1931
Oct. 2.
Dec. 14.

SHOLTO DOUGLAS McCLELLAN.....SUPPLIANT;

VS.

HIS MAJESTY THE KING.....RESPONDENT.

Soldier's Settlement Act—Agreement to purchase—Tenancy at will—Sec. 22, ss. 6 and Sec. 31—Sec. 59, ss. (c)—"Orchard or fruit land"—Personal property.

1. The Soldier's Settlement Board entered into an agreement with McC. for the sale of land to him as authorized by the Act. This Agreement, and the Act itself, provided that such agreement could only be cancelled for default by the settler to comply with the terms thereof, and in the case of land the same could only be re-possessed upon and after the Board giving to the settler thirty days notice of its intention to rescind said agreement.

Held, that the tenancy at will, mentioned in section 22 (6) and section 31 of the Soldier's Settlement Act, is a special statutory tenancy at will, and is not the tenancy at will known to the common law; it is a modified or conditional tenancy at will. After the notice has been given, the settler, if he remains on the land, becomes merely a tenant at will. Section 31, by itself, is merely declaratory of the common law rule.

2. That the sale of "orchard or fruit lands," mentioned in section 59 (*c*) of the Act, though providing for a valuation of the trees apart from the land, is nevertheless a sale of "orchard or fruit lands," which is not personal property.

That an intention in a statute to depart from a common law rule would need to be expressed with the utmost clarity, and that section 59 (*c*) does not pretend to enact that planted and growing fruit trees are to be treated as chattels or personal property.

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Action by the suppliant herein to recover certain lands and chattels of which he had been dispossessed, and for an order that he had been unlawfully dispossessed of the same and for damages suffered by reason of the eviction.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Vancouver.

H. Mason Drost for suppliant.

A. H. McNeill, K.C., for respondent.

The facts and questions of law raised are stated in the Reasons for Judgment.

The President now (December 14, 1931) delivered the following judgment.

This is a petition of right wherein the petitioner claims the return of certain lands and chattels of which he claims to have been unlawfully dispossessed by the respondent, and damages, which he claims to have suffered in consequence thereof. The case presents some unusual difficulties and it will be desirable to state quite fully all the facts.

It will first be convenient to refer to the Soldier Settlement Act, 1919, under which this proceeding arose, and which was particularly designed to assist in the settlement of returned soldiers—defined as "settler" in the Act—upon the land, and the Act was to be administered by a Board. The Board, by Sec. 16 was empowered to sell to settlers, land which it was authorized to acquire under the Act, the purchase price being payable in cash, or, at the option of the purchasers, in twenty-five or less equal instalments, but in no case was the unpaid balance of the purchase price to exceed $5,000, in the case of land.

Section 18 empowered the Board to sell to settlers "any live stock or equipment" acquired under the authority of the Act, the sale price being cash, or, at the option of the settler, payable in four equal, consecutive annual instalments, commencing not later than three years from the date of the sale the amount owing to the Board on such a sale was to constitute a first charge on any land purchased by the settler from the Board, the title, ownership, and right of possession to remain in the Board until repayment of the sale price by the settler. Section 18 (*c*) provides that the balance of the sale price left unpaid to the Board at the time of sale shall not exceed $2,000.

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By Sec. 59, certain wide powers there enumerated were conferred upon the Board, notwithstanding anything to the contrary in the Act. For example the Board was empowered to estimate the value of any land, for any purposes of the Act, apart from the value of buildings thereon, but this apparently was not done in this case; it might vary the provisions of sections sixteen to nineteen, so that live stock and equipment to a value not exceeding three thousand dollars might be sold to a settler, but so that the total amount of balance of price and advances remaining unpaid by the settler as the result of the exercise by the Board of any of its powers under the Act, should not exceed seven thousand five hundred dollars. Section 59 (*c*) is important here and may be recited in full:—

in all cases of sales of orchard or fruit lands, to apply the provisions of section eighteen of this Act, with such other provisions thereof as may depend upon or have relation to those of said section, as if for the words "live stock or equipment," or "live stock and equipment acquired under authority of this Act," or words to the same effect in said section or in any of said sections appearing, there were substituted the words "fruit trees, already planted or growing on any land sold by the Board to the settler," and, for any purpose of this Act, to estimate the value of the trees and shrubs already planted or growing on any land being sold by the Board to the settler apart from the value of such land;

