sequences which flow from the want of proper stamping are removed with retroactive effect and the document then assumes the *status* it would have had had it been properly stamped in the first place. Mr. *Lowe* submitted that this *dictum* was not applicable in the present matter because in *Badat's* case the document there in question was admitted in evidence before judgment and after it had been properly stamped and the necessary penalties paid. This is not, however, quite the position. At p. 177 my Brother SELKE said:

> "Accordingly, I now authorise the stamping of the document subject to the payment of the penalty prescribed by the Act, and I allow the document to be admitted in evidence. The effect of my doing this is, as I understand it, to bring it about that this document now has, for all practical purposes, precisely the same effect it would have had had it been properly stamped in the first place."

The document had been put in in evidence before it was stamped and it was stamped thereafter in accordance with and not prior to the judgment. The direction as to stamping was there given by the trial court when judgment was given, but the matter is taken a step further by the case of *Gleneagles Farm Dairy* v. *Schoombee*, 1947 (4) S.A. 66 (E), where a Court on appeal directed *nunc pro tunc* that the document there in question should be stamped before the Registrar and the necessary penalty paid. In that case the document had been admitted by a magistrate during the hearing before him but was not validated until after the direction given by the Court on appeal. It was nevertheless regarded by the appeal Court as validated with retroactive effect and therefore properly part of the record upon which the appeal was to be decided. In the present case validation of the agreement of lease by stamping had been effected before the notice of appeal was filed and in these circumstances, the first ground of appeal cannot be upheld.

The second ground of appeal was to the effect that the magistrate's finding as to the signature of Exhibit A was against the weight of evidence.

[The learned Judge analysed the evidence and proceeded.]

In my view, nothing has been said in this appeal which would justify this Court in coming to the conclusion that the magistrate was wrong in arriving at this finding. There are other matters which the magistrate has dealt with in his reasons for judgment and which support his conclusion, but it is not now necessary to traverse these in detail. The magistrate's judgment is upheld and the appeal is dismissed with costs.

SELKE, J.: I agree.

Appellant's Attorneys: *Renaud, Fellows-Smith & Mooney.*
Respondent's Attorneys: *Findlay & Sullivan.*

DIBLEY v. FURTER.*

(CAPE PROVINCIAL DIVISION.)

1950. *April* 12, 13, 14. 1951. *February* 5. VAN ZYL, J.

Sale.—Cancellation by purchaser.—Redhibitory defects.—Nature of.—Property sold with graveyard on it.—Usefulness of property not materially impaired.—Not a redhibitory defect.—Fraudulent concealment of such latent defect.—Purchaser would not otherwise have bought.—Entitled to restitution in special circumstances.

Redhibitory defects are those which either destroy or impair the usefulness of the thing sold for the purpose for which it has been sold or for which it is commonly used; the defect must be material and the test whether the defect has destroyed or impaired the usefulness of the thing sold is an objective one, i.e. that the defect has destroyed or impaired it for every one and not just for the particular purchaser; and the defect must attach to the thing sold.

A purchaser only loses his right to claim rescission where the *merx* is lost due to some blame on his part or on the part of any person under his control or where he has parted with it in such manner that he has no substitute that he can offer to return in its place.

In an action by a purchaser claiming the rescission of a contract of sale of a farm, which was to be used as such and for residential purposes, on the ground that there existed on a portion of the ground a graveyard, the Court found on the evidence that at the time of the sale the seller knew of the existence of a certain number of graves on the property and that he had fraudulently concealed the presence of the latent defect from the purchaser.

Held, that the evidence did not show that the usefulness of the property had been materially impaired: accordingly, as the purchaser had not established that the graves were a redhibitory defect, he was not entitled to aedilitian relief.

Held, further, however, in regard to the alternative cause of action, namely fraud, as the evidence showed that the purchaser would not have bought had he known of the graveyard, that in the special circumstances of the case he was entitled to restitution.

Action for cancellation of a sale. Facts not material to this report have been omitted.

G. Muller, for the plaintiff: The appearance of a latent defect entitles a purchaser to rescind the contract; as to what amounts to a latent defect, see *Voet*, 21.1.4 and 5; Mackeurtan *Sale of Goods*, pp. 199, 200, 300; de Wet and Yeats *Kontraktereg*, pp. 202, 203; Wessels *Law of Contract*, Vol. 2, paras. 4673 *et seq.*, 4809; Norman on *Sale*, pp. 328-9; *Hall & Co.* v. *Kearns*, 10 S.C. at p. 155; *Reed Bros.* v. *Bosch*, 1914 T.P.D. at p. 582; *Weinberg* v. *Aristo Egyptian Cigarette Co.*, 1905 T.S. at p. 764; *Trinder* v. *Taylor*, 1921 T.P.D. at p. 519; *Gounder* v. *Saunders and Others*, 1935

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* The appeal which had been noted against this decision was not proceeded with —Eds.

N.P.D. at p. 225. In any event there was an obligation on the defendant to inform plaintiff of the graves. Where a material fact is not disclosed plaintiff is entitled to rescind; Moyle *Contract of Sale, p.* 189; Spencer Bower *Actionable Non-disclosure* at p. 76, paras. 106-8; p. 80, para. 115; *Mackeurtan, supra* at pp. 119 *et seq.*, 124; *de Wet and Yeats, supra* at pp. 29, 201; *Naude* v. *Harrison*, 1925 C.P.D. at p. 92; *Estate Schickerling* v. *Estate Schickerling*, 1936 C.P.D. at p. 276; *Woodstock, Claremont, Mowbray and Rondebosch Councils* v. *Smith*, 26 S.C. at pp. 681, 701; *Levy* v. *Fairclough*, 1950 (2) S.A. at p. 244; *Claassens* v. *Pretorious*, 1950 (1) S.A. at p. 740. Plaintiff could not cultivate the farm for if he did so over the graves he would expose himself to liability to the *actio sepulchri violati*; Matthaeus *de Criminibus*, p. 217; *Gardiner and Lansdown*, p. 1155; de Wet *Strafreg*, p. 261; *Cape Town and Districts Waterworks* v. *Elders*, 8 S.C. 9; *Rex* v. *Letoka*, 1947 (3) S.A. 713; *Rex* v. *Sephuma*, 1948 (3) S.A. 982. As to when the right to cancellation is lost and the effect of the purchaser being unable to restore the asset, see *Mackeurtan, supra* at pp. 316 *et seq.*; *de Wet and Yeats, supra* at pp. 138-140; *Adler* v. *Taylor*, 1948 (3) S.A. 327; *Schwarzer* v. *John Rodericks Motors*, 1940 O.P.D. at p. 181; *Theron* v. *Africa*, 10 S.C. 246; *Vorster Bros.* v. *Louw*, 1910 T.P.D. 1099; Wessels on *Contract*, Vol. 2, para. 4742; *Montagu Co-operative* v. *Levin*, 1912 C.P.D. 1153; *Zieve* v. *Verster & Co.*, 1918 C.P.D. 304; *Muller* v. *Steenkamp*, 1937 T.P.D. 251; *Barkhuisen* v. *Basson*, 1945 C.P.D. 33. A claim for rescission does not exclude a claim for damages. See *Wessels, supra*, para. 4816; *de Wet and Yeats, supra* at p. 202; *Erasmus* v. *Russel's Executors*, 1904 T.S. 365.

