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" V. This order is in no way to be regarded as debarring or preventing the First and Third Respondents from taking whatever action they may be advised to take and that they may be duly authorised to take in connection with the sale of ' Somnex '."

As to costs no order was made against the editor but the Minister and the Secretary for Health (i.e. the department of health) were ordered to pay the costs of the application.

It follows from the reasons which I have given above that the appeal against Order I is dismissed and the appeal against Orders II and III is allowed and those orders are set aside. Order IV remains as there is no appeal against it. Paragraph V is not an order and it falls away with the setting aside of Orders II and III.

With regard to costs the appeal was really prosecuted on behalf of the Government; there was no separate appearance for the editor and the costs of the appeal were not materially increased by the fact that counsel advanced certain arguments on behalf of the editor. Consequently the respondents in this Court must pay the costs of appeal. As to the costs in the Transvaal Provincial Division the applicants in that Court rightly secured an order against the editor but their claims against the Minister and against the Secretary for Health should have been dismissed. It follows that they were entitled to recover that portion of the costs of their application as was necessarily incurred for the purpose of obtaining the order which they succeeded in obtaining against the editor, but they should pay the costs incurred by the Minister and the Secretary for Health in opposing the application for orders against them. There is a difficulty in making such an order against the editor now, because the Transvaal Provincial Division refused to make an order for costs against him and there is no appeal against that refusal to make an order. I understood, however, from what was said by counsel that the Government is assuming responsibility for the costs of the editor in connection with this case. Consequently it seems that an order which will meet the justice of the case will be one directing that the applicants in the Court *a quo* pay the costs of the Minister and of the Secretary for Health in that Court, but that the Minister and Secretary for Health (that is the Department of Health) pay the costs necessarily incurred in that Court by the applicants in obtaining the order which was made by the

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Transvaal Provincial Division against the editor, and such an order will accordingly be made.

TINDALL, J.A., and GREENBERG, J.A., concurred.

Ordered accordingly.

Appellants' Attorneys: *Government Attorney*, Pretoria; *Marais & de Villiers*, Bloemfontein. Respondent's Attorneys: *MacRobert, de Villiers & Hitge*, Pretoria; *Hardy Philip & Scott Brown*, Johannesburg; *Goodrick & Franklin*, Bloemfontein.

NIENABER, *Appellant* v. STUCKEY, *Respondent*.

1946. *November* 26, *December* 11. GREENBERG, J.A., SCHREINER, J.A., and DAVIS, A.J.A.

Interdict.—Spoliation order.—Necessary proof.—Applicant without right to exclusive possession.—Possession.—Sufficiency of proof.—Delay in applying for relief.—Costs.—Magistrate's Court or Supreme Court scale.

Where the applicant asks for a spoliation order he must make out not only a *prima facie* case but must satisfy the Court on the admitted or undisputed facts, by the same balance of probabilities as is required in every civil suit, of the facts necessary for his success in the application.

In an application for a spoliation order the applicant proved that under a contract he had had the right to plough and cultivate a piece of land though the respondent was entitled to exercise such other rights over the land as would not detract from the applicant's rights; that there was a dispute between the parties as to whether the contract was still in existence; that at all material times the applicant had clearly shown an intention of remaining in possession of the land and that the respondent had deprived him of access to the land by closing a gate. It appeared that after ploughing the land in July the applicant removed his implements from the land and that from that time until September, when he was prevented from having access to the land, neither he nor his servants nor any property belonging to him was on the land. The applicant stated in an affidavit that his planters, seed and fertilisers were ready to be moved on to the land on September 6th, and that this fact had been communicated to the respondent's manager, who closed the gate on September 5th. The application having been refused,

Held, on appeal, that the fact that the applicant had not proved that he had had exclusive possession of the land during the time he was exercising his rights, did not disentitle him to relief.

Held, further, that as there was nothing to show that there was any need for the applicant to be on the land between the ploughing and planting, he had never given up physical possession of the land.

Held, further, that though the applicant had only served his petition for a spoliation order in January of the year following the spoliation he had not thereby lost his remedy.

Held, further, that the order should have been granted and with costs on the Supreme Court scale, inasmuch as, though the rental was only £20 for the year, in view of the legal points involved in the matter, it could not be said that the applicant was not justified in taking proceedings in the Supreme Court.

