Volume 5 Issue 3

THE JOURNAL OF
THE HISTORICAL SOCIETY
OF THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN

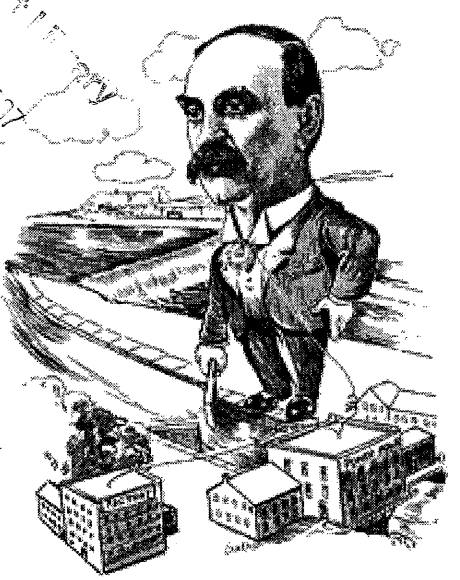
STEREOSCOPE

A River of Litigation[1]

By Michael A. MacDonald

Introduction

In November 2006, I visited the United States National Archives Regional Center in Chicago, Illinois. The purpose for the visit was to collect research materials for a proposed article for the Historical Society for the United States District Court for the Western District of Michigan. The Archives Regional Center maintains court records for the federal courts of this district going back in some cases to 1863, when this judicial district was established. Any person may apply for a research card that allows him to review original documents. In my case, I was interested in the files and records relating to the case of *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913), a legal struggle thatinitiated in the Western District of Michigan in 1903.



William Chandler

I was interested in the *Chandler-Dunbar* case for several reasons, but mainly because it represented litigation from the Western District that reached the United States Supreme Court for final resolution. As I researched the case, other interesting aspects of the case were revealed: a Western District of Michigan federal judge's untimely death while overseas, a pioneering Upper Peninsula newsman/entrepreneur's use of a startling new technology, the history of the political struggle to control the Bahweting[2] (the falls of the St. Mary River, which separates the

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Upper Peninsula of Michigan and Canada at Sault Ste. Marie), the involvement in the case of a United States Secretary of War, who began his career as an attorney in Grand Rapids, and the fact that the birth of a new rule of law concerning legal ownership of water currents was presided over by a Supreme Court justice who had served in the Confederate Army.

The *Chandler-Dunbar* litigation arose in the environs of Sault Ste. Marie, Michigan. While Michigan did not join the Union as a state until 1837, the Upper Peninsula of Michigan was a site of frequent and early explorations by European explorers. In 1622, Etienne Brule was considered the first European to see the St. Mary River. As early as 1650, a European settlement was located near the falls of the St. Mary River, a place that the local Native Americans had named the Bahweting.[3] The Bahweting was a gathering point for Chippewa Indians, attracted at least in part by the bountiful supply of whitefish. When large quantities of iron and copper ore were found in the Upper Peninsula of Michigan in the 1850s, the rushing falls of the St. Mary River proved an obstacle to transporting the ore to the industrial cities of the southern Great Lakes.

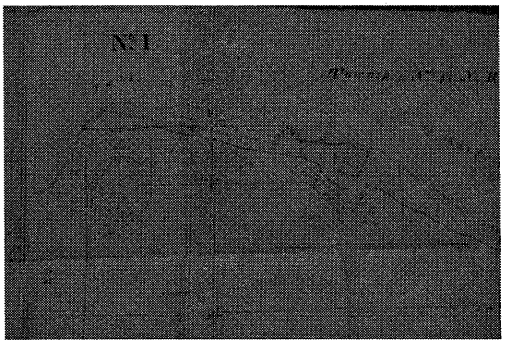
As the United States entered the twentieth century, control of the St. Mary River Falls was hotly contested by three competing interests. The United States government wanted to build a modern canal and locks, which would provide a means of transportation for much needed raw materials. William Chandler, a businessman operating a hydroelectric plant, held legal title to a key piece of property along the Bahweting. The Chandler plant was squarely in the path of the government's planned canal. A third competing group, consisting of Canadian investors, was laying plans to build the world's then-largest hydroelectric plant, which would of necessity put Chandler out of business. And on the sidelines of this struggle, members of the Chippewa nation clung to their treaty-granted "perpetual right" to fish and gather at the Bahweting.[4]

The Quiet Title Lawsuit

On September 2, 1903, in the Circuit Court[5] for the Western District of Michigan, the United States filed a quiet title action seeking to assert its legal title, ownership, and control over a strip of land on the banks of the St. Mary River, and several adjoining islands, situated at Sault Ste. Marie, Michigan. The United States asserted its intention to use the land to construct a modern canal and locks,[6] which would enable large freighters to carry raw materials from Minnesota, Wisconsin, and Upper Michigan across Lake Superior and from there south into Lake Huron and beyond, for use in the national economy. In the absence of more modern forms of transportation, Great Lakes shipping of grains, timber, and ore was the most efficient mode of transportation.

The complaint filed by the United States was 18 pages long and was in large part a history lesson concerning the formation of the United States federal government. The complaint alleged that the river bank and islands,

Photograph of "shacks" used by Native Americans to fish the Bahweting, circa 1901.



Photograph of map used at the first Chandler Dunbar *trial.*

which were "originally" the property of the King of Great Britain,[7] passed to the ownership of the State of Virginia at the conclusion of the War of Independence, as the tract of land known as the Northwest Territory. The State of Virginia thereafter ceded this territory to the United States. On July 13, 1787, the Congress of the United States passed the Northwest Territory Ordinance, which included the area now known as the Upper Peninsula of Michigan.

