1941 *Present :* **Howard C.J.**

ABEYESEKERE *v.* THE COLOMBO MUNICIPALITY.

105—C. R. Colombo, 56,502.

Assessment—Premises occupied by owner—Basis of assessment—Burden of proof—Municipal Councils Ordinance, s. 4.

The value of property for purposes of assessment, where the owner and occupier are one, must be ascertained by determining the rent a hypothetical tenant would give for the property.

The burden is on the owner by the application of the profits' or contractor's basis of assessment or by a comparison of his property with properties of a like nature to establish the annual value he claims to put upon the property.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

N. Nadarajah (with him *B. C. Ahlip* and *P. A. Senaratne*), for the plaintiff, appellant.

H. V. Perera, K.C. (with him *S. Nadesan*), for the defendant, respondent.

Cur. adv. vult.

February 7, 1941. HOWARD C.J.—

This is an appeal from a judgment of the Commissioner of Requests, Colombo, dismissing the plaintiff's action with costs. The plaintiff claimed that the assessment made on his premises No. 3, Kensington Gardens, Bambalapitiya, should be reduced from the assessment of Rs. 1,150 per annum for the year 1939 made by the defendant to one of Rs. 900 per annum. In finding for the defendant the Commissioner

stated that he was not prepared to accept the opinions of Mr. Gomes, Mr. Gonsal, and Mr. Molligodde, who were called by the plaintiff to state what a tenant would be prepared to pay for the premises, in preference to that of Mr. Ernst, the Assistant Municipal Assessor, who had based, checked, and justified his assessment by a comparison of actual rents paid by tenants for similar buildings in the same street. Mr. Ernst's assessment was also based on what is known as the square foot method of assessment which the learned Commissioner seemed to regard as having been accepted as a proper basis in England and elsewhere. He had no doubt as to its suitability as the basis of assessment in the present case. It is true that reference is made to the square foot method of measurement in various local cases. In *Abdul Haniffa v. Municipal Council, Colombo*[1] de Sampayo J. said that the annual value of property cannot be determined, like a sum in arithmetic, by calculating the number of square feet in the floor area, but many considerations both personal and commercial enter into the question. In *Weerasekera v. Municipal Council, Colombo*[2] this method is mentioned but no comment is made on its applicability. In *Soysa v. Municipal Council, Colombo*[3] Soertsz J. throws doubt on the results achieved by this method. Moreover scrutiny of the standard treatises on Rating, such as Ryde and Faraday, indicates that the three methods of ascertaining the rateable value are the following bases :—(1) competition, (2) profits, (3) contractor's. Nowhere is there any mention of the square foot method. Nor has any case from the English Courts been cited as authority for the proposition that it is employed as a basis of assessment or as an aid to ascertain the rateable value on one of the three methods referred to by these writers.

It must, however, be borne in mind, as laid down in *Weerasekera's* and *Soysa's* cases, that the burden of proof was on the plaintiff to establish that the defendant's assessment was wrong. In an attempt to discharge that burden the plaintiff himself testified to the fact that in 1935 he occupied the premises as a tenant at a monthly rental of Rs. 90. Also, that in December, 1935, he purchased the property for Rs. 16,500. The rateable value for 1935, 1936, and 1937 was fixed at Rs. 1,000, for 1938 the assessment was reduced to Rs. 900 on a plea put forward by the plaintiff that one room of the premises had been rendered totally unfit as a living room by the erection of the adjoining house cutting off light and air. The plaintiff estimated that this erection had depreciated the value of his property by Rs. 1,500. He also stated that he had made no extensions or alterations to the building and that rents had not gone up in the locality since 1935. The plaintiff's case was supported by the evidence of Mr. Molligodde who stated that the house in which he lived, for which he paid Rs. 95 a month, was much better than the plaintiff's for which he would consider Rs. 80 too much. Mr. Gonsal, a Chartered Accountant, also gave evidence for the plaintiff and stated that Rs. 90 was a fair rental. Mr. Gomes, an owner of several houses in Bambalapitiya and Wellawatta, stated that Rs. 1,500 would be a reasonable depreciation by reason of the building of the wall. He also considered No. 4 of which he was the owner was better than the plaintiff's house.

