

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Eliza Alison and others v. Burns, from the Supreme Court of New South Wales; delivered 11th December 1889.*

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Present :

LORD HOBHOUSE.  
LORD MACNAGHTEN.  
SIR BARNES PEACOCK.  
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

An action was brought in the Supreme Court of New South Wales against the Colonial Treasurer, as nominal Defendant sued for and on behalf of the Government of the Colony, to recover certain moneys paid by the Plaintiffs under protest to Her Majesty the Queen, in which action a special case was stated by consent and pursuant to an order of a Judge of the Court. The case stated as follows :—

“ The Plaintiffs are the lessees of the leasehold area of the Canonbar pastoral holding situate in the Central Division of the said Colony, and are also the occupation licensees of the resumed area of the said holding. The said holding was, pursuant to the provisions of the seventy-first section of the ‘ Crown Lands Act of 1884,’ by notification in the Government Gazette of 11th July 1885, divided into the said leasehold area and resumed area.

“ The Local Land Board for the land district within which the said pastoral holding is situate, after hearing evidence, appraised the yearly rental of the said leasehold area at the sum of one penny and a halfpenny per acre, and they also appraised the yearly license fee of the said resumed area at the sum of two pounds per section.

“ The total annual payments thus appraised by the said Local Land Board amounted to 1,928*l.* 7*s.* 6*d.* for the said leasehold area, and 921*l.* 11*s.* 8*d.* for the said resumed area.

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" The amount of arrears due in respect of the said resumed area on the appraisalment of the said Local Land Board amounted to the sum of 1,380*l.* 7*s.* 2*d.*

" The said appraisements were conducted under and in accordance with the provisions of the Act 48 Victoria, No. 18, as required by Sections 78 and 81 respectively. Copies of the said appraisements are annexed hereto, and are marked " A " and " B " respectively. The Chairman of the said Local Land Board dissented from the other members of the said Board in respect of the said appraisements.

" The said appraisalment and the evidence taken in writing before the said Board were duly transmitted to the Minister for Lands of the said Colony, and, after consideration of the same by the said Minister, he determined the yearly rental of the said leasehold area at the rate of twopence per acre, and the yearly license fee of the said resumed area at the rate of 2*l.* 13*s.* 4*d.* per section.

" It is admitted for the purposes of this case, but subject to the opinion of this Honourable Court on the question hereinafter submitted as to the power of the said Minister for Lands, that the said Minister, in so determining the said rental and license fee, duly acted as such Minister as aforesaid under the powers and authorities vested in him by the said Act 48 Victoria, No. 18.

" After the determination of the said rental and license fee as aforesaid, notice thereof was duly published in the Government Gazette of the 12th day of September 1887, as provided for by the said Act. No notice of the said determination of the said rental and license fee, or either of them, was given to the Plaintiffs other than the said publication in the said Gazette.

" The total annual sums thus determined by the said Minister for Lands amounted to 2,571*l.* 3*s.* 4*d.* for the said leasehold area, and 1,228*l.* 15*s.* 6*d.* for the said resumed area.

" The said Minister likewise determined the amount of the said arrears at the sum of 1,840*l.* 19*s.* 6*d.*, being the amount duly calculated on the license fee so determined as aforesaid.

" The Plaintiffs have paid to the said Government for the rent of the said leasehold area the full sum of 2,571*l.* 3*s.* 4*d.*, but under protest as to 642*l.* 15*s.* 10*d.*, part of the said sum, being the difference between the amount so appraised by the said Local Land Board and that so determined by the said Minister for Lands as aforesaid.

" The Plaintiffs have also paid to the said Government for the license fee of the said resumed area the full sum of 3,069*l.* 5*s.*, but under protest as to 767*l.* 6*s.* 2*d.*, part of the said sum, being the difference between the amount so appraised by the said Local Land Board and that so determined by the said Minister for Lands as aforesaid.

" It is contended on behalf of the Plaintiffs that the said Minister could not under the circumstances herein-before set forth, and without either remitting the matter to the Local

Land Board or giving the Plaintiffs an opportunity of being heard, lawfully determine the said rental or license fee at a higher rate than that appraised by the said Local Land Board.

“ On the other hand, it is contended by the Defendant that the said Minister had such power under the said Act.

“ The question for the opinion of the Court is whether the said Minister had power so to determine the said rental or license fee under the circumstances herein-before set forth.

“ If the Court shall be of opinion in the negative upon the said question as to the said rental and license fee, or either of them, judgments shall be entered for the Plaintiffs for the said sums of 642*l.* 15*s.* 10*d.* and 767*l.* 6*s.* 2*d.*, or either of them, as the Court shall direct, with interest thereon from the 11th day of November 1887 (should the Court think that the Plaintiffs are entitled to interest), with costs of suit.

“ If the Court shall be of opinion in the affirmative upon the said question, both as to the said rental and the said license fee, judgment shall be entered for the Defendant, with costs of suit.

“ Either party is to be at liberty to appeal to Her Majesty in Her Majesty's Privy Council if so advised.”

The Supreme Court was of opinion that the Minister had, both in respect of the rent and the occupation license fee, power to act as he did in this case when he raised both the above amounts recommended by the Land Board, and ordered judgment to be entered for the Defendant.