J. T. van Wyk, K.C. (with him *W. de Vos*), for the defendant: The presence of the graveyard is not a ground for the *actio redhibitoria*, because, firstly, it is not a defect, and secondly, it is in any event not a defect justifying rescission. Only such defect as materially impairs the usefulness of the *res* gives rise to aedilitian relief. This was the Roman Law and is the Roman-Dutch Law. See *D.* 21.1; *C.* 4.58.4; *Voet* 21.1.8; van Leeuwen *Romeinse Hedendaagse Reg*, 4.18.5-13; *Donellus*, ad *D.* 21.1. *cap.* 2, n. 5; de Groot *Inleiding*, 3.15.7; *Windscheid*, 2.39.3; van Oven, *Romeinsche Recht*, pp. 263 *et seq.*; van Warmelo *Vrywaring teen gebreke by koop in Suid-Afrika*, pp. 11, 18, 23 *et seq.*; *Bodenstein*, 1914 and 1915 S.A.L.J.; *Wessels, supra*, para. 1256; *Mackeurtan, supra*, p. 213; *Wiid* v. *Murison*, 13 S.C. 444; *Christie* v. *Etherbridge*, 19 S.C. 367; *Adler* v. *Taylor*, 1948 (3) S.A. 322; *Reed Bros.* v. *Bosch*, 1914 T.P.D. 578; Huber *Praelectiones Juris Civilis, ad D.* 21.1.6.

The violation of graves is no longer a crime because the *actio sepulchri violati* is inextricably bound up with the idea that graves are *res religiosae*, which is no longer applicable in our law. *Rex* v. *Sephuma, supra* and *Rex* v. *Letoka, supra*, were

wrongly decided. Plaintiff could not be lawfully restrained from cultivating over the graves nor could he insist on his restoring the mounds or monuments on the graves. Such right of restraint can only exist by virtue of contract or servitude, neither of which existed here. See *Voet* 11.7; *Cape Town Waterworks* v. *Elder's Executors*, 8 S.C. 9; *Damhouder*, cap. 109; Matthaeus *De Criminibus* 47.6; *Moorman*, 1.7.9; Van Leeuwen *Censura Forensis*, 1.5.5.2; van den Heever *Lex Aquilia*, 37-42. As to non-disclosure there was only a duty on defendant to disclose such things as would constitute a defect within the scope of the Aedilitian actions.

Muller, in reply.

Cur. adv. vult.

Postea (February 5th).

VAN ZYL, J.: Plaintiff in this matter is suing the defendant for the return of the purchase price of a certain farm and movables which he bought from the defendant; also for damages, and he has tendered the return of the things bought against repayment of the purchase price. Plaintiff, in his declaration, has set out his case as follows (paras. 3-11):

> 3. On the 15th day of May, 1948, plaintiff purchased from defendant the farm "Shangri-La", Bellville, in extent 1.8753 morgen, more fully described as
>
> "Certain piece of redeemed quitrent land situate in the Cape Division, being Portion 6 of Lot K of Stikland"
>
> in terms of a written contract of sale hereto annexed marked "A".
>
> 4. The said property has been transferred to plaintiff by defendant and plaintiff has paid defendant the purchase price set out in Annexure "A".
>
> 5. At the time of the said sale, there was situate on the said property a graveyard containing about 80 graves, which said graves were spread over approximately one acre of the property. Burials had taken place in the said graveyard as recently as the year 1944.
>
> 6. At the time of the said sale there was situate on the said property a dwelling house, outbuildings and a well which was the sole source of water supply for the said property. A portion of the graveyard aforesaid is in very close proximity to the said dwelling and the said well is so situate in relation to the said graveyard as to expose the water in the well to the danger of pollution. It was within the contemplation of plaintiff and defendant at the time of the sale that plaintiff had purchased the property for use as a residence and for the purpose of developing it agriculturally.
>
> 7. Defendant was aware of the existence of the said graveyard at the time of the said sale but prior thereto all traces of the said graveyard had been obliterated by defendant and plaintiff was unaware and could not have been aware of the existence of the said graveyard and only became aware thereof after he had taken transfer and paid the purchase price aforesaid. Plaintiff is, owing to the work of obliteration undertaken by defendant as aforesaid, presently ignorant of the exact location of the individual graves.
>
> 8. The said graveyard constituted a latent defect in the said property the existence of which defect defendant fraudently concealed from plaintiff and which seriously impaired the utility of the property for the purpose for which it was bought.

9. Alternatively, and only in the event of the Court holding that the said graveyard did not constitute a latent defect in the said property, plaintiff says :

(*a*) that the existence of the said graveyard was a material fact known to defendant at the time of the sale, which defendant was, in the premises, under a duty to disclose to plaintiff prior to the sale;

(*b*) with the object of inducing plaintiff to enter into the said sale upon the terms set out in Annexure " A " hereto defendant fraudulently concealed from plaintiff the existence of the said graveyard and plaintiff was thereby induced to enter into the said sale upon the said terms.

(*c*) *In the alternative to para.* (*b*);
defendant negligently concealed or failed to disclose the existence of the said graveyard to plaintiff whereby plaintiff was induced to enter the said contract.

(*d*) *In the alternative to paras.* (*b*) *and* (*c*) *above*,
defendant in breach of his duty aforesaid failed to disclose the existence of the said graveyard.

(*e*) Had plaintiff been aware of the existence of the said graveyard he would not have purchased the said property.

10. Plaintiff has incurred the following costs and expenses in and about the transfer to him, the taking possession of and the maintainance of the said property which costs and expenses have, by reason of the above premises, been rendered useless and of no value to him :

Costs of transfer	£180	13	0
Estimated costs of cancellation of bond and estimate of interest in lieu of notice	41	4	0
Estimated costs of moving into said property ...	50	0	0
Necessary and useful expenses incurred in and upon the buildings of the said property ...	81	0	0

11. Plaintiff hereby tenders to return to defendant the said property and the blinds referred to in Annexure " A " and tenders to pay to defendant :

(*a*) the sum of £12 being the value of the cow referred to in Annexure " A " which cow, through no negligence on plaintiff's part has died; and

(*b*) the sum of £45 being the value of the said stove referred to in Annexure " A ", which stove plaintiff sold before he became aware of the existence of the said graveyard and which he is unable to re-acquire.

