Privy Council Appeal No. 136 of 1916.

The King - - - - - - - - - *Appellant*

v.

Paul A. Paulson and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND AUGUST, 1920.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
VISCOUNT CAVE.
LORD DUNEDIN.
LORD ATKINSON.

[*Delivered by* LORD ATKINSON.]

This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated the 29th December, 1915, which reversed a judgment dated the 15th April, 1914, of the Exchequer Court of Canada by which latter judgment it had been declared that a lease, dated the 8th August, 1904, granted by the Crown to first-named respondent had been forfeited or cancelled and set aside. In the information filed by the Crown, out of which this appeal has arisen, it was prayed not only that this lease of the 8th August, 1904, should be declared as above, but that in the alternative it might be adjudged, in the event of the latter being found not to have been forfeited, that a subsequent lease dated the 28th June, 1910, made by the Crown to the second respondent had been made inadvertently and should be cancelled, and that it should be adjudged that the International Coal and Coke Company, Limited, should be ordered to indemnify the appellant for all expenses, loss, or damage resulting from the refusal of the plaintiff to revive the lease which had been granted

to the respondent Paulson. By the Decree of the Supreme Court of Canada it was ordered and adjudged that the appeal should be allowed, the judgment of the Court of Exchequer reversed, and the information of His Majesty dismissed, and that His Majesty should pay to the appellant Paulson his costs in the Court of Exchequer and in the Supreme Court. No order was made on the prayer for alternative relief.

Section 23 of the Dominion Lands Act, Chapter 54 R.S.C. (1886), provides as follows :—

> " Sections eleven and twenty-nine in every surveyed township throughout the extent of the Dominion lands are hereby set apart as an endowment for purposes of education, and shall be designated school lands : and they are hereby withdrawn from the operation of the Clauses of this Act which relate to the sale of Dominion lands and to homesteads therein : and no right to purchase or to obtain homestead entry shall be recognised in connection with the said sections, or any part of them."

By Section 24 it is directed that school lands shall be administered by the Minister of the Interior under the direction of the Governor in Council.

Section 47 of the same statute runs thus :—

> " 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 the 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 North-west Territories for coal-mining purposes was authorised for the development of coal mines underlying such school lands, subject to the following terms and conditions. The first and sixth of which are alone material on the hearing of this appeal —

> " (1) Leases of school lands for coal-mining purposes shall be for a period not exceeding ten years and shall only be granted to applicants, in the order of their applications, who have satisfied the Minister of the Interior of their means and ability to work efficiently the mines applied for.
>
> " (6) 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."

The term of ten years mentioned in the first condition was afterwards extended to twenty years.

In their Lordships' view these are dominating provisions. Any clauses introduced into leases of mines or mining rights purporting to have been granted under the authority of the Order in Council inconsistent with them, or encroaching upon them, would be unauthorised and might be *ultra vires*. It would be wholly otherwise if the clauses of such leases merely prescribed the mode in which and the methods by which the general power or authority given by the Order in Council should be exercised in the cases of particular leases. There would not

be in such cases any inconsistency or conflict in the contents of the two documents.

The lease impeached is dated the 8th August, 1904. It is expressed to be made between His Majesty King Edward VII, represented by the Minister of the Interior of Canada, styled therein, where the context permitted, the Minister, and including the successors in office of such Minister, of the first part, and Paul A. Paulson therein called the lessee of the second part. It begins with the following recitals :—

> " And Whereas by an Order in Council, dated the Eleventh day of June in the year of Our Lord one thousand nine hundred and two, as amended by an Order in Council, dated the Twenty-sixth of the same month, the Minister is authorized to issue leases of School Lands for coal mining purposes, and the development of coal mines under such lands, for the term and subject to the restrictions and limitations in and by the said Orders in Council prescribed.
>
> " And Whereas the lessee having applied for a lease under the said Orders in Council for the said lands hereinafter described, the Minister has granted such application upon the terms and conditions herein contained, such terms and conditions being in accordance with the requirements of the said Orders in Council."

