[HIGH COURT OF AUSTRALIA.]

FIRTH . . . . . APPELLANT;
DEFENDANT,

AND

HALLORAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1926.

SYDNEY, *Aug.* 2, 3, 27.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Rich JJ.

Landlord and Tenant—Lease—Frustration of contract—Impossibility of performance—Eviction by title paramount—Authority to enter to prospect for coal—Application for mining lease—Mining Act 1906 (*N.S.W.*) (*No.* 49 *of* 1906), *secs.* 70A, 70D——*Mining* (*Amendment*) *Act* 1918 (*N.S.W.*) (*No.* 41 *of* 1918), *sec.* 4.

The plaintiff was the registered proprietor of 857 acres of land. By a memorandum of lease of 14th October 1913 he leased to a person, of whom the defendant was the executrix, 20 acres out of the whole area, and also the mines, seams, veins and beds of coal and all other minerals and mines other than gold or silver at the depth exceeding 300 feet below the surface within and under the whole 857 acres. The lease empowered the lessee to carry on mining operations on payment of a royalty in respect of all coal won. This royalty was to be set off *pro tanto* against a fixed rent of £150 for the first six months and thereafter of £600 per annum. The lease expressly provided that it should not be obligatory on the lessee to carry on mining operations so long as he paid the fixed rent, and it contained a covenant for quiet enjoyment. Rent was paid until June 1922 and was tendered up to October 1922. In that month authority to enter portion of the demised lands, not including the 20 acres mentioned in the lease, was, pursuant to sec. 70A of the *Mining Act* 1906 (N.S.W.)—enacted by sec. 4 of the *Mining* (*Amendment*) *Act* 1918 (N.S.W.)—granted to A for the purpose of prospecting for coal and shale. On 9th November 1922 A applied to the Minister for Mines for leases under the *Mining Act* of the lands covered by his authority to enter. Those applications were

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still pending, but no work of any kind, whether by way of prospecting or mining, had been done on the land by anyone. In an action by the plaintiff to recover the arrears of rent,

Held, by the whole Court, (1) that no frustration of the contract of 14th October 1913 had been brought about either by the passing of the *Mining (Amendment) Act* 1918 or by the grant to A of authority to enter or by the application by A for leases under the *Mining Act*; (2) that the performance of the covenant for payment of rent had not thereby been rendered impossible; and (3) that nothing in the nature of eviction by title paramount had taken place.

Held, therefore, that the plaintiff was entitled to recover.

Matthey v. *Curling*, (1922) 2 A.C. 180, followed.

Decision of the Supreme Court of New South Wales (Full Court): *Halloran* v. *Firth*, (1926) 26 S.R. (N.S.W.) 183, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action having been brought in the Supreme Court by Henry Ferdinand Halloran against Amy Clara Firth as executrix of William Arthur Firth deceased, the parties, by leave, stated for the opinion of the Supreme Court a special case, which was substantially as follows:—

1. By memorandum of lease dated 14th October 1913 Henry Ferdinand Halloran leased to William Arthur Firth the surface of about 20 acres of land and the mines, seams, veins and beds of stone, coal, clay, gravel and other minerals (other than gold or silver) under about 857 acres of land for twenty-five years from 5th June 1912 at the rental of £600 per annum payable half-yearly.

2. On 13th October 1922, at Wollongong, authority to enter under 338 acres (part of the land leased under the aforesaid memorandum of lease of 14th October 1913) for the purposes of prospecting for coal and shale was issued to Albert Andrew Holland.

3. On 13th October 1922, at Wollongong, authority to enter under 360 acres (a further part of the land leased under the aforesaid memorandum of lease of 14th October 1913 and not included in the 338 acres mentioned in par. 2 hereof) for the purpose of prospecting for coal and shale was issued to Albert Andrew Holland.

4. The said Henry Ferdinand Halloran was present when the said applications were dealt with by the Warden, and objected to the granting thereof.

5. On 26th October 1922 the aforesaid Albert Andrew Holland paid to Henry Ferdinand Halloran £2 3s. 8d., being the rent payable under the aforesaid authorities to enter.

6. The aforesaid Albert Andrew Holland did not in fact either himself or by his agents enter under any of the aforesaid lands covered by the aforesaid authorities to enter, except in so far as he may be deemed to have entered by reason or virtue of any of the facts herein mentioned or to be deduced therefrom.

7. On 9th November 1922 the aforesaid Albert Andrew Holland made application to the Minister of Mines for leases under the *Mining Act* of the lands covered by the aforesaid authorities to enter for the purpose of mining for coal and shale, and made all prescribed payments.

