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*May 4, 5.
*Nov. 2.

THE ATTORNEY-GENERAL FOR CANADA AND THE VANCOUVER HARBOUR COMMISSIONERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE RITCHIE CONTRACTING AND SUPPLY COMPANY AND THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Constitutional law—Canadian waters—Sea coasts—Property in foreshores—Harbours—Havens—Roadsteads—Ownership of beds—Construction of statute—"B.N.A. Act, 1867," ss. 108, 109.

The terms "public harbours" in item 2 of the third schedule of the "British North America Act, 1867," is not intended to describe or include portions of the sea coast of Canada having merely a natural conformation which may render them susceptible of use as harbours for shipping; such potential harbours or havens of refuge are not property of the class transferred to the Dominion of Canada by section 108 of the "British North America Act, 1867." The term used refers only to public harbours existing as such at the time when the provinces became part of the Dominion of Canada.

Per Davies, Idington, Anglin and Brodeur JJ.—As that part of Burrard Inlet, on the coast of British Columbia, known as "English Bay," was not in use as a harbour at the time of the admission of British Columbia into the Dominion of Canada, in

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

NOTE.—Leave to appeal to the Privy Council was granted, 20th December, 1915.

1871, it did not become the property of the Dominion as a "public harbour" within the meaning of section 108 and the third schedule of the "British North America Act, 1867"; consequently, the Province of British Columbia retained the property in the bed and foreshore thereof and could validly grant the right of removing sand therefrom.

Per Davies, Idington and Anglin JJ.—Inasmuch as the proclamation, by the Dominion Government, on the 3rd of December, 1912, and the Dominion statute, chapter 54 of 3 & 4 Geo. V., deal merely with the establishment of the port and the incorporation of the Vancouver Harbour Commissioners, they had not the effect of transferring English Bay from the control of the Provincial Government to that of the Dominion Government nor of giving to the Dominion Government any right of property in the bed or foreshore of that bay.

Per Duff J.—The transfer effected by section 108 of the "British North America Act, 1867," of the subjects described in the third schedule of that Act was a transfer of property operative upon the passing of the Act and such subjects were necessarily ascertainable at the passing of the Act by the application of the descriptions to the facts then existing, and, consequently, the question of "public harbour" or no "public harbour" must be determined according to the circumstances as they were at the date of the Union.

Per Duff J.—The term "public harbour" implies public user as a harbour for commercial purposes as distinguished from purposes of navigation simply, or some recognition, formal or otherwise, of the locality in dispute by the proper public authority as a harbour for such purposes, but the question of "public harbour" or no "public harbour" is a question of fact depending largely upon the particular circumstances.

Per Duff J.—If the question of "public harbour" or no "public harbour" were to be decided according to the circumstances existing when the dispute arose, English Bay must be held to be now a "public harbour" within the meaning of item 2 of the third schedule of the "British North America Act, 1867."

Judgment appealed from (20 B.C. Rep. 333) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Macdonald J. in the Supreme Court of British Columbia (2), by which the action was dismissed with costs.

(1) 20 B.C. Rep. 333. (2) 20 B.C. Rep. at p. 334.

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The action was brought in the Supreme Court of British Columbia for the purposes of preventing the dredging out and removal of "Spanish Bank," one of the natural confines of the harbour of English Bay, on the sea coast of British Columbia; of obtaining a judicial declaration that the bed and foreshore of "English Bay" (inside and east of a straight line drawn from the west tangent of Point Grey to Point Atkinson Light House; (see Proclamation of 3rd Dec., 1912, Can. Gaz., vol. XLVI., p. 2077)) are the property of the Crown in the right of the Dominion of Canada; for an injunction to restrain the defendants from trespassing upon the bed and foreshore of English Bay and removing sand, gravel or other material therefrom, and for damages.

At the trial before Macdonald J. the action was dismissed with costs and, on appeal, that judgment was affirmed by the judgment now appealed from.

Newcombe K.C., Deputy-Minister of Justice, for the appellants. British Columbia entered the Dominion of Canada under an Imperial order-in-council, dated the 16th day of May, 1871, called the "Terms of Union," and section 10 thereof provided that "the 'British North America Act, 1867,' should (except certain parts thereof) be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if British Columbia had been one of the provinces originally united by the said Act." By section 108 of the "B.N.A. Act" it is provided that the public works and property of each province, enumerated in the third schedule, shall be the property of Canada, and

that schedule begins as follows: "Provincial Public Works and Property to be the Property of Canada. (1) Canals with lands and water-power connected therewith. (2) Public harbours."

The Dominion of Canada claims that "English Bay" was a "public harbour" or part of a public harbour in May, 1871, and, being such, was included in the schedule above referred to, and that its bed and foreshore became and still are the property of the Crown in the right of the Dominion of Canada and not in the right of the Province of British Columbia. The Province of British Columbia disputes the right of the Dominion to interfere, and intervened, and was added, through its Attorney-General, as a party defendant.

The learned trial judge erred (1) in rejecting the evidence of reputation (*a*) as to such body of water being used as a harbour both before and after the Province of British Columbia entered the Union, (*b*) as to the said body of water being known, called, used and recognized as a public harbour by mariners; (2) in rejecting evidence as to the physical features of other well known and generally recognized harbours of the world to prove what constitutes a public harbour by way of comparison; (3) in finding that the facts existing in May, 1871, alone are to govern as to whether or not "English Bay" is a public harbour within the "British North America Act" and the "Terms of Union"; (4) in refusing to admit in evidence the "British Columbia Pilots" of the years 1888 and 1913, published by order of the Lords Commissioners of the Admiralty and portions thereof dealing with Vancouver Harbour, Burrard Inlet and anchor-

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age therein, and an authentic history entitled "British Columbia Coast Names, their Origin and History," published by order of the Minister of Marine and Fisheries of Canada; (5) in holding that the onus of proof rested upon the plaintiffs to shew that the land in question did not remain the property of the Province of British Columbia; (6) in not properly defining the meaning of the word "harbour" and in not properly defining the meaning of the words "public harbour"; (7) in not finding upon the evidence and law that the waters, bed of the sea and foreshore in question in this action are a public harbour or part of one within the meaning of the "British North America Act" and the "Terms of Union" and that the bed of the said harbour, as well as the foreshore thereof, is and has been since British Columbia became a part of Canada the property of the Crown in the right of the Dominion of Canada; and (8) in misdirecting himself in estimating the weight of the evidence of the witnesses for the plaintiffs in determining as to whether or not their evidence justified him in finding that the areas in question in this action constitute a harbour.

