*Present* : Bertram C.J. and Porter J. 1923.

SILVA *v.* OBEYESEKERA.

*233—D. C. Negombo, 14,509.*

*Lease of coconut estate—Negligent cultivation—Forfeiture—Is malignant abuse necessary for forfeiture—Urban and rural tenements—Framing of additional issues during the trial.*

In every case it is a question for the Judge whether any particular abuse of the leased property may be more appropriately dealt with by damages only, or by cancellation of the lease.

Negligent cultivation may in any particular case, according to the circumstances, be a ground for cancellation of a lease.

Voet's observation that it would not be just to cancel a lease, except on the ground of gross and malignant abuse, must be read with the context in which it occurs, and with special reference to leases or urban tenements where, in the nature of things, any abuse entitling the lessor to cancellation would almost necessarily be malignant.

It is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice; and it is not a valid objection to such a course being taken that they do not arise on the pleadings.

THE plaintiff instituted this action against the defendant (*a*) for a cancellation of a lease on the ground of violation of covenants in the lease to uproot all the cinnamon bushes around and about the young coconut plants and to protect all the young coconut plants from cattle; and (*b*) for Rs. 2,595 as damages in consequence of the destruction of the plants.

2. The defendant-appellant in his answer denied that he had violated the covenants of the lease, or that he had caused any damages to the plaintiff, and stated that this was a dishonest attempt on the part of the plaintiff to have the lease cancelled, as the price of coconuts had risen and the land became valuable.

3. The following issues were framed :—

(*i.*) Has the defendant in violation of the terms and conditions of the lease—

(*a*) Allowed cattle to destroy some of the coconut plants in the leased premises ?

(*b*) Failed and neglected to uproot the cinnamon bushes ?

(ii.) Has the defendant failed and neglected to take due and proper care of the leased premises ?

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(iii.) What damages, if any, is the plaintiff entitled to recover from the defendant ?

(iv.) Was the defendant bound to uproot the cinnamon bushes as soon as he took possession of the leased premises ?

(v.) Is the plaintiff entitled to have the lease cancelled ?

The District Judge (W. T. Stace, Esq.) delivered the following judgment :—

The plaintiff leased to the defendant in 1915 a coconut land of 69 acres odd for a period of fifteen years. The defendant agreed to root out the cinnamon on the land, tend the coconut plants, keep them from injury by cattle, and generally to care for the land. The plaintiff asserts that the defendant has generally neglected to carry out these terms of the lease, that he has failed to uproot the cinnamon, has allowed cattle to eat the young plantation, has allowed jungle to choke and stunt the young trees, and generally abused the land. He asks for a cancellation of the lease and damages at Rs. 2,595.

The case really turns upon the question whether I am to believe Mr. Beven and Mr. G. Schrader on the one hand, or whether I am to believe Mr. C. L. de Zylva on the other. The former two gave evidence in support of the plaintiff; the latter, assisted by one Karunaratne, for the defendant. These three gentlemen all claim to be independent witnesses, who, as coconut experts, or at least, as coconut planters and valuators of wide experience, visited the land for the purpose of this case, Mr. Beven visited it on September 27, 1920; Mr. Zylva on October 31, 1920; and Mr. Schrader on March 8, 1921. The main points in their evidence are as follows:—Mr. Beven says the young plantation was choked with jungle. That there were numerous vacancies, caused (it is suggested by plaintiff) by neglect of the lessee, that of the 40 acres of cinnamon only about 10 acres had been uprooted, that numerous young coconut plants had been burnt and singed, and many more eaten by cattle. He saw many head of cattle wandering about in the estate. Mr. Schrader's evidence is similar. When he went, 6 months after Mr. Beven, a good deal of cinnamon had been uprooted, but about 15 acres was still left, there were about six hundred vacancies, more than half the young plants had been eaten by cattle, and there was jungle in the land. Mr. Zylva tells a different story. There was only a little jungle, and they did not interfere with the plantation. There were signs of manuring, Mr. Schrader said there were no signs of manuring. The cinnamon had been systematically cut away in circles of about 5 feet round the coconut trees (it is admitted that, if this is so, little or no harm would be caused to the coconuts). Not a single plant within the estate had been eaten by cattle except two or three accidentally near the entrance gate. The vacancies were over 5 years old (so must have existed when defendant took the lease, and are not attributable to neglect of the lease). . . . .

