

of her voyage, which is to last for a specified time? Now, if it had been a voyage policy, there is no question, although there had been a warranty of seaworthiness when she started on her voyage, there would be no warranty that she should be seaworthy at an intermediate port at which she touched, which port she is endeavouring to make intermediate; and if it were to be held (as I took the liberty of pointing out in the course of the argument) that there was a warranty in a time policy that the ship shall be seaworthy at her departure, and at every intermediate port during the currency of the time policy, it would be holding that there is a warranty to a greater extent in a time policy than there would be in a voyage policy.

Therefore, I apprehend in this case, as in all cases, we must abide by the general rule, that a policy of indemnity, being a written instrument, the terms of that instrument must be construed subject to certain conditions, one of which is, that in a voyage policy, custom and decision have annexed to that contract a warranty of seaworthiness, and that there is no custom and no decision which warrants the Court in saying, that in a time policy any such warranty attaches. If it were necessary for the decision of the case, we should be inclined to go to the full extent of what Lord Campbell says in the House of Lords. It is unnecessary, however, to do so in this case; because, if there was a warranty, it was satisfied at the time the voyage commenced, and there was no warranty at any intermediate port; and, therefore, upon that, which is a lower ground, the judgment must be affirmed, and with costs.

[Mews' Dig. tit. SHIPPING, B. MARINE INSURANCE, VI. WARRANTIES, 3. *Seaworthiness*, b. *On Time Policy*. S.C. 8 Moo. P.C. 351. See *Dudgeon v. Pembroke*, 1875, 1 Q.B.D. 125.]

[372] HENRY M'KELLAR,—*Appellant*; JOHN WALLACE and JOHN SPENCE,—*Respondents* * [June 17 and 20, 1853].

On appeal from the Supreme Court at Calcutta.

Principles which regulate a Court of Equity in opening stated and settled accounts.

Accounts of long standing and great complication of a mercantile firm at Calcutta, one of the partners of whom afterwards acted as agent in England, involving charges for agency and partnership transactions, were mutually agreed to be investigated and closed. After long negotiations and discussion respecting some of the charges, an agreement was come to, the parties agreeing to strike the general balance at a given sum, reserving one item of the account, amounting to a considerable sum, for future investigation. This reserved item was subsequently settled by the acceptance of a bill of exchange for a lesser amount, as such reserved item, if opened, would have disarranged the settled general account. The Bill of exchange was dishonoured, and an action brought to recover the amount. A bill was then filed for an injunction, for the cancelment of the Bill of exchange, and that the accounts so settled might be opened. The Supreme Court at Calcutta held, that the reserved item being left open, was evidence that the account was not finally closed, and decreed the accounts to be opened, referring the cause to the Master.

Upon appeal, held by the Judicial Committee (reversing such decree and dismissing the bill, with costs) that the transaction amounted to an adjustment of the general accounts between the parties, subject to the reserved item which was ultimately settled, and that the accounts so settled and closed could not, in the absence of fraud, be re-opened.

The Defendant did not appeal from this interlocutory decree, but proceeded in

* Present: Members of the Judicial Committee,—The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan. Knt., and the Right Hon. Sir John Patteson, Knt.

the Master's office in respect of the matters included in the accounts; but before the general report was made by the Master, he appealed from such interlocutory decree to England. In reversing such decree, the Judicial Committee ordered him to pay the costs of the proceedings in the Master's office, and remitted the cause to the Court below, with directions, that the costs payable to the Defendant upon the dismissal of the bill, and the costs payable by him consequent upon the proceedings in the Master's office, should be set off, the one against the other, and the balance paid to the party entitled to the same.

Leave to appeal on an *ex parte* application was, under special circumstances, granted upon terms of the Appellant prosecuting the appeal and giving security for £500. No step was, however, taken by the Appellant to perfect the security or prosecute the appeal. The Respondents, on being served with the Order admitting the appeal, filed a counter petition to revoke the leave granted to appeal. The Judicial Committee, under the circumstances, there having been great delay, made an order putting the Appellant upon terms of lodging his petition of appeal within six weeks, or the appeal to stand dismissed, and enlarged the amount of the recognizance to £1000 to cover the expenses occasioned by the proceedings in the Master's office, reserving the costs of the application to revoke the leave to appeal, to the hearing.

In this case, the appeal was brought from a decree, dated the 22nd of February, 1848, and an order, dated [373] the 19th of July, 1849, made by the Supreme Court at Calcutta in two suits pending in that Court. In the first of these suits the Appellant was Plaintiff, and the Respondents, Defendants; and in the second suit the Respondents were Plaintiffs, and the Appellant, Defendant. These suits arose out of the following circumstances:—

