PAUL A. PAULSON (DEFENDANT) ....APPELLANT;

AND

HIS MAJESTY THE KING, (ON THE RELATION OF THE ATTORNEY-GENERAL FOR CANADA,) AND THE INTERNATIONAL COAL AND COKE COMPANY (PLAINTIFFS) ..... RESPONDENTS.

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*Oct. 29.
*Dec. 29.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Dominion lands—Lease of mining areas—"Dominion Lands Act," s. 47—Statutory regulations — Conditions of lease — Defeasance — Notice—Cancellation on default—Forfeiture of rights—Principal and agent—Solicitor.

A lease granted under the regulations regarding the leasing of school lands in the North-West Territories for coal mining purposes, made pursuant to section 47 of the "Dominion Lands Act," provided that, on default by the lessee to perform conditions of the lease, the Minister of the Interior should have power to cancel the lease by written notice to the lessee, whereupon the lease should become void and the Crown might re-enter, repossess and enjoy its former estate in the lands.

Held, reversing the judgment appealed from (15 Ex. C.R. 252), Idington and Brodeur JJ. dissenting, that in order to determine such a lease it is essential that the cancellation should be effected by a notice in writing from the Minister which actually reaches the lessee.

Per Fitzpatrick C.J.—The notice should declare the intention of the Minister to make the cancellation on account of breach of the conditions, and the lessee should be given an opportunity to remedy the breach in question or, at least, to be heard before forfeiture. No proposed cancellation can be effective against the lessee unless such a notice has been given to him before the forfeiture is declared.

Per Duff J.—In the absence of special authority, solicitors employed by the lessee in respect of his business with the Department can-

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

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not be deemed agents to whom such notice of cancellation could be given on his behalf.

Per Duff J.—Section 6 of the regulations has not the effect, upon default in performance of the nominated conditions, of terminating the lessee's interest *ipso jure*, but only on the election of the Crown manifested as provided for in the lease. *Davenport* v. *The Queen* (3 App. Cas. 115) applied.

Per Idington J. (dissenting).—The lease in question was determinable at the election of the Crown upon the mere fact of breach of conditions and, the Crown having so elected, the Minister was not competent to revive it or to waive the consequences of default.

Per Idington and Brodeur JJ.—By notification to his solicitors and the effect of the correspondence with the Department, which took place thereafter, it must be taken that the lessee had actual notice of the intention of the Minister to cancel the lease for breach of conditions.

APPEAL from the judgment of the Exchequer Court of Canada(1) whereby it was declared that a certain lease by the Crown to the defendant, of mining lands in the Province of Alberta was properly forfeited and cancelled.

The circumstances of the case fully appear in the judgments now reported.

W. N. Tilley K.C. and *J. F. Smellie* for the appellant.

R. G Code K.C. for the respondent, His Majesty The King.

Lafleur K.C. and *Falconer K.C.* for the respondents, The International Coal and Coke Company.

THE CHIEF JUSTICE.—The appellant obtained from the Crown a mining lease dated the 8th August, 1904, of coal under Dominion Lands in the then Provisional District of Alberta. He did not fulfil the conditions

(1) 15 EX. C.R. 252.

of the lease. It is unnecessary to enter into the correspondence between the parties which ensued until we come to the letter addressed on the 13th September, 1909, by the assistant-secretary of the Department of the Interior to the lessee, the present appellant. That letter is as follows:—

Department of the Interior,
Ottawa, 13th September, 1909.

Sir,—I am directed to inform you that as you have failed to comply with the provisions of clause 12 of your lease for coal mining purposes of the east half of section 29, township 7, range 4, west of the 5th meridian, by commencing active mining operations on the land within the time required by the said section of the lease, the Department has been obliged to cancel your lease, and it will, therefore, now make such other disposition of the land as may seem advisable.

I am to add that a refund cheque for $96 paid by your solicitors, Messrs. Lewis & Smellie, as rental for the year ending the 15th July next, will be forwarded to them on your behalf in the course of a day or two.

Your obedient servant,
(Sgd.) L. PEREIRA,
Assistant-Secretary.

Paul A. Paulson, Esq.,
Coleman, Alberta.

The envelope containing this letter was addressed in the same way as the letter itself. It appears to have remained in the post-office of the Town of Coleman some two months and was then returned from the dead letter office marked "no address — not called for."

This communication was no doubt intended to be a notice pursuant to the 16th and 17th conditions in the lease, which are as follows:—

16. That any notice, demand, or other communication which His Majesty or the Minister may require or desire to give or serve upon the lessee, may be validly given or served by the secretary or the assistant-secretary of the Department of the Interior.

17. That in case of default in payment of the said rent or royalty for six months after the same should have been paid or in case of the

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breach or non-observance or non-performance on the part of the lessee of any proviso, condition, term, restriction or stipulation herein contained and which ought to be observed or performed by the said lessee and which has not been waived by the said Minister, the Minister may cancel these presents by written notice to the said lessee and, thereupon, the same and everything therein contained shall become and be absolutely null and void to all intents and purposes whatsoever and it shall be lawful for His Majesty or His Successors or assigns into and upon the said demised premises (or any part thereof in the name of the whole) to re-enter and the same to have again, re-possess and enjoy as of His or their former estate therein anything contained herein to the contrary notwithstanding.

Provided nevertheless that in case of such cancellation and re-entry the lessee shall be liable to pay and His Majesty, His Successors or Assigns shall have the same remedies for the recovery of any rent or royalty then due or accruing due as if these presents had not been cancelled but remained in full force and effect.

