Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nawab Sidhee Nuzhur Ally Khan v. *Ojoodhyaram Khan, from the High Court of Judicature at Calcutta; delivered the* 17*th day of March*, 1866.

Present:

LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JAMES COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

THIS is an Appeal from two Decrees of the High Court of Judicature at Fort William in Bengal, bearing date respective the 1st January, 1863, and the 12th January, 1864, made by Mr. Justice Bayley and Mr. Justice Campbell in a Divisional Branch of the Court. The last of these Decrees, which was made on a review of the former, affirmed it with some slight variation, which it is unnecessary to specify. The first Decree reversed a decision of the Court of First Instance, the Zillah Court of Midnapore, made in a suit in which the present Respondent was the sole Plaintiff. It was a suit for redemption and possession brought by him as mortgagor against the Defendants, who were, 1stly, the representatives of the original mortgagees deceased, viz. Aushootosh Deb and Promothonauth Deb respectively; 2ndly, a receiver of the estate of Promothonauth Deb; 3rdly, the executors of one John Compton Abbot, deceased; 4thly, one Alexander McArthur; 5thly, the Nawab Nazim; 6thly, the executrix of a deceased Mahomedan servant of the Nawab Nazim; and lastly, the Appellant. The connection of these parties respectively with the redemption suit of the Plaintiff will be more particularly explained hereafter.

The decision of the Judge of the Zillah Court dismissed the suit of the Plaintiff, the now Respondent, with costs, on certain objections on points of law which will be subsequently stated, and which, in the opinion of the Judge of that Court, interposed a bar to the further prosecution of the Suit. The Plaintiff was not permitted to go into proof of his case on the merits. From this decision the Plaintiff appealed to the High Court; and that Court, differing in opinion from the Court below on the legal points on which it had proceeded, reversed the decision, and remanded the cause for trial. The present Appeal is brought from that decision.

The suit in the Zillah Court was brought for redemption and possession consequent on redemption of certain valuable estates, particularly described in the plaint, constituting the Plaintiff's ancestral zemindary. The title asserted was that of a mortgagor seeking to redeem against mortgagees represented by their representatives in estate, and against subsequent alienees of the zemindary taking subsequently to the mortgagees, and, as the Plaintiff contended, taking derivatively from them, and subject to his title to redeem them.

One of the points which was urged upon the argument, and which will be considered hereafter in its order, is whether the plaint sufficiently connects the present Appellant, whom it states to be in possession of the property, with that mortgage title originally in the Debs, the mortgagees, so as to show a *primâ facie* case for including him in this redemption suit.

The suit was stated by the Respondent's counsel to be supplemental, in its nature and objects, to one in the Supreme Court for redemption of the same property, brought by the same Plaintiff against the Debs originally, and by amendment against John Compton Abbott. It was further stated by the Respondent's counsel on this Appeal, that as some of the Defendants against whom relief was asked in this suit, viz. the parties above enumerated after Alexander M'Arthur, were not subject to the jurisdiction of the Supreme Court, the Plaintiff had sued in the Zillah Court of Midnapore by reason of that defect alone.

The Plaintiff, as the eldest son, was the head of

a Hindoo family of distinction. A litigation had arisen between him and other members of his family to provide funds, for which he had become a borrower from the Debs. Their advances were secured by mortgages taken at different times, one of which is stated to have been a Bengalee mortgage; the nature of the others does not appear. The mortgagor and the mortgagees were Hindoos. The mortgagees obtained on the 25th May, 1847, a Decree of Foreclosure in the Supreme Court against the mortgagor. This Decree was irregularly obtained, and was subsequently set aside. Whilst this Decree for Foreclosure was in force, viz. on the 10th June, 1847, the Debs sold the zemindary to John Compton Abbott. He, after his purchase, in execution of the Decree of Foreclosure, which he had also purchased, dispossessed the Plaintiff. It does not appear that the mortgagees had been in possession. The contrary may be inferred. The possession, then, was first acquired, whilst the Foreclosure Decree was in force, by John Compton Abbot as owner, and not in privity with the mortgage title.

