[HIGH COURT OF AUSTRALIA.]

PENDLEBURY . . . . . APPELLANT;
PLAINTIFF,

AND

THE COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1912.

MELBOURNE, *March* 7, 8, 11, 12, 13, 14, 29.

Griffith C.J., Barton and Isaacs JJ.

Mortgage—Sale by mortgagee—Powers and duties of mortgagee—Disregard of interests of mortgagor—Sale by auction—Advertisements—Remedy of mortgagor—Account on basis of wilful default.

A mortgagee, in exercising the power of sale conferred on him by the mortgage, not being at liberty to disregard the interests of the mortgagor, is bound before selling, either by auction or privately, to ascertain the value of the mortgaged property and, if the sale is by auction, so far as the circumstances will permit, to give notice of the sale of such a nature, both as to particulars given and as to the places in which, and the modes by which, it is given, as is likely to bring the property to the notice of likely buyers and so to induce such competition as will be likely to secure a fair price.

Kennedy v. *De Trafford*, (1897) A.C., 180, and *Barns* v. *Queensland National Bank*, 3 C.L.R., 925, followed.

The omission from such a notice of such statements as are plainly and obviously necessary in order to enable the particular land to be identified by those invited to buy it, renders the mortgagee liable for any loss occasioned by such omission.

Held, on the evidence that the mortgagee, who had sold the mortgaged land by auction, had entirely disregarded the interests of the mortgagor.

Held, further, that he was responsible to the same extent as a party who is liable for wilful default, and that he was therefore liable to account to the

plaintiff for the amount which would have been realized on a sale of the property conducted without such wilful default.

Decision of the Supreme Court (1911) V.L.R., 332 ; 33 A.L.T., 42, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by William Henry Pendlebury against the Colonial Mutual Life Assurance Society Ltd. claiming damages in respect of the sale by the defendants as mortgagees under a power conferred on them by a mortgage under the *Transfer of Land Act* 1890, of a certain piece of land mortgaged to them by the plaintiff, and claiming in the alternative an account of the sum which, but for the wilful default or neglect of the defendants, would have been realized on such sale, it being alleged that the sale was made wrongfully, recklessly, and/or in bad faith, and/or without due regard to the interests of the plaintiff, and/or collusively with the purchaser.

The facts are fully set out in the judgments hereunder.

The action was heard by *Hood* J., who gave judgment for the defendants, holding that the sale was honestly carried out in due exercise of the power, and that there was no absence of *bona fides* and no want of reasonable care: *Pendlebury* v. *Colonial Mutual Life Assurance Society Ltd.* (1).

From this decision the plaintiff now appealed to the High Court.

Cohen and *Cussen*, for the appellant. If a mortgagee in exercising his power of sale fraudulently or wilfully or recklessly sells the mortgaged property at an under value he is guilty of a breach of duty to the mortgagor: *Barns* v. *Queensland National Bank* (2); *Kennedy* v. *De Trafford* (3); *National Bank of Australia* v. *United Hand-in-Hand and Band of Hope Co.* (4); *Tomlin* v. *Luce* (5); *Colson* v. *Williams* (6); *Wolff* v. *Vanderzee* (7); *Hodson* v. *Deans* (8); *Warner* v. *Jacob* (9); *Coote on Mortgages*, 7th ed., p. 927; *Ashburner on Mortgages*,, 2nd ed., p. 248. The notice given of the auction sale was utterly inadequate, and there

(1) (1911) V.L.R., 332; 33 A.L.T., 42.
(2) 3 C.L.R., 925, at p. 941.
(3) (1897) A.C., 180.
(4) 4 App. Cas., 391, at p. 410.
(5) 41 Ch. D., 573; 43 Ch. D., 191.
(6) 61 L.T., 71.
(7) 20 L.T., 353.
(8) (1903) 2 Ch., 647, at p. 652.
(9) 20 Ch. D., 220.

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

was an utter disregard of the interests of the mortgagor. The evidence shows that there was collusion as to the sale between the purchaser and Gill, who acted for the respondents.

Starke (with him *Macfarlan*) for the respondents. Assuming that the proper rule was laid down in *Kennedy* v. *De Trafford* (1), a sale in order to be "reckless" must be one without any regard whatever to the mortgagor's interests. The test is not what a prudent man would do. The mortgagee's conduct must be such as to enable the Court to say that he has exercised the power for a purpose for which it was not given. There must be a want of good faith and that may be evidence of recklessness. [He referred to *Farrar* v. *Farrars, Ltd.* (2); *Farrer* v. *Lacy, Hartland & Co.* (3); *Haddington Island Quarry Co.* v. *Huson* (4).] A mortgagee is not a trustee of the power of sale: *Field* v. *Debenture Corporation* (5). The Court will not scrutinize too closely the form of the advertisement of the sale provided it is fair. If the mortgagee advertises too much, it will be disallowed on taxation. No greater duty should be cast upon a mortgagee selling under his mortgage than upon the Commissioner of Titles in respect of a sale under the procedure for foreclosure. Where a practice is shown in regard to advertisements for these sales the Court will not say it is a reckless procedure to follow that practice. The evidence does not support the charge of collusion. If an account is ordered to be taken, the measure of damages is not the real value of the land, but what without the wilful negligence or default of the defendants might have been obtained: *National Bank of Australia* v. *United Hand-in-Hand and Band of Hope Co.* (6).

Cohen, in reply, referred to *Marriott* v. *Anchor Reversionary Co.* (7); *Matthie* v. *Edwards* (8); *Tomlin* v. *Luce* (9); *Seton on Decrees*, 6th ed., p. 1962.

Cur. adv. vult.

(1) (1897) A.C., 180, at p. 185.
(2) 40 Ch. D., 395.
(3) 31 Ch. D., 42.
(4) (1911) A.C., 722.
(5) 12 T.L.R., 469.
(6) 4 App. Cas., 391.
(7) 3 D. F. & J., 177, at p. 190.
(8) 2 Coll., 465, at p. 480.
(9) 41 Ch. D., 573; 43 Ch. D., 191.

The following judgments were read :—

GRIFFITH C.J. This was an action brought by the appellant against the respondents, claiming compensation in respect of a wrongful sale of land mortgaged by the plaintiff to the defendants and sold by them at auction after default in payment of interest. The sale itself and all its incidents were directed by one Gill, who was then in the employment of the defendants, but had no authority to direct a sale. The defendants have, however, adopted his action and the case must be considered as if Gill himself had been the mortgagee.

