close of the Crown case, namely that the liquor licence had not been proved according to sec. 153, brought the proviso into operation and that thereupon it became the duty of the Crown by proper evidence to prove the fact of the licence by the means laid down in sec. 153 or possibly some other means. But I do not think that is a proper construction of what the attorney said; he merely said: "The Crown has failed to comply with sec. 153 of the Liquor Act", which means that it was the duty of the Crown, before closing its case, to adduce the necessary proof. That was a wrong contention based on an overlooking of the terms of sec. 318 *bis*. It was, therefore, strictly unnecessary for the magistrate to exercise his power under sec. 247 of the Criminal Procedure Act, and it is unnecessary for us to consider the question whether at the present stage it would be right to remit the case for proof of the fact that the appellant was the holder of the liquor licence on the relevant date. As the Crown case stood the appellant had to be deemed to be the holder of the licence. No circumstances arose rendering it necessary for the Crown to prove the licence either as directed by sec. 153 or otherwise.

It follows that the appeal must be dismissed and the conviction and sentence confirmed.

LUCAS, J., concurred.

[After the appeal had been dismissed Mr. *Human* asked the Court to remit the case in order to enable the appellant to defend the case on the merits. The Court proceeded to deal with this application].

MILLIN, J.: We have dismissed the appeal and, having done that, we are asked to remit the case on a totally different ground; Mr. *Human* now asks us to remit the case in order to allow the appellent to defend the case on the merits. He points out that the appellant would have been able to escape conviction if she had given a reason deemed to be satisfactory by the magistrate for not supplying meals to these travellers, and it is possible that if the case had been conducted with that end in view the magistrate might have been satisfied that the appellant had a good reason for not supplying the meals in question. Mr. *Human* says that the appellant should not be punished (as he puts it) for the mistake which her attorney made in closing the case for the defence, relying on a point of law which has turned out to be a bad point, and he refers us to the possible consequences, if the conviction stands against the appellant, so far as the Licensing Board for the district is concerned. It is argued that the Licensing Board for the district may, when application is made for renewal of the liquor licence, take an adverse view because of this conviction. I do not think it at all likely that the licence will be jeopardised by this conviction, and if the matter is raised before the Licensing Board it is inconceivable that the

appellant would not be permitted to explain the circumstances in which the conviction came to be recorded against her—how the case for the defence was closed by the attorney in reliance on a point of law without leading any evidence, and I am sure that the Licensing Board will listen to any evidence the appellant may lead to show that she had to refuse to supply the meals for reasons beyond her control.

We have to consider whether this is a proper case in which we should exercise the power to remit. I do not wish to say that in no case where an accused has been represented by a professional person at the trial will the Court exercise that power. On the other hand we cannot allow the position to develop in which attorneys who apply for the discharge of accused persons on the ground that the evidence is not complete and, on that application being refused, close the case for the defence without calling evidence, think they have a right when they lose the appeal which follows to apply for a further opportunity of leading evidence. It would be most undesirable to allow that position to develop, and if we exercise the power to remit in the present case I cannot see how there can fail to be a precedent for any other case. We have come to the conclusion that this application for remittal of the case to the magistrate in order to enable the appellant to defend it on the facts must be refused.

LUCAS, J., concurred.

Appellant's Attorneys: *Peens & Jackson*.

SPIES v. LOMBARD.

(APPELLATE DIVISION.)

1950. *May*, 2, 3; *June* 19. CENTLIVRES, J.A., SCHREINER, J.A., and VAN DEN HEEVER, J.A.

Landlord and tenant.—Lease.—Cancellation of.—Lessee entering into a partiarian agreement without landlord's written consent.—Whether lease forfeited by statute.—Whether a "herverhuur" in breach of conditions of lease.—Lessee failing to prevent erosion.—Whether a breach.—Lessee causing damage.—Whether landlord entitled to cancellation.—Claim for damages.—Dependency on main claim.—Statute.—Article 9 of Groot Placaat Book.—Penal provisions of.—Whether fallen into desuetude.—Whether ever received in South Africa.—Principle of non-reception.—Scope and applicability of.

The penal provisions of Article 9 of the Placaat of the Estates of Holland of the 26th September, 1658 (Great Placaat Book 2, column 2515), which is directed

inter alia, against partiarian arrangements by lessees, are not in force in South Africa.

Appellant had sued respondent, who had leased two farms from him for five years, for cancellation of the lease, an order for ejectment and damages, averring that respondent had breached the written agreement in various respects. Clause 4 of the lease obliged the lessee to maintain all improvements on the farm in good condition in order that upon termination of the lease he might deliver them to the lessor in the same condition as he received them, reasonable allowance being made for fair wear and tear. In terms of clause 6 he undertook to lay out and work the fields in such a manner as to avoid erosion. Clause 9 forbade him to sublet ("herverhuur") the farms or any portions of them without the written consent of the lessor which could not be unreasonably withheld. The forfeiture clause was only operative in respect of non-payment of rent. Appellant complained (*a*) that respondent had entered into a partiarian agreement in respect of certain lands on the farms with one F; (*b*) that various doors, windows, fences, etc., had been damaged and not repaired or removed and not replaced; (*c*) that the farm was being severely eroded as the result of respondent's failure to arrest erosion in its early visible stages. In an appeal from an order of absolution from the instance,

Held, as to (*a*), *per* CENTLIVRES, J.A. (SCHREINER, J.A., concurring), that the penal provisions of Article 9 of the Placaat of the 26th September, 1658, had fallen into desuetude.

Held, as to (*a*), *per* VAN DEN HEEVER, J.A. (SCHREINER, J.A., concurring), that the agreement with F was a contravention of the prohibition contained in Article 9 of the Placaat, but that the penal provisions in the Article involving forfeiture had never been received in South Africa; accordingly that the appeal could not succeed on that ground.

Held, further, in regard to (*a*), as the word "herverhuur" denoted a normal sub-letting, viz., a repetition as between respondent and a third person of a contract of the kind entered into between the parties, that the arrangement with F did not constitute a breach of clause 9.

Held, in regard to (*c*), that, in the absence of proof of erosion having taken place as a result of respondent's or F's agricultural operations, absolution had rightly been ordered.

Held, in regard to (*b*), that the respondent had not so seriously neglected the property leased as to justify cancellation and that the claim for damages *per se* was dependent upon the success of the main claim; appeal accordingly dismissed.

The decision in the Natal Provincial Division in *Spies* v. *Lombard*, confirmed.

Appeal from a decision in the Natal Provincial Division [DE WET, J.]. The facts appear from the judgment of VAN DEN HEEVER, J.A.