The effect of a Foreclosure Decree in the Supreme Court in a mortgage suit between Hindoos, is equivalent to a Decree establishing proprietary right, in the Company's Courts, on similar suits on the like instruments.

On the 2nd February, 1848, the Plaintiff filed his Bill of Complaint on the Equity side of the Supreme Court, to set aside this Foreclosure Decree, and to redeem the zemindary. The Bill was originally filed against the Debs only; but on its appearing, by their Answer, that they had sold to Abbott, he was made a party to the suit. After he was made a party to the suit, he entered into an agreement bearing date the 15th April, 1848, with Alexander M'Arthur, which agreement was filed with the plaint, in the suit now under appeal, and is set out at page 5 of the Appendix. This agreement, after reciting that Abbott is well seized of or otherwise entitled to the zemindary, that the same was in arrear for revenue, and was advertised for sale of arrears of revenue, proceeds to stipulate as between these two persons, that M'Arthur shall purchase the zemindary for the sum of three lacs, in case the estate does not sell for more at the

revenue sale; that he will pay to the Government, if he be declared the purchaser, the sum for which the estate may be sold; and that he will, within a certain time after he shall be declared the purchaser, and shall have obtained the usual and due certificate of title, pay to Mr. Abbott the difference between three lacs and the sum for which the estate shall have been sold. At this time the suit of the Plaintiff in the Supreme Court for setting aside the Foreclosure Decree, and for redemption, was pending. The Court, by its decree, dated the 16th November, 1852, set aside the Decree of Foreclosure, and thereby made the zemindary in the possession of Abbott, under his title from the Debs, subject to the right of redemption by the Plaintiff. This right was expressly declared by the Judgment in the following passage:—"We think, therefore, that there must be some Decree for redemption against Mr. Abbott, who, if the objections arising upon the form of the record be answered (which objections the Court had overruled), can stand upon no better footing than the Debs, whose title he purchased."

This Judgment, then, in effect placed the possession of Abbott upon the footing of that of a mortgagee in possession, and from that time his above declared title and his possession were in privity with the mortgage title, and no longer constituted an adverse possession. By the reversal of the irregular Foreclosure Decree, the mortgagor was restored to his original and legal relation to the mortgage title.

After Abbott had been made a party to the redemption suit, Promothonauth Deb, one of the Defendants, died, and the suit was revived, and other parties were made Defendants by a Bill of Revivor and Supplement. The personal representatives of Promothonauth Deb were made parties, together with the said M'Arthur and one George Lindsay Young, and the Nawab Nazim and the representatives of Saudack Ally Khan out of the jurisdiction of the Court were also named as Defendants. These parties were stated by Mr. Leith to have been introduced as Defendants in consequence of some discovery which had been obtained by the answers previously put in. The agreement, however, between Abbott and M'Arthur previously mentioned, of the 15th

April, 1848, was then unknown to the Plaintiff, and the new Defendants above mentioned were made parties upon allegations that at the sale for the arrears of revenue referred to in the agreement M'Arthur had purchased benamee for Abbott and the Debs, and that they had sold to Sauduck Ally Khan, who had purchased benamee for the Nawab Nazim. It would swell the narrative of the facts of the case which preceded the present Suit to an unnecessary length, if the precedent litigation were followed minutely through all its stages. It will suffice for the purpose of explanation to state that Sauduck Ally Khan and the Nawab Nazim did not appear to the Bill, and that, upon M'Arthur's answer coming in, and it appearing by it that he had conveyed to Sauduck Ally Khan benamee for the Nawab Nazim, he was dismissed from the suit, and a Decree for redemption was made against the other parties who had appeared in the suit. This Decree bears date the 16th November, 1852.