The notice was incompetent to cancel the lease for two reasons:—

1. It was not such a notice as is called for by condition 17.

2. It was not given to nor served on the lessee.

As to the first reason, it would be necessary, in order to hold the notice of any validity, that the condition should be construed to mean that the Minister may cancel the lease, but must then give notice to the lessee that he has done so. This is in terms what the letter of the 13th September, 1909, does. There can be no doubt that this is not such a notice as is called for. The notice must be to the effect that it is the intention of the Minister to cancel the lease for breach of the conditions of the lease, thus giving the lessee an opportunity of remedying the breach or at any rate of being heard before his lease is forfeited. There can be no object in a notice that the lease has been already irrevocably cancelled without notice. In the most extreme view, the notice should state that the Minister cancels the lease for breach of condition and

not that he had already done so without notice which he had no power to do.

It has been represented to us that the provision for re-entry was a cumulative requirement for putting an end to the lease; there can be no doubt that frequently in leases the proviso for re-entry stipulates that notice shall be given before a forfeiture is enforced.

The courts lean against a forfeiture and a condition like this should be strictly construed. It is most reasonable to suppose that notice should be given before the forfeiture is enforced because the power to cancel the lease by notice only arises on breach of any of the conditions. If there had been no breach of condition a notice could not have rendered the lease void and there would, therefore, be uncertainty whether the lease was still subsisting or not.

The Imperial statute, 44 & 45 Vict. ch. 41 ("The Conveyancing Act, 1881"), provides by section 14, subsection 1, as follows:—

> A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

A similar provision is to be found in the Ontario statute (R.S.O., ch. 155, sec. 20(2)) and perhaps in the statutes of others of the provinces.

Secondly, the notice such as it was, was neither given nor served on the lessee. It was simply mailed

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to him at the Town of Coleman and, as he did not happen to inquire at the post-office if there was such a notice there for him, which he was certainly not bound to do, it never came to his hands at all.

Whatever the effect of a proper notice would have been, this notice was clearly insufficient for any purpose.

The next document calling for attention is the letter of the 28th January, 1910, addressed by the secretary of the Department of the Interior to the lessee's solicitors. It is as follows:—

Ottawa, 28th January, 1910.

Gentlemen,—With further reference to the Departmental letter of the 11th instant, I am directed to say that, in view of your representations, it has been decided to reinstate the lease in favour of Mr. Paul Paulson for the coal-mining rights of the east-half of section 29, township 7, range 4, west of the 5th meridian.

The re-instatement is, however, granted on the express condition that Mr. Paulson will fyle evidence in the Department, shewing the nature and progress of the work it is understood he has now commenced on the land, giving full particulars as to the extent and depth of the shaft, as well as the necessary works connected therewith.

Your obedient servant,
(Sgd.) P. G. KEYES,
Secretary.

Messers. Lewis & Smellie,
Barristers,
7 Trust Bldg.,
Ottawa, Ont.

This letter was written on the erroneous assumption that the lease had been cancelled, but that it was in the power of the lessor to allow it to hold good, as the letter says, to reinstate the lease.

It is clear that, if the lessor was willing to continue the lease notwithstanding the breaches of condition, he must be taken, on the true fact that the lease was still existing, to have consented to waive the forfeiture of the lease for breach of condition.

This waiver disposes of any necessity for inquiring into the question whether the subsequent lease of the 28th June, 1910, to the International Coal and Coke Co., Ltd., constituted a sufficient re-entry by the lessor. Having waived the breaches of condition the lessor had no right to re-enter for a forfeiture.

I desire to add that I concur in what I understand was the view of the learned judge of the Exchequer Court that the remedy pursued by the Crown in this case was entirely unsuitable.

The appeal should be allowed and the information of the Attorney-General dismissed. The defendant Paulson is entitled to be paid by the Crown his costs of the action and of this appeal.

IDINGTON J. (dissenting).—This is a remarkable case. The appellant so long ago as 8th August, 1904, obtained from the Crown a coal-mining lease or licence over half a section of school lands held by the Crown. The lease or licence professed on its face to be pursuant to and in conformity with a statute providing for the administration of such school lands, and the regulations made thereunder, of which latter the sixth is as follows:—

> 6. Failure to commence active operations within one year and to work the mine within two years after commencement of the term of the lease, or to pay the ground rent or royalty as before provided shall subject the lessee to the forfeiture of the lease and to resumption of the land by the Crown.

The regulations provided that such a lessee should pay in half-yearly payments thirty cents an acre annually and in addition a royalty of ten cents per ton on all coal taken out of the mine and furnish sworn statements relative thereto.

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No less than 160 acres, nor more than 640 acres, could be leased under said regulations to one person.

The appellant, when this case was tried in December, 1913, had never mined on said land a pound of coal. It is admitted, or at all events alleged and not denied, that any coal existent within the area in question is at least two thousand feet below the surface and thus, in competition with that more easily available, commercially speaking, an impossibility.

On the 30th April, 1906, the secretary of the Department having the matter in charge wrote appellant calling his attention to the regulation above quoted, and copying it for him to read, and reminding him that the Department had no evidence that he had commenced active mining operations on the land in question and that the year within which the clause in question required active operations to be commenced had expired on the 1st August then last.

