Marquette Law Review

Volume 13
Issue 4 *June 1929*

Article 2

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Repository Citation
Bruno V. Bitker, *Effect of the Padlock Law upon Landlord and Tenant*, 13 Marq. L. Rev. 201 (1929).
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EFFECT OF THE PADLOCK LAW UPON LANDLORD AND TENANT

BRUNO V. BITKER*

THE provisions of the Prohibition Act, Section 22, Title II, (U. S. C. A. Title 27, Section 33) concerning the abatement of a nuisance have been applied to a variety of facts and the law seems well settled. The fact that the landlord, free of participation in the acts constituting a nuisance, suffers with the tenant, is no defense to the nuisance suit. The object of the padlock action is to abate and prevent a nuisance, regardless of by whom committed.[1]

The effect upon the relationship of landlord and tenant, however, after the commission of a violation of the Prohibition Act, is not so clearly settled by cases in point. The problems arise under various conditions: first, the landlord's rights prior to institution of nuisance proceedings by the government; second, rights of landlord after the government has instituted padlock proceedings; and third, rights of landlord after entry of decree by the Court, padlocking the premises.

I. RIGHT OF LANDLORD PRIOR TO PROCEEDINGS BY THE GOVERNMENT

In cases in which the leases contain provisions against the sale or possession of intoxicating liquors on the demised premises by the tenant, or similar provisions against the breach of any laws, the rights of the parties are subject to the terms of the contract. A breach of this provision would undoubtedly give the landlord the same right to terminate the lease as he would have upon the breach of any other provision of the lease. Right to recover rentals due thereafter or any other damages suffered by reason of the breach would depend upon the terms of the contract.

The problem which faces the landlord, however, is his right to declare a forfeiture against the tenant who violates the Prohibition Act where the lease is silent upon the particular question or fails to contain a saving clause against the violation of a Federal law. This omission is not unusual and most leases which contain prohibitions against law violations refer only to the ordinary health and sanitation laws or building restrictions of the municipality or state and omit reference to Federal statutes. At common law the landlord had no cause of action

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[1] The latest case before the Supreme Court of the United States decided April 7, 1928, is *Grossfield* v. *United States*, 276 U.S. 494.

for forfeiture of a lease based upon the illegal use of the premises by the tenant and no covenant can be implied to create a basis for an action of forfeiture.[2] This is certainly true in Wisconsin where by statute no covenants may be implied in leases exceeding three years.[3]

Unless protected under the contract with his tenant, and having no cause of action at common law, the landlord is apparently helpless in preventing the possibility of subsequent violations on his own property by his tenant.

The Prohibition Act, however, has furnished to the landlord a means of protecting himself. The act provides as follows:

Section 23, Title II, National Prohibition Act, Last Paragraph:

> Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.

The landlord is thus given a statutory right of action under which he can proceed, regardless of his failure to have protected himself under the terms of the lease. The failure of the landlord to avail himself of this protection, assuming his knowledge of the nuisance, may be indicative of his willingness to close his eyes to the true situation and to assume the risks of action by the Government. But the landlord who acts speedily upon learning of the nuisance is not likely to be impeded by the Government in his desire to avail himself of the protection which the Government has provided for him under just such circumstances.

Since the right thus granted, being in the nature of a Federal statutory cause of action, and assuming the requisite amount of Three Thousand ($3,000) dollars as required by the Judicial Code is involved, the proper forum to which to apply for relief would seem to be the United States Courts. The right to institute the proceeding in the United States Court has been determined by the United States District Court for the Eastern District of Wisconsin in an unpublished case, *Lincoln Realty and Investment Company* vs. *Knuth,* decided March 11, 1926, and affirmed by the Circuit Court of Appeals for the Seventh Circuit, January 5, 1927.

The defendant in that case raised squarely the question of jurisdiction, since both parties were residents of the state of Wisconsin. The Court held, however, that the relief sought being specifically provided for by Federal statute, the Federal right appearing on the face of the complaint, and the requisite amount being present, the Federal Court had jurisdiction.[4]

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[2] *Pickalo* v. *Mack,* 217 Mich. 274, 186 N.W. 582.

[3] *Goldman* v. *Dieves,* 159 Wis. 47, 149 N.W. 713.

[4] The general principles applicable to such jurisdictional question are discussed in: *Binderup* v. *Pathé Exchange,* 263 U.S. 291.

At the same time there seems to be no reason why the statute cannot be enforced in the courts of those states which recognize the rights of their own courts of general jurisdiction to apply the laws of the United States.[5]

The practical difficulties to the landlord are apparent. He cannot institute suit under Section 23 without evidence of a violation upon which to substantiate his complaint. He is thus put upon the duty of ascertaining from time to time, as best he can, whether or not his property is being used by his tenant in violation of the Prohibition Act. When the fact of violation is brought to his attention, the landlord permits a continuance of the tenancy thereafter at his own risk.

