[HIGH COURT OF AUSTRALIA.]

GEITA SEBEA AND OTHERS . . . APPELLANTS;
PLAINTIFFS,

AND

THE TERRITORY OF PAPUA . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE CENTRAL COURT OF PAPUA.

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MELBOURNE, *Feb.* 24; *Oct.* 13.

SYDNEY, *Nov.* 24.

Rich A.C.J., Starke and Williams JJ.

Resumption and Acquisition of Land—Compensation—Mode of assessment—Territory of Papua—Land leased by Crown from natives—Aerodrome constructed thereon—Subsequent compulsory acquisition—Prohibition of sale of land other than to Crown—Land Ordinance 1911-1935 (*No.* 5 *of* 1912—*No.* 14 *of* 1935), *sec.* 3—*Lands Acquisition Ordinance* 1914 (*No.* 7 *of* 1914), *secs.* 26, 28 *and* 29—*Lands (Kila Kila Aerodrome) Acquisition Ordinance* 1939.

In 1937 certain natives in the Territory of Papua who possessed a communal usufructuary right to occupy certain unimproved land with perpetual right of succession in their community leased the land to the Crown for a term of ten years at a yearly rental. The Crown transformed the land into an aerodrome, levelling, draining, and making runways, and the Crown and private individuals erected buildings thereon. In December 1939 an Ordinance was enacted providing for the compulsory acquisition of the land by the Crown upon notice by the Lieutenant-Governor in the *Gazette* vesting the land in the Crown. On 7th February 1940 the Lieutenant-Governor published the notice. By the *Land Ordinance* 1911-1935 natives are prohibited from disposing of land except to the Crown.

Held that for the purpose of assessing the compensation payable to the natives the land should be valued as on 1st January 1939 with such improvements on it as formed part of the land and such structures upon it as were permanently attached or affixed to it, on the footing that an estate in fee simple freed and discharged from all trusts and encumbrances whatsoever was acquired by the Crown; that the prohibition from sale other than to the

Crown did not affect the value of the land; that a deduction should be made in respect of the leasehold interest of the Crown; and that no percentage increase should be made for compulsory acquisition.

Decision of the Central Court of Papua reversed.

APPEAL from the Central Court of Papua.

Geita Sebea and other natives of the village of Kila Kila situate in the Port Moresby district in the Territory of Papua by a lease dated 23rd March 1937 leased to the Crown an area of approximately fifty acres for a term of ten years from 19th March 1937 at a yearly rental of fifteen pounds. The natives were described in the lease as being the sole owners of the land and they leased to the Crown all their rights therein.

After the lease was executed, the Government of the Territory of Papua constructed an aerodrome on the land. It was levelled and drained and a customs and quarantine building was erected. The Commonwealth Government erected thereon a building for a Meteorological Station and for wireless signalling, and a house for the necessary machinery, and, with the consent of the Government of the Territory, certain business firms erected business premises on the land. All the buildings were erected for the sole purpose of using the land as an aerodrome; all the buildings, with the exception of the machine house, were erected on concrete piers, but there was no evidence to show whether or not the buildings were fastened to the piers.

After the above-mentioned works were completed and the buildings erected, the *Lands (Kila Kila Aerodrome) Acquisition Ordinance* 1939 was passed and it provided that the above-mentioned land, together with about twenty acres of adjoining land and a further area containing eighteen acres about a mile away, were to be acquired by the Crown by compulsory acquisition on notice by the Lieutenant-Governor in the *Government Gazette*.

By sec. 3 of the *Lands (Kila Kila Aerodrome) Acquisition Ordinance* 1939, it was provided that the amount of compensation and the persons entitled thereto were to be determined as nearly as possible in the manner prescribed in respect of land compulsorily acquired under the *Lands Acquisition Ordinance* 1914.

On 7th February 1940 the Lieutenant-Governor, by notice in the *Government Gazette*, notified and declared that the lands referred to in the *Lands (Kila Kila Aerodrome) Acquisition Ordinance* 1939 were vested in His Majesty the King.