The title to the land in question next changed hands on January 26, 1837, when Michigan was admitted to the Union as a state.[8] The government's lawsuit, known as a complaint, specified that the United States government asserted the right of ownership and control over the Great Lakes and "their communicating passageways," which included the St. Mary River. It was not until August 9, 1842, that the United States and Great Britain signed the Webster-Ashburton treaty establishing the international boundary line down the St. Mary River and the Great Lakes. In this litigation, both parties agreed that the two islands and the adjoining riverbank in question clearly resided within the United States zone.

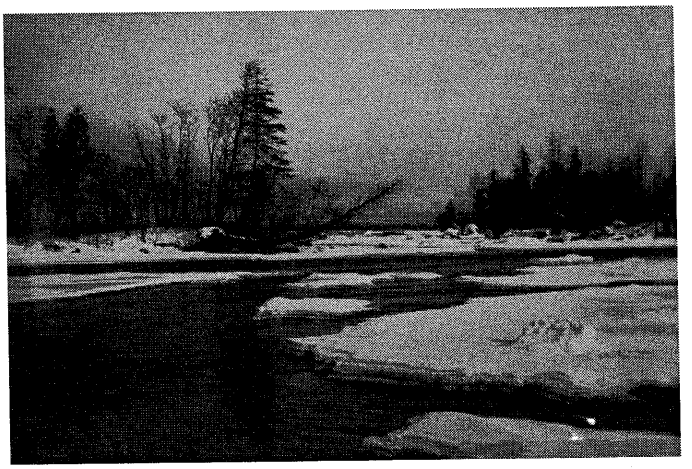
The complaint then turned to the issue of Native American land claims. The land in question, both the river bank and the islands, were traditional Native American camping and fishing grounds. Back on June 16, 1820, the United States had made a treaty[9] recognizing the "perpetual" rights of the Chippewa tribe to occupy and use the disputed land. When another treaty[10] was entered into on March 28, 1836, the rights of both the Chippewa and Ottawa Nations of Indians with regard to the St. Mary River camping and fishing grounds "remained unaffected." A third and final treaty was made on June 27, 1856. This treaty allegedly dissolved[11] any Indian tribal organizations or governments in exchange for payment of money and allotment of "lands in severalty." The United States then asserted in its complaint that whatever residual right of camping and fishing belonged to the Indians was extinguished by a payment of $17,475 on March 3, 1857, by the United States.

The complaint then turned to a critical aspect of the government's case. On March 1, 1847, Congress created the Lake Superior Land District,[12] which made virtually all of the land in the Upper Peninsula available for settlement and ownership by private citizens. Before any land sales could take place, President James K. Polk exercised his authority to "reserve" certain public lands for the benefit of the federal government. In particular, on April 3, 1847, President Polk issued executive orders reserving the contested St. Mary River land for use by the secretary of war.

Despite the president's executive reservation of land, settlers to the Sault Ste. Marie area built homes and businesses along the St. Mary River. The St. Mary River area had been the subject of European interest since at least 1650, when the complaint alleged that the first "military post" had been located in the Upper Peninsula by the government of France. When the land passed from France[13] to Great Britain and then to the United States, the military post became known as Fort Brady. Fort Brady occupied the banks of the St. Mary River immedi-

ately adjacent and southeast of the Indian camping and fishing grounds.

By 1850, the property adjacent to the banks of the St. Mary River was tied up in a hodge-podge of legal claims, including French land grants, British awards of land, Native American treaties, legislation passed by the United States Congress, presidential executive orders, and old-fashioned land squatters. To resolve this mess, on September 26, 1850, Congress passed an act that mandated a government survey of the land abounding the St. Mary River.[14] One of the principal objects of this legislation was to establish the exact boundaries of Fort Brady, as well as any other land needed for the public good. The 1850 act also provided for the public sale of "unclaimed" lots in Sault Ste. Marie and its surrounding area.



The southern view from Island #1 located off the shore of the Chandler property. Chandler described the river bank property and the islands as "worthless" other than for their hydroelectric value. (Copy of photograph from the original court files.)

This military survey was completed by March 10, 1852, at which time the plots and map were forwarded to the federal land office. According to the United States' complaint, the disputed land along the banks of the St. Mary River was clearly reserved for public use. When the government's survey and map were disclosed to the public, the residents of Sault Ste. Marie, Michigan quickly realized that much of their town fell within the Fort Brady reservation. Not surprisingly, the complaint stated that the citizens of Michigan and "their senators and representatives in Congress" demanded a compromise. The compromise was quickly reached, allowing the city of Sault Ste. Marie to exist alongside the Fort Brady reserve. However, according to the complaint, the riverbank and islands contested in this lawsuit remained the property of the United States War Department.[15]

It is at this point that the government's lawsuit turned to the principal character in this case, William Chandler. Mr. Chandler was born in Lenawee County, Michigan in 1846. He spent much of his life in the newspaper business, including starting up the *Cheboygan Tribune* (in 1875) and the *Sault Ste. Marie News* (in 1878). During the time he resided in Sault Ste. Marie, he served as the "collector of tolls" for the State-operated locks and canal from 1877 to 1881. In 1881, when the locks were transferred back to the United States government, Mr. Chandler was appointed "superintendent" for the federal canal and locks.[16] From these facts, we can conclude that Mr. Chandler was quite familiar with the St. Mary River and the rushing currents of the river that daily swept by his office.[17] Certainly, his knowledge of the St. Mary River played an important role in his decision to submit a claim for the two islands and adjacent riverbank property, which later became the site of the Chandler-Dunbar Water Power Company. In any event, on May 17, 1881, William Chandler filed a "Porterfield scrip"[18] for ownership of 40 acres of land adjacent to the St. Mary River, and with that claim, we come to the gravamen of this case.[19]