It is set out *in extenso* in the Appendix. This Decree, together with the Agreement of the 15th of April, 1848, and another document, are annexed by the Plaintiff to his Plaint in the Suit now under appeal. The Decree declared that the "Plaintiff, as between himself and the Defendant in those Suits, was entitled to redeem the mortgaged premises in the Bill mentioned, notwithstanding the said final foreclosure order." The title to redeem was declared as to all the mortgaged premises, and not simply as to those which could be recovered in that Suit, though the Decree would of course bind, those only who were parties to the Suit at the time when it was pronounced, and at that time M'Arthur had ceased to be a party to the Suit. In a subsequent part of the Decree it was further ordered "that the master should inquire and state to the Court what portions of the mortgaged premises had been sold since the same came into the possession of John Compton Abbott for arrears of Government revenue, or otherwise, and to whom the same respectively had been sold; and if he should find that any had been so sold, he was to take an account of all moneys which had been received by or come into the hands of the said Defendant, John Compton Abbott, or any person or persons by his order or for his use in respect of the

purchase money arising from such sales, or of the surplus proceeds of such Government sales, if any, or which, but for his or their wilful default, might have been received." This portion of the Decree furnishes one of the grounds on which the Judge of the Zillah Court proceeded in his dismissal of the Plaintiff's suit.

The Decree also directed certain inquiries in the Master's office; and in the due prosecution of those inquiries, M'Arthur was subsequently, viz. on the 17th of August, 1854, examined before the Master. His examination is stated at length at pp. 18 and 19 of the Appendix. This examination first disclosed to the Plaintiff the existence and contents of the Agreement between M'Arthur and Abbott of the 15th of April, 1848. M'Arthur's examination further disclosed that there was an Agreement between him and Abbott, that the latter should suffer the revenue to fall into arrear, in order that the estate might be sold for arrears of revenue; and further that he, Abbott, should not bid for the estate. M'Arthur explained that his reason for wishing Abbott not to bid was to prevent its going above the three lacs.

This discovery seems to have led to the institution of the present Suit. The Plaint in this Suit was filed on the 30th of May, 1860. In the Plaint it is stated that possession was given to M'Arthur under the certificate of title, consequent on the sale for arrears of revenue, on the 1st of June, 1848. The expression is somewhat confused, but this seems to be the sense of the Plaint.

The Plaint is for redemption and possession, that is, for possession consequent upon redemption. The relation to this Suit of the several parties whom we have above mentioned to have been made Defendants to it, sufficiently appears by what has been already stated, except that it must be added that the Defendant Sidhee Nuzzur Ally Khan Bahadoor, the Appellant, is described as in possession, collusively with the Nawab. The Plaintiff in his Plaint alleges with respect to all the parties whose interests arose upon and after the sale for arrears of revenue, that is from the Nawab Nazim inclusively down to and including the present Appellant, that they took fraudulently and collusively. It was objected for the Appellant, that the Plaint does

not connect him with that charge of fraud and collusion, but the following words in the Plaint, viz. "the collusive, fraudulent, and fictitious auction sale like a private sale," evidently refer to that sale which the Plaintiff treats as the fraudulently interposed bar to his redemption, viz. that at which M'Arthur was declared the purchaser; for in a subsequent part of the Plaint that sale and the Agreement between M'Arthur and Abbott, of the 15th April, 1848, are referred to and the words "and the subsequent transfers," following on the words "the collusive, fraudulent, and fictitious auction sale like a private sale" plainly mean, as the sense imports, all those transfers between the parties whom the Plaintiff makes, in person or by representation, Defendants, by derivation of title from the Nawab Nazim, and the words "being declared collusive," import that the Plaintiff seeks by his Suit to have them so declared. The repetition here of the words "private sale," and the more formal conclusion at p. 4, l. 8 and 9, of the Appendix, viz. "As the said sale took place in the mode described above, so it cannot be viewed in the light of a sale for arrears of revenue, but is to be treated as a private one," clearly and sufficiently mark on what legal ground, whether sound or unsound, the Plaintiff meant to found his title to redeem as against those of the Defendants whom his former Decree in the Supreme Court did not reach. We think therefore there is sufficient allegation in the Plaint to connect the Appellant with the charge of fraud and collusion.