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The natives thereupon claimed from the Territory of Papua £4,478 12s. 6d. compensation and £1,000 damages for severance, and the Territory offered the natives the sum of £269 5s. 9d. in full settlement of their claim for compensation, which offer was refused. On 13th June 1940, all the natives named in the lease except Sebea Vani, who had died during the period between the making of the lease and the commencement of the action, commenced proceedings against the Territory in the Central Court of Papua for compensation pursuant to the Ordinances hereinbefore referred to.

The action was heard on 9th, 10th and 11th July 1940 before *Gore* J. Evidence was given on behalf of the natives that the value of the work done in making the aerodrome was £2,740 and in erecting the buildings £3,460. They alleged that the value of their interest in the said lands was £4,549, and claimed ten per cent of this value for compulsory purchase and £150 for severance. Evidence was given on behalf of the Territory that the value of the lands, without regard to any potentiality as an aerodrome, was £454. On 19th August 1940 an assessment was made in favour of the natives for the sum of £454 and costs.

On 26th August 1940 the natives gave notice of their intention of appealing to the High Court, the appeal being in the form of a case stated setting out the above-mentioned facts. The questions asked in the case stated were substantially as follows :—

1. Whether the judgment of *Gore* J. was correct in law.

2. Whether the natives had a common law title equivalent to a freehold or fee simple in the lands.

3. Whether the provisions of the *Land Ordinance* 1911-1935 restricting the right of the natives to sell or otherwise deal with the lands affected the value of the lands.

4. Whether the potentiality of the lands for use as an aerodrome should be taken into account in valuing the said lands.

5. Whether the natives were entitled to claim compensation for their interest in reversion in (*a*) the works on the said aerodrome, such as levelling, draining and the construction of runways ; (*b*) the buildings on the said lands.

6. Whether the natives were entitled to ten per cent or any other amount for compulsory acquisition of the said lands.

7. Whether the value of the said lands should be assessed according to the value on 1st January 1939, and if not, from what date.

8. Whether the decision of *Gore* J. was against the evidence and the weight of the evidence.

The appeal came on for hearing before the High Court (RICH A.C.J., STARKE and WILLIAMS JJ.). The Court, without hearing any argument on the merits, remitted the case on appeal back to the Supreme Court of the Territory of Papua to inquire into and ascertain :—

(*a*) What, according to the native customs applicable to the lands acquired, was the nature of the title to such lands, and in particular, what, in accordance with such customs, were the incidents as to duration, devolution and otherwise of the rights of ownership or enjoyment which subsisted in such lands ?

(*b*) What persons, according to such customs, had any and what rights of ownership or enjoyment over or in respect to the lands ?

(*c*) What, according to such customs, were the rights of the appellants over and in respect to such lands, and what rights had they, according to such customs or by Ordinance or regulation to represent all persons interested in the said lands or to receive and dispose of the compensation money payable in respect thereof ?

(*d*) What native customs, if any, existed defining or affecting the rights of persons interested in the said lands and other persons in respect of the title to and the right to use or to remove buildings and other articles erected or placed upon the land ?

On 14th May 1941, the Supreme Court of Papua heard the reference. Objection was taken by the appellants to the admission of evidence on the matter. *Gore* J. ruled that the question of admissibility was one for the High Court, and the evidence should be taken and furnished to the High Court in obedience to the order, leaving it to that Court to decide upon its admissibility. After evidence was taken the questions were answered as follows :—

(*a*) The title to the lands in question was a communal usufructuary occupation with a perpetual right of possession in the community. There was no individual devolution of any part of these lands. The death of a member did not affect the collective title. In such an event, the lands still remained Iduhu lands, the property of the community.

(*b*) The whole of the people of Kila Kila have the right of enjoyment in respect of the lands and there was no custom in relation to the right of ownership other than the right to enjoy except the right of control in the Iduhu, which is loosely called ownership.

(*c*) The appellants have no greater rights than the other members of the community according to custom. They are merely acknowledged as the representatives of the community in this particular

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transaction. By the Second Schedule to the *Land Ordinance* 1911-1935 for the purpose of the lease they were deemed to be the owners.

(*d*) There was no custom with respect to the title to and the right to use or to remove buildings and other articles erected or placed upon the land.

The appeal again came on for hearing before the High Court.

