[HIGH COURT OF AUSTRALIA.]

CLAREY . . . . . APPELLANT;
APPLICANT,

AND

PRINCIPAL AND COUNCIL OF THE WOMEN'S COLLEGE . . . . RESPONDENTS.
RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 27, 28.

SYDNEY, *Sept.* 11.

Williams A.C.J., Webb, Kitto and Taylor JJ.

Landlord and Tenant—Recovery of possession of prescribed premises—Conduct which is a nuisance or annoyance to adjoining occupiers—Part of house let for accommodation of university students—Landlord residing in remainder—Noises late at night—Ordinary and proper user—The Landlord and Tenant Acts 1948 *to* 1949 (*Q.*) (12 *Geo. VI. No.* 31—14 *Geo. VI. No.* 9) *ss.* 41 (5) (*d*).

A landlord who lets portion of a building for the accommodation of university students cannot complain that the conduct of the students, in keeping late hours and in the course of doing so making noises of a kind incidental to the occupation of premises as a dwelling, such as walking about, scraping chairs along the floor, having baths, talking and laughing, and preparing for bed, constitutes a nuisance or annoyance to adjoining occupiers within the meaning of s. 41 (5) (*d*) of *The Landlord and Tenant Acts* 1948 *to* 1950 (Q.).

Decision of the Supreme Court of Queensland (Full Court) affirmed.

APPEAL from the Supreme Court of Queensland.

Alexander William Clarey and his wife, Clarice Leila Clarey, were the owners of a weatherboard building at the corner of Lambert Street and O'Connell Street, Kangaroo Point, Brisbane. In 1940 they granted a lease of the rear portion of this building to the Principal and Council of the Women's College within the University of Queensland in order to provide accommodation for some of its students and staff, and occupied the front portion of the building as their residence.

On 17th October 1952, Clarey and his wife gave to the Principal and the Council of the Women's College notice to quit the premises. The ground relied on and the particulars of it are as follow: "That the lessees have been guilty of conduct which is a nuisance or annoyance to adjoining or neighbouring occupiers" (s. 41 (5) (*d*)

of *The Landlord and Tenant Acts* 1948 *to* 1950 (Q.)). " Particulars. You have permitted or allowed noisy and rowdy behaviour on the subject premises at late hours of the night and early hours of the morning. In spite of repeated warnings and requests the occupiers of the premises walk heavily over bare boards, slam doors, pull furniture about and indulge in loud talking and laughter and generally disturb the peaceful enjoyment of the premises by the Lessors in the late hours of the night and early hours of the morning whereby the Lessors are awakened and/or prevented from sleeping and as a result their health has been affected ".

On 22nd November 1952, Clarey and his wife commenced proceedings under the *Summary Ejectment Act of* 1867 (Q.) and *The Landlord and Tenant Acts* 1948 *to* 1950 to recover possession of their own portion of the building.

The substance of the matters complained of by the applicants is contained in the following evidence of Clarey : " When I re-entered the premises in August 1950, into the front position, Miss Bage was then not in control of the Women's College. On my re-entry to the premises, there was an alteration to the attitude of the students using the premises. It was quite noticeable in many ways. There was not the quietness there was. I will be 67 years of age next month and my wife 67 next April. Since my return to the premises in 1950, sometimes the noises would occur of a morning. On one occasion I had to myself appeal to the students. They were hurrying to the bath and would slam the door. After waiting for a quarter of an hour, I went out and asked them to be quiet. This was about 7.15 a.m. Then of an evening, there would be movements around the place not sufficiently for us to object. That was in the early hours of the evening, between 7 p.m. and 11 p.m., the time we would retire. I did not complain about the use of the premises and noise during those hours. Later than 11 p.m., sometimes about midnight, not every night but almost every night, chairs were moved, scraped over floors. The chairs would move and the noise would start . . . There would be heavy treads over bare boards which would resound right through the house. The house is wooden. At times the students would congregate chatter and laugh together, rather loudly. We could hear it in the front of the place. If we were dozing at that time we were awakened. We would hear them passing back and forwards to the bathroom. There were separate doors in the students' room. Noise would come back from the back part to the front part. Occasionally there would be noises of doors being shut. That was occasionally. Other times baths would be taken at 1 a.m. and sometimes as late as 2 a.m. They would come

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in and fill the bath. There would be pulling of furniture over the floor as though they were pulling clothes along a bar in the wardrobe. This all sounded through the house and disturbed us. These noises disturbed me and once I was so disturbed it would be hard to get to sleep again. When I would go to the office after those nights I would be drowsy at my office table".

The magistrate adjudged that the applicants were entitled to possession of the premises and ordered that a warrant issue to eject the respondents and give possession thereof to the applicants.

On an order to review, the Full Court of the Supreme Court of Queensland (*Macrossan* C.J., *Philp* and *Townley* JJ.), made the order absolute and set aside the decision of the magistrate. *Clarey* v. *The Principal and Council of the Women's College* (1)

From this decision the applicants appealed to the High Court.

