[HIGH COURT OF AUSTRALIA.]

GILLEN . . . . . APPELLANT;
PLAINTIFF,

AND

LAFFER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1925.

ADELAIDE, *Sept.* 30.

SYDNEY, *Dec.* 17.

KNOX C.J., HIGGINS, RICH and STARKE JJ.

Crown Lands—Soldiers settlement—Agreement for sale of land—Payment by instalments—Cancellation for non-payment of instalments—Notice demanding payment—Sufficiency of notice—Cancellation for incompetency—Audi alteram partem—Registration of forfeiture or determination of Crown lease—Effect of registration—Discharged Soldiers Settlement Act 1917 (*S.A.*) (*No.* 1313), *secs.* 2, 16—*Crown Lands Act* 1915 (*S.A.*) (*No.* 1199), *secs.* 63, 198—*Real Property Act* 1886 (*S.A.*) (*No.* 380), *sec.* 94—*Regulations of 2nd Dec.* 1920 (*S.A.*), *reg.* 13 (*h*).

An agreement was made between the Minister of Repatriation for South Australia and the appellant under the *Crown Lands Acts* 1915-1919 (S.A.) and the *Discharged Soldiers Settlement Acts* 1917-1919 (S.A.), for the sale to the appellant of certain land, the purchase-money being payable by instalments. The agreement contained a clause providing that, if any of the instalments should be unpaid and in arrear for more than six months after the day when it was made payable, "the purchaser having had at least three months' previous notice in writing demanding its payment," the agreement might be cancelled by the vendor. The appellant being in arrear with certain of the instalments for more than six months, a notice was given to him by the Commissioner of Crown lands (who was also in fact the Minister for Repatriation) notifying an intention to cancel the agreement unless all arrears were paid within a certain time, and setting out the amounts that would in the event of forfeiture taking place be payable under the agreement up to the date of cancellation.

Held, by *Knox* C.J., *Higgins* and *Starke* JJ., that the notice was ineffective to support a cancellation of the agreement:

By *Knox* C.J. and *Higgins* J., on the ground that it contained no demand of payment;

By *Starke* J., on the ground that it was not made by the Minister of Repatriation.

The agreement also, as was required by regulations made under the *Discharged Soldiers Settlement Acts*, contained a provision that "if at any time within a period of ten years from the date of this agreement the vendor is satisfied on such evidence as he deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land with advantage to himself or that the purchaser has neglected to work the said land satisfactorily or has been guilty of serious misconduct during his occupation thereof the vendor by notice in writing given to the purchaser may determine this agreement," &c.

Held, by *Knox* C.J., *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the clause could not be acted upon without the appellant having an opportunity of being heard and of meeting allegations to his prejudice.

Sec. 94 of the *Real Property Act* 1886 (S.A.) provides that "the Registrar-General, upon receipt of notice from the Commissioner of Crown Lands that any Crown lease has been lawfully forfeited or determined in whole or in part, shall make an entry to that effect in the Register of Crown Leases, and such forfeiture or determination shall thereupon have effect."

Held, by *Knox* C.J., *Higgins*, *Rich* and *Starke* JJ., that the section assumes a lawful forfeiture or determination, and has not the effect of validating a forfeiture or determination which otherwise has not been lawfully made.

Decision of the Supreme Court of South Australia (Full Court): *Laffer* v *Gillen*, (1924) S.A.S.R. 514, reversed.

APPEAL from the Supreme Court of South Australia.

An agreement in writing dated 1st March 1919 was made on 26th February 1921 between "the Minister of Repatriation of and for the State of South Australia contracting for and on behalf of His Most Gracious Majesty King George the Fifth" as vendor, and Francis Arnold Gillen as purchaser, purporting to be in pursuance of the *Crown Lands Acts* 1915-1919 (S.A.) and the *Discharged Soldiers Settlement Acts* 1917-1919 (S.A.). By the agreement the vendor agreed to sell and the purchaser to buy certain land. The purchase-money £2,106, was made payable by instalments spread over sixty-five years.

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Clauses 22 and 24 of the agreement were, so far as is material, as follows :—" (22) If at any time within a period of ten years from the date of this agreement the vendor is satisfied on such evidence as he deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land with advantage to himself or that the purchaser has neglected to work the said land satisfactorily or has been guilty of serious misconduct during his occupation thereof the vendor by notice in writing given to the purchaser may determine this agreement upon and subject to such terms and conditions as the vendor thinks fit and upon the expiration of three months from the giving of such notice this agreement and the right of the purchaser to complete the purchase and to possession of the said land shall cease and determine and be void anything in this agreement to the contrary notwithstanding." " (24) And it is hereby declared that if any of the instalments hereby reserved shall be unpaid and in arrear for more than six months after the day whereon the same is hereby made payable the purchaser having had at least three months' previous notice in writing demanding its payment this agreement may be cancelled by the vendor or if the vendor shall be satisfied there has been a breach in the performance of any other of the covenants herein contained or that this agreement is liable to forfeiture the said vendor may re-enter and take possession of the said land and it shall be lawful for the vendor before or after re-entry to cancel and determine this agreement and the said vendor may thereupon insert a notice in the *Government Gazette* declaring this agreement to be forfeited and such notice appearing in the *Government Gazette* shall in all Courts and elsewhere and under all circumstances be taken to be conclusive evidence that this agreement has been legally cancelled and forfeited " &c.

By a writ issued on 21st June 1923 Gillen brought an action in the Supreme Court of South Australia against George Richards Laffer, who was then the Commissioner of Crown Lands and the Minister of Repatriation for South Australia, alleging in his statement of claim (par. 1) that the defendant by his servants and agents had broken and entered the land in question and ejected the plaintiff and his

wife therefrom and had taken possession of the land; and claiming £1,000 damages.

