

67, 1930

No. 29 of 1930.

In the Privy Council.

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ON APPEAL
FROM THE SUPREME COURT OF ONTARIO (APPELLATE
DIVISION).

BETWEEN—

THE KEEWATIN POWER COMPANY LIMITED
(Plaintiffs) *Appellants*

— AND —

THE LAKE OF THE WOODS MILLING
COMPANY LIMITED (Defendants) *Respondents*

10

AND BETWEEN—

THE KEEWATIN POWER COMPANY LIMITED
(Plaintiffs) *Appellants*

— AND —

THE KEEWATIN FLOUR MILLS COMPANY
LIMITED - - (Defendants) *Respondents.*

(Appeals consolidated by Order dated 20th September, 1929).

APPELLANTS' CASE.

RECORD.

20 1. These consolidated appeals are from judgments of the Appellate Division of the Supreme Court of Ontario delivered 26th June, 1929, dismissing the Appellants' appeals from the judgments of Mr. Justice Grant delivered 25th January, 1928, allowing the Respondents' cross-appeals and dismissing the actions. The appeals raise questions as to the respective rights of the Appellants

pp. 377, 378.
pp. 362, 364.

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and Respondents to the flow and use of the waters of the Lake of the Woods.

p. 486, l. 19.

p. 54, l. 37.

p. 486, l. 19.

p. 487, l. 31.

2. The Appellants own a large part of an Island called "Tunnel Island" which divides the outlet of the Lake into the Western and Eastern branches of the Winnipeg River. They operate a large electrical power plant in the west branch of the River which supplies power to the public. They own the banks on each side of the Western outlet and the bed of the stream on which they have erected a dam called the "Norman Dam."

p. 181, l. 16.

p. 229, l. 1.

p. 55, l. 44.

p. 172, l. 36.

p. 297, l. 8.

3. The Respondent Companies are under one management. 10 They own two flour mills, the Lake of the Woods mill known as "Mill A" and the Keewatin Flour Company's mill known as "Mill C". Each gets its supply of power by diverting water from the Lake through an artificial channel or raceway. The water when it passes through the Respondents' water wheels is not returned to the Lake above the Norman dam but flows into the River at a point down stream from the dam. The actions were brought to stop the diversion. One of the Respondents' main contentions is that their grants from the Crown authorize the diversion and if not that the Appellants' rights under their patent from the Crown are subject to the diversion 20 and they ask that it be so declared.

p. 56, l. 19.

p. 8, l. 7.

p. 15, l. 6.

p. 9, l. 1.

p. 16, l. 2.

4. The lands in question are entirely within Ontario but at one time it was contended that they were in Manitoba and were therefore "Dominion Lands" under the jurisdiction of the Dominion (see Canadian Statute 46 Vic. (1883) Cap 17). While this dispute was pending Canada and Ontario, under authority of Dominion and Provincial Orders-in-Council, established a conventional boundary line each agreeing to give confirmatory patents, where necessary, after the true boundary line was established. The correct boundary was fixed by a Report of the Judicial Committee of the Privy Council 30 on 11th August, 1884 (see Imperial Statute 52-53 Vic. (1889) Cap. 28).

p. 396.

p. 397.

p. 484.

p. 474.

p. 481.

5. The Appellants' patent from the Crown (Ontario) is dated 13th April, 1894. It was given pursuant to an agreement dated 24th November, 1891, made by the Crown (Ontario) with the Keewatin Lumbering & Manufacturing Company, which Company on 22nd September, 1893, assigned the contract to the Appellants. By the agreement the Crown agreed to sell to the Company the whole of Tunnel Island (except portions thereof owned by the Canadian Pacific Railway Company) and the shore opposite along with other lands and the Company agreed to expend \$250,000 in works erected 40 according to approved plans; to sell power and lease lands for factory sites at rates not higher than those fixed by a Government engineer;

to surrender a Crown Lease dated 22nd July, 1875, of a large number of islands in the Lake (including Tunnel Island) and of part of the mainland on which the lessees were entitled to cut timber; and to give security to the Crown for the performance of its obligations under the agreement.

