

THE KING UPON THE INFORMATION OF THE AT-
TORNEY-GENERAL OF CANADA,

1914
May 30.

Plaintiff;

AND

THE VANCOUVER LUMBER COMPANY,

Defendant.

Public lands—Deadman's Island—Lease—Authority of Minister.

Deadman's Island, in the harbour of Vancouver, is the property of the Crown in the right of the Dominion of Canada. An Order in Council authorizing the Minister of Militia and Defence to lease that island for a term of years does not carry with it the authority to vary its terms by providing for a right of perpetual renewal. In the absence of an Order-in-Council authorizing such variation, the action of the Minister in doing so is null and of no effect.

ACTION to set aside a lease of Deadman's Island.

Tried before the Honourable Mr. Justice Cassels,
at Ottawa, May 27, 1914.

The facts are stated in the reasons for judgment.

E. L. Newcombe, K.C., and *H. Cowan*, K.C., for
plaintiff.

I. F. Hellmuth, K.C., and *R. S. Lennie*, for de-
fendant.

CASSELS, J., (May 30, 1914) delivered judgment.

Deadman's Island, in the Harbour of Vancouver, is the property of the Crown, represented by the Dominion of Canada. At the time of the passage of the *Confederation Act*, it was owned by the Crown represented by the Imperial Government. Subsequent to Confederation it was transferred to the Dominion of Canada.

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The facts relating to the title to this island are fully set out in the reports of the case of *Attorney-General of British Columbia v. Ludgate & Attorney-General of the Dominion of Canada*. The reasons for judgment in that case are to be found reported in 8 B.C.R. p. 242 (at trial), 11 B.C.R. 258 (Court of Appeal, and [1906] A.C. 552 (Privy Council).

An Order-in-Council was passed by Her Majesty's Privy Council of the Dominion of Canada, and was subsequently approved of by His Excellency the Governor-General of Canada. The Order-in-Council is as follows:

“P.C. 276.

“Certified copy of a Report of the Committee of
“the Privy Council approved by His Excellency
“the Governor-General on the 16th February,
“1899.

“On a memorandum, dated 10th February,
“1899, from the Minister of Militia and De-
“fence, recommending that authority be given
“him to lease Deadman's Island, situated in
“Coal Harbour, Burrard Inlet, British Col-
“umbia, to the Vancouver Lumber Company, of
“Vancouver City, British Columbia, for a term
“of twenty-five years, at an annual rental of
“five hundred dollars.

“The Committee submit the same for Your Ex-
“cellency's approval.

“(Sgd.) Rodolphe Boudreau,

“Clerk of the Privy Council.”

(Seal).

Pursuant to this Order-in-Council, on February 14th, 1899, a lease of this island, a copy of which is set out in the information and admitted by the defendant, was executed by the then Minister of Mi-

litia and Defence, Sir Frederick Borden, purporting to lease to the defendant company the island in question for a term of 25 years. It is open to question whether this lease is effective and whether it does not contain provisions in excess of the powers conferred by the Order-in-Council.

The plaintiff in the action before me does not raise any question attacking the validity of this lease. On April 14th, 1900, the then Minister of Militia and Defence, Sir Frederick Borden, purported to vary the terms of the lease of February 14th, 1899, in very important particulars. Among other changes one amendment would provide for a right of perpetual renewal to the lessee instead of a lease for 25 years, as authorized.

This information is filed to have it declared that the variation of the terms of the lease was unauthorized and that the document in question signed by Sir Frederick Borden is null and of no effect.

I am of the opinion that the contention of the Crown is well founded. It has been proved before me that no Order-in-Council was passed authorizing such a variation as that made by the subsequent document dated April 14th, 1900. I expressed my view at the trial that the evidence of Mr. Macdonell taken on commission was almost wholly inadmissible and irrelevant, and that part of it reciting the statements of Sir Frederick Borden that an Order-in-Council had been passed authorizing the execution of this document was wholly inadmissible to prove such fact. Sir Frederick Borden was not called as a witness.

The plea of *res judicata* which I allowed the defendant to set up by amended defence in order not to deprive it of any defence if a higher Court were

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to take a different view from that entertained by me, in my opinion hardly merits any consideration. It lacks every essential element of a valid defence of *res judicata*.

I think the plaintiff is entitled to judgment declaring that the document of April 14th, 1900, varying the terms of the lease of February 14th, 1899, is void and of no effect, and if the plaintiff so desires it should be delivered up and cancelled.

The defendant must pay the costs of the plaintiff in this action.

*Judgment for plaintiff.**

Solicitor for plaintiff: *E. L. Newcombe.*

Solicitors for defendant: *Pringle, Thompson,
Burgess & Côté.*

* Affirmed on appeal to Supreme Court of Canada, December 4th, 1914.