The Court of Appeal erred (1) in finding that the "Navigable Waters Protection Act," ch. 115, R.S.C., 1906, does not cover an interference with the bed or shore of the sea as the one complained of in this action; (2) in finding that the Dominion officers of the Crown have no authority to interfere with or invoke the assistance of the courts to enjoin the taking of sand in question; (3) in finding that the good anchorage relied upon by the plaintiff was not shewn to exist anywhere in the immediate vicinity of the "Spanish Bank"; (4) in finding that it was unnecessary to ex-

press an opinion concerning the appellants' alternative contention that not only those harbours which were public harbours at the time of the Union passed to the Dominion but those which afterwards became public harbours also passed—this was not only necessary but should have been found in favour of the appellants; (5) in finding that the width of the mouth of "English Bay," having regard to its area, prevents it falling within the definition of harbour; (6) in finding that the future adaptability and use "in the course of time" of the locus for harbour purposes should be considered as a test of whether it at present is in fact a harbour is erroneous and should not be followed; (7) in finding that the area in question has not become a public harbour since 1871; (8) in finding that "English Bay" was not one of the recognized harbours of the Colony of British Columbia; (9) in finding that "English Bay" is not part of Burrard Inlet which was afterwards called Vancouver Harbour; (10) in finding that the name "English Bay" is *primâ facie* evidence that it is not a harbour; (11) in finding that the onus is upon plaintiffs as to whether or not "English Bay" is to be included in the words "public harbour"; (12) in finding that the Province of British Columbia granted the right of removal of sand and gravel from the area in question; (13) in finding that only harbours in use by the public and recognized as such at the time of the Union were transferred to the Dominion.

Definitions of "public harbour" are to be found in vol. 5 of the Oxford Dictionary; Worcester's Dictionary; Wester's International Dictionary; Gould on Waters (2 ed.), p. xi.; Coulson and Forbes on Waters

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(3 ed.), p. 464; Farnham on Waters, p. 27; Cyc. vol. 21, p. 360. The following statutory definitions are referred to: 34 & 35 Vict., ch. 105, sec. 2; "Explosives Act, 1875" (Imp.), 38 & 39 Vict., ch. 17, sec. 108; "Shannon Act, 1885" (Imp.), 48 & 49 Vict., ch. 41, sec. 17; "Fisheries Regulation Act, 1888," 51 & 52 Vict., ch. 54, sec. 14 (Imp.); "Forged Transfer Act, 1891," 54 & 55 Vict., ch. 43, sec. 4(2) (Imp.)

Reference may also be made to *The Queen* v. *Hannam*(1), *per* Esher M.R., at p. 235; *Kennelly* v. *Dominion Coal Co.*(2), *per* Townshend J.; *Town of Huntington* v. *Lowndes*(3), *per* Lacombe J., at p. 629.

The evidence shews that the area in question was used as a harbour before the Union—ships anchored there for safety, and found shelter and anchorage; that it is a natural harbour and has been and now is used as a harbour and affords good anchorage and shelter for ships; that it is called and classed as a harbour in all old records containing matters of general geographical notoriety before the Union and, hence, was, within the minds and intentions of those who drafted the Act, a "harbour." See "Vancouver's Voyage of Discovery to the Pacific Ocean," at pages 248 and 249; "Vancouver Island Pilot, 1864" (published by the Lords Commissioners of the Admiralty), pages 244 and 245; "British Columbia Coast Names, their Origin and History" (by Captain George P. Walbran), published by order of the Minister of Marine and Fisheries of Canada for the Geographical Board of Canada, pages 478 and 507. Throughout the above records Burrard Inlet is called and classed as

(1) 2 Times L.R. 234. (2) 36 N.S. Rep. 495.
(3) 40 Fed. R. 625.

a harbour and "English Bay" is part of Burrard Inlet. The area in question is a natural harbour and all such, without exception, were intended to be transferred to the Dominion by the terms of Union. Vancouver Island, to the west, together with other islands, protect it admirably from the rough seas of the Pacific Ocean. The distance of 21 miles from Vancouver Island to Burrard Inlet is not sufficient for a heavy sea to develop.

"English Bay" is surrounded by land on three sides, and is only exposed to westerly winds to the extent of one point out of 32 points of the compass.

At no time since the Union, forty years ago, has the province declared or exercised any proprietary right or control over the body and foreshore of "English Bay" or in any way disputed the claims of the Dominion thereto until after the commencement of this action, though the Dominion Government had from time to time granted leases and quit claims of water lots and foreshore in "English Bay." Neither the public nor the defendants had the right to take away sand from "English Bay," be or be it not a public harbour. Coulson & Forbes on Waters (3 ed.), p. 62; *Hamilton* v. *Attorney-General*(1); *Musselburg Real Estate Co.* v. *Provost of Musselburg*(2); *Attorney-General* v. *Tomline*(3).

Reference is also made to *Holman* v. *Green*(4); Chitty on Prerogatives of the Crown, p. 307; *Fisheries Case*(5); *Attorney-General (Australia)* v. *Colonial Sugar Refinery*(6); *Attorney-General for British*

(1) 5 L.R. Ir. 555.
(2) [1905] A.C. 491.
(3) 14 Ch. D. 58.
(4) 6 Can. S.C.R. 707, at 711.
(5) [1898] A.C. 700.
(6) [1914] A.C. 237, at p. 253.