Section 22 of the Act provides that all sales of property made pursuant to the provisions of the Act, and whereon any balance of the sale price shall remain payable by instalments or otherwise, shall be evidenced by agreement of sale, and which shall fully set forth the terms of sale. Sec. 22 (2) provides as follows:—

If any instalment mentioned in any such agreement of sale is not punctually made or if the settler makes any other default in performance of the terms of such agreement the Board may without any formal re-entry or retaking and without resort to proceedings in equity or at law, rescind such agreement and resell or otherwise deal with the property as authorized by this Act.

And S. 22 (6) enacts as follows:—

Before exercising as against land the rights by this section given, the Board shall give to the settler notice of its intention so to do, which notice shall be deemed duly given if mailed in any post office by registered letter addressed to the settler at his last address known to the Board thirty clear days before the Board acts hereunder.

In July, 1919, the petitioner applied to the Board for a loan of $7,500, for the purchase of the property here in question and upon the printed form prescribed by the Board; as I understand it, the Board purchased the property

which the settler had selected, and the purchase price was treated as a loan or advance to the settler. The application for loan was to the effect that $5,000 was required for acquiring the land in question, and $2,500 for the purchase of stock, machinery and equipment. The land desired to be acquired by the petitioner consisted of 8·84 acres of cultivated land, situate at Oyama, B.C. The improvements upon the land were stated by the petitioner, in his application for the loan, to consist of certain named buildings, 560 fruit trees, chiefly apple trees, and some growing crops. The application form contains no further particulars; the portion of the printed form designated as "Supplementary Form C," wherein was to be set forth clearly and in detail what "stock, machinery and equipment" the applicant desired to purchase, was left blank. The application for the loan of $7,500 was in due course approved of by the Board, and in the approval by an officer of the Board, it is stated that $5,000 was for the land, and $2,500 "for Fruit Trees and Stock, etc."

Thereupon, an Agreement for Sale of Land, was entered into on the 7th day of August, 1919, between the Board and the petitioner; the Board agreed to sell and the petitioner agreed to purchase the parcel of land already mentioned. The purchase price was $5,000, the purchaser agreeing to pay $500 at the time of the execution of the agreement, the balance in twenty-five equal consecutive annual instalments with interest. The agreement, I would point out, states that the land included all "buildings and other improvements thereon, and the appurtenances thereto belonging and appertaining." The purchaser was to have the right of possession of the land upon the execution of the agreement, and he agreed therein to enter into occupation of the land within three months of the date of the execution of the agreement, and to reside on the land during the continuance of the agreement. The purchaser was to cultivate and crop the land in a good and husbandmanlike manner; he agreed to be guided by any duly authorized officer of the Board in the conduct of his farm operations; if the purchaser neglected to be so guided, and if the Board believed that without such guidance the purchaser would be unable successfully to operate the said land and that his management thereof was likely to prove unsuccessful, the

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Board might, after service of notice on the purchaser, so advise him, and thereupon the farming operations, etc., should be subject at all times and in all respects to the suggestions, advice and approval, of any duly authorized officer of the Board, and the purchaser agreed at all times to afford such officer full and free access to all portions of said lands and improvements thereon, etc. It was a provision of the agreement that should the purchaser fail to make prompt payment of any instalment when the same fell due, or to comply with other conditions mentioned in the agreement, the Board might upon giving the purchaser a thirty clear days' notice of intention to do so, rescind the agreement without any formal re-entry or retaking, or and without resort to proceedings in equity or at law to rescind the agreement, and the effect of such rescission would be to vest the said land in the Board absolutely free and discharged of all rights and claims of the purchaser.