If only half the evidence of Messrs. Beven and Schrader were accepted, it would show scandalous neglect by the lessee. The latter himself gave evidence, and made a very poor impression which I will sum up by saying that one could well believe him to be an incompetent and neglectful planter. On the question of how the vacancies were caused there is not much evidence. Messrs. Beven and Schrader admitted that it was not possible to say positively how old they were, although Mr. Zylva made no bones about declaring them to be more than five years old. But on such evidence as there is, and in view of the general circumstances of the case, it seems to me by far the most probable thing that they have been caused by the lessee's neglect.

The defendant has put forward as part of his defence the plea that the lease does not stipulate when the cinnamon was to be up uprooted. Seeing that the lease was for 15 years, I think it would be reasonable to read it as meaning that the uprooting should begin as soon as the lessee entered upon occupation, and should be completed at as early a period as reasonable. But even if this view is not taken, the other damage by itself amounts, as is shown by the evidence of Messrs. Beven and Schrader, to far more than the plaintiff has claimed. He appears greatly to have underclaimed.

Lastly, can the lease be cancelled? It is clear that the damage done to the estate is not of a temporary character. Trees have been eaten by cattle and permanently set back. Others are stunted by neglect. The whole estate will necessarily be worth much less at the end of the lease than it would have been, but for defendants abuse of it. I think it is clear from the case of *Perera v. Peris* [1] that in such circumstances a lease may be rescinded. The defendant is not a fit person to be in charge of valuable lands.

I answer the issues—

(i.) (*a*) Yes.
(*b*) Yes.

(ii.) Yes.
(iii.) Damages claimed (at least).
(iv.) As soon as reasonable after taking possession.
(v.) Yes.

*Bawa, K.C.* (with him *Samarawickreme, R. L. Pereira, F. de Zoysa,* and *Navaratnam*), for defendant, appellant.

*H. J. C. Pereira, K.C.* (with him *E. W. Jayawardene* and *Amarasekera*), for plaintiff, respondent.

October 9, 1922. BERTRAM C. J.—

This is an appeal against a judgment of the District Court of Negombo. The action was brought for the forfeiture of a lease and for damage caused to the lessor by breach of the covenants of the lease and by negligent cultivation. The learned Judge has found that the covenants of the lease were not observed, and that apart from the covenants the lessee was guilty of gross negligence in the cultivation of the property, a coconut estate. He has found for the plaintiff. He has accordingly decreed a forfeiture of the lease and payment of the damages claimed.

The question was primarily a question of fact. The learned Judge heard two expert witnesses on one side and another expert witness, together with various other witnesses, on the other. He was entitled to accept the expert evidence called for the plaintiff, and there is undoubtedly ample evidence to support his conclusion that the lessee was guilty of gross negligence. In rejecting the evidence of the expert witness called for the defence, the learned

[1] *(1912) 15 N. L. R. 313.*

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Judge took occasion to comment upon that evidence in very severe terms. I cannot help thinking that it would have been better if the learned Judge, in rejecting the evidence, as he no doubt was entitled to do, had expressed himself in a less impassioned and rhetorical manner. A judge may sometimes have occasion to comment on evidence given before him, but it is generally best that he should do so in measured terms. These judicial denunciations remain on record and inflict a permanent stigma on the person affected. The learned Judge's impressions, derived from the behaviour of the witness in the witness box, may of course be well founded, but it is always possible that he is mistaken. I should myself have been more impressed by the view of the learned Judge in this case, if he had seen his way personally to inspect the land in question and so to test, as far as it was possible to test, the evidence of the witness. It is not necessary, however, for us to express an opinion ; the learned Judge has weighed the two bodies of testimony and has decided in favour of that adduced by the plaintiff, and the evidence, speaking generally, is of such a nature that we should not be justified in revising his conclusions that there was negligent cultivation, and, indeed, cultivation which may be described as grossly negligent.

