Judgment of the Lords of the Judicial Committee of the Privy Council on the two (Consolidated) Appeals of the National Bank of Australasia v. *The United Hand-in-Hand and Band of Hope Company, Registered, and William Lakeland, from the Supreme Court of the Colony of Victoria; delivered* 14*th June* 1879.

Present:

Sir James W. Colville.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THE Company which is the first of the Respondents in this appeal, and which will, throughout this judgment, be designated as "the Company," was incorporated on the 18th of October 1866, under the provisions of a Colonial Statute, "the "Mining Companies Limited Liability Act, 1864," for the purpose of working certain mines at Ballarat. The National Bank of Australasia (the Appellant) which will hereafter be spoken of as "the Bank," had a branch at Ballarat, and were the bankers of the Company. In 1873 the then Directors of the Company caused to be executed under its common seal two securities in favour of the Bank. The first of these was an indenture bearing date the 22nd of February 1873, which, after reciting a resolution of the shareholders of the Company empowering the Directors to borrow money not exceeding 20,000*l*., and an agreement between the Directors, purporting to act in pursuance of the powers given to them by that

resolution, and the Bank for an advance of 10,000*l.*, and for having the repayment of that advance with all further sums in which the Company might thereafter become indebted to the Bank, with interest at the rate of 7 per centum per annum, secured in manner therein-after appearing, and also by an assignment by way of mortgage of the leasehold property of the Company bearing even date therewith, assigned, by way of mortgage, the plant and machinery thereby specified. This deed fixed no time for the repayment of the sums secured, but contained a power of sale, expressed in the fullest terms, which the Bank was to be at liberty to exercise if the Company should make default in payment after service upon it of a demand in writing under the hand of the manager or acting manager of the Ballarat branch of the Bank.

The second security, being the further security mentioned in the indenture of the 22nd of February, was not executed until the 11th of March in the same year. It was an instrument of mortgage of the leasehold estate therein described of which the Company was the registered proprietor under the provisions of "the Transfer of "Land Statute," otherwise known as Act No. 301; and it was, with one variation that will be hereafter noticed, in the form prescribed for mortgages by that statute, and was duly registered on the 16th April 1873. The property comprised therein will be henceforth called "the mine."

In 1876 the Company instituted against the Bank and the Respondent Lakeland, a purchaser from the Bank of the mortgaged property, a suit of which the nature will hereafter be considered. On the 6th of December in that year Mr. Justice Molesworth made an interlocutory decree which, amongst other things, directed an account to be taken against the Bank as mortgagees in possession. The Full Bench of the Supreme Court of

Victoria affirmed, with some slight variations, the decree of Mr. Justice Molesworth by a decree, dated the 3rd of May 1877. Against this last decree the Bank obtained leave to appeal on the 16th of May in that year. That appeal is the first of those of which their Lordships have now to dispose. Pending it, the accounts directed by the decree were taken in the Master's office, and on the 9th of August 1878 an order on further directions was made by Mr. Justice Molesworth, which on appeal was affirmed by the Full Court by its order of the 30th of the following month. The second appeal to Her Majesty is against this last order.

The two appeals, though heard together, will be considered separately. The first and principal objection taken to the interlocutory decree is that inasmuch as the Company, by its Bill, impeached the validity of the mortgage securities which the Court affirmed, no decree ought to have been made in the suit except one of dismissal without prejudice to the Plaintiff's right to bring a regular suit for redemption. In support of this contention the learned Counsel for the Bank relied upon the rule of Courts of Equity to this effect, which they insisted was established by the case of Troughton *v.* Binks, 6 Ves. 573, Martinez *v.* Cooper, 2 Russ. 198, Gordon *v.* Horsfall, 5 Moore's P. C. C., 393, Inman *v.* Waring, 3 Degex and Smale, 729, Johnson *v.* Fesenmeyer, 25 Beav., 1858, and The Crenver Mining Company *v.* Willyams, 35 Beav., 353.

