HIS MAJESTY THE KING (IN RIGHT OF THE DOMINION OF CANADA) (PLAINTIFF) ..... APPELLANT;

1933

* June 15, 16.
* Dec. 22.

AND

THE ATTORNEY-GENERAL OF ONTARIO AND WILLIAM L. FORREST (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Constitutional Law—Waters and Watercourses—Real Property—Title to island claimed by Dominion and by Province—"Public Harbour"—"River Improvement"—B.N.A. Act, 1867, s. 108, and third schedule.

Held that Goderich Harbour, located at the mouth of the river Maitland, in Ontario, was (applying the test stated in *Atty. Gen. for Canada* v. *Ritchie Contracting & Supply Co.*, [1919] A.C. 999, at 1004, and upon the evidence), at the time of Confederation, a "public harbour" within the meaning of the 3rd schedule to the *B.N.A. Act.* (Duff C.J. refrained from deciding whether, in view of a certain lease, the harbour was, at Confederation, part of the "public works" or "public property" of the province, within s. 108 of the Act; consideration of this question being unnecessary in view of the ground of decision of the appeal).

But *held* that, on the evidence, it was not established that Ship Island (the land in question) was, at the time of Confederation, a part of the harbour, or a "river improvement" within said schedule; and therefore it could not be said that the island became the property of Canada under s. 108 of the Act.

Certain questions discussed, as to what forms part of a "public harbour" (and as to circumstances to be considered), and as to what would come under the designation of "river improvement," and authorities referred to. (*Per* Duff C.J.: The several descriptions in the schedule are not to be narrowly construed or applied—citing *Att. Gen.*

* PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ.

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of Ontario v. *Mercer*, 8 App. Cas. 767, at 778. Where there is a "river improvement" in the form of a definite physical structure consisting of a principal part and auxiliary or subsidiary works, the whole would pass and with it a title, at least, to so much of the site and of the subsoil as might be regarded as reasonably necessary to give the Dominion free scope for the complete discharge of the responsibilities it was expected to assume touching such works.).

And *held* further, that a certain patent of lease made in 1862, under which the Crown in right of the Dominion of Canada claimed title by reason of a conveyance to it in 1927 of the lessee's rights, did not, on the description in the lease, include Ship Island.

The judgment of the Exchequer Court of Canada (Maclean J.—[1933] Ex. C.R. 44), that the title to the island was vested in the Crown in right of the Province of Ontario, subject to its lease (made in 1929) to respondent Forrest, affirmed.

APPEAL by the Attorney-General of Canada, as representing the Crown in right of the Dominion of Canada, from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the title to Ship Island, situated in the river Maitland, near its mouth, and in what is known as the Harbour of Goderich, in Ontario, was, prior to the taking thereof by the Crown in right of the Dominion of Canada on October 4, 1929, under the *Expropriation Act* (R.S.C. 1927, c. 64), vested, not in the Crown in right of the Dominion of Canada, but in the Crown in right of the Province of Ontario, subject to a lease dated August 16, 1929, in favour of the defendant Forrest.

The facts and circumstances of the case, and issues in question, are sufficiently stated in the judgments now reported. The appeal to this Court was dismissed with costs.

Glyn Osler, K.C., and *D. Guthrie* for the appellant.

A. G. Slaght, K.C., and *W. G. Pugsley, K.C.*, for the respondent Forrest.

Joseph Sedgwick, K.C., for the respondent Attorney-General of Ontario.

DUFF C.J.—I agree with the judgment of my brother Rinfret, but I think it advisable to make some observations upon one or two points raised by the appeal.

The first of these concerns the effect of the lease of 1862 from the Crown to the Buffalo & Lake Huron Railway Co.

(1) [1933] Ex. C.R. 44.