The principal question which arises in this case is a question of law, namely, the degree of misuser of an agricultural property which would justify the Court in forfeiting the lease. The question arises, not as it would normally arise under the English Law on an express condition for forfeiture contained in the lease, but upon a supposed principle of the Roman-Dutch common law. I was urged by Mr. Bawa that according to that principle a Court would not forfeit a lease for misuser unless it is shown that the misuser was "malignant." He relies upon a passage of *Voet 19, 2, 18*, which declares that in Voet's opinion it would not be just that a lessee should be ejected except on the ground of misconduct which is at once gross and malignant. *Ita quoque eum non nisi ob notabiliorem in re conducta versationem malignam dejici, æquum est.*

It certainly cannot be said that there was any malignant abuse of the property in this case. All that was found was gross negligence. It remains to examine how far this expression of opinion on the part of Voet must be taken to declare the law. The question as to what is the nature of the misconduct which would entitle the lessor to eject his lessee before the expiration of the term, and whether that misconduct must necessarily be "malignant," is part of a larger question, *i.e.*, under what circumstances is a lessor entitled to eject his lessee before the expiration of the term ? It would be convenient that we should first discuss this general question.

The source of almost everything which has been written by the Roman-Dutch commentators on this subject to a brief passage

in Justinian's Code, *Chapter 65, De Locato et Conducto, 3.* That passage is as follows:—

> Idem (i.e., *The Emperor Antoninus*) A. Flavio Callimorpho. *Diætæ, quam te conduct am habere dicis, si pensionem domino insulæ solvis, invitum to expelli non opertet, nisi propriis usibus dominus esse necessariam eam probaverit aut corrigere domum maluerit aut tu male in re locata versatus es.*

It is the final phrase in this passage—*aut tu male in re locata versatus es*—which is the subject of all the comments we have had occasion to consider. It should be observed that the paragraph is not a general statement of the law by a jurist, but is a particular enactment in the form of a rescript by the Emperor Antoninus (presumably Antoninus Pius). It should also be observed that it refers solely to urban tenements. The particular tenement mentioned is a *diæta*. At the time of the Roman-Dutch commentators, the accepted reading was here apparently erroneous, and the word *æde* was substituted for *diætæ*. *Diæta* means an apartment—generally an apartment in an *insula*, that is to say, a block of lodgings. It may be compared to a flat in a block of modern "mansions." It is sometimes translated "dining room," and dining rooms appear to have been let separately in the buildings referred to. (See Voet in the paragraph under discussion and the passage in the *Digest* to which he refers *19, 2, 27.*) But Forcellini insists that though a *diæta* may be a dining room, it is not necessarily a dining room. The Emperor thus declares that a lessee of a *diæta* who has paid his rent to the owner of the *insula* cannot be ejected against his will, except for three causes: (1) the fact (proved to the satisfaction of the Court) that the landlord requires the apartment for his own use; (2) the fact that he wishes to undertake repairs; (3) *mala versatio* on the part of the tenant.

As I have above observed, this rescript relates purely to urban tenements. Urban tenements (*urbana prædia*) are throughout referred to separately in the text and in the commentators. The word used for a tenant of the former is *inquilinus*, and he is said to inhabit (habitare) the tenement. The word for the latter is *colonus*, and he is said to enjoy it (*frui*). It is important that we should bear this distinction in mind.

Let us now turn to Voet's comments on this passage; it should be observed that these begin in paragraph 16. He discusses the circumstances under which a tenant may be ejected from either of these tenements (*de domo vel fundo*). He distinguishes first of all cases in which the expelled tenant is entitled to no damages, but only to a remission of such rent as may have been paid in advance, from cases in which he is entitled to claim damages. Proceeding to discuss the former class, he refers to the passage in the Code above cited, and using a text in which the mistaken reading *æde* was substituted for *diæta*, he speaks of a *domus elocata*, and specifies

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three grounds on which a landlord might eject a tenant. He states the third in the exact words of the Code :—*Vel conductor in re conducta male versetur.*

It will be observed that he was here speaking solely with reference to urban tenements. The other causes for ejectment which he mentions, that is, non-payment of rent, the expiration of the lessor's title and the fact that the lease was graned by enemies in temporary occupation of the country, refer to both urban and rural tenements.

