

Privy Council Appeal No. 29 of 1930.

The Keewatin Power Company, Limited - - - - *Appellants*

v.

The Lake of the Woods Milling Company, Limited - - - *Respondents*

Same - - - - - *Appellants*

v.

The Keewatin Flour Mills Company, Limited - - - *Respondents*
(*Consolidated Appeals.*)

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 8TH JULY, 1930.

Present at the Hearing :

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD DARLING.
LORD ATKIN.
LORD MACMILLAN.

[*Delivered by* VISCOUNT DUNEDIN.]

The Lake of the Woods is an enormous expanse of water 1500 square miles in extent. It extends, however, over what is naturally a very flat country so that the outflow from it is not very rapid. The level of the lake naturally varies according to the conditions of rainfall which have prevailed over this large area. The natural outlets to the lake are only two in number which are denominated the western and eastern outlets. The portion of land which divides the outlets is made into an island by the confluence of the outlets lower down, and this island is known as Tunnel Island. The outlets form a stream known as Winnipeg

River which flows on towards the east ; the level of the river is, roughly speaking, seventeen feet below the level of the lake, but the Winnipeg River has a backwater, fed by streams of no magnitude, which extends to the west of the entrance of the western outlet, roughly parallel to the shore of the lake above it. There is also a sort of arm of the lake called Portage Bay which goes westward parallel to the backwater, and is only separated from it by a narrow ridge of land. The neck of land which separates this arm of the lake from the backwater is very narrow, and the difference of level is practically the same as at the western outlet. As matters stand at present there are three outlets besides the two natural outlets. There is an old cut at the extreme west of Portage Bay, and there are two other water cuts or channels through the narrow ridge. The eastmost of these two cuts runs roughly fairly direct from the Lake, passing under the Canadian Pacific Railway which is bridged over it, northward to the backwater, and on it is situated the mill of the defendants and respondents the Keewatin Flour Mills Company which has been denominated in these proceedings Mill " C." The westmost of the two cuts, which is in close proximity to the other, begins by going northwards, but after passing under the Railway turns westerly and then runs in a north-west direction till it reaches the backwater, and on it is situated the mill of the defendants and respondents, the Lake of the Woods Milling Company, which has been denominated Mill " A."

The plaintiffs and appellants are the proprietors of Tunnel Island lying riparian to the western outlet. This part of the country was a debatable land between the Province of Ontario on the one hand, and the Dominion, who then represented what afterwards became the Province of Manitoba. In 1874 an agreement was come to between the Dominion and the Province that whatever rights were granted by either to private individuals should be ratified by whichever government eventually was adjudged to own the land. In 1885 the litigation which had been set on foot to determine the dispute settled that the land in question was within Ontario but, as explained, the Government of Ontario was bound to ratify any grant that had been made by the Dominion. All the territory, including the numberless islands in the Lake of the Woods, was in these times thickly wooded. The main line of the Canadian Pacific Railway crosses the two outlets and runs along the narrow neck aforesaid at a very short distance from the shore of Portage Bay.

In 1878 or 1879 the attention of a certain John Mather was attracted to this locality for the purposes of lumbering operations. He was the head of a company called the Keewatin Lumbering and Manufacturing Company and he and his father cut a channel at the extreme west end of Portage Bay to the Winnipeg River and operated a mill thereon. Further in 1887 he was granted seven thousand dollars by the Government to erect, and he did erect, a roller dam, that is to say, a dam without openings, at the entrance

to the western outlet to raise the level of the lake to make it more efficient for navigation and for any milling upon it. He subsequently became associated with each of the properties represented by the appellants and the respondents in these consolidated appeals, but for the moment mention must be made of a report which he made to the Dominion Minister on the potentialities of the district for developing water power. This report pointed out the particular suitability of three positions:—(1) the western outlet where the appellants' property is now situate; (2) a natural depression through the narrow ridge. This is the position of the property of the respondents the Lake of the Woods Milling Company and their Mill "A," and (3) a canal near Macaulay's Mill. This is the property of the respondents the Keewatin Flour Mills Company and is Mill "C." The materials of this report had really been provided by a survey by a certain McLatchie.

