Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The London and South African Exploration Company, Limited, v. *The De Beers Consolidated Mines, Limited, from the Supreme Court of the Cape of Good Hope; delivered* 18*th May* 1895.

Present:

The Lord Chancellor.
Lord Watson.
Lord Hobhouse.
Lord Macnaghten.
Lord Morris.
Sir Richard Couch.

[*Delivered by Lord Macnaghten.*]

The Respondents, who were Defendants in the action, were tenants of a plot of ground in Dorstfontein in the Division of Kimberley, under a lease from the Appellants for a term of years which expired in 1893. Before the expiration of the term they removed some buildings of a permanent character which they had erected during their tenancy. The Appellants claimed damages for the removal, and the action was brought to enforce the claim. The High Court of Griqualand held that the removal was in contravention of the law of the Colony, and not authorized by the terms of the lease. Accordingly they gave judgment for the Appellants, awarding 500*l.* for damages. On appeal, the Supreme Court of the Colony of the Cape of Good Hope reversed this decision, and entered

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judgment of absolution from the instance. The judgment on appeal was pronounced by Sir J. H. de Villiers, C.J.

In a very learned and elaborate opinion, in which the other members of the Court concur, the Chief Justice discusses the law of the Colony in reference to the ownership of materials annexed to the soil by a person rightfully or wrongfully in temporary possession of land, and he states the conclusions at which the Court had arrived, differing on several important points from the learned Judges of the Court below. Among those conclusions is a proposition to the effect that "In the absence of special "agreement a lessee annexing materials, not "being growing trees, to the soil, is presumed "to do so for the sake of temporary and not "perpetual use, and as between himself and the "owner of the land, does not, during his "tenancy, lose his ownership in the materials." "He may," adds the Chief Justice, "before the "expiration of his term, disannex the materials "and remove them from the land, subject to "the rights of the landlord to obtain security "against any serious damage to the land, and "to interdict any depreciation of his tacit "hypothecation for unpaid rent. . . . . "Improvements necessary for the protection or "preservation of the land may not be removed "even during the tenancy, but on the other "hand they must be compensated for." The Chief Justice then proceeds to enquire whether the effect of the lease was to deprive the Respondents of their common-law right. He answers that question in the negative, and shows from the lease itself that the removal of the buildings in question was authorized by the very terms and conditions of the bargain between the parties.

A most able argument on the Roman Dutch law in force in the Colony was addressed to their

Lordships by Mr. Cohen in support of the view which commended itself to the High Court of Griqualand. Their Lordships, however, see no reason to think that the conclusions at which the Supreme Court arrived are in any respect erroneous. In their Lordships' opinion, it is not necessary to say more on this part of the case, because it appears to them, as it appeared to the Supreme Court, that provisions in the lease, which were certainly not forbidden by law, authorized the Respondents to remove the buildings as they did.

The lease was dated the 7th of December 1888. The land demised, which at the time was "simply grazing ground, ordinary veldt," comprised about 6 acres. The term was to be 5 years from the 1st of May 1888 with an option of renewal for a further term of 5 years. The yearly rent was 120*l.* payable quarterly in advance. It was stipulated that the lessees should within 3 calendar months "properly and "effectually enclose" the land demised, and that they should not "at any time use it for any other "purpose than that of a slaughter place and "kraal with the necessary buildings for the "same." There was a covenant on the part of the lessees against assigning or underletting without consent, and also a covenant that on the expiration or sooner determination of the term they would surrender "the said plot of "ground with all buildings and erections thereon "in good repair and condition." But this covenant was qualified by the following proviso: —"Provided always that if no rent shall be due "and unpaid the Lessees their successors and "assigns shall be at liberty during their tenancy "to remove all such improvements (save and "except boundary fences) as shall be capable of "removal without injury to the land itself." Lastly the lease contained a reservation of

minerals and mineral rights, and a declaration that in case the land should be required for mineral purposes the lessors might terminate the lease on giving 6 months' notice to the lessees, who on their part agreed to give up possession "receiving such reasonable compensation for "the permanent buildings and erections thereon "from the lessors" as might be agreed upon or settled by arbitration.

It appears that with the consent of the lessors the land was underlet to or occupied by one Grewer as a cattle kraal and shambles. It was properly enclosed with a boundary fence, and Grewer erected upon it at a cost of about 650*l.* a brick building with stone foundations as deep in some parts as 18 inches. The option of renewal was not exercised. And shortly before the expiration of the term, no rent being then due and unpaid, the buildings were pulled down and all the materials were removed except those composing the foundations which were covered up with soil.

On the construction of the lease it seems to their Lordships that only two questions can arise:—Were such buildings as were in fact erected on the land "improvements" within the meaning of the proviso? And if so, were they "capable of removal without injury to the "land itself"?

In the argument before their Lordships, as in the argument before the Supreme Court, it was sought to confine the term "improvements" to erections not affixed to the soil. But that is not the natural or proper meaning of the expression which seems to be more applicable to something attached to and forming an integral part of the thing improved than to something which is merely added to it or placed upon it without annexation or union. Nor is the meaning suggested by the Appellants, as it seems, "the

" ordinary meaning of the term ' improvements '
" as applied to land " in the colony. So says the Chief Justice; and his statement on the point was not impugned in the argument before their Lordships. Besides it is to be observed that the expression is found in a proviso which is a qualification of a covenant on the part of the lessees to surrender the land " with all buildings and " erections thereon in good repair and condi- " tion." The buildings and erections referred to in the covenant must be buildings and erections affixed to the soil. The proviso must apply to improvements of the same class and character. Otherwise it would obviously be out of place if not unmeaning.

There remains the question as to the meaning of the words " without injury to the land itself." It is much the same question over again. The Appellants contend that any disturbance of the soil is injury to the land itself, and that therefore according to the terms of the lease no building could be removed unless it were capable of removal without disturbing the soil. But the exception of boundary fences shows that that cannot be the meaning of the expression in the present case. A fence sufficient to keep in cattle pastured on the veldt and collected for slaughter —animals probably not more gentle in disposition or more patient of control than English cattle— could hardly be removed without considerable disturbance of the soil. And therefore, even without the light afforded by the law of the colony as expounded by the Supreme Court, the words must mean something more than what the Appellants contend for. The injury in contemplation must have been injury of a nature substantial or serious. It is not necessary to consider what amount or degree of injury ought to be regarded as substantial or serious, because in the present case there is no evidence to show

that removal of the buildings would necessarily have caused any injury at all. The principal witness for the Appellants stated that he "could "have easily taken away the foundations and "restored the ground to its former condition."

The last clause of the lease does not, in their Lordships' opinion, advance the argument on behalf of the Appellants. It does not prevent the lessees from removing any buildings which they might be entitled to remove under the terms of the lease. It merely gives them the option of leaving their buildings and claiming compensation for them in the event of the lease being prematurely determined for mining purposes.

For these reasons their Lordships are of opinion that the decision of the Supreme Court is right, and they will accordingly humbly advise Her Majesty that the appeal should be dismissed. The Appellants will pay the costs of the appeal.