Previous to and up to the 6th of June, 1825, the Appellant carried on the business of a clothier and merchant tailor in Calcutta, in partnership with one R. Gibson, under the style of "Gibson and Co." On that day, Gibson retired from business, and the Appellant purchased his share and interest in the stock in trade and the credit of the business, and thereafter carried on the business under the same style, for his own sole use and benefit, until the 1st of January, 1831, when he admitted one Leslie (since deceased), and the Respondent, Wallace, into co-partnership with him in the business, for the term of twenty-one years from that date, admitting them into one-half share, and selling to them one half of the stock in trade of the business; reserving the other half of the business and stock in trade, with power to transfer the same to his brother, Thomas McKellar. At this time there were debts to a very large amount due to the Appellant [374] from his customers. Subsequent to the admission of Leslie and Wallace into partnership, a deed of co-partnership, dated the 29th of May, 1832, was made between the Appellant of the first part, Leslie of the second part, and Wallace of the third part; whereby it was agreed, that the trade should be carried on in their names for their mutual benefit, in the proportions above mentioned, under the style of "Gibson, McKellar and Co.," and it was further agreed, that the Appellant, at any time during the co-partnership, should be at liberty to sell, assign, and dispose of his interest to his brother, Thomas McKellar, and that upon the admission of his brother into the co-partnership he should be considered as the head partner of the firm; and it was further agreed, that the firm of "Gibson, McKellar and Co." should collect the debts due to the Appellant, from the customers of "Gibson and Co.," and, as a remuneration for so doing, should have the use of such monies, when collected, up to the end of the current year in which the same should be collected, free of interest, and thereafter at an interest of eight per cent. per annum, and that the money to be collected from customers of the firm of "Gibson and Co.," who were also customers of the firm of "Gibson McKellar and Co.," should be first applied in payment of the debts due to the firm of "Gibson and Co.," until such debts should be satisfied; and it was further agreed that, in the event of the Appellant disposing of his share and interest in the co-partnership trade, and proceeding to England, the Appellant should be the agent of the firm of "Gibson, McKellar and Co.," in Europe, and that all sums of money remitted to any agent or other person by the partners of the firm for the payment of goods, etc., [375] on account of the

joint trade, should be remitted through the agency of the Appellant, and that Leslie and the Respondent, Wallace, in the event of the Appellant proceeding to England, should render to him half-yearly accounts of his private accounts with them, and at the end of every year, when a general account of the stock, etc., should be made, render to the Appellant a summary account or balance-sheet thereof.

Under this deed of co-partnership, the business of the firm of "Gibson, McKellar and Co." was carried on till the 17th of November, 1832, when the Appellant transferred his half share to his brother, as provided by the deed, and from that time the Appellant ceased to carry on the business; T. McKellar, Leslie and Wallace, carrying on the same under the style or firm of "Gibson, McKellar and Co.," until the death of T. McKellar, when the business was carried on by Leslie and Wallace in Co-partnership, under the style of "Gibson and Co." until the death of Leslie after-mentioned.

The firm of "D. McKellar and Son," of Old Burlington Street, London, clothiers, etc., had supplied and shipped all the goods and other merchandise from England required by the firm of "Gibson and Co." for eight or nine years previous to Leslie and the Respondent, Wallace, being admitted into partnership with the Appellant; and the firm of "D. McKellar and Son" were in correspondence with, and had supplied large quantities of goods to the firm of "Gibson, McKellar and Co."

The firm of "Gibson, McKellar and Co.," by a power of attorney, dated the 22nd of January, 1838, without the knowledge or consent of the Appellant, [376] constituted A. McKellar (brother of the Appellant, and a member of the firm of "D. McKellar and Son"), and also the Appellant, their joint and several attorneys in Great Britain, to get in the debts and money due to the firm of "Gibson, McKellar and Co."

From the year 1883, to the month of April, 1838 various Bills of exchange, promissory notes, etc., in respect of debts due and owing to the firms of "Gibson, McKellar and Co.," and "Gibson and Co.," respectively, were sent by those firms to England, for realisation to the Appellant and also to his brother A. McKellar. A. McKellar, however, was the only person who acted under the power of attorney, except in the instance of two small debts owing to "Gibson, McKellar and Co.," which were got in by the Appellant and handed over by him to A. McKellar, as such acting attorney or agent, and who collected and realised certain of the Bills of exchange and promissory notes, and also the amount of certain debts, and accounted for what he so received to the firm of "Gibson, McKellar and Co." in the consignment accounts of the firm of "D. McKellar and Son," with the firm of "Gibson, McKellar and Co."

The Appellant was appointed by the deed of partnership the agent in England of the firm of "Gibson, McKellar and Co.," for the purpose of selecting for "Gibson, McKellar and Co." the goods and merchandise from England which they might require for the purposes of their trade, but, shortly after his arrival in England, the firm of "Gibson, McKellar and Co." gave instructions to the Appellant to hand over to the firm of "D. McKellar and Son" the indents or orders for goods and other merchandise which they, from time to time, should enclose to him, in order [377] that the firm of "D. McKellar and Son" might apply the goods and merchandise thereby ordered, and, in pursuance of such instructions, from that time all the goods and merchandise specified in the indents or orders of the successive firms of "Gibson, McKellar and Co." and "Gibson and Co.," with the exception only of some of comparatively trifling amounts, were procured and supplied by the firm of "D. McKellar and Son," through the Appellant, as such agent, who merely assisted in selecting such goods and merchandise, and paid for the same as agent under the before-mentioned partnership deed, and charged the firms of "Gibson, McKellar and Co.," and "Gibson and Co.," commission at the rate of five per cent. for acting as agent in selecting and in advancing the money to pay for the goods and merchandise so supplied to them, in respect of which the Appellant, from the latter end of the year 1832, to January, 1839, made advances out of his own monies for those firms to a great amount without settling any account with them up to the latter end of the year 1831.

The members of the firm of "Gibson, McKellar and Co.," after the Appellant retired from the partnership, collected under the powers of the partnership deed,

money to a large amount, on behalf of the Appellant, in respect of debts owing to him by the customers of the firm of "R. Gibson and Co.," but Leslie, and the Respondent, Wallace, after the death of T. McKellar, were charged with having neglected to collect a large portion of the debts so due to the Appellant, which it was alleged, in consequence of such neglect, were lost.

