Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Daniel v. *Trotman, from Barbados; delivered 27th April,* 1863.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

THIS is an Appeal from an Order of the Court of Chancery of the Island of Barbados, overruling exceptions taken by the Appellant to the Report of a Master of the Court, made in a suit instituted by devisees and legatees under the will of George Hewitt against Benjamin Howell Jones, his executor and devisee in trust for the accounts of the testator's real and personal estates and for the appointment of a Receiver.

George Hewitt, the testator in the cause, by his will bearing date the 15th of January, 1853, appointed Benjamin Howell Jones, the Defendant in this suit, and several other persons named in the will to be his executors, and gave and devised his sugarwork plantations or estates, called Warrens and Cane Garden, and Bloomsbury, and Caledonia, in the said island, and all the lands, buildings, hereditaments, stock, crops, plantation, utensils, and implements, and other goods and chattels to the said plantations respectively belonging, unto and to the use of the said Benjamin Howell Jones and the said several other persons whom he had named as executors, their heirs and assigns, upon trust, to conduct, keep up, and manage the said plantations and hereditaments in the most advantageous manner, and to pay and apply the rents, issues, and profits thereof respectively, until the period thereinafter mentioned, in manner following,—that is to say, in payment of the expense

of executing the trust, including a commission of five per cent. on the net annual clearances of the said plantations, to be retained by the said trustees, or such of them as should act in his affairs, as a remuneration for their or his care and trouble; and in payment of several annuities to several persons named in the will, and also in providing for the maintenance and education of several of the Respondents, the Plaintiffs in the suit, and also in raising, in aid of his personal estate not specifically bequeathed, so much money as should be required to satisfy his funeral and testamentary expenses and debts, and the liens and charges on his said plantations and estates respectively, and the interest thereof, until the said debts and liens should be fully paid and satisfied, with a direction to apply the monies so raised accordingly, and when, and so soon as all the said debts and the liens aforesaid should be fully paid and satisfied, so that his estate was free from debt; and in the mean time, subject to the trusts aforesaid, the testator directed the said plantations respectively to be held upon trusts mentioned in the will for the benefit of the Respondents respectively. By a codicil to his will bearing date the 8th of June, 1854, the testator gave another annuity, and directed the trustees or trustee of his will during such time as they or he should be in the possession or management of his said estates, to pay the said annuity concurrently with the other annuities given by his will. And when and so soon as his trustees or trustee should give up possession of any of his estates under the trusts of his will, he directed that his estates should, as between themselves, contribute to the payment of the said annuity in the proportions therein mentioned. The testator died on the 4th of August, 1854; and Benjamin Howell Jones, the Defendant in the suit, alone proved the will and codicil, and alone acted in the trusts thereof.

The Appellant is a West India merchant carrying on business at Bristol under the firm of Thomas Daniel and Sons, and in London under the firm of Thomas Daniel and Co. The testator in his lifetime consigned part of the produce of his plantations to the Appellant under his aforesaid firms, and other parts thereof to other West India merchants in this country, and at the time of his death he was indebted

to the Appellant's firms on the balance of their accounts as consignees to the amount in the whole of 2,000*l.* and upwards. He was then also indebted to his other consignees in considerable sums. After the testator's death the Defendant B. H. Jones, his sole acting executor and trustee, continued to consign parts of the produce of the testator's plantations to the Appellant's firms and other parts thereof to the testator's other consignees, but the consignments to these latter consignees were, it appears, made in liquidation or reduction of the balances which were due to them from the testator at the time of his death. The balances due to several of these latter consignees at the testator's death were, it appears, paid in full by means of the consignments thus made to them by the Defendant, B. H. Jones. After the testator's death the accounts of the Appellant's firms as consignees were always kept with the testator's estate, new accounts having been opened by each of the firms upon the testator's decease. From these accounts it appears that the Defendant B. H. Jones consigned produce to the Appellant's firms to the amount of 20,566*l.*, and that the Appellant's firms paid for him and on his account sums amounting in the whole to 27,337*l.* Of the sums thus paid it appears that 18,129*l.* was paid in respect of bills drawn by the Defendant, B. H. Jones, upon and accepted by the Appellant's firms; 1,383*l.* 17*s.* 2*d.* was paid in respect of a judgment debt on the Caledonia Plantation, one moiety of which judgment debt was assigned to each of the Appellant's firms; a further sum was paid in discharge of a Crown mortgage on another of the plantations; and the residue consisted of payments to or on account of the testator's devisees, legatees, and annuitants, and for supplies, insurance, interest, and commission.

