defendant was not liable for any damage done by the water so flowing on the plaintiff's lands.

Young vs. Tucker, 356.

See NON-FEASANCE — ROAD DITCH—ONUS OF PROOF—REFERENCE—ASSESSMENT, 2. 5.—TENANT—KNOWLEDGE— MAINTENANCE AND REPAIR, 3.—AMENDMENT — DITCHES AND WATERCOURSES ACT — MAINTENANCE AND REPAIR, 6 — NOTICE, 5—NATURAL WATERCOURSE, 4.

DEMAND.

See COMPENSATION, I.

DESCRIPTION OF LANDS.

See ASSESSMENT, 7, 8, 10.

DISCRETION.

See VIS MAJOR, 3.

DITCHES AND WATERCOURSES ACT.

Defective Requisition — Damages —Liability of Township— Acquiescence.

A township municipality within the limits of which a ditch is constructed under the provisions of "The Ditches and Watercourses Act" in accordance with the award of the township engineer made in assumed compliance with the requisition of the ratepayers interested is not liable for damages caused to a resident of the township by the construction of the ditch even though the requisition be in fact defective. The plaintiff cannot afterwards complain where he acquiesced in the work complained of.

Seymour vs. Maidstone, 311. 317.

See REPORT OF ENGINEER.

DIVERSION.

See NEGLIGENCE, 2—NATURAL WATERCOURSES, I, 4.

EASEMENT.

See NATURAL WATERCOURSES, I, 5.

ENGINEER.

I. *Competency—Petition.*

A person who signs a petition for a drain which asks that a certain engineer be appointed to make the necessary survey, etc., ought not to be allowed to say that such engineer is competent for the work he was employed to do.

Sage vs. West Oxford—Thornton vs. West Oxford, 122.

2. *Appointment--By-law--Resolution.*

Appointment of engineer by resolution held valid when ratified by the adoption of his report, and the report adopted by a provisional by-law.

Tilbury East vs. Romney—Tilbury North vs. Romney, 261.

3. *Appointment--By-law–Amending Report.*

The appointment of an engineer to examine and report upon a drainage work need not be by by-law in the first intance. Where a report after being adopted by the council was recalled and substantially varied by the engineer, the amended report having been adopted by a provisional by-law, was held to be authorized by the council.

South Dorchester and Dereham vs. Malahide, 275.

See ASSESSMENT, 6.

ESTOPPEL.

Previous Recovery.

A judgment obtained against the township for damages to crops by a former tenant of the plaintiff in respect of the same lands does not operate by way of estoppel.

Sage vs. West Oxford—Thornton vs. West Oxford, 122.

See OUTLET, 5.

EVIDENCE.

1. *Notice—Sufficiency of Proof—R. S. O. (1887) ch. 36, section 31, sub-section 3.*

Held: that there was sufficient evidence of a reasonable and satisfactory notice having been given by plaintiff to entitle him to damages for non-repair of a government drain.

Wickens vs. Sombra, 106.

2. *Non-repair——Engineers' Reports.*

Want of repair of a drain may be proved by evidence other than that of an engineer.

Statements contained in reports by engineers are evidence against the township to whom and by whose authority the reports were made.

Ford vs. Moore, 137.

3. *Provisional By-law–Engineer's Report.*

A provisional by-law containing the report of an engineer employed by the council is evidence of the facts stated in it.

Fewster vs. Raleigh, 227.

See ONUS OF PROOF, 1.

EXPENSES.

See WITHDRAWAL.

FILING.

See NOTICE, 3. 4.

FLATS.

Their Drainage.

Where nature has placed on

certain lands in flats the burden of overflow and backflow, it is not expedient to sanction a drainage system the expense of which would be largely in excess of the value of the lands when relieved and benefited.

Raleigh vs. Harwich, 348.

FUTURE MAINTENANCE.

See ASSESSMENT, 9.

HIGHWAYS.