R. D. Bertie, solicitor for the appellants, submitted, pursuant to the *Appeal Ordinance* 1909, sec. 9, an argument in writing of which the following is a summary:—1. For the purposes of resumption the native owners must be considered to be the owners in fee simple with an ample right of alienation and receive compensation accordingly. The protectorate of New Guinea was constituted a possession by Order-in-Council of 8th June 1888 made under the *British Settlements Act*. By art. XXXI. of the Instructions and Sign Manual and Signet to the Administrator of British New Guinea of the same date the Administrator is instructed specially to take care to protect the natives in their persons and the free enjoyment of their land and other possessions. This instruction has been implemented in the Ordinances. By Ordinance No. 2 dealings in land with or by natives were prohibited, but it was provided that the Administrator might purchase or lease the land. The principle of this Ordinance has been continued: See, for the present law, *Land Ordinance* 1911-1935, secs. 3-9 and Second Schedule. The original Letters Patent and the Instructions issued thereunder have statutory authority; the Administrator is bound by statute to protect the natives in the free enjoyment of their land. The Possession was acquired not by cession or conquest but by settlement, and the common law alone was brought into the country. Save for the Ordinance preventing alienation the natives could freely alienate their land. They hold the land free of all services, save fealty, and this is an estate of freehold. Reg. 1 of the Second Schedule of the *Land Ordinance* 1911-1935 recognizes that the native owners can convey an estate in fee simple. The prohibition against alienation is applied for the benefit of the natives alone and cannot be used to decrease the value of the land. The Crown is the only buyer in the first instance, and it is a reasonable assumption that the Crown as a buyer would always pay the fair market price. The consideration of the position of the appellants as joint owners under the Crown is quite a different problem from that of their rights *inter se*. 2. The whole work of making the aerodrome was one work. The runways were obviously part of the land, and

the runways and the buildings were built for the same purpose. The improvements were effected for the more convenient use of the land as an aerodrome and were part of the land (*Reid* v. *Smith* (1)). The natives are not at present capable of doing anything for their land beyond using it for gardens, but the state of mental or economic development of the owners does not affect the value of the land on resumption. When the court has to decide the value of the land to the vendor it does not take into account any accidental limitations on the vendor. 3. The increased value of the land because of its potentiality as an aerodrome should be considered (*Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer Vizagapatam* (2)). The economic state of the appellants is irrelevant. An able and willing vendor presupposes a vendor in full possession of his faculties and able to put the land to its most profitable use and also able to refuse to sell if the price offered by the hypothetical buyer is not high enough. 4. In valuing the land recent purchases of land in the vicinity by the Government from native owners should be considered. 5. Cases such as *Corrie* v. *MacDermott* (3) are distinguishable because in those cases there was a restriction on the right of alienation and also of user. Here the natives, though they could not sell, had the full right of user and could, in theory, extract from the land whatever profit or value was there and the value of the land to them was its full market value. 6. The land should be valued as at January 1940. The provision of the special Ordinance that the amount of the compensation and the persons entitled should be determined as nearly as possible in the manner prescribed under the *Lands Acquisition Ordinance* 1914, refers only to secs. 37 to 39 of the *Lands Acquisition Ordinance*: sec. 29 does not apply. 7. There is no reason why the English practice of allowing ten per cent for compulsory purchase should not apply in Papua. *Higgins* J. in *Spencer* v. *The Commonwealth* (4) disallowed a claim for ten per cent, but nevertheless seems to have added about ten per cent to his valuation.

T. W. Smith, for the respondent. Questions 1 and 8 will be automatically determined by the answers to the other questions. The title of the appellants to the land was the right of communal usufructuary occupation, and was not equivalent to a fee simple (*The Courts and Laws Adopting Ordinance (Amended) of* 1889, secs. 2, 3, 4; *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (5)). The

(1) (1905) 3 C.L.R. 656.
(2) (1939) A.C. 302.
(3) (1914) A.C. 1056.
(4) (1907) 4 C.L.R. 418.
(5) (1901) A.C. 373, at pp. 380, 383.

