Raad se bevinding dat hy nie, omdat hy gewoonlik vir 'n Kaapse Maleier deurgaan, in die Maleiergroep geklassifiseer kan word nie.

Dat die appellant inderdaad 'n lid is van 'n ras of stam wie se nasionale tuiste in Indië is, val nie te betwyfel nie. Soos reeds opgemerk is hy uit Indiërouers in Indië gebore en het daar sy tuiste gehad totdat hy agt jaar oud was. Namens hom is egter voor hierdie Hof betoog dat hy, volgens die getuienis, inderdaad 'n lid is van die ras of klas wat as die Kaapse Maleiers bekend staan en wel omdat hy dit geword het deur 'n feitelike proses van vereenselwiging met Kaapse Maleiers, 'n proses wat te onderskei sou wees daarvan dat hy gewoonlik vir 'n Kaapse Maleier deurgaan. Die verskil is nie vanselfsprekend nie. Dit veronderstel dat iemand soos die appellant deur eie vereenselwiging met Kaapse Maleiers, wat taal, geloof en lewenswyse betref, inderdaad een van hulle kan wees, al gaan hy nie gewoonlik as sodanig deur nie. Of werklike lidmaatskap op so 'n wyse verwerf kan word, sonder opname in die Maleiergemeenskap deur algemene aanvaarding, is minstens vraaglik. Indien dit wel as 'n feitelike gebeure moontlik is, sou dit in 'n geval soos die onderhawige daarop uitloop dat die betrokke persoon inderdaad lid is van twee verskillende groepe. Die Wetgewer het, meen ek, nie bedoel dat enige persoon tegelyk in meer as een groep geklassifiseer kan word nie. Dit blyk, wat gekleurdes betref, onder meer uit die bepaling in art. 5 (1) van die Wet dat iedere gekleurde wie se naam in die register opgeneem word, geklassifiseer moet word „volgens die etniese of ander groep waartoe hy behoort". Word hy dan, in 'n geval van werklike lidmaatskap van twee groepe, in een van die twee groepe geklassifiseer, sou hy nie kan beweer dat dit onjuis is nie. Daar is niks in die toepaslike wetgewing wat daarop dui dat die keuse in so 'n geval —as dit hoegenaamd kan voorkom—by die betrokke persoon sou berus nie. Dit wil inteendeel blyk dat die appellant in elk geval, al het die aangevoerde feitelike proses hier plaasgevind, nie as lid van 'n ander groep as die Indiërgroep geklassifiseer sou kon word nie. Art. 5 (5) van die Wet, soos ook para. (*c*) van die Proklamasie en die omskrywing van etniese groepe in die Proklamasie, laat die klem op herkoms val. Volgens para. (*c*) van art. 5 (5) moet 'n gekleurde wie se natuurlike ouers albei as lede van dieselfde etniese of ander groep geklassifiseer is, as lid van daardie groep geklassifiseer word. Volgens para. (*c*) van die Proklamasie word, wat genoemde ses groepe betref, iemand geag ook 'n lid van 'n ras of klas of stam te wees indien sy natuurlike vader as lid van daardie ras of klas of stam geklassifiseer is. (Vgl. *Sekretaris van Binnelandse Sake* v. *Jawoodien*, 1969 (3) S.A. 413 (A.A.)). Die appellant se moeder is weliswaar nie as lid van die Indiërgroep geklassifiseer nie, soos vermoedelik sou gebeur het indien sy haar man hierheen sou gevolg het, maar al is art. 5 (5) daarom nie van toepassing nie, dan behoort die appellant nogtans onteenseglik uit hoofde van volbloed herkoms aan die etniese Indiërgroep in para. (5) van die Proklamasie omskryf, en kan hy nie, sonder om af te wyk van die ingestelde etniese patroon wat in die gekleurde groep voorkom, terselfdertyd vir die doeleindes van die Proklamasie inderdaad 'n Kaapse Maleier of, wat dit betref, inderdaad 'n lid van enige ander groep wees nie.

Ek sou wil byvoeg dat ek ook nie oortuig is dat die getuienis aantoon dat die appellant, afgesien van algemene aanvaarding, deur die aangevoerde feitelike gebeure in der waarheid 'n Kaapse Maleier geword het nie, maar met die oog op die voorgaande is dit nie nodig om op die getuienis in te gaan nie. Die appèl word van die hand gewys met koste.

OGILVIE THOMPSON, A.R., WESSELS, A.R., JANSEN, A.R., en VAN WINSEN, WN.-A.R., het saamgestem.

Appellant se Prokureurs: *Fuller, de Klerk en Osler*, Kaapstad; *McIntyre en van der Post*, Bloemfontein. Respondent se Prokureurs: *Adjunk Staatsprokureur*, Kaapstad en Bloemfontein.

KESSOOPERSADH EN 'N ANDER v. ESSOP EN 'N ANDER.

(APPÈLAFDELING.)

1969. *September* 11; *November* 11. STEYN, H.R., OGILVIE THOMPSON, A.R., HOLMES, A.R., WESSELS, A.R., en RABIE, WN.-A.R.

**Verhuurder en huurder.—Huurkontrak.—Onregistreerde lang huurkontrak.—„Derde partye" soos bedoel in art. 2 van Wet 50 van 1956. —„Derde partye" sluit nie 'n koper in nie.*—Huur gaat voor koop. *—Omvang van.*

Die verhouding wat tot stand kom tussen die huurder en die koper wat ingevolge die reël *huur gaat voor koop* gebonde gehou word, is sodanig dat so 'n koper nie as 'n derde party soos bedoel in artikel 2 van Wet 50 van 1956 beskou kan word nie. (OGILVIE THOMPSON, A.R., en WESSELS, A.R., het nie saamgestem nie).

Die omvang van die reël *huur gaat voor koop* en die voorbehoudsbepaling in artikel 2 van Wet 50 van 1956 volledig bespreek.

Die beslissing in die Natalse Provinsiale Afdeling in *Kessoopersadh and Another* v. *Essop and Another*, omvergewerp.

Appèl teen 'n beslissing in die Natalse Provinsiale Afdeling (KENNEDY, WN.-R.P., HARCOURT, R., en MILLER, R.), wat 'n beslissing van JAMES, R., in die Plaaslike Afdeling Durban en Kus, 1968 (4) S.A. 610, bevestig het. Die feite blyk uit die uitsprake.

G. I. Raftesath, namens die appellante: Before considering the effect of the provision relating to registration in sec. 2 of Act 50 of 1956, it is necessary to ascertain what the legal position was immediately before the section came into operation. See Wille, *Landlord and Tenant in*

**Landlord and tenant.—Lease.—Unregistered long lease.—"Third parties" in section 2 of Act 50 of 1956.—"Third parties" does not include a purchaser. —"Huur gaat voor koop."—Scope of.*

The relationship which arises between the lessee and the purchaser who are bound by the rule "huur gaat voor koop" is such that such purchaser cannot be regarded as a third party as contemplated by section 2 of Act 50 of 1956. (OGILVIE THOMPSON, J.A., and WESSELS, J.A., dissented).

The scope of the rule "huur gaat voor koop" and the proviso to section 2 of Act 50 of 1956 fully discussed.

The decision in the Natal Provincial Division in *Kessoopersadh and Another* v. *Essop and Another*, reversed.

South Africa, 5th ed., pp. 99-100; *Canavan & Rivas* v. *New Transvaal Gold Farms*, 1904 T.S. at p. 147; *Hitzeroth* v. *Brooks*, 1964 (4) S.A. at p. 447F-G (E). In the absence of registration a long lease was binding (*a*) on a purchaser without knowledge for the first ten years of the lease; *Komen* v. *de Heer and Others*, 1908 N.L.R. 237; (*b*) on a purchaser with knowledge for the full term of the lease; *Canavan & Rivas* v. *New Transvaal Gold Farms*, *supra*. So far as statute law was concerned, the position in regard to registration was as follows: (*a*) in the Transvaal no „long lease" was of any force and effect against creditors or any subsequent *bona fide* purchaser or lessee of the property leased or any part thereof unless it was registered against the title deeds of such property. Sec. 29 of Proc. 8 of 1902; *Canavan & Rivas* v. *New Transvaal Gold Farms*, *supra*; (*b*) in the Orange Free State, subject to the difference as to the period, the statutory position was the same as in the Transvaal. See sec. 51 of Ord. 12 of 1906; (*c*) in the Cape the common law remained unaltered. *Municipality of Indwe* v. *The Indwe Railway, Collieries and Land Company Limited*, 23 S.C. at pp. 226-227; (*d*) in Natal there was no provision for registration in Law 12 of 1884, and accordingly the common law applied. *Executor Estate Komen* v. *de Heer and Others*, 28 N.L.R. at pp. 583 *et seq.*; *Komen* v. *de Heer and Others*, *supra* at p. 240. Prior to Act 50 of 1956, (*a*) at common law there was uncertainty as to whether writing was necessary for the validity of leases; *Herbert* v. *Anderson*, (1839) 2 Menz. 166; *Green* v. *Griffiths*, 4 S.C. at p. 349; *Hitzeroth* v. *Brooks*, *supra*; *Wille*, *op. cit.*, pp. 90-91, 100; de Wet & Yeats, *Kontraktereg en Handelsreg*, 2nd ed., p. 233; (*b*) there were differences in the statutory requirements between the Province: (i) both in the Transvaal and in the Orange Free State notarial execution was required for the validity of leases for periods of not less than ten and 25 years respectively; (ii) in the Cape the common law applied; and (iii) in Natal there were the special requirements of Law 12 of 1884 as to evidence in writing and part-performance. See *Wille*, *op. cit.*, pp. 102-103. By the opening words of sec. 2 of Act 50 of 1956 the Legislature plainly provided for uniformity throughout the country in regard to writing, just as it did in regard to contracts of suretyship (see sec. 6 of Act 50 of 1956); donation (see sec. 5 of Act 50 of 1956); and sale (see sec. 1 of Act 68 of 1957). So far as leases were concerned, the decision to lay down that writing was not necessary was presumably in part at least the result of the fact that no duty or charge was levied on leases as such. However (*a*) the statutory provisions in the Transvaal and the Orange Free State, in regard to writing, were so linked to the provisions relating to the requirement of registration, that it was impracticable to repeal the one and not the other; and (*b*) the common law relating to the requirement of registration was closely linked to the requirement of writing, because without writing there could be no registration. Consequently if, while repealing sec. 29 of Proc. 8 of 1902 (T) and sec. 51 of Ord. 12 of 1906 (O), the Legislature in sec. 2 of Act 50 of 1956 had simply provided that writing should not be necessary for the validity of any contract of lease, it would have meant that there would be uncertainty as to whether it was intended to eliminate the requirement of registration altogether. It was to remove the possibility of any such uncertainty that the Legislature added the

proviso in sec. 2 of Act 50 of 1956; the proviso clearly being intended to qualify what had gone before. The proviso is not elaborate, it merely establishes uniformity in regard to what are commonly called long leases. See *Wille*, *op. cit.*, pp. 90, 102; sec. 102 of Act 47 of 1937. The meaning of the term „third parties" as used in sec. 2 of Act 50 of 1956 must be considered in the light of the above. The term „third parties" has no single, defined or universally appropriate meaning. See, e.g., sec. 11 of Act 29 of 1942. It cannot be said that the meaning of the term „third parties" in sec. 2 of the Act is clear. The term does not mean only those who were original or immediate parties to a lease. See *Hitzeroth* v. *Brooks*, *supra* at pp. 444, 452. A person who was not a party to a lease was nevertheless held not to be a third party, on the basis that she was, by virtue of the common law, at all times bound by the lease. Cf. *Costain & Partners* v. *Godden, N.O. and Another*, 1960 (4) S.A. at pp. 460-461. In construing the term „third parties" in sec. 2, therefore, a valid distinction cannot be drawn between one who is an actual party to a lease, and one who is bound by it according to common law. Since from that category of persons called „third parties" are excluded certain persons who although not immediate parties are regarded by the common law as parties, the only satisfactory way of defining the category of „third parties" is by excluding all those who would be bound by the lease at common law. This construction leads to results which accord with the ordinary canons of construction of statutory provisions that the Legislature is presumed not to wish to alter the existing law more than necessary, *Johannesburg Municipality* v. *Cohen's Trustees*, 1909 T.S. at p. 818; Steyn, *Die Uitleg van Wette*, 3rd ed., p. 96; and that the Legislature does not intend anomalous results, *Steyn*, *op. cit.*, p. 101. This construction would mean that: (*a*) those gratuitous successors who would formerly have been bound by a lease, will continue so to be bound; (*b*) the lessee in occupation who would formerly have been protected at least for the first ten years of his lease, will continue to be so protected; (*c*) the lessee who would have been protected against a purchaser with knowledge for the whole term of the lease, will continue to be so protected; (*d*) the protection afforded a lessee in occupation under a short lease by virtue of the maxim *huur gaat voor koop* as against a purchaser without knowledge, will not be more favourable than that of a lessee in occupation under a long lease as against a purchaser with knowledge so far as the first ten years of the lease are concerned. Therefore the first respondent is not a „third party" within the meaning of the term in sec. 2 of the Act, and the view expressed by COLMAN, J., in *Alternators (S.A.) (Pty.) Limited* v. *Boulanger*, 1969 (3) S.A. at p. 78D-G, is incorrect. Cf. Kerr, *The Law of Lease*, pp. 28-32. Therefore the first respondent is bound by the terms of the lease for the period up to the 30th April, 1976, and so it should be ordered.

