

In the High Court of Justice.

In the Matter of the Municipal Drainage Act and Amendments
Thereof.

Sandwich South vs. Maidstone.

I hereby consent to the Referee amending my report on the repair and improvement of the Town line drainage work dated the 20th day of May, 1905, by striking out the allowance made by me for farm bridges \$327.00, and should he find the petition for the Croft drain insufficiently signed, then I consent to the improvement of the Croft drain, including the part across the Town line being struck out of the report by him and the assessments for same, and also to the estimated cost of the Croft drain and farm bridges being deducted from the whole estimated cost of the proposed work so changing the gross estimate.
Dated at Essex this 14th day of February, 1906.

Witness.

(sgd) E. A. Wisner

(sgd) James S. Laird

Engineer.

Drain othe

Windsor, Oct. 30th, 1905.

In the High Court of Justice.

In the Matter of the Municipal Drainage Act
and Amendments thereof.

B e t w e e n :-

Sandwich South and Maidstone.

Report On Inspection.

Pursuant to my Appointment herein I inspected the Drainage Area of the Town-Line Drain in the Townships of Sandwich South and Maidstone in company with representatives of the parties on the 30th day of October, 1905.

The upper section of the Town-Line Drain in Maidstone is now called the Newman Drain. The natural trend of the surface of the land appears to be across the Town-Line from Maidstone into Sandwich South in a north-westerly direction. That part of the Town-Line Drain on the road allowance between the townships carries the water directly north and through the watershed to the Twomey Drainage Creek and the Mooney Creek Drain. The water in the Drainage Creek on the Town-Line has very much encroached upon the west side of the travelled portion of the highway and in places there is scarcely room for public travel. It is claimed for the proposed scheme that by it the road will be made wider and the places washed out will be filled and sodded over and a strip will be taken off the farm side of the Drain so that the capacity may be somewhat increased. The Drain otherwise is out of repair.

(sgd) J. B. Rankin,

Referee under Drainage Laws.

Windsor, Oct. 30th, 1905.

In the High Court of Justice.

In the Matter of the Municipal Drainage Act.

B e t w e e n :-

The Corporation of the Township
of Sandwich South,

- and -

Plaintiff,

The Corporation of the Township
of Maidstone,

Defendant.

This is an appeal from the report of James S. Laird, Engineer for the Defendants, dated 30th day of May, 1905, and from the plan, profile, specifications and assessments, made by him for the repair and improvement of the West Town line, and Mooney Creek Drainage Work.

A. H. Clarke, Esq., K.C., for plaintiff.

J. H. Rodd, Esq., for defendant.

Pursuant to my appointment I inspected the locality of the proposed improvement of the West Townline and Mooney Creek Drainage work and the area assessed for same, in company of representatives of the parties, on the 30th day of October, A.D. 1905.

The grounds of appeal are as follows:-

1. The proposed work in Sandwich South is not to be continued to a sufficient outlet and the report is therefore without jurisdiction.
2. There was no sufficient petition for the assumption by the council of Maidstone of the award on Croft drain as part of the drainage work under The Municipal Drainage Act, and the Croft Drain is not to be carried to a sufficient outlet in Sandwich South.
3. The proposed work will injuriously and dangerously affect the townline road and for that and other reasons should not be permitted.
4. The assessment for farm bridges is unwarranted as their

construction is not required by the proposed work.

5. That the assessment against lands and roads within the limits of Sandwich South and the townline between the townships is illegal, unjust and excessive.

6. And upon such further and other grounds as will appear from the proceedings taken and the evidence to be adduced.

The defences and objections are as follows:-

1. The defendant corporation joins issue with the plaintiff corporation upon the allegations contained in the reasons of appeal delivered herein.

2. The defendant corporation denies the necessity of a petition for performing drainage work from a point in the Middle Road North-westerly to meet the townline and the Mooney Creek drain, as it is merely a work of extension, enlargement and repair of these drains and the fact that to follow the course of what was known as the Croft Drain, makes no difference under the Statute.

3. The defendant corporation alleges that if in fact the petition is necessary, then one sufficiently signed under the Act was presented to the Council and acted upon by it, asking for such drainage work, and for the incorporation of what was the Croft Drain, into the Drainage scheme.

4. This drainage work is a ^{part} ~~part~~ and parcel of the said Town line and Mooney Creek drain, and the drainage work is in fact carried to a proper and sufficient outlet for the water to be carried away by it.

