Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Levy v. Tuckett and others, from the High Court of Chancery of the Island of Jamaica; delivered 31st January, 1871.

Present:—

Lord Cairns.
Sir James W. Colvile.
The Judge of the High Court of Admiralty.

THE first question in this case is one depending more upon the construction of the Will of the testator than upon the solution of any dispute as to the general rule of law. Where the owner of an estate in the West Indies, being the absolute owner of the estate, appoints a consignee, that consignee, contrary to the ordinary rule between Principal and Agent, is held to have a lien for his advances and charges upon the corpus of the estate. Further than this, where a consignee is appointed by the owner of an estate, or by the Court of Chancery, and where there are incumbrancers upon the estate who stand by, and either acquiesce in, or do not object to that appointment, the lien of the consignee upon the corpus of the estate may, under those circumstances, be held to have priority to the incumbrance or charge of the persons who being thus aware of his appointment acquiesce in it, or do not object to it.

Where, however, the appointment of the consignee is made, not by the Court, and not by the absolute owner of the property, but by persons who stand in a fiduciary position, such as executors or trustees, the right of the consignee to his lien will depend upon the right of those executors or trustees

to cultivate and manage the estate, to preserve the estate in specie, and, incidental to that preservation, to take those steps necessary for cultivating the estate, including the appointment of a consignee.

These principles have been well settled by the cases which were referred to at the Bar, and it is unnecessary to consider the facts of those cases more minutely.

The Will of the testator, in the present case, is dated the 1st of November, 1850. By that Will the testator appointed as executors his widow and the Respondent William Berry. His widow and the Respondent William Berry being thus in the position of executors and trustees, it is the extent and limit of their power over the estate which have to be ascertained.

The general scope of the Will, without at present reading in detail the provisions of it, appears to be this. The testator had, at the time of making the Will, a sugar estate, or plantation, originally consisting of various parts, but cultivated as a whole under the name of the Lyssons Estate. It was properly pointed out to us by Mr. Mackeson, that although the testator afterwards acquired some additional property, called Mount Ephraim and Montpelier, his real estate, at the time of making his Will, consisted of the plantation already referred to—the Lyssons Plantation. He appears by his Will to have considered that plantation of the value of upwards of £6000. He does not seem to have entertained any idea of preserving it in his family for the enjoyment of his children, for he has provided that his children should be sent to England, educated there, and taught some useful trade or profession. He appears to have intended to terminate the connection of his family with the Island, and to have desired the conversion, at some time or other, of his property into money, to be divided among his family.

The first clause of his Will runs in these words: "I charge all my real and personal estate with the "discharge and payment of all my just debts, funeral expenses, legacies, and bequests, as hereinafter mentioned. I direct my executors and "executrix to sell and dispose of, to the best advantage, and as soon after my death as the matter "can be fully and advantageously arranged, such "part of Lyssons estate as extends from the Retreat

"line on the Morant Bay Road westward to the big "grass piece on Mr. Lundy's line, including all the "north side of the estate, to the boundary of Mount "Alta on the Mount Ephraim line; and I leave it "to the discretion of my executors and executrix "whether they include Quashie Wood with the "estate for sale or otherwise."

There is here, therefore, a direction to sell, apparently in one lot, the whole of the estate which is thus described. The sale is to take place as soon after the testator's death as the matter can be fully and advantageously arranged. And although we have not any map showing precise boundaries of that which was to be sold, it appears from the manner in which it is spoken of to be, at all events, a considerable part of the estate, and in substance to include all that the testator at that time thought he had to dispose of, except what might lie below or south of the line which he has thus drawn.

The second clause proceeds thus:—"I desire and "direct my executors and executrix to place the "proceeds of the said estate (except as before ex-"cepted) in the Treasury of this Island, in trust for "my dear children, share and share alike, and pay-"able to them or each of them on attaining the age "of twenty-one years." Now their Lordships have no hesitation in saying that this second clause appears to them to point to the division of the corpus which was to arise from the sale directed by the first clause in the Will; and that the words "except as before excepted," although, perhaps, not the best expression that could have been used, point, according to a fair construction, to that portion of the estate, be it large or small, which, lying below or south of the line drawn in the first clause, was, therefore, to be excepted from the operation of the first clause.