1. *Overflow of Water.*

Where the plaintiff, the owner of a lot, with the assistance of his neighbors, constructed a ditch on his lot which brought the surface water to the roadway opposite a culvert on such roadway, through which, during freshets, water from lands on the other side of the roadway flooded the plaintiff's land; held: that he had no cause of action for damages against the municipality.

Murphy vs. Oxford, 350.

2. *Drainage—Protection—Paramount Rights.*

Of two municipal interests confided by the legislature to municipal councils, highways and drainage, their duties with regard to highways being for the benefit of the public at large, must always be paramount to their duties with regard to drainage schemes, which can only be exercised at the instance of, and for the benefit of, private persons or for the benefit of localities; and therefore where a proposed scheme did not provide for the protection of a highway which had been endangered by frequent washings-away by an existing ditch at a certain portion of such highway, the engineer's report was set aside.

Euphemia vs. Brook, 358.

See ROAD DITCH.

INDEPENDENT CONTRACTOR.

See NEGLIGENCE, 1.

INDEPENDENT JUDGMENT.

See ASSESSMENT, 6.

INJUNCTION.

Diversion—Outlet.

Where water was diverted from one drain to another without providing a proper outlet, the township was found guilty of negligence, and in default of a proper outlet being provided within a time fixed, injunction ordered to issue restraining defendants from discharging water into the new course to the damage and injury of plaintiff.

Gahen vs. Mersea, 140.

See ROAD DITCH—OUTLET, 4—NATURAL WATERCOURSES, 4.

INJURING LIABILITY.

See APPEAL, 2.

JURISDICTION.

See REFEREE—ASSESSMENT, 8.

KNOWLEDGE.

Purchaser — Damages — Previous Flooding.

It is not an answer to a claim for damages caused by overflow that the plaintiff when purchasing was aware of the flooding of the land in previous years by reason of the drain complained of.

Arn vs. Enniskillen, 210.

See DAMAGES, 1.

LIMITATION OF ACTION.

Statutes—Construction—Amendment—Retroactive Effect—54 Vic. ch. 42, section 16, (O).

Unless there is clear declaration in the Act itself to that effect, or unless the surrounding circumstances render that construction inevitable, an Act should not be so construed as to interfere with vested rights.

Section 16, of 54 Vic. ch. 42 (O), limiting the time for the enforcement of claims for compensation by persons injuriously affected by the exercise of municipal powers of expropriation does not apply to a claim existing at the time of the passage of the Act.

Re Roden vs. Toronto, 402.

See NOTICE, 4. 5.

MAINTENANCE AND REPAIR.

1. *Section 585, Municipal Act 1892.*

Section 585 may be invoked from time to time whenever the facts according to the altered circumstances of the case, render work necessary the better to maintain any such drain or to prevent damage to adjacent lands.

Chatham and North Gore vs. Dover, 117.

2. *Deepening, Etc.—Damages.*

The deepening, widening and extending of drains so as to carry away all the water they were originally designed to carry away, is a work of maintenance and repair within the meaning of the Drainage Act, and persons injured by neglect to so maintain and repair are entitled to damages.

Fewster vs. Raleigh, 227.

3. *Extension beyond Initiating Municipality.*

A municipality is authorized under section 585 of the Municipal Act to improve a drain though the work extends into an adjoining municipality.

Tindell vs. Ellice, 247.

4. *Agreement with Third Party—Person Injuriously Affected—Mandamus—57 Vic. ch. 56. section 73, (O).*

A municipality is not liable for the repair of a drain constructed by it under an agreement with a person not a party to the action.

Held, per Court of Appeal, reversing on this point the Drainage Referee, that under section 73 of the Drainage Act, 1894, (57 Vic. ch. 56 (O), a ratepayer whose property has been assessed for the maintenance and repair of a drain, as deriving benefit from it, is a person injuriously affected by its want of repair even though he has not suffered any pecuniary loss or damage by reason thereof, and he may be awarded a mandamus to compel the municipality, whose duty it is to keep the drain in repair, to do such work as may be necessary unless the municipality can shew that even if the drain were repaired it would, from changes in the surrounding conditions, be useless to the applicant's property.

