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*Mar. 22, 23.
*June 26.

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF COLCHESTER SOUTH (DEFENDANTS).. } APPELLANTS;

AND

DOMINIQUE VALAD (PLAINTIFF.).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Practice—Reference—Report of referee—Time for moving against—Notice of appeal—Cons. Rules 848, 849—*Extension of time—Confirmation of report by lapse of time.*

In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to sec. 101 of the Judicature Act and rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed, and that V. was entitled to $600 damages. The municipality appealed to the Div. Court from the report, and the court held that the appeal was too late, no notice having been given within the time required by Cons. Rule 848, and refused to extend the time for appealing. A motion for judgment on the report was also made by V. to the court on which it was claimed on behalf of the municipality that the whole case should be gone into upon the evidence, which the court refused to do.

Held, affirming the decision of the Court of Appeal, that the appeal not having been brought within one month from the date of the report, as required by Cons. Rule 848, it was too late; that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which this court would not interfere.

Held also, Gwynne J. dissenting, that the report having been confirmed by lapse of time and not appealed against, the court on the motion for judgment was not at liberty to go into the whole case upon the evidence, but was bound to adopt the referee's findings and to give the judgment which those findings called for. *Freeborn* v. *Vandusen* (15 Ont. P. R. 264) approved of and followed.

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

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APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the Divisional Court in favour of the plaintiff.

The action was brought against the municipality for damages for injury to plaintiff's land and crops from the negligent construction of a drain by the defendants. When the action came on for trial it was referred to the official referee under sec. 101 of the Judicature Act, and rule 552 of the High Court of Justice, and the questions raised for decision on this appeal were: Was the Divisional Court right in holding that an appeal from the referee's report was too late not having been brought within one month from the date of the report as required by Consolidated Rule 848, and in refusing to extend the time for appealing? Could the court, on a motion for judgment on the referee's report, go into the whole case on the evidence, or was it bound to give judgment on the findings in the report? The Divisional Court held that it could not go into the whole case, and its decision on that ground, as well as on the ground that the appeal was too late, was affirmed by the Court of Appeal.

Wilson Q.C. for the appellants. We can appeal against the report notwithstanding it is conclusive as to matters of fact. *Raymond* v. *Little* (1).

On the merits the learned counsel referred to *Corporation of Raleigh* v. *Williams* (2); *Cowper Acton* v. *Essex* (3); Cripps on Compensation (4).

Douglas Q.C. and *Langton* Q.C. for the respondent referred to *Geddis* v. *Bann Reservoir* (5); *Suskey* and *Township of Rowney, in re* (6).

(1) 13 Ont. P. R. 364.
(2) [1893] A. C. 540.
(3) 14 App. Cas. 153.
(4) 3 ed. pp. 160, 162.
(5) 3 App. Cas. 430.
(6) 22 O. R. 664.

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THE CHIEF JUSTICE.—I am of opinion that there was no error in the judgment of the Court of Appeal and that it ought not in any way to be interfered with.

First, the appeal to the Divisional Court from the referee's report was properly held by Mr. Justice Falconbridge to be too late, it being indisputable that notice of appeal was not given within the time prescribed by Consolidated Rule 848. By Consolidated Rule 849 an appeal against a report must be brought on to be heard within one month from the date of the report. It is for a party appealing to file the report before he brings his appeal. It is not, however, within the power of an appellant, by delaying the filing of the report, to enlarge the time for appealing allowed him by Consolidated Rules 848 and 849. The practice thus prescribed for proceedings in the High Court was adopted from the former practice of the Court of Chancery, where it had prevailed under the authority of a general order of the court for a considerable time. (Chancery General Order 253).

As regards any extension of the time for appealing by way of indulgence, that was entirely for the discretion of the learned judge of the Divisional Court who did not think fit to grant it. This being so the Court of Appeal refused to interfere, and this court certainly ought not to entertain an appeal on any such grounds. We have held in several cases, that this court will not interfere with the decisions of the Court of Appeal of the province of Quebec in matters of practice, and I see no reason why the same principle should not apply to the adjudications of the Court of Appeal for Ontario.

Then coming to the question as it was presented on the motion for judgment upon a report which we must assume to have become absolutely confirmed by the lapse of time and the appellants' failure to appeal against

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it, we have to consider what was the effect of the report thus confirmed. Was it open to the Divisional Court on that motion to go into the whole case upon the evidence, or was it at liberty to take the facts stated by the referee on the face of his report and to inquire if those facts justified his conclusion that the defendants had been guilty of negligence, or was the court bound, upon the report standing undisturbed by an appeal, to adopt the referee's findings and merely to give the judgment which those findings called for? I am clearly of opinion that the latter was the proper course. In the case of *Freeborn* v. *Vandusen* (1), the learned Chancellor of Ontario treats the report of a referee and the mode of appealing from it and proceeding upon it as being regulated by the same practice as that which applies to a master's report. This was evidently the intention of the judges who framed the Consolidated Orders, as appears from the heading which precedes Consolidated Order 848.

