1949 *Present :* **Dias J. and Windham J.**

PERERA (G. A., N. W. P.), Appellant, *and* FERNANDO *et al.*, Respondents

S. C. 68—D. C. Kurunegala, 4,192

Land acquisition—Coconut estate in 1947—Compensation payable—Market value—Method of calculation—Payment of 10 per cent. on market value—Discretionary—Land Acquisition Ordinance (Cap. 203), ss. 21, 38.

A contract was entered into between the Governments of Ceylon and the United Kingdom for the sale to the United Kingdom, at a guaranteed price, of the entire exportable surplus of copra and coconut oil produced in Ceylon. This contract was originally entered into in 1942 for a period of three years expiring on 31st December, 1945, and was renewed for a further period of five years from 1st January, 1946, to 31st December, 1950. The contract was, however, confined to copra and coconut oil and there was nothing in the contract to prevent the owner of a coconut estate from selling fresh coconuts or desiccated coconut wheresoever he wished, whether in Ceylon or outside it, and at whatsoever price he could fetch. Nor was there any evidence adduced that the price guaranteed under the contract was a higher price than an owner might expect for copra or oil sold internally, or for fresh or desiccated coconuts sold internally or externally, during the period of the contract.

Held, that the market value in May, 1947, of coconut estates in general was not governed entirely by the price guaranteed for copra under the contract.

Held, further : (i) In deciding upon the market value of property compulsorily acquired evidence of recent sales in the vicinity is an important test, provided that such sales were of property similarly situated and are shown to have been by a willing seller to a willing buyer.

(ii) In order to obtain the market value of coconut property in Ceylon the court can assess the annual profits of the land on the footing of the price current at the date of valuation and multiply it by the "years' purchase", a "years' purchase" being 100 divided by the rate per cent. which a reasonable purchaser might expect as annual profit from the land.

(iii) Market value of property is the price which a willing vendor might be expected to obtain in the open market from a willing purchaser, and the price will be estimated having in view the future potentialities of the property.

(iv) Section 38 of the Land Acquisition Ordinance confers upon the Government Agent a discretion, not a duty, to award an additional ten per cent. on the market value of the property finally awarded. Neither the District Court nor the Supreme Court, in appeal, has jurisdiction to award the ten per cent. or to order the Government Agent to pay it.

APPEAL from a judgment of the District Judge, Kurunegala.

R. R. Crossette Thambiah, Solicitor-General, with *H. Deheragoda, Crown Counsel*, and *B. C. F. Jayaratne, Crown Counsel*, for plaintiff appellant, dealt with the facts.

1——J. N. A 93568—1,044 (11/49)

Price of copra was fixed for 3½ years at the time of the acquisition Thereafter price was uncertain. Hence, the proper method of valuation is that adopted by the Government Valuer, Mr. Orr. The net income is capitalised for the 3½ years at the known figures. Thereafter, estimated figures are capitalised by multiplying net profit by the multiplier obtained from Parry's Valuation Tables. The multiplier for the 3½-year period is also obtained from Parry's Tables. See Parry's Tables on Valuation, page 54. The learned District Judge failed to appreciate the application of this method of valuation to the circumstances of this case. The usual method of multiplying net income by ten years' purchase is here wrong. The buyer buys income in perpetuity, but the income for 3½ years is fixed; thereafter it is variable. Hence, in capitalising, two periods must be taken, a limited income for 3½ years, and a variable income in perpetuity. Therefore, Mr. Orr's method is the proper method.

Mr. Orr's results are supported by P11, the list of sales. P11 was admitted at the trial without any contest. P11 shows prices of coconut lands both before and after the date of this acquisition. The rate per acre in no case exceeds Rs. 1,200. The learned Judge failed to take account of P11 in arriving at his judgment.

In regard to the documents D7 and D12, valuation reports of Mr. Schokman, it is submitted that Mr. Schokman not having been called as a witness, these documents were wrongly admitted by the Judge. It was also agreed that they would not be considered unless Mr. Schokman was called. Further, D 12 was also privileged. They were made use of by the Court in its judgment. See sections 114 and 154 of Civil Procedure Code, *Siyadoris v. Danoris et al.* [1], *Silva v. Kindersley* [2], *Duncan v. Cammell, Laird & Co.* [3].

On market value of the property see *Stevens v. Munasinghe et al.* [4], *Government Agent v. Perera* [5], *Frenchman v. Assistant Collector, Haveli* [6].

