

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 148/1982

BETWEEN

RUEL DAVIS  
 AND  
 MAUD DAVIS

PLAINTIFFS

A N D

WILLIAM EUSTACE FRANKLYN  
 AND  
 AVIS ADALMA GRINDLEY

1ST DEFENDANTS

A N D

ELI JAMES

2ND DEFENDANT

W. Clark Cousins instructed by Rattray, Patterson and Rattray for the Plaintiffs.

Donald Scharschmidt instructed by Yvonne Bennett of Robinson, Phillips and Whitehorne for first Defendants.

John Sinclair instructed by Silvera and Silvera for second Defendant.

HEARD: 7th July and 17th November, 1988  
 20th and 21st April, 1989, 17th  
 December, 1990 - 16th, 17th, 22nd  
 and 28th July, 1992 and 10th June, 1994.

MALCOLM, J.

On the 28th July, 1992 I reserved Judgment in this matter, the trial of which spanned a period of nearly four years. During this time Maud Davis the female Plaintiff and one John Wahrman a defence witness whose evidence remained uncompleted, both died. This is merely by way of a preamble and is naturally not by way of explanation for the delay in delivering Judgment. I apologise to all concerned.

The Pleadings

The Writ of Summons was dated and filed on the 29th July, 1982. The Statement of Claim filed herein is dated the 12th April, 1993 and reads as follows:-

1. The Plaintiffs were at all material times the owners and mortgagors of property situate at Derry in the parish of Saint Mary and registered at Volume 1075 Folios 432 and 434 of the Register Book of Titles.
2. By mortgage agreement dated the 1st October, 1970 and registered on the 7th day of April, 1972 in the Register Book of Titles as Mortgage No. 239089, the Plaintiffs mortgaged the said property to the first Defendants to secure the sum of Four Thousand Dollars (\$4,000.00).

Sic. 3. The Plaintiff fell in arrears of payment of the mortgage debt and by powers of sale vested in the Mortgagees under the mortgage agreement the first Defendants sold the said property to the second Defendant for the sum of Fifteen Thousand Dollars (\$15,000.00)

4. The said sale price of Fifteen Thousand Dollars (\$15,000.00) was so low that in itself it constitutes evidence of fraud, and the Plaintiffs say that the power of sale was improperly or collusively exercised by the Mortgagees, and that the transaction was fraudulent,

Particulars of Fraud

5. The said sum of Fifteen Thousand Dollars (\$15,000.00) was not a true and fair value of the said property and was in fact so grossly below the true value of the said property that it amounted to a sacrifice of the said property.

6. The first Defendants knew or ought to have known that the said sum of Fifteen Thousand Dollars (\$15,000.00) was grossly inadequate and the first Defendants took no proper and adequate precautions to obtain a fair price and to prevent a sacrifice of the said property.

7. The first Defendants did not act in good faith in selling the mortgaged property to the second Defendant at the grossly inadequate price.

8. The second Defendant purchased the mortgaged property from the first Defendants at the grossly inadequate price, and the first Defendant knew or ought to have known prior to or at the time of the purchase that the price was grossly inadequate and below the true and fair value of the said property.

9. The second Defendant knew or ought to have known prior to or at the time of the purchase that the first Defendants had taken no proper and adequate steps to obtain a fair price and to prevent a sacrifice of the said property and the second Defendant did not act in good faith in the said purchase.

10. The second Defendant knew or ought to have known prior to or at the time of the said purchase that the first Defendants were not acting in good faith in selling the mortgaged property to the second Defendant at the grossly inadequate price.

11. In the alternative the Plaintiffs say that the first Defendants owed a duty of care to take reasonable proper and adequate precautions to ascertain and obtain the true value of the said property which is approximately Two Hundred and Fifty Seven Thousand Dollars (\$257,000.00) and if such precaution had been taken the said property would have fetched a reserve price of not less than One Hundred and Twenty-five Thousand Dollars (\$125,000.00).

AND THE PLAINTIFF CLAIMS FOR AN ORDER that:-

- (a) This Honourable Court rescind the contract of sale of the said property and set aside the sale on the ground that the sale of the said property at the gross undervaluation was fraudulent;
- (b) In the alternative that the Mortgagees are liable to make good the difference between the price which the property was sold at and that which it would have produced had it been sold at a reserve price under the decree of the Court;
- (c) Costs
- (d) Such further and/or other relief as may be just.

(Sgd.) Rattray, Patterson & Rattray.

An Interlocutory Judgment in default of Appearance was entered against the Defendant William Eustace Franklyn on 28th November, 1983 and it was ~~ordered~~ that damages against him should be assessed. There is nothing on the records to show that this wasever done.