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Columbia v. *Attorney-General for Canada*(1); *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(2); *Fader* v. *Smith*(3); *Attorney-General for British Columbia* v. *Esquimalt and Nanaimo Railway Co.*(4); *Nash* v. *Newton*(5); *Lake Simcoe Ice and Cold Storage Co.* v. *McDonald*(6); *Rowe* v. *Smith* (7); *Nicholson* v. *Williams*(8); *Hudson* v. *Tabor* (9).

L. G. McPhillips K.C. and *J. A. Ritchie* for the respondents. The claim that the province has not and never had any right to authorize the removal of sand from the bed or foreshore, nor any interference therewith, as the waters were navigable waters of the sea, but was obliged to maintain the bed and foreshore in their natural state and prevent waste, in other words, to see that the duties of the Dominion Government in regard to navigable waters were carried out locally, is untenable and must be disregarded inasmuch as there is no remedy disclosed for its enforcement. Even if it were open to the plaintiffs to contend that the jurisdiction over navigation and shipping which is vested in the Dominion Government would entitle it to stop interference with the bed of the sea, although it was the actual property of the province, this claim must be dismissed for the reasons both that it was really dropped at the trial and that there was no evidence to support it.

(1) [1914] A.C. 153 at p. 174.
(2) [1906] A.C. 204.
(3) 18 N.S. Rep. 433.
(4) 7 B.C.R. 221, at pp. 240, 241.
(5) 30 N.B. Rep. 610, at pp. 620, 626.
(6) 29 O.R. 247; 26 Ont. App. R. 411; 31 Can. S.C.R. 130.
(7) 51 Conn. 266.
(8) L.R. 6 Q.B. 632, at p. 641.
(9) 2 Q.B.D. 290.

The right of the Dominion over navigation is only legislative and as no legislation has been passed enabling the Dominion to prohibit interference by other owners, with the soil of their lands when underneath navigable waters, the claim that the province must be enjoined from authorizing the removal of sand, cannot succeed. Even if special legislation were not necessary, the plaintiffs cannot succeed because no injury to navigation has been shewn. *Central Vermont Railway Co.* v. *Town of St. Johns*(1), at page 297; *In re Provincial Fisheries*(2), at page 575; *The Queen* v. *Fisher*(3); *The Queen* v. *St. John Gas Light Co.*(4), at page 346; *Lake Simcoe Ice and Cold Storage Co.* v. *McDonald*(5).

With regard to this being a public harbour, the question whether or not the Dominion has any right to interfere with the taking away of sand depends upon whether the point at which the sand was taken was the bed or foreshore of a public harbour, and was also used in some sense for harbour purposes prior to the Union. "English Bay" was not a harbour at the time of Union and, under the terms of the "British North America Act," no harbour became the property of the Dominion except such as were public harbours at the time of the Union. Even if "English Bay" were a harbour, there is absolutely no evidence that the bed or foreshore at the points in question were ever used for any harbour purposes. *The Fisheries Case*(6), at pages 711 and 712; *Attorney-General for*

(1) 14 Can. S.C.R. 288.
(2) 26 Can. S.C.R. 444.
(3) 2 Ex. C.R. 365.
(4) 4 Ex. C.R. 326.
(5) 29 O.R. 247; 26 Ont. App. R. 411; 31 Can. S.C.R. 130.
(6) [1898] A.C. 700.

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British Columbia v. *Canadian Pacific Railway Co.*(1), at the foot of page 209; *Pickels* v. *The King*(2), at p. 702; *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.*(3), at pages 415 and 422; *The Queen* v. *Hannam* (4); *Foreman* v. *Free Fisheries and Dredgers of Whitstable*(5); *The "Aurania" and the "Republic"*(6), at page 103.

A harbour must afford safe anchorage and shelter to vessels from all winds and at all times of the year, and it must also be provided with quays or wharves for the loading and unloading of goods. It does not include all that would be included in a port, which is a district defined for customs purposes, nor does it include a roadstead, which is a place of temporary anchorage for vessels waiting to enter the harbour. "English Bay" does not satisfy these requirements of the above definitions, as it is exposed to winds which have often caused tugs and scows to break adrift and go ashore, and logs to be lost from booms. The seas, in a westerly wind, get up to 12 and 14 feet, and "Spanish Bank," is no protection at high tide, and only a very limited one at low tide. There are no public wharves for loading and unloading goods, in fact, it is merely a roadstead, lying outside the Harbour of Vancouver. The Bay was certainly not used as a harbour prior to 1871; there were no settlers there then, and the sand was taken from a point outside the anchorage described by the plaintiff's witnesses.

No Dominion order-in-council, statute or proclama-

(1) [1906] A.C. 204.
(2) 7 D.L.R. 698.
(3) 26 Ont. App. R. 411.
(4) 2 Times L.R. 234.
(5) L.R. 4 H.L. 266.
(6) 29 Fed. R. 98.

tion subsequent to the Union can make this bay a "public harbour" under the "British North America Act." If it could, then any sheet of water of whatever nature could now be taken by the Dominion under the designation of a "public harbour." No order-in-council prior to the Union could have that effect. Even if it could, there is no evidence that there ever was such an order-in-council. We rely on the statement of the law on this point set out by McPhillips J.A., in his judgment in the court below.

THE CHIEF JUSTICE.—The substantial claim in this case is for a declaration that English Bay forms part of the Harbour of Vancouver and as such is the property of the Dominion of Canada under the terms of the "British North America Act, 1867." Section 108 of this statute provides that

> the public works and property of each province enumerated in the third schedule to this Act shall be the property of Canada.