The case made by the plaintiff falls into two divisions, one relating to matters antecedent to the sale. and the other to events which occurred at and subsequent to it, but it is all one case, and may be put, briefly, as a charge that the defendants in making the sale absolutely disregarded the interests of the mortgagor. So far as regards the first division of the case the ground of complaint is that the auction was conducted under such circumstances as to preclude any chance of a fair competition. The land, which was in fact worth about £2,000, realized only £720. As to the second division the plaintiff alleged collusion between Gill and the purchaser. He alleged, indeed, actual participation by Gill in the profits made by the purchaser, which were immediate and very large, but he failed to establish this charge. He did, however, establish facts to which I will advert later, tending to show an unusual and unexplained, if not inexplicable, consideration for the interests of the purchaser on the part of Gill.

The obligations of a mortgagee who sells the mortgaged property were considered by this Court in the case of *Barns* v. *Queensland National Bank* (1), in which the rule laid down by Lord *Herschell* L.C., in the case of *Kennedy* v. *De Trafford* (2) was stated and applied. The learned Lord Chancellor said, in the course of his speech (3): "My Lords, I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty

(1) 3 C.L.R., 925.
(2) (1897) A.C., 180.
(3) (1897) A.C., 180, at p. 185.

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Griffith C.J.

towards the mortgagor. *Lindley* L.J., in the Court below, says that 'it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor.' Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words 'good faith,' but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith."

I understand Lord *Herschell* to mean that the mortgagee must not recklessly or wilfully sacrifice the interests of the mortgagor, and that if he does he is to be regarded as not having acted in good faith. A good deal of discussion took place as to the meaning in which the terms "recklessly" and "good faith" were used by the learned Lord Chancellor. Mr. *Starke* suggested that the word "reckless" is used in a sense analogous to that in which it is used in *Derry* v. *Peek* (1). If a man makes a material statement which is false in fact, careless whether it be true or false, he is as much guilty of fraud as if he knew it to be false. That is a case of an act of commission. So, he suggests, in the case of a sale by a mortgagee, if he omits to take obvious precautions to ensure a fair price, and the facts show that he was absolutely careless whether a fair price was obtained or not, his conduct is reckless, and he does not act in good faith. I am disposed to accept this analogy as sound. In the case of *Kennedy* v. *De Trafford* (2) *Lindley* L.J., had said in the Court of Appeal, immediately before the words quoted by Lord *Herschell* L.C.:— "A mortgagee . . . is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor: that is all."

The question therefore to be determined in this case is, in my judgment, whether the facts establish that on the sale complained of the defendants by their agent, Gill, "looked after their own

(1) 14 App. Cas., 337.

(2) (1896) 1 Ch., 762, at p. 772.

interests alone," and absolutely disregarded the interests of the mortgagor.

The land in question is a square block of 640 acres situated about 235 miles from Melbourne in what is called the "Mallee Country," which is a large tract of many thousands of square miles lying in the north western part of Victoria, originally covered with a dense wood-growth called "mallee," and for a long time considered practically valueless. The soil is, for the most part, of a sandy nature, with few if any watercourses, and the annual rainfall is comparatively small. The quality of the soil naturally varies. Some parts of the tract have a red loamy soil, and are much more valuable than others. Of late years the land has been found to be adapted, when cleared, for the cultivation of cereals and also for grazing.

The mortgage, which was given to secure a loan of £600 with a penal interest of 7 per cent., reducible to 5 per cent. on prompt payment, was dated 14th March 1908, and was for a period of five years. Before making the advance the defendants obtained a valuation from a Mr. Salmon, who reported (*inter alia*) that the land was occupied by the plaintiff and his family (who, however, resided on a neighbouring property), and used for growing wheat and oats and for grazing, that a water channel belonging to a "Water Tanks Trust" was distant from it about a mile, which would be very advantageous when the channel was connected with the property, that the land was undulating and a nicely lying allotment, that the soil was "red to brown sandy loam" of good quality for cereals and for grazing, that the only timber on the land was a mallee shelter clump, that the land was all cleared, nearly all ready for cultivation, with about 250 acres under cultivation, that its rental value was probably 2s. 6d. per acre (£80). To the questions "If readily lettable" and "If readily saleable" he said "It should find a tenant," and "I think so in say within 12 to 24 months." He valued the property as a freehold at £1,280, and added, "It should be a very safe security for a loan of £600." The plaintiff had in his application for the loan stated that the title to the land was an agricultural lease from the Crown, and it appeared that the balance payable in order to convert it into freehold was £240.

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Griffith C.J.

Interest was payable on 1st March and 1st September in each year. The plaintiff made default in payment of the interest due on 1st September 1909 and 1st March 1910, and on 18th April 1910 a formal demand was made upon him for payment of these arrears, together with a sum of £9 16s. 11d. for rent paid to the Crown, in which it was stated that on default the defendants might proceed to sell under the mortgage. On 7th May a further notice was given requiring the plaintiff to pay all principal moneys interest and other moneys due under the mortgage, and stating that in default of payment within 14 days after service of the notice it was the intention of the defendants to offer the land for sale in pursuance of the 116th Section of the *Transfer of Land Act*.

The plaintiff deposed that in reply to this notice he wrote a letter to the defendants to the following effect:—

"Dear Sir,—I am very sorry that I cannot meet my account as there was a storm that knocked down my crop and I was putting in 400 acres on account it was a good year and also I made all fences sheep proof and subdivision paddocks also. That is the best I could do for the Society at that time;" and added "I said nothing about paying interest, but asked them to let it stand over till coming crop and that I would pay the increased rate of interest."

He said that he received no reply to this letter.

It appeared from the defendants Letter Register that a letter was received from plaintiff on 18th May and acknowledged on the same day, but the letter was not produced, nor a copy of the acknowledgment, if any was sent.

Gill, who, as already said, had no authority to do so, then undertook to offer the land for sale at auction through a Melbourne auctioneer, Mr. Brown. The first advertisement was published in the *Argus*, a Melbourne daily paper of large circulation, on 26th May. The advertisement was repeated in the *Argus* of 28th May and 4th and 14th June. The sale was also advertised in the *Age*, another Melbourne daily paper of large circulation, on 27th and 28th May and 14th June, which was the day appointed for the sale. The advertisement in each paper was in these terms:—

"Tuesday 14th June.
At half-past 2 o'clock.
AUCTION SALE.
By order of the Mortgagees.
At the Rooms 432 Collins Melbourne.