J. Allan Howard, namens die respondente: There is no justification, in interpreting sec. 2 of Act 50 of 1956, to depart from the ordinary and natural meaning of the expression „third parties" as used therein. The ordinary meaning of the expression in this context is „those who are not parties to the lease or cession", the word „parties" connoting not only the original contracting parties but also those who have be-

come such in accordance with the law relating to the creation of contractual relationships. „Parties" to a lease, in the sense referred to above, include persons who have become such in the various ways discussed in the Court *a quo* and persons who, whether formally or informally, ratify or adopt or otherwise agree to be bound by the lease, but do not include persons who were merely bound as if they were parties by virtue of common law rules unconnected with the creation of contractual relationships. It being common cause that the first respondent has at no time agreed to be bound by the terms of the lease and as he has not otherwise become a „real party" thereto, he is a „third party" within the meaning of the section. With regard to the meaning of „party" and „third party" see *Hitzeroth* v. *Brooks*, 1964 (4) S.A. at p. 450C-E; *Hitzeroth* v. *Brooks*, 1965 (3) S.A. at pp. 452A-453B. MILLER, J., was correct in holding that the effect of the common law rule (by which a purchaser of property with knowledge of an unregistered long lease over it was bound by the lease) was not to introduce a fresh or additional party to the lease; it only operated so as to bind the purchaser as though he were a party. As to the common law position, see Wille, *Landlord & Tenant in S.A.*, 5th ed., pp. 93-4, 100; *Hitzeroth* v. *Brooks*, 1964 (4) S.A. at p. 447E-G; *Canavan & Rivas* v. *New Transvaal Gold Farms*, 1904 T.S. 136; *Municipality of Indwe* v. *Indwe Railway Collieries and Land Co. Ltd.*, 23 S.C. at p. 226; *Komen* v. *de Heer and Others*, 1908 N.L.R. 237. It is true that a purchaser who is thus bound by an unregistered long lease is also bound by all of its material terms, as though he had been substituted for the original landlord. *Essop Ebrahim & Sons* v. *Hoosen Cassim*, 1920 N.P.D. at p. 79; *de Jager* v. *Sisana*, 1930 A.D. at p. 82; *de Wet* v. *Union Government*, 1934 A.D. at pp. 63, 73; *Kruger* v. *Pizzicanella and Another*, 1966 (1) S.A. at pp. 454G-455C. Nevertheless a purchaser who is bound by the material terms of the lease because of actual or constructive notice of its existence does not become a party thereto. The relationship between him and the tenant is *sui generis*, notwithstanding *obiter dicta* in *de Wet's* case, *supra* at p. 73, to the effect that he is a cessionary of the original landlord. This submission derives some support from the statements of leading Roman-Dutch writers regarding the effect of the doctrine *huur gaat voor koop*. See Grotius, *Introduction*, 3.19.16; Schorer's *Note* CCCXCVIII (*Maasdorp's* trans., 2nd ed., pp. 264-5, 617); van Leeuwen, *Censura Forensis*, 1.4.22.19 (translation by *Barber & Macfadyen* at p. 192); Voet, *Commentary on the Pandects*, 19.2.17 (*Gane's* translation, vol. 3, pp. 424-5). The doctrine had its origin in considerations of equity, with the emphasis upon protection of the tenant's claim to occupation under the lease against the competing claim of the purchaser; and this militates against the notion of a transference of rights under the lease, no matter how closely the resulting relationship between purchaser and tenant resembles the relationship which such a transference would bring about. *Wille*, p. 92; *Shalala and Another* v. *Gelb*, 1950 (1) S.A. at p. 865; *Johannesburg Municipal Council* v. *Rand Township's Registrar and Others*, 1910 T.S. at p. 1320. Before the expression „third parties" can be given a restrictive interpretation, so as to depart from its ordinary meaning, it must appear that to give it its plain meaning would

lead to: (*a*) some glaring absurdity or anomaly which the Legislature could not have intended; or (*b*) a result contrary to the intention of the Legislature as manifested by the context or otherwise. *Venter* v. *Rex*, 1907 T.S. at pp. 914-5; *Storm & Co.* v. *Durban Municipality*, 1925 A.D. at p. 55; *Rex* v. *Jaspan*, 1940 A.D. at p. 17; *Neethling* v. *Estate Burger*, 1942 A.D. at p. 78. To accord the expression its plain meaning (i) would not give rise to any such absurdity or anomaly, and (ii) would not be contrary to any discernible intention of the Legislature. *Alternators (S.A.) (Pty.) Ltd.* v. *Boulanger*, 1969 (3) S.A. at p. 78D-G. The „anomalies" to which the appellant referred in the Court *a quo* are not true anomalies, alternatively, they are not so glaring as to justify a departure from the ordinary meaning of the expression „third parties". The fact that greater protection is accorded to tenants under short leases than tenants under unregistered long leases is neither inequitable nor anomalous. It is not correct to class as an anomaly the clearly expressed intention of the Legislature to alter the common law to the extent that unregistered long leases are no longer binding on gratuitous successors; if, notwithstanding, the presumption to the contrary that intention is clear, that is an end of the matter. In any event, in the historical context of the legislation, the presumption which is applicable as an aid to interpretation is not that against an intention to alter the common law, but the wider presumption against an intention to alter the existing law. Steyn, *Die Uitleg van Wette*, 3rd ed., p. 96; *R.* v. *Vos*: *R.* v. *Weller*, 1961 (2) S.A. at p. 749A-B. To interpret the expression „third parties" so as to exclude a *bona fide* purchaser with knowledge of an unregistered long lease would bring about a drastic alteration in the law as it had existed in the Transvaal and Orange Free State for half a century. There is no basis for a restrictive interpretation of the expression „third parties" because the only clearly discernible object of the Legislature was to achieve uniformity in regard to the formalities applicable to leases, which affords no clue as to whether or not „third parties" was intended to bear its ordinary meaning. *Steyn*, *op. cit.*, pp. 25-6; *de Villiers* v. *Cape Law Society*, 1937 C.P.D. at pp. 431-2; *Moser* v. *Milton*, 1945 A.D. at p. 525. Whether gratuitous successors are or are not properly excluded from the ambit of „third parties", there is no justification for cutting down the meaning of the expression further so as to exclude onerous successors with or without notice of the lease. Before Act 50 of 1956 was passed: (i) sec. 29 (1) of Transvaal Proclamation, 8 of 1902, provided, *inter alia*, that an unregistered long lease of land (10 years) was not of any force or effect against any subsequent *bona fide* purchaser of the property; (ii) sec. 51 of Ord. 12 of 1906 (O) contained a provision to the same effect save that the period was 25 years; (iii) the position in Natal was governed by the provisions of Law 12 of 1884; and (iv) the common law remained unaltered in the Cape. If the Legislature intended to achieve uniformity by providing that unregistered long leases would not be binding on persons who would not be bound at common law it would not have enacted the proviso to sec. 2 of Act 50 of 1956; it would simply have repealed the earlier legislation. The general similarity in form and content between sec. 2 of Act 50 of 1956 and sec. 29 (1) of

Transvaal Proclamation 8 of 1902 affords some indication that the Legislature intended to achieve uniformity by extending the provisions of the Transvaal enactment (in a modified form) to the rest of the country. If sec. 2 of Act 50 of 1956 is interpreted in the light of the Transvaal Proclamation „third parties" must at least include purchasers, whether or not they purchase with knowledge of the lease. If a „third party" within the meaning of the section is a person who, at common law, would not be bound by an unregistered long lease, the first respondent (*a*) would not be such a „third party" in respect of the first ten years of the lease (on the authority of *Komen* v. *de Heer and Others*, *supra*, the appellants having been in occupation at the date of the sale); (*b*) would be such a „third party" in respect of the remaining period of the lease. The first respondent would not be bound for any period of the lease in excess of ten years. The relevant date for determining whether an onerous successor had actual knowledge of the lease is the date of sale. *Wille, op. cit.*, p. 100. The date of sale is the relevant date for occupation by the tenant who relies upon the maxim *huur gaat voor koop*, and as occupation is a form of notice there is no justification, in principle, for selecting a different date as being relevant for determining whether the purchaser had actual knowledge of the lease. *Wille, op. cit.*, p. 95; *Judd* v. *Fourie*, 2 E.D.C. at p. 55; *Shalala and Another* v. *Gelb*, 1950 (1) S.A. at pp. 863, 865, 866. If the relevant date were the date of transfer the purchaser would be bound by a lease concluded without his knowledge after the date of sale provided he was informed of its existence before receiving transfer—which would be inequitable and contrary to principle. The language of the proviso to sec. 2 of Act 50 of 1956 is incapable of a construction which excludes from the ambit of „third parties" a purchaser in the situation of the first respondent. The effect of such a construction would be that the first respondent is not a „third party" for the first ten years of the lease but is transformed into a „third party" upon the expiration of that period. For this reason it is impossible to equate „third parties" with persons who, at common law, would not be bound by an unregistered long lease.

Cur. adv. vult.

Postea (November 11).

RABIE, WN.-A.R.: Dit is 'n appèl teen die bevel van 'n voltallige Regbank van die Natalse Provinsiale Afdeling waarvolgens 'n appèl teen 'n beslissing van JAMES, R., in die Plaaslike Afdeling Durban en Kus met koste van die hand gewys is. Die uitspraak van JAMES, R., is gerapporteer: kyk 1968 (4) S.A. 610. In albei Howe is beslis dat die aansoek van die applikante (nou die appellante) vanweë die bepalings van art. 2 van die Algemene Regswysigingswet, 50 van 1956, nie kon slaag nie, en die uitslag van die huidige appèl hang ook af van die vertolking wat aan hierdie artikel gegee word.

Die volgende feite was gemene saak tussen die partye toe die appellante se aansoek verhoor is: Op 18 April 1966 het die tweede respondent, wat destyds die eienaar van sekere grond geleë aan Crosstraat in Durban was, 'n skriftelike ooreenkoms met die appellante gesluit

waarvolgens hy die grond vir 'n tydperk van nege jaar vanaf 1 Mei 1966 aan hulle verhuur het en ook aan hulle die reg verleen het om die huur vir nege tydperke van twee jaar elk te hernu. Die appellante het besit van die grond geneem maar die huurkontrak is nie teen die tweede respondent se titelbewys ten opsigte van die grond geregistreer nie. Op 19 September 1966, terwyl die appellante in okkupasie van die grond was, het die tweede respondent dit aan die eerste respondent verkoop. Toe die eerste respondent die grond gekoop het, het hy geweet dat die appellante die grond huur, maar hy het gemeen dat hulle maandelikse huurders was. Hy het later transport van die grond ontvang en teen daardie tyd was hy bewus van die inhoud van die huurkontrak tussen die tweede respondent en die appellante.