The defence (so far as is material) was as follows :—

"4. On or about 26th February 1921 the defendant on behalf of his said Majesty entered into with the plaintiff an agreement for sale and purchase of the said lands which said agreement was dated 1st March 1919 and is the agreement referred to in par. 1 of the plaintiff's claim.

"5. It was a term of the said agreement that if at any time within a period of ten years from the date thereof the defendant was satisfied on such evidence as he deemed sufficient that the plaintiff had neglected to work the said lands satisfactorily the defendant might by notice in writing given to the plaintiff determine the said agreement and that upon the expiration of three months from the giving of such notice the said agreement and the right of the plaintiff to possession of the said lands should cease and determine.

"6. The defendant was on 24th January 1923 satisfied upon evidence which he deemed sufficient that the plaintiff had neglected to work satisfactorily the said lands and on the said 24th January while so satisfied did by notice in writing given to the plaintiff determine the said agreement.

"7. On or about 27th April 1923 the plaintiff and his wife were in unauthorized possession and occupation of the said lands and whilst in such possession and occupation the defendant pursuant to the power conferred upon him by sub-par. XIII. of sec. 9 of the *Crown Lands Act* 1915 authorized certain persons to take possession of the said lands and to forcibly eject every person therefrom.

"8. On 1st May 1923 the plaintiff and his wife were in unauthorized possession and occupation of the said lands and whilst in such possession and occupation the persons authorized by the defendant as mentioned in the last preceding paragraph hereof took possession of the said lands.

"9. The defendant says that he is not guilty—By statute *Crown Lands Act* 1915, sec. 303.

"10. Alternatively it was a term of the said agreement that if any of the instalments thereby reserved should be unpaid and in

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arrear for more than six months after the day whereon the same was thereby made payable the plaintiff having had at least three months' previous notice in writing demanding its payment the said agreement might be cancelled by the defendant and the defendant might thereupon insert a notice in the *Government Gazette* declaring the said agreement to be forfeited and such notice appearing in the *Government Gazette* should in all Courts and elsewhere and under all circumstances be taken to be conclusive evidence that the said agreement had been legally cancelled and forfeited. Certain instalments reserved in the said agreement were on 11th November 1922 unpaid and in arrear for more than six months after the day whereon they were thereby made payable and the plaintiff upon that day had had at least three months' previous notice in writing demanding their payment. On the said 11th November 1922 the defendant cancelled the said agreement. In the further alternative on 9th January 1923 the defendant delivered to the Registrar-General a notice dated 22nd December 1922 that the said agreement had been lawfully and wholly determined and on the said 9th January 1923 the Registrar-General made an entry in the Register of Crown Leases that the said agreement had been lawfully determined."

The action was heard by *Poole* J., who gave judgment for the plaintiff for damages to be assessed : *Gillen* v. *Laffer* (1). From that decision the defendant appealed to the Full Court, which allowed the appeal with costs of the action in the Court below : *Laffer* v. *Gillen* (2).

From that decision the plaintiff now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Cleland K.C. (with him *Teesdale Smith*), for the appellant. The document upon which the respondent relies as a notice under clause 24 of the agreement was not such as to authorize the cancellation of the agreement. It was not given by the vendor, the Minister of Repatriation, but by the Commissioner for Crown Lands, and the fact that the two offices were held by the same person does not affect the question. The notice is not a three months' notice as required by clause 24, that is, a notice requiring payment within three months

(1) (1924) S.A.S.R. 170. (2) (1924) S.A.S.R. 514.

after it is given; but it is a two months' notice, and it was given less than six months after one of the instalments had become due (see *Quartermaine* v. *Selby* (1)). This objection applies whether the notice is given under clause 24 or under sec. 63 or sec. 198 of the *Crown Lands Act* 1915. The notice is not a demand of payment as required by clause 24; but it is a misleading statement of what will happen if payment is not made within a certain time. Where there is a provision for forfeiture it must be strictly complied with (*Johnson* v. *Lyttle's Iron Agency* (2); *Pigot* v. *Cubley* (3); *Jackson & Co.* v. *Northampton Street Tramways Co.* (4); *Phillips* v. *Bridge* (5)).

[KNOX C.J. referred to *Geake* v. *Ross* (6).]

The power to cancel given by sec. 63 of the *Crown Lands Act* 1915 does not apply to agreements made by the Minister of Repatriation under the *Discharged Soldiers Settlement Acts* 1917-1920. That section refers to agreements made by the Minister of Crown Lands, and has no application to agreements made under sec. 14 of the *Discharged Soldiers Settlement Act Amendment Act* 1918. As to the purported cancellation under clause 22, that was ineffective; for the appellant was entitled to be heard in his defence, and no opportunity was given to him for that purpose.

Villeneuve Smith K.C. and *Hannan*, for the respondent. The notice of 21st December 1921 is a sufficient demand of payment within clause 24. The test of whether it is a demand of payment is what effect it will have on the mind of the person to whom it is given (*Crook* v. *Morley* (7); *Flannagan* v. *Milne* (8); *Everard* v. *Watson* (9); *Blair* v. *Cordner* (10); *Doe d. Price* v. *Price* (11); *Fox* v. *Jolly* (12); *Stubbs* v. *Slater* (13)). The fact that the notice is given by the Commissioner of Crown Lands and not by the Minister of Repatriation does not matter, for it was given with the authority of the Minister of Repatriation. The *Crown Lands Act* 1915 being incorporated in the *Discharged Soldiers Settlement Act* 1917 by sec.