8. The aforesaid applications for leases have not yet been granted, and the applications are still pending.

9. The authorities to enter mentioned in pars. 2 and 3 hereof at the expiration of the twelve months for which they were issued were not renewed.

9a. The aforesaid authorities to enter do not cover approximately 157 acres of the area leased by the aforesaid memorandum of lease dated 14th October 1913.

10. Rent under the memorandum of 14th October 1913 has not been paid since 5th June 1922, but legal tender of £225 4s. 1d., the rent due up to 20th October 1922 (being the date on which the said authorities to enter were granted), has been made and refused.

11. The said William Arthur Firth died on 15th November 1917.

12. Probate of the last will and testament of the said William Arthur Firth was granted to Amy Clara Firth, his executrix, on 10th December 1917.

The questions for the opinion of the Court were as follows :—

(1) Has the lessee since the granting of the authorities to enter or since the application for a lease been liable to pay the whole of the rent reserved under the memorandum of lease dated 14th October 1913 ?

(2) If the answer to question 1 is in the negative, has the lessee since the granting of the authorities to enter, or since

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the application for a lease, been liable to pay rent under the memorandum of lease dated 14th October 1913 in respect of the leased premises not covered by the said authorities to enter and the said application for a lease or any part thereof ?

(3) If the answer to question 2 is in the affirmative, will the proportion of rent to be paid by the lessee be in the proportion of the value of what is left of the leased premises to the value of the whole of the leased premises or in what proportion ?

By the memorandum of lease referred to in par. 1 of the special case the plaintiff, who was the registered proprietor of the 857 acres of land leased, leased to Firth the 20 acres and the mines, &c., of coal, &c., at a depth exceeding 300 feet below the surface of the whole 857 acres, with liberty to the lessee to search for, win and carry away all coal and minerals and other produce of the mines and lands for his own benefit, also to enter upon the surface of the 20 acres and sink shafts, &c., and erect plant, &c., to hold the premises for the term of twenty-five years from 5th June 1912 at the rent for the first six months of £150 and for the residue of the term at the yearly rent of £600. It was also provided that the lessee should pay a royalty of sixpence per ton in respect of all coal won over and above such quantity of coal as might be worked in respect of the fixed rental, and that so long as the lessee duly paid the fixed rent it should not be obligatory on him to work or carry on mining operations on the demised premises during the term. The lessee covenanted that he would, during the term, pay the rent or royalty at the times and in the manner appointed for payment; and the lessor covenanted that the lessee, so paying the rent and royalty and observing all his covenants, might "peaceably and quietly hold use occupy and enjoy the premises . . . during the said term without any interruption or disturbance by the lessor or any person lawfully claiming any estate or interest in the said premises or any part thereof through or under him them or any of them."

The Full Court, which heard the special case, in delivering judgment said (*Halloran* v. *Firth* (1)):—"The plaintiff is suing for arrears of

(1) (1926) 26 S.R. (N.S.W.) 183, at pp. 186 *et seqq.*

rent under the lease; the defendant has no answer to the claim except so far as the Act No. 41 of 1918, or the steps taken thereunder by Holland, have discharged him from his obligation to pay rent under the lease. The defendant states his claim to be discharged in two or three ways. He claims that there has been a 'frustration' of the contract between the lessee and lessor which is embodied in the lease; the frustration being brought about either by the passing of the Act of 1918, or by the grant to Holland of his authority to enter or by Holland's application for a lease. While admitting that he has not been technically evicted by title paramount he claims that what has taken place amounts substantially to an eviction. He also contends that his obligations under the lease have become impossible by Act of Parliament. Taking these contentions *seriatim* we are of opinion that there are several answers to his contention that the doctrine of frustration applies. This doctrine received considerable attention during the years of war, especially in reference to commercial ventures. In the words of *Vaughan Williams* L.J., approved by Lord *Shaw* in *Horlock* v. *Beal* (1): 'English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract.' To that passage it may be proper to add that in some cases the 'condition' may not be actually expressed but may be necessarily implied. The present state of the authorities shows a considerable body of legal authority in support of the proposition that the doctrine of 'frustration' does not apply to a demise by which an estate in land is created and passed to the lessee. This view is supported by the decision of *Lush* J. in *London and Northern Estates Co.* v. *Schlesinger* (2); of *Reading* L.C.J. in *Whitehall Court Ltd.* v. *Ettlinger* (3); of *Bankes* and *Younger* L.JJ. in *Matthey* v. *Curling* (4); and no doubt is thrown on the correctness of this view by the House of Lords in the last-mentioned case where *Whitehall Court*

(1) (1916) 1 A.C. 486, at p. 513.
(2) (1916) 1 K.B. 20.
(3) (1920) 1 K.B. 680.
(4) (1922) 2 A.C. 180.

