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class of case the section is designed to suppress. And further the parties were advised to take their case before the Supreme Court by the District Commissioner.

(After hearing arguments.)

I make order for costs.

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[CIVIL JURISDICTION.]

[ACTION NO. 89, 1922.]

FREDERICK BENJAMIN SPAETH *v.* ARTHUR HERBERT HALLEN.

Lease and sub-lease—buildings—growing crops—stock and implements—covenant by lessor to purchase by valuation on termination of a lease—further covenant if parties unable to agree on a valuation to refer to arbitration—lessee transferred the lease in breach of lessee's covenants subject to similar covenants contained in original lease—buildings erected by sub-lessee.

Held, on termination of lease the defendant (the original lessor) became liable to the plaintiff (the original lessee) to take at a valuation all things within the terms of the covenants of the original lease—the Court then proceeded to a valuation disposing of Arbitration.

K. J. MUIR MACKENZIE, Acting C.J. In this case the plaintiff claims £5,562 10s. as being the value of the buildings, growing crops, stock and implements on the estate known as Na Tawarau the property of the defendant, taken over by him on the 1st July, 1922, on the expiration of a lease from defendant to plaintiff and in accordance with the covenants contained in that lease.

It seems that in the year 1906 the whole estate of Na Tawarau and Raviravi, comprising over 8,000 acres, was let to one Armstrong, who had sub-let a portion to Spaeth.

In 1909 the Colonial Sugar Refining Company were developing the country and Mr. Spaeth formed the idea of developing the estate of Na Tawarau into a sugar plantation. His lease from Armstrong expired in 1912, so that for the purpose mentioned he desired a longer lease which would give time to make the necessary improvements followed by an option to renew at the end of the term; or, if the parties did not renew, to be entitled to call upon the lessor to pay for the buildings, stock, implements and growing crops on the estate when his term finished.

He therefore entered into correspondence with Mr. Crompton, who was at that time acting as plaintiff's solicitor, making his proposals, and pointing out the advantage to be gained by the lessor, if the lessee were encouraged to improve the estate by bringing it into proper rotation and erecting the necessary buildings, rather than exhaust the estate, all of which could not be done unless the lessee was given the option of renewal and an assurance that he would not be spending his money for another's benefit.

Negotiations went on by correspondence between Spaeth, Crompton, and Hallen until in June, 1910, Hallen came to Suva and sees Spaeth, after which Spaeth writes Crompton to the following effect:—

> The conditions verbally agreed upon between myself and Dr. Hallen are as follows:—
>
> A renewal of lease from 1912 to 1922 . . . . . at a rental of £800 per annum with the optional renewal for another period of 10 years, or otherwise, Dr. Hallen at expiry of lease in 1922 to take over at a valuation (settlement by arbitration) of all improvements, including buildings, labour, stock, harness, implements and growing crops.

There was further correspondence resulting in a meeting of Spaeth and Hallen at Crompton's office, when the draft conditions for the lease were settled.

These terms were embodied in a document (exhibit P). So that they varied slightly from those contained in Spaeth's letter, and, as afterwards proved to be the case, again varied from the covenant eventually embodied in the lease which was different to either.

Thereafter plaintiff proceeded with his work of making the estate into a cane plantation, but towards the end of 1910 he formed the idea of not carrying this out himself, but of transferring his lease, for he wrote to Mr. Crompton in November asking him to obtain Dr. Hallen's consent to a transfer, and Mr. Crompton forwarded that request to Dr. Hallen on 1st December.

Dr. Hallen did not consent to a transfer then, for he wrote on 14th December, 1910. Re Spaeth's lease we have no means of deciding this till we know the standing of the transferee. On 28th January, 1911, Crompton forwarded the lease to Spaeth to Hallen for signature and, in manuscript at the bottom of that forwarding letter, he writes:—

> Mr. Spaeth is sub-letting Tawarau to H. H. Ragg and Bryan Holmes. Both of them are good energetic men and the latter is one of the best cane men in the Colony. You may rest content that they will do well at Tawarau.