The Plaintiff swore to the truth of his Plaint. The answers of the Defendants were then taken. Those of the Appellant and of the Nawab Nazim are respectively at p. 10 and p. 16 of the Appendix. That of the Appellant, at p. 10 in the 2nd and 3rd articles, relies on the pendency of the Suit in the Supreme Court, and on the Plaintiff's right not being established there. In the 4th article he relies on the special Law of Limitation, sec. 24, Act I. of 1845, and says that as the Suit is not brought within one year, the sale cannot be set aside. In the 6th he relies on the general Law of Limitation, sec. 14, Reg. III. of 1793. In the 7th he denies collusion. The answer of the Nawab Nazim raises the same questions on the law of limitation of suits.

He objects further, in his third article, that the Government should have been made a Defendant, the Suit being to set aside the revenue sale. He denies the charges of fraud and collusion, and insists that if the Plaintiff has been wronged he has his claim for damages against Abbott and others.

The Plaintiff's vakeel was examined by the Court as to the meaning of the Plaint and the nature of the fraud charged. That examination, which is at p. 17 of the Record, does not carry the matter further than the Plaint itself. The issues will be found at pages 17 and 18 of the Appendix.

The 1st and 2nd issues are on the Law of Limitation, as above stated.

The 3rd relates to the Government not being a party, "the Suit being to reverse the sale."

The 4th is on the effect of the pendency of the Suit in the Supreme Court.

The 5th related to the form of the Plaint.

The Zillah Judge decided against the Plaintiff on the 1st, 2nd, 3rd, 4th, and 5th issues; the defect of form to which the 5th issue related, he declared to be amendable; but as he considered the Suit to be barred on the other grounds of the limitation law, and the nature of the Decree in the Supreme Court, he made no amendment.

The High Court, on Appeal, decided that the Suit was not brought to set aside the revenue sale; that it was not barred by effluxion of time; that the pendency of the Suit in the Supreme Court, at the time of the institution of this suit (afterwards in the High Court, which had been substituted for the Supreme Court), and the Decree given in that Suit, were no bar to the prosecution of the claim.

The Court considered that M'Arthur and Abbott could not allege their own wrong, and that a trust might be fixed on the estate of M'Arthur in favour of the Appellant without disturbing the Government sale; and with this declaration of the law they remanded the cause for trial.

Before entering upon the particular questions raised by this appeal, it may be right to observe, that the Courts in India, in disposing of the case, were bound to proceed, as the High Court appears to have proceeded, upon the facts alleged by the Plaint, and upon the assumption of the truth of those facts. Where a Plaintiff on certain alleged facts

asks relief, and is unable to obtain a trial of the facts, and a hearing on the facts that he may establish, by reason of the conclusions of law which the Judge forms on the case in its then condition, justice requires that the Court should proceed upon the Plaintiff's allegations. The case must be determined as if it had arisen on a demurrer to a pleading or to evidence where such procedure exists. Courts cannot be justified in refusing to allow cases to go to proof upon any other assumption than that the facts alleged are capable of proof and are proved. This assumption of the truth of the facts alleged must, however, be limited to the consideration of the legal effect of the facts alleged upon the bars raised against the trial of those facts, and their Lordships therefore abstain from expressing any opinion upon the points urged at the Bar, which do not arise out of the Plaintiff's pleadings and documentary proofs, or which, if they arise, are not necessary to the decision of this Appeal. Observations were made by Mr. Leith upon the omissions in, and nature of, the Answers put in by the Defendants to the Respondent's Plaint; but their Lordships, for the above reasons, do not think it right to refer to those observations. The Answers can only be looked at for the purpose of ascertaining whether they raise the legal bars insisted on. Throughout the following observations their Lordships must be understood to proceed upon a hypothetical case of fraud, and to express no opinion on its truth or probability.