An intelligent discussion, however brief, can only proceed with the pertinent provisions of the lease before us. I, therefore, quote them:

* * * provide sufficient accommodation in the Inner Harbour of Goderich aforesaid for the largest vessels navigating Lake Huron and shall establish and maintain during the period of this demise a facile and safe entrance or channel into the Inner Harbour aforesaid for such vessels as aforesaid and whether by the erection and maintenance of piers or otherwise with a depth in such channel sufficient for the safe entrance of the vessels aforesaid, and also shall and do at their like risk, cost, charges and expense from time to time and at all times during the term hereby granted well and sufficiently repair, uphold, maintain and keep the said wharves and piers, channel and Inner Basin in good, substantial and sufficient repair and fit proper and accessible for the safe landing of passengers and for the discharge of vessels and steamers and the landing and warehousing of goods and passengers therefrom. AND upon this further condition that the Buffalo and Lake Huron Railway Company and their Successors shall when and so often from time to time as they may contemplate any alterations, improvements or additions at the said Harbour or at the Wharves or Piers connected therewith or constituting part of the same, submit the same and the plans, diagrams and specifications thereof respectively to the Commissioner of Public Works and the Commissioner of Crown Lands and shall not commence or proceed with the said alterations, improvements or additions or prosecute, carry out or complete the same or any part thereof without the approval of the Commissioner of Public Works and the Commissioner of Crown Lands respectively. AND FURTHER that the Commissioner of Public Works and the Commissioner of Crown Lands or either of them and their Engineers, Architects and other Officers and Servants may from time to time during such periods of alterations, improvements or additions and at all times whatsoever have free access to at and from the said Harbour, Wharves or Piers connected therewith or constituting part of the same and to examine and view the state and condition of repair and of the navigation of the same as the case may be and that all such alterations, improvements and additions shall be executed to the satisfaction of the Commissioner of Public Works. AND upon this further condition that the said Company and their Successors shall and do permit and suffer foot passengers and other persons to use the said wharves or piers for the purpose of air and exercise or upon other lawful and reasonable occasion at any time or times without charge and also shall and do permit and suffer passengers to land at the said wharf or pier from any boat, ship or vessel with their personal baggage or luggage without charge. AND also upon condition that the said Company and their Successors shall demand and receive reasonable wharfage dues only for or in respect of goods and merchandise landed at or shipped from the said intended wharves or piers, and shall upon no account exact unreasonable or exorbitant dues for the same and that the same dues shall be in accordance with any Statute of Our Province of Canada passed in reference to the said Harbour and now of full force and effect, or hereafter to be passed and that in default of any such Statute as hereinbefore mentioned then that such dues only shall be received and collected by the said Company and their Successors as have been, in a Table thereof submitted to and approved by Our Governor General in Council. AND upon this further and express condition that in default of all or any of the conditions, provisoes, limitations

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and restrictions these Our Letters Patent and the demise lease and the term hereby granted and everything herein contained shall be and We do hereby declare the same to be null and void to all intents and purposes whatsoever and that the land and premises hereby demised and leased and every part and parcel thereof shall revert to and become vested in Us, Our Heirs and Successors in like manner as if these Our Letters Patent had never been granted, or the lands and premises hereby demised, anything herein contained to the contrary thereof notwithstanding.

On behalf of the Attorney-General for Ontario, it is argued that the harbour in question, in view of this lease, cannot fall within the description "public harbour" or, as it was put by counsel, it is a "private harbour".

It is very clearly not a "private harbour" in the ordinary sense of these words. The public rights of navigation are not in any manner affected by the lease. On the contrary, the purpose of the lease is plainly to improve the capacity of the harbour for the purposes of navigation and commerce and to provide facilities for the exercise of the public rights in respect thereto. Power is reserved, it is true, to exact reasonable tolls under the supervision of the Crown in respect of the landing of goods but the seisin of the bed of the harbour and the shore remain in the Crown subject to the term of years granted.

