

EDWIN RISTER, WILLIAM F. JACOBS, OSCAR WALTERS AND ISAAC BJERSTEDT ( <i>Plaintiffs</i> )	}	APPELLANTS;
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1958  
 \*May 21,  
 22, 23  
 \*\*Oct. 7

AND

LORENZ A. HAUBRICH, OTHER- WISE DESCRIBED AS LAWRENCE HAUBRICH ( <i>Defendant</i> ) .....	}	RESPONDENT.
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ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE  
OF SASKATCHEWAN

*Damages—Diversion of water—Onus under s. 8 of The Water Rights Act, R.S.S. 1953, c. 48.*

To establish a claim under s. 8 of *The Water Rights Act*, R.S.S. 1953, c. 48, the onus is on the claimant to show that the damages for which he claims were caused by reason of the alleged diversion of waters.

*Held:* The action in which the plaintiffs alleged that their lands had been flooded by water wrongfully diverted by the defendant, should be dismissed. The plaintiffs failed to satisfy the onus of establishing, by a preponderance of evidence, that, but for the work done by the defendant, they would not have sustained the damages for which they claimed. The weight of evidence is in favour of the proposition that the work was not the cause of their loss.

APPEAL from a judgment of the Court of Appeal for the Province of Saskatchewan, reversing a judgment of McKercher J. Appeal dismissed.

*A. E. Neville, Q.C.*, for the plaintiffs, appellants.

*E. D. Noonan, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a unanimous judgment of the Court of Appeal of Saskatchewan, which allowed an appeal from the judgment of McKercher J., who had given judgment awarding damages, in the aggregate, in excess of \$17,000 and costs to the appellants Rister and Jacobs against the respondent. The appellants alleged that their lands had been flooded by water, which they claimed had been wrongfully diverted by the respondent. The appellants Walters and Bjerstedt did not claim damages, but,

\*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Martland JJ.

\*\*The Chief Justice, owing to illness, did not take part in the judgment.

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along with the other two appellants in their statement of claim, asked for an injunction requiring the respondent to open the original natural channel and to dyke the new water course causing the flooding of the appellants' lands. This relief was not pressed or granted at the trial.

The respondent is the owner of the north half of section 24, township 12, range 8, west of the 3rd meridian in the Province of Saskatchewan. The south half of this section is owned by Ivan Moulton, who was a witness in, but not a party to, these proceedings. The lands to the south of Moulton's land, the north half of section 13, are owned by the appellant Rister. The lands to the south of Rister's land, the south half of section 13, are owned by the appellant Bjerstedt. The lands to the south of Bjerstedt's land, the north half of section 12, are owned by the appellant Walters. The appellant Jacobs owns the east halves of sections 14 and 23, which lie immediately to the west of the lands owned by the respondent, Moulton, Rister and Bjerstedt. His claim related only to the east half of section 14.

A large slough, known as Bjerstedt's Slough, at the times material to this action, covered the major part of Bjerstedt's lands and a portion of those of Rister, Walters and Jacobs.

The north half of section 24, owned by the respondent, is bounded on three sides by roads. On the west and north are two municipal roads and on the east there is a provincial highway, no. 19. There are two culverts under the road on the west, a twenty-four-inch metal culvert about 450 feet south of the northwest corner of section 24, and a thirty-six-inch metal culvert about 900 feet south of the twenty-four-inch culvert. On the road to the north of section 24 there had been a wooden culvert or bridge about two feet by six feet, which was replaced in 1955 by a thirty-six-inch metal culvert. This is located on the north boundary of the northeast quarter of section 24. The road to the north of section 24 had been built by the rural municipality of Glen Bain in 1945.

The evidence establishes that, at the time of the spring run off, water from an area of some fourteen to fifteen square miles drains into the east half of section 23, from where it flows, by means of the two culverts in the road to the west of section 24, mostly through the larger culvert,

onto the north half of section 24. On occasions when there had been a heavy run off the water had overflowed across the road itself because the two culverts were inadequate to handle the flow. It was the contention of the appellants that, prior to 1950, the water would flow generally across the north half of section 24 in a northeasterly direction and from there to the south half of section 25 immediately to the north. Ultimately this water would reach a slough known as Thompson's Slough, which lies further to the northeast. It was, however, admitted in evidence, and particularly in that of the appellant Bjerstedt that, in years when there was a heavy run off, water would also flow south from the north half of section 24, ultimately reaching the Bjerstedt Slough.

