1914
April 15.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.....PLAINTIFF;

AND

PAUL A. PAULSON AND THE INTERNATIONAL COAL AND COKE COMPANY, LIMITED..... DEFENDANT

Coal Mining Areas—Dominion Lands—Lease by Crown—Conditions—Breach—Forfeiture—Re-entry—Declaration of Right—Jurisdiction.

One of the provisions of a lease of coal mining rights in certain Dominion Lands contained the following stipulations:

"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."

Held, that, read in the light of R. S. 1906, c. 50, sec. 47 and certain regulations made thereunder on 11th June, 1902, the power of the Minister to excuse the lessee did not extend to those active operations required to be done by the lessee within one year from the commencement of the term demised, but was limited to the obligations on the part of the lessee to work a mine or mines within two years and afterwards, as expressed in the provision of the lease in question.

2. Where the lessee under a lease such as that above mentioned has been guilty of a breach of conditions operating a forfeiture and is not in occupation of the demised area, the fact of the Crown leasing the same to another is a sufficient re-entry for the purpose of determining the prior lease.

3. While it is competent to the Court to make a merely declaratory order in any cause or matter, it is proper for it to decline to entertain proceedings wherein the party instituting the same attempts to forestall proceedings against him by the defendant, and merely seeks to obtain a declaration that the defendant would have no good cause of action against him in subsequent proceedings between the parties. *Dyson* v. *Attorney-General* (1911) 1 K. B. at p. 410 relied on.

THIS was an information exhibited by the Attorney-General of Canada to obtain a declaration that a

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certain lease of coal-mining areas in Dominion lands had been properly cancelled by the Crown; or if this was not so, then in the alternative for a declaration that a subsequent lease was issued improvidently, and should be cancelled.

The facts are stated in the reasons for judgment.

December 9th and 10th, 1913, and January 21, 1914.

The case was heard before the Honourable Mr. Justice Cassels, at Ottawa.

R. G. Code, K.C., for the plaintiff.

E. D. Armour, K.C., and *J. Travers Lewis*, K.C., for the defendant Paulson.

E. Lafleur, K.C., and *A. Falconer*, K.C., for the defendant The International Coal and Coke Company. Ltd.

CASSELS, J., now (April 15th, 1914) delivered judgment.

This is an information exhibited on the part of His Majesty setting forth that on or about the 8th August, 1904, the plaintiff represented by the Honourable the Minister of the Interior duly demised and leased to the defendant Paulson, by indenture in writing, all mines, seams, and beds of coal, in or under the following parcel or tract of land, that is to say,—the east half of section twenty-nine (29), township seven (7), range four (4), west of the fifth principal meridian. The information then sets out clauses 12 and 17 of the lease. Clause 12 reads as follows:

> "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

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"and effectually work any mine or mines opened by "him unless prevented from so doing by circum- "stances beyond his control or excused from so doing "by the Minister."

The information then proceeds to state that on the application of the defendant Paulson, extensions of time under clause 12 were granted until on or about the 11th March, 1909. The said defendant Paulson applied for a further extension of time to July 15th, 1910, under the provisions of clause 12, within which to begin operations under the said lease.

The information proceeds to allege that the Minister by memorandum dated the 1st September, 1909, advised Paulson that he, Paulson, having failed to comply with the provisions of clause 12, the Department had been obliged to cancel the said lease.

The information further alleges that in view of representations made it had been decided to re-instate the lease in favour of the said Paulson. That subsequently the plaintiff being advised that the said lease had become and was in fact forfeited and void, granted a lease of the said premises to the defendant, the International Coal and Coke Company, Limited, bearing date the 28th April, 1910.

The information proceeds to allege that the defendant Paulson refused to recognize the validity of the said cancellation, and the prayer for relief is a declaration that the lease to Paulson was cancelled and forfeited prior to the granting of the lease to the defendant the International Coal and Coke Company, Limited, and that no obligation was created binding upon the plaintiff by the letter of renewal of the 28th January, 1910. In the alternative the plaintiff asks if the said lease to Paulson was not properly cancelled the subsequent lease to the Coal Company should be

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cancelled as having been issued improvidently. No relief is asked against Paulson for recovery of possession, but merely for the declaration above mentioned.