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Ltd. v. *Ettlinger* (1) was expressly approved. If the doctrine of frustration were to be held to apply in such a case it would have the extraordinary effect of terminating automatically the estate vested in the lessee and of putting the lessor back into possession irrespective of the wishes of the parties. It can in our opinion make no difference that the demise is coupled with rights and obligations which remain executory until the party interested chooses to enforce them such as an option of purchase or a right to mine. A further answer to this contention is that even in the case of obligations which are merely contractual the doctrine does not apply unless the real gist of the contract is destroyed. It is contended by the defendant that that is so in this case because the lessee has lost his right to win his minerals when he chooses; and that this was the gist of the contract. It is quite true that the Act of 1918 has to a certain extent interfered with the proprietary rights of all owners of minerals not reserved to the Crown, including the rights of the plaintiff and the defendant. But this is something far short of the destruction of the defendant's rights under the lease. In our opinion if there is anything that can be said to be the gist of this lease regarded simply as a contract it was that the defendant should have the right to mine. This the Act did not destroy. It merely embodied a new legislative policy that if a proprietor of mines does not choose to work them himself any person who is prepared to undertake the task should be permitted to do so on payment of what the Legislature considered to be an appropriate compensation to the owner. There is a close analogy between such legislation and the legislation providing for the compulsory occupation of premises for war purposes which was the subject of the decision in *Matthey* v. *Curling* (2). It was also contended that the contract had been rendered impossible by Act of Parliament. The covenant sued on is the covenant for payment of rent which has clearly not been rendered impossible nor has any covenant which the parties entered into in the lease been made illegal or impossible; what has happened is that the lease has been rendered less beneficial to the lessee and any relief on that score can only be obtained where it amounts to frustration of the contract, a matter with which we have already

(1) (1920) 1 K.B. 680. (2) (1922) 2 A.C. 180.

dealt. The only remaining point that requires to be considered is the contention that a quasi eviction has taken place by the passing of the Act of 1918, or the grant of the authority to enter or by both combined. The answer to this is that there has been no eviction in fact and nothing in the nature of an eviction. A lease may never be granted of the land to Holland, and it will be time enough to consider that matter if and when it happens. As was held in *Gander* v. *Murray* (1) an authority to enter confers no title whatever in the subject land on the holder. The title to these lands is the same to-day except for the lapse of time as it was the day after the lease was granted. If no authority is given to a stranger, there does not appear to be any provision in the Act of 1918 which in any way affects the title of the owner of minerals to work them himself and no authority to him to enter is necessary for that purpose. It appears to us unnecessary to consider what is the effect of the issue to a stranger of an authority to enter under the Act of 1918 when the owner himself has not started mining operations. We may assume, without in any way deciding that it is so, that the effect is to prevent the owner from himself mining for the particular minerals which are the subject of the authority. That in the present case would leave the lessee free to win all minerals, &c., other than coal or shale, and on the authority of *Gander* v. *Murray* would not in any way destroy his title to the minerals, but would only interfere with some of the incidents of his title. It could in no sense of the term be called an eviction of the lessee. For those reasons we are of opinion that the answer to the first question in the special case should be in the affirmative. The costs will be paid by the defendant."

From that decision the defendant now appealed to the High Court.

Windeyer K.C. (with him *Pitt*), for the appellant. The effect of sec. 4 of the *Mining* (*Amendment*) *Act* 1918 and of the authority to enter granted to Holland and the applications for mining leases made by him was to frustrate the lease of 14th October 1913. Once there has been an application for a lease, there is no exclusive title in the applicant while his application is pending (*Croudace* v. *Zobel* (2)). Until the application is dealt with, the appellant is deprived of

(1) (1907) 5 C.L.R. 575.

(2) (1899) A.C. 258.

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the use of the land and the right of the lessor to rent is suspended. Where there has been an interference with the land by title paramount, the payment of a proportionate portion of the rent is suspended (*Neale* v. *Mackenzie* (1)). If the Crown acts by authority of an Act of Parliament to deprive the lessee of the use of the land, that is, or is analogous to, eviction by title paramount. [Counsel also referred to *Matthey* v. *Curling* (2) ; *Whitehall Court Ltd.* v. *Ettlinger* (3).]