In the premises and against the said tenders plaintiff is in law entitled to claim rescission of the contract of sale, Annexure " A " hereto and repayment of the purchase price of £5,250 and damages in the sum of £352 17s.

To this declaration defendant has pleaded in the following terms :

2. (a) Verweerder erken dat daar 'n woonhuis, buitegeboue en puts (die enigste waterbron) op gemelde eiendom was ten tye van die aangang van gemelde kontrak; en dat die bedoeling was dat eiser daarop sou woon en boer.

(*b*) Verweerder erken ook dat daar 'n paar mense (die juiste getal is eiser onbekend, maar ongeveer 10) meer as vyf jaar gelede op 'n deel van die grond weg van die huis en die puts begrawe was en dat die verteerde stoflike oorskot nog daar was toe eiser gekoop het.

3. (*a*) Verweerder het reeds lank voor gemelde verkoping die oppervlakte waar sodanige stoflike oorskot is, gelyk gemaak, en was ten tye van gemelde verkoping bewus van die feit dat die stoflike oorskot van gemelde mense in die grond was.

(*b*) Verweerder erken dat hy nie gemelde feit aan eiser gemeld het nie, en dat eiser ook nie enige tekens daarvan aan die oppervlakte kon bespeur nie.

4. Verweerder ontken dat die gemelde feit 'n wesentlike feit was, ontken dat hy dit van eiser weerhou het met die doel om hom te oorreed om gemelde kontrak aan te gaan, en ontken dat hy hom aan enige bedrog skuldig gemaak het. Verweerder ontken in besonder dat eiser nie die eiendom sou gekoop het as hy van gemelde feit bewus was, en sê dat eiser dit in alle geval sou gekoop het.

6. Verweerder ontken dat daar omtrent 80 graftes is of was en ontken in alle geval dat hy te enige tyd van so 'n getal bewus was; maar sê in alle geval dat al sou daar 80 graftes gewees het, slegs die verteerde stoflike oorskot aanwesig was ten tye van gemelde verkoop, en ontken dus dat die water in die puts besoedel kon word of dat dit 'n gebrek was, of dat die nuttigheid van die eiendom vir die doel waarvoor dit gekoop is daardeur verminder is.

7. Verweerder dra geen kennis van die besonderhede in para. 10 beweer nie, ontken dit en vra dat die eiser bewys.

8. Behalwe soos hierin erken word paragrawe 5 tot 9 van die deklarasie ontken.

9. In die alternatief, al sou die bewerings in paragrawe 5 tot 9 juis wees, pleit verweerder dat eiser enige reg van opsegging van gemelde kontrak verloor of verbeur het, deurdat :

(*a*) Eiser reeds in Oktober 1948 bewus was dat daar graftes op gemelde eiendom was toe gemelde koopkontrak aangegaan is, en eers op 16 Februarie 1949 gemelde kontrak opgesê het.

(*b*) Vanaf Oktober 1948 tot 16 Februarie 1949 het eiser voortgegaan om al die voordele onder gemelde kontrak te geniet d.i. hy het eiendomsreg ten opsigte van die gemelde grond, huis, koeie en stoof geniet en uitgeoefen.

(*c*) Tussen Oktober 1948 en 16 Februarie 1949 het eiser die stoof verkoop.

(*d*) Op 16 Februarie 1949 kon eiser weens sy handelswyse en onredelike versuim nie *restitutio in integrum* eis nie, deurdat

(*a*) Die stoof nie deur eiser aan verweerder teruggegee kon word nie,

(*b*) Die koei dood is,

(*c*) Die waarde van die eiendom aansienlik gedaal het vanaf Oktober 1948 tot 16 Februarie 1949.

10. Die waarde van die stoof, koei en blindings was £55, £10 en £30 respektiewelik.

11. Paragrawe 11 en 12 word ontken.

The declaration is set out in its final form as it appears after certain amendments were allowed during the trial. As a result of the amendments granted certain further causes of action were added and defendant has taken exception to them on the ground that they disclose no cause of action. They are the causes of action which appear in para. 9 (*c*), (*d*), (*e*).

[The learned Judge then proceeded to analyse the evidence and found that portion of the farm Shangri-La had been used as a graveyard up to and including 1944.]

I come now to consider whether, after the middle of 1945 when the defendant bought Shangri-La, the graveyard was still visible and if so to what extent. I shall at the same time consider the extent of the defendant's knowledge of the existence of this graveyard.

[The learned Judge after analysing the evidence found that in the middle of 1945 there were a large number of graves visible and recognisable as graves and that at the time the defendant sold the property to the plaintiff he knew that there were at least 25 graves on it. The learned Judge also found in fact that there were over 80 people buried there. He then proceeded.]

On 15th of May, 1948, defendant sold Shangri-La together with a stove, blinds and a cow to plaintiff who is a bee farmer and who bought the property in order to carry on his bee farming on it. During June plaintiff took possession of the farm and later in the month took transfer of the property. I am satisfied that the plaintiff did not know when he bought the farm that it had been used as a graveyard. When plaintiff bought the farm the garage and the servants' quarters were not completed; and he proceeded to have them completed. While these building operations were going on the mealies that had been stored in a copper drum in one of the servant's rooms were moved out and someone left off the lid of the drum, and the cow got at the mealies and then drank water, and became " blown " and died. During the same month plaintiff sold the stove for £45 to the makers, Jameson's Engineering Works.

On 6th October, 1948, Kannemeyer, the builder of the house and outbuildings, came in the company of an architect to inspect the house in connection with a case that the defendant had against him. At this inspection he met plaintiff's wife and during conversation asked how she liked living on a graveyard. When she remained incredulous about his assertion he offered to take her and show her where the graves were. They went to the place but Kannemeyer found that all indications of the graves had been removed. When her husband returned she immediately informed him of what she had learned.