A. Milne, K.C., with him *J. B. Macaulay*, for the appellant: Respondent's arrangement with Fourie was to constitute the latter a *colonus partiarius*, and therefore it amounted to a breach by respondent of clause 9 of the lease between appellant and respondent; see Van den Heever, *The Partiarian Agricultural Lease in South African Law* (pp. 18, 19, 28-30, 38, 39, 43); *du Preez* v. *Steenkamp and Others* (1926, T.P.D., at p. 366); *Keighley, N.O.* v. *Erasmus* (1938, S.R. 153); *Stevens* v. *van Rensburg* (1948 (4), S.A.L.R. 779); *Blumberg & Sulski* v. *Brown & Freitas* (1922, T.P.D., at p. 136). The test of the right to rescind in the absence of a forfeiture clause for a breach of lease is whether the breach was a material one going to the root of the contract; see *MacDonald, N.O.* v. *Hume* (1875, Buch. 8); *Abdulla & Co.* v. *Kramer Bros. and Others* (1928, C.P.D. 423). Clause 9 is a vital term of the lease; see clauses 4, 6, 7; *cf*. Art. 9 of the Placaat of the 26th September, 1658. The test is whether the lessor would have entered into an agreement without such a term; see *Strachan* v. *Prinsloo* (1925, T.P.D. 709); *O'Connell* v. *Flischman* (1948 (4), S.A.L.R., at pp. 193-4); *Foster* v. *Hillman Bros*. (1932, W.L.D. 228-9). The obligation imposed by clause 6 was a vital term or a condition of the tenancy, a breach of which entitled the appellant to cancellation; see *Strachan's* case (*supra*), and *cf*. Forest and Veld Conservation Act 13 of 1941; *Estate Geekie* v. *Union Government and Another* (1948 (2), S.A.L.R. 494); *Keighley's* case (*supra*, at p. 158); *Henning* v. *le Roux* (1921, C.P.D. 592). If the property is being seriously neglected, the Court will not refuse cancellation merely because there is a duty upon the lessee to restore the property in good order on the termination of the lease; nor is it necessary that the lessee's conduct should be wilful; see *Visser* v. *London & Jagersfontein Diamond Mining Co*. (1 C.L.J. 341); Voet (19.2.18); *Stamp* v. *Rex* (1879, Kotze 147); *Bower* v. *Dow & Co*. (1887, 2 S.A.R. 175). The Court will not withhold cancellation merely because the existing damage may be small and repairable; it is the potentiality of further damage arising in the case of such a tenant continuing as such which warrants the view that it would be inequitable to allow him to remain in possession; see *Visser's* case (*supra*); Wessels' *Law of Contract in South Africa* (Vol. II, para. 2,944); as to the extent of the tenant's duty to maintain the improvements in good order, see *Lurcott* v. *Wakeley* (104 L.T. 290, at pp. 291, 295, 297); *Anstruther-Gough-Calthorpe* v. *McOscar and Another* (1924, I K.B. 716); *Sarkin* v. *Koren* (1948 (4), S.A.L.R. 438). There is a presumption that if damage is caused to leased property it is caused by the lessee; see *Eensaam Syndicate* v. *Moore* (1920, A.D. 457); *Daly* v. *Chisholm & Co., Ltd*. (1916, C.P.D. 562); *Keighley's* case (*supra*); as to the *onus* resting on the tenant to rebut the presumption, see *Frenkel* v. *Ohlsson's Cape Breweries* (1909, T.S. 957); the tenant is responsible for the acts of third persons damaging the leased premises when he fails to take proper precautions against the damage; see *von Holdt* v. *Bruwer and Others* (1918, C.P.D., at p. 167); *Voet* (19.2.19); or where damage is done maliciously with intent to injure the tenant; see *Voet* (19.2.19). There is nothing in *Voet* (19.2.29) to suggest that an award of damages for a breach of a lessee's duty cannot be made before termination of the lease; the implication is the other way; see *Daly's* case; *Stamp's* case; *Henning's* case; *Visser's* case; *Bower's* case, all *supra*, van Leeuwen, *Cen. For.* (1.4.22.16).

J. N. C. de Villiers, K.C., for the respondent: Clause 6 of the lease must be interpreted *contra stipulatorem*; see *Olds* v. *Wilson* (1924, O.P.D. at p. 140); *Eastern Free State Board of Executors* v. *Theron* (1922, O.P.D. at p. 180). It was never the duty of respondent to rectify any erosion existing on the farm at the commence-

ment of the lease or to maintain the farm in a better condition than it was when he took possession of it; see *Poynton* v. *Cran* (1910, A.D. at p. 221); *Viljoen* v. *Cleaver* (1945, N.P.D. at p. 334); *Sarkin* v. *Koren* (1949 (3), S.A.L.R. 545); *Henning* v. *le Roux* (1921, C.P.D. 587); *Sarkin* v. *Koren* (1950 (1), S.A.L.R. at pp. 499-500); there is no presumption that on the date that respondent was put into possession of the leased farm, it was free from erosion; the *onus* is on appellant to prove that; see *Bresky* v. *Vivier* (1928, C.P.D. 202); alternatively, if some erosion did take place during the currency of the lease, it was not such as to justify cancellation of the lease; *cf.* de Wet & Yeats, *Handelsreg* (p. 109); *Strachan* v. *Prinsloo* (1925, T.P.D. 709); *Transvaal Cold Storage Co.* v. *S.A. Meat Export Co., Ltd.* (1917, T.P.D. 413); *Trinder* v. *Taylor* (1921, T.P.D. 517); Maasdorp's *Institutes of South African Law* (Vol. III, p. 204); *Solomon* v. *van Zyl* (25 S.C. 974). Clause 9 of the lease must be restrictively interpreted; see *Gillison* v. *Thomas' Estate* (1920, E.D.L. 146); Wille, *Landlord and Tenant in South Africa* (4th ed., p. 118); *McGilvary* v. *Reis & Others* (1945, W.L.D. 11); in any event appellant could not reasonably have refused his consent to the arrangement between respondent and Fourie; *cf.* *Thomas* v. *Curnow* (1913, W.L.D. 168). If there was a breach of the terms of the lease, the Court *a quo*, in the circumstances and in the exercise of its discretion, correctly refused to order the cancellation of the lease; see *Wille* (*supra*, pp. 112, 120); *Visser* v. *London & Jagersfontein Diamond Mining Co.* (1884, 1 Greg. 8; 1 C.L.J. 341); *Vorster* v. *Leo* (1913, W.L.D. at p. 83); *Bester* v. *Taylor* (1912, O.P.D. at p. 63). The Court has a discretion whether to order cancellation and will only do so if misuse of a serious and damnifying nature is proved; see *Wille* (*supra*, at pp. 237, 243); *Voet* (19.2.18); van Leeuwen, *Cen. For.* (1.4.22.16); *Bower* v. *Dow & Co.* (2 S.A.R. 175); *Breed* v. *van Pletzen* (1915, E.D.L. 460); *Boruman* v. *Basson* (1906, O.R.C. 3); *Stamp* v. *Rex* (1879, Kotze 147); *Henning* v. *le Roux* (1921, C.P.D. at p. 592); *Parker* v. *McLeenon* (3 S.A.R. 218). There is no clear evidence of the condition of the improvements at the time respondent first assumed responsibility for them; the *onus* on this point is on appellant; see *Shapiro* v. *Yutar* (1930, C.P.D. 92). The claim for damages is premature; *cf.* *Voet* (19.2.18 and 29); alternatively, the damages, if any, have not been proved sufficiently clearly; see *Aucamp* v. *Morton* (1949 (3), S.A.L.R. 611).

Milne, K.C., in reply.

Cur. adv. vult.

Postea (June 19th).

CENTLIVRES, J.A.: I have had the privilege of reading the judgment prepared by my Brother VAN DEN HEEVER and agree that the appeal should be dismissed with costs.

