Present: Dalton and Lyall Grant JJ. 1926.

ASSISTANT GOVERNMENT AGENT *v.* ABDUL RAHIMAN.

81—(Inty.) D. C. Kandy, 315.

Housing and Town Improvement Ordinance, No. 19 of 1915, s. 49—Land covered by building—Dedication—Land Acquisition Ordinance, No. 3 of 1876—Compensation—Sections 21, 22, and 23.

Where land covered with buildings and other land, within the lines of a back lane scheme, was acquired under the Land Acquisition Ordinance for the purpose of executing an improvement under the Housing and Town Improvement Ordinance.

Held, the owner was entitled to compensation for all the land acquired and that the Crown had no right to claim the benefit of section 49 of the Housing and Town Improvement Ordinance.

FOR the purpose of the execution of a back lane scheme in the town of Kandy, under the provisions of the Housing and Town Improvement Ordinance, it became necessary to acquire an extent of land 4.57 perches in area. The Assistant Government Agent, acting in pursuance of the mandate issued to him by the Governor, proceeded to take order for the compulsory acquisition of the said lot, and offered a sum of Rs. 2,300 as compensation for the building on the land, the site on which the building stood, and certain coconut trees. The bare land itself was excluded from the assessment. A reference to the District Court of Kandy under the Land Acquisition Ordinance followed. The matter for determination by the District Judge was, whether or not the defendant's claim to compensation for the bare land was well-founded. Compensation was awarded in respect of only half the bare land. Both parties appealed from this order. In appeal the defendant was declared entitled to full compensation for the bare land.

M. W. H. de Silva, C.C., for plaintiff, appellant.

Keuneman, for defendant, respondent.

September 8, 1926. DALTON J.—

This case raises questions as to compensation payable on the compulsory acquisition of land under the Land Acquisition Ordinance, 1876, and the Housing and Town Improvement Ordinance, 1915.

The District Judge has awarded to defendant the sum of Rs. 3,758, and costs, as compensation for the acquisition of his land. From that award both plaintiff and defendant have appealed. The reference to the District Court by the Assistant Government Agent (who is termed the plaintiff in these proceedings) sets out that the

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Governor under, the provisions of section 6 of the Land Acquisition Ordinance, by mandate dated October 22, 1924, directed the plaintiff to take order for the acquisition of certain land described as lot 16 within the Municipal limits of Kandy and of the extent of 4.57 perches or thereabouts. The boundaries of the land are fully set out, but it is not necessary to repeat them here. Thereupon the plaintiff took action, under section 7 of the Ordinance, reciting the order for the acquisition of the land and declaring the intention of the Government to take possession of the land which was required for a public purpose, " namely, for the execution of the back lane scheme sanctioned by His Excellency the Governor in Executive Council." The reference further sets out that as the plaintiff was unable to agree with the person interested (called Abdul Rahiman Saibo, the defendant) the amount of compensation to be allowed, he referred the matter to the District Court under the provisions of section 11 of the Ordinance. The amount tendered by the plaintiff for the land and the premises under section 8 of the Ordinance was set out as Rs. 2,300, but this was not accepted by the defendant. The prayer of the reference is that—

> " The court will, pursuant to the directions and provisions to the effect contained in the said Ordinance No. 3 of 1876, proceed to inquire and determine the amount of such compensation . . . . "

Filed with the reference are two documents, the first being a letter of October 22, 1924, to the Government Agent, Kandy, from the Clerk to the Executive Council, which it is well to set out in full. It was in the following terms:—

Copy forwarded to—

The Chairman, Board of Improvement Commissioners, Kandy, with reference to his letter No. 11 of May 12, 1924, and connected correspondence.

No. 332/19398.
Colonial Secretary's Office,
Colombo, October 22, 1924.

