

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commissioner of Public Works, representing the Colonial Government of the Colony of the Cape of Good Hope v. Logan, from the Supreme Court of the Cape of Good Hope; delivered the 12th June 1903.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The short question in this Appeal is, whether the Respondent is entitled to compensation for lands expropriated by the Government of Cape Colony for purposes connected with a railroad constructed by the Government through the Respondent's land.

The land in question is part of a farm called De Draai Farm or Kruispad, which was originally granted by the Government to one Schalk Willem Pienaar on perpetual quit rent, and by the deed of grant, which is dated the 1st November 1838, the grant is expressed to be made subject to certain conditions therein mentioned and as "being further subject to all such duties and regulations as either are already or shall in future be established respecting lands granted under similar tenure."

It has already been decided by this Board in *The Divisional Council of the Cape Division v. De Villiers* (2 A. C. 567), and it is not

disputed, that lands of this tenure are subject to the provisions of the Proclamation of Sir John Francis Cradock of the 6th August 1813 for the conversion of loan places to perpetual quit rent. By this Proclamation it was provided that every holder of a loan place, on his making application by memorial to the Government for the purpose, should have a grant of his place on perpetual quit rent to the same extent as he had theretofore legally possessed the same on loan. Sections 4 and 11 are as follows:—

Section 4.—“The Government reserves no other rights but those on mines of precious stones, gold, or silver, as also the rights of making and repairing public roads and raising materials for that purpose on the premises; other mines of iron, lead, copper, tin, coals, slate, or limestone are to belong to the proprietor.”

Section 11.—“This perpetual quit rent” (meaning apparently the land held on that tenure) “shall further not be liable to any other burthens but those to which all freehold lands are already subject or which may hereafter be further prescribed.”

Under later legislation the powers of the Government in respect of the making of roads were vested partly in Road Commissioners and partly in Divisional Councils. The provisions of the earlier Ordinances and Acts for this purpose were consolidated in Act IX. of 1858, intituled “An Act to provide for the Management of the Public Roads of the Colony,” the material Sections of which, for the present purposes, are as follows:—

“Section 10.—The Chief Commissioner or any Assistant Commissioner or any Officer duly appointed by the Governor and acting under the authority of the Governor may enter upon and take possession of so much of any land belonging to Her Majesty the Queen as may be required for the purpose of any main road and for the erection of toll-

“ houses, toll-bars, residences for workmen, or for any other  
 “ purpose relating to the execution of this Act ; and they may  
 “ enter upon all such land lying convenient to a main road, and  
 “ there dig, get, and carry away any stone, clay, or other  
 “ materials which may be required or serviceable for making  
 “ or repairing any main road.

‘ Section 11.—For the purpose of making any such main  
 “ road, and of providing any such toll-houses and residences  
 “ as aforesaid, and generally for any of the objects of this Act,  
 “ the aforesaid Commissioners of Roads, or other Officer by  
 “ them duly authorized, are hereby invested for the purpose of  
 “ so doing with all and singular the legal rights, if any, belong-  
 “ ing to the Government of this Colony in respect to the  
 “ taking of any land and the raising and carrying away  
 “ materials for making and repairing public roads, whether  
 “ such rights have been preserved to the said Government by  
 “ the proclamation of His Excellency Sir John Francis  
 “ Cradock bearing date the 6th day of August 1813, permit-  
 “ ting the conversion of lands on loan into places on perpetual  
 “ quit rent, or have been created by express stipulation or  
 “ condition in any grant of freehold property, or exist in any  
 “ other way or manner whatsoever: Provided that no land be  
 “ taken or materials be raised or carried away as aforesaid  
 “ without previous notice to the proprietor thereof.

“ Section 12.—If any of the aforesaid Commissioners of  
 “ Roads, acting under the authority of the Governor, should  
 “ require to take or use any land or to dig, get, or carry away  
 “ any materials situated as aforesaid, belonging to any person  
 “ who may not be bound by law to allow the said Commis-  
 “ sioner so to do without requiring any recompense or  
 “ payment, and who may think proper to require compensation  
 “ from the said Commissioner—or if he should require to use  
 “ any land or to take materials from any land that the Govern-  
 “ ment may have a legal right to use, but which has been  
 “ improved by cultivation, irrigation, or otherwise—he may treat  
 “ and agree with every such person for the purchase or hire as  
 “ the case may be of any such land or materials, and may  
 “ enter into any contract relative to the obtaining of such land  
 “ or materials, and for compensation for the use of such  
 “ improved land, upon such terms and conditions as he shall  
 “ judge expedient.”

And the same Section further provided, in case of disagreement between the owner of the land and the Commissioner as to the amount of the purchase money, or hire, or other recompense to be respectively given and accepted, for the same to be settled by arbitration as therein appears.

