Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Simon Rose, Appellant, and Paola, Widow of George Grant, and others, Respondents, from Malta, delivered 14*th July*, 1877.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

THIS is an Appeal from a Decree of the Second Hall of Her Majesty's Civil Court in Malta, whereby the Appellant, in passing his accounts, has been charged with various sums of considerable amount, for which, as he contends, he is not justly liable. In dealing with it their Lordships have been placed at great disadvantage. They have not had the benefit of hearing Counsel for the Respondents, who have not appeared. The determination of the questions raised depends in some measure upon the peculiar law and practice of Malta; and the voluminous proceedings in the cause have been very baldly, not to say badly, translated from the Italian. In these circumstances their Lordships have deemed it right to examine carefully for themselves the whole of the Record before coming to any decision upon the particular questions argued before them.

The history of the case is as follows:—

George Grant, the late husband of the first and the father of the other Respondents, died on the 30th, leaving a will dated the 28th, of November, 1854. He had carried on business at Malta for many years, and had married a native of that Island, by whom he left eight children, all minors, the eldest being sixteen and the youngest only two years old when their father died. His will was made and published according to the forms prescribed by the law

of Malta; and one clause of it contains an express reference to "the legitimate portion" to which a child might be entitled "according to the Statute Law of Malta." It has, therefore, been assumed, and in their Lordships' opinion correctly assumed, throughout the proceedings in the cause, that whatever may have been the testator's domicil of origin, he was, at the time of his death, domiciled in Malta, and that the administration of his estate was to be governed by the law of that place.

The will is set out at p. 5 of the Record. The material passages of it will be afterwards considered. The last clause is in these words: "I hereby nominate and appoint Simon Rose (the Appellant) and John Grant jointly, and each of them separately, executors of this my last will, and guardians and testamentary curators of my above-mentioned children, all minors, with full power and authority as recognized by the laws."

On the 12th of December, 1854, the Appellant and John Grant petitioned the Second Hall of the Civil Court, praying to be confirmed as executors of the last will of George Grant, "with all the necessary faculties usually granted to such executors and as of law." The Court granted the demand, "provided that all the formalities prescribed by law should be before fulfilled." And two days afterwards the following note was recorded by the Registrar: "On the 14th day of December, 1854, Mr. Simon Rose and Mr. John Grant, residing in Valletta, appear before us, and in execution of the aforesaid decree, promise, and have promised spontaneously, on their respective oath, and bind, and have bound themselves, to fulfil faithfully the will of the English merchant, Mr. George Grant, now dead, of the city of Valletta, to render annually in this Second Hall of the Royal Civil Court a just, legal, and faithful account, and for the aforesaid effect they have hypothecated all their present and future property, and this according to the municipal *right* (the last word ought obviously to be 'law,' the more correct translation of 'Diritto'), at Book IV, chapter 1, sect. 34." The note is then signed by both executors, and below their signatures appears this memorandum which, is signed by the Registrar: "They swore and signed before me on the 14th day of December, 1854." (Record, p. 10.)

In January 1855 the executors presented another petition in the second Hall of the Court, stating that their testator had carried on "an establishment of goods in general (*Anglicé*, a general store); had ordered that after his death the business should be continued for the benefit of his wife and children, by keeping for the purpose regular commercial books, in which should be duly entered all the operations of the said establishment, so as to elucidate at all times the active and passive estate of the same; had given to the Petitioners the charge of examining periodically the said books and affairs subjecting them to their approval; and that in order to carry on the business a suitable person capable of satisfying the conditions prescribed by the testator, and others which the Court might impose, was required; and praying the Court to appoint such a person, submitting that William Grant, the brother of the testator, was then carrying on the said establishment to their satisfaction. The order of the Court on this petition is dated the 5th of January, and is to the effect that it should be lawful for the petitioners to commit the charge stated in their petition to the said William Grant, but that they "should inspect in the quality of the charge committed to them according to the law and to the terms of the testamentary disposition of the late George Grant." (Record, p. 336). This William Grant died shortly after his appointment, and no person was ever formally appointed to be manager in his place. It is true that, on the 27th of January, 1858, the Defendant and John Grant executed in favour of William Grant, the eldest son of the testator, and one of the Respondents, the power of attorney (L) at p. 151 of the Record. And on the 3rd of August, 1860, the Defendant executed also in favour of the said William Grant, and by notarial act, the general power of attorney (M), which is at page 156 of the Record. But the first of these powers seems to be limited to the shipping department of the business; and the last, though general, is limited in its duration to the period of the absence of Rose from the Island. On the other hand, it is stated by the widow, Paola Grant, and the said William Grant, in their petition of the 9th of April, 1863 (hereinafter referred to), that from the time of the death

of her husband she had always attended to the establishment, and had been assisted by her said son. (Record, p. 77).

John Grant, the co-executor, left Malta in March 1861, having been in bad health since the end of 1859, and died on the 17th of the following June. Before his death was known in Malta, and on the 21st of June, 1861, the Appellant filed in the second Hall of the Civil Court a petition with various accounts. In the former he stated that he and John Grant had been appointed by the testator executors, curators, and administrators; that John Grant, owing to his illness, could not fulfil the charges committed to him; was then absent from the Island, and had virtually ceased to be executor, curator, and administrator; that he (the Petitioner) was desirous to renounce the charges committed to him by the testator for his own sake, as also because he considered, after experience, that the widow and eldest son of the testator were sufficiently able to administer the estate without the help of strangers; that he had brought into Court the accounts, statements, and prospects of the administration of the estate held from the time of the testator's death for the purpose of obtaining the necessary acquittance; and, while renouncing the said executorship, curatorship, and administration, prayed to have "the accounts, statements, and prospects annexed to the petition examined and approved according to law, so that he might have the necessary acquittance." The Court on this petition appointed Dr. Lorenzo Cuschieri and an accountant named Joseph Andrew Micallef referees to revise the accounts, suspending the making of any further order until "after the termination of the charge given to the referees." (Record, p. 36).

Up to this point, then, the position of the Appellant was that of one who had accepted the charge of executor, curator, and administrator, with its duties and responsibilities as understood by the municipal law of Malta, whatever these may be, and was seeking as party actor to be relieved from that charge upon passing his accounts in the manner prescribed by law.

There is no trace of anything further having been done towards the passing of the accounts or the release of the Appellant for nearly two years. On

the 9th of April, 1863, the Respondents, Paola Grant and her son William, presented the petition already mentioned, praying to be appointed executors, curators, and administrators, instead of the Appellant and the late John Grant. The Court "awarded the demand," provided the Petitioners should fulfil all the formalities required by law. This they appear to have done on the 17th of April, on which occasion they admitted that the property of which they assumed the administration was of the approximative value of Sc. 93,768; and on the 22nd of April their appointment was duly notified to the Appellant. This transaction, therefore, divested him thenceforth of the character of executor, curator, and administrator, and fixed the period at and from which his accountability would cease, but left him accountable for his administration up to that date (Record. p. 79).