These causes for the ejectment of a tenant, enunciated in paragraph 16, are the subject of fuller comment in paragraph 18. He is still generally dealing with both rural and urban tenements. Note the phrase *colonos ac inquilinos*. But as I read it, in his fuller comment on this particular cause :—*Mala versatio in re conducta*, he is still referring only to urban tenements. He insists that the *mala versatio* referred to must not be negligible, or merely a breach of the covenants which stipulate for the manner in which the property is to be used but must be some grave and injurious misuser of the property. He observes that inasmuch as the lessee of a dining room (*cænaculum*) could not put an end to his tenancy because of the non-execution of repairs which only gave him slight inconvenience, so also it is reasonable (*æquum est*) that he himself should not be ejected except for some signal and *malignant* misbehaviour in the property leased. Voet so far is here speaking not of the tenant of a farm, but of the lessee of a *cænaculum* in an *insula*. He says that to justify his expulsion the misbehaviour of the tenant must be "malignant," but it is, indeed, difficult to imagine in such a case any misuser of the premises such as would entitle the landlord to cancel the lease, which would not be " malignant. "*

Most of the other commentators, whom I have consulted, also treat the passage as having reference to urban tenements. *Christinæus* (*II. Decisio CXV.*) whose comments in one of the fullest says :—

> *Tertio expelli potest in quilinus quando in re locata male versatur, hoc est, facit rem deteriorem quam accepit tempore contractus.*

It will be observed that he uses the word " *inquilinus.* " The examples he gives are the cutting down of trees (presumably in an urban garden) and the burning down of staircases, and he further observes that in all leases there is a tacit condition that the lessee shall behave on the leased property :—"*Bona fide eo modo quo solent frugi et temperantes homines versari.*" By the examples he quotes, and by his reference to the necessity of the observance of *bona fides*, Christinæus appears to be of the same view as Voet, viz :—That the abuse entitling a landlord to cancel must be malignant abuse. But it must be observed that subject to a further

* Van Leeuwen quotes Sichardus as suggesting that what the Emperor primarily had in his mind was the user of the premises as a brothel.

observation of Voet, which I will consider immediately, both of them are speaking with reference to an Imperial rescript referring solely to urban tenements.

The question next arises : Do the principles of this Imperial rescript, though originally enacted with regard to urban tenements, extend to rural tenements ? Here we find ourselves on controversial ground. *Van Leeuwen* (*2, 4, 22, 1*) mentions that two views were held. Carpzovius, contrary to the general opinion, maintained that the enactment should not be restricted to urban tenements. Van Leeuwen, with all respect to the eminence of Carpzovius, prefers to follow the general body of commentators, who took the opposite view, considering the weight of opinion to be overwhelmingly on their side.

> *Ubi hæc eadem non solum in domo, sed etiam in fundo aliave re locata obtinere sentit contra Sichard, & alios communiter,* qui dispositionem d. leg. 3. Cod. Locat. *ad prædia urbana restringi volunt : quorum tamen sententiam propter nimian rationis disparitatem, pace tanti Viri fummique Practici. sequi malim.*

It seems to me that Voet, at any rate as far as the question of misuser is concerned, must be taken to be on the side of Carpzovius. After the passage quoted above, he proceeds to add that, inasmuch as the methods of abuse which should be considered sufficient to justify ejectment are not found to be enumerated in the law, it would appear that the whole question must be left to the determination of a prudent and careful judge, as to whether the particular abuse is to be restrained by ejectment or simply by damages, or whether it should be, on the ground of its triviality, be ignored altogether. It is clear that he does not mean this expression of opinion to be restricted to urban tenements, because he proceeds to add that he is of this opinion whether the abuse in question is manifested in private matters or in public matters, *and even in the case of exactions by farmers of taxes.*

The question of the applicability of this rescript to rural tenements is discussed by the eminent French civilian, Domat (*Bk. 1 Tit. 4.* Having first quoted the rescript with reference to urban tenements, *section 3, paragraph 13-16,* and *section 4, paragraph 1*), he observes as follows :—

> "All that has been said in the first three sections is common to leases of farms, and ought to be applied to them, except some articles of which it is easy to judge that they have no relation to them. Thus what has been said of the landlord's right to turn the tenant out of his house, if he has occasion for it himself, has no relation to a lease of land. In the same manner it would be easy to judge of the other rules which ought not to be applied to leases of farms."

