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1932  
 Oct. 4 & 5.  
 Dec. 22.

BETWEEN :

HIS MAJESTY THE KING, in right of the Dominion  
 of Canada,

PLAINTIFF;

AND

THE ATTORNEY-GENERAL OF ONTARIO and  
 WILLIAM L. FORREST,

DEFENDANTS.

*Constitutional law—British North America Act, Section 108—Rights of the  
 Province and Dominion thereunder—Harbours—“River improvement.”*

The Court found upon the evidence that it was open to serious doubt if  
 Ship Island was in 1867 situate within the bounds of what was then  
 known as Goderich Harbour. That in any event it did not then

form part of the said Harbour and was not then a harbour or river improvement.

*Held* that even assuming that Ship Island was in 1867 situate within the bounds of the harbour of Goderich, inasmuch as it was not part of the said harbour and was not at that time a harbour or river improvement, it did not pass to the Crown in right of the Dominion of Canada under section 108 of the British North America Act.

INFORMATION by the Attorney-General of Canada asking that it be declared that that certain piece of land known as Ship Island was, prior to the expropriation thereof, vested in His Majesty the King, in right of the Dominion of Canada, and if not, that, in the alternative, it be declared that it became so vested by the said expropriation, and that the Court fix the compensation for the said lands.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Toronto, solely on the question of title.

*H. H. Davis, K.C.*, and *D. Guthrie* for the plaintiff.

*J. Sedgwick* for the Attorney-General of Ontario.

*A. G. Slaght, K.C.*, and *W. G. Pugsley, K.C.*, for William L. Forrest.

The questions of law raised at the hearing are stated in the reasons for judgment.

THE PRESIDENT, now (December 22, 1932), delivered the following judgment:

The facts of this case, rather than the law, present unusual difficulties and it will become necessary to mention them at some length. Before referring to the facts, it will be convenient first to state the nature of this proceeding, and the scope of the claims of the several parties thereto.

In the month of September, 1929, a certain dredging company, under the terms of a contract in writing between His Majesty represented by the Minister of Public Works of Canada, and the said dredging company, commenced to dredge a certain parcel of land known as Ship Island, (earlier known as No. 2 Island) lying in close proximity to the mainland in the Harbour of Goderich, Ontario, it being the intention to remove the whole of that island for the improvement of navigation in the Harbour of Goderich.

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The island at this time was about one acre in extent, but in earlier years its area comprised something over four acres; the reduction in area was, I understand, due to dredging operations carried on by the Government of Canada in recent years for the improvement of the harbour. The plaintiff then, as now, believed himself to be the owner of Ship Island in fee simple. The defendant Forrest, claiming an interest in Ship Island by virtue of a lease obtained from the Government of the Province of Ontario, and otherwise, commenced an action in the Supreme Court of Ontario against the dredging company, and obtained an interim injunction restraining the dredging company from removing or dredging any part of the island. The injunction was dissolved, the plaintiff agreeing to expropriate the interest, if any, of Forrest, without prejudice to the claim that Ship Island was vested in and the property of His Majesty the King in right of the Dominion of Canada.

The lands in question were then expropriated under the authority of The Expropriation Act, Chap. 64, R.S.C., 1927, and the same then became and new remain vested in His Majesty the King in right of the Dominion of Canada. If it be held that the lands were not vested in the plaintiff prior to the expropriation proceedings, then the plaintiff is willing to pay whatever compensation may be eventually fixed by the Court. The defendant, the Attorney-General of Ontario, claims that the fee simple to Ship Island is (subject to an outstanding leasehold interest) in His Majesty the King in right of the province of Ontario. The defendant Forrest, as already stated, claims a leasehold interest in the island by virtue of a lease of the same made to him by His Majesty the King in right of the province of Ontario, in August, 1929, for the period of twenty-one years. It was also urged on behalf of Forrest that he had obtained a prescriptive title to the lands in question against the Crown by an adverse possession of sixty years, but that claim was abandoned at the end of the trial. Forrest also claims title to the lands by virtue of a continuous and exclusive possession of ten years by himself and his predecessors, under the provisions of The Limitation Act, Chap. 106, R.S.O., 1927. It might be convenient here to remark that the island or a portion of it had been occupied by one Marlton, and later by his son, for many years,