Sir,—With reference to your letter No. 237 dated May 14, 1924, I am instructed by the Governor to transmit to you the accompanying preliminary plan No. 7,703 and to state that, with the advice of the Executive Council, His Excellency the Governor directs you to take order for the acquisition under the provisions of Ordinance No. 3 of 1876, section 6, of the allotments of land described in the said plan as lots 1 to 26, and situated in Colombo street, Castle Hill street, and Trincomalee street, within the Municipal limits of Kandy, in the District of Kandy, Central Province, and required for a public purpose, viz., for the execution of the back lane scheme sanctioned by His Excellency the Governor in Executive Council (*vide* C. S. letter No. 3 of May 9, 1924).

A further communication will be addressed to you regarding the vote from which the cost of acquisition should be met.

I am, Sir,
Your obedient servant,
(Signed) C. H. COLLINS,
Clerk to the Executive Council.

Government Agent,
Central Province.

The second document is an extract dated November 7, 1924, from the *Ceylon Government Gazette* setting out that lot 16 bearing assessment No. 404, described as a portion of a garden containing certain trees, a tiled masonry building and drains, and 4.57 perches in extent, under an order for acquisition, was required for a public purpose and was to be taken possession of by the Government.

The only question raised by defendant in his answer to the reference was as to the sufficiency of the compensation to be paid. He claimed the sum of Rs. 7,500.

From the reference and answer, therefore, it would seem that when the matter came into Court the question raised was as to the amount of compensation to be paid for lot 16, 4.57 perches in extent, compulsorily acquired by the Government under the provisions of the Land Acquisition Ordinance, 1876. Under section 12 of that Ordinance it is open to the Crown, at any time after a reference to the Court, to enter into possession of the land and to obtain a certificate vesting the land absolutely in the Crown. Whether or not that was done in this case does not appear, but that does not affect these proceedings, for the whole of the land has in fact been acquired by the Crown. At the opening of the reference to the District Court, Mr. Loos, appearing for the plaintiff, then for the first time stated that the sum of Rs. 2,300 tendered as compensation was in respect of the building on lot 16 and for the actual land upon which the building stood, plus the value of the trees growing upon the rest of the land. He purported to rely upon the provisions of section 49 of the Housing and Town Improvement Ordinance, 1915. The material part of that section is as follows:—

49. (1) Where in any area already in whole or in part occupied or likely to be occupied by buildings any local authority or any Board of Improvement Commissioners is of opinion that back lanes should be provided for the scavenging of such area, it may make a scheme (herein called a "back lane scheme") . . . .

(2) For the purpose of any such scheme the authority framing the scheme shall require

(*a*) Any land covered with buildings which it is necessary to acquire . . . . ; and

(*b*) Any other land covered with buildings situated within the lines of the proposed back lanes.

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No compensation shall be payable in respect of any other land within the lines of the proposed back lanes, but all such land shall be deemed to be dedicated by the owners for the purpose of the proposed back lanes.

Provided that compensation shall be payable in respect of any income-producing trees growing on or within the said lines which it shall be necessary to remove for the purposes of the scheme.

The argument advanced by Counsel, based upon the provisions of this section, was that compensation was only payable for land acquired covered with buildings, and that for any other land no compensation was payable, since it is to be deemed dedicated by the owners for the purposes of the scheme. This argument, in my opinion, is not sound, having regard to what was actually done in this case. It must be noted that the authority has power to acquire only land covered with buildings. They can acquire nothing further under this section. The method of acquisition is set out in section 80 of the Ordinance. Where any land or building is authorized or required to be acquired for the purposes of the Ordinance and no agreement is arrived at, the authority seeking to make the acquisition applies to the Governor, who declares the land or building is needed for a public purpose, and he " may order proceedings to obtain possession of the same for the Government and to determine the compensation to be paid to the party interested under the Land Acquisition Ordinance, 1876."