The case of *Freeborn* v. *Vandusen* (1) has never been reversed or overruled, and it therefore stands as an authoritative decision as to the procedure of the High Court of Justice upon the point in question. Moreover, its weight as an authority is greatly enhanced by the consideration, that it is the judgment of the chief judge of that branch of the High Court which until recently exclusively dealt with these questions as to the reports of masters and referees, and a judge who had himself had great experience as a master in chancery. I should not therefore, for these reasons alone, be disposed to overrule it, even if I could do so consistently with our own rulings against interfering with mere matters of procedure before referred to. I am, however, of opinion that the Chancellor's judgment was a correct construction of Consolidated Rules 848, 849 and

(1) 15 Ont. P. R. 264.

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850, and that this practice, which is founded on the old Chancery General Order 253, and was established by the Consolidated Rules of 1888 in lieu of the prior practice, is more reasonable and convenient than that which has been established in England under cognate orders. *Freeborn* v. *Vandusen* (1) decides that a referee's report, like a master's report, stands absolutely confirmed when the time for appealing has elapsed, just as under the old practice of the Court of Chancery a master's report did after the order absolute to confirm. In the words of the Chancellor referring to the report of a referee, "the course of the court is to treat it, if not appealed from, as a finality." Where a party does not appeal the evidence taken before the referee is not before the court on a motion for judgment, any more than the depositions taken before the master were under the former practice before the court when the cause came on to be heard on further directions. Under the English practice the report amounts to nothing final; on the motion for judgment the court go behind the referee's report and discuss the merits. The provision for an appeal from the referee, just as in the case of the master, is designed, and can only have been designed, to shut out all such discussion on the motion for judgment, when the court adopts the findings of the referee or master as final, and bases its judgment on those findings as *res judicatæ*. The English practice, on the other hand, makes no provision for such an appeal; the review of the referee's finding and the judgment of the court thereon are both included in the motion for judgment.

By the alteration in the practice effected by the rules of 1888, such cases as *Longman* v. *East* (2), and *Cumming* v. *Low* (3), have become inapplicable, and to ascertain how a report of a referee which has become absolutely

(1) 15 Ont. P. R. 264. (2) 3 C. P. D. 142.
(3) 2 O. R. 499.

confirmed is to be proceeded upon we must have recourse to the former practice of the Court of Chancery applicable to the reports of the master.

These authorities show that except in cases where the master exercised his power of stating special circumstances, leaving the court to draw its own conclusions therefrom, which was not the course pursued by the referee here, the court could only have regard to the conclusions arrived at, and would not enter into any discussion of facts or reasons which the master might have stated in the report.

The result is that the appellants, not having appealed from the report, and the referee having found in the plaintiff's favour that there had been actionable wrong on the part of the defendants, and that the plaintiff had suffered damages to the amount of $600, the Divisional Court had no alternative but to pronounce the judgment which the Court of Appeal have affirmed and which is now the subject of the present appeal. A contrary decision as to the right of the defendants to go into the merits on the facts stated on the face of the report would do great injustice to the respondent, who would thus be debarred from going into the evidence at large and who was not called upon to appeal from a finding in his favour. Arriving at this conclusion I am not called upon to discuss the merits, or to go into the evidence; I may say, however, that I have read the evidence twice, and I am of opinion, that not only was there some evidence of negligence, but that it establishes a strong case of negligence, both as regards the cutting of the embankment and as regards the Richmond drain. In the case of the latter, tested by the principle laid down by the Privy Council in *Williams* v. *Raleigh* (1) as to the distinction between compensation under the statute for lands injuriously affected and

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damages for negligence, indemnity for the former being recoverable only under the statute, whilst the proper remedy for negligence is by action, I am of opinion that there was evidence of actionable negligence. The appellants were warned by their own engineer that the mouth of the Richmond drain as planned would be insufficient to carry off the water, and yet they persisted in carrying out the work. This, surely, comes within the language of the judgment of the Judicial Committee in the passage from it quoted by the Chief Justice of Ontario.

The embankment was not a statutory work at all, it was no part of the original plan for the Richmond drain. There is evidence that the cuttings in this embankment caused damage to the respondent (see the extracts from the depositions in respondent's factum); for this the respondent's only remedy was by action.

I cannot part with this case without characterizing the litigation as extravagant and wasteful in the extreme, and I must express the hope that some check may be placed by legislation on appeals to this court in such cases as the present.

The appeal must be dismissed with costs.

TASCHEREAU J. concurred.

GWYNNE J.—This is an action instituted in the Queen's Bench Division of the High Court of Justice for Ontario against the Municipal Corporation of the Township of South Colchester, for damage alleged to have been caused to the plaintiff and his land by reason of the negligence of the defendants in the construction of certain drains, for the construction of which by-laws had been duly passed by the council of the municipality in conformity with the provisions of the Acts of the province of Ontario in relation to the construction of drains.

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In order to understand the case it will be convenient to set out, in an abbreviated but substantial form, the material part of the plaintiff's statement of claim.

