Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Eccles and others, v. Mills and others, from the Court of Appeal of New Zealand; delivered 5th March 1898.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The question in this case was whether a sum of money recovered more than twenty years ago by the lessee of a New Zealand farm from the executors of his lessor as compensation for the non-fulfilment of a certain covenant in the lease ought not to have been charged against the specific devisees of the farm instead of being paid as it was out of the lessor's general estate.

The claim though it arose so long ago is not barred by Statute or by laches or by any rule of equity. The liability is not dealt with directly by any provision in the lessor's will. The answer to the question must therefore depend on the true meaning and nature of the covenant. Is the covenant one that runs with the reversion? If so, is that circumstance of itself enough to

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throw the liability on the reversion in exoneration of the general estate? If the covenant does not run with the reversion does the reversioner necessarily escape all liability? or must the inquiry be carried further? May not the liability depend on other considerations than the rights and remedies of lessees under the Statute of 32 Henry VIII. and the question whether the agreement is or is not under seal? May it not perhaps be that as between the objects of the testator's bounty the liability depends on the consideration whether the covenant is properly incident to the relation of landlord and tenant or is in its nature preliminary and introductory to the commencement of that relation—whether it is so to speak a condition of the letting or a condition of the lease? These questions were all debated more or less fully at the Bar. They are certainly none of them free from difficulty, and there does not appear to be any authority applicable to the peculiar circumstances of the case.

By deed dated the 2nd of September 1868 the lessor John Jones of Dunedin in the Province of Otago demised to Francis Dillon Bell a farm of some 4,000 acres in that Province known as Meadowbank. The term was 14 years from the 1st of September 1868. The rent was to be 1,000*l.* a year. The lease contained a covenant by the lessor for himself his heirs executors administrators and assigns in the following words:—

> "The lessor his heirs or assigns will at his or their own "expense on or before 1st day of September 1869 completely "finish laying down in good English grass and in accordance "with the rules of good husbandry the 1,000 acres which the "lessor has already commenced laying down in English "grass."

If there were nothing more in the lease bearing on the construction of this covenant and nothing else to be considered there would undoubtedly be implied in and by reason of the covenant to "finish" the operation in question an agreement on the part of the lessor to lay down in English grass and according to the rules of good husbandry so much and such parts of the 1,000 acres referred to as had not been laid down in that manner already. There would also be implied on the part of the lessee an authority or licence for the lessor to enter upon the land and cultivate it for that purpose. And if such an agreement and such a provision were implied in the lease it would be difficult to contend that the burthen of the covenant did not run with the reversion so as to give the lessee a right of action and a remedy against the persons who might be assignees of the reversion at the time fixed for the complete fulfilment of the covenant.

The covenant however does not stand alone. It is accompanied and apparently controlled by the following declaration which is inserted at the end of the lease:—

"It is hereby declared that there shall not be implied in this "lease any covenant or provision whatever on the part of "either of the parties hereto."

The effect of this declaration if it means what it says is to qualify the preceding covenant by shutting out every possible implication which the terms of the covenant would seem to suggest or require.

The result therefore is that by the covenant so qualified the lessor warrants that he will on or before the 1st of September 1860 completely finish laying down the 1,000 acres in good English grass according to the rules of good husbandry but that he does not bind himself further in any shape or way. He does not agree to break up the land or to lay it down or to do anything on the land in fulfilment of the apparent intention of the covenant. He has reserved no power of entry nor is he given any authority to enter for that purpose. Still if the operation is not found finished on the prescribed day he must be answerable in damages. That is the bargain between the parties. They stand to be bound by the strict letter of their contract. They chose to draw the line there. They would not go one step further. Whatever there might be beyond the mere letter of the contract depending on inference or implication that was deliberately excluded—a singular provision no doubt whether it proceeded from mutual distrust or sprang from the fancy of the draftsman or was adopted as a means of avoiding some difficulty of the moment. But the declaration is not open to any ambiguity. The language is as plain and as positive as language can be. And after all perhaps the explanation is not so very far to seek if Mr. Bell's letter of the 2nd of July 1869 which is in evidence may be taken as an accurate description of the surrounding circumstances and the position of the parties at the time when the lease was executed.

The treaty for the lease was it seems a very protracted affair. The great matter to be arranged was the laying down of the 1,000 acres in English grass. Mr. Bell counted upon this improvement to make the rent. At Mr. Jones' request he laid down about 250 acres. Mr. Jones set about doing the rest of the work himself. He ploughed the ground and he sowed it. Then he wanted Mr. Bell to accept the land as he was laying it down. Mr. Bell refused. The quality of the seed was not what it should have been: the best seed in the world would come to nothing on a single ploughing: the work would have to be done all over again. Everybody said so, friends and neighbours as well as the incoming tenant. Heedless of warning and deaf to advice Mr. Jones went on in his own way. When he had once ploughed and once sown the specified number of acres though no grass was to be seen he maintained that he had done all that was required. Mr. Bell would not yield. Mr. Jones was firm or perhaps obstinate. Fortunately they both appealed to the future. Time would tell who was right and who was wrong. So when it came to the point of granting the lease "a year was given" as Mr. Bell says "to "*prove*" whether the work had been properly done or not. Mr. Jones was content to pay the penalty if the fates were against him. But apparently as a point of honour he would not set his hand to anything implying an agreement to do more than he had done without expressly negativing any such implication.

