NINO BONINO v. DE LANGE.

1906. *March* 19. INNES, C.J., and SMITH and MASON, J.J.

Landlord and tenant.—Ejectment under a clause of the lease.—Spoliation. —Violence or fraud.

A clause in a lease purported to give the lessor the right, in certain eventualities, to cancel the lease and prevent the lessee having access to the premises without recourse to law. Correspondence took place between the parties with reference to certain alleged breaches of the lease. Thereafter the lessor wrote cancelling the lease, but before his letter had been received he, unknown to the lessee, barricaded the premises and obtained possession of the keys. *Held*, on appeal, that violence or fraud are not essential elements of an act of spoliation provided the deprivation is effected illegally and without the consent of the person despoiled, that the clause in question was against public policy and of no effect, and that the lessee was entitled to be reinstated.

Appeal from a decision of BRISTOWE, J., in the Witwatersrand High Court.

The facts are set out in the judgment.

Gregorowski, for the appellant: It is against public policy that such an agreement should be inserted in a lease. Such an agreement is of no effect and cannot protect a person who acts under it. No person can take the law into his own hands. See *Blomson* v *Boshoff* ([1905] T.S. 429); *McLoughlin* v. *Delahunt* (Foord, 129); Goudsmit's *Pandecten Systeem*, vol. 1, sec. 84; *Digest* 4, 2, 13.

Manfred Nathan, for the respondent: Before there can be spoliation the retaking of possession must be either by force or illegally. If the parties have agreed that possession may be retaken in certain instances, then the retaking cannot be illega No force was used in this case. (See Wassenaar's *Judicieele Praktyk*. ch. 14). In cases of spoliation the Court can take into consideration whether the retaking of possession was secret or not. In the case of *McLoughlin* v. *Delahunt* the taking was secret, whereas in this instance there was no secrecy. A retaking was contemplated by the parties and such was authorised in certain instances by the lessee. The respondent was compelled to eject the appellant in order to prevent breaches of the peace being committed on the premises. Vide *White and Tucker* v. *Rudolph* (Kotzé, 115). The present case is entirely distinct from *Blomson* v. *Boshoff*.

Gregorowski was not called on to reply.

INNES, C.J.: This is an appeal from an order of the High Court refusing a *mandament van spolie* or a decree reinstating the appellant in the possession of a certain billiard room, of which he alleged that the respondent had deprived him. The respondent was the lessee of the Corporation Restuarant. He sublet a portion of it to the appellant. It is not necessary to refer to the terms of the lease further than to say that there was an undertaking by the sub-lessee of the billiard room to conduct it in a proper and seemly manner. There was another clause which gave or purported to give the respondent, the lessor, on the breach of any term of the contract, a right of cancellation and re-entry.

It is admitted that on the 21st November, and during the currency of the sub-lease, the respondent took possession of the billiard room. The circumstances under which he did so are dealt with in a number of very voluminous affidavits. The respondent alleges that the room was badly conducted, that questionable characters were allowed to resort there, that the foulest language was habitually used in the room, and that betting and gambling were freely permitted. He filed very strong affidavits in support of these allegations. If those affidavits are true there would seem to have been a breach of the lease. But they are denied by the appellant, who also filed a number of affidavits. About the 8th November the respondent wrote to the appellant complaining that gambling and betting were allowed in the room, and pointing out that he was breaking the conditions of the lease. The appellant replied that if there was any betting or gambling it was not known to him, and that he would take steps to see that such things did not occur in the future. A

few days after this Messrs. Clark & Co., who were sureties for the respondent as lessee of the whole building, wrote to him complaining of what was going on in the billiard room, and pointing out that he was endangering his license. Thereupon the respondent's attorney wrote to the appellant that he had been instructed to give him notice that the lease was cancelled, and that "under clause 18 thereof my client will prevent you from having access to the premises." That letter is dated 20th November, but early on the morning of the 21st, and before the letter had been received, the respondent barricaded the door of the billiard room, and took possession of the keys which had been left on his premises, and claimed to retain them. In effect he prevented the appellant from having access to the billiard room. The point the Court has to decide is whether he had a right to do so.