On the same date as the Agreement for Sale of Land was executed, August 7, 1919, the Board and the petitioner entered into another agreement, under the caption, Agreement for Sale of Stock and Equipment. By this agreement the Board agreed to sell, and the purchaser agreed to buy, "All the goods and chattels enumerated in the purchaser's application, or as are more particularly described in the purchaser's requisition, hereinafter referred to as the 'chattels,' etc." The property agreed to be sold under this agreement was intended, I think, to relate only to the fruit trees. The purchase price, $2,500, was payable in four equal instalments, and was to be a first lien upon the right, title or interest of the purchaser in the land described in the first-mentioned agreement. The agreement also provided that the "title, ownership and possession of the chattels shall remain in the Board until the total amount of the purchase price together with interest as aforesaid has been paid," and that the purchaser should have the use and possession of the chattels during the continuance of the agreement, provided he was not in default under the agreement, and provided the property had not been retaken by the Board in the manner provided. The agreement contained the following provision which sets forth the grounds upon which the Board might enter into possession of the property agreed to be sold, and resell the same:—

It is agreed between the Board and the Purchaser that if the Purchaser fails to make payment of any instalment hereinbefore mentioned when the same falls due, or fails to comply with any of the other conditions of this agreement or with respect to any other agreement, entered between him and the Board, or if the Board considers that the security furnished hereby has become impaired through the fault of the purchaser then and in such case the said amount, with accrued interest, if any, shall become due and payable in like manner and to all intent and purposes as if the time herein mentioned for the payment of such money had fully come and expired, and the Board may, without any formal re-entry or retaking and without resort to proceedings in equity or in law repossess and resell the said chattels, the proceeds thereof to be applied in reducing the amount unpaid thereon, and if deficiency arises, the deficiency shall be paid by the purchaser to the Board which shall have a right of action against him therefor.

Under the agreement, it will be observed that no notice was required to be given to the purchaser by the Board, of its intention to enter into possession of the chattels, in the event of default of any nature.

On or about March 10, 1929, an authorized officer of the Board, Mr. Sinclair, visited the property in question, but observed no person on or in charge of the farm during his brief visit there. It appears from the evidence that the petitioner had gone to Vancouver in the month of December, 1928, for the purpose of there disposing of his apple crop of the season of 1928, and, I think, he had shipped his apple crop of that year, to Vancouver, for that purpose. The petitioner testified that he became ill while in Vancouver, and was unable to return to his farm until April, 1929, but he states that he left during his absence a person in charge of the premises, and in occupation of the dwelling house which was on the land in question. I have no doubt but that the witness Sinclair was correct in stating, that at the time he visited the property, he believed the property was unoccupied and perhaps abandoned, and also I believe that the petitioner's servant or agent was in occupation of the dwelling house. Sinclair stated that upon examination he found that no attention whatever was being given to the orchard, the trees had not been pruned for about three years, nor was the land being properly cultivated. He concluded that if any normal crop was to be obtained in 1929 from the apple trees, and if the Board's equity in the property was to be preserved, it was imperative that some competent person be put in charge of the property at once; if this point be of importance, I believe

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and find that the petitioner was in default in this respect. Mr. Sinclair accordingly recommended to the Board that some arrangement be made with one Lowe, an experienced and competent orchardist, living in the same locality. Accordingly, on or about March 25, the land, inclusive of the fruit trees and other improvements on the property, was leased to Lowe, until December 31 following, at a rental of $145. He was not to have possession of the buildings until the petitioner had been given an opportunity to remove his personal effects. The lease provided that if the Board desired to sell the premises during the term of the lease, the same might be terminated upon one month's notice, and Lowe would in that event be entitled to reasonable compensation; and the lease states how that compensation was to be reached. Lowe had no option of purchase of the property, and it is quite evident, I think, that the property was leased to Lowe, so as to ensure the proper cultivation and care of the fruit trees during that season. Lowe forthwith entered into possession of the leased property, and proceeded to cultivate and care for the same, but he did not procure possession of the dwelling house until the month of August following, when the petitioner vacated the same.