In the Grossfield case the landlord testified that the only knowledge he had of the violation was a newspaper report of a raid, that he thereafter remonstrated with his tenant who assured him that the violation would not be repeated. The government instituted padlock proceedings two and one half months later. The United States Supreme Court said:

> The circumstances called for prompt action and the failure of the owners of the premises to take any steps to remove the tenants until after the suit had been brought evinces a lack of concern not easily reconcilable with a real desire on their part to make sure that the unlawful use of their property would not be repeated.[6]

The statute and the Court could have notified landlords no more clearly of the necessity of prompt and speedy action on behalf of the landlord who desires to protect his property against padlocking, than by this quoted statement of the Supreme Court.[7]

The relief sought may be denied the landlord upon the ground of waiver as in any other case in which the landlord loses the right of forfeiture by acquiescing in the breach through acceptance of benefits under the lease after knowledge of the breach. On this very point, the court, in *United States* vs. *Boynton,* 297 Fed. 261, p. 269 declares:

> Clearly only a lessor who has not acquiesced in the maintenance of a nuisance may complain of such nuisance as a ground for forfeiture of the lease.

And in Wisconsin in a case where the situation was reversed in that the tenant sought to be relieved from the lease, because of a violation of the Prohibition Act by a co-tenant, the court says:

> Assuming, but not deciding, that a right of forfeiture arose, by the continued occupancy of the premises and payment of the rent in accord-

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[5] The particular relief has been granted in Pennsylvania in: *Burke* v. *Bryant, et al,* 128 Atl. 821, 283 Pa. 191.

[6] *Grossfield* v. *U. S.* 276 U.S. 494.

[7] See, too, *Grossman* v. *United States* 280 Fed. 683 (7th C.C.A.).

ance with the terms of the lease the International Banking Company waived its right to declare a forfeiture. . . . . While we find no case in point, we see no reason why acts which are held to amount to a waiver of forfeiture by a landlord do not have the same legal consequences as do those of the tenant when a forfeiture is claimed by him.[8]

The Prohibition Act, therefore, has given to the landlord an additional cause for forfeitures, not granted to him under the common law, and to which he may not be entitled under the contract with his tenant.[9] The right to the relief however, appears no broader than a right of forfeiture for any breach of the lease which would otherwise warrant a forfeiture. The same general principles as to acquiescence and waiver appear applicable, particularly since the statute gives to the landlord an "option," which he can exercise or waive.

II. Rights of Landlord After Institution of Padlock Proceedings by the Government

This article is merely an attempt to point out briefly certain questions effecting landlord and tenant and is not concerned with rights of the landlord as against the Government in a padlock proceeding. Frequently the landlord is advised for the first time of the acts of nuisance on his property upon being served with summons in the Government's suit. In truth the institution of suit by the Government may be only constructive notice since it is unnecessary to make the owner of the property a party defendant.[10]

The provisions of Section 23, under which the landlord may declare a forfeiture, are still open to him, however. This may be accomplished through the filing of a cross-complaint, in which the prayer for relief begs judgment declaring a forfeiture of the lease against the landlord's co-defendant. The right to thus cross-complain has been determined in a number of cases.[11]

If the landlord has not been made a party to the Government's action, he may intervene, and obtain the relief provided in Section 23, assuming the innocence of the landlord with respect to the violation of the Prohibition Act.[12]

But, as was said in the Boynton case, the landlord who seeks the relief must do so in good faith and must be free of knowledge of or

[8] *Cox* v. *Miller Brewing Co.*, 192 Wis. 297.

[9] As to the necessity generally of electing between declaring a forfeiture for cause and waiving the right by recognizing the continuance of the lease see *Wilson* v. *Demos*, 185 Wis. 42.

[10] *United States* v. *Marhold*, 18 F. 2nd 779.
Denapolis v. *United States* 3 F. 2nd 722.

[11] *Grossman* v. *United States*, 280 Fed. 683 (7th C.C.A.).

[12] *United States* v. *Boynton*, 287 Fed. 261.

participation in the acts complained of by the Government. In the Grossman case and in the Boynton case the Court granted the forfeiture upon the landlord's request, enjoined the use of the property against the sale of intoxicating liquors and accepted the landlord's bond to insure the observance of the injunction. On the other hand, the nuisance suit being solely preventative,[13] there appears no reason why in the final decree the court cannot order a forfeiture of the lease to an innocent landlord and at the same time a padlocking of the premises for one year because the likelihood of continuance of the nuisance seems clear.

