1920.

Present: Bertram C.J. and De Sampayo J.

SILVA *v.* SILVA.

4—D. C. Galle, 16,864.

Lease—Action for forfeiture—Failure to erect wire fence and keep land clear of weeds and grass.

A lease contained, *inter alia*, the following provision: "If the lessee fail to put up the said wire fence, or to keep the land clear of grass and weeds, the lessor is hereby authorized to have the deed cancelled."

Held, that in the circumstances of this case (see judgment) the breach of the covenant was not such as to justify a forfeiture of the lease.

THE facts appear from the judgment.

H. J. C. Pereira, for the appellant.

Amarasekera, for the respondent.

September 14, 1920. BERTRAM C.J.—

This is an action for the forfeiture of a lease granted by an uncle to a nephew for a period of nine years. The lease contained certain express stipulations; one was that the lessee should fix a wire fence to the land hereby leased during the term of the lease. There were other stipulations, the object of which was to protect the property. It is expressly provided that, "if the lessee fail to put up the said wire fence, or to keep the land clear of grass and weeds, the lessor is hereby authorized to have the deed cancelled." It is on that stipulation that the action is brought. The breach was denied. No application was made by the lessee to the Court to relieve him against the consequences of the breach. The circumstances, therefore, were not investigated from that point of view as fully as they might have been.

The facts appear to be that this transaction was in the nature of a family transaction. The lessor had an adjoining piece of land. He was anxious to have the two pieces of land worked together. He granted the lease to his nephew, not purely as a pecuniary transaction; and in a letter written soon after the commencement of the lease—D 3—he reminds his nephew of the real terms on which the lease was granted. The nephew, so the Judge finds, failed to put up the barbed wire fence. An attempt, indeed, was made to show that he did put up the barbed wire fence immediately after the commencement of the lease, but that it was removed

by thieves. A reference to the removal of a barbed wire fence by thieves occurs in the letter I have just referred to (D 3). But the learned Judge finds that the fence there referred to was an old fence put upon the land by a previous lessee. I think myself that there are good grounds for his finding. If one reads the letter, the reference does not read like a reference to a new fence erected in compliance with the covenant. If the lessee was so zealous immediately to erect the fence within a fortnight or three weeks of his entering into possession, there would be little justice in the repeated complaints which are contained in the letter. I think, therefore, that there was good ground for the Judge's finding that the covenant to erect the wire fence had not been complied with. For some time, according to the evidence, though the uncle says he wrote letters complaining of the absence of the wire fence, nothing much was done by the uncle to insist upon the fulfilment of the stipulation. This was very natural, in view of the family relationship between the parties, and in such circumstances laxities of this sort may easily arise.

But about a year after the commencement of the lease the uncle finds that his nephew had sub-leased the land at a profit to a Moorman. There is certainly no covenant against sub-leasing in the lease. But such an act was obviously in breach of the spirit of the agreement in the circumstances. On discovering this he proceeded to obtain reports from a headman as to the condition of the land, and in a few weeks claimed a forfeiture of the lease, on the ground that the fence had not been erected, and that the land had not been properly attended to. There can be no question that the real motive of the action was not the failure to build the fence, but his resentment at the conduct of his nephew in sub-leasing the land to a stranger. Nevertheless, it may well be that an uncle, who had not pressed his legal rights up to this point, might feel justified in pressing them when he was so treated.

We are now asked on appeal, for the first time, to grant the lessee relief against the failure to observe his express obligations. Various cases have been cited to us, but most of them are in regard to relief against failure to pay rent. But the only case which is really in point is that on which the learned Judge acted, that is, the case of *Agar v. Ranewake*.[1] The principle there laid down by Lascelles C.J. is as follows : " No authority has been adduced to us, and I do not believe that any can be found, that in a case where there has been a breach of covenants to keep the property demised in good order, the lessee is entitled to equitable relief. The only ground, as far as I can see, on which he could claim such relief is that the penalty of forfeiture would be outrageous or *immanis*, in the language of the Roman-Dutch law, in the circumstances of the particular case."

[1] *(1912) 16 N. L. R. 129.*

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BERTRAM C.J.

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In this case relief was not formally claimed, and we are asked to consider the question only at this stage of the case. It can only be said that, as far as the circumstances have been disclosed by the evidence, no substantial title to relief has been made out. In my opinion, therefore, the appeal should be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.