1913. *May* 19, 20; *June* 12. WARD, J.

Landlord and tenant.—Agricultural lease.—Sub-letting without lessor's consent.—Forfeiture.—Cancellation of lease.

The lessee of a farm, while remaining in possession, sub-let to a third party, without the lessor's consent, the right to live on the farm and to graze cattle thereon :—*Held,* that the lessee had not thereby forfeited his lease, and that consequently the lessor was not entitled to claim cancellation of the lease.

Action in which the plaintiff claimed an order for rectification of certain document, dated the 12th February, 1903, signed by him, purporting to contain the terms and conditions upon which he let his farm "Charlottesdal" to defendant, an order declaring the lease at an end, and calling upon defendant to quit. Alternatively, he claimed an order declaring the lease cancelled by reason of the defendant's sub-letting the farm, without the consent of plaintiff, and non-payment of rent. There was a further claim for £500 damages sustained by reason of defendant's refusal to quit.

The document was as follows:—

Griqualand West, C.C.,
Farm Rietputs,
12de/2/'03.

Ik, de ondergeteekende, alleeniger eigenaar van de plaats Charlottesdal in deze, de Kimberley en Boshofse Distrikten, erken hiermeden, deze geheele plaats, zonder om eenige rechten van enige soorten voor mij uit te houden, verhuurt te hebben aan de Heer A. Leo, tegen betaling van £15 voor iedere een jaar, voor de eerste vier jaren, en tegen betaling van £30 per jaar na afloop van 4 jaren zoo lang als Mnr. A. Leo deze plaats nog langer wil hebben.

Ik erken ook voor die eersten vier jaren vooruitbetaling ontvangen te hebben; en het is veronderstelt dat Mnr. Leo naderaan de huur van iedere een volgende jaar ook altijd moet vooruitbetalen na afloopen van de eerste vier jaren. Als Mnr. A. Leo de plaats wil niet meer hebben, dan moet hij drie maanden kennis aan mij geven, en als hij verzuim om kennis te geven, dan zal hij verplicht wees om nog voor een volgende jaar huur te betalen.

(Get.) D. J. VORSTER.

Als Getuigen:
(Get.) H. Vorster,
,, M. Vorster.

The facts appear from the judgment.

J. van Hoytema (with him *F. E. T. Krause, K.C.*), for the plaintiff: The defendant had no right to sub-let, and therefore the plaintiff is entitled to cancel the lease itself. The lease was of a rural tenement, and it has been laid down in the Cape Province in *de Vries* v. *Alexander* (*Foord*, 43), that a tenant of a rural tenement may not sub-let. The law is the same in the Transvaal; see *Cullinan* v. *Pistorius* (1903, O.R.C. 36); Wille, *Landlord and Tenant*, p. 160; and Wessels, *History of the Roman-Dutch law*, p. 628.

The defendant committed a breach of a material term of the lease, and the lease must therefore be forfeited. In *Visser* v. *London and Jagersfontein D.M. Co.* (1 C.L.J. 341), it was held that it was in the discretion of the Court to forfeit a lease for breach of an implied term against sub-letting, but the Court has no discretion in the case of a lease of an agricultural farm. See Pothier, *Louage*, sec. 284 (quoted by Wille, p. 163). Breach of a material condition in a contract involves forfeiture of the contract.

[WARD, J.: The case of *Mersey Steel and Iron Co.* v. *Naylor* (9 A.C. 434), shows there must be repudiation of the contract.]

Secondly, the contract of "caretakership" granted by the defendant is clearly a sub-lease.

Article 9 of the Placaat of September 26th, 1658 (Wille, *Landlord and Tenant*, p. 137), makes the original lease null.

J. Stratford, K.C. (with him *H. H. Morris*), for the defendant: There is no authority in South Africa for the proposition that breach of an implied condition against sub-letting entails a forfeiture of the lease. Even where there is a breach of an express condition, the question of the materiality of the breach arises. Voet, 19, 2, 18, relied on in *Visser's* case, is to the effect that a lease will only be forfeited on account of grave misuse by the tenant. The plaintiff's remedy is against the sub-tenant for ejectment. The "caretakership" contract is not a lease or sub-lease. Under article 9 of the Placaat of 1658 the penalty of "nullity" refers to the sub-lease only.

