LECTURE XXII.

THE DEFINITION, REGULATION, AND BUYING-OUT OF FOREST-EASEMENTS.—(*Concluded.*)

Buying-out or Commutation.

THE Acts differ slightly in their wording as to the circumstances under which the law permits, or directs, the getting rid of rights by "commuting" them for a compensation. They do not notice buying-out by consent and amicable arrangement; but there is nothing in the law to prevent the parties coming to terms for the extinction of a right, at any time and under any circumstances. All the Acts agree in referring only to compulsory buying-out in State (Reserved) Forests; *i.e.*, they lay down certain conditions under which the Forest Settlement Officer can decide to apply the process. When under such conditions, an order is made, the right-holder cannot (subject to his right of appeal) object.

The Acts also regard the commuting or buying-out only as part of the initial proceedings (Lecture XVII.) for constituting the forest; no provision is made (and this is a defect to be remedied at some future time) for any subsequent application of either side to compensate rights. Yet it is obvious that circumstances may alter; and rights which did not appear at the time of constitution to need any adjustment, may afterwards prove an insuperable obstacle to proper working; and the right-holder himself may be anxious to get his right commuted. There ought then to be a power of proceeding before a proper authority.[1]

In the Indian Forest Act, after mentioning the several modes

[1] The Land Acq. Act (X. of 1870) might possibly be held to apply to such a case; but it would probably be considered rather a straining of language. The Act enables Government to make a declaration of public utility in the case of "land"; and (by the definition clause) "land" includes "benefits to arise out of land;" so that if it was a public advantage to be free of the easement, it might be said that the forest right (as a benefit to arise, &c.) was required for a public purpose.

(already discussed) of providing for Forest-easements, sec. 15 goes on to say: "In case the Forest Settlement Officer finds it impossible, having due regard to the maintenance of the (Reserved) Forest to make such settlement under Section 14 as shall ensure the continued exercise of the said rights," &c., he *shall* (subject to Rules which may be made on the subject) proceed to commute, *i.e.*, to buy out the rights.

The Burma Act says merely, "If the right is not provided for otherwise," the F. S. O. shall commute it. The meaning, however, is practically just the same, as the right would be "provided for" by admission to exercise, if it were not incompatible with the safety of the forest. The Madras Act adopts the same wording as the Burma Act.

The Indian Act expresses distinctly, the principle that a right can be exercised in the forest under two conditions;—one in favour of the right itself, one in favour of the safe existence of the servient forest. The right must be ensured a *continued exercise* (*i.e.*, not satisfied for a short time, after which it may fail); and the forest must be *duly maintained*, *i.e.*, must not have its resources over-taxed nor the indispensable business-like management of it prevented.

From this clear expression of principle (and no other meaning can be given to the words used) it appears logically to follow that, if the forest is unable, in its natural and existing state, to provide for all the rights allowed, and that *without* fault of the Government in its Forest Department (through over-cutting, defective management, &c.), then a reduction of the right must follow; and that in such a case there could be no claim to compensation. The deficiency being due to nature—or due to some action in the past, for which the present cannot be called to answer—there seems to me no more ground for compensating a disappointed claimant, than there would be if some natural calamity had caused the whole forest absolutely to disappear.

It is impossible to say how the matter would be settled if a case actually occurred in which a forest was at the time of constitution in a bad state (so that whatever it would ultimately bear when restored, it would not *then* bear the rights), or when a forest became in a bad state, perhaps through an extensive accidental fire, or an attack of insects. Equitably and in conformity with principle I submit, a reduction (*cf.* pp. 293, 305) or a suspension of rights *pro tem.* could

be claimed; and on what *principle* of justice the public treasury could be asked to pay compensation, I am at a loss to conceive.

The Indian Acts however make no provision for the question; and seem to award compensation under all circumstances where the F. S. O. cannot make provision for the rights. It may perhaps be held that the Act is so, reason or no reason: or that it was intended on what I must call eleemosynary considerations; or because the inability of the forest would be due to the absence of public control in the past. There I must leave the subject, and pass on to what is next provided.

The forest will have been carefully studied and inspected before the settlement, so that the F. S. O. will have the best means possible under the circumstances, of judging on the points which the law requires him to take into consideration. If in the end, it appears that the available grazing acreage and the probable yield in wood, will not (without wrongful excess) continue to supply the rights, commutation is the only remedy provided in set terms. It would not, however, be necessary to commute the whole of the rights in many cases; there is nothing, for instance, in the law, which would prevent the F. S. O. arranging with a right-holder who had 50 cows, to take compensation for 25, and continue to graze the other 25.