It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear. Indeed it is not denied by Mr. *Nathan* that there is abundant authority in support of it; van der Linden, Voet and other writers are quite clear on the point. And the spoliation which the Court would in this way set aside need not necessarily consist of acts of violence. It is admitted by Mr. *Nathan* that acts done secretly, without the consent or knowledge of the person despoiled might also amount to spoliation. The best definition I have been able to find is one given by Leyser, who states 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. He does not make violence or even fraud an essential element, provided that the act is done against the consent of the person despoiled, and illicitly. That principle, it appears to me, was recognised in the case of *McLoughlin* v. *Delahunt* (Foord, p. 129), which has been referred to during the argument. Mr. *Nathan* contended that the respondent acted as

he did in order to prevent breaches of the law which were continually taking place in the billiard room. But if that was so one would have thought that the respondent would have informed the police. As a fact it is clear that that was not his object. His intention was to take advantage, on his own behalf and for his own protection, of the clause in the lease to which I have referred.

The principle, as I have said, is clear. The point we have to consider is whether the fact that the parties inserted a very special condition in the lease makes any difference. That condition reads as follows: "Should the party of the other part fail to pay the rent on the due date, and should the same remain unpaid for a term of six days thereafter or should he fail to pay any of the amounts due under and by virtue of this agreement or fail to carry out one or any of the terms and conditions herein contained, the party of the one part shall have the right to immediately cancel this agreement . . . and to prevent the party of the other part from having access to the said premises, without recourse to law." Now if at the time when this clause was acted upon the party dispossessed did not object, if he consented to what was done, then of course there would be no spoliation. But this is not such a case. Here the lessee contends that he has not broken any condition of the lease. He objected at the time, and still objects, to the entry of the lessor upon the premises; and the lessor knew from the correspondence which had taken place that that was the position which the lessee took up.

Under these circumstances, does a clause of this kind place the lessor in any better position than he would have occupied without it? In my opinion, it does not; and for the simple reason that the Court cannot recognise such a provision. It is an agreement which purports to allow one of the two contracting parties to take the law into his own hands, to do that which the law says only a court shall do, that is, to dispossess one person and to put another person in the possession of property. It purports to allow the lessor to be himself the judge of whether a breach of contract has been committed, and having decided in his own favour to allow him of his own motion to prevent the lessee from having access to the premises. Only a court of law can do

those things. The parties cannot stipulate to do them themselves. To take a case not nearly so strong as this, very often there is inserted in contracts of pledge a clause stipulating for the right of *parate executie*, the right of the pledgee under certain circumstances without obtaining the judgment of any court to realise and execute upon the pledged property. I have always understood that the weight of authority is against the validity of such a clause. And if that is so, this is an *a fortiori* case. But whether I am right with regard to *parate executie* or not, this is a stipulation which goes much further. It is a contract against public policy, void, and which the Court can be no party to recognising.

It is true that the respondent's case may be a hard one. He is the licensee of the whole of these premises; he has taken possession of them. The High Court so far upheld his conduct that he is now running the billiard room himself, and the position is not free from complication. But he has himself or his advisers to thank for that. He should have come to the court. The position is in a nut-shell. If he had clearly shown the court that the conditions of the lease had been broken, he could have got some remedy either by way of an order of ejectment or by a temporary interdict pending further proceedings. If, on the other hand, the case is not clear, what right has he, merely to avoid delay (whether he purports to act under a contract or not), to take the law into his own hands and to deprive another of the possession of property which up to that time he rightly held? In my opinion the order asked for in the court below ought to have been granted; the appeal must be allowed and the order of *restitutio* must issue.

SMITH, J.: I regret that the decision of the court below, which is now appealed against, cannot be supported. I say I regret it, because it does not seem to me, judging from the facts deposed to in the evidence, that there can be any doubt that there have been grave breaches of the conditions of the lease, and that, owing to the peculiar circumstances of the case and the respondent being the license-holder of the premises of which this building formed a part, he was put in some peril of losing his license.

But it seems to me that the law applicable to this case is perfectly clear. There is no doubt that this is a case of spoliation, and the law will not allow a man to take the law into his own hands and to take out of the possession of another, who is unwilling to yield it up, property which he thinks he has a claim to or may have a very good and very just claim to. His remedy is to enforce his rights through the court.