On December 15, 1883, the United States government granted a "patent" to William Chandler for the land in question. According to the government's complaint, a chain of errors had led to this unintended result. First, the records relating to the survey may have contained errors and were certainly subject to interpretation. Second, the survey itself was never intended to extend to the Indian fishing and camping grounds, upon which Mr. Chandler had in fact made his claim. Third, the Chandler application was reviewed by a "division" of the government land office that did not have possession of the full public records relating to the land surrounding the Sault Ste. Marie area. As the complaint put the issue, Mr. Chandler was granted a patent to government land through "inadvertence," "mistake," and "confusion." As any lawyer will tell you, that is a tried and true formula for litigation.

As later events would show, the legal dispute over the property was a three-sided contest. First, the government was gradually laying its plans for a modern canal and locks on the property in question. Meanwhile, Mr. Dunbar was proceeding with plans

to build hydroelectric facilities along the banks of the St. Mary River, allowing him to harness the river's energy through water-powered electrical generators.[20] By 1891, William Chandler was working with Harris T. Dunbar to create what was later to become the Edison Sault Light and Power Company. By 1893, the Chandler-Dunbar Water Power Company was providing electrical power services to the City of Sault Ste. Marie, Michigan from a hydroelectric plant based on the banks of the St. Mary River. The third competing interest arose in 1887, when a group of businessmen proposed the construction of a major "canal project" to harness hydroelectric power from the St. Mary River. The hydroelectric "canal project" began well but became mired in financial difficulties. In 1895, Canadian entrepreneur Francis Hector Clergue[21] proposed to buy the still uncompleted St. Mary River "canal project." To accomplish this purpose, he set up the Lake Superior Power Company, which purchased the rights to the St. Mary River "canal project" for approximately $68,000. The "canal project" was planned to be the largest hydroelectric project of its time. Faced with numerous construction and engineering challenges, it took until October 25, 1902, to hold the "grand opening" of the St. Mary River canal,[22] an event attended by the governor of Michigan and the Michigan congressional delegation.[23]

Unfortunately for Francis Clergue and his investors, the canal project did not turn out to be financially successful. By October 1903, one year after its opening, the Lake Superior Power Company was over $7,000,000 in debt and unable to pay its bills. Meanwhile, the more dependable and fiscally sound Chandler-Dunbar Water Power Company, still under the leadership of William Chandler, applied in 1901 for a permit to expand its hydroelectric activities along the banks of the St. Mary River. Needless to say, this application put William Chandler directly into conflict with Francis Clergue and the Lake Superior Power Company, and it drew the attention of the United States government, which was now ready to modernize the canal and locks necessary for Great Lakes shipping. It was upon this background that the United States filed a lawsuit to clarify who was the proper owner of the disputed parcel of riverbank property and adjoining islands in the St. Mary River.

The Parties to the Suit—For the Government

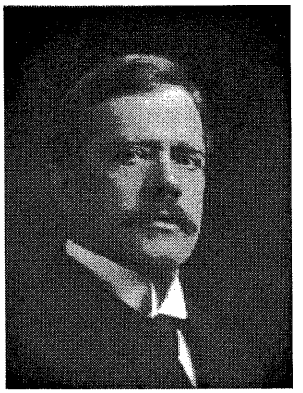
U.S. Attorney George G. Covell's signature

The lawsuit was filed under four signatures on behalf of the United States government. The plaintiffs were the United States attorney of the Western District of Michigan, the attorney general of the United States, the solicitor general, and a special assistant United States attorney.

George G. Covell: Mr. Covell was born in 1860. He became a resident of the Traverse City, Michigan area and was elected, as a Republican, to represent that area in the Michigan House of Representatives from 1893 to 1896. He then served in the Michigan Senate from 1897 to 1898. On February 15, 1898, he was named by President William McKinley to become the United States attorney in the Western District of Michigan.[24] (The nomination of Mr. Covell took place shortly before the United States declared war on Spain on April 25, 1898.) Mr. Covell served as the United States attorney from 1898 to 1910, which makes him the second longest-serving United States attorney in this district. (Joseph F. Deeb is the longest-serving U.S. attorney, with a 13-year tenure from 1940 to 1953.) Mr. Covell also had the distinction of serving his country during the assassination of President McKinley (in 1901) and completing two terms as U.S. attorney under President Theodore Roosevelt.

Philander C. Knox: Mr. Knox became attorney general under President McKinley and continued in that capacity when Theodore Roosevelt became president. Mr. Knox was a native of Pennsylvania and became one of the most successful commercial litigators of his day. While serving as the attorney general, his critics called him a "Wall Street stooge" and "Sleepy Phil," for his many former corporate clients, including U.S. Steel. However, President Roosevelt called him "the best attorney general this government has ever had." Knox played a key role in President Roosevelt's antitrust activities. In 1904, Knox left the Department of Justice to serve as a United States senator for Pennsylvania. In 1908, Philander Knox ran for the Republican Party presidential nomination, which he lost to William H. Taft. He must have remained on good terms with President Taft, as Knox was appointed secretary of state in 1909.

Henry M. Hoyt: Mr. Hoyt was also a native of Pennsylvania. His father was a Civil War general who also served one term as governor of Pennsylvania. Hoyt served as an assistant attorney general at the Department of Justice from 1897 to 1903. President Roosevelt then named him the solicitor general in 1903. (The term "solicitor general" meant that the appointee served as supervisor over all Department of Justice litigation before the United States Supreme Court). The *Chandler-Dunbar* suit must have been one of the early controversies brought to the newly appointed solicitor general, since it was filed in September 1903. Hoyt left the Department of Justice in 1909 to work for Philander Knox at the Department of State.



