

HIS MAJESTY THE KING.....PLAINTIFF;

1923
Nov. 15.

AND

THE SAYWARD TRADING & RANCH-
ING COMPANY, LIMITED, and } DEFENDANTS.
Others..... }

Crown—Soldier Settlement Board—Principal and Agent—Right to sue in Crown's name—9-10 Geo. V, c. 71, sections 4 and 41—Agreement by settler disposing of property—Validity.

Under the provisions of the Soldier Settlement Act, B.H.M. & A. four of the defendants, applied for a loan from the Soldier Settlement Board, which thereupon entered into an agreement to sell to them certain land, stock, machinery, etc. The Board then acquired such land, stock, machinery and conveyed same to said B.H.M. & A., under the agreement and placed them into possession thereof. Previous to their said application (namely, on the 25th of June, 1919) B.H.M. & A., had entered into an agreement with the S. Co., the other defendant, for the acquisition of the K. property (afterwards purchased by the Board), the purchase price to be procured out of a loan to be obtained by B.H.M. & A. from the Board. In compliance with the said agreement, B.H.M. & A., assigned to the S. Co., all redeemable interest they might have in the property, and the company thereunder took possession and assumed ownership of the same, and still hold a certain part thereof as against the Board. Said assignments were not deposited with the Board, and B.H.M. & A., without having obtained the permission of the Board for the purpose, were not living on their farms. Action was brought to recover said property and to have the agreements and the assignments with the S. Co. declared null, etc. The defendants contended that the action should have been brought in the name of the Board, and not in that of the Crown.

Held, that the present action was properly instituted in the name of the Crown.

2. That as the Soldier Settlement Act was passed solely for the benefit of returned soldiers, the Board could not recognize transactions between the settler and the S. Co., whereby others than the returned soldier would benefit, and that all such transactions were contrary to the provisions of the Act and were illegal.
3. That inasmuch as the settlers were still indebted to the Board for advances made in their behalf, nothing passed under the agreement of the 25th of June, 1919, and the assignments referred to above, with respect to the property in question. *The King v. Powers*, 1923 Ex. C.R. 131, referred to.

INFORMATION exhibited by the Attorney-General of Canada for an order declaring certain agreements between the soldier-settler and third parties null and void and for recovery of property.

September 27th and 28th, 1923.

Case now heard before the Honourable Mr. Justice Audette, at Vancouver, B.C.

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M. A. Macdonald and *C. L. Fillmore* for plaintiff.
J. E. Bird for Sayward Trading and Ranching Company
 and *J. E. Armishaw*.

R. M. Macdonald for *G. B. Armishaw*.

A. L. Kent for *H. A. Armishaw*.

The facts and questions of law involved are stated in
 the reasons for judgment.

Audette J. AUDETTE J. (this 15th November, 1923) delivered judgment.

This is an information exhibited by the Attorney-General of Canada whereby the Crown is asking, *inter alia*, for an order that certain land, stock, machinery and building materials purchased by The Soldier Settlement Board, for the four soldier-settlers, defendants herein, namely: Morton, Bradley, Hart and *G. B. Armishaw*, and now alleged to be in possession of The Sayward Trading and Ranching Company Limited and *J. E. Armishaw*,—be delivered to the plaintiff. The information asks further that all assignments or agreements made by the said settlers, in violation of the provisions of The Soldier Settlement Act, 1919, be declared illegal and void and delivered for cancellation.

Among the many questions discussed at bar there is one which lies at the very threshold of them all and that is, as contended by the defence, that the action should have been instituted in the name of The Soldier Settlement Board of Canada, and not in the name of the Crown.

The Act in question (1) is

An Act to assist returned soldiers in settling upon the land, that is providing for the Crown's assistance to them, and by sec. 4 thereof the powers of the Board are therein defined and consist, among other things, in acquiring, holding, conveying and transferring any of the property which it is by the Act authorized to so acquire, hold, convey, and transfer, etc.

Then the section proceeds by stating that

the Board shall be and be deemed a body corporate, but for such purpose only, and as such shall be the agent of the Crown in the right of the Dominion of Canada.

There is no enactment in the Statute expressly declaring that the Board might sue or be sued. There is, however, in sub-sec. (b) of sec. 61 of the Act a provision allowing an action to be instituted in the name of the Board,

as agent of His Majesty, in the special case of the recovery of a commission wrongly paid. It is a specific clause dealing with procedure only and not with a substantive right of action. That is, under the statute, the only instance where the Board is given the power to sue,—it is a specific power given in a specific case—and the action is to be taken as agent of the Crown. Therefore it would seem to fall within the doctrine of construction as contained in the maxim: *Expressio unius, exclusio alterius*. But it is clear that this provision as to agency does not affect the issues in the case at Bar. That being so the point need not be pursued further.

