

1930
 *April 24.
 *June 11.

AGNES SCHULTZ MONTGOMERY }
 AND OTHERS (DEFENDANTS) } APPELLANTS;

AND

THE RURAL MUNICIPALITY OF }
 ASSINIBOIA (PLAINTIFF) } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporations—Drainage—Municipality's right to make and maintain drains on private land—Sufficiency of by-laws—Remedy of land owners—Municipal Act, Man., R.S.M., 1913, c. 133—Jurisdiction of County Court in Manitoba as to equitable right.

Plaintiff municipality (in the province of Manitoba) proposed to enlarge a ditch or drain on land then owned by T., now owned by defendants. Its engineer interviewed T. who assented, with certain stipulations, to the work being done. In 1915 a contract was prepared between the municipality and a contractor for the doing of the work and the municipality passed by-law no. 837 authorizing this contract, which was then executed, and the work was done. In 1928 the municipality passed by-law no. 1987 enacting that a certain other drain running through the land (which was then owned by defendants) "be cleaned, altered and deepened" according to plans, etc., and that the municipality's officers, servants, etc., "are hereby authorized and empowered to enter upon said land for the aforesaid purpose;" and the work was done. In 1929 defendants blocked up both drains, and the municipality sued in the County Court for damages. The question was as to the municipality's right to make and maintain the said works.

Held: As to the first work, the municipality could not recover judgment based on an equitable right to make and maintain the ditch by reason of T.'s assent, and execution of the work in pursuance thereof, as the County Court had no jurisdiction, even in the absence of objection by either party, to hear and determine an equitable right of this character; but, as to both works, under s. 590 of the *Municipal Act*, R.S.M., 1913, c. 133, the municipality had the power, having passed a by-law for the purpose, to do the work in question (without expropriating any land under s. 574) subject to the owner's right to compensation. Each of said by-laws was sufficient, for the purpose of s. 590, as authority for the work done in pursuance of it, although by-law no. 837 was not drawn in the form that a skilled draughtsman would adopt. Defendants' certificate of title was subject to said statutory rights of the municipality. Defendants' rights were confined to claiming compensation, to be determined as provided in the Act.

Judgment of the Court of Appeal for Manitoba, 38 Man. R., 527, reversed in part.

*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Caunon JJ.

APPEAL by the defendants (by special leave granted by the Court of Appeal for Manitoba), and cross-appeal by the plaintiff, from the judgment of the Court of Appeal for Manitoba (1) which maintained in part and reversed in part the judgment of McPherson, C.C.J., in favour of the plaintiff.

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The plaintiff is a Rural Municipality in the province of Manitoba, and brought action in the County Court of Winnipeg, in said province, claiming damages against the defendants for blocking up certain drain work done by the plaintiff on land now belonging to the defendants. The real question in issue was whether or not the plaintiff was within its rights in making and maintaining the works in question. McPherson, C.C.J., gave judgment for the plaintiff. The defendants' appeal to the Court of Appeal was allowed in part, and the judgment below varied by reducing the damages awarded, the court holding that the defendants were justified in stopping up one of the ditches in question, but had no right to stop up the other one (1).

The material facts of the case are sufficiently stated in the judgment now reported. The defendants' appeal to this Court was dismissed with costs, and the plaintiff's cross-appeal allowed with costs both in this Court and in the Court of Appeal, and the judgment of the trial judge restored.

E. F. Newcombe K.C. and *J. K. Morton* for the appellants.

F. Heap K.C. and *C. Isbister* for the respondent.

The judgment of the court was delivered by

SMITH J.—Prior to the year 1915, the late Honourable John Taylor was the owner of a large tract of land at and around Headingley, in the respondent municipality. The natural drainage of these and neighbouring lands was in a southeasterly direction, passing south of Portage Avenue, through a depression or ravine on the Taylor property to the Assiniboine River. The late Mr. Taylor granted these lands to himself and wife for life, and, after their death, to his daughters, the appellants.

(1) 38 Man. R. 527; [1930] 1 W.W.R., 500.

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There was a small artificial ditch passing from a culvert at Portage Avenue through the ravine mentioned, and also a small ditch on the north side of Portage Avenue, leading to the culvert. The late Honourable John Taylor had endeavoured to get relief from surface water lying on part of his lands at Headingley, but nothing was done until about 1915, when Portage Avenue was being paved. This resulted in bringing water more quickly to the culvert crossing Portage Avenue, and it became necessary to enlarge this culvert and provide an enlarged outlet. The respondent municipality, about this time, instructed its engineer, G. W. Rogers, to interview the Honourable John Taylor in reference to the proposed enlargement of the ditch south of Portage Avenue on his property, and a meeting was brought about by Councillor Taylor, a son of the Honourable John Taylor, at the property, at which the two Taylors and Mr. Rogers were present. Mr. Rogers explained what was proposed to be done, and the Honourable John Taylor asked that the culvert across the existing ditch be enlarged, and that some of the dirt be put north, to improve the grade, and that otherwise no dirt be left on his property. With these stipulations, he assented to the municipality entering and doing the work.