As far back as 1867 the Cape Supreme Court in the case of *Friedlander* v. *Croxford and Rhodes* (5 S. 395) applied Art. 9 of the Placaat in holding that a sub-lease of part of a *praedium rusticum* was a nullity as regards the landlord who had not given his written consent to the sub-lease. In 1880 DE VILLIERS, C.J., in *de Vries* v. *Alexander* (Foord 43) again applied Art. 9 and held that a sub-lease entered into without the consent of the landlord was void. It is interesting to note that *Friedlander's* case was not quoted in *de Vries* v. *Alexander*, the reason probably being that the report of *Friedlander's* case was first published in 1902. Art. 9 was also applied in *Visser* v. *London and Jagersfontein Diamond Mining Co.* (1884, 1 Greg. 8) in so far as the Court interdicted a lessee from sub-letting. In *Bester* v. *Taylor* (1912, O.P.D. 60) the Court construed Art. 9 as not applying to a sub-lease of portion of a leased property, and although *Friedlander's* case was referred to in the judgment it does not seem to have been appreciated that it was held in the Cape case that Art. 9 rendered a sub-lease of portion of the leased property invalid. In *Vorster* v. *Leo* (1913, W.L.D. 77) the effect of *Friedlander's* case was again not appreciated.

Other articles of the Placaat were applied in *de Beers Consolidated Mines* v. *London and South African Exploration Co.* (10 S.C. 359) and *van Wezel* v. *van Wezel's Trustee* (1924, A.D. 409).

Even assuming that Art. 9 of the Placaat had the same force and effect in South Africa as if it had been enacted at the Cape of Good Hope prior to the British occupation, it is important to note that there is no case on record in which the Courts have declared a lease forfeited on the ground that the lessee sub-let without the written consent of the landlord. In *Seaville* v. *Colley* (9 S.C. 39) DE VILLIERS, C.J., said at pp. 44, 45:

> "The conclusion at which I have arrived as to the obligatory nature of the body of laws in force in this Colony, at the date of the British occupation in 1806, may be briefly stated. The presumption is that every one of these laws, if not repealed by the local legislature, is still in force. This presumption, however, will not prevail in regard to any rule of law which is inconsistent with South African usages. The best proof of such usage is furnished by unoverruled judicial decisions. In the absence of such decisions the Court may take judicial notice of any general custom which is not only well-established but reasonable in itself. Any Dutch law which is inconsistent with such well-established and reasonable custom, and has not, although relating to matters of frequent occurrence, been distinctly recognised and acted upon by the Supreme Court, may fairly be held to have been abrogated by disuse."

In *Green* v. *Fitzgerald and Others* (1914, A.D. 88 at p. 111) INNES, J.A., (as he then was) said:

> "In *Seaville* v. *Colley* (9 J. 39) it was held that a right of retraction, founded upon the *lex Anastasiana*, and recognised by the law of Holland, had been abrogated by contrary usage and was no longer in force in the Cape Colony. I do not think, however, that the doctrine of the Roman-Dutch law can be confined to cases where contrary usage has been established; both in principle and on authority mere desuetude must in certain circumstances be sufficient. The authorities, however, do not discuss in any detail what those circumstances should be, and it would be unwise to attempt to lay down a comprehensive rule."

Applying the principle in relation to desuetude laid down in the

last-mentioned case, it seems to me that it can fairly be said that by desuetude the penal provisions in Art. 9 in relation to the forfeiture of the lease and the penalty provided for in the concluding words of that article have ceased to be law in South Africa. In *Visser's* case (*supra*) the Court declined to declare the lease A between the landlord and the tenant forfeited and the attempt made in *Bester's* case (*supra*) to have the original lease cancellel failed. In the former case the Court held that "billijkheid niet de vernietiging van het kontrakt vorderde", and in the latter case it was held that the article did not apply to a sub-lease of portion of the B leased property. In neither case was it necessary, in view of the *ratio decidendi* adopted, to consider whether the whole of Art. 9 was still in force in South Africa. This being the position, I think that it is reasonable to hold that those provisions of Art. 9 referred to above have fallen into desuetude in South Africa.

C

SCHREINER, J.A.: I agree that the appeal should be dismissed for the reasons stated in the judgments of my Brothers CENTLIVRES and VAN DEN HEEVER. In regard to the forfeiture and penal portion of Art. 9 it is satisfactory to know, as the result of the D researches of my Brother VAN DEN HEEVER, that, apart from the principle of desuetude, the principle of non-reception can be used to protect our law by the rejection, not only of whole enactments or sections of enactments in the Groot Placaat Boek which were never imported into South Africa, but also of distinct portions of E sections, other portions of which have been treated as being part of our law.

VAN DEN HEEVER, J.A.: The appellant is the owner of two farms "Uitvlucht" and "Oshoek", situated in the District of Dundee, Natal, which he let in writing to respondent on the 6th F January, 1947. In the contract the currency of the lease was expressed as running for five years from the 1st January, 1947 to the 31st December, 1952; but nothing turns on this ambiguity. The clauses of the contract which are important for the purposes of this case are the following:—

G

4.

"Die huurder onderneem om alle verbeterings op die plase in goeie orde te hou om hulle by die beëindiging van hierdie huurkontrak in dieselfde orde van reparasie soos hy hulle ontvang het aan verhuurder oor te lewer, redelike toelating vir sluitasie (*sic*, obviously meant to be 'slytasie') sal in ag geneem word.

6.

H Die huurder sal die reg hê om soveel lande soos hy wil te ploeg, maar hy onderneem om die lande so te maak sodat gronderosie voorkom word en om sover moontlik die lande op so 'n manier te maak sodat daar geen skade aan die weivelde kom nie.

9.

Die huurder het nie die reg om enige dele van die plase of die plase te herverhuur nie, maar as hy dit wil doen moet hy eers die verhuurder se toestemming daartoe kry, sulk toestemming sal nie moedswillig teruggehou word nie."

Then there is a forfeiture clause which was conceived as becoming operative only in the event of the lessee being in arrear with the payment of rent for more than fourteen days after demand.

Averring that respondent had breached the contract in various respects appellant instituted an action against respondent in the Natal Provincial Division in which he claimed cancellation of the A lease, an order for ejectment, damages in the amount of £1,350 and costs, £1,000 being the damages claimed in respect of misuse and £350 in respect of respondent's holding over.

Appellant complained that in November, 1947, and without his consent respondent entered into a partiarian agreement in respect B of lands on the said farms with a certain Fourie and allowed the latter to plough on such lands pursuant to the partiarian agreement in breach of clause 9 of the agreement between the parties. Consequently appellant terminated the lease by notice in writing on the 24th December, 1947, and required respondent to vacate the C property, which the latter refused to do. Appellant moreover complained of the following acts and omissions on the part of respondent:

"(a) the windows of the dwelling have been broken and remain unrepaired, with the result that the building has deteriorated in condition; D

(b) the door of a rondawel has been removed with the result that exposure to the elements has caused damage;

(c) portion of the door of a native outhouse and the window thereof have been removed with the same result as is set out in (b);

(f) boundary and other fences have been broken down and remained unrepaired; in various places fencing material has actually been removed and not replaced; E

(g) the iron gate at the entrance to the farm has been damaged and broken;

(j) the farm is becoming severely eroded as the result of respondent's general failure to take adequate or any steps to arrest erosion in its early visible stages."

These issues were tried before DE WET, J., who granted absolution from the instance with costs; hence this appeal. The learned F Judge held that the partiarian arrangement with Fourie was in breach of clause 9 of the agreement, but that it was not such a breach as to justify the conclusion that by such action respondent must be held to have repudiated the lease. On the complaints G relating to abuse or neglect of the property let he found either that they were not proved, or, where proved, did not evince on respondent's part a wilful disregard of his obligations under the lease so that it could be said that his action amounted to a repudiation of the contract. He was not satisfied that the damage done to the homestead, although serious, was such as could not be repaired so H as to restore the house to the same condition as it was in before. Under the circumstances appellant's claim for damages under this head was premature. Accordingly, as I have said, he absolved respondent from the instance.