This was answered by his solicitors in a letter of the 18th of May, 1906, quoting instructions from him as follows:—

> Referring to your letter of the 30th April last addressed to Mr. Paul A. Paulson, we have to-day received a letter from Mr. Paulson, which we submit explains the situation. In part Mr. Paulson's letter to us reads as follows:—
>
> "Enclosed please find a letter which I have just received from the Department of the Interior, relating to the mining of coal on the east half of section 29, township 7, range 4, west of 5th meridian.
>
> "Will you be good enough to go to the Department for me and explain to them that I was the original purchaser of a lot of coal land adjoining this half-section, which has been transferred to the International Coal and Coke Company, in which company I am a large stockholder; that coal is being mined on the land to the north of section 29, and that the tunnels are being steadily extended southward toward this land, and that all coal unerlying section 29 will have to be mined through the tunnels now being pushed forward to the south toward section 29 by the International C. & C. Co. The coal, under section 29, cannot be mined or gotten out any other way,

except by the tunnels above referred to, and these tunnels will tap the coal seam in section 29 at great depth. As a matter of fact there are no outcrops of coal on section 29, and it is many hundred feet underlying the surface of that section. The outcroppings are all on section 28, to the east of section 29. When the present tunnels are extended to the north limits of section 29, the coal on it will be mined and come through the tunnels 2½ miles to the International Company's works on the railway in section 8, township 8, range 4, west of 5th. I trust there will be no trouble about this, and that the Department does not intend to force me to mine the coal just now, when it is impracticable to do so.

Upon this he was given an extension of time to 1st August, 1907.

On the 21st of August, 1907, his solicitors were reminded of this extension and told

so far no advice has been received of the mining operations having been commenced.

On the 4th of September, 1907, his solicitors wrote the secretary of the Department explaining the slow progress of tunnels for other mines likely to reach this land and need of another year's extension for appellant.

In this letter they say:—

It is absolutely impossible to mine the coal from this section until the tunnels reach it from the north, as all the coal has to come through these tunnels to the railway.

On the 28th September, 1907, the secretary answered:—

I beg to say that before the extension asked for can be granted it will be necessary to file here a definite statement by the applicant as to the extent of the operations already undertaken and the expenditure incured so far in developing the mines from which these lands will be reached.

To this they reply on the 15th October, 1907, as following extract shews:—

The International Coal and Coke Company which owns the coal lands to the north, south and east of the above half-section, have

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approximately spent $1,000,000 and upwards in the development and improvement of its property, and are now engaged in running tunnels from the north in the southerly direction toward the above-mentioned half-section.

The said tunnels were started from section 8, township 8, range 4, W. 5th, and extended through section 5 into sections 32 and 33, 7-4, and will in due time be extended into the east half of section 29.

On the 25th November, 1907, in view of the representations so made, appellant was granted an extension to the 1st February, 1909.

On the 27th November, 1908, the respondent company applied for a mining lease of the land in question and were told by letter of 14th December, 1908, that the application could not be entertained as the land was under lease to appellant for coal mining.

On the 11th March, 1909, the appellant's solicitors wrote reciting part of the foregoing and reiterating the story of the respondent company having expended a million dollars and its tunnels being needed to enable mining on land in question.

They parenthetically remark as follows:—

(Mr. Paulson was the original owner of the properties owned by the company and is now a large holder of its shares.)

And they state further as follows:—

The coal from the east half of 29 would have to be hauled through the above mentioned tunnels down to the railway on section 8-8-4.

They conclude by asking an extension to 15th July, 1909.

On 9th March, 1909, the manager of the respondent company writes the Minister pointing out that appellant's lease has existed for years and nothing has been done thereunder to fulfil the conditions; that there is no work done on the land and that it is located right in the centre of the company's property

and is being held solely with the object of holding us up for a bonus or for royalty on the coal we might at any time make arrangements to mine therefrom.

He further pointed out that the company were working in the next section adjacent to this land in question and will have to go through it to reach sections 28, 21 and 16 of same township and range, and asks, under these conditions, if the lease now in question cannot be cancelled and the company's application for a lease thereof reconsidered. He explained appellant had no other land in the vicinity and recognizes that if he had there might be a legitimate excuse and assumes the Minister's investigation will shew appellant has none.

The Minister replies promising an investigation.

The secretary then answers the solicitor's letter of 11th March informing them an inspector has been instructed to visit the land and report fully.

On the 14th July, 1909, he wrote to the solicitors of appellant acknowledging receipt of a cheque to cover rental for year ending 15th July, 1910, and informs them it is only

accepted conditionally pending a decision in regard to the extension of time asked for by Mr. Paulson, which cannot be settled until the Minister's return.

I enclose receipt No. 20239 for $96.

It may be observed this was tender of rent for a year in advance not yet due.

On 13th September, 1909, the assistant-secretary writes the appellant's solicitors that

in view of the inspector's report in the matter, and after careful consideration of the circumstances, it has been decided that it would not be in the public interest nor in that of the School Lands Endowment Fund to grant Mr. Paulson the extension asked for, and I am, therefore, to inform you that he is being advised that his lease for coal mining purpose of this half section has been cancelled. The

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Department will now make such other disposition of the land as may seem advisable.

A refund cheque will be forwarded to you within the course of a day or two in favour of Mr. Paulson for $96 paid as rental for the current year ending the 15th July, 1910, which, as you were advised by letter of the 14th July, was only accepted conditionally.

The appellant was notified accordingly by letter directed to same address as a former one (evidently received), but it was returned as uncalled for.