The plaintiff, who is the owner of the north half of lot no. 7, in the 5th concession of South Colchester, containing 100 acres, alleges that in the years 1883 and 1884 the defendants undertook to construct a drain within the limits of the municipality of South Colchester, called the Richmond drain, upon plans, specifications and a by-law adopted and passed by the municipality for the construction thereof, under the provisions of the Municipal Acts of Ontario. That the drain commenced at a point in lot no. 8, near the line between the 1st and 2nd concessions, and passed northerly, intersecting in its course three or four other tap drains and other small drains connecting them, and thence north by a deep cut across the 4th concession to about the middle of lot no. 8, in the 5th concession, where it turned at right angles to the east to an outlet several miles distant at a creek called Cedar Creek. That at the point where it so turned east it is intersected by a drain called the McLean drain, the waters in which flow northwesterly across plaintiff's farm to an outlet several miles distant in a river called Canard River, and that this drain had also been constructed by the defendants under the drainage Acts. That from the point where the McLean drain and the Richmond drain so intersect, the latter drain was never large enough to carry off the volume of water brought from the south of the 4th concession and to drain the lands assessed for its construction. That because the McLean drain intersected the Richmond drain at the point aforesaid, and because the Richmond drain from thence to its outlet in the east was insufficient, water rushed down the McLean drain in greater volume than its

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capacity could carry off, and the plaintiff's said land and the lands even in the adjoining township of North Colchester became flooded thereby, and that in consequence thereof, the defendants made a settlement by arbitration with the municipality of North Colchester, and in pursuance thereof built an embankment along the north and west sides of the Richmond drain at the point where it was intersected by the McLean drain, thereby filling up the McLean drain at such point of intersection, and thereby preventing the flow of waters from the Richmond drain into the McLean drain. That the defendants during the years 1887 and 1888 caused that part of the McLean drain which lies north of the Richmond drain and between it and the township of North Colchester to be cleared out, but refused to enlarge it to any greater size than was sufficient to drain the lands in the township north of the Richmond drain. That at every heavy rainfall large volumes of water, brought by the Richmond drain with great force against the embankment, washed the same away, whereby plaintiff's land became flooded, and that the defendants caused and permitted ditches to be cut into the embankment in several places, whereby the water flowed on to plaintiff's land and destroyed his crops in 1889 and 1890. That extra water has been brought and kept on plaintiff's farm and crops to his damage, that would not have been so brought and kept but for the said Richmond drain. That the defendants were guilty of gross negligence in constructing the said drains and embankment and leaving them incomplete and insufficient, and in refusing to enlarge the McLean drain, and in building an embankment instead which was imperfect and useless to prevent overflow of water on plaintiff's farm.

Now here it may be observed, that this last paragraph contains the whole gist of the plaintiff's cause of action,

which is thus stated to consist merely in gross negligence in the construction of drains, constructed, as is admitted, upon plans, specifications and by-laws adopted and passed by the municipality under the provisions of the Acts of the legislature relating to the construction of drains by municipalities. And for this alleged negligence the plaintiff in conclusion claims nine hundred dollars for loss of crops, and the use of his land for crops, owing to their having been drowned and destroyed by water diverted from its natural course and brought on the plaintiff's farm by means of the Richmond drain in the years 1889 and 1890.

To the plaintiff's cause of action so stated, the defendants by their statement denied the charge of negligence made by the plaintiff, upon which the plaintiff joined issue, and the issue was brought down for trial at Sandwich in October, 1890, when the learned judge presiding at the trial made the order following:

This action coming on for trial at Sandwich on the 20th October, 1890, and the same being, on the application of the plaintiff, postponed until the 21st day of October, 1890, and the said action coming on, on the said 21st day of October, in the presence of counsel for all parties and the jury notice having been struck out and the jury dispensed with; upon opening of the matter and hearing read the pleadings and what was alleged by counsel aforesaid, and consideration the appointment of a referee having been postponed to, and disposed of, this day.

It is ordered that all questions arising in this action be, and the same are, hereby referred to Frank E. Marcon, Esq., Official Referee, for inquiry and report pursuant to sec. 101 of the Judicature Act and rule 552 of the High Court of Justice, and the said referee may inspect the locality and works in question; and such evidence as may be offered by the parties, or as the referee may require, may be taken in short hand by the stenographer and need not be signed by the witnesses.

2. That the costs and proper charges of such examination, reference, report, stenographer and type writing of the evidence for the court and parties shall be costs in the cause herein.

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Now upon the true construction of the above sec. 101, under the authority of which this order was made, and upon the authority of the judgment of the Court of Appeal in England, in the three cases of *Longman* v. *East*; *Pontifex* v *Severn*; and *Mellin* v. *Monico* (1), it must be held, that neither the action, nor the issue joined therein between the parties, was by the above order referred to the referee to determine.

Commenting upon sec. 56 of the English Judicature Act of 1873, from which sec. 101 of the Ontario Judicature Act is taken almost verbatim, Bramwell L. J., at p. 149 of the above report, says:

> Under sec. 56 any question arising in the cause may be referred by the court or a judge for inquiry and report to an official or special referee. He is not to dispose of the action, and I do not think he is even to determine any matter in issue between the parties. * * * His duty is, instead of determining issues of fact or of law, to find the materials upon which the court is to act. Clearly, under sec. 56 an action cannot be referred to him to decide facts and law.