I do not think it is necessary for the decision of the present case to refer to the other public works and property enumerated in this third schedule, although for certain purposes it might be desirable to make a comparison with the nature of the other public works and property so enumerated and passing to the Dominion of Canada.

The constitution of this country was established by the "British North America Act, 1867" (Haldane, in *Australia Case*). It is, comparatively speaking, a short statute and it is obvious that many matters with which it deals could only be provided for in general terms. It is the business of the courts, when occasion arises, to say what interpretation is to be put

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on any of its provisions so far as these govern the particular case. It is not the business of the court to expand or supplement the legislation.

The Judicial Committee of the Privy Council accordingly, in the *Fisheries Case*(1), declined to give any general definition of what constituted a "public harbour" within the meaning of the above provisions of the "British North America Act." At pages 711-712 of the judgment it was said:—

> Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question what falls within the description "public harbour." They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent at all events, upon the circumstances of each particular harbour what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green*(2), that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion.
>
> Their Lordships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it. (Fol. *British Columbia* v. *Canadian Pacific Railway Co.*(3), at p. 629.)

A large body of evidence has been taken and, at the argument before this court, a wealth of research was offered us in the form of dictionary definitions, descriptions of the principal harbours of the world and other interesting information.

(1) [1898] A.C. 700. (2) 6 Can. S.C.R. 707.

(3)

Into any of these considerations it is unnecessary for me to enter holding as I must do that English Bay is in no sense of the word a harbour; it is in my opinion wanting in every distinctive mark that would render it possible to describe it as such. It is, indeed, admitted that, except as a possible harbour in the future, it can now only be considered as an outer harbour or part of the Harbour of Vancouver.

It matters nothing, I think, that some one, in the year 1855, may have described this then scarcely explored part of the coast as suitable for a harbour, or that the Dominion Government should have proclaimed it as being a harbour or part of a harbour. What we have to do is to decide whether at the present time it is a harbour within the meaning of the "British North America Act" so that the property in it is vested in the Dominion Government. As I have said I cannot find anything present either of usage, works or requirements which would render it possible to describe this open bay as fulfilling any of the conditions essential to bring it within any definition or description of a harbour.

I do not desire to express any opinion on the questions which have been discussed during the hearing as to whether a harbour must necessarily have been such at the date of the Union or whether it is sufficient that it was then a potential harbour; or whether, though the property remained in the province at the Union, it could by subsequent events be divested and become the property of the Dominion. None of these questions, in my opinion, need to be answered for the decision of the present case.

There is one point calling for consideration. The

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statement of claim was by leave amended to include the claim put forward in paragraph 11 to the effect that whether English Bay be or be not a "public harbour," the defendants had no right to interfere with the bed of the foreshore thereof, the same being navigable waters of the sea.

This point, though pleaded was not relied on at the hearing in the courts below and does not appear to have been referred to in the argument; no attempt to deal with it is made in the appellant's factum. The practice of raising a substantial claim for the first time at the hearing of an appeal before this court is most objectionable and should be discouraged in every possible way. The inconvenience of such a course and its unfairness to the opposite side are obvious. This view has been strongly upheld by the Judicial Committee of the Privy Council in the recent case of *City of Vancouver* v. *Vancouver Lumber Company* (1), at page 720 (foot).

This claim is, of course, advanced under section 91 of the "British North America Act, 1867," which gives to the Parliament of Canada exclusive legislative authority over (amongst other matters therein enumerated) "10. Navigation and Shipping." It is to be observed that it is simply legislative authority over the subject which is given to Parliament and we have not been referred to any legislation by Parliament under which the claim in question could be supported; it follows, of course, that no contravention can be alleged of any legislative provisions made by Parliament.

As presented by counsel in argument at the bar of

(1) [1911] A.C. 711.

this court, the claim is an abstract one, since there are no facts established on which it can be based. It is not shewn that there is any navigation to be interfered with or that, if there were, it would be interfered with by any action of the respondents. The contrary would indeed appear to be the case. Neither is it shewn that the removal of sand as taken by the defendant company could cause any injury to the coast; the contrary would again appear to be the case. The practice of the removal of such natural products of the shore as sand, shells and seaweed spoken of in Coulson & Forbes, in the extract quoted in the appellant's factum, at page 14, is a common one and as therein stated the right belongs to the Crown or its grantees; if, however, the shore is the property of the Crown in right of the province, this does not assist the claim of the Dominion Government. Even if English Bay were a harbour, the foreshore might be the property of the province and it has not been shewn that it is the property of the Dominion. The province might have the right to take sand from the foreshore even if English Bay were a harbour and, *a fortiori,* if it were merely a part of the coast of the province.

The appeal should be dismissed with costs.

DAVIES J.—The substantial questions to be determined on this appeal are, first, whether English Bay or harbour lying outside the entrance to the Harbour of Vancouver was a "public harbour" within the meaning of the term as used in the third schedule of the "British North America Act, 1867," and became, under section 108 of that Act, "the property of Canada" — and, secondly, whether, if it was not such a

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"public harbour" the Dominion Government had the right to restrain parties from removing gravel from a bar or bank running out from the coast into the bay and alleged to be necessary for the protection of shipping resorting to and anchoring in that bay as a harbour of refuge from storms.

As to the first question whether English Bay was, at the time British Columbia entered into the Union with Canada, in 1871, a "public harbour" within the meaning of the "British North America Act" I feel I need not say more than that I fully concur with the courts below and with my colleagues in answering that question in the negative.

Mr. Newcombe, however, contended that even if English Bay was not, in 1871, when British Columbia became part of Canada, a public harbour it was at least a potential one and has since then become a public harbour by reason of the use made of it by shipping and for shipping and harbour purposes and by the proclamation of 1912 proclaiming it as a port and defining its limits.

