Under cross-examination he said : " I have seen you and the co-respondent asleep together near the store on the same mat."

If that is all that the witness really knows, it would not appear sufficient for a finding that the respondent and co-respondent have been living together as man and wife.

But if such be the fact, there must be other witnesses from the neighbourhood who can prove it.

The record is therefore remitted to the Commissioner, for the petitioner to be afforded an opportunity of submitting further evidence, if he so desires.

It is to be noted that the petition alleges an act of adultery " in December 1938 " but there is nothing in the record to support that allegation : and the petitioner may desire to amend the petition in this respect.

Reference should be made to another point.

S. 12 of the Divorce Ordinance 1883,[1] requires that the Commissioner shall forward to the Supreme Court (*inter alia*) " a statement of the decree (if any) to which the petitioner is in his opinion entitled and the general decision at which he has arrived ".

What is meant by the term ' general decision ' is not free from doubt, and it may be for this reason that the practice has grown up of the Commisioner limiting himself to a recommendation as to the decree.

In consequence it is left to the Supreme Court, which has not heard the witnesses, to make the findings of fact. This is obviously unsatisfactory.

The term ' general decision ' is wide enough to include a finding of fact : and the Court therefore holds that the Commissioner should make findings and forward them to the Supreme Court with his recommendations.

AH BEN *ats.* POLICE.

[Appellate Jurisdiction (Corrie C.J.) July 4, 1940.]

Liquor Ordinance 1932[2]—*s.* 85—*onus of proof that a person is a native*—*s.* 44—*onus of proof as to licence*—*Summary Jurisdiction Procedure Ordinance*—*s.* 30—*negative averments.*

Appellant was convicted on two counts—one of selling liquor to a native contrary to s. 66 of the Liquor Ordinance, 1932 and one of selling liquor without a licence contrary to s. 44 of the same Ordinance. On the first count no evidence was tendered to show that the purchaser of the liquor was a native ; on the second count no evidence was tendered to show that appellant was not the holder of a licence.

HELD.—(1) There is a sufficient allegation to satisfy s. 85 of the Liquor Ordinance 1932 (and so shift the onus of proof to the defendant) if it is alleged in the complaint that the person is a native.

(2) The prosecution must call evidence that the person charged was

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[1] *Cap.* 16.
[2] *Rep. Vide Liquor Ordinance*, 1946, *ss.* 46, 82, 92 *and* 93.

not the holder of a licence to establish a prima facie of an offence contrary to s. 44 of the Liquor Ordinance 1932.

[**EDITORIAL NOTE.**—This decision is of interest only as to onus of proof of no licence. S. 30 of the Summary Jurisdiction Procedure Ordinance (Rep.) was as follows :—

> " If the information or complaint shall negative any exemption proviso or condition in the " law on which it is framed the complainant need not prove such negative but the defendant " shall prove the affirmative thereof if he would have advantage of it."

See now Liquor Ordinance, 1946, s. 92 and Criminal Procedure Code Cap. 4, s. 209. S. 44 of the Liquor Ordinance, 1932 (Rep.) was as follows :—

> " Every person who shall sell any liquor without holding a licence authorsing the sale thereof " shall for the first offence be liable to a fine not exceeding fifty pounds and for any " subsequent offence to a fine not exceeding one hundred pounds or to imprisonment for a " period not exceeding six months or to both such fine and imprisonment. Upon any convic- " tion under this section the offender shall forfeit all liquor in his possession with the vessels " containing the same to the use of His Majesty and the same may be sold by order of a " District Commissioner and the proceeds of the sale shall be paid to the Colonial Treasurer. " In the case of a second or subsequent offence the offender shall be declared after conviction " by such District Commissioner to be and shall thereupon be disqualified from holding a " licence of any description for the sale of liquor for a period of twelve months from the date " of such conviction." See now Liquor Ordinance, 1946 s. 46.

On the subject of negative averments see *Archbold* 31st edition p. 330, *Paley, Summary Convictions* 9th edition p. 324. *Journal of Criminal Law, July*, 1940, p. 269. Also the following cases :—

R. v. Turner [1816] 5 M. & S. 206 ; 105 E.R. 1026 ; 14 Dig. 430.
Apothecaries Coy. v. Bentley [1824] Ry. & M. 159 ; 1 C. & P. 538 ; 14 Dig. 431.
Huggins v. Ward [1873] 8 Q.B. 521 ; 29 L.T. 33 ; 14 Dig. 431.
R. v. Scott [1921] 86 J.P. 69 ; 14 Dig. 431.
Roche v. Willis [1934] 151 J.L.R. 154.
R. v. Oliver [1943] 2 A.E.R. 800.
R. v. Sellars [1946] 1 A.E.R. 82.
R. v. Putland & Or. [1946] 1 A.E.R. 85.]
Cases referred to :—
Davis v. Scrace [1869] L.R. 4 C.P. 172.
Taylor v. Humphries [1864] 34 L.J.M.C. 1.

APPEAL against conviction. The facts and arguments are set out in the judgment.

R. Townsend, for the appellant.
The Attorney-General, *E. E. Jenkins*, for the respondent.

CORRIE, C.J.—This is an appeal by Ah Ben against two convictions by the Commissioner's Court at Taveuni whereby the appellant was found guilty of having (1) sold liquor to a native, contrary to s. 66 of the Liquor Ordinance 1932 ; and (2) having sold liquor without a licence, contrary to s. 44 of the same Ordinance.

