

67, 1930

No. 29 of 1930.

**In the Privy Council**

**ON APPEAL**

**FROM THE APPELLATE DIVISION OF THE SUPREME  
COURT OF ONTARIO**

**BETWEEN:**

**THE KEEWATIN POWER COMPANY, LIMITED**  
(Plaintiff) - - - - - *Appellant,*

—AND—

**KEEWATIN FLOUR MILLS, LIMITED**  
(Defendant) - - - - - *Respondent.*

**AND BETWEEN:**

**THE KEEWATIN POWER COMPANY, LIMITED**  
(Plaintiff) - - - - - *Appellant,*

—AND—

**THE LAKE OF THE WOODS MILLING COMPANY**  
(Defendant) - - - - - *Respondent.*  
(Consolidated appeals)

**RESPONDENTS CASE**

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**Case for the Respondents**

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1. These are consolidated appeals from two judgments of the Appellate Division of the Supreme Court of Ontario, dated 26th June, 1929, dismissing appeals by the present Appellant (Plaintiff) from the judgments of the trial Judge, Grant J., dated 25th January, 1928, allowing cross appeals by the Respondents (Defendants) from the same judgments, and dismissing the Appellant's actions.

2. Each of the Respondents owns a large flour mill and elevator on the North shore of the Lake of the Woods, and each had for many years before

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these actions were brought operated its mill by means of water drawn from the lake through a channel or mill-race. The Appellant seeks in these actions to restrain the Respondents from drawing any water from the Lake of the Woods for this purpose.

3. The Lake of the Woods, which has an area of some 1,500 square miles, discharges towards the north through two natural outlets, separated by Tunnel Island, and known respectively as the East Branch and the West Branch of the Winnipeg River.

From the foot of the rapids in the West Branch a long bay, called Darlington Bay or Winnipeg Bay, runs westerly within a few hundred feet of Portage Bay, an arm of the Lake of the Woods, from which it is separated only by a narrow ridge of rocky land. Since the level of Portage Bay is some 20 feet above that of Darlington Bay, water power can readily be made available by cutting channels through this ridge. 10

The Respondents are the owners of two adjoining parcels of land upon the ridge under grants from the Crown made in 1891 and 1892 respectively and their mills are situated close together upon the ridge. The channels in question had been made and used, under circumstances to be mentioned later, for some years before the dates of these grants.

4. The Appellant's contention was the same in both actions, viz., that the Appellant, by virtue of a grant from the Crown made in 1894, was entitled to the whole of the natural outflow through the West Branch; that the prior grants under which the Respondents claim conferred no right to take water from the Lake of the Woods; and that the Respondents should be restrained from taking any water whatever from the Lake. 20

5. The grant to the Appellant of 13th April, 1894, conveyed most of Tunnel Island and a block of land on the opposite side of the West Branch, and

“(e) All these 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 together with the water power adjoining thereto on the West branch or outlet of the said Winnipeg River.” 30

The grant was made subject to the performance of an agreement with the Crown of 1891, to be mentioned later, and

“subject also to the 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. 40

“PROVIDED that any such powers or privileges which may

Ex. 1. p. 484

p. 487, L. 31

p. 487, L. 40

hereafter be granted shall not destroy or derogate from the privileges hereby granted.”

6. It is one of the Respondents' submissions that having regard to the fact that the Respondents' channels were in existence in 1894, the grant of water power to the Respondents comprised upon its true construction only such water power as might be available in view of the existence of these channels.

7. Grant, J., the trial Judge, held that by reason of the common intention of the parties to the grants under which the Respondents claim and the purpose of these grants the Respondents were entitled to use in the operation of their mills all the water that would pass through their channels according to the dimensions of these channels at the date of the grant to the Appellant in 1894. He also held that the conduct of the Appellant had disentitled it to the relief claimed. p. 338 et seq.

The Appellate Division held that the grant to the Appellant, having regard to the language quoted above, did not confer upon the Appellant the exclusive rights asserted and did not entitle the Appellant to restrain the Respondents from using water from the lake. p. 368 et seq.

