

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 established 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.

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## 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.

ACTION FOR POSSESSION OF LAND for breach of covenant in a lease. The facts are fully set out in the judgment.

*J. S. M. Park*, for the plaintiff.

*W. L. Davidson*, for the defendants.

CORRIE, C.J.—The plaintiff is claiming possession of 2 acres 3 roods 4 perches of land in the district of Naitasiri.

The land in claim was leased by the plaintiff to the defendant, Bulli Din Mahomed, by a lease dated 30th October, 1936, for a term of ten years from the 1st January, 1935. The lease contained a covenant by the lessee that he would not transfer or sublet the land without the previous consent in writing of the lessor.

The plaintiff alleges that on or about the 16th November, 1938, the defendant, Bulli, in breach of his covenant, transferred the land to the defendant, Karim Buksh, without having obtained the consent in writing of the plaintiff.

Karim Buksh has not appeared in the action. Bulli Din Mahomed has filed a defence in which he pleads:—

- (a) That he has not transferred the land without the plaintiff's consent;
- (b) That the plaintiff arbitrarily and unreasonably withheld his consent refusing to grant it except upon payment of a fine of £5; and
- (c) Alternatively, that since the transfer, the plaintiff has accepted payment of rent from the transferee.

At the hearing of the action the first of these defences was abandoned.

While no transfer of the lease has yet been registered under the Land (Transfer and Registration) Ordinance 1933, it is not contested that the defendant Bulli has taken all the steps necessary for such registration, other than obtaining the written consent of the plaintiff, and that Karim Buksh has gone into possession of the land to the exclusion of Bulli.

With regard to the second defence, the defendant's argument is that although there is not in this Colony any enactment corresponding to s. 3 of the Conveyancing and Law Property Act 1892,<sup>1</sup> which declared that in all leases containing a covenant against assigning without licence, such covenant should, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso that no fine should be payable for such licence, nevertheless, the Court should hold that to demand a fine is inequitable. No authority for this proposition has been cited, and it is clear that if there had been a rule of equity forbidding the taking of a fine on a licence for the transfer of a lease, there would have been no reason for the enactment in England in 1892 of a provision to that effect.

I come therefore, to the third ground, which is really the substantial ground of defence, namely that by accepting rent, the defendant has waived his rights under the covenant.

It is not denied by the plaintiff that in February, 1939, he accepted payment of rent for the year 1938. Such acceptance, however, would not operate as a waiver in respect of a breach of the covenant unless it were made with full knowledge of the facts.

<sup>1</sup> 55 & 56 Vict. c. 13.

The payment was made by the clerk of the solicitor who acted for both defendants, and he and the plaintiff have given evidence. There is a conflict of testimony as to whether or not the plaintiff was told that the rent was being tendered on behalf of the transferee. The plaintiff gave a receipt and swears that he wrote on it "On behalf of rent due by Bulli for 1938"; and it is significant that this receipt is not produced by the defendant.

It is, moreover, not denied by the defence that when, at a later date, rent for 1939 was tendered to the defendant by Karim Buksh, the plaintiff refused to accept it from him.

On the evidence I am not satisfied that the plaintiff was told that the rent for 1938 was tendered on behalf of Karim Buksh or that when he accepted such rent he was aware that the land had been transferred.

It follows that this acceptance could not operate as a waiver, and the Court need not consider the plaintiff's further contention that as the rent for 1938 was payable in advance acceptance of it would not operate as a waiver, even if he had accepted it with knowledge of the transfer.

Finally the defendant, Bulli Din Mahomed, asks for relief from forfeiture on such terms as the Court shall think fit.

There is, however, in this Colony no enactment corresponding to s. 146 sub-s. (8) of the Law of Property Act 1925,<sup>1</sup> and the rule here with regard to relief from forfeiture remains as it was in England before the 1st January, 1926.

That rule was laid down in *Barrow v. Isaacs* [1891] 1 Q.B. 417, in which it was held that equity would not grant relief against forfeiture for breach of a covenant not to assign without licence.

Judgment will be entered for the plaintiff for possession of the land in claim, with costs.

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## RAGUDATT v. RAMAUTAR.

[Civil Jurisdiction (Corrie, C.J.) July 31, 1940.]

*Moneylenders Ordinance, 1938*<sup>2</sup>—s. 2—*definition of moneylender*—s. 14 *pleaded as defence to an action on a Promissory Note*—*burden of proof that claimant is a moneylender*—s. 3—*whether burden is on defendant where it is not alleged that money lent in consideration of repayment of a larger sum*—s. 2—*definition of "Calendar year"*.

Plaintiff who was not a registered moneylender claimed to recover principal and interest due under a promissory note. It was admitted by the plaintiff that on five occasions between 10th January, 1939 and 1st April, 1940 he had lent money on interest or for profit but not more than three of these transactions took place in any one year reckoned between 1st January and 31st December.

<sup>1</sup> 15 Geo. 5, c. 20.

<sup>2</sup> 55 & 56 Vict. c. 13.