But ordinarily, it is not only one right that has to be dealt with; there are many right-holders; it is the *aggregate burden of their claims* that may prove excessive; and it would be difficult to lay down any rule under which *some* rights should be entirely bought out and the rest left alone. In some cases at any rate, it would be desired to equalize, by adopting the plan of *proportionate* reduction of the whole: compensating all for the part of the right extinguished, and leaving the rest. Here the principle explained at p. 378, (App. A.) might be applicable. Considering the probable total capacity of the forest in grazing acres, or its yearly yield of wood for fuel or building, the reduced quantity for each R. H. could be calculated out easily enough by the aid of the formula given in the note to p. 378.

If a general proportionate reduction had to be made, there would, I think, be no occasion in India to make any allowance for the owner's right of participation. But generally, where the rights absorb the whole produce, the State as owner, would

certainly have a prior right to reserve such part of the produce as would suffice to meet the cost of the establishment. This right depends on the principle (*mitnutzungs-recht*) explained on pp. 294, 297.

In all cases, it rests with the Forest Settlement Officer (after hearing the parties, and subject to appeal), to determine when the circumstances exist under which the right has to be bought out. He ultimately decides (on the evidence of forest experts, reports, inspections, &c.) that the right would or would not be compatible with the due maintenance of the forest; and that the regulated right could or could not be ensured a continued exercise.

Nothing is said as to the easement being indispensable to the R. H. By this term I do not mean to refer to what is known as an "easement of necessity" (p. 80), which concerns easements such as the right of way, or watercourse. Sect. 24 of the Act settles all such questions; and the procedure under sect. 15 is not concerned with them in any way. But in the case of right of pasture or to produce, it might prove to be the case that a R. H. would be almost unable to find a substitute for his right. In practice, fortunately, the question will very rarely prove beyond the power of the F. S. O. to dispose of equitably; the times were not ripe when the Act was made, to attempt any refined distinctions or provisions on the subject.[1]

[1] In France the plea of "indispensability" may be raised; and if there is a dispute it is settled by the Conseil de Préfecture. Wood-rights are never deemed to be indispensable; as wood can always be bought; but grazing may be (see Code For. Art. 64). (But this would not avail if it were the fact that the forest was not in a condition to support the right). In the Austrian law, commutation may be refused when either the right is absolutely necessary to the R. H., or the cost of compensation to the forest-owner would be excessive.

In principle, therefore, the continental law decides, 'if the right be of a kind that we can recognize as indispensable, and be proved to be so, then, so long as the forest *can* supply it, the right cannot be got rid of: if the forest is unable to support it continuously, and with reference to the safety of the servient property, we cannot help it, that is the fault of nature.' On the general subject, another consideration must be borne in mind: it may be true that in some cases a right is 'indispensable' or is very much wanted, but there are hill ranges and many other places, where, if the grazing right is not reduced to perhaps rather inconvenient limits, or stopped altogether for a time, *nature will stop it for you* by ceasing to produce, on the ill-used soil, the grass necessary for the grazing-right. It is much better to give compensation than to produce this result. Moreover, who is to decide in a backward or semi-civilized country, whether the right *is* absolutely necessary? In Europe the conditions are different, and it may be possible to discuss and settle such a question by

The means of compensation are specified in general terms as "land" or "a sum of money" or "compensation in such other manner" as is thought fit by the F. S. O., with whom rests the decision as to which form is best to adopt. He may always give compensation partly in one form and partly in another. Only in the Burma Act (sec. 15) is his choice restricted by the proviso that he cannot give land in compensation, unless the right-holder consents to take it. But anywhere, the F. S. O. would never force a man to take land if he preferred money.

These terms would allow of the adoption of any one of the forms used in Germany, which are described in Appendix A. to this Lecture. The practical considerations there stated will also prove worthy of attention.