Whether this explanation be satisfactory or not everybody must admit that in construing a contract the Court is bound to give effect to every part of it. If a stipulation is found in the bond it matters little how it got there. It is not to be rejected because it may be unusual or ignored because twenty years afterwards the Court cannot guess why it was ever introduced.

Mr. Jones did not live to see the end of his experiment. He died on the 16th of March 1869. By his will which was made on the 20th of December 1868 he divided his property among his children. Some of their shares he settled including the share in which Meadowbank was comprised. He appointed executors and made them also trustees of the settled shares.

The Appellants who claim under a Voluntary Conveyance represent the inheritance in Meadowbank. The principal Respondents are the persons interested in the testator's residuary estate.

At the end of the first year of his tenancy Mr. Bell claimed compensation for breach of the covenant in question. The claim was originally made against the testator's executors as trustees of Meadowbank. The matter was referred to arbitration. By an award dated the 2nd of March 1871 the arbitrators found that the covenant had been broken. They assessed the damages at 2,296*l.* 7*s.* 4*d.*, and directed that the parties contesting the claim should pay that sum to Mr. Bell as executors of Mr. Jones. The money with interest and costs was ultimately paid to Mr. Bell out of the testator's personal estate not specifically bequeathed.

The payment was directed to be borne by the testator's executors in deference to an opinion of Sir Roundell Palmer and Mr. T. D. Archibald afterwards Archibald J. who advised that the covenant did not run with the reversion and that the damages would be payable out of the testator's general estate.

The learned Counsel of course gave no reasons with their opinion. But it can hardly be doubted that they proceeded on the principle that effect ought to be given to every term of the contract.

The propriety of the payment was not questioned at the time or for many years afterwards. Lately however difficulties arose in regard to some items in the trustees' accounts and two suits were instituted for partial administration of the testator's estate. In the course of the second suit the question now at issue came to be discussed. At the suggestion of the Judge the pleadings were amended. All parties interested were brought before the Court and the suit was turned into a suit for general administration. Mr. Justice Williams was of opinion that Mr. Bell's claim ought to have been satisfied by the specific devisees and that the testator's general estate ought to be recouped by a charge on Meadowbank. A decree to that effect was accordingly pronounced with consequential directions. On appeal the Court unanimously affirmed the decree.

Their Lordships are unable to concur in the view taken by Mr. Justice Williams and the Court of Appeal in New Zealand. They think that the covenant in question must be construed as qualified and controlled by the declaration which follows it. On that construction the covenant does not run with the reversion and inasmuch as in their opinion the covenant is not incident to the relation of landlord and tenant they think that the liability for the breach of the covenant properly fell to be borne by the testator's general estate.

The view taken by their Lordships of the nature and meaning of the covenant renders it unnecessary to determine upon whom as between the different objects of the testator's bounty the liability would have fallen primarily if the covenant had been unqualified and uncontrolled by any other provision in the lease. But inasmuch as Mr. Justice Williams proceeded on the assumption that the covenant was unqualified and on the admission of Counsel that the covenant ran with the reversion and as his judgment in its entirety was approved by the Court of Appeal it would hardly be right for this Board to pass the question by in silence.

The reasoning of Mr. Justice Williams in substance seems to be this:—The covenant runs with the reversion. It is therefore not merely an obligation imposed by statute on the reversioner but a burthen or charge upon the reversion itself. A person who takes a benefit under a will must take the benefit with any burthen that happens to be attached to it. Then there are plenty of cases where legatees of leaseholds have tried in vain to shift the burthens incident to their leasehold interest and throw them on the testator's general estate; those cases are in point; there the burthen was incident to the lease; here it is incident to the reversion. The leaseholder bears the burthen incident to his holding; the reversioner must in like manner bear the burthen incidental to his estate.

