Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Henderson v. *Astwood and others, Astwood and another* v. *Cobbold and others, and Cobbold and another* v. *Astwood and others, from the Supreme Court of Judicature of Jamaica, delivered 3rd February* 1894.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

In 1887 one Davies, a Doctor of Medicine practising in Jamaica, was in the position of mortgagee in fee of a wharf at Kingston known as Astwood's Wharf. At an earlier period in the history of the property part of the site was occupied by Messrs. Finke & Co. The part which was then called Astwood's Wharf belonged to Miss Astwood one of the Plaintiffs. Her business manager was her nephew, George Astwood the other Plaintiff. Miss Astwood does not seem to have been a person of means, or to have taken an active part in the transactions which led to the present litigation. Everything was left in the hands of George Astwood. By an indenture dated the 22nd of June 1877 Miss Astwood conveyed her property to Davies by way of mortgage and charged it further in his favour by two deeds dated respectively the 6th of October 1880 and the 23rd of March 1882.

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The mortgage contained a power of sale, absolute and unqualified in the event of interest being in arrear for 30 days. In 1884 George Astwood bought out Messrs. Finke & Co. for the purpose of enlarging Astwood's Wharf. The purchase was made with moneys advanced by Davies, and the property was conveyed to him in fee upon certain terms defined in an agreement dated the 8th of March 1884. The agreement provided for payment of interest on the purchase money quarterly, and contained a power of sale without notice in case of default. By an indenture dated the 15th of September 1884 the several charges on the premises which by that time had been thrown into one were consolidated; the interest in arrear was turned into principal, and a further advance was made by Davies for the purpose of improving the property, bringing up the total amount secured as principal to the sum of 4,500*l*. The powers of sale in the earlier deeds were kept alive, and made applicable to the new advance, and extended to all the mortgaged premises as if they formed one property in security.

In September 1887 the interest on the consolidated mortgage was greatly in arrear, the business was falling off, the gross income was not sufficient to pay the charges and outgoings, and the Astwoods appeared to be hopelessly embarrassed.

In these circumstances Davies required payment of the amount due to him, which was stated to be 6,000*l*. The notice was disregarded, and he put the mortgaged premises up to auction. The auction was held on the 16th of September 1887. The Defendant Cobbold, who was son-in-law to Davies, was the highest bidder. The property was knocked down to him for the sum of 3,200*l*. which seems to have been its full value at the time.

Cobbold was ostensibly the purchaser. In reality he was acting on behalf of Davies. No money passed. Davies however executed a conveyance to Cobbold, and he at the same time signed a paper undertaking when called upon to convey the property to Davies.

After the auction Davies treated himself as the owner. He went into possession and repaired the property, made improvements, and carried on the business in his own name and on his own behalf.

On the 1st of May 1890 Davies agreed to sell Astwood's Wharf for 7,000*l.* to the Defendant Henderson, who was a member of a New York firm of steamship owners.

In carrying out the contract the flaw in Davies' title became apparent. In accordance with the practice in Jamaica the vendor's solicitor, a Mr. Vendryes, prepared the draft conveyance. Mr. Vendryes who had been concerned in the earlier transactions settled the draft as a conveyance to Henderson's firm from Cobbold. But in the fold of the draft he explained the state of the title in a note from which the following is an extract:—

"In 1887 Doctor Davies in the exercise of his powers as "mortgagee sold the premises at public auction. All notices "were given, and Mr. Cobbold being the highest and best bidder "was declared the purchaser. He has not however paid the "purchase money. Indeed he purchased for Dr. Davies who "is now selling to the Company. I have made the conveyance "simply from Mr. Cobbold to the Company as the most proper "course to my mind, but should it be desired Dr. Davies will "join."

Mr. Vendryes' suggestion was not adopted. On the purchaser's behalf, and without any objection on the part of the vendor, the draft was altered so as to state the whole transaction, and to put on record the fact that Davies was selling as mortgagee under the power of sale contained in his securities.

The conveyance to Henderson was dated the

11th of August 1890. It was recorded in the Island Record Office on the 14th of that month.