[1] *T. C. L. R. 7.*

[2] *40 N. L. R. 419.*

[3] *41 N. L. R. 1.*

The rental was Rs. 90. He also stated that rents had decreased in 1939 as compared with 1938 owing to the building of new houses. He considered Rs. 95 the highest rent that a tenant would pay for the plaintiff's house. The question arises as to whether the plaintiff has discharged the burden of proof imposed upon him by law. The assessment is based on "annual value" which is defined in section 4 of the Municipal Councils Ordinance, as follows :—

> "Annual value means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for any house, building, land, or tenement if the tenant undertook to pay all public rates and taxes, and if the landlord undertook to bear the cost of repairs, maintenance and upkeep, if any, necessary to maintain the house, building, land, or tenement in a state to command that rent :
>
> "Provided that in the computation and assessment of annual value no allowance or reduction shall be made for any period of non-tenancy Whatsoever"

"Annual value" is therefore determined by the rent a tenant would pay for the property to be rated. As a broad principle it was laid down in *Hayward v. Brinkworth, Overseers*[1] that the rent actually paid is prima facie evidence of value, but it is not conclusive evidence : the rent, however, recently agreed to be paid by a perfectly free occupier would be a criterion of value difficult to set aside. This principle, formulated also by Faraday and Ryde, has been accepted by the Ceylon Courts in *Silva v. Colombo Municipal Council*[2], *Weerasekera v. Municipal Council, Colombo* (*supra*), and in *Soysa v. Municipal Council, Colombo* (*supra*). In *Weerasekera's* case the appellant succeeded in his appeal on the fact that the rental of Rs. 65 that he was receiving for the year in question and the previous two years in respect of the premises was a fair test to apply in determining the annual value. Similarly in *Soysa's* case the Court accepted Rs 45, the actual rent recently fixed, as the basis. It will be observed that in both of these cases the annual value was determined on the basis of rent actually being paid at the time of assessment. In the present case rent has not been paid for the premises since 1935. In this connection the following passage from the judgment of Lush J. in *Metropolitan Board of Works v. West Ham*[3] is an point :—

> "The rateable quality of property is not to be determined by what it once was, or may hereafter become. If a piece of fertile land were to be covered by the ashes of a volcano or by an inundation, it would have no rateable value so long as it continued in that condition. So also, on the other hand, a barren rock, so long as it remains a barren rock, has no rateable value ; but the moment it is worked as a quarry it becomes rateable. The rateable quality of the property must be determined by what it is at the time the rate is made."

Again in *Durham County Council v. Tanfield Overseers*[4] it was laid down that the test is not what the value was in the preceding year, but what a tenant would give on a yearly tenancy commencing at the date of assessment. In this case, the owner and occupier are one and the value

[1] *10 L. T. N. S. 608.*
[2] *3 Bal. 163.*
[3] *(1870) L. R. 6 Q. B. 193.*
[4] *(1923) K. B. 333.*

of the property must be ascertained by determining the rent a hypothetical tenant would give for the property—*London County Council v. Erith* [1]. In doing so all possible occupiers including the owner must be taken into account as possible tenants. In this case the occupier does not pay actual rent for the premises and the question of his obtaining them on a competitive basis does not arise. The appellant has attempted to establish his case by a comparison of his property with other properties of a like nature which are the subject of letting, a method recognized in *Liverpool Corporation v. Llanfyllin Assessment Committee* [2] and *Pointer v. Norwich Assessment Committee* [3]. Counsel for the appellant has also had recourse to the profits and contractor's basis of assessment. The former presupposes a calculation of the rent which would commend itself to a tenant upon an estimate of the profits resulting from the occupation of the premises. The contractor's basis presupposes an estimate of the rent by reference to the interest which a contractor would expect for the money he had expended in buying the land and erecting the buildings of which the premises consist. Can it be said that the appellant and his witnesses have by the application of the profits or contractor's basis of assessment or by comparison of the premises with others of a like nature proved that the assessed value should be fixed at a sum of Rs. 900 per annum ? Reference has been made to the purchase money paid in 1935, but no valuation is before the Court of its present value. I do not think the burden of proof imposed on the appellant has been discharged.

In these circumstances the appeal is dismissed with costs.

Appeal dismissed.

[1] *(1893) A. C. 562*

[2] *(1899) 2 Q. B. 14*

[3] *(1922) 2 K. B. 471.*