On the balances of the accounts of the Appellant's firms made up to the 31st of December, 1859, with interest to that date, there was due to the firm of Daniel and Sons the sum of 4,285*l.* 13*s.* 1*d.*, and to the firm of Daniel and Co. the sum of 4,752*l.* 10*s.* 10*d.* The bill in the cause was filed on the 21st July, 1859, and on the 29th July, 1859, a Receiver was appointed of the testator's real and personal estates. By the Decree made upon the hearing of the cause, bearing date the 11th of

November, 1859, accounts were directed to be taken of the estate and assets of the testator, and of the crops, rents, issues, and profits of his sugarwork plantations or estates come to the hands of the Defendant Benjamin Howell Jones, and of the disposition thereof, and of what debts were due and outstanding; and accounts were also directed of all the real and personal estate of the testator, and of all the debts, annuities, liens, charges, and incumbrances affecting the same. And it was ordered that the Receiver appointed by the Court should, out of the crops, rents, profits, and produce of the said sugar work plantations or estates, and other estate of the testator, pay the interest on the incumbrances against the said plantations or estates and other estate which the Master should report to be due, and the several annuities given by the testator's will and codicil, and afterwards the said incumbrances according to their priorities. And directions were given for ascertaining what sums would be sufficient for the maintenance of the infant Plaintiffs and for the payment of such sums by the Receiver.

Under this Decree the Appellant carried in two states of facts, claiming the above-mentioned sums of 4,285*l.* 13*s.* 1*d.* and 4,752*l.* 10*s.* 10*d.* against the testator's estate, and on the 7th day of December, 1860, the Master made his Report in the cause, by which he found that the Defendant B. H. Jones, as executor and trustee, was indebted to the estate of the testator in the sum of 9,690*l.* 10*s.*, on account of the net proceeds of the crops and profits of the plantations and of other moneys received by him as executor and trustee; and with reference to the sums claimed by the Appellant, he certified that these claims had been objected to on the grounds that the amounts claimed were personal contracts of the executor, and not authorized under the will of the testator, and that the Defendant B. H. Jones had received considerable sums of money as the net clearances of the said plantations in each year since the testator's death, and was largely indebted to the testator's estate on account thereof; and he further certified that he did not find any clause in the testator's will giving power to the executor to raise money on the security of the estates, and that he was of opinion that the Appellant's firms were entitled to the full amount of the judgment debt

assigned to them, and were also entitled to place the orders and drafts of the Defendant B. H. Jones, executor and trustee, against the amount of the produce shipped and consigned by him or in their hands at the death of the testator, and to keep alive their original account against the testator's estate, but that they were not justified in making advances to the said Defendant B. H. Jones to the large amount of 6,771*l.* 14*s.* 1*d.* in excess of the produce shipped and the amount realized. He therefore allowed the Appellant only the amount of the judgment debt and of the balances due from the testator at the time of his death to the Appellant's firms, with interest to the 29th July, 1859, the time of the appointment of the Receiver.