I am quite unable to accede to this contention. I do not think the 108th section enacting that

> the public works and property of each province enumerated in the 3rd schedule to this Act shall be the property of Canada

was ever intended to cover more or can fairly be construed as covering more than public works and property existing at the time the Union took place. That section passed the property in these enumerated works from the provinces to Canada. It was a then present transfer of existing public works and property and had no relation to potential works or possibilities, such as harbours, which, in the future, settlement by population and expenditure of money might create.

If subsequently to Confederation from any cause potential harbours became *de facto* harbours and it became necessary for the Dominion to acquire the rights or property on their foreshores either vested in the Crown in right of the province or in private individuals there were obvious methods by which the Dominion could acquire such property or rights.

Then as to the right claimed on the part of the Dominion, if English Bay was a harbour of refuge for shipping only, and not a "public harbour" within the meaning of the Act, to restrain any one from removing gravel from a bar or bank forming, as contended, one of the protecting arms of the alleged harbour of refuge for shipping and so destroying or impairing the protection its presence gave to the harbour, I have only to say that the amendment to the statement of claim, par. 11, did not claim that there had been any such removal of the sand or gravel from the bar in question as was destructive or prejudicial to the harbour or bay as a harbour or port of refuge. Nor did the evidence shew or prove that to be the case.

If, under its legislative power over navigation and shipping, the Dominion had created and defined any special place as a port or harbour of refuge it might well be that it would be entitled to prevent its destruction as such by the removal of one of its protecting arms by exercising its power of expropriation and awarding compensation to the owner of the foreshore, whoever he might be. The trial judge has found that the bay does not, except under the special circumstances and to the limited extent he mentions, afford for ships a haven of safety and I do not think that the evidence shews a removal of gravel or sand from the

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bar which can be said prejudicially to affect that bay as a harbour of refuge.

The claim advanced was an absolute one challenging the right of the Attorney-General of British Columbia

> to authorize the removal of any part of the said bed or foreshore or interference therewith.

It does not claim that the removal of the sand or gravel complained of prejudicially affected that bay as a harbour of refuge, but simply puts forward the claim on the ground

> that the waters of English Bay, being navigable waters, it was the duty of the Crown in so far as it was represented locally to maintain the bed and foreshores of the said waters in their natural states.

It seems to me that, as made, the claim was based upon the contention that English Bay was a public harbour within the "British North America Act" and that its foreshore as such had passed to the Dominion.

I have already dealt with this part of the case, but giving the very widest construction to the claim as made and assuming that it was intended as an assertion of a right to protect to the fullest necessary extent a harbour of refuge created by the proclamation of 1912 I fail to find evidence to support the contention that the removal of the sand or gravel proved did prejudicially affect or destroy such harbour or might be reasonably feared to have that effect.

The complainant has failed in proving the facts essential to the maintenance of his case and I would, therefore, dismiss the appeal.

IDINGTON J.—The claim of appellants that English Bay now in question was a public harbour or part

thereof within the meaning of the "British North America Act," I think must rest upon the meaning to be given the term "public harbour" as used in said Act and the relevant facts demonstrating the conditions and use made of such bay, in 1871, when British Columbia became one of the provinces of Canada.

If we have regard either to the language used by the late Lord Herschell in *The Attorney-General for Canada* v. *The Attorney-General for Ontario, etc.*(1), at pages 711 and 712, when dealing with the term "public harbour" as used in said Act or, I submit, to the plain ordinary meaning of the words, it seems quite clear that at said date there had not been any such use made of any part of said bay as to constitute it or any part of it a public harbour or part thereof.

It has been argued, however, that the said bay together with the protecting conformation of the adjoining and adjacent land fitted it by nature for use as a harbour and hence, as part of the Crown domain, was in fact a public harbour at the time in question.

The language I use is mine, but, as I understand the argument put forward, it represents fairly the substance thereof without expanding its details.

It seems to me almost such "an exhaustive definition of the term applicable to all cases" as their Lordships declined to attempt.

Indeed, the argument seems in direct conflict with what their Lordships had in mind, else I suspect the few additional words needed to cover, what the hand of man in the service of the Crown may have done to aid nature, and thus have completed all that was

(1) [1898] A.C. 700.

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needed to frame the desired exhaustive definition, would surely have been supplied.

Nay more, the framers of the legislation by which British Columbia became part of Canada, could, at that stage of things (in British Columbia's development) so easily, instead of using the round-about language they did, have framed a suitable definition that would have made plain all now contended for if they really intended as is argued.

For these and other considerations needless to dwell upon it seems to me the argument is not well founded and that using the old method of resorting to the facts, as their Lordships suggested in the case just referred to, destroys appellants' case.

And as to what has been called the other branch of the case so far as designed to protect a harbour, that must also fail for want of a "public harbour" to be protected.

Then neither does the proclamation nor the Act of 1913, constituting the Harbour Commission, which have been, tentatively as it were, put forward, seem when clearly examined to found any claim such as made.

The Dominion Parliament may have the power by legislation to lay a foundation for such a claim. Why, indeed, the easy path of legislation has not been chosen instead of the thorny and difficult one of litigation, seems inexplicable.

The proclamation deals only with the constitution of a port and the Act of 1913, by section 11 thereof, only gives the commission such property as the Dominion, at the enactment, may have had within the limits defined therein.

Moreover, if the marking on Exhibit No. 3 of where the sand in question was taken be correct, that taking was outside said limits. And I suspect the Act was passed later than the alleged commission of the trespass.

It would seem as if the property in the foreshore was vested in the province; possibly subject to legislation of the Dominion in virtue of its powers over navigation and shipping. In the absence of such legislation it is not worth while forming a definite opinion as to the powers each may have relative thereto. And even if there is, upon which I express no opinion, an inherent power in the Dominion to take, against any one impeding navigation, proceedings to restrain the same, the facts in evidence do not seem to fit or lay a foundation therefor.

And if the province has the right to the soil and minerals therein, what of the sand ?

I think the appeal should be dismissed with costs.