On the 4th of July, 1863, the referees having made no report, George Mitrovich, also an accountant, was, by an Order of the Court, substituted for Joseph Andrew Micallef.

In April, 1865, Mitrovich made a separate report, which is set out from p. 36 to p. 50 of the Record. Dr. Cuschieri, the other referee, did not file his Report until September 1868. It is set out from p. 50 to p. 67 of the Record. It is unnecessary at present to consider the report of Mitrovich, who went fully into the accounts in detail. It is sufficient to state the two penultimate paragraphs, viz.:—

"Section 132. Finally, in speaking of the statement presented by the executor, Simon Rose, up to the 31st of December, 1860, bringing up the estate of the late George Grant to about 15,000*l.*, comprising the increase of the property, as per document already mentioned, marked H, we submit to this Court that that statement is erroneous in several things, and after having examined the whole, as far as it was possible, we felt it our duty to make a statement ourselves, in which, after having taken into account the errors we found, we brought up the said estate to 14,692*l.* 12*s.* $3\frac{10}{12}$*d.*, without taking the increase on the property, as above, and without reckoning the deficit of the cash. This statement results from the annexed Prospect No. 9.

"Section 133. In it we do not mention the

deficit of the cash as at section 39 of this Report, nor the apparent surcharges of the charges in trade at section 124, nor the apparent aggrievance (*sic*) in the particular account of the Widow Grant at section 126, and the sums said to have been paid to her as at section 129. As all this much is obscure, and not certain or defined, we could not include it in that statement, and we have not done so, leaving it to the judgment and prudence of this Court to give on that matter the dispositions and orders which, in this delicate circumstance of the case, it will consider most fit, and in the manner it will deem best."

Dr. Cuschieri's report found nearly as much fault with the report of his brother referee as with the proceedings of the Appellant. It is chiefly valuable as containing an exposition of the law of Malta applicable to executors, curators, and administrators, and as pointing out the irregularities and shortcomings in that respect of the Appellant. His conclusion, which is even more unfavourable than that of Mitrovich, is thus expressed :—"Finally, Mr. Simon Rose, merchant, guardian of the Wards, and respectively curator of the widow of George Grant, testamentary executor of his last will, demands, in his original petition, to be allowed to renounce the executorship, curatorship, and administration, after the examination and approval of his accounts, statements, and prospects, so as to obtain the necessary acquittance. That, from what resulted, I am humbly of opinion that the demand of Mr. Simon Rose is not to be acceded to, but that this Court do give provision in the manner which it will deem best for the protection of the interests of the Wards and of the widow Grant."

It is obvious that upon these reports the Appellant could not, without more, obtain the release and acquittance for which he had originally asked, and thereupon the character of these protracted proceedings was changed. The Appellant ceased to be an executor seeking to be discharged on having his accounts passed before a *quasi* administrative forum; and became the Defendant in a suit brought against him for an account by the widow and children of his testator.

This suit was instituted in the First Hall of the Civil Court on the 22nd of February, 1869. The libel is at p. 1 of the Record, and its conclusions, as

summarized by the Decree under Appeal (p. 350), are the following:—

1. That it be declared that the Defendant has badly administered the hereditary estate of George Grant; dissipated such estate; and badly exercised the tutorship, curatorship, and administration intrusted to him by the Testator in virtue of his testament.

2. That it be declared that the accounts of the said administration presented by the Defendant on the 20th of June, 1861, before the Second Hall of the Civil Court are unjust and illegal.

3 and 4. That the Defendant be condemned to pay the sum to be found due from him with respect to the said administration, according to the liquidation to be made in consequence of the examination of the said accounts; and also all damages, expenses, and interests occasioned by the said bad administration and dissipation of the estate.

On the 12th of June, 1869, the Court made an interlocutory decree ordering the Defendant to present within four days an additional libel "developing his exceptions" (pleas); and the Plaintiffs to reply to it within an equal time.

The Defendant's pleading is at p. 69. If any answer to it was filed, it is not in the record before heir Lord shis.

Upon these pleadings it results that the matters in controversy between the parties were, as they still are, reducible to three heads:—

1st. The character in which the Defendant is accountable, the Plaintiffs contending that he accepted the duties and became subject to all the legal responsibilities of an ordinary executor, curator, guardian, and administrator; the Defendant insisting that his duties were merely those of inspection, the real management of the business, and the responsibility therefor, being vested in the widow Paola Grant.

2nd. The failure of the Defendant to perform the obligations which he had undertaken, notably in omitting to file an inventory of the estate in due form of law.

3rd. Whether, in taking the accounts, he was not chargeable with various sums in excess of those with which he had credited the estate, and ought not to

have others with which he had debited the estate, as disbursements properly made out of it, disallowed.

It is obvious that the questions thus raised more or less run into each other, inasmuch as the liability of the Defendant for a particular sum may depend upon the general nature of his accountability.

The first hearing of the cause took place on the 28th of August, 1869, before Dr. Giovanni Conti, as Judge of the First Hall, who, by his order of that date, found, for the reasons there stated, that the Defendant could not be allowed to discuss, at that stage, how the powers committed to him by the testator's will were to be interpreted; that, having acted according to the law as executors, curators, and administrators generally act, and sought to have his accounts examined as of law, he must have them examined in the same manner as the accounts of any other person holding such a character are examinable; that even if it were true that the widow had administered, the Defendant was not on that account exonerated from responsibility by reason of the interest of the children, some of whom were still under age; and that his plea, which tended to show that he was in no way bound to render an account, was inconsistent with his application in the Second Hall for an acquittance on passing his accounts; and then proceeded to declare and decide that the accounts, together with any additions or corrections which the Defendant might make, should be examined and verified in the same way as the accounts of executors, curators, and administrators are usually examined, and according to the obligations and duties of the said Defendant by the three new referees who were thereby appointed with the powers therein mentioned, and directed to present their report within two months. Of these referees, one was a merchant nominated by the Plaintiff, another a merchant nominated by the Defendant, and the third a lawyer nominated by the Court.

Against this order there was no appeal.

