1934 *Present:* **Wijeyewardene J.**

VIRASINGHE, Appellant, *and* PERIS, Respondent.

19—C. R. Colombo, 87,736.

Landlord and tenant—Expiry of notice to quit—Action instituted for ejectment, rent and damages—Payment, after service of summons, of a sum as damages and not as rent—Waiver of notice.

Where, after the expiry of a notice to quit, a landlord sued a tenant for ejectment and recovery of rent and damages and, notwithstanding the subsequent payment, as damages, of a sum greater than the rent due, refused to issue any receipts to the defendant and continued the action—

Held, that the receipt of damages pending the action could not be interpreted as a waiver of the notice to quit.

"The question of waiver of notice—if one may use an expression which has been condemned as a loose and unscientific expression—cannot be discussed as an abstract question of law but should be considered with reference to the facts of each particular case."

Fonseka v. Naiyan Ali (1920) 22 N. L. R. 447 distinguished.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

H. W. Thambiah for the defendant, appellant.

G. P. J. Kurukulasuriya for the plaintiff, respondent.

Cur. adv. vult.

March, 26, 1943. WIJEYEWARDENE J.—

The defendant was a tenant of the plaintiff paying a monthly rental of Rs. 60. The plaintiff gave notice to the defendant on September 29, 1942, asking him to vacate the house at the end of October The defendant failed to do so and the plaintiff filed the present action on November 6, for the ejectment of the defendant and for the recovery of Rs. 60 as rent and damages at Rs. 60 a month from November 1. On December 10, the defendant sent the plaintiff's attorney a cheque for Rs. 140 and filed answer on December 11. His only plea in the answer was that a month's notice was insufficient and he asked in the prayer that he should be given time till the end of January 1943, to vacate the premises. Though the answer did not disclose a defence which could have been successfully urged, yet the filing of the answer enabled the defendant to prevent the plaintiff from getting a decree against him on the summons returnable date. When the case came up for trial the Counsel who appeared for the defendant in the lower Court suggested the following among other issues: "Was the notice to quit pleaded in the plaint waived by the subsequent acceptance of rent?" On the plaintiff's Counsel objecting to the issue as it did not arise on the answer, the defendant's Counsel stated that the plea could not have been raised in the answer as the payment referred to was made after the filing of the answer. That statement was incorrect as was shown later when the defendant gave evidence and admitted that the payment was made before the answer was filed. However, on the strength of that erroneous statement of his Counsel, the defendant succeeded in getting that issue framed. After hearing evidence the Commissioner entered judgment against the defendant on December 21. The defendant thereupon filed the present appeal and has continued to be in occupation of the premises up to date.

The Counsel for the appellant relied on *Fonseka v. Naiyam Ali* [1] in support of his contention that there was a "waiver of notice". That case was an action for ejectment filed on January 9, 1920, by a landlord against his monthly tenant on the ground that the tenancy had been determined on December 31, 1919, by a notice to quit. It was proved by the defendant that under the contract of tenancy he had to pay rent on or before the 10th day of each month and that the plaintiff had accepted from him on each of the dates—January 10 and February 10—a sum of money equivalent to the monthly rent and issued receipts to him stating that the sums of money were received as rents for January and February respectively. It was held by the Court that these circumstances proved that the landlord had "waived" the notice. The contention of the Council for the landlord that the acceptance of rent after the institution of the action could not affect the rights of parties at the date of the action was rejected by de Sampayo J. on the ground that the tenant paid the rent before the summons was served on him and that therefore the action could not be regarded as pending at the time of the payment. The facts of the present case are entirely different. The payment here was made after the service of summons. The

[1] *22 N. L. R. 447.*

defendant himself has stated in his evidence that he knew that he was liable to pay damages to the plaintiff and that the cheque for Rs. 140 was sent by him " in part payment of the damages ". The defendant who has described himself as a teacher at a well-known educational institution must have understood perfectly well the meaning of the words he used. Moreover, his failure to raise this plea in the answer filed by him after the payment shows that it was not made by him as a payment of rent. The plaintiff's attorney who gave evidence stated that he received the cheque but did not accept it on account of rent and did not, in fact, issue any receipts to the defendant in respect of that payment. Moreover, the amount paid was more than the rent due at the date of the payment and it is difficult to base on such a payment an artificial presumption in support of a plea of waiver (*vide London School Board v. Peters* [1].)

The question of waiver of notice—if one may use an expression which has been condemned as a loose and unscientific expression—cannot be discussed as a abstract question of law but should be considered with reference to the facts of each particular case. It would be absolutely unreal to impute to the plaintiff in this case an intention to waive the notice when her conduct right through the proceedinbs is a negation of such an intention. The plaintiff could not have known her own mind if she waived the notice and yet refused to issue receipts to the defendant and continued the action for ejectment. Moreover, the evidence of the defendant shows that he did not make the payment as rent. This question has been considered in *Davis v. Bristow* [2] and some subsequent cases with special reference to the statutory tenancies created under the Increase of Rent (War Restrictions) Acts of 1915 and 1919. But th following passage from the judgment of Lush J. in *Davies v. Bristow* (*supra*) shows how one should approach the consideration of this question with regard to tenancies in general :

" Where a breach of covenant available for forfeiture has been committed by a tenant it is correct enough to say that the landlord can waive the forfeiture, for by the breach of covenant the term is not avoided, it is only rendered voidable. at the landlord's option. He can elect whether to affirm or disaffirm the tenancy and if he by some act evinces an unequivocal intention to affirm it, as by the acceptance of rent with notice of the breach, he cannot afterwards insist on the forfeiture, and no statement made by him at the time of doing that act that he does it without prejudice to his right to re-enter will affect the conclusion that the forfeiture is waived. The earlier cases were cases of forfeiture ; they were not cases in which the term had been brought to an end by a notice to quit. and in my opinion the principle which is applicable to the former class of cases is not applicable to the latter. When once the notice to quit has expired the position of the parties is precisely the same as it would be if the original lease had provided for the determination of the term on the date mentioned in the notice. There is in that case no room for the election by the landlord. The landlord and the tenant may of course agree that a

[1] *1902—18 Times L. R. 509.* [2] *(1920) 3 King's Bench, 428.*

new tenancy shall be created on the old terms and that is what in effect they do when they agree that the notice to quit shall be waived. But the agreement to continue the tenancy must be proved. It must be shown that the parties were *ad idem* as to the terms ".

It is not possible to hold on any reasonable interpretation of the facts in this case that there has been a " waiver of the notice ". I would dismiss the appeal with costs.

Appeal dismissed.