SUPPLEMENT TO
CUST'S
WEST INDIAN ESTATES.

SUPPLEMENT

TO

A TREATISE

ON

THE WEST INDIAN INCUMBERED ESTATES ACTS,

WITH

REPORTS OF CASES

DECIDED SUBSEQUENTLY TO THE YEAR 1864.

BY

REGINALD JOHN CUST, Esq.,

OF LINCOLN'S INN, BARRISTER-AT-LAW, AND ASSISTANT COMMISSIONER.

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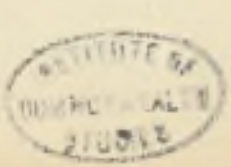

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PREFACE.

Since the publication of the 2nd Edition of this work, the Islands of Montserrat, Grenada, Nevis and Dominica have adopted the Incumbered Estates Acts, which are now in force in all the principal West Indian Colonies which are subject to the Laws of England, except Barbadoes.

By an Act passed in the Session of 1872, the jurisdiction of the Court has been continued until Parliament shall otherwise determine.

Several cases of importance have been decided by the Commissioners since the publication of the 2nd Edition of this work, and some of them have been from time to time reported in the Solicitor's Journal. As, however, they are not easily accessible in that form, and a desire has been expressed by gentlemen practising in the Court to have them in a more convenient form, a few of the more important cases have been

collected, and are contained in the following Appendix.

In February 1865, Mr. STONOR resigned the office of Chief Commissioner, and Sir FREDERIC ROGERS that of Assistant Commissioner; and by a Warrant of the Lords Commissioners of Her Majesty's Treasury, dated on the 17th of February 1865, JAMES FLEMING, Esquire, one of Her Majesty's Counsel, was appointed Chief Commissioner, and REGINALD JOHN CUST, Esquire, Barrister-at-Law, Assistant Commissioner, in addition to his office of Secretary of the Commission.

All the following Judgments have been delivered since Mr. FLEMING's appointment.

APPENDIX No. 2.

THE WEST INDIAN INCUMBERED ESTATES COURT.

THE LAST CONTINUANCE ACT, 1872.*

"An Act to continue the Appointment and Jurisdiction of the Commissioners for the Sale of Incumbered Estates in the West Indies."—35 Vict. Chap. IX.

WHEREAS by the Act of the seventeenth and eighteenth years of Her Majesty's reign, chapter one hundred and seventeen, intituled "An Act to facilitate the sale and transfer of Incumbered Estates in the West Indies," and the Act of the twenty-first and twenty-second years of Her Majesty's reign, chapter ninety-six, being an Act to amend the said first mentioned Act, the appointment and jurisdiction of the Commissioners for Sale of Incumbered Estates in the West Indies were made for limited periods which have expired:

And whereas their appointment and jurisdiction were continued by the Expiring Laws Continuance Act, 1870, until the thirty-first day of March one thousand eight hundred and seventy-two:

And whereas it is expedient that their appointment and jurisdiction should be continued until Parliament shall otherwise determine:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons,

* For the previous Acts see Appendix No. 1, pages 67, 89, 96 and 98.

in this present Parliament assembled, and by the authority of the same, as follows:

Office of Commissioners continued.

1. The offices of the Commissioners for Sale of Incumbered Estates in the West Indies, and all powers, jurisdiction, rights, and privileges pertaining thereto, shall continue and be in force until Parliament shall otherwise determine.

Restriction as to moneys provided by Parliament.

2. No moneys provided by Parliament shall be applicable to the payment of any salaries of the said Commissioners or of any officers connected with the said commission.

Proviso as to lapse of powers of Commissioners.

3. The appointment, jurisdiction, and powers of the said Commissioners shall be taken and deemed to have been for all intents and purposes in full force and effect from the thirty-first day of March one thousand eight hundred and seventy-two up to the time of the passing of this Act, as if such appointment and jurisdiction had been continued by the Expiring Laws Continuance Act, 1870, until the time of the passing of this Act.

LIST OF COLONIES

In which the West Indian Incumbered Estates Acts are in force, with the dates of the Orders in Council by which they were brought into operation, and of the Addresses of the Colonial Legislatures upon which such Orders were founded.

Names.	Date of Address.	Date of Order.
St. Vincent	15 July, 1856	2 February, 1857
Tobago	22 December, 1857	31 July, 1858
Virgin Islands	28 December, 1859	7 March, 1860
St. Christopher	December, 1859	26 March, 1860
Jamaica	4 March, 1861	26 June, 1861
Antigua	October, 1864	1 November, 1864
Montserrat	26 June, 1865	3 November, 1865
Grenada	18 July, 1866	10 November, 1866
Dominica	11 March, 1867	26 June, 1867
Nevis	March, 1867	26 June, 1867.

The Acts came in force in the year 1857, but no business was transacted until the following year. Only one estate, the Arnos Vale Estate in St. Vincent, was sold previously to the year 1862. Since the month of May in the latter year one hundred and fifty-four estates have been sold under the commission.

Eighteen estates have been sold in Saint Vincent, twenty-three in Tobago, six in St. Christopher, fifty-two in Jamaica, thirty-four in Antigua, ten in Montserrat, seven in Grenada, and five in Dominica.

About one-third part of the estates sold had been allowed to go out of cultivation and had become waste. Many other of the estates had been but partially cultivated. The total purchase moneys of estates sold amounted to the sum of £249,015.

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REPORTS OF CASES.

I.

WEST INDIAN INCUMBERED ESTATES COURT.

8, Park Street, Westminster, April 12, 1865.

(Before James Fleming, Esq., Q.C., and Reginald J. Cust, Esq., Commissioners.)

Re Sutherland and McLeod.
Ex parte Graham and Porter.

The Waterloo and Orange Hill Estates in St. Vincent were sold under an Order of the Court. A canal ran through those estates and through four adjoining estates, and a wharf on the sea-shore was appropriated and used for the benefit of the six estates. The expenses of the maintenance of the canal and of the wharf were charged rateably upon the six properties. At the time of the sale an arrear in respect of the rates charged upon Waterloo and Orange Hill was due from those estates. The Commissioners directed such arrears to be paid out of the purchase moneys.

Archibald Smith for petitioners.
W. Mackeson for claimants.

The Chief Commissioner said:—In deciding this case, I leave wholly untouched the question as to the liability running with the land, which was so fully and ably argued before me on the last hearing.

In my opinion the right to the use of the water and of the wharf was sold as well as the estates, and I consider the purchase money to represent the value of the right so sold, as well as the value of the estates.

The money claimed by Messrs. Graham and Porter

was expended by the other proprietors in maintaining the due flow of the stream through the property sold and in maintaining the wharf, and the expenditure has in fact preserved part of the property sold, and I think that the other proprietors might lawfully object to any use of the stream running through their lands or of the wharf, until they were repaid the portion of the moneys expended by them, and to which, according to the course previously pursued, the owner of the part of the stream sold was liable.

I am of opinion that, under the circumstances, the Court must protect the purchaser in the enjoyment of the rights which he has purchased, and against the demand which is made by this claim; and I consider the claim to be properly a charge upon the fund realized, and I therefore allow it. I understand that there is no dispute as to the amount. If there be, it must be referred to my learned colleague to determine the amount.

II.

WEST INDIAN INCUMBERED ESTATES COURT.

8, Park Street, Westminster, May 10, 1865.

(Before JAMES FLEMING, Esq., Q.C., and REGINALD J. CUST, Esq., Commissioners.)

Re SCOTT.
Ex parte HEAGAN.
Ex parte SHAND.

Practice — Transfer of proceedings — Opposition to sale.

The petitioner has a right to decide whether he will proceed in the Central Court or in the Local Court, and the proceedings will not be transferred except upon special grounds. The fact that an estate has been for many years administered by a receiver for the benefit of incumbrancers, and that the owner has no beneficial interest, is of itself a ground for sale.

In this case a conditional order for sale of an estate called "Donovans," in the island of Antigua had been made.

This estate formerly belonged to James Donovan, who died in 1811, having by his will devised it to his son, Richard Donovan, for life, with remainder (as events happened) to James Hancock Donovan for life, with an ultimate remainder (after certain limitations which failed) to Richard Donovan in fee.

Richard Donovan, by his will, devised the estate to his daughter, Caroline Scott, for life, with remainder to her first and other sons in tail.

Richard Donovan died in 1816, and James Hancock Donovan died about 1834; Caroline Scott died, leaving an eldest son, Honeywood Scott, who was the present owner.

On the death of Richard Donovan in 1816, a suit was instituted in the Island Court of Chancery on behalf of James Hancock Donovan (then an infant), and a receiver was appointed. Another suit was instituted in 1833 for the purpose of ascertaining the priorities of certain incumbrances affecting the estate, and much litigation took place, resulting in an appeal to the Privy Council. By an order of the Privy Council, made in 1839, it was declared that Messrs. Shand had a first charge on the estate for a sum exceeding £10,000, in priority to certain legatees under the will of James Donovan, who claimed legacies amounting to about £3700.

The estate had been in the hands of a receiver from 1816 to the present time, and the proceeds had been applied in keeping down the interest of the above charges, and in reducing to a certain extent the debt of Messrs. Shand, but the balance due in respect of that debt amounted to more than £5000, and the legacies were unpaid. Nothing had been received by any person claiming as owner for a great many years, the estate having been administered by the receiver for the benefit of the incumbrancers alone. In January, 1865, Messrs. Shand, the first incumbrancers, being desirous of obtaining payment of the principal of their debt, petitioned for a sale, and a conditional order was accordingly made.

Mr. Heagan, who claimed under one of the above

named legatees, thereupon filed a notice of opposition to the conditional order, on the ground that a sale would be unjust and inexpedient, and he also presented a petition under the 12th General Rule for the transfer of the proceedings to the Court of the Local Commission, and both the above matters now came on for hearing.

It was contended on behalf of Mr. Heagan, on the petition for transfer, that the legatees whom he represented resided in the island, and were unable to incur the expense of retaining agents or solicitors in England, and that, as Messrs. Shand were obliged to keep agents in the island, it could be no disadvantage to them to conduct the proceedings in the Local Court.

On the second question, the opposition to the conditional order, Mr. Heagan contended that there was no case for a sale, as the estate was, in favourable times, capable of "paying its way," *i. e.*, of keeping down the interest of the incumbrances, and that it had only failed to do so during the last three years, in consequence of the exceptional drought.

On behalf of Messrs. Shand it was urged on the first point that, as petitioners, they had a right to choose their own Court; and, on the second point, that they had a right to call for payment of their principal as well as their interest. If the present system were continued, the risk would be theirs, while the benefit (if any) would accrue to others. It appeared by the evidence that the expense of passing the receiver's accounts of this estate in the Island Court of Chancery amounted annually to £150, but that owing to some reform which had been introduced, it was hoped that in future it might be done for £90.

Waddy appeared for Mr. Heagan.

Archibald Smith appeared for Mr. Shand, the petitioner.

Mr. *Butt* (of the firm of Booty and Butt) appeared on behalf of Mr. Scott, the owner, and supported the conditional order. He also objected to a transfer of the proceedings.

Mr. Fleming, Q.C., said that the application to transfer the proceedings to the local Court must be refused with costs. There was no ground whatever for the application. The petitioner had a right to select the *forum* most convenient to himself, and had

besides a better right to do so than Mr. Heagan, who was a *puisne* incumbrancer. The principal matters involved in the case had already been the subject of argument in the Privy Council, where the legatees had been fully represented, and there was nothing in the case which could not be disposed of as easily in London as in the colony. As to the second point, he could not see that it was "unjust or inexpedient" within the meaning of the 8th section of the Act of 1858 that the estate should be sold. On the contrary; he thought that the petitioners were entitled to realise their security, and to obtain, through the medium of the Incumbered Estates Acts, that relief to which they would have been clearly entitled in a Court of equity. The circumstance that the estate had been managed by a receiver since 1816, at a great cost, and that there had been no beneficial owner for many years, brought the case within the policy of the Acts, and was, of itself, one of the strongest arguments in favour of a sale.

Mr. Cust concurred, and said that, although he had been connected with the Incumbered Estates Court since its first institution, he had never known a case in which the necessity for a sale was more strongly manifested.

III.

WEST INDIAN INCUMBERED ESTATES COURT.

8, Park Street, Westminster, June 14, 1865.

(Before James Fleming, Esq., Q. C., and Reginald J. Cust, Esq., Commissioners.)

Re MacFee, deceased.
Ex parte MacFee.

A person must have been seized of the legal estate to give his widow a right to dower.

The proceedings in this case had been instituted for the purpose of realizing a mortgage on the West Indian estates of the late John MacFee, of the Island of St. Vincent, who died in 1862, leaving consider-

able real estate in St. Vincent, but subject to incumbrances exceeding the value. Seven estates, named respectively Mount Greenan, Sans Souci, Peruvian Vale, Henry Vale, Jambou Vale, Pennistons, and Escape, had been sold by the Commissioners, the proceeds of the sale of the first four had been distributed, and the matter now came under the consideration of the Court on the settlement of the schedule of incumbrances on the remaining three estates, in consequence of Mrs. MacFee, the widow of the late owner, having filed two claims, one against Pennistons only, on the ground that that estate had been purchased by her late husband out of her own money, and that he had promised to settle it upon her, and the other against all three estates in respect of her dower.

The first claim was decided on the ground that there was no evidence that the money applied in the purchase of the Pennistons estate was separate property, or of any consideration for the alleged promise; but the second claim involved the consideration of several questions, which formerly were of frequent occurrence, but which are now almost forgotten by practitioners, viz., the expedients by which the claim of a widow to dower may be defeated. The Dower Act of 1833 had not been extended to St. Vincent at the time of Mrs. MacFee's marriage, and the claim was, therefore, not capable of being defeated by her husband. The estates called Pennistons and Escape had been purchased by John MacFee from a Mr. Chauncey, who had, to all appearance, duly conveyed them to MacFee, but it turned out that the deeds of conveyance by which the legal estate had apparently been conveyed to MacFee had been executed, not by Chauncey himself, but by Mr. Graham, as Chauncey's attorney, under a power executed by Chauncey for that purpose, Chauncey being in England, and Graham and MacFee being in St. Vincent; and that Chauncey had died a day or two before the execution of the conveyance in his name by Graham. The power of attorney being thus rendered void by Chauncey's death, the legal estate did not pass by Graham's execution, but remained in the devisees or heirs of Chauncey. And owing to this accidental circumstance, the claim of

Mrs. MacFee to dower was defeated. The widow's claim to dower out of the Jambou Vale estate was resisted on different grounds.

The Jambou Vale estate formerly belonged to Baillie and Ames, who, in February, 1856, sold it to MacFee for £1800, to be paid in four instalments: on the 1st of February, 1856; the 1st of August, 1856; the 1st of February, 1857; and the 1st of August, 1857. By the conveyance to MacFee the estate was conveyed to the use of trustees for 500 years to secure these instalments, and subject thereto to the use of Macfee, and the deed contained the following proviso:—

"Provided always, and it is hereby agreed and declared between and by the parties to these presents, that if the said John MacFee, his heirs, executors, administrators, or assigns, shall pay or cause to be paid to the said James Evan Baillie, Hugh Duncan Baillie, and George Henry Ames, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, the said balance of unpaid purchase money or sum of £1800, and interest at 5 per centum per annum thereon, from the said 1st day of February, in the year of our Lord 1856, in such instalments, and at such respective times as in the said two several bonds hereinbefore mentioned or referred to, and in the covenant of the said John MacFee in that behalf hereinafter contained, is mentioned and specified in that behalf, then and in that case, and immediately on and after payment of the said sum of £1800 and interest, the said term of 500 years hereinbefore created shall absolutely cease and determine."

The deed then contained a covenant by MacFee to pay the instalments on the days above named. The instalments were all paid by MacFee about the times respectively appointed, but there was no evidence as to the precise days of payment except in the case of the third instalment, which appeared by an indorsement on the deed to have been paid on the 9th of April, 1857. This instalment having been due on the 1st of February, 1857, was clearly paid two months after the appointed time, and on this ground it was contended that the term of 500 years, though a satisfied term, was a subsisting term, and that as

the deed by which the term had been created had been handed over with the other title deeds to the mortgagees at the time of the mortgage, they were entitled to the benefit of the term as a protection against the widow's dower, which only attached to the freehold, subject to the term. The cases of *Maundrell* v. *Maundrell*, 10 Ves. 246, and *Rice* v. *Rice*, 2 Drew. 81, were cited on this point.

It was contended, on behalf of the widow, (1) that the term was not a subsisting term, for that, on the true construction of the proviso for cesser, the term ceased on payment of the last instalment at whatever time it was paid; and (2) that, even if it were a subsisting term, yet, as it had never been assigned to a trustee for the benefit of the mortgagee, it was attendant on the inheritance as much for the benefit of the widow as of any other person.

Mackeson for Mrs. MacFee.

Archibald Smith and *Pearson* for the mortgagees.

The COURT were of opinion upon the claim of Mrs. MacFee to an equitable lien on the purchase moneys of Pennistons, that there was no evidence that the moneys alleged to have been advanced out of Mr. MacFee's property were ever part of her estate, and that if they were not they belonged to her husband absolutely, and that there was not sufficient evidence to support the allegation of a contract to settle the estate, even if such a contract would have been effectual. As to the claim of dower, the Court were of opinion that the proviso must be read in its entirety, and could not be separated into two parts, and that the term, although satisfied, was subsisting at law, as the condition at which it was to cease had not been strictly fulfilled. As the term was subsisting, and the instrument creating it had been handed over to the mortgagee at the time the mortgage was created, the mortgagee was entitled to the benefit of the term as a protection against the claim of dower. The claims of Mrs. MacFee were, therefore, disallowed.

in March, 1860, the Leiths had executed the deed of covenant hereinafter referred to at length, by which they covenanted to consign to Chambers a certain amount of produce, not only from Charlotteville and Telescope, but also from the estates now under administration, for the purpose of discharging this debt.

Supplies, to a certain extent, had been furnished by Chambers to the Leiths, for the purposes of the estates now under administration, though not to a very large amount, and produce had been consigned by the Leiths to Chambers, to cover these supplies, but, in consequence of the Leiths having failed to consign to Chambers produce sufficient to cover the value of the supplies, a balance had become due from the Leiths to Chambers. It was, however, alleged that if the whole of the produce of the estates now under administration had been conveyed to Chambers, no balance would have been due. Under the above circumstances various questions arose as to the rights of Chambers, whether he ever was a consignee properly so called, or, if a consignee, whether he ever occupied such a fiduciary or intimate relation to the estates in question as to give him a lien thereon, or whether he was not merely in the position of a merchant who had done casual business on commission for the Leiths, and on their personal security.