DUFF J.—The principal question must be decided by the application of those provisions of the "British North America Act," which effected a distribution between the provinces and the Dominion of the property of the Crown within the territorial limits of the several provinces. As Lord Watson observed in the *Precious Metals Case*(1) :—

> The title to the public lands of British Columbia has all along been and still is vested in the Crown; but the right to administer and to dispose of these lands to settlers together with all royal and territorial revenues arising therefrom, had been transferred to the province, before its admission into the Federal Union.

(1) *Attorney-General B.C.* v. *Attorney-General of Canada*, 14 App. Cas. 295, at p. 301.

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And I think it is not unimportant to keep in view the difference between the provisions of the "British North America Act" dealing with public proprietary rights and those of section 91 conferring general legislative jurisdiction. It is true, as has been frequently pointed out, that when public property is spoken of in the Act as being "the property of" or "belonging to" the Dominion or a province these expressions import that the right to its beneficial use or the proceeds of it is within the exclusive disposition of the Dominion or of the provincial legislature as the case may be, the property itself remaining in the "Sovereign as the Supreme Head of the State" (see [1892] A.C. p. 443); and it may be an admissible form of expression to say that the question whether a given item of public property is vested in the Dominion or in the province is strictly a question of legislative control over its administration as property. Nevertheless this legislative control over Crown property as property whether transferred to the Dominion Legislature or reserved to the Provincial Legislatures is treated in the "British North America Act" as ownership, and their Lordships of the Privy Council have more than once held that the provisions of the Act dealing with this subject of ownership in relation to public property must be construed and applied independently of the provisions dealing with general legislative jurisdiction.

In *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1), it was said:—

Their Lordships are, however, unable to assent to the argument for the Dominion founded on section 92(24). There can be no *a*

(1) 14 App. Cas. 46, at p. 59.

priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved for their use has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

In *The Attorney-General of the Dominion* v. *The Attorney-General of Ontario*(1), at pages 709 and 710:—

> It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament rights were transferred to it. The Dominion of Canada was called into existence by the "British North America Act, 1867." Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada.

And, at page 713:—

> If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by section 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the "British North America Act," been left to the provinces and not vested in it.

The question, therefore, whether Spanish Bank has passed to the Dominion is a question which must be determined by reference to the provisions of the Act relating to the distribution of the public assets

(1) [1898] A.C. 700.

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and as it is not disputed that the property in question was vested in the province at the time of Confederation, the point to be determined is whether or not it has by one of the "express enactments" of the "British North America Act" been transferred to the Dominion. The Dominion contends that it has been so transferred, by force of section 108, as part of a "public harbour" within the meaning of item two of the third schedule.

The Dominion contention is twofold.

(1) That English Bay was a public harbour within the meaning of item two at the time of the admission of British Columbia into the Canadian Union and Spanish Bank was part of that harbour.

If these propositions be established the property indisputably passed to the Dominion.

(2) That English Bay, being at the time mentioned, an arm of the sea having the physical qualities necessary to fit it for use as a public harbour and having since become in fact a public harbour of which Spanish Bank is a part, the public harbour with Spanish Bank as one of its constitutent parts has consequently passed to the Dominion.

First, then, was Spanish Bank part of a public harbour at the time of the admision of British Columbia into the Canadian Federation within the meaning of the second item of the third schedule ?

Lord Herschell, speaking for the Judicial Committee in the *Fisheries Case*(1), says it would be extremely inconvenient that a determination should be sought of the abstract question: "What falls within the description of a public harbour ?" And he adds

(1) [1898] A.C. 700, at p. 711.

that it would be likely to prove misleading and dangerous to attempt an exhaustive definition of the term applicable to all cases.

Nevertheless, it must be difficult to apply oneself intelligently to the question of fact whether a particular locality does or does not fall within item 2 of the third schedule without first having arrived at some conclusions as to the attributes connoted by the phrase "public harbour." In *Regina* v. *Hannam*(1), Lord Esher said:—

> A harbour in its ordinary sense was a place to shelter ships from the violence of the sea and where ships are brought for commercial purposes to load and unload goods.

And he added "the quays were a necessary part of the harbour." During the argument on the *Fisheries Case* (2) the opinion was expressed more than once by Lord Herschell and Lord Watson and it does not appear to have been disputed on behalf of the Dominion, that to constitute a "public harbour" within the meaning of item two it would not be sufficient to have simply an arm of the sea affording shelter to ships in certain states of the wind and that the phrase employed connotes in addition something in the nature of public user for loading or discharging ships. The observations made repeatedly by their Lordships during the argument are, of course, not authoritative, but I think one is justified in appealing to them as evidence of the meaning of the phrase "public harbour" according to the common understanding. See stenographer's note of the argument at pages 198, 199 and 201. In *Attorney-General* v. *Canadian Pacific Railway Co.*(3) it was assumed that it was necessary to

(1) 2 Times L.R. 235. (2) [1898] A.C. 700.
(3) [1906] A.C. 204.

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shew user for commercial purposes as distinguished from purposes of navigation merely. Generally speaking, I think such user must be shewn in the absence of some evidence of recognition by competent public authority of the locality in controversy as a harbour in the commercial sense. *The King* v. *Bradburn*(1), at pages 429 and 430. As to the extent of the commercial user necessary to bring a given locality within the description "public harbour" a variety of circumstances may no doubt affect the determination of that question.