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provisions of the *Land Ordinance* 1911-1935 restricts the right of the appellants to sell or otherwise deal with the land and must therefore affect its value. The only purchaser is the Crown. The restriction on disposition must be taken into account as a factor, as the natives could not sell. The value of the land depends on the terms on which it is held by the owners (*Corrie* v. *MacDermott* (1); *MacDermott* v. *Corrie* (2)). The potentiality of the land for use as an aerodrome might be taken into account in valuing the land, but in determining the compensation it should not be the price that would be paid by a "driven" purchaser to an unwilling vendor. Although the potential value of the land was its value as an aerodrome, the parties should be regarded as being prepared to meet at a figure somewhere between the bare agricultural value and its potential value, namely, what a willing purchaser would pay (*Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (3)). The amount of compensation is fixed at what a willing purchaser would pay, and neither party must be considered to be driven into the bargain. The answer to question 5 (*a*) is the same. As to 5 (*b*), the only basis of bringing the buildings into consideration was that they became part of the land and were not removable at the end of the lease. Local native custom was that the owner of the materials became the owner of the house; what the owner of the land had in relation to such buildings was the right to insist upon their removal (*Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (4)). The appellants are not entitled to ten per cent or any other amount for compulsory acquisition (*In re Wilson and State Electricity Commission of Victoria* (5); *In re an Arbitration between Bowman and State Rivers and Water Supply Commission* (6)). The value of the land should be assessed according to the value on 1st January 1939 in accordance with *Lands Acquisition Ordinance* 1914, sec. 29. The evidence, however, shows that the buildings which were in existence on 1st January 1939 were also in existence on 1st January 1939.

Cur. adv. vult.

NOV. 24.

The following written judgments were delivered:—

RICH A.C.J. I have had the advantage of reading the judgment of *Williams* J. and as I am in substantial agreement with it I have nothing to add.

The appeal should be allowed.

(1) (1914) A.C. 1056; 18 C.L.R. 511.
(2) (1913) 17 C.L.R. 223.
(3) (1939) A.C. 302, at pp. 316, 322.
(4) (1901) A.C. 373.
(5) (1921) V.L.R. 459, at p. 463.
(6) (1930) V.L.R. 388.

STARKE J. Appeal by case stated from the Supreme Court of the Territory of Papua pursuant to the *Papua Act* 1905-1940, sec. 43. Counsel appeared for the Territory, but the appellants submitted a legal argument in writing pursuant to the section.

The appellants in the Supreme Court claimed compensation under the *Lands* (*Kila Kila Aerodrome*) *Acquisition Ordinance* 1939 (No. 19 of 1939). By that Ordinance, sec. 2, certain lands described in the schedules were vested in His Majesty, in the events which happened, for an estate of fee simple, freed and discharged from all trusts and encumbrances whatever. That Ordinance, sec. 3, also provided :—" The Government of the Territory of Papua shall pay compensation for the land vested in His Majesty pursuant to this Ordinance and the amount of such compensation and the persons entitled shall be determined as nearly as possible in the manner prescribed in respect of land compulsorily acquired under the *Lands Acquisition Ordinance*, 1914, notwithstanding anything to the contrary in such Ordinance." The *Lands Acquisition Ordinance* 1914 (No. 7 of 1914) provides, sec. 28, that in determining the compensation under the Ordinance, regard shall be had, so far as material to the case, to the value of the land acquired, but without reference to any increase in value arising from a proposal to carry out a public purpose. In the present case, that value should be assessed as on 1st January 1939 (Ordinance, sec. 29 (*b*)), but it would not seem that the value of the land was different at any subsequent date. The principle upon which compensation is assessed is the same as in English law. It is the value that a willing vendor might reasonably expect to obtain from a willing purchaser for the land with all potentialities, but any enhanced value attaching to the land by reason of the fact that it is being compulsorily acquired for the purpose of the acquiring authority must be disregarded (*Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (1) ; *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (2)).

The natives or people of Kila Kila are divided into clans called Iduhu, which control through headmen their lands. These natives or people had a right of enjoyment in respect of the lands acquired : it is a communal or usufructuary occupation with a perpetual right of possession in the community. But the lands were controlled by two Iduhu, of whom the plaintiffs in the action were the headmen or representatives. In 1937, the headmen or representatives of these Iduhu by an instrument in writing describing them as the owners of the land leased to His Majesty portion of the land the

(1) (1914) A.C. 569. (2) (1939) A.C. 302.