going back at least to 1875, and thereon the Marltons carried on the business of building and repairing vessels, boats, scows and dredges; it was also the base of dredging operations carried on by them in Goderich Harbour for some years. Forrest purchased in 1920 from William Marlton all the buildings, plant, machinery, tools, scows, barges, etc., paying therefor the sum of \$15,500, and he carried on a business there similar to that conducted by Marlton and his son, and he also lived on the island. Forrest apparently received from Marlton a paper title to two barges for registry at Customs, but Marlton at that time informed Forrest that he had no title to the land and consequently no conveyance was made by Marlton to Forrest of any interest in the island. The plaintiff claims title to the lands in question, because at the date of Confederation, Goderich Harbour, then within the province of Canada, passed to the Crown in the right of the Dominion as a public harbour, by virtue of section 108 of the British North America Act, and Schedule Three thereto, and that Ship Island was a part of that public harbour, or was a harbour improvement. The plaintiff also asserts title to the lands in question through various grants or leases made by the province of Upper Canada and the province of Canada, all interests in which were eventually acquired, it is claimed, by His Majesty the King in the right of the Dominion of Canada, and to which I shall shortly refer with greater particularity. The plaintiff resists the claim of the defendant Forrest to possession of the lands by reason of ten years undisturbed occupation. The Canadian National Railways is no longer a defendant.

Before referring to the documentary evidence tendered by the respective parties relating to the matter of title to Ship Island, it might be useful to state a few facts concerning the early history of Goderich Harbour. Goderich Harbour is located at the mouth of the River Maitland, which river was, in earlier days at least, a stream of considerable size, and its upper reaches flowed generally through a narrow valley, but when it reached a point about two miles distant from Lake Huron, into which it flowed, the valley broadened out to a width of from a quarter to half a mile, and through this flat valley the river wound through a series of islands of various sizes, one of which

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was Ship Island; some of these islands were larger than Ship Island, and some were smaller. These islands, it may be assumed were of alluvial origin, but it is, I think, a fact that Ship Island existed as such prior to any of the dates material here. Between these islands and the outlet of the river into Lake Huron was a comparatively shallow flat or basin of considerable extent, which, I think, came to be later called the Inner Harbour. The outlet of the river into Lake Huron was through a beach and it was evidently difficult in the early days to maintain an adequate opening in the beach. In 1835 it was evident that the harbour, then, I think, only the end of the River Maitland, was not sufficiently safe or commodious for the accommodation of even small shipping, and it is apparent that the public authorities were at that time desirous of having a harbour constructed at or near the junction of the river and lake. The town of Goderich had been earlier laid out; it lay along the lake shore and on the south side of the Maitland river and extended up the river for quite a distance. On the opposite side of the river was what was known as Colborne Township. The construction of a harbour at this place, according to a report made in 1870 by John Page, Chief Engineer of Public Works, was first undertaken by the Canada Company, which company we shall hear more about, and he states that though this company made a considerable expenditure on harbour works they were allowed to fall into decay. This work was required by the terms of a lease to which I shall later refer. The Canada Company transferred its rights in the harbour to the Buffalo and Lake Huron Railway Company and which will be later mentioned. In a report made by Hon. H. H. Killaly, on Harbours of Refuge, in 1862, he states that the principle adopted in the construction of Goderich Harbour was 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 of water, the entrance to it being between two piers, the width between the piers being 170 feet at the narrowest point; it would appear that considerable harbour improvement work had been carried out prior to the date of this report, either by the Canada Company, or by the Buffalo and Lake Huron Company, or by both.

A very considerable amount of documentary evidence in the form of grants, leases, plans, and official reports, was put in evidence at the trial, not all of which was in the end claimed to be relevant. In 1830 the province of Upper Canada granted to the Canada Company a large tract of land, designated as the township of Goderich, in the county of Middlesex, in the district of London, but it was conceded by Mr. Davis that this grant did not comprise Ship Island, and it need not therefore be further considered. In 1835, the Government of the Province of Upper Canada leased to the Canada Company, for the period of twenty-one years, certain parcels of land, covered with water in the townships of Goderich and Colborne in the county of Huron. Though this lease is not now of importance it is still desirable to examine it. The land covered with water that was demised is described as follows: "Commencing at the Water's Edge of Lake Huron in the Southern limit of the Tier of small farm lots abutting on the South side of the Town Plot of Goderich—Thence West 500 yards more or less to deep or navigable Water, thence Northerly parallel with the Shore always at the distance of 500 yards more or less in a manner to continue in navigable Water one mile, thence East to the Water's Edge in the Township of Colborne, thence Southerly along the Water's Edge of Lake Huron to the River Maitland, thence up along the Water's Edge of the River Maitland, along the Colborne Side thereof one Mile and seven-eighths of a Mile more or less, till a line produced Westerly will strike the North East Corner of the said Town of Goderich—Thence Westerly crossing the River to the Goderich side thereof; thence down along the Water's Edge of the River Maitland along the Goderich side thereof to Lake Huron, Thence Southerly along the Water's Edge of Lake Huron to the place of beginning." From this description it is clear, I think, that it was the bed of the River Maitland from its outlet at the shore of Lake Huron, and a mile and seven-eighths up the river, that was leased, within which area was situated Ship Island; land covered with water in Lake Huron, was also included in the lease, but in that we are not interested. The Canada Company, as a condition of the lease, was required within five years to build and maintain a substantial wharf or pier extending into the water such a distance as