It is alleged in the information that prior to the issue of the lease to the defendant, the International Coal and Coke Company, Limited, to wit, on the 25th April, 1910, the defendant, the International Coal and Coke Company, Limited, by letter agreed, among other things, to indemnify the plaintiff for any expenses, loss and damage which might result from the refusal of the plaintiff to revive the lease issued to the said defendant Paulson. And by letter of the plaintiff to the defendant the International Coal and Coke Company, Limited, on the same date the plaintiff agreed to issue the lease referred to in the preceding paragraph to the defendant, the International Coal and Coke Company, Limited, subject to the undertaking and agreement to indemnify as in the said letters contained.

The defendants the International Coal and Coke Company, Limited, by their defence admit that the defendant now pleading agreed by letter of date the 25th April, 1910, to indemnify the said plaintiff as in the said letter set forth. The defendant Paulson raised various defences, amongst others, that the Minister having waived the condition that required the commencement of active operations within one year could not take advantage of any subsequent delays, also a waiver of the forfeiture by acceptance of rent and want of notice, and various other defences. The defendants the Coal and Coke Company supported the case presented on behalf of the Crown.

At the opening of the trial of the case, I suggested to the parties that this was not a case for a declaratory judgment, that the lease to Paulson had been cancelled

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and a new lease granted to the Coal and Coke Company After the argument(1), I found the reported case of *Dyson* v. *Attorney-General*, decided by the Court of Appeal in England. The following judgment of the Master of the Rolls is important. Referring to the power to make declaratory judgments, he states:

"The jurisdiction is, however, now enlarged, for "by Order xxv, r. 5, 'no action or proceeding shall "be open to objection on the ground that a merely "declaratory judgment, or order, is sought thereby, "and the court may make binding declarations "of right whether any consequential relief is or "could be claimed or not.' I can see no reason why "this section should not apply to an action in which "the Attorney-General, as representing the Crown, "is a party. The Court is not bound to make a "mere declaratory judgment, and in the exercise "of its discretion will have regard to all the circum-"stances of the case. I can, however, conceive "many casses in which a declaratory judgment may "be highly convenient, and I am disposed to think, "if all other objections are removed, this is a case "to which r. 5 might with advantage be applied. "*But I desire to guard myself against the supposition* "*that I hold that a person who expects to be made* "*defendant, and who prefers to be plaintiff, can, as* "*a matter of right, attain his object by commencing an* "*action to obtain a declaration that his opponent has* "*no good cause of action against him.* The Court "may well say '*Wait until you are attacked and then* "*raise your defence,' and may dismiss the action with* "*costs.* This may be the result in the present case. "That, however, is not a matter to be dealt with on

(1) (1911) 1 K. B. 410.

"an interlocutory application. It is pre-eminently "a matter for the trial."

What the plaintiff is seeking here is just what the Master of the Rolls guards against, namely, against the supposition that he was holding that a person who expected to be made defendant, and who preferred to be plaintiff could as a matter of right attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. To this he suggests the Court may well say, "Wait until you are attacked and then raise your defence." That language is very opposite to the facts of this case, more particularly to the second branch of the plaintiff's information namely, to have it declared in the event of Paulson's lease not being avoided that the lease to the Coal Company should be declared void as improvident, etc. It is obvious that having regard to the undertaking of indemnity, that no claim could be made by the International Coal and Coke Company, Limited, by reason of the lease not being valid. No application was made on behalf of any of the defendants to have this question first determined, and the case proceeded to trial, the facts being practically confined to the written documents and the correspondence between the parties.

At the trial of the action all parties seemed to take for granted that under the provisions of Clause 12, herein set out, the Minister had authority to excuse the lessee from commencing active operations upon the said lands within one year from the date of the said term, and work a mine or mines thereon within two years from that date. When I came to consider the case for the purpose of judgment, I formed a strong view that such was not the meaning of the clause, but not desiring to give judgment on the point which the

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parties had not argued—I caused the counsel for the various parties to be notified that I would like to have this question argued and subsequently counsel appeared before me and argued the case.

