

JUDGMENTS
OF THE
FIJI COURT OF APPEAL
AND OF THE
SUPREME COURT OF FIJI

WONG MOO *v.* FONG LEE

[Civil Jurisdiction (Seton, C.J.) September 18th, 1946]

Trustee Ordinance—s. 31 (1) (b) (ii) and 31 (1) (b) (iii)—whether lessee a trustee of sub-lessee's land where right of renewal exists in sub-lease.

The plaintiff was the sub-lessee of the defendant. The sub-lease contained a clause giving the sub-lessee a right to renewal to be exercised within a reasonable time. The terms of the renewal were to be agreed by the parties and if not agreed were to be decided by an arbitrator.

The defendant left the Colony and returned to China and although he had appointed an attorney to act for him in his absence, the attorney had no power to execute the sub-lease.

The terms of the sub-lease having been settled by an arbitrator on the 8th July, 1946, an originating summons was taken out on behalf of the plaintiff for an order under sections 31 (1) (b) (ii) and/or 31 (1) (b) (iii) of the Trustee Ordinance to vest the land in question in the plaintiff.

At the hearing of the summons Counsel informed the Court that the defendant had returned to the Colony and executed the lease.

Counsel then argued as to who should pay the costs.

HELD.—If the defendant had been still absent from the Colony when the summons came on for hearing, the Court would have held that he was a trustee of the demised premises for the plaintiff for the new term and that he was out of the jurisdiction of the Court. The Court would then have made an order under section 31 (1) of the same Ordinance vesting the demised premises in the plaintiff.

Cases referred to:—

In re General Accident Assurance Corporation Ltd. (1904) 1 Ch. 147.

[**EDITOR'S NOTE.**—The relevant paragraphs of the Trustee Ordinance read as follows:—

“Where a trustee entitled to or possessed of any land or entitled to a contingent right therein, either solely or jointly with any other person . . . is out of the jurisdiction of the Court . . . or cannot be found the Court may make an order vesting the land in any such person . . . as the Court may direct.”

K. A. Stuart for the plaintiff.

N. S. Chalmers for the defendant.

SETON, C.J.—As regards the costs of the summons, I propose to decide the matter as if the defendant were still absent from the Colony and consequently I have to consider whether or not, if such had been the case, the plaintiff would have been entitled to succeed in these proceedings.

Mr. Stuart contends that, the plaintiff having duly exercised the right of renewal, the defendant became upon the expiration of the original lease, a Trustee of the demised premises for the plaintiff for the further term of 12 years mentioned in Clause 7 of the original lease. He says that the position was analogous to that of a vendor who contracts to sell to another an estate and from that moment has impliedly declared himself a trustee for the purchaser (*Lewin on Trusts*, 14th Ed. p. 93). I think that this is so. Mr. Stuart has cited a number of cases in support of his contention and I select *in re General Accident Assurance Corporation Ltd.* (1904) 1 Ch., 147, as being perhaps the nearest in point. In that case a limited liability corporation went into voluntary liquidation for the purpose of carrying out a sale of its property; it received the full purchase consideration from the purchasing company and afterwards became automatically dissolved by virtue of section 143 of the Companies Act, 1862, before the property had been legally conveyed to the purchaser. Included in the property was a mortgage secured on leasehold property. The purchasing company was being paid the interest due under the mortgage by the mortgagor but, being desirous of getting in the legal estate, they presented a petition to the Court under the Trustee Act, 1893, asking that an order might be made under sections 26 and 35 of the Act vesting in them the mortgage debt and premises comprised in the mortgage deed for all the estate of the corporation therein. In support of the petition, it was submitted that when the consideration for the sale was fully paid, the Corporation became a trustee of the mortgage security for the purchasing company and, the Corporation having become dissolved, it was a case where the trustee could not be found within the meaning of sections 26 (ii) (c) and 35 of the Trustee Act, 1893, and under section 36 of the Act, any party interested in the mortgage could apply for a vesting order. The learned judge apparently accepted this view and made the order as prayed.

Accordingly, in this case, if the defendant had been still absent from the Colony, when this summons came on for hearing, I should have held that he was a trustee of the demised premises for the plaintiff for the new term of 12 years and that he was out of the jurisdiction of the Court within the meaning of section 31 (1) (b) (ii) of the Trustee Ordinance. Then I should have gone on to make an order under section 31 (1) of the same Ordinance vesting the demised premises in the plaintiff for the term and upon the conditions contained in the draft sublease which had already been approved on behalf of both parties.

I order the defendant to pay the costs.