The referees made their Report on the 27th of December, 1869. It confirmed in many respects that of Mitrovich. Each assumed "the net active," *i.e.*, the balance at the credit of the estate when the executors assumed the administration of it, to be at least the sum admitted by the Defendant in

fol. 1 of a book called "Ledger A," viz., 12,558*l.* 2*s.* $8\frac{8}{12}d.$ The account headed "Prospect A," at p. 99, shows how this balance was made up. It shows, however, that on the detailed accounts rendered, the "net active" would appear to be only 11,142*l.* 7*s.* $3\frac{5}{11}d.$; and that the difference between that sum and the 12,558*l.* 2*s.* $8\frac{8}{12}d.$ being 1,415*l.* 15*s.* $5\frac{3}{12}d.$, rested upon the unexplained admission of the Defendant. Some argument has been addressed to their Lordships on the last-mentioned sum which will be afterwards considered. It must, however, here be mentioned that the referees, in examining the accounts which result in the first item in Prospect A, found various errors of addition and calculation, sometimes against, and sometimes in favour of the estate, of which the balance was against the estate to the amount of 163*l.* 10*s.* Therefore, in order to rectify these errors either the value of the goods specified in the so-called inventory had to be stated at 7,433*l.* 0*s.* 5*d.* instead of 7,269*l.* 10*s.* 5*d.*, or the 163*l.* 10*s.* had to be set against the 1,415*l.* 15*s.* $5\frac{8}{12}d.$, reducing that sum to 1,252*l.* 5*s.* $5\frac{8}{12}d.$ This would seem to represent the state of things as shown by the books on the 31st of January, 1855. (See Report of the referees, pp. 84 and 85.)

This report of the referees and the corrected balance-sheets scheduled thereto show generally that starting with the above balance of 12,558*l.* 2*s.* $8\frac{8}{12}d.$ as the ascertained value of the testator's estate on the 31st of January, 1855, the business was thenceforward carried on at a profit up to the 31st of December, 1860; the gross profit being 7,373*l.* 6*s.* $8\frac{8}{12}d.$, which, after deducting the sum of 4,249*l.* 13*s.* $2\frac{6}{12}d.$, the total of the sums drawn by Mrs. Grant for the maintenance and education of the family, left a net profit to the estate of 3,123*l.* 13*s.* $6\frac{2}{12}d.$

During this period sundry sums were drawn out of the business and placed in various investments, all of which, with one exception, seem to have been good and profitable; and on the other hand 809*l.* was said to have been lost by a fire. The referees (at p. 120, Prospect K) estimate the net active of the estate on the 31st of December, 1860, at 15,688*l.* 10*s.* $4\frac{3}{12}d.$

On the other hand the report remarks on the

absence of a regular and proper inventory; and the fact that some of the books which should cover the period between the 30th of November, 1854 (the date of the testator's death), and the 31st of January, 1855, were missing.

And, although it states that "it may be said that after January, 1855, the books of the establishment began to exist, and considering the nature of the important and various operations of that establishment, were kept regularly and with capacity (see sec. 6, p. 84); it nevertheless shows that a good deal of confusion existed in the accounts between the 31st of January and the 31st of March, 1855 (secs. 14 to 17 inclusive). To this period belong the imaginary item of 2,097*l.* 16*s.* 9*d.*, which was a good deal discussed in the course of the proceedings, and is afterwards referred to; and also one of the now disputed items, viz., the bills of exchange of which the proceeds amounting to 504*l.* 4*s.* 6*d.* were received by Mrs. Grant. Secs. 36, 37, and 45 are particularly directed to the now disputed items of the "charges in trade," the sums drawn by Mrs. Grant, and 283*l.* 5*s.* 9½*d.*, the amount of unexplained entries in the cash-book; and secs. 47 and 48 embody the general conclusions of the referees.

To these sections or some of them it may hereafter be necessary more particularly to refer.

The Plaintiffs, on the 9th of May, 1871, filed a further libel embodying their objections to the report of the referees, who, on the 15th and 22nd of June, were examined in Court upon it.

On the 9th of April, 1872, the cause came on to be heard in the First Hall. It was argued upon all the materials then existing, and the sitting Judge (Dr. Paolo Vella), proceeding principally upon his view of what, upon the true construction of the testator's will, was the responsibility assumed by the executors, discharged the Defendant from all further liability, directing him to declare upon oath within ten days that he had not in his possession money or other valuable goods belonging to the estate; and reserving any remedy which the minor children might have against their mother or elder brother for any acts of maladministration.

In April 1872 the Plaintiffs appealed from this Decree to the Second Hall. Some long-written

pleadings, which do not require particular notice, were filed on this appeal (see p. 181), and on the 1st of May, 1873, the referees filed a written answer to a question put to them by the Court of First Instance on the 15th of June, 1871. This answer is at page 187 of the Record.

On the 29th of May, 1873, the Appellate Court made an Interlocutory Decree, which constituted a new point of departure in this protracted litigation. (Record, p. 188.)

That order, after reciting that it was necessary to have a more ample instruction in the suit, ordered, "without prejudice of the reasons of the parties"—

1. That the Plaintiffs should file a clear and distinct note of the goods and credits, and of the value and quantity of the articles, upon which they were to be admitted to take the oath *in litem* as a proof of what had passed into the hands of the Defendant after the death of the testator, and when he took up the administration of the estate, adding a declaration of their readiness to swear to the truthfulness of that note with respect both to the existence and the value and quantity of the goods and credits described therein.

2. That the Plaintiffs, within the said term, should also file a short, clear, and distinct note, showing which of the items mentioned and indicated in the prospects, notes, and accounts annexed to the report of the referees they intended to contest.

3. That the referees should, at the expense of the Defendant, inquire and report what would approximatively have been the necessary sum for a good paterfamilias during the administration in question, to expend for the subsistence of the Plaintiff Mrs. Grant and her children, and for the suitable education of the children, taking into consideration their social condition, their usual way of living during their father's lifetime, their estate, the number of the family, and of the servants necessary according to the said condition, the sicknesses that might have taken place, and all other circumstances of the case in particular; and also make the inquiry and report there directed concerning the investment in the shares of the Maltese Navigation Company, a question which, having been ultimately decided in the Defendant's favour, is no longer material.

But for the express statement in this order that it was "without prejudice to the reasons of the parties," the form of the directions given and of the inquiries directed would imply that the Court had then decided the question of the nature of the Defendant's responsibility in a sense adverse to him and contrary to the Decree of the Court of First Instance.

On the 9th of July, 1873, the Plaintiffs, in pursuance of the last-mentioned Decree, filed their two notes. The first (pp. 190-1) states that, besides the goods represented by the item of 7,269*l.* 10*s.* 5*d.* mentioned in the accounts of the Defendant and in the report of the referees, the goods specified in the annexed list A, to the amount and value of 4,258*l.* 1*s.* 6*d.*, passed into the hands of the Defendant and his co-executor on the death of the testator. This note also, apparently without the slightest foundation, charged the executors with having received 14,000*l.* in ready money out of the chest of the testator.

