Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Whitfield and another v. *Howell and others, from the Court of Chancery of the Island of Barbados; delivered* 28*th June*, 1881.

Present:

SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THE bill in this case is substantially one for carrying into effect the trusts of a deed dated the 10th of February 1874, by which Elizabeth Howell, and her son Conrade Howell, gave security to the Messrs. Whitfield for the balance of accounts running between them and Conrade Howell. The question is whether the security given by Elizabeth Howell extends to all dealings between the Whitfields and Conrade Howell, or is confined to a single class of dealings of which a separate account was kept. The nature of the business between the Whitfields and Conrade Howell is stated in the bill, and is admitted by the answer, and also proved by the affidavit. It is shown that there was a general trading business carried on between the Whitfields and Conrade Howell, and also a drawing account by which Howell drew upon the Whitfields for the purpose of answering his necessities in respect of a special contract that he had entered into. Paragraph 19 of the bill states this: "That during "the whole of the time the said Conrade Adams "Howell held and carried on the said contract, "he drew upon and remitted largely to the said "firm of 'George Whitfield and Company'

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" altogether, or chiefly, through the Colonial Bank
" in this island, upon the said drawing credit,
" in respect of which an account was kept
" between the said firm of George Whitfield and
" Company and the said Conrade Adams Howell,
" called 'the drawing account;' and the said
" Conrade Adams Howell had also during the
" whole of that time, or the greater part thereof,
" other transactions with the said firm of George
" Whitfield and Company for goods obtained by
" them for him, or furnished by them to him,
" (namely, for such articles as cement, bricks,
" and hoops, &c., invoiced by the said firm to
" him,) in respect of which a separate and
" distinct account was kept between the said
" George Whitfield and Company and the said
" Conrade Adams Howell, called sometimes 'the
" general account,' and sometimes 'the current
" account,' but upon this account the said George
" Whitfield and Company never honoured, dis-
" counted, paid, accepted, or indorsed any bills
" of exchange, promissory notes, or orders for
" the payment of money for the said Conrade
" Adams Howell."

Now that is a distinct statement that upon the general or current account money was not paid to the order of or for Conrade Howell. These accounts went on and were kept perfectly distinct, and the letter which closes the drawing account shows how distinct they were. On the 1st of November 1876 the Whitfields write to Conrade Howell saying:—" We thank you for remittance therewith " (that must refer to an acknowledgement of a letter) " in Colonial Bank draft 90 days
" 1,050*l.* placed to your credit on drawing account.
" We have also accepted your draft upon us, as
" advised, in favour of the bank, 1,000*l.* at your
" debit. By this transaction your drawing credit
" will be brought to a close, leaving you in
" credit some 50*l.* when the account is made up.

"Your general account however shows a heavy "balance against you." And then they ask him to make efforts for the payment of the balance, and add, "We are glad the drawing "credit proved useful to you, and we have to "thank you for the punctuality with which "remittances were sent forward to meet the "drafts." So that, the accounts having been kept totally distinct, one of them is from that time entirely closed, and a small sum of money, it appears in the result to have been a sum of 54*l.*, which stood to Howell's credit upon the drawing account, was transferred to his credit upon the general account.

It is to that state of facts that their Lordships have to apply the expressions in the deed of the 10th of February 1874. It appears that in the year 1873 Howell was indebted to the Whitfields on the drawing account in the sum of something like 3,000*l.* The Whitfields were uneasy at that state of the account, and they applied for some security; and Elizabeth Howell, the mother of Conrade, agreed to give some security for it. Some reference has been made to prior negotiations between the parties, and also to some subsequent correspondence; but their Lordships think that the deed must speak for itself, and that it is not right to import into the construction of the deed any of the correspondence, which is only referred to as showing how the facts stood between the two mercantile firms that were dealing with one another.