There is no evidence here to show what exactly was the application of the Board of Commissioners, or whether there was any application at all, but there is no doubt as to what was actually acquired. Mr. Keuneman has gone further, and argued that there is no evidence of the existence of any Board of Commissioners or of any back lane scheme, but that was not questioned at the hearing of the reference. It was taken for granted by both sides at the hearing, as appears from the letter of January 30, 1925, addressed to the Government Agent by defendant's proctors. The land actually acquired is the whole of lot 16, including that part which, according to the case for the plaintiff, is not covered with buildings. Under section 49, however, the authority had no power to make any such acquisition, although under the Land Acquisition Ordinance power is given to the Government to acquire it for the purposes of that latter Ordinance. In the case of section 49, land not covered by buildings remains the property of the owner although it is to be deemed to be dedicated for the purposes of the back lanes. That dedication can only follow upon an acquisition by the authority under section 49. Counsel for the plaintiff argued that this dedication was equivalent to a conveyance to the public for all purposes, but that argument loses sight of the law governing the dedication of a highway or also

of the terms of the section which provides for nothing but a right of way on the lines of the proposed scheme, which has to be maintained and repaired by the local authority. The dedication of a permission to use a way is in the character of a gift, but it is a gift of the use of the way only (*Gautret v. Egerton* [1]). It is the use of the soil that is offered by the owner, and in a case which comes within section 49 the use to which the land may be put is strictly confined to the scavenging of the area. The owner of the soil prior to the dedication, on such a dedication being made, remains the owner of the soil, and none of his rights therein are affected apart from the conditions and reservations attached to the dedication. (*Fisher v. Browne.*[2]) In the case before this Court, however, the whole of the land has been acquired, as I have pointed out, by the Crown, and the former owner retains no rights whatever therein. There is no room here for any dedication by the owner. The Crown has full power to make this acquisition under the Land Acquisition Ordinance, but it is obvious that having done so it cannot now seek to limit the compensation payable under that Ordinance on the basis that there has been a dedication of part of the land, by reference to the provisions of another Ordinance which has no application to the particular circumstances. It is not open to the Crown to say that it is true that we have acquired the whole of the land in question, including land without any buildings thereon, but we do not propose to pay any compensation for the latter, because under section 49 it is to be deemed to be dedicated by the owners for the purposes of the proposed back lanes. I am unable to see that here there has been any acquisition under section 49, for in fact, as I have already pointed out, the authority has no power to acquire any land not covered by buildings. It is not questioned, however, that the Crown has acquired the whole of the land—land actually with buildings on it and other land; hence there is no case of any dedication arising. It is possible that action might have been taken under section 49, but for some reason, no doubt sufficient to the authorities, they preferred to acquire the whole of the lot under the provisions of the Land Acquisition Ordinance. This is confirmed by the letter of January 30, 1925, to which I have already referred, which mentions a threat to take advantage of section 49. The letter of the Government Agent of January 29, to which it was a reply, has not been produced, but I think it a reasonable inference, having regard to the action already taken in the acquisition, that the threat was to seek to limit the compensation payable, if the offer then made was not accepted. That strengthens the conclusion to which one is irresistibly drawn by the other circumstances, that there never was any acquisition under the powers given by section 49. Compensation is therefore payable on the footing of the Land Acquisition Ordinance as set out in sections 21, 22, and 38. The market value is

[1] *L. R. 2 C. P. 371.*

[2] *B. & S. 770.*

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deposed to by the Government Assessor at Rs. 5,216. This is the sum asked for by defendant in his petition of appeal, and the sum to which Mr. Keuneman says the defendant is entitled; it is not necessary, therefore, to consider whether or not he is entitled as of right to a percentage on the market value under section 38.

It is impossible at this stage to allow the plaintiff to amend his claim or to commence these proceedings afresh under section 49, as Counsel for the plaintiff has asked, should the Court be against him on the appeal. How that could be done, having regard to what has already taken place, I am unable to see, as the whole of the land has been acquired by the Crown in due form of law.

