Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Haddington Island Quarry Company, Limited v. *Alden Wesley Huson and others, from the Court of Appeal of British Columbia; delivered the 27th July* 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD SHAW.
LORD MERSEY.
LORD DE VILLIERS.
LORD ROBSON.

[DELIVERED BY LORD DE VILLIERS.]

This is an Appeal against a Judgment of the Court of Appeal of British Columbia reversing a Judgment of Morrison, J., in the Supreme Court, which dismissed the Plaintiffs' action with costs. The Plaintiffs were the mortgagors and personal representatives of mortgagors of a certain Quarry known as Haddington Island, and the Defendants were the assignees of the mortgage and purchasers of the Quarry, the sale to the latter having been effected by virtue of a power of sale conferred on the mortgagees by the indenture of mortgage. The statement of claims contained several claims, but the claims to which the arguments before their Lordships were mainly directed were for a cancellation of the conveyance to the purchasers, and for a declaration that the Plaintiffs were entitled to redeem the mortgage. The grounds upon which these claims were based were that the assignment of the mortgage did not vest in the Defendant Company any interest in or title to the mortgage,

[60.] J. 89. 100.—7/1911. E. & S.

that there had not been a due registration either of the assignment or of the conveyance, that the Defendant Company had no right to exercise the power of sale, that no demand had been made on the mortgagors for payment and no notice given to them of the intended sale, and that "the Defendant Company did not use its best "exertions, or indeed any exertions, to obtain "the best price for the said Haddington Island "alleged to have been sold by it as aforesaid, "and that the purchase price alleged to have "been paid by the Defendant Walker or the "Defendants McDonald, Wilson, and Snider, was "a very inadequate price for the said property." At the close of the trial the learned Judge made the following observations:—"The whole "transaction, it seems to me, has been quite "valid and regular, and you cannot disturb the "Defendants. But I have some misgivings as "to the assignment to Fulton. Outside of that, "I would not hesitate to give judgment. I think "the sale was valid, and the other points I am "satisfied on, but I have some misgiving on "that point." There is an obvious misprint, as the assignment, the validity of which is denied, was made *by*, and not *to* Fulton, who was Commissioner of Lands. The mortgagee was one Macaulay, who had assigned the mortgage to a previous Commissioner of Lands, and the point now made by the Plaintiffs was that the title to the mortgage did not vest in the Defendant Company as assignee, inasmuch as the Commissioner had not obtained the authority of the Lieutenant-Governor in Council to assign the bond. The Judge, after considering the question, decided that it could not be raised without making the Attorney-General a party. He accordingly dismissed the action with costs. On appeal to the Court of Appeal, the Chief Justice and Martin, J., confined themselves

entirely to the question whether the sale had been made by the Defendant Company with due regard to the interests of the mortgagors. Galliher, J., also discussed that question, but he made a few observations upon another question raised in the Court of Appeal, namely, whether an arrangement made before the date of the assignment by the Government with the mortgagors, under which the Government was to receive the royalty due to the mortgagors on stone taken from the Quarry and apply the same in reduction of the debt, would have debarred the Government from exercising the power of sale. If the Government had no right to sell the property, the assignees would be equally debarred from selling it. Upon this point the learned Judge said:—"Taking all "the arrangements which finally culminated in "the agreement of 12th July 1894, and reading "that agreement, it appears to me it goes no "further than to provide for an application of "the royalty on such stone as should be supplied "thereunder on the mortgage. This was done, "and although we find a credit for stone supplied "the Empress Hotel, I treat that merely as a sum "received and applied in due course on the mort-"gage. This was the last credit given, and is "some two years before the mortgage was as-"signed to the Defendant Company, so that, even "if that is treated as a payment under a special "agreement, the mortgagors were for a long time "subsequent thereto in default, and the Govern-"ment could deal with the mortgage as they saw "fit, due regard being had to the interest of the "mortgagors. Their assigns could, of course, do "likewise." He agreed, however, with the other members of the Court of Appeal that the sale had not been made with due regard to the interests of the mortgagors, and the sale was accordingly ordered to be set aside and the Plaintiffs were allowed to redeem.

Their Lordships entirely agree with the view that what took place between the Government and the mortgagors before the assignment was not sufficient to deprive the assignees of the right to exercise the power of sale contained in the Indenture. The real question, therefore, to be decided in this Appeal is whether, in view of the pleadings and of the evidence given at the trial, the Court of Appeal rightly decided that there was such a reckless disregard of the interests of the mortgagors as would justify the setting aside of the sale.