George Astwood came to hear of the sale to Henderson before it was completed. He heard too that there was some hitch in the bargain. He thought he says "that the hitch must relate to the "sale to Cobbold." His curiosity or his suspicion was aroused. As soon as Henderson's conveyance was recorded he made himself acquainted with its contents. Then it was, if his memory is to be trusted, that he "first discovered the real "nature of the transaction." He did not however come forward at once. He knew that the wharf was wanted for the accommodation of a line of steamers. He probably thought it not unwise—perhaps he thought it not dishonest or unfair—to wait until Henderson had spent or had come under contract to spend a large sum on the property. Astwood himself puts Henderson's expenditure at about 8,000*l*. When Henderson was committed to a considerable outlay there was nothing more to be gained by waiting. So on the 16th of February 1891 a writ was issued in the names of Miss Astwood and George Astwood against Davies, Cobbold, and Henderson. The writ was followed by a statement of claim filed on the 21st March. The Plaintiffs thereby claimed (1) a declaration that Cobbold's conveyance and Henderson's were fraudulent and void as against the Plaintiffs; (2) an account of what if anything was due on Davies' securities; and (3) redemption on payment of the balance, if any. There was an alternative claim asking (*a*) an account of what was due from and to Davies treating him as mortgagee in possession from October 1887 to August 1890, and bringing into account the 7,000*l*. received by Davies from Henderson, and (*b*) an order for payment against Henderson as well as against Davies of what might appear to be due from Davies.

Davies who had gone to New York died there on the 17th of April 1891 without having delivered a defence. The action was revived against his legal personal representatives, of whom Cobbold was one. They wrote to the Plaintiffs' solicitors offering to submit to a decree for an account on the footing of Davies having been in possession as mortgagee from October 1887 to August 1890, bringing into account the 7,000*l.* with an inquiry as to permanent improvements made by Davies which increased the value of the mortgaged premises. This offer was rejected. It was repeated in the Statement of Defence delivered by Davies' representatives.

The action came on for trial before Sir Adam Gib Ellis C.J. on the 21st and 22nd of July 1892. On the 15th of September 1892 his Honour pronounced judgment in which he announced that the conclusion to which he had come on the whole case was,—

"That an order must be made (1) Declaring that as against "the Plaintiffs the Indenture of 16th September 1887 and of "11th August 1890, are frandulent and void. . . (2) Directing "that an account be taken as between the Plaintiffs and Defendants the representatives of the late Dr. Davies as mortgagee in possession since 14th October 1887. (3) Finding "the Plaintiffs entitled to redeem the mortgaged premises on "payment to these Defendants of the balance found due on "such accounting."

The precise terms of the decree were referred for settlement to the Full Court, to which both Henderson and Davies' representatives appealed.

The appeals, and the argument as to the settlement of the terms of the decree, came on to be heard on the 10th, 11th, and 28th of November 1892 before the Full Court, consisting of Sir Adam Gib Ellis C.J. and Nathan and Northcote J.J. Judgment was given on the 5th of January 1893. Both appeals were dismissed with costs and Davies' representatives and Henderson were both ordered to pay the costs of the Plaintiffs up to the date of the entry of the judgment. It

was ordered and adjudged that the deeds of September 1887 and August 1890 were fraudulent and voidable against the Plaintiffs' rights as mortgagors. An account was directed of what was due on the 11th of August 1890 in respect of the mortgage, charging on the one hand an occupation rent and on the other interest at the rate specified in the mortgage. On the balance thus ascertained interest was to be calculated at the legal rate, but no allowance was to be made for moneys expended either by Davies or by Henderson on lasting improvements. Then provision was made for redemption of the premises on payment of the amount found due. Payment was to be made either to Davies' representatives and Henderson, in such proportions as they might agree, or into Court in the event of their not agreeing. In default of payment the action was to stand dismissed against Henderson, but apparently without costs. The Plaintiffs however were to be allowed to fall back on their claim to have the 7,000*l.*, the amount of the purchase money paid by Henderson, brought into account, but in that case an inquiry was to be made as to moneys expended by Davies in lasting improvements.