The case of *Temby* v. *Lippingwell* (1908, O.R.C. 68), not followed.

The decision of the Orange Free State Provincial Division in *Nienaber* v. *Stuckey*, (1946, O.P.D. 233), reversed.

Appeal from a decision of the Orange Free State Provincial Division (DE BEER, J.). The facts appear from the judgment of GREENBERG, J.A.

N. J. Grobler, for appellant: Even on respondent's version, the contract was one of lease; *Du Preez* v. *Steenkamp* (1926, T.P.D. 362 at 366-7); *Crous* v. *Crous* (1937, C.P.D. 251 at 256-7); van den Heever, *The Partiarian Agricultural Lease in South African Law* (pp. 6, 11-19, 30, 43-44); Wille, *Landlord and Tenant in South Africa* (3rd ed., p. 1). Respondent's conduct amounted to an act of spoliation and entitled appellant to a *mandament van spolie*. *Wille* (*supra*, p. 252); *Nino Bonino* v. *de Lange* (1906, T.S. 122); *Voet* (19.2.18); Leyser, *Meditationes ad Pandectas* (Bk. 19, Tit. II, par. iii); for definition of spoliation, see *Nino Bonino* v. *de Lange* (*supra*, at 122 *in fine*); see also *Leyser* (*supra*, Bk. 4, spec. 219). Appellant at the time of the closing of the gate by respondent had *detentio* of the lands in the sense in which that word was used and explained by INNES, C.J., in *Scholtz* v. *Faifer* (1910, T.S. at 246-8); as to the nature of the possession which must be established in spoliation proceedings, see *Scholtz* v. *Faifer* (*supra*, at 246) and *Pretoria Racing Club* v. *van Pietersen* (1907, T.S. 687 at 692). As to the origin and history of the *mandament van spolie*, see Fockema Andreae, *Het Oud-Nederlandsch Burgerlyk Recht* (pp. 200-3); de Blecourt, *Kort Begrip van Het Oud-Vaderlandsch Burgerlyk Recht* (pp. 189-201); in its developed form this remedy was in some respects similar to the " Assize of Novel Disseisin " of English Law, but it was wider; *cf.* Maitland, *Collected Papers—The Beatitude of Seisin* (Vol. 1, pp. 406-56, esp. p. 413), and Holdsworth, *History of English Law* (Vol. 3, at p. 162); *cf.* Grotius, *Introduction to Dutch Jurisprudence* (2.2.2 and 12), and *Digest* (41. II. 3, 6, 8; 43, xvi. 23-26); *Gaius* (4 and 19).

The *onus* to establish that appellant should not have taken proceedings in the Supreme Court instead of the magistrate's court was on respondent, and that *onus* was not discharged by him; further, the matter was one of considerable difficulty; *cf. Smith* v. *Coetzee* (1945, 2 P.H.F. 55); *Ehler (Pty.), Ltd.* v. *Silver* (1946, 2 P.H.A. 66); *Voet* (43.16.3); Wassenaar, *Praktyk Judicieel* (Kap. XIV, Art. 1, p. 218); van der Linden, *Judicieele Praktyk* (Bk. 2, Tit. 22, Art. 1); van den Berg, *Ned. Advysboek* (Deel 3, No. 145, p. 387); Merula, *Manier van Procederen* (4.37.2.8); Bort, *Complainte* (Tit. 1, No. 39, para. 7, p. 378; Tit. 14, para. 1, p. 393); Nassau La Leck, *Register* (p. 807); Huber, *Hedendaagsche Rechtsgeleerdheid* (Bk. 5, Kap. X, p. 731); Van Alphen, *Papegaai* (Part 2, p. 118); Gail, *Observantien* (*Obs.* 75, p. 435); the material time when appellant should have estimated his case was when notice of his petition was given; *White* v. *Saker & Co.* (1938, W.L.D. 173).