Stephens vs. Moore, 283.

5. *57 Vic. ch. 56, section 75 (O.) —Notice.*

Under section 75 of the Drainage Act, 1894, 57 Vic. ch. 56, (O), any municipality whose duty it is to maintain any part of a drainage work constructed under the provisions of any act respecting drainage by local assessment may, without being set in motion by any complainant, initiate proceedings for its repair and improvement and for extending its outlet, although nearly the whole of the cost is assessable against adjoining townships.

Caradoc vs. Ekfrid, 295, 303.

6. *Damage from Water Caused by Plaintiff's Act or Neglect— Section 73, ch. 56, 1894 (O.)—Mandamus.*

Where the plaintiffs constructed box drains between their land and a township drain through which water flowed and injured their crops, held: that they could not recover damages from the township. Persons are bound to use such precautions as will prevent, as far as possible, the flooding of their properties.

"Maintenance" within the meaning of section 73 of the Drainage Act, 1894, includes whatever is necessary to put the drain in a proper condition to carry off the water flowing into it, having regard to the purpose for which the drain was constructed.

Though the plaintiffs failed in their claim for damages the evidence shewed that the water remained on the plaintiffs' premises for an unreasonable length of time; held: that they were persons whose property was injuriously affected by the condition of the drainage work, and that they were entitled to a mandamus against the defendant municipality to maintain the drain, pursuant to section 73 of the Drainage Act.

Peltier vs. Dover East, 323.

See NON-FEASANCE.

MANDAMUS.

See MAINTENANCE AND REPAIR, 4. 6.

MILL DAM.

See WITHDRAWAL.

NAMES OF OWNERS.

See ASSESSMENT, 10.

NATURAL DRAINAGE.

See ASSESSMENT, 10.

NATURAL RESERVOIR.

See DAMAGES, 4.

NATURAL WATERCOURSES.

1. *Diversion—Abandonment of Easement.*

A natural watercourse is not created by the overflow of water in times of freshet upon lands of lower level than the adjacent lands. The diversion of a watercourse with the acquiescence of all interested parties for a long period of time entitles the owner of lands relieved by such diversion to say the original course shall not be restored. The diversion of water raises a legal presumption of an intention to abandon the right to have it flow in the original course.

Desmonde vs. Armstrong, 221.

2. *Definition—Surface Water.*

A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continues or from a perenial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character.

Beer vs. Stroud, 361.

3. *Defined Channel—Surface Water—Right to Drain into Neighboring Lands.*

That cannot be called a defined channel or watercourse which has no visible banks or margins within which the water can be confined; and an occupant or owner of land has no right to drain into his neighbor's land the surface water from his own land not flowing in a defined channel.

The rule of the civil law that the lower of two adjoining estates owes a servitude to the upper to receive all the natural drainage has not been adopted in this Province.

Williams vs. Richards, 370.

4. *Surface Water — Diversion of Watercourse—Railways—Arbitration and Award—Damages—Injunction—Continuing Damage.*

If water precipitated from the clouds in the form of rain or snow forms for itself a visible course or channel and is of sufficient volume to be serviceable to the persons through, or along, whose lands it flows, it is a watercourse, and for its diversion an action will lie.

Where such a watercourse has been diverted by a railway company in constructing their line without filing maps or giving notice the land owner injuriously affected has a right of action and is not limited to an arbitration.

For such diversion the land owner, in the absence of an undertaking by the company to restore the watercourse to its original condition, is entitled to have the damages assessed as for a permanent injury.

The mode of computing damages to be allowed in lieu of an injunction, considered.

Arthur vs. G. T. R'y, 375. 381.

5. *Surface Water—Easement—Lands of Different Levels.*

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2. *Divers*

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between adjoining lands of different levels so as to give the owner of the land of higher level the legal right, as an incident of his estate, to have surface water falling on his land discharged over the land of lower level although it would naturally find its way there. The owner of the land of lower level may fill up the low places on his land or build walls thereon although by so doing he keeps back the surface water to the injury of the owner of the land of higher level.