Their Lordships do not dispute the authority of these cases, but conceive that the present is distinguishable from them, and does not fall within the somewhat strict and technical rule affirmed and enforced in them. It will be found in all of them, if examined, that whilst on the one hand the Plaintiff impeached the mortgage securities,

the Defendant on the other insisted on his rights as mortgagee and on nothing more; and that the relation of mortgagor and mortgagee having been established, the Court held that the Plaintiff could not be allowed to have a decree for redemption on a bill which disputed the existence of that relation, and contained no prayer for redemption. The rule is treated as a privilege incident to the character of mortgagee, which the Defendant had throughout admitted and insisted on. But what is the present case? The Bill, admitting the execution of the mortgages, insists that such execution was *ultra vires* the then Directors, and prays that they may be declared void as against the Company; but it also states, and impugns as fraudulent and void against the Company, a series of transactions the effect of which, if valid, would be to destroy the Company's right of redemption, and to convert the title of the Bank from a mortgage into an absolute title. The 28th paragraph moreover contains a direct statement that the sums advanced by the Bank upon the mortgages had been more than satisfied by the value of the gold obtained by them from the mine. And the bill prays, amongst other things, that all the impeached transactions may be declared void as against the Company; that possession of the mine, and of so much of the plant and machinery as remains in the possession or control of the Defendants, may be restored to the Company; and that an account may be taken of all gold, or the proceeds thereof, received by the Bank, or which, but for their wilful default, might have been received from the mine, and of the proceeds of any machinery and plant sold by the Defendants, and for payment of what may be found due on taking the account together with interest thereon, "the "Plaintiff offering and undertaking to pay or "allow to the Defendants all sums properly ex-

" pended by them respectively in the working of " the said mine, for the substantial benefit of the " property, and also *all other just credits;* and " that all proper and necessary accounts may be " taken, and all necessary directions given."

The Bank by its answer, not relying wholly on its title as unpaid mortgagee, with all the privileges as well as liabilities incident thereto, maintained the validity of the transactions subsequent to the mortgages which were impeached by the Bill; alleged that under the circumstances thereinbefore appearing it became absolutely entitled to the property comprised in the mortgages; submitted that it was not liable to account to the Company, or to any other person, for its dealings therewith, or for the proceeds of the sale of any of the said property; and denied that the Plaintiffs had any title to, or right, or interest in the property the subject of the suit, or the accounts thereby sought.

From this statement of the somewhat loose and informal pleadings in the cause, it plainly appears that the issues raised between the Company and the Bank were not merely mortgage or no mortgage, but further, whether, by means of its acts subsequent to the impeached mortgage the Bank had ceased to be mortgagees, and had become absolute owners. The Court was bound to try all those issues. The dismissal of the suit might have been taken to affirm the title set up by the Bank generally, or would at least have left its claim to more than a mere mortgage title, subject to redemption, open to future litigation. Again, if the Company, as the Court observed, failed to establish its right to have the mortgages set aside, but succeeded on all the other issues, the result was only to modify the relief prayed by the Bill, and it was obviously necessary to direct the accounts ancillary to that modification in order to ascertain whether, as alleged

by the Bill, the Bank's advances on the footing of the mortgages had been more than satisfied by their receipts, or whether there was still any balance due to them in respect of those advances. Their Lordships are therefore of opinion that the rule invoked does not apply to such a case as the present, and conceive that they are in some measure supported in that opinion by the cases of Montgomery *v.* Calland, 14 Sim., p. 70, and The Incorporated Society *v.* Richards, 1 Dr. and Warren, 158, which will be hereafter noticed with respect to the other questions raised at the hearing of these appeals. They prefer to rest their judgment on this point upon the distinction taken above, rather than upon the general principle upheld in Parker *v.* M'Kenna, L. R., 10 Ch., App. 96, The London Chartered Bank *v.* Lempiere, L. R., 4 P. C., 572, and Hilliard *v.* Eiffe, L. R., 7 E. and I. A., 39, because those decisions relate to what should be done on the failure of the Plaintiff to prove allegations of fraud in general cases, whereas the rule invoked by the Bank in this case is one based upon the relation of mortgagor and mortgagee. The principle, however, of these decisions, so far as it is applicable to this case, is in favour of the Company.

Assuming, then, that the Bill ought not to have been dismissed on the ground suggested, their Lordships have to consider whether the questions determined in favour of the Company were correctly so determined, and whether the decree based on such findings was incorrect either in substance or in form.

Little, if anything, was urged at the Bar by way of argument to show that the declarations of this decree touching the transactions subsequent to the execution of the mortgages were incorrect.