The second note is marked B, and is at p. 193.

The referees made their report under the last Decree on the 5th of December, 1873. It is at p. 196 of the Record. They went at some detail into the payments actually made, but in answer to the question specifically referred to them, reported that the annual sum approximately necessary for the family was 667*l.* 10*s.*, as shown in the Prospect F (p. 223) annexed to their report, subject, however, to the observations contained in the 19th paragraph of the report.

On the 5th of December, 1873, the Court, by the order at p. 235 of the Record, required further written pleadings from the parties. The Plaintiff's pleading was filed on the 21st January, 1874, and is at p. 236. The Defendants' was filed on the 23rd of February, 1874, and is at p. 242.

Further evidence, both documentary and oral, was taken by the Court, which, on the 26th of June, 1874, made the Decree under appeal (p. 350). If any reasons were given by the learned Judges for this Decree other than those expressed in the formal "considerations" upon which the mandatory part of it purports to be founded, such reasons are not before their Lordships. The "considerations," however, are very full, and indicate with tolerable

certainty the grounds upon which the Court came to its conclusions. These may be briefly summarised :—

1. That upon the true construction of the will the Defendant was appointed executor, trustee, guardian, and curator, not only of all the testator's children, but also of his wife, and was not exempted from any of the obligations imposed by law upon executors, guardians, and testamentary curators.

2. That, by his acts, the Defendant had accepted the quality and charge of guardian and curator, as well as that of executor and trustee, with all their legal duties and responsibilities.

3. That the Defendant had failed to perform the obligation which the law cast upon him of making a proper inventory in due form of law.

4. That, according to the terms of the will, and also according to law, he had no power, without being authorized for this purpose by the competent authority, to give or disburse any sums from the profits above what was needed and necessary for the use, benefit, and advantage of the wife and children for her subsistence and their suitable education; "calculated also" (it is difficult to make sense of the translation of this latter passage in the ninth consideration) "those small sums that, according to the said will, the wife was empowered to receive for her account and that of the children."

5. That, by reason of his failure to make a proper inventory, the Defendant had become liable to be surcharged with all the items specified in the Plaintiff's List A, which they could prove, *in genere*, the value, if the Court saw fit, to be proved by their oath *in litem*.

The Court then found as a fact that the Plaintiffs had failed to prove, *in genere*, any of their claims with regard to the existence of any of the merchandizes or goods specified in List A, except the Havannah cigars and certain sugars, but had established their claim in respect to these two items.

And, applying the principles thus laid down to the facts, whether found by themselves, or resulting from the reports of the Referees, the Court declared and decided that the Defendant should be charged in account,—

1. With the value of the cigars mentioned in the list A, such value to be approximately fixed by the

referee thereafter appointed, and under the reserve of the Plaintiffs giving the oath *in litem* for this item after the presentation of the report;

2. With the sum of 504*l.* 4*s.* 6*d.*, the amount of the proceeds of the bills of exchange mentioned in List B, which were said to have passed, in February 1855, through the hands of Mrs. Grant ;

3. With the sum of 283*l.* 5*s.* 9½*d.*, the amount of the errors in the cash balance of the 31st December, 1860, specified in the 45th paragraph of the referees' first report ;

4. With all sums said to have been paid by the Defendant for the subsistence and education of the family Grant in excess of the annual sum of 600*l.* fixed by the Decree as the proper sum to be disbursed for every year up to 1860 for the use and advantage of the family ;

5. With the difference between the sums said to have been spent for charges in trade during the years 1855 and 1856, and the sum of 1,200*l.* fixed by the Court as a proper allowance for such charges ;

6. With the sum of 758*l.*, less 54*l.*, as the value of the sugar specified in List A.

Then follows a direction for the correction of the accounts in the manner expressed in the 28th and 29th "considerations," and a final order dismissing all claims of the Plaintiffs not included in the before-mentioned declarations, but condemning the Defendant to pay to the Plaintiffs whatever might be found due according to those declarations by Dr. Giovanni Chapelle, the referee appointed to fix the value of the cigars, with interest at 5 per cent. from the date of the Decree, reserving to the Defendant any right of compensation which he might have on the result of the accounts to be rendered by him from 1861 up to the end of his administration.

The first question that arises on this appeal is, was the Court right in the view which it took of the charge which the defendant had undertaken, of the character in which he was accountable, and of the general responsibilities which he had incurred ?

The case was argued before their Lordships as if upon the true construction of the will the widow took what is known in this country as a life interest in the estate, subject to the burthen of maintain-

ing and educating the children out of the annual income, in other words, that if the annual income were more than adequate to meet that charge, she was solely and absolutely entitled to the surplus; and, further, that she was intrusted with, and primarily responsible for, the management of the establishment, the duties of the executors being merely those of inspection.

The will, though it contains some expressions proper to an English will, is really one made and published in a foreign form, and with reference to a foreign law. The first thing to be observed as to the disposal of the beneficial interest is, that the testator has constituted his widow and his children his "universal heirs." This, without more, would import that they were to take jointly and with equal rights the *universum jus testatoris, i.e.*, all his rights with all his liabilities. It may be that he could engraft upon this disposition, in favour of the wife alone, an usufruct equivalent to an English life estate. Whether he has done so will be afterwards considered. It is clear, however, that the *corpus* of the estate being given to the children jointly with their mother, and they being all under age, it was necessary to make some provision for their protection. Accordingly, the scheme of the will appears to have been to put the whole estate in trust. The first clause directs that the business shall be carried on for the sole benefit and advantage of the wife and children in the sole name of George Grant, until the children shall attain their full age or be married. The next directs that all his property, including specifically the stock-in-trade, shall, from the date of the testator's decease, be invested, and explains this by adding, " not only the said property, but also the gains, produce, and proceeds to be derived from such my property under the authority and control of my hereunder appointed executors of my estate, and testamentary curators and guardians of my wife and children."

So far the intention expressed is that the business shall be carried on for the benefit of the children as well as of the wife; that for their joint benefit not only the *corpus* of certain property, but the gains, produce, and profits of the business shall be *invested* (a direction implying accumulation); and that this shall be done by the executors, who are to be also

testamentary curators and guardians of the wife as well as of the children. The next clause directs that the establishment *may* be continued as aforesaid by the widow, who shall be empowered, for the account of herself *and the children*, to receive and pay only small sums of money; that regular books of account shall be kept, which books and the estate of the affairs shall be periodically subject to the examination, control, and approval of the executors, curators, and guardians "of the interest not only of my said dear wife, but also as regards the property and interest of my said children until shey shall respectively attain their majority."