The Defence of Avis Grindley was duly filed. It reads:-

- 1. This Defendant admits Paragraphs 1 and 2 of the Statement of Claim.
- 2. This Defendant says that the mortgage Agreement referred to in Paragraph 2 of the Statement of Claim contained inter alia the following terms:-

".....that the Mortgagor

DO HEREBY COVENANT with the Mortgagee:-

  - (a) To pay to the Mortgagee the Principal sum of Four Thousand Dollars on the last day of October, One Thousand Nine Hundred and Seventy-One.
  - (b) To pay to the Mortgagee so long as the said Principal sum or any part thereof shall remain unpaid, interest thereon at the rate of nine and one-half per centum per annum by equal quarterly payments on the last days of the months of March, June, September and December in each and every year during the continuance of this security, the first of such payments to be made on the last day of December, One Thousand Nine Hundred and Seventy-one and to be in the amount of Ninety-five Dollars being interest calculated from the first day of October One Thousand Nine Hundred and Seventy-one.
  - (c) To pay the Mortgagee c/o Messrs. Robinson, Phillips and ~~Whitehorn~~, Solicitors, Highgate during the continuance of this security on the last days of March, June, September and December in each and every year a sum of not less than Two Hundred Dollars on each day for a Sinking Fund towards the reduction of the Principal sum hereby secured, the first of such payments be made on the last day of December, One Thousand Nine Hundred and Seventy-one."

".....That the Powers of Sale, distress appointing a Receiver and foreclosure and all ancilliary powers conferred upon the Mortgagee by the Registration of Titles Law shall, anything in the said Law to the contrary notwithstanding be conferred upon and be exercisable by the Mortgagee without any notice to the Mortgagor on demand by the Mortgagee:-

1. If default is made in payment of the principal sum secured or any balance thereof or any Sinking Fund payment due thereon at the times hereinbefore covenanted for any payment of the same and is such default shall continue for Thirty Days OR
2. Whenever the whole or any part of any quarterly instalment of interest shall remain unpaid for Thirty Days OR
3. If or whenever there shall be any breach or non-observance on the part of the Mortgagor or any other of the covenants or conditions hereinbefore contained or by Law implied OR
4. If or whenever the Mortgagor shall commit any act of Bankruptcy whether such act be voluntary or involuntary.....That notwithstanding the covenant for the repayment of the said Principal sum on the last day of October One Thousand Nine Hundred and Seventy-one if the Mortgagor shall duly and punctually observe and perform all other covenants and obligations herein contained and by Law implied, the Mortgagee shall not before the last day of October One Thousand Nine Hundred and Seventy-four require payment of the said Principal sum."

This Defendant will at the trial of this action refer to the said agreement for its full terms and the true purport thereof.

5. As to paragraph 3 of the Statement of Claim this Defendant says that the Plaintiff failed to make payments in accordance with the agreement.
6. In further answer to the said paragraph, this Defendant says that by Notice dated 20th August, 1976 addressed to the Plaintiffs, the Plaintiffs were advised that if the sum then owing in respect of principal, outstanding arrears of interest, costs of default and costs of preparation of Notice was not paid within 30 days of the date of the said Notice the Mortgagee would proceed to sell the premises comprised in the said mortgage.
7. This Defendant further says that by letter dated 1st September, 1976 the firm of Robinson, Phillips and Whitehorne requested the plaintiffs to settle the said mortgage in full by 20th September, 1976.
8. At all material times the said firm of Robinson, Phillips and Whitehorne was acting on behalf of the Mortgagees.
9. Notwithstanding the matters pleaded in paragraphs 5 and 6 supra the plaintiffs failed to pay the sum owing under and in respect of the said mortgage.
10. By Notice dated 11th May, 1979 Robinson, Phillips and Whitehorne advised the plaintiffs in terms similar to paragraph 5 supra.

11. By letter dated 9th August, 1979 Robinson, Phillips and Whitehorne advised the plaintiffs that the security in question would be put up for sale at Public Auction on 28th September, 1979.
12. In spite of the matters pleaded in paragraphs 5, 6, 9 and 10 supra. the plaintiffs failed to pay the sums owing under and in respect of the said mortgage.
13. By letter dated 20th March, 1981 Robinson, Phillips and Whitehorne the plaintiffs were reminded that the mortgage should have been paid up by the year 1974 and were advised that if same was not paid up by 3rd March, 1981 the premises would be put up for Public Sale.
14. By letter dated 20th November, 1981 Robinson, Phillips and Whitehorne gave the plaintiffs notice to the effect that the mortgaged security would be put up for Public Sale on 22nd January, 1982.
15. Notwithstanding the matters pleaded in 5, 6, 9, 10, 12 and 13 supra. the plaintiffs failed to settle the sum owing under and in respect of the said mortgage.
16. This Defendant says that acting under the Power of Sale in the mortgage instrument and under powers contained in the Registration of Titles Act in consequence of the failure of the plaintiffs to make payments in accordance with the mortgage instrument between June, 1976 and January, 1982 the mortgaged security was on three occasions put up for sale at Public Auction.
17. On the occasions referred to in paragraph 16 supra. the auctioneer received no bids for the premises in question and the sales were withdrawn.
18. The last of the three auctions being on 22nd January, 1982.
19. At the request of the plaintiffs, Robinson Phillips and Whitehorne agreed to defer any further effort to sell the premises in question to a date subsequent to the 5th February, 1982 in order to enable the plaintiffs to settle on or before the said date the mortgage and all sums owing under and in respect of the same.
20. This Defendant says that notwithstanding the matters pleaded in paragraph 18 supra. the plaintiffs failed to make any <sup>payments</sup> on or before 5th February, 1982 as agreed or at all.
21. The said mortgage security was again put up for sale at Public Auction on 26th February, 1982.
22. The said sale was withdrawn as the auctioneer received no bids in respect of the said premises.
23. In or about the month of February, 1982 the second named Defendant made an offer to Robinson, Phillips and Whitehorne in respect of the said mortgaged security and Robinson, Phillips and Whitehorne accepted same on behalf of the mortgagees.