The first of these transactions is the execu-

tion sale to Cuthbert in trust for the Bank on the 6th of August 1874, which is the root of the title set up by the Bank to an absolute interest in the mortgaged property. The facts proved as to this were the following. In the preceding month of July the Company, being indebted to the Bank in the sum of 15,384*l.*, and being otherwise, as it would seem, in an unprosperous condition, a scheme was set on foot for the formation of a new Company, for the issue of new shares, the proceeds whereof were to be applied partly in reduction of the debt to the Bank, and for vesting the property, subject to the mortgage, in this new Company. This, of course, could not be legitimately effected except with the consent of the requisite number of shareholders ascertained by proceedings duly had under the provisions of the Deed of Association of the Company. No such proceedings were had. The course of action adopted was to cause the Company's interest in the mortgaged premises to be seized and sold in execution in a collusive action, the proceedings wherein were previously arranged between the then Directors of the Company and their solicitor, and the manager (Robson) and the solicitor (Cuthbert) of the Bank, the purchaser at the execution being Cuthbert, as trustee for the Bank. One reason why the Bank thus became purchaser seems to have been the apprehension that any stranger who purchased might question the validity of the mortgages. The Bank, through Cuthbert, afterwards transferred the interest purchased at the execution sale to trustees for the new Company, receiving from the latter the sum of 3,400*l.* in reduction of the balance due upon the mortgage.

It is clear that by these collusive proceedings the Bank could obtain no good title against the

Company, and that the Supreme Court of Victoria was right in so declaring. But it is equally clear (and this is material to one question raised touching the form of the decree) that, although the ultimate object of the contrivance was to substitute the new for the old Company as mortgagors, with a right of redemption, the effect of the proceedings, if valid, would have been to vest the interest of the old Company, *i.e.*, the equity of redemption, in the Bank between the date of the execution sale and that of the subsequent transfer to the new Company, and to make them absolute owners of the mortgaged premises during that period. That this has been the view of its rights taken by the Bank is shown by the third of its grounds of appeal from Mr. Justice Molesworth to the Full Bench of the Supreme Court of Victoria, and by the first of the "reasons" of its case in this appeal.

The next material act of the Bank was the issue of the notice of the 10th of February 1875 (the terms and effect of which will be afterwards considered). This was somewhat inconsistently served upon the old as well as upon the new Company.

Then came the proceedings of the 5th of March 1875, under which the mortgaged premises were put up for sale, as under the powers of sale contained in the indenture of assignment and instrument of mortgage, and knocked down to the Messrs. Davey. This transaction has also been declared by the decree to be void as against the Company. A question has been raised whether it was an actual sale, or a mere buying in of the property put up for sale. In neither view can it have had any effect on the right of the Company. On the second hypothesis it would necessarily leave the rights of all parties

as they were; on the first, the sale would be impeachable by the Company, on the ground that the Daveys were merely nominal purchasers on behalf of the Bank, who, as mortgagees selling under their power of sale, could not sell to themselves.

The last and most important transaction to be considered is the sale to Lakeland, both of the plant and machinery and of the mine, for one lump sum of 6,000*l.*, under the memorandum of agreement of the 15th of September 1875. Mr. Justice Molesworth held that this sale was unwarranted as between the Company and the Bank; but as between the Company and Lakeland was valid as to the plant and machinery, but not as to the mine. The Full Court, however (and, there being no cross appeal, its decision on this point must be accepted as final), held that, as between all parties, the sale was valid as to the plant and machinery, but not as to the mine. The question therefore is reduced to that of the validity of the sale of the mine.

Mr. Justice Molesworth, being doubtless more familiar than we are here with the provisions of "The Transfer of Lands Statute" and their application, summarily disposed of this question by saying "I do not think the Bank effectually sold "Lakeland the mining lease. It could only "make title under 301, and did not." This point, however, having been raised at the Bar with some distinctness, at least in Mr. Southgate's reply, their Lordships will deal with it more in detail.

It is not immaterial to consider in what character the Bank was dealing with Lakeland in this transaction. On the face of the agreement of the 15th of September 1875, they do not purport to be acting as mortgagees exercising a power of sale. According to their case, they were then the absolute owners of

the mine, inasmuch as whatever right of redemption had existed in the old Company had been extinguished by the sale to Cuthbert in 1874, and whatever right of redemption had ever existed in the new Company had been extinguished by the execution proceedings taken in March 1875 against that Company (which thenceforth disappeared from the scene), and by the subsequent assignment from Hardy to the Bank. It is hardly necessary to observe that a sale of the mine by the Bank in the character of absolute owners, which, as between them and the Company, they did not possess, could not pass a good title against the Company.