The Appellant then presented a petition by way of exception to this Report. By this petition the Appellant stated that after the death of the testator the Defendant B. H. Jones, having no money or personal estate of the testator to enable him to carry on the cultivation of the said plantations, applied to his, the Appellant's, firms to advance him money for that purpose, and to enable him to carry out the trusts of the testator's will, agreeing to consign the crops of sugar made on the plantations to reimburse the advances, and that the Appellant's firms agreed to do so, and accordingly did so by the Defendant B. H. Jones drawing bills of exchange on the said firms, and consigning them sugar from the said plantations to repay the sums paid by them as acceptors of the said bills, and towards the payment of supplies sent out by them for the said plantations, and otherwise for moneys paid on account of the testator's estate; and after setting forth in detail the payments which had been made by the Appellant's firms, the Appellant by the petition insisted that the Master was not justified in disallowing his claims; that his firms, as consignees of the testator's plantations, had a lien on the crops of the plantations in respect of their claims; that the testator having devised his plantations to trustees, including the Defendant B. H. Jones, who had alone acted in the trusts, thereby authorized the Defendant B. H. Jones to pledge the crops of the plantations to raise money for the purposes of the trusts, and that he (the Appellant) having advanced money for those purposes, was

entitled to be repaid such moneys out of the crops of the estate, and was entitled to a lien on such crops until the same were repaid; and further, that he was in no way answerable for the application of the proceeds of the crops which came to the hands of the Defendant B. H. Jones, he not being bound to see, and it being impossible for him to see, to the application thereof. The Petition therefore prayed that the Master might be directed to allow the items in the accounts of the Appellant's firms which had been disallowed by him; and that the Receiver might be directed to consign the crops of sugar of the testator's plantations to the Appellant's firms until the respective balances due to them as consignees were fully paid and satisfied. This petition was in the first instance supported only by an affidavit of Thomas Louis, the Appellant's attorney in the island, deposing that the facts stated in the petition were true to the best of his knowledge and belief; but the petition having been met by affidavits on the part of the Respondents, which were to the effect that the Defendant, B. H. Jones, had some moneys in hand belonging to the testator's estate at the time of his death, and had besides received the offal crops of the estate from that time until the appointment of the Receiver, a further affidavit was made by Thomas Louis, on the part of the Appellant, by which he deposed that the Appellant's firms gave no personal credit to the Defendant, B. H. Jones, in respect of the advances they made for the benefit of the testator's plantations, but that they looked to be repaid such advances out of the sugar made on the said plantations, and which the Defendant, B. H. Jones, as executor and trustee, agreed with the Deponent as the attorney and agent of the Appellants, to consign to the Appellant's firms in payment of the advances made to the Defendant, B. H. Jones, as such executor and trustee, for the benefit of the testator's estate.

By an order made on this Petition, and bearing date the 27th March, 1861, the Court, after taking notice that no less than 18,129*l.* appeared to have been advanced to the Defendant, B. H. Jones, on his drafts by bills of exchange, and that no mention was made in the Report of the application of that sum, or how it was shown to have been expended

for the benefit of the estates, or in liquidation of the debts of the testator, ordered that the Master should take back his Report, and add to it a complete account between the Defendant, B. H. Jones, as executor and trustee, and the Appellant's firms, commencing with the sum due by the testator at his death, and bringing it down with annual rests, after the custom of merchants, to the discharge of the Defendant, B. H. Jones, from his office of trustee; and that in this account the Master should charge the Appellant's firms with the proceeds of the sugars consigned to them, and give them credit for all sums advanced by them in payment of any debt due by the testator's estate, and for all advances made by them to any of the parties interested under the testator's will, on the order or by the direction, or with the sanction of the Defendant, B. H. Jones, and for all sums advanced and expended for supplies, and in the cultivation of the estates.