The third clause runs thus:—"I further direct "that the interest accruing from this money, or "such part thereof as may be necessary, shall be "taken and used in the most advantageous way for "the education and maintenance of my dear "children." This sentence is not without its importance as showing that the money spoken of immediately before is corpus, and that this is the manner in which the interest arising from that corpus was to be applied. "Secondly, I give and

"bequeath in trust to my executrix and executors "such other part of Lyssons estate, extending from "Mr. Lundy's (M'Cullock) grass piece westward to "Brown's Gut, and known as the Morant Bay Run, "for the purpose of selling in small lots from time "to time, as advantageous opportunities may offer, "save and except thirty acres, which I give and "bequeath to my dear wife." This appears to their Lordships clearly to point to a part of the estate which, not being part and parcel of the sugar plantation as a commercial concern, might be treated as outlying, and be the subject of beneficial sale in small lots.

The fifth clause is in these words:—"I direct "and request my executors and executrix to place "the proceeds of the sales of this land in the Island "Treasury at interest, for the benefit of my children, "as previously directed to be done with the pro- "ceeds of Lyssons estate or sugar plantation."

Their Lordships consider that in the clauses which I have read there is a complete and perfect disposition of the Lyssons estate. Part is to be sold as one lot, and that is obviously the sugar plantation. The proceeds of it are to be put in the Island Treasury. The other part is to be sold in smaller lots, as occasions may arise; and the proceeds of those smaller lots are also to be put in the same Treasury for the same purpose.

The ninth clause runs thus:—"As my real and "personal estate is charged with the payment of "all my just debts and legacies, it is the over- "plus which I direct to be placed in the Island "Treasury." And the tenth clause is: "I con- "sider Lyssons estate (exclusive of Quashie Wood "and the Morant Bay Run), together with the live "and dead stock, is worth upwards of six thousand "pounds."

It is to be observed that the Master has found by his report that the value of the estate of the testator, at his death, was £7000, so that the acquisitions made by him after the date of his Will, were probably not of considerable value.

Their Lordships, upon the whole, look upon this Will as containing a trust, not for the cultivation, not for the management, not for the preservation in specie of the estate, but a trust for its conversion and sale, and for the realization of a sum which,

after paying debts and expenses, was to be placed in the treasury; and they look upon the Will as imposing upon the executors the duty, not of recklessly or carelessly forcing the estate upon the market, but of endeavouring, *bonâ fide*, at the earliest period after the death of the testator, to effect a proper and judicious sale of the estate.

So far, therefore, as the power to appoint a consignee of the property, and to give to that consignee a lien upon the estate, would be derived from a trust for the cultivation and management of the estate, their Lordships are unable to find in this Will any authority which would give the consignee any such right.

Now, the position of matters at the death of the testator, which took place in 1856, was this. There had been a mortgage made in his lifetime to one Richard Atkinson, by a deed dated the 29th September, 1854. In that deed the widow, Mrs. Tuckett, had joined. She was separately examined for the purpose of binding her right to dower, and for the purpose of binding her right to a sum of £2000, which was her own separate property, which had been invested by her husband, the testator, in the purchase of this estate, and for which, therefore, she had a charge or lien upon the estate. The amount of this mortgage debt at the death of the testator was £1390. There were other debts due at the death of the testator, amounting in the whole, together with this mortgage, to £11,168. On the other hand, the assets of the testator consisted of his real property, which was valued by the Master at £7000, and of personal property amounting to £1291. The aggregate of the assets, therefore, was £8291, while the aggregate of the debts was £11,168. There was, therefore, a deficiency or an insolvency of the estate amounting to about £3000.

We have now to consider whether any reason has been assigned for postponing the sale of the estate, which was directed by the Will. It is not suggested in evidence, or in the pleadings, that any attempt to sell took place. It is not suggested that the approximate value named by the testator could not have been obtained for the property. It is not suggested that any valuation was made of the property for the purpose of sale, or that any circum-