The Appellant, in November, 1837, executed a power of attorney, appointing one Greenaway, of [378] Calcutta, his attorney and agent, to recover and receive from the firm of "Gibson, McKellar and Co." all debts which then were, or thereafter should be, due to the Appellant, not only on account of the firms of "R. Gibson and Co.," and "Gibson, McKellar and Co.," in which he had been a partner, but also for the monies due to him from the firm of "Gibson, McKellar and Co.," for the goods and merchandise as settled by the firm of "D. McKellar and Son," and paid for by the Appellant, as such agent, and at the same time the Appellant empowered Greenaway to make out and finally settle all accounts between the Appellant and the firm of "Gibson, McKellar and Co."

This power of attorney was received by Greenaway, in February, 1838; but previously to its receipt, and on the 26th of January, 1838, T. McKellar died, having by his Will appointed Greenaway his executor, who proved the Will; and, shortly after the death of T. McKellar, his share in the business of "Gibson, McKellar and Co." was by deed assigned to Leslie and the Respondent, Wallace, by Greenaway as such executor; and by such deed, Leslie and Wallace took upon themselves the payment of all the partnership debts and liabilities to which T. McKellar was liable jointly with them at the time of his death, as a member of the firm of "Gibson McKellar and Co."

In the beginning of the year 1838, Greenaway, as the Appellant's agent at Calcutta, rendered to "Gibson and Co." the Appellant's account current between him and "Gibson, McKellar and Co.," of all their dealings and transactions in business then remaining unadjusted (other than those which related to the collecting of and accounting for the outstanding debts due to the Appellant), from the month of [379] June, 1832, to the 31st of January, 1838. This account current, numbered 2, at the time it was so rendered by Greenaway, was objected to by the firm of "Gibson, McKellar and Co.," when Greenaway requested Leslie and Wallace to make out and render to him, as such agent, the accounts in the manner which they were willing to admit the same. They agreed to do so; and, accordingly, they made out and rendered their account current to Greenaway, up to the 31st of January, 1838, which was numbered 3. By such account they admitted a balance of Rs. 491,695 14a. 3p., to be due from "Gibson, McKellar and Co." to the Appellant, on the 31st of January, 1838.

The difference in amount between the accounts numbered 2 and 3, rendered by Greenaway on behalf of the Appellant, and by "Gibson and Co." respectively, was a sum of £3757 15s. 1½d., but there was no difference whatever in such accounts as to the respective amounts of the sum total charged against "Gibson, McKellar and Co.," for the price of each shipment of goods. In the account No. 2, discount at the rate of two-and-a-half per cent. up to the 30th of June, 1836, upon the respective amounts of the sums total charged, was allowed to "Gibson, McKellar and Co.," and from that time to the close of the account, no discount was allowed; and a commission of five per cent. was charged upon the respective amounts of all the sums total so charged. By the account No. 3, "Gibson and Co." claimed to have certain discounts allowed upon amounts total charged against "Gibson, McKellar and Co.," for the price of shipment of goods and for commission of five per cent. charged only upon the respective amounts of all the sums total so [380] charged, after first deducting a discount of seven-and-a-half per cent., and the difference of interest consequent upon these differences, and such claims, represented all their objections to the account No. 2.

In consequence of these claims on the part of Leslie, and the Respondent, Wallace, many negotiations and discussions took place before the month of September, 1838, as to their settlement, and at length it was, in September, 1838, finally arranged and agreed between Greenaway, as the Appellant's agent, and "Gibson and Co.," that the firm should pay the Appellant the sum of Rs. 91,695 14a. 3p. in cash, and give a bond for 4 lacs of Company's Rupees, payable quarterly by instalments

of Rs. 25,000, and that the disputed item of £3757 15s. 1½d. should stand over for future investigation, and, accordingly, the firm of "Gibson and Co." paid Greenaway that amount in cash, and on the 24th of September, Leslie and Wallace executed and gave their Bond for 4 lacs of Rupees, payable by instalments. This Bond recited, that Leslie and Wallace had examined and investigated the several accounts of the Appellant with the firm of "Gibson, McKellar and Co.," rendered on his behalf, up to the 31st of January, 1838, but that they refused to admit the further sum of £3757 15s. 1½d. claimed as due to the Appellant, until satisfied on further investigation and examination.

In May, 1839, Leslie came to England, bringing with him a power of attorney from his copartner Wallace, expressly authorising him to settle the differences between the firm of "Gibson and Co." as to the disputed item of £3757 15s. 1½d., and such differences were accordingly finally closed and settled by Leslie giving to the Appellant a Bill of exchange, [381] dated the 31st of August, 1839, drawn by the Appellant upon and accepted by Leslie in the name of the firm of "Gibson and Co." payable eighteen months after date, for Rs. 30,744 4a., a lesser sum than the reserved item.

The Bill of exchange was forwarded to Greenaway at Calcutta, who received the same in due course, and informed Wallace of that fact. The Bill not having been paid at maturity, the Appellant, on the 14th of March, 1841, brought an action on the plea side of the Supreme Court at Calcutta against the Respondent, Wallace, and Leslie to recover the amount. To this action the Defendants pleaded, first, that they did not accept; secondly, that the Bill was accepted at the request and for the accommodation of the Appellant, and without any consideration for the same; thirdly, that the acceptance was obtained and procured by the Appellant by fraud and covin; and fourthly, a set off. A commission for the examination of witnesses in England was obtained, but was not returned at the date of the trial, (the 30th of June, 1842,) when a verdict was given for the Appellant, for the amount of the Bill of exchange, and interest at 8 per cent.