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The respondent leased the north half of section 24 for some years prior to 1945, when he purchased it. In November of 1947 he employed one Paulson to straighten out the course in which the water had been flowing across his land. Paulson used a municipal road maintainer with a twelve-foot blade. Presumably the blade was tilted at an angle and then a ditch was cut in a "V" shape which was about two feet deep and about two feet wide at the top. This ditch commenced not far from the larger, more southerly culvert on the road west of the respondent's land, thence a distance north and then in an easterly direction. The ditch did not extend to the north boundary of section 24. At the point at which it stopped it connected with an existing channel which extended to that boundary, where there was a ditch south of the municipal road which led to the culvert under that road.

The appellants sought to establish that the earth thus excavated was piled to the south of the ditch, as it proceeded east, and to the east of the ditch, as it proceeded north, thus forming a continuous earth dyke. However, the evidence of several witnesses, including Paulson himself, is that in some places earth was piled on the one side of the ditch and in other places on the other side.

Paulson's evidence as to the exact scope of his work is not too clear. It was suggested by the appellants that he had constructed a complete, new ditch, but the weight of evidence indicates that, in fact, he connected up existing pot holes in the old runway. It was also suggested that he had

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filled in the old channel. He himself says "we levelled it out and filled in a bit of it in." However, as pointed out by Gordon J.A., in his judgment in the Saskatchewan Court of Appeal, concurred in by all the other members of the Court, the significant fact is that Paulson worked for only about two and one-half hours, part of which was spent in filling in an old basement. The total sum paid by the respondent in respect of his work was \$24.

The appellants' contention, as set forth in their statement of claim, is that the respondent, by reason of Paulson's work, had filled in and dyked an existing channel and caused the water coming onto the respondent's land to flow south to the Bjerstedt Slough, instead of northeast to the Thompson Slough. In support of this proposition the appellants adduced evidence that prior to 1947 there had been a natural channel toward the northeast, following a snake-like course, variously estimated by witnesses as from ten to twelve feet wide and with a depth of three to four feet.

Evidence was also led to show that, whereas the land comprising the Bjerstedt Slough had been broken in the 1930's and had been completely seeded prior to and in 1949, it had been flooded in each of the years 1950 to 1955 inclusive.

In answer to these contentions there are certain facts which require consideration. There is the very limited period of time during which Paulson worked, which would have been inadequate to permit his filling a channel of the kind described by the appellants' witnesses. Also there are those pointed out by Gordon J.A. in his judgment in the following terms:

There are certain salient facts which must be constantly borne in mind. The first is that the years 1950 to 1955 inclusive were certainly the wettest consecutive years in the history of this Province. The evidence clearly establishes this fact, if I could not take judicial notice of it. The second is that cultivated land erodes very readily, whereas prairie grass has a peculiar resistance to erosion. The third fact is that it was very much more to the advantage of the defendant to have the water diverted north than to have it come south through his land.

The respondent filed in evidence two maps of his land. One of these, ex. D.4, was prepared in 1955 by Ronald Ferber, a district engineer on the staff administering the *Prairie Farmers Rehabilitation Act* in Gravelbourg. This was prepared from a survey made by George Beynon, a

graduate in agriculture and engineering, and, at the time, employed on the staff administering the *Prairie Farmers Rehabilitation Act*, in September 1950. The other, ex. D.3, a contour map, was prepared by John Joseph Schaeffer, a qualified civil engineer, in September 1956. The elevations on the two maps are almost identical and show that there was no general change in the area between 1950 and 1956.

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These maps, and the evidence given in relation to them, show that the purpose of the ditch dug by Paulson was to seek to divert the water reaching the respondent's land, by way of the larger culvert on the road west of it, into the northeast channel. They also show that, after water flowing through that culvert has joined with that flowing from the smaller culvert to the north, a point is reached on the respondent's land from which all such water can, by reason of the relative land elevations on the north half of section 24, flow equally well either to the northeast toward Thompson's Slough or south to the Bjerstedt Slough. However, the flow of water to the northeast is impeded by the municipal road to the north of section 24, which is some two to three feet higher in elevation than the adjoining land, and which thus has the effect of causing the water to move toward the south rather than to the northeast.