On future utility of acquired property see *Rajendra Nath Banerjee v. Secretary of State for India* [7].

H. V. Perera, K.C., with *N. E. Weerasooria, K.C.*, and *N. M. de Silva*, for defendants and added defendants, respondents.—The contract price represents a guaranteed minimum and not the maximum price. We cannot say that there is a limited period of 3½ years. The future prospects of the coconut industry are good, according to the witnesses for the defendants. Mr. Orr's method cannot apply here. See Cripps on Compensation, pages 172, 182 and 187. Mr. Orr's method does not apply in this case. This is like a fee simple in perpetuity and the proper method is to multiply the net income by the 10 years' purchase. This is the method always adopted in Ceylon.

D7 and D12 have been marked and put in evidence. It is submitted that they were not wrongly admitted. In any event, the defendants do not rely on these documents for their case, and, even if wrongly admitted, there was no prejudice. See section 167 of Evidence Ordinance and *Abdul Rahim v. Emperor* [8].

[1] *(1941) 42 N. L. R. 311.*
[2] *(1914) 18 N. L. R. 85.*
[3] *(1942) A. C. 624.*
[4] *(1941) 42 N. L. R. 446.*
[5] *(1903) 7 N. L. R. 313.*
[6] *A. I. R. (1922) Bombay 399.*
[7] *32 Calcutta 343.*
[8] *A. I. R. (1946), (P. C.) 82.*

P11 is of no value. No evidence was led as to the contents of P11. The mere production of P11 is not sufficient to show how the properties in P11 compare with the property acquired. The learned Judge rightly did not act on P11.

D11 is no support for Mr. Orr's valuation. It is both belated and useless.

In regard to the cross-appeal, section 38 of the Land Acquisition Ordinance casts on the G. A. a duty to pay the 10 per cent. for compulsory acquisition. This is not a matter of discretion. Section 38 provides that the Government Agent *shall* pay the amount awarded and the percentage with interest on both. "Shall" governs both. No operative decision of the G. A. is necessary to give any legal right to any one to demand the percentage. "May" in section 38 means *shall*. See *Julius v. Bishop of Oxford* [1].

B. C. F. Jayaratne, Crown Counsel.—In regard to the cross-appeal, "May" here can only mean "may" and not "shall". There is nothing to indicate that the normal meaning should not be given to the word "may". The payment is entirely discretionary. Compare for instance section 23 of the Indian Land Acquisition Act where payment of the percentage is imperative. Our Ordinance is modelled on the Indian Ordinance but we have departed in section 38 from the imperative terms of section 23 of that Ordinance. The whole purpose of our Ordinance too is to provide for compulsory acquisition. Hence, it is hardly likely that the payment of the 10 per cent. in consideration of the compulsory nature of the acquisition would have been left in a doubtful state where "may" might mean "shall". If the intention was to make the 10 per cent. payment obligatory nothing would have been simpler than to have provided for it in section 21 where provision might have been made for its determination upon determining market value. Section 38 only provides for payment of the percentage if and when it is awarded by the G. A. The case of *Julius v. Bishop of Oxford* only sets out circumstances in which power conferred on one person gives a legal right to another to demand the exercise of that power by the person on whom it is conferred. No such circumstances exist here giving a legal right to any one to the 10 per cent. The 10 per cent. is determined only after the compensation has been finally awarded. The District Court itself has no jurisdiction in this matter, nor has the Supreme Court such power in appeal. See *Dias v. Ellis* [2], *Government Agent, W. P. v. Stork et al.* [3], *Julius v. Bishop of Oxford* [4]. Maxwell on Interpretation of Statutes, pages 246, 247 and 252.

H. V. Perera, K.C., replied briefly on the cross-appeal.

R. R. Crossette Thambiah, Solicitor-General, replied briefly on the appeal.

Cur. adv. vult.

[1] *(1880) 5 A. C. 214 at 225.*
[2] *(1903) 7 N. L. R. 112.*
[3] *S. C. 135 D. C., Colombo 2121. S. C. Minutes of November 14, 1898.*
[4] *(1880) 5 A. C. 214 at 244.*

November 30, 1949. WINDHAM J.—

This is an appeal under section 26 of the Land Acquisition Ordinance (Cap. 203) against an award of compensation ordered by the District Court to be paid to the defendant-respondents by the plaintiff-appellant (the Government Agent of the North-Western Province) in respect of the compulsory acquisition of certain lands known as Arampola Estate having a total area of 804 acres, 2 roods and 5 perches. The estate consisted of coconut, rubber and paddy lands, and also a small percentage of plantain and waste land ; but more than three quarters of it, namely, 670 acres, 1 rood and 20 perches, was coconut land, and this appeal is confined to the figure awarded in respect of this coconut land, with which was included a further one acre and nineteen perches occupied by estate roads. The compensation awarded by the court in respect of this land, after a very lengthy trial and in a long and carefully considered judgment, was Rs. 1,802 per acre, the figure representing the market value of the land on May 7, 1947, which it was agreed was the relevant date. The plaintiff appeals against this award, alleging that the figure is excessive.