In November 1967 het die appellante in die Plaaslike Afdeling Durban en Kus aansoek gedoen om 'n bevel wat verklaar dat hulle kragtens die ooreenkoms van 18 April 1966 geregtig was om die grond te okkupeer, dat die ooreenkoms nooit gekanselleer is nie en dat dit bindend was op die eerste respondent. Die verhoor van die aansoek is uitgestel en die Hof het kragtens Reël 6 (*g*) van die Hooggeregshofreëls beveel dat getuienis aangehoor word oor die vraag of die appellante en die tweede respondent hulle ooreenkoms met mekaar in Junie 1966 gekanselleer het. Getuienis is nie aangehoor nie, want op die uitgestelde dag, 8 Augustus 1968, het die partye die Hof meegedeel dat hulle tot 'n vergelyk oor hierdie aangeleentheid gekom het en JAMES, R., het toe ingevolge ooreenkoms tussen die partye 'n bevel gemaak wat verklaar dat die ooreenkoms nie gekanselleer is nie, asook die volgende bevel insake koste, nl.

„That the respondents are ordered to pay the costs of this application jointly and severally up to 13th June, 1966, and that the costs thereafter incurred shall depend upon the Court's decision on the remaining issue in these proceedings, which they proposed to argue."

Art. 2 van Wet 50 van 1956 lui soos volg:

„Geen huurkontrak van grond is bloot op grond van die feit dat dit nie op skrif gestel is, ongeldig nie: Met dien verstande dat geen huurkontrak van grond wat aangegaan word vir 'n tydperk van minstens tien jaar of vir die natuurlike lewensduur van die huurder of 'n ander in die huurkontrak genoemde persoon, of wat van tyd tot tyd na keuse van die huurder hernieubaar is vir 'n onbepaalde tydperk of vir tydperke wat tesame met die eerste tydperk van die huur, gesamentlik minstens tien jaar beloop, en geen sessie van so 'n huurkontrak, indien so 'n kontrak of sessie na die inwerkingtreding van hierdie Wet verly word, teenoor derde partye geldig is nie, tensy dit teen die titelbewys van die verhuurde grond geregistreer is."

Volgens art. 4 van dieselfde Wet sluit „huur" in art. 2 ook „onderhuur" in, en „huurder" ook „onderhuurder".

JAMES, R., het die appellante se aansoek van die hand gewys op grond daarvan

„that an onerous successor to a lessor is not bound by the terms of an unregistered long lease of which he did not have notice at the date he purchased the property. This is so because such a person is, in my judgment, a ‚third party' within the meaning of the proviso to sec. 2 of Act 50 of 1956".

Op appèl voor die Natalse Provinsiale Afdeling het die appellante aangevoer dat hulle geregtig was op 'n bevel wat verklaar dat hulle die grond vir 10 jaar vanaf 1 Mei 1966 kon okkupeer, maar hierdie betoog is verwerp. HARCOURT, R., se beslissing kom daarop neer dat die voorbehoudsklousule in art. 2 aandui

„that the Legislature intended to do away with all questions of, and enquiries into, the questions of notice by occupation or other knowledge by the purchaser",

dat, anders as wat die posisie voorheen onder die reël *huur gaat voor koop* was, 'n persoon wat ná die inwerkingtreding van art. 2 grond koop ten opsigte waarvan daar 'n ongeregistreerde langtermyn-huur bestaan nie meer vanweë sy kennis van die kontrak, of vanweë die huurder se okkupasie ten tyde van die koop, aan daardie huurkontrak gebonde gehou kan word nie, en dat hy derhalwe as 'n „derde party" soos bedoel in die artikel beskou moet word. KENNEDY, WN.-R.P., het met die uitspraak van HARCOURT, R., saamgestem. MILLER, R., het ook daarmee saamgestem, maar het sekere opmerkinge van sy eie bygevoeg. Hy sê o.m. dat die Wetgewer se redes

„for bringing about the change in the law may be obscure",

maar dat na sy mening die doel van art. 2 was

„to take away, *inter alia*, the protection which a lessee under an unregistered long lease might formerly have enjoyed against a purchaser who, although not a party to the lease, bought with knowledge of such lease".

Dit blyk dat daar twee vrae is wat beantwoord moet word. Die eerste is of gemelde art. 2 beteken dat die reël *huur gaat voor koop* in die geval van 'n langtermyn-huurkontrak alleen van toepassing kan wees indien die kontrak geregistreer is en in geen ander geval nie. As die antwoord op hierdie vraag „ja" is, sal mens moet sê dat die koper van die grond nie verplig is om die huur te eerbiedig nie en dat hy dus noodwendig ook 'n derde party soos bedoel in art. 2 sou wees. Die tweede vraag is of, indien art. 2 nie so 'n betekenis het nie en die reël *huur gaat voor koop* geld in die geval voor ons, die koper nie nogtans kan sê dat hy 'n derde party is soos bedoel in art. 2 nie op grond daarvan dat hy nie kontraktueel teenoor die huurder verbonde is nie.

Vóór die inwerkingtreding van art. 2 het daar, vir sover hier ter sake, die volgende wetteregtelike bepalings in verband met huurkontrakte bestaan. In die Transvaal het art. 29 van Prok. 8 van 1902 soos volg bepaal:

„29. (1) No lease of any mynpacht, claim or right to minerals, and no lease of land or any stand for a period of not less than ten years or for the natural life of any person mentioned therein, or which is renewable from time to time at the will of the lessee indefinitely, or for periods which together with the first period thereof amount in all to not less than ten years, shall be of any force or effect if executed after the taking effect of this Proclamation unless executed before a notary public, nor shall it be of any force or effect against creditors or any subsequent *bona fide* purchaser or lessee of the property leased or any portion thereof unless it be registered against the title deeds of such property.

(2) No cession of any such lease as is mentioned in the preceding subsection, made after the taking effect of this Proclamation, shall be of any force or effect against creditors or any *bona fide* purchasers thereof, unless such cession be registered in the registration office in which such lease is registered."

In die Oranje-Vrystaat het art. 51 van Ord. 12 van 1906 dieselfde bewoording as die pas aangehaalde artikel in die Transvaalse Proklamasie gehad, behalwe dat die tydperk van 'n langtermyn-huur wat daarin genoem is 25 jaar was en nie 10 jaar soos in die Transvaalse Proklamasie nie. In Natal het art. 1 (*c*) van Wet 12 van 1884 soos volg bepaal:

„No action shall be maintained on any contract to grant or take a lease or sub-lease of immovable property, or any interest therein, for a period exceeding two years from the time of making such contract, unless and save so far as such contract shall be evidenced by some writing signed by or on behalf of the person sought to be bound thereby, or by or on behalf of some person for whose contracts the person sued may then be liable."

Art. 2 van dieselfde Wet het bepaal dat art. 1 (*c*) nie geld nie in die geval van

„. . . any contract where there has been part performance by any party or his representative in such a way as is inconsistent with any other reasonable conclusion than the actual existence of such a contract in the whole or in part".

Al hierdie wetteregtelike bepalings is herroep deur art. 32 van Wet 50 van 1956.

Die bepalings van die Natalse Wet was van bloot bewysregtelike aard en het nie die gemene reg en die werking van die reël *huur gaat voor koop* geaffekteer nie. Wat die Transvaalse Proklamasie betref, is die tydperk van 10 jaar wat daar genoem word in ooreenstemming met die tydperk wat in die gemene reg vir 'n huur *in longum tempus* met betrekking tot grond gegeld het (kyk *Canavan and Rivas* v. *New Transvaal Gold Farms, Ltd.*, 1904 T.S. 136). Die tydperk van 25 jaar wat in die Vrystaatse Ordonnansie genoem word, is nie in ooreenstemming met die gemene reg nie en het sy oorsprong waarskynlik in 'n verkeerde vertolking van 'n plakaat van 1744 wat, met die oog op die heffing van belastings, registrasie van huurkontrakte van 25 jaar en langer vereis het (kyk *Canavan and Rivas* v. *New Transvaal Gold Farms, Ltd., supra* op bl. 146-7, en prof. J. C. de Wet se artikel „*Huur Gaat Voor Koop*" in Tydskrif Vir Hedendaagse Romeins-Hollandse Reg, 8ste jaargang, 1944, op bl. 228). Die bepaling in sowel die Transvaalse Proklamasie as die Vrystaatse Ordonnansie dat daar registrasie van 'n langtermyn-huur moet wees om teen skuldeisers, kopers en huurders te goeie trou te kan geld, toon ooreenkoms met die reël van die gemene reg dat 'n langtermyn-huur *coram lege loci* verly moes word om teen die verhuurder se skuldeisers en opvolgers *titulo singulari* te kon geld (kyk bv. Voet, *Commentarius ad Pandectas*, 19.2.1; Groenewegen, *De Legibus Abrogatis, ad Cod.* 4.65.9; *de Wet, loc. cit.*, bl. 192 en 232; Wille, *Landlord and Tenant in South Africa*, 5de uitg., bl. 93). Op hierdie aangeleentheid, en meer in die besonder die kwessie van goeie trou, of kennis, aan die kant van die koper van grond ten opsigte waarvan daar 'n langtermyn-huur bestaan, word later ingegaan. In die Kaapprovinsie het geen wetteregtelike bepalings bestaan nie en het die gemene reg gegeld.

Die advokate van die partye is dit met mekaar eens dat die volgende twee paragrawe in *Wille, op. cit.*, op bl. 99-100, 'n korrekte opsomming van die hier tersaaklike reëls van die gemene reg betreffende huurkontrakte van grond bevat:

„A short lease, that is, one for less than ten years, whether executed in writing or not, if followed by occupation, is binding on the parties and on all the successors of the landlord. If the tenant is not in occupation, the lease is not binding on the creditors of the landlord, nor is it binding on a purchaser of the leased property unless, at the date of the sale, he had knowledge of the lease. The lease, however, is binding on the parties and on the landlord's gratuitous successors.

A long lease possibly requires to be executed in writing to make it legally binding, even as between the parties. If duly registered, it is binding on the parties and all the successors of the landlord. In the absence of registration, the lease is not binding on the creditors of the landlord. It is not binding for its full term on a purchaser, unless, at the date of the sale, he had knowledge of the lease; if the purchaser did not have such knowledge, but the tenant was, at the date of the sale, in occupation of the property, the purchaser is bound by the lease for the first ten years. The lease is, in all circumstances, binding on the landlord, and on his gratuitous successors."

Dit is nie nodig om 'n mening uit te spreek oor die vraag of dit slegs

die koper se kennis ten tyde van die koop is wat sy gebondenheid aan die huur bepaal, soos in die aanhaling te kenne gegee word, en nie ook die kennis wat hy het wanneer hy transport neem nie. Ek wys verder daarop dat *Wille* elders in sy aangehaalde werk (op bl. 95) sê dat dit in die geval van 'n korttermyn-huur nog nie deur 'n Hof beslis is of, waar die huurder nie in okkupasie is nie, die koper nogtans, bloot op grond van sy kennis van die huur, aan die huur gebonde gehou kan word nie. Die geleerde skrywer voer egter aan dat sy mening steun vind in sekere *dicta* en in sekere beslissings in verband met langtermyn-hure. Vir huidige doeleindes is dit ook nie nodig om op hierdie aangeleentheid in te gaan nie. Onderhewig aan wat so pas gesê is, meen ek dat aanvaar kan word dat die aanhaling hierbo 'n juiste uiteensetting van die regsposisie bevat vir sover dit betrekking het op die kopers van gehuurde grond.