C. P. Brink, K.C. (with him *P. J. van Blerk*) for respondent: In order to succeed, the *onus* was on appellant to show (*a*) that he was in peaceful and undisturbed possession of the land in question at the time of the alleged deprivation, and (*b*) that respondent unlawfully deprived him of such possession; both these elements must be clearly proved; a *prima facie* case is not sufficient; *Burnham* v. *Neumeyer* (1917, T.P.D. 631); *Rieseberg* v. *Rieseberg* (1926, W.L.D. at 65-6); *Shaw* v. *Hendry* (1927, C.P.D. 357); *Gerber* v. *Pretorius* (1942, G.W.L.D. 87); *Mandelkoorn* v. *Strauss* (1942, C.P.D. at 497-8); *Scholtz* v. *Faifer* (1910, T.S. at 246); *Meyer* v. *Westelike Ko-op. Mkpy.* (1943, O.P.D. at 103, 105); Nassau la Leck, *Register* (s.v. Spolie, p. 807); *Zutphen* (p. 735); *Gail* (2 *Obs.* 129, n. 10; *Obs.* 152); v.d. Linden, *Judiceele Praktyk* (D. II, p. 312). The contract is one in the nature of lease but is not one under which applicant is entitled to exclusive possession of the land in question; *cf. Temby's* case (1908, O.R.C. 68). Originally the possessory interdicts were not available to lessees and other persons who did not have the *animus sibi habendi*; *Voet* (43.16.36); v. d. Linden, *Handboek* (1.13.1); von Savigny, *Possession* (Perry's tr., pp. 56-7); under the influence of the Canon Law, however, the *mandament van spolie* was extended to lessees and other persons who were not possessors in the strict juridical sense; *Meyer* v.

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Glendinning (1939, C.P.D. at 91-2, 94-6); the South African Courts have frequently granted spoliation orders in favour of lessees; see, e.g. *Nino Bonino* v. *de Lange* (1906, T.S. 120); *Blomson* v. *Boshoff* (1905, T.S. 429); *Wait* v. *Wait* (1929, E.D.L. 342). Assuming that the applicant is a lessee it was for him to prove that at the time the gate was closed, he was in possession of the land in question; in order to discharge this *onus* it was necessary for him to establish, (*a*) that he had an intention of holding the property, not as owner, but as lessee, and (*b*) that he was in physical control or occupation of the property: *Scholtz* v. *Faifer* (1910, T.S. 243 at 246-7); *Voet* (41.2.3); Salmond, *Jurisprudence* (9th ed., pp. 371-2, 377, 395); *Groenewald* v. *van der Merwe* (1917, A.D. 238-9); Holland, *Jurisprudence* (12th ed., pp. 194-5); Wille, *Principles of South African Law* (2nd ed., pp. 175-7, 179). As to whether applicant was in possession of the land at the time of the alleged deprivation, appellant did not apply to lead evidence in terms of O.F.S. Rule of Court 9, but claimed a decision on the affidavits; *cf. Hilleke* v. *Levy* (1946, A.D. at 214); *Rieseberg* v. *Rieseberg* (*supra*); *Peterson* v. *Cuthbert & Co.* (1945, A.D. at 428); *van Malsen* v. *Alderson* (1931, T.P.D. at 38); *Hall* v. *Pitsoane* (1911, T.P.D. 853). It is conceded that a lessee who is in full occupation of the leased property may not be ejected forcibly. *Voet* (19.2.18); *London & S.A. Exploration Co.* v. *Moodoosoodam* (3 H.C.G. at 318). A refusal to allow a person to gain admission to property in respect of which he has no rights does not amount to an act of spoliation; *Dig.* 43.16.1 (26). Spoliation is a remedy which was intended for meeting a case of emergency and should be granted only to an applicant who acts promptly; the result of the delay in the present case virtually rendered the proceedings abortive; *cf. Shahmahomed* v. *Hendriks* (1920, A.D. at 159); alleged deprivation took place and the matter was within the jurisdiction of a magistrate; *Mans* v. *Marais* (1932, C.P.D. 358); *van der Lith's Est.* v. *Kruger* (1932, T.P.D. 81).

Grobler in reply.

Cur. adv. vult.

Postea (December 11th).

GREENBERG, J.A.: The appellant, in an application which he

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made to the Orange Free State Provincial Division, alleged that in July, 1943, he hired a portion of a farm from the respondent for three years from the 31st August, 1943, at a rental of £15 per annum for the first two years and £20 per annum for the last year; that he was in peaceful possession of the land from the commencement of the lease until the 5th September, 1945, when one Delport, acting on the respondent's instructions, closed the only gate giving appellant access to the land and thereby unlawfully dispossessed the appellant of the land. He thereupon wrote to respondent demanding that the gate be re-opened and that possession of the land be restored to him, but this was refused and he accordingly claimed an order directing the respondent to open the gate and restore possession to him of the land. This order was refused and the appellant now appeals.