Goderich Harbour was, on the 1st of July, 1867, a harbour to which the public had the right to resort and did resort for commercial purposes, and it would appear, therefore, that it satisfied the criteria laid down in *Attorney-General for Canada* v. *Ritchie Contracting & Supply Co.* (1).

But another condition must be present before s. 108 can take effect. That section applies only to public harbours which on that date were part of the "public works" or "public property" of the province. Whether on that date Goderich harbour as a whole was, and whether the particular parts of it (alleged to be so) in question were, in view of the lease to the Railway Company, part of the "public property" or "public works" of the province in the sense of s. 108, it is not necessary to consider; and I desire to reserve that point in the most complete sense until it arises for determination.

The next topic concerns the particular locality in respect of which the dispute arises. First of all, I wish to reserve

(1) [1919] A.C. 999.

the question whether, if it had been established as a fact that prior to and up to the 1st of July, 1867, fishermen had been permitted to use Ship Island for the purpose of wintering their boats there (that is to say, boats used for fishing in Lake Huron), that would not have been some evidence of the fact that this piece of Crown property had been recognized as part of the "public harbour". Then, much attention was given in argument to the icebreaker which had, at one time, been placed across the branch of the river between Ship Island and the main land. As to the purpose of this icebreaker, we are not left in doubt. It is explained in the following paragraph given in the report of the Commissioner of Public Works for the year 1861:

> From the foregoing it will be seen that the principle adopted in the construction of this harbour is to convert the extensive flat at the mouth of the river, some 20 acres in extent, into an inner basin, to have a depth of 14 feet water; the entrance to it being between two piers, with which considerable progress has been made. The width between the piers at the narrowest part is 170 feet. Vessels wintering in this harbour ran considerable risk in spring, from the ice carried down on the breaking up of the winter, by which a steamer was, in 1859, carried out and lost. To obviate this, the company have had an ice-breaker, of considerable extent, constructed across one of the branches of the river, which effectually answers its purpose.

An ice-breaker constructed for such a purpose might, according to the circumstances, be regarded as a part of the harbour works, that is to say, a part of the harbour, but, whether or not a part of the harbour, it would most assuredly fall within the description of "river improvement" as employed in the third schedule. I do not doubt, moreover, that, if there was a cribwork on Ship Island which was an integral part of the ice-breaker, or if merely intended to give the ice-breaker additional resistance against the impact of flood or ice, such cribwork would form part of the "river improvement". I must not be understood as attempting to expound the scope of the phrase "river improvement", but such a work as that under consideration devised for the protection of the harbour works and the shipping in the harbour from the force of the waters and the ice of the river is, in the strictest sense, a work for the improvement and protection of navigation and, in my view, plainly a "river improvement" within the meaning of the *B.N.A. Act*, if the other condition be satisfied, viz., that the work is part of the "public property" or a "public work" of the province.

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This brings me to one or two general observations which I desire to add respecting the construction and effect of s. 108 and of the third schedule. One observation of the first importance I make in the form of an adaptation of Lord Selborne's words in *Attorney-General for Ontario* v. *Mercer* (1),

> The general subject * * * is of a high political nature; it is the attribution of royal territorial rights for purposes of * * * government.

It follows, I should think, that the several descriptions in the schedule are not to be narrowly construed or applied.

It is still more important to notice that the judgment of Lord Herschell in the *Fisheries* case (2) dealt only in a very restricted way with what would be comprised in a public harbour transferred by force of the statute. Their Lordships declined to define, or even to describe, "public harbours" and, indeed, their Lordships confined their opinion to one particular question, viz., the decision in *Holman* v. *Green* (3), in which this court had held that a foreshore bordering on a public harbour, if it was the property of the Crown, passed *de jure*. Their Lordships indicated circumstances in which, in their opinion, a foreshore would pass; if it had been used for anchoring ships or landing goods: but these conditions are only mentioned by way of example, and it is most important to note that they are strictly confined to the matter of the foreshore.

