and Allday, the *Nottingham Patent Brick and Tile Co.* v. *Butler*, and *Elliston* v. *Reacher* resemble those in clause 7, and one of the considerations mentioned in favour of conferring the power on each purchaser to enforce the condition against others is that otherwise, if all the land were sold, no one could enforce the restriction. It was argued that the words no coloured persons will be allowed and no canteens, &c., will be allowed on the stands sold imply non-allowance, and therefore prohibition by the vendor of such a use of the stands. Neither inference seems to me justifiable. The clause refers to these conditions as reservations, and the words in question mean that the standholder's ordinary rights as holder will be curtailed to the extent that coloured persons will not be allowed to occupy the stands; now the only person who could allow coloured persons to occupy the stands sold would be the standholder; so the real meaning of the words is, with reference to him, "You will not be allowed to permit or place coloured persons other than servants on the stand." I can see no words in this deed of sale imposing even inferentially a legal duty on the vendor to enforce this restriction on offending standholders, and when the nature and results of such an obligation are considered it seems in the last degree unlikely that such an obligation should be undertaken. It would be, if they sell all the stands as contemplated, a personal liability likely to last for generations, so far as one can see, and binding the estates of the defendants for all time; and it presupposes a permanent quasi-servitude throwing a personal burden on persons having no interest in any land connected with the dominant tenement, or indeed in any land at all, and whose representatives may be scattered all over the world. Nor does it in my judgment make any difference that the plaintiff has not obtained transfer; the interpretation of the words used do not depend upon transfer being given, as the conditions clearly govern the sale as well as the transfer of the stand, and there seems no reason why a purchaser should not be able to enforce them as well as a transferee. The natural and indeed the only defensible interpretation of clause 7, and one which also gives it an effective operation, seems to me to be on the lines of

the English and South African decisions, which make these restrictive covenants binding *inter se* amongst the purchasers of lots in such a township as this, and also binding as between the purchasers and the vendor, but do not impose on the vendor any obligation to enforce them as against an offending standholder. This decides the action and renders it unnecessary to consider the other interesting questions raised during the argument.

The appellant syndicate is therefore entitled to succeed in the appeal and cross-appeal; the magistrate's judgment must be amended to a judgment for the defendant syndicate in the court below on the claim in convention with costs in both courts.

INNES, C.J., concurred.

Appellant's Attorneys: *Wagner & Klagsbrun*; **Respondent's** Attorneys: *Macintosh & Kennerley*.

1922. O.P.D. 104.
1923. E.D.L. 109.
1930. T.P.D. 151 152.
1935. T.P.D. 269, 271
1939 C.P.D. 84, 85, 96
1945 T.P.D. 256.
45 T.P.D. 252
46 O.P.D. 233.
47 (3), 155, 591.
48 (1), 71
App. Cas. (2) 667

app. 53 (2) 644
app 57 (1) 171
app 60 (1) 613
app 60 (2) 686
61 (2) 104

app 68 (3) 676
app 69 (1) 244
app 68 (2) 628
68 (3) 663
app. 69 (2) 59
app. 71 (1) 887
Cons 71 (2) 470
Cons 71 (3) 798

SCHOLTZ v. FAIFER.

1910. *April* 8. INNES, C.J., and WESSELS and BRISTOWE, JJ.

Spoliation.—Builder.—Jus retentionis.—Possession.—Intention.—Temporary absence.—Building derelict.

In order to retain his lien over partially erected buildings, the builder must have not only the intention to hold possession, but also the actual physical possession either personally or by a representative. Mere temporary absence from the building would not constitute a cessation of such possession, but where work is suspended for a considerable time special precautions must be taken to retain control.

The possession necessary is not the possession as owner, but possession with a view of protection as against the owner.

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

The appellant, who had contracted to erect certain buildings for the respondent on condition that the latter supplied the materials and paid for the work as it progressed every two weeks, applied in the court below for an order reinstating him in possession of the building then partially erected, and for an order on the respondent or those acting under her to vacate the premises. He alleged that after portion of the building had been erected the respondent had failed both to provide materials regularly as required and to pay the instalments when due; that during January and February, 1910, the respondent had interfered with the building operations; and that on the 25th January the respondent wrote to him cancelling the contract and requesting him to vacate the building. On the 29th January the respondent issued a summons in the magistrate's court claiming the ejectment of the appellant from the premises. The appellant refused to give up possession, and on the 4th February—the magistrate's court case not having yet been heard—the respondent took possession of and placed another contractor on the work. The appellant alleged that this act of the respondent's was both forcible and illegal, and he accordingly applied for an order of reinstatement into possession.