The defendant-respondents have cross-appealed, contending that the learned judge erred in not awarding, or ordering the plaintiff to pay, an additional 10 per cent. on the market value assessed as compensation, arguing that the provisions of section 38 of the Ordinance (Cap. 203) with regard to the payment of an additional 10 per cent. are mandatory and not merely discretionary.

Though the appeal was argued at great length, the grounds advanced by the learned Solicitor-General for disturbing the findings and conclusion of the District Court reduced themselves in effect to three, and may be summarized briefly as follows. First, it is urged that in assessing the compensation the court erred in failing to appreciate and apply the method of calculation expounded by the plaintiff's expert witness, the Chief Valuer, Mr. Orr, who upon those calculations arrived at the figure of Rs. 1,200 per acre as the proper compensation payable for the land in dispute. Secondly, it is contended that the learned District Judge wrongly admitted in evidence certain documents, D7 and D12, which set out the valuation of a witness not called, and that these documents materially influenced him in rejecting the evidence of Mr. Orr. Thirdly, it is contended that in estimating the market value of the land the court wrongly ignored a document, P11, which set out a list of prices said to have been paid for other coconut estates at recent sales in the neighbourhood.

Mr. Orr was a valuer with the highest qualifications, reputation and experience in valuing town properties, though he admitted to knowing little or nothing about coconut estates. The method of calculation applied by Mr. Orr was the method commonly and rightly applied in estimating the present value of a land in a case where its owner will for a limited defined period be able and entitled to receive from the property an annual income of an amount less than that which he will expect to receive when that period has come to an end. This method is employed in cases where the property is, for the defined period, subject to a leasehold or to an annuity in favour of the landlord, followed by a reversion of the

freehold to the landlord whereunder the annual yield of the property to him will become unfettered. In such cases the annual yield of the property to him during the period of the lease or annuity will be limited to the amount of the rental under the lease or the amount of the annuity, and such amount will constitute the maximum income derivable by him from the property during the limited period, after which the deferred income, being the highest annual value which he might expect to obtain, will become the criterion upon which the market value of the land will be computed. In such a case, the present value, to the owner, of the limited annual income (i.e., maximum obtainable income) for the defined period is added to the present value of the reversion in perpetuity, based on the highest annual value of the land which he will expect to obtain on the reversion to him of the freehold at the end of the defined period. The result will be the present value of the land. These actuarial values, which may be worked out mathematically if somewhat laboriously, are instantly ascertainable by reference to Parry's Tables, once given the amount of the maximum annual yield during the defined period and the highest annual value expected to be thereafter obtained during the reversionary period.

Applying the above method to the present case, Mr. Orr arrived at a figure of Rs. 1,200·81, as the present value per acre of the coconut land in dispute. But in my view, mathematically correct as Mr. Orr's calculations may have been, he was wrong in applying the above method to the present case. In applying it, he took as the defined period of limited and maximum income (corresponding to the term of the lease in the example that we have been considering) the period of 3½ years. This he did by reason of a contract which was entered into between the Governments of Ceylon and of the United Kingdom for the sale to the United Kingdom, at a guaranteed price, of the entire exportable surplus of copra and coconut oil produced in Ceylon. This contract was originally entered into in 1942 for a period of three years expiring on 31st December, 1945; but it was renewed for a further period of five years from 1st January, 1946, to 31st December, 1950. The period of 3½ years was taken by Mr. Orr because that was approximately the period from 7th May, 1947, as at which date the value of the land had to be calculated, and 31st December, 1950, when the United Kingdom contract was due to expire. Under this contract the price guaranteed by the United Kingdom for copra sold to them under the contract was at the relevant date (7th May, 1947) Rs. 125 per candy. It was not disputed at the trial that this Rs. 125 would represent a price to the producer, ex-estate, of Rs. 120 per candy, and it was this price of Rs. 120 per candy which Mr. Orr adopted, in his calculations, as being the maximum price obtainable during the remaining 3½ years (approximately) which the United Kingdom contract had to run. Upon this assumption, and making use of Parry's Tables to ascertain the "yearly purchase" figure, he made his calculation of the present value of the coconut estate for that 3½-year period, which worked out to Rs. 446·42 per acre, taking the annual profit per candy as Rs. 60, i.e., Rs. 120 guaranteed price, less Rs. 60, cost of production. He then calculated the present value of the "reversionary" interest in perpetuity, i.e., the interest as from the expiry of