stances existed at the death of the testator of a temporary character, after the passing away of which a sale might be more judiciously effected. The only information that we have as to the motives influencing those who adopted another course of management of the estate, is in the Affidavit of the Respondent Berry, at page 21. He says:—"The "aggregate amount of the debts so owing by the "said testator at the time of his death, exceeded "by a considerable sum the value of the whole real "and personal estate left by him, and the only "chance of eking out anything for the benefit of "his widow and family was by carrying on the cul- "tivation of the said Lyssons estate, for which "purpose it was necessary that the mortgage debt "of the said Richard Atkinson should be taken up, "and provision made for such further advances as "should from time to time be required for working "the estate. Had such estate been brought to a "sale on the death of the said James Tuckett, his "widow and children would have been thrown on "the world wholly unprovided for." Now, of course these are motives which are creditable in the highest degree to the humanity of the executor who makes this statement; but the statement which he makes in substance is nothing else than this,—that the estate of the testator was insolvent, that the execution of the trusts declared by the Will of the testator would have left his family unprovided for, and that contrary to, and in opposition to those trusts, the executors, of whom the widow was one, thought that a better arrangement might be made, and a better result produced, if the Will of the testator was departed from, and a course of management of the estate adopted which he never had contemplated, and never provided for.

The motive which led to this course of action may be in the highest degree creditable to the feelings of the executor; but, unfortunately, the statement that he here makes is that the acts which were done, were done in opposition to, and, I may add, in known opposition to the provisions and the wishes of the testator.

Accordingly no effort was made to sell the estate, and a course of management which contemplated the preservation of the estate unsold, was at once adopted. The firm of the present Appellant were

put into office as consignees in the first place without any deed, and in that office, for the few years following the death of the testator, they made advances, and a considerable sum in respect of those advances was due to them.

On the 29th of June, 1858, the old mortgage made to Atkinson was transferred to the Appellant's firm. The mortgage of Atkinson, on the face of it, does not stipulate for any precise rate of interest. On the transfer interest was stipulated to be paid at the rate of 9 per cent., and further payments of 1 per cent. as a bonus upon bills to raise the money due upon the mortgage, and of 5 per cent. commission were added by way of charge upon the estate.

Another deed was executed on the 30th of June, 1858. That was a fresh mortgage to the firm of the Appellants to secure to that firm their charges for commission and expenditure as consignees. It provided for a mode of accounting which virtually would involve compound interest. There was an agreement contained in it on the part of the executors to consign all the produce of the estate to the firm of the Appellants for sale, and the deed in every part of it, and more especially the provisions to which I have referred, contained no limit of time with regard to its operation, but was in fact a deed on the face of it intended to continue without limit. There was a limit with regard to the amount of the advances to be secured of £4000, but by a further deed executed on the 18th of October, 1861, this limit was again removed, and the security was made to appear as a security to the firm of the Appellant without any limit in amount and without any limit in point of time.

The result now is that under this deed the Appellant claims to stand as an Incumbrancer for an expenditure amounting now to upwards of £14,000, including charges and interest.

Now it is hardly necessary, after what has been already said, to add that their Lordships consider the stipulations in these deeds, the appointment of the consignee, the attempt to give to the consignee a charge upon the estate simply as consignee, clearly unwarranted by the terms of the Will, and they are of opinion that the deeds in that character cannot have any operation. Of course the assignment

of the mortgage originally made to Richard Atkinson is perfectly good, and everything which is due upon that mortgage the Appellant is entitled to as an Incumbrancer, standing in the place of Atkinson.

Their Lordships are further of opinion that the Appellant is entitled to stand in the position of the executors; and that the estate having *de facto* been managed and cultivated, and the profits having been received where there were profits, for the benefit of the estate, the Appellant is entitled out of the proceeds of the estate to have an account taken, the terms of which will be presently read, securing to him the repayment, as far as those proceeds will extend, of all that in point of fact has been properly expended in the management and cultivation of the estate or in paying the debts of the testator.

So far, in substance, their Lordships concur with the opinion of the Vice-Chancellor, although they regret that the opinion of the Vice-Chancellor in the Island was not followed by those consequential directions which were absolutely necessary, in order to give to the Appellant what in justice he was entitled to, at the same time that full effect to the deeds was refused.

We have now to turn to the remaining question in the case, which is a question arising between the Appellant, on the one hand, and the widow, the executrix, and William Berry, the executor, on the other hand. I have already said that the widow was entitled to a sum of £2000 by way of charge upon the estate. It is suggested, and appears not to be denied, that she also has claims of dower upon the estate. It is found by the Master that William Berry is entitled to a debt due from the testator's estate, upwards of £2000, part of which was due from the testator in his lifetime, part of which arises from debts of the testator paid by William Berry since his death.

