1945 CarswellAlta 63
Alberta Supreme Court

Balemba v. Louis,

1945 CarswellAlta 63, [1945] 2 W.W.R. 605, [1945] 4 D.L.R. 505

Balemba and Balemba v. Louis

Parlee, J.

Judgment: May 30, 1945

Counsel: *A. T. McLean*, for plaintiffs.
N. V. German, for defendant.

Subject: Property
Headnote
Landlord and Tenant --- Notice to quit — Waiver
Landlord and Tenant — Notice to Quit Signed by Only One of Two Co-Owners — "Waiver" of Notice to Quit — Application to Have Tenant Declared Obnoxious.
In the absence of a term in the lease providing otherwise, a notice to quit signed by one only of two co-owners is good. *In re Viola's Lease; Humphrey v. Stenbury*, [1909] 1 Ch. 244, 78 L.J. Ch. 128; *Right v. Cuthell* (1804) 5 East 491, 102 E.R. 1158, applied.
Strictly speaking there cannot be a waiver of a notice to quit. The meaning of what is often called a "waiver" of a notice to quit is that a new tenancy has been created by an act which unequivocally recognizes its existence. The action of the landlords in the present case in applying, before the expiration of the notice to quit, to the Judge of the Court of Rental Appeals to have the tenant declared an obnoxious tenant within the meaning of the wartime rentals regulations *held* not to be a recognition of the continued existence of the lease and not a waiver of the notice to quit. *Blyth v. Dennett* (1853) 13 C.B. 178, 22 L.J.C.P. 72, 138 E.R. 1165, and other cases, referred to.

***Parlee, J.*:**

1 The plaintiffs are the registered owners of the rear suite of 9553-102A Avenue, in the City of Edmonton, and more particularly described as lot 21, block 5, river lots 12 and 14, plan D.

2 On May 20, 1944, they leased the suite to the defendant as from the 25th of that month at a rent to be fixed by the Rental Control Board. The board fixed the rent at $40 per month. On September 30, 1944, there was served on the defendant a notice to quit the premises on November 24, 1944, on the ground that the rent was in arrear for more than 15 days. The notice was signed by the plaintiff, Anna Balemba, and does not purport to be on behalf of or given wth the consent of her co-owner. There was, however, produced on the hearing an affidavit of John Balemba that his wife usually transacted the business in connection with the leased premises.

3 The defendant alleges and it is not disputed that the plaintiff, Anna Balemba, by application dated November 21, 1944, applied to His Honor Judge Crawford (of the Court of Rental Appeals) to have the defendant declared an obnoxious tenant. This application was heard on December 17, 1944, and was dismissed. The plaintiff (applicant) and the defendant both appeared on the application.

4 The plaintiffs now apply for possession of the leased premises. The defendant resists on the two following grounds:

5 (1) That the notice to quit is ineffective as it is signed only by the plaintiff Anna Balemba and does not purport to be on behalf of her co-plaintiff and that there is nothing before the Court to show that she had any authority from her husband to give the notice;

6 (2) That by her application to have the defendant declared an obnoxious tenant the plaintiffs "have waived the notice in question, and by their conduct are estopped from saying that there was not a lease in existence after the 24th of November, 1944."

7 These objections will be considered in the order mentioned. In support of the validity of the notice the plaintiffs rely on *Burrows v. Mickelson* (1904) 14 Man. R. 739, at 742, where Perdue, J. observes:

> Where one of two joint tenants, who are landlords of premises, gives a notice to quit, this has the effect of determining the tenancy, and it has this effect, even where the notice is not expressed to be on behalf of anyone except the person giving it. *Doe d. Aslin v. Summersett* (1830) 1 B. & Ad. 135, 109 E.R. 738, *Foa on Landlord and Tenant*, p. 560.

8 In answer to the statement of Mr. Justice Perdue the defendant cites Lord Ellenborough, C.J. in *Right v. Cuthell* (1804) 5 East 491, 102 E.R. 1158.

9 In *Doe d. Aslin v. Summersett, supra*, Lord Tenterden, C.J., in circumstances as appear to exist here, says at p. 739:

> Joint-tenants are seised not only of their respective shares, *per my*, but also of the entirety, *per tout;* Litt. s. 288.

10 And also (same page):

> Upon a joint demise by joint-tenants upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that holds the whole of all so long as he and all shall please; and as soon as any one of the joint-tenants gives a notice to quit, he effectually puts an end to that tenancy; the tenant has a right upon such a notice to give up the whole, and unless he comes to a new arrangement with the other joint-tenants as to their shares, he is compellable so to do.

11 The case of *Right v. Cuthell, supra*, was relied upon but Chief Justice Tenterden points out that there a specific mode was provided for in giving the notice to put an end to the subsisting lease. He says, p. 740:

> The case of *Right v. Cuthell* which was relied upon at the Bar, is clearly distinguishable. There a lease for twenty-one years from Adams to Cuthell, was determinable at the end of fourteen years, upon six months' notice in writing by landlord or tenant, their respective heirs, executors, etc. under his or their hands. Adams made Fisher, Nash, and Hyrons executors and Fisher and Nash only gave the notice. The case was put, not upon the ground that they were executors, but upon the ground that they were joint-tenants, and that, circumstanced as that case was, where a mode specifically pointed out was to be pursued in order to put an end to a subsisting term, and that mode required the concurrence of all the joint-tenants, a notice by some of the joint-tenants only would have no operation, but that concludes nothing upon a case in which a notice by one only of the joint-tenants would clearly operate upon his share, and where the confining it to that share might work great injustice to the defendant.