It was admitted that a mere covenant to consign, not acted upon, would not of itself give the covenantee the rights and privileges of a consignee. It became, however, ultimately unnecessary to decide these questions, as the Court were of opinion that the provisions of the above mentioned deed of covenant, which were of a special nature, were such as to preclude Chambers from claiming priority over Davidson & Co., and, the estate being insufficient to pay the mortgage of Davidson & Co., the ultimate rights of Chambers became of no consequence.

By this deed, which was dated the 15th of March, 1860, and made between John Leith and James Leith of the one part, and Chambers of the other part, after reciting that by an indenture dated the 23rd of January, 1860, certain estates belonging to James Leith, called Charlotteville, Telescope, and Fairfield, had been mortgaged to Chambers to secure £2,500, and that by another indenture, also dated the 23rd of January,

1850, certain house property in Scarborough, in the Island of Tobago, belonging to John Leith and James Leith, had been mortgaged to Chambers to secure £800, and that James Leith was also seized of certain estates called Speyside and Runnymede, and that John Leith and James Leith were also together seized of certain estates called the Old Grange, New Grange, Grafton, and Kendal Place, subject to certain mortgages or charges affecting the same; and that in consideration of the deferred period allowed by Chambers for payment of the said mortgage moneys, it had been agreed that John Leith and James Leith should, according to their several estates and interests therein, and so long only as possession should not be adversely taken by the parties holding the respective mortgages or charges aforesaid, consign to Chambers not less than two third parts of all the sugar, rum, and other produce, to arise from as well Charlotteville and Telescope as from Speyside, Runnymede, Old Grange, New Grange, Grafton, and Kendal Place; and also that the deferred period for payment of the said mortgage moneys should not preclude Chambers from annually charging interest at the rate of £5 per cent. on his mercantile accounts: And reciting that in the mercantile dealings between the said parties, two accounts had been, and were intended to be, kept by Chambers, one account being with James Leith alone, and the other account being with John Leith and James Leith, and it had been agreed that the first above mentioned indenture of mortgage, and the estates comprised therein, should be available in favour of Chambers, to secure the balances which should become due on both of the said accounts to the extent of £2,500, as aforesaid. And that since the date of the said recited indentures the said accounts had been made out and rendered to John Leith and James Leith, showing a balance of £806. 1s. 3d., due by James Leith, and a balance of £1,217. 19s., due by John Leith and James Leith, to Chambers, on the 31st day of December, 1859: It was witnessed that in consideration of the premises, and in order to express and carry out the true intention and agreement of the parties, John Leith and James Leith, and each of them, did, according to their interest, covenant with Chambers that they would, during the space of five

years, from the 31st day of December, 1859, and during such further period as the said several mortgage securities made by the two indentures of the 23rd day of January, 1860, or either of them, should continue subsisting securities, ship, remit and consign to Chambers, or such person or persons as he should appoint at London, not less in each year than two third parts of the sugar, rum and other produce to be made upon Charlotteville, Telescope, Speyside, Runnymede, Old Grange, New Grange, Grafton, and Kendal Place, and would, in the event of their leaving the said island, or relinquishing the active management of the said estates, nominate and employ as their attorney or attorneys for the management thereof, some person or persons to be approved by Chambers, and by or through such attorney or attorneys cause the consignments thereof to be made to him as aforesaid: To the end that such consignments might be sold and disposed of in the usual manner, and the net proceeds thereof held and applied for the several uses, interests and purposes thereinafter expressed and declared: And also that they would give due notice and advice to Chambers or to the consignees for the time being under the covenant thereinbefore contained, of all shipments and consignments intended to be made of any such sugar, rum, or other produce as aforesaid, to the intent that insurance might be made thereon. And also would send to Chambers, or to such consignees, for the time being as aforesaid, proper lists and particulars of all such stores and supplies as should be required for the use of the said plantations, and which he was to have the option of supplying. And it was declared and agreed that the net proceeds and moneys to arise from the sale of the said sugar, rum, and other produce should be applied and disposed of in manner following (that is to say)—In the first place there should be retained or paid thereout the annual interest on the mortgage debts for the time being, due to Chambers as aforesaid; and, in the second place, in or towards meeting such supplies as Chambers should be willing to send out, and in reimbursing him for such drafts as he should be willing to accept for labour, purchase of cattle, or other usual island contingencies of the said plantations, or for taking up or discharging any of the aforesaid mortgages or charges on the said estates, together

with the usual interest and commission on the same respectively. And also all such sums of money as should become due and payable for freight, duty, and insurance, and other incidental charges attending the consignments of the said sugar, rum or other produce, and the shipping of such stores and supplies as aforesaid, which insurance Chambers was thereby authorised to make, and covenanted and agreed to make accordingly; but so long as the said shipments of each year should exceed the amount of the expenses of the same year, together with the usual interest and commission. And in the third place the residue and surplus of the said net proceeds should from time to time be applied and retained by Chambers in or towards the liquidation and discharge of the principal of the said sums of £2,500 and £800, or so much thereof as from time to time should remain due, until the same and all interest thereon should be fully paid and satisfied. And it was further witnessed that in further pursuance of the said agreement, and in consideration of the said covenants, Chambers covenanted with John Leith and James Leith, that he would, during the said term (if the said covenant for consignment should so long continue in force and be duly performed on the part of John Leith and James Leith), receive all such consignments or cause the same to be received by some other merchant, and sell and dispose of the same, or cause and procure the same to be sold and disposed of in the usual way of trade, and also pay, apply, and dispose of the net proceeds to arise from the sale and disposition of such consignments, or cause or procure the same to be paid, applied, and disposed of, to, or for the several purposes, and in the manner before mentioned. And also would during the same term (on having due notice and advice for that purpose) and so long as each year's shipments should exceed the amount of the expenses for the same year, effect insurances to a sufficient amount on all shipments as well of such consignments as aforesaid as of the stores and supplies which he might furnish and send out. And would in all other respects, but so long only as the annual consignments should yield a surplus after meeting the annual expenses, act, or cause or procure some other merchant or merchants to act, as consignees and factors of John Leith

and James Leith as aforesaid. And further, that in case the said covenants and agreements should be duly observed, he would not at any time before the expiration of the said term commence any action, suit, or proceeding against John Leith and James Leith for enforcing payment of the said mortgage debt, or any part thereof, or any interest thereon.

The above deed was produced by Chambers as evidence of his due appointment to the office of consignee, but it was contended by Davidson & Co. that the provisions of the deed showed a clear intention that the rights of Chambers were to be subject to the rights of the prior mortgagees, and were in fact to cease and determine whenever the prior mortgagees should take possession, a state of things inconsistent with the paramount lien now claimed by Chambers.

Archibald Smith for Chambers.

W. W. Mackeson, for Davidson & Co., in a lengthened argument, extending over two days, reviewed the whole series of cases by which the lien of consignees of West Indian estates had been established, and contended that the notion that this lien could be created by salvage, or by anything short of actual agreement, was erroneous, and that the principle relied on by Mr. Stonor, the late chief commissioner, in his judgments, as reported in Cust's West Indian Estates, had no foundation. Independently therefore, of the deed of covenant, Chambers could gain no priority over Davidson & Co., without their express or implied agreement; and in this particular case the deed of covenant showed that they never contracted for, or had any idea that they could contract for, such a priority.

The following cases were cited:—*Re Sutherland, Ex parte Garraway* (not reported); *Bertrand* v. *Davies*, 31 Beav. 429; *Re Tharp*, 2 Sm. & G. 578 n., Cust, 246; *Fraser* v. *Burgess*, Moo. P. C. C. 314; *Re McDowall*, Cust, 269; *Scott* v. *Smith*, 3 Burge's Col. Law, 357; *Simond* v. *Hibbert*, Russ. & M. 719; *Scott* v. *Nesbitt*, 14 Ves. 438; *Farquharson* v. *Balfour*, 8 Sim. 210; *Sayers* v. *Whitfield*, 1 Knapp, 133; *Shaw* v. *Simpson*, 1 Y. & C. C. C. 732; *Morrison* v. *Morrison*, 2 S. & G. 564; *Daniel* v. *Trotman*, 11 W. R. 717; *Pennant* v. *Simpson*, 1 Knapp, 399; *Steele* v.

Murphy, 1 Moo. P. C. C. 445; *Re Greathead*, Cust, 242; *Re Pengelley*, Cust, 271.

The Chief Commissioner delivered the judgment of the Court as follows:—This case is one of great difficulty, and my decision has been come to after much hesitation and anxiety, an anxiety heightened by the knowledge that, owing to the depreciation of West Indian property, the decision, be it given for whom it may, must induce a serious loss to gentlemen who have, in entire good faith and honesty of purpose, advanced their money on the security of the estates with the proceeds of which we are now dealing. It is however a satisfaction to know that if I err in my decision the error can be corrected by the Privy Council.

Upon the much vexed questions as to the lien of a consignee, and the extent of that lien, notwithstanding the very able and elaborate argument which has been urged before me, I feel that I am bound to adopt the principles established by the decisions of my learned predecessor, and that those principles must be deemed the law in this Court until they are pronounced erroneous by a higher jurisdiction. There is nothing more essential in the administration of justice than the certainty of the law, and if the argument addressed to me could raise a doubt in my mind as to the correctness of the views on which the judgments of my predecessor were founded, the number of these judgments, the extent to which the law established by them has been carried out in this Court, and the effect which they must have had upon transactions in and in relation to the colonies, would forbid me from acting upon that doubt. It has, however, been strongly insisted that the Privy Council, in the case of *Fraser v. Burgess* (*ubi sup.*), overruled the principle on which the decisions of this Court in favour of consignees were founded. I need scarcely say that if I could view the judgment in that case as having such an effect, I should, without a moment's hesitation, bow to its authority, but, after the most attentive consideration of every passage in that judgment, I think it leaves the question wholly untouched, and that, save in so far as the question may be affected by the decisions of my predecessor, it remains in the same state of uncertainty as Lord

Kingsdown stated that it stood at the time the judgment in *Fraser* v. *Burgess* was delivered. It is very true that the ground on which that judgment was pronounced was the well-known doctrine of acquiescence, and that the judgment disallowed the distinction between a person who singly filled the character of consignee and a person who, by managing the estate, furnishing all the supplies, and dealing with all the proceeds, combined in himself the two-fold office of manager and consignee, a distinction on which Mr. Stonor had rejected the claim of Mr. Fraser, the appellant. But I do not find in either circumstance any reason to conclude that the Privy Council intended to decide against the supposed right of a consignee to a lien on the estate, or to limit the extent of that lien, and the reference, towards the close of the judgment, to the case of *Sayers* v. *Whitfield*, 1 Knapp, 148, appears to me to lead to a directly contrary inference.

I also conceive that, with the knowledge which the Lords of the Privy Council had of the recent institution of this Court, of the important interests with which it had to deal, and of the influence of its decisions upon the prosperity of the colonies under its jurisdiction, and with the knowledge which they had, from Mr. Stonor's own judgment, of the principles on which this Court was proceeding, if they had come to a conclusion that those principles were erroneous, and could not be sustained in law, they would have clearly expressed that conclusion, whilst, if they merely deemed it to be an open question, they might well leave it to some person who might consider himself aggrieved by a decision of this Court to bring the matter before them for final determination. I therefore do not consider that the case of *Fraser* v. *Burgess* calls upon me to depart from the principles established by the decisions of my predecessor, and considering that more than five years have elapsed since that case was decided, and that during that time the administration of all the estates sold under the orders of this Court has proceeded upon those principles, and that there has been no appeal from any one of the decisions, I think that I should exercise a most mischievous stretch of jurisdiction were I to overrule them.

Whilst it was insisted before me that the principles of Mr. Stonor's decisions as to the rights of a consignee were overruled by the case of *Frazer* v. *Burgess* it was also urged that they were opposed to the judgment of the Master of the Rolls in *Bertrand* v. *Danis*, 31 Beav. 432. It was, of course, not contended that the latter case was, as the former, binding upon me, but it was strongly argued that it was sufficient to justify me in departing from the rule of law established by my predecessor. With every deference to the high authority of a judgment pronounced by so eminent a judge as the Master of the Rolls, I cannot yield to the argument.

The judgment in *Bertrand* v. *Davis* appears to me to proceed entirely upon those principles of English law which would be applicable to an English estate—and the peculiar position of West Indian property, and the necessity of employing a consignee, and of giving the security of the estate in order to induce the required outlay by the consignee—do not appear to me to have been present to the mind of the learned judge when he delivered his judgment. I may also remark—whatever may have been the real facts in the case—that it is not stated in Mr. Beavan's reports that the manager, whose right against the *corpus* of the estate was denied, advanced out of his own funds the money for the supplies; nor does the judgment treat him otherwise than as a mere manager, or make any allusion to the fact—if such were the fact—that he filled the double character of manager and consignee. But whatever may have been the facts—and although it is quite true that in a settled colony the settlers take with them such of the laws of England as are applicable to their situation—I am humbly of opinion that it would be straining a principle of law beyond all reasonable intendment to hold that a mortgagor or tenant of a limited estate could not give a consignee a lien paramount to all other interests for his advances, when, without such advances, the security of the mortgagee might, and in all probability would, for all beneficial purposes, be extinguished; and the rights of the reversioner attach only upon an uncultivated waste.

The observations of Lord Eldon in *Scott* v. *Nesbitt*, 14 Ves. 444, 445, of Lord Wynford in *Sayers* v.

Whitfield, 1 Knapp, 148, 149, and of Lord St. Leonards in *Re Thorp*, 2 Sm. & Giff. 578, 579, appear to me to have a direct and most important bearing upon this part of the case; and if those observations were applicable to West Indian estates, at the times at which the judgments were delivered by those learned Judges, their force and their importance have been greatly increased by the subsequent depreciation in value of West Indian property, and, unfortunately, several instances have come before this Court in which estates, formerly of great value, have gone entirely out of cultivation, in consequence of the failure of persons interested in them to find merchants willing to act as consignees, and in which those estates have been sold in this Court as waste lands. Mr. Mackeson also urged upon me that there was no usage in Jamaica or the other islands which could put the rights claimed by consignees on the footing of a custom, and his experience, having practised for several years at the bar in Jamaica, enabled him to state the point from his own knowledge, but the same fact was found upon a reference made to the Master, in *Scott* v. *Nesbitt*, and the observations made by Lord Eldon in that case, and by the learned Judges in other cases to which I have referred, were all made with the full knowledge that the rights of the consignees could not be claimed under any special usage within the colonies.

The principle, however, upon which the title of consignees has been supported is of wider range and more universal application than any particular usage, and, as remarked by Lord St. Leonards, is daily acted upon in Ireland in regard to fines paid upon renewable leaseholds, and is indeed also frequently acted upon in this country in similar cases. In considering the rights of consignees, I have not overlooked the passage from Mr. Burge's Commentaries so much relied upon in Mr. Mackeson's argument, but I am still of the opinion which I expressed during the argument that, when Lord Kingsdown spoke of the principles established by the authority of the case of *Scott* v. *Smith* (*ubi sup.*), he referred to the order in that case, and the facts to which that order applied, and not to the passage in the Commentaries, and I do not think that a court of first instance would be justified, upon the statement of the case of *Scott* v. *Smith*, as made

by Mr. Burge, in overruling a principle which, since the institution of the Court, has been made the ground of its decisions, and upon the authority of which the rights of all the suitors have been determined, and determined without appeal, and, so far as I know, hitherto without remonstrance. I am also clearly of opinion that, in order to create the relation of consignee of a particular estate, it is not necessary that the merchant should furnish all the supplies or receive all the consignments, and the case of *Simond* v. *Hibbert*, 1 R. & M. 719, appears to me a full authority upon this point, and the usage, I believe, is in conformity with that case. The dealings between the parties must, in every instance, be open to inquiry, and whilst a consignee cannot be allowed to prejudice the inheritance by payments made for the benefit of the mortgagor or tenant for life, he must at the same time be protected in regard to all outlay made, so far as it can be made under his control, for the benefit of the estate. If therefore the claim of Mr. Chambers depended solely upon either of the points to which I have adverted, I should allow the claim; but there is an objection which appears to me fatal to it, and which, I regret to say, the very able argument addressed to me by Mr. Archibald Smith has not removed from my mind. Whatever may be the ordinary rights of a merchant as consignee, I cannot for a moment doubt that those rights may be released, postponed, or varied by agreement with the person acting as the owner of the estate, and that if that agreement be reduced into writing, both parties must be bound by the legal construction of the written agreement, and the more particularly when it assumes the form of a deed under seal.

In consequence of the importance of every question bearing upon the rights of consignees to all parties interested in the West Indies, and the length, zeal and ability with which the point has been argued before me, I have deemed it necessary to state the grounds on which I adhere to the principles established by the decision of my learned predecessor, otherwise I should have confined my observations to the construction of the indenture of March, 1860. I consider that all the rights of Mr. Chambers, in relation to the estates in question before us, whether as

consignee or otherwise, must be governed by the provisions of that deed, and that, according to its true construction, his rights are taken and made subject to the prior title and interest of the mortgagees. The deed distinctly states that those particular estates were subject to the mortgages, and the grantors professed to grant and must be held to have granted only according to their interest as mentioned in the deed, which I understand to mean—and which, I think, ought to be understood to mean—as affected by the mortgages; and the rights of the mortgagees, and the actual agreement, so far as it affected the estates now in question, only related to the annual consignment of two third parts of their produce, and such consignment was only to continue until possession should be taken by the mortgagees, and was therefore made determinable by their act. Upon these provisions of the indentures, my opinion is that I cannot hold Mr. Chambers entitled to the priority which he claims over the mortgagees, and I think that the debt due to him must be placed in the schedule after the debt due to the mortgagees. According to that which I deem to be the true construction of the deed, Mr. Chambers' own agreement was to take subject to the prior rights of the mortgagees, and I cannot relieve him from the effect of that agreement. It also appears to me that the provisions as to the mode of dealing with the moneys to arise from the sale of the consignments, and the absolute discretion given to Mr. Chambers in furnishing the supplies, as well as his agreement to postpone the payment of the debt, such debt, for the purpose of the argument before me, being considered a debt due to him as consignee, are not consistent with the maintenance of the ordinary rights of a consignee as against the estate itself. I, however, do not enlarge upon these points, as I think Mr. Chambers took all his rights in regard to the estates in question, subject to the prior title of the mortgagees. The Registration Acts, of force in the Island of Tobago, would also, I think, throw great obstacles in the way of the claim to priority insisted upon by Mr. Chambers, whatever may be the true construction of the indenture of March, 1860, but, as I decide the case upon the provisions of that indenture, it is unnecessary for me to enter fully into the consideration of

the Registration Acts. I disallow Mr. Chambers's claim to priority, and direct that the amount due to the petitioners, as mortgagees, be placed before the amount due to him; but as it appears to me that Mr. Chambers had reasonable grounds for making the claim, I disallow it without costs.