The correspondence, copies of which are attached to the petition, and the answering affidavits filed on the respondent's behalf, show that the respondent denied that he had granted a lease of three years to the appellant and that his version was that during May, 1943, he had granted the appellant the right, for a period of two years from the 1st August, 1943, to plough and cultivate the land on his own account, but under the " supervision and care " of the respondent's manager Delport; the respondent and Delport also denied in their affidavits that the appellant was in possession of the land after the 31st July, 1945, or that he was dispossessed of the land by the closing of the gate. I shall have to discuss the facts in more detail at a later stage.

The learned Judge in the Court below followed what was said by BRISTOWE, J., in *Burnham* v. *Neumeyer* (1917, T.P.D. 630 at p. 633) viz.: " Where the applicant asks for a spoliation order he must make out not only a *prima facie* case, but he must prove the facts necessary to justify a final order—that is, that the things alleged to have been spoliated were in his possession and that they were removed from his possession forcibly or wrongfully or against his consent."

I agree with what was there said as to the cogency of the proof required. Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the *status quo* be restored, it is to that extent a final order and the same amount of proof is required as for the granting of a final interdict,

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and not of a temporary interdict; where the proceedings are on affidavit as in this case—no application having been made for the Court to exercise its powers under Rule of Court 9 (*a*) to hear oral evidence—the principles which have been recently discussed in this Court in *Hilleke* v. *Levy* (1946, A.D. 214) apply and I agree with the learned Judge that it was impossible, on affidavit, to decide the disputed question as to whether the agreement between the parties terminated in July, 1945, or July, 1946. I shall have to refer later to the relevance of the period of the agreement. At this stage it is sufficient to say that the appellant must satisfy the Court on the admitted or undisputed facts by the same balance of probabilities as is required in every civil suit, of the facts necessary for his success in his application. The learned Judge *a quo* was not satisfied, on the material before him, that the appellant was in possession of the land after the 31st July, 1945, and therefore refused the application. The correctness of his decision on this question is the main point in issue in this appeal.

The only ground on which it was disputed that the contract under which the appellant acquired his rights to the land in 1943 was such as to entitle him to a spoliation order, if he was deprived of the enjoyment of those rights by a spoliatory act, was that under the contract he was not entitled to exclusive possession of the land. The denial of his right to exclusive possession was based on two contentions (*a*) that under the contract the appellant was not a lessee but merely had the right to plough and cultivate the land, with the result that the respondent was entitled to exercise such other rights of a lessor as would not detract from the appellant's rights; the instance of such other rights which was given in argument was that while the land was not being ploughed or used for cultivation the respondent, and not the appellant, was entitled to its enjoyment; (*b*) that the appellant was bound to exercise his rights " under the supervision and care of Delport," the respondent's manager.

In regard to (*b*), my first difficulty is that neither the papers nor the argument have afforded an explanation of what is meant by this statement, and I am therefore unable to see how it affects the exclusiveness of the respondent's possession. In regard to the facts, the respondent nowhere puts forward this restriction as if it were a part of the original contract, and nowhere suggests that it was

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agreed upon later, but he maintains it only in connection with his manager Delport, who appears to have assumed his duties as such manager only in October, 1943. Delport refers to the instructions that he received from the respondent on the point but the terms of his instructions, as testified to by him, do not necessarily mean more than that he was to see that the appellant did not exceed the rights conferred on him, viz.: to plough and cultivate the land. In the result, I do not think that this contention assists the respondent in any way. In regard to (*a*), the appellant asserts that he was a lessee of the land and it is clear that if this were so, his possession would be such as is required to support a claim for restitutional relief against spoliation. But the dispute on this point cannot be resolved on affidavit evidence, and for the purposes of this case it must be assumed that the respondent is not excluded by reason of the contract from the enjoyment of such rights as do not conflict with the appellant's rights as testified to by the respondent. Does this assumption disentitle the appellant to the relief he claims?

