APPELLATE CIVIL.

Before Mookerjee and Chotzner JJ.

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June 7.

NAORANG SINGH

v.

A. J. MEIK.*

Lease—Transfer of Property Act (IV of 1882), s. 108, cl. (c), true construction of—Express or implied covenant for quiet enjoyment of a lease effect of—Claim for abatement or suspension of rent—Law before the Transfer of Property Act—Person claiming under lessor, interpretation of.

A and *B* were lessees under *C* to work adjoining mines. *C* brought a suit against *A* for recovery of royalty and other dues. *A* contended that he could not work the whole mine owing to the wrongful act of *B* and therefore he was entitled to a reduction of rent :—

Held, that upon a true construction of s. 108 (*c*) of the Transfer of Property Act, the unauthorised act of *B* would not absolve *A* from the liability of paying rent in accordance with his lease, and therefore he was not entitled to a reduction of rent.

Hayes v. *Bickerstaff* (1) referred to.

Like the express covenant, the implied covenant protects the lessee against all disturbance by the lessor whether lawful or not, save under a right of re-entry, but, as against other persons, it protects the lessee only against lawful disturbance.

Wotton v. *Hele* (2) and other cases referred to.

Before the Transfer of Property Act, the law was that if the lessee were evicted by title paramount to that of the lessor or by a person to whom he had given the land on lease, the lessee was discharged from the payment of rent and might claim abatement or suspension.

Munee v. *Campbell* (3), *Gopaunnd* v. *Lalla Gobind* (4) referred to.

* Appeal from Original Decree, No. 191 of 1919, against the decree of Phanindra Nath Chatterjee, Subordinate Judge of Burdwan, dated April 30, 1919.

(1) (1669) Vaughan 118.
(2) (1670) 2 Wms. Saund. 178 (*b*).
(3) (1859) 11 W. R. 278 ; 12 W. R. 149.
(4) (1869) 12 W. R. 109.

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Held further, that *B* could not be treated as a person claiming under *C* as his act was unauthorised and consequently *C* could not be liable for the wrongful act of *B*. But *A* had a remedy against *B* for tort.

Harrison v. *Muncaster* (1), *Sanderson* v. *Berwick* (2) referred to and discussed.

APPEAL by Naorang Singh, the defendant No. 1.

This appeal arose out of a suit for recovery of minimum royalty and other dues for six years from 1911 to 1917 under a mining lease granted by the predecessor of the plaintiffs on the 28th September, 1901. A similar lease was granted to Myer & Co., on the 22nd April, 1897, by the predecessor of the plaintiffs for the adjoining mine. The defendant contended that as certain portion of the coal land was acquired by the Land Acquisition Act, he was entitled to abatement and that as his possession of the mine had been interrupted by Myer & Co., the entire rent was suspended. The lower Court decreed the suit in part. In the High Court the appellant contended that in view of the provision of section 108 (*c*) of the Transfer of Property Act he was entitled to a reduction of the rent payable by him, as a considerable portion of the mine let out to him had been flooded by reason of the act of Myer & Co., which held the adjoining mine under the plaintiffs. The High Court held that before construing section 108 the case ought to be remanded for determination of certain issues. After remand the section was construed and the appeal was dismissed.

Dr. Dwarkanath Mitra, *Babu Satindra Nath Mookerjee* and *Babu Rama Prosad Mookerjee*, for the appellant.

Babu Ram Charan Mitra and *Babu Atul Chandra Dutt*, for the respondents.

(1) [1891] 2 Q. B. 680.

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MOOKERJEE J. This is an appeal by the first defendant in a suit for recovery of minimum royalty and other dues under a mining lease granted by the predecessor of the plaintiffs on the 28th September, 1901. The suit was instituted on the 6th July, 1917, and the claim covered the period of six years between the 14th April, 1911, and the 13th April, 1917. The defendant resisted the claim substantially on two grounds, namely, first that he was entitled to abatement, inasmuch as six bighas out of the thirty-two bighas of coal land included in the lease had been acquired under the Land Acquisition Act, and, secondly, that as his possession of the mine had been interrupted by Myer & Co., who were lessees of an adjoining mine under a grant made by the predecessor of the plaintiffs on the 22nd April, 1897, the entire rent was suspended. The Subordinate Judge gave effect to the first contention and overruled the second, with the result that on the 30th April, 1919, the claim was decreed in part. The present appeal, preferred by the defendant against this decree, was heard on the 17th January, 1921. In support of the appeal it was urged that in view of the provision of section 108 (*c*) of the Transfer of Property Act the appellant was entitled to a reduction of the rent payable by him, as a considerable portion of the mine let out to him had been flooded by reason of the act of Myer & Co. who held the adjoining mine under the plaintiffs. The Court held that before the question of the true construction of section 108 could be usefully discussed, it was necessary to ascertain facts which had not been investigated by the Court below. The Court accordingly directed the lower Court under O. XLI, r. 25 of the Civil Procedure Code, to try the following issues on additional evidence and to return the evidence to this Court together with the findings thereon and the