In British Columbia there was passed, in 1867, and in force at the time of Confederation an ordinance known as the "Harbour Ordinance," an ordinance respecting harbour and tonnage dues and to regulate the licences on the vessels engaged in the coasting and inland navigation trade, which provided for the proclamation of "ports, inland places and waters" as "harbours," the effect of the proclamation being to bring the proclaimed locality under the Act for the purpose of applying the regulations and prohibitions enacted by it. There is no evidence in this case and, as I pointed out, in giving judgment at the trial in *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(2), there was in that case no evidence of any proclamation having been issued under that ordinance or under the ordinances passed some years before in which the legislation had its origin. Had it been shewn that such proclamations had issued with respect to other localities, while the locality in controversy had never been proclaimed, that would have been of considerable weight in favour

(1) 14 Ex. C.R. 419. (2) 11 B.C. Rep. 289.

of the province; while, on the other hand, the fact that the locality had been proclaimed would establish a case in favour of the Dominion which it might be difficult if not impossible for the province to repel. Again, the expenditure of public money or the absence of such expenditure may be a circumstance of some importance. None of these elements is present in this case. The evidence shews that the physical character of English Bay is such as to make it capable of being used as a harbour. It is capable of being used, that is to say, in its natural state, not merely as a shelter for ships, but as a harbour for commercial purposes; but the evidence as to the state of affairs at the date of the Union does not really carry us beyond this. There is no evidence that it was then in use or had ever been in use as a harbour in the commercial sense and the probabilities are against it; and there is no evidence that there ever had been any public money spent upon it or any other recognition of it as a harbour by any competent public authority. My conclusion is on this question of fact that the decision must be against the Dominion.

Even on the assumption that the Dominion had sufficiently shewn English Bay to have been a public harbour at the date mentioned there would still remain the question whether Spanish Bank was a part of that harbour; there is, as I have said, no evidence of user, but I am not sure that, given a public harbour, their Lordships' observations in the *Fisheries Case*(1) as to the evidence of user by landing goods or anchoring ships can properly be read as intended to lay down a single exclusive test for determining

(1) [1898] A.C. 700.

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whether the foreshore or solum is or is not part of it. To me, at all events, it is not quite obvious that a ledge or sandspit, the property of the Crown, affording protection necessary for the maintenance of a public harbour, that is to say, protection necessary to enable it to be used for that purpose, can in no circumstance be regarded as part of the harbour within the meaning of item two unless it is shewn to have been used for discharging or mooring ships. That Spanish Bank, however, is such a necessary protection is not satisfactorily proved.

The second question remains. If the question of public harbour or no public harbour, for the purpose of applying section 108, had to be decided by reference to the circumstances existing at the time the controversy arises and not by reference to the state of circumstances existing at the date of Confederation, I should have no difficulty in holding that English Bay is now a "public harbour."

The additional question — whether or not Spanish Bank is a part of that harbour is one which would probably have to be answered in the negative by reason of the absence of satisfactory evidence either of user or that it serves the office of protection.

I think, moreover, that the Dominion fails in its main contention on this branch of the argument. The language of sections 108 and 109 and of the third schedule when read with section 117 seems to me to shew that subjects of the third schedule were intended to be transferred to the Dominion as subjects which, when the Act came into force, were the property of the province and at that time answered the descriptions found in the schedule. In other words, as the

transfer was to be operative upon the passing of the Act, the subjects transferred were necessarily subjects ascertainable at the time by the application of those descriptions to the existing facts. The other construction would lead to results little short of absurdity.

The third schedule is in the following words:—

Provincial public works and property to be the property of Canada.

1. Canals, with lands and water power connected therewith.
2. Public harbours.
3. Lighthouses and piers, and Sable Island.
4. Steamboats, dredges and public vessels.
5. Rivers and lake improvements.
6. Railways and railway stocks, mortgages, and other debts due by railway companies.
7. Military roads.
8. Custom houses, post offices, and all other public buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordinance Property.
10. Armouries, drill sheds, military clothing, and munitions of war, and land set apart for general public purposes.

It could hardly have been within the contemplation of the Act that the roadbed of a provincial government railway, for example, constructed after Confederation should pass to the Dominion as soon as it should be a completed railway or that a ship acquired for provincial government purposes should forthwith become the property of the Dominion. One can hardly distinguish between such subjects (which, if existing at the date of the Act, would, of course, fall within the third schedule) and a pier or an artificial harbour constructed as a provincial government work.

A reference to the language of the judgments in which the effect of sections 108, 109 and 117 has been discussed seems to indicate that it has generally been

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assumed that the subjects which passed under section 108 were subjects ascertainable at the time of the transfer. In the *Vancouver Street Ends Case* (*Attorney-General* v. *Canadian Pacific Railway Co.*) (1), it was assumed in all the courts that the question of public harbour or no public harbour and whether the foreshore was one of the constituents of the harbour must be decided by reference to the facts existing in 1871.

In the litigation that is generally known as the *Fisheries Case* (2), the first question submitted by the Dominion and the provinces in relation to the beds of public waters and public harbours was in this form in part:

> Did the beds of the lakes, rivers, public harbours * * * situate within the territorial limits of the several provinces not granted before Confederation become under the "British North America Act" the property of the Dominion ? (See (3).)

The formal answer given by their Lordships to the first question is as follows:—

> 1. In answer to the first and fourth questions, that under the "British North America Act, 1867," the improvements only in lakes and rivers within the provinces *became* the property of the Dominion of Canada; that under the same Act, whatever is properly comprised in the term "public harbour" *became* the property of the Dominion of Canada; and the answer to the question, what is properly so comprised, must depend, to *some extent*, upon the circumstances of each particular harbour.

All this points to a transfer operative at the passing of the Act; and on the argument it was assumed that the date of Confederation was the decisive date. See report of the argument at page 202. As to the point of view from which the subject was considered

(1) [1906] A.C. 204; 11 B.C. Rep. 289.

(2) [1898] A.C. 700.

(3) [1898] A.C. at page 701.

in the Supreme Court of Canada, see judgment of Strong C.J.(1), at page 515. The questions submitted in that case were framed after a good deal of consideration and with the object of setting at rest as far as possible such points as that now raised by the Dominion. I think there is sufficient evidence in the arguments and in the judgments to shew that there was a general consensus of view that the position now taken by the Dominion was not sustainable.