Brett L. J. at p. 152, says:

> I think it convenient before I proceed to the construction of the Judicature Acts to consider the kinds of references that existed previously to the passing of those statutes, and afterwards to consider the effect of the Judicature Acts on the then existing law. Before the Judicature Acts there were several modes in which disputes were remitted to the decision of third persons and which might be called references. There was the common law reference to an arbitrator constituted by the consent of the parties. There was the compulsory reference to an arbitrator under the provisions of the Common Law Procedure Act, 1854. There was the reference to the master to report in the common law courts as to matters of discipline and similar questions, and in the Court of Chancery there was the reference into chambers. It was not intended by the Judicature Acts to interfere with these references, and they at present exist with all their incidents. But it was thought that further powers ought to be given to the Divisional Courts, and I think that sec. 56 gives to the Chancery Division a new tribunal, that is to say, instead of referring certain questions for a report into chambers, that court may, if they think fit, refer questions to an official referee, an officer newly appointed with

(1) 3 C. P. D. 142.

limited duties and also with defined powers. Section 56 therefore gives to that Division a new tribunal in addition to their own chambers; but it gives to the common law Divisions a new power as well a new tribunal; it gives them power to do what the Court of Chancery had done in a suit or cause. The common law courts had no power previous to the passing of sec. 56 to refer matters in a cause for report, but only to refer for report of the master matters of discipline; these matters the courts themselves were bound to decide upon the facts, but they sometimes delegated the duty to a master. This section, however, gives them power to remit questions in a cause for report in the same way as a question was referred in the Court of Chancery into chambers, and afterwards the report was brought back from chambers to the court.

And again at p. 155, after commenting on the powers conferred by sec. 57, he says:

I should say that, in the case of a report to the court or judge under sec. 56, the court or judge may differ from the official referee as to any finding which is an inference from the facts that the referee has reported, they may deal with his report generally in the same way as the courts do with a report of the master upon a matter of discipline. But with regard to the finding of a referee of issues of fact sent to him under sec. 57, either by consent of the parties or without consent, I think the appeal is of the same nature as the appeal from the finding of a judge when he tries without a jury, or as the appeal from the finding of a jury, that is to say, the court must accept the finding of the referee, unless they can set it aside, according to the ordinary rules which would be applicable to the finding of a jury, or to the finding of a judge trying a cause without a jury.

And Cotton L. J. at p. 159, says:

Before I proceed to deal with the three appeals which are before us, I will first consider the sections of the Act of 1873. Secs. 56 and 57, on the face of them, relate to very different matters. Sec. 56 provides for cases which frequently occurred in the Court of Chancery, where on some question being raised either of a scientific or other nature requiring special knowledge, the evidence was conflicting, or the witnesses differed, (as for instance, as to what would be the result of a certain act sought to be restrained by injunction, or as to what ought to be done in order to remedy a particular state of things, or as to what timber was fit to be cut), it was not unusual to direct a reference to some expert or scientific man to report to the court upon the question as to which there was a conflict of evidence, or as to which for any other reason the court desired to have information. These cases,

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by sec. 56, may be referred to an official referee, who is not to find the issues between the parties, but to make a report, and that report is for the assistance of the court, as is shown by this, that it may be adopted wholly or partially by the court, and when adopted may be enforced as a judgment of the court.

Section 57 provides for a different matter. As I understand it, it is to enable certain issues of fact arising in a cause, which the court or judge thinks cannot be conveniently tried before the court or judge either with or without a jury, to be referred to another tribunal, and that really is acting upon what formerly was constantly the practice in the Court of Chancery.

These observations of the Lords Justices in relation to secs. 56 and 57 of the English Judicature Act of 1873, have precise application to secs. 101 and 102 of the Ontario Judicature Act, which are taken almost verbatim from the said secs. 56 and 57.

In the action before us the only material question in issue is, whether the defendants were or were not guilty of negligence in the construction of the Richmond and McLean drains, in the plaintiff's statement of claim mentioned; the legality of the construction, that is to say, the authority to construct those drains, was not questioned. Now, whether the defendants were or were not guilty of negligence in their construction, thereby causing damage to the plaintiff, was a mixed question of law and of fact. First, of fact, namely, as to the matters of fact relied upon as constituting the alleged negligence, and, secondly, of law, namely, whether matters of fact, when ascertained, constituted negligence in point of law. This latter question, or part of the material question, was not at all submitted to the referee; he had no authority what ever except to take evidence and to report his findings upon the matters of fact relied upon as constituting the alleged negligence, and to report the evidence with his findings thereon to the court, whose duty and right it was, upon the authority of the judgment of the Court of Appeal in England in the cases

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above cited when arriving at a judgment in the action on the issues joined therein, to consider the evidence and upon consideration of it to differ, if they should think fit, from any finding of the referee which was an inference from the facts reported by him, and to render judgment according to the court's view of the law, as applicable to the matters of fact submitted to the referee to inquire into and report upon; and in case of any of the findings of the referee upon the matters of fact submitted to him to inquire into and report upon appearing to be inferences drawn by him from the evidence, then to exercise their own judgment from such evidence, and, if they should differ from the inference drawn by the referee, to act upon their own judgment.