"J. T. Brown and Co. Auctioneers Wangaratta and 432 Collins Street Melbourne are instructed by the Mortgagees to offer for sale by Public Auction as above at half-past 2 o'clock in the afternoon All That piece or parcel of land being Allotment 21 in the Parish of Curyo County of Karkarooc and containing 640 acres and being more particularly described in Agricultural Lease Volume 853 Folio 170439.

"This property is about seven miles from Curyo Railway Station is well fenced and watered, with useful buildings.

"Terms at sale."

No avertisements were published in local newspapers nor in any other paper, and no other notice was given. The total sum spent in advertising was £2 17s. 6d.

The plaintiff contends that this notice of sale was wholly inadequate and indicates a total disregard of his interests.

It is not disputed that some advertisement was necessary. In my opinion, the object of a sale by auction is to secure a fair price for the property offered by means of competition between probable purchasers. And the object of giving public notice of a sale by auction, whether by advertisement, bellman, posters or otherwise, is to bring the subject of the sale to the notice of such probable purchasers, and so to induce such competition as will be likely to secure a fair price.

The notice ought, therefore, so far as the circumstances will admit, to be of such a nature, both as to particulars given and as to the places in which and the modes by which it is given, as to be likely to secure this result. It is not disputed that if a mortgagee sells by private contract he is bound to take reasonable means to ascertain the value before selling, and the same rule applies, in my opinion, to a sale by auction.

If on a sale by auction there is in the description which he gives of the property a material misstatement by which the price realized is reduced, the mortgagee is responsible to the mortgagor

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Griffith C.J.

for the loss. In the case of *Tomlin* v. *Luce* (1), *Kekewich* J. speaking of the liability of a mortgagee under such circumstances, said:—"So long, however as he selects agents presumably competent he cannot be made liable for their errors in judgment or in matters of detail not seriously affecting the success of the sale or the price realized. On the other hand, I think that if the mortgagee is guilty, directly or indirectly, of a serious blunder inducing a failure to sell, or a large diminution of the price realized, the mortgagor can hold him responsible for that, and it is no answer for him to say that the blunder was no fault of his own, but was that of an agent in whom he properly placed implicit confidence."

The Court of Appeal (*Cotton*, *Bowen* and *Fry* L.JJ.) (2), held that the mortgagee was liable for any loss occasioned by the mistake which had in fact been made, but dissented from the measure of damages adopted by *Kekewich* J.

In my opinion, the same principles apply to material omissions as to material misstatements. I mean the omission of such statements as are plainly and obviously necessary in order that the readers or hearers of the notice may know what the thing is that they are invited to buy.

The plaintiff contends that the advertisement was inadequate in itself, since it gave no information by which the subject of the sale could be identified without a search in the Titles Office and that the manner and extent of the publication were also inadequate. Amongst other defects in the advertisement itself he points out that the only definite statement of the locality, besides the number of the allotment, is that it is about seven miles from Curyo Railway Station, and that a person reading the advertisement would not, unless he was already acquainted with the land itself or with the locality, know in what direction it lay from that station. It appeared in evidence that the land to the north-west of Curyo (where the land in question is situated) is very good, while the land to the east of that township is very poor. Nor would a reader know whether the soil was good, bad or indifferent—red and loamy, or sandy. He would not know that the land was all cleared and had all been under crop, or

(1) 41 Ch. D., 573, at p. 575. (2) 43 Ch. D., 191.

that about 250 acres were actually sown with wheat (as the defendants say they knew), or that it was subdivided (as it was) into paddocks, or that it was within a mile of the Trust Water Channel, or the amount of the balance due to the Crown, which was a most important matter to a purchaser. These are the more important of the omissions complained of. *Primâ facie*, I think the contention is well founded. Nevertheless, such an advertisement might be adequate if it appeared that it was in fact likely to come under the notice of persons so familiar with the locality as to be able to identify the land from the description as land which they knew.

The description of a piece of land as No. 200 in a city street, contained in an advertisement published in the city, is substantially very different from a similar description of a block of country lands hundreds of miles away published only in city newspapers. For instance, the description in a notice of a sale by auction of a mining property as "A gold mine known as Gold Mining Lease No. 200 at Smithville" might be quite adequate if published by notice affixed to the property itself or in its neighbourhood, or, perhaps, if published in local papers, but would be absurdly inadequate if only published in a place where in all probability there would be no readers who would be able to identify it by that description. It would be no better than advertising for sale "a gold bracelet contained in a sealed box to be opened by the purchaser."

Several auctioneers were called by the plaintiff, who said that according to their experience the advertisement in question was inadequate, not only in its form but also in the extent of its publication. According to their testimony the usual mode of advertising country land for sale by auction is to publish advertisements in local papers as well as in the metropolitan papers, daily or weekly, with posters in addition, and sometimes by other means as well. One of them, who lives in the district in which this land is situated, said that, if the land had been advertised locally, there would have been buyers at a price of £3 or £3 5s. an acre.

Against all this it was suggested that, as the *Argus* and the *Age* circulate all over Victoria, it is sufficient to advertise in them. That they do so circulate is a notorious fact, but it is

H. C. OF A 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Griffith C.J.

equally notorious that a person desiring information as to purely local matters does not look to the great city dailies for it. We cannot pretend to be ignorant of notorious facts. A witness named Edwin Forrester, a farmer at Curyo, who lived alongside the land in question for many years and knew it well, and whose wife bought it in July 1910 from a purchaser from the purchaser at the auction, did not know that it was for sale.

The only evidence offered in support of the sufficiency of the notice was that of the Melbourne auctioneer, Brown, and Mr. J. C. Stanford, an auctioneer who actually conducted the sale for him. Brown deposed that he prepared the advertisement from the information given to him by Gill, and that for the last five years he had not advertised mortgagees' sales locally. He said in cross-examination that he did not know that a great part of the land was under crop, that this would have been an important matter to tell purchasers, as also that it was fenced all round and sub-divided and that the soil was rich. He added: "These would not be stated in a mortgagees' sale." He also said "I don't think we endeavour to get the best price in a mortgagees' sale." The learned Judge seems to have thought this last statement ironical, but it seems to me the natural inference from his previous statements, which were serious enough. Stanford said in cross-examination that, if land was brought to him for sale, he would make inquiries, but that usually the owner gives full information. He added "but I would not make inquiries if selling for the mortgagee," and in re-examination said, "I wouldn't consider it necessary to advertise locally. It would depend on the mortgagee. The advertisement in the present case is the usual one in such cases."