"Foreshore" was treated as employed in the strict technical sense. Mr. Blake, speaking for the Province of Ontario, on that ground declined to discuss the validity of *Holman* v. *Green* (3), which was left to Mr. Longley who represented Nova Scotia. The reason which led their Lordships to limit themselves so strictly to dealing with the subject of public harbours is, no doubt, to be found in the argument. Mr. Blake pointed out the almost insuperable difficulty of discussing the subject usefully in view of the absence of any information as to the nature of the harbours in Canada at the date of Confederation; and their Lordships naturally confined themselves to the concrete

(1) (1883) 8 App. Cas. 767 at 778.

(2) Attorney-General for Canada v. Attorney-General for Ontario, etc., [1898] A.C. 700.

(3) (1881) 6 Can. S.C.R. 707.

question presented by the decision in *Holman* v. *Green* (1). Indeed, in the formal answer expressed in the Order in Council, their Lordships limited themselves even more strictly. The answer is in these terms:

* * * whatever is properly comprised in the term "public harbours" became the property of the Dominion of Canada; and that the answer to the question, what is properly so comprised, must depend, to some extent, upon the circumstances of each particular harbour.

Attorney-General for British Columbia v. *Canadian Pacific Railway Company* (2) was concerned with the title to a very limited part of the foreshore of Burrard Inlet. In that case, evidence was adduced to show that the part of the Inlet adjacent to the part of the foreshore in controversy was in use for harbour purposes in the strictest sense, and the foreshore also, at and prior to the date of the admission of British Columbia into the Union. The finding of fact in that case was based upon that evidence.

Attorney-General for Canada v. *Ritchie Contracting & Supply Co.* (3) elucidates the matter somewhat further. It was held there that a harbour, in order to fall within the class "public harbour" in the relevant sense, must be one to which ships had the right to resort for harbour purposes and did so resort at the pertinent date; but the decision says nothing whatever which can assist you in determining what are and what are not the constituent parts of what is admittedly a "public harbour", for the purpose of precisely ascertaining the subjects that passed under that designation.

One consideration that ought not to be lost sight of is that an important reason for vesting in the Dominion public harbours and river improvements was that the Dominion, charged with exclusive jurisdiction regarding trade and commerce, navigation and shipping, lighthouses, buoys, the regulation of sea coast and inland fisheries was, no doubt, expected to assume the burden of maintaining navigation works, harbour works and river improvements such as, at all events, we are concerned with here.

No case has, prior to this, so far as I know, arisen respecting harbour works, works for facilitating the use of the harbour, for protecting the harbour and so on. I am inclined to think it would be difficult to find an adequate

(1) (1881) 6 Can. S.C.R. 707. (2) [1906] A.C. 204.
(3) [1919] A.C. 999.

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ground for contending that such works did not pass under the statute. Indeed, so much appears to have been conceded in the *Fisheries* case (1) by the provinces.

As to river improvements, to adapt the judgment of the Judicial Committee in the *Fisheries* case (1), there would appear to be "no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada". I cannot doubt that, where you have a "river improvement" in the form of a definite physical structure consisting of a principal part and auxiliary or subsidiary works, the whole would pass and with it a title, at least, to so much of the site and of the subsoil as might be regarded as reasonably necessary to give the Dominion free scope for the complete discharge of the responsibilities it was expected to assume touching such works. I reserve in the fullest degree the question whether the title to the subsoil *ad centrum* would pass.

The judgment of Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ. was delivered by

RINFRET J.—The question to be determined in this appeal is whether His Majesty the King in right of the Dominion of Canada (who is the Appellant) is entitled to a small island about one acre in extent, known as Ship Island, in the harbour of Goderich, either in fee simple, or as assignee of the tenant for the remainder of a term of ninety-nine years created by a lease dated the 2nd day of June, 1862.