This reasoning does not appear to their Lordships altogether satisfactory. It does not perhaps keep sufficiently distinct the two principal questions which on the assumption that the covenant runs with the reversion would present themselves for consideration—the question whether the covenant is a burthen or charge on the reversion itself, and the question whether the covenant is in its nature incident to the relation of landlord and tenant. In regard to both their Lordships have some difficulty in accepting the view of the learned Judge. Granted that the covenant runs with the reversion it does not follow that the liability under the covenant is a burthen upon the reversion. At common law no covenant ran with the reversion. By the statute of Henry VIII. all lessees have "like action and "remedy against all persons . . . having "any gift or grant . . . of the reversion of "the said lands and hereditaments so letten ". . . for any condition or covenant ex-"pressed in the indentures of their leases" as they might have had against their lessors. They cannot have any greater right or any more extended remedy. In the lifetime of the lessor the covenant was not a burthen on the land in the hands of the lessor. After his death how can it be a burthen on the land in the hands of the specific devisee? The Appellants do not dispute that if the covenant ran with the reversion the specific devisees of Meadowbank came under liability to Mr. Bell. Whatever liability the statute threw on the specific devisees as assignees of the reversion that they were bound to bear as between themselves and the lessee. But the testator's estate was also liable and residuary legatees take nothing until the testator's liabilities are satisfied. If the liability for the breach of the covenant was not a charge on the inheritance as Mr. Justice Williams seems to have thought it was why should the specific devisees bear it rather than the testator's estate merely because for the protection of tenants the statute gives the lessee an additional remedy against the lessor's assignees? The enquiry must go deeper. It would seem that the nature of the obligation in each particular case must determine the question. If it is in its nature incident to the relation of landlord and tenant it would only be fair that the burthen should be borne by the devisee as between him and the testator's estate, falling on him as landlord whether the agreement bears a seal or not. That seems to have been the principle of *Mansel* v. *Morton*, L.R. 22 Ch. Div. 769, where it will be observed there was no covenant to run with the reversion though by some slip in the report the Master of the Rolls is made to say that there was. The lease was not under seal and therefore the statute had no application. The agreement there was that the lessor should buy the tenant's property at the end of the term and it was held that as between the specific devisee and the testator's estate this obligation incident as it plainly was to the relation of landlord and tenant fell on the devisee. On the other hand if the covenant is not in its nature incident to the relation of landlord and tenant—if the thing to be done is something preparatory to the complete establishment of that relation it would seem to be fair and in accordance with the probable wishes of the testator that the burthen of the covenant unperformed by him in his lifetime should be borne by his estate rather than by the specific devisees. In the present case the object of the covenant was to ensure the premises being put into a condition fit for the occupation of the tenant under the lease. Such a covenant is intended to be performed forthwith not to remain attendant on the lease during its currency. In its nature it seems to be very different from a covenant by the landlord to keep buildings on the demised land in repair or to pay for unexhausted improvements at the end of the lease.

The cases cited at the bar where the question was between a specific legatee of leaseholds and the testator's estate are of little or no assistance in determining the question now under consideration. The only one cited in which the covenant could possibly be regarded as otherwise than incident to the relation of landlord and tenant (if indeed any covenant in a lease on the part of the lessee can be regarded as otherwise than incident to that relation) was the case of *Marshall* v. *Holloway*, before Shadwell, V.C. 5 Sim. 186. There the lessee covenanted to make certain improvements in existing buildings and to erect certain new buildings on the demised land within a comparatively short period. The lessee died before the period expired without having completely performed his covenant. It was held that the devisee of the leasehold ought to be exonerated by the general personal estate from the cost of completing the unfinished work. That case if it could be accepted as an authority would appear to go far beyond the position which the Appellants seek to establish. The report however is so confused that it is not easy to say upon which if any of the various grounds touched upon in the judgment his Honour desired to rest his decision. It is certainly not surprising to find that subsequent judges have differed on the point. Turner V.C. felt considerably embarrassed by *Marshall* v. *Holloway* in a case before him (*Fitzwilliams* v. *Kelly* 10 Hare 266) where the covenant was meant to be in attendance during the whole term of the lease and to have a recurring operation—a case in this respect apparently as different from *Marshall* v. *Holloway* as well could be. He thought Shadwell V.C. must have relied on a provision in the will as to the payment of the testator's debts. Sir John Romilly M.R. however considered that the principle in *Marshall* v. *Holloway* and the principle in *Fitzwilliams* v. *Kelly* were one and the same —the principle being that the obligation of completing the testator's interest in the subject matter of the bequest falls on the testators general estate (see *Armstrong* v. *Burnet*, 20 B. 424, 431, 437). The M.R. seems to have thought that the fulfilment of the repairing and building covenant in *Marshall* v. *Holloway* was required to complete the testator's interest as lessee or in other words that the fulfilment of that covenant might be regarded as antecedent and preparatory to the complete establishment of the relation of tenant and landlord. Whatever may be the true explanation of *Marshall* v. *Holloway* their Lordships agree with Williams J. in thinking that it would not be satisfactory to rely on a case about which there is so much obscurity though they can not see that *Marshall* v. *Holloway* was virtually overruled or indeed affected by the decision of the Court of Appeal in *Hawkins* v. *Hawkins*, 13 Ch. Div. 470 which seems to have been a very plain case and is one in which their Lordships entirely agree.

Their Lordships will humbly advise Her Majesty that the decision under appeal should be reversed and that the suit should be dismissed with costs in the Courts below so far as it seeks to throw the liability for the breach of the covenant in question on the specific devisees of Meadowbank. The Respondents who represent the residuary legatees will pay the costs of the appeal including the costs of the Respondents the trustees. The last named costs will be taxed as between solicitor and client.