If, however, Lakeland, to use Mr. J. Molesworth's expression, is "entitled to the benefit "of all the muddled titles and powers which the "Bank had to convey to him," and the sale is to be treated as made by the Bank in exercise of the power given by the instrument of mortgage, the transaction is impeachable upon other grounds. The Company was the registered owner of the mine under the provisions of "The Transfer of Land Statute;" and the mortgage was made under and subject to the provisions of the 83rd and following sections of that Act, and was duly registered thereunder. The instrument itself is in the form set forth in the 12th schedule to the Act, except that it contains, as that form permits, a special covenant or agreement, which will be hereafter considered. Hence the only way in which the mortgagee could extinguish the rights of the mortgagor in the mine was by foreclosure, under the 31 Vict., No. 317 (of which there is no question here), or by a sale under the 84th, 85th, and 87th sections of "The Transfer of Land Act." The 84th section provides that if the mortgagor shall make default in payment of the principal sum or interest, and such default

shall be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee may serve on the mortgagor, in the manner therein specified, notice in writing to pay the money owing on the mortgage. The 85th section provides that if such default shall continue for one month after the service of such notice, or for such other period as may in such mortgage be for that purpose fixed, the mortgagee may sell the land, giving him ample powers and discretion as to the mode of sale, and providing that no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale. The 87th section provides that, upon *the registration* of any transfer signed by a mortgagee for the purpose of such sale as aforesaid, the estate and interest of the mortgagor in the land therein described at the time of the registration of the mortgage shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, &c.

The special clause in the instrument of mortgage was to the effect that, notwithstanding anything contained in the Land Transfer Act, it should be lawful for the Bank, in the event of default being made in the payment of the principal money and interest secured "on such "demand being made as aforesaid," immediately to serve such notice of demand as aforesaid in the manner prescribed by the 84th section of the Statute on the Company, and, after the expiration of 14 days from the service of the notice of demand, to sell the land in pursuance of the powers in that behalf vested in the mortgagee under the 85th section of the Statute.

It has been argued that the demand of the

10th of February 1875 was the only notice of demand which, under this clause, was requisite in order to support a sale made 14 days after its service in pursuance of the statutory power. The clause is not very clearly worded, but their Lordships cannot agree in this construction of it. A demand was necessary in order to fix the time of payment. Until its service there could be no default, and it may be further remarked that the demand actually served makes no reference to the statutory mortgage of the mine, but merely specifies, as the consequence of the failure to make payment forthwith, that the Bank will proceed to exercise all or such of the powers contained in the bill of sale (of the chattels) as it shall see fit. The clause in question seems to their Lordships expressly to require service of some notice of demand to be made *after* default in payment. It may qualify the 84th section by allowing that notice of demand to be served immediately instead of "one month" after default, and the 85th section by allowing the sale to be made 14 days instead of one month after service of such notice, but it does no more. It does not deprive the mortgagor of the right to have a notice of demand served upon him, after he is in default, as a necessary preliminary to a sale under the statutory power. From a case recently before their Lordships (Campbell *v.* The Commercial Bank of Sydney), which arose upon similar provisions in a New South Wales Act, it may be inferred that, upon an application to complete the title of the purchaser by registration under the 87th section an objection on the ground of the failure to serve a proper notice of demand might, and probably would, have been taken by the Registrar. Again, it follows from both the 42nd and the 87th sections of the Act under consideration that, whether the transaction

with Lakeland be regarded as a sale by absolute owners or as one by mortgagees under the statutory power, no interest in the mine could effectually pass to the purchaser until registration, and consequently that the agreement of the 15th of September 1875 was a mere agreement for sale which, whatever equities it created between the Bank and Lakeland, left the prior equity of the Company untouched.

Their Lordships have now to deal with the particular objections taken to the form of the decree. In order to estimate the weight of these, it will be well to consider what was the general nature of the decree to be made in a suit so framed, and upon the facts so found. The suit was in the nature of an equitable ejectment, in which each party claimed an absolute interest in the property, for the profits of which the Bill sought an account. The Court, taking an intermediate view of the rights of the parties, found that the relation of mortgagor and mortgagee originally subsisted between the parties, and had never been effectively determined; that the transactions on which the Bank relied as making their title absolute were void against the Company; that consequently it was necessary to take an account of what, if anything, remained due upon the mortgage, and to ascertain whether, as alleged by the Company, the Bank's charge had been satisfied when the Bill was filed.

