1934 *Present :* **Dalton and Drieberg J.J.**

WEERARATNE *et al. v.* ABEYWARDENE.

247—D. C. Tangalla, 3,477.

Lease—Action for damages for breach of covenant—Primary obligation indivisible—Liability for damages divisible—Each lessor entitled to recover his share.

In an action to recover damages for breach of a covenant in a lease granted by two persons, each lessor is entitled to recover only his share of the damage.

APPEAL from a judgment of the District Judge of Tangalla.

N. E. Weerasooria (with him *Wickramanayake* and *Batuwantudawe*), for defendant, appellant.

Siri Perera, for plaintiff, respondent.

July 31, 1934. DRIEBERG J.—

The first plaintiff and Alice Weeraratne leased to the defendant Smithland estate of 179 acres 1 rood and 33 perches by indenture P 1 of February 16, 1928, for a term of four years for a sum of Rs. 9,000. After the term of the lease expired and the defendant surrendered possession, this action was brought by the first plaintiff and T. O. Weeraratne, the second plaintiff, for the recovery of Rs. 2,500 damages sustained by the failure of the defendant to observe certain terms in the deed of lease, for example, failure to repair buildings and roads, failure to keep the land clear, neglect of the citronella plantation, and failure to carry out other conditions imposed for the proper maintenance of the estate. Alice Weeraratne is the mother of the second plaintiff. It is alleged in the plaint that she leased on behalf of her son, the second plaintiff, who was a minor at the time, but there is no mention of this in the deed and she must be regarded as having acted for herself. There is evidence that the second plaintiff owns a half of the estate. In his answer, the defendant denied the claim and pleaded that the second plaintiff, who was no party to the lease, had no cause of action against him and, further, that the first plaintiff could not maintain the action without joining Alice Weeraratne. He also pleaded prescription.

The trial was on the following issues:—

(1) Did the defendant duly observe and perform the covenants of the indenture of lease?
(2) Can this action be maintained without joining both lessors?
(3) Has the second plaintiff a cause of action against the defendant?
(4) Is the plaintiffs' claim or any part of it prescribed?

The second and third issues were not first disposed of but evidence was led and in the course of the examination of the first plaintiff, who was the first witness called, there is a note that his counsel stated that he did not propose to join Alice Weeraratne. In his judgment the trial Judge held that the second plaintiff was a necessary party to the action as he was the owner of a half share of the land, and that the non-joinder of Alice Weeraratne did not vitiate the action. He found there was a failure to carry out certain of the undertakings in the lease, assessed the damages at Rs. 600, and gave both plaintiffs judgment for that sum. The defendant appeals from this judgment.

As regards the second plaintiff, the position is clear. He was no party to the contract and unless Alice Weeraratne's interest in the lease passed to him by assignment or otherwise he has no rights whatever under it.

The action, therefore, must be regarded as one brought only by the first plaintiff for the recovery of the whole amount of damages caused by the defendant, and the question for decision is whether such an action is possible. Clause 17 of the lease provided that the lessee "would hold himself liable to pay all damages caused to the lessors" by his failure to observe the conditions of the lease.

When a person contracts on obligation for one and the same thing in favour of several others, each of these is only creditor for his own share; but the debtor may contract with each of his creditors, if that be the intention of the parties, so that each of the persons in whose favour the obligation is made is creditor for the whole, in which case a payment made to any one liberates the debtor against them all. In such a case, the obligation to the creditors is said to be *in solido, Pothier, vol. 1, p. 144* (Evans' translation). But there must be clear evidence of intention that the parties wish to be regarded as co-principal creditors or, in other words, that the obligation to them is *in solido*; in case of doubt it is presumed that each is a creditor to the extent of his share (Nathan: *Common Law of South Africa, vol. 2 (2nd ed.), p. 565*). A stipulation in a lease for the payment of rent, where there are several lessors, is ordinarily not regarded as an obligation *in solido*. Voet, *19.2.21*, dealing with the *actio locati*, says, that if there is a plurality of lessors each has an action for his share against the lessee, unless it has been expressly agreed to the contrary and in cases where a plurality of persons have farmed the public revenue. There appears to be no change in the more modern Roman-Dutch law in this matter. Maasdorp in his *Institutes of Cape Law, vol. 3, p. 245 (4th ed.)*, says, that "where there are several co-lessees, each is, in the absence of any stipulation express or implied to the contrary, only liable for a proportionate share of the rent; and in the same way, if there are several co-lessors, each can sue only for his share of the rent, unless it has been otherwise agreed upon". See also Nathan's *Common*

Law of South Africa (2nd ed.), vol. 2, p. 904, and Wille on *Landlord and Tenant in South Africa (1910 ed.), p. 321,* in which there is a qualification of the general rule to which I shall refer later.

That this is the position of several lessors where there is no stipulation to the contrary has been recognized in local cases. In *Budharakita Terunanse v. Gunasekera*[1], one of two lessors was permitted to sue for the half share of rent due. In *Panis Appuhamy v. Selenchi Appu*[2], the judgment in *Budharakita Terunanse v. Gunasekera (supra)* was approved and applied to the case of lessees, it being held that in the case of two joint lessees each was only liable for his share of the rent in the absence of anything to indicate that their liability was joint and several.