By Section 3 of Act XIX. of 1874, which provided for the construction (amongst other railways) of a railway from Worcester to

Beaufort West, all and singular the powers which were by the Act IX. of 1858 bestowed upon the Commissioners of Roads in regard to taking or acquiring lands and materials necessary for the making or repairing of any such main road as in the said Act mentioned or of any works in connection therewith, were bestowed upon the Governor or any person charged by him with the making or maintaining the railways precisely as if the said powers and authorities were, *mutatis mutandis*, therein again set forth, and as if the said railways were public roads.

The railway from Worcester to Beaufort West was constructed partly on lands forming part of the farm now belonging to the Respondent, and a station called the Touws River Station was made there. Previously to and in the year 1885 the Government acquired portions of the farm for the purposes connected with the railway, including the building of an hotel, and paid Du Plessis, the then owner of the farm, 350*l.* in respect of such expropriation. According to the evidence of Mr. Elliott, the general manager of the Government Railways, that sum was paid because of the hotel, which he thought was not quite a railway purpose.

On the 16th December 1896 the Government gave notice to the executors of Du Plessis (then deceased) of their intention to expropriate a further portion of the farm in extent 160 acres. The land appears to be required for certain purposes connected with the existing railway other than construction or maintenance thereof. By deed of transfer dated the 24th February 1897 the farm was conveyed to the Respondent, who thereupon became and is now the registered owner of it. The Respondent bought with notice of the notice of 16th December 1896.

Lengthy negotiations thereupon ensued between the Government and the Respondent respecting his right to compensation for the land

expropriated under the notice of 1896, and respecting certain rights of water. In the result the Respondent, on the 25th of July 1900, commenced the present action against the Appellant, and by his declaration he claimed (amongst other things) a declaration that the land claimed to be expropriated since 1885 was not required for railway purposes, and restoration of the same to him with damages. At the trial the other issues were disposed of, and as it appeared that the Respondent was quite willing to the expropriation going through provided compensation was paid, the parties agreed that the issue be determined whether the Respondent was entitled to compensation in respect of the expropriation.

The Supreme Court gave judgment, dated the 6th May 1901, for the Respondent, declaring him entitled to compensation for the land expropriated. The reasons for the judgment were stated by the Acting Chief Justice Sir E. J. Buchanan.

It is admitted that the land in question has not been improved by cultivation, irrigation, or otherwise within the meaning of the 12th Section of Act IX. of 1858, and that the Appellant's right to expropriate the land without payment of compensation is derived from the Proclamation of 1813, which (as he contends) is extended by the 11th Section of that Act to the other purposes mentioned in that Section.

The question therefore turns exclusively on the proper construction of the 11th Section. Does that Section mean that the right of taking land and materials for the making and maintenance of roads reserved to the Government as regards quit-rent lands by the Proclamation of 1813 are extended and made applicable to the other purposes mentioned in the Section? Or is it only a transfer Section whereby the existing powers of the Government *tales quales* are trans-

ferred to and vested in the Commissioners? If the former is the true construction, the decision should be in favour of the Appellant, for their Lordships think that the power, if extended to taking land for new purposes, must be a power to expropriate without the payment of compensation as reserved by the Proclamation. It must be admitted that the language of the Section is capable of either construction. In favour of the Appellant's construction it may be argued that the whole Section is governed by the opening words "for the purpose of making any such main road and of providing any such toll-houses and residences as aforesaid and generally for any of the objects of this Act." And that the words "for the purpose of so doing" are repeated after the word "invested." On the other hand, if the object was to extend the existing power to new purposes, which is equivalent to the creation of a new power of expropriation, you would expect a much more direct expression of the intention, and it may be pointed out that the Section extends to freehold lands as well as quit-rent, and the existing powers which had been created by express stipulation or condition or in some other way or manner as regards freeholds, might well be powers which would be sufficient for some or all of the purposes mentioned so as to satisfy the words of the Section. Their Lordships are disposed to adopt the narrower construction of the Section which would make it a transfer only of the existing powers from the Government to the Commissioners as more conformable with the language used. But their Lordships are also influenced by the consideration that the effect of the Appellant's construction would be to take away the Respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This

principle has frequently been recognised by the Courts of this country as a canon of construction, and was approved and acted on by Lord Watson in delivering the Judgment of this Board in *The Western Counties Railway Company v. Windsor and Annapolis Railway Company* (7 A. C. 178, at p. 188).

Their Lordships therefore agree with the conclusion of the learned Judges in the Supreme Court, though not perhaps for quite the same reasons. They are of opinion that the Respondent was not bound by law to allow the Appellant to take the land for the purposes for which they are required without recompense, and he is therefore entitled to compensation under the 12th Section of the Act. They will therefore humbly advise His Majesty that the Appeal be dismissed. The Appellant will pay the costs of it.

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