

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of O'Brien v. Walker, and Curlewis v. O'Brien and another, from the Supreme Court of New South Wales; delivered 9th April 1886.*

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Present :

LORD BLACKBURN.

LORD HALSBURY.

LORD HOBHOUSE.

SIR RICHARD COUCH.

These two appeals, which have been consolidated, are both against the order of the Supreme Court of New South Wales, dismissing the appeals of the Appellants (Defendants) against a decree of the Primary Judge in Equity, and on an appeal by the Respondent Walker (Plaintiff), varying that decree.

The amended claim of the Respondent states that Thomas Waldron was the registered proprietor in fee of certain lands, subject to two mortgages. The first was a mortgage for 20,000*l.* to the trustees of a Loan Society. The other, which, though prior in date, was not registered till after the mortgage for 20,000*l.*, was to secure 4,400*l.* and any further sums he might advance to Waldron to the Appellant O'Brien. This last mortgage might be paid off on giving three months' notice.

On the 27th January 1881 the Sheriff under a *Fi. fa.* against Waldron, sold the interest of Waldron, subject to the two mortgages, to the

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Plaintiff, and on the 28th February 1881 the Plaintiff was duly registered as the proprietor in fee, subject to the two mortgages. The Plaintiff gave to O'Brien three months' written notice that he would pay off the whole moneys secured by the mortgage to O'Brien, and he tendered a sum of money which O'Brien accepted while insisting on his right to claim more. The sum so paid was the full amount of 4,400*l.* and further advances and interest which the second mortgage was given to secure.

The principal contention of the Defendants, now Appellants, was that O'Brien had exercised a power of sale contained in the mortgage on default by Waldron, and had under it, before the sale by the Sheriff, conveyed the property to one Raine, who had subsequently sold it to Curlewis. It is not necessary to say more than that both Courts have held that what purported to be a sale to Raine was a mere sham. This being a question of fact, this Board would not lightly differ from what has been found by both Courts below; and certainly there is in this case ample evidence to justify the finding of the two Courts. The decree of the Primary Judge in Equity is right so far as it declares that the Plaintiff had duly paid the 4,400*l.* further advances and interest, and so far as it gives relief on that footing. But in addition His Honour ordered that a sum of 600*l.* and interest should be paid by the Plaintiff, now Respondent. The Supreme Court varied the decree by striking out all about this 600*l.* That 600*l.* is part of a larger sum of 2,500*l.* which O'Brien alleges that he was to have received from the first mortgagees on the security of their mortgage.

It is asserted, and for this purpose their Lordships may assume it to be true, that the Respondent O'Brien had purchased the lands in question for a sum of 14,500*l.*, and, before he had

either paid the price or obtained the transfer of the title, sold it to Waldron for 24,400*l.* The trustees of the Loan Company had satisfied themselves that they could, if a proper title was made, safely advance 17,500*l.* on the security of this land as it then was, and 2,500*l.* more when certain buildings were erected, and it seems to have been arranged between the three, O'Brien, Waldron, and the trustees of the Loan Society, that O'Brien should cause the unpaid vendors to transfer the title to Waldron as his nominee, which they were bound to do if paid the 14,500*l.* for which they had sold it; that O'Brien and Waldron should enter into an arrangement to erect the buildings, and that the Loan Company, taking a mortgage for 20,000*l.*, should advance at once 17,500*l.*, to enable O'Brien to pay the vendors and to start the building speculation; and that when the buildings had advanced to a certain stage, it does not appear what, the Loan Company were to advance the remaining 2,500*l.* Nothing of this is mentioned in the mortgage to the Loan Company, which is simply to secure 20,000*l.*, but it may be all true, and, for the purposes of the argument, their Lordships will assume it to be the real transaction. Their Lordships are not to be taken as agreeing in the severe observations made by the Judges below on this transaction, but they cannot see how it affords any ground for charging in this suit the now Respondent, who seeks only to redeem the mortgage to O'Brien, with any money which that mortgage was not intended to secure.

Their Lordships wish to guard against being supposed to give any opinion as to whether the mortgage for 20,000*l.*, which undoubtedly takes priority of that which the Respondent Walker has redeemed, can be enforced to any greater extent than 17,500*l.*, or as to any remedy which O'Brien may have to enforce payment of the

2,500%. said to have been retained out of the 20,000%. which the first mortgage was framed to secure. Those are questions not raised in this suit.

Their Lordships, therefore, will humbly advise Her Majesty that both appeals should be dismissed, with costs to be paid by the Appellants.

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