

FITCHAT v. COLONIAL SECRETARY AND CENTRAL SOUTH AFRICAN RAILWAYS.

1910. *May* 18. MAASDORP, C.J., and WARD, J.

Expropriation.—*Sec. 4 of Ordinance 46 of 1903.*—*Servitude.*

To expropriate land means to take the ownership of it, including *inter alia* the right to walk, ride and drive over the land.

This matter arose out of the recent proceedings reported on p. 14 (*supra*), whereby the second respondents were interdicted from obstructing a railway crossing.

Subsequent to this interdict the first respondent, purporting to act under the powers vested in him by Ordinance 46 of 1903, had expropriated the right-of-way in question, and the second respondents had thereupon fenced in the railway line on both sides and intimated to the applicant that there was no longer any right-of-way. Applicant now moved the Court for an order declaring the expropriation to be illegal and forbidding the second respondents from in any way interfering with the right-of-way over the line, to which the applicant was entitled as an erf holder, alleging that he had suffered damage through the closing of the road.

Blaine, K.C. (with him *Brebner*), for the applicant: The legality of the expropriation is entirely dependent on the wording of Ordinance 46 of 1903. Sec. 4 empowers the Governor to enter upon, take possession of and use any land required for railway purposes. No definition of land is given, and therefore the ordinary meaning must be attached, which entirely excludes an incorporeal right over the land. Statutes depriving individuals of rights must be expressed in the clearest terms. Compare the Land Clauses Act, 8 & 9 Vict. c. 18, sec. 3, incorporated in subsequent expropriation Acts, in which a very wide meaning is given to the word "land."

[WARD, J.: Is not sec. 4 taken almost bodily from the Railway Clauses Act of 1845, where no definition of land is given?

MAASDORP, C.J.: How can you get over sub-sec. (b), which, with a view to the entering upon and the taking possession and use of any land, gives special power to "divert . . . permanently . . . any roads, streets or ways"? Supposing there had been no servitude reserved, the Governor could have taken the land as a whole, and why cannot the part now be taken which was formerly reserved?]

Legitimate authority would have to be obtained to enter upon the land. No power to take a servitude is given, and the only occasion where such can be done is where authority is given to expropriate the land for certain specific purposes, and where the extinction of some servitude existing over the land already entered upon is a necessary incident to the carrying out of those purposes. See *G. W. Railway Co. v. Swindon and Cheltenham Extension Railway Co.* (9 App. Cas. 787); *Clark v. London School Board* (9 Ch. App. 120); and compare *Corporation of Yarmouth v. Simmons* (10 Ch. D. 518).

[MAASDORP, C.J.: Does not the expropriation of land mean the expropriation of ownership?]

It would not include the rights of third parties. Further, it was evidently felt that the word "land" did not suffice for all purposes, for under the General Expropriation Ordinance (11 of 1905) land is defined as including immovable property, which would cover a praedial servitude. Sec. 6, the only other empowering section, shows clearly that the word "land" does not include a servitude, which can under that section be expropriated as an alternative to the land.

Williamson (with him *P. U. Fischer*), for the second respondents: By Ordinance 32 of 1905 the terms of Ordinance 11 of 1905 are made applicable to the Railway Expropriation Ordinance. The term "land" must include all the rights appertaining thereto. The English cases are inapplicable, for the statutes on which they were decided contain a definition which must necessarily be restrictive. Further, the right given to divert must include the right of closing the old road, which is a neces-

sary incident to such diversion. See Maxwell on *Interpretation of Statutes* (3rd ed.), ch. 12, sec. 2, p. 502.

Lloyd, for the first respondent, did not address the Court.

MAASDORP, C.J.: The question under consideration must be decided by the terms of Ordinance 46 of 1903. In that Ordinance there is no definition of the word "land," and no restrictive interpretation has been placed upon the word. The English cases, where the statutes provide a definition, cannot apply, as the word "land" is there used in the sense of the definition. We must ask ourselves the meaning of the expressions "to expropriate" and "to enter upon and use" any land. Expropriation means the taking of the ownership, which includes *inter alia* the right to walk, ride or drive over the land. These rights are included and can be expropriated, and the land in question might originally have been expropriated *in toto*; but this was not done. However, whether by way of grant or whether because something had been paid for the land, it was handed over subject to this reservation of the right-of-way. Now it would indeed be curious if the law provided that the Government could have expropriated the whole, but not this remnant which was not originally taken. This remnant is part of the ownership. In expropriating it is the ownership which is taken and not the land, and there does not appear to be anything to prevent the Government from taking back that portion of the ownership originally reserved to the corporation. The application must therefore be dismissed with costs.

Applicant's Attorney: *G. A. Hill*; Respondents' Attorney: *F. S. Webber*.