24. As to paragraph 4 of the Statement of Claim this Defendant denies that she was guilty of fraud as alleged or at all.

Dated the 2nd day of June, 1983.

Settled.

D.A. Scharschmidt

(Sgd.) Robinson, Phillips and Whitehorne  
Attorneys-at-Law for the First  
named Defendant.

The Defence of the second named Defendant Eli James is a very short document and reads:-

1. Paragraph 1 of the Statement of Claim is admitted.
2. The second named Defendant makes no admission as to paragraph 2 of the Statement of Claim.
3. Save that the second-named Defendant admits that the first named Defendant sold the plaintiffs' property to the second named Defendant for the sum of Fifteen Thousand Dollars (\$15,000.00) - no admission is made as to paragraph 3 of the Statement of Claim.
4. Paragraph 4 of the Statement of Claim and the Particulars of Fraud set out thereunder are denied.
5. Save as is hereinbefore admitted.....seriatim.

Settled

Silvera and Silvera

Per: L. Howard Facey  
Attorney-at-Law for the Second named  
Defendant.

#### THE PLAINTIFF'S CASE

After a brief opening Mr. Cousins called Mr. Ruel Davis. He testified that he was a farmer for 40 years and that Maud Davis his wife, the female plaintiff was now dead.

In 1971 they had bought a property at Derry, St. Ann for Ten Thousand Dollars. He described it as pure woodland and forest with a "mash down house on it." He extended the building by adding five apartments to the two that existed. He testified that there was no cultivation on the land. He subsequently built a smaller house on the property and planted 30 acres of bananas, 7,000 dwarf coconut trees and 7 acres of cocoa. In effect the tenor of his evidence on this particular aspect was that there was considerable expenditure and improvement after he bought the land.

He said he took a \$4,000.00 mortgage from Robinson, Phillips and Whitehorne to buy the place. The attorney he dealt with then was a Mr. Touzalin. As far as repayment was concerned his evidence in chief was as follows:-

"Had to pay per quarter interest \$95.00. Can't remember how much per quarter for mortgage.

Ques: Did there come a time when you fell into arrears?" Ans: "Don't remember that ever happening. Received notice that money due to pay. Don't remember whether I got more than one notice."

At this stage it was sought to introduce evidence re an application by the witness (prior to notice) to the Agricultural Credit Board for a loan to plant coffee and orange, and as to a visit to the property by an Extension Officer. An objection by Mr. Scharschmidt to this line of examination was taken at this stage.

The next witness was John Wahrman who was interposed and who gave evidence for the defence. Eighty-seven years old he described himself as a retired Valuator and Real Estate Agent. He ceased working on 31st March, 1988. He was a Valuator for 26 years from 1962. Prior to that he had been an Assistant Superintendent of Roads and Works - Parochial Board.

He was familiar with Derry having known the land from 1928. He stated he was directed to carry out valuation of Derry in 1969. Went there in the presence and company of Ruel Davis who he knew long before. He was shown the extent of the land by Davis. Consisted of two parts - one part was 36 acres 2 Roods and the other part 22 acres. He put a value of \$6,000.00 on the land. There was an old wooden building on property and he saw also another concrete block building.

At the request of Robinson, Phillips and Whitehorne he did another valuation of the property in 1976 - Ruel Davis was also present on this occasion. He placed a valuation of \$20,000.00 on the property.

Subsequently he put up the property for sale at Public Auction. He did this three times having got posters printed. They were posted on the mortgaged property. On the third attempt to sell he advertised the sale for three days in the Daily Gleaner. There were no bids at any of the three auctions. Despite objection by Mr. Cousins two posters were tendered in evidence as Exhibits 1 and 1A. The first one (Exhibit 1) the witness identified as being in connection with attempted sale on September 28, 1979. The second (Exhibit 1A) was in connection with sale on January 22, 1982.

Davis was present at both auctions. At the last auction Davis told him that he was negotiating to obtain a loan in Highgate - he said nothing else.

Later he spoke to Mr. Costa a partner in the firm of Robinson, Phillips and Whitehorne and as a result of what was said another auction was held two weeks after - there were no bids and the witness said he could not recall if Davis was there. As a result of certain instructions he proceeded by way of Private Treaty.

Eli James (the second defendant) having come to him, he sent him to look at the property. After further negotiation and after Mr. James had made an offer he told him to put it in writing. Thereafter he took him to Highgate where, not seeing Mr. Costa, he passed the matter over to Mr. McCalla and there his participation in the matter ceased. The witness testified that he had known Ruel Davis for not less than 40 years and Eli James for 40-45 years.