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subject of the acquisition for a term of ten years at a yearly rental of fifteen pounds per annum and this instrument becomes conclusive evidence of the facts therein set forth and of the title of the Crown to the estate or interest referred to: See *Land Ordinance* 1911-1935, Second Schedule, clause 7. The majority of these headmen or representatives are the appellants in this Court and it has been assumed in the Supreme Court and before this Court that they sufficiently represent the persons entitled to compensation under the Ordinance already mentioned.

The compensation under the Ordinance is payable on the footing that an estate in fee simple freed and discharged from all trusts and encumbrances whatever is being transferred from the natives or people of Kila Kila to the Crown: See Ordinance 1939 No. 19, sec. 3; *Amodu Tijani* v. *Secretary, Southern Nigeria* (1). The persons entitled to the compensation are the people or natives of Kila Kila, and it is distributable among the members of the community through the headmen or representatives of the Iduhu, which controlled the lands acquired. And no objection has been taken to the form of the action or to the parties thereto.

The value of the land is necessarily one of difficulty. It is situated in an uncivilized country and can at best be only roughly estimated. The learned judge fixed the value of the land for agricultural purposes at six pounds per acre for a block of seventy-one acres upon which there was an aerodrome, and twenty-eight pounds for another block of eighteen acres, or £454 altogether. And he held that this sum represented the true value of the land with all its potentialities. But he declined to consider as affecting the value of the land certain improvements and structures which existed upon the land at the date upon which the value of the land had to be assessed. These improvements and structures had been made by the Government of the Territory or by business firms who were licensees of the Government. They were aerodrome improvements such as the runways, drainage, roads, parking areas, and fencing, a building for housing the power plant erected on a concrete base with walls of fibro-cement sheets, a building for a radio station and meteorological office and laboratory erected on heavy cement blocks, a customs and quarantine office, and there were also other buildings erected by business firms under the licence of the Government. The learned judge was of opinion that these structures were not fixed to the land so as to become part of it, but remained chattels.

(1) (1921) 2 A.C. 399.

" The meaning of the word " (fixtures) " is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil. . . . But an exception has long been established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term " (*Bain* v. *Brand* (1)). And in determining whether or not a chattel becomes a fixture, the intention of the person affixing it to the soil is material only so far as it can be presumed from the degree and object of the annexation (*Hobson* v. *Gorringe* (2) ; *Provincial Bill Posting Co.* v. *Low Moor Iron Co.* (3) ; *Reid* v. *Smith* (4)).

The learned judge was unable to draw the inference that the improvements and structures were part of the land, because they would be useless to the natives and because he could not think that buildings erected in connection with a public utility were to remain attached to the land. Here I think the learned judge was in error. All he had to consider in connection with the structures on the land was the degree of annexation, which was very considerable, and the object of annexation, which was patent for all to see, namely their use as part of an aerodrome. Moreover, the improvements on the land in the way of runways, drainage, parking areas, and so forth were inherent in the land itself and did not depend upon annexation or affixation.

But the value of the land might, however, be affected and diminished if the structures and buildings upon the land upon the day for the assessment of its value were " trade fixtures " removable by the Government. The land did not vest in the Government until 7th February 1940, when the *Gazette* notice of vesting was published pursuant to the *Lands* (*Kila Kila Aerodrome*) *Acquisition Ordinance* 1939 No. 19, but on 1st January 1939, when the assessment had to be made, the Government's rights under the lease from the natives subsisted, including the right to remove trade fixtures upon the land during the continuance of its term. This latter right was a relaxation in favour of the tenant for the encouragement of trade.

But whether they are or are not trade fixtures is a question of fact depending upon the circumstances of the case. In some cases,

(1) (1876) 1 A.C. 762, at p. 772.
(2) (1897) 1 Ch. 182.
(3) (1909) 2 K.B. 344.
(4) (1905) 3 C.L.R. 656.

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the size and permanence and the general character and object of the structures and buildings may lead one to the conclusion that they are not tenant's fixtures but something permanently annexed to the land (See *Pole-Carew* v. *Western Counties and General Manure Co.* (1); *Whitehead* v. *Bennett* (2)); for the removal must be capable of being effected without material injury to the land or the destruction of the fixture: Cf. *Foa, Landlord and Tenant*, 4th ed. (1907), p. 697.