Leslie died on the 11th of June, 1841, having by his will appointed the Respondents his executors.

While the proceedings at law were going on, the Appellant, on the 30th of September, 1841, filed a bill on the equity side of the Supreme Court at Calcutta against the Respondent, Wallace, as surviving partner of the firm of "Gibson and Co.," and also against the other Respondent, Spence, the executor of the late Leslie. The bill stated, among other things, the before-mentioned deed of copartnership and the col-[382]-lection and realisation, by T. McKellar, Leslie and Wallace of certain of the debts due to the Appellant from the customers of the firm of "Gibson, McKellar and Co.," who had been customers of the firm of "R. Gibson and Co.," and that other of such debts had been lost by the neglect of T. McKellar, Leslie and the Respondent to recover and get in the same, and prayed that an account might be taken of all monies which T. McKellar, Leslie and Wallace, or any of them, and which the Defendants, as executors of Leslie, or either of them, had collected or received in payment or satisfaction, either wholly or partly, of the debts due to the Complainant as such member of the old firms in which he was so interested as aforesaid; and of the debts which he had purchased or obtained from G. T. Gibson as aforesaid, and of all monies which McKellar, Leslie and Wallace, or any of them, and which the Defendants, or either of them, as such executors aforesaid, had collected or received from the customers of the new co-partnership firm, and which, according to the terms and provisions of the deed of co-partnership, had been applied towards payment of the debts due to the Plaintiff, and paid over to or placed to his credit, which but for the wilful neglect or default of McKellar, Leslie and Wallace, and each of them; might have been collected in or received by them; and that the Defendants might be decreed to pay him what, upon taking such account, might be found due to him; and that the Defendants should deliver over and deposit with the proper officer of the Court, all the accounts, vouchers, etc., belonging or in any way relating to the old firms in which he was interested as aforesaid; and that in the meantime the [383] Defendants might be restrained from collecting or receiving any of the debts due to him, and for general relief.

The Respondents, on the 23rd of February, 1842, put in a joint answer, ad-

mitting that T. McKellar, Leslie and Wallace collected and received debts and monies to a large amount on behalf of the Appellant, and which were owing to the firm of "R. Gibson and Co.," but they denied that any debts had become irrecoverable and lost to the Appellant by reason of any neglect or omission on their part, as alleged in the bill.

On the 1st of March, 1843, the Respondents filed a cross bill in the same Court against the Appellant. The bill stated, that the Appellant had been appointed as attorney to collect divers sums of money on bills, etc., for the firm of "Gibson, McKellar and Co.," and that he never at any time rendered a true account of the collection of such monies, and, by reason of his negligence in not demanding payment of, or suing upon, certain bills, the same became irrecoverable, and barred by the Statute of Limitations; that the Appellant as such agent had charged the firm with the agency commission of five per cent., and the bill charged that the invoices sent were imperfect, incorrect, and false, the Appellant having, in breach of his duty as agent, charged higher prices in his accounts than the price actually paid by him to those from whom he had purchased, and had not allowed them discount when allowed to him, and that the accounts wanted many items which ought to have been credited to the firm of "Gibson, McKellar and Co.," and that the members of that firm had never obtained a full, true, and faithful account of his deal[384]-ings, transactions, and purchases as such agent. The bill also charged, that the accounts between the firm of "Gibson, McKellar and Co." were still open and unsettled, and, after charging that the Appellant had in his possession the original invoices, etc., and seeking the production thereof, prayed, that the prior accounts might be opened up and re-adjusted; and for an injunction restraining him from receiving any of the debts, and that the Bill of exchange might be delivered up and cancelled, as it had been obtained by pressure and duress, and the Appellant restrained from issuing execution upon the judgment recovered by him.

The Appellant by his answer insisted, that the accounts were finally settled and closed by the payment and Bond; that after the settlement of the disputed item of £3757 15s. 1½d., when he considered all matters in relation thereto finally settled and adjusted, he had destroyed the greater part of the vouchers and papers relating thereto as being no longer of any value, and he submitted, that by reason of such final settlement of accounts the Respondents were not entitled to any account of such particulars as were inquired after and prayed for by their bill, previously to the 31st of January, 1838; and he further, by his answer, stated, that he had received from the sellers, from the years 1834 to 1836, in consequence of ready-money payments, a discount varying from 5 to 7½, and that he received a commission of 2½ per cent., as a *del credere* commission, from June, 1836, to end of 1837, out of the profits of the parties from whom he purchased the goods.

Witnesses were examined on both sides, and the correspondence between the parties respecting the [385] settlement was filed. The Appellant examined Greenaway, to establish the material issue, that the accounts were stated and settled as he insisted. There was no evidence to show that the Appellant had been guilty of any of the acts of fraud or duress, or that he had been guilty of neglect or default in getting in the debts due to the firms of "Gibson, McKellar and Co." and "Gibson and Co.," as alleged by the bill.