Thus, in *Schleider* vs. *United States,* 11 Fed. 2nd 345 (cited with approval by the United States Supreme Court in the Grossfield case), the landlord upon being advised of the nuisance, caused the eviction of the tenant and the premises were in fact closed at the time of the trial. The Court says (p. 347):

> It is the contention of appellants that the property of an innocent owner cannot be ordered closed after the ejectment of the tenant and the abatement of the nuisance. There would be much force in this contention if it were not for the provision allowing the owner to bond the injunction. This is a reasonable requirement as a guaranty of good faith, and to insure that the property will not again become a nuisance, for a period sufficient for it to lose its character and reputation as a place where liquor may be purchased. This provision affords ample protection to an innocent owner.

The landlord having the right to seek the relief provided for in Section 23 for forfeiture of the lease in the same action by which the Government seeks to padlock the premises, and assuming that under given circumstances his prayer would be granted, a bond accepted, the premises restored to him free to be used for any purpose excepting the unlawful use complained of, he is still confronted with the problem of determining whether he cares to forfeit the lease and release the tenant from obligations thereunder, or prefers to allow the lease to remain in full force and affect.

III. Landlord's Rights After Entry of Decree Padlocking Premises

Since the forfeiture of the lease prior to suit by the government or in the same action with the government's suit does not of itself prevent padlocking the premises, the landlord's problem with respect to the lease appears the same before, during, and after the entry of the decree. If the landlord prevails, the contract is cancelled, the premises may be restored to him, but his right of action against the tenant for rentals

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[13] *Murphy* v. *United States,* 272 U.S. 630.

thereafter would appear to have been effectively terminated under ordinary circumstances. On the other hand there appears no reason why the landlord may not waive his right to a forfeiture, permit the lease to remain in full force and effect, entitling him to the rentals reserved.

Thus, in *United States* vs. *Pepe,* 12 F. 2nd 985 (2nd C. C. A.) the court says:

In the instant case the premises had theretofore been padlocked for a year. Though the owner had thereupon begun dispossess proceedings, he did not pursue them; on the contrary, he permitted the lease to remain in force and after the year was up accepted the back rent. In so doing the owner acted within his legal rights; he was not obligated to terminate the lease and thereby to jeopardize the collection of the rent.

The right to thus collect the past rentals, accruing during the period of the padlock has been passed upon squarely in a recent case.[14]

Of course, if the lease contains a saving clause whereby the tenant's liability carries through after eviction, the landlord may declare a forfeiture and still recover for subsequent sums due.[15] Regardless, however, of whether the landlord declares or waives the forfeiture, his right to collect rentals during the period of the padlocking would depend upon his non-participation in the illegal acts.

The serious question for consideration in each case, therefore, arises in determining the fact of participation by the landlord. If the lease was originally made for the purpose of providing premises upon which the law could be violated, although not so expressed, the courts will not enforce the terms of the lease. This is on the general principle that the courts will not recognize the rights of either party to any illegal contract.[16] It would seem to be proper for the tenant in defending the action on the theory of illegality to introduce evidence of the acts and conduct of the parties before and after making the lease to permit the court or jury to pass upon the question of whether the lease, silent as to the illegal use, was in fact entered into for that purpose.[17]

Assuming, however, that the original contract was lawful, the subsequent participation by the landlord in the illegal acts would prevent the right of recovery, no matter how slight was the participation.[18] On

[14] *Goellet* v. *National Surety Company* (N.Y.), 164 N. E. 112.

[15] A lease containing such a clause is discussed in a recent Wisconsin case. *Selts Investment Company* v. *Promotors of Federated Nations.* (Wis.) 222 N.W. 812.

[16] *Koepke* v. *Peper,* 155 Ia. 687, 136 N.W. 902.

[17] *Kessler* v. *Pearson,* 126 Ga. 725.

[18] *Harbison* v. *Shirly,* 139 Ia. 605, 19 L.R.A. (N.S.) 662.

the other hand, it would seem that mere knowledge of the subsequent unlawful use although sufficient to constitute a waiver of the right of forfeiture, does not make the landlord a participant therein. It has been said: "The lessor is not the keeper of the conscience of the lessee, and has no police control over him in such matters. . . . ."[19]

In the event of a padlocking of the premises, therefore, where the original lease was in fact entered into for a lawful purpose, the subsequent illegal use, though known to the landlord, does not prevent recovery of rentals accruing during the padlock period, if the landlord did not participate in the prohibited use. While knowledge of the intended use prior to or at the time of the execution of the lease would taint the contract, knowledge acquired thereafter does not constitute participation.[20]

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[19] *Ashford* v. *Mace,* 103 Ark. 114, 39 L.R.A. (N.S.) 1104.
[20] *Ibid.*