With this decree all parties, including even the Plaintiffs, are dissatisfied, and all parties have appealed to Her Majesty in Council.

In arriving at the decree under appeal the learned Judges of the Full Court seem to have proceeded upon a view of the facts inconsistent, in their Lordships' opinion, with the fair result of the evidence.

The main ground of the decision is a finding of fact that Davies was guilty of actual fraud in going through the form of a sale to Cobbold. The so-called sale was of course inoperative. A man can not contract with himself. A man can not sell to himself, either in his own person

or in the person of another. But such a transaction is not necessarily a fraud or evidence of fraud. The thing may be done with or without a dishonest intent. It may be a cloak for fraud, or it may be a mere blunder. The question is—which is the proper conclusion here? The facts really speak for themselves. Davies had advanced a large sum on a security not capable of yielding a return under all circumstances, but necessarily varying in value with the fluctuations of trade. Interest was in arrear to the amount of 800*l.* or 900*l.* according to George Astwood's own admission. For part of this sum acceptances had been given and they were dishonoured. The outgoings including interest were 900*l.* a year. The gross income could not be calculated at more than 800*l.* So Astwood says in a letter written to Davies in June 1887, in which he pleads for a reduction in the rate of interest. He was in debt, he says, to other persons besides Davies; trade was bad; he was not the only person in difficulties; on all sides were to be found empty and unoccupied wharves and stores that would neither rent nor sell for want of business; the only way to make the two ends meet was to reduce the interest. Davies replied that he was not averse to a reduction in the rate of interest, but that as things stood the expedient would be futile. Hampered as he was by debt and harassed by his creditors Astwood could not attend properly to his business. So Davies counselled bankruptcy, promising help if Astwood were once in a position to make a fresh start. Astwood would not listen to this proposal. Davies told him there was nothing for it then but foreclosure, and advertised for a wharfinger to manage the business on his account. Thereupon, suddenly and without warning, Astwood closed the wharf and carried the business off to other premises. His excuse is that he was afraid

Davies would sell to himself privately as he thought he had power to do. Then came the auction and the so-called sale to Cobbold. It was a foolish step. But what is there to suggest any dishonest intention? Davies might have entered and foreclosed. A foreclosure action must have been undefended. Astwood as he says had no money. Davies if he pleased might have asked for a sale and got leave to bid, or he might have called upon the Astwoods to release the equity of redemption. After the auction Astwood wrote to Davies a letter, in which he stated that he would have parted with his interests as they stood at the wharf, and agreed to connect himself no further with wharf business for a very trifling consideration. It is impossible to conceive any intelligible motive for fraud. Two of the learned Judges do indeed suggest a motive. They suggest, with more or less confidence, that the object Davies had in view was to hold to the property if it turned out well, and to throw it back on the hands of the mortgagors if it turned out badly. And they found themselves to some extent on the fact that Cobbold's conveyance was not registered till the sale to Henderson. But neither of the learned Judges explains what a mortgagee in his senses could hope to gain by throwing back an insufficient security on the hands of impecunious mortgagors. Their Lordships are satisfied that neither Davies nor the Astwoods considered the equity of redemption worth thinking about, and that on Davies' part there was neither fraud nor oppression.

Henderson's conduct is next brought under review. The charge in his case is, that through his solicitor he had notice of actual fraud. The notice is supposed to have been conveyed in the passage which has been already quoted from Mr. Vendryes' note on the draft conveyance to Henderson. Nathan J. construes that passage