(1) (1889) 5 T.L.R. 223.
(2) (1877) 5 Ch. D. 687.
(3) (1864) 15 C.B. (N.S.) 701.
(4) (1886) 55 L.T. 91.
(5) (1873) L.R. 9 C.P. 48.
(6) (1875) 44 L.J. C.P. 315.
(7) (1891) A.C. 316.
(8) (1919) 27 C.L.R. 1, at p. 10.
(9) (1853) 1 El. & Bl. 801.
(10) (1887) 19 Q.B.D. 516.
(11) (1832) 9 Bing. 356.
(12) (1916) 1 A.C. 1.
(13) (1910) 1 Ch. 632.

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2, the agreement in this case falls within the description in sec. 4 of the *Crown Lands Act*, and sec. 63 applies to it. The registration of the forfeiture under sec. 94 of the *Real Property Act* 1886 (S.A.) gave conclusive effect to the forfeiture, and operated to revest the estate in the Crown, so that the appellant was in unlawful possession. The power given under clause 22 to the Minister of Repatriation was not judicial or quasi-judicial, and there is no reason to assume that there should be implied a right in the appellant to have notice of the charge against him and an opportunity to meet it (*R.* v. *Arndel* (1); *Russell* v. *Russell* (2); *Cassel* v. *Inglis* (3); *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (4)).

[STARKE J. referred to *Australian Trading Co. Pty. Ltd.* v. *Jones* (5).

[KNOX C.J. referred to *Smith* v. *The Queen* (6).]

Cleland K.C., in reply. The Minister of Repatriation when acting under clause 22 of the agreement had a quasi-judicial duty to perform, and, since clause 22 was inserted in the agreement pursuant to reg. 13 (*h*) of the Regulations of 2nd December 1920 made under the *Discharged Soldiers Settlement Acts*, the duty is a statutory one. Where a duty is imposed by statute or contract on a person to determine anything which affects the pecuniary position of another, that other person must be given an opportunity of being heard (*Smith* v. *The Queen* (7); *Board of Education* v. *Rice* (8); *Local Government Board* v. *Arlidge* (9); *De Verteuil* v. *Knaggs* (10); *Weinberger* v. *Inglis* (11); *Armstrong* v. *South London Tramway Co.* (12)).

Cur. adv. vult.

Dec. 17. The following written judgments were delivered :—

KNOX C.J. The appellant, the plaintiff in the action, was before and up to 1st May 1923 in possession of certain lands under an agreement dated 1st March 1919, made between him and the

(1) (1906) 3 C.L.R. 557, at pp. 571-572.
(2) (1880) 14 Ch. D. 471, at pp. 478-479.
(3) (1916) 2 Ch. 211, at p. 230.
(4) (1923) 32 C.L.R. 518, at p. 567.
(5) (1925) V.L.R. 273; 47 A.L.T. 5.
(6) (1878) 3 App. Cas. 614, at p. 623.
(7) (1878) 3 App. Cas. 614.
(8) (1911) A.C. 179, at p. 182.
(9) (1915) A.C. 120, at p. 133.
(10) (1918) A.C. 557.
(11) (1919) A.C. 606, at p. 631.
(12) (1890) 7 T.L.R. 123.

Minister for Repatriation of the State of South Australia. On 1st May 1923 the respondent, who was then Commissioner for Crown Lands and Minister for Repatriation of that State, forcibly ejected the appellant from the lands in question. The appellant having brought this action to recover damages for his eviction, the respondent sought to justify the trespass alleged, on three grounds, namely, "(1) that the plaintiff was in unauthorized possession because there was a cancellation of the agreement for non-payment of instalments under a power contained in clause 24 of the agreement; (2) that the agreement had been determined by the respondent under clause 22 of the agreement on the ground that he was satisfied that the plaintiff had neglected to work the land satisfactorily; (3) that, whether the agreement was lawfully determined or not under either of these clauses, the respondent as Commissioner of Crown Lands gave the Registrar-General notice that it was lawfully determined and the Registrar made entry of that in the Register of Crown Leases, and that thereupon by virtue of sec. 94 of the *Real Property Act* 1886 the determination whether lawful or not had effect." The action was tried by *Poole* J., who held that the respondent had failed to establish any of the grounds of justification on which he relied, and entered judgment for the appellant for damages to be assessed. On appeal to the Full Court of South Australia this judgment was reversed, the Court being of opinion that the agreement had been duly cancelled for default in payment of instalments under the power contained in clause 24 thereof. From that decision this appeal is brought.

I propose to deal with the three grounds of defence in the order in which they are set out above; and the first question is whether there has been a valid cancellation of the agreement under the power contained in clause 24. That clause is, so far as is material, in the words following: "And it is hereby declared that if any of the instalments hereby reserved shall be unpaid and in arrear for more than six months after the day whereon the same is hereby made payable the purchaser having had at least three months' previous notice in writing demanding its payment this agreement may be cancelled by the vendor or if the vendor shall be satisfied there has