The first bar to the Plaintiff's claim set up by the Appellant was that of limitation of suit by effluxion of time. The first period of limitation insisted on by the Appellant was that under Act I. of 1845, sec. 24. That objection necessarily supposed the suit to be brought to set aside the revenue sale; this remedy, however, the suit did not seek, but, relying on the agreement of the 15th April, 1848, antecedent to the sale, the Plaintiff claimed a right, as it were, to confess and avoid that sale, by imposing a trust on the estate which passed under it. The question, therefore, as to this period of limitation is, whether the Plaintiff is well founded in claiming the right thus claimed by him, in effect whether the Plaintiff can treat the

auction sale, as against those Defendants who rely on it, as a private sale. Before dealing with this point, however, it will be convenient to consider the other period of limitation on which the Appellant relies as a bar, the general law of limitation of twelve years. As to this, it is sufficient to observe that on the allegations in the plaint that bar cannot be set up; for the title and possession of the Defendants against whom the redemption is prayed by this suit, is expressly alleged to be founded on fraud. This period of limitation, therefore, may be laid out of the case; and we come then to what has appeared to their Lordships to be the real question in the case (the question to which we have above referred), whether the Plaintiff can, in point of law, insist, notwithstanding the auction sale for arrears of revenue, that as against him, that sale ought to be viewed as a private sale. The title to redeem in this suit as against the parties subsequent to Abbott is rested on that ground, and the case which the Plaintiff alleges by his plaint and by the documentary proof appended to it is one of fraud between Abbott and M'Arthur, to deprive him of his title to redeem the zemindary, by means of a secret purchase of it between them for three lacs of rupees, including a fraudulent device of a sale by auction for arrears of revenue, such arrears to be designedly incurred. By that agreement Abbott would become directly interested that the estate should sell for a low price, since the proceeds would be subject to the mortgagors' claim, and the lower the price obtained at the auction sale the larger the share would be which Abbott would take of the three lacs. Parties to a secret fraud intend it to be secret, and the price realized at the auction sale would alone be known. These facts and conclusions are directly taken and derived from the plaint, and the agreement of the 15th April annexed to it, and from M'Arthur's examination before the Supreme Court, which are all parts of the Plaintiff's proofs.

If these facts cannot be displaced, the agreement was undoubtedly a gross fraud on the mortgagor committed by both the actors in it, viz. Abbott and M'Arthur. But it was argued that even if this case were true, the remedy under the Act I. of 1845 was for damages only. This argument was

in conformity to the opinion of the Zillah Judge. But it is to be observed that this argument assumes the very question under discussion, which is, whether the Act extends to the present case. Mr. Justice Bayley thought that the Act was not designed to protect a fraudulent purchaser. He put his decision on the ground that a man is not allowed by law to take advantage of his own wrong; and he treated the case of such a purchaser as beyond the protection intended to be given by the Act to purchasers under an auction sale.

No authority founded on the decisions of the late Company's Courts was referred to by the Judges of the High Court, and none such has been quoted before their Lordships on the argument of this Appeal. The case is, however, not altogether new in India. The question was considered in the decision of the Supreme Court in the cause so often referred to, to which this suit is alleged to be supplemental. Mr. Justice Colvile, in that Judgment, whilst he declares a Government sale for arrears of revenue to give a title against all the world, with certain exceptions, engrafts on that general rule this exception, that a fraudulent purchase at such auction sale by a mortgagee will not defeat the equity of redemption. The subject is treated in Mr. Arthur Macpherson's book on Mortgages, at page 91, who there quotes a prior decision, *Kelsall* v. *Freeman*, of the same Supreme Court to the same effect. The author, now a Judge of the High Court at Calcutta, expresses a similar opinion, and as his book is one well known and frequently consulted in India, the decision under review cannot be regarded as unsettling a previously settled state of the law, and as raising for the first time an exception to the general protection which this legislative title affords to purchasers. In support of this view we may refer to other authorities. In the celebrated opinion of C. J. De Grey in the House of Lords in the *Duchess of Kingston's case*, he says, "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that they were mis-

led." "Fraud," his Lordship proceeds to state, "is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal." The Chief Justice then proceeds to state that fines and recoveries may be avoided for covin by strangers, and gives other illustrations of the same principle. The case of *Collins* v. *Blantern*, 2 Wils. 341, is an authority to show, if any were needed, that a Court will strip off all disguises from a case of fraud, and look at the transaction as it really is. In addition to these authorities, it may be observed that the principle embodying this distinction pervades the law. Under sales in market overt, the purchaser acquired a title against all the world; but this protection did not extend to a fradulent buyer who knew that the seller had no real authority to sell. If the thief who sold in market overt repurchased the article, the defrauded owner could then assert his title against such reacquisition. See Viner's Abridg. tit. Market Overt. In Bacon's Abridgment, tit. Fraud. p. 768, Gwillim and Dodd's edition, it is said, "If goods are sold in market overt by covin between two, on purpose to bar him that has right, this shall not bar him thereof. 2 Inst. 713. Cro. Eliz. 86." The same principle applies to bills of exchange and other negotiable instruments, made or which become payable to bearer, and pass by delivery.