as an invitation to connive at an attempt to conceal the nature of the previous transaction. "The purchaser," he adds, "had notice there-"fore that not only had a fraud been commenced, "but that it was still being kept up, and he was "asked to connive at it by taking under a title "which at the same time he was informed was a "sham one." On these grounds Nathan J. bases his concurrence with the findings of the Chief Justice, that there was actual fraud and that the purchaser had notice of it. But for the latter conclusion he adduces another reason to which he attaches "at least equal weight." It seems that when the draft conveyance was altered by Henderson's solicitor, apparently in New York, absolute covenants for title were inserted, and they passed without objection. Why the covenants for title took that form does not appear. Nothing seems to have been made of the point until the appeal. It may be the practice at New York, as was suggested before the Full Court. It may be that the form was adopted in consequence of a statement by Mr. Vendryes in his note on the draft conveyance that some of the documents connected with the title had been destroyed in the fire at Kingston; or it may be that the title was so well known that the form of the covenants was a matter of little moment, and it was not thought worth while to send the draft back to New York. However that may be, Nathan J. expresses his opinion that Henderson's "recorded title "to anyone acquainted with the practice of "conveyancing reeks with fraud." Their Lordships are unable to discover such damning evidence in the covenants for title, nor do they take so uncharitable a view of the conduct of the parties. If Astwood thought Davies could sell to himself privately it seems a little hard to call Davies a rogue because he

thought he could buy from himself at a public auction. Mr. Vendryes may not have shown much skill in his profession. But a solicitor may be a bad lawyer without being necessarily a bad man. And certainly Mr. Vendryes is entitled to this observation in his favour, that of his own accord, and without the pressure of any requisition, he told the whole story with perfect truth and frankness, as if he were not conscious of having done anything to be ashamed of. As regards Mr. Henderson himself the learned Counsel for the Astwoods were invited to say what according to their view he ought to have done. Having learned a flaw in the vendor's title from a communication made to him by the vendor's solicitor, ought he to have disclosed it to the mortgagors? The Chief Justice seems to think he ought. But the learned Counsel for the mortgagors promptly disavowed any notion of that sort. Still, they said he ought to have made some communication to Davies. But what should the communication have been? Insisting as Henderson did on a title under the power of sale, it would have been absurd for him to have required the concurrence of the mortgagors, or to have asked any question as to the proposed application of the purchase money. What was there left to be said? Anybody in the position of Davies, whether honest or not, would have resented with indignation an allusion to a slip in the past or a pious wish for his good guidance in the future.

Although their Lordships acquit Davies of any dishonest intention in putting forward Cobbold as the purchaser, there is one part of his conduct which seems to call for observation. When he found that the sale to Cobbold was inoperative, and that he had not divested himself of the character of mortgagee, it became his duty to communicate the fact to the mortgagors,

and to offer to furnish them with accounts; and this duty was specially incumbent upon him because he had himself in effect stated to them, as no doubt he believed at the time, that the sale at the auction in 1887 was a real transaction. It may be that he was satisfied that nothing in any event would be coming to the mortgagors. But the excuse, even if it were made out, would not, in their Lordships' opinion, relieve him from the duty plainly cast upon him. Their Lordships therefore think that his estate must bear the costs of the action up to the time when his representatives filed their defence.

As far as Henderson and his solicitor are concerned, they appear to have acted throughout with strict propriety; they had no reason to suspect that Davies had done or meant to do anything dishonest; and their Lordships much regret that the learned Chief Justice and his colleagues should have thought fit to use the term "fraud" in connection with their conduct.

At the trial the learned Chief Justice did not go so far as to hold that the power of sale had ceased to exist. But he held what was much the same thing, that it could only be exercised with the concurrence of the mortgagors. On appeal a fresh point was raised. It was contended that the power of sale was destroyed or exhausted by the ineffectual attempt to exercise it on the occasion of the auction in 1887. This contention was accepted without hesitation by all the learned Judges. It seems to their Lordships that the proposition on which it is based is not founded on any principle; and the learned Counsel for the Astwoods very properly admitted that, after the case of *Topham* v. *the Duke of Portland* (5 L. R. Ch. Ap. 40), it was impossible to maintain that a power was extinguished by an act done, apparently in execution of the power, but in reality in fraud of it. If the view of the Full

Court were tenable, it would follow of course that the conveyance to Henderson could not have operated against the mortgagors. But how could it have operated in their favour? Davies was paid the fee simple value of the property. In return he purported to convey the fee simple and all his estate and interest in the premises. If he was not in a position to convey the absolute ownership, the conveyance must at the least have passed whatever interest he had. And yet the learned Judges of the full court held that, after the conveyance to Henderson, there was "nobody who in any sense "can claim to be placed in the position of "mortgagee." The words quoted are Mr. Justice Nathan's, but the other Judges use almost the same language. And so they all come to the conclusion that the effect of the conveyance was to release the mortgagors from their covenant to pay interest at the rate specified in the mortgage. Their Lordships are unable to follow this part of the decision.

