DIAS *v.* ELLIS.

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D. C., Colombo, 14,373.

Land acquisition case—Ordinance No. 3 of 1896, s. 38—Percentage on market value—Discretion of the Government Agent.

The claim for the 10 per cent. on the market value of the land acquired by the Government, allowable under section 38 of the Ordinance No. 3 of 1896, need not be made synchronously with the claim for compensation.

MIDDLETON, J.—I am doubtful whether an action for the 10 per cent. value would lie, or whether the proper remedy is not by way of *mandamus* under section 46 of the Courts Ordinance.

Per CURIAM.—Section 38 of the Land Acquisition Ordinance does not confer any legal right to compensation for compulsory acquisition other than that which may be decreed so under the second, third, and fourth heads of section 21; nor any legal right to the 10 per cent. of the market value in addition to the amount of compensation finally awarded.

The discretion vested in the Government Agent under section 38 to allow 10 per cent. on the market value is not an arbitrary or capricious discretion, but should be governed by reason and justice.

THE plaintiff raised this action against the Hon. Mr. Ellis, the Government Agent of the Western Province, to recover a sum of Rs. 5,437, being 10 per cent. of the sum of Rs. 54,370 awarded to the plaintiff by the District Court of Colombo as compensation for the acquisition of his property, known as "the Canonry," under the Land Acquisition Ordinance.

The District Judge dismissed the plaintiff's claim on the ground that the payment of 10 per cent. on the amount of the compensation finally awarded was a matter of discretion with the Government Agent, and that such a claim should have been made in the original land acquisition case, and not by a separate action.

The plaintiff appealed. The appeal was heard on the 4th February, 1903.

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Dornhorst, K.C. (with him *Sampayo, K.C.*), for appellant, referred to section 38 of Ordinance No. 3 of 1876, section 6 of Ordinance No. 17 of 1887, and the Indian Act No. 10 of 1870, section 42; also to Stork's case (D. C., Colombo, 2,131), decided on 14th November, 1898, in support of the right of the claimant to make his claim to the 10 per cent. of the market value in a separate action; Bishop of Oxford's case (*5 App. Cas. 214*); Alderman Blackwell's case (*1 Vernon Ch. Cas. 153*); *Howell v. London Dock Co.* (*8 El. and Bl. 2 29.*); *and Queen v. Tithe Commissioners 14 Q. B. 474*), *and* Maxwell's *Interpretation of Statutes, as to the meaning of* " *may.*"

Ràmanathan, S. G., for respondent.—The only question is, what is there in the circumstances of this case which makes the permissive " may " compulsory? Is it for the public benefit or for the advancement of public justice, as asked by the Lord Cairns in *5 Ap. Cas. 225*, who quoted with approval *Queen v. Tithe Commissioners* (*14 Q. B. 474*)? Section 38 of Ordinance No. 3 of 1876 was copied from the Indian Act No. 10 of 1870, section 42, where " shall " is the word used. The local Legislature has altered it to " may." The contention raised by the appellant has never been pressed in our Courts for a quarter of a century.

Cur. adv. vult.

4th March, 1903. MIDDLETON, J.—

This was an appeal from a judgment dismissing the claim in an action for the recovery of Rs. 5,437.50, being 10 per cent. on Rs. 54,375 awarded in land acquisition case No. 2,137 by the District Court to the plaintiff as compensation for the acquisition to the Government of the property known as " The Canonry," situate at Mutwal. The first point was whether his claim for the 10 per cent. under section 38 of Ordinance No. 3 of 1876 ought to be made synchronously with the claim for compensation. The District Judge held that it should be, but in D. C., Colombo, 2,131, the late Chief Justice Bonser and Mr. Justice Withers held the contrary, and in my opinion that decision is right, and the District Judge and the assessors have nothing to do with the question of the 10 per cent., which only arises after the compensation has been fixed by agreement or assessment by the Court.

The next question is, whether the first paragraph of section 38 is compulsory or discretionary only as regards the Government Agent. Several cases have been quoted from the English reports showing that it has been held in certain instances that the words " it shall be lawful " have an obligatory sense; that " may " is equivalent to " must " and " shall " in certain contexts, such as where " for the public benefit or the advancement of public

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justice " it should be so. Looking at the fact admitted by counsel for the appellant, that the Ceylon Ordinance is a replica of the Indian Act, with the exception that in section 38 the word " may " is substituted here for the word " shall " used in the Indian enactment, I feel very strongly that it must have been the intention of our Legislature to adopt the potential sense in place of the obligatory, but at the same time I do not think that its bare user concludes the construction to be put on the word.