Observe however in India, that when land is given, it will almost always be culturable land, and there is no reason why it should be a part of the forest; for other Government land in the neighbourhood may be available. In many cases, outlying areas of the forest will already have been set apart for the purpose of providing for rights which are excluded from the reserve (p. 266).[1]

In saying that *culturable* land would be awarded, I should add that as far as the terms of the Act go, there is nothing to prevent the compensation plot being wood- or forest-land, or a plot adapted only to some particular use; but practically such lands would not be acceptable; the party to be compensated would rarely, if ever, be able to utilize a plot of forest as forest; nor does there exist any legal provision compelling him to maintain it as such. Whatever land is given, even if it is a portion of the forest area itself, it will always be cleared for cultivation.

In general it should be observed, that it is well to explain matters freely, and to advise the (probably ignorant) right-holder, and see that he understands his own advantage and the *pros* and *cons.* in accepting

evidence and argument before a court of law. In India, it is much better to leave the matter to the Settlement Officer (and, the local Government has power *to lay down any rules* it pleases for his guidance in this matter). The Settlement Officer is bound equitably to consider *both* the forest interest and the interest of the people, and decide whether a commutation is or is not desirable.

[1] I shall be excused for repeating, that we are here speaking of the grant of land in absolute property as a compensation for a right extinguished; and this has nothing to do with the previous arrangement whereby the right is left in existence, but its exercise is provided for in some tract excluded from the (legally constituted) forest, but which *does not* become the property of the right-holder.

one or other form of compensation. Culturable land is really one of the best forms of compensation: it gives a steady return, and is (under all ordinary circumstances) a secure and substantial property; it may also give a man the means of feeding his own cattle, and providing manure for his own original holding (in connection with which the right existed). On the other hand, there are cases in which money, and especially an annual payment, is more useful.

Valuation.

The Act says nothing about the principles on which either the valuation of the right, or the valuation of the means of compensation, is to be conducted. Things were not ripe in 1878, for such provisions; the basis of practical experience was wanting. But as time goes on, Rules can be made under the Act, which will provide all that is necessary. Here again the details given in Appendix A. as to valuation in Germany, will often prove suggestive. The rules of the French law (as described in the Code and the "Ordonnance") will also prove useful, whether relating to the compensation by land (*cantonnement*) for wood-rights, or by money (*per voie de rachat*) for other rights.[1]

Under any circumstances it is necessary for valuation purposes to start with a unit of value; and obviously that is the sum of money representing fairly *the value of one year's exercise of the right*; or if it is a right exerciseable once in 5, or once in 10, or once in 30 years, &c. (as for repairs and total rebuilding) then an average can be taken.

In India this can only be a roughly calculated and liberal sum—liberal, I add, partly because the transaction is compulsory, and partly to obviate inequalities resulting from a possible rise and fall in prices. General conditions can be taken into consideration, *e.g.*, grazing for a cow in good forest-grazing, would be valued higher than that in a poor dry scrub-jungle, where grass only grew during a short "rainy" season. A rough acreage of the area requisite to supply the right could be estimated, and a fair value per acre assigned; or calculating

[1] The grant of a bit of the forest cut off (*cantonnement*)—it is *always* a bit so cut off—is applied to wood-rights, because the R. H. *can* if he pleases, keep the place as forest to supply his rights in kind; but otherwise he is *free* to do what he chooses; the land is valued *as it is*, and handed over to him: "*le cantonnement compense en pleine propriété ce qu'il ôte en droits d'usage*" (*Meaume*, sec. 162, p. 223).

the probable value[1] of feeding one animal (see p. 353), and multiplying the figure by the number of animals grazing in a year, an approximate value of the annual grazing right would be obtained. In all cases the first step is to obtain *the sum of money that represents one year's average exercise.*

The next step is to *capitalize* this unit value. To do this scientifically, would involve the consideration of what is the proper rate of interest which a valuable easement, regarded as a kind of property or investment, may be taken normally to produce; just as we know by experience what rate of interest can usually be got from house property, from investment in public funds, from agricultural land, &c., &c., on a general average. That being known, it is a matter of arithmetic to calculate the capital value, or, in other words, to say "how many years' purchase" (of the annual value) should be fixed.[2] For a long time to come, in India, it must suffice to lay this down more or less arbitrarily; (we might assume (for example) that the R. H. ought to get as the rate of interest on the capital value of his right about the same as culturable land would give him; this would be sufficiently liberal). In that case, something between 15 and 20 years' purchase (according to the quality of the grazing and the practical value of the right—greater or less, to the R. H.) might be adopted.