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to ensure the free navigation of vessels, of the burthen of at least 20 tons, into the Harbour of Goderich through the River Maitland; it was to excavate and remove so much of the sand bar, rock, or other obstructions that impeded navigation at the entrance of the said river and harbour; it was to deepen the bed of the river and lake so as to permit the free navigation of vessels of the tonnage mentioned. In 1837, the Canada Company was authorized by Chapter 50 of the Statutes of Upper Canada "to erect a harbour at Goderich on Lake Huron." That statute seems to recognize the lease which I have just referred to but beyond that I do not think it sheds any light upon the controversy. This lease expired after twenty-one years, and as it did not purport to part with the title to the land covered with water, or the islands in the river, consequently no title in fee simple can be derived from it, and it may therefore be disregarded. Then, in 1840, a grant issued from the province of Upper Canada to the Canada Company conveying certain "parcels or tracts of land covered with water," in the Huron Tract of the county of Huron. Describing the land demised the grant reads: "Being composed of the River Maitland from the northerly boundary of the Huron Tract to Lake Huron." In the same manner the Rivers Thames, Bayfield, and Aux Sables, or portions of them are granted. This grant it seems to me comprised that part of the River Maitland in which we are interested, although Mr. Davis seemed to think it applied to the upper reaches of that river, but as it reserves such portions of River Maitland as constitute the bed of navigable waters, it would seem to be of no importance. There is nothing in the grant which suggests the demise of any islands in the River Maitland. In June, 1859, the Canada Company agreed to sell to the Buffalo and Lake Huron Railway Company certain described lands within and without the Town of Goderich, also the rights, interests and privileges which the Canada Company "may now have, to and in Goderich Harbour in virtue of the Provincial Act, Seven, William the Fourth, Chapter fifty, with all their right to the wharves and piers thereof, the boundaries of the said Harbour being constructed by the said Act as situate, lying and being in accordance with the lease from the Crown of date the twenty-eighth day of July, 1835, or otherwise" The Canada Company also agreed to sell "the land covered with

water lying between the Townships of Goderich and Colborne that is to say, by the River Maitland from its confluence with Lake Huron for a distance up stream of one mile and seven-eighths of a mile." There is no mention of any island in the River Maitland being included in this instrument. Some years later the Canada Company conveyed by deed to the Buffalo and Lake Huron Railway Company all the property described in this agreement of sale. After the Act of Union, in 1862, the province of Canada, leased to the Buffalo and Lake Huron Railway Company, for 99 years, precisely the same land covered with water as was described in the lease made by the Government of Upper Canada to the Canada Company. There is no explanation as to why this lease was made to this railway company, but one might surmise that the Buffalo and Lake Huron Railway Company was of the opinion that possibly the Canada Company was in default in performing the conditions mentioned in the grant of 1840 to it, and that therefore a lease direct to itself was desirable as a measure of protection. This lease was upon the condition that the lessee would perform and execute certain improvements in Goderich Harbour, but these need not be enumerated. There is not in this lease any reservation as to the bed of navigable portions of the land covered with water, and the lease is silent as to any islands falling within the bounds of the described land covered with water. Whatever right or title the Buffalo and Lake Huron Railway Company acquired in Goderich Harbour later became vested in the Grand Trunk Railway Company; there is no evidence as to whether or not the Buffalo and Lake Huron Company was in default under the terms of the lease of 1862. In 1870, by an Order in Council of the Government of the Dominion, the Minister of Public Works of Canada was authorized to acquire from the Grand Trunk Railway Company any rights which the latter had in Goderich Harbour, whatever they were, but it appears this was not acted upon. Then the next event was that the Canadian National Railways, as successor to the Grand Trunk Railway Company, and the Buffalo and Lake Huron Railway Company, quitted claim to His Majesty the King, in the right of the Dominion of Canada represented by the Minister of Marine and Fisheries, such rights as they had in the Harbour of Goderich.

