Privy Council Appeal No. 84 *of* 1926.

Frances Clara Gardner - - - - - - - - *Appellant*

v.

Te Porou Hirawanu and others - - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JANUARY, 1927.

Present at the Hearing:

LORD SHAW.
LORD WRENBURY.
LORD PHILLIMORE.
LORD BLANESBURGH.
SIR JOHN WALLIS.

[*Delivered by* LORD WRENBURY.]

On the 26th August, 1921, the appellant became assignee and registered proprietor of a lease dated the 20th December, 1919. In the latter part of the year 1923 she sold and assigned the lease to one Wharawhara Topine, owner of an adjoining block. The reversioners in May, 1923, sued the appellant for damages for acts done by the appellant in January and February, 1923, whereby as they alleged the reversionary interest had been depreciated. The action was by order of the 7th July, 1925, removed into the Court of Appeal for argument. By order dated the 23rd October, 1925, it was remitted to the Supreme Court with a direction that on certain parties being added as plaintiffs, judgment should be entered for the reversioners, and on the 10th February, 1926, the Supreme Court gave judgment for the reversioners for £600 and costs. This is an appeal from the order of the 23rd October, 1925, and consequently from the judgment of the 10th February, 1926.

The lease of the 20th December, 1919, was a lease of about 228 acres of native uncleared land in the Provincial District of Taranaki, in the north island of New Zealand, for a term of 42 years from the 20th August, 1919, at a rent of 4*s*. 2*d*. an acre for

the first 21 years, and afterwards at a yearly rent equal to 5 per cent. of the Government unimproved valuation to be made about July, 1940, with a further 5 per cent. of the rent for the costs and expenses of the Land Board. It contained covenants as follows :—

> "3. The Lessee will at all times during the said term repair and keep in good and tenantable repair and condition the said land and all improvements for the time being thereon and will at the end or sooner determination of the said term so deliver up the same (fair wear and tear and damage thereto by fire earthquake or tempest excepted).
>
> "4. The Lessee will during the said term cultivate manage and use the said land in a husband-like manner and will at all times keep the same free and clear of noxious weeds and will comply with the provisions of 'The Noxious Weeds Act 1908' or any amendment thereof to which an occupier is liable."

The land was unimproved and uncleared native land covered with bush, and as to about 40 acres contained millable trees (totara matai, white pine and rimu)—millable trees are hereinafter called timber. Early in 1923 the appellant sold the timber to a firm of saw millers. In January and February, they cut and removed it, and in payment for it gave the appellant sawn timber of the value of £600. The respondents alleged that the act of felling and removal was wrongful; that their reversionary interest was materially and injuriously affected thereby; and they sued for damages for its depreciation. The judgment under appeal upheld this contention and awarded £600 and £162 8*s*. costs.

The land, as has already been stated, was uncleared land. When cleared it was adapted for pasturage, but until cleared it could not be brought under cultivation. The reversioner is, no doubt, justified in saying that the timber is part of the land; that a lessee, by virtue of his lease, acquires only a special property in it; that he has not a general right to cut down and destroy it; that the general property remains in the reversioner; that the special property of the lessee is determined by severance; and that if the timber is severed from the land the property, in the absence of some further right contained in the lease, vests in the person entitled to the first estate of inheritance. The question is whether under this lease in the facts of this case the reversioner has not granted to the lessee a larger right of property—nay more, whether he has not imposed upon the lessee an obligation to cut the timber in pursuance of the lessee's covenant to "cultivate, manage and use the land in a husband-like manner."

In the case of *In re Rotoiti*, No. 5 Block (1923, N.Z. L.R. 619). Hosking, J., pointed out that in New Zealand the clearing of bush country is well known as coming within the class of improvements for the purposes of the Land Acts and the legislation relating to the valuation of land, and pointed attention also to the fact that a covenant to comply with the provisions of the Noxious Weeds Act (a covenant which is contained in art. 4 of this lease), would be fanciful unless clearance of the surface of the land was contemplated.