Given the capital value of the right, we have lastly to determine a certain compensation, the value of which will be a just (and fairly liberal) equivalent. If it is land, it will be best (in order to simplify calculation) to value it as if cleared and ready for the plough. If costs will be incurred in clearing, they may be provided for by giving a lump sum of money to cover all initial expenses of starting cultivation. The land will also in future, be liable to land revenue and cesses. It may be that the Controlling Revenue authorities will consent to remit these (in revenue language the

[1] This value might be calculated by ascertaining the cost of stall-feeding, and taking a rate per head more or less approaching the cost, according as the grazing (which is being valued) is better or poorer (see p. 383).

[2] The *formula* is $C = \frac{R \times 100}{p}$; where C is the required capital value; R is the annual value, and p the given rate of interest. Let us suppose a grazing right whose annual value is *Rs.* 24; and we take 5 p. c. as a proper rate of interest: then $C = \frac{24 \times 100}{5} = 480$ (*Rs.*) or, in other words, we take 20 years' purchase of the annual value to give the capital value (see p. 383).

grant will be *muâfi*), if not, then the capitalized revenue charge (at the same number of years' purchase) must be deducted from the total value of the land; and this will result in so much larger an extent (in area) or some superior quality of land, being requisite.

In valuing land, we can have recourse to comparison with the (possibly ascertainable) value of similar land in the neighbourhood. But most commonly it will be necessary to calculate a fair money value per acre for the crops (of ordinary kind) that can suitably, and will according to custom, be grown (deducting the costs of production, and the land revenue and cesses if these are not remitted). This is the value per acre according to yearly average return; and the total or capital value of the land per acre is found by multiplying this produce value by a certain number of years' purchase, which may be from 15 to 20 (land rarely sells for more).[1]

If this sort of calculation is not practicable, then I submit that we must waive all questions of logical accuracy or real equivalence, and adopt such a general rule as is contemplated by the law of Saxony which lays down[2] that "the plot of land given in compensation must be in extent and capability, such that the grantee can get off it (an annual) yield (of whatever kind of crop) *equal in value to the calculated annual value of the right*" which is being compensated; (*i.e.*, if the right yields what is represented by a money value of 10 Rupees a year, the land must also bear crops giving a net yield of Res. 10.) No doubt, in theory, this is not an accurate rule;[3] but then accuracy is, under existing circumstances (and will be for many years to come), unattainable in India and the Colonies. In all cases, a good deal will depend on locality, on land being generally more or less prolific, and more or less desirable and in demand, as property.

If a "sum of money" is given, it will obviously be that sum which represents the capitalized value of the right, the calculation of which has already been explained.

[1] If the produce valuation per acre is known, we can at once tell how many acres will be needed to give a capital value equal to the capital value of the right. A grazing right at 20 *Res.* annual value is capitalized (say × 20) at *Res.* 400. Land available has a roughly estimated *net* produce value of *Res.* 10 per acre. Capitalized (at say × 15) it is *Res.* 150. Something under 3 acres would then be the compensation.

[2] Law of March 17th, 1832, Art. 130. *See* Qvenzel, p. 216 ff.

[3] See remarks in Appendix A. (p. 884).

I would, however, point out, that a payment of a lump sum of money down, to an Indian peasant right-holder, is about the worst way of compensating him that is possible. He will have no idea of investing the money, but will spend it all in a very short time, or the money-lender will absorb it. I do not discuss the possibility of giving a sum in Government securities or deposited in the Savings Bank; but it can certainly be urged that an annual payment, or other sum to be drawn periodically from the Treasury (of the Tahsíl or Revenue Subdivision) is far more useful and lasting. It is clear that from the mention of a "sum of money" and also of "other means" and the wide discretion given to the F. S. O., that there could be no legal objection to making a periodical payment.

Under this head it might be possible to compensate in money by means of a *remission of the land revenue* payable on the person's own agricultural holding. This would be in fact, making a money payment, but securing its being advantageously expended. No such arrangement could be made without the previous sanction of the Chief Revenue Authority. It may also be possible in some cases to arrange some *delivery in kind*, as a certain quantity of sawn wood, or a delivery of manure (in kind) in lieu of a litter-right; but such matters can only just be mentioned as quite within the terms of the law.

Whatever form is adopted, the object ought to be to give realizable value, *i.e.*, something which practically suits the condition of the recipient, and is really a compensation to him for the right he gives up.