Bavin K.C. and *Bowie Wilson*, for the respondent, were not called upon.

Cur. adv. vult.

Aug. 27. The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. We agree with the learned Judges of the Supreme Court in the answer given by them to the first of the questions submitted by the special case and in the reasons which they gave in support of their conclusion.

In our opinion this appeal should be dismissed.

ISAACS J. I also am of opinion that the appeal should be dismissed.

The argument for the appellant rested on one circumstance, namely, that in the events that had happened Holland had, by virtue of sub-sec. 5 of sec. 57 of the *Mining Act* 1906, a statutory right to "carry on mining operations on the land" until his application for a lease was granted or refused. That circumstance, it was argued, had one, if not both, of two legal consequences. The first consequence claimed is that in law it ousted the appellant, because it prohibited her from working the land for coal, since to do so would be an interference with the statutory right of Holland. Reference was made in this connection to *Croudace* v. *Zobel* (4), where the Privy Council affirmed the right of the authority-holder to interim protection by injunction. The second consequence claimed is that the object of the appellant's lease was frustrated, and therefore the obligation to pay rent was terminated.

(1) (1836) 1 M. & W. 747.
(2) (1922) 2 A.C., at pp. 227, 237.
(3) (1920) 1 K.B. 680.
(4) (1899) A.C. 258.

As to the first asserted consequence, it would be difficult to imagine a more conclusive authority on the point than *Matthey* v. *Curling* (1). In that case exclusive possession was actually taken by a third party under statutory authority created subsequently to the execution of the lease, the possession being retained for the whole of the unexpired portion of the term. Nevertheless, the tenant was held bound to fulfil his covenant to rebuild. Lord *Buckmaster's* judgment, which may also be taken as the opinions of Lords *Sumner* and *Wrenbury*, sets out all that it is necessary to say with respect to the first position urged (2). That position cannot be supported, and it is unnecessary to enter into the reasoning upon which the decision referred to is founded.

The second position, namely, frustration, is equally unmaintainable. I do not agree that, because the contractual obligation relied on by the plaintiff is created by an instrument of lease, the doctrine of frustration is necessarily excluded. The nature of the relation of landlord and tenant, the history of the doctrine of frustration, its inherent meaning and the judicial determination of relevant cases would lead me to reject so sweeping a rule. Nor do I think the consequences of terminating the relation of landlord and tenant any more extraordinary than that of terminating any other legal relation which by hypothesis is expressly and impliedly created on a mutual and fundamental basis of existence or continuance which fails at a given point. In a matter resting on covenant it is " the contract . . . and not the estate . . . which is the determining factor " (*Hallen* v. *Spaeth* (3)). But I base my opinion on this branch on the fact that, there being no express limitation of the covenant to pay rent, neither the language of the lease nor the attendant circumstances at the time it was made lead to any such interpretation. Of course, the lessee confidently expected that he would always during the term have the right to mine for coal, if he were so disposed. We may even suppose that he would not have been willing to enter into the bargain had he believed he would be liable to pay rent and yet prevented from mining. But that falls

(1) (1922) 2 A.C. 180. (2) (1922) 2 A.C., at pp. 226, 227.
(3) (1923) A.C. 684, at p. 690.

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Isaacs J.

short of establishing an implied condition of the contract that, if the events now relied on occurred, the lease should forthwith cease and all obligations end.

The *Mining Act*, and acts of administration under it, have undoubtedly intervened so as to restrict temporarily, and, perhaps eventually, entirely, the use by the lessee of the land leased. Again, *Matthey* v. *Curling* (1) determines that that does not necessarily amount to frustration, terminating contractual relations. To ascertain whether frustration has occurred so as to effect such a result, all the facts have to be examined. I include in that the terms of the Act under which the interruption occurred. Much may depend on the terms and provisions of the relevant Act as to whether the law intended to interfere with the contractual relations of the parties. There is nothing in the *Mining Act* which makes the lease unlawful, and certainly nothing which makes the covenant to pay rent unlawful. The Act regards the private land as land containing valuable minerals and, for the general welfare, permits extraction of those minerals. But it treats owners and lessees as having rights of compensation for their respective interests, and those interests are measurable without disregarding their reciprocal obligations. The lessee is compensated in case of a Crown lease for mining purposes. Compensation would depend on the force of various factors, including the cost to the lessee of winning coal. Part of that cost is the rent he pays his landlord. To treat that as immaterial would be unfair to the mining lessee, and also unfair to the landlord, unless the coal were treated as the owner's, free from the lease, which is impossible. The Act does not, therefore, frustrate the objects of the lease : it merely, at most, preserves the bargain intact and converts the interest created by the lease into a pecuniary claim. That is a result which every person in the community possessing property may have to submit to.