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been a breach in the performance of any other of the covenants herein contained or that this agreement is liable to forfeiture the said vendor may re-enter and take possession of the said land, and it shall be lawful for the vendor before or after re-entry to cancel and determine this agreement and the said vendor may thereupon insert a notice in the *Government Gazette* declaring this agreement to be forfeited and such notice appearing in the Government *Gazette* shall in all Courts and elsewhere and under all circumstances be taken to be conclusive evidence that this agreement has been legally cancelled and forfeited." A due exercise of this power would cause a forfeiture of the purchaser's interest in the land, and it follows that the respondent must establish that all the conditions on which the power may be exercised have been strictly performed. Those conditions so far as now relevant are—(i.) default for more than six months in payment of an instalment, (ii.) the purchaser must have had three months' previous notice in writing demanding payment of the instalment or instalments in arrear. As to condition (i.) it is not denied that on 21st December 1921, when the notice on which the respondent relies was given to the appellant, each of two instalments was in arrear for more than six months. As to condition (ii.) the notice on which the respondent relies as a notice demanding payment is in the words following :—" 21st December 1921.—Sir,—I am directed by the Hon. the Commissioner of Crown Lands to advise you that it is intended to cancel Soldier's Acquired Agreement No. 30 and to reoffer the land unless all arrears are paid within two (2) months from this date. In the event of forfeiture taking place as indicated, you will be liable for payment of amounts due up to the date of actual cancellation.—Payment due 31/8/20, £26 6s. 6d. ; 28/2/21, £26 6s. 6d. ; 31/8/21, £36 17s. 1d. : and interest thereon."

Mr. *Cleland* for the appellant contended that the notice was defective—first, because it was not given by the vendor, the Minister of Repatriation, but by the Commissioner of Crown Lands ; secondly, because it did not expressly require that the arrears should be paid up within three months ; and, thirdly, because it was not a notice " demanding payment." In the view which I take of the objection

last mentioned it is unnecessary for me to express an opinion on either the first or the second point raised.

The notice states that it is intended to cancel the agreement unless all arrears are paid within two months from its date, and warns the appellant that if the forfeiture takes place he will be liable to pay the amounts due up to date of cancellation. I agree with *Poole* J. in thinking that this notice contains no demand for payment of the instalments in arrear and is therefore not a notice demanding payment within the meaning of clause 24 of the agreement. It amounts, in my opinion, to no more than an intimation that if the arrears be not paid within two months it is intended to cancel the agreement, and that if the agreement be cancelled the purchaser will still be liable for instalments due up to the date of cancellation. In effect, the purchaser is told "If you choose to pay within two months the instalments in arrear the agreement will remain in force; but if you elect not to do so the agreement will be cancelled and you will still be liable to pay the instalments due to date of cancellation." In my opinion clause 24 of the agreement requires that before the power to cancel can be exercised an explicit and unequivocal demand shall be made for payment of the instalment or instalments in arrear, and the notice in question contained no such demand.

For these reasons I think the respondent has failed to establish the first ground on which he attempts to justify the eviction of the appellant.

The next question is whether the agreement was duly determined under the power contained in clause 22. That clause, so far as relevant, is in the words following: "If at any time within a period of ten years from the date of this agreement the vendor is satisfied on such evidence as he deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land with advantage to himself or that the purchaser has neglected to work the said land satisfactorily or has been guilty of serious misconduct during his occupation thereof the vendor by notice in writing given to the purchaser may determine this agreement." The argument for the appellant on this point was that the notice of cancellation given was ineffective because the appellant was not given an opportunity of being heard before the Minister decided to determine the agreement. The condition

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precedent to the exercise of the power given by this clause is that the vendor shall be "satisfied on such evidence as he deems sufficient" of the incompetency or personal disability of the purchaser. In a sense the power is given by contract, for it is a term of the contract between the vendor and the purchaser; but in truth the power conferred on the vendor is a statutory power because its insertion in the contract is required by clause 13 (*h*) of the Regulations made in December 1920 under the power to make regulations conferred by the *Discharged Soldiers Settlement Acts* 1917-1919. In substance the question under discussion is the same as if the Act of Parliament contained a provision that in the case of every contract of sale made under the Act the Minister should have the power of cancellation in the events specified in clause 22 of the agreement. I agree with *Poole* J. in thinking that the clause contemplates that an inquiry shall be made by the Minister before he arrives at a decision. The provision that the vendor is to be satisfied on such evidence as he deems sufficient, in my opinion clearly indicates that the vendor is to act not arbitrarily but on evidence, and if evidence is to be received I think the case is one in which the maxim *Audi alteram partem* applies. The Minister is required to inform his mind by evidence before giving his decision, and the person whose rights may be affected by that decision should be given an opportunity of controverting any evidence that may be adduced. The Minister is a person invested by law with authority to adjudicate upon a matter involving civil consequences to an individual, and although he is not, strictly speaking, a legal tribunal, the rule applies that no man should be condemned to consequences resulting from alleged misconduct, unheard and without the opportunity of making his defence (see *Wood* v. *Woad* (1), cited in *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* (2)). Many of the authorities on this question were considered and discussed in *Sydney Corporation* v. *Harris* (3). In that case *Griffith* C.J. stated the rule in the words following (4): "The general rule of law is that a person so circumstanced—that is, who is liable to be called upon by some public authority to incur a heavy burden or loss—is

(1) (1874) L.R. 9 Ex. 190.
(2) (1906) A.C. 535, at p. 540.
(3) (1912) 14 C.L.R. 1.
(4) (1912) 14 C.L.R., at p. 5.

entitled to be heard and to have the opportunity of giving reasons why such an order should not be made and enforced against him."

For these reasons I agree with *Poole* J. in thinking that the pretended determination of the agreement under clause 22 was ineffective. I may add that apparently the learned Judges who composed the Full Court concurred in the opinion expressed by *Poole* J. on this point, though, in the view which they took, a decision upon it became unnecessary.

As to the third question I need say no more than that I agree with the learned trial Judge in the conclusion at which he arrived and in the reasons by which he supported that conclusion.

In my opinion the appeal should be allowed.