The sole authority to which we were referred in support of the view that an application for a writ of spoliation can only be granted to a person who has exclusive possession is the case of *Temby* v. *Lippingwell* (1908, O.R.C. p. 68). I do not follow the reasons for this decision; the application appears to have been refused because the applicant, not having been in exclusive possession of the horse which he said had been removed from his possession unlawfully, was not entitled for that reason to a *jus retentionis*. As it is clear that a person who has no rights at all to the property removed from his possession, may still be entitled to the relief, his not having a *jus retentionis* has no relation to his claim for the relief. On the other hand there appears to be good reason for holding that exclusiveness of possession is not an essential element. In *Nino Bonino* v. *de Lange* (1906, T.S. 120) INNES, C.J., says (at p. 122)) that " spoliation is any illicit deprivation of another of the right of possession which he has whether in regard to movable or immovable property or even in regard to a legal right ". Wassenaer (*Practyk Judicieel*, Chap. 14, Art. 1) says that the remedy following on spoliation is competent to anyone who has been deprived of " eenige goederen of gerechtigheden " which seems to include incorporeal rights. (See also *Voet*, 43.16.7; Lee's *Introduction to Roman-Dutch Law*, 3rd ed., p. 167). The fact that these authorities state

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generally, and without any limitation or exception, that the possession of incorporeal rights is protected against spoliation means that the holders of such servitutal rights as rights of way, where clearly the person who holds the servitude does not have exclusive possession of the land, are entitled to the relief against dispossesion by spoliation. See also de Blecourt, *Kort Begrip van het Oud-Vaderlandsch Burgerlyk Recht* (5th ed., p. 189), where he says that, in respect of the same piece of land, there may be different rights, vested in different persons, all entitled to the protection of spoliation proceedings. Moreover, apart from authority, I can see no reason why the relief should not be available merely because the person who has been despoiled does not hold exclusive possession. Assuming, therefore, that the appellant was not a lessee and enjoyed only the rights testified to by the respondent, and assuming also that on the respondent's version of the appellant's rights, the latter did not have exclusive possession during the time he was evercising his rights, I do not think there is any ground for holding that this factor disentitles the appellant to relief.

I come now to the ground on which the application was refused in the Court below. The learned Judge said that two elements are essential for the possession which is protected against spoliation, viz. *animus* and *detentio*. With this I agree. He also held that on the affidavits the appellant could at the most claim that he had clearly exhibited his intention of remaining in possession " but the *onus* rests on him to prove this *detentio* clearly, and instead I find that for over a month after the termination of the lease he exercised none of the rights of possession."

I am unable to agree with this conclusion. The learned Judge was right in holding that the appellant had clearly shown an intention of remaining in possession. The correspondence which is attached to the affidavits shows that the appellant consistently maintained, during the period of that correspondence, viz. from the beginning of June, 1945, until after the 5th September, 1945, that his lease did not expire until the end of July, 1946, and made it abundantly clear that he had no intention of vacating before that date; on two occasions during July, 1945, the rent for the ensuing year was tendered on his behalf to the respondent. It is also clear that, notwithstanding the respondent's intimation to him during June, 1945, that he was to vacate the land at the end of

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July, he ploughed the land during the month of July. The appellant himself does not say that it was during the month of July, but he does not deny the respondent's statement that it was. It was not disputed that this ploughing was inconsistent with an intention to vacate. It is true that after he had finished the ploughing he removed his implements used for this operation from the land, and that from that time until the 5th of September neither he nor his servants nor any property belonging to him was on the land. But he states in his replying affidavit—and no application was made on respondent's behalf to reply to this allegation—that " I had finished ploughing a portion of the lands which were ready for planting and this fact was communicated to Delport when he advised me that he was closing the gate. My planters, seed and fertiliser were ready to be moved on to the lands the following day, but at 5 o'clock in the afternoon on September the fifth, 1945, Delport closed the gates and thus deprived me of possession of the lands."

There is nothing in the papers which suggests that, particularly as the land adjoined his own, for the purpose of carrying on his farming operations, there was any need for the appellant, either himself or through his servants, to be on the land between the ploughing and the planting, or during that period to have any implements there, and this absence from the land neither detracts from the inference of intention to be drawn from the correspondence and the ploughing, nor is it conduct which in fact amounts to a vacation by him of the land.

