

OAK RIDGE ROAD

LENGTH: 2,606' (.5 MILES)

WIDTH: ~~20~~ 50

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July 16, 2009

William R. Shane, Town Manager
Town of Cumberland
290 Tuttle Road
Cumberland, Maine 04021

Re: Knights Pond

Dear Bill:

We did check at the Registry of Deeds to see if the original decree referenced in the one from 1969 that you forwarded me was recorded and it was not. However, we did find the underlying easement between the Burnells and the Knights and I enclose it herewith.

Please let me know if you need anything further in this regard.

Very truly yours,


Kenneth M. Cole III

KMC/lts
Enclosure

~ Over 50 Years of Service ~

Know all Men by these Presents, That

we, Ripley F. Burnell and Elizabeth S. Burnell, of Cumberland in the County of Cumberland and State of Maine in consideration of one dollar and other valuable consideration paid by

Richard P. Knight of Falmouth in said County of Cumberland

the receipt whereof we do hereby acknowledge, do hereby remise, release, bargain, sell and convey, and forever quit-claim unto the said

Richard P. Knight and his heirs and assigns forever, the perpetual right and easement to flow a portion of our land located northeasterly of Greely Road Extension, so called, in the Town of Cumberland.

Said flowage rights are limited to the present height and area now flooded by the water impounded by the dam constructed by the Grantee on his land lying north-westerly of our land. The limits of said flowage are marked by iron pipes painted yellow and set at the waters edge on the property line on the northerly and south-erly sides of said flowage and by two iron pipes painted yellow set at the waters edge on the easterly side of said flowage.

Also hereby granting to the Grantee the right and easement to enter on other land of the Grantors adjacent to the flooded area for the sole purpose of damming any watercourses that may develop, natural or otherwise, draining the water of said flowage in any other manner than through the spillways of Grantees dam.

The Grantee may, and shall remove the killed growth and brush from the flooded area.

The Grantors waive any claims for damages that may arise by reason of the temporary escape of the waters of said flowage from natural causes, or from the spring freshet, and waive any claims for damages from wildlife that may be attracted by said flowage.

The premises flowed are a portion of the same conveyed to Ripley F. Burnell by Fred E. Burnell, et al. by deed dated October 26, 1943 and recorded in Cumberland County Registry of Deeds in Book 1742 Page 21, and by deed of Minnie M. Burnell, Guardian of Kathleen C. Burnell et al, dated February 12, 1944 and recorded in said Registry of Deeds in Book 1742 Page 20, and are a part of the same conveyed to the Grantors as joint tenants by Harry P. Sweetser by deed dated November 20, 1951 and recorded in Book 2055 Page 471.

To Have and to Hold the same, together with all the privileges and appurtenances thereunto belonging, to the said

Richard P. Knight, his

heirs and assigns forever. And we do covenant with the said Grantee his heirs and assigns, that we will warrant and forever defend the premises to the said Grantee his heirs and assigns forever, against the lawful claims and demands of all persons claiming by, through, or under us.

In Witness Whereof, we, the said Ripley F. Burnell and Elizabeth S. Burnell, being husband and wife,

joining in this deed as Grantors, and relinquishing and conveying all rights by descent and all other rights in the above described premises, have hereunto set our hands and seals this SIXTY-FIVE day of July in the year of our Lord one thousand nine hundred and sixty-five.

Signed, Sealed and Delivered in presence of

Robert J. Cram
to hold

Ripley F. Burnell
Elizabeth S. Burnell

State of Maine, Cumberland ss.

Personally appeared the above named

Ripley F. Burnell and Elizabeth S. Burnell

and acknowledged the foregoing instrument to be their free act and deed.

Before me,

Robert J. Cram

NOTARY PUBLIC
JUSTICE OF THE PEACE

STATE OF MAINE, CUMBERLAND COUNTY, SS.

Received JUL 21 1965

in BOOK 2909

PAGE 365

Attest:

Samuel R. Taylor

REGISTRY OF DEEDS

at 11 o'clock 25 M., and recorded

Register.

Burnell
&

to

Knight

-
Q C

These cases were consolidated for trial by agreement of counsel. The case of Loon E. Burnell v. Richard P. Knight was heard with the exception of that portion of the amended complaint which concerns the prayer for reformation of a deed from Leon E. Burnell to Richard P. Knight, this issue to be tried at some later date.

Ripley F. Burnell and Elizabeth S. Burnell
v. Richard P. Knight,
Docket No. 68-839

The issue is whether or not the defendant violated the conditions of a deed of easement executed by the plaintiffs on July 16, 1965 by exceeding the flowage rights granted in the deed.