Sections 78 and 81 of the Crown Lands Act of 1884 are in a group of sections relating to the division of runs or pastoral holdings, of which Section 71 directs that every runholder shall, within 120 days after the commencement of the Act, lodge with the Minister a written application for a pastoral lease in the prescribed form of whichever portion of his run may be converted into a leasehold area under this part of the Act, and with the application he is to furnish a plan of his pastoral holding showing, with other matters, all improvements upon it made by him, or of which he claims to be the owner. The runholder is not in the same position as a stranger applying for a lease, and this is material in considering the intention of the pro-

vision for fixing the rent. Section 78 enacts that the Governor may grant pastoral leases of leasehold areas subject to the provisions following, of which the second is, "The rent shall, in all cases, commence from the date of the notification of the division of the pastoral holding, and be determined by the Minister after appraisalment by the Local Board, which shall conduct all appraisements in the prescribed manner." Section 81 relates to occupation licenses. The Supreme Court say they "see no reason for supposing that the Legislature intended to give the Minister less power in determining, after informing himself by appraisalment, what the occupation license fee should be, than in determining what the rent of the leasehold area should be after informing himself in the same way." Their Lordships agree in this, and they also see no reason for supposing it was intended to give the Minister more power in determining what the rent of the leasehold area should be than in determining what the occupation license fee should be. They think the intention is the same in both cases. Section 81 is not in the same terms as 78, but it may throw light upon that section. The words are—

"The runholder shall be entitled to an occupation license of the resumed area if he shall have applied for such license at the time of his making his application for a pastoral lease, and shall have deposited with the Colonial Treasurer a sum equal to two pounds per section of six hundred and forty acres of the estimated area on account of the first year's license fee, and upon approval by the Minister he shall pay the difference between the sum paid into the Treasury and the license fee appraised as herein-after provided, and during the currency of such license shall pay such annual license fee per section as

aforesaid as shall be determined by the Minister after appraisal by the Local Land Board. Provided that the Minister may at any time direct a fresh appraisal to be made, and may require the licensee to pay his annual license fee on the basis of such fresh appraisal after the expiration of any current year during the continuance of the license."

Their Lordships do not agree with the Supreme Court that this section should be read "and shall pay the difference between the sum paid into the Treasury and the license fee determined by the Minister after appraisal by the Local Land Board as herein-after provided," instead of "appraised as herein-after provided." The words of the section appear to be intended to give to the appraisal a greater effect than an information or recommendation to the Minister of what the rent should be, which is the view the Supreme Court has taken of both sections.

Section 49, as to conditional leases of adjoining land which may be granted to conditional purchasers of land, says, "The annual rent to be paid for land conditionally leased shall be such sum not less than twopence per acre as the Local Land Board subject to the approval of the Minister shall determine as the fair rental thereof." These words cannot be construed as giving to the Minister the power which he has exercised in this case, and there is no apparent reason for his having, in the case of a pastoral lease, a greater power than in the case of one of these conditional leases.

It is necessary to refer to the sections of the Act which relate to the Local Land Board and its powers and duties to see what is intended by the appraisal. But before doing this, it may be useful to notice the previous legislation regarding Crown lands. The Crown Lands Occupation Act of 1861 (25 Vict., No. 2)

in the 23rd section provided that, in cases where it was necessary or desirable to fix or ascertain any rent by appraisement, the Minister or any officer authorized by him and the claimant might concur in the appointment of a single appraiser, or, failing that, each party should appoint an appraiser, and the award of any appraiser or appraisers was to be binding, final, and conclusive upon all parties to the appraisement for all intents and purposes. By the amending Act of 1880 (43 Vict., No. 29), it was enacted that the appraisement should be made by one or more appraisers appointed by the Minister charged with such appraisement, and every appraisement so made should, unless altered or vetoed by the Minister after the receipt of a report and recommendation from three such appraisers, be binding, final, and conclusive. These Acts were repealed by the Act of 1884. By it, it was enacted (Section 11) that there shall be a Local Land Board for every land district or for several land districts, the members of which are not to exceed three in number, and to be appointed by the Governor. Section 14 regulates the procedure of the Board. It is to have power to hear and determine all complaints and other matters brought before it, and to conduct all inquiries sitting as in open Court, and take evidence on oath. Every party is to have a right to be heard by Counsel, attorney, or agent, and the decision is to be given in open Court. By Sub-section 6 the Minister may return to the Local Land Board for revision, re-hearing, or further consideration any case or matter which shall appear to him to have been improperly or insufficiently considered or determined by the Board. The Minister might under this have returned the appraisement to the Board for revision. The giving him this power appears to show that the Board was intended to have more

than a mere power of recommending to the Minister what the rent should be.

After an examination and consideration of the various sections of the Act, and the previous legislation, their Lordships are unable to agree with the learned Judges of the Supreme Court that "the policy of the Act seems, in all cases between the Crown and its tenants where rent or the amount of compensation to be paid to Crown tenants is concerned, to place the Minister in the position of a landlord with supreme power to fix the rent which the Crown tenant is to pay, limited only by ministerial responsibility to Parliament." It seems to them to be the policy and intention of the Act that the Local Land Board and the Minister should concur in fixing a fair rent for the occupation of Crown lands by persons who are recognized by the Act as having a preferential claim to occupy them. In their Lordships' opinion, the Minister had not power to act as he did in the case of either the rent or the license fee, and judgment ought to be entered for the Plaintiffs for both the sums mentioned in the case, with interest at 5 per cent., and costs. They will therefore humbly advise Her Majesty to allow the appeal and reverse the judgment of the Supreme Court, and order judgment to be entered for the Plaintiffs accordingly. The Respondent will pay the costs of the appeal.

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