But for the presence of clause 18 in the lease this case of course would not be arguable at all. It seems to me that the clause cannot affect the rights of the parties. It is in effect an agreement between the two parties that one of them shall be permitted to do an act which the law does not allow him to perform. Such an agreement, as was pointed out in the case of *Blomson* v. *Boshoff*, is contrary to public policy and the Court will not enforce it. It is true that the provisions of the lease there were somewhat different to the conditions in this case, but the practical effect was the same. In that case the lease purported to give the lessor a right to physically eject the lessee from the premises. In the present case the lease only gives the lessor the right to refuse the lessee access to the premises. It seems to me that he did refuse him access in the most practical way; after the lessee had left the billiard room for the night, and the lessor saw he had left the premises, he barricaded the room, and when the lessee came the next morning he found the room barricaded against him.

Any state of circumstances more likely to lead to a breach of the peace than that, I find it difficult to conceive; because if a man finds property barricaded against him which he thinks he has a right to enter he is extremely likely to resort to force to effect an entrance. It seems to me the case may be put in another way, which is this—that the law will not allow a man to be a judge in his own case. Here the lessor says: "I am of opinion that there have been breaches of the covenants in the lease, and under my lease I am entitled to barricade this room against the lessee." The lessee does not accept that view of the position at all; he denies that there have been breaches of the lease. Is the lessor to be allowed to be the judge in his own case and decide that there have been breaches in connection with this

property? I do not think the Court can uphold such a contention; therefore I agree that the appeal should be allowed.

MASON, J., concurred.

Appellants' Attorneys: *Macintosh & Kennerley;* Respondent's Attorneys: *Roux & Jacobsz.*

24 N.254. 36 E.303, 315. 47/4 J.330. 83(3)619(A) 60(3)855 65(4)302(W.)

DWYER v. GOLDSELLER.

1910 T.P.D. 562 23 - 206. 39 - 272, 285.

1906. *March* 20. INNES, C.J., and MASON, J.

Promissory note.—Co-obligors.—Joint and several liability.—Release of one of the co-debtors.—Personal discharge.—Liability of remaining debtor.

A and B signed a promissory note whereby they undertook jointly and severally to pay the amount. A assigned his estate for the benefit of his creditors, the deed of assignment stipulating that he should be released from all his liabilities. The holder of the note sued B for the full amount. *Held*, on appeal, that the discharge given to A was a personal discharge merely, and that therefore B was only discharged to the extent to which he would have had a claim against A for contribution; and that he was liable for half the amount of the note.

Appeal from a decision of the Second Civil Magistrate of Johannesburg.

The appellant and his father who were substantially partners in a business concern jointly signed a promissory note for £100 in favour of the respondent whereby each became jointly and severally liable for that amount. The £100 was applied in connection with the affairs of the business, which was carried on in the father's name. The father subsequently entered into a deed of assignment with his creditors, amongst whom was the respondent, whereby he obtained a release and discharge from all claims

and demands which his creditors who signed the deed had against him. The respondent then sued the appellant in the magistrate's court for the full amount of the note, and was met with the defence that the creditors having released his co-debtor he was also released. The magistrate rejected this defence and gave judgment for the full amount of the note. The defendant appealed.

Gregorowski, for the appellant: The deed of assignment extinguished the debt due on the promissory note and the other signatory to the note cannot be sued. The respondent did not reserve his right to claim against the appellant. The money given on the note went into the business and it was the partnership estate as well as the estate of the father which was assigned. The business was carried on under the name of J. Dwyer, and he was released; therefore the other members of the partnership were also released. Lindley on *Partnership* (vol. 1, p. 266) shows that a release of one partner is a release of the partnership. See *Commercial Bank of Tasmania* v. *Jones* (62 L.J., P.C. 104).

This deed of assignment operated as a real release and not merely as a personal discharge (Pothier on *Obligations*, secs. 261 and 264). Everything that J. Dwyer possessed was taken in entire satisfaction of the debt. See *In re Ewa* (70 L.J., K.B. 810).

Esselen, for the respondent: English law is not applicable to this case. The Roman-Dutch law is different. See Pothier on *Obligations*, sec. 581. Unless it is perfectly clear that the creditor extinguished the debt itself the release will merely be regarded as a personal discharge. According to the deed of assignment this was a personal discharge. *Vide* Grotius 3, 41, 9. The Court must inquire whether it was the intention to extinguish the whole debt. If presumption does enter into this case it should operate in favour of the respondent (the plaintiff in the court below). But the question of prejudice is a question of fact, not one of presumption. The Court is bound to consider the result of the assignment. If the assignment is good he has consented to it, and if it be not good he cannot claim to be discharged to the extent of half the debt.