In pursuance of this Order, the Master made a further Report, dated the 26th April, 1861, by which, after stating that the Appellant's solicitors had declared their inability to give any further account, or to furnish any information as to the application of the moneys drawn out of the Appellant's hands by the Defendant, B. H. Jones, he certified that it was impossible to show how the moneys drawn by the Defendant, B. H. Jones, were expended, and after stating particulars of sums paid by the Appellant's firms to and on account of the annuitants and devisees, and for debts and supplies and insurance, he added that the proceeds of the sugars consigned to the Appellant's firms were far more than sufficient to meet these payments and charges, and that the balances of such proceeds and sums far exceeding such balances had been drawn by the Defendant, B. H. Jones, from the Appellant's firms, and the appropriation of them could not be traced. He further stated that the Defendant, B. H. Jones, had been debited with the whole amount realized by the sales of the sugars consigned, as well as by the offal crops of the plantations during the period he acted as executor, and had been credited with the payments which had been made to the parties interested under the will by his sanction, direction, or orders, and he con-

cluded his Report by referring to an account in which he adjusted the claims of the Appellants' firms in the same mode in substance as he had adopted in his former Report. Exceptions were taken by the Appellant to this Report. They were in substance to the effect that credit had not been given to the Appellants' firms for all the sums which had been paid upon the bills drawn by the Defendant, B. H. Jones, and in discharge of the incumbrances and charges against the testator's estate.

Upon the hearing of these exceptions the following Order was made:—The Court directed the Reports to be referred to the Master. It declared the Appellant's firms to be fully entitled to be repaid out of the future crops of the estates to be consigned to them for that purpose, all sums which they had advanced to the trustee, and which had been in any manner expended for the benefit of the estates; and after referring to the Appellant's solicitors having declared their inability to furnish further information, it directed that the Master should be at liberty to keep open the question for the period of three months to give an opportunity for reconsideration, and if this was declined, the Master was to make up his account on the principle before stated, and declare the balance which might thus appear to be due and for which the Appellant would be entitled to the Judgment of the Court. In conclusion, the Court ordered the exceptions to be overruled, and with costs.

It is from this Order the present Appeal has been brought. The Petition of Appeal prays not only that the Order may be reversed and the items claimed by the Appellant in the accounts of his firms allowed, but that the Receiver may be directed to consign the crops of sugar of the testator's plantations to the Appellant's firms, until the respective balances due to them as consignees are fully paid and satisfied.

The case was very fully and ably argued before us. It was contended on the part of the Appellant that he is entitled to the relief sought by this Appeal by virtue of the special agreement entered into on his part with the Defendant, B. H. Jones, or, failing his title under that agreement, by virtue of the rights and remedies to which, as was insisted on his part, all consignees of West India estates are

entitled independently of any special agreement. On the part of the Respondents, on the other hand, both the existence and validity of the alleged special agreement, and the rights and remedies claimed on the part of the Appellant to belong to consignees of West India estates independently of special agreement, were disputed and denied.

The case, therefore, presents two subjects for consideration: the special agreement, and the general rights and remedies of consignees of West India estates. It will be convenient first, to consider how the case stands as to the special agreement. As to the existence of this agreement their Lordships are fully satisfied upon the evidence before them, that the agreement was, in fact, made and entered into. They see no reason to doubt the evidence given by Louis on the part of the Appellant, or the fact of the agreement having been made as deposed to by him. They find nothing on the part of the Respondents which in any way contradicts that evidence, and they cannot but think it highly improbable that such large advances should have been made by the Appellant without any agreement having been entered into respecting them. So far, therefore, as this agreement is concerned, the case appears to their Lordships to resolve itself into the question of its validity. That question depends upon two points: first, whether, according to the true construction of the testator's will, the Defendant, B. H. Jones, had power to bind the future profits of the plantations by such an agreement; and, secondly, whether assuming that he had this power, he has well and effectually exercised it. First, then, as to the construction of the testator's will. It is to be observed that the primary object of the testator was that his plantations should be kept up, conducted, and managed in the most advantageous manner. Not only is this trust in terms declared by the will, but every purpose of the will—the payment of the expenses of the trust, of the annuities, of the allowances for maintenance, of the testator's general debts, and of the liens and charges on the plantations—depends upon that trust being fully carried into effect. The will, therefore, ought plainly to be so construed as to give full effect to these purposes. Looking, then, to the dispositions of the will, there is not, it is to