What the deed says is this. It recites that the Whitfields "have lately paid for Howell several "bills of exchange, amounting together to the "sum of 3,000*l.* or thereabouts, and they "may hereafter advance and pay to him or "on his account divers sums of money either "in honouring his drafts or in discounting or "paying bills of exchange drawn or accepted

"or indorsed by him or otherwise." Now the whole of that sentence refers to advances and payments made by the Whitfields to or on account of Howell. The recital goes on to say that "for the purpose of securing to the Whit-"fields all such sums of money as shall at any "time hereafter be due and owing to them "from Conrade Howell, in respect of any sum "or sums so advanced as aforesaid or upon a "balance of account or otherwise howsoever, with "interest for the same, it hath been agreed." Pausing there for a moment, it is observable that a new element or class of transactions is introduced into the recital, namely the balance of account. Then comes the recital of the agreement that was made between the parties,—"it "hath been agreed that Conrade Howell should "enter into the covenant herein-after contained, "and that Elizabeth Howell should assign unto "the Whitfields the herein-before mentioned "sums," (that refers to certain sums of money which were said to be due to her upon securities that are mentioned, the nature of which does not signify,) "as a security for the payment of the said bills so paid by them." Their Lordships consider that the words "so paid" refer not only to the bills which had been actually paid at this date of 10th February 1874, but to all those the payment of which was contemplated by the previous recital. Now there are two parts of that agreement, just as there are two distinct classes of mercantile transactions mentioned in the previous recital: Conrade Howell is to enter into a covenant, and Elizabeth is to assign her securities as a security for the payment of the bills paid by the Whitfields. Then comes the witnessing part of the indenture, which states the consideration. The indenture witnesseth "That in pursuance "of the said agreement, and in consideration of

"the sums of money by the Whitfields already "paid for Conrade Howell in taking up his "drafts, and in consideration that they may "hereafter advance and pay to him, or on "his account, divers sums of money either "in honouring his drafts or discounting or "paying bills of exchange drawn accepted or "indorsed by him or otherwise." So far that corresponds to the first class of transactions stated in the recitals, but it goes on:—"And "for the purpose of securing to the Whitfields "all such sums of money as shall at any time "thereafter be due and owing to them from "Conrade Howell, in respect of any sum or "sums of money so advanced as aforesaid, or "upon balance of account or otherwise how-"soever, the said E. Howell hath assigned." Pausing there again, we find that prior to the assignment by Elizabeth Howell both classes of the transactions between the Whitfields and Conrade Howell have been mentioned, and it is stated that the balance on both those classes of transactions is intended to be secured. If the deed stopped there, if there was a simple assignment of Elizabeth Howell's money and securities and this statement of the general purpose of the deed was the only explanation of that assignment, if the deed never went on to say what the Whitfields were to do with the property assigned to them, then it might be said, as it was argued at the bar, that there was a difference between the recitals of the deed and the operative part of the deed. But the deed does not stop there. It goes on to mention the specific trusts upon which the assignment was made; and therefore this statement of the general purpose which is introduced into the witnessing part is only a reintroduction of the matter of the recitals which was stated in a more regular way in the prior part of the deed.

Mr. Macnaghten justly observed that it was a rare thing to find the whole purpose of the deed stated as introductory to the operative part. It does occur sometimes; but it is a rare thing. It is a very clumsy thing to do, and it is quite needless if the recitals are properly prepared. However here it is, and it must be treated as a simple repetition of the recitals, and as explanatory of the whole deed. But the really operative part of the deed is the assignment itself and the trusts that are declared upon it.

Now we come to see what are the trusts declared. There are two alternative trusts; the first trust is this:—"If Conrade Howell shall "upon demand pay or cause to be paid all "such sum and sums of money which the "Whitfields have advanced and shall advance "and pay for Conrade Howell, either in "honouring his drafts or discounting or paying "bills of exchange or promissory notes given "drawn or accepted or indorsed by him or "otherwise without any deduction or abate-"ment whatsoever and according to the true "intent and meaning of these presents;" then the Whitfields are to re-assign the securities to Elizabeth Howell. But in order to raise this trust, there is no need to pay what is due on the general account. On that account there were no advances or payments for Conrade Howell, none whatever. There were the common mercantile transactions, orders of goods, consignments of goods to Conrade Howell and payments by him for them; but advances to him or payments for him there were none. Therefore, the fact being that Conrade Howell has paid all sums of money which the Whitfields have advanced or paid for him either in honouring his drafts or in any other manner whatsoever, Elizabeth Howell, or those who now represent the fund, may come and ask to have this trust carried into effect.

