

Court of the County of York in favour of the plaintiff in an action for a nuisance.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

D. W. Saunders, K.C., for the defendant Borland.

R. B. Henderson, for the defendant Weighart.

J. T. White, for the plaintiff.

The judgment of the Court was delivered by RIDDELL, J.:—The plaintiff sues Weighart, his landlord, and Borland, a tenant of Weighart's, for a nuisance committed by the latter—noise, vibration, etc. The learned County Court Judge has given judgment against both defendants, and they now appeal.

As against the landlord it is alleged that he made an agreement, at the time of the plaintiff's lease, with the plaintiff, that no machinery should be allowed in the front part of the building, in part to be occupied by the plaintiff; but that afterwards he leased such part of the building to his co-defendant, and the co-defendant placed heavy and noisy machinery in such part of the building, to the prejudice of the plaintiff.

All the evidence upon this alleged agreement was gone over more than once during the argument, and I have again read all the proceedings at the trial; and I am of opinion that no such agreement has been made out. The lease to the plaintiff contained a covenant for quiet enjoyment, but it is admitted that such a covenant does not cover the practice complained of. *Jenkins v. Jackson*, 40 Ch.D. 74, may be looked at upon this point. And it naturally follows that this is not a derogation from the landlord's grant. Nor can the plaintiff claim as against the defendant Weighart independently of the lease and the relation of landlord and tenant.

"In the case of landlords who have given up to the tenant control of the premises . . . out of which the damage arises, the Court has never gone further than to hold them liable when the use from which the damage or nuisance necessarily arises was plainly contemplated by the lease:" *Earl v. Reid*, 23 O.L.R. 453, at p. 466.

Nothing of that kind is found in the present instance.

The appeal of Weighart should be allowed with costs, and the action against him dismissed with costs. As against the other defendant, there is ample evidence upon which the learned County Court Judge could find a nuisance; and we should not interfere, if it were clear that he had not omitted to take into consideration some of the elements.