Each of these professional witnesses agreed that, if there were a small flow of water, the ditch constructed by the respondent would carry it to the northeast, but that, in case of a heavy flood, the result would be the same as if no ditch had been constructed and in such case the bulk of the water would flow toward the south.

The evidence is clear that the run offs in the years 1950 to 1955 were very heavy.

Referring to Schaeffer's map, Gordon J.A., in his judgment, points out:

It is interesting to note that in the northern runway, where the water did reach the ditch to the south of the northern municipal road, the elevation is 76.8 and at the point where it left the southern boundary of the southeast quarter of section 24, the elevation is 69.6 so the gradual slope of this whole section from the point where the water enters is more markedly to the south than the north. Another point that must be borne in mind is that when the waters flooded over the west municipal road as it did in 1950, at an elevation of 92 feet, not only the ditch dug by the defendant

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but its alleged three foot banks would be completely submerged and when the waters receded, the bank would be so soft that it would be readily swept away at its weakest point, which, as stated above, from the southern culvert was at an elevation of 86.5 feet.

A further factor in relation to the flow of water to the south is also referred to in this judgment as follows:

Further, the learned trial judge, very properly held that the cultivation of the fifteen acres at the point where the water entered section 24 was a factor in diverting the water south, but there is nothing illegal in that. The defendant had a perfect right to cultivate his land and make it as productive as possible and all agree that if it had not been for the five successive very wet seasons, the plaintiffs would have suffered no injury. Once the water reached the cultivated land, it was bound to tear out a channel and the contour map clearly indicates that this channel was eroded just where one would expect to find it. Once started it would require a major operation to divert it.

I agree with Gordon J.A. that this action, if it were to succeed, must be brought within the statutory provision which is now s. 8 of *The Water Rights Act*, R.S.S. 1953, c. 48, and which was formerly s. 8 of c. 41 of the Revised Statutes of Saskatchewan 1940. That section reads as follows:

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 damnified by reason of such diversion, impounding or construction.

Counsel for the appellants contended that if the respondent built the ditch in question to divert water to the north he would become legally liable if, having done so, the ditch proved to be inadequate for that purpose. I do not agree with this contention. To succeed in an action under s. 8 the person claiming damages must establish in evidence that the damages for which he claims were caused by reason of the diversion which is alleged. The onus was upon the appellants to show that their damages were the consequence of what the respondent had done.

Reference was made by the appellants to *Corporation of Greenock v. Caledonian Railway Company*<sup>1</sup>. It is to be noted that the following statement of the law by Professor Rankine, in his work on the Law of Land Ownership in Scotland, 4th ed., p. 376, was cited with approval by Lord Chancellor Finlay and Lord Dunedin in that case at pp. 571 and 577. His statement of the law is as follows:

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The sound view seems to be that even in the case of an unprecedented disaster the person who constructs an opus manufactum on the course of a stream or diverts its flow will be liable in damages provided the injured proprietor can show (1.) that the opus has not been fortified by prescription, and (2.) that but for it the phenomena would have passed him scathless.

In my view the appellants have not satisfied the onus of establishing, by a preponderance of evidence, that, but for the work done by the respondent, they would not have sustained the damages for which they claim. The weight of evidence is in favour of the proposition that it was not the cause of their loss.

The learned trial judge found that the damages sustained by the appellants had resulted from the action of the respondent and the construction of the road to the north of the respondent's land by the rural municipality of Glen Bain. In reaching this conclusion the only witness whose evidence he doubted was the respondent himself. His conclusions were inferences drawn from the evidence of the other witnesses.

For the reasons above given and those given by Gordon J.A. in the Court of Appeal, I do not agree that, on this evidence, it should be found that the appellants have established affirmatively that their damage was caused by any wrongful act on the part of the respondent. A claim has not been proven under s. 8 of *The Water Rights Act*.

I would, therefore, dismiss this appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiffs, appellants: Bagshaw, Neville & Wilson, Regina.*

*Solicitors for the defendant, respondent: Gravel, MacLean & Sirois, Regina.*

<sup>1</sup>[1917] A.C. 556.