I am satisfied that plaintiff and his wife find it repellent to live on the property now that they know that it has been used as a graveyard. It was in consequence of this feeling that immediately upon hearing about the graveyard from his wife plaintiff went to see defendant. Two versions are given of the interview; one by plaintiff and one by defendant, and I am of opinion that plaintiff's version is the correct one. The defendant's version hangs in the air. I am of opinion that plaintiff opened this interview with a question in the terms: " Mr. Furter, I understand there is a cemetery on the property you sold me? " I am also satisfied that the defendant was taken aback at this remark because he had removed all traces of the graves, had not told the plaintiff of their existence and had not thought that the plaintiff would find out. I am also satisfied that the defendant did not ask the plaintiff by way of a joke whether he had dug up any bones; for on his own evidence he stated: " Mnr. Dibley het daar gekom en gesê ek het aan hom 'n begrafplaas verkoop, en hy was baie ontevrede." The defendant is not only a school teacher but he is also an intelligent man and I am satisfied that he realised that the plaintiff was taking the matter very seriously and that this was no time to be facetious. In my opinion this remark was made in order to ascertain the source and extent of the plaintiff's knowledge. The plaintiff and his wife made on me the impression that they were truthful and reliable witnesses and I accept their evidence in all cases where there is a

conflict between them and the defendant and his wife. The plaintiff got no satisfaction at this interview. He then went to see Mr. Bosman and at that interview he found Mr. Bosman not at all helpful though he did confirm that there were graves on the property.

After this interview the plaintiff went to see his attorney who later contacted the defendant, and at the suggestion of plaintiff's attorney the defendant went to see the plaintiff. At this second interview the plaintiff again adopted the attitude of wishing to cancel the sale, but on this second occasion the plaintiff was more specific in his demands. He demanded that the defendant take the property back or that it be sold and the defendant pay the plaintiff the difference between the amount it realised and the purchase price. He gave the defendant a month in which to decide what he would do and informed him that if he did not get satisfaction he would take the defendant to Court. On the probabilities I am satisfied that this is what happened. It must be borne in mind that in the mean time the plaintiff had been to see his attorneys. I am also satisfied that the defendant said nothing to this except shrug his shoulders and say, " I am ruined anyhow ". I believe this not only because I believe the plaintiff and not the defendant as stated above, but also because this statement was not seriously attacked in cross-examination. The defendant's version was not put in cross-examination.

I am satisfied that when plaintiff got no satisfaction he then proceeded to make further inquiries to see whether he could substantiate the allegations made by Kannemeyer and Bosman. In this the plaintiff was hampered by the fact that he and his wife were unilingual English speaking and the people from whom they had to inquire were Afrikaans speaking Coloured people. On this account he employed his attorneys to make the necessary inquiries. These were completed in January, 1949, and on 16th February a letter of demand was sent to the defendant claiming cancellation and damages, followed by a summons issued on 23rd February.

I am satisfied that, after 6th October, 1948, the plaintiff exercised no rights of ownership in regard to the *merx* which were inconsistent with his intention to rescind the contract. I am also satisfied that at both these interviews the plaintiff made it clear to the defendant that he intended to cancel the sale.

I am also satisfied that the defendant did not remove the external indications of the grave with the object of deceiving any purchaser of the farm. I am of opinion that he removed them for the reasons that he wished to cultivate portion of the property and, like any other normal person, did not like to look upon them. But I am satisfied that at the time of the sale he was aware that the place had been used as a burial ground for Coloured people; and that he knew of at least 25 graves and in all probability very many more, and that some of them appeared of fairly recent date. I am

also satisfied that when selling the property the defendant was aware that if it were known that a substantial portion of Shangri-La had been used as a graveyard there would be people who would not wish to own it; and that it might affect the price he could get for the property; and that it was for this reason that he did not inform plaintiff of the existence of the graves.

There remains one issue of fact with which I must deal before considering the law. It has been alleged in the declaration that the well—the only permanent water supply on the property—was in such close proximity to the graves that it was in danger of being polluted by them. This contention has not been established by the evidence and it was abandoned in argument.

Plaintiff has in the first place contended: that the graveyard constitutes a latent defect in the farm; that the defendant fraudulently concealed it from plaintiff; and that the defect has seriously impaired the utility of the property for the purpose for which it was bought, viz. a residence, and development agriculturally. The defendant admits in his plea that at the time of the sale the intention was that plaintiff should live on the property and farm it. In argument, however, he has contended that the presence of the graveyard on the property does not constitute a defect such as can found an action for redhibitory relief under the *actio redhibitoria*. He bases this contention on two grounds: (*a*) it is not a defect, and (*b*) if it is one then it is not of the nature that justifies rescission.

On the facts as stated above I am satisfied that at the time of the purchase the graveyard, if it was a defect, was a latent one, and I am also satisfied, for reasons which I shall deal with later, that defendant's concealment of its presence on the property was fraudulent.

The defendant contends that only such defects which impair the usefulness of a *res* to a material extent give rise to aedilitian relief. This action has come down to us from the Roman Law where it was originally confined to slaves, "vee" and land. Later it was extended to cover all sales. See Moyle *Contract of Sale in the Civil Law*, pp. 194-195. In the *Corpus Juris* there is no real attempt to define a redhibitory defect. One of the passages that appears to come nearest to a definition is *Dig.* 21.1.1.8. There are, however, numerous examples given. See, for instance: *Dig.* 21.1.1.(7) and (8), 4 (3), 5, 6, 7, 10, 12, 14 and 49 and *Cod.* 4.58.4.1. From these and other texts *Moyle* extracts the following definition:

> "they (redhibitory defects) are those defects which either destroy or impair the usefulness of the thing sold for the purpose for which things of that kind are ordinarily intended to be used".

Van Oven *Leerboek van Romeinsch Privaatreg*, p. 267, is to like effect and also *Bodenstein*, S.A.L.J. p. 399. Van Warmelo *Vrywaring Teen Gebreke by Koop in Suid-Afrika*, pp. 21-25, regards "bruikbaarheid" as an essential element. I am of opinion, after examining the references to the *Digest* given above, that the definition given by *Moyle* is correct except that two things must

be added: firstly, that the defect must not be of a trivial nature and, secondly, the test whether the usefulness of the *res* has been impaired is objective in the sense that it must attach to the *res* and must not be dependent upon the whim of the purchaser. See *Dig.* 21.1.12.2&4 and 21.1.14.1&4.