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Section 41, dealing with procedure for compulsory purchase, provides that where the owner of land claims inadequate compensation, the Board may cause an information to be exhibited in the Exchequer Court. That is that the Crown shall sue and not the Board.

The Board was created and established by the Crown with the object of facilitating the purchase of land for the returned soldiers and of settling them upon the same; these lands to be purchased and the advances made to the soldiers, with the Crown's money.

There is nothing in the Act which takes away the Crown's prerogative to sue for the recovery of its property. The King is also supposed to be always present in Court, Chitty's Prerogative of the Crown, 244. In the construction of the Act, the principle must be recognized that an intention to take from the Crown the right to sue is not to be presumed and the statute is not to be regarded as changing the existing state of the law beyond what its enactments declare, either in express terms or by unmistakable implication. It is not to be assumed that Parliament would overthrow fundamental principles, take away the Crown's prerogative, or alter the general principles of law, without expressing itself with irresistible clearness. Maxwell, Interpretation of Statutes, 2nd ed. 126, 188. Endlich, Interpretation of Statutes, pp. 95, 153 and 173. Chitty's Prerogative of the Crown, 244.

However, we have in the present case, a very important enactment in sec. 4 which, by itself, should decide this important question, and that is, that the Board is created for "the purposes of acquiring, holding, conveying and

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transferring" some specific property,—and "for such purposes only, the Board shall be and be deemed a body corporate and as such the *agent* of the Crown, etc."

If the Board is, under section 4 of the Act, the agent of the Crown it is not acting *sui generis* and if it is only an agent, it follows that the principal, the Crown, apart from the prerogative, and as a principal, has obviously the right to sue. The Board is the agent of the Crown, therefore the Crown is the principal and as such has that right. The Act defines the powers of the Board, creates it the agent of the Crown for the purposes mentioned in the Act and no more. *The King v. Vancouver Lumber Co.* (1), *British American Fish Co. v. The King* (2).

The Soldier Settlement Act, 1919, was assented to on the 7th July, 1919, and it was contended by counsel for the defendants that the Act was in force on only part of that day, that is from the time the clerk of Parliament had endorsed the assent on the Act. There is no fraction of a day in such cases. Moreover it is provided by sec. 11 of the Interpretation Act, that when an Act is expressed to come into operation on a particular day, it shall be construed as coming into operation on the expiration of the previous day. I have therefore come to the conclusion that all the material transactions in question in this case must be treated as made under the Act of 1919, both from the assent given the Act on the 7th July, 1919, and from the reading of sec. 64 thereof.

Upon application made therefore, under the said Act, by the defendants Bradly (2nd September, 1919), Hart (1st July), Morton (7th July), and G. A. Armishaw (29th August, 1919), the Board entered into an agreement with them to sell them certain land, stock, machinery and equipment, and placed them in possession of the same, under the terms of the said agreement.

Previous to their application, these soldier-settlers had entered into an agreement, dated 25th June, 1919, which is recited in full in par. 16 of the Information, whereby, among other things, it was agreed that the Sayward Co. was to sell to the four above-mentioned settlers and H. A. Armishaw who in turn were to purchase the King property

(1) [1914] 17 Ex. C.R. 329;
 50 D.L.R. 6; 41 D.L.R. 617.

(2) [1918] 18 Ex. C.R. 230.

(the one afterwards purchased by the Board), etc., and that the purchase price was to be procured out of a loan to be obtained by the soldier-settlers from the Board.

Furthermore, in compliance with the said agreement, these settlers on the 21st August and 23rd October, 1919, assigned to the Sayward Co. all redeemable interest they held or might hold with the Dominion Soldier Settlement Board in the property allotted to them under their applications and the company thereunder assumed possession, control and ownership of the same and the company and J. E. Armishaw, its manager and president, have since held and are now holding possession of certain of the said stock, machinery and equipment as against the said Board. These assignments were not deposited with the Board and they only came to the knowledge of its officers during April, 1920, when it was found the settlers were not living on their land, etc.

Now it is quite clear that these transactions are not allowable and are illegal under the Act, and moreover it is established, under clear and distinct evidence, that each settler is responsible to the Board for all his obligation and that the Board could not and would not recognize such a company, whereby other than returned soldiers could benefit from such loans made by the Board. No consent in writing was ever given by the Board to allow these settlers to depart from their obligation and to live outside their farm (sec. 52).

This is so clearly stated in the Act that it becomes unnecessary to do any more than to state these bare facts. I will however, on these questions, refer to the case of *The King v. Powers* (1).