The respondent denied the alleged interference with the appellant's work and the failure to provide the materials when required or to pay the instalments when due. He alleged that since the 24th December, 1909, neither the appellant nor any one on his behalf had been in possession of the building, and that his taking possession on the 4th February, 1910, was neither forcible nor illegal, inasmuch as the appellant had apparently abandoned the contract, and had no intention of completing the work. At the time the new contractor took possession on the 4th February there was no person present on behalf of the appellant, nor was the contractor in any way interfered with until after the lapse of two days.

It was admitted that the appellant was by his contract given the right to occupy an outbuilding already erected on an adjoining stand belonging to the respondent free of charge during the course of the building operations, and that at the time the respondent retook possession the outbuilding was occupied by a woman with whom the appellant was living.

The learned judge in the court below found that the appellant had ceased to have possession of the building operations since the 24th December, 1909, and had placed nobody in charge on his behalf. With reference to the question of the summons in the magistrate's court, the learned judge was of opinion that the ejectment therein prayed for related to the outbuilding which the appellant had the right to occupy during the progress of his work. The application was refused with costs and the appellant appealed.

Morice, for the appellant: The decision of the learned judge in the court below is contrary to the rules laid down in *Nino Bonino* v. *De Lange* ([1906] T.S. 120). The question of spoliation is fully dealt with by Kersteman in his *Woordenboek, sub voce "Spolie."* The appellant was in possession of the incomplete building on the day when the respondent placed the new contractor in charge of the works. He was in possession on the 24th December. He had the right under his contract to occupy an outbuilding on the ground, and he continued to occupy it even after the new contractor had commenced work. The Court will never presume an abandonment of possession. The respondent has practically admitted that the appellant never lost possession, because he issued a summons in the magistrate's court claiming ejectment from the premises.

Blackwell, for the respondent. The appellant was never really in possession of the premises at all. The material was all supplied by the respondent, and the appellant merely engaged to do the work. From the 24th December to the 4th February there was nobody on the appellant's behalf in charge of the premises. Mere intention to retain possession is not enough; there must be actual possession. If there is no possession *de facto* the builder's lien is lost. The work had been abandoned, and the respondent was fully justified in taking possession. See *Pretoria Racing Club* v. [illegible] [1907]

T.S. 687). The magistrate's court summons merely related to the possession of the outbuilding.

Morice replied.

INNES, C.J.: It is settled law in this court that a builder has a *jus retentionis*, in respect of a building erected by him, for his *utiles impensae;* that was decided in *United Building Society* v *Smookler's Trustees and Golombick's Trustee* ([1906] T.S 623). The same right was held to exist where the buildings were in course of erection, by *Pretoria Racing Club* v. *Van Pietersen* ([1907] T.S. 687), under the circumstances which were present in that case. That right terminates with the loss of possession unless the possession is taken away by undue means. *Pietersen's* case, following upon *Bonino's*, decided that where a builder has been deprived of possession illicitly he is entitled to apply to the Court for a summary order of restitution; and that was the relief sought for by the appellant.

Now a person who applies for such an order must satisfy the Court upon two points: that he was in possession of the work at the date of the alleged deprivation, and that he was illicitly ousted from such possession. To my mind the most important point to be decided in the present case is whether the appellant was in possession of the work on the 4th February, when Faifer handed over the building for completion to the new contractor, May. Here the possession which must be proved is not possession in the ordinary sense of the term—that is, possession by a man who holds *pro domino*, and to assert his rights as owner. It is enough if the holding is with the intention of securing some benefit for himself as against the owner. The whole question is discussed by Voet (41, 2, 3), and he calls that kind of possession "natural possession," as distinguished from juridical possession. The idea is put so clearly in a Scotch case that I desire to quote a very short extract from the judgment of one of the judges—*Cooper* v. *Barr and Shearer* (11 Macpherson's Scots Revised Rep. 633). The question there related to a lien upon a ship which was upon the slip of the person who had repaired her, and who claimed a lien. It was held that the discharge of the ship from that slip into a neighbouring dock, even though she was still connected by a hawser with the slip, was a relinquishment of retention and a loss of possession. Lord ARDMILLAN said (p. 640), "To give a right of lien over a ship it is necessary that the ship should be in possession of the person claiming the lien; not indeed a possession adverse to that of the owner, but still a distinct separate possession of the ship by the person repairing her, the person who claims the lien." But to this natural possession, as to all possession, two elements are essential, one physical, and the other mental. First there must be the physical control or occupation—the *detentio* of the thing; and there must be the *animus possidendi*—the intention of holding and exercising that possession. Let me examine whether these elements were present here, on the 4th February, when spoliation is alleged to have taken place. It is not easy to define what constitutes physical control or occupation of an unfinished and partly completed building. When the house has advanced so far towards completion that the doors are placed in position it may be locked up, and possession of the key would be equivalent to possession of the building. But that cannot be done when the building is only half finished. The position with regard to such a building appears to me to be in ordinary cases somewhat as follows. The builder has the right from the owner to go on the land to erect the building. He has that right for the purpose of continuously working at the building and completing it, and so long as he does so and goes upon the site for that purpose, the work must be regarded as under his control. During his possession he cannot prevent the owner from coming on to the work, but the owner cannot turn him off, and the work itself is under his (the builder's) control.