The position, as proved by facts which are not in dispute, is that the appellant had clearly declared his contention, during June and July, 1945, that he was entitled to the land until the following year, and up to the end of July had unequivocally manifested his intention of acting accordingly, while the respondent had denied his right to remain on the land and had threatened to take proceedings for ejectment. In July the appellant ploughed the lands and it is clear that during this time he was in physical possession. From the fact that he was in physical possession at that time, with the clearly expressed intention, both by word and deed, of continuing in possession for the ensuing twelve months, and in the absence of any evidence to the contrary, it appears to me that there are good reasons for concluding that he continued in possession.

The only additional facts that are alleged on the respondent's

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behalf are that during June 1945 appellant reaped and removed his potato and mealie harvest from the land, and allowed his cattle to eat the mealiestalks and that after completion of ploughing the appellant removed his implements from the land. There is no allegation that after the ploughing had been completed, the appellant did anything which indicates or suggests an abandonment or vacation of the land. The only statement in the affidavits filed on behalf of the respondent is a bare denial by him that the appellant was in possession after the 31st July, 1945, and by Delport that the appellant was in possession on the 5th September. In the absence of an allegation by them of any specific act on the part of the appellant that might be relevant as indicating an abandonment or vacation on his part, I conclude that their denial of his possession is not an independent allegation by them of a fact, but merely an inference drawn by them from the facts which they allege.

In the circumstances there was nothing that required the presence of the appellant or his servants or any implements on the land between ploughing and planting, and the only thing that it can be said he has left undone is the omission of some symbolic or formal act such as walking on to the ground occasionally or leaving some of his property lying there—at the mercy of wind and weather and thieves. I know of no reason why the omission of a gesture of this kind should affect the matter.

Lastly, there is the letter, written on the 8th August, 1945, by respondent's attorney to the appellant's attorney, on which Mr. *Grobler* rightly placed a good deal of reliance. This letter, after a reference to the appellant's " onwettige en wederregtelike handelwyse " in ploughing the land, notified the recipient that the respondent would take legal proceedings against the appellant for ejectment from the land. On the face of it, this is an admission that at that date the appellant was in possession of the land. Mr. *Brink*, on respondent's behalf, said that no inference of such a fact could be drawn from the letter as the respondent, who lives in Durban, was probably ignorant of the true position and that the attorney may have issued the threat without instructions on the facts. In the first place, although the respondent was in Durban, his manager Delport was on the spot and was in touch with the attorney, but apart from this, if the threat in this letter was made under a mistake of fact, this should have been made clear by affidavit. In the result,

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it seems to me that there is no conflict of fact on the affidavits in regard to the appellant's physical possession of the land at the time when the gate was closed and that they prove that he was in such possession.

It was also contended on respondent's behalf that inasmuch as there was another gate which would give appellant access to the land, the closing of the one gate did not deprive him of possession. It appears that there is another gate leading on to respondent's ground and respondent maintains that notwithstanding the closing of the gate of which complaint was made, appellant has not been denied access. Respondent in his affidavit denies that the gate which has been closed was originally made with his consent, as is alleged by appellant, but it is clear that, since October, 1943, appellant has been using this gate to the knowledge of Delport—he himself alleges that he used it since July, 1943—and the appellant says that the other gate is approximately 1¼ miles from his homestead, and that its use by him would necessitate his travelling about 350 yards over respondent's lands to the land in issue, whereas the gate in question leads directly from appellant's farm to the land in dispute.

Mr. *Grobler* contends that the remedy lies not only when there is a deprivation but also when there is a disturbance of possession, and he refers to *Wassenaer* (*op. cit.* Ch. 13, Art 1), who says that the remedy is available " als iemand binnens jaars geraakt of geturbeert is uit de possessie." The words " geraakt of geturbeert " seem to connote anything which touches or affects or disturbs the possession and not to require complete deprivation. But I do not think that this point need be pursued as it is clear that the appellant was in possession of the right of access through this gate of which he has been deprived, and the remedy is therefore available.

