

mortgage the said 163 acres, or any part thereof, and that the same were included therein contrary to the terms of the agreement between the plaintiffs and the defendant in that behalf.

10. That the said deed of conveyance of the 16th day of March, 1869, was also prepared under the instructions of the defendant, and the plaintiffs had no independent professional advice or assistance in reference to the said conveyance before or at the time of the execution thereof, and the plaintiffs did not know, nor did either of them know, that the said deed of conveyance comprised the whole of the land contained in the said grant from the Crown, and the plaintiffs executed the same fully believing and on the understanding that the land thereby conveyed was the same land as was comprised in the said deed of mortgage, and that such land did not include the 163 acres of land whereon they were living with their families, and which they were then cultivating.

11. That the plaintiffs never agreed to mortgage or sell to the defendant any part of the said 163 acres, and they say that they executed both the said deed of mortgage and the said deed of conveyance under a mistake as to the land comprised in the said deeds, and without any intention to mortgage or sell to the defendant any more of their said land than was leased to the said James Butcher Braithwaite.

12. That the execution of the said deed of conveyance was fraudulently obtained by the defendant in this: that he well knew that the said deed of conveyance contained 163 acres not agreed by the plaintiffs or intended by the plaintiffs to be mortgaged or sold to the defendant, and that the same were included therein contrary to the terms of the agreement between the plaintiffs and the defendant in that behalf.

13. That the plaintiffs have been in continuous possession and occupation of the said 163 acres of land since the 5th day of October, 1868, and no claim for possession of the said land was ever made upon them by or on behalf of the defendant before or about the month of May, 1874.

14. That until the said month of May, 1874, the plaintiffs were not, nor was either of them, aware that the aforesaid mortgage and conveyance affected or purported to affect their title to the said 163 acres of the said land.

The plaintiffs therefore pray—(1.) That it may be declared that the said deed of mortgage of the 5th day of October, 1868, was and is a mortgage only of so much of the land comprised in the said deed of grant as was contained in the said lease to the said James Butcher Braithwaite by the said deed of the 28th day of July, 1866, and that the said deed of mortgage may be altered and reformed in accordance with such declaration. (2.) That it may be declared that the said deed of conveyance of the 16th day of March, 1869, was and is a conveyance only of so much of the said land comprised in the said deed of grant as was leased to the said James Butcher Braithwaite by the said deed of the 28th day of July, 1866, and that the said deed of conveyance may be altered and reformed in accordance with such declaration. (3.) That the plaintiffs may have such further or other relief in the premises as may be just.

PLEA.

On Monday, the 21st day of September, 1874.

The defendant, by his solicitor, John Nathaniel Wilson, says,—(1.) That he admits the allegations contained in the first, second, third, fifth, and sixth paragraphs of the declaration. (2.) That he denies the allegations contained in the fourth paragraph of the said declaration, except so far as the same alleges that the land comprised in the said deed of grant contained, in addition to the land included in the said deed of lease, 163 acres of land. (3.) That he denies the allegations contained in the seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth paragraphs of the declaration.

REPLICATION

On Saturday, the 28th day of November, 1874.

The plaintiffs, by their solicitor, Charles Beard Izard, say,—That they take and join issue on so much of the defendant's pleas as denies the allegations, or any part of the allegations, contained in the fourth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth paragraphs of the plaintiffs' declaration.

ISSUES.

1. Were the plaintiffs, at and for some time prior to the date of the lease in the declaration mentioned, dwelling on the said 163 acres of land in the declaration mentioned, and cultivating and using the same?—Yes.

1A. Were they so dwelling on, cultivating, and using the said land at and for some time prior to the date of the mortgage in the declaration mentioned?—Yes.

1B. Were they so dwelling on, cultivating, and using the said land at and for some time prior to the date of the conveyance in the declaration mentioned?—Yes.

2. On the treaty for the mortgage in the declaration mentioned, was it mutually agreed by word of mouth between the plaintiffs and the defendants that the whole of the land included in the Crown grant mentioned in the declaration should be included in the mortgage?—Yes, as far as Paora Torotoro was concerned, but not as regards Rewi, because the treaty was with Paora Torotoro.

2A. If not, was it on such treaty as aforesaid so agreed that only the land so leased to the said James Butcher Braithwaite as in the declaration mentioned should be included in the said mortgage?—No; it was not only Braithwaite's lease.

3. Was the said deed of mortgage prepared under the instructions of the defendant alone?—Yes.

3A. Was the said deed of mortgage prepared under the instructions of the plaintiffs as well as of the defendant?—No.

4. Had the plaintiffs, before or at the time of the execution of the said mortgage, any independent legal advice in reference to the said mortgage?—No.

5. Did the plaintiffs or either of them know, at time of execution of mortgage, that the said mortgage comprised all the land included in the said grant?—Yes; Paora Torotoro only.

5A. Was the said mortgage deed read over, interpreted, and explained to the plaintiffs before the execution by them, and did they understand the nature and effect thereof?—Yes; read over, interpreted, and explained, but no evidence that it was understood by Rewi Haokore.

6. Was the execution of the said deed of mortgage fraudulently obtained by the defendant by reason of his knowing that the plaintiffs did not intend to include therein the said 163 acres?—[Struck out at trial.]

7. Was the said conveyance on the 16th day of March, 1869, prepared under the instructions of the defendant alone?—Yes.

7A. Was the said conveyance prepared under the instructions of the plaintiffs as well as of the defendant?—No.

8. Had the plaintiffs, before or at the time of the execution of the said conveyance, any independent legal advice in relation to the said conveyance?—No.

9. Did the plaintiffs, or either of them, and, if so, which, know at the time of the execution of the said conveyance that the said conveyance comprised all the land included in the said grant?—Yes; by Paora Torotoro, but not by Rewi.

9A. Was the said conveyance read over, interpreted, and explained to the plaintiffs before the execution thereof by them, and did they understand the nature and effect thereof?—Yes; read over, interpreted, and explained to both, but no evidence that understood by Rewi Haokore, but understood by P. Torotoro.

10. Did the plaintiffs, previously to the execution of the mortgage to the defendant, agree to mortgage to the defendant the said 163 acres?—Yes, by Paora Torotoro, inasmuch as it was included in Crown grant.

10A. Did the plaintiffs, previously to the execution of the conveyance to the defendant, agree to sell to the defendant the said 163 acres?—Yes, by Paora Torotoro inasmuch as land included in Crown grant.

11. Was the execution of the said deed of conveyance fraudulently obtained by the defendant, by reason of his knowing that the plaintiffs did not intend to include therein the said 163 acres?—No.

12. Were the plaintiffs in occupation of the said 163 acres at or for some time prior to the 5th day of October, 1868, and have they been in occupation thereof ever since?—Yes.

13. Was any claim for possession of the said 163 acres made upon the plaintiffs by or on behalf of the defendant before the month of May, 1874, and, if so, when first?—Yes, on or about 11th December, 1873.