The Board thereupon decided to rescind the agreements made with the petitioner and to dispossess him of all the property, and in pursuance of the terms of the first mentioned agreement, and the statute, it served notice upon the petitioner of its intention to rescind the first agreement and that it had rescinded the second agreement.

The notice recites the agreement to purchase the land, and then it proceeds to state, that the amount due on account of principal and interest in respect of the said purchase, and also the indebtedness due on account of advances for "stock and equipment" and otherwise had been consolidated and made payable in stated instalments; that the petitioner had abandoned the land and failed to farm the same in a good and husbandmanlike manner; that he had failed to make payment of the amounts stipulated at the time of the consolidation of the amounts due under the two agreements; and that he had failed to protect the Board's security. The notice stated that upon the expiry of thirty days after the mailing of the notice to the petitioner, the

Board would rescind the agreement for the sale of land and vest the same in itself; and that the Board had rescinded the second agreement and had taken possession of the "stock and equipment" and was proceeding to resell the same, because the petitioner had abandoned such property, and because the Board's security therein had been impaired by reason of such default. The agreement for the sale of the land was formally rescinded by resolution of the Board on August 8, 1929.

According to the terms of this notice, it would appear that the Board deemed it sufficient to notify the petitioner of its intention, after thirty days notice, to rescind the agreement respecting the purchase of land, and that it had rescinded the second agreement and entered into possession of the stock and equipment. I should doubt very much, if, upon the facts disclosed, it could be properly alleged that the land, or the chattels so called, had been abandoned by the petitioner; it is true that he was absent from the property for a few months, but he left a person in occupation of the premises and there was not, I think, any intention of abandoning the property. But I do not propose discussing this point, because the petitioner was undoubtedly in default upon his payments under both agreements, or under the new arrangement made when the two advances were consolidated, and in any event this was a sufficient default to terminate both agreements.

I perhaps should point out, because it may be important later upon the question of damages, that on April 17, the District Solicitor of the Board, Mr. Morrow, wrote the petitioner stating that the action to rescind the agreement became necessary so that immediate arrangements might be made to have some one care for the property, in order to prevent depreciation, and he stated that "unless you are prepared to place your agreement with the Board in good standing same will be duly rescinded when the 30 day notice expires." In another letter, following a day or so later, the solicitor stated: "If it is your intention to place your account in good standing I will be glad if you will attend to the matter at the earliest possible date." Officers of the Board stated in evidence that had instalments past due under the agreement, been paid before the expiration of the thirty day notice, the petitioner would have been

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restored to the property. The occupation by Lowe would not be an impediment so far as the Board was concerned, it was said, except that Lowe, if he insisted, might require thirty days notice of the termination of the lease, and compensation. The petitioner, so far as I know, made no tender to the Board of past due instalments, at any time subsequent to the receipt of the notice which I have mentioned.

For the respondent, Mr. McNeill, advanced the very ingenious argument that the petitioner was merely a tenant at will so far as possession of the land under the first agreement was concerned, and that the agreement to sell the land was entirely another matter, that is to say, the agreement could not be terminated without a thirty day notice to the petitioner, but that the petitioner might be dispossessed of the land because he was a tenant at will. In so far as the second agreement is concerned, the defence substantially is, that no notice was required by the terms of the agreement, or by the statute, and that the respondent could without notice rescind the agreement and enter into possession of the fruit trees, or whatever property was sold and purchased under the second agreement, and that such property in this respect was in the same position as "stock and equipment," under Sec. 18.

Section 31 of the Act is to the effect that every settler occupying land sold by the Board, shall, until the Board conveys the land to him, be deemed a tenant at will. On the other hand, S. 22 enacts that if a settler is in default in the payment of any instalment mentioned in any agreement of sale, or makes any other default, the agreement may be rescinded by the Board, but ss. 6 of the same section states, that before the Board, may exercise any rights given it by this section as against land, the Board shall give the settler thirty clear days notice of its intention so to do, which in this case means, that before any agreement relating to the sale of land could be rescinded the petitioner must have thirty days notice. These two sections of the Act would appear to be in conflict, but I think their meaning and the intendment of the legislature, is rather evident. The interpretation to be placed upon s. 22 (6) and s. 31, I think, is that the tenancy at will therein mentioned, is a special statutory tenancy at will, and is not the tenancy at will