It is contended by the Appellant that the Deeds to which I have referred, appointing the Appellant's firm consignees of the estate, having been executed by the widow and by William Berry, and that they being parties to the contract contained in those Deeds, the Appellant is entitled, out of the proceeds of the estate, to whatever may be found coming to him, in priority, at all events, to the widow and to William Berry, and that they cannot set up their

claims upon the estate as preferential to those of the Appellant. No notice was taken of this contention in the Decree of the Court below, although directions upon the subject were asked for, and it falls to their Lordships now to express an opinion and to give proper directions upon the point.

The case appears to their Lordships to be a very simple one in this respect. As regards the widow, in the mortgage to Atkinson, she had joined, as has been already said, for the express purpose of postponing any right she might have with regard to this £2000, and with regard to her dower. The Deeds subsequently executed to the Appellant's firm were, in reality, in the nature of further charges, and it would have been matter of some surprise if a different arrangement had been made with regard to the claims of the widow in those further Deeds from the arrangement made in the mortgage to Atkinson.

It is, however, to be observed, in the first place, that there appears to have been another reason, and a very obvious one, for the absence in the Deeds afterwards executed of any stipulation restoring to the widow a priority which, in the case of Atkinson's mortgage, she had given up; because we find in the Deed of Consigneeship, at page 15 of the Supplemental Record, this provision is made. It is a Covenant by Fanny Tuckett and William Berry. They severally and respectively covenant with the firm of the Appellant "that they, the said Fanny "Tuckett and William Berry, have respectively "hitherto, since the Agreement for the advances "aforesaid was made and entered into and payments "have been made to them respectively thereunder, "duly appropriated and applied, and that they and "their respective heirs, executors, and administra- "tors, will respectively henceforth duly appropriate "and apply all moneys which they or either of "them have received or shall receive from the said "Saul Moss, Charles Levy, and Solomon Isaac "Leon, their executors, administrators, or assigns, "in pursuance of or under the security of these "presents, strictly and expressly to and for the "purposes and objects mentioned and contemplated "in and by the proviso or agreement in that respect "hereinbefore mentioned and declared, and in a due "course of administration as to the debts, mainte- "nance, annuities, and legacies, payable by the

"estate and under the Will of the said James "Tuckett, deceased."

Now under this clause it would have been competent for the widow and for Berry, having both of them preferential claims, to have applied moneys paid to them—and considerable sums were so paid by the firm of the Appellants—in satisfying those preferential claims which they possessed, if they had been minded to apply them in that way.

It is therefore quite conceivable and natural that the executors in that state of things would not be anxious for, while, on the other hand, the consignees would not tolerate, any provision which would retain a priority of charge on the part of the executors against the estate. However, the covenant which follows this appears to their Lordships to put the matter beyond all doubt.

The next Covenant is this, that they, the firm of the Appellants, "shall and do, in the first place, "apply the net moneys to arise and to be produced "from such sale or sales," that is, the produce, "(after paying or retaining and satisfying thereout "all the costs and charges for insurance, freight, or "carriage, and the usual charges for commission, "and the expenses of the said sale or sales) first, in "discharge of the debt which, for the time being, "shall be due and owing on the aforesaid account "current, secured by these presents, by carrying "such net proceeds at the respective days of pay- "ment or receipt thereof to the credit of the said "account current; and after all moneys due on such "account current shall have been fully paid and "satisfied, then that they do apply such net pro- "ceeds in payment of the interest at the rate of "£9 per centum per annum, as aforesaid, on the "debt secured by the said prior mortgage assigned "as aforesaid; and lastly, in payment of the said "principal sum of £1390. 2*s*., secured by the said "recited indenture of mortgage and assignment "thereof, until the said several moneys shall have "been fully paid and discharged, or otherwise satis- "fied, and, after full payment and satisfaction "thereof, shall pay any residue or surplus of the "said proceeds, if any, unto the said Fanny Tuckett "and William Berry, as executrix and executor as "aforesaid, their heirs, executors, administrators, "or assigns, or other the representatives of the said

"James Tuckett, to be held and applied as assets of "the said estate."

Their Lordships, therefore, find here a clear and distinct contract for a valuable consideration, between the widow and William Berry on the one hand, and the firm of the Appellants on the other, that the proceeds of the estate should be applied in a particular order, in which order, whatever might be the just and proper claims of the firm of the Appellants, either under this Deed or by virtue of their position as consignees, were to be satisfied, in the first instance, before any payment should be made to the executors.

Their Lordships, therefore, read the Deed as containing this contract, and, in consequence of that view of the contract, they are unable to doubt but that in the distribution of the proceeds of the estate, the claim, whatever it be, of the Appellants must first be satisfied.