As agtergrond tot die toepassing van die reël *huur gaat voor koop* in Suid-Afrika word kortliks op die volgende gewys. Die reël het waarskynlik sy oorsprong te danke aan 'n strewe om aan die huurders van huise en lande 'n bestendigheid van titel te gee wat hulle onder die Romeinse reg nie geken het nie (*de Wet, loc. cit.*, op bl. 170). In die Romeinse reg kon die koper die huurder uitset. Die reël word soos volg in C. 4.65.9 weergegee: *Emptori quidem fundi necesse non est stare colono cui prior dominus locavit nisi ea lege emit*, d.w.s. dit is vir die koper van 'n plaas nie nodig om die huurboer aan wie die vorige eienaar verhuur het in die huur te laat aanbly nie tensy hy op daardie voorwaarde gekoop het. Kyk ook *Graham* v. *Local and Overseas Investments (Pty.) Ltd.*, 1942 A.D. 95 op bl. 110. Die Romeinsregtelike reëling het in sommige streke bly voortbestaan, maar in die provinsie Holland en in sekere ander gebiede was daar plaaslike wetgewing wat die beginsels onderliggend aan die reël *huur gaat voor koop* beliggaam het (*de Wet, loc. cit.*, op bl. 181-186). Die beginsel dat 'n huurder in sy besit beskerm word waar die grond na 'n ander oorgaan, vind sy oorsprong, volgens prof. *de Wet, loc. cit.*, bl. 169-174, in ou Wes-Europese gebruiksvorms van grond wat voor die resepsie van die Romeinse reg bestaan het en wat aan die gebruiker van die grond 'n saaklike reg gegee het. 'n Ontleding van die skrywers en van die praktyk in die Noordelike Nederlande lei die geleerde skrywer tot die gevolgtrekking

„dat die huurder, volgens die gemene reg, 'n saaklike gebruiksreg ten aansien van die grond gehad het"

(*loc. cit.*, bl. 193), en hierin sien hy dan ook, as ek dit reg verstaan, die grondslag van die verpligting van die koper van gehuurde grond om die besitsreg van die huurder te erken. In die proefskrif van Nelissen, *Huur en Vervreemding*, waarna daar in *Graham* v. *Local and Overseas Investments (Pty.) Ltd., supra* op bl. 110, verwys word, word die mening uitgespreek dat die oorsprong van die reël *huur gaat voor koop* in oorwegings van billikheid gesoek moet word. Hy sê (op bl. 179):

„Bij de ontwikkeling van de huur, kwam de ondoelmatigheid van het ‚koop breekt huur' aan het licht. Dat in de strenge toepassing van dezen regel eene groote hardheid verborgen lag, viel bovendien moeielijk te ontkennen. Gaf men eenmaal den huurder regt op de zaak, althans zoolang deze onder den verhuurder bleef, 't scheen onbillijk, dat door eene willekeurige daad des verhuurders, de huurder van zijn regt verstoken bleef. Onbillijk, dat een huurder, die

voor een tijd van eenige jaren eene woning had gehuurd, en juist met het oog op dezen termijn alles comfortabel had ingeright, van den eenen dag op den anderen tot ontruiming zou kunnen worden gedwongen."

Hier kan miskien daarop gewys word dat Schorer in sy aantekeninge op *de Groot se Inleiding, ad* 3.19.16, in noot 59, die regverdiging vir die reël in die billikheid en gesonde verstand vind. Hy sê:

„By ons, zegt *de Groot*, moet de kooper de huur laaten volgen; het welke betaamenlijk en uit de gezonde rede blijkbaar is, nadien de kooper de plaats van den verkooper vervangt. Nu kan immers niemand een' ander meer rechts toevoegen, dan hij zelf bezit."

Soos deur prof. *de Wet, loc. cit.*, bl. 188, aangetoon word, herinner hierdie sienswyse enigsins aan dié van Dechkerus, wat in sy *Dissedtationum Juris et Decisionum Libri Duo*, lib. 2, diss. 8, daarop wys dat die gewoontereg van Brabant, anders as die Romeinse reg, die huurder in sy besit teen die koper beskerm en dan hierdie verklaring van die reël van die gewoontereg gee, nl., *consuetudinis illae fuit ratio emptorem scientem aedes conductas intellegi lege permittendae conductionis emisse*, d.w.s. die rede vir daardie gewoonte was dat 'n koper wat weet dat huise verhuur is verstaan word om dit te gekoop het met die beding dat die huur toegelaat moet word. *Dechkerus* voeg by dat dit vroeër die gewoonte was om so 'n beding in koopkontrakte op te neem.

Ek noem in hierdie verband nog die mening van Fockema Andreae, *Het Oud-Nederlandsch Burgerlijck Recht*. Hy vind die verklaring van die reël *huur gaat voor koop* in die openbaarheid van die huurder se gebruik van die grond en in die koper se gevolglike veronderstelde bekendheid met die huurooreenkoms. Hy sê (deel 1, bl. 345-346):

„. . . de kooper kon er ook moeilijk onbekend mee zijn gebleven, dat er een huurder in het goed zat, en ik vermoed dat men er op dezen grond toe gekomen is, hem de eerbieding van het recht des huurders op te leggen".

Bodenstein, *Huur Van Huizen En Landen Volgens Het Hedendaagsch Romeins-Hollandsch Recht*, vind hierdie verklaring van die reël „alleszins redelijk" (bl. 153). Kyk ook *Shalala and Another* v. *Gelb*, 1950 (1) S.A. 851 (K) op bl. 863-864.

Wat die publiekmaking van saaklike regte betref, dien vermeld te word dat 'n plakaat van Karel V in 1529 verlyding *coram lege loci* vereis het vir die oordrag van onroerende goed en die vestiging van saaklike regte daarop (Groot Plakaat Boek, 1, bl. 374; *de Wet, loc. cit.*, bl. 186). Huurkontrakte van langer as 10 jaar is as 'n soort vervreemding beskou en moes dus ook so verly word: *Voet*, 19.2.1.; Groenewegen, *De Legibus Abrogatis, ad C.* 4.65.9. *Groenewegen*, sê dat dit die algemene opinie van geleerdes was en dat afwyking daarvan nie net *in fraudem* van die Wet en tot nadeel van die *fiscus* sou wees nie, maar ook tot nadeel van kopers (*in praeiudicium emptorum*). In die geval van 'n huur *modici temporis*, sê hy, is die gevaar van benadeling klein (*parvum est praeiudicium*).

Groenewegen sê op dieselfde plek dat hy die reël *huur gaat voor koop* só verstaan dat dit alleen geld as die huurkontrak verly is voor die Regter van die plek waar die goed geleë is. Ander skrywers sê dieselfde vir sover dit langtermyn-huurkontrakte aangaan, d.w.s. dat verlyding *coram lege loci* vereis word vir die inwerkingtreding van die reël (*Voet*, 19.2.1; *de Wet, loc. cit.*, bl. 191-192).

Die posisie wat ontstaan waar 'n persoon grond koop ten opsigte waarvan daar 'n huur vir langer as 10 jaar bestaan wat nie *coram lege*

verly is nie, word deur enkele skrywers behandel wie se sienswyse gevolg is in die saak *Antje Komen* v. *Hendrik De Heer*, (1908) 29 N.L.R. 237, waar die Natalse Hof beslis het dat so 'n huur wat nie geregistreer is nie net vir 10 jaar, en nie langer nie, teen die koper geld. Dit kom daarop neer dat so 'n huur dan as 'n huur vir 'n kort termyn geld. *Groenewegen, ibid.*, sê dat as 'n huur vir meer as 10 jaar *privatim* aangegaan word, dan is dit kragteloos vir sover dit die termyn van 10 jaar te bowe gaan (*quantenus longum tempus excedit, viribus non subsistere . . .*). *Boel*, in sy aantekeninge op Loenius se *Decisien en Observatien, ad casum* III, verwys na sekere plaaslike keure waarin die algemeen gesê word dat 'n koper gebonde is om 'n huurder se reg te eerbiedig, maar dan voeg hy by dat sommige geleerdes van mening is dat die woorde beperk moet word

„en alleen maar te verstaan, den kooper in de verdere huyre niet anders gehouden te zyn, dan tot 10 jaren toe . . ."

Boel wys in dieselfde aantekeninge daarop dat *Wesel* ook meen dat dit die posisie in Holland is. Die Natalse Hof het verder nog na *van Leeuwen* verwys (op bl. 247 van die verslag). In *Executor of Hite* v. *Jones*, 19 S.C. 235, is *Groenewegen* en *Boel* se gemelde aantekening in die loop van argument aan die Hof genoem, en hoewel DE VILLIERS, H.R., nie na hulle in sy uitspraak verwys nie, het hy die volgende gesê wat in ooreenstemming met hulle menings is (op bl. 244):

„I agree also that even in regard to leases actually in existence at the time when the land under lease is purchased, the rule giving a real right to the lessee, as against the purchaser, does not extend to terms exceeding ten years, without notarial registration of the lease upon the title-deeds of the property."

In die geval van korttermyn-huurkontrakte is in die Romeins-Hollandse reg geen verlyding *coram lege* vereis nie, maar okkupasie deur die huurder was skynbaar vereiste vir die beskerming van sy regte onder die reël *huur gaat voor koop*. Prof. *de Wet, loc. cit.*, op bl. 191, sê die volgende in hierdie verband:

„Alhoewel ons skrywers nie uitdruklik vereis dat die huurder in besit moet wees nie, skyn dit tog uit hulle verklarings afgelei te kan word, want hulle praat van ‚retensie' (*Neostadius*) en *‚jus retentionis'* (*Voet*). By die formulering van die reël skyn ons skrywers in elk geval uit te gaan van die veronderstelling dat die huurder in besit is."

Wille, op. cit., bl. 94, is dieselfde mening toegedaan.

Ons ou skrywers, sover ek weet, behandel nie die spesifieke vraag of 'n koper wat van 'n langtermyn-huur weet kan sê dat hy nie daaraan gebonde is nie omdat dit nie *coram lege* verly is nie. Al wat in hierdie verband blyk, is enkele uitlatings oor die kwessie van kennis in die algemeen. Ek het reeds verwys na wat *Dechkerus* sê. Prof. *de Wet* verwys in sy gemelde artikel (op bl. 180) na van Zuthpen se *Nederlandtsche Practycke*, waar *s.v.* „Huyringhe ende Verhuyringhe", n. 32, die volgende gesê word:

„Dat een cooper ofte eenich ander singulier successeur niet gehouden en is uyt te houden de huyre die den verhuyrder met den huyrder aangegaen heeft wordt by verscheyden Doctoren gelimiteert gheen plaets te hebben wanneer het verhuyrde godt wordt verkocht ofte ghetransfereert op yemandt die weet dat het selve verhuyrt is ende dat over sulcks een singulier successeur hebbende kennisse van de verhuyringhe ghehouden is nae te komen de huyre tusschen sijn voorsaet ende den huyrder ghecontraheert."

Die skrywer voeg egter daarby dat daar „somighe andere doctoren" is wat 'n ander mening huldig.

In Suid-Afrika, waar registrasie in die Akteskantoor die plek van

verlyding *coram lege* ingeneem het, is daar by die toepassing van die reël *huur gaat voor koop* van die standpunt van die Romeins-Hollandse reg uitgegaan dat 'n langtermyn-huur geregistreer moet wees om teen derdes te geld, maar ons Howe het terselfdertyd van vroeg af blyke gegee van 'n houding dat waar so 'n huur nie geregistreer is nie, 'n koper wat van die huur weet verplig is om dit te eerbiedig indien die huurder in besit van die grond is (kyk bv. *Green* v. *Griffiths*, 4 S.C. 346 op bl. 350; *Executor of Hite* v. *Jones*, 19 S.C. 235; *Canavan and Rivas* v. *New Transvaal Gold Farms, Ltd., supra* op bl. 147 en 156; *Executor Estate Jacob Komen* v. *Hendrik De Heer and Others*, (1907) 28 N.L.R. 577 op bl. 584). Die „*bona fide* purchaser or lessee" waarvan daar in die Transvaalse Proklamasie en die Vrystaatse Ordonnansie gepraat word, kan m.i. nouliks iets anders wees as die koper of huurder wat nie kennis dra van 'n huur oor die grond wat hy koop of huur nie, sodat gesê kan word dat die Wetgewer hier die gemene reg wou bevestig het. In *Canavan and Rivas* v. *New Transvaal Gold Farms, Ltd., supra* op bl. 147, het INNES, H.R., dan ook die volgende in hierdie verband gesê:

„. . . we should now adopt the limit of ten years, but with the qualification laid down by *Voet* that it is not illegal to enter into an underhand lease for ten years and upwards; that such leases are binding *inter partes*, but that they are not binding without notice upon particular successors and creditors of the lessor unless registered against the title. That doctrine is equitable; it is supported by reason and by authority, and I think that this Court should adopt it. It is satisfactory to find that on such a very important point as this recent legislation did not change the existing law, but that Proc. 8 of 1902 only recognised and re-enacted the common law of the country."

