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BAILEY *v.* FERDINANDUS.

D. C., Kandy, 173.

Land Acquisition—Ordinance No. 6 of 1877, s. 2—Right of assessors to hear questions of law—Question of law affecting jurisdiction of Court—Who to decide such question—Averment as to Surveyor-General reporting on necessity of land for public purpose—Method of valuation of property.

Though assessors have to consider questions of law conjointly with the District Judge in a land acquisition case, yet, where the legal point raised refers to the jurisdiction of the Court, the District Judge even after the appointment of assessors, is the proper authority to decide such a question.

Where a libel of reference alleged that the Governor had directed the Government Agent to take order for the acquisition of the land for a public purpose, that the required notice was duly published, &c., that the Government Agent held a summary inquiry and tendered to the defendant a certain amount by way of compensation, &c.—*Held*, that it was not necessary to allege also that the Surveyor-General examined the land and reported to the Governor that it was needed for the purpose mentioned.

Held also, that the proper method of valuing the land is to consider (1) the situation of the property, (2) the best use to which it can be put, and (3) the use to which property immediately adjoining it is put.

In considering the question of the best use to which the property can be put, the past history of the house and its neighbourhood will be of use.

IN this Land Acquisition case, the counsel for the defendant took exception to the libel of reference, in that it did not state that any reference was made to the Surveyor-General or to any other officer specially authorized by the Governor to examine the land and report whether the same was fitted for the purpose for which it was sought to be acquired, nor was there any allegation that the compensation was tendered to the defendant. After the parties had nominated their respective assessors and the case was fixed for hearing on the 10th July, 1899, the District Judge fixed the 19th April for the disposal of the matter of law raised by the defendant. On that date the counsel for the defendant contended that it was not competent for the Court sitting alone to decide the question of law, in view of section 2 of the Ordinance No. 6 of 1877, and he moved that the argument do stand adjourned for the day of trial with the assessors.

The District Judge allowed the motion, but on the trial day (10th July) he heard counsel before swearing in the assessors, and disposed of the point of law himself as follows :—

" My reasons for holding that the matter of law raised by Mr. La Brooy should be decided by the Judge alone are these :—

" The function of the assessors is merely to assist the Judge in determining the amount of compensation (sections 14 and 17).

The objections taken by Mr. La Brooy strike at the very root of the libel of reference. If his objection is a sound one, the assessors will not be called upon to aid the Judge in determining the amount of compensation. If the reference is bad, the libel must be dismissed. That is a matter for the Judge alone to decide. If in determining the amount of compensation, any question of law or practice or usage having the force of law arises, and there is any difference of opinion between the Judge and assessors or any of them, the opinion of the Judge shall prevail (section 2 of Ordinance No. 6 of 1877).

"As to the objections themselves, it seems to me the libel is good. Section 13 enacts the information to be stated by the Government Agent in making a reference under section 11. All that information has been stated. It is not competent for the Court to look behind the direction by the Governor, with the advice of the Executive Council, to the Government Agent to take order for the acquisition of the land (section 6). The other objection is that there is no allegation that the compensation was tendered to the defendant. The allegation does appear, though not where Mr. La Brooy thinks it should appear."

On the question of compensation, which the Government Agent determined to be Rs. 2,022, evidence was heard on both sides, and the District Judge and Assessor Gunatilleka were agreed that that amount was fair and just. Assessor Fernando thought the land was worth Rs. 100 per acre, making a total of Rs. 5,100 for the 51 acres acquired.

Defendant appealed.

Dornhorst, for appellant.

Loos, C. C., for respondent.

Cur. adv. vult.

28th August, 1899. WITHERS, J.—

The first question we have to decide is, was defendant's demurrer a question of law which must be tried by the District Judge and the assessors?

That the assessors have to consider questions of law is clear from the 25th section of the Land Acquisition Ordinance of 1876, which has been repealed and replaced by section 2 of the amending Ordinance No. 6 of 1877, which enacts as follows: "In case "of any difference of opinion between the judge and assessors or "any of them, upon any question of law, or practice or usage having "the force of law..... the opinion of the judge shall prevail, "subject to appeal to the Supreme Court hereinafter provided."