the United Kingdom contract in (approximately) 3½ years' time. For this purpose he assumed (upon inadequate grounds as I shall show) that from that time onwards the annual profit per candy would be only Rs. 40; that is to say, he assumed that the price of copra would drop considerably after the expiry of the United Kingdom contract. Calculating on this basis he worked out the present value of the "reversionary" interest at Rs. 754·39 per acre. Adding this to the Rs. 446·42 per acre already calculated for the 3½-year period of the contract, he reached the result of Rs. 1,200·81 as the present value of the property per acre.

Now this method of calculating the present market value of property by dividing perpetuity into two periods, namely, (*a*) an initial defined period of fixed diminished income, and (*b*) the reversionary period, i.e., perpetuity minus that defined period, was, as I have said, wrongly applied in my view to the present case: and for this reason—that its application was based on a fallacy. The fallacy was the wrongful assumption that the annual income which could be derived from a coconut estate during the 3½ years for which the United Kingdom contract had to run was limited to and governed entirely by the price guaranteed for copra under that contract. And so it would have been if the contract had applied to all produce of the coconut property, whether in the form of copra or otherwise, and if the owner had been prohibited from selling any such produce to any other person, at any other price, than to the United Kingdom (through the Government of Ceylon) at the price guaranteed for copra and coconut oil in the United Kingdom contract. Had such been the case, then it may well be (though I do not decide the point) that Mr. Orr's method of calculation would have been the appropriate one. For there would then, during the 3½ years, have been a fixed *maximum* price for the produce of the land. And it is of the essence of this method of calculation that during the limited period there should be a fixed maximum annual return from the property, as there would be if the landlord were during that period entitled to receive nothing more than a rental from the land or an annuity charged on it. This is made clear from a perusal of *Cripps on Compensation*, 8th edition, at page 188, where the method is explained. Whether such fixed maximum return is at the same time a fixed minimum return, as it would be in the case of a rental or annuity, is immaterial.

The position, however, is very different in the present case. For there was nothing in the contract between the Governments of Ceylon and the United Kingdom, nor any prohibitive legislation, to prevent the owner of a coconut estate from selling fresh coconuts or desiccated coconut wheresoever he wished, whether in Ceylon or outside it, and at whatsoever price he could fetch, subject to obtaining a formal licence to do so, since the contract was confined to copra and coconut oil. Nor was there even any obligation on an owner to sell his copra or coconut oil to the Government of Ceylon for export to the United Kingdom at the guaranteed price; for there was no legislation compelling him to sell copra to the Government of Ceylon at all, and the United Kingdom contract provided merely for the sale to the United Kingdom of all exportable *surplus* of copra or coconut oil. Nor was there any evidence adduced that the price guaranteed under the contract was a higher

price than an owner might expect for copra or oil sold internally, or for fresh or desiccated coconuts sold internally or externally, during the period of the contract.

In short, the United Kingdom contract was not the only factor regulating or relevant to the annual yield which might be expected from the coconut property while it remained in force, and the price for copra fixed under it was a guaranteed minimum price for the produce of the land rather than a fixed maximum. For this reason alone I consider that the method of calculation applied by Mr. Orr was wrongly applied, and that the learned judge did not err in declining to adopt the valuation figure, Rs. 1,200 per acre, calculated by it. The same objection attaches to the evidence and calculations of Mr. Spencer Schrader, the other expert called by the plaintiff, who likewise assessed on the basis of an initial $3\frac{1}{2}$-year period, upon the assumption that the guaranteed price for copra under the United Kingdom contract was the maximum price obtainable for the produce of the property during that period, and that prices would fall thereafter. His estimate was Rs. 1,300 per acre.