The next contention advanced on respondent's behalf was that a spoliation order is a remedy which is intended for meeting a case of emergency and should be granted only to an applicant who acts promptly. The appellant in this case certainly did not act promptly; the spoliation is said to have occurred on the 5th or 6th September and it was made clear to the appellant on the 17th September that the respondent would not reinstate him, but his petition was not served until the 11th January with a notice of

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set-down for the 14th February. Ultimately it was heard on the 7th May; it appears that the respondent's and Delport's affidavits were signed on the 26th and 22nd February respectively, and the appellant may not have been responsible for this delay. But there is nothing beyond this to explain why he did not expedite the matter more than was done. But whatever be the cause of the delay, there is no warrant for holding that the appellant thereby lost his remedy. On the contrary, the last passage cited from *Wassenaer* (Ch. 13, Art 1) makes the remedy available for a year. (See also *Voet* (43.16.6 and 7).) It is true that Savigny on *Possession* (pp. 406 *et seq.*) describes this remedy as "*Possessorium Summariissimum*," but I think the adjectival qualification refers not to the period within which the remedy must be claimed, but to the procedure of the court in dealing with the application. I express no opinion on the question whether the court has a discretion to refuse an application where, on account of the delay in bringing it, no relief of any value can be granted.

It appears to me therefore that the learned Judge erred in refusing the application, and the only other question is whether, in accordance with the respondent's contention, the appellant should be awarded costs on the magistrates' courts scale in the Court below. The appellant in his petition said that the value of the rights of which he had been deprived was £600. The fact that the rental that he alleged was £20 for the last year makes this figure surprising, although not necessarily impossible of acceptance, and the respondent's affidavits throw little light on this question. The legal points that were involved raised questions of some difficulty and on the whole I am not prepared to say that the appellant was not justified in taking proceedings in the Supreme Court.

As I understood from Mr. *Grobler* that he does not now ask for an order restoring possession to the appellant, the order will be that the appeal is allowed with costs in both Courts.

SCHREINER, J.A. and DAVIS, A.J.A. concurred.

Appeal accordingly allowed.

Appellant's Attorneys: *W. P. Jeffreys;* Respondent's Attorneys: *Naude & Naude.*

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1946. *December* 6, 11. WATERMEYER, C.J., TINDALL, J.A. DAVIS, A.J.A.

Criminal law.—Murder.—Provocation.—Decision that defence not made out.—Decision one of fact not of law.

In a prosecution for murder, the trial Judge, who was sitting without a jury, had decided that the accused had lost his power of self control but that in fact the provocation he had received was not of such a nature as would have deprived an ordinary person of his power of self control, and had convicted the accused of murder. A question of law was reserved as to whether there was evidence on which the Court was entitled to convict the accused of murder.

Held, that the conclusion of the trial Judge as to the nature of the provocation was a decision of fact the correctness of which could not be enquired into under the question reserved.

The case of *Rex* v. *Butelezi* (1925, A.D. 160); *Rex* v. *Attwood* (1946, A.D. 331); *Rex* v. *Blokland* (1947, A.D. 940), applied.

Appeal upon a question of law reserved by PRICE, J., sitting with assessors in the Standerton Circuit Court. The facts appear from the judgment of WATERMEYER, C.J.

B. Shtein, for the accused: The Crown has not discharged the *onus* of proving that the accused had the necessary intention to kill; the offence is therefore not murder but culpable homicide; *Rex* v. *Ndhlovu* (1945, A.D. 369). As to the South African law of provocation, see *Rex* v. *Butelezi* (1925, A.D. 160 at 162). The principles of English law quoted by the learned Judge in the Court *a quo* are based on English cases where the provocation was not so great as in the present case, namely *Rex* v. *Welsh* (11 Cox 336); *Rex* v. *Lesbini* (1914, 3 K.B. 1116); *Rex* v. *Stedman* (Foster 292); *Rex* v. *Lynch* (5 C. & P. 324); *Rex* v. *Keat* (90 E.R. 298). In the present case the provocation was sufficient to deprive any ordinary person of the power of self-control. Further, on the facts.

N. Philips, for the Crown: The *onus* of proving that the accused had the intention to kill was discharged. As to the requisites for a plea of provocation, see *Rex* v. *Butelezi* (1925, A.D. 160 at 162) and *Rex* v. *Attwood* (1946, A.D. 331). It is submitted (*a*) that the provocation was not sufficient to deprive any ordinary person of the power of self-control so as to cause the commission of the murder in the present case: Russell on *Crimes* (9th ed., pp. 384, 387, 390); Archbold, *Criminal Laws* (22nd ed., p. 759); *Mancini* v. *Director of Public Prosecutions* (1942, A.C. 1 at 9, 10); (*b*) that the accused