And by it :—

All mines, seams and beds of coal in, on or under the tracts or parcels of land therein described, with full power to search for, work, mine and carry away the said coal, were demised to the lessee for a term of twenty years from the date thereof at the yearly rent of 96 dollars payable half-yearly in advance on the 15th January and the 15th July in each year, together with the royalties therein mentioned. The lease is expressed to be granted on several conditions. Those numbered 12, 14, 16 and 17 are alone material in the present appeal. They run as follows :—

> " 12. 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.
>
> " 14. That no waiver on behalf of His Majesty, His Successors or Assigns, of any such breach shall take effect or be binding upon him or them unless the same be expressed in writing under the authority of the Minister, and any waiver so expressed shall extend only to the particular breach so waived and shall not limit or affect His or their rights with respect to any other or future breach.
>
> " 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 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, repossess and enjoy as of His or their former estate therein anything herein contained to the contrary notwithstanding."

It was argued, not very strenuously however, that according to the proper construction of the sixth of the conditions prescribed by the Order in Council of the 11th June, 1902, on the failure of the lessee to commence active operations within one year from the date of the lease, or on his failure to work the mine within two years from that date, or on his failure to pay the ground rent or royalties as provided, the lease became absolutely null and void. If this were so, then a lessee, by doing any one of these things, and taking advantage of his wrong by relying on his own default, could escape from the burdens of his lease. A lessee so relying on his own wrong, could not compel his lessor to enforce against him the forfeiture of the lease ; so that when this maxim is applied even to a condition most absolute in form, it reduces the condition in operation to one merely providing that the lease should only be void at the option of the innocent party (*Quesnel Forks Gold Mining Co.* v. *Ward and others*, 1920, A.C. 222). Again the words of the condition are, " shall subject the lessee to the forfeiture of the lease and to the resumption of the land," which in their Lordships' view merely means that the lessee shall render himself liable to have his lease forfeited at the option of the Minister. The Minister is thus empowered to determine the lease, but no provision is contained in the Order in Council as to how, or by what method he is to exercise this power. It was contended (rightly, as their Lordships think) that a method is prescribed by Clause 17 of the lease. This condition is wider in its scope than Clause 6 of the Order in Council, but having regard to the provisions of the first and twelfth of these clauses, it covers the three defaults with which the former is conversant, namely, the failure of the lessee to commence active operations within the first twelve months from the date of the lease, his failure to work the mine within two years from the same date, and his failure to pay the ground rent and the royalty reserved.

The parties have used the words " may cancel " the lease. It is not found in the Order in Council, but the intention is plainly this, that the lease, if any of the defaults mentioned in it have occurred, was to be voidable at the option of the Minister ; and could be put an end to by the service on the lessee of a notice in writing, and this notice in writing so served thereby becomes the effective instrument for the purpose desired. Cancellation has no retrospective operation. It does not make a lease void *ab initio*. *Nelthorpe* v. *Dorrington*, 2 Lev. 113 ; *Bolton* v. *Bishop of Carlisle*, 2 H.B., 259 ; Re *Ways Trusts*, 2 De G. J. & S., 365. Nothing material, therefore, turns upon the use of this word.

In fact the lessee, Mr. P. A. Paulson, never commenced active mining operations on the lands demised within the meaning of

the Order in Council and of the lease, and never worked the mines, but went into possession of the lands as far as was practicable, and paid the rent reserved in advance as it accrued due up to and inclusive of the 15th July, 1910, practically for six years. On the 14th of July, 1909, Mr. P. G. Keyes, the Secretary to the Department of the Interior, wrote to Messrs. Lewis & Smellie, the solicitors of the lessee, acknowledging the receipt of the cheque for the rent for the year ending the 15th July, 1910, and informing them that the amount was only accepted conditionally pending a decision on the lessee's application for an extension of time to begin to work the mine. That letter was apparently inadvertently addressed to Winnipeg instead of Ottawa for, on the 28th of July, 1909, Messrs. Lewis & Smellie received from this same Mr. Keyes a letter which ran as follows :—

> " Gentlemen, I enclose herewith a letter dated the 14th instant which was inadvertently addressed to Winnipeg instead of Ottawa, enclosing receipt in favour of P. A. Paulson for 96·00 dollars."

