Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Louis William Short, Frans Johannes Wepener and The Turffontein Proprietary Estates, Limited, v. *The Turffontein Estate, Limited, from the Supreme Court of the Transvaal; delivered the 3rd July* 1905.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
SIR HENRY DE VILLIERS.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

By a notarial instrument dated the 27th December 1893, and made between the Respondent Company of the one part and one Pieter Dirk de Villiers by his attorney of the other part, the Respondent Company leased to de Villiers a certain portion of the Turffontein farm measuring 74 morgen for the term of 99 years from the 1st November 1889 at the rentals therein mentioned, and it was thereby provided (Clause 4) that the said piece of land was leased exclusively for agricultural purposes with the right to de Villiers to erect the necessary buildings for residence, but not to subdivide in order to sell or lease such portion as stands for building purposes, (Clause 8) that in the event of de Villiers neglecting to pay the rent within 30 days after the same should have become due or if the piece of land should have been built

upon, then within three months after the same should have become due, or in the event of the breach of any of the conditions, terms, or provisions, the said lease should be null and void, and the Respondent Company should have the right to resume possession of the said piece of land and to eject de Villiers without the latter being entitled to make any claim to any compensation of whatsoever description, and it was further provided that de Villiers might cede to third parties either partially or in its entirety the said agreement for lease but only for agricultural purposes.

A portion of the lands demised containing 44 morgen became vested by cession in the Appellants Short and Wepener. Applications were made both orally and by letter by the Appellant Short to the Respondent Company for permission to lay out the 44 morgen as a township and dispose of it on the same terms as had been granted in another case, but the Directors of the Respondent Company declined to entertain the proposal. Subsequently the 44 morgen were transferred to the Appellant Company which was incorporated on the 20th April 1903. The Appellants Short and Wepener signed the trust deed of the Appellant Company as subscribers of large numbers of shares and became directors of the Company.

On the 20th of May 1903 the Appellants published advertisements of a sale to take place on the following 27th May of the 44 morgen in 85 one acre lots. Such advertisements were accompanied by a plan in which the land was shown as laid out and sub-divided into such 85 lots with streets intersecting the land and affording a direct access to each lot, and it was admitted at the trial that the streets and blocks were marked out on the land as represented on

the plan. The land was called in the advertisements "Turffontein Gardens" and described as situated within a few minutes' drive from Market Square, Johannesburg, adjoining Turffontein township, and amongst other attractions it was said to have a 'bus service at present and that it would soon have a tramway.

By the Statement of Claim in this action it was alleged that the cession by Short and Wepener to the Appellant Company of the 44 morgen was itself a breach of the terms and conditions of the lease of the 27th December 1893, and it was also alleged that the Appellants had committed a breach by sub-dividing the land in order to sell or lease the same as stands for building purposes. The Respondent Company claimed (1) a declaration that it was entitled to treat the lease of the 27th of December 1893, so far as regards the 44 morgen, as null and void, and (2) delivery of possession, and alternatively (3) an interdict against the use of the land for other than agricultural purposes, or otherwise committing a breach of the terms and conditions of the lease.

The defence was in substance a denial of the alleged breaches. The contention of the Appellants was and is that they did not by the issue of the advertisements threaten or intend to use the land for other than agricultural purposes, and had not sub-divided the land in order to sell or lease the same as stands for building purposes.

The action was tried before the Chief Justice of the Transvaal and Solomon and Smith, JJ. By their Judgment dated the 9th of September 1903 (from which this Appeal is brought), a declaration was made in the terms of the first paragraph of the claim, and the Appellants were ordered to deliver up possession of the 44 morgen

of land to the Respondent Company. The Chief Justice who delivered the Judgment of the Court said :—

"It is clear to me, looking at the advertisements and at the "other facts in the case, that the object of this sub-division "was to lay out a township to be occupied, not by industrious "peasants each cultivating his own patch, but by an ordinary "suburban population such as inhabits the neighbouring "townships, coming into work at Johannesburg by the 'bus "and tram service referred to in the advertisement."

Their Lordships cannot differ from this finding of fact, and they think it immaterial that the Appellants endeavoured to cloak their purpose by the language which they used or the terms they proposed to insert in the leases to be granted to the purchasers. If the real intention of the Appellants was in truth such as described by the Chief Justice, the case is not altered because they chose to say the sub-division was exclusively for agricultural purposes. A point, however, was raised before their Lordships on the meaning of the word "stand," which is not mentioned in the Judgment of the Chief Justice. The Appellants say in their case that the term "stand" is well known to the law and custom of the Transvaal as a plot of land intended for a building site, and imports an area far smaller than one acre. No witness was called to say that a plot of one acre would not be properly described as a "stand," and, in fact, there is no evidence whatever upon the subject. If it is a question of the custom of the Transvaal it would have been more advantageously dealt with in the Colony. The word seems to their Lordships to be used for a plot for erection of a dwelling-house, and it is obvious that the size of the stand might differ whether the houses were intended as residences for miners and persons engaged in similar occupations or suburban residences for a town population.

It was also contended that this is a mere paper scheme which was not carried into execution, and the proper relief (if any) in the circumstances was interdict and not ejectment. If the breach relied on was the intended use of the land for other than agricultural purposes, or some other unfulfilled purpose, the proper and only remedy would be by interdict. But the breach relied on by the Respondent Company is the accomplished fact of the subdivision of the land into plots, with a view to its being offered for sale. The learned Chief Justice has pointed out that the subdivision contemplated by the lease was a subdivision preceding sale and not following it, and the contention that there could be no breach of the fourth clause until the land had not only been cut up, but had been actually transferred to a number of new purchasers, seemed to him, as it does to their Lordships, quite untenable. That being so, their Lordships are not convinced that the Court had any jurisdiction to grant interdict instead of ejectment without the Respondent Company's consent. In fact the point is not referred to in the Judgment.

Their Lordships, therefore, will humbly advise His Majesty that the Appeal should be dismissed, and the Appellants will pay the costs of it.