It is for the learned judge to determine whether the structures and buildings upon the land were or were not trade fixtures upon the land upon 1st January 1939. If they were, then in my opinion the value of the land should be assessed upon the footing that the Government had a right to remove them from the land and would, rather than pay compensation therefor, remove them from the land during the continuance of its term. I do not of course refer to the improvements upon the land such as runways and so forth already mentioned, inherent in the land.

The question remains how the land should be valued, if these improvements and structures or any portion thereof form part of the land. It is useless to consider what the land with the improvements and structures upon it would bring in the open or any other market, for there was no market. Some artificial method must be adopted, and the most satisfactory, to my mind, is to take the agricultural value of the land as fixed by the learned judge plus an addition measured by what it would cost to make or establish the improvements and structures existing upon and forming part of the land at the date of valuation but taking into account a proper deduction for obsolescence or depreciation: Cf. *Edinburgh Street Tramways Co.* v. *Lord Provost, &c., of Edinburgh* (3); *London Street Tramways Co.* v. *London County Council* (4); *Melbourne Tramway and Omnibus Co.* v. *Tramway Board* (5).

The leasehold interest in the Government also requires consideration and a proper deduction made in respect of it. One of the witnesses placed a value, as I follow his evidence, of £2,562 upon that interest. But the value of the interest depends, I apprehend, on the difference between the actual rent paid and the improved annual rental that the property is worth multiplied by the number of years' purchase at which the tenant's interest should be valued: See *Cripps, Compensation*, 8th ed. (1938), p. 189.

(1) (1920) 2 Ch. 97.
(2) (1858) 27 L.J. Ch. 474.
(3) (1894) A.C. 456, at pp. 459, 460.
(4) (1894) A.C. 489, at p. 491; (1894) 2 Q.B. 189, at pp. 191, 192.
(5) (1919) A.C. 667, at p. 672.

The appellants also claimed that they were entitled to ten per cent or some other amount for compulsory acquisition of their lands. In practice, a ten per cent allowance is often made, but " this percentage may be taken to cover various incidental costs and charges to which the owner is subject whose land has been taken, and if no percentage were added such incidental costs and charges would have to be considered in assessing the amount of compensation " (*Cripps, Compensation*, 8th ed. (1938), p. 213). Otherwise there is no right to this percentage, and in the present case the claim is untenable.

The question whether the provision of the *Land Ordinance* restricting the rights of the appellants to sell or otherwise deal with the land affects its value should be answered in the negative. The Ordinance, sec. 3, provides that save as thereinafter provided a native shall have no power to sell, lease, or otherwise deal with, or dispose of, any land, and any contract made by him to do so shall be void. But the Government may in certain cases purchase or lease native lands (sec. 5). The *Lands (Kila Kila Aerodrome) Acquisition Ordinance* 1939, however, disposes of the matter. It enables the Government to acquire the lands in question here and prescribes for payment of compensation to the natives or persons entitled thereto.

The questions stated should be answered as follows :—

1. No. The land should be valued as on 1st January 1939 with such improvements upon it as formed part of the land and such structures and buildings upon it as were permanently attached or affixed to it.

2. The land should be valued on the footing that an estate in fee simple freed and discharged from all trusts and encumbrances whatsoever was acquired by the Government.

3. No.

4. See No. 5.

5. Yes, (*a*) if subsisting improvements on 1st January 1939, (*b*) if permanently attached or affixed to the land on 1st January 1939.

6. No.

7. Yes.

8. Unnecessary to answer.

Finally, I would express the hope that the administration and the Protector of the Natives will consider the propriety of protecting

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the money payable to the natives as compensation and appropriating it by Ordinance or in some other lawful manner for the permanent welfare of the natives; e.g., in improving their lands or dwellings or schools or hospitals, and not allowing it to be wasted in exchange for shells or beads or coloured cloths or suchlike things.

