

LANDLORD AND TENANT — COVENANT NOT TO ASSIGN —
ACTS OF PART PERFORMANCE

*Ferguson v. Hullock*¹

Mrs H., owner of an apartment house, gave to Mrs C. a lease for five years including a covenant not to assign without consent and provision for re-entry. Mrs C. assigned her interest in the lease to one T., who agreed to assign to a Mrs F. The latter collected moneys from the lodgers, until Mrs H. took possession as owner. Mrs H. had not been asked for her consent to any assignment and did not give it, but when Mrs F. and T. sought possession as against her, Gavan Duffy J. gave Mrs F. possession on the grounds that T. had had at least a weekly tenancy to assign, he was entitled to notice before its determination, and no notice had been given; that T.'s vacation of the premises in favour of Mrs F. did not affect a surrender of the tenancy; that Mrs F.'s agreement with T. had been the subject of acts of part performance sufficient to satisfy s. 55 of the Property Law Act 1928, and Mrs F. had thus acquired the right to possession by way of an equitable assignment.

His Honour began by pointing out that although Mrs H. never gave her consent to the assignments nor waived her right to insist that her consent was necessary, that fact was immaterial in deciding whether Mrs H. had a right of re-entry as against the plaintiffs; for even at common law a breach of a covenant did not *ipso facto* effect a forfeiture, but now s. 146 of the Property Law Act 1928 restricts the landlord's rights, requiring notice to quit to be given, notice which the defendant did not give. Therefore T. had at least an assignable weekly tenancy (determinable by notice) when he purported to assign to Mrs F., by which operation he would transfer his right to possession to her, unless, as counsel for the defendant urged, T.'s lease had been surrendered by operation of law when he left the premises to allow Mrs F. to occupy them.

Gavan Duffy J. firmly rejected this contention, and this, in my submission, was correct. Quoting a recent passage by Evershed M. R.,² His Honour pointed out the difference between the case of a tenant going out of possession in favour of a *third* party, and that of the landlord re-entering. As regards the two N.S.W. cases cited by counsel for the defendant, *Simpson v. Mitchell*,³ and *Corrigan v. Ewan*,⁴ as Gavan Duffy J. succinctly put it:⁵

If they really lay down that an assignment made in breach of a covenant not to assign without the landlord's consent if followed by the tenant going out of possession and the assignee going in, *ipso facto* brings about a surrender by operation of law, I am not, especially in view of s. 146 of the Property Law Act 1928, prepared to follow them.

¹ [1955] A.L.R. 512. Supreme Court of Victoria, Gavan Duffy J.

² *Foster v. Robinson* [1951] 1 K.B. 149, 155. ³ (1944) 61 W.N. (N.S.W.) 147

⁴ (1948) 63 W.N. (N.S.W.) 77.

⁵ [1955] A.L.R. 512, 516.

Thus T. had not lost his lease when he assigned to Mrs F. The contract to assign was in writing but was not signed by T., and it therefore came within the Instruments Act 1928, s. 128. Despite s. 53 of the Property Law Act 1928, s. 55 of that same Act admits the doctrine of part performance, and His Honour found that Mrs F.'s acts of entering into possession, and managing the business there, were sufficient acts of part performance.

This would seem to give Mrs F. a good equitable assignment under the doctrine of *Walsh v. Lonsdale*,⁶ but His Honour saw the difficulty of granting specific performance (which is the supposed basis of an equitable interest) to enforce a contract in breach of a covenant not to assign without consent (*Willmott v. Barber*).⁷ 'With some hesitation', His Honour chose to follow the Australian High Court authority of *Dougan v. Ley*,⁸ where specific performance was ordered conditional on the consent of some public officer necessary to the transfer, being obtained.

I submit, however, that His Honour was quite right when he suggested that that Australian case was 'not directly in point'; and also, this present case seems a far cry from the ministerial consent case⁹ which His Honour cited to substantiate his argument. To add that specific performance could be decreed here because 'the assignment T. agreed to make has not yet been made, and no breach of the covenant against assigning without consent has been committed',¹⁰ seems tantamount to the court authorizing the breach.

But on that basis Mrs F. was granted possession, she having 'a good equitable assignment' from T.

This case shows clearly the effect of a breach of a covenant not to assign without the landlord's consent, and the operation both of the doctrine of part performance and of the principle expressed in *Walsh v. Lonsdale*;¹¹ but perhaps the most important feature of the case is the concise statement it contains on the law regarding surrender of leases by operation of law.

J. D. PHILLIPS

⁶ (1882) 21 Ch. D. 9.

⁷ (1880) 15 Ch. D. 96.

⁸ (1946) 71 C.L.R. 142.

⁹ *Re E. D. White Ltd.* (1929) 29 S.R. (N.S.W.) 389.

¹⁰ [1955] A.L.R. 512, 519.

¹¹ *Supra*.

**CERTIORARI — ERROR OF LAW UNRELATED TO
JURISDICTION — LABOUR AND INDUSTRY ACT —
EXEMPTION OF EMPLOYER FROM PROVISIONS REQUIRING
GRANT OF LONG SERVICE LEAVE**

*Re Industrial Appeals Court
Ex Parte Henry Berry & Co. (Aust.) Ltd.*¹

The provisions of Division 4 of Part VIII of the Labour and Industry Act 1953 require the grant of long service leave to employees who have served for certain prescribed periods. S. 153 (1) of the Act em-