N.B.—The above decision was appealed against by Mr. Chambers, and was confirmed by the Privy Council, on 8 Nov., 1866. L. R. P. C. Appeals, vol. 1, p. 296.

V.

WEST INDIAN INCUMBERED ESTATES COURT.

8, Park Street, Westminster, 16 January, 1867.

(Before James Fleming, Esq., Q. C., and Reginald J. Cust, Esq., Commissioners.)

Re Edwards and others.
Ex parte Shand.

A direction in a testator's will to pay legacies out of the rents and profits according to the seniority of his children will not govern the rights of the legatees when the legacies become payable out of the fund produced by the sale of the estate.

In calculating the value of an annuity given to a deceased person, the case of Todd v. *Beilby*, 27 *Beavan*, *followed.*

The petitioner, Mr. Shand, was mortgagee of a legacy of £5000, charged by the will of Andrew Edwards in favour of his eldest son on the Grove Estate in the island of Antigua, which had been sold. Mr. Shand claimed on the purchase money the amount of his security in priority to an annuitant, and other legatees, claiming under the same will.

Speed for the mortgagee.

W. Mackeson for annuitant and other legatees.

The Chief Commissioner delivered judgment as follows:—

Several questions have been raised before us in relation to the proceeds of the sale of this estate. I disposed of most of them during the hearing, but I reserved my judgment as to the priority claimed for the legacy given to the eldest child of the testator Mr. Edwards. The claim made on behalf of the testator's grand-daughter Eliza Mary Ann Edwards appeared to me on the hearing, and it still appears to me, to be wholly untenable. The legacy of £5000, first expressed to be given to her, was bequeathed to her only in case her father should not survive the testator, but he did survive the testator, and the circumstance under which the testator intended it to become a bequest never arose. I am also of opinion that the £5000 claimed on her behalf under the subsequent provisions in the will was not effectually given to her. The estates, subject to the legacies validly bequeathed by the testator, were settled by a strict entail upon her father, the testator's eldest son, as tenant for life, and a power was given to him when in actual possession to charge the estates with £5000 in favour of his younger children. In case he did not make such charge, the testator bequeathed a similar sum to those children, but the son did make the charge, and the contingency on which alone the testator's bequest was to have effect did not arise, and consequently Eliza Mary Ann Edwards, as the child who might have been entitled if her father had not executed the power, cannot succeed in her claim as her father did execute the power. It is true that she takes nothing under the execution of that power by her father, but that is owing, not to any defective exercise of the power, but solely to the fact that the property charged had been exhausted in payment of prior charges.

The question of priority has been very fully and ably argued. The point, like most other points arising upon the disputed construction of wills, may not be free from doubt, but I have come to the conclusion that I cannot allow the priority claimed for the legacy given to the eldest child. The Court is bound as far as possible to give effect to all the provisions of a testator's will, and to carry into effect his intentions as disclosed in that instrument, and I think I should fail both in giving effect to the whole

will and in carrying out the testator's intentions if I were to allow the priority which has been insisted upon.

It does not appear to me necessary to enter into a minute examination of the will, because, with the testator's clear directions that the legacies should be charged upon his estates, and that the devisees should take subject to the charge made in favour of the legatees, I cannot doubt that the testator intended all the legacies to be a charge upon, and if necessary that they should all be paid out of, the corpus of the estate. The directions that the legacies should be paid out of the rents and profits, and when so paid should be paid according to the seniority in age of the children, are directions which cannot under the circumstances which have arisen, be carried into effect, and I do not think that I could be justified in importing the direction as to seniority given in regard to the mode of dealing with the rents and profits into the order of this Court for distributing the proceeds resulting from the sale of the corpus of the estate. It is evident from the whole of the will that, after making provision by the legacies for his younger children, the testator most anxiously desired to preserve the estates in his family, and the direction as to payment of the legacies out of the rents and profits appears to me to be given with the intent of preserving the estate in the family, and in reference to the convenience and position of that estate, and according to the well known principle of equity on which *Sherman* v. *Collins*, 3 Atk., p. 318, and similar cases were decided. I cannot allow those directions to prejudice any of the legatees, or to place one of them in a better position than the others, and I must therefore disallow the claim for priority insisted upon in favour of the legacy given to the eldest child, and decide that the legacies given to the testator's children and the legacy given to his granddaughter Ann Eliza Edwards and the annuity are to be paid rateably out of the proceeds of the sale. In calculating the amount to be paid in regard to the annuity, I think, as the annuitant is dead, that I must follow the case of *Todd* v. *Beilby*, decided by the Master of the Rolls, 27 Beavan, p. 353. When the present case was argued before me, I was not aware of that de-

cision, and was prepared to decide in accordance with that which had been so long the practice of the Court of Chancery, and to follow the ruling of V. C. Knight Bruce in *Wroughton* v. *Colquhoun*, 1 De G. & Smale, p. 360, and certainly if *Todd* v. *Beilby* had come judicially before me, I should not have ventured to overrule *Wroughton* v. *Colquhoun*, but as *Todd* v. *Beilby* has not been appealed from, I consider it my duty to follow it. I must therefore direct the amount due to the annuitant for arrears of the annuity at the time of her death to be ascertained, and shall direct the dividend to be paid upon that sum. As the proceeds of the sale of the estate have not produced sufficient to pay the amounts due for principal upon the legacies it is unnecessary to calculate or allow interest upon them, and therefore interest cannot be allowed upon the arrears of the annuity. My order consequently is, that the amount realized by the sale of the Grove estate after payment of the per centage and costs be paid rateably according to the amounts due upon the legacies and the amount found due for the arrears of the annuity. The costs of all parties to come out of the fund.

VI

WEST INDIAN INCUMBERED ESTATES COURT.

8, Park Street, Westminster, June 9, July 7, 1869.

(Before JAMES FLEMING, Esq., Q. C., and REGINALD J. CUST, Esq., Commissioners.)

Re BLAIR.
Ex parte ROBERTS.

West Indian estate—Lien of consignee.

On the sale of a West Indian estate the lien of the consignee will, under ordinary circumstances, have priority over a mortgage.

In this case two estates, called the Lambkin Hill Estate and the Bagnold's Spring Pen, had been sold

by order of the Commissioners, the former for £790 and the latter for £138. The usual advertisements had been issued, and the parties now attended for the final settlement of the schedule of incumbrances.

The first claim appearing on both the schedules was that of Mr. Roberts, the late consignee of the estates, who claimed the sum of £4888, as the balance of his account, extending from 1850 to 1864, when Mr. Geddes died. This claim was opposed by Mrs. Blair, the only child and devisee of Mr. Geddes, and by the trustees of her marriage settlement, who claimed priority over the consignee in respect of a charge of £1000, being the balance of an old mortgage which had been assigned to them on Mrs. Blair's marriage.

As the purchase money of the estate was insufficient to satisfy either of the claims the question of priority involved in effect the right to the whole fund in Court, after deducting the costs of the sale, and became the subject of a strenuous contest. The remaining facts, so far as they are material to the above question, will be found sufficiently stated in the judgment of the Commissioners.

Haynes, for Mrs. Blair and her trustees, disputed the claim of the consignee, and its priority over the charge of £1000. He cited *Scott* v. *Nesbitt*, 14 Ves. 438; *Sayers* v. *Whitfield*, 1 Knapp, 133; *Farquharson* v. *Balfour*, 8 Sim. 210; *Shaw* v. *Simpson*, 1 Y. & C. C. C. 732; *Morrison* v. *Morrison*, 2 S. & G. 564; *Symond* v. *Hibbert*, 1 Rus. & Myl. 719; *Daniel* v. *Trotman*, 11 W. R. 717; *Fraser* v. *Burgess*, 13 Moo. P. C. 314; *Chambers* v. *Davidson*, 15 W. R. 534, L. R. 1 P. C. 296.

Archibald Smith, for Mr. Roberts the consignee, was not called upon.

July 7.—Mr. FLEMING, Chief Commissioner, delivered the judgment of the Commissioners as follows:—

The questions in this matter arise upon the settlement of the schedules of incumbrances relating to two estates in Jamaica called Lambkin Hill and Bagnold's Spring Pen.

Mr. Roberts, the petitioner, asks that his claim, which amounts to £4888. 2s. 5d., and greatly exceeds

the amount for which the estates were sold, the sale having realised less than £1000, may be placed on the schedule in priority to all other incumbrances. This is objected to by Mrs. Blair, the daughter of the late proprietor, and by her trustees, who claim to be entitled to a mortgage charge of £1000 on the Lambkin Hill Estate.

The grounds on which Mr. Roberts' claim is opposed are:—first, that Mr. Roberts was never a consignee of the estate, or that, if he were, he, by a special agreement with the late owner, released the lien to which he was entitled for the debt now claimed; and, secondly, that, assuming him to have been a consignee, the mortgage of £1000 now vested in the trustees has priority over his lien on the estate.

The first objection applies to both the estates; the second is applicable only to the Lambkin Hill Estate, Bagnold's Spring Pen not having been subject to the mortgage for £1000.

The Lambkin Hill Estate formerly belonged to Mr. Geddes, the father of Mrs. Blair, subject to a mortgage for £2250. On 4th October, 1849, Mr. Geddes paid off the mortgage, and for that purpose borrowed £1000 from the trustees of his own marriage settlement on the security of a transfer of the old mortgage to that extent.

This sum of £1000, advanced by the trustees, was part of certain trust funds which were settled to the use of Mr. Geddes for life, with remainder to his child or children absolutely, and Mrs. Blair, as the only child of Mr. Geddes, who obtained a vested interest in the settled funds, became absolutely entitled to them on attaining her majority in November 1861, subject only to the life interest of her father.

Mr. Geddes, by his will, devised the Lambkin Hill and Bagnold's Spring Pen Estates to trustees upon trust in effect for Mrs. Blair for life, with remainder to her children, and he died on the 28th of May, 1864. Upon the marriage of Mrs. Blair, in August, 1865, the mortgage debt of £1000 was assigned to trustees upon the usual trusts for the benefit of Mrs. Blair and her intended husband in succession, with remainder to their children.

The character in which Mr. Roberts, the petitioner, acted is clearly proved, not only by his own affidavit but by the affidavit of Mrs. Blair herself. Mr. Geddes, the father of Mrs. Blair, was, prior to 1850, a West Indian merchant residing in London, and Mr. Roberts, the petitioner, was then his clerk. In 1850 Mr. Geddes gave up his London business, and went to reside permanently on his estate in Jamaica, and then Mr. Roberts succeeded to the London business, and carried it on on his own account.

It appears further from the evidence that for several years Mr. Roberts acted in every respect as consignee of the estates. Mr. Geddes managed the estates himself, and consigned the produce to Mr. Roberts in the usual manner, drawing bills upon him and receiving from him supplies for the use of the estate, and the transactions were carried on upon the usual terms as to interest and commission. It is, however insisted by the objectors that the receipt by Mr. Roberts of certain dividends to which Mr. Geddes was entitled under his marriage settlement, and an arrangement that the surplus of them should be applied in part satisfaction of the balance from time to time due to Mr. Roberts, and certain references to the arrangement that they should be so applied made in letters written by Mr. Roberts, establish a special agreement between Mr. Geddes and Mr. Roberts, under which Mr. Roberts agreed, in consideration of the receipt of those dividends, to accept them as his security for the balances to become due to him, and to forego all his rights or lien as a consignee of the estate.

It appears from Mr. Roberts' earlier accounts that the business between him and Mr. Geddes was at the commencement confined strictly to transactions between a West Indian proprietor and consignee, but that from 1852 Mr. Roberts transacted other business for Mr. Geddes, received these dividends, and made other than consignee's payments on his behalf, still continuing to act and to perform all the duties of consignee. It also appears that the bills drawn by Mr. Geddes and honoured by Mr. Roberts, and the costs of the supplies furnished in the usual course of dealing as between proprietor and consignee largely exceeded the value of the produce consigned, and that Mr. Geddes became deeply indebted to Mr. Roberts.

The debt, which for the first few years varied from small sums up to £2000, had by the close of the year 1857 swelled to the amount of £3196, and at the end of 1860 it amounted to the sum of £4487.

It is evident from the letters set forth in Mr. Roberts' affidavits that Mr. Geddes was at this period in a situation of great pecuniary embarrassment, and well aware that he was largely indebted to Mr. Roberts, and that he had not the means of paying the debt. From 1852 Mr. Roberts received, by the direction of Mr. Geddes, the annual dividends referred to, and which amounted to a sum of between £200 and £300 a year, and after paying thereout the sums required by Mr. Geddes for his private affairs, was allowed to supply the surplus towards the discharge of the debt due to him.

The objectors insist that the receipt of those dividends by Mr. Roberts, and, after making the payments directed by Mr. Geddes, the application of the residue of them towards the discharge of the debt due to him, and the passages in his letters before referred to in reference to the arrangement that they should be so applied, establish the alleged special agreement under which Mr. Roberts consented to accept the dividends as the security for his debt, and to forego all his rights as the consignee of the estates. No direct evidence of the alleged agreement is brought forward, and I think the receipt of the dividends and the passages in the letters which are relied upon are wholly insufficient to establish the existence of any such arrangement. In fact, the character of consignee was filled by Mr. Roberts from 1850 up to the time of the death of Mr. Geddes, in 1864, and Mr. Roberts received and accounted for the dividends from 1852—that is, during the greater part of the time in which he acted as consignee.

It is clear from the correspondence and all the facts brought before us that Mr. Roberts desired to act and did act with great forbearance and consideration towards Mr. Geddes, and that he did not press him for the settlement of his debt; and I think that particular passages in Mr. Roberts' letters ought to be construed by the light which the surrounding circumstances throw upon them. Mr. Roberts also most distinctly negatives upon his oath the existence of

any such agreement, and the facts before us are, in my opinion, wholly insufficient to establish it, or even to lead to an inference that any such arrangement was ever in the contemplation of either of the parties.

In support of the contention great stress was laid upon accounts handed by Mr. Roberts to Mr. Geddes, when that gentleman was in England in 1862, and which are accounts of payments and receipts in the years 1860 and 1862, and in which no balance was carried down as due to Mr. Roberts, but the circumstances under which those accounts were handed to Mr. Geddes are fully explained in Mr. Roberts' affidavit, and appear to remove any adverse inference which could be drawn from them, and although omitting to carry down a balance may support a presumption that a previous balance had been discharged, or that no balance was due, yet where a balance is admitted it cannot, in my opinion, afford evidence of an intention to alter the nature of the security for that balance.

It was also objected that Mr. Roberts was appointed consignee by a proprietor in possession and in the management of the estate, but under ordinary circumstances a consignee must be appointed either by the proprietor or by some one acting as or on behalf of the proprietor, and as the principle upon which the rights of a consignee mainly depend is that his advances and supplies keep up the estate, his rights and lien are against the estate, and it would be impossible for London merchants transacting business consignees to inquire into and become acquainted with the title of the West Indian proprietors with whom they deal, or with the incumbrances affecting their plantations. I therefore think that there is nothing in this objection, and that Mr. Roberts's title as consignee, and the rights which the character of consignee confer upon him, are untouched by any of the objections which have been urged.

The only remaining point to be considered is the claim to have the debt of £1000 for which the mortgage was given placed upon the schedule of the Lambkin Hill Estate in priority to the debt due to the consignee. Although several points were urged

to distinguish the present from an ordinary claim of a mortgagee to priority, I am unable to attach weight to any of them, or to distinguish the present mortgage from any ordinary mortgage upon West Indian property. Many cases were also cited in reality, although not avowedly, in support of the contention that the claim of a mortgagee has priority to the claim of a consignee. I do not, however, think it necessary in the present case to reopen that question. If I did, I should adhere to the opinion which I expressed in *Chambers* v. *Davidson* (*ante*, p. 12), and having regard to the fact that from the beginning this Court has held the consignee entitled to priority over other incumbrancers, and that for several years past the doctrine of this Court upon that point has been known, and the business in connection with the colonies subject to the jurisdiction of this Court conducted on the understanding that such is the law, I think that if that understanding is to be declared ill-founded it must be so declared by a Court of Appeal and not by this Court. A mortgage upon a sugar plantation, in truth, resembles an English mortgage merely in name and in form. The land forms only an item in the capital by which the trade is carried on. Whilst the returns from the sugar crop exceed the value of the supplies and costs of labour and management, the security of the plantation for repayment of mortgage money may be sufficient, but if from want of supplies or from other causes the cultivation be discontinued, the value of the land becomes most severely depreciated, and the depreciation increases by the length of time during which the land is out of cultivation. The land out of cultivation yields little or no profit.

The cultivation can only be maintained by supplies annually furnished, and in ordinary cases, owing to the position of West Indian proprietors, those supplies can be obtained solely by means of consignees, and the advances made by them constitute the means by which the trade is carried on, and every one advancing money on the security of a sugar plantation must be aware, or must, I think, be assumed to be aware, of the nature of the transactions which are requisite to keep up the trade (*Sayers* v. *Whitfield*, 1 Knapp, 8, 149). I stated in *Chambers* v. *Davidson*,

that even if I entertained doubt upon the point, I should deem it my duty to adhere to the law of this Court as laid down before I presided in it, and not venture upon my own impression to overrule a principle long acted upon, and considered as law. I adhere to that view.

So far as this Court is concerned the present case appears to be governed by the case of *Re Greathead, Ex parte Chapman* (Mr. Cust's Book, p. 219).

The facts of the two cases are similar. In that case as in this the owner was in possession subject to family charges which were vested in the trustees of marriage settlements, and to mortgages, and the lien of Mr. Chapman, the consignee, was held to have priority over the family charges, as well as over the mortgages. The decision in favour of the consignee was not appealed from, but a similar lien having been claimed against the same parties, by a manager, and having been disallowed by Mr. Stonor, then Chief Commissioner, an appeal was carried to the Privy Council, which reversed his decision on that point, and established the lien of the manager in priority to the family charges as well as the mortgage.

The decision of the Privy Council appears to have been founded principally upon the general acquiescence of the parties entitled to the charges in the course of management, from which the manager's claim arose, and for that purpose the acquiescence of the tenants for life of the charges was held sufficient to bind the interests of those in remainder.