J. van Hoytema, in reply: A breach of an express condition in a lease against sub-letting entails forfeiture of the lease even though no sanction is attached in the lease to such breach; *Macdonald, Q.Q.* v. *Hume* (1875), Buch. 8), and *Rissik Street Syndicate* v. *Smith, Forrest & Co.* (3 S.A.R. 81). It can make no difference to the materiality of the breach whether the sub-letting is prohibited by agreement of the parties or by implication

of law. *Visser's* case is not in point, because Voet 19, 2, 18, relating to misuser and not to sub-letting, was followed. The contract of "caretakership" is a lease; see the almost identical case of *Watson's Curator* v. *Petersen's Estate* (23 S.C. 175).

Cur. adv. vult.

Postea (June 12):—

WARD, J.: In this case the plaintiff, who is a farmer, and is living at Wonderfontein, in the district of Warrenton, Cape Colony, sues the defendant for the rectification of a document of February, 12, 1903, signed by him, and purporting to contain the terms upon which the plaintiff let his farm, Charlottesdal, to the defendant, and an order declaring the lease at an end. Alternatively, an order declaring the lease cancelled by reason of the defendant's subletting the farm. On February, 12, 1903, the plaintiff agreed to let his farm Charlottesdal, in the district of Warrenton, to the defendant. The terms of that agreement are in dispute. The defendant wrote out the document complained of, which is in the following terms: "I, the undersigned, sole proprietor of the farm Charlottesdal, in the Kimberley and Boshof districts, acknowledge hereby to have let this whole farm, without reserving to myself any rights of any kind, to Mr. A. Leo against payment of £15 (fifteen pounds sterling), for each year for the first four years, and against payment of £30 (thirty pounds sterling), per year after the expiration of four years as long as Mr. Leo still desires to have this farm. I acknowledge also to have received payment in advance for the first four years; and it is supposed that Mr. Leo must afterwards pay the rent of each succeeding year in advance after the expiration of the first four years. If Mr. Leo does not want the farm any longer, then he must give me three months' notice, and, if he neglects to give me notice, he shall be compelled to pay rent for the following year as well.—Signed, D. J. Vorster. As witnesses: H. Vorster, M. Vorster." This document was signed by the plaintiff, and witnessed by his brother, H. Vorster, and by H. Vorster's wife. The defendant entered upon the farm Charlottesdal, and effected some improvements. In Nobember, 1907, the plaintiff gave him notice that his lease terminated in May, 1908. To this letter the defendant did not reply, and at the end of 1907, or the beginning of 1908, H. Vorster went to see the defendant at his brother's residence at Smitskraal, Orange Free State, and obtained a copy of the

agreement. The plaintiff then started an action similar to the present one in the High Court, in Kimberley, in May, 1908. An objection was taken to the jurisdiction of the court, which was upheld. During 1908, and portion of 1909 an attempt was made to settle the differences between the parties, the defendant being prepared to go out upon receipt of his expenditure on the farm as found by arbitration, and the plaintiff being willing to pay him compensation only for actual improvements, as found by arbitration. These attempts failed, and the plaintiff started the present action on November 12, 1912. The claim of the plaintiff is that the defendant fraudulently induced him to sign a document of lease containing terms other than those agreed by him by reading out the document inaccurately. The plaintiff is an intelligent man, who can read and write; at the time of the contract he was an active man of 62 years of age, and in possession of all his faculties, as indeed he is to-day. He is also a man of business. His brother, H. Vorster, who was present when negotiations were carried on, is a considerably younger man, and also an educated man, *i.e.*, he can read and write, and is also a business man. It is obvious from these facts that a strong case must be made out before the Court can upset a document signed by the plaintiff over 10 years ago, and one which was only disputed five years after it was signed. I do not say that the Court cannot decide the case on the oath of the parties alone if it is clearly satisfied that the plaintiff is speaking the truth, and the defendant is not, but where intelligent and educated men sign documents the Court must be perfectly satisfied with the evidence before it will find that a case of fraud, such as is alleged on the present occasion, is made out. This is not a case of a man taking advantage of his position as adviser to the plaintiff, or of the fact that the plaintiff is an ignorant and illiterate man. Nor does the plaintiff strike me as a confiding or simple man. [His Lordship then went into the evidence as to what took place between the parties on the signing of the document and subsequently, and proceeded.] On the whole, I have come to the conclusion that the plaintiff has not discharged the onus which was on him of proving that a false representation was made to him as to the contents of the document when he signed it.