6. The Appellants' patent of 1894 recited the agreement of 1891; the assignment of 1893 and the giving of security by the Appellants. It granted the lands contracted to be sold and other lands including as Parcel (e):—

10 "All those islets or reefs of rocks and the land under water in said west
 "branch of Winnipeg River between Tunnel Island and the last described
 "block of land (viz. 40 acres on the opposite shore) together with the water
 "power adjoining thereto on the west branch or outlet of the said Winnipeg
 "River."

Then followed this provision:—

 "Subject nevertheless to the performance by the said The Keewatin Power
 "Company Limited of all the terms and conditions of the hereinbefore in part
 "recited agreement of the twenty-fourth day of November in the year of Our
 "Lord One thousand eight hundred and ninety-one and subject also to the
 20 "condition and understanding that nothing herein contained shall be construed
 "as conferring upon the grantees exclusive rights elsewhere upon
 "the said Lake of the Woods or upon other streams flowing
 "into or out of said Lake, or shall confer upon said Company power or authority
 "to interfere with or in any way restrict any powers or privileges heretofore
 "enjoyed by us or which may hereafter be granted or demised to any other
 "person or company in respect of any other water power on the said Lake of
 "the Woods or on any other stream flowing out of or into the said Lake.

 "Provided that any such powers or privileges which may hereafter be
 "granted shall not destroy or derogate from the privileges hereby granted."

30 7. The Norman dam was commenced by the Appellants in 1893
 and was completed some time before 1898 when an agreement was
 made with the Crown (Ontario) dated 22nd June, 1898, for its opera-
 tion. The security given under the 1891 agreement was released in
 1913. The Appellants commenced the construction of their electrical
 power plant in 1924 and completed it and put it into operation in
 1926.

40 8. The patent from the Crown (Ontario) to the Lake of the
 Woods Company for the site of Mill "A" was issued on 10th May,
 1892. The lands granted border on the Winnipeg River and not on
 the Lake. The description of the land by metes and bounds fixed
 certain points by the distance from the "millrace made by the Lake

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p. 499.
p. 510.

"of the Woods Milling Company" but the patent did not profess to grant any right to take water from the Lake. The Rat Portage Lumber Company on 9th March, 1897, and the Canadian Pacific Railway Company on 2nd June, 1902, conveyed additional lands to the Lake of the Woods Milling Company.

p. 172, l. 29 to
p. 173, l. 12.

p. 529.

p. 267, l. 26.
p. 523, l. 37 to
p. 524, l. 29.
p. 273.

p. 529.

p. 195 l. 22.
p. 204, l. 1.
p. 206, l. 1.
p. 212, l. 29.
p. 219, l. 31.
p. 220, l. 36.
p. 223, l. 21 to
p. 225, l. 16.
p. 229, l. 30.
p. 232, l. 26.
p. 235, l. 9.
p. 236, l. 25.
p. 227, l. 31.
p. 241, l. 27 to
p. 247, l. 18.
pp. 256-268.
p. 275, l. 37.
pp. 315, 316.
p. 318, l. 32.

9. Mill "A" and the raceway leading thereto were constructed in 1887 and the mill was put into operation the following year. By 1906 the installed water wheel capacity had increased from 446 cubic feet per second to 1,263 cubic feet and by 1912 it was further increased to 1,870 cubic feet. The output of the mill increased from an average of 2,050 barrels per day during the month of highest output from 1893 to 1899 inclusive to an average of 4,850 barrels per day in the month of highest output in 1916. The highest output in any month between 1912 and 1915 was 101,338 barrels and the highest between 1916 and 1925 was 130,754 barrels. These changes were made possible by alterations in the raceway and by the installation of new power and milling machinery. Details of these changes are given in the evidence of the witnesses Hansen, Cherry and Alexander.

p. 471.

p. 471, l. 44.

p. 488.
p. 489.
p. 490.
p. 496.
p. 507.
p. 520.