I have dealt rather summarily with the pleadings since either during the trial or on appeal certain issues were jettisoned and on appeal it was common cause that the issues raised before the

learned trial Judge which came up for decision here are the following:—

(*a*) Whether the respondent breached clause 9 of the lease by reason of "letting" to Fourie and, if so, whether the breach was such as to entitle the appellant to cancellation;

A (*b*) whether in any event clause 9 of the lease was such a vital term or condition of the contract that its breach entitled the lessor to cancellation and, if so, whether there was such a breach;

B (*c*) whether the respondent has in breach of the terms of the lease, so seriously neglected the property leased as to justify cancellation;

(*d*) whether, in any event, the appellant was entitled to damages.

In connection with the issue stated under (*a*) Mr. *Milne* on behalf C of appellant raised a difficult legal problem which has for long been a vexed question. He maintained that apart from the consideration whether under the common law this alleged breach of contract was so serious (I use the neutral term provisionally) as to justify cancellation, the respondent, by entering into the D partiarian agreement with Fourie, has forfeited the remainder of the lease by virtue of the provisions of Art. 9 of the Placaet of the Estates of Holland of the 26th September, 1658 (G.P.B. 2, col. 2515), which is directed, *inter alia*, against such partiarian arrangements by lessees and is in force in this country. Mr. *de Villiers* on the other hand argued that the 9th article is confined E to a prohibition against the cession or assignment of "na-huur" and is not concerned with anything in the nature of sub-letting and that in any event that enactment has no force of law in the Union. It is necessary therefore to examine the Placaet in some detail; for if, as Mr. *Milne* contends, the evils at which it is F directed include such transactions as that between respondent and Fourie and if the article has the force of law here, that would dispose of this case.

The 9th article of the Placaet may be rendered as follows:—

> "Lessees of rural land and persons not being owners who have the use of G such land by other title may not directly or indirectly either during the currency of the lease or after its expiration, make over such lease or rights in respect of ameliorations by sale, exchange, donation or other contracts, without having first obtained the written consent of the owner, on pain not only of nullity, but also of forfeiture to the owner of the remainder of such a lease of lands if the lessee or user is entitled thereto, as well as forfeiture of any action in respect of ameliorations to which they may be entitled; over and H above the foregoing the contracting parties incur a penalty equal to the sum which they have stipulated between them."

The prohibition is directed against "Bruyckers ofte Pachters". Pachters are of course lessees of rural land. A "bruycker" is according to the "*Woordenboek der Nederlandsche Taal*" edited by Muller and Kluyver "In't bijzonder 'Houder', gebruiker (hetzij als pachter, hetzij anderzins) van eene boerderij met bijbehoorende landerijen." (*Cf.* Grot. *Inleyd.* 2.10.8). As we

shall see later, in Dutch law (before it became Roman-Dutch) most forms of land tenure separated from ownership, including the ordinary lease, were regarded as real rights, *iura in rebus alienis*. In his *Kort Begrip* (4th ed., pp. 209, 213) De Blecourt points out that in the older Dutch statutes the word "huur" does not con- A note a *locatio-conductio* in the Roman sense, but:

> "het zakelijk recht van gebruik van eens anders grond, hetzij voor korteren of langeren tijd of zelfs voor eeuwig, veelal medebrengende de bevoegdheid om er een huis op te zetten en onder verplichting om jaarliks iets voor dit gebruik te betalen, onder de naam van vijns, pacht, erfcijns, erfpacht enz., soms zelf onder den naam van rente, gewoonlijk ook onder verplichting van B nader te bespreken casueele praestaties."

From this as well as from the fact that the prohibition is directed to bruikers as well as to pachters it appears that the expression "huur" as used in the statute has a meaning wide enough to include a partiarian tenant. (See Huber, *Hedend. Rechtsgel.*, C 3.8.17).

Another consideration which points in the same direction is the fact that the act which the Legislature forbids, is *inter alia*, "making over" such lease (huyre), which includes any form of making over and not necessarily by way of onderpacht. The prohi- D bition could not have been directed only against an assignment of the lease in the sense that the lessee stepped out of the contract without the consent of the lessor, for according to Dutch law the lessee's obligations toward the lessor remained in existence even where the latter had for some time accepted rentals from the sub-lessee; and E although the lessor had rights of hypothec against the sub-lessee, he had according to the common opinion no direct right of action (Zutphen, *Nederl. Pract. s.v.* "Hueringhe ende Verhueringhe", *n.* 14, 15; Van der Keessel, *Dictata ad Grot.* 3.19.10). Consequently all that the tenant could make over, apart from his claim F to compensation or his rights to relocation, if any, were his rights *utendi fruendi* under the lease.

In *Vorster* v. *Leo* (1913, W.L.D. 77 at p. 83) WARD, J., touched upon the difficulty of holding that the prohibition was limited to an out and out cession of the lease, since such a transaction was in any event null and void. The word "*overzetten*" used in the G statute has a meaning wide enough to include transactions other than assignment; it was a word conveying a very elastic concept; it connoted any form of conveyance, irrespective of its content, for example property or rights less than proprietary (Woordenboek, *De Vreese en Boekenoogen, s.v.* "overzetten".) In *Bester* v. H *Taylor* (1912, O.P.D. 60) MAASDORP, C.J., held that the Placaet dealt only with a complete cession or "making over" of a lease as a whole and did not affect the right to sub-let a portion, provided the original lease remained intact. This proposition is to my mind untenable. The Placaet is a Dutch statute and has to be given the meaning it bore at the time of its promulgation. The Dutch, like the Romans, did not rely too much upon the draftsman

of statutes. Where the evil against which a statute was directed was clear and the legislature expressly prohibited only one means of realising that evil, other methods of doing so, quite apart from simulation, were regarded as equally forbidden and *in fraudem* A *legis*. Consequently *Paul* stated in D. 1.3.29:

> "*contra legem facit, qui id facit quod lex prohibet; in fraudem vero, qui salvis verbis legis sententiam eius circumvenit*",

or as it is expressed more picturesquely in the Canon law:

> "*cum quid una via prohibetur alicui, ad id altera non debet committi*".

(*c*. 84 *de reg. jur. in* VI° (*post* 5.12)). Since the industrial or B economic evil aimed at—as we shall see—was the putting of potentially fractious tenants on to the land leased, without the owner's consent, every assignment or sub-letting of a portion of such land increased the potential sources of trouble and therefore the evil. In Brunswick, where of course the same canon of construction pre-C vailed, a statute prohibited the sale of portions of certain landed estates. The Court held that the object was to prevent disintegration of such estates and that a long lease of a portion, since it militated against redintegration, was therefore unlawful (Seuffert's *Archiv*, Band 22, No. 12). In *Dadoo, Ltd. and Others* v. *Krugers-* D *dorp Municipal Council* (1920, A.D. 530) the question was in how far these canons of construction were applicable to statutes of the Transvaal Republic enacted by representative institutions; that decision has no direct bearing on the interpretation of Dutch statutes promulgated before the British occupation of the Cape E (*Cf*. 1942 *S.A.L.J.* 333). In both *Bester* v. *Taylor* and *Vorster* v. *Leo* (*supra*) it was apparently overlooked that as early as 1867 it had been decided in *Friedlander* v. *Croxford and Rhodes* (5 Searle 395) on the authority of *Van der Keessel* that where a lessee of rural land sub-let part thereof without the landlord's consent, the F sub-lease was invalid.