In the present case Mr. Geddes was not only tenant in fee of the estate subject to the mortgage, but also tenant for life of the interest moneys due upon the mortgage, and Mrs. Blair, in whose interest the objections are made, was, subject to her father's life interest, absolutely entitled on attaining her majority in November 1861 to the mortgage, and she was perfectly aware that her father managed the property and employed Mr. Roberts as the consignee, and must, I think, have known that her father was in pecuniary difficulties; and although Mr. James Geddes, one of the trustees, in his affidavit denies that he was acquainted with the fact that Mr. Roberts acted as consignee, he admits that it was fully known to him that Mr. Geddes was in possession, and in the

actual management, of the Lambkin Hill Estate, and that Mr. Roberts succeeded to Mr. Geddes' business as a West Indian merchant in London when that gentleman settled in Jamaica in 1850, and that Mr. Roberts carried on large business transactions with him; and I must assume that Mr. James Geddes was fully aware of the manner in which West Indian plantations are managed, and that it was necessary to have a consignee, and that a consignee was employed, and that without such employment, and without the aid of the advances and supplies furnished by him, the business of the estate could not be carried on; and considering that Mr. James Geddes was the brother of the late Mr. Geddes, I think he must have been aware that he was in embarrassed circumstances, and if, with such knowledge, he and his co-trustee and Mrs. Blair allowed Mr. Geddes to continue the management of the estate, and took no steps to obtain possession of it upon their legal title, or to enforce the payment of the mortgage money, but allowed persons dealing with Mr. Geddes to deal with him on the assumption that he had full power to manage the estate, and to obtain the advances and supplies required in such management, I think I cannot now allow them to turn round upon the consignee and dispute the priority of his lien. The maintenance of the plantation, at least the maintenance of it in cultivation, up to the death of Mr. Geddes in 1864, was due to those advances and supplies; and it appears to me that it would be inequitable to allow those who must have known that such advances and supplies were in the course of being made, and who did not attempt to disturb or interfere with Mr. Geddes' management, to deny the right on the faith of which the advances were made, or to insist upon a claim which was allowed to slumber whilst the consignee furnished the means by which the business of the estate was carried on. I therefore think the consignee entitled to priority.

I believe that only one other point was urged upon us in support of the claim for priority made on behalf of the mortgagee. Mr. Roberts, in his correspondence with Mrs. Blair after the death of her father, spoke of the mortgage as a then subsisting security; such no doubt it was, and if the estate had

realised a sufficient sum to pay the consignee's charge and the £1000, the £1000 would, no doubt, have been paid. The priority and not the validity of the mortgage is in question.

With respect to the costs it is the practice of this Court, and as a general rule it has been found beneficial, to encourage the owners of estates to attend the proceedings in order to assist the Commissioners in checking as far as possible the claims of consignees, mortgagees, and other incumbrancers, and, where no factious or unnecessary opposition is made, the costs of such attendance are, as a rule, paid out of the estate. The objections filed in the present case are substantially on behalf of Mrs. Blair, the owner, and although I have found myself compelled to disallow them, I think the case was a proper one for inquiry, and I shall therefore order the costs of all parties to be paid out of the funds in Court.

My learned colleague concurs in this judgment.

VII.

WEST INDIAN INCUMBERED ESTATES COURT.

Westminster, Jan. 14, Feb. 25, 1870.

(Before JAMES FLEMING, Esq., Q. C., and REGINALD J. CUST, Esq., Commissioners.)

Re EDWARDS.
Ex parte PARKER & Co.

The Comfort Hall Estate.

Priority—Consignee and manager—Liberty to appeal.

The manager of a West Indian estate who advances his own moneys for the cultivation of the estate cannot in the absence of special circumstances claim a lien on the estate in respect of such advances as against the consignees.

Liberty to appeal to the Privy Council will not be

granted unless the amount at stake is sufficient to justify the expense.

In this case the Comfort Hall Estate in the Island of Antigua, containing 588 acres, had been sold under an order of the Commissioners for £800, which was insufficient to discharge the incumbrances on the estate, and divers questions arose on the settlement of the schedule of incumbrances, as to the priority of the several incumbrancers.

The estate had been for many years in the possession of Ann Wickham Edwards, who died in 1867. In 1853, Henry Bourne was appointed agricultural attorney or manager, and acted in that capacity until the year 1865, when he gave up the management voluntarily.

In January or February, 1863, Messrs. McDonald became consignees of the estate, and made the necessary advances in that capacity until December, 1866, at which time a considerable balance was due to them, which balance had become vested by assignment in Messrs. Parker and Co., the petitioners. The fund in Court was not sufficient to pay the whole of this balance.

Bourne, the late manager, alleged that at the time he gave up the management the sum of £249. 16s. 5d. was due to him in respect of advances made by him for the benefit of the estate, and he claimed to be placed on the schedule in respect of that sum in priority to the claim of the consignees. The consignees resisted this claim on the ground that Bourne was only a servant of the owner, and was not bound by contract or custom to expend his own moneys in the cultivation of the estate, and that if he did so he did so for the accommodation of the owner, and did not acquire any lien on the estate as against the consignees.

Archibald Smith for Messrs. Parker and Co., the consignees.

Tremlett, for Bourne the manager, contended that a manager stood in as favourable a position as a consignee, and ought to be paid, if not in priority to the consignee, at least *pari passu*. He cited *Frazer* v. *Burgess*, 13 Moore P.C. 314; *Scott* v. *Smith*, 3 Burge Colonial Law 357; *Chambers* v. *Davidson*, L. R. 1 P. C. 296.

Mr. FLEMING, Q. C. (Chief Commissioner).—This matter comes before us on objections to the draft schedule of the purchase money arising from the sale of the Comfort Hall Estate. The estate sold for £800. The commission payable to the Treasury amounts to £16. The costs are high, owing to the long and heavy litigation in this Court, and I am informed that they will exceed £280. The balance due to the receiver under this Court is £271. 7s. 4d., and the sum due to the consignees on their account since the objector gave up the management of the estate, is £76. 10s. 1d., and if these amounts prove correct, the sum in respect of which the present contention arises can barely exceed £150. The objector acted as manager of the estate from the year 1853, and appears to have carried on the cultivation, without the assistance of a consignee, until the month of January or February, 1863. At that time he informed Mrs. Edwards, with whom he dealt as the owner of the property, that he required advances from a consignee to enable him to continue the cultivation, and, with her permission, he applied to a member of the firm of Messrs. McDonald, West India Merchants, who was then resident in Antigua, to cause his firm to act as consignees for the estate. Messrs. McDonald consented, and they and their assignees acted as consignees until a receiver was appointed under the order of this Court. The objector, Mr. Bourne, voluntarily threw up the management of the estate in the year 1863. He now states that a sum of £249. 16s. 6d. with interest from the 31st August, 1864, is due to him, and he claims to be placed on the schedule in priority to the consignees, and if such priority be disallowed then to be placed rateably with them in regard to any balance due on their accounts between their appointment in the early part of 1863 and the time at which he gave up the management.

I have already decided that the consignees are entitled to priority in respect of the balance due to them from the time the objector resigned the management, and I adhere to that decision. It is in conformity with the invariable practice of this Court since it was instituted, and, in my judgment, with the only ground on which the rights of consignees can be supported—namely, that their advances maintained the property up to the time at which it was sold.

Although the sum in dispute is small, the second branch of the claim raises a question of importance in regard to West Indian interests. The rights of consignees and managers against the owners of West Indian plantations, including mortgagees and persons having charges under settlements, have frequently engaged the attention of this and other Courts, but not one of the cases touched the right of priority as between consignees and managers.

Lord Kingsdown said, in *Fraser* v. *Burgess*, that he could not see a distinction between the claims of a consignee and a manager who had expended money in the cultivation of an estate as against the persons interested in the estate. I not only bow to the decision in that case, but entirely concur in it. Lord Kingsdown, however, spoke only in reference to the rights of consignees and managers as against the owners and mortgagees, and no question was raised in that appeal as to the respective rights of consignees and managers, the fund being sufficient to pay both. My learned predecessor decided that the manager had no claim against the estate, and that decision led to the appeal. Lord Kingsdown's statement of the law in that case consequently affords me no assistance on the present occasion. Upon general usage and upon principle I do not think that the manager's contention can be supported. It is understood in the dealings with West Indian merchants that the consignee is to supply all the funds and all the supplies required for the cultivation of the plantation, in respect of which he acts as consignee; and that in consideration of such advances and supplies the produce is to be consigned to him, and if insufficient to meet his outlay his lien on the estate is to arise. To allow an owner or a manager to make an outlay upon the plantation independently of, and without notice to, the consignee, and in respect of it to give him a prior charge to, or an equality of charge with, the consignee, would certainly prejudice the security on which the consignee relied and made his advances, and would, in my opinion, be a fraud upon him, unless the circumstances were such as to render such outlay a matter of pressing and absolute necessity. Considering that the cultivation of the greater part of the sugar plantations in the West Indies is carried on by means

of the advances made and the supplies furnished by consignees, I should feel great hesitation in disallowing the right to priority to which it is generally understood that they are entitled, although of course if such supposed right could not in law exist, I should have no alternative and must disallow it; but in the present case I am of opinion that no such difficulty or necessity arises. After the Messrs. McDonald were appointed consignees, any advances made by Mr. Bourne without notice to them were made at his own risk, and upon principle I think that his claim for them must be postponed to that of the consignees. A consignee deals with the estate, and, provided the person in the possession or management of it be in actual and apparently undisputed possession, it is quite indifferent to the consignee or his rights what may be the character of that possession. A tenant with a limited interest, a mortgagee in possession, or a manager, can all lawfully employ a consignee and give him the same rights; those rights arising from the necessity of the case and not from contract. The claim of a consignee resembles in principle a claim for salvage or a claim for payment of the fines upon renewable leaseholds. His outlay maintains and keeps in existence the property to which his right attaches. A manager on the contrary is merely the agent of the proprietor, and cannot have a better title than he has. His first claim is against the proprietor, and it is only when he fails to satisfy it, that the manager can in case of a sale or other distribution of the corpus or proceeds of the property make a title to be paid out of the proceeds. Such was the case in *Fraser* v. *Burgess*. The title of the consignee to be placed first on the schedule in that case was established in this Court, and was not controverted in the appeal; but my predecessor disallowed the claim of the manager to be placed upon the schedule, and the Privy Council, acting under the advice of Lord Kingsdown, placed him on the schedule, holding that as all the persons entitled as owners or incumbrancers had concurred in his management they were bound to repay him the sums properly expended in that management.

The judgment proceeded entirely upon the principle of acquiescence on the part of the owners and

mortgagees, and as the sale of the property prevented the payment of the manager by the parties interested in it, the Privy Council held that he was entitled to be paid out of the proceeds, treating him as the agent of those parties. The cases of *Chambers* v. *Davidson* and *Scott* v. *Smith* were also mentioned to me, but no point was decided in either of those cases bearing upon the present one. I do not think it necessary to remark upon the argument founded upon acquiescence. A consignee has no concern in, and can neither acquiesce in nor oppose the management of a plantation by any particular person, and cannot abandon any right by dealing with the person in the actual management, unless he be aware of, or has sufficient ground to suppose, fraud. I am therefore clearly of opinion that, upon all the principles of law applying to the rights of consignees, the consignee is, in respect of the debt due to him, entitled to priority over the manager. It has further been urged to us that as Mr. Bourne was appointed manager, or agricultural attorney, by the local Court of Chancery in 1853 he is entitled to priority. If any question turned upon the point, I should have great difficulty in holding that he was an officer of the local Court of Chancery, when, at his request, the Messrs. McDonald were appointed consignees in January or February, 1863. He passed no accounts before the Court, and, so far as appears, acted independently of and without any communication with it from the time of his appointment, and for several years he dealt with Mrs. Edwards, the widow of the former owner, as the owner, acted under her orders, and took his instructions from her. But it is unnecessary to decide the point, as the objector voluntarily and entirely for his own purposes retired from the management of the plantation in 1865, without applying for or obtaining any order or discharge from, or making any application to the local Court of Chancery, and without taking any steps to preserve such rights as he had, or any security for the balance which might be found due to him. I have now gone through in detail the principal grounds which have been so fully and ably urged before us in support of the objector's contention, and feel obliged to disallow them, and to decide in favour of the priority of the consignee. My decision would, however, have

been the same, had I entertained a different opinion upon any of the points urged, as I think Mr. Bourne's conduct when he induced Messrs. McDonald to become consignees, as disclosed in his own affidavit, and his relinquishment of the management under the circumstances detailed by himself, would have barred him from claiming any priority as against them. As the case has been argued before us to-day at our request, I think that the objector ought to have the costs of the day, including those of the preliminary enquiries, out of the estate, and as the point appears to be new I shall make no order against him as to the other costs, notwithstanding that my decision is against his claim.

Feb. 25.—Mr. Bourne presented a petition in pursuance of 17 & 18 Vict. c. 117, s. 65, asking for leave to appeal to the Privy Council against the above order.

Tremlett, for Bourne, the petitioner submitted that although the fund in Court was small, yet the principle of law involved in the decision was one of great importance.

It appeared that the fund in Court which would remain after payment of costs and of charges having priority over both Bourne and the consignees, would not amount to £200.

Mr. Fleming, Q. C. (Chief Commissioner.)—This matter comes before us upon a petition presented in the name of Mr. Bourne, praying that he may be at liberty to appeal against our order, giving the consignees priority on the schedule to him in respect of a balance which he claims in respect of moneys expended by him whilst he acted as the manager of the estate which has been sold. The discretion given to us by the 65th section of the Act of 1854 is very ample, and, however anxious we may be to have the correctness of any decision given by us tested by an appeal to a higher Court, we both feel that we should abandon a duty imposed upon us if we did not carefully consider whether in our discretion the matter ought to be carried further. In forming an opinion upon applications similar to the present, the amount of the sum, the title to which is questioned, must form a very material ingredient, although, of course, many

cases might arise in which we might feel it right to allow an appeal when the amount at stake was small, but the present is not one of those cases, and we feel bound to refuse the present application principally on account of the smallness of the sum. Although the point of law which has been so fully and ably argued before us may be new, it certainly is one which very rarely occurs, and during the whole of the time in which this Court has been so fully occupied with West Indian matters, it has never before been brought before us, and, considering the small amount of the sum, we cannot think that we should be justified in putting the gentlemen, in whose favour we have decided, to the heavy costs of an appeal, or to delay the further administration of the estate in order to have an abstract question of law decided which has not before been involved in any of the cases tried by us, and which may never again arise. We also think it very questionable whether the Privy Council would deem it necessary to express an opinion upon the point, as, if they concurred in our view that Mr. Bourne's own conduct when he induced the Messrs. McDonald to become consignees, his silence as to any demand which he then had, or which he might expect to have, and his assurance that they were to have all the rights of consignees in regard to the plantation, as well as his conduct in voluntarily throwing up the management of the property without obtaining an order from or making any application to the local Court of Chancery, and without taking any steps to obtain from Mrs. Edwards, whom he treated and dealt with as owner, any personal security or any security upon the property, and the time which has elapsed since he left the estate without making any demand, were sufficient to bar his claim, it would be unnecessary to enter upon or decide the legal question. We refuse the present application, not only because the sum in question is so small, but also because we think that Mr. Bourne's own conduct, and especially his *laches*, cannot justify us in granting leave to appeal.

VIII.

WEST INDIAN INCUMBERED ESTATES COURT.

Westminster, February 25, 1870.

(Before JAMES FLEMING, Esq., Q.C., and REGINALD J. CUST, Esq., Commissioners.)

Re EALES.
Ex parte EALES.
The LONGVILLE ESTATE.

A mortgagee who succeeds to a moiety of the estate as heir at law may retain his status of mortgagee as against subsequent incumbrancers.

In this case, the Longville estate, in the Island of Jamaica, containing 2000 acres, with the live and dead stock thereon, had been sold under an order of the Commissioners for £1820, and the schedule of incumbrances now came on for settlement. The estate formerly belonged to Christopher Thomas Eales, who, on the 19th of May, 1865, mortgaged it to John Roberts to secure £900. In April, 1866, Roberts having become embarrassed, made an assignment for the benefit of his creditors; and on the 22nd of December, 1865, the above mortgage was assigned by Roberts' trustees to Christopher Eales, father of the above named Christopher Thomas Eales.

On the 27th of June, 1865, Christopher Thomas Eales conveyed one moiety of the estate to George Turland; and on the 2nd of December, 1866, he died, leaving his father, Christopher Eales, his heir at law, under the Jamaica statute, 3 Vict. c. 34.

Christopher Thomas Eales died in Jamaica, his father, Christopher Eales, being at that time in London, and the news of the death of Christopher Thomas Eales did not reach his father until after the date of the assignment of the mortgage. Christopher Eales took possession of the estate immediately after the date of the assignment, and expended considerable

sums in its cultivation and management ; and he claimed to hold the estate as mortgagee and to add the amount he expended to his mortgage. Two adverse claims had been filed, one by William Drummond Jones, who claimed as consignee, and one by William Samuel Paine, who claimed as a mortgagee of forty head of cattle, but Paine's mortgage was subsequent in date to that of Christopher Eales.

It was objected that the position of Christopher Eales, he being owner of a moiety of the estate, precluded him from charging against subsequent incumbrancers anything beyond the principal and interest due on his mortgage.

Archibald Smith, for Christopher Eales, contended that the accident of his having, by the death of his son, become heir to one half of the estate, that circumstance not being known to him at the date of the transfer, did not deprive him of the rights of a mortgagee in possession, and that he was entitled to adopt whichever position he found most beneficial to himself. He cited *Toulmin* v. *Steere*, 3 Mer. 210; *Davis* v. *Barrett*, 14 Beav. 542; *Richards* v. *Richards*, Johns. 754; *Otter* v. *Lord Vaux*, 6 D. M. & G. 634. He disputed the claim of Jones, the consignee, on the ground that there was another consignee acting at the same time.

G. S. Airey, for Jones, the consignee.

Smith Guscotte and *Wadham*, for Paine, the second mortgagee.

Mr. Fleming, Chief Commissioner.—I reserved my judgment in this matter in order more fully to consider the various points so ably and fully urged by Mr. Archibald Smith, but such further consideration has only tended to confirm the views which I entertained at the hearing, and to satisfy me that Mr. Jones, as the last consignee, ought to be placed at the head of the incumbrancers. Mr. Archibald Smith did not reopen the question so often debated in this Court, and he admitted the general right of a consignee to priority over ordinary incumbrancers, but he denied that Mr. Jones was a consignee, or at least such a consignee as to entitle him to priority. Mr. Jones claimed to have acted as consignee in the year 1866, and sought to be placed on the schedule in regard to the balance due upon his accounts for

that year. Mr. Archibald Smith, for the petitioner, contested his title upon two grounds: first, that Mr. Roberts was consignee until his bankruptcy in April, 1866, and that there could not be two consignees of the same estate; and secondly, that Mr. Roberts' mortgage deed contained a provision by which the owner agreed to consign all the sugar grown on the plantation to him. There was no evidence before the Court to shew that any moneys were supplied for the estate by Mr. Roberts during the three first months of 1866, although I was informed that the petitioner was in a position to establish that some payments had been made. I, however, considered it unnecessary to give evidence of that fact, as my decision could not be affected by it. I do not upon principle see any objection to two persons acting as consignees of the same estate at the same time, and the case of *Simond* v. *Hibert* (1 R. & M. 719) establishes that there is no objection in law. In fact, cases might arise in which it would be absolutely necessary to employ two consignees, as if the acting consignee became from embarrassments unable to furnish the supplies, the cultivation of the plantation could not be continued unless another consignee were employed; and I must say, considering that Mr. Roberts failed in April, 1866, something of the kind appears to me to have occurred in the present case, even if a few payments were made early in 1866, as it is highly improbable that Mr. Roberts, on the eve of bankruptcy, could be in a position to furnish the necessary supplies, or that Mr. Eales would, without ample cause, have sought the aid of a fresh consignee.