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We are, therefore, in this position, that both in the original texts and in most of the commentators, *mala versatio*, as a ground for ejection, is referred to only in connection with urban tenements, and it is by no means certain that the principles of the enactment, in which the phrase occurs, are to be considered as having been extended to rural tenements. The question therefore arises :—Is there no other passage in the original texts which has been referred to and adopted by the Roman-Dutch commentators as stating the law with reference to agricultural properties ? There is such a passage, though strangely enough it is left without comment or reference by Voet, Van Leeuwen, Grotius, Grœnewegen, Christinæus, and other commentators. Voet, indeed, does refer in the fullest and most illustrative manner to the obligations of a tenant of a farm. (See *19, 2, 19.*) He refers to unseasonable cultivation, deterioration of trees and vines by unskilful cultivation, neglect of buildings and water channels, change of methods of cultivation, cutting down of fruit-bearing trees, and all sorts of other abuses ; but he speaks of these solely from the point of view of the lessor's rights to damages, and nowhere suggests that they also confer upon him a right to cancel the contract.

The passage above referred to is an opinion by the jurist, Paulus, and will be found in the *Digest* in the Chapter *Locati et Conducti 19, 2, 54.* The case submitted was that of a lease of a farm where the lessee and lessor had bound themselves by mutual penal stipulations, in the event of the lessor ejecting the lessee, or in the event of the lessee quitting the holding before the expiration of the term. The lessee had made default for two years in the payment of the rent. Can he be ejected without apprehension of an action for the penalty ? The reply of the jurist was that though there was no express reference in the penal stipulation to the payment of rent, neverthless that it was reasonable to treat the agreement not to expel the tenant during the term as subject to the payment of rent *and proper cultivation.* It should be observed that Paulus does not say that a tenant will be expelled during his term for improper cultivation, but he treats the obligation to pay rent and the obligation to cultivate properly as being on the same footing, and expresses the opinion that a tenant may be ejected for breach of the former obligation during the term, even though there is a penal stipulation to the contrary. By coupling rent with proper cultivation he seems to imply that the tenant may similarily be ejected during the term for improper cultivation. This is the sense in which the passage is understood by two commentators, Gerard Noodt and Zœsius. Gerard Noodt (see *19, 2*) discusses the obligations of tenants and insists on the duty of rural tenants :—

> *Ante omnia vero placet Gaio colonum curare, ut opera rustica suo quoquo tempore faciat, nimirum, ne intempestiva cultura deteriorem fundum faceret.*

With regard to town tenants he quotes the institutes as declaring that they must behave in the houses leased to them as befits a good *pater familias* :—*In domo conducta versari ut oportet bonum patrem familias*. The commentator then recites the causes for which a tenant may be expelled, even although there is an express agreement that he shall not be ejected from the farm during the term of the lease. One of the causes is improper cultivation.

> *Nam verisimile est (quod Paulus respondit) ita convenisse de non expellendo colono intra tempora præfinita: si duo observaverit, unum est; si ut oportet, coluerit; alterum, si pensionibus paruerit.*

Similarly Zœsius combines the opinion of Paulus with the rescript of Antoninus, and, enumerating the causes for which a tenant may be expelled, states as the third of such causes—misconduct in the leased property :—

> " *Subest enim conditiœ, ita colat, ita inhabitet, ut oportet: qua non servata non est, quot quœratur se expelli.*"

> " For there is an implied condition that he shall so cultivate, so occupy, as he ought to do and this condition not being observed there is no reason why he should complain that he is ejected." (*XIX., 2, 36.*)

It would appear to me, therefore, that the authorities available to us for the proposition that a lessee of agricultural property may be ejected before the expiration of his lease on the ground of negligent cultivation, consists of the opinion of Paulus, above cited, and the two comments by Gerard Noodt and Zœsius. It remains to be determined whether the expression of Voet, with regard to the necessity of misconduct being "malignant" in the case of urban leases, should be held to be authoritative, with regard to improper cultivation under rural leases also.