WILLIAMS J. On 23rd March 1937 the appellants, who are natives of Papua, leased approximately fifty acres of land to the Crown for the term of ten years computed from 19th March 1937 at the yearly rental of fifteen pounds. The Crown constructed an aerodrome upon this land known as the Kila Kila Aerodrome. By 1st January 1939 the Crown had constructed on the land a runway formed with concrete drains and parking areas and had enclosed the whole aerodrome with a fence. The Crown had also erected certain buildings occupied as a radio and meteorological station and office and a customs and quarantine office; and certain companies had also placed buildings on the land, which they used in connection with servicing the aircraft. The owners of the buildings paid no rent and no charges were made for the use of the aerodrome. The buildings, with the exception of one, were erected on concrete piers. There was no evidence to show whether or not they were fastened to these piers. All the buildings were erected for the purpose of using the land as an aerodrome and for no other purpose whatever. The value of the work done in making the aerodrome was assessed on behalf of the appellants at £2,740 and of the buildings at £3,460. The respondent gave no evidence of value.

After this work had been done to the land and these buildings had been erected the *Lands (Kila Kila Aerodrome) Acquisition Ordinance* 1939 was passed, authorizing the resumption of the leased lands which, together with about twenty acres of adjoining lands and a further area of land comprising about eighteen acres situated about one mile from the leased lands, were included in the schedules thereto. Clause 3 of the Ordinance provided that the Crown should pay compensation and the amount of such compensation should be determined as nearly as possible in the manner prescribed in respect of land compulsorily acquired under the *Lands Acquisition Ordinance* 1914. By notice in the *Government Gazette* dated 7th February 1940 the lands described in the schedules were resumed by the Crown.

The appellants brought an action in the Central Court of Papua to determine the amount of compensation to which they were entitled. The action came on for trial before *Gore* J., who held that

the resumed lands had no potentiality except for use as agricultural lands and assessed the compensation on that basis at £454.

This appeal raises the question whether the basis of compensation adopted by the learned trial judge was correct.

As appears from his Honour's informative report, the appellants' title to the land was a communal usufructuary title equivalent to full ownership of the land, so that they were entitled to be compensated on this footing (*Amodu Tijani* v. *Secretary, Southern Nigeria* (1)). The *Land Ordinance* 1911-1935, sec. 3, prohibits the disposal of land owned by natives by sale, lease or any other dealing and any contract made by them to dispose of land is void, but this restriction could have no detrimental effect upon the determination of the value of the land when compulsorily acquired, because in the hands of the Crown it would be freed therefrom. Indeed, the reference in the *Lands (Kila Kila Aerodrome) Acquisition Ordinance* 1939, sec. 3, to the *Lands Acquisition Ordinance* 1914 is sufficient to show that the appellants as full owners of the land are entitled to have the compensation assessed upon as ample a basis as though it had been acquired from a European. The Crown stressed the fact that under the peculiar circumstances of this case it was the only possible purchaser, but even so, as pointed out by the Privy Council in *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (2), "if the potentiality is of value to the vendor if there happen to be two or more possible purchasers of it, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it."

The *Lands Acquisition Ordinance* 1914, sec. 29, provides as follows: —"The value of any land acquired by compulsory process shall be assessed as follows:—(*a*) In the case of land acquired for a public purpose not authorised by a Special Ordinance according to the value of the land on the first day of January last preceding the date of acquisition; and (*b*) In the case of land acquired for a public purpose authorised by a Special Ordinance, according to the value of the land on the first day of January last preceding the first day of the meeting of the Legislative Council in which the Special Ordinance was passed. (2) The value of the land shall be assessed without reference to any increase in value arising from the proposal to carry out the public purpose."

(1) (1921) 2 A.C. 399.

(2) (1939) A.C. 302, at pp. 316, 317.

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At the date of the resumption the leased part of the land had been improved as an aerodrome, but the additional land was still unimproved for this purpose. The *Lands (Kila Kila Aerodrome) Acquisition Ordinance* 1939 does not specifically authorize a public purpose, but the preamble states that the lands described in the schedules are required immediately for the purposes of or connected with the Kila Kila Aerodrome, and it appears to me that this statement is sufficient to bring the case within the *Lands Acquisition Ordinance* 1914, sec. 29 (*b*). The correct date of valuation is therefore 1st January 1939. It is true that the Crown was free to acquire other suitable lands of the same dimensions and construct an aerodrome there, but to do so would require considerable outlay, so that the resumed lands had the potentiality that, having been improved to the extent already mentioned, the Crown would be willing to acquire them for their agricultural value plus the value of the expenditure already made rather than to have to purchase other lands at their agricultural value and then have the trouble and expense of improving them to the same extent. Assuming, therefore, that the appellants were willing vendors and the Crown was a willing purchaser the price would be determined having regard to the fact that the vendors would know that the Crown would pay this amount but no more, and the Crown would know that the vendors could reasonably expect this price (*In re London County Council and London Street Tramways Co.* (1); *Melbourne Tramway and Omnibus Co.* v. *Tramway Board* (2)). Similar principles are applied where land used as a church or school is resumed, the compensation being fixed by ascertaining what it would cost to acquire an equally convenient site and erect equally convenient buildings there (*Halsbury*, 2nd ed. vol. 6, p. 45; *Cripps* on *Compensation*, 7th ed. (1931), p. 170). In determining the amount, the improvements made to the leased land consisting of the runway and the concrete drains would have to be taken into account.

