

THE RURAL MUNICIPALITY OF }  
MONET NO. 257 (*Defendant*) ... }

APPELLANT;

1956  
\*May 23, 24  
\*Oct. 2

AND

GRAHAM CAMPBELL (*Plaintiff*) .....RESPONDENT;

AND

MARIAN McCALLUM (*Plaintiff*) .....RESPONDENT;

AND

JAMES FRANCIS WILLIAMS AND }  
REGINALD JOHNSTON (*Plain-* }  
*tiffs*) ..... }  
RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Municipal corporations—Construction of road—Diversion of surface water—Whether authority required under s. 8 of The Water Rights Act, R.S.S. 1940, c. 41—The Rural Municipality Act, 1946 (Sask.), c. 32; 1950 (Sask.), c. 37.*

Section 8 of *The Water Rights Act*, R.S.S. 1940, c. 41, which provides that “no person shall divert or impound any surface water not flowing in a natural channel or contained in a natural bed . . . without having first obtained authority to do so under the provisions of this Act”, applies to a rural municipality which constructs within its boundaries a road the effect of which is to turn the drainage water from its natural channel and bring about a diversion of that water onto adjacent lands, even if there was no intention on the part of the municipality to create such a diversion of water.

Judgment appealed from ((1955), 15 W.W.R. 442) affirmed.

APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment at the trial together of three actions.

G. H. Yule, Q.C., for the appellant.

E. M. Hall, Q.C., and R. H. McKercher, for the respondents.

The judgment of the Court was delivered by

\*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Nolan JJ.  
(1) 15 W.W.R. 442, [1955] 3 D.L.R. 578.

1956  
 RURAL  
 MUNICIPALITY  
 OF MONET  
 No. 257  
 v.  
 CAMPBELL  
 AND OTHERS

NOLAN J.:—This is an appeal from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment of McKercher J., who, in three actions which were tried together, awarded damages against the appellant municipality for having constructed a road which interfered with the natural flow of water and diverted it onto the lands of the respondents.

All the lands in question are situated in township 27, range 14, west of the third meridian, and had been cropped without interruption from the time they were first cultivated until 1951 after the construction of the road. The respondent Campbell farms the north half of section 35, the respondent McCallum the south half of section 34 and the respondents Williams and Johnston the north half of section 27, all in the said township.

The road in question was graded by the appellant between the years 1948 and 1950. Prior to that time it was only a road allowance in which a few low areas had been filled in. The road runs north and south between sections 2 and 3 in the south and between sections 34 and 35 in the north. The grading covered up a culvert which ran under the old road allowance between section 15 and section 14. No provision was made for the installation of a new culvert. Neither were there any other culverts constructed throughout the four-mile portion of road lying east of sections 15, 22, 27 and 34 until the summer of 1952.

The road was built under the statutory authority of *The Rural Municipality Act*, now R.S.S. 1953, c. 140. In 1948 *The Rural Municipality Act*, 1946 (Sask.), c. 32, s. 196(1), cl. 9 provided:

196. (1) In addition to all other powers conferred on councils by this Act, the council of every municipality shall have power: .....

9. to lay out, construct, repair and maintain roads, lanes, bridges, culverts and any other necessary public work in the interests and for the use of the municipality.

A new Act was passed in 1950 (c. 37), which came into force July 1, 1950. The old s. 196(1), cl. 9 is, under that Act, s. 199(1), cl. 10. The wording is identical in the two sections.

The cause of action is based on s. 8 of *The Water Rights Act*, R.S.S. 1940, c. 41, which provides:—

8. (1) No person shall divert or impound any surface water not flowing in a natural channel or contained in a natural bed and no person shall construct or cause to be constructed any dam, dyke or other works for the diversion or impounding of such water, without having first obtained authority to do so under the provisions of this Act.

(2) If any person without having obtained such authority diverts or impounds surface water not flowing in a natural channel or contained in a natural bed or constructs or causes to be constructed any dam, dyke or other works for the diversion or impounding of such water, such person shall be liable to a civil action for damages at the instance of any person who is or may be damaged by reason of such diversion, impounding or construction.

It is common ground that the appellant did not apply for or receive any authorization to build the road in question under the authority of *The Water Rights Act*, *supra*.

The learned trial judge said:—

The defendant did not obtain the necessary authority mentioned in said sub-section one, required to construct the road in question. The water involved was surface water not flowing in a natural channel or contained in a natural bed, and the provisions of the aforesaid Act are applicable in these circumstances to Rural Municipalities in Saskatchewan.

The learned trial judge held that, not having obtained the necessary authorization to divert the water, the appellant was liable, and he awarded damages in an amount aggregating \$13,100.

The judgment of the learned trial judge was unanimously affirmed by the Court of Appeal for Saskatchewan (1).

It was established by the evidence and not disputed that the natural drainage on the lands was in an easterly direction to the road and that water so draining was blocked by the road, turned north and eventually emptied onto the

1956  
 }  
 RURAL  
 MUNICIPALITY  
 OF MONET  
 No. 257  
 v.  
 CAMPBELL  
 AND OTHERS  
 Nolan J.  
 —

1956

RURAL  
MUNICIPALITY  
OF MONET  
No. 257

v.