Mr. *de Villiers* further relied upon the decision in *Eckhart* v. *Nolte* (1885, 2 S.A.R. 48) in which KOTZE, C.J., in the Transvaal held that Art. 9 contains no prohibition against "making over" the lease itself, but merely against the alienation of the right or G alleged right of *na-huur*. With great respect, this construction is untenable if one considers the article in its context and against its background. The evil which the Legislature sought to repress is fully set out in the preamble. It recounts that Charles V had in 1515 issued a decree against certain malpractices of "huurlieden en pachters"; that secs. 31, 32 and 34 of the Political Ordinance H of 1580 were also intended to repress these evils; that these enactments did not achieve their objects; that tenants were becoming so presumptuous that, where they had enjoyed the "huur" of lands for several years, they retain and continue to use such land at the expiration of their conventional tenure without the consent of the owners on such pretexts as "na-huur", improvements, planting and sowing, the erection of buildings, etc. Sometimes they "make over" such lands to third parties and sell the *na-huur* for great

sums of money or endow their children in marriage therewith as if they were the owners and had inherited the land from their parents and maintain their alleged rights with violence against landlords and other concessionaries of the latter. The Placaet then proceeds, in addition to making new and special provisions to re-enact the A Edict of Charles V and Arts. 30 to 34 inclusive of the Political Ordinance of 1580 (G.P.B. 1, col. 337) which deal with the same evils and ordered local authorities to enforce these measures. The preamble to the Imperial Edict of 1515 recounts that after the expiration of their conventional tenancy "Pachters ende Huyr-B luyden" claimed a right of retention or *na-huur* on various pretexts and caused violent disorders. Accordingly it enacted that where tenants are in occupation of land as lessees or persons entitled to its enjoyment, their tenure shall be for four years only, after which they are obliged to vacate the property occupied unless they C are in possession of written contracts entitling them to hold the land for longer periods. Arts. 30 to 34 of the Political Ordinance deal with the same subject-matter and in its turn confirmed and re-enacted the Edict by reference.

Our Art. 9 was taken over almost verbatim from Art. 3 of the D Placaet of the Estates of Zeeland dated the 16th February, 1618 (G.P.B. 1, col. 365). In this measure it is clear that the evil contemplated was the holding over on specious grounds after the termination of their conventional tenancy by lessees and other per-E sons entitled to the enjoyment of land. Consequently, the preamble recounts, they make over their tenancy to third parties together with their standing crops, livestock and implements "in order to circumvent and defraud the landlords." Such a transfer without the written consent of the owner was forbidden and gave rise to forfeiture of the remaining period of the lease at the option of the F landlord.

All these statutes refused to countenance any claim to *na-huur* unless it was stipulated in writing, in which event, of course, the expression na-huur became a misnomer. They are the outcome of the impact upon each other of two different legal systems. In G Roman law a lessee had purely personal rights against his landlord. According to Germanic law the *bruiker* had *gewere* enforceable against the world (Hübner, *Grundzüge d.d. Privatrechts*, 4th ed., pp. 160, 538; Heusler, *Institutionen*, Vol. 1, p. 379; De Blecourt, *op. cit.* 209). For convenience I refer to any form of land tenure short of ownership conceded by the owner to another as "permissive H tenure". The Germanic tendency, perhaps owing to industrial conditions in Europe in those times, was throughout that permissive tenure developed into proprietary rights, so that what *De Blecourt* terms *rolverwisseling* occurred: by lawfully or unlawfully maintaining a claim to na-huur or the *ius retractus* the concessionary ultimately became owner and the original owner and his successors in title retained only a claim to payment of a quit-rent (*De Blecourt*, p. 209 *et seq.*; *Heusler*, Vol. 2, p. 169 *et seq.*).

With the reception of Roman law the Romanists sought to regulate short leases by the rules of *locatio-conductio* and to apply the principles of *emphyteusis* to "leases" for lengthy terms. As can be gathered from the Placaeten, a clash occurred in which the local courts favoured the tenants whereas the superior, romanistically orientated courts were inclined to protect the proprietors (*De Blecourt*, p. 224). In the process of this *rolverwisseling* tenants who had had possession and had worked and improved lands for a few years claimed a prior right of relocation quite apart from agreement (*cf.* Sande, *Decis.* 3.6.2), a notion which died hard.

To obviate the disorders which arose out of this conflict the Legislature intervened. Oral leases of rural tenements were limited to four years; rights to compensation for improvements and standing crops were defined and declared to be no justification for holding over; claims to "na-huur" unless stipulated in writing were declared to be invalid. Seeing that every occupier of land was the landlord's potential antagonist and a possible source of trouble and since the landlord had only himself to blame if he put a recalcitrant peasant in possession of his land, but not if that peasant, without consulting the landlord, put a stranger in possession thereof, the Legislature forbade such transfers of possession, whether during the term or after the expiry of the original permissive tenure. That is the only reasonable meaning one can attribute to the words "noch hangende ende geduyrende de huyre, noch oock naer de expiratie van dien". What is forbidden is the making over of "de huyre" in Art. 9. As we have seen the expression "huur" embraces forms of tenure other than *locatio-conductio* and the prohibition was directed to *bruikers* as well as to *pachters*. It follows that what was forbidden was the making over to another, without the landlord's written consent, of any portion of the tenant's own rights *utendi fruendi* which purports to give the person to whom it is made over a form of tenancy or occupation. The anomalies which have been alleged to arise in connection with the forfeiture clause do not exist. Whether the tenant purports to "make over" during the currency of the lease or after its termination, his transactions is a nullity and he incurs a penalty equal to the rental agreed upon between himself and the sub-lessee. If the transaction takes place during the currency of the original lease he forfeits the remaining period of the lease as well as all claim to compensation for improvements; if it takes place after the termination of the original lease, he forfeits only his claims to compensation and the penalty, for he has no lease to forfeit. That is why the Legislature said "indien sy eenige soude mogen hebben". No na-huur could have been forfeit as the statutes had declared against its existence.

That is the interpretation which *van der Keesel* put upon Art. 9. After pointing out (*Dictata ad Grot.* 3.19.10) that the law in several *rechtskringen* was different, he makes observations which may be rendered as follows:

> "After the times of *Grotius* this rule permitting rural tenements to be sub-let was altered in Holland by the Placaet of 1658, which was enacted by the Estates of Holland to curb the presumptuousness of lessees. It prohibited the transfer by lessees to others by any title whatsoever, either during the currency of a lease or after its termination, of such a lease or the improvements made upon leased land without the landlord's consent in writing, on pain of nullity, forfeiture of the unexpired portion of the lease and of any rights to compensation for improvements and on pain of a fine equal to the rentals stipulated in the prohibited contract."

The question then arises whether the contract between respondent and Fourie falls within the prohibition. *Colonia partiaria* is an elastic concept. At the one extreme it may include a contract with a man who is no more than a labourer, while at the other extreme a sharecropper may be a lessee in all respects save that in lieu of paying a rental sounding in money he renders to the landlord a quota of his crops (Dernburg-Sokolowski, *Röm. Recht* (8th Ed., sec. 368, note 4); Huber, *loc. cit.*). In the present case it was common cause that the contract between respondent and Fourie was closer to the latter of the two extremes I have indicated. Fourie could plough when and as he liked and sow what he pleased without being subject to respondent's orders. It is true that while the fields were lying fallow respondent had grazing rights thereon, but when crops were standing Fourie was in occupation of the lands. For these reasons it appears to me that the partiarian agreement fell within the prohibition and that Wille, *Landlord and Tenant* (4th Ed., p. 113) was correct in maintaining

> "that the whole object of the Placaat is to prevent occupation of the leased property by persons unauthorised by the landlord. It is immaterial what form of contract the tenant makes with the third person, whether it be a cession, or a sub-lease or a contract of some other description."