Again, a title by Estoppel is a well-known title. The doctrine that a man cannot take advantage of his own wrong, as used and applied by Mr. Justice Bayley to this title to redeem, is a correct application of that doctrine, if the facts support him. Assuming, as we must, the Agreement to be proved, was this sale, as between Abbott and M'Arthur, really meant to be a sale under the revenue laws for arrears of revenue, or was it a device,—part of the machinery, as it were,—to effect a fraud? Under a private conveyance, in the state of the title and of these parties, the estate, if conveyed by Abbott to M'Arthur, would have been redeemable by the Plaintiff. If the sale were intended to have been a real sale under the revenue laws, what would have been Abbott's interest? His estate would have been extinguished, and all that he would have been entitled to would have been

a mortgagee's interest in the surplus of the money realized by the sale over the arrears. Would a real vendor seek to reduce that surplus? The price was a fixed sum of three lacs; the parties contemplated a sale under that sum by the auction proceeding; and it may be well to repeat that it was Abbott's interest to cause, as far as he could cause it, that the auction price should be low, since, though the auction-sale was public, his agreement was not known to the mortgagor. What, then, if the sale were to be real, could be the consideration which M'Arthur was to receive for the excess of the three lacs over the auction price? The estate would have passed to him for the lesser sum. This suffices to show that, as between them, the sale was meant to be under the terms of the Agreement in the case that has happened, which was a case contemplated by Abbott at least. These parties, therefore, are estopped or precluded by their acts from setting up, as against a third person, the mortgagor, the object of their fraud and a stranger to the Agreement, the illegality of the Agreement itself. The Plaintiff is entitled to say, this Agreement is the real contract. Two cases decided by The House of Lords upon the effect of the Encumbered Estates Act for Ireland, *Hooke* v. *Errington*, 7 Ho. Lds. 617, and *Power* v. *Reeves*, 10 Ho. Lds. 645, were referred to by the Appellant's counsel, in support of the Appellant's case, but it is sufficient to say that these were not cases of a fraudulent use of the provisions of an Act of Parliament for effecting a fraudulent purpose. They do not appear to their Lordships in any way to affect the present case.

The various questions that have been put in the course of the Argument, of notice, of knowledge, of purchase by an innocent principal through a fraudulent agent, need not here be answered. They do not arise on the facts before us. Those facts may not be the real facts. Any opinion expressed upon these points would be not merely an *obiter dictum*, it would be by anticipation an opinion hazarded on supposed facts, and evidence, if the cause be still untried, might be made to fit them.

This decision proceeds entirely upon the ground that, as between these parties, the sale must now be considered as a private sale. The decision has no application to interests derived under a real

auction sale. The opinion of their Lordships upon this point disposes of the first bar of Limitation by effluxion of time under Act I. of 1845.

The questions remaining for consideration are, whether the pendency of the Suit in the Supreme Court, or the nature of the Decree, or any acting under that Decree, present a bar to the prosecution of the Suit, which the Decree under appeal has remanded for trial on the facts. The mere pendency of the Suit cannot operate as a bar, since the Suit in the Zillah Court was intended to be simply in furtherance of and supplemental to it. The nature of the Decree requires more consideration. Had that Decree been one which could not have been modified or varied by further proceedings in the Supreme Court itself, in the nature of a Supplemental Suit on the new matter discovered since the Decree, the objection might have been tenable; but the law of the Court is otherwise. Had the Nawab and the parties Defendants subsequent to him been subject to the jurisdiction of the Supreme Court, the relief which is now sought to be obtained against them in the Zillah Court might have been prosecuted by a further Suit, in the nature of a Supplemental Suit, properly constituted in the Supreme Court. The Decree, as to the account and the inquiries directed as to alienated lands, might upon the new facts have been varied there, and the same relief may be obtained in this Suit. The Defendant in possession is charged in substance as Assignee of the mortgage, and in that character redemption is prayed against him. The relief is subject to the same conditions and equities, which would have attached to it in the Supreme Court.