CAMPBELL  
AND OTHERS

Nolan J.  
—

lands of the respondents. The actual flooding in 1952 lasted for four days, from April 6 to April 9, and was more extensive than it had ever been before. Three hundred feet of highway were washed out between sections 34 and 35.

There was, however, a difference of opinion as to the amount of water which, originating on section 15, would flow onto township 27 in a spring run-off and would ultimately come to rest on the respondents' lands. The witness Webb, a surveyor called by the appellant, was of opinion, after examining the drainage channels and contours, that only about 15 per cent. of the water so originating would come to rest on the respondents' lands. The evidence of the witness Webb on this point was rejected by the learned trial judge. On the other hand, evidence adduced on behalf of the respondents, which was accepted by the learned trial judge, established that the flooding originated west of the road on section 15, where the appellant had blocked the natural channels for surface water by the construction of the road without culverts.

It was contended by counsel for the appellant in the Courts below that s. 8 of *The Water Rights Act* did not apply in the case of a municipality constructing roads within its boundaries and with no intention of diverting or impounding water. It is plain from s. 2(4) of *The Water Rights Act* that it applies to a municipality. That subsection reads as follows:—

4. "company" means any incorporated company, the object and powers of which extend to or include the construction or operation of any works under this Act, or the carrying on thereunder of the business of the supply, utilization or sale of water for any purpose, and includes any person who has been authorized or has applied for authority to construct or operate such works or carry on such business, or who has obtained a licence under this Act; and also includes a municipality and an irrigation district.

The appellant also contended that it is inconceivable that the Legislature intended that, after 1935 when s. 8 was enacted, all roads built after that date would have to have special authorization.

No question can arise as to the right of a municipality to build roads within its boundaries for the use of the municipality. It has complete authority so to do under the provisions of *The Rural Municipality Act, supra*. But the question for determination is whether authority is required under *The Water Rights Act*.

1956  
 }  
 RURAL  
 MUNI-  
 CIPALITY  
 OF MONET  
 No. 257  
 v.  
 CAMPBELL  
 AND OTHERS  
 Nolan J.

Counsel for the appellant referred in argument to a number of sections of the Act which obviously do not apply to the construction of a road by a municipality. But does s. 8 apply?

In *Baker v. The Rural Municipality of Lajord* (1), the municipality built a grade on the road allowance and constructed a bridge or culvert in the road. Subsequently the bridge was washed out by flood and on the authority of the council the gap in the road where the bridge had been was filled in with earth. In 1944 the road was graded and was raised another one and one-half feet, making it four feet above the level of the surrounding land. In 1947 the water rose on the east side of the road on Baker's lands and was prevented by the road from draining to the west. Baker's lands were flooded.

Under *The Rural Municipality Act* the municipality was required to keep roads in repair and it did so by filling in the gap. The municipality applied, under *The Water Rights Act*, for authorization to "repair and maintain the road as a dyke". The application was refused, but the municipality did fill in the gap. It was held by the Court of Appeal for Saskatchewan that s. 8 of *The Water Rights Act* applied and that the municipality was liable for the flooding because it had not obtained authority to build a dam or dyke for the diversion of surface water. Martin C.J.S. stated at p. 980:—

The road then became a dyke or dam which prevented the natural flow of surface water from sec. 24 to other lands to the west.

Counsel for the appellant contended that "diversion", as used in *The Water Rights Act*, does not mean flooding, but a taking of water for the use or purpose of the municipality.

(1) [1950] 2 W.W.R. 978, [1950] 4 D.L.R. 750.

1956  
 RURAL  
 MUNICIPALITY  
 OF MONET  
 No. 257

v.  
 CAMPBELL  
 AND OTHERS

Nolan J.

I am unable to agree with this contention. In my view the construction of the road, with no provision for a culvert, turned the drainage water from its natural channel and so brought about a diversion within the meaning of s. 8.

The appellant further contends that the road was not built "for the diversion or impounding of water" and that no municipality builds a road for that purpose. Nevertheless, if the building of the road results in, what I conceive to be, a diversion of the water, then I think that authorization must be obtained under s. 8 of *The Water Rights Act*. This is particularly true when it is remembered that the new grade did away with the existing culvert which had previously carried the water from west to east under the old road. In a word, the road became a dyke or dam, which prevented the flow of surface water to other lands to the east, and authorization was necessary.

The respondents contended, in this Court, that, although it had not been pleaded or raised in argument in the Courts below, it was open to the Court to give judgment on the common law right of action. Holding, as I do, that the municipality is liable for the flooding because it did not obtain authorization to build the road in the manner in which it was built, I find it unnecessary to consider the question of liability at common law.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitor for the appellant: G. H. Yule, Saskatoon.*

*Solicitors for the respondents: Hall, Maguire & Wedge, Saskatoon.*

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