That cheque must have been cashed by the Department, for in a letter dated the 13th September, 1909, addressed to Messrs. Lewis & Smellie and signed L. Pereira, Assistant Secretary, the writer informed them that Mr. Paulson's application for an extension of time had been refused, that his lease " has been cancelled," and that a refund cheque would be forwarded to the addressees within the course of a day or two in favour of Mr. Paulson for 96·00 dollars " paid as rental for the current year ending the 15th of July, 1910, which, as you were advised by letter of the 14th of July, was only accepted conditionally." By a refund cheque is obviously meant a cheque drawn by or on behalf of the Minister in favour of Mr. Paulson or of Messrs. Lewis and Smellie. It is denied on behalf of the first respondent that such a cheque was ever received by him or his solicitors. It was for the appellant to prove that it had been sent. No evidence whatever was given to that effect.

No tender has ever been made to the lessee or his solicitors of this sum of 96·00 dollars so paid and received. The information filed upon the 15th January, 1913, 18 months after it had been received does not contain any offer to refund it, or any excuse for its detention. In their Lordships' view it must now be treated as having been, in July, 1909, accepted unconditionally, though that, as will presently appear, is a matter of no consequence.

Before considering what is the effect of that receipt having regard to Clause 14 of the lease providing that no waiver on behalf of the lessor shall have effect or be binding upon him unless expressed in writing, it will be desirable to consider the mode of dealing adopted by the parties with reference to their respective rights and obligations under this lease. It is not pretended and is not the fact that the lessee was from first to last guilty of any breach of any covenants or any condition contained in the lease other than his failure, as required by its 12th clause, to

commence active mining operations on the land within one year from the commencement of his term, and to work a mine or mines on the lands within two years from that date. He has entirely failed to do either of these things and his failure is the sole foundation for the present suit. But the obligation imposed upon him by this clause 12 is qualified by this, that he is not bound to fulfil either obligation if he be prevented from doing so by circumstances beyond his control, or be excused from doing so by the Minister. Both these events are alleged to have happened. He has, he contends, during all the time up to the cancellation, been prevented from commencing active operations on the lands, or working a mine upon them by circumstances beyond his control, and in consideration of that fact, apparently, the Minister has frequently extended his time for commencing active operations or opening a mine on the lands. These extensions were invariably given by letters written by Mr. Keyes, the Secretary of the Department. The last was given by a letter dated the 25th November, 1907, addressed to the lessee's solicitors, which ran thus :—

" Ottawa, 25th November, 1907.

" Gentlemen,

" With reference to your letter of the 15th ultimo in regard to the application of Mr. Paul A. Paulson for an extension of time within which to begin operations under his lease for coal mining purposes of the East half of Section 29, Township 7, Range 4 West of the 5th Meridian, I beg to say that in view of the representations made in your letter, Mr. Paulson will be granted an extension of time until the 1st February, 1909, for this purpose.

" Your obedient servant,

" (Sgd). P. G. KEYES,

" Secretary."

In their Lordships' view this letter amounts in effect, though possibly not in form, to a waiver in writing of all antecedent breaches of his covenant of the kind mentioned, of which the writer was aware at the time it was written.

On the 24th June, 1908, the lessee's solicitors sent to Mr. Keyes a cheque for 96 dollars in payment of the rent for the year ending the 15th July, 1909, and received on the 30th June, 1908, a receipt for the same in a letter from Mr. Keyes running thus :—

" Ottawa, 30th June, 1908.

" Gentlemen,

" I enclose, herewith, a receipt in favour of Mr. Paul A. Paulson for $96·00 in payment of the rental for the year ending the 15th July, 1909, for coal mining purposes of the East half of Section 29, Township 7, Range 4 West of the 5th Meridian, Coal Berth No. 3 School Lands.