Cross examined by Mr. Cousins the witness said he worked closely with farmers in the area. Shown a document, he agreed that it was a programme of Development - By Consent it was tendered in evidence as Exhibit 2. It is headed:- "Agricultural Credit Board - Programme of Development AND proposed use of Loan."

At this stage the trial was part heard and adjourned. When it resumed approximately five months later Mr. Cousins informed the court that Mr. Wahrman had died.

The plaintiff's case continued to unfold itself through the testimony of Mr. Earl Douglas. He gave his calling as Project Architect, Quantity Surveyor and Land Valuator and he said he was still so occupied. He was once a carpenter on the Panama Canal Project. He had subsequently taken a correspondence course from Bennett College in England. It was a course in Building Construction and Architecture. He completed the course in Sheffield in December 1945. He returned to Jamaica in 1947 after service in the Royal Air Force. He returned to Jamaica in 1947 and started his own business - Building Construction, Drawing, Quantity Surveying and Land Valuation. He did this for 40 years. He went to the United States of America where he was engaged in similar work until he left in 1988.

He knew Mr. Ruel Davis, the plaintiff. In July 1982 Mr. Davis requested him to do a valuation for him in respect of a property in St. Mary. He did this and made "Written Report" which he signed. This was put in by consent of all parties as Exhibit 3.

The report gives a total market value of \$27,500.00 with a "Force Sale Value" of \$190,000.00.

He was exhaustively and searchingly cross-examined by Mr. Scharschmidt as to his expertise in his profession and his qualifications in the field of valuation.



his expertise and his professional background and training in the fields he spoke of. Some of his answers were interesting and revealing e.g. "I was working as a Draughtsman before I was qualified to work as one." again:-

"When I was employed to Israel Design Groups (New Jersey) I was sent to school and had to leave and come back to Jamaica. I had to sit for an examination at Bennett College in England, only one examination I took. I don't know if they have a professional examination to qualify one as a Quantity Surveyor - not aware of that in England but they should."

On the aspect of how he arrived at his valuation he told Mr. Scharschmidt "my business was mostly construction. I was weak in the area of crop valuation - took number of plants from Mr. Davis and got valuation from Mr. Fuller .....don't remember making note of capacity of tank."

Ruel Davis was resworn and further examined by Mr. Cousins. He said the name of the Extension Officer who made the recommendation for the loan was Mr. Rose - ~~this had already been~~ evidenced by Exhibit 2. He was asked if he attended at the office of Robinson, Phillips and Whitehorne for third Auction he said yes but he did not see Mr. Wahrman there that day, he thought he was ~~there~~ until about 2 p.m.

Shown Exhibit 1A, the poster - he stated that he never saw it at the Lawyer's office - he first saw it in the Gleaner. On that day he never spoke to anyone at Robinson, Phillips and Whitehorne. He did so subsequently, that is, the following week. He spoke to Mr. Phillips discussing the arrears of mortgage and the auctioning of his land.

As a result he went to the Agricultural Credit Board and got a letter the same day from ~~them~~ which he gave to Mr. Phillips. A copy was tendered as Exhibit 4. His evidence reads in part:- "I saw Mr. Phillips, we conversed, we spoke about our land. He said no auction can take place until they hear from the Credit Board."

I set out the contents of Exhibit 4 which reads as follows:-

"Highgate, St. Mary  
February 4, 1982.

Messrs. Robinson, Phillips and Whitehorne  
Attorneys-at-Law  
P.O. Box 2  
Highgate

Re: Ruel Davis et ux Lands at Derry, St. Mary

We are preparing a new Application for \$27,100 for Ruel and Maud Davis. It includes a sum of over \$7,000 to pay off debts owing to you and Messrs. Silvera and Silvera.

The application will go before the Agricultural Credit Board on February 16. It is recommended by the Field Staff and we feel it will be favourably considered by the Board.

You will appreciate that I cannot commit the Board but I state the above in the hope that you will be indulgent with Mr. Davis in respect of the pending sale.

Yours truly,

(Sgd.) Z. M. McKnight  
Senior Credit Officer

He testified that the property was subsequently sold by the mortgagee. The following Monday he was in his cultivation and he saw that Mr. Eli James was there. He gave the witness a letter - shown a document he said that that was a true copy of the letter - (tendered as Exhibit 5). It originated in the office of Robinson, Phillips and Whitehorne and is dated 1st March, 1982. Addressed to Mr. and Mrs. Ruel Davis it reads thus:-

Re: Your Mortgage

" We write to advise that your premises at Derry contained in Certificates of Title registered at Volume 1075 Folio 432 and Volume 1075 Folio 434 has been sold under Powers of Sale contained in a mortgage to Mr. Eli James of Russell Hall in the parish of Saint Mary for the sum of Fifteen Thousand Dollars (\$15,000.00)

We have today instructed Mr. James to take possession of the property and we would be obliged if you would co-operate with him and formerly hand over possession as of today.

We are seeing to the Transfer of the Title to Mr. James and will account to you for the balance purchase price as quickly as possible.