8. In 1874, the western and northern boundaries of the Province of Ontario being in dispute between the Dominion of Canada and the Province, the two Governments arranged a temporary conventional boundary, on the one side of which grants were to be made by the Dominion and on the other by the Province. They agreed that when the boundary was settled each would ratify any grants by the other of lands then ascertained not to have been within the territory of the Government which granted them. Under this arrangement, which lasted until the settlement of the boundary in 1884, the rocky ridge of land between Portage Bay and Darlington Bay fell to be dealt with by the Dominion. Ex. 32, p. 396 et seq.

9. Early in 1881 the Dominion Government asked John Mather to prepare a “comprehensive scheme which would utilize to the fullest extent the available water powers now undeveloped at the different outlets of the Lake of the Woods.” Ex. 36, p. 409  
Ex. 37, p. 410  
Ex. 38, p. 411, L. 9

Mather was the head of the Keewatin Lumbering and Manufacturing Company, which had a saw mill at the west end of Portage Bay. He was the leading man in the district and a pioneer in its development, and he had been the first, in 1879, to develop water power for his saw mill by cutting a channel through the ridge between Portage Bay and Darlington Bay. He was also, as the trial Judge says, the moving spirit in all three companies involved in this litigation or their predecessors. p. 150, L. 31-p. 152,  
L. 1,  
p. 157, L. 18-24  
Ex. 50, p. 406  
p. 340, L. 41

40 The Government further instructed McLatchie, a surveyor, to make a map of the district, showing existing mills on the ridge and “any sites that may be suitable for the erection of other mills.” In Mather's report of 27th April, 1881, and McLatchie's plan of 2nd May, 1881, the mill of W. J. Macaulay, upon the site afterwards acquired by the Respondent Keewatin Flour Mills Company, is mentioned and his channel is shown. Ex. 34, p. 408  
Ex. 38, p. 410 et seq.  
Ex. 33, Book of  
Plans, No. 2

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The report and the plan also show, among the sites suitable for the development of water power, both the West Branch and also a site on the ridge, just west of Macaulay, where Mather recommends that a channel should be cut through the ridge. This was the site afterwards acquired by the Respondent Lake of the Woods Milling Company.

Ex. 49, p. 431 et seq.

10. In April, 1887, the Dominion Government, on the petition of the inhabitants of the district, agreed to grant \$7,000 to Mather for the erection of a dam in the West Branch of the Winnipeg River, in order to maintain the level of the Lake of the Woods in the interests both of navigation and of existing and future mills using the water power across the ridge. With this grant Mather built for the Government the first dam in the West Branch. 10

p. 157, L. 31-39  
p. 160, L. 37-p. 161,  
L. 23

11. The titles of the Respondents were derived as stated in the eleven next succeeding paragraphs.

Ex. 39 p. 402  
Ex. 40 p. 404  
Ex. 41, p. 407  
Ex. 44, p. 422  
Ex. 45, p. 423  
Ex. 46, p. 424  
Ex. 47, p. 427

12. In 1878 W. J. Macaulay, a lumberman who owned timber limits in the district, applied to the Dominion for a parcel of land on the ridge, stating that he wanted it in order to build a saw mill and to develop the water power. In 1880, while his application was pending, and with the knowledge and approval of the Dominion Government, he cut a channel through the ridge across the land applied for, built a saw mill, and put it in operation by means of the water power from the channel. In 1884 he obtained from the Dominion a grant of 27 acres, which he sold to Dick & Banning, a firm of lumbermen, under a previous agreement between them. This is the site now owned by the Respondent, Keewatin Flour Mills, Limited. 20

