Privy Council Appeal No. 53 of 1929.

Benjamin F. Groat - - - - - - *Appellant*

v.

The Hydro-Electric Power Commission of Ontario - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH JUNE, 1929.

Present at the Hearing:

LORD BUCKMASTER.
VISCOUNT DUNEDIN.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD BUCKMASTER.]

Their Lordships do not desire to hear counsel for the respondents on this appeal. When the case is examined, in the opinion of the Board, it is clear that the judgments appealed from cannot be disturbed.

The appellant, who was a hydraulic engineer, realised that it might be possible so to interfere with the sub-surface flow of a river as to enable water to be taken from a main stream into an outlet in such a way as to keep it free from ice; in other words, if the flow were arrested at the bottom and accelerated on the surface, and the intake drawn from the bottom, the jamming and obstruction that was due to the gathering of ice floes in the early months of the year might be avoided. For this purpose, he stated his invention in a specification which became the subject-matter of Letters Patent granted on the 6th April, 1919. In this document, after having referred to the difference between the surface and the bed velocity of the stream, and pointing out how that might be in the one case arrested, and in the other accelerated, he says that the best method of accomplishing this

purpose is by raising the average elevation of the bed of the stream, at or in the vicinity of the outlet, so as to form a sub-surface ridge or dam, or several such ridges or dams extending across or partially across the channel of the river, canal, or stream in any suitable direction, either transversely or angularly disposed relatively to the direction of the flow of the river, and adds that the length, height and position of the ridges will depend upon the circumstances under which they are being constructed, and adds that they may or may not be parallel with one another. It is impossible to read such a claim without realising that it omits to provide any one of the essential conditions that are necessary to establish protection of an invention. The height, the number, the distance and the direction of these ridges that are to be raised on the bottom of the river are all left wholly undefined; whether they should go wholly across the river, or whether they should not, whether taking them across or leaving them half-way depends upon the velocity of the stream or on what other circumstances there is no disclosed means whatever to ascertain.

There is nothing here to enable anyone who desires to place an obstruction at the bottom of a river, which all may do, to know what it is he may and what it is he may not do without infringing this patent. Nevertheless, this patent, with all its manifest infirmities, was made the subject of proceedings for infringement against the respondents, because they, for the purpose of securing that the intake to their works from the Niagara River should be free from ice had adopted the following device. They had built up a curtain wall across the mouth of the intake from the river, and they had pierced this wall in many places with large channels at the bottom, six of which included sockets extending twenty-five feet into the river through which the water might flow. They had, at the same time, dredged and made a large pool with sloping sides in front of the intake and, not as part of their original plan, but, probably for the purpose of providing a bed for conduits, connected with the sockets in case they should be required at a later date, they had carried forward for a distance of some 100 feet or more into the bed of the river, the trenches. These sockets and trenches were alleged to be an infringement of the plaintiff's patent. At the place where these inlets exist, the Niagara River is a mile wide, and there is evidence by practical engineers that these ridges, for the purposes mentioned, cannot really have any material effect upon the way in which the water is taken into this inlet free from ice. The statement made by the learned Judge who tried the case is this:—

> "Mr. Hogg . . . swears that neither the sockets nor the eight-foot excavations extending from them, have any appreciable effect in the operation of the intake plant, and that if the sockets were cut off and the irregularities levelled it would make no difference in the operation."

Then he says this evidence is concurred in by another witness,

> "Who also says that even deep channels are wholly ineffective in the Niagara River unless extended out two or three thousand feet into the current, which is what he has done on the American side of the river."

He adds that against these statements, there is the evidence of an eminent professor, who thinks that the spaces between the sockets retard and direct the lower flow and thereby infringe the appellant's patent. The learned Judge preferred the evidence of the practical men to the evidence of the eminent theoretical expert, and his view was unanimously approved by the Court of Appeal, who thought it unnecessary even to deliver a judgment upon the matter. In these circumstances, this case comes before this Board with a finding which, although it is true, is a finding dependent upon the acceptance of opinion, is to some extent at least based upon definite fact established by the experience of some of the witnesses, and is agreed to by the Court of Appeal from which this appeal has been brought. Their Lordships would have to throw over the whole of the findings of the learned Judge in the Court of first instance, who tried the case, supported by the Appellate Tribunal, if they were to permit this appeal to succeed, a procedure contrary to the ordinary practice of the Board. There are occasions when rigid reliance on such a rule might be capable of working injustice, and in all such cases their Lordships are always prepared to relax its strength, but in the present case they have no doubt whatever that reliance upon it is only one means of defeating a claim, which would be defeated by one, if not by more, of the other defences that were raised in the action.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

BENJAMIN F. GROAT

v.

THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO.

DELIVERED BY LORD BUCKMASTER

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