There were other erroneous assumptions made by Mr. Orr in working his calculations which likewise made them of dubious value, for example his assumption, which I have already mentioned, that the price of copra would drop upon the expiry of the United Kingdom contract, which opinion was based on what he (who admittedly knew nothing about coconuts) had been told by persons who were not called as witnesses, thereby not only depriving it of the weight which might have been attached to it as expert opinion, but rendering it objectionable as hearsay. But the earlier fallacy was alone sufficient to justify the learned judge in rejecting his method of calculation.

It has been contended by the learned Solicitor-General that the trial in the District Court was conducted throughout on the footing that the market value in May, 1947, of coconut estates in general, and of the Arampola Estate in particular, was governed entirely by the price guaranteed for copra under the United Kingdom contract; and certainly the repeated reference in questions put by counsel, and in all the evidence, to prices " per candy " (a copra measure), and the absence from Counsel's questions, witnesses' evidence, and from the judgment itself, of any reference to the price obtainable for fresh or desiccated coconuts, would seem to indicate that such may have been the case. But if so, then the Crown was in error in assuming this wrong basis for its calculations. And if the calculations of the Crown's expert were unacceptable (as they were) because he overlooked certain important factors, of which the chief was the fresh and desiccated coconut market, the fact that everybody else had overlooked those factors would not make the calculations any less unacceptable, and would not render the trial judge's rejection of them a wrongful rejection. Moreover it would in my view be inequitable to allow the Crown, after the exceedingly protracted and expensive trial in the District Court, and now that it has felt the pinch of the case, to succeed through its own lack of competence in presenting its case below, in having the re-trial which it seeks, thereby enabling it in a second attempt to present its case more adequately and upon a proper basis.

That renders it unnecessary to consider at any length the second main ground of the appeal as argued before us, which was that the learned judge erred in admitting in evidence a written valuation report, D7, valuing the land in dispute as at the 18th September, 1946, and a letter, D14, confirming that report. Both were written by a Mr. Schokman, Mr. Orr's assistant as Government Valuer, who was not called as a witness, and who has since died. It was agreed by the parties and by the court that, while the documents should be marked, they should not be admitted or relied on as evidence unless Mr. Schokman was called. On a careful perusal of the judgment I am satisfied that the learned judge did not rely on the substance of Mr. Schokman's valuation in arriving at his own assessment of compensation, but that it was one of the factors which influenced him in rejecting Mr. Orr's evidence and valuation. Since, however, Mr. Orr's method of valuation in any case fails on its own demerits, as I have shown, and not merely through any comparison with that of Mr. Schokman, I hold that although those documents D7 and D12 were wrongly admitted in evidence, as in my view they were by reason of the non-calling of Mr. Schokman, their admission is not such as will afford a ground of appeal, in view of the provisions of section 167 of the Evidence Ordinance. For the burden is now on the Crown to show that Mr. Orr's valuation ought to have been accepted, and it is not sufficient merely to show that it was rejected for wrong or inadmissible reasons.

The third ground of appeal which has been pressed by the learned Solicitor-General is that, in deciding upon the present market value of the coconut property, the court erred in not taking into consideration, as admittedly it did not take into consideration, a document produced by Mr. Orr, P11, which set out a list of prices said to have been paid for other coconut estates at contemporary or near-contemporary sales in the neighbourhood, none of which prices was more than about Rs. 1,200 per acre. Now it is well settled law that evidence of recent sales in the vicinity, if properly adduced, is an important test in deciding upon the market value, provided that such sales were of property similarly situated; see *Government Agent, Southern Province v. Silva*[1], *Government Agent v. Perera*[2], *Stevens v. Munasinghe*[3]. To this I would add that the sales must be shown to have been by a willing seller to a willing buyer, and that in the case certainly of coconut estates the other properties must be shown to be, at leaxt approximately, in the same condition and state of preservation, and planted with coconuts to the same percentage of their area, as the property in question, in order that the prices which they fetched should be any indication of the fair market price for the property in question.

In the present case, however, the list P11 was produced by Mr. Orr without his giving any explanation of the sources from which he derived the particulars which it contained. In producing it he merely said—"I produce a statement marked P11 giving sales of coconut properties over 100 acres in extent". It is true that there was no objection to its production on the part of Counsel for the defence; but that cannot be

[1] *(1898) 3 N. L. R. 235.* [3] *(1903) 7 N. L. R. 313.*

[2] *(1941) 42 N. L. R. 446*

taken as an admission that the sales were free and that the condition and the other above-mentioned particulars of the properties to which it related were approximately the same as those of the Arampola property in the present case; for the list itself contained nothing to indicate these things. The list P11 did, it is true, set out that this same Arampola property had been sold on a previous occasion for only Rs. 612 per acre; but even if the entire contents of P11 had not been pure hearsay, this item would have been of little value as a test for the present market price, for it contained no particulars to show whether that sale was a free one, and the sale had taken place in April, 1944, more than three years before May, 1947, at a time when on uncontradicted evidence coconut properties were fetching far less. Indeed, from the very wide divergence of prices per acre for the various properties set out in the list it would appear rather that the circumstances of those sales, or the condition of the properties, differed considerably from one another, and therefore could not all have been the same as in the present case.