Ex. 48, p. 428, Book  
of Plans, No. 3

Ex. 43, p. 417

Ex. 52, p. 433  
Ex. 53, p. 433  
p. 152, L. 18-22

13. On 3rd May, 1887, Mather, as Vice-President of the Respondent, Lake of the Woods Milling Company, of which he was also General Manager, applied on behalf of the Company to the Ontario Government for some 12 acres of mainland and island at the site just west of Macaulay mentioned in his report of 1881. The application was made to the Ontario Government because it had by that time been decided that this part of the disputed territory belonged to Ontario. 30

Ex. 54, p. 436  
Ex. 55, p. 437  
Ex. 56, p. 438  
Ex. 58, p. 439  
Ex. 59, p. 440  
Ex. 60 & 61, p. 441  
Ex. 62 & 63, p. 442  
Ex. 64, p. 443  
Ex. 65, p. 444  
Ex. 66, p. 444  
Ex. 67 & 68, p. 447  
Ex. 69 & 70, p. 452

p. 152, L. 29-p. 153,  
L. 15  
p. 153, L. 34-43  
p. 172, L. 29-p. 173,  
L. 12  
p. 217, L. 18-35

14. The application said that the Company desired to build on the land applied for a large flouring mill and other necessary buildings, and in the negotiations that followed Mather made it clear to the Government that the Company intended to develop and use for its undertaking the water power from the Lake of the Woods and wanted the site for that purpose. The Government said that, owing to conflicting applications, it could not without further enquiry grant the application in full. But, being anxious for the benefit to the district of the Company's undertaking, it assured the Company that part at any rate of the land applied for would be granted, and allowed and encouraged the Company to go on with its work without delay. Accordingly during the years 1887 and 1888 the Milling Company, under Mather's direction, cut a channel through the ridge and built a flour mill and plant which were run by means of the water power from the channel. This Mill is spoken of in the Record as Mill "A." 40

15. Dick & Banning had applied in 1885 to the Ontario Government for an additional  $2\frac{1}{2}$  acres to the west of the site which they had bought from Macaulay. They protested against the Milling Company's application, on the ground that it overlapped the additional land for which they had applied and that their application was entitled to priority. Ex. 51, p. 431  
Ex. 55, p. 437  
Ex. 57, p. 438
16. A long negotiation followed, and there was an investigation on the ground by the Director of Surveys of Ontario. Finally, in 1890, the Commissioner of Crown lands arranged an arbitration of Dick & Banning's claim. He said that the Government would confirm the title of Dick & Banning to the land covered by Macaulay's grant from the Dominion, and that "the arbitration should proceed upon the basis of the territory being Dick, Banning & Company's, the Milling Company to have the bed of the canal (i.e. the canal cut by it in 1887) . . . as well as twenty feet on either side of it over the property owned by Dick, Banning & Co." Ex. 66, p. 444  
Ex. 74, p. 459  
Ex. 75, p. 460  
Ex. 76, p. 461  
Ex. 77, p. 461
- The arbitrators awarded \$1,375 to Dick & Banning, and in October, 1890, Mather, on behalf of the Lake of the Woods Milling Company, forwarded to the Government Dick & Banning's receipt for the amount awarded, with the necessary plans, and asked for a grant "to cover the land applied for by that Company in connection with the water power, flour mill and elevator there." Ex. 78, p. 462  
Ex. 79, p. 463  
Ex. 82, p. 467  
Ex. 83, p. 468 et seq.
17. To Dick & Banning's further protest the Commissioner on 18th September, 1890, replied that it was several years since his predecessor "gave permission to the Milling Company to erect their works and avail themselves of this mill race," and that he had thought that "the construction of the flour mills . . . and the consequent benefit to the locality was so important that he should not withhold from them this water privilege. They have since gone on, completed this mill race, and have been constantly engaged in transacting business. This was an important consideration in a new part of the country." Ex. 80, p. 464  
Ex. 81, p. 465
- Accordingly, on December 19th, 1890, the Department directed that upon the Milling Company undertaking to compensate some persons who had made improvements and paying \$10 per acre, a patent should issue to it for the land applied for. Ex. 84, p. 470
18. On January 5th, 1891, the Ontario Government made to W. R. Dick and Mary Banning a grant of 27 acres, "known as 'Dick Banning & Company's Mill location' between Portage Bay and Winnipeg Bay in the Municipality of Keewatin . . . shown on plan of survey of said Municipality by E. Stewart, Provincial Land Surveyor, dated 20th December, 1889, of Record in the Department of Crown Lands." Ex. 12, p. 471
- The description by metes and bounds fixes the westerly boundary of the land granted 20 feet from the "Mill race constructed by the Lake of the Woods Milling Company," and Stewart's plan shows both that mill race and also the channel cut by Macaulay and since used by Dick & Banning. Apart from this, the grant does not mention water power or water rights. Ex. 28, Book of Plans No. 4
- The land granted was substantially identical with the land previously granted to Macaulay as stated in paragraph 12, and was bounded on the north by Darlington Bay and on the south by the north side of the Canadian