" Your obedient servant,

" (Sgd.) P. G. KEYES,

" Secretary."

The excuse given by the lessee for his inaction is repeated in several letters from time to time. It is shortly this. His land is described as East half, Section 29. The adjoining section abutting upon it and belonging to his co-respondent, is Section 28. There is no outcrop of coal on Section 29. There is on

Section 28. The seam of coal under Section 29 is several hundred feet below the surface. The coal is being mined in Section 28 to the north of Section 29, and the tunnels made in the former section were being steadily pushed south towards the latter section so as ultimately to tap its underlying seam. As soon as these tunnels, about 2½ miles in length, had effected a junction with the coal under Section 29 the latter could be won and carried away. To mine it till then was impracticable.

On the 11th March, 1909, when the respondents' solicitors applied for a further extension of time, from the 1st February to July, 1910, which was not granted, they stated in their application that unless some unforeseen accident should occur, these tunnels would reach the East half of Section 29 before the 15th July, 1910. Something occurred, however, in the month of November, 1908, which may have destroyed all hope of further extension. The International Coal and Coke Company apparently coveted East half, Section 29. They knew, of course, that their tunnels were being driven up towards its boundary, and on the 27th November, 1908, they asked the Dominion Land Agent for a lease of it. By letter of the 14th December, 1908, Mr. Keyes, the Secretary, replied on behalf of the Department to the effect that the application could not be entertained, as this half section was already under lease to Mr. Paulson for coal mining. This application, though refused for the time, appears to have a good deal to say to what subsequently happened in this case. On the 9th March, 1909, the Company returned to the assault, making a case against Paulson's being allowed to hold his lease longer.

In reply, a letter was written from the Department apparently by the Minister, informing the agent of the Company, Mr. Whiteside that, as the Company had already applied for a lease of the coal mining rights on the land No. 29, in the event of the present lease being cancelled, the application made by the Company would be given immediate consideration. Again, on the 24th August, 1909, the Company wrote to the Minister of the Interior referring to Section 29, and stating that their gangways were getting very close to this section, and that he would confer a great favour upon the Manager of the Company if he would find out as soon as possible what could be done with regard to this matter. From a report from Mr. Checkley to the Minister, dated the 1st September, 1909, which was received in evidence, it is stated that the Coal and Coke Company had asked for the cancellation of Paulson's lease, as he had done nothing on the land, and that the East half of Section 29 was absolutely essential for the proper development of the Company's property, and asked for instructions whether the extension of time till the 15th July, 1910, asked for by Mr. Paulson, was to be granted or whether his lease should be cancelled and one granted to the International Company. The Minister lost no time in making his selection between these alternatives. In the fourth paragraph of the Information it is stated that on that very day he made up his mind that Paulson's

lease should be cancelled, and that he had by memorandum given directions to that effect pursuant to which the letter of the 13th September, 1909, was written.

Their Lordships, happily, have not to decide whether the cancellation of Paulson's lease is really due to the latter's omission to commence active mining operations or to work the mines on the land demised by his lease between the 25th November, 1907, and the 13th September, 1909, or is due to the sinister importunities of the International Coal and Coke Company; but one thing is clear, that it is rather difficult to reconcile the statements contained in the letter of date of the 13th September, 1909, with these revelations touching the too successful efforts of the Company, in their own interest, to oust Paulson from the holding for which he had paid the rent and received no benefit for a period of practically six years.

The next matters for consideration are, first, what is the true effect, after a breach of covenant or contract involving a liability to forfeiture has occurred, of the payment of rent by the tenant and the receipt of it by the landlord with full knowledge of the breach; and, second, whether the presence in the lease or contract of tenancy of a provision such as that which exists in the lease in the present case, that waiver of a breach shall not be operative unless expressed in writing, destroys or modifies that effect, and if the latter, to what extent. The authorities appear to their Lordships to establish that the landlord, by the receipt of rent under such circumstances, shows a definite intention to treat the lease or contract as subsisting, has made an irrevocable election so to do, and can no longer avoid the lease or contract on account of the breach of which he had knowledge.