If, therefore, the claim was one for rent, the first plaintiff could have sued the defendant only for the half share due to him. In such an action though the other lessor would not be a necessary party, it would no doubt be possible for the defendant lessee to have him made a party under section 18 of the Civil Procedure Code if the circumstances of the case required his presence before the Court to enable all questions involved in the action to be effectually and completely settled. One can conceive of cases where the presence of the other lessor, assuming there were two, would not be necessary, for example, the lessee might have paid a half of the rent to the other and there would be only a question whether the plaintiff-lessor was paid his moiety. In this case, however, the defendant did not move that the other lessor be made a party for this reason, but contended that the action could not be maintained unless he was a party and that therefore the action should be dismissed.

Is the position different where the action is brought by one of two joint lessors not for rent but for damages for failure to observe covenants in the lease? Wille on *Landlord and Tenant in South Africa, p. 321,* says, " If there are more than one landlord each may bring the action for his proportionate share of rights under the lease (Voet *9.2.21*); of these rights it is probably only the right to claim the rent which could be separated into proportionate shares ". The author does not refer to any authority for this, but it is clear that while some rights and liabilities are joint, other rights and liabilities may be different. For example, though one of two lessees can fulfil his obligation of payment of rent by paying his share of it to the lessor, can be resist an action for cancellation of the lease brought against himself and his co-lessor for default in payment of rent by the latter? Judgment cannot be entered against him for rent which he has already paid, but it must be allowed that he is liable to ejectment and to submit to cancellation of the lease if all the rent due to the lessor be not paid. Similarly, if one of the lessees abandoned the lease, can the other claim that so long as he paid his moiety of the rent and kept a half of the land in a proper condition the lessor was bound to continue the lease, so far as his interest in it was concerned? This shows that though the obligation of payment of rent may not be joint or *in solido,* yet other obligations under the lease may be of another nature. Pothier on *Obligations, vol. 1, p. 195* (Evans' translation), dealing with indivisible obligations, says, " An indivisible obligation being the obligation of a thing, or act, which is not

[1] *(1895) 1 N. L. R. 206.* [2] *(1903) 7 N. L. R. 16.*

susceptible of parts, either real or intellectual, it is a necessary consequence, that when two or more persons have contracted a debt of this kind, although they have not contracted it *in solido, et tanquam correi debendi,* nevertheless, each of the persons obliged is debtor for the whole of the thing or act that forms the object of the obligation; for he cannot be a debtor for a part of it only, since it is supposed that the thing is not susceptible of parts ".

Thus though the obligation of each lessee in regard to rent is not *in solido* to the extent that he cannot be compelled to pay more than his share of it, his liability with his co-lessee to the lessor to a cancellation of the lease, if all the rent be not paid, is an indivisible obligation. Similarly, obligations such as maintaining the property in good order are indivisible, and one of two lessees cannot resist a claim for cancellation of the lease brought for the property being allowed to fall into disrepair by claiming that he had fulfilled his share of that covenant. He cannot do so for the reason that such an obligation is indivisible.

But is the claim for damages against the lessors for failure of such an indivisible obligation in itself indivisible? *Maasdorp,* dealing with the subject of solid and non-solid obligation, says " in other words, each of several co-obligors (except in the case of co-partners) is only liable for his share of the contract, and not for the whole contract *in solidum ;* and each of several co-obligees is only entitled to his proportionate share of the rights covered by the contract. This rule will apply even to the secondary obligation of paying damages in default of performance of a primary indivisible obligation, such as the building of a house, for, though the primary obligation is indivisible, the damages are divisible and each co-obligor will be liable only for his share of the same ". (*Institutes of Cape Law, vol. 3, p. 101 (4th ed.).*) The same principle is recognized by *Pothier*—" A second example, is the obligation which I may have contracted with anyone, to build a certain edifice upon his land ; this obligation is indivisible ; the creditors may conclude against each of my heirs, requiring him to be condemned to build the entire edifice ; but as each of my heirs, although debtor for the entire construction of the edifice, is nevertheless not debtor *in solido,* he has a right to require that his co-heirs be included in the cause, that in default of their fulfilling this obligation, they may be condemned in damages each only for his own hereditary part " (Pothier on *Obligations, vol. 1, p. 201* (Evans' translation)).

This passage deals with a somewhat different case, but it is important as recognizing the principle that a primary obligation may be indivisible, but not so the liability for damages arising from a breach of it.

It appears to me that one is obliged to apply the same principle to the case of several lessors. Though the obligation of the lessee under the lease for the proper maintenance of the land is indivisible as far as the lessors are concerned, in the sense that each lessor has the right to enforce the covenants in respect of his share as well as that of his co-lessor, each lessor can only recover his share of the damages caused by breach of such covenants. There is no doubt that the application of this principle, especially in the case of claims for damages where there are several

lessees, may lead to inconvenient results, but it is always open to the parties to provide in the deed of lease for joint and several rights and liabilities.

I am of opinion, therefore, that the first plaintiff could have brought this action only for a half share of the damages caused by the lessees and that he is only entitled to a half share of the damages awarded, namely, Rs. 300. The judgment appealed from will be set aside, and judgment will be entered for the first plaintiff for Rs. 300 against the defendant with costs as in the second class, and against this the defendant will be entitled to be paid by the first plaintiff the excess costs incurred by the defendant by reason of the action being brought in a higher class. The second plaintiff will pay to the defendant his costs in the Court below. The plaintiffs will pay to the defendant the costs of the appeal.

DALTON J.—I agree.

Judgment varied.