HIGGINS J. The plaintiff, a returned soldier, who got possession of two blocks of land under agreement with the Minister of Repatriation in South Australia, sues the Minister for trespass—for eviction; and the Minister (who is also Commissioner of Crown Lands) seeks to justify the eviction on these grounds: (1) a notice in writing given to the plaintiff determining the agreement as under clause 22 of the agreement on 24th January 1923; (2) forcible ejection of the plaintiff as in unauthorized possession under the power conferred on the Commissioner by sec. 9 (XIII.) of the *Crown Lands Act* 1915; (3) not guilty—the general issue under the same Act, sec. 303; (4) a notice in writing *previously* given cancelling the agreement, as under clause 24 of the agreement, on 21st December 1921; (5) an entry made by the Registrar-General that the agreement had been lawfully determined. The agreement was dated 1st March 1919. It is made under the common seal of the Minister as vendor (as I read it) and of Gillen as purchaser. The purchase-money (£2,106) is made payable by instalments spread over sixty-five years. No instalments are payable in the first year, an instalment of 2½ per cent is payable half-yearly in the second year, an instalment of 3½ per cent is payable half-yearly in the third year, and instalments of 5 per cent half-yearly in the fourth, fifth and subsequent years for sixty-five years. These instalments, if paid, would satisfy principal as well as interest. This purchaser has not paid one penny of the instalments.

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Clause 24 is as follows: [The clause was set out as above.] Now, on 21st December 1921, a notice was sent to the plaintiff Gillen as follows: [The letter was set out.] It is beyond dispute that these sums were due and payable as stated, and that they were not paid; but at the date of the notice the third instalment, £36 17s. 1d., was not yet six months overdue, and, therefore, under clause 24 was not immediately available as a ground of forfeiture.

It is contended by Mr. *Cleland* for the appellant purchaser that under clause 24 this notice is insufficient, as a ground for cancellation, for several reasons. One is that the notice contained no actual demand for payment of any instalment. Looking back at clause 24, the purchaser must have had "at least three months' notice in writing *demanding its payment*" (payment of a definite instalment). Moreover, it is not enough to threaten cancellation; the writing must demand payment—the demand must be *in writing*, not inferred from the threat. At most, the condition precedent as to three months' notice has only been fulfilled as if its terms ended with "notice in writing"; but we must see that effect be given to the additional words "demanding its payment." It is no use to urge that this notice as it stands would serve practically the same purpose of warning the purchaser—that is not for us to judge: this power to cancel, to forfeit, must be strictly pursued, or there is no forfeiture (*Johnson* v. *Lyttle's Iron Agency* (1); and see *Geake* v. *Ross* (2)). On this point I respectfully concur with *Poole* J.

Perhaps I ought to say that this objection to the notice is equally fatal to the notice if it is to be treated as given under sec. 63 of the *Crown Lands Act* 1915. I assume that the plea of not guilty under sec. 303 (par. 9 of defence) and the *Supreme Court Rules*, Order XX., r. 11, would make a defence of notice under sec. 63 available, for the defendant is sued in his personal name; but I am not yet satisfied that the Commissioner's power under sec. 63 (as distinguished from the power of the Minister of Repatriation) extends to lands under the *Discharged Soldiers Settlement Acts* 1917-1920.

I need not express any opinion on the other objections to this notice taken on behalf of the appellant. Having come to the conclusion that one objection is fatal to this notice, it is better not

(1) (1877) 5 Ch. D. 687.

(2) (1875) 44 L.J. C.P. 315.

to hazard pronouncements as to the other objections ; my judgment is not to be a repertory for obiter dicta. I pass by, for instance, the weighty argument that the notice should *on its face* show that it comes from the Minister of Repatriation in his capacity as such Minister—that it is not enough to prove (as is proved here) that the notice was sent with the authority of that Minister as well as with the authority of the Commissioner of Crown Lands. It is enough for the purpose of my judgment to say that, in my opinion, the defence fails so far as it depends on clause 24 of the agreement, or on sec. 63 of the *Crown Lands Act* 1915 (if relevant). Perhaps I should here admit that I was impressed by the illustration given by the learned Chief Justice of South Australia—that the highwayman's formula, " Your money or your life," is surely a demand for payment. But the construction of the notice here does not necessarily supply the word " give," as in the highwayman's formula ; and neither the word nor any synonym appears *in the writing*, as is here necessary. The Lands officer seems not to have taken the trouble of looking up the agreement or the Act which governed him. It is to be noticed that the vendor—the Minister of Repatriation as such—did not insert any notice declaring the agreement to be forfeited, as mentioned in clause 24 of the agreement, but there was a notice inserted by the Commissioner of Crown Lands, as such, that the agreement has been cancelled by the Commissioner in terms of sec. 63 of the *Crown Lands Act* 1915.

As for the effect of the *Real Property Act* 1886, sec. 94, I concur with the Chief Justice of this Court as well as with *Poole* J. It appears that on 11th November 1922 (in pursuance, no doubt, of the notice of 21st December 1921) the defendant wrote, on one of the triplicate copies of the agreement, the words " Cancelled Geo. R. Laffer 11/11/22 Commissioner of Crown Lands " ; that on 22nd December 1922 a notice was received by the Registrar from the Commissioner that certain " leases " (including this agreement) had been lawfully and wholly determined ; that on 9th January 1923 the Registrar endorsed on the agreement that it had been " lawfully determined as appears by notice from the Commissioner of Crown Lands No. 838553 produced for registration on the 9th day of January 1923 at noon (no entry on trip.)," and signed the endorsement ; and

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that the Registrar on 24th July 1923 certified on the same copy "that the within is a true copy of the Register Book of Crown Leases vol. 645 folio 10." It is argued that this entry in the Register Book is conclusive as to the validity of the forfeiture, under sec. 94: "The Registrar-General, upon receipt of notice from the Commissioner of Crown Lands that any Crown lease has been lawfully forfeited or determined in whole or in part, shall make an entry to that effect in the Register of Crown Leases, and such forfeiture or determination shall thereupon have effect." I concur with the view of *Poole* J. that sec. 94 assumes a lawful forfeiture or determination—if indeed, the section applies to a forfeiture by the Minister of Repatriation at all. It is on registration that an instrument of transfer or of mortgage becomes effectual (sec. 67); and it is upon registration that a forfeiture of a Crown lease takes effect (sec. 94).