Mr. Archibald Smith urged that many frauds might be carried on if the contemporaneous employment of two consignees were allowed. Such no doubt might be the result, and when a case of that description arises we must deal with it, but we are not to presume fraud; and no fraud is alleged on the present occasion. I think, therefore, on the authority of *Simond* v. *Hibert*, and the practice of this Court, that Mr. Jones is entitled to priority in respect of so much of his debt as arose in and after April, 1866; and in regard to so much of his debt as arose between January and April to stand rateably with the petitioner as to any sum which the petitioner can prove

to be due to the estate of Mr. Roberts for advances beyond receipts during those three months; and if no sum be found due to the estate of Mr. Roberts on account of transactions during that time, then to priority for the whole of his debt.

The covenant in the mortgage deed was the personal covenant of the mortgagor, and there can be no doubt that it might have been enforced against him, and that previously to Mr. Roberts' bankruptcy Mr. Roberts might have restrained the mortgagor from making consignments to any other person, but the covenant did not bind the estate, did not prevent a stranger from acting as consignee, nor prejudice his rights, as against the estate, for the supplies which were necessary for the maintenance and upholding of the estate, and in my opinion it cannot affect the rights of Mr. Jones. Similar covenants are usual in mortgages of West Indian estates, but this Court has not allowed them to destroy the claims of consignees, unless fraud or special circumstances were established against the consignee. Therefore on neither ground urged by Mr. Archibald Smith can I refuse to give effect to Mr. Jones' claim.

With regard to the question as to the second mortgage upon the live stock I am clearly of opinion that it cannot be supported as against the prior mortgagee. The second mortgage was made nearly five years before the sale, and was a mortgage affecting forty head of cattle all then living and marked with a particular brand, and giving no right as against their progeny, nor as against any cattle substituted for them. No evidence is before us to shew that any of the forty were living at the time of the sale, or were included in the ninety cattle sold with the estate; nor if there were, as each animal sold varied in value from the other, do I see any means by which it would be possible for this Court to apportion the purchase money. Irrespective however of this very serious difficulty in the way of the second mortgagee, I think that he has no equity against the first mortgagee. So long as any portion of the debt and costs due to the first mortgagee, or of the moneys properly expended by him in the maintenance and cultivation of the estate remains undischarged, a second mortgagee

has no equity. His equity to marshal lies not against the prior mortgagee but against those who have title to the property which was left untouched when that mortgagee realised his mortgage security. So long as any part of the debt due to the first mortgagee remains unpaid the equity which allows marshalling in favour of a second mortgagee does not arise. It was not disputed before me that the petitioner held the estate as mortgagee, and not as heir to his deceased son. It is clear, I think, upon the evidence that he elected to take as mortgagee. It was his interest to hold under that title, and the cases quoted by Mr. Archibald Smith appear to establish that he was entitled to insist upon his right to make the election, and he has petitioned this Court as mortgagee. The petitioner is therefore, in my opinion, entitled to charge against the estate not only the mortgage debt, interest, and costs, but also all sums properly expended by him as the mortgagee in possession of a West Indian estate, and it must be referred to Chambers, if the parties differ, to take the petitioner's accounts upon the footing of this declaration.

I shall therefore direct that, as between Mr. Jones and the petitioner, Mr. Jones be placed in priority on the schedule; and as between the petitioner and Mr. Paine, that the petitioner be placed in priority in respect of all sums due to him for principal, interest, and costs on his mortgage security, and for all sums properly disbursed by him for the cultivation and maintenance of the plantation whilst he was mortgagee in possession. If after taking the accounts and paying all the charges upon the schedule prior to the petitioner's debt, it shall appear that any balance of the purchase money remains, I shall reserve liberty to Mr. Paine, should he be so advised, to again bring forward his claim. I now merely decide that the petitioner is entitled to priority over him in regard to all the sums in respect of which I direct him to be placed on the schedule.

IX.

WEST INDIAN INCUMBERED ESTATES COURT.

8, Park Street, Westminster, April 1, 1870.

(Before JAMES FLEMING, Esq., Q.C., and REGINALD J. CUST, Esq., Commissioners.)

Re PLUMMER.
Ex parte SYMES.

St. Christopher—Statute of Limitations—Reversionary interest—Sale by Provost Marshal.

Under the local statute No. 201 *of* 1863 *a mortgage of a reversionary interest is not barred until twenty years after the reversion has fallen into possession.*

Under the local statute No. 37 *of* 1837 *the Provost Marshal cannot sell an equitable interest in money secured by mortgage.*

This was a petition for the distribution of a sum of £866. 4s. 1d., part of the proceeds of the sale of the Belvedere Estate, in the island of St. Christopher, which had been carried to a separate account.

It appeared that by a family settlement made in 1840, a sum of upwards of £4200 (which was the sum in respect of which the fund in Court had been appropriated) was assigned to trustees, upon trust to pay the interest to Emily Foster Haydon for her life, and after her death upon trust to divide the principal between her two sons, Vaughan Haydon and Dolbeare Haydon, in equal shares.

In 1843, Vaughan Haydon and Dolbeare Haydon mortgaged their reversionary interest in the fund to John Francis to secure £120, with interest at five per cent.

Vaughan Haydon died in 1853, intestate, leaving his mother, Emily Foster Haydon, and his brother, Dolbeare Haydon, his sole next of kin. Dolbeare Haydon died in 1862, having by his will bequeathed

all his personal estate to his mother, who died in 1863, having by her will bequeathed the residue of her personal estate to parties who were represented by the present petitioner.

It appeared therefore that the fund in Court was applicable first to the discharge of Francis's mortgage, and, subject thereto, was payable to the legatees of Emily Foster Haydon.

It was, however, objected by the legatees that as no interest had been paid on Francis's mortgage for more than twenty years, the mortgage was barred by the Statute of Limitations, and in addition to that objection a claim was made by F. S. Wigley and A. P. Burt to a moiety of the fund by virtue of a bill of sale under the hand and seal of the Provost Marshal of the Island of St. Christopher, made in 1855, whereby, after reciting a judgment obtained against Vaughan Haydon in the Island Court of Queen's Bench, upon which execution had issued, and had been duly levied upon all the right, title and interest of the said Vaughan Haydon in and to the Belvedere Estate, and that the said estate had been sold by auction to Wigley and Burt—the Provost—in exercise of the authority vested in him, and in consideration of the sum of £6, granted, bargained, and sold to Wigley and Burt, their heirs and assigns, all the right, title, and interest of the said Vaughan Haydon in and to the estate.

It was contended on behalf of Wigley and Burt that under the bill of sale all the interest, present and future, of Vaughan Haydon in the mortgage debt of £4,208. 6s. 8d., being all his interest in the Belvedere Estate, passed to the purchaser, and that, subject to Francis's mortgage, if the same were still subsisting, Wigley and Burt were entitled to a moiety of the fund. It was, however, objected on behalf of the legatees of Emily Foster Haydon that a mortgage debt was not such an interest as could pass under the description contained in the bill of sale, and that even if it were so the bill of sale was void, and *ultrâ vires* so far as it affected to deal with such an equitable interest as the one in question. The Provost Marshal's authority was created by the local statute No. 37, dated the 13th of April, 1837, which prescribed minutely the mode in which execution should be levied, but it was contended that the

directions of the statute were not applicable to the seizure and sale of such an interest as the present one, which was a mere reversionary interest in a portion of a mortgage debt, itself subject to a mortgage. Such an interest could not have been seized by the sheriff under an English judgment, and it was insisted that a judgment in St. Christopher must be taken to have the same legal effect as a judgment in England, except so far as it might be affected by the local statutes.

The cases of *Doe* v. *Greenhill*, 4 B. & Ald. 684, and *Scott* v. *Scholey*, 8 East 466, were referred to on this point.

Peek, for the petitioners, contended that Francis's mortgage was barred by the 37th section of the local statute No. 201, passed in 1863, which provided that "all actions upon any indenture, bond or other instrument under seal shall be commenced and sued within twenty years after the right of action accrued and not after."

G. Rochfort Clarke, for Francis, the mortgagee.

Archibald Smith, for Wigley and Burt, contended that, whatever might be the law of England as to judgments, it was the universal understanding and belief throughout the West Indies that an assignment by the Provost Marshal was sufficient to pass whatever interest the debtor had, whether legal or equitable, and that the description in the bill of sale was an apt and sufficient description of the interest then possessed by Vaughan Haydon in the Belvedere Estate.

The Commissioners were of opinion that, in the case of the mortgage of a reversionary interest, the right of action could not be considered to have accrued so far as regarded the fund subject to the mortgage until the reversion fell into possession, and that, therefore, the mortgagee was not barred.

As to the claim of Wigley and Burt, they were of opinion that under the particular circumstances of the case the interest of Vaughan Haydon was not such an interest as could be seized or sold by the Provost Marshal under the provisions of the Colonial Act, and that the bill of sale was irregular, but they desired to express no opinion as to the effect of the Island Statutes upon a regular mortgage security.

The claim of Francis, the mortgagee, was, therefore, admitted; and the claim of Wigley and Burt was disallowed; but the £6 and interest upon it were by consent directed to be paid to Wigley and Burt, and costs of all parties were ordered to be paid out of the fund.

X.

WEST INDIAN INCUMBERED ESTATES COURT.

8, Park Street, Westminster, November 16, 23, 1870.

(Before JAMES FLEMING, Esq., Q. C., and REGINALD J. CUST, Esq., Commissioners.)

Re Osborn.

Consignee—Lien—Power to appoint—Proceedings in Chancery.

A consignee to whom a balance is due is entitled to have the estate sold in the Incumbered Estates Court. (Farquharson *v.* Balfour, 8 *Sim.* 210, *distinguished.*)

A consignee, by taking a security, or entering into an arrangement with the owner, does not thereby give up his general lien, except so far as his general lien may be inconsistent with the terms of the security or arrangement. (Chambers *v.* Davidson, 15 *W. R.* 534; *L. R.* 1 *P. C.* 296, *explained.*)

The rights of a consignee do not depend upon the estate of a person by whom he is appointed. Any person lawfully in possession of an estate may appoint a consignee, and the consignee so appointed will be entitled to all the rights incident to the office.

The pending of a Chancery suit is no ground for staying proceedings in the Incumbered Estates Court.

In this case a conditional order had been made for sale of an estate called Blackman's or Mount Lucy,

in the Island of Antigua, and objections had been filed on behalf the owners.

The estate formerly belonged to Dr. Osborn, who died in 1852, having devised it (with other estates) to trustees for fifty years in trust out of the rents and profits to raise and pay certain specified debts in aid of his personal estate; and subject to the said term and to certain annuities he devised the estate to the use of Judith Matilda Osborn during her life, for the benefit of herself (as a *feme sole*) and her son Kean Brown Osborn in equal shares, and in case the said Kean Brown Osborn should die in her lifetime then in trust wholly for her own separate use, and from and after her death he devised the said estate to the use of the said Kean Brown Osborn in fee with a gift over in case he should die without leaving issue living at his death.

On the death of the testator, James Barrett, the acting trustee of the will entered into possession and remained in possession until September 1857, when he gave up possession to Judith Matilda Osborn and her husband George Godolphin Osborn. On this occasion the firm of Garraway & Co. (now represented by Frederick Garraway) advanced £500 for the purposes of the estate, and undertook to advance such further supplies as should be necessary for the purpose of cultivation on receiving the consignments in the usual manner, and by a deed dated the 16th of December, 1857, after reciting to the above effect, Mr. and Mrs. Osborn granted all their estate, right, title, share, and interest in the said estate, and in the live and dead stock thereon, to a trustee upon trust to secure the consignment of the produce to Garraway & Co., and upon trust out of the annual profits of the estate after payment of the expenses of cultivation to pay off all sums advanced from time to time by Garraway & Co. to Mr. and Mrs. Osborn, and to pay the balance to Mr. and Mrs. Osborn, their executors, administrators, and assigns.

By a deed of release, dated the 12th of November, 1858, after reciting the said will, and certain dealings with other estates thereby devised, and that James Barrett, as acting trustee of the said will, had been in possession of all the estates devised by the said will, and had applied the net produce thereof in

discharge of the debts charged thereon by the said will, and that all the said debts had been paid, and that accounts were in preparation showing the receipts and payments by the said James Barrett as such trustee in respect of the said several estates, but that the same were not then complete, and that Mr. and Mrs. Osborn had agreed, in consideration of obtaining possession of the estate, to waive the accounts, Mr. and Mrs. Osborn released Barrett from all liability under the will in respect of Blackman's Estate.

The accounts were subsequently completed, and a memorandum, signed by Messrs. Garraway on behalf of the owners, was subsequently annexed to the said release, by which it appeared that the amount of debt chargeable on all the estates was £3381. 11s., and that the proportion chargeable on Blackman's Estate was £944. It appeared, however, that the above sum of £844 had not been actually raised by James Barrett out of the produce, but had been provided by Garraway & Co. at the request of Mrs. Osborn.

By an indenture, dated 30th June, 1859, after reciting the prior indenture of 16th September, 1857, and that it had been erroneously supposed that Mrs. Osborn was entitled to the whole of the produce of the estate during her life, it was declared that, notwithstanding the ultimate trusts of the said indenture, one moiety of the net produce of the said estate should be applied for the maintenance of the said Kean Brown Osborn, or invested for his benefit.

A large sum became due to Messrs. Garraway & Co. on account of the said estate in respect of the cultivation and of the £844 advanced for the payment of debts, and also in respect of advances made for the personal benefit of Mrs. Osborn and her son Kean Brown Osborn; and differences having arisen on the subject, Mrs. Osborn and her son, Kean Brown Osborn, commenced a suit in Chancery against Frederick Garraway, who then represented the firm, whereupon Frederick Garraway presented a petition for the sale of the estate.

Mrs. Osborn and Kean Brown Osborn objected to the sale on various grounds, which

are referred to by the Chief Commissioner in his judgment.

Osborne Morgan, Q. C., and *Wells*, for Mrs. Osborn and Kean Brown Osborn, contended:—(1) That Garraway, being a consignee in possession, could not apply for the sale of the estate (*Farquharson* v. *Balfour*, 8 Sim. 210). (2) That Mrs. Osborn, being only entitled to one moiety of the estate for her life, could not charge the fee; and that Garraway & Co., having taken the security of the deed, had abandoned their general lien (*Chambers* v. *Davidson*, L. R. 1 P. C. 296). (3) That the deed of 1857, by which the ultimate surplus was reserved to Mr. and Mrs. Osborn absolutely, was a breach of trust, and conferred no rights. (4) That the money required for the payment of the testator's debts ought to have been raised out of the income, and that the advance of it by Garraway & Co. was a breach of trust, and gave them no lien on the estate. (5) That the deed of 1859 was also a breach of trust, as being made for the sole benefit and accommodation of George Godolphin Osborn, who was insolvent.

A. L. Smith, for Frederick Garraway, the petitioner.

Mr. FLEMING, Q. C. (Chief Commissioner).—This matter comes before us on objections which have been filed on behalf of Mrs. Osborn and her infant son, against making absolute the conditional order for the sale of a property in Antigua, called "Blackman's," which has been obtained on the petition of Mr. F. Garraway. The first objection urged is of a formal character, and is founded upon the case of *Farquharson* v. *Balfour*, decided by the late Vice Chancellor of England in 1836. (8 Sim. p. 210). In that case it was held that a consignee, whilst continuing to act as consignee, could not ask to have a balance due to him on the then state of his accounts paid out of the *corpus* of the estate, but the Vice Chancellor based his judgment on the inconvenience which must result to all parties from consignees being allowed from time to time to come to the Court, and to ask as often as the balance was in their favour for payment out of the *corpus*, and fully admitted that when the accounts were finally closed, the consignees were entitled to be paid out of the

corpus. That case consequently, irrespective of the special provisions of the Act which constituted this jurisdiction, has no application to cases in our Court, as every petition for a sale of necessity implies an application for the final settlement of the accounts of the consignee, and a cessation of the consigneeship. This objection cannot therefore, in my opinion, be sustained.

The next objection is founded upon the case of *Chambers* v. *Davidson*, as decided in this Court, and afterwards in the Privy Council. That case however, as finally decided, merely affirmed a proposition which could scarcely be considered open to question—that where a consignee acted under the provisions of a written instrument, he was bound by those provisions. I entirely adhere to that decision. In the present case it is said that Mr. Garraway acted as consignee under a deed dated on the 16th of September, 1857, and it has been laboriously and most ably argued before us that that deed was fraudulent, and therefore void. If it were established that the deed of 1857 were void, it could scarcely help the case of the objectors, for if we could not regard that deed, then Mr. Garraway, who certainly acted as consignee from 1857, must be held to have acted as consignee by parol, and to have all the rights attaching to him in that character; but I am very clearly of opinion that the deed of 1857 is in no sense fraudulent.

Mr. Osborn, the testator, under whose will the objectors make their title to the estate, was seized of several estates in Antigua, and devised them all to certain trustees for a term of fifty years, upon trust to either let them, or to manage, cultivate, maintain, and keep them up, with the most ample powers of management, and after payment of all charges and expenses, to pay out of the income of the estates certain debts specified in the will, and he devised Blackman's estate, after the expiration of the term, and in the meantime subject thereto, to the use of the objector, Mrs. Matilda Osborn, for *life*, in trust as to a moiety during her life for her separate use, and as to the other moiety to her son, the other objector, who was then and still is under age, with remainder of the entirety to the son after her decease. The testator's debts charged upon his Antigua estates

were apportioned, and £844 was the amount charged upon Blackman's. Mr. Barrett, of Antigua, was the only acting trustee under Mr. Osborn's will. He entered into possession of the testator's estates, but it is stated that the income from Blackman's did not enable him to pay the £844 charged upon it. The objector, Mrs. Osborn, was anxious to obtain possession, and she paid the money to Mr. Barrett, to enable him to pay off the debts, having first obtained the required sum from Mr. Garraway. It would be clear under this state of circumstances that the objector, Mrs. Osborn, the tenant for life of the moiety, would have a charge upon the estate for the amount which she found to pay off the debts; but in the indenture of release, dated on the 12th of November, 1858, by which Mrs. Osborn released Mr. Barrett, the trustee, and to which Mr. Garraway was a party, it is recited that Mr. Barrett had applied the net proceeds in payment and discharge of the debts by the will directed to be paid, and that the debts were wholly paid and discharged. It was insisted before us that both Mrs. Osborn and Mr. Garraway were estopped by this recital from saying, however the fact might be, that Mrs. Osborn found the money for payment of the debts, or that she or her assignee had still a charge or lien upon the property in regard to them. I think, however, that Mrs. Osborn, who obtained the money from Mr. Garraway, cannot be heard in support of this contention, and that it is open for her or her assignee to show, as against the other objector, that the recital was erroneous, and the indenture of release itself affords strong evidence to show that the recital was inserted, however improper it may have been to insert an incorrect recital, more as a matter of form, in order to discharge the trustee, than as a matter of fact, for it proceeds to say that Mr. Barrett had not rendered his accounts, and that Mrs. Osborn and Mr. Garraway had waived all accounts. There is also a memorandum, although of later date, annexed to the indenture, in which the £844 and the debts apportioned on the other estates are stated and treated as still payable, together with the interest upon them. I am therefore of opinion that it is open to the parties to establish by evidence that the debts were actually

paid by Mrs. Osborn, or on her behalf, and that the accounts of the estate between the testator's death and the date of the indenture of release prove that they were not paid out of the income of the property, as stated in the indenture. I have gone thus fully into the point, because the provisions in the deed of 1859 in relation to them have been so strongly insisted upon as establishing a case of fraud.