Ostrom vs. Sills, 387.

See OUTLET, 3. 4—CREEK.

NEGLIGENCE.

1. *Spreading Earth—Protection of Land During Progress of Work—Independent Contractor.*

In the work of improving and extending a drain where no provision was made for properly disposing of the excavated earth and it was piled up in little hills along the ditch and also where no provision was made for protecting plaintiff's pasture or "green" while work was being done, and the fences were thrown down, the defendants were found guilty of negligence.

The contractors, to whom the work was given out, could not upon the facts of this case be deemed independent contractors so as to relieve defendants from liability.

Wilkie vs. Dutton, 132.

2. *Diversion—Water—Outlet—Injunction.*

Where water was diverted from one drain to another without providing a proper outlet, the township was found guilty of negligence and in default of a proper outlet being divided within a time fixed, injunction ordered to issue restraining defendants from discharging water into the new course to the damage and injury of plaintiff.

Gahan vs. Mersea, 140.

3. *Reasonable Exercise of Statutory Powers.*

An action lies for doing what the legislature has authorized if it be done negligently and if by the reasonable exercise of the powers given the damage could be prevented; it is within this rule "Negligence" not to make such reasonable exercise.

Fewster vs. Raleigh, 227.

See ARBITRATION—ONUS OF PROOF, 2—BY-LAW, 2.

NON-FEASANCE.

Neglect to Repair.

Under the Ontario Municipal Act of 1887, (R. S. O., ch. 184) an action for damages lies against a municipality at the suit of any person who can shew that he has sustained injury from non-performance of the statutory duty of maintaining and repairing its drainage works.

Raleigh vs. Williams, 1.

NON-PERFORMANCE.

Neglect to Repair.

See NON-FEASANCE.

NON-REPAIR.

See EVIDENCE, 1. 2—NOTICE, 2—VIS MAJOR, 1.

NOTICE.

1. *Municipal Act of 1887, ch. 184, sections 583, sub- section 2, and 586.*

Section 583, sub-section 2, applies to a case which falls within section 586, and while prescribing a notice in writing as a condition precedent to a mandamus does not on its true construction preclude an action for damages without such notice.

Raleigh vs. Williams, 1.

2. *Non-repair, R. S. O. 1887, ch. 36, section 31, sub-section 3.*

A notice in writing of the non-repair of the Government drain must be given by the party complaining to entitle him to damages caused by non-repair. He cannot take advantage of a notice given by other persons affected by the neglect to repair.

Clarke vs. Sombra, 110.

3. *Filing—Municipal Act, section 483; 55 Vic. ch. 57, section 2.*

Section 483 of the Municipal Act does not apply to claims under section 591, and if it did apply the issue of a writ may be treated as a claim within the meaning of said section 483. In order to comply with section 2, ch. 56, 55 Vic. it was ordered upon delivery of judgment that the claim be then filed with the proper county court clerk.

Tindell vs. Ellice, 247.

4. *57 Vic. ch. 56, section 93, sub-section 3—Filing—Directory —Sufficiency.*

The provision of sub-section 3 of section 93 of the Drainage Act, 1894, requiring a copy of the notice of claim to be filed with the county court clerk is directory and not imperative, and recovery is not barred where notice of the claim is duly given to the municipality and an action commenced within the time limited, though a copy of the notice is not filed.

A notice that the claim is for damages sustained "by reason of the enlargement and construction" of the drain in question is sufficient to support a claim for damages for interference because of the drain, with access to part of the claimant's farm.

Thackery vs. Raleigh, 328.

5. *57 Vic. ch. 56, section 93—Damages—Drainage Work —Limitation.*

Damages caused by or consequent upon the construction of a drainage work cannot be assessed to the owner of the property damaged unless notice claiming such damages has been served upon the proper officer of the municipality within the time limited by section 93.

McCulloch vs. Caledonia, 340.