known to the common law; it is a modified or conditional tenancy at will, that is to say, the settler, in the case of land, must have thirty days notice of the Board's intention to rescind the agreement, before the agreement may be rescinded and the Board repossesses the land. After the notice has been given and the agreement is rescinded, the settler, if remaining on the land, becomes merely a tenant at will. S. 31, by itself, is merely declaratory of the common law rule. (See *Doe. d. Stanway* v. *Rock* (1), and Woodfall on Landlord and Tenant, 22nd Ed., p. 282). I cannot place any other interpretation upon the statutory provisions to which I have just referred. The agreement in the case of the sale of land is in conformity with the statute, and both required that the purchaser be given thirty days notice of the Board's intention to rescind the agreement, before rescinding the same. I am of the opinion therefore, that the petitioner could not be dispossessed of the lands agreed to be purchased by him until the notice required by the statute was given him, and the agreement rescinded.

Leasing the land in question, with the improvements thereon, to Lowe, and putting him into possession of the same, without giving the required notice of thirty days to the petitioner of the Board's intention to rescind the agreement, was an interference with the petitioner's right of possession to the land, and in law operated as an overt act dispossessing the petitioner of the property. I think the petitioner was at liberty to so construe it, even though he may have had a cause of action against Lowe personally. There was a breach of duty on the part of the Board in dispossessing the petitioner of the land and improvements without first giving the notice required by the statute, and consequently there was a tortious breach of contract. The fact that the petitioner was temporarily permitted to remain in occupation of the buildings, or some of them, must be treated as a mere indulgence and not involving any legal consequences either in the petitioner's behalf, or against the Board. Therefore, I think, the petitioner is entitled to any damage he may have suffered between the time Lowe entered into possession of the property and the

(1) (1842) Car. & Marsh. 549.

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date of expiry of the thirty days notice required by the statute to be given by the Board. It would seem that upon this notice being given the right of possession would inevitably revert to the Board without any entry or other formal act of taking possession.

The question also arises, assuming it was fruit trees that were sold under the second agreement, whether they are to be treated as chattels or as land, and whether, in the latter event, a separate and additional notice should have been given by the Board of its intention to rescind that agreement. This point, I think, calls for some discussion. If the property sold under the second agreement was not realty, but chattels, then upon any default, the Board might enter into possession of the property or chattels, without notice that is the contention of the Crown. Sec. 59 (*c*) of the Act was, I think, enacted for the purpose of enabling the Board in the case of the sale of orchard or fruit lands, to make a greater advance to the settler than it otherwise could under the statute, or possibly, because in the case of the sale of orchard lands, the portion of the total loan made on the security of the fruit trees, should be earlier repaid than that portion of the loan deemed to be made on the security of the land alone, upon the ground that the security afforded by the fruit trees was less secure, and always liable for one cause or another, to deterioration or even extinction. So then, in the case of the sale of orchard lands, when the fruit trees were to be separately valued, the Board had to look to S. 18 in order to ascertain the total amount that might be advanced and the terms of repayment; it was only the provisions of s. 18 respecting advances and repayment of advances that was to be applied, or that was applicable. That could be done without any fictitious severance of the fruit trees from the land. Section 59 (*c*) states that in the case of the sale of "orchard or fruit lands," the fruit trees may be valued apart from the land, but the sale is still one of "orchard or fruit lands," not fruit trees. In fact the first agreement described the property sold, as being a particular parcel of land with all the buildings and improvements thereon, which would include the fruit trees. Section 59 (*c*) does not pretend to enact that planted and growing fruit trees are to be treated as chattels, and clothed with the