It is quite clear from the foregoing recital of the facts that the appellant never intended to do any mining on the lands in question except by means of using the tunnels which the respondent company was making and did make; that he hoped by means of his influence as a leading shareholder therein to acquire the right to use the said tunnels; that he obtained such extensions as he got by representations relative thereto; that the mining of coal under said lands otherwise was as he instructed his solicitors to represent, and they on his behalf did represent, to the officers of the Crown, an impossibility; that assurances thus given and the expectations thus raised of his acquiring the right to use such tunnels, was the only reason why his long continuing defaults in complying with not only the terms of the lease, but also the obvious scope and purpose of the statute, and regulations by which all within the lease must be governed, was tolerated; that but for those representations and consequent expectations the neglect of the Minister in charge to declare the lease forfeited and recover possession would have been such a disregard of the duty cast upon him by the statute and regulations as to render his doing so unjustifiable; and that the attempt of appellant to maintain on foot the said lease was not with the expectation of developing, as the interests of the Crown demanded,

a profitable mine productive of coal, and the consequent production of revenue to be derived therefrom for the support of schools, and all implied therein, but for the unworthy purpose of making merchandise of the lease itself at the expense of his fellow shareholders in respondent company and of the Crown; unless, indeed, his representations are to be taken as false, which it does not lie in his mouth now to set up.

It seems, however, that despite the reiterated statement by the secretary of the Department so late as 11th January, 1910, of adherence to the forfeiture of the lease and its termination thereby, the Department unfortunately was induced to write appellant's solicitors a letter of 28th January, 1910, that in view of their representations it had been decided to reinstate the lease in favour of appellant. But even that concludes as follows:—

> The reinstatement is, however, granted on the express condition that Mr. Paulson will fyle evidence in the Department, shewing the nature and progress of the work it is understood he has now commenced on the land, giving full particulars as to the extent and depth of the shaft, as well as the necessary works connected therewith.

This, I admit, is somewhat ambiguous, but must be read in light of the solicitors' letter of the 21st January, 1910, which induced that of the 28th just now referred to as a reply thereto.

It is as follows:—

> Referring to the correspondence and interviews between yourself and our Mr. Smellie, we now beg to inform you that Mr. P. A. Paulson, the lessee of the east half of section 29, township 7, range 4, west of the 5th principal meridian, in the Province of Alberta, under Departmental lease No. 3, reference No. 730,279, dated 8th August, 1904, having endeavoured, unsuccessfully, to obtain a further extension of time, has commenced active operations on the land and has started mining on the property. We are instructed that Mr. Paulson is sinking his shaft from the surface with all possible speed.

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I take it to refer to operations between August and the said date.

So read any one in the position of the Minister would have expected to have heard from the appellant with a report of what, up to the 28th of January, had been done, shewing something to justify the reinstatement.

Nothing came so far as I can find till after the 14th of April when the same solicitors are told by a letter from the secretary that the law officers of the Crown had advised that it was not within the competence of the Minister of the Interior to revive the lease which was properly cancelled for non-compliance with the conditions, and refusing to consider his application therefor.

The appellant relies upon the conditional acceptance of rent which was returned and the foregoing conditional reinstatement as an answer to the forfeiture of the lease which the learned trial judge finds as a fact took place within the terms thereof.

With the reasons he assigns for so holding I agree and need not repeat same here.

However, if there be any doubt as to the correctness of his findings resting upon the lease alone as such, I think a full consideration of the provisions of the statute and of the regulations thereunder which are themselves of statutory force and effect, must lead to the conclusion that under same the Minister in charge of the trust thus created for school purposes was given authority only to grant such leases as contemplated thereby.

If the lease and its provisions carry in them such pitfalls as the elaborate argument addressed to us im-

plies, it was not, I submit, in conformity with the scope and purpose of the statute and regulations.

In so far as the lease and implications therein conflict with the due operation of the statute, and the regulations pursuant to which it purports to have been made and beyond which it cannot be extended either by its terms or implications resting on the language used the statutory authority must prevail.

I cannot read the statute and regulations as being capable of permitting such consequences as implied in the argument supporting an appellant whose whole course of conduct as evidenced in the facts and circumstances which I have outlined above was productive of the nullification thereof.

To do so would, I submit, frustrate the purposes of the statute and that which set apart these school land sections for administration for the public trust created in support of education.

It has been also argued that the lease so called is but a licence and the cases of *Roberts* v. *Davey*(1); *Doe d. Bryan* v. *Bancks*(2), are relied upon. In addition thereto the cases of *James* v. *Young*(3), *In re Brain*(4), and the remarks of Sir Montague Smith in delivering the judgment in the case of *The Attorney-General of Victoria* v. *Ettershank*(5), at page 371, would seem to indicate a mining lease, so called, may be considered from a different point of view from ordinary leases in regard to the application of the law governing same.

The latter case was brought to my notice by my brother Duff, since the argument, as having relation to the question I had raised in argument and have just

(1) 4 B. & Ad. 664.
(2) 4 B. & Ald. 401.
(3) 27 Ch. D. 652.
(4) L.R. 18 Eq. 389.
(5) L.R. 6 P.C. 354.

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re-stated above relative to the statute governing the right of the parties rather than what by acts or language they had expressed when acting under a statute. The matter has not been fully argued from either point of view.

I, therefore, content myself with stating what I conceive to be law which cannot be got rid of in the way attempted herein.

Of course, I recognize that there must be on the part of the Crown an election to repudiate and a repudiation of the appellant's rights, but deny more is needed under this statute and that it has not incorporated therein the technical doctrines as to re-entry and all implied therein.

That repudiation was clearly and effectually made and a judicial declaration thereof and effects to be given it under the statute is all that is involved in the decision appealed from.

