1910

*May 3, 4.

BING KEE AND LUNG CHUNG (PLAINTIFFS) ..... } APPELLANTS;

AND

YICK CHONG (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Fixtures—Lessor and lessee—Buildings placed on leased land—Evidence—Onus of proof.

In a dispute as to the degree and object of the annexation of buildings erected upon leased land by the tenant in occupation under the lease, the onus of shewing that in the circumstances in which they were placed upon the land there was an intention that they should become part of the freehold lies upon the party who asserts that they have ceased to be chattels. *Holland* v. *Hodgson* (L.R. 7 C.P. 328) followed.

APPEAL from the judgment of the Supreme Court of British Columbia reversing the judgment of Hunter

*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

1910

BING KEE v. YICK CHONG.

C.J., at the trial, and dismissing the plaintiffs' action with costs.

A tract of land, in Nanaimo, B.C., on which were situate a number of small buildings, known as "China-town," was sold, in March, 1908, to the plaintiffs. The defendant was, at that time, and for some years previously had been, tenant of a town lot, part of the land purchased by the plaintiffs, at a yearly rental and had constructed thereon the building in respect of which the present dispute has arisen and commenced to remove it from the locality to a new site at some distance therefrom. The plaintiffs obtained an injunction to restrain him from demolishing or removing the building and the defendant moved to set it aside. Affidavits were filed on behalf of both parties in support of their respective contentions, the plaintiffs alleging and the defendant denying that the building formed part of the freehold. On the return of the motion it was agreed that the application should be converted into a motion for judgment upon a stated case to be filed by consent, or, failing agreement, upon the material filed or to be filed by the parties, supplemented by photographs or a view of the premises. The parties failed to agree upon a stated case and His Lordship Chief Justice Hunter, after hearing the arguments of counsel for the parties upon the affidavits and photographs produced, viewed the premises and delivered judgment as follows: —

"HUNTER C.J.—In this case the defendant was a tenant of the vendor of a town lot bought by the plaintiffs, and claims the right to remove a building erected by him on the lot.

"I have had the advantage of a view, and find that

1910

BING KEE v. YICK CHONG.

the building practically covers the lot; that it is two stories in height; that it rests on rocks placed on the soil. The chimneys are supported on stout poles, which in turn rest on rock. There is a stoop along the front supported by wooden posts, which are firmly attached to a wooden-block sidewalk. The building was used as a store and dwelling house. In my opinion it is a fixture, as it was evidently put there for the purpose of better enjoying the use of the freehold, and the fact that it could no doubt be removed without materially injuring the freehold is immaterial. If that were so, a large number of dwelling houses and shops in the province which are mostly constructed of wood and built on wooden posts, could be treated as chattels.

"Judgment for the plaintiffs with costs."

By the judgment now appealed from, the Supreme Court of British Columbia reversed the judgment of the Chief Justice and entered a judgment in favour of the defendant.

W. L. Scott for the appellants.
Travers Lewis K.C. for the respondent.

The judgment of the court was delivered by

DAVIES J. (oral).—The recognized rule for the determination of cases where constructions have been placed upon leased land is stated by Lord Blackburn, in delivering the judgment of the court, in *Holland* v. *Hodgson*(1), at pages 334-335, where he says:

> There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must

(1) L.R. 7 C.P. 328.

depend on the circumstances of each case and mainly on two circumstances as indicating the intention, viz., the degree of annexation, and the object of the annexation. When the article in question is no further attached to the land than by its own weight it is generally to be considered a mere chattel (see *Wiltshear* v. *Cottrell* (1), and the cases there cited). But even in such a case if the intention is apparent to make the articles part of the land they do become part of the land. See *D'Eyncourt* v. *Gregory* (2). * * * Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to shew that they were intended to be part of the land, *the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels* and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.

This case, like all others of its kind, depends upon the special circumstances and intentions under and with which the constructions were made, and the facts as to their being affixed to the soil.

In the record before us, we have not sufficient evidence of what the circumstances were in which the building was placed upon the land, nor are we able from the evidence to reach a conclusion that the building in question was affixed to the freehold or placed there with the intention that it was to become part of the freehold. In the circumstances of this case we think there was an onus on the plaintiff to shew that the building was intended to be part of the land, which he failed to discharge, and having failed the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Russell, Russell & Hannington.*

Solicitors for the respondent: *Eberts & Taylor.*

(1) 1 E. & B. 674.

(2) L.R. 3 Eq. 382.