Is there then any other part of the deed that has cut down the plain meaning of the first trust? The alternative trust is, that if default shall be made in payment of the sum and sums of money advanced by the Whitfields, then the Whitfields may realise the securities and pay themselves the moneys for the time being due or owing on the security of these presents. Well, it is said that the language of the alternative trust favours the contention of the Whitfields that the assignment is made for the purpose of securing both accounts. It might be sufficient to answer that the Court is not asked to carry that trust into operation, for that trust only arises in case default shall be made in payment of the sums of money advanced by the Whitfields; and no such default has been made. That trust does not now arise, but, taking it as something bearing on the whole construction of the deed, the meaning of it seems to be plain enough. If default is made in the payment of the advances, the securities are to be applied to payment of the moneys due or owing on the security of these presents. That only throws us back again on the whole deed to see what is owing on the security of these presents; and if we find that these presents are in other respects so framed as to secure both accounts by Conrade's covenant, and only the drawing account by Elizabeth's assignment, then all that is owing upon the security of these presents, so far as regards these sums assigned by Elizabeth Howell, is the balance of the drawing account; so that when we have construed the alternative trust we get no further in the direction desired by the Whitfields.

Then comes the second witnessing part, "That "in further pursuance of the said agree-"ment, and for the considerations aforesaid, "Conrade Howell covenants with the Whitfields

" that he Conrade Howell shall and will on " demand pay to the Whitfields all such sum " and sums of money as shall at any time be " due from Conrade Howell to the Whit- " fields without any deduction or abatement " whatsoever:" the most marked difference when you come to compare the nature of the engagement entered into by Conrade Howell with the nature of the engagement entered into by Elizabeth Howell. But that is not all; because there comes another operative part of the deed in the shape of a proviso. It is provided " that " until default shall be made in payment of the " said sum and sums of money advanced or to " be advanced as aforesaid, it shall be lawful " for Elizabeth Howell to receive the interest on " the said sums of money hereby assigned." There again is a limitation of Elizabeth Howell's security to the money advanced or to be advanced as aforesaid. No such default has been made. Therefore if Elizabeth Howell were now living, according to the plain literal construction of that trust she would still be entitled to receive interest on the sums of money which she assigned.

It seems therefore to their Lordships that there is no difference between the recitals and the operative part of the deed. The recitals proper exactly tally with the proper operative part of the deed. The only difficulty has been occasioned by the clumsy reintroduction of matter proper to recitals in the witnessing part of the deed and between the statement of the consideration and the operative words of assignment; and if that is taken as referring, as no doubt the draftsman intended it to refer, to the two witnessing parts, and is distributed, the former part of it to the first witnessing part, and the latter part of it to the second witnessing part, then the whole deed becomes intelligible; and, although it is not constructed according to the

very highest principles of art, yet it reads from beginning to end without any material difficulty. All parts of the deed which are specifically and exclusively directed to point out the destination of the property assigned by Elizabeth Howell are clear, precise, and consistent in saying that she joins only to secure the advances or payments for Conrade, or in other words the drawing account. The only two passages which if uncontrolled might lead to a contrary conclusion, are found to be couched in general terms not specially directed to the property of Elizabeth Howell, but quite intelligible and consistent if applied to Conrade's covenant. Such their Lordships think is the true construction of the deed, and upon that the Appeal fails.

There was another point made with regard to the deed of confirmation, to which, inasmuch as their Lordships have arrived at a very clear conclusion upon the point discussed and decided in the Court below, they think it advisable not now to advert. The result is that their Lordships will humbly advise Her Majesty that the Appeal be dismissed and the Appellants must pay the costs.