reasons therefor; first, was there in fact an interruption of the possession of the defendant during the years in suit within the meaning, of clause (c) of section 108 of the Transfer of Property Act; secondly, if there was such an interruption, was it attributable to any act on the part of Myer & Co. as alleged by the defendant; thirdly, what were the terms of the grant made by the plaintiffs in favour of Myer & Co. The Subordinate Judge has held a local enquiry, taken the additional evidence required and submitted his findings. We have now to determine the appeal under O.XLI, r. 26, sub-rule (2).

The findings of the Subordinate Judge have been accepted by both the parties before us and may be summarised as follows: first, that during the period from the 14th June, 1911 to the 13th April, 1917, there was interruption of the possession of the defendant in respect of an area of ten bighas fifteen cottahs and twelve chattaks approximately in the top seam, while the balance, fifteen bighas four cottahs and eight chattaks remained in fully workable condition and had during this period a shaft pit by which the first defendant extracted coal; secondly, that this interruption of possession was due to the unlawful act of Myer & Co. in joining their mine to the defendant's mine by galleries encroaching upon the defendant's coal land; thirdly, that the terms of the grant in favour of Myer & Co. were set out in the lease granted by the predecessors of the plaintiffs on the 22nd April, 1897, to Haricharan Singh.

The Subordinate Judge has found that if Myer & Co. had not driven galleries by encroaching into the coal land of the defendant and had not thus joined their mine to his mine, no water from their mine could have entered his mine which was thereby flooded and submerged. The immediate cause was

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the destruction of the barrier by Myer & Co.; the ulterior cause was the robbing of pillars in the mine of Myer & Co. and also in a natural channel which carried the surplus rain water of the locality into a neighbouring river. This removal of pillars naturally caused subsidence in their mine and also in the channel, thereby creating a passage for rush of a large volume of rain water and flood water into the mine of the defendant. There can be no doubt that the act of Myer & Co. was, as between them and their landlords, entirely unauthorised by the terms of their lease and must be regarded as unlawful. In these circumstances, we have to decide whether such unauthorised act on the part of the lessees of the plaintiffs, absolves the defendant from liability to pay rent in accordance with his lease. The solution of this question depends upon the true construction of section 108.

Clause (*c*) of section 108 provides that, in the absence of a contract or local usage to the contrary, the lessor of immoveable property shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption. This provision secures for the lessee the benefit of an unqualified covenant for quiet enjoyment. A qualified covenant for quiet enjoyment protects the lessee against interruption by the lessor, his heirs and assigns, or any other person claiming by or under him, them, or any of them, whereas an unqualified covenant protects the lessee against interruption by the lessor, his heirs and assigns or by any other person or persons whomsoever. The covenant, in the unqualified form covers the case of interruption by the superior landlord or other person

claiming by title paramount, exercising a power of re-entry, or otherwise, dispossessing the lessee. But even such a covenant does not include a case of disturbance by persons having no lawful title or right of entry; for, against them the lessee has his proper remedy and does not require a covenant, nor can he, on account of being evicted by such persons, be relieved of his liability to pay rent. Reference may be made in this connection to the exposition contained in the classical judgment of Sir John Vaughan, Chief Justice of the Court of Common Pleas, in the case of *Hayes* v. *Bickerstaff* (1), where he shows that the express covenant, like the implied covenant, protects the lessee only against lawful disturbance of strangers, and then summarises the "inconveniences if the law should be otherwise:"

"1. A man's covenant without necessary words to make it such, is strained, to be unreasonable, and therefore improbable to be so intended; for, it is unreasonable a man should covenant against the tortious acts of strangers, impossible for him to prevent or probably to attempt preventing.

2. The covenantor, who is innocent, shall be charged, when the lessee hath his natural remedy against the wrongdoer and the covenantor made to defend a man from that from which the law defends every man, that is, from wrong.