5. The lands in the township of Sandwich South by reason of their former assessment are by law liable to contribute towards the enlargement and repair of the drains in question and the defendant corporation denies that the assessment against the lands and roads in the Township of Sandwich South is illegal, unjust or excessive.

In 1881 the township of Maidstone procured the services of James S. Laird, an engineer, and he made a report, on the petition presented to the Council, which report is dated the

20th day of August, 1881, and is marked exhibit 4. The drainage work recommended by this report began on the centreline of the Talbot Road lots south from the side road between lots 287 and 288 and extended westerly to the townline between Maidstone and Sandwich East, thence northerly on the west side of said Townline to Mooney's Creek, thence Northwesterly along said Creek to station 69. The dimensions of the different sections of the drainage work are also given in said report. The cost was estimated at \$4660.00. This work was done. In 1882 the same engineer was employed by Sandwich East to report upon the Mooney Creek Drain. The work recommended was estimated to cost \$4137.00 and began 20 rods east of where the work in 1881 ended and continued down stream to stake 48 on the boundary between lots 18 and 19 in the 11th concession of Maidstone where it ended. The dimensions are also given in the specifications, Exhibit 5.

There was then on the completion of the work proposed by the report of 1882 a continuous drainage work from the middle of the Talbot Road lots south at the side road between lots 287 and 288, west to the townline, thence north along the west side of the townline to Mooney Creek and thence down the creek to the limit between lots 18 and 19 in the 11th Concession of Sandwich East.

In 1886 the township of Sandwich East sent on said James S. Laird, engineer to examine the locality of the townline drainage work and he reported in favor of a relief drain which would connect with the Townline drain where it crosses the Talbot Road between lot 292 Talbot Road north and 292 Talbot Road south, and extending through the 12th and 11th concessions and joined the work done in 1882 in lot 14 in the 12th concession of Sandwich East, this was called the Pike Creek drain, exhibit 6. This work extended down and over the work of 1882 and ended at the same place practically. It may have gone half a lot farther north. This work was estimated to cost \$3468.00 and was duly constructed.

In 1892, the township of Sandwich East obtained a report of an engineer to repair the townline drain from the line between the North and South halves of the Talbot Road lots South, Northerly to the Middle Road at an estimated cost of \$578.00. The engineer in this report, says, I find this portion of the drain very badly out of repair having become filled up and obstructed with the sediment washed down from the higher levels to the East. The construction of large drains on the Talbot Road and the Michigan Central Railway and lateral drains their feeders cause the flow of water to entirely overtax the capacity of the Townline drain which overflows and very seriously damages the lands in Sandwich East adjoining the townline. To prevent a recurrence of this overflow it is necessary to enlarge the drain to its original dimensions, exhibit 7. This repair was done.

The township of Sandwich East was in the year 1892, divided into two municipalities by 55 Vict. Chapter 85 (Ont.) and called Sandwich East and Sandwich South, the drainage area under consideration, till this time in Sandwich East, became part of Sandwich South.

In 1893 the township of Maidstone took steps to enlarge Pike Creek from the townline between Sandwich South and Maidstone, northerly to lot number 2 Pike Creek range in the township of Maidstone, exhibit 9. The estimated cost of this work was \$3422.00

In 1897, the township of Sandwich South through A. J. Halford, its engineer, repaired the townline drain and the Pike Creek Drain from the Middle Road North to the head of the work done by the township of Maidstone in 1893, in other words to the townline between Sandwich South and Maidstone. This repair was estimated to cost \$3970, exclusive of bridges. The fall given to this drainage work which is 5 1/2 miles in length, was 30.15 feet or about 5 1/2 feet to the mile. The width of the bottom was made as follows, commencing at the head of the work. For a distance of 296 rods 8 feet, then 284 rods, 10 feet,

next 200 rods, 12 feet, then 432 rods, 18 feet, and the last 500 rods, 24 feet. There was some straightening of the Channel as well as repairs, exhibit 13.

In 1898, Sandwich South, through A.J. Halford, its engineer, cleaned out and repaired the Twomey drain at a cost of \$1252.00, exhibit 11. In this report, the engineer, says, From the townline to the Middle Road the drain shall have a bottom width of 4 feet and will be deepened about 18 inches. From the Middle road to the end at the Gzowski drain the bottom width shall be 10 feet and the depth shall be increased about 8 inches. From the Gzowski drain north to the lake the drain has lately been cleaned out and is in good condition.

In 1899, Maidstone, through James S. Laird, its engineer, repaired the townline drain from the outlet of the Newman drain (which was originally part of the townline drain) North to the Middle Road at a cost of \$497.54. Since 1899, nothing further has been done up to the time of the proposed improvement.