It would be unjust to exclude the relief by reason of mere personal exemption from the jurisdiction of the Supreme Court. To rely on this bar would be to plead an impediment against a Suit instituted to remove it. The direction to inquire as to the alienated lands, and the relief consequent on that inquiry, are introduced for the benefit of the mortgagor in case the pledge should turn out to be irrecoverable through the fault of the pledgee. Such relief in this case is in the nature of compensation for a wrong. If it be subsequently discovered that the pledge can be restored or recovered,

the mortgagor may waive that benefit, and prosecute his right as to the thing itself. Lastly, with reference to the dealing under the Decree, it is to be observed, that the mere prosecution of an inquiry, especially under a mistaken impression, would not raise a case of election, or amount to a waiver of a tort. This is all that the facts alleged disclose. They disclose that, at the time of the Decree, the estate was supposed to be irrecoverable, and that the Court, in directing the inquiries, which it directed, acted on that impression. They do not disclose what has been done in the way of satisfaction under the Decree. The case alleged in this Suit is one of fraudulent misdealing with the property pledged. The case of *Hope* v. *Liddell*, 21 Beavan, p. 183, quoted by the Attorney-General, was not a case of fraud. The observations of Lord St. Leonards, quoted by the Master of the Rolls, relate to a *boná fide* purchaser for value, and to the proper mode of working out his equity against that of a Plaintiff whose property has been alienated by mistake.

The facts in the case of *Hope* v. *Liddell* differ widely from the alleged facts in the case under appeal; and the grounds on which that decision proceeded do not exist in this case, as it now appears. In the case of *Hope* v. *Liddell*, the original testator, Dr. Spencer, devised the lands in dispute to one Thompson, a trustee, on certain trusts. Thompson devised all his estates, by general words, to his sister, Grace Thompson. This devise was erroneously supposed to pass the trust estate, which really went by descent to the heir at law of the trustee. One of the *cestui que trusts* contracted to sell the estate to the Defendant Liddell. The sale was perfectly *boná fide* on both sides. The price was adequate, and was paid. It was paid by the purchaser into the hand of the *cestui que trust* by the direction of the supposed trustee, Grace Thompson. The purchaser was by the trust deed not required to see to the application of the purchase money. The Court said that if Grace Thompson had really been the devisee in trust, as she was supposed by all to be, the transaction could not have been impeached. The defect was the want of the legal estate. On the second question in the Cause, the Court found that the children, the

objects of the trust, had, with full knowledge of all the circumstances and of their rights, taken to the purchase money in lieu of the land. In this case, however, at the time of the decree in the Supreme Court, it was supposed that the land was gone irredeemably. In that state of belief there could have been no matters between which to choose. Afterwards, when it was discovered that the auction sale had been contrived under the Agreement of the 15th April, 1848, a new state of facts appeared. The matters between which to elect would then have been the land, and the full price the three lacs, not simply the auction price. Nothing appears further on the alleged facts, except that the inquiry before the Master went on; but that it might well do, subject to final correction and due adjustment. There is no ground therefore for applying the decision of *Hope* v. *Liddell* as an authority to govern this case in the present state of the facts.

The same cause which has induced their Lordships to refrain, in the earlier part of this Judgment, from expressing an opinion upon the law applicable to an unascertained state of facts, operates also here to induce reserve. Distinctions may exist between claims of this nature, founded on actual fraud by a combination between several wrongdoers, all liable to make satisfaction up to one complete satisfaction for the injury done, between whom there may be, *inter se*, no right to contribution, and remedies founded on contract, or converted by the choice of the sufferer into claims *ex contractu*; but, for the reasons already given, this subject cannot now be pursued further. Their Lordships will humbly recommend to Her Majesty that this Appeal be dismissed with costs.