3. A man shall have double remedy for the same injury against the covenantor, and also against the wrongdoer.

4. A way is opened to damage a third person (that is, the covenantor) by undiscoverable practice between the lessee and a stranger, for there is no difficulty for the lessee secretly to procure a stranger to make a

(1) (1669) Vaughan 118.

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tortious entry, that he may therefor charge the covenantor with an action".

This principle was recognised by Mr. Justice Subramaniya Iyer in *Vithilinga* v. *Vithilingi* (1), when he observed that by a covenant for quiet enjoyment, the lessee is to enjoy his lease against the lawful entry, eviction or interruption of any man, but not against tortious entries, evictions or interruptions, and the reason for the law is solid and clear, because against tortious acts, the lessee has his proper remedy against the wrongdoers. The decision of Mr. Justice Ranade in *Tayawa* v. *Gurshidappa* (2) takes substantially the same view, when it lays down that the words "without interruption", in section 108 (*c*), give a lessee in India the same rights as he would have under what is known in England as a covenant for quiet enjoyment in an unqualified form. The case then before the Court was as in *Gopamund* v. *Lalla Gobind* (3), decided by Sir Barnes Peacock, C. J. and Jackson J., that of interruption caused by the paramount owner of the property, and although it is stated that "the lessee is protected against interruption from any person whomsoever", it is made abundantly clear by the observations which follow that the lessee must protect himself against interruption by a person without lawful right or against wrongful disturbance by a stranger. The rule is thus now firmly settled that, like the express covenant, the implied covenant protects the lessee against all disturbance by the lessor whether lawful or not, save under a right of re-entry, but, as against other persons, it protects the lessee only against lawful disturbance: *Wotton* v. *Hele* (4),

(1) (1891) I. L. R. 15 Mad 111, 121.
(2) (1900) I. L. R. 25 Bom 269
(3) (1869) 12 W. R. 109.
(4) (1670) 2 Wms. Saund. 177, 178 (b).

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Anon (1), *Dudley* v. *Folliott* (2), *Nash* v. *Palmer* (3), *Granger* v. *Collins* (4), *Young* v. *Raincock* (5), *Jeffryes* v. *Evans* (6), *Sanderson* v. *Berwick* (7), *Wallis* v. *Hands* (8), *Mukhtar* v. *Sunder* (9), *Udai* v. *Katyaini* (10). It may be pointed out that, before the Transfer of Property Act, it had been maintained in a long series of decisions that if the lessee were evicted by title paramount to that o the lessor or by a person to whom he had given the land on lease, the lessee was discharged from the payment of rent and might claim abatement or suspension: *Munee* v. *Campbell* (11), *Gopanund* v. *Lalla Gobind* (12), *Kadumbinee* v. *Kasheenath* (13), *Kristo Soondur* v. *Koomar Chunder* (14). To the same effect was the decision in *Donzelle* v. *Girdharee* (15), which held that, in the absence of express agreement to the contrary, a landlord is bound by an implied obligation to indemnify the tenant against disturbance by his own act or by the acts of those who claim under him or by right paramount to him, but not against the wrongful acts of strangers. The same view is reflected in the judgment of Sir John Wallis, C. J. *in Srinivasa* v. *Rangaswami* (16), where he states that a covenant for quiet enjoyment, as between lessor and lessee even in its more extended form, is only a covenant against disturbance by

(1) (1774) Lofft. 460.
(2) (1790) 3 T. R. 584; 1 R. R. 772.
(3) (1816) 5 M. & S. 374; 17 R. R. 364.
(4) (1849) 6 M. & W. 458; 55 R. R. 687.
(5) (1849) 7 C. B. 310; 78 R. R. 652.
(6) (1865) 19 C. B. N. S. 246; 147 R. R. 577.
(7) (1884) 13 Q. B. D. 547.
(8) [1893] 2 Ch. 75, 83.
(9) (1913) 17 C. W. N. 960.
(10) (1922) 35 C. L. J. 292.
(11) (1869) 11 W. R. 278; 12 W. R. 149.
(12) (1869) 12 W. R 109.
(13) (1870) 13 W. R. 338.
(14) (1871) 15 W. R. 230.
(15) (1874) 23 W. R. 121.
(16) (1914) 1 Mad. L. W. 858.

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somebody claiming under a lawful title and does not extend to disturbance by a trespasser.

