

1928
*Feb. 17.
*April 24.

THE RURAL MUNICIPALITY OF BI- }
FROST (DEFENDANT) } APPELLANT;

AND

ANNIE STADNICK (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporations—Construction of roads and ditches by municipality—Alleged negligence in construction, causing flooding of plaintiff's lands—Plaintiff's right of action for damages—The Good Roads Act (Man.) 1914, c. 42—The Municipal Act, R.S.M. 1913, c. 133, ss. 634, 684.

Plaintiff claimed damages from defendant (a rural municipality) for the flooding of her land, which, she alleged, was in consequence of negligent construction by defendant of certain roads and ditches. It was found in the courts below that defendant had negligently failed to provide an adequate outlet for the waters collected, and that to this negligence the damages were due. These findings this Court refused to disturb, as defendant had failed to point to any specific error vitiating them. But defendant contended (1) that as the works were constructed under the authority, and in accordance with the provisions, of the *Good Roads Act*, Man., 1914, c. 42, it was not responsible for injury arising from the execution of the works; and (2) that by virtue of ss. 634 and 684 of the *Municipal Act*, R.S.M. 1913, c. 133, the plaintiff's only remedy, if any, was by way of arbitration.

Held (1): Defendant's first contention failed, as, on the evidence, it had not shewn that the injury caused by the works executed by it was caused by a work authorized and executed according to plans approved under the provisions of the *Good Roads Act*; as defendant thus failed on the evidence, it was not necessary to consider what, otherwise, would have been the effect as to plaintiff's right of action.

(2): Defendant's second contention failed, as the provision for compensation in s. 634 of the *Municipal Act* applies only to damages suffered by reason of diversion of "water from its original course"; that section has no application to flooding by surface water; it contemplates only a diversion of water flowing in a defined water course; s. 684, which deals generally with the right to compensation for damages caused by municipal works, and accords compensation for "damages necessarily resulting" from such works, had no application.

Judgment of the Court of Appeal for Manitoba (37 Man. R. 26) affirmed.

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

APPEAL by the defendant (a rural municipality under the laws of Manitoba) from the judgment of the Court of Appeal for Manitoba (1) affirming, with a variation disallowing damages for the year 1919, the judgment of MacDonald J. (2), who held the plaintiff entitled to recover against the defendant for damage to the plaintiff's crops in the years 1919, 1921, 1922 and 1923, caused, as alleged, from flooding by reason of negligence in the construction by the defendant of certain roads and ditches. The main points dealt with in the judgment now reported (the court refusing, for reasons given in the judgment, to disturb the findings of fact in the courts below bearing on the question of negligent construction) were with regard to the application and effect, as to the plaintiff's right of recovery in this action, of the *Good Roads Act* of Manitoba, 1914, c. 42, and of ss. 634 and 684 of the *Municipal Act*, R.S.M. 1913, c. 133. The defendant's appeal to this Court was dismissed with costs.

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H. A. Bergman K.C. for the appellant.

J. C. Collinson for the respondent.

The judgment of the court was delivered by

DUFF J.—The appeal concerns the right of the respondent to recover damages due to the flooding of her lands in 1921, 1922 and 1923. She is the owner of the S.E. quarter section of sec. 26-22-2 within the municipality of Bifrost. Past the east boundary of the respondent's land runs a road known as the Jacobson Road, extending southward to the Icelandic River and north for a distance of about ten miles from the river.

In 1920, the appellants applied under the *Good Roads Act* of Manitoba for approval of an extensive scheme of road construction, including the Jacobson Road, and a branch road extending eastwardly for two miles from the Jacobson Road along the town line between townships 22 and 23. The scheme was approved and the Order in Council was passed on 1st April, 1920, which required that the roads be improved (*inter alia*) by draining, and the Jacob-

(1) 37 Man. R. 26; [1927] 3 W.W.R. 49. (2) [1926] 2 W.W.R. 324.

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son Road and the branch road were constructed, in the years 1920 and 1921, with appurtenant ditches, on the routes prescribed in the Order in Council.

The respondent alleges that the flooding of her property was the consequence of the negligent construction of these roads and ditches. The learned trial judge, and the majority of the Court of Appeal, agreed in the view that the appellants had negligently failed to provide an adequate outlet for the waters collected by the roads and ditches, and that to this negligence the damages complained of were due.