The next question arises under the law. It is admitted that on June 1, 1907, the defendant entered into a contract with James and Walter Holt by which the Holts were to look after the fences, buildings, kraals, and other erections on the farm for a sum of £2

a month, and that they had the right to graze any of their own stock (not hired cattle) for a yearly rental of £84 a year. The agreement was for a term of 15 years from June 1, 1907, subject to the condition that the defendant could cancel it after three years. The question now arises: was the defendant entitled to sub-let; if not, does sub-letting involve forfeiture of the lease? And, if so, is this agreement such a sub-lease as involves forfeiture? It was admitted by the parties in argument that I was in this case bound by the law of the Cape Colony; that law is laid down in *Friedlander* v. *Croxford and Rhodes* (5, S. 395), and *de Vries* v. *Alexander* (Foord, 43). In *Friedlander* v. *Croxford and Rhodes*, DENYSSEN, J., says in his judgment: "No right of sub-lease is authorised unless with the previous consent of the landlord in writing." Again, on page 397 he says: "The case now before us is the case of an alleged sub-lease of a *praedium rusticum*. To render it valid a previous consent in writing of the landlord should have been obtained; failing which, the sub-lease is a nullity as regards the landlord, and the rights claimed by the plaintiff as a sub-tenant cannot be recognised."

In the course of his judgment he quotes a passage from van der Keessel's *Dictata* on Grotius 3, 19, 10, as followed:—*Regula tamen haec de sublocatione permissa in praediis rusticis, conductis in Hollandia, post Grotii aetatem est lege, Sept.* 26, *anno* 1658, *renovata anno* 1696, *Art.* 9. *Quae ordines Hollandiae constituerunt, ut non liceret colonis sive durante sive etiam finita locatione, vel locationem suam vel etiam meliorationes, quas in praedio conducto fecerunt, in alias quocunque titulo transferret sine scripto domini consensu sub poena nullitatis, atque amittendae locationis, adhuc durantis, atque duris repetendi impensas meliorationis.*"

This passage makes it clear that the lessee who sublet was under the penalty of losing his existing lease. Without entering upon the old controversy as to the meaning of sec. 9 of the Placaat, it may be pointed out that in no copy of this section that I have seen do the words translated or referred to by *amittendae locationis adhuc durantis* occur.

The article says: "On pain of nullity, and such lessee shall also forfeit in favour of the owner any further lease of the said lands, if he is entitled to any other, and further such action for compensation as he may in any way be entitled to, and that in addition to this such contracting party shall forfeit a penalty

amounting to the sum for which they have contracted together." On these words I should have thought that the law declared the agreement between the lessee and sub-lessee a nullity and forfeited merely the right of the lessee to afterlease and improvements, and the further penalty. And that therefore the forfeiture of the lease was excluded.

The next case decided on the subject is that of *de Vries* v. *Alexander* (Foord, p. 43), but this merely decided that the sub-letting was forbidden, and said nothing as to the penalty or forfeiture. That was a case in which the plaintiff sought to eject the defendant who was the sub-lessee—clearly, if his agreement with the lessee is a nullity, he can have no answer to the owner of the property who claims to eject him.

The decision in *Friedlander* v. *Croxford and Rhodes* is to the same effect—it laid down that the sub-lessee could not set up his sub-lease against the landlord.

The CHIEF JUSTICE of the Cape Colony, in the case of *de Vries* v. *Alexander*, based his decision upon his own interpretation of the ninth section of the Placaat, and on the fact that that section had been so construed by many eminent writers to whom great weight is always attached by the Court. Among these are Voet (19, 2, 5), the jurists who edited the *Rechtsgeleerde Observatien* and van der Keessel. Van der Keessel is the only one of these authorities who refers to the penalty for such sub-letting.