Plans and specifications were prepared by the engineer, and tenders asked for, and the tender of Elgin Real was accepted. An agreement was accordingly prepared between the municipality and Elgin Real, bearing date the 25th May, 1915, for building and completing the proposed ditch; and on the 1st June, 1915, a by-law of the municipality, No. 837, was passed, authorizing the entering into of this contract with Elgin Real, "for building an open drain running in a southeasterly direction from the northeast corner of the Headingley Ferry Road, as shewn on profile prepared by G. W. Rogers, Municipal Engineer, and marked No. 2 by him," and instructing and authorizing the Reeve and Clerk of the municipality to sign an agreement with Real attached to the by-law and marked "A"; and to attach the seal of the municipality thereto. The contract was accordingly signed, and the work completed and paid for by the municipality.

On the 19th day of September, 1928, the respondent municipality passed a by-law, No. 1987, to provide for the cleaning, deepening and altering of a certain drain on lots 50, 51 and 52 of the Parish of Headingley north of Portage Road, commencing at the municipal ditch on Dodds Street opposite a dry well put down by the municipality, and running thence in a southeasterly direction to the culvert under the C.P. Ry. tracks and along the railway tracks and opposite the Headingley Agricultural grounds. This by-law enacted that

The said drain be cleaned, altered and deepened, in accordance with the recommendations, plans and specifications, of William Fulton, District Engineer, for the Provincial Government, heretofore annexed marked Exhibit A and identified by the signature of the Reeve and Secretary-Treasurer, and that said work be carried out under the supervision and direction of Councillor Taylor, of Ward No. 1, Headingley; and the officers of the Municipality its servants, agents and workmen, are hereby authorized and empowered to enter upon said land for the aforesaid purpose.

The work was carried out accordingly. This drain passes through the lands of the appellants lying north of Portage Avenue.

In the year 1929, the appellants caused both of these drains to be blocked up, and the respondent municipality brought action in the County Court against the appellants for damages for this alleged wrongful act of the appellants, and were awarded the sum of \$22, the amount agreed on as the cost of removing the obstructions.

The Court of Appeal (1) varied the judgment of the court below by reducing the damages to \$11, holding that the municipality had the right to maintain the ditch south of Portage Avenue, and that the appellants had wrongfully blocked the same, but that the municipality had no right to make the ditch on appellants' lands north of Portage Avenue, and that therefore the appellants had committed no wrong in blocking the same.

The judgment of the Court of Appeal as to the ditch south of Portage Avenue proceeds upon the ground of the equitable right of the municipality to make and maintain the ditch by reason of the assent of the late Honourable John Taylor and the execution of the work in pursuance of that assent. It seems quite clear that the County Court

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had no jurisdiction to hear and determine an equitable right of this character, but the Court of Appeal deals with it because no objection was taken by either party to the jurisdiction. This lack of objection, however, would not confer jurisdiction, and the conclusion arrived at as to the ditch south of Portage Avenue cannot be upheld, as a judgment for the enforcement of an equitable right.

The ground relied upon as respondent's justification for the ditch south of Portage Avenue is by-law No. 837; and for the ditch north of Portage Avenue is by-law No. 1987. In the Court of Appeal it is stated that the municipality had no right to enter upon the appellant's land and construct a ditch without taking the necessary proceedings to expropriate the property required for the purpose, and it is pointed out that section 574 (a) of the *Municipal Act*, R.S.M., 1913, ch. 133, gives the power to expropriate land required for the construction of a ditch through the appellants' land. Section 574 does not seem to have any relation to the ditches in question in this action. The section upon which the respondent relies is section 590, under which the council of every municipality is given power to pass by-laws for opening, making, preserving, improving, maintaining, repairing, flushing, widening, altering, diverting, stopping up and pulling down drains, sewers or water courses within the jurisdiction of the council; and for entering upon, breaking up, taking or using any land in or adjacent to the municipality in any way necessary or desirable, in the opinion of the council, for the said purposes, or for the purpose of providing an outlet for any drain, sewer or water course, or for the purpose of carrying off through private property any water on a public highway; but subject always to the payment of compensation to persons who may suffer injury therefrom. Under this section it is not necessary to expropriate the land, and no notice whatever to the owner of the lands to be entered upon is provided for. The moment that work of the kind mentioned is done upon the owner's land, under authority of a by-law, the owner's right to compensation arises for any injury suffered therefrom.

By-law No. 837 is not drawn in the form that a skilled draughtsman would adopt, but it authorizes the doing of the

very thing that the municipality is authorized to do by by-law; and the municipality and its contractor entered upon the lands in question in pursuance of this by-law. It is true that the engineer in the first place talked the matter over with the late Honourable John Taylor, the owner of the lands, and explained to him the nature of the contemplated work, and intimated that his wishes as to enlargement of the culvert on his lands and disposal of the material would be complied with. Mr. Taylor assented to the work being done, but his assent was in no way necessary, because the municipality had, under the statute, full authority to pass the by-law and carry out the work without any such assent.

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The by-law, No. 1987, authorizing the work that was done north of Portage Avenue, is in better form, and fully authorizes the work under section 590 referred to, and the appellants' rights in connection with that work are, as in the other case, confined to claiming compensation, as provided by that section.

The method of determining, by arbitration, in case of dispute, the amount of compensation for injury occasioned is provided by the statute.

The certificate of title is subject to the statutory rights conferred upon the municipality, under section 590.

The judgment of the trial judge should therefore be restored, with costs to the respondent of this appeal and of the appeal to the Court of Appeal.

Appeal dismissed with costs. Cross-appeal allowed with costs.

Solicitors for the appellants: *Jacob, Morton & Irwin.*

Solicitors for the respondent: *Isbister & Morton.*