The Attorney-General of Ontario claims that Ship Island never vested in the Dominion. The respondent Forrest claims as lessee of the Crown in right of the province of Ontario, and also by prescription and possession as against the rights of the tenant under the lease of June, 1862.

The Appellant was proceeding to remove Ship Island for the purpose of improving Goderich Harbour, when His contractor was restrained by an interim *ex parte* order of the Supreme Court of Ontario, at the instance of the respondent Forrest. The Appellant thereupon commenced this action, claiming a declaration of his rights, or, in the alternative, the usual declaration of vesting under the *Expropriation Act*, R.S.C. 1927, c. 64.

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

The learned President of the Exchequer Court delivered judgment on the 22nd December, 1932 (1), holding that the title to the island was vested in the Crown in right of the province of Ontario, subject to the lease to the respondent Forrest, and that the province and Forrest are accordingly entitled to compensation for the taking thereof.

His Majesty the King in right of the Dominion of Canada appeals from this judgment.

Goderich Harbour is located at the mouth of the river Maitland which flows into Lake Huron. At the period of time material to this case, the river wound its way to the lake through a series of islands, one of which was Ship Island. As observed by the trial judge, it may be assumed that the other islands "were of alluvial origin"; but Ship Island was of a different character. The evidence shows that it was high and dry land for at least a century. It stands at from two to five feet, on its easterly side, to from five to twelve feet, on the westerly side, above the level of the present high water mark in the harbour. It is covered with old trees (elm, basswood, black cherry, etc.), some of them as much as two feet or twenty inches in diameter. From the geological nature of the island, it may be asserted that it was not covered by water at any time within seventy-five or one hundred years back.

As land or public property situate within the territory known as Upper Canada before Confederation, there is no question that, under sections 109 and 117 of the *B.N.A. Act*, Ship Island, subsequent to the coming into force of the Act, remained part of the demesne lands of the Crown belonging to the province of Ontario, and that province retained it as its public property "subject to any trusts existing in respect thereof and to any interest other than that of the province in the same".

It was therefore incumbent upon the Appellant to show that the island had ceased to form part of the public property of the province and had become vested in the Crown in right of the Dominion of Canada; and, unless it be established that it passed out of the domain of the province, either through the operation of some statutory enactment, or by the effect of a deed conveying the title in whole or in part, it must be decided that Ship Island is

(1) [1933] Ex. C.R. 44.

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still vested in the province of Ontario, and the judgment *a quo* must be confirmed.

The Appellant claimed title both ways:

(*a*) As a tenant through and under a patent of lease dated the second day of June, 1862, from the Crown to the Buffalo & Lake Huron Railway Company, all rights thereunder having been conveyed to the Appellant by a quit claim deed dated January 19, 1927;

(*b*) As owner of the fee by reason of the provisions of section 108 of the *B.N.A. Act*, the Appellant contending that Ship Island formed part of a public harbour on July 1, 1867; or, in the alternative, that it was on that date a river and lake improvement within the meaning of that section and the schedule thereto.

The action was tried and is submitted to us only on the question of title, and the judgment is therefore limited to that issue. It will be convenient to examine each of the Appellant's contentions in the order in which they are stated.

The property leased to the Buffalo & Lake Huron Railway Company, in 1862, is described in the patent of lease:

all those parcels of land covered with water situate in the townships of Goderich and Colborne in the County of Huron in our said Province of Canada, being the water lots in front of the town of Goderich in Lake Huron and extending half a mile to the south and north of the River Maitland together with the water lots in the said River extending from Lake Huron up the said river one mile and seven-eighths of a mile to opposite the northeast corner of the said Town of Goderich that is to say: (N.B. The patent then proceeds to define the water lots by metes and bounds).