The case of *Bonanza Creek Hydraulic Concession* v. *The King* (1), relied upon in appellant's factum, but not pressed in argument, turned upon a statute which expressly required a judicial decision on the part of the Minister and hence is clearly distinguishable.

I may add also that appellant has put himself beyond the pale of these cases relied upon, which entitle a lessee to be relieved against forfeiture.

If he has any right to be indemnified for expenditure incurred in reliance upon the apparently inadvertent suggestion of reinstatement he may have some right, upon which I express no opinion, to assert in another way than he attempts herein.

I think, therefore, the appeal should be dismissed with costs.

(1) 40 Can. S.C.R. 281.

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DUFF J.—In my view of this appeal two questions only require discussion. One of these was raised, I think, for the first time during the course of the argument and touches the construction of the order-in-council under the authority of which the appellant's lease purports to be granted. The suggested construction which, if adopted, would be conclusive against the appeal is not consistent with the interpretation followed by the department charged with the administration of the lands affected by the order-in-council and the working of the order-in-council itself; but nevertheless it must be considered.

The exact point is this:—Has section 6 of the order-in-council the effect of causing the lessee's interest to come automatically to a termination, without the exercise of any election on behalf of the Crown, on failure to perform any of the conditions thereby prescribed, namely: (1) the commencing of active mining operations on the demised property within one year after the commencement of the term, or (2) the working of a mine or mines within two years after that date, or (3) the payment of the reserved ground rent or royalty ?

The words of the section are as follows:—

> Failure to commence active operations within one year and to work the mine within two years after the commencement of the term of the lease, or to pay the ground rent or royalty as before provided, shall subject the lessee to the forfeiture of the lease and to resumption of the land by the Crown.

Does this section merely vest in the Crown the right, at its election, to free its title from the lessee's interest on default of performance of the nominated conditions; or, does it operate on such default to terminate that interest *ipso jure* irrespective and independently of any election on behalf of the Crown ?

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The question is a question of construction simply. There can be no doubt that under section 47 of the "Dominion Lands Act" the Governor-in-Council has power to pass a regulation having the force and operation of statute and having the meaning it is now suggested we should ascribe to section 6. The question is:—What is the meaning of section 6? In examining that question it will be convenient to apply some of the usual aids to construction—the traditional interpretation of similar provisions by the courts, the language and the tenor of the order-in-council as a whole, the administrative interpretation of this order-in-council and of similar regulations passed by the Governor-in-Council under the authority of the "Dominion Lands Act," and providing schemes for the administration of various classes of public land by the same Department, the Department of the Interior.

The manner in which the courts have dealt with such provisions, whether found in contracts or in statutes, is described by a very eminent judge in the following passages taken from a judgment of final authority. (Sir Montague Smith speaking for the Privy Council in *Davenport* v. *The Queen* (1), at pages 128, 129 and 130.)

> In a long series of decisions the courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. The same rule of construction has been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract: see *Doe* v. *Bancks* (2); *Roberts* v. *Davey* (3), and other cases in the notes to *Dumpor's Case* (4).
>
> In *Roberts* v. *Davey* (3) the words were that the licence "should

(1) 3 App. Cas. 115.
(2) 4 B. & Ald. 401.
(3) 4 B. & Ad. 664.
(4) 1 Sm. L.C. (12 ed.) 56.

cease, determine, and be utterly void and of no effect to all intents and purposes." As far, therefore, as language is concerned, it was stronger in that case than in the present.

It is, however, contended that this rule of construction is inapplicable when the legislature has imposed a condition. But in many cases the language of statutes, even when public interests are affected, has been similarly modified. Thus, where the statute provided that if the purchaser at an auction refused to pay the auction duty, his bidding "should be null and void to all intents and purposes," it was decided that the bidding was void only at the option of the seller, though the object of the Act was to protect the revenue. In that case Mr. Justice Coltman said: "It is so contrary to justice that a party should avoid his own contract by his own wrong that, unless constrained, we should not adopt a construction favourable to such a view." *Malins* v. *Freeman*(1).

There is no doubt that the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail, but the intention to exclude it should be clearly established.

The question arises in this, as in all similar cases, whether it could have been intended that the lessee should be allowed to take advantage of his own breach of condition, or, as it is termed, of his own wrong, as an answer to a claim of the Crown for rent accruing subsequently to the first year of his tenancy. The effect of holding that the lessee himself might insist that his lease was void, would, of course, be to allow him to escape by his own default from a bad bargain, if he had made one. It would deprive the Crown of the right to the future rents, although circumstances might exist in which it would be more to the interest of the Crown, representing the colony, to obtain the money than to re-possess the land, as, indeed, in the present case, it was thought to be.

See also *Bonanza Creek Hydraulic Concession* v. *The King*(2).

Such being the way in which the courts have looked at similar provisions, is it capable of being "clearly established" that the intention of section 6 was to exclude this "rule of construction," as Sir Montague Smith calls it? The order-in-council provides for the "issue" of "leases" and it is indisputable that the word "lease," as designating an instru-

(1) 4 Bing. N.C. 395. (2) 40 Can. S.C.R. 281.

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ment creating a term of years in the public lands, "issued" by the Department of the Interior, means, in common understanding and usage, a contractual instrument recording in the form of contractual stipulations—covenants, provisoes for re-entry and the like —the terms of the agreement between the Crown and the lessee by which their reciprocal rights and obligations are to be governed touching the subject-matter of the lease. The phraseology of section 6 contains nothing to suggest that the section was framed with a view to excluding the ordinary rule of construction. "Shall subject the lessee to the forfeiture of the lease," while certainly not unambiguous points rather to a penalty exigible from the lessee at the will of the lessor rather than to a consequence decreed by the law itself independently of the will or choice of either. The words "resumption of the land by the Crown" even less disputably seem to point in the same direction.