The Roman Law conception that the defect in order to constitute a redhibitory defect must impair the usefulness of the *res* to a material extent and must attach to the *res* and be a defect when viewed objectively, was in my opinion received into the Roman-Dutch Law. Donellus *ad Dig.* 21.1. cap. 2 n. 6, defines a defect as anything of such a nature that it hinders the use or service of the *res*; and then proceeds to give examples of defects, all of which impair the usefulness of the thing. The best illustration he gives is of a piece of cloth which on account of its being torn or stained or for some other reason cannot be used for a garment. *De Groot* 3.15.7, speaks of a defect as a result of which the *res* "tot haar gewonelyk gebruik onbekwamer is". *Van Leeuwen* 4.18.5 and 6 and *Cen. For.* 1.4.19.15, merely speaks of defect. He does not make any attempt at definition. In both works he deals with redhibitory defects in animals, "vee", and it appears from the illustrations given that the defects are of the nature that they impair the usefulness of the animal for the purpose for which it would ordinarily be used. The significance of this lies in the fact that the right to claim rescission or damages in the case of a latent defect in animals was a right known to Germanic Law. Germanic Law did not apparently confer this right in respect of other things. When, however, the Roman Law was received and aedilitian relief was granted in respect of all things its reception must have been made easy by the existing Germanic Law rule relating to animals; and it seems natural that it would be accepted that the defect must impair the usefulness of the *res*. See *van Warmelo*, p. 85 *et seq.* *Voet* 21.1.8 states that the defect must be of a grave character such as hinders the use and service of the thing. Like *Donellus, supra*, he says, "*quod usum ministeriumque rei impediat*", which would appear to be taken from *Dig.* 21.1.1.8. The importance of this is that both writers were trying to formulate the principle and when doing so turned to the passage in the *Digest* which, in my opinion, comes nearest to the statement of a general principle. From the examples given by *van Warmelo*, pp. 73 *et seq.*, of instances of the things to which the aedilitian relief had been applied in the Common Law it is also clear that the Roman Law conception that the defect must impair the usefulness of the *res* in order to be redhibitory, was received into our law. See too *van Warmelo*, p. 75. That the defect must be a material one can be seen from *Voet* 21.1.8. For the purposes of this case it is not necessary for me to enlarge further on this aspect. The objective nature of the test can be seen from *De Groot, supra*, where he speaks of "gewonelyk gebruik" and the way *Voet, supra*, deals with the

material nature of the defect shows clearly that an objective test must be applied; and see also 21.1.3. In my opinion the objective test also follows from the very nature of the relief and if it were not so the balance which is held between purchaser and seller would be destroyed.

I have not been able to find in our law any case which deals in terms with what constitutes a defect. But that the defect must impair the usefulness of the *res* has been generally accepted. *Bodenstein, supra,* defines a redhibitory defect as:

> "those defects which either destroy or impair the usefulness of the thing sold, for the purpose for which they have been sold or for which they are commonly used".

Mackeurtan *The Law of Sale of Goods in South Africa* (3rd ed., pp. 205 and 207), is to the same effect. See also *Hall & Co.* v. *Kearns*, 10 S.C. 152 at p. 155; *Reed Bros.* v. *Bosch*, 1914 T.P.D. 578 at p. 582; *Weinberg* v. *Aristo Egyptian Cigarette Co.*, 1905 T.S. 760 at p. 764; *Trinder* v. *Taylor*, 1921 T.P.D. 517 at p. 519; *Wiid* v. *Murison*, 13 S.C. 444; *Christie* v. *Etheridge*, 19 S.C. 367, and *Adler* v. *Taylor*, 1948 (3) S.A. 322 (T).

I am therefore of opinion that redhibitory defects are those which either destroy or impair the usefulness of the thing sold for the purpose for which it has been sold or for which it is commonly used; that the defect must be material and that the test whether the defect has destroyed or impaired the usefulness of the thing sold is an objective one, i.e. that the defect has destroyed or impaired it for every one and not just for the particular purchaser; and lastly, that the defect must attach to the thing sold.

In the present case the graveyard attaches to the thing sold, *viz.* the farm. The property was sold as a residence and as a farm. The plaintiff has said that he finds the presence of the graves on the farm abhorrent; that if he had known of them he would not have bought the property; and that should he lose this case he would not continue to live there but would sell the place. I believe this. I am satisfied that there are people who would not have any objection to owning or living on the property but I am of opinion that the majority of people would neither want to own it nor live on it. The presence of the graves on the property does not destroy or impair it as a residence when viewed from the utility point of view. The well has not been polluted by them. The presence of the graves on the property is not in the same category of defect as the stain on *Donellus'* material. The stain can be seen. The graves cannot be seen. It is the knowledge of their existence which makes the property less desirable. To those who are unaware of their existence there is nothing abhorrent about living there. They would suffer no loss in the use of the property as a residence. In my opinion this property with these graves on it falls into the same category as the ugly slave or the slave whose breath smells, *Dig.* 21.1.12, or the slave who wets his bed, *Dig.* 21.1.14.

The next question that arises is: does the presence of the graves impair the usefulness of the farm by preventing the plaintiff from cultivating it or exercising rights of full ownership in regard to it? There are three aspects to this question: (*a*) Would the plaintiff commit an offence if he cultivated over the graves? (*b*) Could anyone prevent him from doing so or insist upon restoring the mounds and monuments upon the graves? and (*c*) Does the presence of three identifiable graves on the property materially impair its usefulness?

Mr. *van Wyk*, who appeared for the defendant in this matter, and who, in his able argument, went fully into the old authorities on the points raised by him, has on this aspect invited the Court to find that violation of graves—grafskending—is not a crime. He submitted that *Rex* v. *Letoka*, 1947 (3) S.A. 713 (O), and *Rex* v. *Sephuma*, 1948 (3) S.A. 982 (T), were wrongly decided. He says that these decisions are not in accordance with Roman-Dutch authority and that the learned Judges who decided the case lost sight of the fact that the crime of *sepulchri violatio* was inseparably bound up with the conception that graves were *res religiosae* and, as in our law graves are no longer *res religiosae*, the foundation of the Roman Law crime had disappeared. He also states that the cases do not quote Roman-Dutch writers but rely on the Roman Law and certain authorities from the Middle Ages which he says are not in point as the conception of *res religiosae* disappeared with the Reformation. On the view which I take of this matter it is not necessary for me to decide this point. The graves fall into two categories; viz. those of which the defendant has removed all signs and the three which are still to-day identifiable. If the plaintiff cultivated over the latter he would in my opinion be committing an offence. The position of the former is altogether different. Their location is concealed. If the plaintiff cultivated over them it could not be said that he had the intention of violating the graves. Even if their location were revealed to the plaintiff I am of opinion that it would not be an offence for him to cultivate over them. He would be removing nothing from them and the mere planting of a crop on them would not in my opinion constitute a violation where all visible signs of them had been removed. In these circumstances the element of *dolus* which is necessary to constitute the crime would be missing.