Solicitor Henry M. Hoyt

Duane E. Fox: I was not able to find much information on Mr. Fox; however, his involvement in the case, as will be shown later, was controversial. The historical record establishes that Mr. Fox was a frequent litigator before the federal courts.

The Answer to the Lawsuit

On November 18, 1903, attorney A. B. Eldredge[25] filed an answer to the United States' complaint. The power company asserted that it had been the owner of the land in question since June 8, 1883.[26] The land in question was not properly "reserved" by any executive order and therefore was available for claiming when Mr. Chandler filed his patent for land. As for the "military reservation," that property did not extend to the site in question. As for the Native American interest, the lawsuit itself alleged that their interest had been extinguished by a cash payment.

Drawing of Marquette Attorney A.B. Eldredge, who represented William Chandler in the lawsuits filed by the United States.

Chandler-Dunbar also alleged that the United States had made offers to buy this riverfront property, which was an admission that Chandler-Dunbar was the legal owner. With an eye towards laches, William Chandler pointed out that he held no "position" with the United States when he acquired title to the land in question. Chandler also pointed out that his land patent had been subject to a series of hearings involving the Department of the Interior, the War Department, and the Indian Affairs legal counsel, which negated the government's claim of error.

Chandler-Dunbar also alleged that the United States was not litigating in good faith. The legal pleadings stated that the true purpose of the lawsuit was to assist the Lake Superior Power Company to control the land in question to assist its private interest in the hydroelectric canal project described earlier. The basis for this claim was the involvement of Attorney Duane E. Fox. Mr. Fox had represented the Canadian business group whose St. Mary River canal project would almost certainly have put the Chandler-Dunbar plant out of business. The Canadian business group lost its lawsuit in the Michigan state courts. However, much to the chagrin of William Chandler, the attorney for his competitor was then appointed a special assistant United States attorney on the federal lawsuit aimed at closing his plant. It was clear to William Chandler that Duane E. Fox's involve-

Western District Historical Society Mission

The Historical Society was created to research, collect, and preserve the history of the lawyers, judges, and cases that have comprised the federal court community in Western Michigan and the Upper Peninsula, and to share this information with the public in an effort to promote a better understanding of the region, the court, and the rule of law.

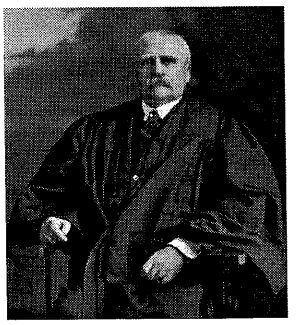
ment in the federal suit was no mere coincidence.

Photograph of Judge Wanty who presided over the first U.S. v. Chandler Dunbar *trial.*

The answer was also clearly drafted with an eye towards settlement, as *Chandler-Dunbar* asserted that the true value of the land was its proximity to the river. The power company called the islands and riverbank land "of no value," except for "use for hydraulic power and for mill sites whereon to use such power." What was unique about this property was that it sat astride the main part of the St. Mary River falls. As the power company put it, the flow of water "is very large and capable of furnishing on said fall a **very large and valuable water power**." (Emphasis added.) Further, the power company alleged that its "water power plant," built during 1887-88 on the property along the banks of the river, had cost $50,000. And over the years, improvements to the water power plant had been made at the expense of another $150,000.

The Circuit Court Quiet Title Case

In 1903, there was only one federal judge in the Western District of Michigan, and the government's lawsuit would appear on his docket. The lone federal judge was George P. Wanty, a lifelong resident of Michigan. He was born in Ann Arbor, Michigan on March 12, 1856. Graduating from the University of Michigan Law School in 1878, he established his law practice in Grand Rapids, Michigan. Attorney Wanty married Emma Nichols on June 22, 1886. Emma Nichols appears to have been one of the first female medical doctors to practice in Grand Rapids. In 1894, George Wanty was elected president of the Michigan State Bar. Then, in 1900, he was appointed by President William McKinley to serve as a federal judge in western Michigan. He remained a federal judge until his untimely death in London, England on July 9, 1906, from an abdominal hemorrhage. Newspaper accounts indicate that Judge Wanty had been in ill health for some time, and that his doctors had advised him that an overseas trip might improve his health.



Photograph of Supreme Court Justice Horace H. Lurton, who authored the final Chandler-Dunbar *opinion. Justice Lurton had previously served on the Sixth Circuit Court of Appeals.*

The *Chandler-Dunbar* case presented two interesting questions to Judge Wanty: 1) Who had the better claim to the land adjacent to the St. Mary River? and 2) Was it proper for the United States government to litigate a case with the assistance of a private lawyer who had a financial interest in the public litigation? Judge Wanty ruled that the involvement of attorney Duane E. Fox was not inappropriate, and allowed the case to proceed to its merits.[27] On the merits of the case, Judge Wanty ruled that William Chandler's ownership of the land was legally secure. In light of the many levels of hearing and review prior to granting the Chandler patent, the court rejected the United States' claim that the land grant had been made in error. In due course, the United States appealed Judge Wanty's rulings.

