1917

ERNEST ENSOR v. MORRIS HEDSTROM LIMITED.

Adopting this statement of the law I find that Greening was acting lawfully, for it is clear that defendants have recognised and adopted his action. At the same time I do not think the practice of dispensing with a distress warrant is one to be encouraged.

There is one other point, however—Greening, when he entered the premises took with him a Constabulary officer. This, in my opinion was unnecessary and irregular. It would have been perfectly proper for the officer, if violence was apprehended, to be prepared to intervene for the preservation of the peace, but he should not in the first instance have accompanied Greening onto the premises and thus, as it were, identified the police with the proceedings. In saying this I accept his statement that he did not speak to any of the men or, apart from being present, take any active part in what was done.

There was, to this extent, an irregularity for which defendants are responsible.

There may be cases in which the unnecessary presence of the police would call for substantial damages, but this is not one of them. The whole affair was carried out quietly and so as to attract little or no public attention, and such inconvenience as plaintiff may have suffered would have been avoided if he had met Greening in a reasonable manner when spoken to before the entry on the premises. It is, therefore, a case for nominal damages.

I award plaintiff ten shillings (10s.) damages. Each party to pay its own costs.

[APPELLATE JURISDICTION.]

1917. *Sept.* 20.

[ACTION No. 25, 1917.]

PETITION OF ADAM ADAIR COUBROUGH.

Election Petition under Letters Patent of 31st January, 1914—income arising from lands in the division—meaning of.

Held, rental reserved fictitious—election declared void.

Sir CHARLES DAVSON, C.J. This is a petition presented under Part 7 of regulations made under clause 21 of the Letters Patent of 31st January, 1914, praying that it may be determined that Mr. Joseph Alexander MacKay, who was returned in July last as being duly elected as the representative of the Vanualevu and Taveuni Division in the Legislative Council of

1917

PETITION OF ADAM ADAIR COUBROUGH.

the Colony, was not duly elected and that his election was void on the grounds that—

(*a*) he had not resided in the division for twelve months preceding the election, and

(*b*) he is not possessed of a net annual income of £150 arising from lands in the division,

as required by clause 15 of the Letters Patent.

Respondent does not claim to be qualified under (*a*), and we are concerned only with (*b*).

Respondent bought the land in question referred to in the evidence as the Good-Phillpot land, comprising 542 acres, for £1,356 5s. The bargain was made in January this year, but owing to delays which have no bearing on this case, the documents were not executed until April. The respondent paid £100 cash and the balance remained on mortgage at 5 per cent., entailing an annual payment of £62 odd by respondent. This land respondent then leased as from 26th February, 1917, to his younger brother, Mr. W. G. MacKay, for six years at £225 per annum, payable half-yearly; the lessee having the option of purchasing the fee simple at any time during the currency of the lease for £1,500.

Though the lessee is nominally Mr. W. G. MacKay he was acting on behalf of himself and his mother, Mrs. Mackenzie, they being the owners and lease-holders of the adjoining properties Nagasau and Nacani, called for convenience "Nagasau." The property is managed by Mr. Mackenzie and his step-son, Mr. W. G. Mackay.

The rent reserved is sufficient in amount, after payment of interest on the mortgage, to give the qualification of £150 as required by the Letters Patent, but petitioner contends that the lease is not a *bona fide* one, the rent being so grossly excessive that it cannot be said to arise from the lands. This must mean one of two things, either that the lease is a mere paper transaction, there being a secret understanding between the parties that the rent is not to be paid, or not to be paid in full, or that respondent's mother and brother are willing, under the guise of rent, to provide him with the necessary qualification, irrespective of the value of the land. What is the necessary qualification? It is an income of £150 "arising out of the land." I take this to mean that the income must have a real and not merely a nominal relation to the land and where the income, as in this case, takes the form of rent, that rent must be such as the land may reasonably be expected to yield. If the rent is greatly in excess of this it cannot properly be said to "arise from the land" and it does not seem