Now Macaulay's mill mentioned as an existing thing had its origin in this way. Macaulay was a lumber man and he obtained as early as 1874 a grant of one hundred square miles, not defined but in the neighbourhood of the Lake of the Woods, to be selected by him, and he proceeded in 1878 to look out for a site for a mill where he could saw his timber. He selected the place where Mill "C" now stands. At this time the Canadian Pacific Railway was in construction and was just approaching this place. Macaulay, of course, saw that the railway, which was here on embankment, would block any channel from the lake to supply the mill, and he asked the Dominion authorities to let him have a bridge. In a letter written to Sir John Macdonald of 1878 he says that he has selected a site and goes on to say:—

"In order to make it available it will require an opening of forty feet wide left through the bank" (*i.e.*, the railway bank) "at about Section 134. What I now ask for is that a bridge of forty or fifty feet may be put across in order that my logs can run under, as my mill will be below the opening. If you will consent to this you will have one of the best water powers in the Country and will be a great benefit to me."

His request was granted and a bridge was made so that the water cut he made could go under it. He duly carried the cut down to the backwater of the Winnipeg River. He built his sawmill which was finished by the autumn of 1881. The same autumn he entered into an agreement to sell his mill to Dick and Mary Banning. The price was to be paid by instalments and Macaulay became bound to get a regular title from the Crown. Accordingly, he got a regular patent from the Dominion Government on May, 1884, of the mill site with adjoining land including the water channel. The plan attached to the patent clearly shows the water channel traversing the middle of Macaulay's ground. The further history of this property Mill "C" now becomes involved with the history of the adjoining property, Mill "A." That history begins in 1887. By this time it was known that the territory belonged to Ontario. In that year

Mather, who was Vice-President and General Manager of the Lake of the Woods Milling Company, which had by that time been formed, applied to the Government for a grant of land, stating that they wanted to establish a mill and use the water power of the Lake of the Woods. The piece of land applied for lay to the west of and contiguous to Dick and Banning's ground, and part of the grant which they applied for lay within Dick and Banning's boundaries. The Government, knowing that other people were about, answered their request thus :—

“ 23rd May, 1887.

“ Having reference to conversation had with you on Saturday last, the 21st inst., in connection with the application of the Lake of the Woods Milling Company for a site at Keewaydin, on which to erect a large flouring mill, &c., as per plan filed here by Mr. John Mather on the 23rd of March last, I have to say that, I am very desirous of meeting the Company's wishes in all possible ways, but, as pointed out to you, there are some conflicting applications which will not allow me, without fuller information, to grant your application in full.

I will say, however, that you are at liberty to go on and erect your mill on that part or portion of land marked on the plan filed by your Company as C.C.P., containing 1.56 acres, with the assurance that it will be sold to you on the understanding of course, that you will compensate the owners of any buildings or improvements found to be upon it, of the existence of which, however, there is at present no information here.”

On the faith of that letter the channel was cut and the mill erected. The channel utilised a natural ravine which ran in a slanting direction. After this there was a great deal of correspondence, but eventually after an arbitration matters were fixed up with Dick and Banning and Dick and Banning granted a receipt for the money paid to them in October, 1890. Reverting now to Dick and Banning they obtained from the Ontario Government, who by this time were recognised as the real proprietors of the land, a patent. This patent described the land generally as a grant of twenty-seven acres “ known as the Dick Banning and 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 . . . ” 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 and Banning. The date of the patent is 5th January, 1891. In 1897, Mather, who was by this time Vice-President and General Manager of a company called the Ottawa Gold Mining & Milling Company, bought the mill and land from Dick and Banning. He pulled down the sawmill and built a reduction mill which he used for some time. Then, finally, Mather again, in his capacity as President and General Manager of the respondents, the Keewatin Flour Mills Company, bought the property from the Ottawa Company and erected a flour mill

instead of the reduction mill which is working at the present time. In 1906, the respondents, the Lake of the Woods Company, acquired the control of this company.

Reverting once more to Mill "A," the various parties having all been compensated, the Ontario Government granted, on 10th August, 1892, a patent. This patent includes all the mill lands and mentions the mill race.