On this conclusion on defendant's appeal, it is not necessary to consider the question raised in plaintiff's appeal, as to the meaning of the words " land covered with buildings " as used in section 49. As plaintiff's case presupposes an acquisition under section 49 of Ordinance No. 19 of 1915. I am however unable to see anything in the context there to prevent the application of the definition of " building " as set out in section 2 of the Ordinance. The question would then resolve itself into an inquiry as to what is included in the word " appurtenances " as used in that definition. The question as to the amount of compensation payable is, however, under the circumstances determined on defendant's appeal. No useful purpose would, therefore, be served by going into this further point. On the last point raised by Crown Counsel, as to the lack of proof that defendant was the owner of the land acquired and so entitled to any sum, no question on that point was referred to the lower Court, and so it does not arise on this appeal. I might, however, point out that plaintiff has throughout treated him as the owner and actually tendered to him the sum of Rs. 2,300.

The defendant is entitled to succeed in this appeal, the appeal of the plaintiff being dismissed; the finding of the Court below will be set aside save as regards costs, and the amount of compensation payable by plaintiff to the defendant is determined at Rs. 5,216. The defendant is also entitled to his costs of this appeal.

LYALL GRANT J.—

This is an appeal by the Assistant Government Agent of the Central Province from an order made by the District Judge of Kandy in connection with proceedings for the acquisition of land under the Acquisition of Lands Ordinance, No. 3 of 1876. There is a cross appeal by the defendant.

The facts stated in the petition of appeal are that the Governor in exercise of the powers vested in him by section 6 of the said Ordinance directed the plaintiff-appellant to take order for the acquisition of the land described in the record. in extent 4.57

perches, that claim was made to this land by the defendant-respondent, and that the appellant after summary inquiry determined the amount at which compensation should be allowed—(1) for the building on the lot, (2) for the site on which the building stood, (3) for the coconut trees standing on the bare land. The value of these he estimates at Rs. 2,300, and for the remaining bare land he allowed no compensation, holding that under section 49 of Ordinance No. 19 of 1915 no compensation need be paid for land not covered by buildings. The compensation tendered was rejected, and the matter referred to the District Court, Kandy, for determination.

After hearing the case, the District Judge ordered the plaintiff-appellant to pay the defendant-respondent a sum of Rs. 3,758, made up as follows: (1) a sum of Rs. 2,300 awarded by the plaintiff, and (2) a sum of Rs. 1,458, the value of half the bare land, on the footing that at least half of the total extent of the bare land must be looked upon as land covered with buildings. The rest was to be regarded as having no buildings, and for it no compensation need be paid.

From this order the plaintiff appeals. The defendant has lodged a counter appeal, in which he claims that compensation should be paid for all the lands acquired.

Two points have been argued before us on appeal:—

(1) Whether in the circumstances of the case the whole of this area is land covered with buildings in the sense of section 49 of Ordinance No. 19 of 1915; and

(2) Whether the amount to be paid as compensation is governed entirely by the provisions of Ordinance No. 3 of 1876, and accordingly whether compensation is due in respect of the whole area so acquired.

Ordinance No. 19 of 1915 is an Ordinance for the housing of the people and improvement of towns. Under that Ordinance Boards of Improvement Commissioners may be appointed for the purpose of initiating and executing improvement schemes under the Ordinance. Among other schemes which they are authorized to initiate are what are known as back lane schemes. In the present instance the Board of Improvement Commissioners of Kandy initiated a back lane scheme and proceeded to acquire the necessary lands to bring the scheme into operation. For the purposes of the scheme the Commissioners are directed to acquire (*a*) any land covered with buildings which it is necessary to acquire to provide access to any proposed back lane from any existing street or back lane, and (*b*) any other land covered with buildings or situated within the lines of the proposed back lane.

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The section proceeds to enact that—

"No compensation is payable in respect of any other land in respect of the proposed back lane, but such land is deemed to be dedicated by the owners for the purpose of the proposed back lanes."