It was also contended on behalf of the Dominion in this court that the acts complained of, removing sand from the bank in question, constituted in some way an infringement of the *jus publicum* of which the Attorney-General for the Dominion is the proper public authority to make complaint. I have no doubt that the Attorney-General of the Dominion has a *status*, acting for the Crown on behalf of the public, to invoke the aid of the courts to restrain, in a proper case, any substantial infringement of the public right of navigation or of the rights incidental thereto. But counsel for the Attorney-General of Canada at the trial took an attitude which precludes the appellant from raising at this stage any contention that what is now complained of was in fact an interference with any of those rights; and that ground of relief cannot be considered in this court.

It seems necessary to add a word upon the suggestion that the Dominion Parliament may in the exercise of its legislative powers under section 91 against the will of a province acquire the title to provincial Crown lands for the purpose of constituting a harbour. To say the least, that, I think, is gravely

(1) 26 Can. S.C.R. 444.

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questionable, it would be going far beyond anything decided or any opinion expressed in the *Attorney-General* v. *Canadian Pacific Railway Co.*(1), where the courts had to deal with an Act passed in exercise not only of its authority derived from section 91 but also of powers arising from the Terms of Union under which British Columbia entered Confederation and with a case, moreover, in which the assent of the province was abundantly proved; it would not be easy to reconcile such a proposition with Lord Herschell's language quoted above from the judgment in the *Fisheries Case*(2), or with section 117 of the "British North America Act." I do not, however, enter upon a discussion of the subject. Reference may be had to, Clement's Canadian Constitution, at pp. 388 and 389; the *Burrard Power Co.* v. *The King*(3), at page 52; and the *Indian Treaty Case; Province of Ontario* v. *Dominion of Canada*(4), at page 127.

ANGLIN J.—I cannot believe that it was intended that every indentation of the uninhabited sea and lake coasts of Canada which had a natural conformation that rendered it susceptible of use as a harbour should pass under section 108 of the "British North America Act" from provincial to Dominion control. In my opinion "public harbours" in the third schedule means harbours in use as such, and not mere potential harbours.

The purpose and operation of section 108 was to effect an immediate transfer of property from the provinces to the Dominion.

(1) [1906] A.C. 204; 11 B.C. Rep. 289.
(2) [1898] A.C. 700.
(3) 43 Can. S.C.R. 27.
(4) 42 Can. S.C.R. 1.

I strongly incline to the view that it does not apply to harbours which have only come into use as such after the Union. There are other means by which the Dominion can acquire jurisdiction over such harbours and title to the property in the land under and adjacent to them requisite for their proper control and administration, whether that title is vested in the Crown in right of the province (*Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.* (1)), or in private individuals.

But it is not necessary to determine this question because I heard nothing in the course of the argument of this appeal, and have found nothing in the record which would warrant interference with the findings of the provincial courts that neither at the date of the entry of the Province of British Columbia into Confederation (1871), nor at the time when this action was begun was English Bay in fact a "public harbour" within the meaning of that term as used in the schedule 3 to the "British North America Act."

Neither the proclamation nor the statute of 1913, relied on by Mr. Newcombe, in my opinion, effected a transfer of the property in question from provincial to Dominion control. The proclamation deals with a port, not with a "public harbour," and is apparently based on an assumption that English Bay formed part of the Harbour of Vancouver. The statute provides powers of expropriation which, so far as the evidence shews, have not yet been exercised.

The record contains neither allegation nor evidence that the removal of sand by the respondent company had affected, or was likely to affect, prejudicially any interest over which legislative jurisdiction

(1) [1906] A.C. 204.

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is vested in the Dominion under the heading, "Navigation and Shipping."

I would dismiss the appeal.

BRODEUR J.—This is an appeal from the courts of British Columbia which dismissed the action of the appellant.

By the "British North America Act," section 108, and the third schedule, the public harbours of each province have become the property of Canada.

By the order-in-council, passed by the Imperial Government in 1871, British Columbia was admitted into the Dominion of Canada and it was stipulated that the provisions of the "British North America Act" should be applicable to British Columbia.

Vancouver Harbour was, on the 3rd of December, 1912, proclaimed as such by the Governor in Council under the provisions of the "Canadian Shipping Act" and according to that proclamation English Bay was declared to be a part of the harbour.

In the year following, a statute was passed by the Federal Parliament vesting the administration of the harbour in the Vancouver Harbour Commissioners, one of the appellants in the present case.

We have to examine, at first, whether this English Bay was a public harbour in 1871. As it has been decided in the *Fisheries Case*(1), the question as to whether a piece of property is a harbour or not is a question of fact which has to be determined according to the circumstances of each case.

The courts below unanimously found that English Bay was not, in 1871, a public harbour and nothing has been brought before us which could convince me that this finding was erroneous.

(1) [1898] A.C. 700.

It is even very much to be doubted whether this part of Burrard Inlet which is called English Bay was ever considered, before the proclamation of 1912, as part of the Harbour of Vancouver, or was ever considered a harbour by itself. We find by a chart of Burrard Inlet, issued in 1891 by order of the Canadian Government, that Vancouver Harbour did not include the part of Burrard Inlet where English Bay is situate; and that chart then proves conclusively that even the Dominion authorities, before 1891, did not consider English Bay as a part of the Harbour of Vancouver.

By the proclamation of 1912 and by the statute passed in the following year the Dominion authorities, of course, assume control over all Burrard Inlet, including English Bay. But that proclamation did not give them the ownership of the bed of the bay. It remained vested in the provincial authorities and the Dominion Government could not assume any right of ownership with regard to that bed without taking the necessary expropriation proceedings. It was a very easy thing to do, but it was not done, and until this is done the provincial authorities may assume to be the owners of the bed of English Bay.

The action of the appellant was properly dismissed and I see no reason why we should interfere with the judgment of the courts below.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Maitland, Hunter & Maitland.*

Solicitors for the respondents: *McPhillips & Wood.*