It always seems to me interesting, in cases such as the present, to examine the parallel development of the Roman law in France. I have quoted the opinion of Domat that it is for a Court to determine to what extent the provisions of the Roman law, with regard to the obligations of urban tenants, must be considered as applying to rural tenements. This question was considered in the course of the preparation of the Code Civil, after the French Revolution. The redactors there decided that the Roman principle, that a landlord might eject a tenant if he required the property for himself, was not founded on justice, and confined it only to cases in which the landlord had so stipulated in his lease. (Art. 1761.) The obligation of the tenant, under the Roman law, to occupy as a good *pater familias*

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(*Institutes 3, 24, 5*) was adopted in the Code (Art. 1728); with regard to resiliation for misuser the Code declares (Art. 1766).

> *Si le preneur d'un heritage rural ne le garnit pas les bestiaux et les ustensiles necessaires a son exploitation, s'il abandonne la culture, s'il ne cultive pas en bon pétre de famille, s'il emploie la chose louée oć un autre usage que celui auquel elle a ete destinée, ou, en general, s'il n' execute pas les clauses du bail, et qu'il en resulte un dommage pour le bailleur, celui-ci peut, suivant les circonstances, faire resilier le bail.*

The French Code thus in effect declares that it is a question of fact for the Judge, whether negligent user or management or breach of covenants should entitle a lessor to cancel a lease, to be decided according to the circumstances of the case.

In the South African Courts there seems very little authority as to the right of the lessor to terminate the lease for negligent cultivation and the conditions subject to which such action may be taken. Nathan quotes no South African decision on the particular point under consideration. Maasdorp cites a case where the Court decreed a cancellation on the ground of failure to feed ostriches on an ostrich farm. (*Maasdorp, vol. 3, p. 233*), and also another case which appears to be a case of an urban tenant. Morice (*English and Roman-Dutch Law, 2nd ed. p. 177*) says :—

> " If it appears from the terms of a lease that the fulfilment of certain stipulations are conditions of the lease, the Courts will enforce forfeiture;"

but he cites no very convencing authority for this general proposition.

The only case on our own books, in which the right to cancel a lease of agricultural property for misconduct is discussed, is the case of *Perera v. Peris* (*supra.*) The judgment was a decision of Lascelles C.J. sitting alone, and though it is one of very great cogency, the learned Chief Justice who bases his judgment on the phrase *in re conducta male versetur* takes no note of Voet's opinion that the *malâ versatio* only gives a right to cancellation, if it is malignant.

This being the position of the authorities, my opinion is as follows:—

(1) We ought, I think, to adopt as of general application Voet's suggested rule that in every case it is a question for the Judge whether any particular abuse may be more appropriately dealt with by damages only or by cancellation of the lease.

(2) Negligent cultivation may in any particular case, according to the circumstances, be a ground for cancellation of a lease.

(3) Voet's observation that it would not be just to cancel a lease except on the ground of gross and malignant abuse must be read with the context in which it occurs and with special reference to leases of urban tenements where, in the nature of things, any abuse entitling the lessor to cancellation would almost necessarily be malignant.

(4) In the present case the learned District Judge must be taken to have found that the negligent cultivation was of such a degree and character that it could not appropriately be dealt with by damages alone, but called for the cancellation of the lease, and, I think, that there is adequate evidence to justify his finding.

There are, however, certain other aspects of the case which have to be considered. I will proceed to set out these points for consideration. After the first expert witness called for the plaintiff had given his evidence, Mr. de Zoysa, for the defendant, submitted three additional issues:—

(6) Has plaintiff since the lease to the defendant transferred the property in question to a third party? If so, can he maintain this action ?

(7) Has the plaintiff by his conduct waived any right he may have had to have the lease cancelled and claim damages?

(8) Is the plaintiff's claim prescribed ?

Counsel for the plaintiff raised the objection that these issues did not arise on the pleadings, and that defendant should have got his answer amended so as to raise these issues. On this objection being taken the learned District Judge disallowed the issues. Here the learned Judge was certainly led into a mistake. No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice, and it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings. See *Dureya v. Siripina*,[1] *Fernando v. Soyza*,[2] *Attorney-General v. Smith*,[3] *Seneviratne v. Candappa*,[4] see also *Jayawickreme v. Amarasuriya*.[5] It would undoubtedly have been better had the learned Judge added these issues in such terms as he thought just.