The parties against whom the action was brought were not only the assignees of the mortgage, but also the purchasers of the property. The sale was effected by virtue of a power which is in the following terms:—"If "the mortgagors make default as to any of the "covenants or provisoes herein contained, the "principal hereby secured shall, at the option of "the mortgagee, his heirs or assigns, forthwith "become due and payable, and in default of pay-"ment the powers of sale hereby given may be "exercised. Provided that the said mortgagee, on "default of payment for one month, may, on one "month's notice, enter on and lease or sell the "lands. And provided also that, in case default "be made in payment of either principal or in-"terest for two months after any payment of "either falls due, the said powers of leasing or "selling or any of them may be acted upon with-"out any notice . . . . Provided that, in "default of the payment of the interest hereby "secured, the principal hereby secured shall "become payable." Ostensibly, therefore, the mortgagees acted within their powers in selling the property, and the purchasers are entitled to the full benefit of their purchase unless it be alleged and proved that they acted in collusion with the vendors, or that the price was so low as in itself to be evidence of fraud or collusion.

Unfortunately, from first to last there is no allegation in the statement of claim charging the purchasers with fraud or collusion or bad faith or knowledge of the existence of facts which would invalidate the sale. The allegations that the Defendant Company, that is to say, the vendors, did not use any exertions to obtain the best price for the land, and that they sold it to the purchasers at a very inadequate price, are quite consistent with perfect good faith on the part of the purchasers, and yet these are the only allegations from which it could possibly have been inferred that at the trial attempts would be made to charge them with collusion or want of good faith. At the trial the evidence was mainly directed towards establishing those grounds of claim which have since been practically abandoned. Incidentally, Alden Huson, one of the Plaintiffs, was asked what the value of the property was, and his answer was: "Well, it is worth at least $20,000, at the very "least. We were offered $30,000 for it once." As this amount is far in excess of the price for which the property was sold, namely, $3,250, it is contended that the sale should not be allowed to stand, but, in the absence of any notice to the Defendants that the alleged inadequacy of price would be relied upon as proof of fraud or collusion on their part, they should not be prejudiced by their failure to produce counter evidence as to value. The evidence as to value given on behalf of the Plaintiffs was of the most flimsy nature. Huson said that they had been offered $30,000 for the Quarry, but did not produce the person who had made the offer. Nor did the Plaintiffs produce any expert, or indeed any other, evidence in support of Huson's casual statement as to value. If the property was so valuable early in 1908, there is no satisfactory explanation why it was not sold and

the proceeds of the sale applied towards redemption of the mortgage. It is clear from the correspondence that as far back as January 1908 Huson knew that there was a prospect of the property being immediately sold for the amount of the original mortgage debt, but, although he protested against such a sale, he made no attempt to find the means of paying the Government the sum of $1,150 which was all that was then still owing for principal and interest. Under the indenture of mortgage the mortgagors were at liberty to pay the debt after three months' notice in writing to the mortgagee or his assigns, or upon the payment of three months' interest in lieu of notice. No such notice appears to have been given, nor interest tendered either to the Government or to the Defendant Company after it had, in March 1908, obtained from the Government an assignment of the mortgage. The Defendant Company accordingly sold the property for $3,250, and it now holds the balance, after payment of capital and interest, at the disposal of those entitled thereto. The Trial Judge was perfectly satisfied as to the validity of the transaction. In the notice of appeal to the Court of Appeal, although other grounds of alleged invalidity are fully stated, not a word is said as to fraud or collusion, but the Court held, in effect, that the sale was fraudulent. Among the cases cited by Galliher, J., was that of *Warner* v. *Jacobs* (51 L.J. N.S. Ch. Div. p. 642), where Kay, J., summing up the authorities, is reported to have said :—" The result seems to be " that a mortgagee is, strictly speaking, not a " trustee of the power of sale. It is a power given " to him for his own benefit, to enable him the " better to realize his mortgage debt. If he " exercises it *bonâ fide* for that purpose, without " corruption or collusion with the purchaser, the " Court will not interfere, even though the sale be

" very disadvantageous, unless indeed the price is " so low as in itself to be evidence of fraud." In the present case the statement of claim alleged, in effect, that the sale was very disadvantageous, but it gave no hint to the Defendants that they would be called upon at the trial to meet a charge of either corruption or collusion, or to meet the case that the price was so low as in itself to be evidence of fraud. Under these circumstances, their Lordships are unable to attach the same importance as was attached by the Court of Appeal to the circumstance that the Defendants produced no evidence as to the value of the property, nor are they prepared to dissent from the finding on the facts by the learned Judge at the trial. They will therefore humbly advise His Majesty that the Judgment of the Court of Appeal should be reversed, and the Judgment of Morrison, J., restored. The Respondents will bear the costs of this Appeal, and the costs incurred in the Court of Appeal and the Supreme Court.

In the Privy Council.

THE HADDINGTON ISLAND QUARRY COMPANY, LIMITED,

v.

ALDEN WESLEY HUSON AND OTHERS.

DELIVERED BY LORD DE VILLIERS.

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