Ambiguity in such instruments as this order-in-council entitles us by the settled practice of the British and American courts to seek the assistance of any settled administrative interpretation which is clear and unmistakable in its effect for arriving at the more probable intention of the authors of the law. The only actual evidence now formally before us as to administrative interpretation is the lease itself upon which the proceedings are taken coupled with the conduct of the Minister and the Department of the Interior and the attitude of the Crown in the course of this litigation; but there can be no shadow of question that, down to the moment of the hearing of the appeal, the construction of section 6, upon which the Government has deliberately acted, as regards the matter now

under discussion, is the construction for which the appellant contends.

It is common knowledge that the "rule of construction" of *Davenport* v. *The Queen*(1) has usually governed the departmental construction of similar regulations.

I think the proper conclusion is that the lease contemplated by the order-in-council is a contractual instrument and that the form of covenant made use of for the purpose of binding the lessee in the lease before us to perform the conditions of section 6 and the clause of forfeiture employed for the purpose of giving effect to the provisions of section 6 are proper clauses to which it was within the power of the Minister to assent and that the reciprocal rights and duties of the Crown and the lessee in respect of the matters to which these clauses relate are in this litigation to be determined by giving effect to the clauses according to their proper construction as stipulations in an instrument *inter partes*.

I do not find it necessary to decide the question raised by the learned Judge of the Exchequer Court whether or not the phrase "excused from so doing by the Minister," in the 12th clause of the lease, applies to the covenants to commence active operations within a year and to work a mine within two years. There is no doubt much could be said in favour of the view of the learned judge, if I may say so respectfully. But the acceptance of that view must, I think, lead to the dismissal of the information for this reason. The judgment of Lord Cozens-Hardy M.R. in *Stephens* v. *Junior Army and Navy Stores*(2), cited at length in

(1) 3 App. Cas. 115.

(2) [1914] 2 Ch. 516.

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the factum of Mr. Smellie, is a sufficient authority for holding that the covenant to commence operations within a year and to work a mine or mines within two years (which I take to mean to open a mine or mines within two years) is not a continuing covenant but a covenant that can only be broken once, and consequently that a waiver of the right of forfeiture (which undeniably took place) arising from the breach of this covenant was an election by the Crown not to avail itself of that right, which election once made, of course, is final.

As to the covenant to continue to work any opened mine—that obviously only comes into effect upon a mine being opened; and the waiver of the forfeiture, or rather the election not to exercise the right of forfeiture accruing for non-performance of the first two mentioned covenants, necessarily imports, or rather necessarily is, an election against exercising that right in respect of any breach of any of the covenants expressed in the clause. The only suggestion that could be made against this view, the suggestion, namely, that a covenant to work continuously any mine or mines that might be operated implies a general covenant to open mines. That suggestion is negatived in the decision referred to as putting forward an interpretation of the clause which is far fetched and unreasonable. I am not satisfied that this conclusion as to the consequences of the waiver of forfeiture arising from the breach of the first two covenants in clause 12 —a conclusion difficult to escape if we accept the learned judge's construction—would rest upon quite so satisfactory a foundation under the construction put upon that clause by the appellant; but I shall not consider this point further, it being unnecessary

to do so in consequence of the opinion I have formed that the right of cancellation vested in the Minister by the provisions of the lease has not in fact been effectively exercised.

The clause (17) is in the following terms:—

That in case of default in payment of the said rent or royalty for six months after the same should have been paid or in case of the breach or the non-observance or non-performance on the part of the lessee of any proviso, condition term, restriction or stipulation therein contained and which ought to be observed or performed by the said lessee and which has not been waived by the said Minister, the Minister may cancel these presents by written notice to the said lessee and, thereupon, the same and everything herein contained shall become and be absolutely null and void to all intents and purposes whatsoever and it shall be lawful for His Majesty or His Succesors or Assigns into and upon the said demised premises (or any part thereof in the name of the whole) to re-enter and the same to have again, re-possess and enjoy as of His or their former estate therein anything herein contained to the contrary notwithstanding.

Provided, nevertheless, that in case of such cancellation and re-entry the lessee shall continue to be liable to pay and His Majesty, His Successors or Assigns shall have the same remedies for the recovery of any rent or royalty then due or accruing due as if these presents had not been cancelled, but remained in full force and effect.

The acts upon which the Attorney-General relies as constituting the exercise of the power of cancellation given by this clause are set out in paragraph 4 of the information, which is as follows:—

That the Minister, by memorandum, under date of September 1st, 1909, directed the cancellation of the said lease and pursuant to such direction, the assistant-secretary of the said Interior Department, on September 13th, 1909, by letter addressed to said defendant, Paulson, advised said defendant, Paulson, that he (Paulson) having failed to comply with the provisoes of clause twelve (12) of said lease, the Department had been obliged to cancel his said lease, to which memorandum and letter the plaintiff will on trial hereof crave leave to refer.