Yours faithfully,

Robinson, Phillips and Whitehorne  
Per: W. C. McCalla "

The witness stated that "on bended knees" he begged Mr. James to take back the money and give him back the place. He never went back to the office of Robinson, Phillips and Whitehorne. He recollected seeing Mr. James the following week on the property patrolling the place with a gun. He received a cheque for \$8,587.05 on 23rd March, 1982. He had gone back to Robinson, Phillips and Whitehorne and that's how he got the cheque.

There were subsequent conversations between himself and Mr. James in respect of the property in one of which the plaintiff alleged that Mr. James had said "I can't give you back more than eight acres."

Mr. Scharschmidt at this stage took objection as it went completely outside the ambit of the plaintiff's claim. Mr. Cousins contended that it was relevant as it established that Mr. James was aware of what the true value of the property was and to quote Counsel "because he had a conscience he was prepared to let him have part of the property back." The objection was upheld.

Earl Douglas was recalled and further cross-examined by Mr. Scharschmidt.

Inter alia, he said the facts he took into consideration at arriving at a valuation were: "study of contour of the land, the condition and area and nature." He testified that one section can be rocky and other good - he walked over 5-6 acres. He didn't know if the rest of the land was rocky. The fact that the land was rocky would affect his valuation. Not knowing what the rest of the land was like he couldn't properly put a valuation on it. He said what he did was:-

"to assume that the rest of the land was that nature.....I valued land at \$1,400 per acre with house on premises and cultivation. I saw the tank, I would say \$1,400 per acre - valuation as cultivated land, assuming no cultivation I would put a value of \$800 per acre."

In answer to a question put by me he said it was the first time he was surveying Agricultural Land. He was also cross-examined by Mr. Sinclair and inter alia, he said that the information he got was from the owner and that it appeared that the information he got led him "completely astray" - to quote him "if I was not led astray my figure would be different."

The male plaintiff Ruel Davis further examined by Mr. Cousins said that himself and his wife purchased Derry in 1971, the mortgage he said was in 1970. Referring to earlier testimony given, he said Mr. James did not give him back any portion of the land and stated that he left the land in November of 1982. When James brought the "letter of possession" he did nothing else, he merely said that he the witness should do nothing in relation to the land.

Cross-examined by Mr. Scharschmidt he said he recalled borrowing \$4,000.00 by way of a mortgage from Robinson, Phillips and Whitehorne and said he knew he had an obligation to repay.

The following portion of his cross-examination I quote verbatim:

"I know if the time came we couldn't pay, the property would be put up for sale. I fell in arrears with principal - paid only on interest. I was advised by letter that I was in arrears more than once. Mortgage was in October, 1971 - the place was eventually sold in 1982. From I got the mortgage I paid no principal. I heard the property was put up for auctions. I heard Mr. Wahrman give evidence. Didn't hear him say I was at the auction. Didn't hear him say I was at three auctions.

During the course of his cross-examination he was shown several documents which were all tendered in evidence. He was shown a document headed "Notice Requiring Payment of Mortgage Moneys and in Default of Intention to Sell" it was dated 20th August, 1976 and witness admitted receiving "a document like this" (Exhibit 7) a notice of like kind dated 11th May, 1979 was shown him and admitted as Exhibit 9. Also tendered as Exhibit 13A was a cheque, mentioned supra, from Robinson, Phillips and Whitehorne for \$8,587.05. He testified of meeting Mr. McCalla of Robinson, Phillips and Whitehorne a few times and of the conversations that took place between them.

The mortgage document was shown to him and tendered as Exhibit 14. His attention was directed to paragraph 11(A) and he said he appreciated he was to pay back the money by October, 1971.

At the end of his evidence the case for the plaintiff was closed.

The Defence of First Defendant

Mr. Scharschmidt opened briefly and called firstly William C. McCalla, Attorney-at-Law a member of the firm of Robinson, Phillips and Whitehorne - Highgate.

He testified he had been practicing since 7th October, 1976. He said he met Mr. Ruel Davis on 22nd March, 1982. The circumstances were as follows and here I quote:-

"I had accepted an offer from Mr. Eli James on behalf of mortgagees William Franklyn and Avis Grindley for sale of Mr. Davis' property under the Powers of Sale contained in a mortgage dated 1st October, 1970 which my firm had made on behalf of the mortgagee. I had written to Mr. Davis on 1st March, 1982 advising him of the sale of the property - Exhibit 5 is the letter I referred to. As a result of letter of 22nd March, 1982 the plaintiff requested us to pay over to him the balance of money in hand in my firm. He asked if I could let him have the money the same day. I asked him to come back on Wednesday and I would disburse the money to him. Saw Davis 24th March, 1982 and I gave him letter and cheque Exhibits 13 and 13A. He indicated to me that the reason for the urgency was that Mr. James the purchaser had agreed to sell him five acres of land with the house and he needed the money for that purpose."

Speaking of John Wahrman, he said he had always done Valuation and Auctioneer work for his firm. He has seen him drive a car - last time being 1985-1986. He wore glasses and the witness constantly saw him read. He always prepared his valuation reports in his own handwriting up to his death. It was not correct that Wahrman was blind from 1969. In fact Mr. James' offer was in Mr. Wahrman's own handwriting in 1982.