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Ex. 26, p. 503

Pacific right of way and station ground. This right of way and station ground, which thus intervened between the land granted and Portage Bay, remained vested in the Province of Ontario until 1897.

Ex. 20, p. 479

19. On 10th May, 1892, the Ontario Government granted to the Lake of the Woods Milling Company the land applied for by it in 1887, where since that time, with the approval of the Government, it had been operating its flour-milling plant by means of water drawn from the Lake of the Woods through the channel which it had made. The grant makes no express reference to water power or water rights, but the description of the land mentions "the Mill race made by the Lake of the Woods Milling Company," and refers to a plan of record in the Department of Crown Lands which shows the mill and elevator and the northerly end of the mill race referred to. 10

Ex. 21, Book of Plans, No. 7

The land granted lay between Darlington Bay and the north side of the Canadian Pacific station ground already referred to. Subsequently the Lake of the Woods Milling Company acquired in 1897 some 5 acres of the westerly part of the land formerly owned by Dick and Banning, and in 1902 from the Canadian Pacific Railway Company a part of that company's station ground.

Ex. 22, p. 499

Ex. 25, p. 509

Ex. 93, p. 500

20. In 1897 John Mather organized and became vice-president and general manager of the Ottawa Gold Mining & Milling Company. This Company bought the mill and most of the land formerly owned by Dick & Banning, and pulled down the saw mill and built a reduction mill and plant, which it worked for some years with water power from the channel originally made by Macaulay. 20

Ex. 16, p. 496

Ex. 17, p. 507

p. 156, L. 4-28

Ex. 11, p. 511

Ex. 18, p. 520

p. 156, L. 29-42

p. 180, L. 35-39

p. 282, L. 16-p. 283,

L. 33

p. 55, L. 35-46

21. In 1905 Mather organized the Keewatin Flour Mills Company, of which he was president and general manager. This Company bought the property of the Ottawa Gold Mining & Milling Company for \$190,000, pulled down the reduction plant, and built upon the site a large modern flour mill and elevator. This Mill, which is spoken of in the Record as Mill "C," was also run by water power from the channel originally made by Macaulay, though there is some dispute in the evidence as to whether or not the capacity of the channel was increased when the mill was built. 30

6 Ed. VII (Dominion)  
C. 120 (Schedule)

22. By an agreement of 1906 the Lake of the Woods Milling Company acquired control of the Keewatin Flour Mills Company. The agreement, which was signed by Mather as President of the Keewatin Flour Mills Company, recited that that Company had "acquired certain lands and water power at Keewatin."

23. The Appellant's title arises as follows:

Ex. 71, p. 450 & 453  
Ex. 87, p. 474

On 24th November, 1891, the Keewatin Lumbering & Manufacturing Company, through Mather, made an agreement with the Ontario Government, which recited that the Crown had agreed to sell and the Company to purchase the greater part of Tunnel Island and some land on the other side of the West Branch, "together with the water power adjoining thereto on the West 40

Branch or outlet of the Winnipeg River." The operative part of the agreement provided for the expenditure by the Company of a stated sum within a limited time upon the development of the water power according to approved plans, and for the surrender of certain islands and other lands of which the Company had a lease from the Dominion Government.