I am of opinion that the plaintiff could not be restrained from cultivating over the graves nor could anyone insist upon restoring their mounds and monuments nor any of the bereaved ones insist on visiting the graves. Bosman gave the Coloured people permission to bury their dead on that portion of his farm which is now Shangri-La. In my opinion the granting of such permission, unless it is hedged around with the necessary safeguards, amounts to the granting of a servitude. In *Willoughby's Consolidated Co.* v. *Copthall Stores Ltd.*, 1918 A.D. 1 at p. 18, the Court said:

> "Mere permission to make use of property may amount to a servitude if the owner of the property knowingly allows some permanent work to be done

under the permission which cannot be removed or restored without substantial damage and prejudice to the thing itself and to the person concerned ". See further the authorities there quoted. In the present case it is impossible not to draw the conclusion that together with the permission of burial was granted the right to erect some monuments on the graves; the right to visit the place from time to time; and the right to maintain the graves and monuments. Plaintiff is however in regard to the graves not in the position Bosman was in, nor even the position that defendant was in. When plaintiff bought he had no knowledge of the graves. There was nothing on the property which could warn him that any such rights existed over the property. All signs of the graves had been removed. There was no registered servitude over the property. He bought the property in ignorance of any such rights, and as pointed out in *Gillespie* v. *Toplis and Another*, 1951 (1) S.A. 290 (C), any rights against him must arise either from contract or servitude. There is no contract here. The people who buried their dead there omitted to have their rights registered. The rights were thus personal rights against Bosman and against the defendant if he had knowledge of these rights. (I shall assume against the defendant that he had such knowledge from what Bosman had told him and from the graves he had found there.) But when plaintiff took transfer of the property free and unencumbered and without knowledge of these rights, the Coloured people who had buried there acquired no rights against him though they may still have personal rights against the two previous owners. The usefulness of the property has therefore not been impaired because there is no servitude or other right on the property in respect of the graves.

As stated above it would be an offence to cultivate over the identifiable graves, and to this extent the usefulness of the graves would be impaired. I am, however, of the opinion that it cannot be said that the three graves materially impair the usefulness of the property, having regard to the purpose for which the property was bought and the fact that the three graves occupy only a very small area of the one and three-quarter morgen.

I come therefore to the conclusion, on this portion of the case, that the plaintiff has not established that the graves are a redhibitory defect and that he is therefore not entitled to any aedilitian relief and therefore that his case on the first cause of action must fail.

I turn now to consider plaintiff's second cause of action; namely fraud which he has pleaded in the alternative. To this cause of action defendant took three defences: firstly, he denied that the presence of the graves on the property was a material fact and, secondly, he denied that he withheld the fact that there were graves on the property with the intention of inducing plaintiff to buy; and thirdly, he stated that the plaintiff would have bought the property even if he had known of the graves.

In regard to his first defence defendant took the point that there was no obligation on him to disclose the presence of the graves on

the property, because in law there is only the obligation to disclose such things as would constitute a defect under the aedilitian actions or under the *actio empti*; and that, consequently, if the plaintiff could not succeed under the aedilitian actions on the ground that the presence of the graves on the property was a latent defect, he could also not succeed on the grounds of fraud.

To put the question quite tersely; was there an obligation on the defendant to disclose to the plaintiff the presence of the graveyard on the property. It is quite clear that had the defendant represented that there were no graves on the property the plaintiff would have had a cause of action founded on fraud. If it was warranted it would have been part of what was stipulated for and the plaintiff could have sued under the *actio empti*. On the other hand if it was not part of the contract in that it had not been stipulated for but had been used to induce the bargain, then, provided that the other necessary elements were present, it could found an action for rescission on the ground of fraud. See *Voet* 4.3.4; *Naude* v. *Harrison*, 1925 C.P.D. 84 at p. 92.

This still leaves the question whether there was an obligation on the defendant to inform the plaintiff of the graves where he had done nothing with the deliberate intention of deceiving the plaintiff. De Groot *De Jure Belli ac Pacis*, 2.12.8 and 9, deals with the obligation to inform the purchaser of known defects. The relevant portion of this reference reads:

2.12.8. " In all contracts Nature demands an equality, in so much that the aggrieved person has an action against the other, for overreaching him. This equality consists partly in the acts, and partly in the subject itself of the contract; and this equality, and dealing upon the square, must be observed as well in those acts that are previous to the bargain, as those that are principal and essential in it "

2.12.9 (1) " One of these previous acts is, that he we deal with ought to discover to us all the faults he knows of, in the thing we are dealing for; and this is not only what is injoined by the Civil Law, but is also agreeable to the nature of the act, there being a nearer society and engagement between persons contracting than what is common to all Mankind. And thus may we answer what Diogenes, the Babylonian, said upon the topic, *That all things which are not declared, are not therefore to be thought concealed. Nor am I under any necessity of telling what may be for your advantage to hear*, as in the case of heavenly things; for the nature of a contract being contrived for the mutual advantage of the contracting parties, requires something more of exactness in it. It was well observed of St. Ambrose, *In all contracts, whatever faults are in the things exposed to sale, they ought to be discovered to the buyer, which if the seller does not do, tho' the right of the thing be transferred to the buyer, the latter has an action against the former, by reason of the fraud.* And in Lactantius, *If a buyer does not inform the seller of his mistake, that so he may have a cheap bargain; or if a man sells a slave that is a fugitive, or a house infected with the plague, and does not discover it to the purchaser, regarding only his own profit, he is not an ingenuous man, as Carneades would have him, but a knave and a rogue* ".

2.12.9 (2) " But it is not so with circumstances that do not directly concern the thing contracted for. As if a man should know that there are several ships coming laden with corn, he is not obliged to tell you so; but, however, to discover such a thing is kind and commendable, and in some cases not to be omitted without breach of charity; yet I will not say it is unjust,

that is, that it violates his right with whom he is dealing; so that what the same Diogenes very pertinently said, as Tully relates it, is as applicable here, 'I have bought my commodity, I have exposed it to sale, I sell no dearer than others do: nay, perhaps cheaper than they, when there is a greater quantity of it; whom do I injure then?' Wherefore that of Cicero is not generally to be allowed, that to conceal or dissemble a thing is, when you would have those whom it concerns to be acquainted with it, to be ignorant of what you know of the matter, merely for the sake of your own private interest. For then only is it unjust, when it immediately concerns the thing that is to be contracted for; as if a house be infected with the plague, or ordered by the magistrates to be pulled down. Which instances you may see there."

2.12.9 (2) note 4; by Mr. J. Barbeyrac: *Valerius Maximus*, Lib. 8 Cap. 11 (1) *An honcst seller must neither augment the buyer's hopes of advantage, nor disguise and conceal from him the knowledge of the faults and inconveniences that accompany the purchase* . . . The author is speaking there of a house which the Augurs had ordered to be pulled down, which circumstance the person who was to dispose of it had never acquainted the purchaser with. *Grotius.*

From this quotation it will be seen that the basic principles are:

(*a*) The parties must be on equal terms when they contract;

(*b*) This applies not only to the contract, but the acts leading up to the contract;

(*c*) This obliges the seller to reveal all defects which are known to him in the thing contracted for, but

(*d*) The seller need not disclose circumstances which do not directly concern the thing contracted for.