Not only did Mr. Orr, who admitted that he knew nothing whatever about coconuts himself, produce this list P11 "out of the blue", but neither he nor any other witness gave any first-hand evidence with regard to the sale of the properties to which it related, nor was any witness called who had even inspected those properties. Such evidence ought to have been called by the Crown if they sought to place any reliance on P11 as affording evidence of neighbouring sales by which the present market price should be tested. As was observed in *In re Dhanjibhoy Bomanji* [1], cited in Donogh's Land Acquisition and Compensation, 2nd ed. at page 96.—"The proper way to deal with a number of instances of sales is to pick out those which relate to land approximately similar to the land to be valued, and then carefully sift the circumstances surrounding each instance". In the present case the circumstances were not even adduced, still less sifted. For these reasons I hold that the learned trial judge rightly ignored the contents of the document P11 in arriving at his estimate of the market value of the property in dispute. And to remit the case in order to enable the Crown to prove properly the contents of P11 and the nature of the sales and of the properties to which it relates, would be open to the same objections as I have set out earlier when considering the question of remitting after the pinch of the case has been felt. I would observe finally that not the least unsatisfactory feature of Mr. Orr's estimate of the market value of the Arampola Estate in May, 1947, was his admission in evidence that "the data on P11 was also of assistance to me in my valuation"; though perhaps the fault was not so much his in relying on it as the Crown's in failing properly to prove it or test its value as evidence.

Having now dealt with the grounds on which it is contended that the learned trial judge, in assessing the market value of the coconut property, wrongly failed to act on certain evidence tendered by the Crown, I will turn to consider briefly whether the estimate which he did reach ought to be interfered with. In brief, the learned judge, rejecting Mr. Orr's method of making separate valuations for a 3½-year period and a reversionary period, adopted the method which has, it would seem, always

[1] *10 Bom. L. R. p. 712.*

been applied in Ceylon hitherto in the valuation of coconut estates ; that is to say, he assessed the annual profits of the land on the footing of the price current at the date of valuation (May, 1947) and multiplied it by the " years' purchase " in order to obtain the market value of the land. A " years' purchase " being 100 divided by the rate per cent. which a reasonable purchaser might expect as annual profit from the land, and it being agreed that 10 per cent. was that rate, the " years' purchase " amounted to 10. This method was in my view the correct one, since for the reasons I have given earlier there was no special principle of assessment to be applied in the present case, such as Mr. Orr sought to apply. It is stated in *Cripps on Compensation*, 8th ed. at page 187, that—" Where no special principle has to be applied, the purchase-money payable to an owner of an estate in fee simple, for lands of which he is in possession, is ascertained by multiplying the highest annual value which he might expect to obtain from such land by the number of years' purchase which the special circumstances require ".

The learned trial judge, upon evidence and calculations with which I see no grounds to interfere, estimated that the property would yield 1,767 candies of copra per year, and that, at the current price of Rs. 125 per candy (i.e., under the United Kingdom contract) the producer would receive a nett profit of Rs. 68·50 per candy. Having ascertained these figures he simply multiplied 1,767 by 68·50 to get the annual profits, and then multiplied this by 10 (the " years' purchase " figure) to arrive at the market value of the land, which came to Rs. 1,210,395. This worked out at the Rs. 1,802 per acre which is the rate of compensation against which the plaintiff appeals.