The general question of a lien of a consignee upon the *corpus* of the estate for the balances eventually found due to him has not been disputed on the present occasion, nor has it been doubted that the objector, Mrs. Osborn, had full authority to appoint a consignee, and to give him all the rights attaching to the character of consignee. The case consequently resolves itself into the effect of the deed of 1857, and of a subsequent deed of 1859.

Mrs. Osborn, the objector, was trustee of the whole estate, and clearly entitled, subject to the term of fifty years, to possession, and to validly appoint a consignee; and I think that she did validly appoint the Messrs. Garraway, now represented by the petitioner, consignees, as the deed of 1857 provided that they should find all the necessary money and supplies, and that the produce of the estate should be consigned to them; and such provisions of necessity assumed that they were the consignees of the estate.

Although Mrs. Osborn was tenant for life and beneficially entitled during her life only to a moiety of the estate, the consignee would certainly have a charge upon the *corpus* for all moneys properly expended by him in his character of consignee, and the only question upon the deed of 1857 is, whether it cut down the rights which the consignee would otherwise have had to a charge upon the beneficial interest which Mrs. Osborn had in a moiety of the estate. I think it did not.

The rights of a consignee do not in any manner depend upon the estate of the person in possession. It is almost a matter of necessity that they should not. If they did, it would be very difficult, if not impossible, to find merchants willing to act as consignees, and a vast number of plantations must go

out of cultivation. It frequently happens that the title of a person in possession of a West Indian plantation is of the most flimsy nature, and in many cases in this Court there has been great difficulty in ascertaining the title to the inheritance, and in several it has been found impossible to trace it.

Mrs. Osborn dealt with all the estate, right, title, share, and interest to which she was entitled in possession, expectancy, reversion, or otherwise under the testator's will, and it is not only clear that she had a sufficient estate under the will to enable her to appoint, but that it was absolutely necessary, if the estate were to be cultivated and maintained at all, that she should have the power to appoint a consignee, and of giving the person appointed the ordinary rights of a consignee of a West Indian estate. Such a power necessarily attaches to every proprietor of West Indian property, whatever his estate in that property may be. It has, however, been strongly insisted upon that the trusts of the deed of 1857 were fraudulent, and that we must therefore hold the deed void. The deed provided that the moneys which had been advanced, or which, under the agreement mentioned in the deed, should be advanced, to or for the accommodation of the objector, Mrs. Osborn, and her husband, by the Messrs. Garraway, should be repaid to them out of the income of the estate, without taking any notice or making any provision in reference to the share to which their infant son was entitled under the will, and the deed further provided that the final surplus of income should be paid to Mr. and Mrs. Osborn without reference to the infant or his interest. The deed of 1857, as is proved, was made under the mistaken idea that the objector, Mrs. Osborn, was entitled during her life to the whole income of the estate, but if it had not I should have had great difficulty in holding that the provisions insisted upon were sufficient to avoid the deed on the ground of fraud, as Mrs. Osborn was clearly trustee for her son, and could in regard to strangers deal with the estate although she was personally responsible to her son for his share of the income from the testator's death, and in her character of trustee for her infant son she was certainly entitled to receive the income from the

manager of the estate. But as these provisions were inserted under a mistake as to the true interests of the parties under the testator's will, and were rectified by the deed of 1859, and as the deed of 1857 only assumed to deal with such interests as Mr. and Mrs. Osborn could lawfully deal with under the testator's will, it appears to me impossible to hold that it is void on the ground of fraud. Mistake is not fraud; and if there were any fraud, which I do not for a moment believe, it was a fraud against the Messrs. Garraway, as Mrs. Osborn by the deed proposed to give them, in regard to their advances for Mr. Osborn and herself, a security which she could not grant. I therefore think that the Messrs. Garraway were lawfully constituted consignees, and that the effect of the deed of 1857 was not to cut down their rights as consignees to a charge upon the life estate of Mr. Osborn in a moiety of the income.

On the merits of the case, it only remains to consider the effect of the deed of 1859 upon the rights of the Messrs. Garraway as consignees. I think that they were validly appointed consignees by Mrs. Osborn, and they certainly acted as consignees from 1857, and were the consignees of the estate when the deed of 1859 was executed. If my view be correct, and the Messrs. Garraway had the ordinary rights of consignees from 1857, the only question now before us is whether the deed of 1859 deprived them of those rights, and made their lien as consignees merely a charge upon Mrs. Osborn's life interest in a moiety of the estate. I have carefully read over the deed of 1859, and think it had no such effect. It rectified the provisions of the deed of 1857, by preventing any future payments out of the whole income in discharge of the personal debts of Mr. and Mrs. Osborn, and by directing the moiety of the surplus income to be accumulated for the benefit of the infant, after payment of the allowance made by the Court of Chancery out of his share. It also provided that so much of the money advanced for the payment of the testator's debts by Messrs. Garraway, by the direction of Mrs. Osborn, as remained due, as well as the expenses of cultivation, should be paid out of produce and income of the estate before any division

was made in shares, but I do not find any provision which deprives the Messrs. Garraway of any rights which they had as consignees; and it appears to me that the whole object and scope of the deed of 1859 was to secure the advances made by the Messrs. Garraway, for the personal benefit of Mr. and Mrs. Osborn, by policies of insurance, and afterwards to direct the application of the income of the estate in a legal manner during the lifetime of Mrs. Osborn, having due regard to the rights of the infant. If the charge of the debts of the testator upon the entire income be not valid, it is merely a question of account, and can in no manner affect the rights of the Messrs. Garraway as consignees.

I therefore hold that the Messrs. Garraway were lawfully appointed consignees by the objector, Mrs. Osborn, with all the rights, including the right of a charge or lien upon the *corpus* of the estate, attaching to the character of consignees, and that their rights as consignees were neither intended to be nor were in fact nor in law altered by the deed of 1859, and that on the merits of the case, should a balance be found due to them in their character of consignees, they are entitled to have the conditional order for sale made absolute.

It has, however, been urged before us that as a suit is pending in Chancery by which the infant, by his next friend, prays to have the accounts of Mr. Garraway, the petitioner in this Court, taken, we ought not to make the order absolute until the result of that cause is ascertained. I, however, do not concur in that view. The accounts can be taken as well in this Court as in Chancery, and at a much less cost to all parties; whilst this Court, as it can deal directly with the estate itself and the possession of it, can give the petitioner relief which the Court of Chancery cannot, and if the petitioner be entitled to sue he certainly has a right to come to the Court which can afford the most complete relief.

The objection that Mr. Garraway in certain dealings with the firm of Overend & Gurney in relation to his interest in several West Indian plantations, including Blackman's, must be held as a trustee for the infant objector, and bound to give him the benefit of those dealings so far as relates to

Blackman's, appears to me so unfounded as to render it unnecessary to comment upon it.

It is, however, said on behalf of the objectors that they can prove that no debt is due to the petitioner in his character of consignee, and they are certainly entitled to establish that case if they can.

I, therefore, think the proper order to make is to direct the conditional order to be made absolute, with liberty to the objectors to apply to set it aside on or before the 31st of January next.

Mr. Cust, Assistant Commissioner, concurred.

XI.

WEST INDIAN INCUMBERED ESTATES COURT.

8, Park Street, Westminster, December 16, 1872.

(Before James Fleming, Esq., Q. C., Chief Commissioner.)

Re Osborn.
Ex parte F. Garraway.

Interest according to the usual course of dealing between a consignee and the estate allowed.

Open accounts held to be continuing until finally closed.

Ordinary commission on consignee's payments allowed.

Costs of proper improvements, especially when made with the knowledge of all parties interested, ought to be allowed to the consignee.

Prima facie evidence of identity, in the absence of any counter evidence, allowed.

This case arose on the settlement of the Schedule of Incumbrances of Blackman's Estate, in the Island of Antigua. The facts of the case are fully stated in the previous report, p. 53.

Wells, for the owner.

Westlake, for F. Garraway.

The Chief Commissioner said:—

This case comes before me on a notice of motion raising objections to the certificate of the Assistant

Commissioner as to the amount due to the consignee. Five objections are insisted upon in the notice of motion.

The first is in relation to that which is described as compound interest, but which is in fact a mere carrying of the interest, whether due on the credit or debit side of the account, to the principal account, on which interest is either charged or allowed according to the state of the account. It is insisted that a recital in an indenture of the 16th of September, 1857, to the effect that Mrs. Osborn should secure in the manner therein mentioned the repayment to the consignees of all moneys advanced by them either to Mrs. Osborn or her husband, or on account of the plantation, with interest thereon after the rate of £5 per cent. per annum from the time or times at which such moneys should be advanced, excludes all claim to interest, save simple interest at the rate of £5 per cent. If the case were to be decided on this recital alone, I much doubt if the contention could be supported. £5 per cent. was to be the rate of interest, but the character of the sums on which it was to be charged in relation to advances made for cultivation and management must, I think, depend upon the custom of merchants. In order to exclude merchants from the benefit of the ordinary charges in the trade, a clear and explicit intention ought to be expressed or necessarily implied in the language used. The words in the recital do not, in my view, exclude the ordinary usage, and the witnessing part is scarcely consistent with putting the suggested meaning upon them. The trusts for cultivation, management, and the consignment of the produce, and as to the payment of the expenses incurred in the management, cultivation, and maintenance of the plantation, are all in the common form of dealings between an owner and consignee, whilst the only witnessing part which expressly deals with interest is in relation to the sums advanced, or from time to time to be advanced, to Mr. and Mrs. Osborn. I think, therefore, according to the true intent of the deed, whilst £5 per cent. was to be the rate of interest, the sums on which it was to be charged in relation to the cultivation and maintenance of the plantation were left to the ordi-

nary dealings between an owner and consignee, and it is clear that all parties understood the indenture in that sense. The accounts rendered by the Messrs. Garraway place the balance due for interest as part of the balance in the account. The accounts were for some time regularly rendered to Mrs. Osborn, and no objection was made, and I think it is now too late to insist upon an objection which, if of force, ought to have been raised when the second account was rendered. As I stated in my judgment of the 23rd of November, 1870, I consider Mrs. Osborn's son bound by her acts in relation to third parties. If, however, I thought myself compelled to yield to the first objection, I am at a loss to see that any sufficient advantage to justify the delay and increased expense could result from such a decision. I should be obliged to refer it back to Chambers to have the account of the consignees taken in a different form. The result would be that they would appropriate the first receipts in each successive year to pay the interest due on the account of the former year. To this in every possible view of the case they would be entitled. The balance in each year, that is, the balance to be carried on to the next account, would therefore be increased to exactly the amount of interest which the consignees retained, and their receipts as against their disbursements would be to that extent greater, and as the balances represent the sums on which interest is payable, the matter would in the new account stand very much in the position in which it stands at present. I think, therefore, that whether I consider the true construction of the indenture taken as a whole, or the result which must accrue from yielding to the application, I am bound to overrule the first objection.

The second objection appears to me quite untenable. If on the transfer of the business of the Messrs. Garraway to Messrs. Overend & Gurney Mrs. Osborn had paid the balance due to the former firm, and closed her account with them, opening a new account with the later firm, the objection could be understood and would succeed, but she did nothing of the kind. The account was transferred as an open and continuing account with the firm of Messrs. Overend & Gurney, and Mrs. Osborn dealt with

them on that footing, and took no steps whatever to close the account or to repudiate the transfer of the business, and I cannot now listen to an objection which, to have effect, ought to have been raised in 1863. I therefore disallow the second objection.

The third objection asks me to disallow all commission on payments made in respect of the estate. In the argument before me the only objection raised was to the half per cent. on payments, the commission of £5 per cent. on supplies not being disputed. The propriety of both payments depends upon the custom of merchants—that custom was fully proved before me, and no conflicting evidence was either tendered or given; and whilst the case on behalf of the consignee was clearly established by the evidence which he brought forward, I am asked on behalf of Mrs. Osborn, without a shadow of proof, to override that evidence, and refuse the commission. I decline to do so, and disallow the third objection. It is certainly strange that this objection should have been urged before the Assistant Commissioner, and that it should now be insisted upon in the present motion, as the indenture of 1857, so much relied upon, expressly provides for the payment of the usual and customary charges and commissions.

It is with regret I comment on the fourth objection, an objection which appears to be inconsistent with fair dealing or ordinary justice. In 1859 it was absolutely necessary, in order to carry on the cultivation of the plantation, to lay out a considerable sum in the improvement of old buildings and the erection of new buildings and works. The consignees, with the full knowledge of all parties, advanced the money requisite for the improvements, and they were made, and I am now asked to disallow the expenditure. Between 1859 and 1863 the great advantage of replacing windmills by steam power became generally known and felt throughout the sugar producing islands, and early in the year 1863, the consignee took down the windmill and erected a steam engine in its place, at a heavy cost. Mrs. Osborn's own agent wrote a glowing description of the benefits which must result to the property from the change, and there can be no doubt that the value

of the plantation was greatly enhanced by the application of steam power. I am now asked, although the property has since 1863 derived all the benefit which the alteration could produce, and although the purchase money has been greatly increased by the knowledge of the existence of the steam power, to disallow as well the moneys advanced for improvements as for the erection of the steam engine. I feel I cannot do so without violating the principles of honesty and justice, and I overrule the fourth objection.

The fifth objection is raised upon the sufficiency of the evidence to identify Mrs. Berning with the widow of the testator's nephew Robert Osborn, Doctor of Medicine, to whom an annuity was bequeathed. Mrs. Berning and her son Keane John Osborn are resident in the colony of Natal, and if the certificates and the written acts be accepted as evidence, no reasonable doubt can be entertained on the point raised. The powers of attorney and the receipt, if made for the purpose of a legal contention, might not afford sufficient evidence, but if made in the ordinary course of business and acted upon by the parties to whom they were addressed, as was the case in the present instance, they afford proof of acts done, and in the absence of all conflicting proof are, in my view, sufficient to support the title of Mrs. Berning. Although Mrs. Berning and her son could not be indicted under the powers of attorney for perjury, it is clear that they might, if the statements contained in them were proved to be false, be indicted upon them for obtaining money upon false pretences, and the punishment for such an offence would be greater than for perjury. I therefore do not attach weight to the objection that Mrs. Berning could not be indicted for perjury, and, I think, as I entertain no doubt on the point, that I should not be justified in delaying the settlement of this long pending matter until an affidavit could be obtained from Natal. I consequently disallow the fifth objection.

XII.

WEST INDIAN INCUMBERED ESTATES COURT.

8, Park Street, Westminster, December 11, 1872.

(Before JAMES FLEMING, Esq., Q. C., and REGINALD J. CUST, Esq., Commissioners.)

Re LINDSAY.
Ex parte BELL.
Ex parte GARRAWAY.

Consignee—Priority.

Circumstances under which a consignee debt will be postponed to the claim of a mortgagee.

This case arose on the settlement of the Schedule of Incumbrances of the Villa Estate in the Island of Antigua.

The facts of the case will sufficiently appear by the judgment.

Westlake for Garraway.

Nugent for the petitioner.

The Chief Commissioner delivered judgment as follows:—

Although in the present case I decide against the claim of the consignee, I do so under the special circumstances of the case, and without in any manner recalling or varying from the opinion which I expressed as to the rights of a consignee in the case of *Chambers* v. *Davidson*. The further experience which I have acquired in reference to West Indian affairs has only tended to confirm that opinion, and to satisfy me that the law of the country as well as justice to the suitors and the interest and well being of the colonies require that the rights of the consignees should be maintained. An abandoned plantation is of comparatively little value, and under ordinary circumstances a plantation kept in cultivation would realize from four to five times the price

which could be obtained for the same property if it had been allowed to run to waste. The cultivation in cases in which consignees are employed is carried on at the cost of the consignee, and to allow owners by their private acts to settle or deal with the plantation to the prejudice of the consignees would be to permit them to charge and give away the property of other persons. If a consignee be not employed the owner can of course do what he pleases with the estate. But whilst I am prepared to support the rights to which I believe a consignee entitled, I can not for a moment doubt that he can by agreement alter or modify those rights, or that circumstances may arise in which equity would restrain him from exercising them. I think in the present case that Mr. Frederick Garraway can not be allowed to insist upon his rights as a consignee as against the mortgagee. The facts, so far as it is necessary to refer to them in the view I take of the case, are few and scarcely in dispute.

There were two mortgages affecting the estate. The second was vested in a Mr. Blackburn, and in some manner he got into possession of the plantation, and after his death his representatives continued in possession. At the time of Blackburn's decease, Mr. Garraway's father carried on the business of a West Indian merchant in partnership with Mr. Garraway and another son, who has since died, and a Mr. Streatfield.