The letter there referred to admittedly in fact never reached Paulson, and that it should reach him,

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was, I think, essential to its taking effect as a cancellation. The words

> the Minister may cancel these presents by written notice to the said lessee and, thereupon, the same and everything therein contained shall become and be absolutely null and void,

import a written notice to the lessee as a condition of the valid exercise of the forfeiture as, indeed, the mode appointed exclusively for exercising it. It required no argument to shew that the paper deposited in the post-office, addressed to the lessee but not received by him, cannot be treated as a written notice within either the letter or the spirit of this stipulation. The learned trial judge appears to have thought that a letter addressed to the lessee's solicitors and admittedly received by them informing them that the Minister had by notice to Paulson cancelled the lease was either by itself sufficient to satisfy the condition or that, as supplementing the letter addressed to Paulson, it completed and perfected the notice thereby initiated.

With great respect, to my mind, this reasoning is not convincing. In the first place there is no allegation in the pleadings that the gentlemen who, in their capacity as solicitors, were conducting a correspondence with the Department of the Interior on behalf of the appellant in relation to this lease, had any authority to receive notice under clause 17 as agents for the appellant. It hardly requires authority to shew that the fact that they were employed in this non-litigious business did not necessarily in itself invest them with such capacity.

In the next place the letter does not profess to be sent on behalf of Minister and in exercise of the power reserved to him by clause 17 and, indeed, evidently

was not so sent. It was, therefore, neither actually nor constructively a notice of cancellation by the Minister, and it cannot be regarded as constituting any essential element of such a notice. Then, if it had been intended to rely upon the correspondence which subsequently passed as constituting notice within the clause, the information should have been framed in such a way as to apprise the appellant that such was the case he would have to meet at the trial. In the absence of anything of the kind in the pleadings, the Crown could only take such a position if it were clear that all the facts were before us so that the appellant could not be prejudiced by the frame of the allegations in the pleading. After analyzing the correspondence I have no difficulty in reaching the conclusion that there is no evidence entitling us to say judicially that the conditions of the forfeiture clause were complied with in respect of written notice. This conclusion makes it unnecessary to consider the other points raised in the argument presenting, what appeared to me upon superficial examination of them only, rather formidable difficulties in the way of the Attorney-General's success. I pass no opinion upon them.

The appeal should be allowed and the information dismissed with costs.

ANGLIN J.—The regulations (11th June, 1902) empower the Minister of the Interior to make leases of school lands for coal-mining purposes, and provide that failure of the lessee to commence active operations within one year and to work the mine within two years shall subject him to forfeiture of his lease. The lessee clearly made default. Under the regulations

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his lease, thereupon, became not *ipso facto* void, but voidable. The lease itself provided that upon default under the regulations

> the Minister may cancel these presents by written notice to the lessee.

There is nothing in this provision inconsistent with the regulations. It was within the power of the Minister, to whom the statute (R.S.C. 1886, ch. 54, sec. 24) entrusted the administration of the school lands, to stipulate as to the manner in which the power of cancellation vested in him by the regulations should be exercised.

Professedly in the exercise of the power conferred by the provision of the lease, a letter from the Department of the Interior, dated the 13th September, 1909, signed by "L. Pereira, assistant-secretary," and addressed to the appellant at Coleman, Alberta, informing him that "the Department has been obliged to cancel your lease," was placed in the post-office. It never reached Paulson and was subsequently returned to the Department from the dead letter office. Concurrently with the mailing of this letter, Paulson's solicitors were notified that their client

> is being advised that his lease * * * has been cancelled.

Assuming the sufficiency of a notice that the *Department has cancelled* the lease, if duly given (I think it was clearly insufficient because it does not purport to be the act of, or even to have been authorized by the Minister himself, and because it signifies past and not present action), the notice so mailed was not given to the lessee. That the notice to which he was entitled should actually reach him is what the lease contemplated. There is nothing in it which consti-

tuted the post-office his agent to receive the notice for him—nothing which dispensed with its actual delivery to him.

But it is contended that the stipulation for a written notice was waived by the subsequent steps taken on Paulson's behalf to secure a re-instatement of the lease. I do not find in what was done anything amounting to such a waiver. There is no evidence of intention on the part of the lessee, with full knowledge of the facts on which his rights depended, to forego or abandon those rights.

Moreover, the Minister subsequently decided

to re-instate the lease in favour of Mr. Paul Paulson.

His solicitors were so notified by letter of the 28th January, 1910. This step clearly involved a waiver by the Minister (who was competent to waive them) of any grounds of forfeiture existing up to that date. It is true that the re-instatement is said to be made on condition that Paulson should file certain evidence with the Department. No time was specified within which that should be done. Whether this condition had been already complied with was perhaps doubtful when, on the 14th April, 1910, not at all for failure to comply with it, but because the Minister had been advised by the law officers of the Crown that it was

not within his authority to revive the lease in Mr. Paulson's favour,

the appellant's solicitors were informed by letter that the Department would treat the lease as having been cancelled from the 13th September, 1909.

With respect, I am of opinion that the lease was not terminated in the manner in which the Minister was empowered to effect cancellation. The conditions of a clause of forfeiture in its favour must be observed

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by the Crown with the same care and precision which is exacted from a subject.

BRODEUR J. (dissenting).—This is a declaratory action on the information of the Attorney-General of Canada to have a lease of the 8th of August, 1904, made by the Crown to the appellant, Paulson, declared duly cancelled and terminated; and, in the alternative, that the lease to the respondent company of the 28th of April, 1910, be declared to have been issued in error.

These two leases cover the same mine.