Dat 'n persoon gebonde gehou word tot eerbieding van 'n huur waarvan hy kennis dra wanneer hy die gehuurde grond koop of huur, is m.i. in ooreenstemming met beginsels wat daarop gemik is om die goeie trou te beskerm en wat wel bekend is in ons reg. In *De Jager* v. *Sisana*, 1930 A.D. 71, waar dit gegaan het oor die vraag of Sisana, wat nie die huurder van grond was nie maar wat deur de Jager se voorganger in titel die reg gegee is om op die grond te bly vir solank as wat hy sekere dienste daarop lewer, het WESSELS, A.R., o.m. die volgende gesê (op bl. 84):

„Several other well-known cases were referred to by Mr. *Broome* in which a similar doctrine was approved of, such as *Richards* v. *Nash*, 1 S.C. 312; *Judd* v. *Fourie*, 2 E.D.C. 41, where knowledge of an unregistered servitude was held to bind a purchaser with knowledge. Now in all these cases the third party had acquired a legal right to specific performance of a contract as over against one of the contracting parties. If A grants to B a servitude, B has a right to that servitude as over against A, and has the right to have that servitude registered. If C knows of the grant, then if he endeavours to get the land free of the servitude he is conspiring with A to defraud B of a valid right which he already has against A and which he can by registration acquire against the whole world. C is therefore *particeps fraudis* with A. But where there exists no lease and where no right has been acquired to the land itself, but only a right to occupy the land in return for services, and this innominate contract ceases to exist by reason of the sale of the land by the person entitled to the services, the occupier or squatter has no right *in re aliena*. The fact that the purchaser knows this cannot make him *particeps fraudis* because there is no fraud upon anybody."

Hier word te kenne gegee, hoewel *obiter*, dat die reël betreffende gebondenheid op grond van kennis ook toepassing kan vind in die geval waar 'n huurder 'n reg verkry wat hy as saaklike reg kan laat registreer. In *Grant and Another* v. *Stonestreet and Others*, 1968 (4) S.A. 1 (A.A.), het hierdie Hof beslis dat 'n persoon wat weet van die bestaan van 'n ongeregistreerde servituut op grond wat hy koop daaraan gebonde ge-

hou word vanweë sy kennis daarvan en omdat sy repudiëring daarvan op 'n soort van bedrog sou neerkom. OGILVIE THOMPSON, A.R., het in hierdie verband gesê (op bl. 20):

„Having regard to our system of registration, the purchaser of immovable property who acquires clean title is not lightly to be held bound by an unregistered praedial servitude claimed in relation to that property. If, however, such purchaser has knowledge, at the time he acquires the property, of the existence of the servitude, he will—subject to a possible qualification, discussed below, relating to cases where there has been the intervention of a prior innocent purchaser—be bound by it notwithstanding the absence of registration. The basis of this obligation is that in attempting, under such circumstances, to repudiate the servitude, the purchaser is *mala fide*, and that the law refuses to countenance any such attempted repudiation because, as it is put in some of the cases, it in reality amounts to a species of fraud (see *Richards* v. *Nash*, 1 S.C. 312; *Jansen* v. *Fincham*, 9 S.C. 289; *Ridler* v. *Gartner*, 1920 T.P.D. 249 and cf. *De Jager* v. *Sisana*, 1930 A.D. 71 at p. 84)."

Dit is m.i. dieselfde beginsel wat aan die grondslag lê van die beskerming van die huurder teen die persoon wat die gehuurde grond koop, of huur, terwyl hy van die bestaande huur weet, en dit is ook dieselfde bykomende belang waarna WESSELS, A.R., in *De Jager* v. *Sisana, supra,* verwys het wat beskerm word, nl. die reg van 'n persoon om sy reg ten opsigte van grond as saaklike reg te laat registreer.

Om nou terug te keer tot art. 2 van Wet 50 van 1956. Die artikel bevat 'n hoofbepaling en 'n voorbehoudsbepaling. Die hoofbepaling bepaal dat geen huurkontrak van grond in skrif hoef te wees om geldig te wees nie. Dit bring waarskynlik mee dat weggedoen word met die bogemelde Natalse wetteregtelike bepaling wat skrif vereis het vir die bewys van 'n huurkontrak van langer as twee jaar (kyk ook art. 32 van Wet 50 van 1956), en dit verwyder sodanige twyfel as wat daar mag bestaan het oor die vraag of huuurkontrakte van grond volgens die gemene reg in skrif moes wees: kyk, bv., *Bodenstein, op. cit.*, bl. 1 e.v.; *Wille, op cit.*, bl. 91. Uit die voorbehoudsbepaling blyk duidelik dat die Wetgewer ook beoog het dat die minimum-termyn van langtermyn-huurkontrakte van grond voortaan oral in die land dieselfde sou wees.

Die voorbehoudsbepaling het geen betrekking op die werking van die reël *huur gaat voor koop* vir sover dit korttermyn-hure aangaan nie, en die posisie ten opsigte van sodanige hure bly dus soos dit was toe die artikel in werking getree het. Dit kom daarop neer, soos hierbo aangedui is, dat geen registrasie nodig is vir die werking van die reël nie en dat 'n huurder beskerm is teen 'n koper, of huurder, mits hy in besit van die grond is, en ook, volgens die uiteensetting van *Wille* in die aanhaling hierbo, as die koper of huurder van sy huur weet, al is hy nie in besit van die grond nie. Wat korttermyn-hure betref het mens dus die voortbestaan van 'n posisie waar 'n huurder beskerm word indien hy in okkupasie is, of die koper (of huurder) nou al weet van die huurkontrak of van sy okkupasie of nie. Die basis vir die beskerming van 'n huurder in so 'n geval is die feit dat hy 'n saaklike reg het wat gevestig word deur sy okkupasie, wat as kennis van die reg aan derdes dien. Dat hy 'n saaklike reg het, is al meermale deur ons Howe erken (kyk *Wille, op cit.*, bl. 139-141), en, wat die rol van okkupasie betref, sê OGILVIE THOMPSON, R., soos hy destyds was, die volgende, waarmee ek saamstem, en *Shalala and Another* v. *Gelb, supra* op bl. 863, waar 'n korttermyn-huur ter sprake was:

„The basis of the real right enjoyed by a tenant in occupation under an unregistered lease . . . is, in my opinion, the constructive notice of his lease which derives from the circumstance of his occupation of the premises."

Die taal van die voorbehoudsbepaling kan m.i. nie as regtens presies beskou word wanneer dit sê dat geen „huurkontrak" teenoor derdes „geldig" is as dit nie geregistreer is nie. Of 'n kontrak geldig is al dan nie, is 'n aangeleentheid wat die kontrakterende partye raak, en nie persone wat buite hulle kontrak staan nie. Ek meen dat die Wetgewer die werking van die reël *huur gaat voor koop* in gedagte gehad het en dat wat hy waarskynlik wou te kenne gegee het is dat, hoewel partye mondeling 'n geldige langtermyn-huurkontrak kan aangaan, die huurder nie 'n reg verkry wat saaklike werking teenoor derdes het nie tensy daar registrasie plaasvind. Waarom die Wetgewer dit nodig gevind het om dit te sê, is nie duidelik nie, want die gemene reg vereis registrasie vir die vestiging van so 'n reg. Miskien is die rede daarvoor dat die Transvaalse en Vrystaatse statutêre bepalings, wat ook met registrasie te doen gehad het, herroep is en dat toe gemeen is dat gesê moet word dat die feit dat langtermyn-huurkontrakte mondeling gesluit kan word nie die vereiste van registrasie van sodanige kontrakte affekteer nie.

Dit moet toegegee word, onderworpe aan die betekenis wat aan „derde partye" geheg moet word, dat op die streng letterlike bewoording van die voorbehoudsklousule die reël *huur gaat voor koop* in die geval van langtermyn-huurkontrakte toepassing kan vind slegs wanneer sodanige kontrakte geregistreer is en in geen ander gevalle nie. Soos sal blyk uit wat hierbo gesê is, kom so 'n vertolking op 'n ingrypende wysiging van die gemene reg neer en, gesien in die lig van die reg wat gegeld het toe die artikel ingevoer is, hou dit ook implikasies in, soos hierna aangedui word, wat die Wetgewer na my mening nie beoog het nie.

My mening is dat aanvaar moet word dat die Wetgewer nie bedoel het om die gemene reg in die onderhawige verband te wysig nie. Dit kom dan daarop neer, soos ek dit sien, dat dit die bedoeling van die Wetgewer is dat 'n huurder sy huurkontrak moet laat registreer indien hy 'n reg wil verkry wat saaklike werking het en wat hom teen derdes beskerm, maar dat dit terselfdertyd nie bedoel word dat derdes nie in sekere gevalle verplig sal wees om 'n ongeregistreerde huur te eerbiedig nie, t.w. in daardie gevalle waar in die gemene reg die reël *huur gaat voor koop* by nie-registrasie teenoor derdes geld.

Indien gevolg gegee sou word aan die letterlike bewoording van die voorbehoudsbepaling sou dit meebring dat dit vir 'n koper, of huurder, wat kennis dra van 'n ongeregistreerde huur oor die grond wat hy koop of huur, geoorloof sou wees om te sê dat hy nie verplig is om die huur te eerbiedig nie aangesien dit nie geregistreer is nie. So 'n gevolg hou in dat die Wetgewer bedoel het om weg te doen met beginsels in ons reg wat, soos hierbo aangetoon is, daarop gemik is om die goeie trou te beskerm en wat toegepas word om 'n persoon te belet om die vrug van sy kwaaie trou of bedrog te geniet. Ek kan nie glo dat die Wetgewer so 'n bedoeling gehad het nie, en ek kan ook aan geen rede dink waarom hy nou juis ons reg met betrekking tot langtermyn-huurkontrakte sou wou gewysig het deur weg te doen met beginsels wat ook op ander gebiede van ons reg aangewend word om die goeie trou te beskerm nie: kyk, bv., *Grant and Another* v. *Stonestreet and Others,*

supra. In die geval van korttermyn-huurkontrakte, soos reeds gesê is, is die posisie wat in die gemene reg geheers het onveranderd gelaat. Dit kan miskien beweer word dat daar minder potensiële nadeel vir derdes by korttermyn-hure as by langtermyn-hure bestaan en dat die Wetgewer om daardie rede 'n nuwe reëling in verband met langtermyn-hure wou ingevoer het, maar ek vind dit moeilik om te glo dat die Wetgewer kon bedoel het om gedrag wat op *mala fides* of bedrog sou kon neerkom in die een geval oor die hoof te sien en in die ander nie.

Die hierbo gemelde artikels in die Transvaalse Proklamasie en die Vrystaatse Ordonnansie het uitdruklik na die kwessie van die *bona fides* van 'n koper of latere huurder verwys. Hierdie artikels is, soos gesê is, herroep deur art. 32 van Wet 50 van 1956, maar na my mening toon hierdie herroeping geensins dat die Wetgewer nou bedoel het dat oorwegings van goeie of kwaaie trou nie meer ter sake sou wees nie. In die ander provinsies was daar nie sulke bepalings nie en het die gemene reg gegeld, en die herroeping van die bepalings in die provinsie waarin dit bestaan het kan dus op sigself geen bewys wees van 'n bedoeling dat oorwegings van goeie en kwaaie trou voortaan nêrens ter sake sou wees nie. Indien daar so 'n bedoeling was, moet dit in art. 2 self gevind word.