In a suit in the English Court of Chancery, instituted for the administration of Mr. Blackburn's estate, Mr. Garraway, the father, was appointed consignee of the plantation, and in that character a debt exceeding £5000 became due to him from the plantation. Mr. Garraway, the father, afterwards purchased for his own benefit, but in the names of his two sons, as his trustees, the first mortgage upon the property. He subsequently settled a sum of £16,000 for the benefit of his wife and daughters, allowing that sum to remain in the partnership during his life, but directing it to be invested after his decease. He appointed his two sons trustees of the money, and as it was allowed to remain with the firm, I think I must hold that all the members of the firm had notice of what had been done. The £16,000 was certainly a debt due from the firm at the time of

the death of Mr. Garraway, the father, and it was equally the duty of the firm to pay it, and of the sons to invest it, and I think a Court of equity could not allow any subsequently acquired right of the firm to be set up against the title of the persons claiming the £16,000. It appears to me to be beyond controversy that the sons could not claim under any such title, but it has been forcibly and strongly urged that the partnership, through Mr. Streatfield, might set up such a right. Although I entertain very little doubt on the subject it is unnecessary to determine that question, as whatever right Mr. Streatfield had is now vested in Mr. Frederick Garraway, and I hold that all Mr. Frederick Garraway's rights under the partnership are bound by the trust. The £16,000 was not invested. Some time after the death of Mr. Garraway, the father, new trustees of the settlement were appointed, and an estate was conveyed to them, and on the 10th of November, 1863, the first mortgage which Mr. Garraway's sons held in trust for him, was assigned to the trustees in part discharge of the £16,000. After the death of Mr. Garraway, the father, Mr. Frederick Garraway was appointed consignee by the Court of Chancery in the place of his father in the Blackburn administration suit. In that character a large sum had become due to him before the 10th of November, 1863, and he now claims to place that sum and the balance due to his father as consignee, on the schedule in priority to the first mortgage, which he and his brother had conveyed in part discharge of the £16,000. The firm of Garraways & Streatfield after the death of Mr. Garraway, the father, got into difficulties, and an assignment of all the rights of the firm was made on certain considerations to Messrs. Overend & Gurney.

After the failure of Messrs. Overend & Gurney all the rights which the firm of Garraways & Streatfield had were conveyed to Mr. Frederick Garraway and are now vested in him, and he is undoubtedly entitled to insist upon such rights as he can claim under the assignment made to him. The first mortgage was expressly excepted from the assignment made to Messrs. Overend & Gurney, and the rights of the parties in relation to it do not appear to me to be affected by the transactions in connection with that assignment, save in so far as they vested all the claims of the

former firm of Garraways & Streatfield in Mr. Frederick Garraway. Whilst Mr. Frederick Garraway acted as consignee under the Court of Chancery in the Blackburn administration suit a certain arrangement was made with the sanction of the Court in regard to his rights as consignee, and that arrangement was carried out by an indenture to which he and his brother, his co-trustee under the settlement of the £16,000, were parties, and the indenture was settled under the order of, and approved of by the Court. In that indenture, which expressly dealt with and settled Mr. Garraway's rights as consignee, it is in direct words stated on his behalf that the first mortgage was the first charge upon the estate. He now asks us to declare the contrary, and to prefer his claim as consignee to the mortgage. I think he was bound both in law and in conscience to make the admission contained in the indenture, and that no person claiming under him can be heard to gainsay it. The contention, however, is that he was a partner in a firm and that although he was technically the consignee, the firm were in truth the consignees, and that the firm could not be bound by any admission he might make. I entirely dissent from that view, If a member of a firm be appointed a consignee under the Court of Chancery, although the firm be entitled to participate in the benefits derived from the appointment, the consignee is as much bound by the proceedings of the Court and by any act done by him or any admission made by him in the course of those proceedings as if he were not a member of the firm, and the firm and every one else claiming any rights under him in his character of consignee must be held to be bound by those proceedings. I should certainly hold that Mr. Garraway could not now be allowed to set up the rights of the former firm which he alone represents, but I am very clearly of opinion if he could that it would not assist his present contention, and that in regard to his rights as consignee and in regard to the rights of all claiming under his consigneeship, the admission made in the indenture is conclusive, and that on every ground I must hold the first mortgage to constitute the first charge.

XIII.

WEST INDIAN INCUMBERED ESTATES COURT.

8, Park Street, Westminster, Aug. 6—Sep. 20, 1873.

(Before James Fleming, Esq., Q. C., and Reginald J. Cust, Esq., Commissioners.)

Re Osborn.
Ex parte Garraway.
Ex parte Bell.
Ex parte Dobree.

Judgment—Mortgage debt.

If a mortgage debt specifically released by a judgment creditor from his debt and the judgment can subsequently become liable to the judgment, it cannot do so in the hands of a purchaser for valuable consideration if the judgment creditor be guilty of laches and neglect to enforce his rights.

The facts of this case are fully stated in the judgment of the Chief Commissioner.

Westlake for Garraway and Dobree.

Nugent for Bell.

Mr. Fleming, Chief Commissioner.—The facts of this case are scarcely in dispute. The late Mr. Garraway, the father of Frederick Garraway and George Garraway, carried on the business of a West Indian merchant in copartnership with his two sons, and on his death in 1856 he had a large interest in the assets of the firm. He appointed a considerable portion of the assets to which he was entitled for the benefit of his family and appointed certain persons trustees of it, and those persons are now represented by Mr. Matthew Bell. After the death of Mr. Garraway, the father, the business was carried on by his two sons and Mr. Streatfield in copartnership under the firm of Frederick and George Garraway and Company, and the amount due to the estate of Mr. Garraway, the father, remained in the firm and was dealt with by the surviving partners. Judgment was entered up in the island of Antigua against Frederick

Garraway in the penalty of £20,000, to secure the sum due by him to the trustees of the fund settled by his father, which in 1863 it is admitted amounted to the sum of £11,748. 17s 7d.

This judgment appears to have been delivered to the Provost Marshal of the Island on the 19th of September, 1863. No execution was in fact levied upon the judgment, nor were any proceedings ever taken to enforce it. Previously to the month of November in the same year the firm of Frederick and George Garraway & Co. became seriously embarrassed and unable to continue their business.

A large portion of the assets of the firm consisted of charges upon West Indian estates, and amongst them of a charge of £3504 4s. 7d, upon Blackman's Estate in Antigua. On the 11th of November, 1863, an arrangement was made between the firm of Frederick and George Garraway & Co. and Messrs. Overend, Gurney & Co., to which Mr. Bell and Mr. Sisson his then co-trustee (since deceased) were parties, and by that arrangement in consideration of certain benefits secured to the estate of Mr. Garraway, the father, Mr. Bell and Mr. Sisson as such trustees, released and discharged the partnership estate of the said firm of Frederick and George Garraway & Co., including therein the charge upon Blackburn's Estate, from all debts due to them as such trustees, and from all judgments or other securities held or claimed by them to secure the payment of such debts. The deed of arrangement further provided that such release should not be held to discharge Frederick or George Garraway in their respective separate capacities or their respective separate estates from the debt due to Messrs. Sisson and Bell as such trustees. From the date of this deed until December, 1865, Messrs. Overend & Gurney carried on the cultivation of Blackman's Estate, furnishing the supplies and applying the produce.

On the 1st of February, 1865, articles of agreement were made between Messrs. Overend & Gurney and Mr. Frederick Garraway for the sale to him of the charge due upon Blackburn's Estate, then amounting to the sum of £4068. 19s. 10d. for the sum of £2500, to be paid by instalments, the last of

which became payable and was in fact paid on the 31st of December, 1866.

In the articles there was a provision that on the payment of the first instalment Mr. F. Garraway should be let into the possession of Blackburn's Estate, and accordingly, although the charge was not assigned to him he appears to have been thenceforward in possession by an agent jointly appointed by him and the proprietor. No assignment, however, of the charge upon Blackman's was made to Mr. Garraway till the 2nd of July, 1869.

Blackman's estate was sold under the order of the Court, on the 22nd of November, 1871, for the sum of £6100.

The matter now comes before us upon an application made by Mr. Bell to be placed as a judgment creditor, under the judgment entered up in the year 1863, upon the schedule for the distribution of the purchase money of Blackman's, in priority to the Messrs. Dobree, who claim to be assignees of the charge for valuable consideration.

The effect of the statutes of the Island of Antigua with respect to judgments obtained in that Island has been most elaborately and ably argued before us, but in the view which we take of the case we do not think it necessary to express an opinion as to the effect of those statutes upon ordinary mortgage securities within the Island. We must, however, observe that we are not aware of any case, and that no case has been quoted to us, which establishes that under the law of England, as it stood before the Act of the 1st and 2nd of the Queen was passed, a writ of elegit could be issued upon a judgment against a mortgage, and that with the exceptions particularly specified in the Island statute the object of the local legislature appears to have been to introduce the law of England as it then stood into the Island. Lord Dillon's case (*Viscount Dillon* v. *Plunket*, 2 Bligh, New Series, p. 239), so strongly relied upon by Mr. Nugent, does not appear to us to support his contention. A person seized of an estate for life in a large property in Ireland conveyed his life estate to trustees upon certain trusts, one of which was the payment of £5000 a year to him. An elegit under a judgment was supported against

the £5000 a year, that is, against the life estate in the lands to the extent of the £5000 a year. If the tenant for life instead of conveying his life estate in the whole property had reserved his legal estate in it to the extent of £5000 a year, and had only conveyed the surplus to the trustees, no question could have been raised, and the issue of the elegit under the judgment would have been a matter of course. The Statute of Frauds gave the same remedy against the equitable as might previously have been pursued against the legal estate of the debtor, and we think that Lord Dillon's case could not have been decided otherwise than it was decided; and the point appeared so plain that neither of the Law Lords adverted to it, and confined their observations to the technical objections which had been raised. We must, however, repeat that in the view we take of the present case we do not think it necessary to decide upon the effect of the particular words of the Island statutes in reference to an ordinary mortgage. The charge upon Blackman's now sought to be affected by the judgment is admitted to have been, and according to the evidence before us certainly was, part of the assets of the firm of Frederick and George Garraway & Co., and was by the indenture of the 11th of November, 1863, fully released from the claim of the trustees and the effect of the judgment. It must have continued discharged from the judgment in the hands of any purchaser from or of any assignee of Messrs. Overend & Gurney other than Mr. Frederick Garraway, and if it could become liable in case he became the purchaser of it, such liability would arise solely from the fact of the continuance of his personal liability, and not from any prior effect of the judgment upon the charge. We are of opinion that the separate estate of Mr. Frederick Garraway, the liability of which was maintained by the indenture of November, 1863, was such separate property as he then possessed, and that the property released could not form part of it. Whether Mr. Frederick Garraway's continuing personal liability could make the charge upon Blackman's, although released by the indenture of the 11th November, 1863, liable to the judgment against him whenever that charge should become vested in him by purchase or otherwise may raise a

question of difficulty, but it is one which we do not think it requisite to decide. We are, however, of opinion that if such liability could exist the judgment could be enforced only against the charge, whilst it was vested in Mr. Garraway, and that it could not be enforced against the charge in the hands of a bonâ fide assignee for valuable consideration, and that the clause in the local statute which enables a judgment creditor to follow property in the hands of a purchaser does not extend to such a property as the charge upon Blackman's. We consider that the articles of agreement of the 1st of February, 1865, were entirely executory, and that until the assignment of the 2nd of July, 1869, was executed, Mr. Frederick Garraway had not such a title to charge as could be affected by a judgment either under the Island statutes or by the law of England, as it existed before the Act of the 1st and 2nd of the Queen. On the 29th of January, 1867, before the assignment was executed, and whilst the charge was apparently released from the effect of the judgment, Mr Frederick Garraway assigned his interest in the charge for valuable consideration to the Colonial Bank, and the Colonial Bank subsequently sold and assigned it to the Messrs. Dobree, and the Messrs. Dobree are also equitable mortgagees for valuable consideration of Mr. Frederick Garraway's interest in the charge and hold the title deeds of the property. We consider that they are entitled to priority over Mr. Bell in respect of such claim as he can make under the judgment. It also appears to us that as the indenture of the 11th of November, 1863, released Blackman's from the demand of the trustees and from the judgment to secure that demand, parties dealing with Mr. Garraway were entitled to consider the release as subsisting, and that Mr. Bell and his then co-trustee, if they intended to dispute the continuance of the release, and to insist that Mr. Garraway's personal liability avoided it when he became entitled to the charge, ought to have taken proceedings to enforce their demand against Blackman's so soon as Mr. Garraway again dealt with that property, under the provisions of the articles of agreement of February, 1865, and that in the absence of any effective or indeed of any

proceedings on their part, it would be inequitable to hold that a purchaser for valuable consideration acting upon the faith of the release of the indenture of November, 1863, should be postponed to Mr. Bell, claiming title under the judgment, and we shall therefore hold the Messrs. Dobree entitled to the priority on which they insist. An account must be taken of the amount due to them, and the sums found by the schedule to be due to Mr. Garraway must after payment of the costs be in the first instance applied in payment of that amount. We think that this is a case in which the costs of all parties, so far as such costs have been occasioned by the questions touching the judgment, ought to be paid out of the moneys found due to Mr. Garraway, and we accordingly order them to be so paid.

XIV.

WEST INDIAN INCUMBERED ESTATES COURT.

8, Park Street, Westminster, August 7 and 8, December 17, 1873.

(Before JAMES FLEMING, Esq., Q.C., and REGINALD J. CUST, Esq., Commissioners.)

Re FYFE.
Ex parte DOBREE.
Ex parte BUCHANAN.
Ex parte CATER & Co.
Ex parte DAVIES.

Consignee—Registration—Accounts—Mortgage.

The Jamaica Registration Acts do not require the appointment of a consignee to be registered.

A consignee of several estates belonging to the same owner is not bound to keep separate accounts for each estate.

The facts of the above case appear sufficiently in the judgment of the Chief Commissioner.

Westlake for petitioners.

Macheson, Q. C., for owner and Buchanan.

Heslop for Davies.

Valpy for Cater & Co.

Mr. FLEMING, Chief Commissioner, delivered the judgment of the Commissioners as follows.

The facts which have given rise to the litigation in this case are simple and are not controverted.

The Reverend Charles Fyfe was the owner of seven different plantations in the Island of Jamaica; six of them lay together, and appear to have been worked together. The seventh, Silver Hill, was situated at some distance from the other six. In 1868 Mr. Fyfe was indebted to the London firm of Messrs. Dobree & Sons, and required further advances from them. In order to secure the then existing debt, and such further advances as should be made to Mr. Fyfe, an indenture was made and executed on the 12th of August, 1868, by which Mr. Fyfe and his children who were then of age made the shares of the said children in the sum of £4000 settled upon the issue of Mr. Fyfe by his marriage settlement a security for the sums due or which should become due from Mr. Fyfe to Messrs. Dobree, and the two children who were under age promised to make their shares also a security to the Messrs. Dobree when they should come of age; and by the same indenture a policy of insurance on the life of Mr. Lawrence Riky Fyfe, one of the sons of Mr. Fyfe, was made a security for the amount then due or to become due from Mr. Fyfe to Messrs. Dobree, and Mr. William Hussey Fyfe, another son of Mr. Fyfe, covenanted to effect an insurance on his life in the sum of £800 as an additional security to the Messrs. Dobree, but it was provided that the securities given by the indenture should not in the whole be a security for more than the sum of £2000. This indenture did not in any manner nor to any extent deal with the plantations of which Mr. Fyfe was seized, nor did it either directly or indirectly affect the management or consigneeship of those plantations. It created merely a personal security for the personal debts of Mr. Fyfe.

By an agreement made on the same day, after reciting that the Messrs. Dobree had agreed to advance certain sums of money to Mr. Fyfe to enable him to improve the said plantations, and that the repayment of such advances had been secured by the before mentioned indenture, but that it was agreed that such advances should be made on the express understanding that all the produce of the plantations should be consigned to the Messrs. Dobree so long as any moneys should be due to them: it was provided that Mr. Fyfe should consign the whole of the produce of the said plantations to the Messrs. Dobree; and it was provided that the produce should in the first instance be applied in payment of the stores, supplies, commission, insurance, freight, duties, and incidental charges and expenses incurred, and then towards satisfaction of the moneys due to the Messrs. Dobree, and that the surplus, if any, should be paid to Mr. Fyfe. This agreement in effect appointed the Messrs. Dobree consignees during such time as any debt should be due to them by Mr. Fyfe, with a provision that such surplus as should remain after discharging all their demands as consignees should be applied in payment of Mr. Fyfe's debts to them. Mr. Fyfe had clearly the power of directing the manner in which his consignees should apply the surplus, and I think a direction on that point cannot affect the rights of the consignees. Six plantations only are mentioned in the agreement, but it has been alleged before us that it was intended to include Mount Henry, the seventh plantation, with the five adjoining to it, and that it has been worked with them, and that the Messrs. Dobree have, in fact, acted as consignees of the seven plantations. In 1871 the Messrs. Dobree advanced to Mr. Fyfe the further sums of £473. 6s. 10d. and £226. 18s. 2d., the former sum to pay off a mortgage created in 1861, and the latter for the personal use of Mr. Fyfe, and took an ordinary mortgage upon four of the seven plantations. This mortgage is stated to have been recorded in the Island. It in no manner referred to any debt due to the Messrs. Dobree as consignees, nor did it purport to deal with or affect their rights as consignees; in fact it did not allude to their position as consignees. It was a mere mortgage

security for the £700 which was not advanced for any consignee purpose, or towards the cultivation of the plantations, and I think it cannot in any manner affect such rights as the Messrs. Dobree can lawfully claim as consignees.

The seven plantations have been sold under an order of this Court made on the petition of the Messrs. Dobree, and they realised on the sale the sum of £3820.

In the draft schedule of incumbrances the Messrs. Dobree are placed as the first incumbrancers in respect of the debt alleged to be due to them as consignees. Objections to the schedule have been filed on behalf of Mr Buchanan, of Messrs. White Cater & Sons, and of Mr. Watson Davies.

Mr. Buchanan claims to be placed on the schedule in priority to the Messrs. Dobree under a mortgage security dated on the 6th of September, 1844, in respect of the four plantations included in that security, and claims £1300 as the principal due to him, and all such interest as shall be found due upon that sum.

Messrs. White Cater & Sons claim to be placed on the schedule in priority to the Messrs. Dobree under a mortgage security dated on the 24th of April, 1848, in respect of the same four plantations, and claim the sum of £306. 19s. 8d. as the unpaid balance due on the said security with interest thereon from the 24th of June, 1872.

Mr. Watson Davies claims to be placed on the schedule in priority to the Messrs. Dobree under mortgage securities dated on the 24th of June, 1867, the 23rd of July, 1869, the 30th of August, 1870, and the 20th of February, 1871, and claims £2500 and £278 as the principal sums due to him, and all such interest as shall be found due upon those sums. The securities of 1867 and 1869 extend only to the plantation called Flamstead, that of 1870 to Flamstead and Rosanna Mount, and that of 1871 only to Mount Elizabeth. Flamstead, Rosanna Mount, and Mount Elizabeth are not included in the mortgages held by Mr. Buchanan and Messrs. White Cater & Sons.

Mr. Buchanan and Messrs. White Cater & Sons consequently claim an interest only in Silver Hill

and three other plantations, called respectively Trafalgar, Carlsrhue, and Mount Henry, and Mr. Watson Davies only in the three called Flamstead, Rosanna Mount, and Mount Elizabeth.