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How in the face of that the defendant can say, as he has since done, that he did not know anything about the sublease I am at a loss to understand; but there were other matters which have led me to form the opinion that defendant's word is in no way to be relied on. Indeed, in his very next letter, dated 8th March, 1911, he writes to Crompton forwarding the lease and adding " What is Mr. Spaeth doing ? Has he left Fiji ? " showing he had a clear notion that Spaeth did not intend to work the property himself. Crompton replied to this and told him Spaeth was at Rotorua and that he expected him to take up the management of a cane estate in the Savusavu district. Anyhow the lease from Hallen to Spaeth was duly signed and dated 25th February, 1911. The lease was for 10 years from 1st July, 1912, at a rental of £800, and contained the covenants on which this action is based. They read as follows:—

> (1) The lessee shall have the option of leasing the premises for a further term of 10 years computed from the expiration of the term hereby granted upon terms and conditions to be agreed between the parties thereto. Provided always that if the parties hereto fail to agree upon the terms for such further lease, then the lessor shall purchase by valuation the buildings erected by the said lessee and also the growing crops, stock and implements, and shall also take over the unexpired terms of the indentured immigrants working upon the land hereby demised.
>
> (2) If the parties hereto shall be unable to agree on a valuation all matters in difference in relation thereto shall be referred to the arbitration of two indifferent persons, one to be appointed by each party, and every such arbitration shall be subject to the provisions relating to arbitrations contained in the C.L. Procedure Act 1854.

On the 4th day of July, 1912, Spaeth signed a sublease to Ragg and Holmes of the same property for 10 years commencing from 1st July, 1912, and containing exactly similar covenants to those I have just read, the only difference being the amount of rent to be paid. It was never argued that this was a transfer, though I think that the matter is at least doubtful, in spite of the difference in rent, for there is no doubt that plaintiff parted with his whole interest. However, I propose to treat it as a sub-lease and further to hold that long before the termination of the lease and sub-lease Hallen knew all about its terms, and whilst he was annoyed to think that his tenant was receiving a great deal more rent from the sub-tenant than he was paying him, he did nothing by way of objecting to the arrangement. For everything went on smoothly over the course of years, and Dr. Hallen visited the

estate once in 1918. In March of this year, in view of the approaching termination of the lease, Spaeth began to negotiate for a renewal on the basis of a reduced rent owing to the decline in the value of sugar estates.

In April defendant writes saying he is coming to Fiji, and in June he arrived.

On 19th June Spaeth and Hallen met and discussed terms. Spaeth says that Hallen stated he was willing to accept a rent of £600 and he wrote on the same day confirming that interview. He did write in terms as follows (exhibit X):—

> In reference to our conversation this morning re Na Tawarau, I now understand you are willing to accept an offer of renewal of the lease of your Na Tawarau property at a rent of £600 per annum.
>
> Before giving you a definite answer to this I require to visit Na Tawarau. I shall have to be present to hand over to you the estate at the expiry of the lease should my decision be adverse to the above offer and then to accept a settlement of the amount that may be agreed upon in compensation of improvements and crop, under the terms of the expiring lease or to appoint an arbitrator for the settlement of same. In that case it will be necessary for you to appoint your arbitrator. The "Adi Keva" leaves Suva to-morrow, don't you think it will further a satisfactory settlement if you were to go with me to Na Tawarau.

How that letter was delivered really does not matter a bit; but it is to be regretted that Dr. Hallen should say one thing in his affidavit and another in the witness-box.

Anyhow the letter shows that no final agreement was reached. Hallen replied to it by appointing a time for its discussion, when he further disputed the terms, stating that all he meant to offer was a low rent to tide over bad times, say, for two years, and not a renewal for 10 years at the £600, also that he did not wish any taking-over clause in the renewal, but would grant a right of re-entry on the expiration of the term.