I therefore find that as far as the Crown or the Board is concerned that nothing passed under the Agreement of the 25th June, 1919, and the four assignments above mentioned, with respect to the property in question, the settlers being still indebted to the Board for the purchase price of the said land, stock, equipment and improvements.

I refrain from passing upon the effect of these assignments and agreement as between the parties to the same, excepting the Crown and the Board, and do not make any

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(1) [1923] Ex. C.R. 131.

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order as to the cancellation and the delivery of the same, as prayed for by the Information. All I need do is to protect, as provided by the Act, the loans made by the Crown under the circumstances.

The Information further prays for an order that all land, stock, machinery, equipment, and building materials purchased by the Board for and on behalf of Morton, Bradley, Hart and George B. Armishaw, or any of them, now in possession of the defendants, The Sayward Trading and Ranching Company, Limited, and John Edward Armishaw, or either of them, be delivered forthwith to the plaintiff and that the said company and John E. Armishaw have not now and since the purchase thereof by the Board have never had any right, title or interest therein, and I hereby give an order accordingly.

However, with respect to the order of delivery (unless the said company and J. E. Armishaw recognize the ownership of the Crown and willingly hand over all and any of the stock, machinery, equipment, and building materials so purchased by the Board and in their possession) the order will have to be limited to such which, under the evidence, is clearly described and identified, the Court being unable to adjudicate upon the balance for want of certainty.

I find that the goods clearly described and identified are as follows:—

One rubber tired waggon; one cream separator; one plough; one seeder; one hay unloading gear or outfit; one Durham cow, with tail torn off—3 years old in January last; one Holstein cow, under name Daisy; one cow, yellow and white mottled, 5½ years old; three horses: one old mare called Fanny; one team which was seen driven by H. A. Armishaw in execution of his mail contract, as testified at trial.

There are quite a number of other items of stock mentioned in the evidence, but for want of proper identification and certainty, I have to leave them at large. However, it is well to bear in mind that J. E. Armishaw was heard as a witness and testified after the evidence had been adduced in his presence by witnesses Wood, Hart, Bradley and Morton, with respect to the stock, machinery, equipment and building materials which they claimed to be in

his possession while the ownership of the same was in the Board or the Crown and yet he did not speak as to that, he did not attempt to contradict the evidence. His silence is significant as against him. No question was asked him, either on behalf of the plaintiff or defendants, as to these chattels in his possession or in that of the company. However, it is impossible for the Court to extend the order of delivery to cover calves, heifer, young sheep and pigs in 1919, which are now beyond description as compared to the year 1919.

Counsel for the Crown abandoned at bar the claim with respect to paragraph 4 of the prayer of the Information.

The defendants Morton, Bradly and Hart, although duly served with a copy of the Information herein, did not file any statement in defence and did not appear at trial.

Therefore, there will be judgment against all the defendants herein, in the following manner:—

1. The action is declared properly instituted in the name of the Crown, under the circumstances of the case.

2. Nothing passed under the agreement of the 25th June, 1919, and the assignments above referred to and the rights and ownership of the Crown in the property in question remain unaffected by these assignments and agreement which are declared null and void in this respect.

3. The land, stock, machinery, equipment and building materials purchased by the Board for and on behalf of the said defendants Morton, Bradly, Hart and George B. Armishaw, or any of them, now in possession of the defendant company, and John Edward Armishaw, or either of them, are ordered to be delivered forthwith to the plaintiff—the said defendant company and John Edward Armishaw having not now and since the purchase thereof by the Board any right, title or interest therein.

4. The said company and John Edward Armishaw are ordered to deliver forthwith to the plaintiff the following property which has been clearly identified by the evidence as being in their possession, namely: One rubber tired wagon; one cream separator; one plough; one seeder; one hay unloading gear or outfit; one Durham cow with tail torn off—3 years old in January last; one mottled, yellow and white cow 5½ years old; one Holstein cow under the name of Daisy, together with three horses, one of which

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being an old mare called Fanny and a young team or two horses—the same which has been seen driven by H. A. Armishaw on his mail contract.

5. The plaintiff will have the costs of the action against all the defendants who filed a statement in defence and joined issue on the plaintiff's claim, namely against The Sayward Trading and Ranching Company, Limited, John Edward Armishaw, George B. Armishaw, and H. A. Armishaw. (*Treo Co. v. Dominion Corset Co.*) (1).

6. There will be no costs to either party on the issue as between the Crown and the defendants Morton, Hart and Bradley.

Judgment accordingly.

(1) [1918] 18 Ex. C.R. 115, at pp. 131, 132.