It will, therefore, be necessary to amend the present schedule in so far as to divide it into two parts, one relating to Silver Hill and the other plantations on which Mr. Buchanan and the Messrs. White Cater have charges, and the other in relation to Flamstead, Rosanna Mount, and Mount Elizabeth, and in whatever place on the schedules the debt due to the consignees may be placed, the amount on each schedule of that debt must be in proportion to the amount of the purchase moneys arising from the sale of the estates to which the schedules respectively refer. Flamstead was sold separately, and produced the sum of £1400. Rosanna Mount was sold with Mount Elizabeth, and it will be necessary to apportion the purchase money of the two according to the estimated value of each.

It is contended on behalf of Mr. Buchanan and the Messrs. White Cater that Mount Henry was not included in the agreement which made the petitioners consignees of Mr. Fyfe's other plantations, and such is certainly the fact, but if sufficient evidence be brought before us previously to the final settlement of the schedules to establish that the petitioners did in fact act as consignees of Mount Henry as well as of Mr. Fyfe's other plantations, it would, I think, be immaterial to their claims as consignees that Mount Henry was not named in the agreement.

Mr. Mackeson, on behalf of Mr. Buchanan, and Mr. Valpy, who appeared for the Messrs. White Cater, contended that the non-registration of the second agreement of the 12th of August 1868, was fatal to the claim of the petitioners to be placed upon the schedule as incumbrancers. I do not understand that it was intended to maintain that the first of the two agreements could be put upon a land registry. I think that the second agreement did not fall within the provisions of the Registration Act for Jamaica. The lien of a consignee upon the land, when it does arise, arises from implication of law, owing to the consignee's peculiar relation to the land. It may

never arise, and may be determined after it has arisen. If the receipts exceed the expenditure it does not arise, and if it arise in one year and the surplus receipts of the subsequent year are sufficient to discharge it, it is determined. The appointment of a consignee by writing, therefore, appears to me to be an instrument which does not require registration; and an appointment by parol, which would be equally effective, could of course not be registered. No instance has been brought before the Court of the registration of the written appointment of a consignee. I retain the opinion I have expressed in several prior cases, and hold that under the Colonial Registration Acts a written appointment of a consignee does not require to be registered in order to give it legal effect, and I overrule all the objections grounded upon non-registration.

All the objecting parties further claim to have the accounts of the consignees taken separately in respect to each of the six or seven plantations to which the claims extend, but considering that six of the seven adjoin each other, and although bearing different names and having defined boundaries they do in fact form but one large plantation, and that the produce from all the seven was shipped and delivered together, and the supplies furnished for all as a whole, and without distinguishing the supplies for one from the supplies for the other, it appears to me impracticable in the present instance to make the separate charge and discharge sought for; but if it were practicable the decision of the Court of Chancery in *Fadelle* v. *Bernard* must prevent me from directing it to be done. In that case a person seized of several estates appointed a consignee and on the death of the proprietor the estates vested under his will in different persons, but the consignee continued to act as consignee of all, and large sums became due to him as consignee, some of the estates requiring an outlay far beyond the returns, but the return from one estate was proved to be in excess of the outlay in regard to it. The consignee contended that his charge extended over all the plantations, whilst the person entitled to the one which had paid its way, insisted that her estate was not liable to

it. The matter came before the Master of the Rolls, and he decided in favour of the consignee. A petition for sale of the estate which had been cultivated without loss was presented to this Court, and we held ourselves bound by the decision in Chancery, but upon that point and several others we gave the devisee leave either to present an appeal or file a bill of review, and stayed proceedings before us until there should be a decision upon the fresh proceedings. A bill of review, or rather a bill in the nature of a bill of review, was filed, and was heard before the Master of the Rolls, and he confirmed his previous decision, and consequently decided that the consignee's charge extended to all the estates for which he was consignee, and that he could not be required to separate the outgoings upon one from those upon another. I think that we must follow that decision, and refuse to call upon the consignees to make separate charges in relation to each plantation.

It was also argued before us on the part of the objectors that a consignee has not a lien on the land save with the consent of all parties interested, and that he is not entitled to priority over mortgagees. Mr. Mackeson, from deference to the many prior decisions of this Court on the point, merely recorded the objections, but they were urged with great learning and ability by Mr. Heslop on behalf of Mr. Watson Davies, and he was supported in his contention by Mr. Valpy, acting for the Messrs. White Cater.

This Court certainly cannot now alter an uniform course of decision which has been followed since the judgment given by my predecessor in the matter of Greathead in May, 1859, and it appears to me that it could not be departed from without causing very serious mischief, inconvenience and loss. For more than thirteen years all the transactions between the English West Indian merchants and the planters have proceeded on the footing that the former were entitled to the first charge on the plantations for which they acted as consignees. The planters have obtained the advances the merchants have made them, and the cultivation of the plantations has been maintained through those advances, on the faith of the principle of law now contested, and the merchants relying upon it have to a great extent given up mortgage

and other securities, and have saved the planters and the estates from the heavy expenses attendant upon them. The merchants would therefore to a great extent be without security for their advances if the principle of law so long acted upon were not upheld. I must decline to vary the course of this Court, however strongly I may be urged to do so. All the authorities bearing upon the point have been brought forward, and it has been argued with great ability and learning, but my opinion upon it remains unchanged, and even if I did not hold myself bound by our prior decisions and the uniform course of the Court, I should decide in favour of the consignee's lien on the land. Although Lord Westbury in *Chambers* v. *Davidson* spoke of it as a presumed lien, the judgment of the Privy Council appears to me to proceed on the assumption that it was a real lien, and I think the observations of Lord Westbury throughout his judgment in that case must be construed by the light of the case before him. I certainly hold the lien to be a real lien on the land, and must decide in conformity with that view. I do not think that the present case raises to any great extent the question of acquiescence. Mr. Fyfe, who appointed the petitioners, of course acquiesced in the appointment of consignees, and I consider that every person taking a mortgage upon a sugar or coffee plantation in the West Indies must be aware that in the ordinary course of business the cultivation of such plantations is maintained by the outlay made by consignees, and that he takes his mortgage subject to all the legal rights of the consignees. If he object to the management as carried on he has only to enforce his legal title to possession, but if he leave the mortgagor or his agent in possession he cannot afterwards object to their management and the employment of consignees. He cannot be heard to say that the mortgagor ought to have allowed the estate to fall out of cultivation; and if he cannot, he must not be allowed to say that the mortgagor was not entitled to take the usual and necessary means to maintain it in cultivation. If out of cultivation the value would be so depreciated as to make the plantation a very scanty security for any sum which in ordinary trans-

actions would be advanced upon mortgage. Although acquiescence has been spoken of in several judgments upon questions as to the claims of consignees, I certainly was never able to follow a line of reasoning based upon acquiescence giving a title to an interest in land, and considering our real property laws I do not think that any legal title in land could originate in acquiescence; but I can fully understand the principle that there being a certain right, acquiescence might estop persons who had acquiesced either actively or passively from subsequently disputing that right. And it appears to me that the acquiescence spoken of ought to be understood in that light, and that a legal title on other grounds in the consignees was admitted. It would indeed be difficult after the decision of Lord Eldon in *Scott* v. *Nesbitt* (14 Ves. p. 438), and the reasoning in support of that decision (pp. 445 and 446), and the judgment of the Privy Council in *Sayers* v. *Whitfield* (1 Knapp, pp. 148 and 149), to deny the title of consignees to a lien upon the land itself for their advances, and it appears to me that the ground on which the title of the consignees was put in those cases is the true ground on which it must be supported; that the outlay of the consignees to a great extent creates and wholly maintains the property dealt with. Lord Eldon put the cases of mines and alum works, and the Privy Council in *Sayers* v. *Whitfield* adopted his views. I beg to add the case of renewable leaseholds for lives, in which the person paying the premium on the renewal has a paramount charge to any other person claiming an incumbrance upon or interest in the leaseholds. The observations of Lord St. Leonards on that subject are very material; *Re Tharp* (2 Sm. & Giff. 578). Such a case appears to me greatly to resemble the case of a consignee. The entire interest is not determined on the dropping of one of several lives, but is greatly depreciated. The West Indian plantation, so far as the land goes, remains if it cease to be cultivated, but the character of the property is entirely changed, and the value depreciated to a formidable extent. The many cases which have come before this Court in which plantations when in cultivation had been worth many thousand pounds, and in which after they had become waste it was difficult to find pur-

chasers at a few hundred pounds, strongly illustrate the force of the observations made by the learned Judge who delivered the judgment in *Sayers* v. *Whitfield* (1 Knapp, p. 149, 150), and show that the outlay for cultivation really creates the property to be dealt with, and in fact the restoration of a plantation which has become waste to cultivation, with the erection of the necessary buildings and machinery, costs more than the market value of the land itself. The facts in connection with West Indian properties, and the judicial view of the nature and requirements of the plantations, given in *Sayers* v. *Whitfield*, appear to me to bring the case entirely within the provisions of the Digest, 20th book, title 4, and the Articles of the Code Civil referred to and quoted by Mr. Heslop, and the principles of our law in reference to the payment of premiums upon policies of insurance and salvage in regard to vessels, and I think I could not decide against the claim of the consignees to a lien on the land without acting in violation of those principles of law and of the law as settled by the authority of the cases of *Scott* v. *Nesbitt* and *Sayers* v. *Whitfield*, and I need not add, after the many cases in which I have expressed an opinion on the subject, that my own view of the law entirely accords with the principles to which I have referred, and with that which I conceive to have been laid down as law in those cases. If the claims of the consignees to a lien on the land have been admitted on the grounds I have mentioned, then their lien must be a lien in priority to all other charges, as the outlay in regard to which it was admitted must be held to a great extent to have created and wholly maintained the property dealt with, and that appears to me to have been the view entertained by the Privy Council in *Sayers* v. *Whitfield*.

Mr. Heslop has pointed out that Vice Chancellor Stuart, in deciding *Morrison* v. *Morrison* (2 Sm. & Giff. 544), a decision which was affirmed upon appeal, in favour of the consignee, and his lien upon that which according to law was the produce of real estate, laid stress upon the fact that he had been appointed consignee by the Court, but the decision was not rested on that fact, and I conceive that such appointment was really immaterial, as it could give

the consignee no rights against the inheritance which an ordinary consignee did not possess. A receiver has a right only as against the rents and profits, and no one ever heard of a decree declaring him entitled to a charge on the corpus of an estate; and, so far as the appointment by the Court extends, there can be no distinction between the appointment of a consignee and a receiver. Both are officers of the Court, and the difference in the remedy lies in the nature of the properties in reference to which they act, and not in any duties they have to perform as officers of the Court. As stated both in *Scott* v. *Nesbitt* and *Sayers* v. *Whitfield*, the most material distinction exists between an ordinary estate in England and a sugar or coffee plantation in the West Indies, and it appears to me that very grave injustice would result from applying the strict law applicable to the former to the latter without bearing that distinction in mind, and that I should do great wrong if I did not follow the principle acted upon in those cases, and treat West Indian plantations as exceptional as mines, alum works, or renewable leaseholds. The affidavit of Mr. Vickers has also been pressed upon my attention. It can scarcely be considered admissible in evidence as a statement of law, being made by an unprofessional witness, but it carries the case no further than the report of the Master in *Scott* v. *Nesbitt*, and I do not think it necessary to comment upon it. I decide the case on that which I conceive to be the law of England, and not upon the ground of any local custom. In the result I hold the consignee entitled to a lien on the land, and to a lien in priority to all other incumbrances.

Mr. Mackeson, anticipating that I must consider myself bound by the prior decisions in this Court, laid the great stress of his objections upon the decision of this Court and the Privy Council in *Chambers* v. *Davidson*, Law Reports, Appeal Cases, vol. 1, p. 296, and endeavoured to bring the case of the petitioners within the principle of that decision. Although that case was very elaborately argued and considered both here and in the Privy Council, the point really involved in it was short, and in my view simple. When freed from extraneous circumstances, the only question was, whether a consignee, who accepted his

appointment as consignee subject to the prior rights of a mortgagee, was bound by the conditions under which he took his appointment. The answer to that question did not admit of doubt. I considered that my decision in the case gave effect to the contract between the parties, but if I were to adopt the views insisted upon by the objectors in the present case, I think I should violate the contract between the parties. This I cannot do, unless the contract be void or illegal. I hold it to be neither, and that I must give effect to it, and found my decision upon the contents of the instruments which created it. Mr. Mackeson contends, and the other objectors support his contention, that the two instruments of the 12th of August, 1868, ought to be read as one instrument, although there are several persons parties to the one who neither were nor could be parties to the other, and that, applying the principles of the case of *Chambers* v. *Davidson* to those instruments, the security of the petitioners for their advances as consignees was confined to the portions of the children and the policies of insurance assigned to them by the first. That contention in fact renders the second instrument nugatory, and deprives the petitioners of the rights of consignees purported to be granted to them by it. It asks me to deny to the petitioners the actual rights for which they contracted. I hold the instruments to be distinct. The first in no manner related to the estates or the management of them. Mr. Fyfe was indebted to the petitioners, and required further advances. Mr. Fyfe and his children concurred in a deed which made the portions of the children under Mr. Fyfe's marriage settlement, and also two policies of insurance, one then existing, and the other to be effected, a security to the petitioners to the extent of £2000. By the second instrument, to which Mr. Fyfe and the petitioners were the only parties, Mr. Fyfe bound himself to consign the produce of the six plantations mentioned in it to the petitioners, so long as any money should be due to them upon the security of the first instrument, and the petitioners were authorized, after retaining and repaying to themselves all the usual outgoings and charges of consignees, to apply the balance towards payment of the sums due to them under that instrument. The

effect was in the first place to make the petitioners consignees for an uncertain period, then to entitle them to the payment of all their outgoings and charges as consignees, and subsequently to authorize them to apply the surplus of their receipts, if any, in discharge of the personal debt due to them by Mr. Fyfe, in respect of which, and which only, they held the security of the prior instrument. To refuse to allow the petitioners the amount due to them as consignees would, in my opinion, abrogate and set at naught the contract on the faith of which they have acted and made their advances, and as Mr. Fyfe had clearly the power to direct the application of the surplus receipts, if any, his direction that they should be applied in liquidation of the debt due by him to the petitioners can not affect or prejudice their rights as consignees. Every appointment of a consignee assumes that his advances are to be paid out of the produce consigned, and it is only when his advances exceed his receipts that his lien on the property itself arises. In this respect the second instrument of August, 1868, is in the common form. Mr. Mackeson strongly pressed upon me an observation made by Lord Westbury in *Chambers* v. *Davidson* (Law Report, P. C. Cases, p. 305). Lord Westbury said: "If a consignee take an express security, it excludes general lien." If my view of the second instrument be correct, it was an express agreement to give a general lien to the petitioners in their character of consignees, and it therefore falls within Lord Westbury's definition. Lord Westbury must be understood by the words express security to mean an express security for the amount due to parties as consignees, and the entire context of Lord Westbury's judgment shows that the words were used in that sense. An express security for a distinct debt could not affect a party making advances as a consignee. Mr. Heslop contended that the mortgage for £700 taken by the petitioners from Mr. Fyfe in 1871 affected their rights as consignees, and Mr. Valpy supported him in the contention; but that mortgage had nothing whatever to do with the rights or obligations of the petitioners as consignees, or any debt due to them in that character. They paid £700 on

Mr. Fyfe's behalf, and took a mortgage security on four of Mr. Fyfe's seven plantations. Such a transaction cannot affect them as consignees under the agreement of 1868. Something was said in the arguments as to the office of a consignee, but I am at a loss to see any bearing which the point could have on the questions before me. If a person be appointed consignee by the Court of Chancery, he becomes an officer of that Court; otherwise he holds no office, and is not in any sense an officer. If he fail to make the advances requisite for the cultivation of the plantations, he ceases to be consignee, and his successor as consignee becomes entitled to a priority over him for his outgoings and other legal charges. It was also contended that the Messrs. Dobree by taking the mortgage of 1871 showed that they did not consider themselves consignees under the agreement of August, 1868, but that mortgage was given and taken wholly in respect of a sum of £700 advanced to Mr. Fyfe at the time at which it was made, partly in order to enable him to pay a debt for which he was pressed, and partly for his own personal wants, and it has no relation whatever to any other transaction between the parties, and affords no proof in connection with dealings of the petitioners as consignees. It was also very urgently pressed upon me that the manner in which the petitioners kept their accounts, the payments made on account of Mr. Fyfe personally being mixed up with payments made on behalf of the estate, and the receipts entered in a general form, proved that the petitioners did not act as consignees, but, as I stated several times during the hearing, I attach no weight whatever to the form of the accounts, and if the objection could prevail, I believe that in the great majority of the cases which have been before us a similar objection would have destroyed the title of the consignees, as generally the whole of the payments made on behalf of the proprietor and of the estate have been entered in one account, and it has frequently been a severe task upon this Court and has given rise to long arguments and objections to determine what were properly the charges of the consignee and what not, and a very heavy case on the subject was before us shortly before we rose for the long vacation. I believe I have now gone

through all the objections, and all the matters urged in support of them, and I must overrule the objections, and hold the consignees entitled to the priority of charge which they claim. I cannot conclude without expressing my best thanks for the great assistance I have derived from the able and learned arguments which have been addressed to me, and the great care which has been taken and research made to bring all the authorities and matters bearing on the points argued to my attention. I think that most of the points urged were properly drawn to the attention of the Court, and that the parties appearing before me ought to have their costs out of the purchase moneys. I have already decided that the owner is to have his costs up to and including those of the last hearing.

The schedule must be divided into two parts. The first will relate to the moneys produced by the sale of Silver Hill, Trafalgar, Carlsruhe, and Mount Henry; the second to the moneys produced by the sale of Flamstead, Rosanna Mount and Mount Elizabeth. As I understand the petitioners have evidence to show that they acted as consignees for Mount Henry, it is not at present necessary to give any direction as to the apportionment of the purchase moneys produced by the sale of that plantation and the two others sold with it. The costs of the petitioners and of the owner must be apportioned relatively in accordance with the amount of the purchase moneys mentioned in each schedule. The costs of Mr. Buchanan and Messrs. White Cater must be charged in the first schedule, those of Mr. Watson Davies in the second. All the costs are to be taxed unless the parties agree upon the proper amounts. An account must be taken of the amount due to the petitioners as consignees, and another account of what is due to them upon the mortgage security of the 5th of April, 1871. The amount found due to them as consignees must be apportioned between the first and second schedules according to the amount of purchase moneys mentioned in them and placed on those schedules as the first incumbrance. The second incumbrance in the first schedule will be that due upon Mr. Buchanan's mortgage, the third that due upon the mortgage security held by Messrs. White

Cater, and the fourth that due upon the mortgage made to the petitioners in 1871. The second incumbrance in the second schedule will be that due upon Mr. Watson Davies's mortgages of the 24th of June, 1867, the 23rd of July, 1859, the 30th of August, 1870, and the 20th of February, 1871.

THE END.

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