The next result was a failure to agree on terms of renewal, and no agreement was ever reached by the 1st July when both leases and sub-lease expired.

I therefore hold that as between Spaeth and Hallen, Hallen became liable within the terms of the taking-over covenant. We now come to the question as to what the effect of that covenant is.

Hallen in his defence, paragraph 9, admits that he took possession of the estate and does not deny authority of his agent, but he repudiates all liability to pay for stock, buildings, or crops. The main ground of his defence is that he says

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that no improvements were made by Spaeth under the lease, but only by Ragg and Holmes, and that his covenant was personal to Spaeth.

I cannot accept that argument as sound in law, nor do I believe that it represented the intention of the parties.

At Common Law, in the absence of any express covenants, the landlord would have the right to all fixtures attached to the soil, but here there is an express covenant and we have to ascertain its meaning. Again, had this been a lease under the Agricultural Holdings Act the lessee would have been entitled to recover compensation for improvements to the subject matter of the lease done during his term, and it would not have made any difference whether the improvements were made by him or by his sub-lessee. That is a matter of construction quite apart from any special provision of the statute itself, which I think cannot be disputed on the authorities, for the sub-lessee in his relation to the lessee and lessor is regarded simply as the lessee's agent in this respect, and what he does during the term of his sub-lease in the way of improvements is regarded as being done by the lessee when the lessor comes to take over at the end of the term.

There seems to be very little authority directly in point; but after a considerable search I have come to the conclusion that the case of *Mansel* v. *Norton* in 22 Ch. D. at p. 769, whilst deciding a different point confirms my view of the principle, also the fact that in cases arising under the Agricultural Holdings Act " tenant " is held to mean the holder of land under a tenancy and includes his executors and administrators and assigns or other person deriving title from him tends to confirm my view that my construction is the right one.

I therefore decide that the defendant is liable to take at a valuation all things within the terms of the covenant.

It was sought to be argued that the covenant covered all improvements customary to be taken over on the termination of the lease of a cane estate in that district. I do not think the custom of the district is material in the least, all we are concerned in is the wording of the covenant, and we cannot go outside it The things covered by the covenant are:—

> The buildings erected by the lessee and the growing crops, stock and implements.

That, I hold, means buildings erected on the estate during the currency of the tenancy, and stock and implements in the possession of the lessee during and at the expiration of the

tenancy, and growing crops standing at the expiration of the tenancy, and nothing else.

I, therefore, disallow from the plaintiff's claim the items headed:—

Manure, &c.	£135
Preparatory work	513
Improvements	130
Mauritius bean in field . ..	40
	£818

I do not think the furniture ought to have been included in the item for a dwelling-house of £600; also I consider that some allowance should be made for the old house which on being rebuilt and improved represents this item; but to that I shall refer later.

This brings me to the question of agency and the arbitration clause. I have no doubt that the defendant did appoint Dan Costello to act as his agent for the purpose of taking possession, and it is proved that he appointed him in these terms, that is to say, he caused to be dictated by telephone to him (exhibit Y):—

Sir,

As agent for Dr. A. Herbert Hallen I hereby notify you that I have this day formally taken possession of "Tawarau," and request you to vacate forthwith.

I am,
Yours, &c.,
D. COSTELLO.

To F. B. Spaeth, Esqr., Tawarau.

And on 1st July Dan Costello went to Na Tawarau and there met Spaeth, Thomas, and Ragg, to whom he gave this notice. Also I believe the witness Mr. Thomas when he says that at his interview with defendant, defendant told him he had appointed Costello as his agent. The meeting of the 1st July resulted in this, that Costello seems to have been a little doubtful as to the scope of his instructions; but on the representation of Ragg and Spaeth that Spaeth's sub-lease to Ragg and Holmes contained a taking-over covenant and that there was an exactly similar covenant in the lease from plaintiff to defendant, he made out and signed exhibit Z:—

Natawarau,
1st July, 1922.