As will be noticed, the lease from the Crown is a lease of "water lots". They are "water lots" in Lake Huron, or "water lots" in the river Maitland, but only "water lots". They are expressly designated as "parcels of land covered with water". The Crown lease contains a complete and minute definition of the metes and bounds, which we do not deem it necessary to set out here in full, but in which, with regard to the *locus in quo*, the lots are referred to as being

along the water's edge of the River Maitland along the Goderich side thereof to Lake Huron.

We find it impossible to bring Ship Island within the description of the leased property, and we agree with the learned President of the Exchequer Court that, upon the terms of the patent, Ship Island was not included in the grant.

It may be mentioned that on June 14, 1859, and on February 17, 1865, agreements were made between the Canada Company and the Buffalo & Lake Huron Railway Company whereby the former sold and conveyed to the latter all its rights and interest under patents or grants previously issued by the Crown to it; but with regard to Ship Island these agreements did not carry the Buffalo Railway Company any further than the lease from the Crown of 1862. It follows, therefore, that the Appellant took no right to or interest in Ship Island under the conveyance by the quit claim deed of January 19, 1927, from the Buffalo & Lake Huron Railway Company.

We have now to consider whether the island became vested in the Dominion by force of section 108 of the *British North America Act.*

Under that section,

> The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

The Third Schedule is entitled "Provincial Public Works and Property to be the Property of Canada"; and, among the works and property enumerated therein, are:

> 2. Public Harbours.
> 5. Rivers and Lake Improvements.

It is contended by the Appellant that, in 1867, Ship Island came under either of these two subheads. We will deal first with No. 2: Public Harbours.

This raises two questions: Whether in 1867 Goderich Harbour was a public harbour within the meaning of the Third Schedule; and, that being answered in the affirmative, whether Ship Island formed part of the harbour.

It would be difficult to say that, in 1867, Goderich harbour was not a "public harbour". In the *Fisheries* case (*Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia* (1)), the Judicial Committee declined to attempt an exhaustive definition of the term. The view that it meant only "such a harbour and such portions of it as had been the creation of public money" was rejected by this Court (*Holman* v. *Green*) (2), and by the Privy Council (*Attorney-General for Canada* v. *Ritchie Contracting and Supply Co.*) (3). In the latter case, it was explained that "*public harbour* means not

(1) [1898] A.C. 700. (2) (1881) 6 Can. S.C.R. 707.
(3) [1919] A.C. 999 at 1004.

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merely a place suited by its physical characteristics for use as a harbour" (an "indentation of the coast to which the public have right of access, and which by nature is so sheltered as to admit of a ship lying there")—"but a place to which on the relevant date the public had access as a harbour, and which they had actually used for that purpose". (p. 1004).

Applying this test, and upon the evidence as to the state of affairs at the relevant date, i.e., at the date at which the *B.N.A. Act* became applicable, it must be agreed that Goderich Harbour was a public harbour. Even although the work of erection of the harbour and of the subsequent improvements thereof may not have been actually carried out by the province or through the expenditure of public money, the work done by the Canada Company or by the Buffalo Railway Company was part of the consideration—in fact, the main consideration—for the leases or grants from the Crown to these companies. To establish this it is sufficient to quote the following passage from the patent of lease to the Buffalo Railway Company of June 2, 1862:

> AND WE DO hereby declare it to be Our Royal will and pleasure and these Our Royal Letters Patent are granted upon and subject to the express conditions hereinafter mentioned that is to say, Upon condition that the said Company and their Successors shall and do at their own risk, costs, charges and expense within the space of five years from the date hereof provide sufficient accommodation in the Inner Harbour of Goderich aforesaid for the largest vessels navigating Lake Huron and shall establish and maintain during the period of this demise a facile and safe entrance or channel into the Inner Harbour aforesaid for such vessels as aforesaid and whether by the erection and maintenance of piers or otherwise with a depth in such channel sufficient for the safe entrance of the vessels aforesaid, and also shall and do at their like risk, cost, charges and expense from time to time and at all times during the term hereby granted well and sufficiently repair, uphold, maintain and keep the said wharves and piers, channel and Inner Basin in good, substantial and sufficient repair and fit proper and accessible for the safe landing of passengers and for the discharge of vessels and steamers and the landing and warehousing of goods and passengers therefrom.