The two causes were heard together in the month of February, 1847, when the Chief Justice, Sir Lawrence Peel, pronounced the judgment of the Court, to the effect, that as there was no ground for impeaching the Bond as fraudulent, it must, therefore, be deemed a settlement as far as it extended; that there was an exception of the sum of £3757 15s. 1½d., which appeared to him to be the only matter substantially in dispute, that it did not appear that the accounts under settlement excluded any of H. McKellar's claims, and the presumption was, that all his claims were included. That the claims against the Calcutta firm appeared to be referable to three heads; the sum agreed to be paid as a valuation of stock, on the admission of the succeeding members to the firm of which H. McKellar was the sole member; the collections in Calcutta to be carried to account of the firm or firms centred in H. McKellar, and the sums advanced by him in England, and his charges on purchases effected by him for the house in Calcutta; and that these on the evidence could not be taken to have been the basis of the proposed settlement. That if, therefore, the

Plaintiff in the original suit (the Appellant) was permitted to have an account of the collections from an earlier date than the date of the Bond transaction, it would be in effect re-opening the [386] accounts, of the settlement of which he had taken the benefit. That, therefore, the account, in the original bill, must be confined to transactions subsequent to the Bond. As to the sum excepted and reserved on giving the Bond, the Chief Justice thought that the circumstances which had taken place were such as ought not to preclude the inquiry proposed to be directed, and the Court referred it to the Master to take the accounts upon that footing.

The case was afterwards re-heard, and on the 22nd of February, 1848, the Chief Justice pronounced the judgment of the Court, "that the nature of the reservation (the sum of £3757 15s. 1½d.) out of the settled accounts was such as to be applicable to all or any of the sums included; and, therefore, they varied the former decree by referring the accounts generally, with direction, that if the Master should find a settled account, he should take the account on that footing."

The Appellant took the initiative in the Master's office, proceeding with the reference ordered by the above decree; and evidence respecting the accounts was entered into.

On the 3rd of April, 1849, the Master made a separate report upon the question, whether the accounts between them was or was not a settled account, and he thereby found, that the accounts between the parties in the suits, and the reserved item of £3757 15s. 1½d. were not, nor was either of them, settled, as contended before him on the part of the Appellant, but that the same were still open and unsettled. To this report, the Appellant took exceptions, first, that the Master had found that the accounts between the Appellant and the firm of [387] "Gibson, McKellar and Co.," up to the 31st of January, 1838, were not settled by the Bond, whereas he ought to have found that the whole of the accounts and dealings between the Appellant and the firm of "Gibson, McKellar and Co.," up to the 31st of January, 1838, were closed by the Bond, except as to the reserved item of £3757 15s. 1½d. and two other small sums, and except the amount prayed for by the Appellant's bill; secondly, that he ought to have found the reserved item of £3757 15s. 1½d. settled and closed by the Bill of exchange.

These exceptions were argued before the Supreme Court, and by an Order of that Court, dated the 16th of July, 1849, the same were over-ruled and the Master's separate report confirmed. The judgment of the Court was delivered by Mr. Justice Colvile, to the effect, that the Master was right in finding that there was no settlement of the accounts, in the sense in which that term was understood in a Court of equity, on either of the occasions referred to by the exceptions; and that even the language used by the Appellant himself, in making his claim before the Master, was not that ordinarily used in setting up a settled and closed account; namely, that the accounts were stated and settled, and that thereupon certain payments were made and a security given, on the footing of that settlement: but that the settlement contended for was effected by such payments and the execution of such security, and that these acts, which might be material as constructive evidence of an antecedent settlement of accounts, was treated as constituting the settlement itself. That the Bond, if taken alone, was neither an account stated, nor afforded any satisfactory evidence of an account stated; no balance being agreed upon, it being left an open question, whether [388] the sum admitted to be due was or was not to be increased by the sum of £3757 15s. 1½d.; and he was of opinion, that the Plaintiff had failed to establish that in September, 1838, there was such a settlement of accounts as that which he set up, or that anything was done by which, in taking the accounts directed by the decree, effect could be given to it as to an account stated. That the effect of the acceptance for Rs. 30,744 4 anas, given by Leslie in the partnership name of "Gibson and Co." to McKellar, was not such a transaction as ought to be treated as a settlement of accounts between principal and agent, which precluded the former from having the accounts of the latter taken in a Court of equity.

Proceedings were then resumed in the Master's office, and warrants were issued at the instance of the Appellant, in pursuance of the original decree, requiring the attendance of the Respondents before the Master to go into the accounts. Meetings

were had, and the accounts gone into, and other proceedings in relation thereto taken.

No appeal was asserted from the Decree pronounced in February, 1848, or the Order of the 16th of July, 1849, made on the Exceptions, but the Appellant's counsel in Calcutta, being of opinion that an appeal might be successfully prosecuted, intimation to that effect was communicated to the Appellant, who was resident in England, and a correspondence ensued respecting the evidence and proofs within the Appellant's power to verify and produce. The Appellant also took the opinion of counsel in England, on points relative to the expediency of an appeal, and ultimately having been advised so to do, by letters, dated the 7th and 24th of December, 1849, instructed his agent in India to direct counsel to [389] move for such appeal on his behalf. The instructions thus sent were, however, not available before the 20th of February, 1850, when the period of six months, the time limited for appealing by the Calcutta Charter of Justice, had expired, and the right to appeal, therefore, lost. Under these circumstances, McKellar presented a petition to the Queen in Council, praying for leave to appeal, notwithstanding the time limited by the Charter had expired.