I have this day taken over from F. B. Spaeth, estate with buildings thereon erected by F. B. Spaeth and Messrs. Ragg and Holmes, growing crops, stock, and implements, &c. The valuation of which will be made on the 3rd instant.

D. COSTELLO,
on behalf of A. H. Hallen.

Witness to the signature of D. Costello—Theo. D. Riaz.

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I believe him when he says that he asked for the valuation to be postponed to the 3rd of July in order that he might receive his written instructions, and though I think that his instructions at that date might have entitled him to do so, I do not think that he ever did in fact bind his principal to accept the valuation as correct when made.

By the 3rd Dan Costello had received further instructions by telephone and as a result of these instructions he refused to take any part in the valuation whatever. He received a copy of the valuation made by Spaeth and Thomas under cover of a letter dated July 4th, and promptly returned it next day. That is to say, he, in effect, disputed the justice of every item in it, and further than that Dr. Hallen has also repudiated all liability.

In my opinion the plaintiff's right course was then to have said, I have made my valuation to which you will not agree, I therefore appoint Thomas my arbitrator, will you kindly do the same ? The defendant also acted wrongly, holding as he did what I have held to be a mistaken view of the covenant in the lease, he repudiated all liability whatever, and said he had no concern in the valuation. After this action is brought, and alternatively by his pleading, he sets up that an arbitration is a condition precedent to the defendant's right to sue him.

I do not think the plaintiff was debarred from suing, because the defendant could not be induced to take any action until he was sued, but simply repudiated liability altogether. In this state of affairs the plaintiff was bound to bring an action to establish his right under the covenant.

I think the authorities show that the C.L. Procedure Act 1854 does not take away the jurisdiction of the Court to decide a dispute between the parties; but it gives power to stop an action brought in violation of an agreement to refer to arbitration and to enforce the agreement between the parties. The Court however will not stay proceedings on the ground of there having been no arbitration, unless the party raising the objection could show that at the time when the action began he was prepared to go to arbitration.

In this case defendant has totally denied any liability under the covenant because he denies that plaintiff ever did any improvements.

It was necessary therefore for me to decide this issue at law before the arbitration could take place.

I feel some doubt as to the right course to pursue, but I have decided, after careful consideration, that since there is

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a right in the Court to decide the dispute I ought not to put the parties to the unnecessary expense and delay of going to arbitration on the figures.

It is true that all the evidence as to values which I have was given by plaintiff and his witnesses; but the figures were never cross-examined on, and the only witness for defendant, Mr. Riaz, who said anything about the amount, put the total considerably higher than plaintiff's valuation. I therefore hold that plaintiff is entitled to receive from defendant the value of the buildings, stock, implements, and crops erected or brought on to Na Tawarau by the lessee or his sub-lessees during the term, and that these items do not include:—Manure, £135; preparatory work, £513; improvements, £130; Mauritius bean, £40 (plaintiff himself told me he did not consider this a crop); an old house and furniture, £200. The last is a somewhat arbitrary figure as I really have very little to guide me in the evidence; but I believe that the defendant will have nothing to complain of if the plaintiff's claim is reduced by that amount.

In other respects I have decided to accept the plaintiff's figures, and judgment will be entered for him for—

	£5,562	10	0
less	1,018	0	0
	£4,544	10	0

together with the costs of this action.

The order appointing the Colonial Sugar Refining Company custodians will be extended for 21 days.

In the event of no appeal being lodged then proceeds of cane cut to be defendant's. Necessary expenditure incurred by the Colonial Sugar Refining Company to be paid by him.

Note.—The above judgment was reversed on Appeal to the Privy Council on the ground that the Court proceeded to a valuation instead of directing an arbitration to take place in accordance with the terms of the lease—in other respects their Lordships agreed with the findings of the learned trial judge.