

MUNICIPAL DEPARTMENT

LEGAL DECISIONS AFFECTING MUNICIPALITIES.

Township of Warwick v. Township of Brooke.—Judgment on appeal by defendants from judgment of the Drainage Referee, setting aside a report of defendants' engineer upon the construction of the McDonald or Flat Creek drain. It was contended, inter alia, for appellants (1) that the referee in computing the number of persons who had signed the petition for the drain erred in refusing to count certain persons whose names were on the petition, who appeared by the last revised assessment roll to be owners of lands benefitted in the drainage area, because upon the evidence, outside the roll, they were not actual owners, but farmers' sons, and that such evidence should not have been received; (2) that the roll for the year 1898, and not for 1897, should have been used; (3) that even if the petition was not sufficiently signed the work was a drainage work which defendants were authorized to carry out under the Municipal Act, sec. 75. The court were unanimous in not differing from the view taken by the referee on the merits, and in thinking that there is much in the recent judgment of the Supreme Court of Canada in *Sutherland-Innes Co. v. Township of Romney* which would make it difficult to sustain the report of the engineer on which the defendants proposed to found their drainage by-law. Held, per Armour, C.J.O., that evidence was admissible to show that farmers' sons not actual owners, who were not shown on the roll to be farmers' sons, but were shown to be owners, were in truth farmers' sons, and not actual owners; that having regard to the provisions of the Municipal Drainage Act no person can be held to be an owner within that Act unless he is seized of an estate in fee

simple in the land of which he claims to be the owner; see per Strong, C. J.C., in *McKillip v. Logan*, 29 S.C.R. 702, as to meaning of owner in the Ditches and Water-courses Act. The referee has power to determine under sub-sec. 3, sec. 89, of the Drainage Act, and rightly received the evidence, and also that the petition having been received and acted on by the Council of Brooke on June 13, 1898, and the roll for that year finally passed by the Court of Revision on May 30, 1897, such roll could not be said to be the last revised assessment roll under sub-sec. 11, sec. 2, of the Assessment Act, until the expiration of the time within which an appeal might be made to the county judge, and that time is five days from the date (July 1 in each year) limited for the first revision by the Court of Revision, and therefore in this case the proper roll was that of 1897, not that of 1898, and also that the Council did not profess to act of their own motion under sec. 75, but only on petition under sec. 3, and it cannot be assumed that they ever would have acted otherwise than by petition. Held, per Osler, J.A. (Moss and Lister, J.J. A., concurring), that up to the year 1874, the authority of a Council to entertain a petition depended upon the fact of ownership of the lands by the petitioners, and that the assessment roll was not the final test, or conclusive of that fact. Review of the changes made from time to time since 1874 in the clause in question. Since the

consolidation of 1877, however, the language of the clause (sec. 3 (1) R. S.O., Ch. 226,) has remained practically as it now is, and, though it is clear beyond peradventure that the assessor neglected his duty in preparing the roll relied on as supporting the petition and by-law, putting in as owners persons whose only rights were as farmers' sons, etc., yet he must now be assumed to have done his duty, and these persons must be regarded as qualified petitioners, i.e., owners, and not excluded as farmers' sons; and the assessment roll on which a council is required to act, if they act at all, is conclusive upon the question of the status of petitioners, and the referee erred in admitting the evidence. The Legislature must have meant to give some effect to the assessment roll by referring thereto in successive Acts from R.S.O., 1877, hitherto in uniform phraseology different from that which had been used in earlier Acts on the same subject. It is not unreasonable to hold that the Legislature meant what it said, for opportunities of dealing with the question of ownership are afforded on appeals to the Court of Revision, and to the County Judge. An enquiry is not open in the case of farmers' sons, any more than in the case of other persons. The section takes the roll as finally revised, and gives effect to it, and it is conclusive for the purpose of conferring jurisdiction upon a Council to entertain a petition. Appeal dismissed with costs.

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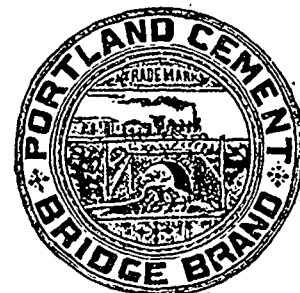
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