This petition was heard before the Judicial Committee, *ex parte*, and, being supported by an affidavit setting forth the circumstances above stated, was allowed, upon terms of the Petitioner giving security for costs, and lodging in the Council office a certificate of recognizance in a penalty of £500.

The service of the Order made upon this petition, dated the 25th of June, 1850, upon the Respondents in India, was the first intimation they received of the appeal, and they presented a counter petition to the Queen in Council to rescind and revoke such Order. It alleged, that no notice of the application for leave to appeal had been given to them, and that proceedings in the Master's office, in the original and cross bill, had been taken by McKellar without any notice of his intended application. That they had no opportunity afforded them of staying proceedings, but were compelled by the steps and proceedings taken by McKellar, as actor, to proceed and incur great expense in the Master's office, since the passing of the Decree of the 22nd of February, 1848, and the Order of the 16th of July, 1849, and that such expenses which they had been so led into could never be recovered, if the appeal was successful, as the whole of these proceedings would be a nullity.

[390] That two years had elapsed since the date of the Decree of the 22nd of February, 1848, and the time when the petition was presented to Her Majesty in Council; that the taking of the steps and proceedings, as actor, inducing them to proceed under the reference in the Master's office, was an acquiescence and submission to the Decree and Order, and a waiver of his right to appeal. That if such fact had been known to the Committee, they would have made McKellar give security for the costs incurred by this proceeding. That McKellar had not entered or prosecuted his appeal; that it was a condition precedent by the Order of Her Majesty in Council, that he should lodge a certificate of recognizance, but that he had not done so, and they prayed that such Order in Council might be reversed, and that McKellar might be ordered to pay the Petitioners the costs incurred. This petition was supported by an affidavit verifying the principal allegations, and was served on the Appellant's agent.

(June 18, 1851.)* Mr. Leith moved to dismiss.

This Court would not have made the Order, admitting the appeal, if it had been possessed of the knowledge of the fact of the proceedings taken in the Master's office by McKellar, under the Decree of the 22nd of February, 1848. That fact was not disclosed in the application made by him, which was *ex parte*. Moreover, the terms of the Order in Council have not been complied with. No recognizance has been entered into, nor has any petition of appeal been lodged, [391] although nearly a twelvemonth has elapsed since the date of the order.

Mr. Wigram, Q.C., *contra*.—It was not thought necessary to appeal from the interlocutory decree, and, accordingly, the parties went in before the Master to

* Present: Members of the Judicial Committee,—The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, The Right Hon. Sir Edward Ryan, Knt., and the Right Hon. Sir John Jervis, Knt.

take the account. When it was discovered that it was requisite and expedient to appeal, the six months limited by the Charter had expired, and this Court granted leave to appeal as an indulgence.

The Right Hon. T. Pemberton Leigh.—There has been great laches, but not such as, in their Lordships' opinion, ought entirely to shut out the appeal. But further terms must be imposed upon the Appellant. The recognizance must be increased to the sum of £1000, a sum sufficient to cover the costs incurred in the Master's office, by the Appellant forcing on the proceedings and taking the accounts; and, as the delay has been occasioned by the Appellant, the petition of appeal must be lodged in the Council office within six weeks, and if not then lodged the appeal is to stand dismissed. This course will, we think, do complete justice to all parties. We reserve the costs of this application.

By the Order in Council made upon this petition, the Appellant was directed to lodge in the Council office the certificate of recognizance to Her Majesty, in a penalty of £1000 sterling, conditioned to stand and abide such determination as might be made, and to pay all such costs as might be awarded in case the appeal be dismissed (such recognizance to be in lieu of the aforesaid recognizance of £500, for costs in the [392] appeal as set forth in the Order of the 25th of June, 1850), and to perfect such recognizance, and lodge his petition of appeal in the Council office within the space of six weeks from the date of the Report, and, in the event of failing to perfect such recognizance and lodge such petition within that period, the Order be discharged, and the costs of the petition paid by the Appellant; but if the recognizance was perfected, and the petition of appeal lodged within that period, then that the costs of the petition was to be reversed.

The appeal now came on for hearing.

Mr. Wigram, Q.C., and Mr. W. A. Collins, for the Appellant.—The simple question the Court below had to decide was, whether the transaction in question entered into in the month of September, 1838, amounted to a settled account up to the 31st of January, 1838, between the parties, and precluded the Respondents from opening the accounts again. Our contention is, that it did constitute a settled account, and that the Court below entirely misconceived the effect of that settlement. Indeed, the Bond and Bill of exchange is a bar to any such claim. The evidence of Greenaway, and the correspondence between the parties respecting this settlement, show beyond dispute that it was a clear case of settled account, with the reservation of one item of £3757 15s. 1½d. Although the investigation of that item, if it had been found to be incorrectly made up, might have disarranged the items in the prior accounts up to the 31st of January, 1838, yet that would not affect such settlement, and that was also settled by the acceptance of the Bill of [393] exchange for a less amount. The charges of wilful neglect and fraud contained in the original bill were unsupported by evidence, and wholly failed. As the accounts between the parties had been so long settled, we submit that the Decree ordering the reference to the Master to take the accounts, and that the Order overruling the exceptions, ought not to have been made. *Brownell v. Brownell* (2 Bro. C.C. 62).—[Mr. Pemberton Leigh: The proceedings taken by the Appellant in the Master's office under the Order was wrong: he should have appealed at once; at all events, he ought, whichever way our judgment may be, to pay the costs of those proceedings.]—The Decree was an erroneous one. In *De Burgh v. Clarke* (4 Clk. and Fin. 562) the House of Lords held that the original Decree, pronounced more than two years before enrolment, was saved by a subsequent Order made in the cause.