12 Both of the above cases were referred to in *In re Viola's Lease; Humphrey v. Stenbury*, [1909] 1 Ch. 244, 78 L.J. Ch. 128. Warrington, J. at p. 246, after quoting from the judgment of Lord Tenterden as above, says:

> That case [*Doe d. Aslin v. Summersett*] only decided that at law in the absence of express terms a notice to quit by one joint tenant is good. The case turned upon the effect of a tenancy from year to year and the nature of the estates of joint tenants at common law, and is not the same as this case, in which the question is whether the *notice to quit is good within the terms of the proviso in the lease*. [The italics are mine.]

13 In *Redman's Law of Landlord and Tenant*, 6th ed., at p. 136, the author discusses the effect of *In re Viola's Lease; Humphrey v. Stenbury* and *Right v. Cuthell, supra*, and the application of the principles of those two cases, and at p. 569, it is stated:

> At common law a notice given by one of several joint tenants (*Doe d. Aslin v. Summersett*) ... is sufficient for the whole, though the terms of the lease may make the concurrence of all necessary (*In re Viola's Lease; Humphrey v. Stenbury [supra]*).

14 See *Foa's Law of Landlord and Tenant*, 6th ed., p. 671; *Woodfall's Landlord and Tenant*, 23rd ed., pp. 445-446; and in *Rourke v. Victorian Financial Guar. & Share Co.* (1894) 20 Vict. L.R. 8, at 10, Williams, J. says (where there were three lessors):

> Here, however, the notice to quit is signed by two of the landlords; the plaintiffs were joint tenants and therefore signature by two of them (if signature be necessary at all) would be sufficient.

15 There being no proviso in the lease before me required to be pursued as in *Right v. Cuthell* and in *In re Viola's Lease; Humphrey v. Stenbury, supra*, and the notice being signed by one of the two joint-tenants, the notice to quit is effective.

16 Secondly, the defendant argues that, by reason of the application of the plaintiffs to have Judge Crawford declare that the defendant was an obnoxious tenant, such application amounted to a waiver of the notice to quit, providing the same was otherwise effective. In support of this contention the defendant relies upon the following cases: *Rex v. Paulson*, [1920] 3 W.W.R. 372, [1921] 1 A.C. 271, 90 L.J.P.C. 1; *Orpheum Theatrical Co. Ltd. v. Rostein*, [1923] 2 W.W.R. 582, 32 B.C.R. 251; *Black v. Stebnicki*, [1930] 2 W.W.R. 656, 39 Man. R. 123; *In re Hohner and Malbeuf*, [1941] 1 W.W.R. 95 (Sask.); *Laidlaw v. Rehill*, [1943] 1 W.W.R. 796 (Alta.); *Hartell v. Blackler*, [1920] 2 K.B. 161, 89 L.J. K.B. 838.

17 The defendant also relies on the observations made in vol. 20, *Halsbury's Laws of England*, 2nd ed., pp. 142-143, pars. 153-154. The last-mentioned paragraph states:

> Questions of waiver usually arise when some act is done by the landlord after the expiration of the notice, which either necessarily or *prima facie* imports the recognition of an existing tenancy.

18 It would appear that, strictly speaking, there cannot be a waiver of a notice to quit differing, in that respect, to a claim to forfeiture for a breach of covenant. What actually results in the former circumstance is that a new tenancy is created.

19 In *Redman's Law of Landlord and Tenant*, 6th ed., at p. 573, the author says:

> In most cases 'waiver' of a notice to quit is a short expression, meaning that a new tenancy has been created (*Blyth v. Dennett*, [1853] 13 C.B. 178, 22 L.J.C.P. 72, 138 E.R. 1165, per Jervis, C.J.). When an effectual notice to quit is allowed to run its course, it determines the tenancy. It cannot then be waived or withdrawn; and where its enforcement is waived, this does not operate as a continuance of the old tenancy, but creates a new tenancy commencing from its expiration.

20 See also *Blyth v. Dennett, supra*, at p. 1166.

21 The question, however, is one of fact in each case whether the tenancy has been so determined.

22 See also *Zouch v. Willingale* (1790) 1 H. B1. 311, 126 E.R. 183, where Gould, J. at p. 184, says:

> In the mere acceptance of rent, the *quo animo* is to be left to the jury agreeable to Lord Mansfield's doctrine in the case in Cowper [*Doe ex dim. Cheny v. Batten* (1775) 1 Cowp. 243, 98 E.R. 1066].

23 The waiver or estoppel relied upon must be an unequivocal act recognizing the continued existence of the lease. In the cases quoted by the defendant the circumstance in each case was either a payment by the tenant to the landlord of rent, or by a distress, both of which have been held to amount to such an unequivocal act by the landlord recognizing the existence of the tenancy.

24 I have not been able to find any case which to my mind could be said to be an authority for the proposition contended for by the defendant.

25 I also refer to *Matthews v. Smallwood*, [1910] 1 Ch. 777, 79 L.J. Ch. 322, where, at p. 786, Parker, J. observes that there is only a waiver of a right of re-entry by the lessor when he "does some unequivocal act recognizing the continued existence of the lease," and at p. 787:

> It appears to me that the defence in each case has to show those circumstances from which the law will imply waiver.

26 The above case was quoted with approval in *Fuller's Theatres & Vaudeville Co. v. Rofe*, [1923] A.C. 435, at 443, 92 L.J.P.C. 116.

27 I am of opinion that the application of the plaintiffs to His Honour Judge Crawford was not such an act as amounted to a recognition of the continued existence of the lease and was not a waiver of the notice to quit.

28 The plaintiffs are entitled to possession of the leased premises. I will fix the date for possession when the order is being settled. The plaintiffs are entitled to their costs.

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