Now the referee by his report, which together with the evidence upon which it is founded has been filed in the Divisional Court in which the action was pending, has reported in paragraphs distinctly as follows:

1. That the plaintiff in 1888 and 1890 was and still is owner of the lot in his statement of claim mentioned.

2. That in 1877 the defendants passed several by-laws for drainage of lands south of the 4th concession, respectively called Aikman's drain, Ferris drain, Shepherd drain and Long-marsh, the three former emptying into Long-marsh drain, which, however, was not of sufficient capacity to carry off to its outlet the waters so brought into it.

3. That through the 4th concession of the township of Colchester there is a ridge of land of sufficient height to separate the waters in the Long-marsh in the 2nd, 3rd and 4th concessions from the waters in Roach's or Walker's marsh in the 5th concession, which lies about 15 feet lower than the Long marsh, but in times of very high water a little water would flow northerly from the Long-marsh to Roach's or Walker's marsh.

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4. That in 1868 the defendants constructed a drain called the McLean drain from a point a little south-east of plaintiff's land to the River Canard, and in 1879, cleaned out and enlarged that drain under the Municipal Act; that this drain was intended to drain the plaintiff's land and other lands in the 5th concession, and would have done so effectually but for the interference of the defendants as hereinafter mentioned.

5. That in or about the year 1870, but without any by-law therefor, the defendants cut a small drain across the 4th concession, which carried a small quantity of water into the 5th concession and Roach's marsh, but which was found ineffective, and on the 12th January, 1884, the defendants passed a by-law for the construction of the Richmond drain to provide an additional outlet for the waters of the Long-marsh to Cedar Creek, and that by an award under an arbitration and agreement come to with the township of Colchester North, an embankment, about three feet high and about three-quarters of a mile in length from above the McLean drain around the elbow or turn easterly to Cedar Creek, was erected on the north side of the Richmond drain for the express purpose of preventing water from the Richmond drain flowing into or being carried therefrom by the McLean drain or overflowing the plaintiff's land or other lands theretofore drained sufficiently by the McLean drain.

6. That the defendants had due notice while constructing this drain that the outlet at Cedar Creek was insufficient, partly owing to the want of sufficient fall, and that the same should be enlarged in order to prevent the water brought down to it from the south overflowing plaintiff's land and other lands in the fifth concession.

7. That the plaintiff was assessed for a cut off by the defendants for the Richmond drain, and was therefore

entitled to have his lands protected from the water coming down the Richmond drain.

8. That subsequent to the award mentioned in the above paragraph 4, and to the making of the said embankment, the defendants caused, or permitted and allowed, a cut to be made in the said embankment at the point where the McLean drain came up to that portion of the embankment separating it from the Richmond drain, thereby causing a large body of water from the said Richmond drain to flow into and surcharge the McLean drain, which it otherwise would not have done in a state of nature, if such cut in said embankment had not been made, thereby overflowing the plaintiff's lands during the years 1889 and 1890 and destroying and injuring the crops on about 50 acres of his land; that the plaintiff's land, after the construction and after the cleaning out on two occasions of the McLean drain, was dry and fit for cultivation until the construction of the Richmond drain and the cutting of the said embankment, whereby the said McLean drain became overcharged as aforesaid.

9. That the plaintiff's crops and lands were damaged by water during the years 1889 and 1890 by waters from the Richmond drain being allowed and permitted to enter the McLean drain, thereby causing an overflow of the latter drain, and that such flooding was not from the skies, and that the lands and crops were so injured was solely due to the waters coming from the Richmond drain as aforesaid.

10. That the McLean drain was ample and sufficient to carry off the waters from the plaintiff's lands if the waters from the Richmond drain had not surcharged it during the years 1889 and 1890.

11. That the defendants were guilty of negligence, 1st, in constructing the Richmond drain, and diverting and carrying water across the 4th concession which

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would not have come there in a state of nature, and providing no sufficient outlet therefor at Cedar Creek, as recommended by their engineer, thereby causing the overflowing of lands in the 5th concession and amongst others those of the plaintiff. 2nd. In cutting or permitting the said embankment to be cut, thereby causing the McLean drain to be connected with the Richmond drain and allowing the waters from the said Richmond drain to flow into and overcharge the said McLean drain, thereby overflowing the plaintiff's lands. 3rd. In bringing down through the Richmond drain such a large volume of water and with such velocity to the 5th concession as to overflow the McLean drain to such a height as to overflow the plaintiff's lands.

12. That the plaintiff has sustained damages in the years 1889 and 1890 by the negligence and wrongful acts of the defendants at the sum of $600, and that he is entitled to recover that sum from the defendants.

