

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

W. S. MacBrayne, for the appellants.

E. D. Armour, K.C., for the executors of the deceased plaintiff, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that two questions had been raised: (1) whether the final order of foreclosure, obtained upon præcipe, in this action, was invalid; and, if so, (2) whether the appellants and those they represented in this matter had lost all right and title to the lands in question under the Limitations Act, or were precluded from making any claim to them by laches or estoppel; and laches might be urged as a ground for sustaining the final order of foreclosure, and also as a ground for rejection of any claim for redemption, even if the order were invalid.

After an examination of the facts and of the proceedings which led up to the final order, the Chief Justice said that it was wholly invalid and must be set aside, not as an indulgence, but ex debito justitiæ: Hoffman v. Crerar (1899), 18 P.R. 473, 19 P.R. 15; Appleby v. Turner (1900), 19 P.R. 145, 175; Anlaby v. Pratorius (1888), 20 Q.B.D. 764; Muir v. Jenks, [1913] 2 K.B. 412; Crane & Sons v. Wallis, [1915] 2 I.R. 411.

With the final order for foreclosure gone, all other questions fell to the ground. What was left was a subsisting action for foreclosure, in which, until final order of foreclosure, the defendants were entitled to redeem. The Statute of Limitations was out of the question; so too were laches and estoppel; and the pending action saved the respondents from the Statute of Limitations, which would have prevented an action being brought now.

A legal representative of the estate of the father of the appellants is a necessary party to this application; and such a representative should be appointed and added, as undertaken by counsel for the appellants.

The appeal should be allowed and the judgments and final order of foreclosure be discharged. The respondents can then proceed to enforce their mortgage, and the appellants can redeem, both according to their rights under it. The appellants should have their costs here and below.

RIDDELL and ROSE, JJ., agreed that the appeal should be allowed.

LENNOX, J., dissented, for reasons briefly stated in writing.

*Appeal allowed; LENNOX, J., dissenting.*