The township of Maidstone is now seeking to repair and improve the Townline drain from the outlet of the Newman drain on the townline north along the road allowance and following the old drain to stake 98 see exhibit 1. The report is made by James S. Laird, C.E.S. and is dated the 20th May, 1905. This proposed work ends about the same place as did the original construction in 1881 but the latter work had its place of beginning at 287 and 288 side-road at the head of what is now called the Newman drain, see exhibit 14.

It is strongly contended by Counsel for plaintiff that section 75 is no authority for executing the work proposed by reason of the Township of Sandwich South doing the work of 1898 from the Middle road north; and the year following Maidstone repaired the Townline drain from the outlet of the Newman drain to the Middle road and hence to the head of the work done by Sandwich South. The effect of the Townline drain upon wash the townline road allowance has been to wash out the roadbed

in places and thereby encroach upon the travelled part to such an extent as to render public travel dangerous. From the report and specifications it appears that all the places washed out are to be filled in with earth so as to widen the travelled part of the road and change the side slopes of the drain on the roadside and sod it over. This improvement necessitates the taking of a strip of land off the farms on the west side of drain and an allowance is made in the report for the land so taken. The drain is to be repaired throughout and to some extent the drain is improved a short distance beyond where the work of 1881 ended.

There can be no doubt of the application of section 75 to such a state of facts. The work is in reality a reconstruction of the drainage work so as to preserve the travelled portion of the highway from being washed out and rendered unsafe for public travel and in doing this work the grade on the side of the road is changed and sodded and the reduction in the capacity of the drain thus caused is made up by using a strip of land off the adjoining farms and widening the drain on the side of the farms. I therefore find that the defendants have ample authority under section 75 for the repair and improvement in the townline drain contemplated and provided for by the report in question herein.

Referring to plan exhibit 14, and applying thereto the evidence of both parties it will readily be seen that the natural tread of the surface water was across the townline from Maidstone into Sandwich South in the course of the Croft drain and the Mooney Creek drain on the north and of the Twomey and Newman drains on the south. The Townline drain was in the natural course from the sideroad between lots 287 and 288 westerly to the townline. This part is now called the Newman drain. From the mouth of the Newman drain north to the Twomey creek drain, it is located on the west part of the road allowance and cuts through the watershed between the Twomey creek drain and the Mooney Creek drain. From the evidence regarding the

condition of the townline road allowance in a state of nature it appears that the primary object of this drainage system was the drying of the road allowance and the grading up of the road with the excavated earth. This drainage work had been in operation less than five years when it became necessary to construct a relief drain and in 1886 the Twomey drain was constructed.

It therefore appears from the exhibits as well as from the oral testimony that the main result of the construction of the Townline drain was the benefit to the highway between Sandwich East and Maidstone. The area of land draining into it from the east and west sides is very small but to a considerable extent it cuts off the surface water of Maidstone from crossing into the adjoining township. It therefore appears to be quite right and proper that the road allowance should be assessed a fair and reasonable sum for its share of the cost of the proposed improvement, and I consider that the Township of Sandwich South has no valid ground for complaint against the amount of its assessment on the townline. From the evidence it is also clear that the lands in the township of Sandwich South are benefited in two ways, first, by way of cut-off, and second, by direct drainage facilities. I therefore find that the proportion of assessment on the lands in the township of Sandwich South for the cost of the proposed work is fair and reasonable.

Upon the evidence I further find and report that considering the work done from time to time as already shown from the outlet of the proposed work down stream and for which the lands originally assessed for the Townline drain contributed the proposed work is carried to a sufficient outlet under the statute particularly in view of my finding upon the Croft drain branch of the proposed drainage work.

I also find and report that the allowance made for farm bridges cannot be sustained. The proposed work does not in any sense render these bridges necessary as contemplated by section 59 of the Municipal Drainage Act.

Turning now to the Croft award drain which is incorporated into the proposed work, exhibit 3 is the engineer's award for the construction of this drain and is dated the 27th October, 1891. The persons made liable to do the work under the award are 10 in number as follows: 1, Robert Croft, 2, James Robinson, 3, William E. Doyle, 4, Mrs. Bridget McLean, 5, John Scully, 6, Michael Scully, 7, Township of Maidstone, 8, Alexander Wilson, 9, William Potter and 10, Michael McCaun.