Die vraag ontstaan of wat hierbo gesê is in verband met goeie en kwaaie trou en die gebondenheid van 'n koper op grond van sy kennis ter sake is in die geval van die reël dat 'n ongeregistreerde langtermyn-huur as 'n korttermyn-huur geld wanneer die koper nie van die huurkontrak weet nie maar waar die huurder in okkupasie is, aangesien daar nie gesê kan word dat die gebondenheid van 'n koper in so 'n geval op werklike kennis aan sy kant berus nie. Na my mening toon wat hierbo gesê is dat die Wetgewer nie bedoel het om die reël *huur gaat voor koop*, soos dit in die gemene reg gegeld het, te wysig nie, en die pas genoemde reël dat 'n ongeregistreerde langtermyn-huur as 'n korttermyn-huur geld in die geval waar die koper nie van die huur weet nie maar waar die huurder in besit is, is deel van die reël *huur gaat voor koop*. Hierdie reël is met betrekking tot korttermyn-hure onveranderd gelaat, en, as my sienswyse korrek is dat die Wetgewer nie die beginsel wou afskaf dat 'n koper op grond van sy kennis aan 'n ongeregistreerde langtermyn-huur gebonde gehou kan word nie, kan m.i. nouliks gesê word dat die Wetgewer sou bedoel het om weg te doen met die oorblywende gedeelte van die reël *huur gaat voor koop*, t.w., dat 'n ongeregistreerde langtermyn-huur as 'n korttermyn-huur geld wanneer, soos in die geval van 'n korttermyn-huur, die huurder in okkupasie is. Die vraag sou kon geopper word of hierdie reël dat 'n ongeregistreerde langtermyn-huur as 'n korttermyn-huur geld wanneer die huurder in okkupasie is, bly voortbestaan het onder die bogemelde Transvaalse en Vrystaatse Wette, waarin gesê word dat geen langtermyn-huurkontrak „shall be of any force or effect" tensy dit geregistreer is, en of die herroeping van hierdie bepalings en die invoering van art. 2, wat vir die hele land geld, nie nou meebring dat die reël nêrens geld nie. Ek weet nie van enige beslissings oor die vraag of die gemelde bepalings die reël in die Transvaal en die Vrystaat afgeskaf het nie, maar al sou dit ook aanvaar word dat hulle dit wel gedoen het, dan

volg dit na my mening nog nie—soos ek ook in verband met die kwessie van die *bona fides* wat in hierdie bepalings genoem word gesê het —dat die Wetgewer in 1956 die bedoeling gehad het om die posisie wat in die Transvaal en die Vrystaat geheers het oral te laat geld nie. Ek meen, inteendeel, dat die bedoeling was om die gemeenregtelike posisie, wat tot dan toe onverminderd in die ander provinsies voortbestaan het, oor die hele land te laat geld.

Ek wys in hierdie verband ten slotte op 'n paar ongerymde situasies wat sou kon ontstaan indien aanvaar word dat die Wetgewer wou wegdoen met oorwegings van kennis en van goeie en kwaaie trou, en wat m.i. toon dat die Wetgewer nie so 'n bedoeling kon gehad het nie:

(*a*) Partye kan mondeling 'n geldige langtermyn-huurkontrak met mekaar sluit en 'n huurder het die reg om die kontrak op skrif te laat stel en dit teen die verhuurder se titelbewys te laat registreer (*Fawcus' Executrix* v. *Bezuidenhout and Others*, 1903 T.S. 39; *Heynes Mathew, Ltd.* v. *Gibson, N.O.*, 1950 (1) S.A. 13 (K)). 'n Koper van die grond sou egter kon beweer dat die huurkontrak ongeldig is wat hom betref, al dra hy ook kennis daarvan en al weet hy ook bv. dat die huurder besig is om dit te laat registreer: dit, terwyl die huurder op sterkte van sy ooreenkoms met die verhuurder geregtig is op die registrasie van die huurkontrak teen laasgenoemde se titelbewys van die verhuurde grond.

(*b*) Gestel 'n eienaar verhuur sy grond vir 'n lang termyn mondeling aan A, en daarna verhuur hy dit op dieselfde wyse ook aan B. Albei huurkontrakte is geldig *inter partes*, maar A en B kan oor en weer aan mekaar sê dat die ander een se huurkontrak met die verhuurder ongeldig is, en dus ook sodanige okkupasie as wat aan die een of die ander gegee mag gewees het. A kan ook nie sê dat hy 'n vroeëre of sterker reg as B het nie, want teenoor B is sy kontrak met die verhuurder kragteloos.

(*c*) 'n Eienaar verhuur sy grond vir 'n lang termyn mondeling aan A, wat die grond okkupeer. B, 'n plakker, wat weet van die huurkontrak en van A se okkupasie, gaan vestig hom ook op die grond. As A nou vir B wil uitset, sê B dat, wat hom betref, A se huurkontrak en okkupasie van geen krag is nie, en dat A derhalwe geen reg het om hom uit te set nie.

Ek gaan nou oor tot die vraag of 'n koper wat in die gemene reg ingevolge die reël *huur gaat voor koop* verplig sou wees om 'n ongeregistreerde langtermyn-huur te eerbiedig kan sê dat hy 'n derde party is soos bedoel in art. 2 en dat hy gevolglik nie aan so 'n huur gebonde is nie. Alle persone behalwe diegene wat self 'n kontrak sluit sou in sekere sin derde partye by daardie kontrak genoem kan word, maar dit word nie deur die respondente betoog dat die uitdrukking derde partye in art. 2 so 'n wye betekenis dra nie. Dit sou ook nie geldiglik betoog kon word nie: kyk, bv. *Hitzeroth* v. *Brooks*, 1965 (3) S.A. 444 (A.A.). Die betoog is dat daar sekere klasse van nie-kontrakterende partye is wat nie onder die uitdrukking sal val nie, soos, bv. diegene wat ingevolge Wetsbepalings die regsopvolger (soos dit bv. in die geval van 'n eksekuteur, of van 'n kurator by insolvensie, verstaan word) van die een of ander party word, of diegene wat hulself volgens die beginsels van die kontraktereg op die een of ander wyse aan die huurkontrak verbind, maar dat diegene wat aan 'n huur gebonde gehou word op grond van

reëls van die gemene reg wat nie op die skepping van kontraktuele verhoudings betrekking het nie, wel daaronder sal val.

Na my mening is die verhouding wat tot stand kom tussen die huurder en die koper wat ingevolge die reël *huur gaat voor koop* gebonde gehou word sodanig dat so 'n koper nie as 'n derde party soos bedoel in art. 2 beskou kan word nie. In *De Jager* v. *Sisana, supra* op bl. 82, sê WESSELS, A.R., die volgende, hoewel *obiter*, net nadat hy daarop gewys het dat in die Romeinse reg die koper nie verplig was om die huur gestand te doen nie:

„This principle, however, was modified by the Roman-Dutch law, and that system adopted the rule that the sale does not break the lease but that the purchaser becomes the landlord of the tenant under the same conditions as his lease with the seller."

In *De Wet* v. *Union Government*, 1934 A.D. 59, waar beslis is dat 'n koper van grond waaroor daar, tot sy kennis, 'n huurkontrak bestaan, gebonde is aan 'n bepaling in daardie kontrak waarvolgens die maandelikse huurgeld in verrekening gebring word teen geld wat die verhuurder aan die huurder skuld, sê Waarnemende Hoofregter STRATFORD die volgende op bl. 63:

„This being a contract of lease, the purchaser is bound on it by the doctrine of *huur gaat voor koop*, and bound also by all its material terms. The term as to how the obligation to pay rent month by month as it accrues is to be extinguished is a material and integral part of the lease, and not, as contended by respondent's counsel, merely collateral. The purchaser is, therefore, bound by it. This conclusion is not only in accord with principle, but is likewise supported by the *Hollandsche Consultatie*, vol. I, No. 287. The facts set out in the *Consultatie* are on all fours with the present case . . ."

In sy uitspraak in dieselfde saak het BEYERS, A.R., die mening uitgespreek dat die koper se reg om die huurgeld te eis wat die huurder onderneem het om aan die verhuurder te betaal op 'n stilswyende sessie van die verhuurder aan die koper berus. Hy het gesê (op bl. 73):

„Wat betref die argument van Mnr. *Curlewis* dat die respondent *qua dominus* geregtig was tot die gevorderde huur is dit voldoende om te sê dat as transportontvanger hy *eo ipso* ook sessionaris van Snyman se regte onder die huurkontrak geword het.

Die redenering van Mnr. *Niemeyer* gebaseer op *Voet*, 18.6.9, en ander outoriteite deur hom gesiteer, nl. dat die transport van 'n eiendom aan die koper hom stilswyend die sessionaris maak van die verkoper se regte ten opsigte van enige huurkontrak rakende die eiendom, kom my, nieteenstaande *Peach* v. *Goosen*, 1925 E.D.L. 196, aanneemliker voor dan die kontensie van Mnr. *Curlewis* dat die koper nie sy reg om huur te vorder by wyse van sessie verkry nie, maar dat die huur *fructus civiles* is, en die koper as eienaar daarop aanspraak maak. Die koper en transportontvanger is 'n *successor singularis* en die woord *successor* toon aan dat hy in die plek van sy *praedecessor* kom en sy regverkrygende word. Maar dis nie nodig om hierdie punt te beslis nie."

In *Boshoff* v. *Theron*, 1940 T.P.D. 299, is beslis dat wanneer die koper transport van die gehuurde grond neem, die verhuurder nie alleen sy regte onder die huurkontrak verloor nie, maar ook van sy pligte daaronder bevry word. In *Shalala and Another* v. *Gelb, supra*, is beslis dat die koper van gehuurde grond gebonde is aan 'n bepaling in die huurkontrak wat aan die huurder die reg gee om die huur te hernu. Indien hierdie beslissings as korrek aanvaar word, sou mens kon sê dat die koper, ten minste nadat hy transport van die gehuurde grond ontvang het, opvolg in die regte en verpligtinge van die verhuurder, en, as dit so is, sou dit kunsmatig wees om te sê dat hy buite die huurkontrak staan en dat hy as derde party vir die doel van art. 2 beskou moet word. Die eersgenoemde drie beslissings, en ook ander wat dieselfde strekking het, word gekritiseer in prof. *de Wet* se reedsgenoemde artikel „*Huur Gaat Voor Koop*" (*loc. cit.*, op bl. 239 e.v.) en in J. C. de Wet en J. P. Yeats, *Die Suid-Afrikaanse Kontraktereg en Handelsreg*, 3de uitg., op bl. 280, op grond daarvan dat die nuwe verkryer van die verhuurde grond nie sonder sessie die regte van die huurder kan bekom nie, en dat hy alleen skuldenaar in die plek van die verhuurder kan word indien laasgenoemde se verpligtinge, met die toestemming van die huurder, aan hom gedelegeer word. Die geleerde skrywers se mening is dat die koper slegs verplig is tot dulding van die huurder se reg en dat die standpunt van die Howe dat die koper teenoor die huurder gebonde is aan die bepalings van die huurkontrak strydig is met die gewone beginsels van die kontraktereg. Dat sessie of delegasie gewoonweg nodig is om regte of verpligtinge, na gelang van die geval, te laat oorgaan, is natuurlik so, maar ek betwyfel die korrektheid van die benadering om die koper se reg op die huurgeld en sy gebondenheid aan die bepalings van die huurkontrak, soos dit deur die Howe erken word, te ontken op grond daarvan dat dit nie in die lig van die gewone beginsels van die kontraktereg te verklaar is nie. Na dit my voorkom, moet die huurder se reg op die huurgeld en sy gebondenheid aan die bepalings van die huurkontrak in die geskiedenis van die reël *huur gaat voor koop* gesoek word. Soos hierbo aangedui is, was dit 'n nuwe reël wat weens praktiese en billikheidsoorwegings tot stand gekom het, en dit sou derhalwe ook nie vreemd wees as daar in sulke omstandighede verhoudinge tussen huurder, verhuurder en koper ontstaan en ontwikkel het wat nie volgens bekende reëls van die kontraktereg te verklaar is nie. In *Thipa* v. *Subramany*, 1954 (4) S.A. 126 (N), het BROOME, R.P., in 'n terloopse opmerking laat blyk dat hy 'n eenderse mening huldig toe hy verwys het na die fiktiewe sessie waarvan BEYERS, A.R., in *De Wet* v. *Union Government, supra*, gepraat het en na

„attempts to find some basis in legal principle for the maxim *huur gaat voor koop*"

en toe gesê het (op bl. 127-128):

„All such attempts are, of course, doomed to failure because the maxim is founded upon custom and legislation and has no basis in legal principle."