The further question then arises whether Art. 9 has the force of law in South Africa. As early as 1839 it was held in *Herbert* v. *Anderson* (2 Menz. 166) that the Placaeten of 1515 and 1580, being merely fiscal or revenue ordinances of Holland, had never become or been made law in the Cape Colony. In *de Vries* v. *Alexander* (1880 Foord, 43, 47) DE VILLIERS, C.J., explained the previous decision by saying:

> "The Court could only have intended to confine their decision to those portions of the Edicts which are of a fiscal or of a purely local nature. So far as they have been incorporated in the general law of Holland and were not inapplicable here, they were equally incorporated in the law of the Colony. Take, for instance, the Edict of 1580. Some of its provisions relating to marriage and to intestate succession formed part of the law of this Colony."

Save perhaps on the principle *stare decisis*, with which I deal presently, that decision is not binding on this Court. With respect, the *dictum* which I have quoted contains a number of errors. A certain confusion seems to have arisen at the Cape owing to the habit of referring to the Kingdom of the Netherlands as "Holland" and identifying the laws of the province of that name with the laws of the Netherlands. If one considers the constitution of the Netherlands at the time of the settlement of the Cape and during all relevant times thereafter, it must be obvious that enact-

ments of the Estates of the province of Holland could have had no application *proprio vigore* to other provinces of the Netherlands or to the Dutch possessions beyond the seas. It was always the conscious policy of the East India Company to avoid all suggestion that any particular province of the Netherlands or its laws enjoyed a kind of hegemony in the overseas possessions (Fruin, "*Den Haag en Batavia*", Verslagen en Mededeelingen, Vereenig. U.B. v./h. O.V.R., 1923, p. 549). To use the Political Ordinance of 1580 as an illustration was unfortunate. In the *Ordere van Regieringe in Policie als Justicie in de plaetsen verovert ende te veroveren in West Indiën* of the 13th October, 1629 (G.P.B. 2 col. 1245, Art. 59) the Estates General of the United Netherlands provided that "in matrimonial matters, in regard to legal relations between husband and wife, testaments and intestate succession, the Ordinance of the Estates of Holland of 1580 shall apply as well as the customs of South Holland and Zeeland", they being less obscure. Before this on the 4th of March, 1621, the "Heeren Zeventien", who as is well known had legislative powers conferred by the Generality, had taken a resolution applying the Political Ordinance of 1580 as well as other statutes relating to intestate succession to Batavia and consequently to the Cape. (Fruin, *Op. et Loc. cit.*; Pestel, *Comment. de Republica Batava, Pars Pr. cap.* 13). From the appendices to the late Mr. Scheeper's unfinished thesis on "Intestate Succession" it is clear that the Political Ordinance of 1580, in so far as it related to these subject matters, was repeatedly applied to the Cape by competent authority. To remove all possible doubt the Estates General again applied it with modification by the *Octrooi* of 10 Jan., 1661 (G.P.B. 2 col. 2633). Once the federal legislature had applied a provincial statute in the *Ordere van Regieringe* to certain Dutch possessions, there was according to the Dutch canon of construction no obstacle to its application also to other colonies. *Voet* describes this process of extensive interpretation by analogy (*Comment.* 1.3.20) as an extension

> "on general rational grounds or because of provisions which can with assurance be deemed to have been intended by the Legislature, so as to embrace all situations, persons and things in regard to which similar considerations as those contemplated in the statute are found to arise."

On the last ground alone the Dutch commentators were satisfied that the *Ordere van Regieringe* applied also to the East Indies. (Van Zurck, *Cod. Batav.* s.v. "Houwelyck", sec. 39; Arntzen *Inst.* 2.3.72). In my view, therefore, there is much to be said for Mr. *de Villiers'* contention that the Placaet of 1658 does not apply to South Africa *proprio vigore*.

That does not dispose of the matter, however. In *De Vries'* case (*supra*) DE VILLIERS, C.J., based the application of Art. 9 to the Cape on two considerations, its operation *proprio vigore* and (p. 47) that

> "So far as they (the Placaeten) had been incorporated in the general law of Holland and were not inapplicable here, they were equally incorporated in the law of this colony."

The provisions of the Political Ordinance of 1580 relating to matrimonial causes and succession were applied to the overseas possessions because they were the only Placaeten on the subjects available in print (Fruin, *Op. & Loc. cit.*). In the same way, because Holland was more advanced than the other provinces and had more institutional law books, statutory rules which did not operate *proprio vigore* found ready reception in the body of our law *via* the writings of the jurists of Holland (*cf. Friedlander* v. *Croxford & Rhodes* (1867, 5 Searle 395)).

In *Swarts* v. *Landmark* (1882, 2 Juta 5) the decision in *de Vries'* case was obliquely confirmed. (See also *Green* v. *Griffiths* (4 S.C. 346 at p. 349).) In *Eckhardt* v. *Nolte* (3 C.L.J. 43) the Supreme Court of the Transvaal Republic dissented from this view, holding that the Placaets were not in force in South Africa. In *De Beers Consolidated Mines* v. *London and South African Exploration Company* (1893, 10 S.C. 359) in an *obiter dictum* DE VILLIERS, C.J., referred to *de Vries'* case and considered that "the 10th, 11th, and 12th articles" of the Placaet of 1658 had been incorporated into the common law of Holland and (I take it, West-) Friesland. On appeal to the Privy Council (1895, A.C. 451) Lord MACNAGHTEN, who delivered the advice of the Judicial Committee, observed:

> "Their Lordships, however, see no reason to think that the conclusions at which the Supreme Court arrived are in any respect erroneous. In their Lordships' opinion, it is not necessary to say more on this part of the case, because it appears to them, as it appeared to the Supreme Court, that provisions in the lease, which were not forbidden by law, authorised the respondents to remove the buildings as they did."

In effect therefore the Privy Council decided no more than that lessees who were at liberty, according to the terms of their lease, "during their tenancy to remove all such improvements (i.e., made by themselves) as shall be capable of removal without injury to the land itself", may do so with impunity.

In *Rubin* v. *Botha* (1911, A.D. 568 at pp. 574, 575) Lord DE VILLIERS, observed:

> "Lessees, as has often been pointed out in the Cape cases, especially in *De Beers Mines* v. *London and South African Exploration Company* (10 Juta, 359), stand on a different footing from other occupiers as their rights have been defined by special legislation."

In this judgment MAASDORP, J.P., concurred and INNES, J.A., remarked:

> "but the claims of a tenant have been much simplified by the application, at the instance of the Cape Supreme Court (with the subsequent approval of the Privy Council), of many of the provisions of the Placaat of 1658 to urban as well as to rural leases."

As we have seen that "approval", if it can be so termed, was rather equivocal.

In *van Wezel* v. *van Wezel's Trustee* (1924, A.D. 409) this Court held that

> "The placaat of 1658, sec. 12, altered the civil law in regard to 'Pachters ende Bruyckers van Landen' and allowed these to remove, during the currency of the lease, all structures erected by them on the leased lands."