If the sale to Henderson is valid, as their Lordships must hold it to be, the action is reduced to a mere question of account,—an account of what was due in respect of the mortgage at the date of the sale and an account of the purchase moneys. In taking the account it was not disputed that Davies was to be charged a fair occupation rent for the time when he was in possession, and that he ought to be allowed all moneys properly laid out by him in repairs. It was argued, however, that he was not entitled to any allowance for lasting improvements. And this was the principal topic in the argument on the Plaintiffs' appeal. That Davies did make lasting improvements was admitted. It was not disputed that those improvements were necessary and proper, and that they added to the value of the premises. It

would be contrary to common justice to deprive Davies of the benefit of the money laid out by him on those improvements, so far as they enhanced the value of the premises. Following the decision of Sir George Jessel M. R. in the case of *Shepard* v. *Jones* (21 L. R., C. D. 469), their Lordships think that an inquiry should be directed in general terms to ascertain what sum ought to be allowed in respect of lasting improvements. It was said that the improvements which Davies made could not have added to the value of the property from Henderson's point of view, having regard to the purpose for which he wanted it. That may be very true, but still Henderson may have had to pay a larger price for the premises because they were fitted with modern improvements, and suited to the ordinary requirements of the trade of the port.

In the result their Lordships think that an order ought be made in the following terms :—

Dismiss the Plaintiffs' appeal to the Privy Council with two sets of costs to be taxed.

Discharge the decree of the Full Court.

Order re-payment of costs, if any, paid under it.

Dismiss the action as against Henderson with costs to be taxed.

Order the Plaintiffs to pay Henderson's taxed costs of his appeal to the Full Court and to the Privy Council.

Declare that Davies is to be charged with an occupation rent for the premises in respect of the period between the 16th of September 1887 and the 11th of August 1890.

Tax the costs of the Plaintiffs of the action up to and including the date of the filing of the defence of the Defendants Cobbold and Mackinnon except so far as such costs were increased in consequence of Henderson having been made a Defendant.

Tax the subsequent costs of the Defendants Cobbold and Mackinnon of the action, including their costs if any of the settlement of the terms of the decree, and of their appeal to the Full Court and to the Privy Council.

Deduct the costs of the Plaintiffs as aforesaid from these costs and ascertain the residue of costs.

Take the following account and inquiry :—

1. An account of what was due to Davies under and by virtue of his mortgage securities on the 11th of August 1890 and in taking such account Davies is to be allowed all sums of money laid out by him in necessary repairs on the mortgaged premises.

2. An inquiry whether any and what sum ought to be allowed to Davies in respect of lasting improvements.

And let such amount if any be allowed Davies in taking the account No. 1.

Let an annual value by way of occupation rent be set upon the mortgaged premises and let the amount with which Davies is to be charged for such occupation rent be deducted from what shall appear to have been due under the account No. 1, and let the balance be certified.

And if such balance shall be less than the sum of 7,000*l.* let interest at the legal rate be computed on the amount of the difference from the said 11th of August 1890.

Set off against the amount of such difference and interest the said residue of the said costs of the Defendants Cobbold and Mackinnon, and let the balance be paid by the party from whom to the party to whom such balance shall be certified to be due.

But if the balance of what shall appear to have been due on taking the account No. 1 after deducting such occupation rent be more than

7,000*l.* let the Plaintiffs pay to the Defendants Cobbold and Mackinnon the said residue of their costs.

Their Lordships will humbly advise Her Majesty accordingly.