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The District Judge's reasons for holding that he was competent to decide the present question of law by himself are that the function of the assessors is merely to assist the Judge in determining the amount of compensation, and the only questions of law which they can take part in deciding are questions incidental to the inquiry into the amount of compensation and arising out of it. There can be no doubt that, had the District Judge been so advised, he might have rejected the libel of reference in the first instance, under the provisions of the 46th section of the Civil Procedure Code (*vide* section 32 of the Land Acquisition Ordinance, 1876). He might, in my opinion, have decided the present question of law at any time before the appointment of the assessors, but the assessors having once been appointed, was he not bound to place before them every question of law embraced in these proceedings? The provisions of the amending Ordinance No. 6 of 1877 are very wide, and appear to keep apart from one another questions of law, questions of practice or usage having the force of law, and the amount of compensation to be awarded. I must say that on this point my mind is not wholly free from doubt. But, as the District Judge observes, the paramount object for which assessors are called in is to decide the amount of compensation to be awarded in cases where the Government Agent has tendered an amount to persons claiming as interested parties and they have refused to accept the amount tendered. And, as he observes, the present question of law touches the very jurisdiction of his Court. He alone ought to decide whether he can entertain the libel of reference, and whether in fact any case has been made out for the appointment of assessors and the creation of a Land Acquisition Court. After much consideration I think that, even at this stage of the proceedings, the District Judge was the proper authority to decide this particular question of law.

Then the next question is : Is his decision on that matter of law a right decision ? In other words, does the libel of reference not show jurisdiction in the District Court to entertain it ? It recites, in the first instance, that the Governor, with the advice of the Executive Council, had directed the Government Agent to take order for the acquisition of the particular land which is the subject of reference. That, as Chief Justice Phear pointed out, is the really important fact to be recited in the libel of reference. That is the all-important fact as regards the Government Agent's powers. Then the libel goes on to recite the following facts : Due publication of notice ; that the Government proposed to take possession of the land ; and that claims for compensation should be made to the Government Agent. Summary inquiry into the value of the land, determination of the amount of compensation, and tender of

the amount which in the Government Agent's opinion should be allowed. The libel does not expressly say that the amount determined was tendered to the defendant as the interested party who had attended in pursuance of the Government Agent's notice. But this may fairly be inferred from paragraph 3 and paragraph C of the libel. These were the proper facts to satisfy the District Judge that the Government Agent had done what was required of him in order to put the District Court in motion. But it was urged that something more was wanting to give the Court jurisdiction: the libel should have disclosed the observance of every formality which the Ordinance requires before the Governor, with the advice of his Council, can direct the Government Agent to take order for the acquisition of any land; it was not enough to state, as the libel states, that the particular land was required for a public use, or even to specify that use; it should have stated that it appeared to the Governor that this particular land was needed for a public purpose; that the Governor had directed the Surveyor-General or other officer to examine such land and to report whether the same is fitted for such purpose; lastly, that the Surveyor-General or other authorized officer did examine the land and did report to the Governor that the possession of the land was needed for the purpose for which it appeared to the Governor likely to be needed. This last fact was pressed upon as the most important fact, because the person to judge of the fitness of the particular land for a particular public purpose is not the Governor or the Governor in Council, but the Surveyor-General or other proper officer who makes his report to the Governor, and it looks as if the fitness of the land proposed to be acquired depended on the opinion of the Surveyor-General, as expressed in his report, for the 6th section of the Land Acquisition Ordinance of 1876 enacts: "That upon the receipt of such report it shall be lawful "for the Governor, with the advice of the Executive Council, to "direct the government agent to take order for the acquisition of "the land." That is to say, the Governor, even with the advice of the Executive Council, could not give such a mandate to the Government Agent unless he had received a report of the fitness of the particular land for the particular purpose for which it had appeared to him to be needful. In other words, the Governor decides on the necessity, the Surveyor-General or other officer on the fitness of the land, and then the Governor, with the advice of his Executive Council, if advised to adopt the officer's opinion, has to direct the Government Agent to put the matter through in the way required by law. But, in my opinion, the statement in the first paragraph of the libel was sufficient to give jurisdiction to the Court on the principle of the maxim "*omnia presumuntur rite*

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esse acte." And on this point I am adopting the opinion of BURNSIDE, C.J., in the case of *Saunders v. Silva, S. C. C. 8.*