In view of what must thus be recognised as settled law, the appellant has been driven to contend, as a last resort that Myer & Co., who hold under a lease granted by the plaintiffs, may rightly be treated as included within the category of persons claiming under them. This argument is attractive but fallacious. Lord Esher M. R. when pressed with the identical argument in *Harrison* v. *Muncaster* (1), on the authority of Fry L. J. in *Sanderson* v. *Berwick* (2), made an important observation which may be usefully recalled here: "the expression in that judgment, *claiming under him*, must be restricted in its meaning to claiming a right under him to do the particular act complained of." This interpretation led to the result that where a lessee of a mine was interrupted, not by any act which the lessor had authorised, but by a flow of water which he had not authorised, the lessor was not liable under his covenant for quiet enjoyment; see also *Jones* v. *Consolidated Anthracite Collieries* (3). The same construction was placed upon the expression, *claiming under him*, by Bray J. in *Williams* v. *Gabriel* (4), when he ruled that a person claiming under the lessor means a person claiming under him the right to do the act complained of, so that if a lessor parts with the property or any adjoining property to a third person, and that person is in a position to rightfully claim, under his title from the lessor, that he is authorised to do those acts, the lessor will be responsible. If this interpretation were not adopted, the lessor would be responsible for all interruptions by any person claiming title through him, whether

(1) [1891] 2 Q. B. 680.
(2) (1884) 13 Q. B. D. 547.
(3) [1916] 1 K. B. 123, 136.
(4) [1906] 1 K. B. 155.

assignee or under-tenant, howsoever wilful or negligent the interruption. There must clearly be some limit, and we are of opinion that the limit indicated by Lord Esher is reasonable. It comes to this, that the lessor becomes bound for any act of interruption by himself or by any person whom he has expressly or impliedly authorised to do the act. This is good sense and fits in with what the parties might well have contemplated, because the lessor has really authorised the acts to be done; but to hold that the parties contemplated that the lessor was to be responsible for wrongful or negligent acts which he had not authorised, would plainly be beyond reason. This principle explains the decision in *Sanderson* v. *Berwick* (1), where the Court of Appeal held a lessor responsible, because his tenant of adjoining land had, in the proper and contemplated use of certain drains, damaged the plaintiff (another tenant of his), but refused to hold the lessor responsible for excessive user of those drains. The test formulated by Lord Esher, it will be found, renders intelligible the decisions in *Ludwell* v. *Newman* (2), *Evans* v. *Vaughan* (3), *Calvert* v. *Sebright* (4), *Carpenter* v. *Parker* (5), *Jeffryes* v. *Evans* (6), *Rolph* v. *Crouch* (7) and *White* v. *Jameson* (8), where the interference with the lessee was by a person whose title arose by a prior act or procurement of the lessor; see also *Harmer* v. *Jumbil Tin Areas* (9). The same principle appears to have been recognised in *Kaliprasanna* v. *Mathuranath* (10),

(1) (1884) 13 Q. B. D. 547.
(2) (1795) 6 T. R. 458; 3 R. R. 231.
(3) (1825) 4 B. & C. 261; 28 R. R. 250.
(4) (1852) 15 Beav. 156; 92 R. R. 361.
(5) (1857) 3 C. B. N. S. 206; 111 R. R. 622.
(6) (1865) 19 C. B. N. S. 246; 147 R. R. 577.
(7) (1867) L. R. 3 Exch. 44.
(8) (1874) L. R. 18 Eq. 303.
(9) [1921] 1 Ch. 200.
(10) (1907) I. L. R. 34 Calc. 191.

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where it was ruled that a lessee, who may have lost possession of a portion of the lands covered by his lease, was not entitled to suspend the payment of rent, if the dispossession had been effected, not by the landlord, but by other persons who were subsequent lessees under him in respect of different lands and had no authority to interfere with the possession of the prior lessee. In the case before us, there was no express covenant for quiet enjoyment in the lease granted to the defendant, and his rights must be determined with reference to section 108 alone. On the other hand there was an express engagement by the defendant to pay the prescribed royalty even if no coal could be raised on account of difficulties in working. In these circumstances, we hold that the remedy of the defendant, if any, lay against Myer & Co.,; their wrongful interference could not be treated as an interruption by persons claiming under the lessors, such as could be successfully set up in answer to the claim for rent made by the lessors in the present action. We hold further that there was no covenant for quiet enjoyment, either contractual or statutory, as against tortious interruption by wrongdoers.

The result is that the decree made by the Subordinate Judge on the 30th April, 1919, is affirmed and this appeal dismissed with costs. There will be one hearing fee only, and each party will bear his own costs of the further enquiry by the lower Court.

CHOTZNER J. concurred.

B. M. S. *Appeal dismissed.*