My view is that the plain grammatical meaning of Clause 12, confines the latter part, namely, "unless prevented from so doing by circumstances beyond his control or excused from so doing by the Minister," to what the lessee has to do after two years from the commencement of the term; but the Minister could not excuse the lessee from commencing within a year or from working the mine or mines thereon within two years from that date.

The Revised Statutes of Canada, 1886, Chapter 54, provides that the school lands shall be administered by the Minister under direction of the Governor in Council. Section 47 provides that lands containing coal or other minerals whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are from time to time fixed by Governor in Council by regulations made in that behalf.

By order in council of the 11th June, 1902, in virtue of the provisions of section 47 of the *Dominion Lands Act*, the issue of leases of school lands in Manitoba and the Northwest Territories for coal mining purposes, was authorized for the development of coal mines underlying such school lands, subject to the following terms and conditions:

1. Leases of school lands for coal mining purposes, shall be for a period not exceeding ten years, etc.

3. The lessee shall in addition to the ground rent pay a royalty of ten cents per ton on all coal taken out of the mine, etc.

6. Failure to commence active operations within one year and to work the mine within two years after the commencement of the terms 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.

These regulations will be found in the Dominion Statutes of 1903, 3 Ed. VII, XXIX.

Section 47 of the *Dominion Lands Act* was repealed by chapter 15, of 55 and 56 Vict. Section 5. There is no material difference with the exception that the lease may be granted for twenty years instead of five years.

My own view of the grammatical meaning of this Clause 12 would confine the power of the Minister to excuse to a period after the expiration of the two years. Then this construction is greatly fortified by the fact that the Governor in Council by their regulations provided that the mines must be opened and worked within two years. It was strongly contended by Mr. Lewis before me that Section 24, which provides that the school lands shall be administered by the Minister, gave power to the Minister as part of his administration to grant a lease on terms different from the provisions and regulations passed by the Governor in Council. I cannot adopt that view. However, an analagous case is that of the *Quebec Skating Club* v. *The Queen*.(1) Mr. Justice Burbidge in dealing with one aspect of the case before him states as follows:—

> "We come now to the contention that there was "a contract to allow the suppliants to go into "possession of the land for which they had applied, "and to keep the possession until Parliament had "given or refused authority for the proposed grant. "And here again I may say that it seems clear to me

(1) 3 Ex. C. R. at pp. 398 et seq.

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"that there never was any intention on the part of "any one to enter into such a contract. There is "nothing of all that in the Order in Council of the "30th of October, and no Minister could without "authority of law bind the Crown by such an "agreement. Had any Minister any such authority? "By the fourth section of the Act respecting the "Department of the Interior R.S.C., c. 22, it is "provided that the Minister of the Interior shall "have the control and management of all Crown "lands which are the property of Canada, including "those known as Ordnance and Admiralty lands. "But that is a general provision which is obviously "limited to a control and management in accordance "with the law relating to such lands. By the Act "respecting Ordnance and Admiralty lands, to which "I have already referred, such lands may, in certain "cases, be leased or otherwise used as the Governor "in Council thinks best for the advantage of Canada "(R.S.C. c. 55, s. 4, ss. 4 and s. 5, ss. 21). But the "Minister of the Interior is not by the Act entrusted "with the power of deciding whether they may be "so leased or used or not. In practice he would, no "doubt have a large, perhaps a controlling influence "in determining such a question; but the decision "to have any legal force, must be made by the "Governor in Council."

It was strenuously pressed before me both by Mr. Armour and Mr. Lewis, that no forfeiture arises without first re-establishing their title by information of intrusion or some other proceeding. And the contention is that the rent had been received prior to the forfeiture which estopped the Crown from taking advantage of this forfeiture. An instructive case on this point, is the case of *Emerson* v. *Maddison*, (1). A

(1) 34 S. C. R. 533; (1906) A. C. 569.

reference to the judgment of the Privy Council at page 575 would show that the Crown is to be considered always in possession. The facts of that case were different in that the Crown had granted the lands to another person who had entered into occupation. In the case before me, the lease is of mining rights, and Paulson was not in occupation of what was leased to him at the time of the lease to the Coke and Coal Company.