It will be observed that the penal provisions of the Placaeten of

Holland to which I have referred have not been applied in South Africa in any decided case; indeed many provisions of the Placaet of 1658 and the measures which it confirmed have been ignored. The rule has not " been incorporated into the law of the Colony " that oral leases of rural land are valid only for four years; that no A lease is valid unless attested in a public instrument or in a document signed by the landlord; that a *quondam* lessee, his household and servants are provisionally and presumptively liable if the efforts of a new lessee on the lands are sabotaged; that if the landlord himself resumes occupation and is unable, owing to the former B lessee's activities or propaganda, to engage agricultural labourers, he may invoke the assistance of the executive authorities who in turn may engage competent workmen at the expense of the late lessee (Placaet of 1658 *passim*; Fockema Andreae's *Commentaries on Grot.* 3.19.10); no lessee who sub-lets has ever been fined an C amount equal to the rentals stipulated by him from the sub-lessee. Only two rules derived from the Placaeten have been received: (1) that it is unlawful to sub-let rural land without the landlord's consent and that consequently the sub-lessee cannot invoke his contract as against the landlord and (2) one, not now relevant, relating to D improvements on leased land.

Nothing will be gained by surveying the writings of the Roman-Dutch authors on the point. Most of those who wrote for Holland are referred to in Wille's *Landlord and Tenant* (Chap. VII). Those who were Romanists adhered to the Roman principle and ignored E the statutory provisions, which was rational if they wrote for the Netherlands as a whole, for in the greater part of the Federation subletting was lawful. Decisions of the Court of Holland and the Hoge Raad are recorded in which express stipulations of forfeiture in case of subletting were upheld. (Regtsgel. *Observat. op Grot.* 2 F *Obs.* 80; Lybrecht, *Reden. Vertoog.* (2.13.7); *Decis. cit. Voet* (9.2.5).) Even in Holland the penal provisions, including automatic forfeiture, seem to have fallen into desuetude.

In as much as in our case law there has been nothing more than a suggestion that the Placaet of 1658 was received in this country G *in complexu* but the penal provision involving forfeiture *ex ipsa lege* has never been applied, it seems to me that the principle should govern: *quod vero contra rationem iuris receptum est, non est producendum ad consequentias.* (*D.* 1.3.14; *cf. C.* 28 *De Regulis Juris in Sexto* (5.12).) Such a course could not sin against the canon *stare decisis.* (See *Union Government* v. *Rosenberg* (*Pty.*), H *Ltd.* (1946, A.D. 120); *Bourne* v. *Keane* (1919, A.C. 815).) This forfeiture *ex lege* has not been received in our law, is capable, if applied, of working harshly and unjustly—especially as no contracting party is likely to know of it—and to my mind should not be received now merely because of a suggestion thrown out seventy years ago and never since acted upon. Another consideration is the following: the Placaet of 1658 was enacted to repress peasant riots in Holland and, as far as its operation *proprio vigore* is concerned,

the remark made by INNES, C.J., in connection with the Placaet of the 7th May, 1754, in *Rex* v. *Harrison and Dryburgh* (1922, A.D. 320 at p. 331) is fully applicable to the penal provisions of this measure:

> " I am of opinion that the Placaat of the 7th May, 1754, was merely a local measure passed to meet the special conditions which prevailed at the A time in the Province of Holland, and that it never became operative at the Cape."

In my opinion the appeal cannot succeed on this ground and must be decided according to the common law.

The question then arises whether the partiarian agreement with Fourie was a breach of clause 9 of the lease and, if so, whether or B not that clause or the breach of it was so vital or material as to entitle appellant to cancel. The fact that the partiarian agreement is a " lease " as contemplated in the 9th article of the Placaet does not mean that it was a lease within the contemplation of the parties in their written agreement. The agreement with C Fourie entitled him to plough some 150 acres on the farms and he commenced such ploughing and sowing. Respondent's allegation that the parties subsequently resiled from the partiarian agreement by mutual consent seems to me irrelevant. But the term of the contract excluded the right to " *herverhuur* ", which D expression to my mind denotes a repetition as between the respondent and a third person of a contract of the kind entered into between the parties—in other words a normal sub-letting. In my opinion, therefore, the arrangement made with Fourie does not constitute a breach of clause 9 of the lease. This view renders E it unnecessary to consider whether, had it been a breach, it would have been so material or vital as to justify cancellation.

I turn now to the alleged breach of clause 6. In that clause the lessee undertakes to lay out and work the fields in such a manner (die lande so te maak) as to avoid erosion. In my opinion a breach F of this term can be established only by proof of erosion which has taken place as a result of respondent's or Fourie's agricultural operations; in other words there must be a causal connection between the agricultural operations and the ensuing erosion. The tenant has not in that undertaking assumed an obligation to G counteract or remedy the results of erosion already in existence or which, though still in progression, have no causal connection with his agricultural operations.

Respondent alleges that in ploughing he avoided places where erosion had previously taken place and let some strips lie fallow between his fields and the dongas which had previously been scoured H out. Appellant's principal witness on this issue was Van der Horst, an expert in soil conservation methods. He examined the farms in August, 1947, and in his evidence thoroughly condemned respondent's farming methods in the light of his science. But he preaches canons of perfection and advocates crop rotation and the construction of contour banks in the ploughed lands; it may be expedient if farmers would put his advice into practice, but respondent has

assumed no obligation to do so. The witness saw considerable signs of active erosion on the farms, but the impression I gain from his evidence is that the phenomenon was in process of development, as a volcano may be active, yet be dormant for certain periods. He admitted that the cause of the damage which he saw " may go back four or five years or more." There is evidence that during the period of respondent's undisputed tenancy the seasons were on the dry side. Other evidence on the point was equally inconclusive. In the result the learned Judge found that " it is doubtful whether the defendant has failed in any way in his obligations in regard to preventing erosion on the farm." That I think was a true assessment of the evidence placed before him. Absolution on this claim was therefore the correct order in the circumstances. In his judgment the learned Judge seems to suggest that, if respondent failed in his duty in this regard he did not do so " deliberately in such a way as would justify a conclusion that he repudiated the lease." This *dictum* elicited the criticism that it applied a purely subjective test. It is unnecessary to enlarge on this matter, however, as the remark alluded to a hypothetical situation and was entirely *obiter*.

I come now to the question whether the respondent has so seriously neglected the property leased as to justify cancellation. As I read clause 4 of the agreement it may be rendered as follows: " The lessee undertakes to maintain all improvements on the farm in good condition in order that upon the termination of this lease he may deliver them to the lessor in the same condition as he received them, reasonable allowance being made for wear and tear." As the learned trial Judge observed, on this issue the appellant's case was not an easy one " because he never handed over the farms properly to the defendant ". After the commencement of the lease the homestead and its appurtenances were occupied by his own tenant, one Pienaar, who left some time in August, 1947, without notifying respondent and left the house unoccupied. On the balance of probabilities emerging from the evidence it would appear that a considerable amount of damage complained of was committed before the homestead was available for occupation by the respondent or somebody put in possession by him. It is probable that fences were removed by persons who prior to the lease in question were appellant's tenants. The evidence is inconclusive.

In regard to the homestead itself and the outbuildings, however, the defendant admitted that a certain amount of damage was caused which is attributable to his negligence. Window panes were broken, and the doors of some outbuildings were removed from their hinges. Before he can claim cancellation, it seems to me, appellant has to establish that the misuse is so serious in degree as to justify the invocation of that remedy.

The test to be applied has been propounded in the authorities and the cases by the use of different expressions. I do not propose to enumerate them as to my mind they all convey the same notion.