The appellant maintains that there was no evidence before the Court to support the conviction upon either of these charges. In relation to the first of these charges, there was evidence that the acucsed had sold liquor to one Moave Cavakece ; and the complaint charged the appellant with this offence " he the said Moave Cacakece being a native ".

1 *Rep. Vide Editorial Note.*

S. 85[1] of the Liquor Ordinance provides that :—

> " Where in any proceedings under this Ordinance it is alleged " that a person is a native the onus of proving such allegation to " be untrue shall unless the court otherwise directs rest on the " defendant in the proceedings ".

The appellant argues that " alleged " in this section means alleged in evidence, and as there was no evidence that Moave Cavakece was a native, the conviction cannot stand.

The word " alleged ", however, cannot be used in the section in the sense suggested by the appellant ; for if it were alleged in evidence that a person to whom liquor was sold was a native, there clearly would be an onus upon the defendant to prove the contrary, and s. 85 would thus be superfluous.

It follows that there is a sufficient allegation to satisfy the section if it is alleged in the complaint that the person is a native.

The appeal in respect of the conviction under s. 66, therefore, must be dismissed.

In relation to the charge of selling liquor without a licence, the appellant maintains that the burden of proof is upon the prosecution, notwithstanding s. 30 of the Summary Jurisdiction Procedure Ordinance 1876,[1] which provides that :—

> " If the information or complaint shall negative any exemption " exception proviso or condition in the law on which it is framed " the complainant need not prove such negative but the defendant " shall prove the affirmative thereof if he would have advantage " of it ".

The appellant relies upon the judgment in *Davis v. Scrace* (L.R. 4 C.P. 172). The appellant in that case had been convicted by the Justices under 2 and 3 Vict. c. 47, s. 42, which forbade the selling of liquor on a Sunday " before the hour of one in the afternoon except refreshments for travellers ": and on appeal the question was raised upon whom lay the burden of proof. The decision turned upon the meaning of s. 14 of the Summary Jurisdiction Act, 1848,[2] which contained a proviso the terms of which differed in no material respect from those of s. 30[1] of the Summary Jurisdiction Procedure Ordinance 1876. The court, following the judgment in *Taylor v. Humphries*, held that the words " except refreshments for travellers " did not constitute an exemption, exception, proviso or condition within the meaning of s. 14 of the Act : and hence that notwithstanding that section the burden of proof was upon the prosecution.

The appellant maintains that a similar interpretation must be given to the provisions of s. 30 of the Summary Jurisdiction Procedure Ordinance 1876 ; and I hold that he is right in his construction of the section.

The offence defined by s. 44 is not selling liquor, but selling liquor without holding a licence. Hence the holding of a licence does not merely constitute an exception taking the case out of the scope of the

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1 *Rep. Vide Criminal Procedure Code, Cap. 4, s. 209 and Liquor Ordinance, 1946, s. 92.*
2 *11 and 12 Vict. c. 43.*

section and thus the prosecution cannot invoke the provision of section 84 (1) of the Ordinance,

> " Where any person shall be charged with an offence under this " Ordinance and such offence shall have been prima facie estab- " lished against him by the prosecutor the onus of proving that he " is covered by any of the exceptions provided in this Ordinance " shall be upon such person ".

The offence has not been prima facie established until evidence has been given that the person charged was not the holder of a licence.

No such evidence was given against the appellant.

The appeal in respect of this charge is therefore allowed and the conviction and sentence are set aside.

WITHEROW *v.* BULLY AND ORS.

[Civil Jurisdiction (Corrie, C.J.) July 30, 1940.]

Covenant in lease not to transfer or sublet without licence—breach of covenant—whether any proviso implied that no fine payable for such licence—acceptance of rent paid by transferee without knowledge of transfer—whether acceptance constitutes waiver—whether lessee can have relief against forfeiture for breach of covenant not to assign without licence.

Plaintiff had leased land to first defendant with a covenant not to transfer or sublet without previous consent in writing of the lessor. During the currency of the lease the first defendant executed a transfer of the lease and the second defendant went into possession. No consent was obtained and a payment of rent was tendered by the clerk of the solicitors for both defendants and accepted. Plaintiff denied being informed by the clerk that rent was tendered on behalf of the second defendant.

HELD.—(1) There is in Fiji no implied proviso to a covenant in a lease not to assign without licence corresponding to that implied by s. 3 of the Conveyancing and Law of Property Act, 1892, 55 & 56 Vict. c. 13 s. 3.

(2) Acceptance of rent without knowledge that it is tendered on behalf of a transferee of the lease is no waiver of a covenant by the lessee not to transfer the lease.

(3) The Court will not grant relief against forfeiture (in Fiji) in case of breach of a covenant not to assign without licence.

[**EDITORIAL NOTE.**—As to point (3), provision is now made by the Land (Transfer and Registration) Ordinance (Cap. 120) s. 50 for relief against forfeiture in case of breach of covenant not to assign. The section was added by amendment in 1944.]

Cases referred to :—

Barrow v. Isaacs & Son [1891] 1 Q.B. 417 ; 60 L.J.Q.B. 179 ; 64 L.T. 686 ; 55 J.P. 517 ; 7 T.L.R. 175 ; 31 Dig. 491.