Ek verwys ten slotte na menings van enkele van ons ou skrywers wat m.i. getuig van 'n opvatting dat die koper in die plek van die verhuurder tree en dat hy gebonde is aan die bepalings van die huurkontrak oor die grond wat hy koop. *Voet*, 19.2.19, sê (*Gane* se vertaling):

„On the other hand also, whenever by statute or custom sale gives place to lease, a particular successor is only bound to bear up to the end with a resident in occupation or a tenant in enjoyment if the lessee is ready to pay the rents (*pensiones*) to him for the ensuing period."

De Groot, *Inleiding*, 3.19.16, sê o.a.:

„. . . By ons werd verder ghebruickt, dat oock den kooper de huire by sijnen verkooper gemaackt moet laten volghen . . .",

en *Schorer* sê in sy aantekeninge hierop (n. 59) dat „de kooper de plaats van den verkooper vervangt". Groenewegen, in sy *De Legibus Abrogatis, ad Dig.* 19.2.32, sê: . . . *quemadmodum moribus nostris singularis successor tenetur stare colono . . . ita et vice versa dicendum est hodie colonum cogi posse ut fundum colat . . .*, d.w.s., net soos volgens ons gewoontes die partikuliere opvolger gebonde is om by die huur te staan, so moet die omgekeerde gesê word, nl. dat die huurder vandag verplig kan word om die grond te bewerk. Die bewering dat

die huurder verplig kan word om die grond te bewerk, is strydig met *Voet*, 19.2.17, wat sê dat die huurder die reg het om die grond te verlaat. Moontlik word bedoel dat hy verplig kan word om die grond te bewerk indien hy sou besluit om dit nie te verlaat nie. Van Leeuwen, *Censura Forensis*, 1. 4.22.19, sê dat volgens die gewoontes van Holland en baie plekke in België *emptor locationi antea factae omnino stare tenetur* (d.w.s. die koper is gebonde om die huur wat vroeër aangegaan is geheelenāl gestand te doen), en in sy aantekeninge op die *Costumen, Keuren ende Ordonnantien van Rijnland, ad* art. 97, sê hy dat die costume dat huur voor koop gaan oor die hele Holland geld,

„soo dat het verkofte goed met de last van de huur overgaat",

en dat die koper

„den huyrder de huyr moet laten volgen, mits genietende de huyrpennigen . . ."

My mening is derhalwe dat die beslissings in albei die Howe benede nie korrek was nie en dat die appèl moet slaag. Dit volg dat ek ook nie saamstem met die sienswyse wat in *Alternators (S.A.) (Pty.) Ltd.* v. *Boulanger*, 1969 (3) S.A. 75 (T) op bl. 78, uitgespreek is oor die aangeleentheid wat hier ter sake is nie.

Dit word soos volg beveel:

(1) Die appèl slaag met koste, welke koste deur eerste en tweede respondente gesamentlik en afsonderlik betaalbaar is.

(2) Die bevele wat in die Plaaslike Afdeling Durban en Kus en in die Natalse Provinsiale Afdeling uitgereik is, word ter syde gestel, behalwe vir die bevel wat in eersgenoemde Hof ingevolge ooreenkoms tussen die partye uitgereik is.

(3) Die koste van die appellante in albei die Howe benede moet deur die respondente gesamentlik en afsonderlik betaal word.

(4) 'n Bevel word uitgereik ooreenkomstig bedes (*a*) en (*c*) van para. 1 van die appellante se kennisgewing van mosie, behalwe dat gemelde bede (*a*) gewysig word deur die invoeging van die woorde „for a period of 10 years as from the 1st May, 1966" ná die woord „Durban".

STEYN, H.R., en HOLMES, A.R., het met bogemelde uitspraak saamgestem.

OGILVIE THOMPSON, J.A.: In terms of a written agreement concluded on 18th April, 1966 second respondent, then the registered owner of the premises known as 39 Cross Street, Durban, leased the said premises to the appellants. The lease was for a period of nine years commencing 1st May, 1966 but conferred upon the lessee the right, subject to due observance of the terms of the lease and to the giving of stated notice, to claim nine renewals, each of two years' duration. Pursuant to this lease, the appellants have at all material times been in occupation of the said premises; but the lease has never been registered in the Deeds Office. On 9th September, 1966, second respondent sold the aforementioned property to first respondent, who is now the registered owner thereof. For the purposes of this litigation, one of the agreed facts is that, although by the time he took transfer first respondent had knowledge of the aforementioned written lease, he, as at the date of his aforesaid purchase, only knew that appellants

„were tenants of the premises but believed they were simply monthly tenants".

Appellants unsuccessfully moved the Durban and Coast Local Division for an order declaring that they are, pursuant to the said lease, entitled to continue to occupy the premises 39 Cross Street (see 1968 (4) S.A. 610 (D)). As briefly reported in 1969 (2) S.A. 384, and in 1969 (1) P.H. K23, an appeal to the Full Bench of the Natal Provincial Division was dismissed, and appellants have now appealed to this Court. The question for decision is whether, on the above-stated facts, first respondent is a „third party" within the meaning of sec. 2 of the General Law Amendment Act, 50 of 1956.

Appellants do not aver that first respondent is a *mala fide* purchaser: their contention, as advanced in this Court, is that, having been in occupation of the leased premises at all material times, they are, subject to giving due notice of renewal, entitled to remain in occupation for a period of 10 years reckoned from 1st May, 1966. This contention —admittedly valid on the postulate that the common law obtains— rests four-square upon the basic submission that, upon a proper construction of sec. 2 of Act 50 of 1956, all those who would at common law be bound by an existing lease are excluded from the category of „third parties" as that expression is used in the section.

Having regard to this radical submission, and bearing in mind that the Legislature is presumed not to wish to alter the existing law more than is necessary (Steyn, *Die Uitleg van Wette*, 3rd ed., p. 96), it is desirable, before examining the provisions of sec. 2 of Act 50 of 1956, to outline the law which obtained when that Act was passed. This varied in the four Provinces. In the Cape the common law prevailed, but in the other three Provinces there were differing statutory provisions. The common law is conveniently summarised by Wille, *Landlord & Tenant*, 5th ed. at pp. 99-100, as follows:

„A short lease, that is, one for less than ten years, whether executed in writing or not, if followed by occupation, is binding on the parties and on all the successors of the landlord. If the tenant is not in occupation, the lease is not binding on the creditors of the landlord, nor is it binding on a purchaser of the leased property unless, at the date of the sale, he had knowledge of the lease. The lease, however, is binding on the parties and on the landlord's gratuitous successors.

A long lease possibly requires to be executed in writing to make it legally binding, even as between the parties. If duly registered, it is binding on the parties and all the successors of the landlord. In the absence of registration, the lease is not binding on the creditors of the landlord. It is not binding for its full term on a purchaser, unless, at the date of the sale, he had knowledge of the lease; if the purchaser did not have such knowledge, but the tenant was, at the date of the sale, in occupation of the property, the purchaser is bound by the lease for the first ten years. The lease is, in all circumstances, binding on the landlord, and on his gratuitous successors."

I incline to the view that *Wille* is right in relating the purchaser's knowledge to the date of the sale, as distinct from the date of transfer; but the last word on the point may conceivably yet have to be spoken (cf. *Grant and Another* v. *Stonestreet and Another*, 1968 (1) S.A. 1 (A.D.) at p. 16H). Subject to that possible qualification, *Wille's* above summary of the common law—which was accepted by counsel on both sides at the hearing of this appeal—appears to me to be correct.

In Natal Law 12 of 1884, sec. 1 (*c*), provided that:

„No action shall be maintained on any contract to grant or take a lease or sub-lease of immovable property, or any interest therein, for a period exceeding two years from the time of making such contract, unless and save so far as

such contract shall be evidenced by some writing signed by or on behalf of the person sought to be bound thereby, or by or on behalf of some person for whose contracts the person sued may then be liable."

Sec. 2 of the said Law, however, provided that sub-sec. 1 (*c*) should not apply:

„. . . to any contract where there has been part-performance by any party or his representative in such a way as is inconsistent with any other reasonable conclusion than the actual existence of such a contract in the whole or in part".

In the Orange Free State sec. 51 of Ord. 12 of 1906 contained a provision which, save for the substitution of 25 years in lieu of a 10 year period, was identical with that which obtained in the Transvaal under sec. 29 of Proc. 8 of 1902. So far as is material to this appeal, this latter read:

„29. (1) No lease of any mynpacht, claim or right to minerals, and no lease of any land or any stand for a period of not less than ten years or for the natural life of any person mentioned therein, or which is renewable from time to time at the will of the lessee indefinitely, or for periods which together with the first period thereof amount in all to not less than ten years, shall be of any force or effect if executed after the taking effect of this Proclamation unless executed before a notary public, nor shall it be of any force or effect against creditors or any subsequent *bona fide* purchaser or lessee of the property leased or any portion thereof unless it be registered against the title deeds of such property.

(2) No cession of any such lease as is mentioned in the preceding sub-section made after the taking effect of this Proclamation shall be of any force or effect against creditors or against any subsequent *bona fide* purchasers thereof unless such cession be registered in the registration office in which such lease is registered."

The above-mentioned statutory provisions were repealed by sec. 32 of Act 50 of 1956 and sec. 2 of that Act provided as follows:

„No lease of land shall be invalid merely by reason of the fact that such lease is not in writing: Provided that no lease of land which is entered into for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period of the lease amount in all to not less than ten years, and no cession of such lease, shall be valid as against third parties if executed after the commencement of this Act, unless registered against the title deeds of the leased land."

In terms of sec. 4 of the Act, it was provided that "lease" includes a sub-lease, and „lessee" includes a sub-lessee.

In what follows I shall on occasion refer to the above-mentioned sec. 2 merely as „the section" and I shall employ the comprehensive term „long lease" as embracing the various leases mentioned in the proviso thereof. As was indicated in *Hitzeroth* v. *Brooks*, 1965 (3) S.A. 444 (A.D.) at p. 451, and also in both Courts below, the section has been the subject of considerable criticism. As from 1st January, 1970 it is repealed by Act 18 of 1969 which, it would seem, is likely to remove the difficulties which present themselves on the section as it stands.

So far as concerns the present case, those difficulties may, I think, be summarised thus. On the one hand, the not inconsiderable alteration in the pre-existing law which ensues if the construction of the section contended for by respondents be correct: on the other hand and inherent in the above-mentioned basic submission advanced by the appellants, the attributing to the Legislature of a singularly inept method of expressing its intentions and the necessity for assigning a *prima facie* startlingly restricted meaning to the words „third parties".

There can be little doubt that the main object of the Legislature in enacting the section and in repealing the earlier statutory provisions

mentioned above was to achieve uniformity throughout the Republic and to set at rest the uncertain question of whether a long lease required to be in writing even *inter partes*. So far as concerns formalities *inter partes*, this was achieved by the opening words of the section. A further object was, no doubt, to remove the anomaly that in the Orange Free State a long lease was determined at 25 years, and not at 10 years as in all the other Provinces. Registration of long leases was not only specifically prescribed by the Transvaal and Orange Free State legislation but was well recognised in the common law, the generally accepted period being 10 years. If, therefore, the Legislature's intention in enacting the section was indeed—as is now contended on behalf of the appellants—to continue to hold third parties bound by long leases as they had been bound under the common law, a simple repeal of the Transvaal and Orange Free State legislation would have achieved that object. The enactment of the somewhat elaborate proviso to the section accordingly at once suggests a legislative intention contrary to that now submitted on behalf of the appellants.