Their Lordships, however, must add to this, that even if there were, as there is not, any doubt on the construction of the Deed, upon the principle of the authorities referred to upon the former part of the case, it would follow that in this instance the consignees having been appointed, and their appointment being perfectly well known to the executors and acquiesced in, any incumbrance which the executors possessed could not be set up in a manner to defeat the just right of the consignees; and whatever objection may be made, on the part of the infants or persons in remainder, to that appointment, it would be clear that no objection could be made on the part of the executors; and this equity, as against the executors, is surely not less strong when in place of merely acquiescing in the appointment they are found to be themselves the persons who made the appointment.

It was said, however, that the Deed contains a clause, that the widow and Berry were not to be personally answerable, in consequence of anything contained in the Deed. But this is not a question of personal liability. It is a question of the order and priority of the distribution of the assets of the testator.

It was said further, that the question now under consideration was one arising between Co-defendants, and that it could not be decided, either in

the suit in the Colony or upon this Appeal. Now, in the first place, with regard to the widow, her claim was stated expressly upon the pleadings in this case. Her claim for dower was mentioned in the plaint. She, in her answering affidavit, takes notice of that claim, and submits it to the decision of the Court. She insists on her right as an Incumbrancer for the £2000, and she submits further, that if any sales should be made, provision should be made in the sale for her dower. With regard to Berry, he states also his claim for the debt to which he was entitled in the answering affidavit he has put in.

There is everything, therefore, upon the face of the pleadings to raise the question. The question, moreover, is one which arises not upon the first hearing but upon further directions, and it is the familiar practice of the Court of Chancery to decide upon further directions questions between Co-defendants, where the decision of those questions occasions no injustice or surprise, and is convenient or necessary for the distribution of assets, or for the decision of the other questions which are raised between Plaintiff and Defendant in the case. One case, and one case only, might be suggested of hardship in such a course to the widow. It might be said that if the widow had any complaint to make of the Deeds to which she was thus a party, she might be desirous of taking proceedings to set aside those Deeds, as regards herself, or to be delivered from any equity which the execution of those Deeds might have created. Several years, however, have elapsed since the present suit was instituted. No proceedings whatever have been taken by way of cross-bill by the widow, and in point of fact nothing is suggested by her in her affidavit which appears to their Lordships to afford a foundation for filing a cross-bill in the cause.

They are, therefore, satisfied that it is according to the practice to determine, and that no injustice whatever is done in determining the question which has thus arisen in the present stage of this cause.

Their Lordships, therefore, finding that the Appellant is justified in his contest, that he has priority to the widow and to Berry, in the distribution of the proceeds of the estate, will humbly advise Her Majesty that for the Decree made in the Colony,

another Decree should be substituted, going into greater detail, and making provisions which could not be made in the Colony; and the form of that other Decree I now propose to read. If, on consideration by the Counsel upon either side, it should appear that there is any technical error in what I am going to read, I mean any error not involving the question of argument upon the merits, their Lordships will be glad to hear from the Counsel any observations they have to make upon that point during the day.

The decree that their Lordships propose to substitute for the decree of the Colony will run thus:—"Continue the receiver; let the real estate "of the testator, together with any cattle, plant, or "other personal property belonging to the estate of "the testator, and now being upon or used together "with the said real estate, be sold, with the appro- "bation of the Judge in the Colony, and at such "time, in such manner, and subject to such condi- "tions as he shall direct. Let all parties to the "suit concur in such sale as the Judge shall direct. "Take an account of what is due for principal, "interest, and costs, under and by virtue of the "mortgage made by the Indenture of 29th Septem- "ber, 1854, to Richard Atkinson, and declare that "the Appellant, as assignee of the said mortgage, "is entitled to be paid all that shall be found due "under the said mortgage, together with any costs "of the transfer thereof not already paid. Take an "account of all rents, produce, or profits, received "by the Appellant or his firm from the estates of "the testator in the pleadings mentioned. Also an "account of all sums paid by the Appellant or his "firm in discharge of debts of the testator, or of "charges or liens affecting the said estates, or paid "by him or them to the executors for the purpose of "discharging, and by the executors or either of them "applied in discharging the said debts, charges, or "liens; and also of all sums by the Appellant or his "firm properly expended, or paid, or advanced, to "the trustees and executors, or either of them, for "the purpose of being properly expended, and after- "wards by them, or either of them properly ex- "pended in managing, stocking, cultivating, or "supplying stores, utensils, or machinery, to the "said estates, or in shipping and disposing of the