I do not think that it was intended that an arbitrary or capricious discretion should be given to the Government Agent, but that his permissive action should be governed by the principle of reason and justice.

What I gather from reading the opinions of the Law Lords in *Julius v. Bishop of Oxford* (*5 App. Cas. 214-244*), which include a consideration of the other earlier cases quoted to us by the learned cousel for the appellant, is that the words " it shall be lawful " are potential *primâ facie*, but may be construed as making the exercise of the power imperative where, from the particular provisions, the context, or the general scope and object of this enactment conferring the power, this may be gathered, and that the enabling words are always compulsory where they are words to effectuate a legal right.

Lord Blackburn says: " If the object for which the power is conferred is for the purpose of enforcing a right, there was the duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf."

Now, the scope and object of the Ordinance here one would have supposed would be to enable the sufferer by compulsory acquisition to obtain compensation on that ground. Neither the preamble nor the context would seem to contemplate this specifically. It is only at section 38 it is enacted that the Government Agent may in consideration of the compulsory nature of the acquisition pay 10 per cent. on the market value mentiond under section 21. in addition to the amount of compensation finally awarded.

Under section 21, if the court and assessors are of opinion that no damages can be awarded under the second, third, and fourth heads therein, they would only be able to award compensation under the first head, *i.e.*, the market value at the time of the award.

This, it seems to me, is rather emphasized by the restriction imposed on the basis of valuation by the terms of section 22.

Such a case I should say, would certainly be one in which the Government Agent ought to exercise his permissive power. Again, the District Court and assessors are not empowered specially to take into consideration the compulsory nature of the acquisition.

but rather enjoined for doing so under the first two heads of section 22, which would seem to include some of the elements which would have to be considered in valuing damages arising from the compulsory nature of the acquisition.

The Ordinance, therefore, does not, in my opinion, confer any legal right to compensation for compulsory acquisition other than that which may be decreed so under the second, third, and fourth heads of section 21, and therefore no legal right as to the 10 per cent. which would enable us to read the word " may " as equivalent to " shall." On this construction there are no cases in which the exercise of the Government Agent's permissive power becomes imperative even where the District Court and assessors have only awarded the market value under section 21, first heading.

In every case under the Ordinance the District Court should find specifically what is the market value, and what the damages separately under each of the three last heads under section 21, as it is on the market value that the 10 per cent., if allowed, is to be calculated.

In my opinion, therefore, this appeal must be dismissed for the reasons I have stated, but I am also doubtful whether this action would lie, or whether the proper remedy is not by way of *mandamus*, under section 46 of The Courts Ordinance, but I express no binding opinion on this point.

MONCREIFF, J.—

I am of the same opinion. Very good reason should be required for holding that " may " means " shall ". It is said the power given in section 38 of the Land Acquisition Ordinance is compulsory because it is conferred for the public benefit or the advancement of public justice. This is, however, a matter between the Government Agent as representing the Crown and the plaintiff, and I do not think it comes within the class of case referred to.

On applying section 38 of Ordinance No. 3 of 1876 to the circumstances of this case, I can find nothing to convince me that the power given to the Government Agent to pay to the persons interested in land taken under the Land Acquisition Ordinance " ten per cent. on the market value mentioned in section 21 " is compulsory. The only consideration which seems to be in favour of the appellant's contention is that, while the compensation to be given is reckoned not only on the market value but on the damage sustained by the persons interested by the severance of the land acquired, the injurious effect of the acquisition on their other property, and the expense incurred in

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changing their residence, there is no compensation for the compulsory character of the acquisition. If the appellant is right, section 38 requires the Government Agent to give compensation in respect of the compulsory nature of the acquisition. But, if that is so, why is the matter separated from the general provisions for compensation, and why is it withdrawn from the reference to the District Judge? In borrowing the section from the Indian Ordinance, No. 10 of 1870 (section 42) our Legislature converted the word " shall " into " may ". I see no reason for thinking that this was accidental; I can very well understand why it was done. The appeal should be dismissed.