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The plaintiff's claim to the fee simple of Ship Island, or to the unexpired term of the lease of 1862, through the chain of title I have mentioned, I think must fail. If the bed of the River Maitland passed from the Crown under any of the grants referred to, or was leased, it does not follow that Ship Island was granted or leased by the Crown. The demise of the river bed, to grantees or lessees, was upon the condition that certain harbour improvements were to be performed, and at the date of the grants or leases which I have mentioned, it is improbable that the islands in the River Maitland would in any way be regarded as an element of importance in the construction or improvement of the harbour, but in any event, there is not, in my opinion, evidence to show that Ship Island was ever granted or leased by the province of Upper Canada, or the province of Canada, in fact the weight of evidence is against such a presumption. The title to Ship Island must therefore be held to have been, prior to the expropriation proceedings, in the Crown in right of the province of Ontario, unless it was acquired by the Dominion as a portion of a public harbour, or a river improvement, at the date of Confederation, and to which I shall at once refer.

The point which, I think, plaintiff's counsel chiefly relied upon was that the lands taken passed to the Crown in the right of the Dominion of Canada at the date of Confederation, under sec. 108 of the British North America Act, which provided that the Public Works and Property of each province, enumerated in the Third Schedule to the Act, should become the property of Canada, and the Schedule, inter alia, enumerates "Public Harbours" and "Rivers and Lake Improvements." "Public harbour" means not merely a place suitable by its physical characteristics for use as a harbour 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. The date at which the test must here be applied is the date at which the British North America Act, by becoming applicable, effected a division of assets between the province, here the province of Ontario, and the Dominion. See *Attorney-General of Canada v. Ritchie Contracting and Supply Company* (1) and *The Fisheries Case* (2). As to the division of assets between

(1) (1919) A.C. 999 at p. 1004.

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

the new provinces of Ontario and Quebec, which belonged to the old province of Canada, no question was raised before me. Assuming Ship Island was within the bounds of what was known as the Harbour of Goderich, and which I shall assume was a public harbour, in 1867, it does not follow that that island was a part of the harbour, and in my opinion it was not. The bounds of the harbour would be one thing, but whether Ship Island was a part of the harbour would be an entirely different question. There would not seem to be any reason for holding that Ship Island was a part of a public harbour, in fact such a contention does not appear to me to be one of substance in view of the facts. 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. Nor do I think it tenable to say that Ship Island was then a "river improvement." It was a parcel of land containing about four acres. The Canada Company may have at one time constructed some crib work on the island, as a part of, or an anchor for, an "ice breaker" built from the mainland to Ship Island, to protect the harbour, but that would not be sufficient to make the island a harbour or river improvement, or a portion of the harbour, and at any rate it has not been shown that the icebreaker was in existence in 1867, and I do not think it was. To say that Ship Island was in use as a harbour or river improvement in 1867 as was urged, cannot, in my opinion, be sustained. Ship Island is regarded to-day as a nuisance, rather than a harbour improvement, and so much so, that to meet the expanding business of the present Goderich Harbour it is proposed to enlarge it by dredging the island away altogether. "Improvements" in a harbour or river in 1867 meant, in my opinion, some Public Work or Property constructed or created and then in existence and use for some purpose or other.

Having reached the conclusion that the title to Ship Island was not in the Crown in the right of the Dominion of Canada, but in the Crown in the right of the province of Ontario, it is not necessary to pronounce upon any other point; it was stated by Mr. Slaght that if I reached this conclusion it would not be necessary to express an opinion upon the claim of the defendant Forrest to Ship Island, by reason of ten years undisturbed occupation of the same by himself or his predecessor Marlton. It follows that the

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defendant the Attorney-General of Ontario, as owner of the fee simple, and the defendant Forrest as lessee, of the lands taken must succeed and I see no reason for withholding costs to the successful parties in respect of this aspect of the case. The question of the amount of compensation is of course reserved as agreed upon. The Court will either hear evidence later in respect of the amount of compensation, or will direct a reference to ascertain the amount of the same, at a time to be fixed on application in the usual way.

*Judgment accordingly.*