But this view as to the position of the parties under clause 24 of the agreement makes it my duty to consider closely the defence under clause 22. The Crown Solicitor having advised that it would be unsafe to rely on the notice of 21st December 1921 as a "notice in writing demanding payment" under clause 24 of the agreement, a notice was sent to the appellant as under clause 22, on 24th January 1923. This notice came from the Minister of Repatriation, as such, and gives notice that he is "satisfied upon evidence which he deems sufficient that you have neglected to work satisfactorily the land" in question. "And the said Minister accordingly hereby determines the said agreement and gives you notice that upon the expiration of three months from the giving of this notice the said agreement and your right to complete the purchase and to possession of the said land, will cease and determine and be void." It is said that this notice was ineffective because the appellant was not given an opportunity of being heard before the Minister decided to determine the agreement—that the appellant should have been given an opportunity of controverting any evidence adduced against him. There is certainly nothing express in clause 22 to suggest a notice to the purchaser before the Minister acts, or to suggest anything in the nature of any inquiry at which the purchaser may appear. The words are: "If at any time *within a period of ten years* from the date of this agreement *the vendor is satisfied on such evidence as he*

deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land with advantage to himself or that the purchaser has neglected to work the said land satisfactorily or has been guilty of serious misconduct during his occupation thereof the vendor by notice in writing given to the purchaser may determine this agreement." But it is urged that the doctrine of " hear the other side " is tacitly implied in this clause ; and many cases have been cited in which the Courts have applied the doctrine to judicial or quasi-judicial inquiries. The doctrine is put by *Maxwell*, 6th ed., p. 638, under the head of " Implied judicial duties " : " In giving judicial powers to affect prejudicially the rights of person or property, a statute is understood as silently implying, when it does not expressly provide, the condition or qualification that the power is to be exercised in accordance with the fundamental rules of judicial procedure, such, for instance, as that which requires that, before its exercise, the person sought to be prejudicially affected shall have an opportunity of defending himself." Primarily, at all events, it is a rule for fair play where there is anything in the nature of a judicial proceeding. I venture to think, however, that nothing is further from the intendment of this clause than a judicial or quasi-judicial inquiry. The Minister's mind has to be satisfied of the incompetency or disability or incapacity to manage the land to advantage or of neglect to work it satisfactorily, or of the misconduct ; and he has to be satisfied " on such evidence as he deems sufficient." That is to say, he may accept the evidence of his officers, as in the present case, as sufficient without cross-examination, without rebutting evidence, without explanation or argument. It is not for the purchaser to select and tender evidence which he would like to bring. Such a power to exclude evidence which is relevant, to take evidence on one side only, is surely wholly inconsistent with a judicial or quasi-judicial inquiry. The imagination must grasp the concrete position. The power is confined to the first ten years, as years of probation ; the contract is one in which the chief object of the vendor is to benefit the purchaser, because the purchaser is a man who served the country in the Great War ; the facts of which the Minister is to be satisfied involve issues of such a character as might lead to endless debate ; and the Minister,

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as administrator, is under a duty to other returned soldiers to see that the first holder is not blocking them without advantage to himself, and under a duty to the State to see that its generosity be not wasted.

The application of the doctrine referred to, all depends on the language and circumstances of the agreement. As has been said in a recent case on the subject before the Judicial Committee—"The particular form of inquiry must depend on the conditions under which the discretion is exercised in any particular case, and no general rule applicable to all conditions can be formulated" (*De Verteuil* v. *Knaggs* (1)). In this case the clause is a clause of an agreement, although the regulation 13 (*h*) prescribes that it shall be inserted. No case has been cited, nor have I found any case, in which the doctrine has been applied in the same level of circumstances. It seemed at first as if the case of *Smith* v. *The Queen* (2) were such a case. There was a provision that the lessee of Crown lands in Queensland should reside on his selection continuously during the term of his lease; provided that, if at any time it should be proved to the satisfaction of the Commissioner that the lessee had abandoned his selection and failed as to the condition of residence during six months, the Governor might declare the lease forfeited. It was held by the Judicial Committee that an inquiry before the Commissioner on this issue was a judicial inquiry, because sec. 5 provided that all questions shall be decided by the Commissioner, who shall give his decision in "*open Court*"; so that the Commissioner could not satisfy the Act without a proper judicial inquiry. The case of *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* (3) was also a clear case of judicial duties. The rules of the society provided that every application for a pension (police force) should be gone into fully by the board, and any member dismissed or obliged to resign should have his right determined by a majority of the board. There was no doubt as to the duties being judicial; and the board refused the plaintiff's claim without any judicial inquiry. The resolution of the board was held void as the board had abrogated their judicial

(1) (1918) App. Cas., at p. 560. (2) (1878) 3 App. Cas. 614.
(3) (1906) A.C. 535.