10. The patent from the Crown (Ontario) of the property known as Mill "C" was issued to Dick and Banning on 5th January, 1891. The description of the property refers to it as "Dick Banning and Company's mill location" shown on a plan by E. Stewart of 20th December, 1889. Stewart's plan shows a raceway. The property borders on the Winnipeg Bay or River, but not on the Lake. There were several transfers of these lands and some changes were made in the area of the site. Ultimately the lands became vested in the Respondent, the Keewatin Flour Mills Company, on 19th April, 1905.

p. 155.

p. 417.

p. 179, l. 22.

p. 507.

p. 180, l. 8.

p. 297, l. 9.
p. 229, l. 4.

11. At the site of Mill "C" there was a small raceway used in connection with a sawmill belonging to W. J. Macaulay as early as 1881. Mr. Macaulay transferred such rights as he had to Dick and Banning and they continued to operate it as a sawmill until 1891, when it was closed down and remained closed until 1897. At that time the Ottawa Gold Mining Company acquired the property and they operated it as a mineral reduction works for about two years when it was again closed down and remained closed until about 1905, when the mill was demolished. The construction of Mill "C" was commenced in 1905 and completed in 1907. At that time the channel or raceway was widened and deepened and water wheels of large

capacity were installed. The largest output of this mill for any month in 1907 was 46,453 barrels, while in 1915 the largest was 136,938 barrels.

p. 207, l. 3.
p. 299, l. 40.
pp. 303-309.
p. 329, l. 10 to
p. 333, l. 26.
p. 530.

12. The various Companies operating in the vicinity of Keewatin and Kenora were largely under the control or management of John Mather. He was associated with Richard Fuller and others in the Crown lease of 1875 and was the president or vice-president and the general manager of the Keewatin Lumbering & Manufacturing Company, the Appellant Company and the Respondent Companies. Considerable correspondence between Mr. Mather, Ministers of the Crown, Government officials, Government land surveyors and others was admitted, notwithstanding objection made by the Appellants. Mr. Mather always attached the greatest importance to the water power at the Norman dam. He claimed that the Keewatin Lumbering & Manufacturing Company was entitled to a patent of Tunnel Island as a site for a sawmill in connection with their lumbering operations under the lease of 1875. He followed up his demand for a patent until, by the agreement of 1891, the necessary lands and water power rights were secured for the Appellant Company.

p. 150, l. 39.
p. 151, l. 15.
p. 157, l. 7.

p. 152, l. 18.
p. 156, l. 40.
p. 85, l. 23.
p. 111, l. 26.
p. 113, l. 16.
p. 116, l. 43.
p. 121, l. 22.
p. 157, l. 29.
p. 162, l. 11.
p. 450, l. 46 to
p. 452, l. 10.
p. 453, l. 20 to
p. 455, l. 18.
p. 457, l. 18.
p. 474, l. 30.

13. The writs in the actions were issued in 1916. At that time the Appellants' electrical power plant had not been built and the actions were instituted to prevent the Respondents acquiring rights as against the Appellants. In February 1926 the Respondents applied to add the Attorney General of Ontario as a party defendant and to amend the defences by adding a claim that the Respondents' patents from the Crown should be rectified so as to include a grant of the rights they now claim. The Attorney General objected and the Appellate Division sustained the objection (59 O.L.R. 406). The Respondents were, however, permitted to amend their defences by setting up among other things their present counterclaims which amendments were made on 5th March, 1927.

p. 1, l. 5.
p. 9, l. 21.
p. 526, l. 38.

14. The actions were tried together by the Hon. Mr. Justice Grant and judgment was pronounced on 11th November, 1927. He held that the correspondence preceding the patents from the Crown could be looked at to ascertain the rights of the Respondents in respect of raceways referred to in the grants or shown on the plans. Even if some of the material filed subject to objection was inadmissible, he was still of opinion that the applications, correspondence and other documents together with the surrounding circumstances furnished ample evidence that the intention of the

p. 338.

p. 344, l. 31.
p. 346, l. 18.
p. 354, l. 11.

p. 354, l. 25.

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p. 358, l. 20.
p. 358, l. 47.
p. 359, l. 8.

p. 360.

p. 362, l. 32.
p. 364, l. 22.