Now upon this report it is to be observed, that in so far as the McLean drain is concerned the referee has found, as a mere matter of fact, by the 10th paragraph of his report, that it was ample and sufficient to carry off the waters from plaintiff's lands, if the waters from the Richmond drain had not surcharged it during the years 1889 and 1890, so that as matter of fact the plaintiff's damage is wholly attributable to such surcharging of the McLean drain by the Richmond drain. Then as to the Richmond drain, it is admitted in the plaintiff's statement of claim that the drain was constructed upon plans, specifications and a by-law duly prepared, adopted and passed by the muncipal council of the township of South Colchester under the provisions of the municipal Acts of Ontario in that behalf, and that the plaintiff himself was one of the parties assessed under such provisions in respect of his said

land for the construction of the drain. Then by the 11th and 12th paragraphs it is apparent, that the referee assumed and erroneously assumed a jurisdiction which the order of reference (it having been made merely for inquiry and report to assist and inform the conscience of the court) did not vest in him, in assuming to adjudicate upon and determine the action itself and the sole material issue joined between the parties therein, namely, that the defendants were guilty of the negligence wherewith they were charged in the statement of claim, qualifying however the conclusion at which he had so arrived by basing it upon the reasons stated in the 11th paragraph of his report, the sufficiency of which reasons to support a judgment in the action against the defendants it was for the court in which the action was pending alone to adjudicate upon and determine, as already shown by the judgment of the Court of Appeal in England in the report of the cases cited (1).

Against this report the defendants moved by way of appeal, upon grounds of the reception of improper evidence, the finding being contrary to law and evidence, and several other grounds which I do not think it necessary to set out here, because I think that every material objection taken before us on this appeal to the plaintiff's right to recover in the action was open to the defendants upon the plaintiff's motion for judgment which came on for hearing in the Divisional Court of Queen's Bench upon the same day as the above motion of the defendants by way of appeal from the referee's report.

Upon the 20th May, 1893, judgment was rendered in the Divisional Court upon both of the said motions as follows, so far as is material:

Upon motion made on the 26th day of November, 1892, unto this court, on behalf of the plaintiff for judgment herein, upon and in ac-

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cordance with the report made by Frank E. Marcon, Esq., referee herein, dated 17th day of February, 1892, and filed the 5th day of September, 1892, and upon motion also made on the same day, on behalf of the defendants by way of appeal from the said report, and for judgment for the defendants, or that the report be varied, or that the questions referred by the order of reference made in this cause * * * be referred back to the said or some other referee to inquire and report, * * * * * * and upon hearing read the pleadings, the judgment bearing date the 24th day of February, 1891, (this is the order of reference) the report of the said referee, the evidence, depositions and exhibits taken and put in at the trial and before the said referee * * * * and upon hearing counsel for both parties, and judgment having been reserved until this day, it is ordered that the said appeal be and the same is hereby dismissed with costs to be paid to the plaintiff by the defendants and that the defendants do pay to the plaintiff the sum of $600 damages with interest from the date of said report, and that the defendants do pay to the plaintiff his costs of this action including the costs of the reference forthwith after taxation thereof.

This judgment upon its face appears to me to show (although it is said to be made upon hearing read the pleadings in the action, the referee's report and the evidence, depositions and exhibits taken or put in at the trial and before the said referee), that the learned judge by whom the judgment was pronounced dealt with the motion for judgment as if the order of reference had vested in the referee jurisdiction to adjudicate upon and determine the action and the issues joined therein, or as if the order had been made under sec. 102 and not under sec. 101 of the Judicature Act.

In so far as the question arising upon the present appeal is concerned it may be admitted, that (no notice of appeal having been served within fourteen days from the filing of the referee's report) that report became absolute at the expiration of the fourteen days as to the mere matters of fact referred to the referee to inquire into and report upon for the information of the court and to enable it to adjudicate upon and determine the action and the issue joined therein, and that

therefore the defendants were too late in moving against the report, whether for the improper rejection or reception of evidence, or for a reference back to the same or another referee, and so that the motion of the defendants by way of appeal from the report was properly dismissed; but neither that dismissal, nor rule 848, nor rule 40, as amended by 1288, nor any other rule, had the effect of extending the jurisdiction of a referee to whom a reference was made under sec. 101 of the Judicature Act one iota beyond what was contained in that section itself; or relieved the court in which the action was pending from the duty of primarily adjudicating upon and determining the action and the issue therein, or from perusing and considering the evidence for the purpose of determining whether any of the findings of the referee upon any matter affecting the proper determination of the action and the issue therein appeared to be inferences drawn by him from the evidence, or (in case they should so appear to be) of relieving the court from the duty of drawing the inference which should appear to the court to be the proper inference to be drawn, irrespective of the findings of the referee in relation to such matters. Those rules are adopted for carrying into effect the purposes of the Act and do not extend the jurisdiction conferred by the Act.

From the above judgment the defendants appealed to the Court of Appeal for Ontario.

The majority of the learned judges of that court, as appears by their judgment pronounced by the Chief Justice, plainly dealt with the case as if the action and the issue therein had been referred by the order of reference to the referee to adjudicate upon and determine; they seem to have felt themselves bound by the finding of the referee, not only upon the existence of the matters of fact from which he has drawn the infer-