They further think the presence in a lease or contract of a provision requiring a waiver to be expressed in writing, such as exists in the present case, does not render inapplicable the principle established, and does not enable the landlord at the same time to blow hot and cold, to approbate and reprobate the same transaction, to say to his tenant, "You were my tenant under a lease or contract of tenancy all the time during which the rent which you have paid me and which I hold, has been accruing," and at the same time to say to him, "You were only my tenant for half that time, and were a mere trespasser during the other half, for I evicted you or cancelled your lease in the middle of the time for which you paid me, I had no right to more than half the rent you paid, but I'll keep the whole of it." It would be wrong and unjust on the part of the landlord so to treat the tenant; to hold in fact the price of what the latter paid for, the enjoyment of his holding for the entire time during which the rent actually paid was accruing, and yet to deprive him of half of that very property. In delivering his opinion in *Croft* v. *Lumley*, 6 H.L. C. 673, Baron Bramwell, as he then was, at 706, when referring to waiver, said :—

> "Now this question supposes there was a breach of covenant giving a right of re-entry, and it supposes therefore that if the lessor elected not to

treat the lease as void, rent was due to him. . . . Now I take it to be clear that the lessor could not do an act affirming the tenancy and yet say he did not elect not to treat the breach as a forfeiture : for instance, he could not distrain for rent due at Christmas and at the same time effectually say that he did not elect to treat an antecedent breach of covenant as a forfeiture ; his act would be taken to be rightful and bind him, rather than his words make his act wrong."

In *Clough* v. *London and N.W. Railway Company*, L.R. 7, Eq. 26, Mellor, J., delivering the judgment of a Court composed of Byles, Blackburn, Mellor, and Lush, JJ., p. 34, after quoting from Com. Digest Election C. 2 :—

" If a man once determines his election shall be determined for ever " said—" The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment when the tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shows an intention to treat the lease as subsisting he can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shows his intention to treat the lease as void, he has determined his election and cannot afterwards waive the forfeiture " (and he cites *Jones* v. *Carter*, 15 M. & W. 718).

But the point is that he cannot do both at the same time. He cannot by receiving 12 months' rent determine that the lease was a subsisting lease while that rent was accruing, and in the middle of that period determine that it no longer subsists. In *Birch* v. *Wright* 1 Term R. 378, the defendant was before the year 1777 tenant from year to year to a Mr. Bowes of the lands in suit at the yearly rent of £223 10*s*., payable half-yearly on the 12th May and 22nd November in each year. On the 22nd November, 1785, the defendant paid all the rent then due except £84 15*s*., which remained unpaid. The plaintiff and another had become entitled to the reversion in May, 1785, they brought an ejectment and laid the demise on the 6th April, 1785. In Trinity term, 1785, they obtained judgment, and in September, 1785, served notice on the defendant requiring him to attorn to them and pay them the money in his hands. He refused, a writ of possession was thereupon executed and he left the lands. An action was then brought for use and occupation, a verdict was found for the plaintiff subject to the opinion of the Court on a case stated. The question for the opinion of the Court was whether the plaintiff was entitled to recover any and what sum in the action. Ashhurst, J., in giving judgment, said :—

" From the 6th of April, 1785, to the time of recovering in the action of the ejectment, in my opinion the plaintiff is precluded from recovering in this form of action, for that would be blowing both hot and cold at the same time, by treating the possession of the defendant as that of a trespasser and that of a lawful tenant during the same period."

Buller, J., at page 387, says :—

" The action for use and occupation is founded on contract and unless there were a contract express or implied it could not be maintained. . . . In the present case the plaintiff . . . has brought his ejectment and obtained judgment upon it which is insisting on the tort and he cannot be permitted to blow hot and cold at the same time. The action for use and occupation

and the ejectment when applied to the same time are totally inconsistent, for in the one the plaintiff says the defendant is his tenant and therefore he must pay him rent, and in the other he says he is no longer his tenant and therefore he must deliver up possession."