J. G. Garland, for the appellants. There is an appeal as of right: see *Too Soo Hing* v. *Patty* (2). The question is whether in determining what is a nuisance a subjective or objective test should be applied. The magistrate applied the objective test and it is submitted that he was right. The Principal and the Council of the Women's College had control of the students and could prevent conduct on the part of the students which amounted to a nuisance. They were therefore liable for the students' acts: *Fraser* v. *Dummett* (3). Unless the magistrate is wrong in law the only question is whether there was sufficient evidence on which the magistrate could find there was a nuisance or annoyance. Anything which creates personal discomfort is a nuisance: *Fleming* v. *Hislop* (4). In *The Landlord and Tenant Acts* 1948 *to* 1950 (Q.) the word "annoyance" should be given a popular or wide meaning. It means something not necessarily a nuisance in law: *Polsue & Alfieri Ltd.* v. *Rushmer* (5); *Angelo* v. *Kean Clarke Brothers* (6). Annoyance is something different from nuisance. Any interference with pleasurable enjoyment is an annoyance: *Tod-Heatly* v. *Benham* (7).

W. B. Campbell, for the respondents. The test as to nuisance or annoyance is an objective test, not fanciful but that of the ordinary reasonable person. The magistrate applied a subjective test and failed to take into consideration the purposes for which the premises were let. He failed to appreciate the fact that the premises had wooden walls through which normal voices could be easily heard.

(1) (1954) Q.S.R. 57.
(2) (1950) 81 C.L.R. 132.
(3) (1948) 67 W.N. (N.S.W.) 129
(4) (1886) 11 App. Cas. 686, at pp. 690, 691.
(5) (1907) A.C. 121.
(6) (1950) N.Z.L.R. 1.
(7) (1888) 40 Ch. D. 80.

There was no evidence that the conduct of the students was other than the normal conduct of students. The use of the premises was the ordinary normal use of a building and the noise resulted from ordinary normal uses. As there was no more than ordinary legitimate use there could be no nuisance or annoyance to the lessors. [He referred to *Christie* v. *Davey* (1); and *Harris* v. *James* (2).] No steps were taken by the lessors to minimise the noise, so that the lessors must take the property as they find it: *Cheater* v. *Cater* (3). The premises were used for the purposes for which they were let and such use was not conduct amounting to a nuisance or annoyance: *Mercantile Investments Ltd.* v. *Australian Optical Co. Ltd.* (4). The ground is provided by *The Landlord and Tenant Acts* for the purpose of enabling a landlord to eject a tenant whose conduct may make the landlord liable for the nuisance caused by the tenant. [He referred to *Cunard* v. *Antifyre* (5); *Frederick Platts Co. Ltd.* v. *Grigor* (6).]

J. G. Garland, in reply. Every person is entitled as against his neighbour to comfortable and healthful enjoyment of his premises. Any inconvenience materially interfering with the ordinary physical comfort of human existence according to plain sober notions of English people is a nuisance and certainly is an annoyance: *Halsbury's Laws of England*, 2nd ed., vol. XXIV., p. 50, par. 87. The matter resolves itself into a question of fact. On the evidence the magistrate was entitled to come to the conclusion that the acts of the students amounted to conduct which was a nuisance or annoyance to the lessors as neighbouring or adjoining occupiers: *Polsue & Alfieri Ltd.* v. *Rushmer* (7). Since it is supported by the evidence the decision of the magistrate should not be disturbed.

Cur. adv. vult.

Sept. 11.

THE COURT delivered the following written judgment:—

This is an appeal from an order of the Full Supreme Court of Queensland which made absolute an order nisi to review an order of a magistrate made under the provisions of the *Summary Ejectment Act of* 1867 (Q.) and *The Landlord and Tenant Acts* 1948 *to* 1950 (Q.). The magistrate adjudged that the applicants, the appellants in this Court, were entitled to possession of the land and premises occupied by the Principal and Council of the Women's College within the University of Queensland, the respondents on

(1) (1893) 1 Ch. 316.
(2) (1876) 45 L.J.Q.B. 545.
(3) (1918) 1 K.B. 247, at p. 262.
(4) (1945) S.A.S.R. 129.
(5) (1933) 1 K.B. 551.
(6) (1950) 1 All E.R. 941.
(7) (1907) A.C. 121