See EVIDENCE, 1—COMPENSATION—COSTS, 2.

OBSTRUCTION.

See WITHDRAWAL.

OFFSET.

See ASSESSMENT, 5—DAMAGES, 3.

OMISSION OF LANDS.

See ASSESSMENT, 9.

ONUS OF PROOF.

1. *Overflow—Damages.*

The onus is upon the plaintiff to establish that the water which caused the damage was brought upon his lands by the defendants. It is not sufficient to shew that the ditch as constructed does not bring about the result expected from it, or that it does not relieve the lands from water.

McLellan vs. Elma, 62.

2. *Negligence—Outlet--Damages.*

In an action for damages alleged to have been caused to lands and crops, and for an outlet, the onus is on the plaintiff to shew negligence, whether actual or constructive, on the part of the defendants, and further that by reason of that negligence the plaintiff has suffered damage, or may suffer damage, which he is entitled to come into court for or prevent continuance of.

Sage vs. West Oxford—Thornton vs. West Oxford, 122.

See VIS MAJOR, 1—APPEAL, 1.

ORDER.

See ASSIGNMENT OF FUND.

OUTLET.

1. *Adjoining Township—Assessment.*

In a drainage scheme for a single township the work may be carried into a lower adjoining municipality for the purpose of finding an outlet without any petition from the owners of land in such adjoining township to be affected thereby, and such owners may be assessed for benefit.

A municipality constructing a drain cannot let water loose just inside or anywhere within an adjoining municipality without being liable for injury caused thereby to lands in such adjoining municipality.

Ellice vs. Hiles—Ellice vs. Crooks, 89.

2. *Increased Flow of Water—Award Drain—Non-repair—Injunction.*

Where defendants brought more water upon plaintiff's land by a drain than it was originally reasonably intended to carry they are bound to find an outlet for such water and to prevent damage being done by it. It is no defence that damage would not have been caused to the plaintiff's lands had he kept in repair, as it was his duty to do, an award drain through his land which formed an outlet for the township drains. The award drain, being a private one, could not properly be made the outlet for new or enlarged municipal drains. If proper outlet not made injunction ordered to issue restraining defendants from bringing the additional water down the drain and using the award drain as an outlet therefor to the damage of plaintiff.

Carruthers vs. Moore, 142.

3. *Assessment—Natural Water-course—Sections 585 and 590, 55 Vic. ch. 42.*

Where a drain constructed or

improved by one municipality affords an outlet either immediately or by means of another drain or natural watercourse, for waters flowing from lands in another municipality, the municipality that has constructed or improved the outlet can under section 590 of the Consolidated Municipal Act of 1892 assess the lands in the adjoining municipality for a proper share of the cost of construction or improvement. Section 585 is retroactive and applies to drains constructed under former Acts.

The words "lands of another municipality," etc., in section 590 include roads.

Harwich vs. Raleigh—Tilbury East vs. Raleigh No. 2, 147. 157.

4. *Assessment—Original Watercourses—55 Vic. ch. 42, section 590.*

The provision of the Ontario Municipal Act (55 Vic. ch. 42, section 590) that if a drain constructed in one municipality is used as an outlet or will provide an outlet for the water of lands of another, the lands in the latter so benefited may be assessed for their proportion of the cost, applies only to drains properly so-called and does not include original watercourses which have been deepened or enlarged.

If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost, a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions towards the cost of such works, would be entitled to have such other municipality restrained from passing contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law.

Broughton vs. Grey and Elma, 169.

5. *Use of—Estoppel.*

Where a municipality had in a previous year repaired and enlarged a drainage work which was to afford an improved outlet for the drainage system of its own and the respondent township's upper lands, and had taxed such township with a proportion of the cost of such work, it was held to be equitably estopped from objecting to the work necessary to insure the respondent township the proper user of the drainage facilities for which such improved outlet was repaired and enlarged, and for which they had been assessed by the appellant township.

Raleigh vs. Harwich, 348.

See NEGLIGENCE, 2—APPEAL, 1.