So in the present case the appellant says to Paulson "I received and kept your rent accruing up to the 15th July, 1910, because you were my tenant for the whole of that period and owed it to me," and at the same time says, "you were only my tenant for half that period, from that time you were a trespasser because I cancelled your lease and you did not owe me the rent you paid, but which I will hold."

In *Jones* v. *Carter*, 15 M. & W., 718 (1846), it was decided that service by a lessor upon a lessee of a declaration in ejectment for the demised premises for a forfeiture operates as an election by the lessor to determine the term, and he cannot afterwards (although there has not been any judgment in ejectment) sue for rent due or after the service of the declaration. In *Grimwood* v. *Moss*, L.R. 7, C.P. 360, Willes, J., expressed his full approval of the principle upon which *Jones* v. *Carter* was founded, namely, that the bringing of the action of ejectment was equivalent to the ancient entry. It was an unequivocal act in the sense that it asserts the right of possession on every ground that may turn out to be available to the party claiming to re-enter. *Jones* v. *Carter* was also approved of by Lord Blackburn in *Scarf* v. *Jardine* (7 A.C. 345). If its principle applies to cancellation of a lease based upon breaches of the covenants contained in the lease, then it may well be that the appellant bases his act of cancellation on all the breaches which have occurred since the 22nd November, 1907, until the last extension of time was given, though the rent has been paid during the entire interval.

The case of *Davenport* v. *The Queen* (3 A.C. Part I, 115) resembles the present case in many respects. There the Crown under powers conferred by several statutes granted a lease to a lessee who failed to cultivate as he had covenanted to do one-sixth of the land demised within the first year of the term, thus rendering the lessee liable to a forfeiture. Rent was, however, received by the Government with full knowledge of the breach. Notices were published in the Gazette of 1869, 1870 and 1871, to the effect that the rent would only be received conditionally. The rent was payable in advance. The first payment was to be made on the 22nd September, 1867, and all subsequent payments on the 1st January, from 1869 to 1875 inclusive. Judgment was delivered by Sir Montagu Smith, and it was held that even assuming that a forfeiture had accrued it was waived by the receipt of rent, notwithstanding the notifications that when money is paid and received as rent under a lease a mere protest that it is accepted conditionally and without prejudice to the right to insist on a prior forfeiture cannot countervail the fact of the receipt. Having regard to all these matters their Lordships are of opinion that it was not competent for the Minister to cancel the lease of the respondent Paulson on the

13th September, 1909, as he purported to do. It may well be that many cases may occur to which the clause as to waiver would be applicable ; what their Lordships think is that it is not applicable in the present case under all its circumstances.

Having come to this conclusion it is unnecessary for their Lordships to deal with the point of the sufficiency of the steps taken to effect cancellation of the defendant's lease. The words of Clause 17 are :—" The Minister may cancel these presents by written notice to the said lessee, and thereupon " everything therein shall become void, etc. Under this clause the notice is the operative instrument. The cancellation is effected by it. Instead of serving a notice running thus " your lease is hereby cancelled," the words are " has been cancelled." The letter is a reply to the appellant's letter of the 11th March, 1909, and for all that appears on the face of the letter the lease might have been cancelled at any time during the six months between the 11th March and the 13th September.

Again, there is no satisfactory evidence that Messrs. Lewis and Smellie were ever clothed with authority by Mr. Paulson to receive such a notice on his behalf. One has little moral doubt that the receipt of this letter came to the respondent's knowledge, but the service of such documents as this should be fully proved by legal evidence. The inclination of their opinion is that the appellant loses on both these points.

Their Lordships are therefore of opinion that the decision appealed from was right and should be affirmed, and this appeal be dismissed. The appellant will pay Mr. Paulson's costs. There will be no order respecting the costs of the other respondents. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE KING

v.

PAUL A. PAULSON AND OTHERS.

DELIVERED BY LORD ATKINSON.

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