Crown was that the Respondents should have and utilize the water powers. He thought that prescriptive rights had been acquired for Mill "A" but not for Mill "C". He said that the evidence as to the alterations made by the Respondents was extensive but he did not feel able to determine upon the evidence whether they had increased the volume of water taken from the Lake. After hearing Counsel on 25th January, 1928, on the settlement of the minutes of judgment he delivered supplementary reasons. Each of the formal judgments as settled by Mr. Justice Grant contained the following declaration:—

"This Court doth declare that the Defendants are entitled to use in the
"operation of their mill and plant at Keewatin all the water that may pass
"through the artificial channel in question herein, as the dimensions of the
"said channel existed on the 13th day of April, 1894, and doth order and
"adjudge the same accordingly." 10

p. 362, l. 37.
p. 364, l. 27.

The judgment further provided that the Appellants' might elect to take a reference to determine the dimensions of the channel on 13th April, 1894, and whether the dimensions had been increased resulting in a diversion of water in excess of that to which the Respondents were entitled and if excess water had been taken the Master would assess damages. If the reference was proceeded with, further directions and costs were reserved but otherwise the actions were to be dismissed with costs. 20

pp. 365-367.

p. 368.
p. 369, l. 38.

p. 374, l. 11.
p. 374, l. 46.

p. 375, l. 21.
p. 375, l. 29.

p. 376.
p. 376, l. 38.

15. The Appellants appealed to the Appellate Division and the Respondents cross-appealed. Latchford, C.J., who delivered the judgment of the Court, was of opinion that the topography, apart from the extrinsic evidence, seemed conclusive that the Crown grants of the mill-sites were made with the common intention on the part of the Crown and the Grantees that the subject matter of the grants should be used for the development of power. In his view the patent to the Appellants did not give a right to the exclusive use of water 30 and he construed the proviso in their grant as referring to the sites of the Respondents' mills. He was of opinion that the result reached in the Court below was right and that the appeal should be dismissed but he thought the Appellants should not have been allowed a reference. In supplementary reasons dealing with the settlement of the formal judgment he referred to the declaration in the judgment of Mr. Justice Grant and said "While that declaration was, I "think, in effect affirmed by this Court, it was not considered proper "to insert it in our judgments."

The Appellants submit that the appeal should be allowed for the 40 following amongst other

REASONS.

1. Because the respective rights of the Appellants and Respondents depend solely on their Ontario patents from the Crown.
2. Because the Appellants, as owners of the banks and bed of the stream are entitled to the natural flow of the stream.
3. Because the proviso or condition in the Appellants' patent conferred no rights on the Respondents.
- 10 4. Because the Dominion had no jurisdiction over the lands or water powers.
5. Because the Crown grants could not and did not profess to authorize the diversion of water to the prejudice of riparian owners.
6. Because no prescriptive right has been acquired in favour of either mill.
7. Because if either Respondent is entitled to divert water the right is limited to the amount of water that was actually being diverted and used or alternatively the amount capable of being diverted and used in the course of prudent mill operation under the conditions existing before 24th November, 1891 (the date of the Appellants' contract) or alternatively 13th April, 1894 (the date of the Appellants' grant) and such right has been exceeded.
- 20 8. Because if either Respondent is entitled to divert water the extent of the right should be determined and excess diversion should be restrained.
9. Because both courts below have held that the Respondents' rights are limited but the formal judgments of the Appellate Division do not express the limitation or restrain excess diversion.
- 30 10. Because the judgments below proceeded on the erroneous assumption that the Appellants' main claim is for damages whereas it is to have their rights determined and protected by injunction.

W. N. TILLEY.

C. F. H. CARSON.

IN THE PRIVY COUNCIL.

**ON APPEAL
FROM THE SUPREME COURT OF ONTARIO
(Appellate Division).**

BETWEEN—

**THE KEEWATIN POWER COMPANY
LIMITED (Plaintiffs) ... Appellants**

— AND —

**THE LAKE OF THE WOODS MILLING
COMPANY LIMITED (Defendants)**

Respondents.

AND BETWEEN—

**THE KEEWATIN POWER COMPANY
LIMITED (Plaintiffs) ... Appellants**

— AND —

**THE KEEWATIN FLOUR MILLS
COMPANY LIMITED (Defendants)**

Respondents.

(Appeals consolidated by Order dated
20th September, 1929).

APPELLANTS' CASE.

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