On this evidence it was contended that the defendants did all that mortgagees generally do in Melbourne, and that therefore they cannot be accused of recklessness. To my mind this evidence proves, if it proves anything, that it is usual for mortgagees selling in Melbourne to disregard the interest of the mortgagors. This may be done in too many instances, but I should be sorry to think that it is a general practice. If it is, the sooner the attention of mortgagees is recalled to their duty—

which, after all, is only to act with common fair play towards a man whom misfortune has placed in their power—the better.

Upon these facts alone I have no hesitation in coming to the conclusion that Gill, so far, absolutely disregarded the interests of the mortgagor.

I pass now to what I have called the second division of the case, premising that the defendants admit by their answer to the plaintiff's interrogatories that they knew at the time of the sale that between the date of the mortgage and the date of the sale there had been a general advance in the price of mallee land.

Brown and Gill were both present at the sale. By the conditions of sale the purchaser was to pay a deposit of £50 in cash, and pay the residue of the purchase money in cash in one month. Stanford's account of what took place is that he read the conditions and advertisement and offered the land, saying nothing about it except the advertisement, that there was a bid of £700 to start, that he dwelt on the bid and asked an advance, and someone bid £20, and that he then sold it by instruction of Brown and Gill.

Brown's recollection was slightly different, but it appeared from his evidence and Gill's that after the first bid (or bids, if there were more than one) Brown asked Gill what was the reserve price, and that Gill gave him a slip of paper which he passed to Stanford, showing a reserve of £714, including debt, interest and charges. Gill says that someone bid £714, and then it went to £720, and was sold. The purchaser was one Lindsay. The slip of paper, which was produced in evidence, showed the amount of £714 made up thus: Debt £674, commission £30, charges £10. Brown's commission on £720 was £30 10s. This certainly suggests that it did not enter into Gill's mind that a larger price would be obtained than one that would entail the payment of about £30 commission. The possibility of a surplus for the mortgagor seems to have been to him altogether negligible. The actual charges (which were only for advertisements), in addition to commission, were only £2 17s. 6d., leaving a small balance of between £6 and £7 payable to the plaintiff. But so utterly was he out of Gill's thoughts that the plaintiff was never informed of the fact, and indeed did not know of the sale until,

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Griffith C.J.

the purchaser from Lindsay having applied for a loan upon the land, a valuator went to value it on behalf of the proposed mortgagee.

Lindsay, the purchaser at the sale, died about September 1910, so that his version of the facts to which I am about to refer was not available. Very little is known about him. Gill says that he first met him in March or April 1910, when he came to the defendants' office in connection with the purchase of a mallee block belonging to one Robbins which was mortgaged to them, that he next saw him five or six weeks after in connection with the same matter; that he next saw him in Collins Street, Melbourne, about a fortnight later, speaking to a person named McLean, when there was a conversation about a loan on McLean's property which Gill declined, and that he next saw Lindsay in Brown's auction room at the sale. According to this story Lindsay was a mere casual acquaintance. Gill further said that at the sale Lindsay came to him and said "How are you, Mr. Gill, are you interested in this sale?" to which Gill replied "Yes, we are selling as mortgagees"; that Lindsay then said "Is it worth buying?" to which Gill replied "It should be as we only lent 60 per cent. of valuation, but you must remember that in addition to the loan there are other charges." If this means anything, it means that Lindsay would be safe in bidding up to the amount of the debt interest and charges, which were afterwards announced at the auction as the reserve. This again shows that Gill had no thought of getting more.

It is plain that Lindsay knew nothing of the land beyond the advertisement. It is equally plain that he must have known the reserve before he made his bid.

When the time came for making the deposit of £50 cash, Lindsay offered his cheque for the amount drawn on the Colonial Bank of Australasia. A copy of his account at that Bank was put in evidence, from which it appeared that on 14th June 1910 he had 4s. to his credit, his last operation on the account having been a cheque for 30s. paid on 28th May. Lindsay asked Brown to take the cheque for a day. Brown says that he asked Gill if he was "all right," to which Gill replied "I think he is." Brown thinks that Gill added that he had sold property and had money.

Brown then took the cheque, and the contract of sale was signed. On 20th June Brown included the cheque in a list of cheques endorsed upon a deposit slip which he was making out but struck it out of the list before making the deposit. On 22nd June Lindsay took up the cheque with a bank note for £50.

Gill says that he next saw Lindsay about 28th or 29th June in his (Gill's) room, when he came in to arrange about a transfer of plaintiff's property, and that he thereupon recommended to him as his solicitor a Mr. Park, who was a son of a late general manager of the defendant company, and whom he had previously recommended to many other persons. We are now asked by the defendant's counsel to believe that Park is a person utterly unworthy of credit. However, Gill took Lindsay to Park and introduced him as a client.

Lindsay evidently had no money, and his only chance of paying the residue of the price was by a re-sale, which he in fact effected in July at a price of between £1,800 and £1,900.

Gill says that he next saw Lindsay on 6th July at Park's office (which was in the defendants' building), and that Lindsay said he was getting anxious about the contract and wished an extension of the time, that Gill said he preferred that the extension should be given by Brown the auctioneer, that later in the day he took Lindsay to Brown's office, who was not in, and that Gill then told Lindsay to see him in a few days, that on the next day Park sent for Gill to his office, where he found Lindsay, with whom he again went to Brown's office, who again was not in.

The suggestion that the extension to which Gill was manifestly willing to consent should be allowed by Brown, whose agency was at an end, is not explained, and is hard of explanation, although Gill said that such extensions were usually granted by the auctioneer. It is to be remembered that in the whole of the transaction Gill was acting without authority from, and without the knowledge of, the defendants.