It may further be added that, under the terms of the lease, all plans or diagrams of improvements had to be submitted to the Commissioner of Crown Lands and the Commissioner of Public Works and they were to be executed to their satisfaction. The companies were to permit and suffer passengers to land at the wharves or piers from any boat, ship or vessel with their personal baggage or luggage without charge and could demand and receive

reasonable wharfage dues only for and in respect of goods and merchandise landed at or shipped from the said wharves or piers, the dues being either controlled by statute or submitted to and approved by the Governor General in Council.

Without going into details, it appears by official plans and by departmental reports that a good portion of those works and improvements had been actually carried out and that, at the time of Confederation, Goderich Harbour was not only capable of being used, but that it was actually in use as a harbour in the commercial sense. It may accordingly be held as falling, at the pertinent date, within the "class of harbour meant by the expression *public harbour*".

In the view we take of the case, it is not necessary to discuss the nature of the province's proprietary rights in the harbour. It is sufficient to say that the Crown, in right of the province, held at least a reversionary interest.

Given a public harbour at Goderich, in 1867, there remains to find out what territory fell within it and, further, whether Ship Island, if within the ambit of the harbour, formed a part of it. (*Attorney-General for Canada* v. *Ritchie Contracting & Supply Co.*) (1). This must depend upon the circumstances of the particular case and, in accordance with the rulings of the Judicial Committee in the *Fisheries* case (*Attorney-General for Canada* v. *Attorney-General for Ontario, etc.*) (2), and in *Attorney-General for British Columbia* v. *Canadian Pacific Railway*) (3), that question must be tried as a question of fact.

We agree with the learned President of the Exchequer Court that, on the evidence, "it is open to serious doubt if Ship Island was, in 1867, situated within the bounds of what was known and used as Goderich Harbour"; and, at all events, we see no reason to dissent from his conclusion that the island was not a part of the harbour.

In the *Fisheries* case (2), the Privy Council expressed the opinion that even the foreshore, between the high and low water-mark, on the margin of a harbour, although Crown property, did not necessarily form part of the harbour, and that there must be a further inquiry as to whether

(1) [1919] A.C. 999 at 1003 and 1004.
(2) [1898] A.C. 700 at 712.
(3) [1906] A.C. 204 at 209.

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it has "actually been used for harbour purposes, such as anchoring ships or landing goods". Of course, their Lordships' observations may be read as laying down only illustrations of what the test must be (Duff, now C.J., in *Attorney-General for Canada* v. *Ritchie Contracting & Supply Co.*) (1); but there is, in this case, no evidence that the island, at the date of Confederation, had become "one of the constituents of the harbour", or, in fact, was in use or had ever been in use for any "harbour purposes", except in respect to one particular: certain cribwork allegedly erected on the island and which may be looked at from the viewpoint either of a harbour work or of a river improvement. For that reason, that particular point will be dealt with together with the last contention in support of the claim of the Dominion, to wit: that Ship Island became vested in the Dominion as falling under item 5 of the Third Schedule of section 108: "Rivers and Lake Improvements".

The facts are these:

Vessels wintering in Goderich Harbour ran considerable risk in the spring on account of the ice carried down the river Maitland, on the breaking up of the winter. To obviate this, at some period prior to the year 1861, an ice-breaker was constructed across one of the branches of the river. This work is mentioned in the report of the Commissioner of Public Works of the 14th February, 1862, and again in the report of John Page, Chief Engineer of the Department of Public Works, dated the 20th January, 1870, where it is referred to as follows:

> In order to prevent the wharves, warehouses, etc., from being damaged during spring freshets, as well as for the protection of such vessels as might winter in the harbour, an ice-breaker, 1,100 feet long, and from 9 to 10 feet high over low water, has been constructed.
>
> This commences at a point on the south shore, 2,300 feet inside of the basin, and extends outwards in a direction nearly parallel with the entrance piers. It appears to be strongly built and secured; nevertheless, a heavy freshet in the spring of 1868, carried away about 200 feet of it, and made a large breach through the gravel bank in its rear.