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ence that the defendants were guilty of the negligence charged in the statement of claim, but they treat as conclusive the inference drawn by him that these matters of fact existing constitute the negligence charged by the plaintiff in the action and denied by the defendants, the sole material issue in the action. They thus adopt the finding of the referee, 1st, as in the 1st subsection of the 11th paragraph of his report is found, namely, that the construction of the Richmond drain and the diverting thereby and carrying water across the 4th concession which would not come there in a state of nature, and providing no sufficient outlet at Cedar Creek, as recommended by their engineer, constituted negligence of which the defendants were guilty and for which they were liable to a judgment being rendered against them in this action, although the statement of claim admits that the said Richmond drain was constructed upon plans, specifications and a by-law made, adopted, and passed respectively under the provisions of the Municipal Acts of Ontario in that behalf. Now the finding, that the not providing a sufficient outlet as recommended by their engineer for a drain so constructed constituted negligence for which the defendants were responsible in this action, is plainly an inference drawn as an inference of law, the correctness of which can only be tested by considering the nature of the alleged recommendation of the engineer and the time of its being made. Mr. Justice Burton, who dissents from the judgment of the majority, points out that the nature of the recommendation, and the time of its being made, were such that it is impossible to hold that negligence of the defendants is a just, proper and legal inference to be drawn from the facts from which it was drawn, and indeed there can, think, be no doubt upon this point, for the matters of fact upon which the referee proceeded in drawing this in-

ference of negligence were all before the court for their consideration upon the question whether the negligence of the defendants was or was not a proper and legal inference to be drawn from them, and these facts appear to have been as follows :—

Upon the 8th August, 1885, the engineer reported to the council of the defendant municipality that the contractor on the contract for the Cedar Creek outlet of the drain had performed the work in conformity with the by-law, and that he was entitled to the full amount of the contract money under the terms of his contract, except one item of extra work, a certificate for which would be given when completed.

Then upon the 2nd November, 1885, the same engineer made a report to the council recommending them to pass another by-law for certain work, which he suggested should be performed at a cost of $2,500, whereby the drain as then almost completely constructed under the by-law passed for its construction would, in the opinion of the engineer, be much improved.

Then upon the 2nd January, 1886, he made another report to the council, whereby he reported that the contractor for the construction of the Richmond drain (the same contractor as was named in his report of the 8th August, 1885) had performed all the work on the Richmond drain, "required by the plans and specifications for the construction of the same as adopted by the council of the township," and in this report he adds : "The drain in the whole is a success and I think will eventually fulfil all the advantages claimed for it." How, under these circumstances, the non-action of the council upon their engineer's report of the 2nd November, 1885, can be held in law to constitute negligence of the defendants in the construction of the Richmond drain, which was then already almost completed and by the 2nd November, 1886, was actually completed as

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required by the plans and specifications for the construction of the same as adopted by the council, is, I confess, to my mind inconceivable. The majority of the Court of Appeal appear to me to have construed this part of the referee's report as a finding, that in point of fact the defendants left the outlet of the drain in Cedar Creek insufficient, contrary to the recommendation of their engineer, as appearing in the plans and specifications adopted by the by-law for the construction of the drain, and to have considered themselves bound by that finding so construing it, but with great deference this view cannot be supported either in point of law or as being stated in the referee's report as a matter of fact so found by him to be. Then again, 2nd, the judgment of the majority of the Court of Appeal approves of the inference of negligence of the defendants as charged in the statement of claim as a fair and legitimate inference from the matter stated by the referee in the second subsection of the 11th paragraph of his report as his second reason for the finding the defendants to be guilty of negligence and liable to the plaintiff therefor in this action, namely, that the defendants " in cutting or permitting the said embankment to be cut, thereby causing the McLean drain to be connected with the Richmond drain and allowing the waters from the said Richmond drain to flow into and overcharge the said McLean drain, thereby overflowing the plaintiff's land." As to this reason for holding the defendants to be liable in this action as for the negligence with which they are charged by the plaintiff in his statement of claim, it is to be observed that the embankment was not, and in point of fact was not claimed, or found, to have been, part of the plan adopted for the construction of the Richmond drain or of the McLean drain ; on the contrary it is by the statement of claim stated to have

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been, and by the referee's report found as matter of fact to have been, erected in pursuance of an agreement entered into between the municipalities of North and South Colchester, to which agreement it is not found or suggested that the plaintiff was a party, and the object of its erection was to try and prevent thereby damage to lands in North Colchester which the Richmond drain after its completion was found to be insufficient to prevent. Whether the defendants' cutting or permitting to be cut an embankment so erected, assuming it to be established as matter of fact that they did so, constituted negligence of the defendants as charged against them in the plaintiff's statement of claim, or indeed any wrong giving to the plaintiff a right in law to recover in this action, or in any action, involves a question of law which cannot by possibility be determined without reference to the evidence in relation to the erection of the embankment and to the alleged cutting or permitting the same to be cut, all of which was before the courts, both the Divisional Court and the Court of Appeal, and thereby it appears that the embankment was erected without any authority in law for its being erected across the land of one Hiram Walker, who was one of the persons assessed for the construction of the Richmond drain, and that by its erection he was prevented from draining his land, as he had a right to do, into the said drain, and for that reason he, in successful assertion of his right in law so to do, cut through the embankment upon his own land, whereby and by the washing away of a part of the embankment as stated in the plaintiff's statement of claim, by force of the waters in the Richmond drain in heavy rains, that drain became again connected with the McLean drain, as by the original design and plan for the construction of the Richmond drain was intended and effected, as indeed sufficiently appears in the plaintiff's

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statement of claim. Now it is impossible to hold in point of law, that, assuming it to be established as matter of fact that the defendants did cut through such an embankment, their so doing could be pronounced to be negligence, either in the construction of the Richmond drain or of the embankment itself, for which the defendants would be liable in this action, or that their so doing would constitute any actionable wrong whatever to the plaintiff.