Gill further says that about 14th July Lindsay brought to the office a form of extension ready written out, and that they again went to Brown's, who was again away, and that he thereupon signed the extension. This document was dated 12th July, and was in Lindsay's own writing, and was to the effect that, in con-

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Griffith C.J.

sideration of the payment by Lindsay of interest at 6 per cent. on £670 the balance due on the contract, Gill on behalf of the Society "renewed and extended" the contract "for the further time of 30 days for the payment of such balance." The 30 days would expire on 13th August at the latest.

A pencil entry upon the defendants' Mortgage Register was put in evidence, which reads as follows:—"Lindsay 6 p.c. on £670 from 17th July to 30/7/10 £1 : 8 : 7." Gill says that this must have been made by a clerk from information supplied by him. In cross-examination he said that the extension was for 14 days on payment of interest at same rate as in the mortgage. This statement is doubly incorrect, both as to time and rate of interest. The entry in the Mortgage Register is also incorrect—both as to the amount and the duration of the time of extension.

This is not explained, but it suggests that Gill was so anxious to oblige Lindsay that he did not trouble about details. On a day which Gill fixed as about 14th July he wrote a memo. to Park as follows:—"If Mr. Lindsay should call at your office this morning will you kindly let me know as I wish particularly to see him." He says that his object was to caution Lindsay against having any money transactions with Park. If so, his mode of sending the message was singular. Before this Lindsay had told him that he was reselling at a considerable profit.

The next day Lindsay came again to Gill at his office and said he had received a cheque as a deposit on the resale which he offered on account of the balance due on his contract, Gill did not, however, take the cheque, which appears to have been for £353. On the same day Lindsay showed him a pay-in slip for the cheque.

Park, who was called as a witness, gave a very different account of the relations between himself Gill and Lindsay. In the course of his cross-examination the defendants put in his diary and two bills of costs rendered by him to Lindsay and Lindsay's executor, which contained numerous entries as to attendances upon both Lindsay and Gill as to the matter of Lindsay's resale, and in particular as to Lindsay's pay-in slip for £353 being handed to Gill. Unless these entries in the diary were fictitious, which,

having seen it, I can find no reason to believe, Gill took as much interest in the resale as Lindsay himself.

On 23rd July Mr. Bullen, town agent for the plaintiff's solicitor, called at the defendants' office and saw Mr. Pullar, their managing secretary, and complained that plaintiff's property which was worth £2,000 had been sacrificed for about £700. The managing secretary in answer to an inquiry whether he had taken any steps before the sale to ascertain the value said, "No, I did not, the matter was in the hands of Mr. Gill." Gill had on the previous day informed Mr. Bullen that he had acted under Pullar's instructions.

Early in August Park informed Pullar that he thought there was something wrong in the transaction, and gave him particulars. In consequence of this injunction a special meeting of the directors of the defendant company was held on 15th August. They requested Lindsay, Gill and Park to attend in the afternoon of the same day, which they did, and told their respective stories. Park was asked to furnish a detailed statement in writing, and did so on the following day.

Gill was suspended by defendants on the same day (15th) and dismissed on the 17th. Pullar, who was examined *de bene esse*, said that he was not dismissed on account of the transaction now in question but that it added to the dissatisfaction already existing in the mind of the Board as to his conduct, in that he had given instructions for the sale of the plaintiff's land without Pullar's authority and without the authority of the Board. He said that as a matter of fact the sale was not authorized by the Board, but the proposal "was done by Gill off his own bat."

Meanwhile the period of extension to 13th August had expired, but the defendants nevertheless accepted the balance of the purchase money from Lindsay on the 17th and transferred the land to him.

Whatever other conclusions may be suggested by this part of the case, I have only considered it so far as it is relevant to the question whether Gill in the matter of the sale acted altogether without regard for the plaintiff's interests. So considered, these facts make a case which was already sufficiently strong quite overwhelming.

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Griffith C.J.

The only other question is the measure of the relief to which the plaintiff is entitled. *Hood* J. thought, though as he decided in favour of the defendants he made no formal finding of fact upon which we can act, that, if the property had been reasonably advertised at an expense of about £30, it would have realized £2,000. Indeed, no other conclusion was open on the evidence.

In *Tomlin* v. *Luce* (1), which was a case of positive misstatement, the Court of Appeal directed an inquiry whether the land would have sold for any and what sum in excess of that realized, if sold without the misstatement. In a case of omission it is not so easy to formulate a standard as the basis of inquiry. If reasonable notice of the sale is taken as the standard, the matter would be left very much at large to the opinion of the Master, whose opinion of what is reasonable might differ from that of the Court. In *Wolff* v. *Vanderzee* (2) *Stuart* V.C. took the reserves fixed upon a sale under the direction of the Court itself as the standard. The procedure in such cases may, I think, be taken as showing what, according to the practice of the Court, is regarded as fit and proper when a sale is made in the conduct of which the interests of several persons are to be considered. Mr. *Starke* intimated that he would not object to that standard.

I am not disposed, however, to lay down as a general rule that a mortgagee selling is always bound to conform to that standard, although it would in many cases, and probably would in this case, lead to the same practical result as the rule which I am about to state.

In *Barns's Case* (3), in which the damages awarded were the full value of the property sold, the Court held the selling to be altogether unwarrantable and a tortious act.

In my opinion, a mortgagee selling under circumstances which show a reckless disregard of the interests of the mortgagor is responsible to the same extent and on the same principles as an accounting party who is liable for wilful default.

I think, therefore, that the defendants are liable to account to the plaintiff for the amount which would have been realized on a sale of the property conducted without wilful default, which I

(1) 43 Ch. D., 191.

(2) 20 L.T.N.S., 353.

(3) 3 C.L.R., 925.

hold to have been established in the sense in which it is used in judgments directing such an account.

BARTON J. I have little to say as to the charge of collusion. Its success depended mainly on the question whether the evidence of Mr. Park was more worthy of credence than that of Mr. Gill. *Hood* J. found that the appellant had not established his case on this point. No doubt there were some circumstances of suspicion apart from the conflict of evidence, but His Honor must have weighed them carefully, and he could not come to the conclusion that they amounted to proof. Having regard to the advantages which he possessed in seeing and hearing the witnesses, and to the fact that the complete effect of a cross-examination is often in the nature of things not to be gathered from the print of a Judge's notes, I think that His Honor's conclusion on this part of the case should not be disturbed. The findings of juries are protected here in the absence of a clear conclusion that the tribunal of fact has failed to do its duty; see *per* Lord *Halsbury* L.C. in *Riekmann* v. *Thierry* (1). The findings of fact arrived at by a Judge sitting without a jury are not of course so protected, but the principles on which this Court acted in *Dearman* v. *Dearman* (2) are I think applicable.