Two departmental plans were filed, respectively dated July, 1861, and 5th November, 1870. They show the ice-breaker.

On the plan of 1861, it is traced across the river channel, in the direction of Ship Island, but it does not reach the

(1) (1915) 52 Can. S.C.R. 78, at 105.

island. It is, however, followed up by another tracing indicated as "cribwork", and running through the width of the island.

On the plan of 1870, the ice-breaker and the cribwork again appear, although not quite in the same relative position to one another. At the extreme end of the ice-breaker, on the island side, a legend on the plan indicates that 200 feet of the work were carried away in the spring of 1868 (as mentioned in Page's report above referred to) and states that this was repaired.

Neither the report of the Commissioner of Public Works, in 1861, nor that of Chief Engineer Page, in 1870, makes any reference to the cribwork on the island. Outside of the tracings on the plans, there is not the slightest evidence even alluding to it. None of the old residents, who were heard as witnesses, were able to give any information about it. It cannot be said with certainty that it was ever constructed. It may have been only part of the "proposed works". If ever constructed, it is impossible to say whether by the lessees of the Crown as part of their obligations or by the occupiers, if any, of the island for their own self purposes. Whatever evidence there is is inconclusive and is susceptible of being interpreted in one sense or the other. We are not satisfied that the presence of the cribwork on the island in 1867 has been established in such a way as to enable us to deal with it as a then existing public work or as a work which was then the property of the province and which could be classed either as harbour work or as a river improvement within the Third Schedule.

Moreover, the cribwork alone, not the island itself, would come under the designation of "river improvement". The island was put there by Nature. Under no stretch of imagination can it be styled a man-made improvement. It was authoritatively decided in the *Fisheries* case (1) that the transfer by s. 108 to the Dominion of "rivers and lake improvements" operates, on its true construction, in regard to the improvements only, that is to say: in regard only to the "artificial works" themselves. It is quite evident that, in this case, the transfer of the cribwork *qua* improvement would not carry the transfer of the entire

(1) [1898] A.C. 700, at 710-711.

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island. We doubt if it would mean any more than an easement on Ship Island in favour of the Dominion. And that leads to a further difficulty, because the record is absolutely lacking in the information required to fix the *locus* of the easement. In the earlier days, Ship Island is proven to have had an area of four acres. This had dwindled down to nine-tenths of an acre in 1929. The balance has been "dredged away". For all we know, the cribwork may have been placed, if at all, on that part of the island which was "dredged away". It is certain that the cribwork and the ice-breaker have long since disappeared. To replace them, a breakwater was built, at a much later date, across the whole of the river Maitland and at some distance north of Ship Island.

The existence—even if it should be conceded—of the cribwork in 1867 would suggest at most the transfer of an easement on Ship Island to the Dominion of Canada by force of s. 108 and its schedule. With the meagre data at our disposal, it is not easy to see how the *locus* of the easement could be defined, nor can we perceive what useful purpose would be served by inserting in the judgment a declaration that the easement was vested in the Appellant, in view of the Appellant's avowed intention to destroy the island.

So far as that question may affect the amount of compensation, it may be taken care of when that and other matters reserved by the judgment of the Exchequer Court will be later considered by that court.

For the moment, the Appellant has failed to convince us that the conclusion reached by the learned President was wrong, and the appeal from his judgment ought to be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitor for the respondent the Attorney-General of Ontario: *Joseph Sedgwick.*

Solicitor for the respondent Forrest: *W. G. Pugsley.*