"produce thereof, or in substantial repairs or per-
"manent improvements of the said estates. Com-
"pute interest on both sides of the said accounts
"from the end of each year, at the rate allowed by
"the Court in the Colony. Declare that the Ap-
"pellant is entitled to be paid out of the proceeds
"of the said estates what shall be found due to
"him on the balance of the said accounts, and that
"the deeds of the 29th and 30th June, 1858, and
"the 18th October, 1861, in so far as they pur-
"port to create a charge on the estates for any
"larger or other sum, are invalid. Continue the
"accounts directed by the first Decree, and take
"an account of all rents, profits, and moneys re-
"ceived by the trustees and executors, or either
"of them, from or in respect of the testator's real
"estates. Tax the Plaintiffs' costs in the Colony,
"and tax the costs, charges, and expenses of the
"Defendant's executors in the Colony (allowing
"one set of costs only), and tax the costs of the
"Appellant in the Colony; such taxation to be
"confined to the costs in the Colony heretofore
"incurred, and to take place at such time as the
"Judge shall direct. The said costs, charges, and
"expenses of the executors, and also any costs
"which may hereafter be awarded to them in the
"Colony, to be paid in the first instance out of any
"moneys found to be due from them, and, subject
"thereto, out of the proceeds of the sale, as here-
"inafter mentioned. Let the balances paid into
"Court by the receiver, and the proceeds of the
"sale hereinbefore directed, be applied in the manner
"and order following: first, in paying any sum
"due to the receiver; second, in paying any costs,
"charges, and expenses of the executors not other-
"wise satisfied; third, in paying the costs, taxed
"as aforesaid, and any future costs which may be
"awarded them in the Colony, of the Plaintiffs and
"the Appellant; fourth, in paying to the Appellant
"the sums found to be due to him under the ac-
"counts in that behalf hereinbefore directed; fifth,
"in paying to the widow, Frances Tuckett, the sum
"£2000 found due to her, and interest on the same,
"from the testator's death, and any sum which, on
"an inquiry to be made for that purpose, she may
"be found entitled to, and which may be allotted
"to her as the value of, or in lieu of, her dower;

"sixth, in paying to the Defendant, William Berry, "the sum of £ , found due to him by the "Master's Report, and interest on the same; "seventh, in paying the other debts found due by "the Master's report, and remaining unpaid, and "interest on the same, and, subject thereto, let "the residue, if any, be applied according to the "trusts of the testator's Will." And their Lordships propose to remit the case "with liberty to "any party to apply to the Judge to make any "addition to this Decree which may be necessarily "incidental thereto, or consequential thereon."

With regard to the costs of the Appeal, their Lordships are of opinion that, inasmuch as although the Appellant has obtained a substantial alteration in the decree, he has failed in one substantial purpose of his Appeal, there ought to be no costs upon either side.

The following memorandum was subsequently handed to the Registrar:—

"And by consent it is agreed between the par- "ties that an inquiry be made whether the parcel of "land next hereinafter mentioned formed part of the "lands referred to in the first paragraph of the tes- "tator's Will, as set out in the Record of proceed- "ings; and if it shall appear that the said parcel "of land did not form part of the lands referred to in "such first paragraph, then all parties who are *sui* "*juris* by their consent, at the bar consenting, and the "infant Respondents by their counsel not opposing, "direct a conveyance by all proper parties to be "settled by the Judge in the Colony if the parties "differ about the same, to the Appellant, of the "parcel of land in Morant Bay, consisting of 3 "acres and 10 poles mentioned in the affidavit of "Respondent William Berry, filed 17th May, 1854, "together with the wharf and buildings erected "thereon by the Appellants; and let the Appellant "give the testator's estate in his account credit for "the sum of £120, also mentioned in the said affi- "davit as the purchase price of such parcel of land. "And if it shall appear that the said parcel of land "does form part of the land referred to in such first "paragraph of the testator's Will, then in taking "the account hereinbefore directed, the Appellant "is to be allowed all moneys which it shall appear "he has *bonâ fide* expended upon or in respect of

"the said piece of land with interest as aforesaid."

This memorandum, having been signed by Counsel, will be added to the Decree which their Lordships propose humbly to recommend to Her Majesty.