It may at once be conceded that it would, *prima facie*, be somewhat surprising for the Legislature designedly to run counter to the well-established and generally accepted principle of our law that a purchaser with knowledge of pre-existing rights takes subject to those rights. On the other hand, since the opening words of the section pronounce writing to be unnecessary *inter partes*, it is not necessarily absurd or inconceivable that the Legislature should, in relation to long leases (which are the sole subject of the proviso to the section), deliberately have prescribed registration as a prerequisite to validity against all third parties. It is to be observed that sec. 3 of the same statute (Act 50 of 1956) also enacted that, if executed after the commencement of the Act, no lease of any rights to minerals in land and no cession thereof should

„be valid as against third parties unless registered . . .".

Accordingly, even if, as I shall now endeavour to show, some probability exists that the full significance of the words employed in the above-cited sec. 2 was not entirely appreciated by the draftsman, the Court should, in my view, nevertheless give effect to the plain wording of that section as it stands.

The description of a long lease contained in the proviso to the section was taken over virtually *verbatim* from para. (*b*) of the definition of „immovable property" contained in sec. 102 of the Deeds Registry Act, 47 of 1937, which, in turn, very closely resembles the description of a long lease appearing in the above-cited sec. 29 (1) of the Transvaal Proclamation, 8 of 1902. In terms of this last-mentioned section, a long lease had not only to be notarially executed but, unless registered, it was also of no

„force or effect against creditors or any subsequent *bona fide* purchaser or lessee of the property leased or any portion thereof".

Sec. 2 of Act 50 of 1956 shows evidence of having been modelled on the above-cited sec. 29 of Proc. 8 of 1902 (T. The draftsman of sec. 2 of the 1956 Act, however, not only incorporated a mention of cession —a matter which the Transvaal Proclamation had dealt with in a separate sub-section—but also substituted for the phrase

„against creditors or any subsequent *bona fide* purchaser or lessee of the property"

appearing in the Transvaal Proclamation the now contentious words „against third parties". In my view, the probabilities are that this substitution was made in the interests of brevity but without full appreciation of the consequences. It may here appositely be mentioned that, although the Transvaal Proclamation did not avail a *mala fide* purchaser of property subject to an unregistered long lease, a *bona fide* purchaser of such property was not bound by the first 10 years even if the tenant was in occupation. For the Proclamation explicitly provided that, in the absence of notarial execution or registration, a long lease should be of no

„force or effect against creditors or any subsequent *bona fide* purchaser or lessee lessee".

In contrast, the appellants in the present case seek, by virtue of being in occupation and invoking a common law rule, to hold a *bona fide* purchaser bound for the first 10 years of the lease. This notwithstanding that the section expressly provides that, in the absence of registration, a long lease shall not be „valid as against third parties". I agree with the view expressed by HARCOURT, J., in delivering the judgment of the Provincial Division that it is unlikely that, in enacting the section, the Legislature should have intended to deprive *bona fide* purchasers of the protection they had for so long enjoyed in the Transvaal and Orange Free State against unregistered long leases. The counter-consideration that a literal construction of the words of the section enures to the advantage of even a *mala fide* purchaser is, in my view, more readily explicable upon the hypothesis, mentioned above, that the draftsman did not appreciate the significance of substituting „third parties" for „creditors or any subsequent *bona fide* purchaser".

The section provides that, if executed after the commencement of the Act and unregistered, a long lease shall not „be valid as against third parties". Now, ordinarily speaking, it is only the parties to a contract who are bound thereby. Admittedly there may be a plurality of parties; but, postulating the simple case of two contracting parties, their contract will normally be binding upon them alone. Initially, they are the sole parties to the contract. In relation to that contract, all other persons may thus perfectly appropriately be designated „third parties". For in the sphere of contract a „third party", in my opinion, ordinarily means somebody other than the contracting parties. The original parties to a contract may, of course, change, or their number may be enlarged. This may occur in a variety of ways recognised by the law of contract —*inter alia*, via the so-called „contract for the benefit of a third party" discussed by HARCOURT, J. To mention but a single obvious example of a change of parties: one party retires entirely from the contract and his place is, with the consent of the other contracting party, taken by another. This last-mentioned person, previously a third party, now becomes what *Wessels* calls a real, as distinct from an original, party. As the learned author points out (*Contracts*, 2nd ed., pp. 483 *et seq.*) real parties embrace representatives by operation of law (e.g. executors and trustees in insolvency) and successors by act of a party (e.g. by delegation or cession). Conversely, circumstances may exist—for example, such as those which prevailed in *Hitzeroth's* case, *supra*—

rendering a person initially bound by the contract. In all the foregoing cases the *de cujus* is, or becomes, either by virtue of the ordinary principles of contract or pursuant to some statutory provision, so identified with the contract as, in my opinion, rightly to be excluded from the category of „third parties". It may well be—it is unnecessary to express a definite opinion on the point—that the landlord's gratuitous successors should also be so identified with him.

In contrast to the foregoing, the purchaser of immovable property which is subject to a lease takes no positive steps to identify himself with the contract of lease as such. Purely as a matter of language, such a purchaser is, no less than a creditor, indeed a „third party" to the contract of lease. The principle embodied in the maxim „huur gaat voor koop", however, obliges such a purchaser—provided certain conditions prevail and subject to performance of his obligations by the tenant—to observe the tenant's rights of occupation and other rights under the lease. A tenant's rights are primarily personal rights against his contractual landlord. But, in the case of a short lease, continued occupation confers upon him a real right to remain in the leased premises. In the case of a long lease, registration confers this real right. Registration is a recognised method of creating real rights and, having regard to the duration of a long lease, I find nothing particularly extraordinary or unacceptable in attributing to the Legislature an intention to require registration of a long lease as a prerequisite for its validity as against all „third parties" in the ordinary literal signification of that expression.

There are certain *dicta* in the decisions of this Court to the effect that a purchaser who is bound by a pre-existing lease of the purchased property automatically steps into the shoes of the previous landlord. Thus in *de Jager* v. *Sisana*, 1930 A.D. 71 at p. 82, WESSELS, J.A., after briefly outlining the Roman law which was superseded in the Netherlands by the rule „huur gaat voor koop", went on to say that the Roman-Dutch law

„adopted the rule that the sale does not break the lease but that the purchaser becomes the landlord of the tenant under the same conditions as his lease with the seller".

Again, in *de Wet* v. *Union Government*, 1934 A.D. 59 at p. 63, STRATFORD, A.C.J., said:

„This being a contract of lease, the purchaser is bound on it by the doctrine of 'huur gaat voor koop', and bound also by all its material terms."

There is also a line of decisions in the Provincial Divisions pointing in the same direction. Of these the most striking is perhaps *Boshoff* v. *Theron*, 1940 T.P.D. 299, wherein GREENBERG, J.P., and SCHREINER, J., decided that, once the purchaser of land which is subject to a lease receives transfer, the landlord-vendor is divested both of his rights and his obligations *qua* landlord. While the practical convenience of accepting the situation as indicated in the above-mentioned decisions is apparent, they have been the subject of considerable weighty criticism in a series of articles by Professor *J. C. de Wet* in vol. 8 (1944) *Tydskrif*, more especially at pp. 239 *et seq.*, and in De Wet & Yeats, *Kontraktereg*, 3rd ed., p. 280. Without pausing to examine that criticism, it is to be observed that the above-mentioned decisions were all dealing with the situation whereunder the purchaser had, as a result of the

protection conferred upon a tenant by the maxim „huur gaat voor koop", admittedly become bound by the lease. In the present case the very enquiry is whether the purchaser (first respondent) is, on the wording of the section, bound at all by a long lease. The fact that the section is silent regarding the position of third parties in relation to short leases is not, in my opinion, of any particular significance. The proviso to the section makes express provision regarding long leases, and it is that provision which must be construed. The provision is that, in the absence of registration, no long lease or cession of a long lease „shall be valid as against third parties". I remain unpersuaded that these last-cited words should not be accorded their plain grammatical meaning. Assuming the correctness of the *dicta* and line of decisions indicated above, the circumstance that, when once admittedly bound by the lease, a purchaser becomes the tenant's landlord does not, when regard is had to the explicit wording and background of sec. 2 of Act 50 of 1956, in my opinion afford sufficient warrant for excluding a purchaser from the category of „third parties" mentioned in that section.

By way of analogy and as illustrating the construction of the terms of a statute so as to be in conformity with the common law, counsel for appellants referred us to the decision in *Fourie* v. *Oberholzer and Others*, 1914 T.P.D. 654. It was there held that sec. 2 of Law 3 of 1886 (T) did not abolish or modify the common law doctrine of notice and that, consequently, a purchaser of land who bought with knowledge of the existence of a servitude over the land was bound by such servitude notwithstanding the terms of the said section which read:

> „No servitude granted after publication of this law shall be valid as against third persons unless in the deed of transfer of the property on which the servitude exists such servitude is duly mentioned and described."

While this decision may be said to lend some support to the contention that, in a particular context, the words „third persons" are capable of being read as meaning „third persons not bound under the common law", a vital factor in the Court's reasoning in *Fourie's* case was that sec. 2 could not be construed independently of the special provision made in sec. 1 of Law 3 of 1886 whereunder, within the two-year period therein provided, a servitude could be registered against all purchasers with knowledge—if not, indeed, against *bona fide* purchasers as well. The decision as to the meaning to be assigned to the words „third persons" was—as, indeed, counsel for appellants himself clearly appreciated—thus vitally dependent upon the special context provided by the provisions of Law 3 of 1886.

No such special context obtains in the present case. Appellants' contention fundamentally depends for its validity upon the anomalies which are claimed would result from a rejection of that contention—more especially, that a literal construction of the words „third parties" would enable a *mala fide* purchaser to avoid an unregistered long lease. In my judgment, considerations such as these do not warrant the Court in assigning to the words „third parties" any other than their ordinary natural meaning. There is, in my opinion, not necessarily any unsurmountable anomaly in requiring a tenant under a long lease to register it if he wishes to acquire real rights. Moreover, acceptance of appellants' contention limits the category of „third parties" to creditors. If

that was indeed the Legislature's intention, a clear expression thereof would have presented no difficulty. It is, as I have mentioned earlier, in my opinion much more probable that in employing the words „third parties" the draftsman of the section overlooked the position of a *mala fide* purchaser. In any event, on the agreed facts in the present case, the first respondent is not a *mala fide* purchaser. Finally, the provisions of Act 18 of 1969 go far, in my opinion, towards showing that the Legislature realised that the wording of sec. 2 of Act 50 of 1956 had created an unsatisfactory situation which required, not merely to be elucidated, but to be rectified.

The cumulative effect of the various considerations I have mentioned is such as, in my judgment, to lead to the conclusion that the decisions in both Courts below and the views expressed by COLMAN, J., in *Alternators (S.A.) (Pty.) Ltd.* v. *Boulanger*, 1969 (3) S.A. 75 (T) at p. 78, were correct and, further, that appellants' contention in the present case should not be sustained.

I would, therefore, dismiss the appeal with costs.

WESSELS, A.R., het met OGILVIE THOMPSON, A.R., saamgestem.

Appellante se Prokureurs: *D. K. Singh, Poovalingam en Vahed*, Durban; *Leslie Weinberg Herman*, Pietermaritzburg; *Davidson en Marais*, Bloemfontein. Respondente se Prokureurs: *Logie en Sellick*, Durban; *Cecil Nathan, Beattie en Kie.*, Pietermaritzburg.

S. v. BRUCE.

(NATAL PROVINCIAL DIVISION.)

1969. *November* 18. JAMES, J.P., and HENNING, J.

Criminal law.—Traffic offences.—Failure to stop after accident, etc.—Paras. (a) *to* (g) *of sec.* 135 (1) *of Ord.* 21 *of* 1966 (N) *create separate offences.*

Section 135 (1) of Ordinance 21 of 1966 (N) creates separate offences in paragraphs (*a*) to (*g*), i.e. these paragraphs do not merely set out the various ways in which the section can be contravened.

Argument on review.

W. O. H. Menge, for the accused, at the request of the Court.
J. R. Joubert, for the State.

JAMES, J.P.: This is an automatic review case which was set down for argument before the Full Bench at the request of the reviewing Judge. Mr. *Menge* argued the matter on behalf of the accused and Mr. *Joubert* for the State. We are obliged to both counsel for their assistance.

The prosecution of the accused, who is an apprentice mechanic aged