The Appeal of the Quiet Title Case

United States v. Chandler-Dunbar Water Power Company, **152 F. 25 (6th Cir. 1907)**

On March 2, 1907, the Sixth Circuit Court of Appeals ruled on the government's appeal from the late Judge Wanty's rulings. The opinion was written by Judge Severens. Henry F. Severens was a native of the state of Vermont who in 1860 moved to Michigan, where in his first job he served as the prosecuting attorney for St. Joseph County. After Severens unsuccessfully ran for various other public offices, President Grover H. Cleveland appointed him in 1886 as only the second federal judge to serve in the Western District of Michigan. On March 16, 1900, President William McKinley appointed him to the Sixth Circuit Court of Appeals.

Judge Severens made short work of the "conflict of interest" issue, stating, "If the object of the private party and that of the United States are one and the same, there would seem to be no sound objection." 152 F. at 28. Turning then to the land dispute, Judge Severens rejected the government's claim of land office error. In his view, errors by the land office were inevitable. The

public's interest in buying and selling real estate rested on an assumption that title was reliable. Thus, when errors occurred, if they were not quickly remedied, the government's rights expired and the buying public acquired good and sound title to real estate. Since one arm of the federal government had granted William Chandler title to the land, another arm of the government should not be allowed to renege on that promise almost 20 years later.[28] In short, William Chandler's title to the land was legally valid. Finally, Judge Severens observed that the government was held to act with dignity and character. In attempting to take William Chandler's property without any payment, Judge Severens said that the federal government was perpetrating a wrong upon a citizen, "which it would promptly condemn if practiced" by one citizen upon another. 152 F. at 41. Despite this second setback, the United States sought an appeal to the highest court in the land.

The First United States Supreme Court Case

United States v. Chandler-Dunbar Water Power Company, **209 U.S. 447 (1908)**

On April 20, 1908, in a terse opinion, the Supreme Court upheld the rulings by Michigan's Judge Severens and the late Judge Wanty. Writing for the Supreme Court, Justice Oliver Wendell Holmes, Jr.[29] held that the United States had granted the land patent to William Chandler and could not now disown that promise. The only remaining issue was the argument by the United States that while Chandler could claim the riverbank, he had no legal right to the islands adjacent to his property. Once again, the Supreme Court disagreed with the government attorneys. This was, in the Court's view, a matter of state law. Under Michigan law, the owner of river property owned the bed of the river, and any islands in that space, up to the midpoint of the stream. Thus, William Chandler was the lawful owner of the banks of the contested portion of the St. Mary River and the islands within his boundaries.

For those unfamiliar with the workings of the federal government, you will be forgiven for thinking that the ruling by the Supreme Court was the end of the story. However, the fundamental problem of bringing enormous quantities of essential raw materials down from the Upper Peninsula remained. Foreclosed in one direction, the United States government took up its second option. If the government could not take William Chandler's property without payment, it could take his property by condemnation and with payment. It was on this basis that the United States returned to the Michigan federal trial court a second time, almost seven years after starting the original litigation.

The Circuit Court Condemnation Case

The power of condemnation is the government's power to take private property for an overall public good. It is a recognition that sometimes the interest of the many must outweigh the interest of the few or the one. In this regard, the United States was now pursuing a case where the law was strongly on its side. And, as for William Chandler, he certainly knew that he was going to lose his hydroelectric power plant and land.[30] The question remaining for the court was: how much were this new canal and locks site going to cost the taxpayers?

The condemnation hearing commenced on April 25, 1910, before the newly appointed Judge Arthur C. Denison, of the Western District of Michigan. Judge Denison was a lifelong resident of Michigan, having been born in Grand Rapids in 1861. A graduate of the University of Michigan law school, he became a member of the State Bar in 1885. In 1906, he served as president of the State Bar of Michigan. In January 1910, he was appointed United States District Court judge for the Western District of Michigan, replacing Judge Loyal Knappen, who had been named to the Sixth Circuit Court of Appeals. Judge Denison served less than two years on the district court bench, before he was elevated to the Sixth Circuit Court of Appeals in October 1911.[31]

With both parties waiving a jury trial, it was up to Judge Denison to make the factual findings in the case. After hearing the witnesses and reviewing the documents, Judge Denison awarded $652,312 in damages to the Chandler-Dunbar Water Power Company, with $550,000 representing the loss of "raw water power," and the remainder of the money representing the value of the admittedly "worthless" real estate, plus improvements. Once again, the government had received an

unpleasant surprise in its litigation. The granting of monetary payment for the intangible water rights was a controversial and relatively new concept in American jurisprudence. This was a ruling certain to generate one more appeal, and the United States did seek an appeal. This time, the appeal was directly from the trial judge's ruling to the United States Supreme Court.

The Supreme Court Case

United States v. Chandler-Dunbar Water Power Company, **229 U.S. 53 (1913)**

The Supreme Court used this case to establish a new principle in the area of riparian law. It was already well established that the federal government retained absolute authority over navigable rivers.[32] Such rivers were considered essential to the commerce of the nation and therefore fell within the authority of the United States Congress. However, it was a question of first impression whether a landowner who had placed improvements upon his land and the bed of a river, which gave rise to a valuable commodity (hydroelectrical power), was entitled to compensation in a federal condemnation proceeding.

The Supreme Court affirmed the well-known rule of law that the owner of land abutting a river (referred to as upland), also holds title to the bed of the river "to the middle thread of the stream." Yet, the great court noted that a landowner on a navigable stream cannot have "ownership" of the river itself. The Supreme Court described private ownership of a navigable river as "inconceivable." Instead, riparian owners along a navigable river have lesser rights of "use and enjoyment," such as the right to install docks and piers in shallow water.