On 22nd September, 1893, the Keewatin Lumbering & Manufacturing Company assigned to the Appellant its rights under this agreement. The Appellant was organized by John Mather, who was its Vice-President and General Manager. On April 13th, 1894, the Government granted to the Appellant the land and water power mentioned in the agreement with some additional land. The material language of the grant has already been quoted in paragraph 5.

Ex. 92, p. 481

p. 66, L. 35-40

p. 157, L. 1-7

Ex. 1, p. 484

24. The Appellant built a new dam in the West Branch which, under an agreement with the Ontario Government, was used for regulating the level of the Lake of the Woods. The Company later obtained a release from further performance of the agreement of 1891 and it did not develop power at the West Branch or make any other beneficial use of the water until some years after the issue of the writs in these actions. John Mather died in 1907.

p. 161, L. 24-p. 162,

L. 5

p. 169, L. 14-44

Ex. 9, p. 508

Ex. 7 & 8, p. 522

p. 158, L. 9-16

p. 55, L. 14-29

25. After the grant to the Appellant in 1894, the Lake of the Woods Milling Company openly spent from time to time large sums in the improvement of their mills and power plant at Mill "A." The purchase of the easterly site (Mill "C") and the expenditure upon it by the Ottawa Gold Mining and Milling Company in and after 1897, and by the Keewatin Flour Mills Company in and after 1905, have already been mentioned.

Ex. 96, p. 533

p. 219, L. 30-p. 225,

L. 24

p. 245, L. 3-45

p. 262, L. 18-p. 264,

L. 30

p. 272, L. 31-p. 273,

L. 36

In 1911 the Lake of the Woods Milling Company repaired the Appellant's dam, which was leaking, and the Appellant paid to the Milling Company one-third of the cost of the repairs. The Ontario Government also paid one-third and the remaining third was borne by the Milling Company. The only interest which the Lake of the Woods Milling Company had in repairing the dam was that the leakage affected the flow of water in the Respondents' channels.

Ex. 95, p. 521

p. 165, L. 32-p. 167,

L. 10

26. In 1913 the Keewatin Power Company agreed to sell its property to E. W. Backus of Minneapolis, U.S.A. It was because of questions arising on this sale that the writs in these actions were issued in 1916, claiming injunctions restraining the Respondents from diverting any water from the Lake of the Woods. This was the first objection by the Appellant to the use of water by either of the Respondents. Statements of claim and defence were filed, but the actions then went no further. Backus acquired the shares of the Keewatin Power Company in 1920, and later began to develop power on the West Branch. The actions finally came to trial in 1927.

p. 65, L. 35-p. 68,

L. 15

p. 70, L. 30-p. 72,

L. 36

p. 158, L. 17-p. 160,

L. 2

Ex. 6, p. 526

27. Grant, J., in his considered judgment after the trial, was of opinion that the departmental records and correspondence were admissible in evidence, both to show the condition of the property at the dates of the various grants and the circumstances surrounding these grants, and also to show under what circumstances, by what authority, and for what purpose the channels had

pp. 339 et seq.

RECORD

p. 354, L. 11-14

been made and used, and thus to determine the rights of the parties in respect of them. His conclusion was that: "If one looks at the records and correspondence, it seems to my mind abundantly clear that both of these defendants were intended to have and enjoy the water powers, through the respective mill-races, for the operation of their mills."

p. 354, L. 25 et seq.

He thought also that even if all the material put in was not admissible, there was ample admissible evidence "to establish clearly the intention on the part of the Crown that the two defendants should have and utilize the water powers."

p. 354, L. 33 et seq.