They referred also to *Parker v. Morrell* (2 Phillips, 453).

Mr. Rolt, Q.C., and Mr. Leith, for the Respondents.—The accounts have never been stated and settled. The Court below was, therefore, perfectly right upon the facts shown, to refer it to the Master, with liberty to surcharge and falsify the accounts. They were not closed by the transactions which had taken place. The claims made by "Gibson, McKellar and Co.," in the account No. 2, for discounts, over charges in respect of the shipments, and the differences of interest which formed their objection to the account, have never been settled; one of the disputed points being, whether a *del credere* commis-[394]-sion was properly charged by the Appellant in his character of agent; a most important inquiry, as it converted the agent into a principal. The Respondents were wholly in the dark as to the particulars of

these discounts and overcharges. They never had the vouchers, only the invoices and statements upon which the alleged settlement of the account up to the 31st of January, 1838, was founded. Facts which the Appellant was bound to have communicated to them were kept back at the time of executing the Bond and accepting the Bill of exchange. The statement furnished them was a *suggestio falsi*. What can be stronger proof that it was not a formal settlement than the undisputed fact, that the item for £3757 15s. 1½d. was reserved, and which manifestly, if wrong, would disarrange the whole of the items of the general account? That alone is sufficient to entitle us to have the accounts opened, as the Court below most clearly expressed in the judgment of Mr. Justice Colville. It was not necessary to establish legal fraud: there was unfair advantage taken, and that is sufficient to justify the Court in opening the accounts. *Gibson v. Jeyes* (6 Ves. 266), *Wood v. Downes* (18 Ves. 120), *Montesquieu v. Sandys* (18 Ves. 301, 308), *Anderson v. Maltby* (2 Ves. 244. S.C. 4 Bro. C. C. 422). Length of time is no bar if fraud appears in a stated account. *Vernon v. Pawdry* (2 Atk. 119), *Allfrey v. Allfrey* (1 Mac. and Gor. 87).

The Right Hon. T. Pemberton Leigh.—During the progress of this appeal, we have had an opportunity of looking very carefully through the [395] whole of the papers in the case, and after the extremely clear and able manner in which the case has been argued at the bar, we feel ourselves in a situation to dispose of it at once, and we think it better to do so now, than to put the parties to any further delay.

The law in cases of this kind I apprehend to be perfectly clear. Parties having accounts between them, may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other, should be furnished in the settlement of those accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance: a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled, therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud; in either case it is good for nothing, if, either from the collusion of the parties, upon the circumstances under which the settlement takes place, it is proved [396] in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or, from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side.

Now, that being the general law of the case, it appears to us very clear that the settlement which took place here was in the nature of a compromise; an acceptance by one party, and a consent to pay by the other a gross sum in satisfaction of a disputed account. Whether the circumstances under which that settlement took place are such as to induce a Court of Equity to set aside the transaction, and direct a general or specific account, must depend on the particular facts of this case, which makes it necessary for us to go into those facts a little more in detail than we should otherwise have done.

Now, the facts appear to be these: Previous to 1831, the Appellant carried on business as a merchant tailor and clothier in Calcutta, under the name or firm of "Robert Gibson and Co." In the month of January, 1831, he agreed to admit in to partnership with him two persons of the names of Wallace and Leslie, who had previously been his assistants in the business, a circumstance not wholly immaterial, because it shows that those persons were probably well aware of the nature of the business, and the mode in which the transactions of that business were carried on both by the London and Calcutta houses. The terms of that partnership were not reduced into writing at the time it commenced, and it was not until May, 1832, that

articles of partnership were executed. By those articles of partnership (after reciting the agreement [397] which had been made for a partnership to commence at the beginning of 1831), it was stated, that a valuation had been made of the shares, of which these new partners were to have one-fourth each, and that a joint and several Bond had been given with the consent of the Appellant, Henry McKellar, for the amount which was due in respect of those two fourth shares, and a period of four years was to be allowed for the payment of the sum, amounting altogether to Rs. 112,500. It further appears from this deed, that the Appellant contemplated retiring from the partnership, and introducing his brother, Thomas McKellar, into the concern, and going himself to England; and there was power reserved by the deed for the Appellant to make that arrangement; and it was further agreed, that in the event of H. McKellar disposing of his share and interest in the co-partnership, and proceeding to England, he should be the agent of the firm of "Gibson, McKellar and Co." in Europe, and that all sum or sums of money that should be remitted to any agent or agents in England should be remitted to him. But no stipulations were introduced into the deed either in respect of the remuneration which H. McKellar was to receive, or the duties he was to perform.

It seems that in November, 1832, Thomas McKellar did go out from England, when the Appellant's share in the partnership was transferred to him, and, in the same year, the Appellant returned to England.

Now, it appears from the old account, No. 1, which is in evidence, that previous to leaving Calcutta the Appellant settled with Wallace and Leslie the amount which was due to him, between himself and his partners, and at that time a balance was shown to be due of about Rs. 228,941.