But the same considerations do not apply to the appellant's charge that the respondents, as his mortgagees, exercised their power of sale in a manner in which they were not entitled to use it, and in the course of doing so inflicted great loss upon him. In respect of this branch of the case most of the facts are undisputed. Some of them, relating to essentials of the charge, are documentary, and where there is any conflict it is largely in matters of opinion in which the credibility of witnesses is not involved, and upon which a conclusion is not difficult to reach on grounds of inherent probability. The case is quite within the rule laid down by *Lindley* L J. in *Coghlan* v. *Cumberland* (3).

I proceed then to consider the manner in which the respondents exercised their power, first pointing out that though their assistant secretary was not authorized to proceed to a sale, yet his acts on behalf of the respondents were adopted by them. In

(1) 14 R.P.C., 105. (2) 7 C.L.R., 549. (3) (1898) 1 Ch., 704.

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Barton J.

Farrar v. *Farrars, Ltd.* (1), *Chitty* J., whose judgment was affirmed by the Court of Appeal, said:—"The power arises by contract with the mortgagor, and forms part of the mortgagee's security. He is bound to sell fairly, and to take reasonable steps to obtain a proper price; but he may proceed to a forced sale for the purpose of paying the mortgage debt." On the appeal *Lindley* L.J. said, in delivering the judgment of *Cotton* and *Bowen* L.JJ. as well as himself (2):—"Every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts *bonâ fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed." It is the mortgagee's duty to sell fairly, says one of these distinguished Judges. It is his duty to act *bonâ fide*, says the other—for what is good faith but fairness?

I add these passages to those cited by the Chief Justice, because they are clear and pointed, though I think the statements of the law which they contain are involved in his quotation from the speech of Lord *Herschell* in the case of *Kennedy* v. *De Trafford* (3). As *Lindley* L.J. said in the same case in the Court of Appeal (4), a mortgagee's "right is to look after himself first. But he is not at liberty to look after his own interests alone"; and these words immediately precede those quoted by Lord *Herschell*. If he confines his attention to his own interests, and sacrifices the mortgagor's property by doing so, he certainly acts unfairly, that is, in bad faith. Can it not be said truly that this unfairness, this disregard of the mortgagee's obvious duty, is fraudulent, or wilful, or merely reckless, according as the surrounding facts show—in addition to a sale at a gross undervalue—deceit or collusion, or deliberate exclusion of the interest of the mortgagor, or utter lack of care for that interest—another way of saying that the only interests he considers are his own? And he considers nothing else if he cares no jot whether a fair price be obtained, so only that the price pays his debt.

Apart then from the question of collusion, of which I have

(1) 40 Ch. D., 395, at p. 398.
(2) 40 Ch. D., 395, at p. 411.
(3) (1897) A.C., 180.
(4) (1896) 1 Ch., 762, at p. 772.

spoken, I think we have to consider in this case whether the mortgagees so used their power as to sacrifice the mortgagor's property by conducting the sale in complete disregard of the mortgagor's interest. It is said that this disregard was shown by evidence that they took no pains to secure a fair price, the facts showing that such a price would have very largely exceeded that which they accepted.

The price obtained on the 14th June 1911 was £720, only £6 over the debt, commission and charges, as stated by the respondents' assistant secretary Gill. There can be no question that the property was then worth as a leasehold from £1,920 to £2,000, the purchaser having £240 to pay to the Crown in order to obtain the freehold. The sale was thus at a great sacrifice, not to the mortgagee, who stood free of loss, but to the mortgagor, who at full value would have secured a balance of £1,200 or more. But very low prices are often obtained at such sales in spite of all efforts to secure real value. And the mortgagee is entitled to force a sale even when the market is not favourable. But it is not set up that there was a falling or a stagnant market. Also it is not to be taken that what the cases call "a fair price" is the full market value. What is a fair price must, of course, depend on the circumstances of each individual case. But it may safely be said that £720 for this property is so greatly below the market value that, in the absence of any circumstance accounting for the difference, the reasonable inference is that it is not a fair price. Was then the failure to secure a proper price due to lack of effort on the part of the respondents as mortgagees, and if so, were their efforts so obviously perfunctory as to warrant the conclusion that they cared for nothing beyond the repayment of their own claim? Did they act in good faith, that is, in the sense of fairness to the owner of the property? They had not informed him of the date of the intended sale. They were not obliged to do so. But they knew that in all likelihood the attraction of probable buyers depended on themselves alone. What means then did they take to attract buyers? There were the advertisements. Perhaps the only means open up to the sale day was to advertise the forthcoming sale in the newspapers or by posters or hand

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Barton J.

bills or by all these methods. The newspaper method was resorted to. Were the advertisements sufficient to give the mortgagor a fair chance of seeing a reasonable surplus over the debt and charges? I think not. They were published in Melbourne papers only, the property being 235 miles distant from that city. That it is usual and advisable to advertise sales of country lands in the local papers was shown by the evidence for the appellant of six land auctioneers, five of them of many years' experience. "The buyers," it was said, "are usually drawn from the district"; "adjoining owners may desire to buy, and the buyers come principally from them"; "the buyers come from the locality who know the land." This evidence seems sensible, and it is a peculiar commentary on it that an adjoining owner, who bought for his wife from Lindsay, the purchaser at auction, did not know of the auction, while the owner of the land himself did not know of it for some weeks. On the other hand, Mr. Brown, the experienced Melbourne auctioneer who had been selling for the respondents during 12 or 14 years and who in fact prepared the advertisements from information furnished by Mr. Gill, says that they—meaning, I think, the respondents—had ceased to advertise locally some five years previously, the practice having been discontinued on his advice, as he found it of no use. Mr. Stanford, who actually conducted the auction, says that he would always advertise in the Melbourne papers which reach the country, and would not consider it necessary to advertise locally, while Gill says that the respondents have not advertised their mortgagee sales for 7 or 8 years in local papers, the alteration having been made by a previous manager and not at his suggestion.