Turning now to the appellants' title. On 24th November, 1891, the Keewatin Lumbering and Manufacturing Company, Mather being then President and General Manager, made an agreement with the Government for the purchase of Tunnel Island and some land on the other side of the western outlet with the water power adjoining. This agreement provided for the expenditure of certain monies within specific times by the company in the development of water power and surrendered a lease of other lands held by the company. In September, 1893 the Lumbering Company assigned its rights under the agreement to the appellant company, of which Mather was at that time Vice-President and General Manager, and on 13th April, 1894, the Government granted the patent to the company of the land of Tunnel Island and the other lands mentioned in the agreement with the water power. At the same time, the appellant company erected a new dam called the Norman Dam half a mile below the roller dam just on the crest of the rapids. As this was to raise the level of the lake and improve navigation the Government agreed to pay four thousand dollars towards its erection, but stipulated for the right to regulate the level of the water. But there was a provision that if the company should come to wish to use the dam for power purposes they might put an end to the agreement. No development of power, however, was effected until after the present actions were started in 1916. Mather died in 1906. In 1911 this new dam was found to leak and it was repaired not by the appellants but by the respondents, the Lake of the Woods Company, the expense being divided into thirds, one-third paid by themselves, one-third by the appellant company, and one-third by the Government; a proceeding clearly recognising the joint interest of the three parties in the waters of the lake. In 1913, one, Backus, made an agreement to take over the company's property. In consequence of this agreement, and at his instance, the present actions were started in 1916, but defences being put in, nothing more was done and they were allowed to drop. In 1920, Backus obtained all the shares of the company and began to develop power under a scheme. The actions were then revived and came to trial in 1927. The appellants' case, as laid, was quite simple. In virtue of the patent from the Crown, the company is riparian owner on the western outlet. As such they say that they are entitled to the whole water naturally coming from the lake and they ask for an injunction against the defendants from diverting any water by means of their artificial cuts. This is at first sight a somewhat startling demand considering that the

defendants have been working continuously since the dates above quoted.

The defendants reply that they have a right to do so by virtue of their patents which are prior in date to the patents of the plaintiffs. That contention has been upheld by the Trial Judge and unanimously by the Court of Appeal. The argument of the appellants which logically comes first is so extravagant as to be scarcely worth repeating, but as it is tabled their Lordships will deal with it. It was that although the Crown at the time the earlier grants were made was proprietor of all the lands contained in the later grant, it could not grant any right which would interfere with the total rights of ungranted land. If that were so, it would be impossible for any proprietor to grant, *e.g.*, a right to minerals, because if he afterwards granted a right to the land, then as rights to land extend *a coelo usque ad centrum*, the grant of minerals would be bad. The grant of an easement would be equally bad, and the whole doctrine of the prescription of easements would fall, because prescription is based on the assumption of a lost grant. No more need be said as to this untenable proposition.

The next question which arises is as to priority, and here there is a real question to be decided. As regards Mill "C" there is no question for the priority is undoubted. But as to Mill "A" the case stands thus. The predecessors in title of the appellants had an agreement, as mentioned above, with the Crown to purchase Tunnel Island with the water power adjoining. This agreement was dated after the patent to Mill "C," but before the patent to Mill "A." Accordingly, the appellants argue that the agreement gave them an equitable right, and that although they did not get the patent till a date posterior to the patent for Mill "A," yet, in virtue of the equitable right, their right must date back to the agreement, and consequently be anterior to that of the respondents, who own Mill "A." In their Lordships' opinion, there are two answers to this contention. The first is that these respondents also had an equitable right prior in date to the agreement of the appellants. After the long correspondence which took place as to the question with Dick and Banning, and after that dispute had been settled by arbitration the Crown finally wrote, on the 19th December, 1890, to say that if the company would pay various parties the outlays they had incurred, and would agree to pay ten dollars an acre for the land, they were agreeable to grant the land, including the mill site, all as shown on a plan by P. L. S. Stewart. To that letter the company sent a reply on the 20th June, 1891, in which they say that Stewart's plan contained a little more than the plan in their original application, but that they were willing that the patents should be made out according to Stewart's plan, and that they would pay 10 dollars per acre for any additional land that was needed. This, their Lordships consider, was a complete acceptance of the offer. It was not affected by the

fact that the exact amount to be paid for the extra land had still to be calculated. If, then, two parties having both equitable rights, the party who has the prior equitable right obtains the first legal grant, there is no more to be said. The other reason is that which weighed with the Appellate Division. *In gremio* of the appellants' title is the following condition :—

“ Subject 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 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 any other stream flowing out of or into the said lake.”

Their Lordships are of opinion that one of the powers and privileges “ hitherto enjoyed by us ” was the power exercised, and the privilege thereby made good of putting the existing cuts through the narrow neck of land ; that is to say, the cut of the old mill at the west of Portage Bay and the cuts leading to Mills “ C ” and “ A.” They also entirely endorse the pronouncement of the Court of Appeal where in reference to this condition they say :—

“ The ‘ understanding ’ must have been arrived at by minds representing the grantee as well as the province of Ontario. Many of the shares in the plaintiff company were then owned by John Mather, and it is in the highest degree improbable that he and his associates should be parties to an understanding that would imperil their other long-established enterprises at Portage Bay.