OUTLET LIABILITY.

See ASSESSMENT, 7. 9.

OVERFLOW.

See ROAD DITCH—ONUS OF PROOF, 1—DAMAGES, 4.

PAYMENT INTO COURT.

See ROAD DITCH.

PERMANENT INJURY.

See DAMAGES, 2.

PETITION.

1. *By-law Authorizing Work no Defence Where Petition Insufficient.*

The defendants having by means of a drainage work caused water to flow upon and injure plaintiff's lands are liable in an action for the damages sustained, and where there was no sufficient petition for the work a by-law authorizing it is illegal, though not moved against, and affords no defence.

Hiles vs. Ellice, 65.

2. *Engineer's Report—Lands to be Benefited—Estoppel.*

In determining the question of lands to be benefited the referee is bound by the engineer's report and should not go outside of the report and bring in other lands said to be benefited; nor should he, contrary to the report, reject lands said not to be benefited. Where the work laid out by the engineer was in a different course from that described in the petition which the plaintiff had signed, and afterwards withdrew from, he was not estopped from attacking the validity of the by-law.

Coulter vs. Elma, 204.

See OUTLET, 1—APPEAL, 1. 2.

PREVIOUS ASSESSMENT.

See ASSESSMENT, 8.

PRIVATE DRAINAGE.

See DAMAGES, 4.

PURCHASER.

See KNOWLEDGE—DAMAGES, 1.

RAILWAYS.

See NATURAL WATERCOURSES, 4.

REFEREE.

Jurisdiction—Repair of County Drain—Assessment.

Where drainage works affecting several minor municipalities are constructed by the county, each minor municipality must keep in repair the part of the works within its own limits and cannot call upon the other minor municipalities to contribute to the expense of repairs and a provision in the county engineer's report that the drain shall be kept in repair by a tax on the lands and roads in the same relative proportion as for the cost of construction, is illegal. The drainage referee has jurisdiction to set aside a by-law of a minor municipality charging other minor municipalities with a portion of the expense of such repairs.

Gosfield North vs. Rochester —Mersea vs. Rochester, 182.

See REFERENCE — ASSESSMENT, 8.

REFERENCE.

Action for Damages—Drainage Trials Act, 54 Vic. ch. 51—Powers of Referee.

Upon reference of an action to a referee under The Drainage Trials Act of Ontario (54 Vic. ch. 51) whether under section 11 or section 19, the referee has full power to deal with the case as he thinks fit and to make of his own motion all necessary amendments to enable him to decide according to the very right and justice of the case, and may convert the claim for damages under said section 11 into a claim for damages arising under section 591 of the Municipal Act.

Hiles vs. Ellice—Crooks vs. Ellice, 65. 74. Ellice vs. Hiles—Ellice vs. Crooks, 89.

See COSTS, 1—BY-LAW, 2—DAMAGES, 3.

REGISTRATION.

See BY-LAW, 2.

REMOTENESS.

See DAMAGES, 2.

REPAIR.

See NON-FEASANCE—EVIDENCE, 1. 2—NOTICE, 2—REFEREE—VIS MAJOR, 1—ASSESSMENT, 10.

REPORT OF ENGINEER.

Award Drain.

Where in a proposed drainage work a ditch or drain constructed under the Ditches and Watercourses Act was incorporated but the engineer made no estimate of its value for the drainage work, or allowance to the parties constructing it, as required by subsection 4 of section 9 of the Drainage Act, an appeal from the engineer's report was allowed.

Euphemia vs. Brooke, 358.

See ENGINEER, 3.

REQUISITION.

See DITCHES AND WATERCOURSES ACT.

RESOLUTION.

See SERVICE—ENGINEER, 2.

RETROACTIVE EFFECT.

See OUTLET, 3—LIMITATION OF ACTIONS.

ROADS.

See HIGHWAYS—ROAD DITCH.

ROAD-DITCH.

Overflow—Damages—Injunction—Payment into Court—Costs.