Puffendorf *De Jure Naturae et Gentium*, 5.3, deals with the same subject and comes to the same conclusion, except that in regard to the price he would seem to leave a larger latitude than *De Groot*. See 5.3.10.

In regard to both these writers it must be noted that they state the propositions generally without any qualification as to the nature of the defect but the examples of defects which they give fall into the category of those which impair the usefulness of the *res*. I do not think that this is conclusive in showing that the principle only applies to such defects which would found an action for aedilitian relief. Pothier in his *Treatise on the Contract of Sale*, 2.2, p. 141 *et seq.* (Cushing's translation), also deals with this subject. In sec. 234 he states:

"Though the rules of good faith, in many of the affairs of civil society, extend no further than to prohibit us from falsehood, but permit us to refrain from discovering to others that which they have an interest in knowing, when we have an equal interest in concealing it from them; yet, in contracts of mutual interest, of the number of which is the contract of sale, good faith prohibits not only falsehood, but all suppression of everything, which he with whom we contract, has an interest in knowing, touching the thing which makes the object of the contract . . .

In making an application of these principles to the contract of sale, it follows, that the seller is obliged to declare all that he knows touching the thing sold to the buyer, who has an interest in knowing it; and, that by omitting to do so, he offends against the good faith, which ought to govern in this contract."

In sec. 235 he deals specifically with a defect which would not be a defect giving rise to aedilitian relief but which nevertheless affords relief on the ground of fraud. This section reads:

"According to these principles, a seller is bound not to suppress any of the defects of the thing, which are within his knowledge, though they are not redhibitory, but of such a nature, that the buyer would not be allowed to complain of them, if the seller were ignorant of their existence . . . The seller is liable, in such a case, *in id quanti* (*emptoris*) *intererit scisse*, D.19.1.4; and such suppression sometimes even gives rise to a rescission of the contract; D.19.1.11 (5)."

In sec. 237, *Pothier* deals with matters which are not intrinsic defects of the *res*. He says:

"Good faith obliges the seller, not only not to suppress any of the intrinsic defects of the thing, but, in general, not to suppress anything concerning it, which may induce the buyer not to purchase, or not to purchase at so high a price. For example, the buyer is entitled to an action, if the seller conceals from him, that the estate which he sells is in a bad neighbourhood, which fact would prevent him from purchasing if he had knowledge of it: *Si quis in vendendendo praedio confinem celaverit, quem emptor, si audisset, empturus non esset, teneri venditorem*; D.18.1.35 (8)."

In sec. 239, *Pothier* warns that this obligation to disclose is seldom extended by the courts beyond the defects which are redhibitory. This section reads:

"Though it is in reference to the exterior *forum*, that the Roman jurisconsults established the principles above stated, touching the obligation of the seller, to suppress nothing from the buyer, which concerns the thing sold, and, though these principles ought to be strictly followed in the forum of conscience; yet we pay little attention to them in our tribunals, in which a buyer is not easily allowed to complain of a concealment of some defect in the thing sold, unless such defect is redhibitory. The interests of commerce not permitting parties to be readily admitted to demand a dissolution of bargains which have been concluded, they must impute it to themselves, in not being better informed concerning the defects, to which the thing sold may be subject."

It seems therefore to me that the defect, to give rise to the obligation to disclose, need not be a redhibitory one—i.e. one giving rise to aedilitian relief—provided that its non-disclosure would have the effect of placing the parties on unequal terms, and that when this latter takes place it is only in cases where the buyer has been really over-reached that relief must be granted.

The non-disclosure of facts which are not defects may also give rise to relief under the principle that they come under the acts leading up to the contract. We find thus that a person who was insolvent was obliged to disclose this fact when contracting. See Van der Keessel *Thesis* 204 and *Holl. Cons.* 4.2 The insolvency of the purchaser is a circumstance leading up to the contract, *viz.* whether he is a suitable person with whom to contract; and it is also an instance of where a duty to speak arises without the purchaser having done anything to deceive or mislead the seller.

In *Woodstock, Claremont, Mowbray and Rondebosch Councils* v. *Smith and Another*, 26 S.C. 681, the Court set aside a contract on the ground of fraud where the identity of the seller had been concealed. Smith, through his brother who was town clerk of one of a number of municipalities which had joined in a common water

scheme, sold certain property to the municipalities under the assumed name of Steyn. Smith's brother had been entrusted with the negotiations and he had been a party to the deception. The judgment in this case does not proceed upon the basis that Smith and his brother had made common cause against the purchaser and that the fraud of the brother could in any way be imputed to Smith but, as I read the judgment, that under the peculiar circumstances of the case, the disclosure of the seller's true name was necessary to enable the parties to contract on equal terms. It is true that in Smith's case there was a positive act of deception; but, in my opinion, this has no real bearing on the question whether there is a duty to disclose.

It must, however, be remembered that the mere non-disclosure of the defect does not give rise by itself to the action for fraud. The knowledge of the defect must be withheld with the object of inducing the other party to enter into the contract or with the object of concealing from the other party facts, the knowledge of which would be calculated to induce him to refrain from entering into the contract. That the element of *dolus* is an essential for this form of action need not be stressed. See the *Cons.*, *supra*, and note the special emphasis placed on *dolus*.

The presence of the graves on this property is a circumstance which in my opinion is so peculiar that it should be disclosed to enable the parties to contract on equal terms. The place was bought as a residence. It is only 1.8753 morgen in size. The graveyard lies close up to the house. More than 80 people have been buried there. Six people have been buried there between 1940 and 1944. The plaintiff bought in May, 1948; within four years of the last two known burials. In my opinion the majority of people would not want to live on or own the property. The defendant has led considerable evidence as to buildings and residences that have been erected on graveyards. I do not know that this evidence is strictly relevant but in any case the evidence concerns graveyards which were either very old and had not been in use for years and the visible signs of the graves had all long since been removed, or graveyards of more than a century old and the public consciousness that they had been graveyards had been lost with the years. My attention was also drawn to the old farms in the Western Province with their old graveyards, often separate ones for European, Slave and Coloured. This also is not a parallel case. They are large farms and old farms on which one would expect to find such graveyards. It can hardly be compared with this case where the graveyard has virtually been sold as the farm. The plaintiff called a sworn appraiser, Hablutzel who stated, and I accept his evidence, that the presence of the graveyard on the property may affect its price in a sale where the facts are known though he does not state in evidence to what extent.