legal quality of personal property; if it was intended so to change the common law it would need to have been expressed with the utmost clarity. In order to apply the provisions of s. 18, in the case of the sale of orchard lands, it was not necessary to say that the fruit trees became personal property just because they were to be valued apart from the land. S. 59 (*c*) is not, I think, to be construed as literally enacting that fruit trees are to be treated as personal property just because "live stock or equipment" was personal property. I might parenthetically say that neither of the agreements appear to be entirely appropriate to the circumstances of the case. The form of agreement suitable to the case where the property agreed to be sold is live stock, or farm equipment, is hardly suitable in the case where the property sold consists of fruit trees growing on land, sold by the Board to settler as orchard lands. The whole contract, I think, might have been expressed in the first agreement. It is even difficult to say, in the first place, what property was sold under the second agreement; I am assuming however that the agreement was intended to have reference to the fruit trees; it was intended, I think, to mean that the fruit trees had been valued at $2,500, and that this amount was to be paid to the Board in the manner there indicated. Then, for example, the condition in the first agreement that the land was to be farmed in a husbandmanlike manner was, I have no doubt a condition intended to relate to the cultivation of the fruit trees, because primarily it was lands to be cultivated as orchard lands, that was sold to the petitioner. There was not a similar condition in the other agreement, and yet it is the default of such a condition that is charged, inter alia, against the petitioner as a reason for terminating the second agreement. This all goes to show how inadequately the agreements express the contract and how difficult it is to give an entirely satisfactory interpretation to the agreements. Departing from these parenthetical observations, which although not necessary to the determination of the case, I felt it useful to make, I would also point out, that the advance made under the second agreement became a first charge or lien on the land; this charge or lien is, by the interpretation clause of the Act, defined as "land." If it be correct that a charge or lien on the

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land, is "land" under the statute, then it would seem that both transactions involved "land" as contemplated by S. 22 (6). The petitioner being in default under both agreements, it is conceded he was liable to be dispossessed, providing that notice was given him as required by S. 22 (6), in the case of land. It seems to me that both agreements are to be treated as one contract for the sale and purchase of orchard lands with all improvements thereon, and I think that is what the statute contemplated, in the case of a sale of orchand lands. I am of the opinion that the notice the petitioner received was a sufficient compliance with the statute in respect of the two agreements, and it is a sufficient answer to the claim of the petitioner for damages if he relies upon the necessity of such a notice in the case of the second agreement; that notice related to the parcel of land agreed to be sold by the Board under the first agreement together with all buildings and improvements thereon. The recission of this agreement divested the petitioner of any interest he had in the land, and everything appertaining to it. What I have said in the preceding paragraph as to the failure of the Board to give the required notice, and the matter of damages, is I think, applicable to the contract as a whole, which as I have pointed out, was really one for the sale and purchase of orchard lands notwithstanding the contract was expressed in two agreements. In any event, if I am correct in the view that the recission of the first agreement divested the petitioner of all interest in the lands and all improvements thereon, then, the petitioner could not have suffered damages by reason of the failure to give the statutory notice in connection with the second agreement, assuming the property therein agreed to be sold was land; the first agreement was rescinded and this dispossessed him of everything which he had agreed to purchase, the land and all improvements, and he could not be injured by the failure of the Board to give notice of intention to dispossess him of something of which he had already been dispossessed. It matters not, I think, that the Board purported to act as if no notice was required under the second agreement, or that it may have considered the fruit trees growing on the orchard lands, as personal property.

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My conclusion is that both agreements are to be treated as relating to lands, and really represent but one transaction, as I think the statute contemplates, because the purchase of the lands and the fruit trees is to be by one and the same person. This conclusion best harmonizes, I think, with the statute. It never could have been intended that one agreement might be rescinded while at the same time the other was in full force and effect; this might conceivably occur, for a short period at least. Treating all the property sold to the petitioner as land, then the notice served upon and received by the petitioner was, I think, a sufficient compliance with the statute, but as I have already stated the notice was not given sufficiently early to deprive the petitioner of damages, if he can successfully establish damages.

The petitioner will be at liberty to apply for an order directing a reference, to ascertain such damages as he may have suffered, within the period already mentioned.

The question of the costs of the action will be reserved until the reference, if any, is executed.

Judgment accordingly.