Then as to the third reason given by the referee for the conclusion arrived at by him, as stated in the 11th paragraph of his report, namely, that the defendants were guilty of the negligence charged against them in the plaintiff's statement of claim, the judgment of the majority of the Court of Appeal does not deal with it in particular, but in dismissing the appeal of the defendants from the judgment of the Divisional Court, which proceeded upon the adoption of the referee's report, they seem also to have adopted that report *in omnibus*, both in point of law and of fact, yet it cannot, I think, admit of a doubt that the referee's third reason is no more than finding, as matter of fact by implication, that the Richmond drain, constructed according to its design and plan of construction, brought down such a volume of water and with such velocity into the 5th concession as to overflow the plaintiff's land therein, which is neither the cause of action alleged in the statement of claim, nor is it an actionable wrong done to the plaintiff by the defendants, so that it is impossible that the judgment in favour of the plaintiff in this action can be sustained for the reason stated in the third subsection of the 11th paragraph of the referee's report; and upon the whole, for the reasons I have given, I am of opinion that the judgment of the Divisional Court in favour of the plaintiff cannot be sustained, and that this appeal must be allowed with costs and

judgment be ordered to be entered for the defendants in the Divisional Court in the action with costs.

The enormous delay which has taken place, and the frightful expense which has been incurred in the prosecution and defence of this action, is deplorable in the extreme, but I cannot help saying that I think this delay and expense have been due to an inconsiderate reference to a referee of matters which, in view of the statements made in the statement of claim, and the single matter of defence pleaded in answer thereto upon which issue was joined, now appear to have been very simple, and which, if tried before a judge, with or without a jury, could have been disposed of in a very short time and at a comparatively insignificant expense. The reference to a referee has, on the contrary, resulted in the production of a printed volume containing upwards of 450 pages of evidence, of which I think it may safely be said that nine-tenths is irrelevant and never could have been admitted, if the issue in the action had been tried before a judge with or without a jury.

As to the case of *Freeborn* v. *Vandusen* (1), upon the authority of which the learned judge of the Divisional Court proceeded, it is to be observed, that the matters referred there were of a very different character from those referred by the order in the present case; they were not in truth matters referable under section 101 at all, although by what appears to have been a singular mistake the first paragraph of the order refers to that section. It must be obvious, that such reference to the section could not make the reference to be within the section, if the essential matter referred was of a nature not within the section, which was the case in *Freeborn* v. *Vandusen* (1). The action was to remove a defendant, who had been appointed by the court jointly with the

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plaintiff a trustee of an estate, from his office as such trustee, and for an account of his dealings with the estate. The court made an order the second paragraph of which contained the whole gist and substance of the order, which was in the nature of a decretal order and comprehended within itself a judgment upon every matter involved in the action, and a reference to the master as in the ordinary case of a reference after judgment, to carry it into effect. The paragraph ordered as follows:

> That it be referred to the master to take the accounts of the defendant, and to appoint a trustee to act with the plaintiff, James S. Freeborn, in the place and stead of the defendant, who was to be removed upon the new appointment, such appointment not to take effect until confirmation of the report.

Now plainly such a reference was not at all one coming under section 101, and, with deference, it was in my opinion quite a mistake in such an order, which involved in itself a judgment upon the whole matter involved in the action, to have inserted anything in relation to section 101, as was done in the first paragraph of the order.

Now the learned Chancellor's judgment, that the master's report upon the matter so as above referred was to be regarded in the same light, and to have the same effect, as any other report of the master upon a reference after judgment, to give effect to the judgment, that is a truism which may readily be conceded, and it must I think be to the matters so expressly referred by the order that the judgment of the Chancellor is to be construed as applying and not to the case of a simple regular reference merely for inquiry and report under section 101.

If the learned Chancellor had ruled that in the case of such a simple reference like the present under section 101, if the referee should assume to report upon

and to find and determine matters beyond the scope of the reference, and should assume the functions of a judge by affecting to adjudicate upon and determine the action and the issues therein, as was done in the present case, that such report is to be regarded in the same light, and of like effect as the report of a master upon a reference after judgment, or as a report upon a reference made under section 102, and should be binding upon the court, I must say that, in my opinion, such a judgment would have been quite erroneous and should be reversed as subversive of the plain intention of the legislature in enacting the clauses of the Judicature Act in relation to the different kinds of references thereby authorized; but the special character of the reference in *Freeborn* v. *Vandusen* (1) removes all necessity of construing the Chancellor's judgment therein as having any application to the case of a simple reference like that in the present case for inquiry merely and report for the information of the court under section 101, to aid the court in rendering judgment on the action.

SEDGEWICK J.—I concur in the judgment of the Chief Justice. The appeal should be dismissed.

KING J.—I am of opinion that this appeal should be dismissed with costs for the reasons stated in the judgment of the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellants: *A. H. Clarke.*

Solicitor for the respondent: *D. Rogest Davis.*

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