And there is a proviso that—

"Compensation shall be payable in respect of income producing trees within the back lanes, which it shall be necessary to remove for the purposes of the said scheme."

In pursuance of this section the Board of Improvement Commissioners laid out a scheme and acquired certain lands. A part of the scheme included the area in dispute. That area forms part of a garden at the back of a shop and dwelling house in Trincomalee street, Kandy.

Upon the area there stands an outhouse; the Commissioners offered compensation on the footing that the area occupied by this outhouse was the only portion of the land that was covered by buildings.

The District Judge has allowed compensation on the footing that about half the area is land covered with buildings. It was argued before us that the whole area should be regarded as land covered with buildings in the sense of the Ordinance. "Covered with buildings" is a phrase susceptible of different meanings, and as to its use in the Ordinance of 1915 I think assistance is gained by reference to the definition of the word "building" in that Ordinance.

The definition of the word "building" given in section 2 says: "Building" includes outhouses or other appurtenances of a building. I think "covered with buildings" means "covered with buildings and appurtenances," and the question really is whether a back yard of small dimensions is included in the term "appurtenances."

Reference was made to the schedule of the Ordinance, where certain rules are laid down to govern buildings. Rule 2 provides "that the total area covered by all buildings (the word "building" is here used in a different sense from its sense in the Ordinance) or any site used for any domestic building, factory, or workshop, shall not exceed two-thirds of the total area of the site, and the area not so covered shall belong exclusively to the building and shall be retained as part and parcel thereof."

We have not been informed of the exact proportion which the area of this yard or garden bears to the area of the premises to which it is appurtenant, but to judge from the plan submitted it appears to be of about an equal size.

It appears to me that so far as some area of one-third of the total site is concerned that must clearly be considered to be included in the term "building" as appurtenant to the actual building.

I am inclined to think, looking through the provisions of the Ordinance as a whole, that any extension of this area cannot be considered to be a building. The one-third area is clearly appurtenant to the actual structure, because that structure cannot be extended on the site without a breach of the rules.

If we include a larger area under the designation of " appurtenances," it is difficult, if not impossible, to fix any limits. Unless, therefore, the plaintiffs can show that the total area of the garden, including the site of the outhouse, is not more than one-third of the whole premises, they cannot, I think, succeed on this ground.

It was argued, however, that as Government had chosen to acquire compulsorily the entire area hatched on the plan, it must pay for that entire area, and not merely for the portion built on.

Proceedings were under the Land Acquisition Ordinance, and that Ordinance does not allow of any deductions from the market value of the whole sum. It was pointed out that Government might have contented itself with acquiring the land covered by the outhouse, and that the owner would have been compelled to dedicate the rest of the land without compensation for the purposes of a back lane. In that case, no doubt, smaller compensation would have been paid.

In reply to this it was argued by Counsel for the Crown that the fact of Government acquiring the whole area instead of a part only made no difference to the amount of compensation payable.

The argument which struck me as ingenious was that as soon as the scheme was approved, the land not built upon became dedicated to the public, and was of no further value to the owner. Accordingly in assessing compensation, the Court could only take into consideration the land which was built upon.

I am unable to agree with this argument. If the Crown acquires land not built upon, all right and title to this back lane passes for ever from the owner, but if the land is merely dedicated to the public for the purposes of a back lane, the owner still has all the rights in the land which are not inconsistent with this dedication.

In other words, the lands remain his, but burdened with a servitude. That servitude only arises when the land is dedicated, and I don't think dedication takes place until the scheme is carried out.

If Government chooses to acquire the whole land, it appears to me that it must pay the market value of the whole area according to the principles laid down in the Land Acquisition Ordinance.

There is no dispute as to the value of the land, as the claimant is prepared to accept Captain Eastman's valuation.

I think the appeal by the Crown should be dismissed, and the counter appeal allowed and compensation awarded in accordance with the valuation on the basis that the whole land acquired must be paid for.

Plaintiff's appeal dismissed.
Defendant's appeal allowed.