Accordingly, applying the principles laid down by Lord Parker in *Browne v. Flower*, (1911) 1 Ch. 219, 224 et seq., and *Pwllbach Colliery Co. v. Woodman*, (1915) A. C. 634, 646 et seq., and by the Court of Appeal in *Harmer v. Jumbil*, (1921) 1 Ch. 200, he held that "the Crown would not be free to frustrate the purpose for which grants had been made to the defendants, namely, the operation of their mills by the use of the water-powers through the existing mill-races, nor could the plaintiff acquire from the Crown any greater or stronger right in that regard," and he was therefore "fully convinced that the defendants' rights to the use of the water-powers cannot be successfully attacked by the plaintiff."

p. 356, L. 24

p. 356, L. 36

28. The learned Judge dealt, in part, as follows with the conduct of the Appellant as affecting its right to relief in these actions:— 20

p. 340, L. 40-p. 341, L. 12

"One John Mather, a pioneer of 1877 or 1878 in that district, was actively interested in all three companies involved in this litigation, or in their predecessors. It is not overstating the facts to say that he was the moving spirit in all three. . . . If knowledge or actual notice of the facts, and of what each of the parties was doing, and how the several properties were occupied and used, and that the defendants (or their predecessors) were using the mill-races to operate their mills, has any bearing upon or is a deciding factor in the solution of the problem before me, the solution would not be difficult, because John Mather appears to have occupied a prominent executive position in all three companies, and to have been actively engaged in them all. Actually, what the three were doing, John Mather was doing for them. 30

\* \* \* \*

p. 357, L. 13-22

"Defendants set up . . . that the plaintiff and its predecessors had full knowledge of and acquiesced in what was being done by the defendants; that the plaintiff stood by and assented to the development of the water-power through the canals, and the erection and equipment of huge mills and elevators to be operated by water-powers so developed, the whole involving the expenditure of several million dollars, and that the plaintiff is now estopped from questioning the defendants' rights to do as they have done in the honest belief that they were lawfully entitled to the use of the water-powers. 40

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“That the plaintiff company, or its predecessors, had full knowledge of what was being done by both defendants, and acquiesced therein, and recognized their right to do what they were doing, seems to me to be incontestable.

p. 358, L. 6-19

“As I apprehend the circumstances, the three companies were working along in a friendly manner, without any dispute or difference and without any question being raised as to the defendants’ rights, until control of the plaintiff company passed into other hands.

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“It was not until 1916, apparently, that the defendants’ rights to water-power were seriously questioned, and then the writs were issued in these actions, which have been brought to trial 11 years later.

“In my opinion, there was such an acquiescence on the part of the plaintiff as would make it inequitable for the Court to give effect to its claim that the defendants are not entitled to the use and enjoyment of water-powers through the respective artificial channels.”

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29. Grant, J., held that the Respondents’ rights were to be measured by the capacity of the channels as they stood at the date of the grant to the Appellant in 1894, but he found himself unable to decide, upon the evidence at the trial, whether or not either of the Respondents had exceeded its rights as he declared them, and he allowed the Appellant a reference in each action to determine this question.

p. 358, L. 30-p. 359,  
L. 21  
p. 360, L. 35-p. 361,  
L. 11  
pp. 362, 364

30. The Appellant appealed in both actions to the Appellate Division, contending that the Respondents were not entitled to take any water through their channels. The Respondents cross-appealed, contending that no references should have been granted and that both actions should have been wholly dismissed.

p. 365 et seq.  
p. 367

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31. The Appellate Division on 26th June, 1929, dismissed the Appellant’s appeals, allowed the Respondents’ cross-appeals, and dismissed the Appellant’s actions.

pp. 377, 378

Latchford, C. J., delivering the judgment of the Court, was of opinion that the evidence objected to was not needed to establish the fact that the Respondents’ lands were applied for and granted as power sites. He thought that the very topography of the place showed that the Crown grants of these sites were made with the common intention on the part of the Crown and the grantees that the sites should be used for the development of power.

p. 368 et seq.  
p. 369, L. 30 et seq.

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In his view it was not open to doubt that the fullest disclosure was made to the Ontario Government of the particular purpose for which the sites were desired, and that the provincial authorities sanctioned and encouraged the enterprises actual or contemplated that would depend for their success upon the development and use of the water power obviously available across the ridge.

p. 372, L. 7 et seq.