This settles the question as to priority of right. The next question is what are the rights of the defendants ?

The first argument addressed by the plaintiffs is that, as there is no actual mention of water rights in the patents the defendants have no right to the use of the water. This argument was fully dealt with in the Courts below, and their Lordships agree with the view of the Trial Judge and of the Appellate Division. It is clear beyond all question that the making of cuts, though actually done by the respondents' predecessors, was done with the full knowledge and approbation of the Crown, who at that time was proprietor of the whole lands belonging now to the plaintiff as well as of those of the defendants. The water cuts are shown in the plans annexed to the titles of both of the defendants to the full extent as regards Mill “ C,” and to the extent where the mill stands as regards Mill “ A.” The point may be tested by asking whether, in view of what it had permitted to be done, and indeed encouraged to be done, the Crown immediately after granting the patents, could have stopped up the outlets from Portage Bay. It clearly could not have done so, and the appellants can have no higher title than the Crown their author had.

The next argument is of the extravagant order but requires a little preliminary explanation. Neither of the cuts in question permits the water to run continuously from Portage Bay to Winnipeg River. In other words, there is no bye-pass at the

mills. The cut is absolutely blocked by the mill sluices and the water only flows when the sluices are opened. The reason for this is abundantly apparent. When a mill is placed on an ordinary river, though a dam may be made so as to impound a certain amount of water, yet as the river is continuously flowing the water must get past, and as it is not expedient to work the mill wheel continuously without stopping, there is a bye-pass of some sort to allow the water to go down. But in this case there is really no current in the proper sense. The water is drawn from a huge lake and the amount of water available is determined by the level of the lake which varies. It would be utterly foolish for a mill in the position of Mills "C" and "A" to erect a bye-pass—always assuming that they had the right to do so—for it would simply lessen the supply from which they had to draw when they wished to work. But the arrangement being as stated the appellants argued that the only right in the defendants owing to what the Government had allowed them to do in the matter of the cuts, was to conduct the water to the mill by means of the cuts, but they had no right to let away the water by opening the mill sluices. Such a mill would, indeed, be appropriate for Tantalus, but such a mill and such a water power is unknown in modern jurisprudence. There remains, however, another real and debateable question. What is the extent of the respondents' right? Now the learned counsel for the respondents took very high ground. He said that what was done by the cutting of the mill races was equivalent to the division of the stream effected by the owner of the land to wit the Crown. His clients were thus given a riparian situation on the stream so divided, and as such had all riparian rights. In other words they might use water as they liked provided they returned it, except in so far as consumed in drinking, to the stream, and they might, if they chose, let the mill races run by a bye-pass. He relied on what was said by a majority of the Court in *Stockport Waterworks Company v. Potter*, 3 H. & C., p. 327, and affirmed in *Nuttall v. Bracewell*, L.R. 2, Ex. p. 14.

"The case where a riparian proprietor makes two streams instead of one, and grants land on the new stream, seems analogous to a grant of a portion of the river bank, but not analogous to a grant of a portion of the riparian estate not abutting on the river. In the case of a grant of land on a new stream, the grantee obtains a right of access to the river, and it is by virtue of that right of access that he obtains his water rights."

Their Lordships recognise this principle of law as absolutely correct in the case where the owner of both banks, as here the Crown, divides the stream, but the answer to this argument is one of fact: the Crown did not do it. They might have done it and it is not devoid of interest to note that if they had gone on with the proposals indicated in the old report of Mather already mentioned, they would have done it, for that report, speaking of the proposed channel which ultimately came into being as Macaulay's cut, *i.e.*, Mill "C", indicated that it ought

to be of somewhat large dimensions in order to provide for water power along the banks of the backwater of the Winnipeg River before it joined the outcome of the western outlet of the lake. But the Crown did not embark on any such scheme, but only allowed the individual mill proprietors to make cuts first for Mill "C" and then for Mill "A." The result in law is that the rights in the various proprietors are not the rights of riparian owners in the stream, but are rights of easement granted by and good against the Crown and also good against the appellants, who only take through the Crown, but still rights of easement. There are many easements which depend, as Lord Parker said in *Picllbach Colliery Co. v. Woodman* [1915] A.C. at p. 646, not upon the terms of the grant but upon the circumstances under which the grant was made. Now comes the question, what is the extent of the easement? One word must here be said as to the pleadings. If the appellants' case was to be judged strictly on the pleadings there would be no room for the consideration of this question, for the only claim the appellants made when they came into Court was that the respondents were not entitled to take any water at all from the lake, and the respondents' answer was simply that they had not done anything that they were not entitled to do. But as the case went on it seems to have dawned on the appellants' advisers that it was possible to contend that though the respondents were entitled to some water they were not entitled to as much as they were taking, and they made such case as they could. The result was that in his judgment the Trial Judge inserted 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."

