1956 *Present :* **H. N. G. Fernando, J., and Sinnetamby, J.**

EASTERN HARDWARE STORES, Appellant, *and*
J. S. FERNANDO, Respondent

S. C. 559—D. C. Colombo, 34,849/M

Landlord and tenant—Notice to quit—Waiver—Acceptance of rent "without prejudice"—Effect on pending suit—Rent Restriction Act, s. 13 (1) (a).

Compromise of suit—Mode of proving it—Civil Procedure Code, s. 408.

Evidence—Estoppel—Principles applicable.

Acceptance of rent for a period subsequent to notice to quit does not revive a tenancy if the money is taken by the landlord without prejudice to a pending action instituted by him to eject the tenant.

Once an action has been instituted, the Court will not take cognizance of a compromise of it unless it is proved by way of an application made under section 408 of the Civil Procedure Code ; it cannot be proved by way of issues framed at the hearing of the action.

In order to create a valid estoppel there must be not only action by one party on the faith of the declaration or act of the other party but also such action must be to his detriment. Performance, therefore, of what is a legal obligation cannot create an estoppel. Further, there must be a direct connection between the action taken by the party prejudiced and the false impression created by the representation (or conduct) of the other party.

APPEAL from a judgment of the District Court, Colombo.

V. Thillainathan, for the plaintiff-appellant.

Ananda Karunatilleke, for the defendant-respondent.

Cur. adv. vult.

November 23, 1956. SINNETAMBY, J.—

The facts of this case briefly are as follows :

Plaintiff instituted this action on 19/3/55 to eject the defendant from premises bearing No. 554, Skinners Road South. The premises in question are subject to the provisions of the Rent Restriction Act and in order to dispense with the authorisation of the Rent Restriction Board the plaintiff pleaded that the defendant had been in arrears of rent for over a month after the same had become due within the meaning of section 13 (1) (*a*) of the Act. The plaintiff averred in his plaint that rents were due from 1/1/54. By letter dated 20/10/54, P6, the plaintiff through his proctor gave the defendant notice to quit and deliver possession on 30/11/54. With the plaint the plaintiff also asked for an interim injunction restraining the defendant from removing the machinery, fittings, equipment, etc., in the premises. This application for an interim injunction was perhaps made by plaintiff in order that he may effectively exercise his landlord's lien. Along with the summons that issued on the defendant there was also served a notice requiring the defendant to show cause why an injunction should not be issued and, pending hearing of the application, enjoining him from disposing of machinery, fittings, equipment, etc. The evidence is that on service

of summons and notice of interim injunction the defendant hurried to the landlord and paid him a sum of Rs. 778·82 on account of rent and damages up to February, 1955, and a further sum of Rs. 221·18 being Counsel fees, stamp charges and proctor's fees. The plaintiff's proctor received that sum without prejudice to the case and issued to the defendant receipt D2 in which it was so expressly stated, viz. that the money was accepted without prejudice to the case. A similar receipt D1 on the same terms was issued in respect of fees and stamp charges.

Several issues were framed at the trial based mainly on questions of law. The facts stated above were not disputed. The defendant, however, contended that plaintiff's action must fail chiefly on two grounds: first because there was a waiver of the notice by the acceptance of rent on document D2 for a period subsequent to the notice; and secondly because the plaintiff expressly undertook to withdraw the action when the amounts referred to in D1 and D2 were paid. There was also a plea of estoppel on which defendant relied. The learned District Judge held with the defendant on all the issues covering these matters and this appeal is against his findings.

The plaintiff denied the allegation of the defendant that on the 23rd March there was an agreement by which plaintiff, in consideration of the payments, agreed to withdraw the action but the learned judge disbelieved him on this point and held that there was in fact such an agreement. It is quite manifest that on this matter the learned judge has completely misdirected himself. He has not considered the significance of the express stipulation in documents D1 and D2 that the payments in question were *without prejudice to the case*. This can only mean one thing, viz., that payments were accepted subject to the condition that the acceptance was not to affect adversely plaintiff's rights in the case. How the learned judge came to overlook so important a stipulation is difficult to comprehend. Obviously the payments were made because the issue of the interim injunction unless dissolved would have dislocated defendant's business as he himself admits. Acceptance of rent for a period subsequent to the notice revives the tenancy only if from the facts established in the case an intention to waive can reasonably bo inferred. Every such payment does not *ipso facto* amount to a renewal. In this case the very terms of the receipt issued for the payment negatives in no uncertain terms any such inference. The learned judge was clearly wrong in accepting the uncorroborated testimony of the defendant and in holding that the payment amounted to a waiver of the notice.