to me to matter whether the lease is a purely paper transaction or whether the so-called rent is actually paid. If this were not so it would be possible for one man to give a qualification to another in whom he was interested, say, his son, by leasing from him at a rental of £150 a block of land worth at the outside, say, £10 a year. This would, in my opinion, reduce the qualification clause to a nullity in so far as it relates to land and to substitute for it a bare income qualification, thus ignoring the whole spirit and intention of the clause; the income in such a case would arise not from the land, save as to £10, but from the generosity of the lessee. It follows that even if the rent is actually paid the Court must satisfy itself that it arises from the land in the sense indicated. The real question is, has a fictitious value been placed on the land in order to give the qualifications ? In applying this principle, however, reasonable margin must be allowed; the rental value of land cannot be fixed with anything like mathematical exactness and petitioner must show a substantial exaggeration.

Where lessor and lessee are strangers there would be a very strong presumption (assuming that the rent is really paid) that although the rental might seem high the lessee would not be likely to pay more than the land was worth to him, but where close ties exist between the parties this presumption is appreciably weakened.

To come now to the facts of the case. I do not intend to go in any detail through the evidence which occupied the attention of the Court for more than four days, but shall refer to it as shortly as I can before stating the conclusions I have come to in the light of that evidence and of the arguments of counsel.

Respondent has fairly and frankly stated that his object in buying and leasing the land was to qualify for a seat in the Legislative Council, and there is nothing improper in this. He says, further, that he fixed the rental with this sole object in view and without reference to the value of the land. I see nothing necessarily wrong in this; it was for the lessee to look after his side of the bargain; but all this is subject to the consideration that the income so obtained must satisfy the requirements of the Letters Patent.

In considering the value of the land I have carefully borne in mind that the question is its value to the lessees, which is admittedly greater than would be its value to an ordinary purchaser; this arises from the fact of its proximity to "Nagasau." Two owners of contiguous property, Mr.

1917

PETITION OF ADAM ADAIR COUBROUGH.

Duncan and Mr. Harper, had made offers for the land before it was acquired by respondent, the amounts being £1,250 and £1,000 respectively, but they both state emphatically that it is not worth anything like 8s. 4d. per acre, the rental under the lease. Mr. Duncan puts the annual value at about £108, 8 per cent. on the capital, and Mr. Harper at 3s. per acre, say £80, at the outside, but this is only after the land has been fenced, cleared and grassed. It must be borne in mind that these two gentlemen must be taken to have a good knowledge of the land, because they have made offers to purchase it. Other witnesses from Taveuni, with a long and intimate knowledge of land and its management, some of whom have lived there nearly all their lives, substantially corroborate the above evidence, and the Commissioner of Lands gave similar testimony. They say that the rents of pastoral lands in Taveuni begin at 6d. an acre for the first few years, rising gradually to two shillings as the lands are cleared and put in order for grazing; and Mr. Blair says, and this is important, that the block to the east of and adjoining the Good-Phillpot land has been assessed by his department at sixpence to two shillings and that it is "very much the same as Good and Phillpot's." The leases at sixpence to two shillings are Government leases and it may be that private leases would rule rather higher, but, on the other hand, it must be remembered that the top prices quoted are for land which has been cleared and fitted for grazing, which is not the case with the land in question.

Mr. Hedstrom, who owns 6,000 acres in the Colony, whose company owns 5,000 to 6,000 acres, some of which is in Taveuni, and who is himself a valuer of land and property, says that a rental of 8s. 4d. per acre for pastoral land is an "impossible business proposition."

This evidence as to value was not seriously shaken in cross examination, but there was evidence given for respondent which showed that much higher rents were paid in the Colony; these cases, however, generally turned out to relate to land in other parts of the Colony or land of a different character to that involved here. One witness, it is true, said this land was worth 8s. 4d. to an adjoining owner, but, he added, only threepence to an outsider; this enormous disproportion is hard to understand, but the lower estimate tends to show that the land is in one of the earliest and not one of the latest stages of development.