The critical argument in the case was whether the power companies could assert a "use and enjoyment right" to harness the inherent water power of the river. Many of the facts in the case favored the position of the power companies. First, the United States government had acquiesced in the construction of hydroelectric dams along the length of the St. Mary River. Second, the power companies had constructed considerable facilities along the river at private expense. Third, the power companies had received income from the sale of hydroelectric power. By its legislation, Congress was threatening to end this valuable source of income. This argument eventually led District Judge Denison to award the Chandler-Dunbar Company a payment of $550,000 (which was far short of the $3,450,000 sought) for the loss of the right to harness the St. Mary River's inherent water power.

In the end, the Supreme Court, in an opinion written by Justice Horace H. Lurton,[33] unanimously sided with the public's interest in commerce and navigation. While it was undisputed that the power companies would be reimbursed for any real estate taken (the so-called uplands), the inherent water power's value was not to be so easily captured:

> ...the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland. The Government had dominion over the water power of the rapids and falls, and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use. These additional values represent, therefore, no actual loss and there would be no justice in paying for a loss suffered by no one in fact. 'The requirement of the Fifth Amendment is satisfied when the owner is paid for what is taken from him.' The question is what has the owner lost, and not what has the taker gained. 229 U.S. at 76.[34]

The holding in *United States v. Chandler-Dunbar* is still good law and has been cited both by the Supreme Court and lower courts on many occasions. See *Boone v. United States*, 944 F.2d 1489,1501 (9th Cir. 1991).

Post Script

William Chandler, and his hydroelectrical power company, survived the disappointing trip to the Supreme Court. While he did not actually receive the full monetary damages awarded by Judge Arthur C. Denison, the company Chandler founded continues to supply hydroelectric power to the Sault Ste. Marie area even to this day. As for Judge Denison, it is likely that he never forgot the *Chandler-Dunbar* litigation. After all, it appears that it was his only district court case that was appealed to the United States Supreme Court, and it ended with his award of damages being overturned by the high court. I suspect that he took comfort in the fact that his brief two-year stint on the district court

bench in the Western District of Michigan was followed by 20 years of service on the Sixth Circuit Court of Appeals. Judge Denison must also have taken comfort in the fact that no litigant ever again convinced the United States Supreme Court to reverse one of his rulings, despite authoring 80 published opinions.

One might ask, were the results worth the trouble of litigation? As for the Sault Ste. Marie canal and locks, even after 100 years of operation, they continue to play a vital role in the nation's commercial transportation system. The Native Americans, who lost ownership of the Bahweting, did not simply disappear into the woods. The Western District of Michigan is home to the largest group of recognized Indian nations on the eastern side of the Mississippi River. With the advent of casino gambling, the Native American tribes have seen a resurgence in their tribal memberships and their economic power. Finally, the Chandler-Dunbar case was not the last time that the United States government invoked the power of land condemnation to further a national priority. In the 1970s, the federal courts of the Western District of Michigan presided over the condemnation of approximately 60,000 acres of land which became the Sleeping Bear Dunes National Lakeshore. That is a story for another day.

Endnotes

1 I am indebted and owe a recognition of thanks to the United States Attorney's Office librarian, June VanWingen, and the archivist for the Historical Society and resident librarian in Grand Rapids for the Sixth Circuit Court of Appeals, Joan Byerly, both of whom obtained materials for this article. My colleagues Don Daniels and Jeff Davis provided insightful comments and editing suggestions.

2 The Chippewa word for the "falls" at the St. Mary River.

3 Today the area is known as Sault Ste. Marie, Michigan.

4 One witness in the trial stated that he visited the Bahweting in 1846, and recalled seeing "the largest body of Indians I ever saw." Witness William P. Spaulding, trial transcript at 232. When asked about the Indians' reaction to the 1852 survey of the Bahweting, a witness stated, "I know the Indians didn't like it..." Trial transcript at 322. The Indians continued to fish the Bahweting at the time of the federal trial. Witness John G. Stradley, trial transcript at 241.

5 In 1903, the federal trial courts were divided into both district and circuit courts. Today, the federal trial courts are known as district courts; the term "circuit courts" is used exclusively to describe the federal courts of appeal.

6 This strip of land had been a natural portage point "from time immemorial," according to the government's complaint. The first travelers would have had to either ride the rapids or manually portage around the rapids. This was followed by a human powered tramway and then a wooden canal and locks system.

7 The government's complaint does not discuss the basis on which the governments of France and Great Britain acquired title to the land from the Native Americans. The Ottawa and Chippewa Indian nations were not parties to the instant lawsuit.

8 After acquiring the Northwest Territory, the United States was unable to accurately survey the land for 60 years. It was not until 1847 when Congress established the "Lake Superior Land District" that citizens could begin to legally acquire title to land in the Upper Peninsula of Michigan. See 9 United States Statutes at Large 146.

9 This treaty is set out at 7 United States Statutes at Large 206.

10 This treaty is set out at 7 United States Statutes at Large 491.

11 This treaty is set out at 11 United States Statutes at Large 621. "It appears that what the treaty dissolved was an artificial amalgam of the Ottawas and the Chippewas, not the Chippewas themselves." *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F.Supp. 157, 159 (D.D.C. 1980), citing *United States v. State of Michigan*, 471 F.Supp. 192, 200 (W.D. Mich. 1979) (opinion by Judge Noel P. Fox). The United States government has officially recognized both the Chippewa and Ottawa tribes located in the Upper Peninsula of Michigan.

12 See 9 United States Statutes at Large 146.

13 For an example of litigation concerning French

land grants, see the case of *United States v. Repentigny*, 72 U.S. 211 (1866), in which United States Supreme Court rejected a claim to enforce French land grants in Michigan.