By the lease of the 8th of August, 1904, a yearly rent of $96 was stipulated and by section 12 it was declared

> that the lessee shall commence active operations upon the said lands within one year from the date of the commencement of the said term and shall work a mine or mines thereon within two years from that date and shall thereafter continuously and effectually work any mine or mines opened by him unless prevented from so doing by circumstances beyond his control or excused from so doing by the Minister;

and, by clause 17 of the agreement, it was covenanted that in case of non-performance of any condition not waived by the Minister, the Minister may cancel the lease by written notice to the lessee and, thereupon, the lease shall become absolutely null and void and the Crown may re-enter and re-possess the property leased.

The lessee Paulson is described in the lease as residing in the Town of Coleman, Alberta. His solicitors were Messrs. Lewis & Smellie of the City of Ottawa.

The lessee was also in possession of several mining rights adjoining the property in question in this

lease and he organized the respondent company to carry out his mining operations. His shareholders, however, refused to take over the mining rights which he had in virtue of his lease of the 8th of August, 1904. The operations on mines acquired by the respondent company were carried out with very extensive and successful results.

The appellant failed to commence operations on the mine in question in this case, as provided in the contract. He obtained from time to time from the Minister extensions of time for the beginning of the carrying out of his operations.

On the 11th of March, 1909, his solicitors, Messrs. Lewis & Smellie, made a new application for an extension of time until the 15th July, 1910, to begin operations under this lease.

On the 9th July, 1909, Messrs. Lewis & Smellie sent to the Department a cheque for $96 in payment of the rental for the year ending 15th July, 1910. The secretary of the Department acknowledged receipt of that letter but stated that the amount

was accepted conditionally pending a decision in regard to the extension of time asked for.

On the 1st of September, 1909, the Minister directed the cancellation of the lease and a letter notifying Mr. Paulson accordingly, dated the 13th September, 1909, was addressed to him at Coleman.

At the same time and on the same day, a letter was sent to Messrs. Lewis & Smellie telling them that it had been decided not to grant Mr. Paulson the extension which they asked for him and they were informed that his lease had been cancelled.

Messrs. Lewis & Smellie continued to correspond

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with the Department, urging that the cancellation should not be carried out, and as a result of their representations they were informed by letter of the 28th January, 1910, that it had been decided to re-instate the lease in Mr. Paulson's favour, subject to the condition that evidence should be filed shewing the nature and progress of the work.

Later on, on the 14th of April, 1910, the Department of the Interior wrote Paulson's solicitors that they had been advised by the law officers of the Crown that it was not within the authority of the Minister to revive the lease, which lease

was properly cancelled for non-compliance with the conditions thereof.

The appellant, who had been instructed by the letter of the 28th January to give evidence of the work which he claimed having done, did not produce that evidence before the latter part of April. He continued to offer his rent, which was refused.

On the 25th April, 1910, the respondent company gave an undertaking to the Department to indemnify the Crown for any damage which might result from the refusal of the Department to revive the Paulson lease and, on the 28th of June, 1910, the mining rights in question were leased to the respondent company.

One point has been raised as to the meaning of clause 12 of the Paulson lease.

That clause, as I already stated, provided that the work should begin within a year, that the mine or mines thereon should be operated within two years and that thereafter the mine would be continuously and effectively worked, unless excused by the Minister.

Three different covenants are provided in that clause:—

1. The beginning of operations within a year;
2. The working of a mine within two years;
3. Its continuous working.

It is contended that the waiver of the Minister could apply only to the working of the mine, but could not affect the beginning of operations and the opening of mining.

I am unable to accept that contention. It seems to me that the Minister had the right to excuse the lessee not only with regard to the continuous working of the mine, but also with regard to the beginning of operations and the opening of a mine. In other words, this clause empowering the Minister to interfere should cover the three different operations covered in that section. It is a well established rule that where a section contains distinct covenants and there are words of restriction either in the prefatory or concluding part, those words must be extended to every part of the section. Beal, Interpretation (2 ed.), p. 185; 1 Saunders, p. 60.

The main question is as to the validity of the cancellation. The lease provided that the Minister

> may cancel these presents by written notice to the said lessee * * * and it shall be lawful for His Majesty * * * to re-enter.

As I have already said, the notice addressed to the lessee's residence, mentioned in the contract, was not delivered. But, at the same time, his solicitors, who had been carrying out all the correspondence with the Department, were notified that the Department could not grant the extension of lease they had asked for Mr. Paulson and that he was being advised that his lease has been cancelled and that

> the Department will now make such other disposition of the lands as may seem advisable.

The correspondence which followed shews conclu-

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sively that Mr. Paulson knew of the cancellation of the lease and that, if the formal written notice did not reach him, he had been advised through his solicitors of the cancellation, since he took steps to counteract the decision of the Department and begged of the Minister to be reinstated in his rights as lessee. The Minister acceded to his request and, by a letter of the 28th January, 1910, he informed him through his solicitors that the lease had been reinstated, but on the condition that certain evidence should be given as to the extent of the work he claimed to have done.

Several months passed before this condition was fulfilled and, at last, the Minister on the advice of the law officers of the Crown informed Mr. Paulson's solicitors that the lease should be considered as duly cancelled, since he had not the right to revive it.

All those circumstances disclosed by the correspondence in the case shew to me conclusively that the appellant knew of the cancellation of the lease. He may have, however, on the strength of the letter of the 28th of January, performed some operations and incurred liabilities in connection with the working of the mine. I would recommend that he be compensated for the damages which he has suffered in connection therewith.

The appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Lewis & Smellie.*

Solicitors for the respondent, His Majesty the King: *Code & Burritt.*

Solicitors for the respondents, The International Coal and Coke Co.: *Fleet, Falconer, Phelan & Bovey.*