On this evidence I think the fair conclusion is that a mortgagee having some little regard for the interests of the mortgagor would advertise in the newspapers of the district, or at least some of them, as well as in the Melbourne papers, when about to sell a distant country property in Melbourne. One's own knowledge of affairs tells one that a country resident relies most on the local papers for announcements of local interest.

Then as to the character of the advertisement. In this connection it must be remarked that a great deal depends on the place

in which an advertisement is to be published. One that is published in the locality in which the property is situated, where there are residents who probably have some knowledge of its whereabouts and its advantages, need not specify so much as to the situation and qualities of the land, and the extent of the improvements, as a notification addressed to metropolitan readers, hundreds of miles away from the property, ought to do. In some cases, indeed, a mere outline might be sufficient in a locality where the property is well known. But to what extent can dwellers in Melbourne who may not be able to travel hundreds of miles to inspect a property, be expected to take an interest in the mere fact that a block of 640 acres, "about seven miles from Curyo Railway Station, well watered and fenced, with useful buildings," is to be sold by order of the mortgagee? That is the whole of the information vouchsafed. It might be enough for a farmer in the Curyo district. But the resident of Melbourne would not find in it the things he required to know before he risked his money. The local man, if he ever saw it, might say: "I know that block. It ought to be a bargain at three pounds an acre anyhow. A good deal of it is under crop and most of it fit for the plough. It is on the best side of the railway where the red loam is, and not far from the irrigation channel." But the Melbourne man would probably say: "They do not tell one whether the place is on the right or the wrong side of the line, what sort of soil it has, how much is under crop, and how much fit for the plough, nor how it stands for irrigation water if I want it; I suppose the silence is because it is not satisfactory in these respects, so I will not waste valuable time going to the sale." The respondents were aware of qualities which recommended the property, because they had received before making the loan a report from their own valuer in which it was stated among other things that the soil was "red to brown sandy loam of good quality for cereals and for grazing"; that it was all cleared and nearly all then ready for cultivation, about 250 acres being then cultivated; that there was a Trust Water Channel about a mile away, which would be very advantageous when the farm came to be connected with the channel; and that the then value as a freehold was £1,280, which meant that as a leasehold it was worth

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Barton J.

£1,040. Both Mr. Gill and the secretary Mr. Pullar, knew that since the loan the values of lands in the Mallee country had risen. Gill says it had risen "in places." Pullar says that he and the Society were aware that Mallee lands generally had advanced in value, including that in the vicinity of the appellant's farm, but they could not tell whether it was substantial; it might be only an inflated value. The answer to that qualification is that whether the value was inflated or not, the mortgagees were not entitled to ignore it if they paid any attention to the mortgagor's interest.

The society and their chief officials being in possession of all this knowledge favourable to the prospects of a good sale, ignored it and adopted the means described, and nothing further or better, to bring purchasers. The question is not whether they ought to have advertised all that they knew and whether they should have resorted, not only to local newspapers, but to posters and handbills, for the attraction of purchasers. Let it be conceded that not all of this was to be expected of these mortgagees. But were they justified in silence as to all of the most material advantages of the property, and in adopting a means of notification which upon the evidence was only one of many, and ignoring every other means, including that which would appeal to any man of common sense, desirous of obtaining a fair price, as almost indispensable? Whatever may be considered a fair regard for the mortgagor's interest beyond the mere desire to repay themselves their advance, this course of conduct shows all too plainly that the interest of this helpless farmer weighed not a feather in the balance with the respondents.

That which took place at the sale brings this absence of regard into stronger relief. Not a word was said by the auctioneer to the meagre attendance as to the salient advantages of the property. That measure of information would not have cost a penny. The poor and curt advertisement was read by way of "a short speech." That was all. Gill was present, and it did not occur to him to impart any of his knowledge to the auctioneer, Stanford. If Brown knew more than was in the advertisement, he too was dumb about it. When the bidding hung fire the

auctioneer was told no bid less than £714 would be entertained, and he made that known. This was after Gill had put his calculation on a slip of paper and handed it to Brown, who passed it to Stanford. "It showed," says Gill, "the reserve of £714 including debt, interest and charges." Whether when this was announced the auctioneer called it a reserve price, or not, a probable purchaser standing by could scarcely doubt what it meant. That Gill's object as representative of the respondents at the sale was confined to the securing of repayment was made, if possible, clearer than ever by his answer to Lindsay's inquiry whether the farm "was worth buying."

These facts, added to those antecedent to the sale, are enough. I need not adduce others such as those which have impressed the Chief Justice. What I have stated shows to my mind convincingly that there was a disregard of the mortgagor's interest and a sacrifice of the property which amounted to recklessness, and I think the appellant was and is entitled to relief, and that the account should be taken as in a case of wilful default.

In my opinion the appeal must be allowed and the sum for which the respondents are to account ascertained in the manner proposed.

ISAACS J. Important questions of law have been raised with respect to the responsibility of a mortgagee in the conduct of the sale of the mortgaged property, including his liability for mere negligence. It was contended that if he were shown to have sold with less care and precaution than an ordinary prudent owner would observe in the sale of his property he was liable to the mortgagor for the loss sustained.

A mortgagee of land is always in equity, and under the *Transfer of Land Act* 1890, sec. 114, at law also, merely the holder of a security. The power of sale is given to him entirely for his own benefit, and its purpose is to enable him to realize enough to satisfy his claim, if the property will produce it, and to return whatever balance may remain to the mortgagor. It is undoubted law that so long as he observes specified formalities and acts in good faith his conduct cannot be challenged. But what is included in "good faith?" *Lindley* L.J. in *Kennedy* v. *De*

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Isaacs J.

Trafford (1), said:—"It is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor." Lord *Herschell* in the House of Lords (2) said that was all included in good faith. In the same case Lord *Macnaghten* (3) said:—"If a mortgagee selling under a power of sale in his mortgage takes pains to comply with the provisions of that power and acts in good faith, I do not think his conduct in regard to the sale can be impeached."

There are some words of Lord *Herschell* which to some extent leave undetermined the question how far the mortgagee is bound to take reasonable precautions in the exercise of his power of sale, but the inclination of his mind seems to be against it.

Regarding the matter from the standpoint of principle it seems to me clear that the word "recklessly" cannot include mere negligence or carelessness in carrying out the sale.