14 See 9 United States Statutes at Large 469. The survey of Sault Ste. Marie, Michigan was conducted by Thomas Whelpley, a deputy surveyor for the United States. A copy of Surveyor Whelpley's report is maintained in the Regional Archives. For those interested in genealogy, it is an excellent source of names of persons residing in Sault Ste. Marie, Michigan in the early 1850s.

15 The complaint also details how an 1852 congressional act allowed the State of Michigan to construct the first canal and locks on the St. Mary River at a location within the Fort Brady reservation. See 10 United States Statutes at Large 35. It was on March 3, 1881, that the State of Michigan returned the Sault Ste. Marie locks and surrounding land to the United States government. See 21 United States Statutes at Large 189.

16 In 1889, the Canadian government built a canal and locks on its side of the international boundary. This was prompted in part by a dispute with the United States government dating back to 1870. In that year, American officials refused to allow the "Chicora," a former Confederate blockade runner, to use the Sault Ste. Marie canal and locks.

17 William Chandler was also the driving force behind the dredging and engineering, which made possible the Michigan Inland Waterway, a 45-mile water route running from Pickerel Lake out to Lake Huron at Cheboygan, Michigan. The Michigan Inland Waterway is still operational today.

18 In the nineteenth century, it was not uncommon for Congress to use grants of land to recognize services provided or as payment for debts incurred by the United States government. The recipient was given a "scrip" which allowed the holder to obtain title to unreserved public land. See *Bronken v. Morton*, 473 F.2d 790, 792 (9th Cir. 1973). As for the Porterfield scrip, it arose from a 6,000 acre land grant made by the Virginia legislature, to recognize the sacrifices made by Revolutionary War Colonel Charles Porterfield. The Porterfield land grants became tied up in litigation with land grants made to Meriwether L. Clark (as in the Lewis and Clark Expedition). See *Kinney v. Clark*, 43 U.S. 76 (1844). The Sixth Circuit Court of Appeals ruled that the Clark land grants were superior in time to the Porterfield land grants, and the Supreme Court affirmed that ruling. It appears that Congress felt that the ruling in the *Kinney v. Clark* case worked a hardship on the descendants of Colonel Charles Porterfield. On August 11, 1860, Congress passed an act that granted 6,133 acres worth of land patents, i.e. "scrip," to the descendants of Colonel Porterfield. See 12 Statutes at Large 836. Some of this Porterfield scrip eventually came into the possession of William Chandler, and he made a claim for the land along the banks of the St. Mary River.

19 William Chandler was nothing if not tenacious in defending his property interests. In 1896, the United States Supreme Court ruled that Chandler was the true property owner of the land in question. See *Spalding v. Chandler*, 160 U.S. 394 (1896). The plaintiff in the case, William P. Spalding, had filed suit in the Michigan state courts seeking a judicial declaration that he had the better title to the disputed land. The Michigan Supreme Court ruled for William Chandler and the United States Supreme Court affirmed that ruling.

20 Inventors such as Thomas Edison (the incandescent light bulb) and Robert Westinghouse (the "dynamo" generator) were making the use of electrical power practical for industrial and residential uses by the 1880s. The author grew up on the banks of a river in Michigan and can recall visiting the local hydroelectric dam and generator with his father, who was the supervisor of power and maintenance for a paper mill near Kalamazoo, Michigan.

21 Francis H. Clergue was born in Bangor, Maine. He pursued a law degree and was admitted to the State of Maine Bar in 1878; however, much of his business career was geographically centered in Ontario, Canada, where he founded Algoma Steel and numerous other enterprises. He has been recognized by the Canadian government as a "national historic figure." Before moving to Ontario, Canada, Clergue had proposed to build a railroad across

Persia (modern day Iran), a project that never quite materialized.

22 For a comparison, consider the world famous Panama Canal, which cost $375 million, ran 41 miles in length, took 11 years to complete (the American construction), and only opened in 1914.

23 Fortunately for the canal owners, when it came time to apply for a permit to operate the canal, which involved diversion of Great Lakes water, the approval was granted by U.S. Secretary of War Russell Alger, a former Michigan governor. In his earlier years, Mr. Alger had begun his law practice in Grand Rapids, Michigan before enlisting in the Union Army. One assumes that a "Michigan" man would have been inclined to assist the economic development of his home state. Mr. Alger ended his brief term as secretary of war on August 1, 1899.

24 According to Department of Justice records, Mr. Covell's salary as the United States attorney was $3,500 annually. He had one assistant United States attorney, a Mr. Dwight Goss, who made $1,600 per year. By way of comparison, the United States district court judge for the Western District of Michigan, Henry F. Severens, was paid $5,000 annually. The circuit judges for the United States Courts of Appeal were paid $6,000 annually.

25 Later in the case, the defendant was assisted by attorney John H. Goff and attorney Moses Hooper.

Mr. Eldredge was a resident of Marquette, Michigan. He was active in Democratic party politics, serving on the Michigan National Democratic State Central Committee in 1899. Records establish that he appeared before the Michigan Supreme Court on 19 cases from 1888 to 1911. In the majority of those cases, he defended the interests of one of the Upper Peninsula railroad companies.

Mr. Goff was a resident of Sault Ste. Marie, Michigan at the time of the lawsuits concerning the Chandler-Dunbar company. He had a number of cases before the Michigan Supreme Court. I believe he may have died in the Battle Creek area in 1905.

Mr. Hooper was a resident of Oshkosh, Wisconsin, and, as of 1910, was president of the Osh Kosh Law Library Association. He was born in 1835 and died in 1932. Mr. Hooper had some expertise in "water power" cases, having appeared before the United States Supreme Court in the case *Green Bay & Mississippi Canal Company v. Patten Paper Company*, 172 U.S. 58 (1898).