He completed this transaction on 1st March, 1982 having previously familiarised himself with the matter by reading the file.

Mr. Costa, a partner had been dealing with this matter. He was not in office on 1st March, 1982 when the offer was first made. He referred the matter to him for instructions. Having got them he went through with the matter. The offer was accepted - the mortgage had expired and was in arrears. The sale had been postponed to 5th February, 1982. Mr. Davis had sought the assistance of the Agricultural Credit Board to obtain a loan to pay up the mortgage.

On 5th February, 1982 the sale was further postponed to enable Mr. Davis to bring in correspondence from the Agricultural Credit Board. The correspondence was not brought. Mr. James paid deposit of \$10,000 on 1st March, 1982.

Cross-examined by Mr. Cousins the witness said that in March, 1982 he was engaged in Conveyancing Practice and is still so engaged - this work entailed the preparation of mortgages.

He was asked why he had referred to Mr. Costa when ~~Wahrman~~ and James came. His reply was that at the time he was not familiar with the matter as Mr. Costa had been dealing with it. He went through the file from start to finish. He first familiarised himself with it on 1/3/82 - that was the first time. His evidence continued:-

"By "had been sold" I meant we had accepted  
an offer and had entered into a binding  
arrangement for the disposal of the property."

Mr. McCalla stated that he was not present in court when Mr. ~~Wahrman~~ gave evidence - the offer of \$15,000 was in Mr. ~~Wahrman~~'s handwriting. On the aspect of valuation he said he also took into account his own experience of the value of agricultural land. At the time he was an Associate in the firm and Mr. Costa was a partner. Mr. Cousins asked the question:-

"Do you consider a sale for half the market  
value to be a fair price?"

An objection by Mr. Scharschmidt was taken and upheld. The witness said he also took into account the fact that Mr. ~~Wahrman~~ told him that the place had been "put up" three times and he failed to get any bids at Public Auction. He took into account the fact that the mortgage had expired in 1974 and was in arrears - He continued:- "in light of these factors the offer was accepted as fair and reasonable." He agreed with Mr. Cousins that on an exercise of a power of sale, the mortgagee has a duty to himself and the mortgagor. He said the market value was one of the

considerations - \$15,000.00 would have been about 60% of the market value. His evidence continued:-

"I understood house was of little or no value - and using my own calculation of \$5,000.00 per acre - 54 acres - \$23,000.00 , tank on property - including Wahrman's valuation, on the face of it, and bearing in mind that the mortgagee has not got to accept the best offer - obligation to my client - I accepted the offer etc."

Mr. McCalla agreed that it was important for the mortgagee who was selling pursuant to his power of sale to correctly describe the property. He added however that he would not necessarily agree that it would materially affect offers in regards to sale. He said:-

"I don't agree that if land were described as beach land instead of swamp it would materially affect offers. I would expect a prudent purchaser to inspect the property advertised before making an offer. Having inspected then the misrepresentation, if there was one, would be exposed."

The witness was shown Exhibit 1A and was asked if he agreed that the land advertised for sale was in two titles. He agreed.

Witness was shown Exhibit 4 - letter dated 4th February, 1982 and stated that he was aware of this letter when Mr. James made the offer. He stated that instead of getting a commitment he produced this letter which fell short of a commitment. He had spoken to Mr. Sydney Phillips on the matter but only generally "not in specifics."

From the notes made by Mr. Phillips on the file witness said he could contradict Mr. Davis if he said when he left Mr. Phillips he was under the impression that the property would not be sold - he said he was referring to notes made by Mr. Phillips.

In re-examination by Mr. Scharschmidt he stated that he was familiar with Mr. Phillips' handwriting. He recognised it in notes tendered as Exhibit 15 - Mr. Eli James offer to purchase was also tendered as Exhibit 17.

Further cross-examined by permission Mr. Cousins suggested to Mr. McCalla that Mr. Wahrman had in 1970 because of deteriorating eyesight been obliged to employ a driver. The witness said he employed a driver but could not say in what year. He did not agree that Mr. Wahrman in his last ten years could hardly see.

Michael Costa, partner in the firm of Robinson, Phillips and Whitehorne, Attorney of 41 years standing, also testified on behalf of the first defendant. He recalled the transaction with Davis. Mortgage was in arrears - both interest and

principal. At the beginning of July, 1977 he would go down to Highgate, at first three times and afterwards two times weekly. He knew John Wharman who he met during the first two weeks of July. He did Valuations and Auctions for his firm in St. Mary - He saw him everytime he went down to Highgate.

Mr. Costa was shown a document - "Particulars and Conditions of Sale" in connection with the transaction herein - it was tendered as Exhibit 18. The witness said it represented two parcels of land at Derry. There were Public Auctions in this matter - postponed from time to time. Mr. Steve Touzalin, Attorney-at-Law originally looked after this matter. On his retirement Mr. McCalla joined the firm in 1976. The question was put:-

"Mr. McCalla says in 1982 he sought your advice in this matter - the answer was in the affirmative. Mr. Costa continued that it was made in respect of an offer to purchase the property. He said he gave him the go ahead to sell."