To such a state of things the observations of Lord St. Leonards, in the case of The Incorporated Society *v.* Richards, 1 Drury and Warren, 334, apply. When pressed to give the Defendants the advantages of a mortgagee in an ordinary suit for redemption, he said, "This is a peculiar "case, and cannot be treated as the ordinary "case between mortgagee and mortgagor. Here "you set up a title adverse to the owner; and "when a creditor denies his character as such,

" and claims as owner, I cannot allow him to " fall back on his original character of creditor, " as if he had never departed from it. I will " never allow a party, who has put the owner at " arm's length, to turn round, when defeated, " and claim all the benefits attached to the " character of a fair creditor."

The particular objections to the form of the interlocutory decree will now be considered in detail. The first was that it charges the Bank as mortgagees in possession from the 6th of August 1874, the date when Cuthbert took possession of the mine. This objection was but faintly pressed, since it is obviously for the interest of the Bank that the account should cover the period between that date and February 1875, when the Bank resumed actual possession, inasmuch as the yield of the mine whilst the new Company worked it was worth only 7*l.* 19*s.*, whilst the sums allowed for disbursements during the same period, and for which the Bank got credit in account, amount to 4,256*l.* 5*s.* 6*d.* In any case, however, the direction appears to their Lordships to be correct, because it is consistent with the facts established, and with the claim of the Bank to an absolute title in the mine as against the Company from the date of the Sheriff's sale to Cuthbert.

The second and third objections were that the decree erroneously treats the Bank as chargeable with the value of the gold obtained, 1st by the new Company, and 2ndly by Lakeland. Their Lordships are of opinion that the Bank was properly so treated. As mortgagees in possession they were admittedly accountable, not only for their actual receipts, but for what, but for their wilful default, they might have received. And it appears to their Lordships that whatever was received by those whom it has been found the Bank put into possession without just title, and in deroga-

tion of the Company's rights, has correctly been held to fall within this category.

Another objection taken to the decree was that, as varied by the Full Bench, it made the Bank chargeable with interest on the principal moneys for which it was held accountable. And the learned Counsel for the Bank relied much upon the general rule affirmed in Nelson *v.* Booth, 3 Degex and Jones, 119, to the effect that a mortgagee in possession is not chargeable with interest on his receipts if, when he took possession, an arrear of interest was due to him. This, however, as has been shown, is not an ordinary redemption suit, and the before-cited case of The Incorporated Society *v.* Richards is a clear authority that in an exceptional case like this the Defendant cannot claim the immunities of an ordinary mortgagee. There Lord St. Leonards ordered the account to be taken with annual rests. Such a direction, though more usual, is in terms less favourable to the Defendant than that contained in the decree under appeal, which amounts only to one that interest be allowed on both sides of the account. That it was competent to the Court, in the circumstances, to give such a direction their Lordships entertain no doubt. The question whether the Master has correctly calculated interest under that direction was one which could only be raised on an exception to his report, and the Bank filed no exceptions thereto. Their Lordships may, however, remark that he seems to have acted correctly in allowing compound interest with half yearly rests on the mortgage debt, that debt being the balance of a current banking account kept in that way; and that, if the interest was to be so calculated on one side of the account, it ought, by parity of reason, to be calculated in the same way on the other side. Whether the Bank ought to have been charged with

compound interest on the balance found due from it to the Company on the 31st of March 1876 after that date is, perhaps, a question which might have been successfully raised by an exception to the Report. But it was not so raised. Another objection taken was that the interlocutory decree, instead of directing, as in an ordinary redemption suit, the taxation of the Bank's costs, and the addition of the certified amount of them to the amount due for principal and interest on the mortgage, reserved the consideration of them until after the taking of the account. It is sufficient on this to say that in a suit of this character such a reservation was, in their Lordships' judgment, within the discretion of the Court, and consistent with usual practice. Whether the Court, under the reservation, was right in making the order as to costs which it made on further direction, is a question which will be considered on the other appeal. That the costs of the first appeal to the Full Court were within the discretion of that Court their Lordships have no doubt. Nor would they see any grounds for impeaching the soundness of the particular exercise of that discretion were it proper to entertain an appeal on that ground.

An objection on which their Lordships have felt greater difficulty is that taken to the direction in the decree, as finally drawn up, that the Bank should be charged with " what, but for " its wilful negligence and default, would have " been the clear proceeds of the sale of the said " plant and machinery."

The Bill, which is loosely drawn, made no special case as to the sale of the plant and machinery at an undervalue, otherwise than by alleging in the 35th paragraph that the sum of 6,000*l.* was considerably less than the value of the *mine and property* sold to Lakeland, as the Bank well knew, and that a larger sum had been,

previously to the sale to Lakeland, offered for the said property; and as to the plant and machinery prayed only for an account "of the proceeds of "any machinery or plant sold by the Defendants "or either of them;" saying nothing about negligience or wilful default.