It now becomes our duty to consider what action should be taken with regard to them at this stage of the case. With regard to the first of these new issues, it appears from a certified copy which has been submitted to us that since the institution of the action, the plaintiff has made a gift of the property leased to his son, who is a Buddhist priest. It is suggested that it is possible that this

[1] *(1908) 4 A. C. R. 125.*
[2] *(1899) 2 N. L. R. 40.*
[3] *(1906) 8 N. L. R. 229.*
[4] *(1917) 20 N. L. R. 60.*
[5] *(1918) 20 N. L. R. 289.*

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Buddhist priest, who is now the real person interested in the right of cancellation, might prefer to adopt the lease and continue the tenancy, or that it might appear that he had himself waived any claim to forfeiture by accepting rent from the tenant. See D. C. Kalutara 9,107.[1] It is also urged that he should, at least, be added as a party under section 404 of the Civil Procedure Code, and that the Judge should have fully considered what might be the legal effect of the assignment of the claim for cancellation. I think it highly improbable that if the donee were added as a party, he would desire to repudiate his father's action, and I see no reason to doubt that it is the intention of the Code, by providing for the addition or substitution of parties where there has been an assignment pending action, that the assignee should be entitled in the same action to pursue the remedies of his assignor. This is a principle of English procedure which I take our Code to have adopted. See Order 17, Rule 1. Nevertheless, as it is this donee, if anyone, who is entitled to the cancellation, I think the case should go back to allow of a motion for his addition as a party and for a framing of any issue which may seem to arise on this being done.

With regard to the question of waiver, this is a most important one and ought certainly to have been considered. The plaintiff though in his plaint he speaks of "repeated protests", does not go into the witness box, so that he could not be asked any question with regard to these protests. Very little appears in the evidence to show that he was aware of the neglected condition of the property, though the fact that he lived in the neighbourhood may be considered to suggest that he is likely to have been. As the issue of waiver was excluded, it was not possible for Counsel for the defence to go into the matter, and it may be that had he addressed himself to the subject some fuller material might have been presented. There is no doubt that the plaintiff accepted rent after the proprty was allowed to fall into a neglected condition, but this in itself would not create a waiver unless the circumstances were known to him. The law on the subject of waiver of forfeiture by receipt of rent will be found discussed in *Smith's Leading Cases* in the notes to *Dumpor's Case*.[2] See also the recent Privy Council case, cited by Mr. Bawa (*King v.* Polson.)[3] It seems desirable that the case should go back for this issue to be raised and decided.

The third of the suggested new issues was that of prescription. Mr. Bawa suggested that it might well be that some of the damage complained of was caused by cattle at some time beyond the period of prescription, and he even urged the extraordinary proposition that, inasmuch as our Code authorizes a Judge to reffiect a plaint where it appears on the face of it that the claim is prescribed, it is the duty of every plaintiff in every case to prove affirmatively

[1] *S. C. Min., Dec. 5, 1921.* [2] *Smith's Leading Cases, vol. I., p. 32.*

[3] *(1921) 1. A. C. 271.*

that this claim is not statute barred. It is hardly necessary to say anything with regard to this proposition. In this case the breach alleged is a continuous breach, and a fresh cause of action arises during each moment of its continuance. I do not see any reason for permitting this issue to be raised at this stage of the case.

I am therefore of opinion that the case should be remitted for the consideration of the issues indicated. For the purpose of that consideration, the finding of fact of the learned Judge that there was in this case grossly negligent cultivation entitling the plaintiff in the absence of waiver on his part, to the cancellation of the lease, should be treated as final. With regard to costs, I think that the fairest order would be that defendant should pay the costs of this appeal, and that the costs already incurred in the Court below should be costs in the cause. Defendant has failed in the main issues of fact and law. He has succeeded in getting the case sent back on the question of addition issues, but he might have appealed at once on the point, and had he done so much time and expense would have been saved.

PORTER J.—I agree.

*Sent back.*