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this appeal, at the corner of Lambert Street and O'Connell Street, Kangaroo Point, Brisbane, and ordered that a warrant should issue to eject the respondents from these premises and to give possession thereof to the appellants. The Supreme Court ordered that the order of the magistrate should be set aside and that any warrant issued in consequence of that order should be rescinded. The only appeal to the Supreme Court from the order of the magistrate is that contained in s. 53 of *The Landlord and Tenant Acts*, sub-s. 2 of which provides that there shall be an appeal, as to questions of law only, to the Supreme Court from any judgment or order of a court of competent jurisdiction in proceedings under this Part of the Act. The ground on which the magistrate found for the appellants and made the order for recovery of possession was that contained in s. 41 (5) (*d*) of *The Landlord and Tenant Acts*, that is to say, that the lessee had been guilty of conduct which was a nuisance or annoyance to adjoining or neighbouring occupiers. The particulars given in support of this ground were as follows: "You have permitted or allowed noisy and rowdy behaviour on the subject premises at late hours of the night and early hours of the morning. In spite of repeated warnings and requests the occupiers of the premises walk heavily over bare boards, slam doors, pull furniture about and indulge in loud talking and laughter and generally disturb the peaceful enjoyment of the premises by the Lessors in the late hours of the night and early hours of the morning whereby the Lessors are awakened and/or prevented from sleeping and as a result their health has been affected." The appellants occupy the front portion and some of the students and staff of the Women's College the rear portion of the building. The rear portion was first let to the respondents to provide accommodation for some of its students and staff in 1940. At that time the appellants occupied as part of their portion a large room with a fireplace which formed a sort of buffer between the front and the rear of the building, and helped to prevent noises made by the students being heard in the portion occupied by the appellants. About February 1947 the appellants went to live in Melbourne and let the whole building to the respondents. In 1950 the appellants returned to Brisbane and the respondents at their request gave up possession of that part of the front of the building they now occupy, the respondents continuing as tenants of the rear of the building and of the room with the fireplace. The appellants, soon afterwards, began to request the respondents either to give up possession of the rest of the building or to purchase the whole of the premises or at least to give up possession of the room with the fireplace. The respondents were unable to agree to any of these requests.

The correspondence on these subjects that passed between the parties is set out in full in the reasons of the learned Chief Justice of Queensland and need not be repeated.

The appellants then commenced these proceedings. The magistrate evidently accepted the evidence of the appellants. This evidence proved that the students made a considerable amount of noise at late hours of the night and disturbed the appellants in their sleep and caused them considerable discomfort. But the noises made by the students were only noises of the kind that are incidental to the occupation of premises as a dwelling. They consisted of noises made by such acts as walking about, scraping chairs along the floor, having baths, talking and laughing, and preparing for bed. A landlord who lets a portion of a building for the accommodation of university students can only reasonably expect that such students will keep late hours and in the course of doing so will make such noises. The appellants' evidence does not appear to us to be reasonably capable of proving that the students made an improper use of the rear portion of the building for the purposes for which it was let. Where landlords let adjoining premises to accommodate a number of persons, they cannot complain if those persons move about the demised premises, talk, move chairs, shut doors, have baths, prepare for bed, and do such things at late hours. In *Lyttelton Times Co. Ltd.* v. *Warners Ltd.* (1), Lord *Loreburn* delivering the judgment of the Privy Council said: "If A. lets a plot to B., he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired. So also if B. takes a plot from A., he may not act so as to frustrate the purpose for which in the contemplation of both parties the adjoining plot remaining in A.'s hands was destined. The fact that one lets and the other hires does not create any presumption in favour of either in construing an expressed contract. Nor ought it to create a presumption in construing the implied obligations arising out of a contract. When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose, or what were the purposes, to which both intended the land to be put, and, having found that, both should be held to all that was implied in this common intention" (2). Of this case Lord *Parker* (then *Parker* J.) said in *Jones* v. *Pritchard* (3): "The latter case seems to shew that if a grantor is doing, on land retained by him, only what it was at the time of the grant in the contemplation of the parties that he should do, and is guilty of no negligence or want of reasonable care or precaution, he cannot be liable for nuisance

(1) (1907) A.C. 476.
(2) (1907) A.C., at p. 481.
(3) (1908) 1 Ch. 630.

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entailed upon the grantee. And, of course, where the grantee is occasioning a nuisance to the grantor by doing on the land granted what it was at the time of the grant in the contemplation of the parties that he should do, and there is no negligence or want of care or precaution, the case is an a fortiori one " (1). See also *Pwllbach Colliery Co. Ltd.* v. *Woodman* (2); *Mercantile Investments Ltd.* v. *Australian Optical Co. Ltd.* (3). There is no evidence that the conduct of the students caused any inconvenience to any adjoining or neighbouring occupier except the appellants. There is evidence to the contrary. The discomfort that the appellants suffer proceeds from the circumstances that they and the students live under the same roof and the building is an old weatherboard building in which noises are very audible. In *Ball* v. *Ray* (4), a case where it was alleged that the noise made by horses constituted a nuisance, Lord *Selborne* said : " In making out a case of nuisance of this character, there are always two things to be considered, the right of the Plaintiff and the right of the Defendant. If the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour, shewing substantial injury, is entitled to protection " (5). In *Pollock* on *Torts*, 15th ed. (1951), p. 311, the learned author says : " The use of a dwelling-house in a street of dwelling-houses, in an ordinary and accustomed manner, is not a nuisance though it may produce more or less noise and inconvenience to a neighbour."

We are of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Gilbert, Pattison & Mooney.*
Solicitors for the respondents, *Hawthorn Cuppaidge & Co.*

B. J. J.

(1) (1908) 1 Ch., at p. 636.
(2) (1915) A.C. 634, at pp. 647, 648, 650.
(3) (1945) S.A.S.R. 129.
(4) (1873) L.R. 8 Ch. App. 467.
(5) (1873) L.R. 8 Ch. App., at pp. 469-470.