The learned judge also held that on the 23rd March, 1955, there was an agreement by plaintiff to withdraw the action. The only evidence on which he came to that finding is the oral testimony of the defendant, but it is quite obvious that the learned judge has not taken a realistic view of the facts deposed to by the plaintiff and the defendant. If his evidence is true one would have expected him as a normal prudent man to have obtained some writing to safeguard his interests from the plaintiff. Defendant filed an answer after the alleged agreement but in his answer he makes no mention of any undertaking by plaintiff to withdraw the action: indeed, his averment is that plaintiff undertook to withdraw

only the injunction though he adds that he was to continue as a tenant. This is in the teeth of receipts D1 and D2. There is, however, a more fatal objection to the acceptance of this plea. Rights of parties have to be determined as at the date of action and the Court must in deciding issues arising in a case do so only on evidence relating to facts which existed before the date of action. This is an elementary rule of law but the learned judge tries to overcome it by stating that a party to an action is entitled to waive any right that he has. A party undoubtedly is entitled to compromise a suit by reaching an agreement after action brought, but a Court can take no cognizance of it unless it is duly notified to Court and the Court passes a decree in accordance therewith in terms of section 408 of the Civil Procedure Code. Such a course, if adopted, does not in any way infringe the cardinal rule of law that in an action rights of parties must be determined as at the date of action. The defendant, not having taken steps under section 408, is not entitled to rely on an alleged agreement to withdraw the action as a defence to plaintiff's claim. Any compromise of a suit must be determined in an application under section 408 of the Civil Procedure Code and not by way of issues framed at the hearing of the action. It may be open to a Court, however, to stay proceedings in an appropriate case to enable a party to take steps under section 408 but such a course was not adopted in this case.

On the question of estoppel too the learned District Judge has come to a wrong finding. His main observations on this matter are as follows :

> " The plaintiff has agreed on 23/3/55 that there would be no further arrears and the defendant has acted upon that belief both on the 4th of April and later when he continued to pay further rents or damages or whatever they may be called in the receipts. In these circumstances I hold that a valid estoppel has been created. "

An important—indeed, the most important—element required to create a valid estoppel the learned judge has lost sight of. He has failed to appreciate that in order to create a valid estoppel there must be not only action by one party on the faith of the declaration or act of the other party but also such action must be to his detriment. What is the action the defendant is alleged to have taken ? The learned judge refers to two. First, he refers to the defendant's appearance in Court on the 4th of April. But is that the result of the representation or is it because the defendant was required to so appear in response to the summons ? Secondly, the learned judge refers to the fact that the defendant continued to pay rent even thereafter. I fail to see how it could possibly be contended that defendant's action was to his detriment or that payment of rent by the tenant was because of the alleged representation to withdraw the action. Would it not be more reasonable to attribute the payment to the obligation created by law for an overholding tenant to pay damages or for a tenant whose tenancy was not terminated to pay rent in terms of the agreement of tenancy ? In a plea of estoppel it is most important that direct connection between the action taken by the party prejudiced and the false impression created

by the representation—or conduct—must be established (vide *Rodrigo v. Karunaratne* [1]). The defendant has not established that he has been in any way prejudiced by the alleged settlement, nor has he shown any direct connection between his actions and the alleged agreement to withdraw the case. The plea of estoppel therefore fails.

For these reasons I would therefore set aside the judgment of the learned District Judge and enter judgment for plaintiff as prayed for less any sums paid by defendant after date of action. Plaintiff will be entitled to costs both here and in the Court below.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.