When the case came to the Appellate Division, the learned Judge who gave the judgment of the Court, stated as one of the questions argued before them:—

"That if the defendants have rights to divert water, such rights are limited, and are not as declared in the judgment";

and in the judgment he said that their judgment practically affirmed the declaration aforesaid, though they did not think it necessary to embody it in the formal judgment. In these circumstances, their Lordships would not wish to tie themselves down strictly by the pleadings and avoid giving their judgment on this matter. They are of opinion that the declaration made, so far as it goes, is right, that is to say, that the amount of water which the defendants may use is only limited by the size of the channel cut through Portage Bay, which the defendants are not at liberty in any way to enlarge. They think that is the inevitable result from the way in which the Crown, which was absolute master of the situation, gave their permission. The Crown

officers saw the channel as cut, and made no objection ; but they made no stipulation whatever and took, so far as is proved, no interest in the question of what were the dimensions of the mills as put up. After all, what is really the meaning of the granting of a water right for a mill ? As Baron Martin put it in *Nuttall's* case (*supra*), " the application and use of flowing water to work machinery is as old as the law." No doubt the machinery must be for the use of a mill, but the Crown made no stipulation as to the size of the mill, or as to its character. Here there have been saw mills, reduction mills and flour mills, all working in turn, and all without objection till the objection raised years afterwards by the present appellants. The real right given by the Crown was the right of bringing water to two channels. This is borne out by the expression used by the Crown in the limiting condition of the appellants' title already quoted.

"The 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."

That shows that in the view of the Crown it had granted water powers and might do so again. The Crown were to their full knowledge granting water power and they laid down no restrictions as to amount, except the necessary restriction which ensued from the size of the channels cut through the ground. The defendants had, their Lordships think, right to take for their mills all the water that the channels they had been permitted to make could bring them. Those channels they could not enlarge. Be it also observed that the maxim *tantum præscriptum quantum possessum* does not apply to an easement by grant. When you are dealing with grant, the grantee may always, if he chooses, not exercise his right under the grant to the full without in any way prejudicing his full right if he finds it convenient to use it. In truth, not only is the size of the channel the only limit as to the quantity of water that can be read out of the terms of the title and the circumstances attending the grant, the limit with which the Crown, which was master of the situation, was content, but there was no tangible case made as to the possibility of defining a limit of any other kind. As to Mill "C," there are no data whatsoever. It would be perfectly impossible to evaluate the amount of water consumable by the Saw Mill taken down years ago. As to Mill "A," certain figures have been put in dealing with the potentialities of the mill at different dates, but these figures could form no basis for a determination. Milling capacity in barrels has nothing to do with it, and the measurements as to the amount of water that can be passed in cubic feet per second are all based on a hypothesis of a 20-ft. head. But the head in actual working would necessarily vary. The truth is that this whole part of the case is a mere afterthought. There is no trace of any real damage being done to the water power of the plaintiffs, unless the taking of any water is a

damage, but they conceived the idea of securing a monopoly to themselves of the whole of the water power of this enormous lake—an idea never entertained by the Crown, their author, when the whole arrangements were still to make. Nor is there any fear of the respondents damaging the lake, because by subsequent legislation, the Government has power to regulate the level of the lake.

There is, however, one other element of limitation as to which the judgments are silent. The easement is for a mill, and it is only for a mill that it can be used. The respondents could not, for instance, divert the water for a town supply or for the use of another tenement, or simply, by removing the obstruction, permit the water to run away. There is a suggestion of such misuse in the assertion that there has been an installation of hydro-electric power. Now, if it suited that in order to turn some machinery in the mill it was better to first create electricity and let electricity do the work that would be still use as for a mill. If it had been shown that the hydro-electric installation was being used for quite another class of business that would be struck at; but while the words sound big, the truth of the situation is that it is only used to light the mill, and their Lordships think that this also is clearly part of what would be permissible in connection with the mill. The mere fact that instead of having two installations at Mills "A" and "C", they have one at Mill "A" which supplies Mill "C," is such a trifling matter that their Lordships do not think it calls for any interference.

Their Lordships have, in view of the importance of the case, gone into the whole matter from the beginning, but they have really done no more than concur in the very able judgment pronounced by the Appellate Division, and they will humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

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