The material source of our law relating to letting and hiring is substantially Roman. The contract was one governed by good faith and in an action brought upon it the *iudex* decided not upon the strict law, but according to the demands of good faith; so much so that where a formal stipulation was engrafted upon a consensual lease the *stipulatio* was adjudged, not according to the traditional method of the *ius strictum*, but subject to conditions implied by good faith. (*D.* 19.2.54.1.) The *iudex* awarded to plaintiff only what was his due in good faith " *quidquid reus dare facere oportet ex fide bona*." The tolerant treatment of this contract has been received in our law and in the absence of a *lex commissoria* neither party is bound to suffer cancellation merely because he has been to some extent unpunctual or remiss in his performance. It is trite law that non-payment of rent is not *per se* good cause for cancellation. The rule stated by most of our authorities, namely that a landlord cannot in the absence of a forfeiture clause in the lease sue for ejectment unless his tenant has been in arrear with the payment of rent for at least two years seems to me arbitrary and unjust and it is based on *communis error;* the passages from the *Corpus Juris* upon which our authorities rely do not support the proposition. In *D.* 19.2.54.1. *Paul* says that a lessee who had stipulated for a conventional penalty in the case of ejectment and is in arrear with his rent for two years may be met with the *exceptio doli* if upon being ejected he sues on the stipulation; for the stipulation contains the implied condition "provided I duly pay my rent". *D.* 19.2.56. merely provides that where the lessees of flats and barns have disappeared and failed to pay rent for two years, the landlord may enforce the landlord's lien on *invecta et illata* in their absence. There is no mention of ejectment or cancellation. *Novel* 120 *C.* 8 provides that both leases and *emphyteuta* may be cancelled if the tenant is in arrear with rentals or canons for more than two years, but that was a privilege accorded to the Church and *piae causae*, and, as Groenewegen testifies (*De Legib. Abrogat. ad Constit. Cit.*) it had fallen into desuetude after the Reformation. Nowhere in the Pandects is it stated, however, that a lessor may not cancel a lease on that ground within two years where the equity of the case demands it. It is unnecessary for present purposes to examine the degree of tolerance but, in any event, it is clear that in this regard equitable elasticity prevailed and prevails. Similarly the landlord's obligations were not judged too rigorously. At Roman law if a lessor lets pasture land unknowing that it contains noxious weeds, he is not liable for damages resulting to the lessee's animals, but is obliged only to concede remission of rent (D. 19.2.19.1). In *Comment.* 19.2.18 Voet expressly invokes the equitable principle which governs the contract of letting and hiring and says:

> " Just as the lessee cannot prematurely terminate the lease nor claim remission of rent on the ground that he has been somewhat inconvenienced in the enjoyment of part of the leased premises, or on the ground that he is slightly incommoded because repair of part of the premises becomes necessary, but

only if he is deprived of the greater extent of his use and enjoyment (D. 19.2.27), so too it is equitable that he should be ejected only on the ground of considerable and ill-natured misuse of the property let."

Continuing *Voet* remarks that since the law does not demarcate the dividing line between venial misuse and such misuse as would justify cancellation, the matter is left to judicial discretion to decide whether such misuse should be curbed by ejectment, by damages or whether it should be overlooked entirely on the ground of its insignificance. (*Visser* v. *London and Jagersfontein Diamond Mining, Coy.* (1 Gregorowski, 8, 13); *Bower* v. *Dow & Co.* (2 S.A.R. 175); *Henning* v. *le Roux* (1921, C.P.D. 587, at p. 592).)

In deciding what order would be equitable in the circumstances a Court would obviously give due weight to considerations, *inter alia,* such as how serious is the damage done; whether it is progressive; whether the lessor is threatened with irreparable loss.

The house is built of freestone, plastered on the inside with ordinary " dagga ". The floors are made of stamped earth. The windows are old and have been treated in the past to hardly any paint at all. It seems unlikely that the building could appreciably be damaged by some rain coming in at the windows, or suffer such deterioration that immediately prior to the termination of the lease it cannot readily be put in a condition in which respondent can hand it over to appellant in the state of repair which the term of the lease requires. The rondawel from which one section of a barn door is missing has a concrete floor, which one may assume is not lightly destructible. The outhouse hardly merits that name; from the photos put in and the evidence it appears to be—and to have been at the inception of the lease—nothing more than a rubble shack. Respondent maintains that it is his intention to effect repairs as soon as he can put a tenant into the house, as otherwise damage will be recurrent, but that he was prevented from doing so by appellant bringing this action, since no tenant will occupy the premises on a precarious tenure. The impression I gain from the record is that the damage to the property, in so far as respondent is liable to repair, can easily be remedied at small cost. The learned trial Judge absolved respondent from the instance also on this claim and in my opinion appellant has not shown that order to be wrong. From the history of the pleadings supported by the evidence it seems that the parties had a difference, whereupon appellant seeking to take advantage of respondent's partiarian agreement with Fourie, sought to terminate the lease and thereafter, as an afterthought, attempted to buttress his main claim by means of these flimsy side-issues.

There remains only the question whether in any event appellant was entitled to the damages admitted. DE WET, J., dismissed this claim on the ground that it was premature. It seems to me that the fate of this claim is dependent upon that of the claim for cancellation. If cancellation is the proper order that would terminate the lease and the appellant would be entitled to damages in lieu of the

repairs which respondent should have effected. But if the lease continues respondent will have to repair in order to put a manager or other occupier in occupation; in any event, at the expiry of the lease he would have to return the premises in the same condition as that in which he received it after Pienaar vacated making due allowance for fair wear and tear. If damages were awarded now respondent would be compelled either to restore doubly or to restore in anticipation. On this issue, too, I am of opinion that we cannot disturb the judgment of the Court *a quo*. For these reasons the appeal is dismissed with costs.

Appellant's Attorneys: *Conradie & White*, Vryheid; *Mason, Hodson & Howes*, Pietermaritzburg; *A. W. McHardy*, Bloemfontein. Respondent's Attorneys: *J. Fraser & Co.*, Pietermaritzburg; *Naudé & Naudé*, Bloemfontein.

HERHOLDT v. MUNICIPALITY OF DE AAR AND OTHERS.

(APPELLATE DIVISION.)

1950. *June* 13, 19. GREENBERG, J.A., SCHREINER, J.A., VAN DEN HEEVER, J.A., HOEXTER, J.A., and RAMSBOTTOM, A.J.A.

Municipality.—Loans to.—Money advanced to it for works differing from those to which voters had consented.—Whether municipality liable to repay.—Ord. 10 *of* 1912 (*C.*), *secs.* 179, 180.

In terms of sections 179 and 180 of Ordinance 10 of 1912 (Cape) a municipality is liable to repay a loan advanced to it for works which, though destined for the same purpose, are different (even if " fundamentally ") from those in regard to which the voters have consented to the borrowing of the money.

The decision in the Cape Provincial Division in *Herholdt* v. *De Aar Municipality and Others*, confirmed.

Appeal from a decision of the Cape Provincial Division [SEARLE and OGILVIE THOMPSON, JJ.]. The facts appear from the judgment of GREENBERG, J.A.

A. H. Broeksma, K.C., for the appellant: There is a difference between " objects " and " purposes "; see Stroud's *Judicial Dictionary* (2nd ed., p. 1,626). " Objects " in sec. 180 (2) of Ord. 10 of 1912 (C.) is generic whereas " purposes " in sec. 179 (1) includes and implies the particulars and details of an undertaking and the costs thereof for which a loan is to be raised in terms of sec. 180 (2). The Administrator's powers for which provision is made by sec. 179 (3) are merely general and do not imply authority to effect fundamental modifications of such works or their operation. The