Their Lordships find that in the present case the acreage of the demised land was small; that upon the evidence it was capable of carrying only about 1½ sheep to the acre; and as a farming proposition was not practical unless all the land was cleared. Mr. Chas. Phillip Smith, a witness for the plaintiffs (the reversioners), said in re-examination: "The only reasonable way to enjoy the land is by felling the bush: by that I mean, the land as a whole. That is the only method in which you could enjoy the land." The plaintiffs' evidence, in fact, comes to this: not that it would have been wrong to fell the timber at some time, but that to fell it so early and before clearing the bush elsewhere was to fell it, not for the purpose of cultivation, but with a view to making money by its sale, and that this was not justifiable. In their Lordships' opinion this contention cannot be supported. The covenant to cultivate, manage and use in a husband-like manner imposed upon the lessee an obligation to cultivate, importing and creating an obligation to improve the land—that is to say the whole of the land—by clearance, with a view to cultivation. If the lessee unduly deferred the clearance of the land the lessor might, no doubt, complain of breach of covenant; but he has no grievance if the lessee proceeds to perform his obligation to make clearance at such early time as is most to his own benefit. The right of the reversioner is that the demised land shall be so dealt with as that all of it shall be brought under cultivation, and that at the expiration of 42 years he shall regain possession of the land not depreciated by any act which the tenant was not entitled to do upon the land. If the timber might legitimately be cut at some time during the 42 years the reversioner cannot complain of acceleration, although he might complain of delay in developing the land by clearance.

In their Lordships' opinion Article 4 of the lease "may be substantially described as that of a grant by implication arising from the nature of the subject matter in order to give effect to an evident intent that the tenant shall have the reasonable enjoyment of the subject matter." The quotation is from the judgment in *In re Rotoiti*. It was the intention of the lease that the tenant should have the use of all the land for pastoral purposes, and clearing the land was a necessary act in order to achieve that intention. Indeed, their Lordships go further and say that Article 4 extends beyond the grant of a right, and creates in the lessee an obligation to make during the 42 years a clearance of the land, including the felling of the timber in dispute. The very detailed and careful judgment of Hosking, J., in *In re Rotoiti* is, in their Lordships' judgment, right. The majority in the Supreme Court do not dispute the correctness of that decision. They distinguish the present case on a ground which is, in their Lordships' opinion, erroneous. Stout, C.J., says: "There were no circumstances in this case which showed that the tenant who became the assignee of a [quaere, meaning "the"] lease obtained the lease for the purpose of farming."

Sim, Reed and Adams, JJ., say: "The evidence makes it clear, we think, that the cutting of the timber was not done for any such purpose" (viz., the purpose of securing the profitable enjoyment of the land), "but for the purpose of making an immediate benefit out of the timber." The learned Judges here fail to give effect to the covenant to cultivate. It was impossible to cultivate without clearing. The tenant owed the duty of clearing, and as has been pointed out acceleration of the date at which the clearing is done is a thing which affected the reversioner not at all, although delay in so doing might have been a breach of covenant. The tenant having a right or being under an obligation to fell the timber, is not bound to burn it, as according to the ordinary practice he would burn the bush. He may dispose of it in the best way which circumstances allow. If he cuts and sells the timber early in his occupation he does not thereby deprive the reversioner of 42 years later of anything. The act will, no doubt, affect the price which the lessee will obtain for the lease if he sells it, but that is a matter with which the reversioner is not concerned. It is unnecessary to consider whether the tenant would be entitled to cut and sell the timber upon the eve of the expiration of the term, say, when 41½ of the 42 years of the term had expired. The case suggested is one which could not arise if the tenant performed the obligation to "cultivate, manage and use the land in a husband-like manner." A compliance with that covenant necessarily involved that the timber should have been cut and removed from the land many years before that time, and, as their Lordships have already pointed out, the date of its removal is matter of indifference to the reversioner, provided that the date shall be such as that the covenant to cultivate is performed. Their Lordships are of opinion that the judgment of the minority Judge, Ostler, J., is right, and that this appeal succeeds. The action should be dismissed with costs here and below. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

FRANCES CLARA GARDNER

v.

TE POROU HIRAWANU AND OTHERS.

DELIVERED BY LORD WRENBURY.

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