The will, then, vests the whole of the testator's property in the Defendant and the late John Grant, in trust (and this is one of the clauses upon which the difficulty as to the widow's supposed life interest arises) "for the use, benefit, and advantage of my wife during her natural life, to the end that from the annual gains, profits, and proceeds of the property, the same shall be enjoyed by my said wife, for her subsistence, and for the support and suitable education of all my children."

The next clause (and that implies some right of enjoyment by the children during their mother's lifetime) provides that before their mother's death there shall be no partition or division of the bulk of the estate; but that until that event it shall be enjoyed *pro indiviso*, unless it shall be absolutely necessary to make an advancement for any child on attaining full age or marrying.

In the next clause the institution of the widow and children as universal heirs of the estate is followed by this sentence, the latter part of which is somewhat obscure, "and, subject to the life interest of my said dear wife, to all the annual gains, profits, and proceeds of my said property, for her and their use, benefit, subsistence, and suitable education of my children, and granting my said property in trust unto my said executors, trustees, and guardians, in the manner hereinbefore mentioned, my full and whole power and authority."

Then come two clauses importing a forfeiture of the widow's interest in the event of her re-marriage, and that of a child's interest if he or she become a Roman Catholic; and clauses relating to the possible resignation of the trustees, the appointment of

others in their place, and other matters relating to the trust; and these are followed by that containiug the appointment of Simon Rose and John Grant, which has been already stated.

Their Lordships concur with the learned Judges of the Second Hall in thinking that the charge imposed upon the Defendant and his co-executor and accepted by them was not merely that of testamentary executor, but also that of trustee for the widow and children, and testamentary curator and guardian for the children; and that the Defendant is generally accountable in those characters. How far the Court, proceeding upon one expression in the will, was right in treating them as "curators and guardians" also of the widow, or whether that relation in its strict sense could subsist between the persons nominated and a widow of full age and *sui juris*, their Lordships express no opinion. The Defendant was, at all events, a trustee for her as well as for the children.

In considering, however, the extent of their responsibility, the nature of the principal property, viz., a large retail business, and the directions given in the will respecting the conduct of it, ought to be regarded. The testator evidently did not contemplate that the trustees should personally attend to the ordinary business of the shop and its daily details; indeed, such attention would obviously have occupied their whole time. The clause just referred to, empowering the widow to continue the establishment, and the direction that the books of account and the real state of his affairs should be *periodically* subject to the examination, control, and approval of the executors, sufficiently evince the intentions of the testator in this respect. He himself constituted his wife a manager of the business, and it was obviously necessary to employ other persons to assist her in the management. Such persons were employed, not for the performance of duties which the trustees ought to have performed themselves, but as necessary agents to conduct the ordinary details of the shop. Whilst, therefore, the trustees were bound generally to superintend the business, and to correct and put a stop to all irregularities which careful superintendence and the periodical revision of the books would have brought to light, they ought not to be held respon-

sible for errors and irregularities committted in the ordinary routine of the business by those who were necessarily entrusted with the management of it, and which they, in the exercise of their general power of supervision, could neither foresee nor prevent.

As to the nature of the interest given to the widow in the income, their Lordships have felt more doubt. But upon the whole they are disposed to think that the contention to the effect that she was entitled to the whole of the annual income and profits for her own benefit, subject to the charge of maintaining and educating the children cannot be supported. Such a construction seems to be inconsistent with the direction that she should have power to receive and pay only small sums of money on account of herself and her children; with the direction for the investment of the gains, produce, and profits of the business; and with the provision for the enjoyment of the whole fund *pro indiviso* during the widow's lifetime "by and between" her and the children. The construction which their Lordships would put upon all the clauses of the will which relate to this question, taken together, is that the testator intended that the income, so far as it was not expended for the support of the family, should be accumulated during the minority of the children; and that the accumulations should be added to the *corpus* of the estate, which, during the widow's lifetime, was to be enjoyed by her and her children, even after they had attained majority, as a joint and undivided fund, of which she probably might be the manager or administrator. There is nothing which points distinctly to a separate beneficial ownership by her of the surplus income (if any).

And it is to be observed that this construction of the will is altogether consistent with the acts and conduct of the parties, until the commencement of the hostile relations between them. It is sufficient to instance the application of the executors for leave to appoint the testator's brother to manage the business under them; the appointment by them of Rowlinson as book-keeper; the execution of the before-mentioned powers of attorney in favour of William Grant, the son; the application of the Defendant to be released on passing what purported to be the accounts of his administration of the

estate; and the fact that in those accounts, and the books of the establishment, the surplus profits are nowhere treated as belonging to the widow, but are regularly carried to the credit of the general estate. Their Lordships, therefore, see no grounds for reversing or qualifying the Decree under appeal in so far as it determines that the Defendant was bound to account, as executor, trustee, curator, and guardian, with the widow and children as representing the whole beneficial interest in the estate; and that for the profits, as well as for the capital, embarked in the business; for the income as well as for the *corpus* of the estate.

The question whether the Court, in applying this principle, has erred, in charging the Defendant with all or any of the items in question, has now to be considered.

The first and the last are in the nature of surcharges in the item of 7,269*l.* 10*s.* 5*d.*, the assumed value of the merchandize and goods as they existed at the date of the testator's death.

That the Defendant and his co-executor failed to exhibit an inventory in due form of law cannot be disputed. It has been ruled by the Court below, and the proposition has not been disputed before their Lordships, that, according to the law of Malta, the consequence of this omission is to allow the persons interested in the estate to surcharge the executor's accounts by the procedure followed in this case. The question, therefore, is reduced to this,—Had the Court before it evidence upon which it was justified in finding that these two items were proved *in genere*? The proof of the existence of these cigars consists of the testimony of Vincenzo Fenech given on his examination on the 13th of May, 1874. It is certainly slight, but there is nothing to set against it. He was produced on that occasion as a witness for the Defendant, and was not re-examined, as he might have been, as to what he had said on cross-examination about these cigars. The evidence appears to have satisfied the Court, subject to the corroboration to be afforded by the oath *in litem*—a corroboration which appears to their Lordships to be in such a case as this of very little value. In this state of things their Lordships (though they might not if sitting as a Court of original jurisdiction have come to the same conclu-

sion upon such slight evidence) do not feel justified in overruling the judgment of the Court below on a pure question of fact.

As to the sugar, the Court has found not only that it existed *in genere*, but that its value was 758*l*., for part of which (54*l*.) the Defendant had already accounted. The evidence on which the Court proceeded seems to have consisted of the documents described in the 17th "consideration" (see p. 359), as "exhibited at folios 709 and 710 of the Process." Now, if these documents are identical with the documents 9, 12, and 13, at pp. 281, 282, and 283 of the printed Record (and except these invoices their Lordships find no documents relating to the sugars specified in List A), it is difficult to see how, though they may establish the existence of some of those sugars, they make out the quantity claimed by List A.