duties. On the other hand, in *Marquis of Abergavenny* v. *Bishop of Llandaff* (1), where a bishop had power "if he shall think fit" to refuse a licence to a class of clergymen, it was held that the Bishop was not bound to hold a formal inquiry of a judicial character. In *Bonaker* v. *Evans* (2) *Parke* B. puts the position of the law with his usual thoroughness—"a man cannot incur the loss of *liberty* or *property* for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge made against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary." This explains the line of such cases as those in which local authorities have pulled a man's house down because, in contravention of the law, he has not got the approval of the local authority to the erection or has failed to make required repairs, &c. (e.g., *Cooper* v. *Wandsworth District Board of Works* (3); *Hopkins* v. *Smethwick Local Board of Health* (4); *Sydney Corporation* v. *Harris* (5)). Yet even in this class of cases, the need to hold a judicial inquiry depends on the construction of the particular Act (*Cheetham* v. *Manchester Corporation* (6)). The cases as to expulsion from clubs or from mutual insurance societies rest mainly on existing interests in property (*Wood* v. *Woad* (7), distinguished in *Cooper* v. *Page* (8); *Armstrong* v. *South London Tramway Co.* (9), wages already earned; *Baird* v. *Wells* (10)). But in the present case we have a mere contractual relation—an agreement that in sixty-five years the ex-soldier, paying all instalments, shall have the land, with a proviso that if the Minister be satisfied before ten years have passed, and by such evidence as he thinks sufficient that the man will get no good from the land, the Minister may determine the agreement. Where a householder has no contractual relation with a local authority, and the local authority pulls down his house for disobedience of the law, there should not be this punishment without a fair trial; but there is nothing to prevent a man from contracting with his benefactor that the benefactor may turn him out if he think fit. In *Russell* v. *Russell* (11) partnership articles provided that if *the business should not be*

(1) (1888) 20 Q.B.D. 460.
(2) (1850) 16 Q.B. 162, at p. 171.
(3) (1863) 14 C.B. (N.S.) 180.
(4) (1890) 24 Q.B.D. 712.
(5) (1912) 14 C.L.R. 1.
(6) (1875) L.R. 10 C.P. 249.
(7) (1874) L.R. 9 Ex. 190.
(8) (1876) 34 L.T. (N.S.) 90.
(9) (1890) 7 T.L.R. 123.
(10) (1890) 44 Ch. D. 661.
(11) (1880) 14 Ch. D. 471.

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conducted to the satisfaction of B (one of the partners) he should have power to determine the partnership by notice; and it was held by *Jessel* M.R. that the power was exercisable by B at his will and pleasure, and that there was no obligation on him to act as a tribunal, or to call on the partners for explanation: "It is open to him to say 'I am not satisfied'; and there is an end of it." In *Cassel* v. *Inglis* (1) a committee of the Stock Exchange had power to re-elect and to admit such candidates as they deemed eligible; and members objecting had to communicate their grounds of objection by letter to the committee. It was held that the committee were not bound to give reasons for their decision, or (*semble*) to acquaint an applicant with the particulars of objections lodged; and that they were entitled to select their own procedure and to hear the applicant or not as they were advised. Where the board of directors of a company has power to refuse a transfer of shares, they cannot be compelled to disclose their reasons (*In re Gresham Life Assurance Society*; *Ex parte Penney* (2)). Where an annuity is to cease on the marriage of a daughter without the consent of her trustees, the trustees are under no obligation to disclose their reasons for refusing to consent or to hear the daughter before refusing consent (*Watson* v. *Cain* (3); and see *Train* v. *Clapperton* (4)). In the recent case of *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (5), before the Judicial Committee, the Lieutenant-Governor of British Columbia had power to issue Crown grants upon "reasonable proof" of certain facts (improvement, occupation, &c.); and it was held that because of the words "reasonable proof," and because the issue of the grant would prejudice another party, the function in deciding was "judicial"—in the sense that the Lieutenant-Governor must preserve a judicial temper and a proper feeling of responsibility; but that the Lieutenant-Governor was not bound to follow the practice of a Court of justice, and that it was within his discretion to determine whether there was "reasonable proof." So, in the present case, the Minister has to determine whether the reports of the officers of the department seem to him to sufficiently establish

(1) (1916) 2 Ch. 211.
(2) (1872) L.R. 8 Ch. 446.
(3) (1890) 12 A.L.T. 113.
(4) (1908) A.C. 342.
(5) (1922) 1 A.C. 202.

the fact of neglect to work the land satisfactorily; and he has, by express words, power to refuse any evidence adduced on behalf of the "purchaser." In my opinion, the agreement by clause 22 binds the purchaser (I might rather say the person selected to have the benefit of the blocks of land), substantially, to allow the Minister, during the first ten of the sixty-five years, to determine the agreement if he think that the purchaser, this returned soldier, will not make good with the land. This returned soldier, if the Minister has that opinion, is not to stand in the way of other returned soldiers.

For this reason—the determination under clause 22 of the agreement—I think that the appeal should be dismissed.

RICH J. I shall assume that the agreement in question was not validly cancelled under clause 24, and proceed to consider whether "the agreement had been determined by the respondent under clause 22 of the agreement on the ground that he was satisfied that the plaintiff (appellant) had neglected to work the land satisfactorily." The answer to this question depends upon the construction of the clause. It is contained in an agreement "granted" under the *Discharged Soldiers Settlement Acts*, which includes (as it is bound to do) the provision prescribed by reg. 13 (*h*) of the Regulations of 1st December 1920 made under sec. 16 of the Principal Act of 1917. *Poole* J. decided (1) that the clause did not empower "the Minister to determine the lease without giving the plaintiff" (appellant) "the opportunity of being heard against any proposed decision adverse to him." The nature of the thing done—deprivation of property—implies a judicial act (*Hopkins* v. *Smethwick Local Board of Health* (2)). Then the phraseology of the clause points in the same direction. The significant words are "evidence" and "deems." One meaning of the latter word is to adjudge or decide (*Russell* v. *Russell* (3)). The words connote a decision depending on inquiry after hearing the party concerned and considering any evidence adduced by him. Such a decision has "reference to a public duty exercised under statutory authority" (*Weinberger* v. *Inglis* (4)). In the words of the cases, the power conferred on the Minister is

(1) (1924) S.A.S.R., at pp. 181, 182.
(2) (1890) 24 Q.B.D., at pp. 714, 715.
(3) (1880) 14 Ch. D., at p. 479.
(4) (1919) A.C., at p. 636.