26 It was on this date that the Secretary of the Department of the Interior approved the land patent for William Chandler involving the land in question.

27 The evidentiary problems facing trial attorneys have not changed in 100 years. At trial, the defendant attempted to introduce a set of "notes" allegedly made by government surveyor Whelpley. To authenticate the "notes," he called a bank officer, Ryn Vant Hoff, who testified that he frequently compared handwriting, had compared the questioned writing (the "notes") to known writing and offered an opinion that Whelpley authored the "notes." See trial transcript at pages 463-465.

28 Since they were not party to the litigation, no one asserted any rights on behalf of the Native Americans who had received a promise from the United States of a "perpetual right" to fish and camp along the Bahweting. With regard to Native Americans, Judge Severens' opinion simply observed, "As the settlement of that region by the whites progressed, the Indians receded into remoter regions, and, while there were 40 wigwams at the time of the treaty, but 6 remained. Besides, the land was unfit for cultivation. And, it was doubtless expected that before the canal would be built, the reservation would be extinguished, and this was what happened." 152 F. at 31.

29 Justice Holmes was a former lieutenant in the Union Army, a former professor at Harvard Law School, and a former chief justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

30 As later events demonstrated, the land condemnation case did not destroy William Chandler. He and his hydroelectric energy plant relocated on the St. Mary River, and through his successors continue to provide electrical service to the Sault Ste. Marie area even today.

31 Unlike his short stay on the district court bench, Judge Denison served for 20 years on the Sixth Circuit Court of Appeals. Retiring at the age of 70, Judge Denison returned to the private practice of law for an additional 10 years.

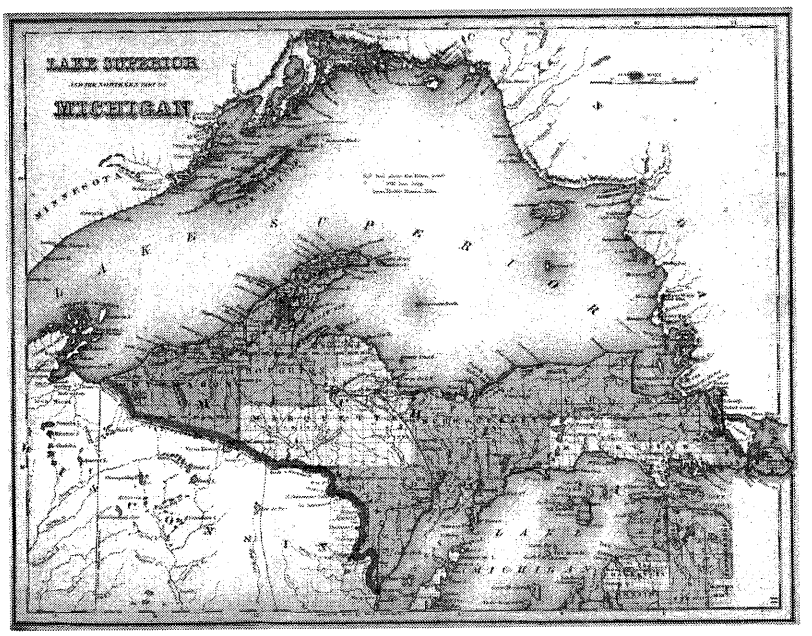
32 The Historical Society's journal, the *Stereoscope*, published an article by attorney Michael Puerner concerning the Supreme Court case known as *The Daniel Ball*, 10 Wall. 557, 19 L.Ed. 999 (1871), in Volume 2, Issue 1, which discussed the principles of ownership, access, and control of navigable rivers.

33 During what most certainly was a varied career, Horace Lurton fought for the Confederacy during the Civil War. In 1886, he became a justice on the Tennessee Supreme Court. In 1893, he was appointed to the Sixth Circuit Court of Appeals, where he served with Judge William Howard Taft. While serving on the Sixth Circuit Court of Appeals, Judge Lurton also served as dean of the Vanderbilt Law School for seven years. When William H. Taft became president of the United States in 1909, his first appointment to the United States Supreme Court was Horace H. Lurton, his former colleague on the Sixth Circuit Court of Appeals. In light of current court judicial appointment practices, it is interesting to note that the whole appointment process took a total of eight days: nominated on December 13, he was confirmed by the Senate on December 20.

According to Sixth Circuit protocol, each new judge is recorded as having held a particular "seat" upon being assigned to the court. Justice Lurton was recorded as having held the "first seat" in the Sixth Circuit succession chart. Over time, the appointees to this seat were predominantly judges who had served in the Western District of Michigan, including Loyal E. Knappan, W. Wallace Kent, Albert J. Engel, Jr., and currently, Judge David W. McKeague.

34 Justice Lurton also authored the Supreme Court's opinion in a companion case decided on the same day as the *Chandler-Dunbar* case. See *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 33 S.Ct. 679 (1913). In *Lewis*, the plaintiffs operated an oyster farm in the Great South Bay, Suffolk County, New York. The United States government ordered a dredging company to create a ship channel across the bay, which disrupted the oyster farm. As in the Michigan case, the Supreme Court held that the oyster farms had a legal right to operate their business; however, their rights of ownership did not include a right to reimbursement from consequential damages caused by improvements to navigation.

35 For an excellent review of the legislative process that led to the creation of the Sleeping Bear Dunes National Lakeshore, please see *Sixties Sandstorm*, Brian C. Kalt, Michigan State University Press, 2001. Professor Kalt is faculty member at Michigan State University College of Law.



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