The first document includes 10 barrels of sugar at the invoice price of 2,048 scudi; the second, 6 hogsheads of sugar in loaves (being 592 loaves in all), at the invoice price of 98*l*. 15*s*. 9*d*.; and the third, 50 barrels of crushed sugar, at the invoice price of 132*l*. 4*s*. 5*d*. On the other hand, the Plaintiff's claim in List A was for 60 instead of 50 barrels of crushed sugar, valued at 190*l*.; for 80 cantars (whatever that may mean) of Dutch loaf-sugar, valued at 300*l*.; and for 6 tierces of English loaf-sugar, valued at 135*l*.

Again, even if the evidence established that the quantity of sugar claimed in List A existed *in genere*, there would seem to have been some error in the calculation of its value. The three parcels of sugar specified in A are there valued at 190*l*., 300*l*., and 135*l*. The total of these sums is 625*l*. Yet the Court has fixed the value at 758*l*., having apparently added in by mistake 133*l*. claimed in List A as the value of 30 barrels of butter. It seems to their Lordships that the amount of this item, if the Defendant is to be held chargeable in respect of it, requires revision.

Both these items are, however, subject to this further consideration. They represent goods which it is said ought to have entered, but did not enter, into the account made up by the Defendant and his co-executor as on the 31st of January, 1855. It has, however, been shown that in that account the

Defendant charged himself with a sum of 1,415*l.* 15*s.* 5*d.*, for which the contentious referees, as well as Mitrovich before them, could find no foundation except the Defendant's own admission. Now, considering what the referees have reported concerning the books as they existed before January 1855, their Lordships think there is a strong presumption that any goods which existed at the time of the testator's death, and were omitted from the so-called inventory, were sold between the date of the testator's death and the 31st of January, 1855, and that their value entered into this sum of 1,415*l.* 15*s.* 5*d.* There is no suggestion that any such goods were fraudulently abstracted from the shop. It would, therefore, be inequitable to charge the Defendant with the two items in question without allowing him to set off against what may be found due from him in respect of them, either the whole sum or the balance of 1,252*l.* 5*s.* $5\frac{2}{12}$*d.*, in case the former sum has been already reduced to that balance by the rectification of the errors, amounting to 163*l.* 10*s.*, in the manner indicated in the fifth paragraph of the first report of the referees. The highest estimate of the value of these goods being less than this sum, any inquiry into their value, if not already made, would seem to be unnecessary.

The next item to be considered is the second, viz., that of 504*l.* 6*s.* 6*d.*, the amount of the bills of exchange of which the proceeds are admitted to have passed through the hands of Mrs. Grant in February 1855.

The account given of these bills of exchange by the referees is at p. 87. They state, "on verifying the transactions of the bills of exchange sold in the months of January and February 1855, we find that the amount of several of them does not appear to have been passed in cash; but we find in the cash important sums under the denomination "to merchandize account-shop," the derivation of which is unknown; and on the other side are registered in the ledger several bills of exchange sold, and their value of 504*l.* is said to be paid to Mrs. Grant. This leads us to establish that the sums in the cash are in the greater part the price of the said bills of exchange, whose amount has been paid to Mrs. Grant, and, consequently, the said two items of 1,163*l.*

15*s.* 9*d.* and 214*l.* 2*s.* $\frac{3}{12}$*d.* are not entirely the price of sold merchandize, as they have been erroneously put to the credit of this account. For the sold bills of exchange and their relative passage see Note X." Note X (p. 104) states in a separate column the different bills, of which the proceeds make up the sum of 504*l.* 4*s.* 6*d.*

The Court below had also before it the notes to the reports of Mitrovich and Cuschieri which are at page 341 of the Record, and show that some at least of these bills had not been properly entered in the cash. From all these materials it resulted that this sum of 504*l.* 4*s.* 6*d.* was money received on account of the estate before March 1855, for which the Defendant had to account, and for which, on the face of the accounts, he had very obscurely accounted. The item accordingly became one of those specifically questioned by the Plaintiff's note B. And the mode in which the charge was finally met by the Defendant is stated in his pleading at the bottom of page 253. There, after insisting, first, that it is sufficient to relieve him from responsibility to show that the money was received by Mrs. Grant, he says, "The exponent however is in case of proving, to contradict the Plaintiffs and show them the rashness of their pretensions, that those bills were sold by Mrs. Grant, and that their price was received by her, and sent to the Anglo-Maltese Bank." And he then states in detail how this was done. Now, if the Defendant had proved that Mrs. Grant, having received the proceeds of the bills sold, had paid those proceeds into the Anglo-Maltese Bank on account of the trading establishment, there would have been an end of this part of the case. It could not have mattered whether this was done by Mrs. Grant or by any other employé. Their Lordships, however, are unable to find on the Record any evidence in support of these specific allegations on the part of the Defendant. And it is to be presumed that the Court below has proceeded on the assumption that he had failed to trace the bills beyond the hands of Mrs. Grant, though there is no finding to that effect.

But the Court does not appear to have adverted to, or rightly apprehended, the finding in the report of the referees, that important sums

appeared under the denomination of "To merchandize account shop," the derivation of which is unknown, and to their conclusion that such sums are in greater part the price of these bills. If this conclusion of the referees is correct, and their Lordships can find no evidence in the Record to the contrary, it is plain the trading establishment has had the benefit of them. Their Lordships therefore think that the liability of the Defendant for this item has not been established.

The third item of 283*l.* 5*s.* 9½*d.* appears to be made up of sums entered by the book-keeper in the books of the shop to balance the cash; some of the entries are, "Deficiency of cash," and "Deficiency supposed to have been lost." On these items the referees observe "that it is possible that in the multiplication of business several payments and re-imbursements were not registered at the proper time, and were afterwards forgotten by the book-keeper." It is obvious that these errors occurred in the course of the conduct of the ordinary retail business during the period when Mrs. Grant and her son William were taking a large and active part in the management of the concern, and may have been due to the carelessness or inaccuracy of the book-keeper or of the employés who ought to have reported their transactions to him. It is certainly not shown that these errors were due to any want of care on the part of the Appellant in the exercise of his duty of general supervision; they are in the nature of losses which must occasionally occur in the conduct of every large business, and therefore, in their Lordships' view, are not the consequence of any breach of the duty the Appellant had undertaken to perform.

The fourth item consists of the sums disbursed for the subsistence and education of the family Grant in excess of the annual sum of 600*l.*

In the course of the cause it was a question whether all the sums so charged in the account had been actually paid to or on account of Mrs. Grant. She denied that she had received so much money. The Decree under Appeal has no express finding on this point. It proceeds, as will be seen, upon a principle which made the fact of payment immaterial. But for the purposes of this Appeal it is

desirable to see how the evidence on this point stands.