Now we come to the merits of the case. It was strenuously contended by Mr. Dornhorst that the award of the District Court was not only against the weight of evidence, but was based on no intelligible principle whatever. Neither member of the Court which has decided the amount of compensation tendered to be sufficient has explained, it is said, whether he values the land as horticultural land, building land, waste land, or any sort of land. It has not been valued by Judge or assessor as anything in particular. It cannot be called waste land, because it has several fruit trees on it, jak and mango, and has grass on it for grazing. Why not then value it as horticultural land? It is true that Mr. Piper and Mr. Huxley condemned the land as unsuitable for tea, but the two experienced witnesses called by the defendant thought that it would do very well for tea, and also for cacao on the lower part of the land; or, why was it not valued as a building property? The witnesses for the Government Agent admitted that there were at least two available sites for building. According to a witness on the other side, there was room enough on those sites for putting up fifteen houses. The plaintiff's assessors thought that the land was worth no more than Rs. 20 an acre at the outside. Defendant's first witness, who had been a planter for over twenty years, may be said to have valued the land at about Rs. 300 an acre. Whence this extraordinary difference? The witness last referred to says, he valued the land as in part a good building property and in part very suitable for such valuable products as tea and cacao. Of course, if you value a land as combining several admirable qualities, there is no limit to the value you may put upon it. But this is not very business-like. Now, the value of landed property mainly depends upon three considerations: (1) the situation of the property; (2) the best use to which it can be put; and (3) the use to which property immediately adjoining it is put. When those points have been considered there may be various modes of assessing the value. The land in question is a little over 50 acres. In the immediate vicinity is land partly under tea and partly under patana and scrub, and chena land. The land itself is covered with lantana, shrubs, grass, some jak and mango trees, and a sapu tree. There is a building on it and the site of an old store building. No one occupies the land or pays rent for it, as far as I can make out. Its history is briefly this. It was once under coffee, poor coffee which died out between fifteen and twenty years ago. No attempt has been made to plant it since. During all this time and at the present moment it has served and serves no profitable

purpose. A neighbour offered some time ago Rs. 20 per acre with the building thrown in, as he thought it would do to turn his cattle out to graze on. But that offer was not accepted.

The answer to the question, What is the best use to which the land can be put, is according to history, no use at all except perhaps for grazing purposes. No one has offered to buy it for tea or cacao, and no one has offered to lease it for tea or cacao, and no one has attempted to plant tea or cacao on it. No doubt some of the adjacent land has some good tea on it, and the land still under chena may be good for tea and perhaps cacao as well. So, the use to which the adjoining land has been put and is best suited seems to be horticultural. But if the present land had been as fit for horticultural as land in its vicinity, somebody would have acquired it for such a use. Then why should it be valued as a building site? It does not become a building site because you can put up a building or two on it. A building site is a site where you can put up buildings which are likely to attract tenants as other buildings in the vicinity. Nothing in the history of this land or its neighbourhood makes it reasonable to suppose that, if one put up houses on the two available sites on it, he would get tenants for them. Mere chance cannot be allowed to influence the value. The difficulty of getting water is against the land being used as a residential property. The District Judge bases his award chiefly on the circumstance that similar land in the vicinity of the land in question has recently been acquired for the same purpose at Rs. 20 per acre. That was a circumstance properly taken into account. But Mr. Dornhorst minimized the effect of that circumstance by observing that, as a large extent of good land was acquired with land like that in question, the owner was ready to throw in the poor land for a nominal price, if he was offered a liberal compensation for the good land. But I think the history of the land affords the best evidence of its value, and I regard it as proved that the best use the land can be put to is a grazing ground, as I said before. No one has offered or tried to make a fruit garden of it, or a cocoanut or tea garden of it, or to convert it into a residential property. I think the award is strictly according to the evidence.

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The evidence gives us no particulars as to the condition or character of the land, when it was first planted with coffee, whether it was chena land and better, or only such grass land as even in the tea enterprise if has been attempted, with manuring, &c., to press into the yielding area of an estate. We only know that

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when coffee died out, these 50 acres got overgrown with lantana, and that for eighteen years no one in the old coffee capital has desired either to experiment with tea or cacao on it, or to utilize it as a building site for his own pleasure or for his profit in letting to tenants. I think this hard fact of no one having desired to use it for any purpose save grazing, limits our consideration of its value to that which we would put on any grassy hillside in its vicinity, and that however it once was considered fit for plantation purposes, we should not longer so regard it. I would express the second consideration scheduled by my brother in the more restrictive wording, "the best use to which the property could "properly and would probably be put;" and when there had been this neglect of the land for horticultural or building purposes, I would say it showed that the public—the possible investors in such lines—regarded it as not properly suitable for either, and therefore it was improbable at the time of acquisition that it would be required for either. When Colombo is spreading southwards, I am prepared to regard the vicinity of stations on the Southern Railway as possible building sites, though I do not know that Kelani, Ragama, or land in that direction should be so regarded. But has the area used for building sites in Kandy extended at all in the direction of this land in the last twenty years? I do not find proof thereof.

As to the legal questions, I would only say, in addition to my brother's views, that I have never regarded it to be a question for the assessors, which of two rival claimants is entitled to the compensation. In any such difficulty I would ask, must the assessors give their opinions on the question in order to "deter- "mine the amount of compensation," regarding as I do their functions to be limited to that duty?

I desire to concur entirely in all my brother has written.