The learned judge summarized his conclusions, and indicated the reliance which he placed upon the evidence of various witnesses regarding the future prospects of coconut properties, in the following passage from his judgment :—" When the price of copra has been fixed by agreement at Rs. 125 as in this case till the end of 1950, I see no reason why the same formula " (i.e., multiplying the present estimated annual profits by 10) " should not be adopted unless there be some definite evidence before court to show that price would vary and vary considerably. From the expert evidence of Mr. Lloyd, which I accept, it appears to be highly probable that the price is not likely to come down below Rs. 125 till at least 1956. Dr. Child, the Crown expert, is unable to give the coconut price after 1950. Mr. Wilkins, a proprietary planter of repute against whose integrity nothing has been said, is confident of the future of copra that the price will keep to over Rs. 125 even long after the expiry of the contract. Mr. Steuart too is of the same opinion. It is only Mr. Schrader who has got a very pessimistic view of the future. I reject his prophecy of the future and hold that it is fairer to calculate the value of the coconut area on the footing of the present price as the prospects are, if anything, only brighter in the future. Though Mr. Steuart has calculated 12 years profits as the purchase price, on account of the substantial nature of the buildings on this land, I think I would rather accept the 10-year principle and fix the price of the coconut area at Rs. 1,210,395, i.e., 1,767 × 68·50 × 10 ".

I am unable to hold that the above estimates and conclusions of the learned judge were wrong. Compensation under the Land Acquisition Ordinance must be based on the market value of the property, and "market value" has been held by the Privy Council to be "the price which a willing vendor might be expected to obtain in the open market from a willing purchaser": *Municipal Council of Colombo v. K. M. N. S. P. Letchiman Chettiar*[1]. And the price will be estimated having in view the future potentialities of the land: *South Eastern Rail Co. v. London County Council*[2]; that is to say, the present value of the future prospects of the land should be taken into account. What those future prospects are cannot, of course, be more than a matter of opinion. But the learned judge was in my view quite justified in accepting the opinions of those witnesses who were optimistic about the price of copra after 1950, in particular that of Mr. Lloyd, who as Managing Director of Lever Brothers, Ceylon, Ltd., was highly qualified to speak on the prospects of the world market in vegetable oils, and in rejecting the opinion of the more pessimistic Mr. Schrader. It may be that a "willing purchaser" should be a prudent one; but prudence is not always to be identified with pessimism. If the carefully reasoned anticipations of an expert like Mr. Lloyd led to optimism, a prudent purchaser might well act on them, and might well assume that prices would not fall even after 1956, which was the latest year to which Mr. Lloyd could prophesy with confidence. In short the learned judge was justified in basing his whole assessment on the 1947 "peak" price guaranteed for copra, upon the view of an expert that that peak price would be maintained at least until 1956, or even exceeded. This view was corroborated by the experts called for the defence, Mr. Wilkins and Mr. Steuart, long-headed planters both of them, with practical experience of valuing coconut properties and of the coconut market. Their own assessments of the market value of the property in dispute, it may be observed, were respectively Rs. 2,128 and Rs. 2,392 per acre, estimates considerably in excess of the Rs. 1,802 awarded by the court. It is also to be observed that the figures estimated by the plaintiff's and the defendants' assessors, respectively, before the trial, were Rs. 1,840 and Rs. 1,894 per acre, figures likewise in excess of that arrived at by the court.

The court itself, in assessing the market value, appears to have had in view only the copra market, and not the market for fresh or desiccated coconut; indeed no evidence was tendered regarding the latter. Since however, the guaranteed price of Rs. 125 per candy in the export copra market (which price was held not to be likely to fall after the lapse of the guarantee) was always available for all the produce of the property, it represented a guaranteed minimum, so that the learned judge's estimate could not have been less, and might have been more, had there been before him evidence regarding the present price and future prospects of fresh and desiccated coconut and had he taken such evidence into account. The plaintiff's appeal, which alleges the assessment of the court to be too high, cannot therefore be allowed on this ground, which I have already touched upon earlier in this judgment; and the defendant does not in his cross-appeal allege that the figure is too low.

[1] *(1947) 48 N. L. R. 97*

[2] *(1915) 2 Ch. 252.*

For all these reasons the appeal must be dismissed.

It remains to consider the cross-appeal. The point advanced by the defendants in the cross-appeal is that the learned District Judge erred in not awarding to the defendants, or ordering the plaintiff (Government Agent) to pay to them, 10 per cent. of the market value assessed by the court as compensation, their contention being that the provisions of section 38 of the Land Acquisition Ordinance (Cap. 203) with regard to the payment of an additional 10 per cent. are mandatory and not merely discretionary. Section 38 reads as follows :—

> "38. In addition to the amount of compensation finally awarded, the Government Agent may, in consideration of the compulsory nature of the acquisition, pay ten per centum of the market value mentioned in section 21. When the amount of such compensation is not paid either to the persons interested or into court on taking possession, the Government Agent shall pay the amount awarded and the said percentage with interest on such amount and percentage at the rate of six per centum per annum from the time of so taking possession :
>
> Provided, however, that the costs (if any) payable to the Government Agent by the person interested shall be deducted from such amount and percentage ;
>
> Provided also that in cases where the decision of the District Court is liable to appeal, the Government Agent shall not pay the amount of compensation or the percentage, or any part thereof, until the time for appealing against such decision has expired and no appeal shall have been presented against such decision, or until any such appeal shall have been disposed of ".