He thought that the Appellant’s claim to prevent the Respondents from using their water powers must rest solely upon the grant to the Appellant of

p. 374, L. 8 et seq.

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1894, regard being had at the same time to the prior grants. In his opinion the grant to the Appellant "was never intended to convey and does not in fact convey the exclusive use to which it asserts a right."

p. 374, L. 21 et seq.

Construing the language of the Appellant's grant (quoted above in par. 5), he thought that the statement that in addition to Tunnel Island and a described block of land the Appellant was to have "the water power adjoining thereto on the West Branch or outlet of the Winnipeg River" showed that the Crown intended to grant "that water power and none other." He also thought that the "condition or understanding" to which the grant was made subject showed that nothing contained in the grant "should be taken to mean that any rights conferred by it should enable the grantee to exclude the defendants from the exercise of their rights 'elsewhere upon the Lake,' that is, where to the knowledge of the grantors the defendants had long been using its waters." 10

p. 375, L. 13 et seq.

He was further of opinion that among the "powers or privileges heretofore enjoyed by" the Crown, which the Appellant was to have no "power or authority to interfere with or in any way restrict," was the undoubted power to grant the lands at Portage Bay in order that they should be used as power sites.

p. 375 L. 24 et seq.

As to the cross-appeals, the Court thought that no references should have been granted by the trial Judge, because the burden was upon the Appellant to prove that the Respondents had exceeded their rights, and, upon the evidence, the Appellant had failed to discharge this burden. 20

32. The Respondents submit that Grant, J., was right in holding that by virtue of their own grants of 1891 and 1892, which were prior to the grant to the Appellant, they were entitled to take water through their channels for the operation of their mills, but that he should not have limited the Respondents' rights to the capacity of the channels in 1894. The common intention at the dates of the grants was that the owners of the sites granted should develop what water power they might require from time to time for their undertakings at those sites, and there was no intention of limiting their use of water for such purposes. 30

33. In any case it is submitted that at the date of each of the grants under which the Respondents claim, the right to receive water through the channel and to use such water for the development of power was a continuous and apparent quasi-easement enjoyed by the property granted over the property retained by the Crown.

The Respondents also refer to "An Act respecting the Law and Transfer of Property," R.S.O. (1887), Chapter 100, Section 12.

The Respondents further submit that by the grants to them or their predecessors of the channels in question, being permanent works, and of the land adjoining, the grantees become entitled to receive and use through such channels the water from Portage Bay. 40

34. The Respondents further submit that the Appellate Division was right in holding that the Appellant's grant of 1894 did not confer an exclusive right to the whole natural outflow through the West Branch. It is submitted that by this grant the Appellant became entitled only to a localized water

power on the West Branch, upon the same footing as other water powers drawing from the lake. Moreover, the right to exclude the Respondents which the Appellant asserts in these actions is just such an "exclusive right elsewhere upon the said Lake of the Woods or upon other streams flowing out of the said Lake" as the grant in terms withholds.

35. The Respondents further submit that the conduct of the Crown and of the Appellant was such as to preclude the Appellant from disputing the Respondents' rights or objecting to anything done by the Respondents before the commencement of these actions, and that if necessary the Court will pre-  
10 sume licences to the Respondents covering everything now complained of.

36. As to the Crown, it is submitted that both Dick & Banning and the Lake of the Woods Milling Company would have had a good defence, on the ground of encouragement and acquiescence, against any attempt by the Crown to prevent them from taking water through their channels from the Lake of the Woods.

37. As to the Appellant, it is submitted that Grant, J., was right in his conclusion, set out in paragraph 28, upon the question of acquiescence, and that the action should have been wholly dismissed upon the ground that the Appellant by laches and acquiescence had disentitled itself to any of the  
20 relief claimed.

