Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Divisional Council of the Cape Division v. *De Villiers, from the Supreme Court of the Colony of the Cape of Good Hope; delivered 28th April* 1877.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE Appellants in this case were the Defendants in a suit brought against them by the Respondent, who sought to recover against them damages for having entered his land and taken away gravel. The Defendants justified upon the ground that they had a right to take it for the repair of a certain public road; and the question is whether the Defendants were justified or not in entering upon the Plaintiff's land and taking away the gravel. The Plaintiff is the proprietor of a certain perpetual quitrent tenure, and the Defendants are the curators of the public roads under Act 10 of 1864, by section 3 of which they have all the rights which were vested in the Commissioners of Roads by the Colonial Act 9 of 1858. By the 11th section of that Act it was provided that, "For the purpose of making "any such main road the aforesaid Commis- "sioners of Roads or other officer by them duly "authorised are hereby invested for the purpose "of so doing with all the singular and legal "rights, if any, belonging to the Government of "this colony in respect to the taking of any "land and the raising and carrying away

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" 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, " permitting the conversion of lands on loan into " places on perpetual quitrent, or have been " created by express stipulation or condition in " any grant of freehold property, or exist in any " other way or manner whatsoever."

The question, then, resolves itself into this: Had the Government the power to take gravel out of this land which was held upon a perpetual quitrent tenure: and that depends upon the grant itself and upon the proclamation of the Government of the 6th August 1813. The grant, which is set out at page 12 of the Record, is a grant to Jan Albertus Dell, of whom the Plaintiff was the transferee, of a perpetual quitrent tenure " subject to all such duties and regulations as " either were then already or should in future be " established respecting lands granted under " similar tenure." The learned Chief Justice in delivering his judgment has shown that the term by which quitrent has always been known in the colony is " Erfpacht," which is the term applied to the Emphyteusis of the Roman Dutch law, and was also the term used in the Dutch version of the proclamation in the grant in question, and in all quitrent grants which, prior to the year 1822, were made out in both the Dutch and English languages. The *jus emphyteusis* did not give the Emphyteuta the right of taking away gravel or minerals. The proclamation of 1813 says, " Every holder of a loan place, on his making " application by memorial to Government for the " purpose, shall have a grant of this place on " perpetual quitrent to the same extent as he " has hitherto legally possessed the same on " loan." By clause 3, " The holder by this

" grant shall obtain the right to hold the land " hereditarily, and to do with the same as he may " think proper in like manner as with other " immovable property, as also, should he deem " it advisable, to sell or alienate it." Then by clause 4, " Government reserves no other rights but " those on mines of precious stones, gold, or silver, " as also the right of making or repairing public " roads and raising materials for that purpose on " the premises," and so on. Then by section 11, " This perpetual quitrent shall further not " be liable to any further burthens but those " to which all freehold lands are already sub- " ject,"—that is, subject to the reservations which are expressed in this proclamation;— " the perpetual quitrent shall not be liable " to any other burthens but those to which all " freehold lands are already subject." Then by clause 6 it is provided that " In all judicial " decisions regarding quitrent the same rights, " laws, and usages shall be observed which have " hitherto been acted upon or which may here- " after be established, enacted, and followed in " judicial decisions with respect to freehold " lands." That must also mean, subject to the reservations contained in the proclamation. Their Lordships have arrived at the conclusion that the view of the case which was taken by the learned Chief Justice in the Court below was a correct one, namely, that the grant to Dell was subject to the reservation by Government of the right to raise and take gravel for repairing the public roads. The Plaintiff's own witness, Mr. De Wet, says, " I have been chief clerk in the " surveyor general's office for about thirty-three " years. I do not remember that the right of " the Government to take gravel from quitrent " land originally granted as such was ever " disputed." Therefore, whether the land was quitrent granted in lieu of loan land, or of quit-

rent originally granted, the same rule seems to have prevailed under the proclamation. Leopold Marquard, another of the Plaintiff's witnesses, said, "There is no difference in the form of "tenure between loan places converted into "quit-rent and those originally granted as such," Therefore, not only by the terms of the grant as construed by the Chief Justice, but by the usage, the Government seems to have had the right of taking gravel, and that right has been transferred to the Divisional Council of the Cape Division by the two Acts to which allusion has been made.

In these circumstances their Lordships think that the decree of the Court below must be reversed. The Plaintiff asks in his plaint that in case it "shall be found that the Defendants "have any right to remove gravel, stones, earth, "or other matter or things from the said "land, it may be declared by this Honourable "Court that such right cannot be exercised "with respect to cultivated, arable, or sowing "land without compensation to the Plaintiff." The learned Chief Justice in his judgment says: "There can be no objection to a judicial "declaration to the effect that the Defendants "are not entitled to take materials from such "portions of the Plaintiff's land as have been "improved by cultivation, irrigation, or other-"wise without compensation to the Plaintiff, "such compensation to be determined in the "manner provided for by the 12th clause of Act "No. 9 of 1858." Their Lordships are of opinion that if the gravel was taken from land which had been so improved, the Plaintiff would be entitled to compensation, but in his suit he does not allege that the gravel was so taken. The case for damages is for taking the gravel from his land; he does not say that the gravel was taken from land which had been improved,

and that the Defendants had taken it without giving proper notice or offering compensation. Their Lordships do not think that this is a case in which there is any necessity to make a declaration of right in their decree, although they think it right to say that if the gravel was taken from cultivated land the owner of the land would be entitled under section 12 to receive compensation, to be estimated in the manner provided by that section.

Under all the circumstances, their Lordships will humbly advise Her Majesty that the decree be reversed and the suit dismissed, and that the Respondent do pay the costs of this appeal.