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judicial or quasi-judicial, and "not a power which he may exercise at his will and pleasure, capriciously or not capriciously, as he thinks fit" (*Russell* v. *Russell* (1)). But he is not bound to apply to the inquiry judicial methods or procedure (*Local Government Board* v. *Arlidge* (2) ; cf. *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (3)). He may obtain information in any way he thinks best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view (*De Verteuil* v. *Knaggs* (4)). The expressions "natural justice" or "common justice" are now-a-days often loosely applied. In every case the nature of the power must be closely examined. On the one side, one finds cases such as *Cassel* v. *Inglis* (5), where an absolute power is conferred by the contract to be construed; on the other side, when the power or duty is "judicial or quasi-judicial," the principle "*Audi alteram partem*" applies, and it is immaterial whether the question has to be determined either by the other party or by members of a committee or by a majority of the partners, or by any other domestic tribunal constituted by agreement between the parties (cf. *Green* v. *Howell* (6)).

For these reasons I agree with *Poole* J. that the power was not properly exercised. I also agree with his Honor's decision on the third ground on which the respondent seeks to justify his acts, namely, on the construction of sec. 94 of the *Real Property Act* 1886.

For these reasons I agree that the appeal should be allowed.

STARKE J. The document of 21st December 1921 does, in my opinion, demand payment of the sum therein mentioned, and interest thereon. I agree with the reasons of *Murray* C.J. and of *Angas Parsons* and *Napier* JJ. on this point. But it was not, in my opinion, demanded by the Minister of Repatriation, as required by the agreement. The administration of the *Discharged Soldiers Settlement Act* is committed to a responsible Minister of the Crown, styled the Minister of Repatriation, who is, for the purpose of the Act created a body corporate with perpetual succession. It is true

(1) (1880) 14 Ch. D., at p. 481.
(2) (1915) A.C. 120.
(3) (1922) 1 A.C., at p. 213.
(4) (1918) A.C., at p. 561.
(5) (1916) 2 Ch. 211.
(6) (1910) 1 Ch. 495, at p. 500.

that the *Crown Lands Act* and the *Discharged Soldiers Settlement Act* are to be read as one Act, and, except so far as inconsistent with the *Discharged Soldiers Settlement Act*, the provisions of the *Crown Lands Act* are to apply to and in respect of the lands set apart under the *Discharged Soldiers Settlement Act*. But that does not mean that the Commissioner of Crown Lands mentioned in the *Crown Lands Act* can perform and execute the administrative functions and powers committed to the Minister of Repatriation under the *Discharged Soldiers Settlement Act*, but rather that the Minister of Repatriation is empowered to exercise the functions and powers of the Commissioner in respect of the department committed to his charge. If the King had committed the office of Commissioner of Lands and that of Minister of Repatriation to different individuals, it seems clear to me that the Commissioner could not have made a demand either under clause 24 of the agreement or under sec. 63 of the *Crown Lands Act* in respect of lands placed under the administration of the Minister of Repatriation: he would have no authority from His Majesty to interfere in that department of the Public Service. But what is the position when the same individual fills both offices, namely, that of Commissioner of Lands and that of Minister of Repatriation? I apprehend that if he acted and gave notice both as Commissioner of Lands and as Minister of Repatriation, the notice would be good enough. But if he exercises, as in this case, the functions and powers of the Commissioner of Crown Lands, and not those of the body corporate styled the Minister of Repatriation, then, in my opinion, the notice is bad, and cannot found a forfeiture. The demand must be made by or with the authority of the party entitled to make it, and the other party, if the demand be made by an agent or otherwise by authority, must be notified of that authority and afforded an opportunity of investigating it if he so desire (cf. *Roe d. West* v. *Davis* (1)). The demand in this case fails in this requirement: on its face it was not made by the party entitled to make it or by anyone with his authority, and I cannot see, in the circumstances, that the other party was bound to assume that it was in fact made by the Minister of Repatriation; and he

(1) (1806) 7 East 363.

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was not so informed. The result is that the demand required under clause 24 of the agreement was not duly or properly given.

I agree with *Poole* J. and with my brother *Higgins* as to the effect of the *Real Property Act* 1886, sec. 94.

The provisions of clause 22 of the agreement remain for consideration. I appreciate the opinion of my brother *Higgins* on this clause. The parties have based the right of determining the agreement upon the satisfaction of the Minister as to certain facts, and not upon the existence of those facts. But the principle of such cases as *De Verteuil* v. *Knaggs* (1) establishes, in my opinion, the right of the plaintiff in this action to a fair opportunity of being heard and of meeting allegations to his prejudice before he is deprived of his rights.

The appeal, therefore, succeeds, and the judgment of *Poole* J. should be restored.

Appeal allowed. Judgment of Full Court discharged and judgment of Poole J. restored, except so much thereof as orders a stay of proceedings. Respondent to pay costs of proceedings since 17th April 1924 in the Supreme Court and of this appeal.

Solicitors for the appellant, *Cleland, Holland & Teesdale Smith.*

Solicitor for the respondent, *A. J. Hannan*, Crown Solicitor for South Australia.

B. L.

(1) (1918) A.C. 557.