There being no suggestion of any other circumstance establishing freedom from interference as the basis on which both parties entered into relation of landlord and tenant, the second ground fails as well as the first.

The appeal should, therefore, be dismissed.

(1) (1922) 2 A.C. 180.

HIGGINS J. I have now had an opportunity of reading and considering Part IV. of the Act of 1906 as amended to date. I had not seen the Act before; and the course which the discussion took did not allow me an opportunity to get a consecutive view of the provisions. To my mind it now seems clear that the difficult questions as to frustration of contract, eviction by title paramount, obligations become impossible by Act of Parliament, do not even plausibly arise in this case. The Legislature, having absolute power over titles to land and minerals under land, has simply allowed holders of miners' rights to obtain authority to enter and prospect, and to apply for leases of private land under which there are minerals. There is an exception where bona fide mining operations are being carried on by or with the concurrence of the owner at the time when the application for the authority or for the lease is made: see sec. 70D—a section which I think was not referred to in the argument. The covenant of the lessor for quiet enjoyment is against "any interruption or disturbance by *the lessor* or any person lawfully claiming any estate or interest . . . through or under him them or any of them"; there is no covenant against disturbance by Parliament. It seems to me to be absurd to rely on the authorities as to eviction by title paramount or as to the obligation to pay rent becoming impossible, after the plain statement of the law contained in the recent case of *Matthey* v. *Curling* (1). As Lord *Buckmaster* said (2), "the lessee remains liable on his covenants in the lease, notwithstanding that he has been deprived of the term by the exercise of legal powers." Here, there has not been even a deprivation of the term. "Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the grant, and with it the corresponding liability for payment of rent. Eviction by the lessor himself is with equal reason an answer to the claim upon the covenant" (3). Here the lessor had the title, and the power of the Legislature to do what it will with people's property is not a "title" at all; and there has been no eviction. The lessor was not in any way responsible

(1) (1922) 2 A.C. 180.
(2) (1922) 2 A.C., at p. 229.
(3) (1922) 2 A.C., at p. 227.

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Rich J.

for what the Legislature did in the exercise of its constitutional powers, in the absence of express covenant applicable to such an event.

I concur in the opinion that the appeal should be dismissed.

RICH J. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Allen, Allen & Hemsley.*

Solicitors for the respondent, *Minter, Simpson & Co.*

B. L.

Cons *DKLR Holding Co (No2) v Commissioner of Stamp Duties (NSW)* 149 CLR 431

Appl *DKLR Holding Co (No2) Pty Ltd v Comr of Stamp Duties* 56 ALJR 287

Cons *A C T Revenue, Comr for v Perpetual Trustee Co (Canberra)* (1993) 118 ACTR 1

Appl *Stamp Duties, Chief Commissioner of v Buckle* (1998) 72 ALJR 243

Refd to *CSD (NSW) v Buckle* (1998) 192 CLR 226

Appl *Chief Comr of Stamp Duties (NSW) v ISPT Pty Ltd* (1998) 41 ATR 29

Appl *Comr of State Revenue v Pioneer Concrete* (2002) 76 ALJR 1534

Appl *Comr of State Revenue v Pioneer Concrete* (2002) 192 ALR 56

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . . APPELLANT;

AND

THE PERPETUAL TRUSTEE COMPANY LIMITED . . . . . RESPONDENT.

(QUIGLEY'S CASE.)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1926.

SYDNEY, *Aug.* 12, 27.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Stamp Duties—Conveyance—Deed of settlement—New beneficial interest—Trust for settlor for life—Ad valorem duty—Stamp Duties Act 1920-1924 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 32 *of* 1924), *secs.* 65, 66 (1), 73 (1) (*b*), (*c*).

By sec. 66 (1) of the *Stamp Duties Act* 1920-1924 (N.S.W.) it is provided that "Subject to the provisions of this Act every conveyance is to be charged with *ad valorem* duty in respect of the value of the property thereby conveyed." The expression "conveyance" is defined by sec. 65 as including (*inter alia*) a settlement. Sec. 73 (1) provides that certain instruments are not to be charged