ATA MOHAMMED *v.* VICTORIA GRANT.

[Civil Jurisdiction (MacKenzie, Acting C.J.) November 17, 1922.]

Lease—covenant by lessee not to assign or part with possession—premises sub-let by lessee—whether a breach of covenant—rent and rates in arrears—tender of amount due refused—Common Law Procedure Act, 1852, 15 and 16 Vict., c. 76, s. 212—relief against forfeiture—application of rent paid in advance after knowledge of a breach covenant—question of waiver considered.

Ata Mohammed was the tenant under a written agreement with Victoria Grant of premises in Suva owned by Victoria Grant for a term of five years as from 1st April, 1921. The agreement provided for payment of rent (weekly) and for payment of rates by the tenant and further provided :—

> " The lessee will not assign or part with his possession of the " said premises without the written consent of the lessor first had " and obtained but such consent shall not be unreasonably with- " held."
>
> " In case the lessee shall fail or neglect to observe perform or " keep any of the covenants agreements and conditions on her part " herein contained and such failure or neglect shall continue for " the space of one week or in case any part of the said rent shall " be in arrear or unpaid for seven days after the same ought to be " paid as aforesaid then and in either of such cases the lessor shall " have the right to re-enter upon the said premises and to determine " the said tenancy and all monies theretofore paid by the lessee to " the lessor shall be absolutely forfeited to the lessor and as for " liquidated damages in respect of such failure and neglect."

A sum of £260 representing rent in advance for 65 weeks (up to June 30, 1922) was paid by Ata Mohammed at the commencement of the term but thereafter no rent was paid.

On October 24, 1921, Ata Mohammed sub-let part of the premises to one Joe Abdul Rashid and on January 16, 1922, sub-let the balance of the premises to the same person without in either case obtaining the lessor's consent.

In December, 1921, Victoria Grant served notice on Ata Mohammed that she intended to exercise her right of forfeiture. Thereafter she took no further action (except to make weekly demands for rent after June 30, 1922, the date up to which rent was paid in advance) until August 14, 1922, when she gave notice by her solicitor that her agent would re-enter upon the premises that day and determine thereby Ata Mohammed's tenancy on the grounds that seven weeks rent, viz., £28 was due and owing and that Ata Mohammed had not paid the rates and taxes on the premises and that he had sub-let and parted with possession of the premises in or about the month of December, 1921, for the then balance of the term without first obtaining her permission. On the same day a bailiff went into possession on behalf of Victoria Grant and on the following day gave notice to the sub-tenant Joe Abdul Rashid to either vacate the premises or became tenant to Victoria Grant—he took the former course. On receipt of the notice of August 14 Ata Mohammed's solicitor formally tendered the amount of rent and rates outstanding

and the tender was refused. Eventually Victoria Grant agreed to withdraw her bailiff on the understanding that Ata Mohammed would bring an action claiming relief against forfeiture to determine the issue.

HELD.—(1) Tender of the full amount of rent and rates due and owing by a tenant together with costs incurred by the landlord entitles a tenant to relief against forfeiture on grounds of non-payment of rent and rates.

(2) Sub-leasing by a lessee is not a breach of a covenant by the lessee not to assign or part with possession of the leased premises.

Cases referred to :—

(1) *Peebles v. Crosthwaite* [1897] 13 T.L.R. 198.

(2) *Doe and Pitt v. Hogg* [1824] 27 R.R. 512 ; 31 Dig. 376 ; 31 Dig. 373.

(3) *Crusoe and Blencowe v. Bugby* [1771] 95 E.R. 1030 ; 31 Dig. 392.

ACTION claiming relief against forfeiture. The facts appear fully in the judgment.

G. F. Grahame for the plaintiff.

J. N. Leleu for the defendant.

MACKENZIE, Acting C.J.—This is an action in which the plaintiff's claim is for relief against forfeiture by the defendant of the plaintiff's tenancy of premises at 28 Cumming Street, Suva.

The case has raised several points of considerable interest but I do not think I shall find it necessary to deal with more than three.

The facts appear fully in the pleadings and from the evidence, and it was only in minor points that they were in dispute.

For this purpose of this judgment I only propose to refer to them shortly as follows :—

By an agreement dated 28th November, 1921, defendant let 28 Cumming Street to plaintiff for five years computed from 1/4/21 at £4 a week.

Plaintiff entered into possession of these premises on 1st April, 1921, although owing to a dispute as to building of a kitchen the agreement was not signed until 28th November.

Plaintiff paid £260 rent in advance, that is, 65 weeks up to 30th June.

By agreement also plaintiff covenanted to pay all rates and taxes. He also covenanted not to assign or part with the possession of the premises without the written consent of the landlord. There was a covenant for re-entry on rent being in arrear for one week and for breach of any of the other covenants after one week.

It is admitted that in October, 1921, plaintiff sub-let part of the premises to Joe Rashid and again subsequently in January, 1922, sublet the remaining portion of the premises to the same person and that both these sublettings took place without the landlords consent.

And further it is not disputed that in December, 1921 and August, 1922 defendant gave notice to plaintiff that she intended to exercise her right of forfeiture, but she did nothing further until July, 1922, when the amount of rent paid in advance was used up.