be observed, any trust of the surplus of the rents and profits after answering some only of the special purposes designated by the will, but the whole rents and profits are dedicated to all the special purposes which are pointed out. The devisees of the estates take subject to those purposes. The intention, therefore, must have been to vest in the trustees full power over both the immediate and the future rents and profits, and that this was the intention is made clear by the trust to raise money to supply the deficiency of the personal estate for the payment of the debts. It is true, indeed, that this trust does not in terms extend to all the purposes of the will, and does not in terms embrace the raising money for keeping up and managing the plantations: but this latter purpose, though not in terms expressed, must, as it seems to their Lordships, almost necessarily be implied; for, unless the plantations were so kept up, the trust for raising money for the payment of the debts could not be made available.

These considerations present themselves upon the face of the trusts declared by this will. They become of much greater weight when the subject to which those trusts apply is taken into consideration. Plantations in the West Indies cannot be regarded in the same light as landed estates in England. The cultivation of them is, as was repeatedly said by Lord Eldon, a species of trade. In all questions respecting them considerations of trade and commerce quite foreign to the cultivation of landed estates in this country present themselves. They cannot be carried on without the intervention of consignees and agents in this country, and the cases are rare indeed in which they can at all be carried on without advances being made by those consignees and agents to be reimbursed out of the future proceeds. In the ordinary course of business the cultivation of a West India estate can no more be carried on without advances being made by consignees, and being so reimbursed, than trade can be carried on in this country without debts being contracted and being paid or secured. It may be as well to add on this part of the case that this difference between West India estates and landed estates in this country does not enter merely into questions relating to the conduct and dealings of trustees, but that it goes much further, and affects

the construction of wills and instruments relating to the estates, as was held in the case of Lushington *v.* Sewell (1 Sim.) by the late Sir Anthony Hart, a Judge eminently acquainted with the law and practice relating to estates in the West Indies. Their Lordships feel bound therefore, both by authority and upon principle, to apply these considerations to the construction of this will, and, so applying them, they have come to the conclusion that, according to the true construction of this will, it was within the power of the Defendant, B. H. Jones, to bind the future profits of these plantations by the agreement entered into by him with the Appellant's firms.

Secondly, then, did the Defendant, B. H. Jones, well and effectually exercise this power by the agreement entered into by him? It was insisted, on the part of the Respondents, that he did not, and that the agreement, not having been reduced into writing, was void by the Statute of Frauds; but their Lordships find no trace, in any of the proceedings, of the Statute having been set up in answer to this claim, and they think that this objection, even if well founded, could not be entertained, at all events at this stage of the case. They think, however, that the objection is not well founded, the agreement having, in their judgment, been in part performed.

Their Lordships therefore are of opinion that, by virtue of the special agreement entered into with the Defendant B. H. Jones, the Appellant's firms are entitled to be paid out of the testator's estate all the sums advanced by them respectively, with interest thereon; but in holding this they desire to be distinctly understood as proceeding upon the ground that in their opinion the agreement was *bonâ fide* made and *bonâ fide* acted upon on the part of the Appellant's firms. They collect from the reasons of the Judgment printed in the Appendix that the Court in Barbados entertained a different opinion upon this point, and considered that the large amount of the drafts drawn by the Defendant B. H. Jones upon the Appellant's firms put them upon inquiry, and justified the conclusion that they were aware that the Defendant was misapplying the moneys which were drawn for by him. If their Lordships had seen their way to this view of the

case, they would not have hesitated to affirm this Order, but the facts of the case do not appear to them to warrant this conclusion.