In the case of *Visser* v. *London and Jagersfontein Diamond Mining Company* (1 C.L.J. 341), it was held by REITZ, C.J., DE VILLIERS, J., and GREGOROWSKI, J., that a lessee of a *res rustica* had no right to sub-let, and the lessees were interdicted from so doing. It was further held that whether breach of conditions and misuser should involve cancellation of the lease was in the discretion of the Court, and in the circumstances of that case an interdict was granted. There were other claims of misuser in that case—but it is clear the Court did not decree a forfeiture in that case; and therefore held at least that they were not bound so to do. The authority quoted is Voet 19, 2, 18. He says that the rule that lessees who have misused the property may be ejected does not apply to every slight abuse or neglect, but only especially serious and injurious abuse—*de insigniter damnosoque abusu*, and he continues: *Cumque recensiti in jure non inveniantur illi abutendi modi, qui sufficientes habendi forent, id totum arbitrio providi ac circum-*

specti judicis relinquendum videtur, utrum abusus expulsione, an sola in di quod interest damnatione coercendus, aut etiam ob exiguitatem conniventia praetermittendus sit.

And it is contended that it is only on this rule, if at all, that the Court could order a cancellation of the lease. And that the Court should exercise its discretion against a cancellation in this case because at worst there was but a partial sub-letting by which no harm could possibly occur to the plaintiff, who on hearing of the terms upon which the Holts held the property, expressed himself as satisfied with them as tenants.

The proposition therefore is whether I am to accept the law as laid down by the High Court of the Orange Free State so far back as 1884, or am I to follow the *Dictata* quoted above of van der Keessel, or whether, thirdly, the rule laid down in the case cited, and the passage from the *Dictata* cited may not be reconciled.

The passage from the *Dictata* refers to the case of a person who transfers his *locatio*; and if we hold that the Placaat forbade the cession of a lease, and rendered it void, the natural result might well be held to be that the lessee lost his lease on an assignment, because by parting with it to the sub-lessee he has abandoned all right to it, and the sub-lessee has himself no answer to the lessor in the action for ejectment.

There is a difficulty in this view, because, if the cession is void it is difficult to see how the lessee has parted with his rights—but in any case he would have lost any further material interest in them.

If that is so, the writers might readily have adopted the view that where there is an assignment of a lease, the lease is forfeited; but the case where there is only a partial cession is quite different, and in a case like the present, where the lessee remains in possession, but at the same time allows another a right to graze cattle and live on the property, he actually does not purport to cede his lease, or give up any of his rights under the lease. The case does not appear to me to fall within the mischief aimed at by the Placaat, and there is no authority which goes to the extent of saying that the lease is forfeited. In these circumstances, I am not prepared to hold that the lease is forfeited in the present case. It seems to me that the lessor is amply protected by his right to interdict the lessee from sub-letting, and to claim damages, if any, which might arise from such sub-letting. Even if the law were that the Court has a discretion in such a case to grant an order cancelling the lease,

I do not think I should exercise that discretion in the present case to forfeit the lease. Judgment must therefore be one of absolution from the instance with costs.

Plaintiff's Attorney: *M. M. Roux;* Defendant's Attorney: *M. Cohn.*

[Reported by *G. Hartog,* Esq., Advocate.]

WITWATERSRAND TOWNSHIP, ESTATE & FINANCE CORPORATION, LTD. v. RITCH.

1913. *June* 11, 19. WARD, J.

Landlord and tenant.—Lease of stand.—Restrictive covenants as to coloured persons.—Living on stand.—Caretaker.

In terms of a lease the lessee was not to allow coloured persons, other than domestic servants, to live or dwell on the premises leased :—*Held,* that it was not a breach of the lease for the lessee to allow a coloured person, not a domestic servant, who had a home of his own, to sleep on the premises as a caretaker.

This was an action in which the Witwatersrand Township, Estate and Finance Corporation, Ltd., claimed an order against the defendant, cancelling certain deeds of lease in respect of Stands 876 and 879, Fordsburg, dated August 31, 1893, by reason of defendant's breach of their terms and conditions, and an order directing him to vacate the stands and the buildings thereon. The plaintiffs claimed as the successors in title of the Ford and Jeppe Estate Co., Ltd., which in 1893 was the registered owner of that portion of the farm Turffontein 19, now known as Fordsburg. Defendant became the lessee of the stands in question on February 16, 1904.

Clause 9 of the lease provided that the lessee should have "no right to open or allow or cause to be opened, any store or any place for explosives. . . . or allow coloured persons, other than domestic servants, to live or dwell on the stand, or do or allow anything to be done which might grow to be a nuisance, disturbance, damage, annoyance, or grievance to the lessors or their tenants, without plaintiff's consent in writing and endorsed upon the lease."