If the right to sell is a power which, as laid down in *Warner* v. *Jacob* (4) is given to him not as a trustee for the mortgagor but for his own benefit, it must carry with it the consequence that with respect to the way he carries out the sale, not merely is he not liable as for breach of trust, but also that he owes no duty of care to the mortgagor, so long as he is *bonâ fide* acting within the limits of his power. His rights under the power are adverse to the mortgagor. He cannot, therefore, on any principle known to the law be liable for mere negligence, because that assumes a standard of care owed to another. The mortgagee is however confined by the expressed and implied limits of his power and by nothing else. Lord *Lindley* said in *Free Church of Scotland (General Assembly of)* v. *Overtoun (Lord)* (5):—"There is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used *bonâ fide* for the purpose for which they are conferred." And in a later case, *British Equitable Assurance Co. Ltd.* v. *Baily* (6), the same learned Lord observed regarding the power of a company to alter its by-laws:—"Of course, the powers of altering by-laws, like other powers, must be exercised *bonâ fide*, and having regard to

(1) (1896) 1 Ch., 762, at p. 772.
(2) (1897) A.C., 180, at p. 185.
(3) (1897) A.C., 180, at p. 192.
(4) 20 Ch. D., 220, at p. 224.
(5) (1904) A.C., 515, at p. 695.
(6) (1906) A.C., 35, at p. 42.

the purposes for which they are created, and the rights of persons affected by them."

If he *bonâ fide* endeavours to do so, if he takes the best steps to that end, which he honestly believes will secure it, and the circumstances warrant, then he has acted in good faith and cannot be called to account however disastrous to the mortgagor the outcome may be.

Two extreme views may be mentioned to be put aside. To say that so long as he exercises his power with the real object of getting his debt paid he is absolved, is too low a standard of responsibility, because that loses sight of his obligation to deal fairly with the mortgagor's residual property. On the other hand, to make him answerable for mere carelessness in realization, however anxious to act fairly by the mortgagor, is placing the standard too high, and would not only be cutting across principles, but would become a serious impediment to, and, by recoil, impose a heavy burden upon, needy borrowers. The mortgagee, when the permitted time arrives, is not bound to wait for his money, merely because the mortgagor might profit by delay. And as *ex hypothesi* he is engaged in a lawful endeavour to get back money which is overdue, he cannot be expected to further increase the advances of the mortgagor by expending further sums for his sole possible benefit, in the shape of a higher surplus price. A prudent owner might well risk considerable outlay in order to secure a possibly enhanced return. But the mortgagee is not called upon to do this, without express stipulation to that effect. He would get no advantage from the outlay beyond the amount of his debt, and he might end in increasing that.

But if a further outlay is in the circumstances reasonable, and apparently necessary and prudent to conserve the mortgagor's interest, and to prevent his residual property being sacrificed, and if, having regard to what a cautious man would consider the total selling value of the property, it is manifestly safe, the mortgagee is, in my opinion, not justified in refusing to make or incur it merely because he can get enough for himself without it. It must, however, be safe; if it is not, the mortgagee would be taking risks for the benefit of the mortgagor which he is not called upon to do; if it is, he is merely using part of the mort-

H. C. OF A. 1912.

PENDLEBURY v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Isaacs J.

gagor's own property to preserve the rest. Neglect in such circumstances would be manifestly improvident and would afford cogent evidence upon which a tribunal would be at liberty to think, and probably would think, the neglect reckless or wilful. It would be so grossly unfair to the mortgagor who is unable to protect himself that the Court would find it difficult to resist the conclusion that the mortgagee had no intention of observing Lord *Lindley's* rule in the *British Equitable Case* (1) already quoted. By "recklessness" then, I understand a disregard of the mortgagor's interest, ignoring his property in the possible surplus, in short, not caring whether its fair and proper value was obtained or not, as distinguished from the mere want of care or prudence in the course of honestly trying to conserve it.

The first is not compatible with good faith in enforcing the power of sale; the second is entirely consistent with good faith in carrying out its purpose, though lacking in skill or attention.

The question in the present case is whether the evidence shows a reckless disregard by the respondents of the appellant's interest as mortgagor.

It has been impressed upon us that Mr. Justice *Hood* has found there was neither recklessness nor even unreasonableness, that he so found upon the oral testimony of witnesses of whose truthfulness and capacity he is the best judge, and that, he having preferred the opinion of one set of witnesses, another Court ought not to disturb those findings. The principles which guide an appellate tribunal have been often stated and acted on by this Court, and for my own views I shall do no more than refer to what I said in *Dearman* v. *Dearman* (2). I specially draw attention to the quotation (3) from Lord *Blackburn's* judgment in *Smith* v. *Chadwick* (4).

As to the facts themselves, which, so far as relevant, are stated in the judgment of the learned Chief Justice, I can see no escape from the conclusion that the mortgagees did not exercise the power of sale in good faith, because the society sold the mortgagor's land without the smallest regard for his interests. He had no real chance whatever to save a plank from the wreck, his

(1) (1906) A.C., 35.
(2) 7 C.L.R., 549, at pp. 559, *et seq.*
(3) 7 C.L.R., 549, at p. 564.
(4) 9 App. Cas., 187, at p. 194.

very existence was ignored, and his land and improvements and labour were sacrificed without the least sense of obligation to him, though a comparatively small effort was necessary to prevent the disaster, and though, as the respondent society must have recognized, if it even gave the matter a thought, the property itself contained the amplest and safest means of preservation. For these reasons I agree that the appeal should be allowed.

The appellant is entitled to be placed in the position in which he would have been had the respondent society treated him fairly by observing the implied condition of good faith in exercising their power of sale.

The order proposed by the learned Chief Justice is the proper order for this purpose, the mortgagees being made liable as on the basis of wilful default.

Appeal allowed. Judgment appealed from discharged and the following judgment substituted:—Declare that the defendants were guilty of wilful default in respect of the sale by auction of the land in the pleadings mentioned. Inquiry directed as to what amount would have been produced if the sale had been conducted without such wilful default. Judgment for the plaintiff for a sum equal to the difference between the amount so ascertained and £714 *with costs of action including costs of de bene esse examination and of interrogatories and discovery. Cause remitted to the Supreme Court. Respondent to pay the costs of the appeal.*

Solicitors, for the appellant, *George Bullen & Son* for *S. E. Buller*, Beulah.

Solicitors, for the respondents, *Moule Hamilton & Kiddle.*

B. L.