From the 37th paragraph of the first report of the three referees (p. 92) it results clearly that all these sums were duly entered in the books, that they appeared not only in the general books of the establishment as disbursements, but were charged to Mrs. Grant in her separate account, and, considering the share which she took in the business, and her means of access to the books, it is difficult to believe that she could have been thus charged with sums which were not actually paid to her or on her account. Again, in their report of the 5th of December, 1873 (p. 195), the referees have gone more fully into this question. In the first paragraph they state that in order to form an opinion of the expenses necessarily incurred for the subsistence and education of the family, they had been obliged in the first place to ascertain what were the expenses really incurred, and what were the sums of money had by the widow Grant between the 1st of January, 1855, and the 30th of April, 1863, and how these sums were spent.

And in paragraphs 3 and 4 they state that from the examination of the books produced by William Grant it resulted that during that period 3,417*l.* 16*s.* 4*d.* had been paid for accounts and other expenses as shown in detail by the Note A annexed to the Report (p. 201); and further sums, amounting in all to 2,474*l.* 0s. 10*d.*, had been received by Mrs. Grant in cash, as shown in detail by their Note B (p. 219).

Exceptions were no doubt taken to this report by the Plaintiffs and answered by the Defendant in the pleadings filed under the Order of the 5th of December, 1873, and set out at pp. 236 and 242 of the Record. In their pleading the Plaintiffs again disputed the actual payment of a large but undefined part of these moneys to or on account of Mrs. Grant, and called for further evidence. And the Defendant has annexed to his pleading sundry accounts which are to be found between pp. 257 and 276. The Court, however, omitted to adjudicate upon the questions thus raised. It proceeded on the principle indicated in the 9th and 26th "considerations," viz., that the Defendant had no power *without being authorized by competent*

authority to make payments for the subsistence of the family, at all events beyond what was strictly necessary; that it was accordingly competent to the Court to fix retrospectively what was a fit sum to be allowed for such subsistence and the education of the children, and that nothing in excess of that sum could be allowed to the Defendant. It had, no doubt, this principle in its mind when it made the Order of Reference of the 29th of May, 1873. The referees, in answer to the inquiry thereby directed, had reported that the annual sum of 667*l.* 10*s.* was, in their judgment, approximately necessary for the subsistence, &c. of the family, adding the remark that in fixing this sum they had not calculated the extraordinary expenses made by the family Grant, and which now and then are necessary in every family. How this sum was calculated is shown in detail in Prospect F (p. 223), and many of the items certainly seem to be moderate enough for a family of ten persons. The Plaintiffs, however, excepted to the proposed allowance as excessive; and the Court, by its 26th "consideration," has (it does not appear on what precise grounds) cut it down to 600*l.*

In this latter "consideration" the Court refers to "a positive disposition of the law as regards the tax and liquidation for the maintenance of persons under guardianship and curatorship," but the Judgment does not contain any express reference to the text of that law.

Their Lordships can find in the "Diritto Municipale di Malta," compiled under the Grand Master De Rohan, and republished with annotations in 1843, nothing which seems to bear upon this question, unless it be the 17th Article of the 3rd Chapter of the 3rd Book, and a portion of the commentary upon it. It is to be observed that this 3rd Chapter, which treats of the obligations of guardians and curators, is referred to in the Record as still in force in Malta.

The following appears to be a sufficiently correct translation of the article of the original Code of Rohan:—

"Whenever it is a question of alienating or granting in lease, either for a term or in perpetuity, the property of wards or minors, or of hypothecating

their property, or binding them personally, our special order, founded on the report of the Judge, shall be essential to the validity of such alienations, grants in lease, obligations, and mortgages; nor shall it suffice that the aforesaid acts shall have been necessary, favourable, or beneficial to the wards, even though minors."

The term "minors" in this clause, as opposed to that of "wards," seems to import wards under fourteen, or certainly those under seven years of age.

The passage in the commentary above referred to, is to this effect:—

"The guardian has regularly the power of doing, by virtue of his office, whatever his ward might have done, acting as a good paterfamilias, if he had attained his majority; and therefore, whatever the guardian does, either in a Court of Justice or out of a Court of Justice, is treated as done by the ward himself; and thus, through the guardian, a right of action accrues to the ward.

"On the other hand, although the right of the guardian is most extensive, he cannot do of himself alone all that a real proprietor of full age might do, but only has the power of doing those acts which cannot be delayed without risk, and are not of great consequence. In everything else the authority of the guardian is not sufficient, but, for the validity of the act, an order of a Judge having previous cognizance of the matter in question must necessarily be applied for."

It is unnecessary, for the reasons hereafter given, to determine whether the law thus enunciated extends beyond such acts of alienation as involve a disposition of some part of the *corpus* of the ward's estate, or limits the discretion of a guardian in the application of mere income to the maintenance and education of his wards. It would seem that, under some of the systems of law that are founded on the civil law, the guardian might, at his discretion, so apply the whole income, although he could not in any case exceed it.

This appears to have been once the rule in France (Pothier, "De la Tutèle," Article 19), though the discretion of the guardian has since been limited by Articles 454 and 455 of the Code Civil, which require the allowance of the ward to be fixed by the Conseil de Famille.

If the present question were only to be determined

by the general and positive law of Malta, their Lordships might have deemed it necessary to seek further information on this subject. It appears, however, to them that, in this particular case, the question is determinable not by the general rule of law, whatever that may be, but by the peculiar provisions of the will.

Their Lordships are disposed to think that, although upon the true construction of the will the widow did not take a life interest in the estate, subject to the maintenance and education of the children, so as to entitle her to the surplus income (if any) after these purposes were satisfied, the testator did mean to confer upon her the power of expending all the yearly profits for her own subsistence and the maintenance and education of the children, if she thought proper, subject, however, to the supervision of the trustees, who would be bound to see what was so expended, and whose duty it would be to retain and invest the surplus. The mere fact that the widow, a person *sui juris*, was to be maintained, suitably to her condition of life, out of the common fund, distinguishes the case from the ordinary one in which a guardian is administering the exclusive property of his ward. The first trust of the will is " for the use, benefit, and advantage of my dear wife during her natural life, to this end that from the annual gains of my property the same shall be enjoyed by my said wife for her subsistence, and for the support and suitable education of all my children." And in the clause in which the testator constitutes his wife and children his universal heirs, he adds, " subject to the interest of my dear wife to *all* the annual gains of my property, for her and their use, benefit, subsistence, and suitable education of my children." These peculiar provisions seem to confer upon the wife the power to dispose of all the income for these purposes, and evince an intention on the part of the testator to supersede the provisions of the law referred to in the Judgment. In point of fact, the income has not been wholly expended for these purposes, and the corpus of the property has been largely increased since the testator's death by additions of surplus income. In these circumstances their Lordships think the arbitrary sum of 600*l.*, assessed by the Court as the proper annual

allowance "for the use, advantage, subsistence, and education of the family Grant," is not warranted, and that the Appellant ought to be allowed all the moneys in fact paid to the widow for the above purposes.