Of the above Nos. 1, 2, 3, 5, 9 and 10 sign the Petition exhibit 2. Had all the parties interested in the award, at the time it was made, been still living at the date of the petition, that is, on the 11th day of July, 1904, then there would have been no doubt about the majority having signed the petition to change the award drain into a Municipal drainage work according to the provisions of Section 84 of the Act.

If the owners to be considered are confined to the owners of the lands assessed for the construction of the ditch under the award, the case would stand. William Croft and David Croft are assessed with owners with their father; Pat. McCann and James Scully are assessed in place of Michael Scully; James H. Wilson, John H. Wilson and Mrs. A. Wilson in place of Alex. Wilson. Allowing for the names of Michael Scully and Alexander Wilson as being on the original award there will be the above seven names underlined less two to be added to the original number ten which would make the total number of assessed owners 15 and a majority 8.

Warwick vs. Brooke (1901) 1 O.L.R. 433.

Challoner vs. Lobo (1900) 32 O.R. 247.

Evidence was received as to the actual ownership of the lands assessed by the engineer under the award of 1891 and the case was stand thus:

S.W. 1/2	2, North Middle Road	William Croft	1
N. 1/2, 1,	South Middle Road	J. Robinson	1
N. 1/2, 3,	South Middle Road	(Wm. T. Doyle) (John E. Doyle)	2.

S.1/2, 1,	North Middle Road	(Mary McCaun (Martha Lennon (Eliza Larkind (Ann Haley (Bridget Davis (Margaret Ward (Bridget McLean	7
S.E.1/2, 2,	North Middle Road	John Scully	1
W.1/2, 2,	South Middle Road	(Pat. McCaun (James Scully	2
N.1/2, 1,	North Middle Road	(Ursula Wilson (James H. Wilson (John H. Wilson	3
S.1/2, 3,	North Middle Road	W.H. Potter	1
S..1/2, 2,	South Middle Road	M. McCaun	1
Township of Maidstone			<u>1</u>
Total owners			20

The number required for a majority 11.

It is therefore clear that the petition for changing the Croft award drain into a Municipal Drainage work was not signed by a majority of the persons interested in said drain whether these are to be considered as assessed owners or actual owners. The petition therefore does not authorize the proposed work in the course of the Croft drain.

There is no separate estimate of the cost across the townline in the course of the Croft award drain as provided for by section 59.

It appears to me that the improvement of the Townline drainage work, in the manner proposed by the engineer in his report, is absolutely necessary in order to preserve the highway from any further encroachment on the part of the drain and to render the said highway safe for public travel. Relieving the scheme of the improvement of the Croft award drain will leave the whole of the improvement in Sandwich South for the benefit of the Townline drain and consequently give greater capacity for the waters brought down by that drain.

With the consent of the engineer which is attached hereto I disallow all the farm bridges as not being rendered necessary by this proposed work and eliminate from the scheme the improvement of the Croft drain. The gross estimate of the

work as shown by the engineer's report will therefore be reduced by the sum he has allowed for farm bridges and the total assessments upon the lands and roads for the improvement of the Croft award drain to its junction with the Townline drain.

For the reasons given and my findings of fact I therefore allow the appeal of the township of Sandwich South on the following grounds, Farm bridges are not rendered necessary by the proposed work, the separate estimate of the work across the Town line and no sufficient petition under Section 84 for incorporating the Croft award drain. The appeal is allowed with costs to be taxed by the Clerk of the County Court of the County of Essex at Windsor, on the High Court scale. There will be no witness fees allowed to those witnesses who gave evidence on townline assessment only.

The effect given to my report on inspection is in corroboration of the evidence regarding the course of the Townline drain being across the surface fall of the land and the injurious effect of the drain upon the road allowance and the need there is of preventing any further encroachments.

The trial of this case shall be considered as occupying two days and stamps to the amount of \$8.00 shall be attached to this report by the defendant and in case of default the said stamps shall be affixed by the plaintiff and the amount thereof added the bill of costs and taxed to the plaintiff.

(sgd) J. B. Rankin

Referee under Drainage Laws.

Chatham, Feb. 21st, 1906.

Between The Corporation of the Township of Sandwich South Plaintiff
and
The Corporation of the Township of Maidstone Defendant
I certify the foregoing to be a true copy of the Report on inspection and Judgment of the Drainage Referee in this action on file in my Office
Dated at Windsor this 21st March 1906
Francis Cleary
Clerk County Court Essex

H. C. J.

In the Matter of the Municipal

Drainage Act.

Between :-

Sandwich South

and

Maidstone

Judgment,

Engineer's Consent

&

Inspection Report.