Where defendants by means of a road ditch caused water to flow upon plaintiff's lands they were held responsible for damages, and required either to provide an outlet or close up the ditch so as to prevent the further overflowing of plaintiff's lands. The plaintiff held entitled to costs of the action although a sufficient sum to cover the damages was paid into court.

Seebach vs. Fullerton, 58.

See APPEAL, 2.

ROUTE.

See COURSE OF DRAIN.

SERVICE.

Report of Engineer—By-law.

Service of report, plans, etc., upon the clerk of an adjoining municipality, instead of upon the reeve, though unauthorized by by-law or resolution of the council of the initiating municipality, was held a sufficient compliance with section 61.

Malahide vs. Dereham, 243.

See NOTICE, 5.

SERVITUDE.

See NATURAL WATERCOURSES, 3.

SPECIAL BENEFIT.

See ASSESSMENT, 10.

STATEMENT OF CLAIM.

See COMPENSATION, 2.

STATUTES.

See LIMITATIONS OF ACTIONS.

SURFACE WATER.

Embankment.

It is the right of the owner of a lot on a lower level to guard against the flow of water upon his lot by banking, or otherwise.

Murphy vs. Oxford, 350.

See NATURAL WATERCOURSES, 2. 3. 4. 5.

SWAMPS.

See DAMAGES, 4.

TENANT.

Damages—Drainage Works.

A tenant of land may recover damage suffered during his occupation from construction of drainage work, his rights resting upon the same foundation as those of a freeholder.

Ellice vs. Hiles—Ellice vs. Crooks, 89.

THIRD PARTY.

See MAINTENANCE AND REPAIR, 4.

TORT FEASOR.

See ARBITRATION, 2.

VIS MAJOR.

1. *Damages—Neglect to Repair—Onus.*

It is a condition precedent to getting the benefit of the "act of God" that the party pleading it shall have performed its duty. If the court can see upon the whole evidence that a substantial, ascertainable portion of the damages is attributable solely to the excess of water which would have overflown if the defendant had performed its duty of keeping drains in repair, then there ought to be a proper reduction in that respect, but the burden of proof is upon the defendant to shew beyond a reasonable doubt that if it had done its duty the same damages would have resulted.

Fewster vs. Raleigh, 227.

2. *Rain-storm—Damages.*

For damages caused to the crop of a farmer by an unusual rain-storm and the backing up of water from a large river a municipality is not liable.

McCulloch vs. Caledonia, 340.

3. *Liability to Provide Drainage for Exceptional Rainstorms—Discretionary Powers.*

Where a municipality has constructed a drain sufficient according to the requirements of the locality for carrying off water flowing over lands from swamps and ordinary rainfalls, though apparently not sufficient for carrying off water caused by exceptionally heavy freshets from rainstorms, held : a sufficient fulfillment of their statutory duty with regard to drainage.

Where an exceptionally heavy rainstorm caused waters from a drain to overflow and damage the plaintiff's crops, held : that the damage was caused by *vis major* and that the municipality was not liable.

It is not usual for the court to review the discretionary powers of a municipal council, provided such discretionary powers are exercised within the limit of their statutory jurisdiction and without disregard of personal right.

McKenzie vs. West Flamboro, 353.

VOLUME AND SPEED.

See ASSESSMENT, 9.

WATERCOURSE.

See NATURAL WATERCOURSES.

WITHDRAWAL.

57 Vic. ch. 56, section 86—Mill Dam — Consent — Appeal to Referee—Terms—Expenses —Section 97.

A council which has consented to acquisition of a milldam as part of a drainage work proposed to be constructed by an adjoining township, pursuant to section 80 of the Drainage Act, may withdraw such consent before the passing of the by-law of the constructing municipality. Such withdrawal is sufficiently manifested by appealing to the drainage referee.

The withdrawal in such a case should only be allowed upon the appealing municipality indemnifying the originating municipality against the preliminary expenses which should be charged upon the lands and roads affected by the proposed improvement as provided by section 97.

Augusta vs. Oxford, 345.