Cross-examined by Mr. Cousins he said he was now aware that the property was in two Certificates of Title. He said "I think I recognise Mr. Davis in Court - I was dealing with husband and not with wife in relation to the mortgage." He agreed that it would be right to say that the property having been put up for auction and no bids received he was anxious to sell, pay off the mortgage and close the matter. He took the decision to accept the offer.

The second named defendant Eli James testified in chief that he was a farmer of Russell Hall, St. Mary. He heard that land belonging to Mr. Davis was for sale and that Mr. John Wharman was the auctioneer. He went to him in connection with the land. He was told to make an offer and this he did to the sum of \$15,000.00. He stated that the offer "was reduced into writing by Mr. Wharman" - Exhibit 17 was identified as the said offer.

He gave Mr. Wharman a cheque for \$10,000.00 payable to Robinson, Phillips and Whitehorne. Subsequently he paid the balance of purchase price and in due course received the Title.

After that, he met and spoke with Mr. Davis who asked him to let him have back the property to which he replied:- "give me back the \$15,000.00 and I will let you have it." He said weeks went by and he didn't show up - suffice it to say that nothing came of the subsequent talks. The witness described the land as farming land but in very poor condition. There was a house on the land. His evidence was to

the effect that the auctioneer had originally asked \$20,000.00 for the property but had eventually settled for \$15,000.00. He testified as follows:-

"Not true the purchase price of \$15,000.00 was grossly inadequate. I thought it was a fair price.....didn't conspire with anybody to buy the land. Didn't attend any of the auctions."

He said Mr. Wahrman died about three years ago. His sight when he died was bad but he was not blind at anytime of his life.

To Mr. Cousins in cross examination he said he saw Mr. Davis after the sale - on more than one occasion. He had agreed to give him back the land because:- "he came to me and pleaded with me - I knew his deceased wife - a nice lady."

By way of description of the property he said he didn't think it was so much woodland. He said he never at anytime asked Mr. Davis if he could manage such a property. He never spoke to Mr. Davis about buying his property before he spoke to Mr. Wahrman. When he went to Mr. Davis he appeared more frightened than upset.

He never told him he should not reap any more crops from the land. He denied telling Mr. Davis that he should go back to Robinson, Phillips and Whitehorne and get back whatever balance from the sale that was due to him. He ended by saying he wouldn't say he got the property at a very good price, he got it for what it was worth.

Dulcie Cummings, housewife of Derry in St. Mary gave supporting evidence. She knew both Mr. Davis and Mr. James. She recalled that Mr. Davis had a problem with his land and that after Mr. James bought the property Davis came over to her home and she told of a conversation they had. I omit its contents as it affords no assistance in this matter.

Cross-examined by Mr. Cousins she admitted being once employed by Mr. James and stated they are "friends up to now."

#### Submissions and the Law

Mr. Scharschmidt in his closing submissions referred to the plaintiff's allegation of Fraud and reminded the Court that the male plaintiff said he did not know the mortgagees.

After defining Fraud he stated that there was no evidence from Mr. Davis showing any connection between the first and second Defendants. There were no bidders at the auctions and the only offer made was by Mr. James.

He described Mr. Douglas' evidence on behalf of the plaintiff as "a disaster." If the property could not be sold by Public Auction it had to be sold by Private



Treaty - only one offer had been made. There was nothing to show any bad faith. He referred to Halsbury's Law's of England 4th Edition Volume 32 - Paragraph 726 under the rubric "Mode of Exercise of Power." The paragraph reads:-

"A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale; he has been so described, but this only means that he must exercise the power in a prudent way, with a due regard to the mortgagor's interests in the surplus sale money. He has his own interest to consider as well as that of the mortgagor, and so long as he keeps within the terms of his power, exercises the power in good faith for the purpose of realising the security and takes reasonable precautions to secure a proper price, the court will not interfere, nor will it inquire whether he was activated by any further motive. This duty to obtain a proper price is owed also to subsequent mortgagees, but not to a surety. A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him, so long as the amount is fixed with due regard to the value of the property.

It is sufficient if the mortgagee complies with the terms of the power and acts in good faith, but good faith requires that the property is not dealt with recklessly. If the sale is in good faith and he charges himself with the whole of the purchase money he may sell on the terms that a substantial part, or even the whole is to remain on mortgage. The mortgage is apparently not bound to watch the market so as to sell at the highest price.....

If the mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the price is so low as to be in itself evidence of fraud, but not on the ground of undervalue alone and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale. However if the mortgagee does not sell within proper precautions, he will be charged etc."

Paragraph 729 although not referred to by Mr. Scharschmidt is of assistance. Under "Employment of Agents" there is the following: "The mortgagee is entitled to employ agents to effect the sale, and so long as he selects agents presumably competent he is not liable for their errors of judgment or errors in matters of detail not seriously affecting the success of the sale or the price realised etc."