38. It is further submitted that both Respondents had in 1916 when these actions were brought a prescriptive right to maintain the channels and to use as required the water power made available by such channels as they or their predecessors had done without adverse interruption for more than twenty years previously. It should be mentioned that at the easterly site there was a period between Dick & Banning and the Ottawa Gold Mining and Milling Company, and again between that Company and the Keewatin Flour Mills Company, during which the mills were not working and little water passed through the channel, but these intervals in the user were voluntary  
30 cessations by the owners of the site, not adverse interruptions submitted to by them.

39. It has already been submitted that the Respondents' rights ought not to be limited by reference to the capacity of the channels in 1894. But, even if their rights are so limited, it is submitted that the Appellate Division was nevertheless right in dismissing the actions. The Appellant was not entitled to a reference to enable it to prove what was a necessary part of its case at the trial, but only after it had established that there had been some infringement of its rights.

40 The evidence for the Respondent the Lake of the Woods Milling Com-  
pany was that there was no change in the dimensions of the westerly channel between its construction and 1916. The Appellant called no evidence about this channel. There was therefore no justification for a reference in this action.

p. 165 L. 6-20  
p. 179, L. 14-p. 180,  
L. 34

p. 172, L. 29-p. 173,  
L. 42  
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In the action against the Keewatin Flour Mills Company there was evidence both ways upon the question whether the capacity of the easterly channel had been increased when the flour mills were built in 1905. It is submitted that the proper conclusion from this evidence is that no increase was proved, but it is unnecessary to discuss this point, since the Appellant did not show what the capacity of the channel was in 1894 or that the Respondent had drawn more water through the channel than would have gone through it as it stood in 1894.

40. The Respondents submit that the judgments of the Appellate Division dated 26th June, 1929, should be affirmed, for the following, among other 10

## REASONS

1. Because the Respondents are entitled to take from the Lake of the Woods all the water which they have taken;

2. Because the grants under which the Respondents claim were prior to the grant to the Appellant;

3. Because it was the common intention of the parties to the grants under which the Respondents claim that the grantees and their successors should develop and use water power from the Lake of the Woods to the extent required from time to time for their undertakings; 20

4. Because at the date of each of the grants under which the Respondents claim the right to receive water through the channels in question and to use such water for the development of power was a continuous and apparent quasi-easement enjoyed by the land granted over the land retained by the Crown;

5. Because the Respondents and their predecessors as owners of the permanent channels in question were and are entitled to the flow of water in such channels and to use such flow for the development of power;

6. Because the Appellant's grant from the Crown does not entitle it to maintain these actions;

7. Because by the conduct of itself and the Crown the Appellant is estopped from disputing the Respondents' rights or objecting to anything done by the Respondents before the commencement of these actions; 30

8. Because the Appellant by laches and acquiescence has disentitled itself to any of the relief claimed in these actions;

9. Because the Respondents had a prescriptive right to take the water which they had taken before the commencement of these actions;

10. Because every reasonable presumption ought to be made in favour of the open and long continued user of water by the Respondents;

11. Because the Appellant failed to show that either of the Respondents had exceeded its rights or had infringed any right of the Appellant;

12. For the reasons stated by Grant, J., so far as favourable to the Respondents, and by the Appellate Division.

WILFRID GREENE

C. S. MacINNES

CHRISTOPHER C. ROBINSON

G. P. SLADE

**In the Privy Council**

On Appeal from the Appellate Division  
of the Supreme Court of Ontario.

BETWEEN

THE KEEWATIN POWER COMPANY, LIMITED  
(Plaintiff) *Appellant*

AND

KEEWATIN FLOUR MILLS, LIMITED,  
(Defendant) *Respondent*

AND BETWEEN

THE KEEWATIN POWER COMPANY, LIMITED  
(Plaintiff) *Appellant*

AND

THE LAKE OF THE WOODS MILLING COMPANY  
(Defendant) *Respondent*

(Consolidated Appeals)

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**Case for the Respondents**

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BLAKE & REDDEN  
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