Now I will assume that this is such an ordinary contract as the Court was considering in *Pietersen's* case. It is not clear that it is, because, as was pointed out by Mr. *Blackwell*, here the material was supplied by the building owner, and not by the contractor. But I will assume in favour of the appellant that the general rule applies, and that this was an ordinary building contract. In such a case mere temporary absence for a short time would not destroy the physical element which is necessary

to constitute possession. Take the extreme case put by Mr. *Morice*, where a builder goes away every night; he still has the *detentio* of the work which he is in course of erecting. If it existed originally, he still has it; mere absence at night does not deprive him of it. But where work is suspended for a considerable time, then it seems to me that if the builder desires to preserve his possession he must take some special step, such as placing a representative in charge of the work, or putting a hoarding round it, or doing something to enforce his right to its physical control. If he chooses to leave the work derelict, then, no matter what his intention may be, the physical element is absent, and he loses possession, even though he may say he intended to resume it or never intended to abandon it: the *animus* may be there, but the *detentio* is absent. It seems to me that a builder who has ceased work, and whom the owner has warned that it will be completed by another if he does not continue it, should take some special step to define his position and assert his control, if he wishes to ask the Court to regard his possession as still existing.

Applying that principle to the circumstances of the present case, what do we find? The facts are in a nutshell. Mr. *Morice* says they have been found in a very one-sided fashion by the trial judge. But I have read the affidavits carefully, and I think that they amply justify the finding of fact which the learned judge has recorded. No workman was on the site after the 23rd or 24th December, until the 4th February, when possession was taken by the respondent and May was put into possession. A period of seven or eight weeks elapsed, during which no work at all was done. And when May was placed in possession there was no semblance of control—no workman or representative of the contractor was there. The work, so far as could be judged, was derelict. Yet on the 25th January Faifer had written that he would have the work completed by the new contractor, May. That was the time for Scholtz, if he wished to retain possession, to assert his control. But he did nothing. He merely replied that he had been delayed three times, in the execution of the work, and that he wanted payment before he went on with it; he took no steps to resume control.

Much reliance was placed by Mr. *Morice* on the fact that a summons was issued by Faifer on the 29th January claiming possession of certain premises, which it is alleged was an admission that on that date Scholtz was in possession of the half-finished building. But I do not think the summons intended to admit anything of the kind. The reference to possession can be read as meaning possession of the outhouse referred to in the summons, which the appellant continued to occupy by leaving in it the woman with whom he was living. It was in respect of those premises that an order of ejectment was asked for—at any rate, the summons is capable of being read in that way—and I do not think we should extend it so as to imply such an admission as Mr. *Morice* contends for.

This being so, can it be said that Scholtz had on the 4th February that physical control of the work which it is necessary for him to have had in order to constitute possession? I do not think upon these facts any court would hold that he was in control of the work. But then his occupation of the outhouse was relied upon. That was erected by Faifer in 1908. The ground belonged to his wife, but the house was erected by and belonged to him. It is evidently a movable building, because, according to the affidavits, it was moved as far as it could be on to the adjoining stand; there was a distance of something like 45 yards between the spot to which it was moved and the place where the work was being carried on. In this outhouse, which the appellant only occupied by special leave granted under the contract, the woman with whom he lived was in residence. It is not clear from the affidavits that Scholtz himself had been there at any time immediately before the 4th February; but supposing he had, I do not think that gave him possession of the work, any more than it would have done if the outhouse had been on the opposite side of the street. I am not satisfied—and it is for the appellant to satisfy us—that he was in possession of the work on the 4th February. It is quite true that the learned judge did not decide that he was not. But he did not decide the other way either; and if one reads his reasons for not intervening, every one of them seems to me to go to show that the appellant