In *Robertson's Civil Proceedings against the Crown*, (1), it is stated " Nor does the information of intrusion suppose the King out of possession, etc." But however this may be, the fact of the granting of the lease to another is sufficient re-entry. This is laid down in the case of *Baylis* v. *LeGros*, (2) and is cited in the *Dumpor's case* (3), often referred to by counsel. I therefore think that this contention is of no effect. I have referred to all the cases cited by Mr. Armour, and an analysis of all of them show that the receipt of rent prior to the forfeiture waives the forfeiture. The leading case of *Davenport* v. *The Queen*, (4) is the one most pressed upon me. To my mind there is no analogy between that case and the present. It is only necessary to consider the facts of the case to recognize this. In that case there was a deliberate concurrence of all the members of the Government in accepting the rent. The full rent for the full term of the lease was accepted. That being so the Court held that the Crown could not avail themselves of the forfeiture.

The contention put forward is that on the 8th July, 1909, a marked cheque for $96.00 payable to the order of the Deputy of the Minister of the Department of the Interior, in payment of the rental for the year ending

(1) Ed. 1908 at p. 183.
(2) 4 C. B. N. S., 539.
(3) 1 Sm. L. C. 44.
(4) L. R. 3 A. C., p. 115.

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the 15th July, 1910, for coal mining purposes of the east half of section 29, was sent to the Department. A letter was written on the 14th July, 1909, signed by Mr. Keyes, Exhibit No. 40, in which he states that he begs

> " to acknowledge the receipt of your letter of the " 9th instant, enclosing your cheque for $96.00 in " payment of the rental for the year ending the 15th " July, 1910, for coal mining purposes of the East " half Section 29, Township 7, Range 4, West 5th " Meridian, which is leased to Mr. Paul A. Paulson, " for coal mining, and to say that the amount in " question is 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."

On the 13th September, 1909, a letter was written to Mr. Paulson addressed to him at his place of residence mentioned in the lease; and a similar letter was also written to Messrs Lewis & Smellie of the same date, by which they were notified that the lease to Pauson had been cancelled. Messrs. Lewis & Smellie were transacting the whole business in connection with this lease and acting for and on behalf of Paulson; and it is conceded that they received this letter. I also think that the subsequent correspondence indicates that Paulson duly received the notice. It seems to me impossible to contend under the provisions of the statute and of the order in council, to which I have referred, that such a receipt of rent would be treated as waiver. If the Minister himself had no power to waive, *a fortiori* a subordinate was equally without power. I think that the lease having been cancelled there was no power on the part of the Minister to revive the lease, and that the contention, if it is

essential to the determination of the case, put forward in the information on the part of the Crown is well founded.

Moreover, I think a careful perusal of the correspondence coupled with the declaration of Paulson shows that there never was a bona fide intention on the part of Paulson of mining the lands in question unless he could obtain the consent from the defendants the International Coal and Coke Company, Limited. In one letter it is stated that he has a controlling interest in that company; but at the trial it was stated by counsel that that statement is not corrrect. The Coke Company and Mr. Paulson are at daggers drawn, and absolutely refuse and decline to confer upon Paulson any right to utilize their property for the transmission of the coal.

In order to mine the property leased to Paulson it would according to his contentions be necessary to go down about 2,000 feet, a matter that would make it absolutely impracticable commercially to mine on the location in question. It is to my mind absolutely clear that what the defendant Paulson was seeking to do, was to hold his lease without complying with the terms of it, with the view to compelling the Coke Company to buy him out. The earlier representations in the correspondence show that the excuse put forward for obtaining further extension of time was the fact that the property in question could not be mined until the coal company who had mining rights on either side of Paulson's concessions reached his location, and was always upon the representation that it would be impossible for him to commence operations until the Coke Company approached his location that the delays were obtained.

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I think the Crown is entitled to a declaration that Paulson's lease was properly cancelled for the reasons I have stated. Had the proper course been pursued and the Crown waited until a petition of right for damages, if a fiat were granted, had been brought, Paulson's damage would have been nothing or merely technical. I think under the circumstances of the case each party should bear their own costs.

Judgment acordingly.

Solicitors for the plaintiff: *Code & Burritt.*

Solicitors for the defendant Paulson: *Lewis & Smellie.*

Solicitors for the defendant The International Coal and Coke Company, Ltd.: *Fleet, Falconer & Company.*