Some evidence was, however, given at the hearing touching an offer of 8,000*l.* for mine and plant, and the value of the latter; and Mr. Justice Molesworth, coming to the conclusion that the whole of the transaction with Lakeland was fraudulent and void as against the Company, decreed that the Bank should be charged "with "the diminution of the value of the mining plant "and machinery caused by its selling in excess "of its replacing; and with the full value of the "mining plant and machinery sold to Lakeland." His decree, therefore, so far as it related to the plant sold to Lakeland, was consistent with his finding; and it cannot be said that there was not some evidence to support both. The difficulty, however, arises on the decree as modified by the Full Court. Their judgment says, on this point, "We think, however, that the decree must be "varied. We consider that the sale of the chat-"tels was not unwarranted, and that the Bank "ought not to be charged with the value of the "plant, &c.;" and, after dealing with the notice of demand and its effect, adds, "the declaration "that the sale to Lakeland was unwarranted as "against the Plaintiffs, and that the Bank should "be charged with the diminution in value of the "mining plant and machinery comprised in the "mortgage, must both be omitted, but the Bank "must be charged with what, but for wilful "negligence and default, would have been the "clear proceeds of the sale of the plant and "machinery." And the decree was varied accordingly. At first sight the first passage cited from this judgment seems to be inconsistent with

what follows, and with the decree; but upon consideration their Lordships are of opinion that the words, "the Bank ought not to be charged "with the value of the plant, &c.," must be taken to refer to the higher value of the plant and machinery before the diminution of that value by the cause contemplated by Mr. Justice Molesworth, and that the learned Judges did not thereby intend to overrule Mr. Justice Molesworth's conclusion that the plant sold to Lakeland was sold for less than its true value.

There was no *constat* of what was actually received by the Bank from Lakeland in respect of the plant, one lump sum of 6,000*l.* having been paid for both mine and plant, and some inquiry on this point was, therefore, necessary. If the Court were satisfied that the price paid for both subjects was a fair one, the proper inquiry was, of course, how much of the 6,000*l.* was attributable to the price of the mine, and how much to the price of the plant. On the other hand, if it had grounds for supposing that the plant had been sold at an undervalue owing to the want of due care and diligence, the ordinary reference to the Master would be to charge the Defendants with what, but for their wilful negligence and default, might have been received. The full Court appears to have corrected the judgment and decree of Mr. Justice Molesworth by substituting this direction for his direction to charge the Bank with the full value of the plant and machinery; a change in favour of the Defendants.

Upon the whole, their Lordships have come to the conclusion that the Full Court, as well as Mr. Justice Molesworth, had sufficient grounds for holding that the plant might have been sold for less than could have been obtained for it, regard being had to the 35th paragraph of the Bill, to the evidence in the cause, and to the

conduct of the Bank in selling for one sum that which they had a right to sell with that which they had no right to sell. They are, therefore, of opinion that the appeal against the interlocutory decree wholly fails.

Little need be said on the second appeal. It has already been remarked that, if the interlocutory decree is right, no question can be raised as to the accounts taken under it, inasmuch as the Bank filed no exception to the Master's report. The case is still stronger against the Bank on this point, for it appears from Mr. Justice Molesworth's judgment, at page 240 of the record, that the Plaintiffs having filed exceptions, of which some were allowed, the Defendants consented that instead of sending the case back to the Master, the Court should draw up an order as of the 22nd of July 1878, fixing the amount due from the Bank at 6,815*l.* 11*s.* The only question that remained was, what was to be done as to the costs of the suit. Now not only had the Bank set up, and failed to prove, a title to an absolute interest in the property, not only had it sought to destroy the right of its mortgagor by a series of very questionable transactions, but it had then been found to have been overpaid, in its character of mortgagee, when the Bill was filed. These circumstances were amply sufficient to deprive it of the ordinary right of a mortgagee to the costs of suit, and to bring the question by whom the costs were to be borne within the discretion of the Court. Their Lordships can see no ground for interfering, contrary to the ordinary practice of this tribunal, with that discretion, and must therefore humbly advise Her Majesty to affirm the decree of the 3rd of May 1877, and the decretal order of the 30th of September 1878, and to dismiss these appeals with costs.

Printed at India Office, 18/6/79.—(100.)