Now *prima facie*, the word " may " in the second line of section 38 means what it says, namely that the Government Agent shall have a discretion whether or not to award an additional ten per cent. ; otherwise the word " shall " would have been used, as (significantly) it was used in the Indian legislation upon which section 38 was modelled. Learned counsel for the defendants, however, points to the ensuing words " in consideration of the compulsory nature of the acquisition ", and to the provision a little further on that where the compensation is not paid upon the Government's taking possession the Government Agent " ***shall*** pay the amount awarded *and the said percentage* ". These words, he argues, coupled with the absence of the words " if any " after the words " the said percentage ", or after the word " percentage " in the first and second provisos to the section, rebut the presumption that the word " may " is discretionary only. If the word confers a discretion only, and not a duty, then the effect of the section, he contends, would be to create a liability to pay interest on the ten per cent. as from the date of taking possession, although the Government Agent need not exercise his discretion to pay the ten per cent. at all until long after that date. Certainly the section is not too happily drafted, and the amendments consequential upon the substitution of " may " for the " shall " appearing in the Indian model do not appear to have been too well thought out. Nevertheless I cannot find anything in it which would be sufficient to rebut the presumption that " may " means " may ". Clearly, in the

context of the section, the words "if any" are to be implied after all the later references to the percentage. Nor do I find anything in the Ordinance which would justify the construing of the expression "may" as conferring a power coupled with a duty on any of the grounds upon which it was held in *Julius v. Lord Bishop of Oxford* [1] that such an expression may properly be so construed. In particular, no right is conferred upon the defendants elsewhere in the Ordinance to claim the ten per cent. on the compensation, such as is conferred upon them to claim the compensation itself, and such as might have necessitated the provision of section 38 being construed to confer on the Government Agent a power coupled with a duty.

I read section 38 as conferring upon the Government Agent a discretion, not a duty, to award an additional ten per cent. on the market value of the property finally awarded; though like all discretions, it should not be exercised arbitrarily or capriciously. In the present case the Government Agent did offer to the defendants an additional ten per cent. on the sum which he offered as compensation, provided they accepted that sum and did not bring the matter to court. The defendants refused the compensation offered, and the matter came to court. It follows that where the Government Agent and the claimants cannot agree upon the compensation out of court, the ten per cent. cannot be awarded—because the compensation itself will not be finally awarded—until the District Court, or in the event of an appeal the Supreme Court or even the Privy Council, has fixed the compensation: see *Ellis v. Fernando* [2]. Furthermore, since under section 38 it is only the Government Agent who is empowered to award the additional ten per cent. on the compensation, such power being nowhere conferred upon the District Court, I agree with the learned District Judge when he held in the present case that he had no jurisdiction to award the ten per cent. or to order the Government Agent to pay it. No more, therefore, would this Court have such power, upon an appeal from a judgment of the District Court. This point was so decided in an unreported two-judge decision (Bonser C.J. presiding) *Government Agent, W. P. v. Stork and another*, recorded in the Supreme Court Minutes dated 14th November, 1898, with which I respectfully concur.

The interpretation which I have placed upon the word "may" in section 38 has also the authority of precedent. It was held in *Dias v. Elli*, [3], after consideration of some of the arguments advanced before us, that section 38 confers upon the Government Agent a discretion only, and not a duty, with regard to the payment of the ten per cent. of the market price. The same view was taken in *Government Agent, Kandy, v. Marikar Saibo* [4], in a judgment which was overruled by the Privy Council but not on that point. I think the matter can admit of no reasonable doubt.

The cross-appeal is accordingly dismissed. In the result, both the appeal and the cross-appeal having failed, there will be no order for costs in the hearing before us. The judgment of the District Court is affirmed.

DIAS J.—I entirely agree and have nothing to add.

Appeal and cross-appeal dismissed.

[1] *(1880) 5 App. Cases, 214.*
[2] *(1899) 3 N. L. R. 335.*
[3] *(1903) 7 N. L. R. 172.*
[4] *(1911) 6 S. C. D. 30.*