The remaining item to be considered is that of the sum said to have been spent for charges in trade during the years 1855 and 1856. These, upon no other grounds than those indicated in the 27th consideration, have been cut down to 1,200*l.*, a sum fixed, apparently, arbitrarily and at the discretion of the Court. Their Lordships can see no ground why the sums actually expended under this head should not have been allowed to the Defendant, unless, indeed, it were clearly shown that they were materially in excess of what was necessary.

All that the record discloses upon this point is as follows:—

The 124th paragraph of Mitrovich's Report (p. 47), which is cited in the 27th "consideration," after stating the balances which had been put to debit of profit and loss during each of the years from 1855 to 1860 (both inclusive) says, "We say nothing on the four last items taken on an average, because the sums are moderate, but the first two deserve an explanation, by whom it is due, because, taken together, they form a considerable sum, which seems to us to be rather an excessive one." The balances on which this observation is made are 1,943*l.* 6*s.* $6\frac{3}{12}d.$ and 684*l.* 14*s.* $5\frac{7}{12}d.$, making together 2,628*l.* 0*s.* $11\frac{10}{12}d.$

On the other hand, the first report of the contentious referees (see paragraph 36, p. 91,) is on the whole favourable to the Defendant. It says: "Speaking first of the sums which are yearly brought in account under the denomination of 'charges in trade,' we remark that they seemed to us excessive, for which we thought it necessary to examine the registration in the relative books in order to know their consistence and origin. The detail of some of 'these charges in trade' is found noted in other two books, viz., in the book called 'petty charges,' and in another called 'petty cash-book.' We repeatedly begged these books from William Grant, but we never had them. From the above examination we found out that this item, 'charges in trade,' includes all the expenses referable to the

merchandize, viz., commission fees, land transports, freights, assurances, postage, interest, and all other expenses of clearance, as well as all the other expenses made in Malta, such as Custom dues, storage expenses, transports, &c. Therefore, regard being had to what precedes, we do not consider the item in question as excessive, especially when we take into consideration the many transactions which were made at the time to which the said expenses refer." And the two sums in question are accordingly entered in the Profit and Loss Account F annexed to the Report.

In their libel objecting to this Report (p. 141), the Plaintiffs say they can admit no more than 360*l.* for charges in trade for the whole six years instead of 3,570*l.* 15*s.* $5\frac{6}{12}d$; but they made no mention of "the charges in trade" in their list of contested items (B, at p. 193). And the only other document on the record, so far as their Lordships can discover, which relates to this item, is Document VI, at p. 344, which is headed "charges in trade in the year 1855," and purports to be one of the documents mentioned in the reports of Mitrovich and Cuschieri. This specifies in some detail the particular sums paid under this head. It contains, however, many items which on the face of them carry no explanation; and in particular items in each month for "petty expenses," which are sometimes considerable, and amount in that year to 925*l.* 12*s.* $6\frac{8}{12}d$.

It does not appear what, if any, discussion took place before the Court upon this account, or whether any inquiry was made as to particular items contained in it. The reduction made by the Decree seems to be one made "at discretion."

Their Lordships cannot think that this was the mode in which the Court should have dealt with this question. If they were not satisfied with the conclusion to which the referees came at the end of the 36th paragraph of their report, and with their allowance of the sums in question, they should have caused the Plaintiffs to specify the particular items to which they objected, and have made or caused to be made such further inquiry concerning them as they deemed necessary. And for the purpose of that inquiry they should have compelled William

Grant to produce the two books which he is said to have withheld from the referees.

This not having been done, their Lordships think that the report of the referees ought to be accepted; that the items in question ought to be allowed to the Appellant; and that the Decree must on this point be varied.

The petition of Appeal and the Appellants' case also complained that he had been charged with the sum of 2,097*l.* 16*s.* $9\frac{2}{12}$*d.*, which has already been mentioned in connection with the first report of the referees.

It was, however, stated at the Bar that this is not the case. Their Lordships themselves so construe the Decree. They conceive that the final declaration and direction of the Decree, taken in connection with the 28th "consideration," imports no more than that the accounts were to be corrected by treating this item as an imaginary one, inserted only by the accountant, Rowlandson, when he was opening the new books for the purpose of balancing *pro tem* the merchandize account between the 31st of January and the 1st of March, 1855, and one which did not permanently affect either party. And this, if the view of the Court below, appears to their Lordships to be correct.

Their Lordships will, therefore, humbly advise Her Majesty to allow this Appeal, and to declare that the Appellant is not chargeable, and ought not to be charged with the sums of 504*l.* 6*s.* 6*d.* and 283*l.* 5*s.* $9\frac{1}{2}$*d.*, mentioned in the Decree of the Second Hall of Her Majesty's Civil Court of Malta of the 26th June, 1874; or with the difference between the sums actually paid by the Appellant for the subsistence and education of the family Grant, and the annual sum of 600*l.*, fixed by the said Court as the proper sum to be allowed for such subsistence and education; or with the difference between the amount of the sums appearing by the books of the said business to have been spent for charges in trade during the years 1855 and 1856, and the sum of 1,200*l.*, mentioned in the said Decree; but that the Appellant ought to be allowed all the before-mentioned sums in passing his accounts.

And further, to declare that, as to the sums with which the Appellant may be chargeable in

respect of the value of the cigars and sugar in the said Decree mentioned, he is entitled to set off against the same the sum of 1,415*l.* 15*s.* $5\frac{3}{12}$, in the report of the referees mentioned, or so much thereof as has not already been set off against other errors or liabilities; and that in case, after the allowance of such set off, anything should appear to remain due in respect of the said two items from the Appellant, the true value of the said sugar, which appears to have been erroneously stated in the said Decree to be the sum of 758*l.*, be ascertained by Dr. Giovanni Chapell in the said Decree mentioned, or by some other referee, to be appointed by the Court.

And to order that the cause be remanded to the said Second Hall of Her Majesty's Civil Court at Malta, with instructions to cause the liquidation under the said Decree to be corrected and made in accordance with the before-mentioned declarations. Their Lordships think that, in the peculiar circumstances of this case, there should be no order as to the costs of this Appeal.

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