The presence of the graves on the property is a circumstances which directly concerns the *res*. The surface indications have been removed but the remains are still there.

I am of the opinion that defendant knew that the presence of the graves on the property was a circumstance, attaching to the property, of a very peculiar nature such as one would not normally expect to find on a property of that kind. I am also satisfied that the defendant knew that if this fact were made known to prospective buyers they might not wish to buy. And I am satisfied that the defendant knew that the plaintiff did not know, nor had any reason to suspect, that portion of the property had been used as a graveyard. I am also satisfied that at the time of the sale the defendant did not inform the plaintiff of the graves because he thought that if the plaintiff knew he might not buy. Due to the peculiar nature of the defect in the property the defendant, in my opinion, knew that the plaintiff might be labouring under a misconception as to the true nature of the thing he was buying and he did not inform him because he thought that if he did the plaintiff might no longer want to buy. The above course of action is, in my opinion, the same as taking advantage of another's mistake in order to bring about a contract.

In my opinion, the plaintiff would not have bought had he known of the graveyard, and in my opinion in the circumstances of this case, he is entitled to restitution. In coming to this conclusion I have borne in mind what *Pothier* said: that it is only in very exceptional cases that relief will be granted on the grounds of fraud for the non-disclosure of a defect which is not a redhibitory defect, i.e. a defect giving rise to aedilitian relief. But this is an exceptional case and one where damages are of no account. It is not the reduced value of the farm that has brought the plaintiff into Court. It is the dislike of living on or owning such a property which can in no way be compensated for by a payment of money.

I shall now deal with the alternative defence. The plaintiff was informed on 6th October, 1948, that there were graves on the property and he immediately informed the defendant that he intended to cancel the contract. When the defendant did not agree to the cancellation I do not think that it was unreasonable on the part of the plaintiff to delay issue of summons in this matter until a proper investigation had been made. Bosman was unco-operative and it would have been a very foolish man who went to Court or initiated legal proceedings on the uncorroborated evidence of Kannemeyer. The proper people to give evidence and the proper information on which to found the plaintiff's case was the evidence and information that could be supplied by the people who used the graveyard. The people who had conducted the burial services during the years were dead and the plaintiff was then left with the task of finding out who had buried relatives on the farm. In this investigation he was hampered by a lack of knowledge of Afrikaans

and so he had to call in his attorneys to make the investigations for him. When one bears in mind that the defendant was given a month to decide what he was going to do; that they were coloured witnesses who had to be found; that the period which the investigation must cover was a long one; that the investigation had to be effected by plaintiff's attorneys, and that the Christmas and New Year holidays fell in the period in which the investigation took place, then I am of opinion that there is nothing unreasonable in the delay from 6th October to 16th February.

There is no evidence to show that after plaintiff had heard of the graves on the property he exercised any acts of ownership in regard to the property which were inconsistent with his intention to cancel the sale or which precluded him from making restitution of the property as he possessed it at the date when he first became aware of the graves on the property. The stove was sold prior to October, 1948, and the cow also died prior to that date.

The fact that the plaintiff has sold the stove and that the cow has died does not in itself preclude him from claiming rescission. This relief is only lost to the plaintiff where, through his fault or that of the people under his control, the thing is lost or he is unwilling to return it. See *Voet* 21.1.11, who further mentions that this right is also lost in the case of a slave where the slave has been manumitted. I am of opinion that the purchaser only loses this remedy where the *merx* is lost due to some blame (skuld) on his part or on the part of any person under his control or where he has parted with it in such a manner that he has no substitute that he can offer to return in its place. In this case the stove was sold before the discovery by the plaintiff of the graves. No blame attaches to the plaintiff in regard to his failure to return the stove. He had bought it. He had received delivery of it. He had become owner. He had no reason to suspect that any portion of the *merx* was defective and he sold it in the belief that he had received what he had bargained for. Under these circumstances he is entitled to tender the substitute, namely the price he received for it: £45.

In regard to the cow the position is different. The cow had not been sold, it had died. From the circumstances of the case there appears to have been no negligence on the part of the plaintiff or anyone under his control. This is the sort of risk inherent in farming and one which both parties must have contemplated at the time of the sale. The plaintiff has tendered the value of the beast, being £12; and this figure has not been disputed. Under these circumstances it is not necessary for me to consider whether any tender was necessary, for the plaintiff has tendered and is bound by his tender. I come therefore to the conclusion that this defence is bad and must fail. See too, Pothier on *Sale*, secs. 221 and 222 (Cushing's translation).

My conclusion, therefore, is that the plaintiff is entitled to the refund of the purchase price of the farm Shangri-La against re-

transfer of the farm; delivery of the blinds; and payments of the amounts of £12 and £45 being the value of the cow and stove respectively.

In regard to the damages plaintiff is entitled to the costs of transfer, £180, and the costs of cancellation of the bond and the interest on the bond in lieu of notice, £41. Neither of these amounts have been disputed.

The costs of moving into Shangri-La were, in my opinion, £25. In making this estimate I do not allow plaintiff any amount for his own time. It is merely for the transport of his goods and the labour he hired.

The necessary and useful expenses incurred in and upon the buildings on the property I estimate as follows:

The completion of the out-buildings, the construction of the septic tank and the materials supplied ...	£41
The hot water cylinder installed and the copper piping and fittings	£25
Painting of the house materials	£5
Labour	£5
Total	£76

There shall therefore be judgment for the plaintiff in the sum of £5,250 and £280 damages against transfer to the defendant of the property Shangri-La; delivery of the blinds to defendant; and payment to defendant of the sum of £57. Defendant is to pay costs of suit.

Plaintiff's Attorneys: *Nell & Jacobson*. Defendant's Attorneys: *Haak & Marais*.

SLAMBE v. JOHANNESBURG CITY COUNCIL.

(TRANSVAAL PROVINCIAL DIVISION.)

1951. *August* 3, 14. DE VILLIERS and DE WET, JJ.

Municipality.—Jurisdiction.—Pedlars, hawkers and street vendors.—By-law 156 (b) *of Chap.* 8 *of Public Health By-laws of Johannesburg City Council.*—Ultra vires *enabling sub-secs.* 27 (a) *and* (73) *of sec.* 80 *of Ord.* 17 *of* 1939 (*T*).

By-Law 156 (*b*) of Chapter 8 of the respondent Council's Public Health By-Laws which provides that "no person engaged in any business or occupation involving the preparation, handling, serving, delivery, storage or sale of food-