There remains the question of the buildings. On the scanty evidence available to this Court they were apparently fixtures, but this is a matter for the learned trial judge to determine applying the principles referred to in *Halsbury*, 2nd. ed, vol. 20, pp. 96 et seq., and in the cases referred to by this Court in *Commissioner of Stamps (W.A.)* v. *L. Whiteman Ltd.* (3). A tenant is allowed to remove trade fixtures during or at the end of the term. The Crown as lessee was not trading in the strict sense, but the aerodrome was

(1) (1894) 2 Q.B. 189.
(2) (1919) A.C. 667.
(3) (1940) 64 C.L.R. 407.

used for commercial purposes, although not for profit, and it seems to me that the principles applicable to trade fixtures can be applied to the buildings placed there by the Crown. The buildings erected by the companies with the permission of the Crown were clearly placed there for the purposes of trade, and were therefore tenant's fixtures (*Halsbury*, 2nd ed. vol. 20, pp. 105, note *a*, and 106, note *e*; *Mears* v. *Callender* (1); *Webb* v. *Bevis Ltd.* (2); *North Shore Gas Co. Ltd.* v. *Commissioner of Stamp Duties* (*N.S.W.*) (3)). If, as appears to be probable, the buildings can be removed, their only materiality in the assessment of the compensation would be that it would benefit the Crown to pay something more for the resumed land rather than to have to go to the expense of removing and re-erecting them elsewhere.

The case is not one in which ten per cent should be added to the value of the land when determined in accordance with these principles. This addition is often made to cover incidental costs and charges to which an owner whose lands are taken is subject so as to ensure that he will receive full compensation, but there do not appear to be any circumstances here which would require the addition.

These considerations show that the valuation on an agricultural basis made by the learned judge was erroneous and that the case should be referred back to him to amend his valuation in the light of these general principles. When the amount of compensation has been determined, it will be necessary to consider whether the rental of fifteen pounds per annum payable under the existing lease of the fifty acres is equivalent to the full rental value of the land. If it is not, as appears to be the case, the lessee would be entitled to an amount to represent the value of the lease to him for the balance of the term and this amount should be deducted from the compensation, because, under an ordinary resumption, the lessee would be entitled thereto as his share of the full value of the land, but here the Crown and the lessee are the same person.

As a check to the amount of the valuation arrived at according to these principles, it would be justifiable to assess the rental value of the resumed lands by estimating the amount which the Crown would be willing to pay to continue its occupation of the leased lands having regard to the extent to which they had been improved for the purpose of an aerodrome, and to occupy the additional lands rather than to have to go elsewhere, carry out similar improvements and remove the buildings thereto, and then to capitalize this rental

(1) (1901) 2 Ch. 388, at pp. 396, 397. (2) (1940) 1 All E.R. 247.
(3) (1940) 63 C.L.R. 52, at p. 68.

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value (*Earl of Eldon* v. *North-Eastern Railway Co.* (1); *In re Athlone Rifle Range* (2)).

The appeal should be allowed and the questions asked in the case answered as suggested by my brother *Starke*.

Appeal allowed. Discharge the order of the Court below. Remit the matter to it to award compensation in accordance with the terms of this judgment. Respondent to pay the appellants' costs of this appeal. Costs of the original hearing to be dealt with by the Supreme Court.

Solicitor for the appellants, *R. D. Bertie*.

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

O. J. G.

(1) (1899) 80 L.T. 723.

(2) (1902) 1 Ir. Ch. 433.