As regards the evidence of the two managers of Nagasau, each of them was subjected, as was inevitable under the cir-

cumstances, to a severe cross-examination, and I make every allowance for the difficult situation in which they found themselves when compelled to answer, without much time for consideration, volleys of unexpected but relevant questions. When called upon to go into details showing how they expected to make the venture pay so as to justify the high rental, they seemed to be inspired by a cheery optimism which commanded my admiration, but failed to satisfy my judgment.

As to the nature of the land, I have come to the conclusion on the evidence that it must be looked on as almost entirely grazing as opposed to coconut land; most of it is above the coconut area, and the portion of it on which coconuts can be profitably grown is, at best, small. As to its condition the evidence is conflicting, that for petitioner showing that it is for the most part in bush, partly heavy and partly light, while that for respondent indicates a much more forward condition, requiring, consequently, a much smaller expenditure to fit it for fattening cattle. In the one case an outlay of anything up to £2,000 would be required; in the other, much less. One of respondent's witnesses, Mr. Douglas, puts the cost at £600 to £700 including fencing. Here again the weight of evidence is on the side of the petitioner: this land has been abandoned since 1884 and has been in the market for some years, and although trespassing cattle may have to some extent kept down the bush, it is clear that a very considerable expenditure will be necessary, even with timber instead of wire fencing, this, together with the time occupied in these operations before the land can be fully utilised, must be taken into account in considering the rental value. On the whole I come to the conclusion that although the answer to this question of value may lie somewhere between the two extremes, it is much nearer the estimate given by petitioner's witnesses.

As to the *bona fides* of the lease, there is a point on which petitioner's counsel laid considerable stress, not, I think, without reason. It was shown and not disputed that the lessee, under his option, could at any time acquire the freehold by paying his brother £244, i.e., £100, his cash payment to the vendors, plus £144, the difference between £1,500 and £1,356. If he borrowed this sum at 7 per cent. the interest would be, in round figures, £17, and this, with the interest on the mortgage, amounts to £79; the land would thus be costing him, say, £80 a year instead of £225.

Now, this lease is either purely a business transaction or it is not; if it is, as respondent and his witnesses strongly affirm,

1917

PETITION OF ADAM ADAIR COUBROUGH.

it is not easy to see why the lessee does not avail himself of his option and save £145 a year. If it is not, then surely some support is given to petitioner's contention. No doubt the mere fact that the lessee refrains from taking a course which would deprive his brother of his qualification does not show that the rental is excessive, but it lends support to the contention that the object of the lease on both sides was to give the qualification and that the true value of the land has been lost sight of.

I have carefully considered Dr. Brough's point that if the lessee buys the land at the end of his tenancy for £1,500 the total cost will work out at about £5 5s. an acre, and that the rental must be looked on to some extent as purchase money, but in that case it seems that the question would arise whether that part of the so-called rental which is to be considered as purchase money (and not rent) can properly be described as "income" within the meaning of the Letters Patent; if not, the rental would be *pro tanto* diminished and the qualification would disappear. I have, also, not lost sight of the alleged value of the acre on Qila as a shipping place and of the fact that freehold land is at a premium.

The opinion at which I have arrived is confirmed by other elements in the case besides those dealt with above, but I do not consider it necessary to burden an already long judgment by referring to them.

On the evidence, as a whole, I can come to no other conclusion than that the rental reserved is very largely in excess of the true value of the land, so largely as to satisfy me that it is fictitious and that therefore the income represented by it does not "arise from the land" within the meaning of the Letters Patent.

It follows that respondent was not qualified, and my determination, which I shall certify to His Excellency the Governor, as required by the Letters Patent, is that he was not duly elected and that the election was void.

N.B.—When the judgment was delivered the ownership of land in Taveuni was, in error, attributed to Mr. Hedstrom as an individual, instead of to his company.