Mr. Scharschmidt cited the case of Cuckmere Brick Company Limited v. Mutual Finance Limited; (1971) 2 ALL ER 633 (C.A.). The headnote shows as he rightly said

that this was clear case when the mortgagee was liable to the mortgagor for damage suffered by reason of negligence of the mortgagee's agent. Of course in the instant case before me plaintiff's counsel made Fraud the gravamen of his complaint and argued his case with commendable skill and persuasiveness.

Mr. Cousins cited the local case of Moses Dreckett which dealt with the Cuckmere Case in detail and to which I will refer in due course.

Mr. Sinclair for the second defendant submitted that on the evidence the purchaser was unconnected with the mortgagees. He said a bona fide purchaser for value would be protected by the Registration of Titles Act. He submitted that the relief sought at (a) of the Prayer of the Statement of Claim "cannot be granted." He referred to Mr. James' evidence that he regarded the price of \$15,000.00 as fair having regard to the condition in which he saw the land.

Mr. Cousins' submissions were much lengthier than those of his opposing Counsel. I will in the interest of brevity set out what I perceive to be the salient features of his argument. He submitted that there must be "a balancing of two competing and independent considerations - entitlement to recover loan and duty to protect mortgagor." He went on to say the mortgagees will be liable if they fail to exercise the Power of Sale in a manner capable of securing the true market value of the mortgaged property. He mentioned that it was incumbent on the Court where there was a sale by Public Auction to carefully scrutinize the sale - and he listed his arguments under eight heads. For purposes of this Judgment I shall isolate head (5) which Mr. Cousins set out in three parts. His argument was as follows:-

- "A properly conducted Auctions means (a) auction is advertised in a manner that will bring facts of sale to the attention of the public at large and not merely to persons in area of mortgaged property. (b) That the property is properly described as to its nature, size and user.
- (c) Sale to purchaser must be on an arms length basis at a price honestly determined."

He commented on certain parts of the oral evidence saying, inter alia, that Mr. Douglas' evidence was evidence on which the court could properly rely. At this stage, for I will refer to it later, I will merely say that his evidence was totally unimpressive and that any case that places reliance on such evidence is doomed to failure. Mr. Cousins referred briefly to Mr. McCalla's evidence and also to Mr. Costa's. He commented on Eli James' evidence and said he was not a truthful witness.

As mentioned earlier Mr. Cousins cited Dreckett v. Rapid Vulcanizing Company Limited S.C.C.A. No. 35/83. The leading judgment of Carberry J.A. at page 6 reads (Paragraph 1):

"I turn now to the law, and it is fair to say that it is not in a very satisfactory state. The authorities that have been cited, and there were many, show that the courts have alternated between showing concern for the mortgagor and a wish to protect him against a mortgagee who recklessly sells off the mortgage premises, concerned only to recover his mortgage debts; while on the other hand the courts have stated that the whole object of taking security for a loan is to enable the lender or mortgagee to recover his money on the borrower's default, and that the object of the mortgage was to enable this to be done speedily and at the mortgagee's convenience."

Paragraph 7 of the judgment goes on to say:-

"In Wolfe v. Vandenzee the mortgaged property had been misadvertised by the auctioneer in the particulars of sale, and but for this might have sold at a higher price. On the other hand the courts have frequently taken the view that a mortgagee in exercising his power of sale of the mortgaged premises should be liable only for fraud, not for negligence."

He referred to the Cuckmere case and P. 11 of the judgment reads:-

"In Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.; (1971)..... The Court of Appeal in England reviewed the two lines of authority. It was basically a case which fell within type (b) above, a case in which the auctioneer had misdescribed the property in the particulars of sale....."

Salmon L.J. reviewed the two lines of authority at pages 965 (All E.R. 643) et seq. At Page 966 he said:

"It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith,

the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it....."

The proposition that the mortgagee owes both duties in my judgment, represents the true view of the law (emphasis supplied) and later in the judgment he had this to say:-

"I accordingly conclude, both on principle and authority that a mortgagee in exercising his power of sale owes a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decided to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."

#### Findings and Conclusions

I find, and it is common ground and not in dispute, that the registered proprietor fell into arrears with the mortgage payments resulting in the mortgagee exercising the power of sale given in the Mortgage Deed.

Mr. Scharschmidt's description of Mr. Douglas' evidence as "a disaster" is neither inaccurate nor uncharitable. I place no reliance on it and in my view he did a great disservice to the plaintiff's cause.

I accept that the property had been put up for Public Auction three times and Mr. Wahrman had failed to get any bids. When Mr. McCalla stated that "in the light of these factors the offer was accepted as fair and reasonable" his assessment of the situation is one with which I agree. A mortgagee's duty on sale is to take reasonable precautions to obtain a proper price, not the best price.

In my view it cannot be said that the sale price was so low that in itself it constituted evidence of fraud. There is no evidence of any collusion between the Defendants.

In my opinion the fraud alleged has not even been remotely proved and the contention that the property was sacrificed is not substantiated.

I accept the submissions of both Counsel for the Defendants.

The reliefs sought by the plaintiff at (a) and (b) of his prayer are refused.

Accordingly there will be Judgment for both Defendants with costs to be agreed or taxed.