The defendant filed answer and counterclaim. The contention presented in the counterclaim is, in substance, that the plaintiffs deliberately, willfully and maliciously caused water to escape from defendant's pond by removing large amounts of gravel from the area on their land adjacent to defendant's pond, there by causing a drainage and seepage which may result in a lowering of the water level of the pond, making it impossible for the pond to function to accomplish the purposes of its creation. The pertinent conditions of the deed of easement are couched in the following language:

"Said flowage rights are limited to the present height and area now flooded by the water impounded by the dam constructed by the Grantee on his land lying northwesterly of our land. The limits of said flowage are marked by iron pipes painted yellow and set at the waters edge on the property line on the northerly and southerly sides of said flowage and by two iron pipes painted yellow set at the waters edge on the easterly side of said flowage."

"Also hereby granting to the Grantee the right and easement to enter on the land of the Grantors adjacent to the flooded area for the sole purposes of damming any watercourses that may develop, natural or otherwise draining the water of said flowage in any other manner than through the spillways of Grantee dam."

"The Grantee may, and shall remove the killed growth and brush from the flooded area."

"The Grantors waive any claims for damages that may arise by reason of the temporary escape of the waters of said flowage from natural causes, or from the"

spring freshet, and waive any claims for damages from wildlife that may be attracted by said flowage."

Previous to July 16, 1965 the plaintiffs had instituted suit against this defendant for damages claimed to have been caused by defendant's pond overflowing property of the plaintiffs. On July 16, 1965 a settlement was made whereby the defendant paid the plaintiffs the sum of \$1300.00 for a release of all claims and the plaintiffs executed a deed granting the defendant a perpetual right to flow a portion of their land on certain terms and conditions. The deed set the limits of flowage as marked by iron pipes which were placed at the edge of the pond by the parties. The defendant was granted the right to enter on the land of the grantors adjacent to the flooded area for the sole purpose of damming any watercourses that might develop, naturally or otherwise, and for draining the water of said flowage in any other manner than through the spill ways of grantee's dam and , further, the grantors waived any claims for damages arising from temporary escape of waters from natural causes or from a spring freshet and for claims for damages from wildlife that may be attracted by the flowage. Both plaintiffs and defendant claim damages.

There was much testimony and evidence in the case based on the opinions of experts as to the effect of the water in the pond on that portion of the area adjacent to plaintiffs' gravel pit. The experts in their opinions did not agree as to what effect the pressure of the pond water would have, or is now having, on that portion of land which contains the pond between the gravel pit and the pond.

There appears to be some increase in the volume of water in the pond since the execution of the easement of flowage on July 16, 1965. The increase was gradual from 1966 to 1969 when it reached, in May of 1969, a height approximating 2 feet, 4 1/2 inches from the bottom of one of the pipes placed in the ground by the parties in 1965. Much of the increase was caused by beaver dams constructed in two or three places on

the edge of the pond which affected the height of the water to any appreciable degree.

Contention was made by the plaintiffs that the increase was caused by the defendant raising the height of the sluiceways in his dam.

I find that the beaver dams became a major factor in raising the height of the water. The testimony convinced me that the presence of the beavers in the pond was not from a deliberate act on the part of the defendant but they are there as a result of a normal and natural migration of the beavers.

The deed of easement contains the provision:

"The grantors----waive any claims for damages from wildlife that may be attracted by said flowage."

According to the allegations in the complaint, the plaintiffs have the burden of proving that any additional rise in the flowage beyond the pipes since July of 1965 was caused by the willful and malicious acts of the defendant and not brought about by the conditions which were waived in grantors' deed, such as spring freshets and activities of wildlife. There is some evidence that the beaver dams caused an increase in the flowage but to what extent is questionable due to the problem of proof.

I find no substantial evidence of probative force that the defendant willfully and maliciously acted in such manner that he was in violation of the terms of the flowage easement deed. In view of this finding of non-liability on the part of the defendant, it becomes unnecessary for the court to consider damages.

In considering the counterclaim of the defendant, I find that he is entitled to no damages. The plaintiffs are perpetually enjoined from removing gravel or, in any other manner, destroying the natural embankment of defendant's pond within a distance of 100 feet from the edge of the pond adjacent to plaintiffs' gravel pit.

Leon E. Burnell v. Richard P. Knight
Superior Court Civil Action 68-838

This case was tried under a consolidation agreement along with Burnell, et al v. Knight, Docket No. 68-839 on the issue of damage to property of Leon Burnell by defendant Knight by the overflow of the Knight pond onto the Leon Burnell property. There was no flowage easement involved in this case. I find there was some overflowing of the Knight Pond on the Leon Burnell as a matter of fact and that Leon Burnell is entitled to the sum of \$78.67 damages.

Judgements in each case to be entered in accordance with the respective findings.

June 23, 1969.

Walter M. Tapley, Jr.

Justice, Supreme Judicial Court.