Thereafter weekly according to her story which I believe defendant made demand for rent until the 14th day of August but no rent was paid.

On the 14th day of August defendant re-entered on the premises and remained there for some days until an arrangement was come to pending the result of this action.

The grounds for re-entry were rent from 1st July unpaid, rates from year 1922 unpaid, breach of covenant in parting with possession. Thereafter the plaintiff at once tendered the full amount of the rent and rates asked for—he did not tender any additional sum for costs occasioned by the demand ; but was not apparently asked to do so.

The tender was refused. I think I can clear the ground at once as to these two alleged causes of forfeiture. It is the law that under the Common Law Procedure Act 1852 forfeiture cannot be claimed for arrears of rent if the full amount be tendered and the landlord is bound to accept the tender and any costs incurred by him as a satisfaction of his claim to forfeiture any time before trial. In equity apart from the Common Law Procedure Act, the proviso for re-entry is regarded as a security only and if the parties can be put in the same position as before the lessee is relieved against forfeiture. I think I should be right to apply the same principle with regard to non-payment of rates and I hold that these two grounds for defendant's demand must therefore fail but the plaintiff must pay all costs incurred up to and including the final demand on 14th August. The third ground of forfeiture is the most difficult to deal with—that plaintiff broke his covenant by parting with possession of the premises.

Plaintiff's counsel has argued that parting with possession means more than parting with physical occupancy for a time and that in fact legal possession is not parted with until there is no reversion remaining in the sublessor. Here it is admitted that a reversion did remain in the sublessor. He further argues that if it had been intended to restrict subletting the covenant would have stated this definitely. I agree that a purely temporary leave to occupy in the place of the sublessor could not be construed as a parting with possession but it is only after considerable doubt that I have made up my mind that this doctrine ought to be extended to cover the present case. The two authorities quoted to me *Peebles v. Crosthwaite*, 13 T.L.R. 37 and 199 *Pitt v. Hogg*, 27 R.R. at 512 are both cases distinguishable from the present one ; but both cases are undoubtedly in favour of the plaintiff's argument, and in the course of the latter the case of *Crusoe v. Bugby* is referred to (an old case of which no report is available in the library) and the reference to that case is sufficient to induce me to hold that the plaintiff's contention is right, for I cannot find that the principle enunciated in that case has ever been questioned or reversed on appeal.

The covenant in *Crusoe v. Bugby* was that the lessee . . . " shall not nor will at any time or times during this demise assign transfer or set over or do or otherwise part with or put away this present indenture of demise or the premises hereby demised or any part thereof to any person whomsoever without the licence and consent of the lessor, etc."

Bayley J. in his judgment in *Pitt v. Hogg* referring to *Crusoe v. Bugby* says " The question there was whether the fact of the lessee having granted an underlease of the premises worked a forfeit " and the Court said " the Courts have always had a strict hand over these conditions for defeating leases. Very easy modes have always been

countenanced for putting an end to them. The lessor if he pleased might certainly have provided against the change of occupancy as well as against an assignment, but he has not done so by words which admit of no other meaning—' assign transfer and set over ' are mere words of assignment—' otherwise do or put away ' signifies any other mode of getting rid of the premises entirely and can not be confined to the making of an underlease.'' The court makes no direct reference to the words in the covenant " or otherwise part with . . . the premises demised " but it is clear that the Court included them in their interpretation of the covenant as not precluding the lessee from subletting for that, according to the passage from the judgment of Bailey J. which I have just read, was the question before the Court. I think then on the authority of this case and in the absence of authority to controvert it I am bound to hold that there has been no breach of covenant here and that defendant's claim to forfeiture is bad.

Deciding as I have done that there has been no breach of covenant I need not deal with the question of waiver raised here, but without giving any definite decision on the point I may say that after considering the numerous authorities cited to me in argument I incline to the view that the application of rent paid in advance after knowledge of the alleged breach of covenant coupled with the fact that no decisive step was taken by defendant until August would incline me to the view that a waiver of an alleged breach of covenant had taken place. I therefore grant the order as prayed by the plaintiff and give him the costs of the action.

GUNPAT CHOWDAREE *v.* JAGAI.

[Civil Jurisdiction (Young, C.J.) August 23, 1923.]

Bills of Sale Ordinance 1879[1]*—definition of " bill of sale "—non-compliance with provisions as to attestation and registration—document void as a bill of sale—whether clauses divisible from covenants which operate as a bill of sale are likewise void.*

Jagai entered into an agreement for the use of Gunpat Chowdaree's leasehold property as a dairy farm " subject to the legal right of Gunpat Chowdaree to possession ": Jagai was to take the profits of his dairy farming and was to pay to Gunpat Chowdaree all rents, rates and taxes due on the land. Jagai agreed to pay by instalments the value of the chattels and fences on the property and not to sell or dispose of any of the same without written consent until the agreed value was paid.

HELD—(1) An agreement containing clauses for sale and purchase of chattels and conferring a lien or charge for the purchase money in favour of the vendor over the chattels sold is a Bill of Sale and is void if unregistered.

(2) Covenants contained in clauses of the agreement but divisible from the covenants which operate as a Bill of Sale are not likewise void.

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[1] *Cap.* 179.