These findings of fact could only be successfully impugned in this court by pointing to some specific error in the courts below, vitiating the findings, and this counsel for the municipality has quite failed to do. It would serve no good purpose to discuss the evidence in detail. The appeal must be considered on the footing that the respondent's loss, owing to the flooding of her land, was due to the failure to make reasonable provision for the discharge of the surplus water collected in the roads and ditches constructed by the appellants.

On behalf of the appellants, the grounds of appeal now to be considered are, first: that the works mentioned were constructed under the authority of the *Good Roads Act, 1914*, and in accordance with the provisions of that Act, and, such being the case, the municipality is not responsible for any injury arising from the execution of the works, and, second: that by virtue of the provisions of the Municipal law of Manitoba, the only remedy of the respondent, if she has any, even for negligence, is to proceed to arbitration under those provisions.

As to the first of these contentions, the difficulty in the appellants' way appears to be this. In order to establish the defence based upon the allegation that the work was constructed under the authority of the *Good Roads Act*, it was necessary to identify the work authorized under that statute. The Order in Council, approving the decision of the Good Roads Board, in respect to certain works in the municipality, is produced, and these works include what has been referred to above as the Jacobson road and the branch road to the east. The Order in Council provided for the improvement of the roads by draining, grading and

gravelling the same. But the report of the engineer, the maps, plans, drawings, profiles and specifications of the works which should have accompanied the report of the engineer, and which would shew in detail the character of the work authorized under the statute, including the measures for dealing with waters collected by the works contemplated by the scheme, which it was the duty of the Board to transmit to the Clerk of the Municipality, were not produced. In the absence of these documents, which would have afforded authentic information as to the precise nature of the work authorized, with the concomitant protective measures, if any, the learned trial judge, and the judges of the Court of Appeal, were obliged to determine as best they could, whether the flooding of the respondent's land was in truth due to works executed pursuant to the plan and approved by the Good Roads Board, and so under the authority of the statute. Facts were adduced in evidence, of more or less cogency, pointing to the conclusion, that as a part of the statutory plan, the municipality had contemplated the construction of an outlet leading from the eastern terminus of the eastern branch into a lake called Crooked Lake, and thence into Icelandic River, at a point much below the outlet actually provided. Such an outlet would have given the most natural and effective method of freeing the roads actually constructed, and the adjacent lands from the menace of flooding. It was in point of fact in 1923, actually put into execution. In addition to that, certain ditching constructed in the year 1923, considerably added to the accumulation of surplus water, and there is no pretence for suggesting that this ditching formed any part of the statutory scheme. The evidence seems to indicate that the government engineer visited the works only occasionally, and that the works were really under the control of the municipality.

The learned trial judge, as well as the majority of the Court of Appeal, were convinced that the works, as actually executed, did not make reasonable provision for the escape of the water collected, and, on general principles, the appellants can only escape responsibility by shewing that the very thing which they did was that which the statute authorized. There is no satisfactory ground for differing from the view of the courts below, that the appel-

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lants have failed to shew that their works were executed according to the plans approved.

The decision on this point, it will be observed, turns entirely upon the issue of fact. The appellants fail because they have not shewn that the injury caused by the works executed by them was caused by a work authorized and executed according to plans approved under the provisions of the *Good Roads Act*. Had this been established, it would have been necessary to consider the appellants' contention that, in such circumstances, they are not answerable in an action by a plaintiff, who alleges that in consequence of the works he has suffered damage, and that his remedy, if any, must be found in some statutory provision for compensation, if there be any.

I now turn to the defence advanced by the appellants, based upon sections 634 and 684 of the *Municipal Act*. I have no hesitation in holding that the provision for compensation in s. 634 applies only to damages suffered by reason of diversion of "water from its original course." I agree with the majority of the court below that this section has no application to flooding by surface water, and that it contemplates only a diversion of water flowing in a defined water course.

Sec. 684, which is the enactment dealing generally with the right to compensation for damages caused by municipal works, accords compensation for "damages necessarily resulting" from such works, and has no application here.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Anderson & Seeman.*

Solicitor for the respondent: *W. W. Coleman.*