It is not even suggested that the Appellant had any knowledge that the Defendant B. H. Jones was misapplying the testator's assets, or any ground for suspecting any such misapplication, except in so far as the large amount of the Defendant's drafts might induce such suspicion. But according to the agreement entered into with the Appellant, the advances to be made by him, and which were made by means of these drafts, were to be not merely for the cultivation of the plantations, but generally for the purposes of the testator's estate; and their Lordships can see no ground for assuming that the Appellant had any reason to suspect that his advances were not applied for those purposes. The fact of the other consignees being paid off would naturally lead to that conclusion, and the regular payments to and on account of the annuitants and devisees could not but induce the belief that the testator's estate was being duly administered. It is remarkable, too, as was well pointed out by Mr. Druce in the course of his argument, that when the plantation accounts are examined the amounts expended on the plantations in several, if not all, the years of the Defendant's management beyond the offal crop, exceeded the sums drawn from the Appellant's firms in those years.

This part of the case, indeed, was scarcely, if at all, insisted upon on the part of the Respondents in the course of the argument at the Bar, and their Lordships find themselves quite unable to adopt the opinion of the Court in Barbados upon it. Their Lordships collect from the Order under appeal that in the opinion of the Court in Barbados the Appellant was bound to see to the application of the moneys advanced by him under the agreement; but however this may have been in the view which the Court in Barbados took of the case, their Lordships are of opinion that as the case really stands no such obligation rested on the Appellant. The moneys advanced by him were not meant or intended to be applied to any defined or special purpose. They were of necessity to be applied at the discretion of the Trustee to whom they were advanced. To hold that the Appellant's firms were bound to see to the

application of these advances would in effect render it impossible that any such advances could be made. The principle which governs the cases as to the obligation of seeing to the application of money applicable to the payment of debts seems to their Lordships to settle this question. The Appellant, then, being in their Lordships' judgment entitled to relief by virtue of the special agreement, it is unnecessary for their Lordships to say how the case would, in their opinion, have stood independently of that agreement; but it may be right to add that they are not satisfied that the rights of consignees of estates held in trust ought in all cases to be affected by the defaults of the trustees. The case of Simond *v.* Hibbart seems to have an important bearing upon this point. There may be rights on the part of consignees paramount to the rights both of the trustees and the *cestui que* trusts; but their Lordships desire to be understood as not intending to give any final opinion on this question.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the Order complained of by this Appeal, and to declare that no Order ought to have been made either overruling or allowing the exceptions taken by the Appellant to the Master's Report, but that the accounts of the Appellant's firms of Daniel and Son, and Daniel and Co., as consignees, ought to have been and ought to be taken, and that in taking such accounts the Appellant's said firms respectively ought to have been and ought to be allowed all sums of money paid by them respectively to or by the order of the said Defendant Benjamin Howell Jones as executor or trustee of the said testator's will in respect of his drafts against consignments, or in the ordinary way of business, for the cultivation of the said testator's plantations or estates, or in or towards payment of any charges or liens affecting the said plantations and estates or any of them, or otherwise for the purposes of the said testator's will and codicil or either of them, and that what, upon the taking of the said accounts, shall be found to have been the balances due to the Appellant's said firms at the time of the appointment of the Receiver in the cause ought to have been and ought to be allowed to the Appellant against the testator's estate, and ought to have been and ought to be paid to the Appellant out

of such estate, with interest upon such balances at the usual rate and according to the usual course until payment thereof, and to order that the case be remitted to the Court in Barbados with directions to carry the above declarations into effect; and further to order that the Appellant's costs of the exceptions and of this Appeal be added to the amount which shall be found payable to him, and be also paid out of the testator's estate, with liberty to the Appellant to apply to the Court in Barbados respecting the payment to him and otherwise as he may be advised.

It is, as above-mentioned, asked by the Petition of Appeal that the Receiver may be directed to consign the produce of the plantations to the Appellant, but their Lordships do not think that such an order could properly have been made upon the hearing of the exceptions, and they therefore make no order on this part of the Petition. The Appellant, if so advised, may apply to the Court in Barbados for this part of the relief asked by the Petition of Appeal.