

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the Appeal of the
Bank of New South Wales v. Campbell from
the Supreme Court of New South Wales
delivered Friday, February 5th, 1886.*

Present :

LORD BLACKBURN.

LORD MONKSWELL.

LORD HOBHOUSE.

SIR RICHARD COUCH.

THEIR Lordships think that in this case it will be their duty to advise Her Majesty that the Order appealed against should be reversed, and consequently it would follow that the decree of Mr. Justice Faucett should be restored. That is the advice which they will humbly give to Her Majesty, and their Lordships will now proceed to state the grounds on which they will give that advice.

It is unnecessary to inquire into a great many of the matters that have been referred to in the course of the argument. It is admitted by the counsel for the Respondent, and their Lordships do not see that there is any ground on which it could have been disputed, that it must be taken here that this particular mortgage was validly executed within the provisions of the Acts as a security collateral to a bill of exchange, and so far good that there is no ground for impeaching it on that account.

Then we have to see what this mortgage is. Whatever other mortgages may be, this particular mortgage is a mortgage that was created under the Act of 1862, and did undoubtedly contain both a provision for redemption and

A 20724. 100.—2/86. Wt. 2708. E. & S.

also a provision for enabling the Appellants to foreclose; and that foreclosure, when it had taken place, if it was good, would prevent the subsequent redemption. The question comes therefore to be whether there is anything shown in the Acts which govern this bank to take away the power of foreclosure. Of course, if it was enacted by the Legislature that under such mortgages as this, when held by this bank, there should be no power of foreclosure, it would follow that the power of redemption still remained. The question is, is there anything to show that? The learned Judges below seem to have treated the case exactly as if the transaction had happened before the Act of 1864 was passed at all, and as if that Act had not been in existence. How that happened has not been explained. Everything seems to show that that Act was in existence, and that Act their Lordships think is the important one. Having recited that the powers of the bank given in the previous Act had been unduly limited, and so forth, the Act of 1864 proceeds to abolish altogether section 3 of the former Act, and then it enacts that it shall be lawful for the corporation to make loans of money on cash credit accounts and so on, describing generally everything that a bank would do dealing as a banking company, and adds—"but that it shall not be lawful for the said corporation to advance or lend any money upon the security of lands or houses or ships, nor to own ships." Then there is a provision about shares; and then comes what is put in the form of a proviso, but which seems rather to be an enactment. "Provided always that nothing herein, or in the said recited Act contained, shall invalidate any lien acquired or to be acquired by the deposit of deeds or any mortgage of lands or other property taken or to be taken by the said corporation or any

" person or persons on their behalf as security
 " collateral to any bill, promissory note, bond, or
 " other security, or any right, claim, or title to
 " lands or other property thence to arise." It
 is not necessary to refer to the provision as to
 the shares which follows. It certainly does seem
 to their Lordships that it is not possible to say
 that the right to foreclose which is contained in
 this mortgage is there taken away. The
 mortgage at all events is good. Then what is
 there in the words that follow? It goes on
 afterwards as part still of the same proviso—it
 is not at all good draughtsmanship—to say that
 there is nothing to prevent them " from taking,
 " holding, or enjoying to them, their successors
 " and assigns, for any estate, term of years, or
 " interest for the purpose of reimbursement only
 " and not for profit, any lands, houses, or other
 " hereditaments, or any merchandise or ships
 " . . . which may be taken by the company in
 " satisfaction, liquidation, or discharge of, or
 " in security for any debt due, or to become
 " due to the company." No doubt these are
 awkwardly worded phrases, and it does not
 appear as if the Legislature which passed them
 had any definite idea of what they were meaning
 to say; but is it possible to say that by the words
 they should hold it " for the purpose of reimburse-
 " ment only, and not for profit," when they were
 taking security for any debt due or to become
 due to the company, it was meant that the power
 to foreclose (which is expressly attached by
 statute to the mortgage) was in itself taken away,
 and that it was in fact enacted here that when
 a mortgage is held by this particular company
 there shall be no longer a power to foreclose?
 It certainly does not seem to their Lordships
 that there is anything in these words that could
 possibly have that effect. Whilst the former
 Act, section 12, stood alone and without anything

affecting it, there might have been something to be argued in favour of that proposition—and it is not to be understood that their Lordships are expressing any opinion on what it might have been if the former Act had stood unaltered,—but as it is, their Lordships think the question really comes round to this: that under the Act of 1864 this mortgage, which involved foreclosure, was legally and properly taken by the bank, and that there is nothing whatever to enact that the power of foreclosing should be taken away. The result is that their Lordships think the original decision of Mr. Justice Faucett was right, and that the Appeal from it should have been dismissed with costs. They will therefore humbly advise Her Majesty now to make a decree to that effect. The Respondents must pay the costs of this Appeal.