On coming to England, the Appellant acted, as he [398] had agreed to do, as the agent for the new firm at Calcutta, and not only selected the goods that were to be sent to the Calcutta firm, but he himself paid for those goods, and it appears from the accounts, which are not disputed, that the advances he made in that respect were so large, that at the end of the year 1833 they amounted to £11,676, and at the end of 1834 they amounted to £20,685, and at the end of 1835 to about £29,000. Now, during the whole of that time invoices were sent of the goods that were thus furnished to the Respondent; invoices would, of course, be sent by the parties who supplied the goods, and, with a single exception, all those goods were supplied by the firm of "A. McKellar and Co." in London. Now, those invoices would, of course, show to the Respondents the amount of the goods which they were alleged to have received, and the amount of the invoice prices which were represented to have been paid for those goods. On the other hand, they would not show what charges the Appellant was supposed to make for the agency he performed on their behalf in England, or the allowances which he might make in respect of the sums that were charged in the invoice account. But, in the autumn of 1836, an account current was sent of all the dealings and transactions which had taken place in respect of that agency from the beginning; to what date does not distinctly appear; but at all events, it must have been up to the end of the year 1835. Now, that account would necessarily show everything: it would show what charges he made; it would show what allowances he made; it would show at what rate interest was charged, and at what rate commission was charged; and, as far as I can find in the course of these proceedings, no observation was made on the account so [399] rendered, either in the shape of approbation or disapprobation, until a period which I am about to mention. The parties go on in that way; H. McKellar continues to purchase goods, and to send them out, paying for those goods, until the month of January, 1838, and probably until a subsequent period; but it is only to the month of January, 1838, that it is necessary for us to apply our attention.

In 1838, according to the account made out by the Appellant, there was due to him on the old account, Rs. 228,941, and on the new account, or the purchase account, the sum of £36,169. These accounts were sent out to Greenaway, his agent at Calcutta, with directions to obtain a settlement, and with power to give a discharge for anything which might be paid in respect of them. With these accounts the Appellant sent a letter addressed to the Respondents, on which much reliance has been placed by the Respondents in their argument. It is to be observed, that in the account current there was this distinction; up to the month of

June, 1836, and during part of that month, there is an allowance made by the Appellant for discount in all these accounts. What the distinct rate was, is not, perhaps, in all cases, very clear; we will take it at two-and-a-half per cent., as the Respondents allege that it was. But, from the end of June, 1836, there was no allowance for discount at all. Therefore, there was a difference in the discount allowed; up to June, 1836, a discount allowed, and no discount allowed after June, 1836. In 1838, Greenaway receives the accounts, accompanied by this letter to the Respondents, which contained this passage. "I have now the pleasure to forward copy of your account current, to which I do [400] not anticipate any objection." It is clear, therefore, that there had been some previous correspondence and discussion between these parties with respect to the result of these accounts. With respect to this dealing, he says, he sends these accounts, and the letter then goes on to say that, "the discounts have been shown where allowed in the account rendered. You will observe from the last shipment, in June, 1836, no discount has been allowed, the whole of the goods having been purchased for cash, and consequently none allowed, as also in the account of Brickwell and Moore, enclosed in mine to you of last month.["]

Now, it is said that this is an incorrect representation by the Appellant, and is in fact equivalent to saying, You will find in this account the whole amount which I have received for discounts allowed. Why, it is quite obvious that it is no such thing. The character of that statement is this, as has been urged by the Respondent's counsel. In part of the account there is discount allowed, in another part of the account discount is not allowed; where discount is allowed you will see it in the account, and where none is allowed, it is stated that he had received none.

These accounts, together with a letter dated the 26th of April, 1838, are sent by Greenaway to the Respondents; a letter proposing and urging a settlement, and offering to correct any errors or omissions that may be found in them.

Now, what takes place upon this? The Respondents had known in 1836, or in the beginning of 1837, when they received this account current, the principle upon which this gentleman was making out his account, the amount on which he charged interest; [401] the rate at which he charged interest; the rate at which he charged commission, and the rate at which he allowed discount. It is very true they did not know by that account, either in 1836 or in 1838, what the amount of discount was which the Appellant himself had received; but having these accounts rendered to them, they object; and what is their objection? Why, at first it did not very distinctly appear what the particular grounds of their objection were; but Greenaway says, Well, if you are dissatisfied with this account, render me an account as you say it should be made out: an account with the items which you say it ought to contain. They do make out what they say the account ought to be, and they charge the Appellant, and debit the account with discount at seven-and-a-half per cent upon every purchase, introducing into the account the corrections that would result from that deduction. It is perfectly true that the effect of that would be to alter every single item in the account, and that seems to have been the difficulty which was pressed upon the Court below, namely, that they could not consider it in any sense a settlement, when not only the balance might have been altered, but, when there was not one single item in the account which would not be altered, if the defence of the Respondents prevailed. Then what is the result of that account as made out by themselves? The result is this; that there is due on that account, instead of £36,000, a sum of £32,000 or £33,000, making, therefore, a difference of £3000; and then how is that matter treated by these parties? Why, they say this, Here is a balance which we must admit to be due from us, at all events, to the amount of Rs. 491,695, and if you will give us time for the [402] payment, we will consent, not only to admit that balance, but we will pay down Rs. 29,000 at once, and we will give security, by our Bond, for the payment of Rs. 400,000 by instalments, in four years, by a lac of rupees in each year.

Well, it is said, this is not a compromise but a settlement. It is not very material which; the language, however, of the Bond, would rather seem as if it were in some sort a compromise, for it states, that in consideration that time shall be allowed the Respondents for the payment of that balance, it is agreed, to admit that Rs. 491,695 are due by them, but at the same time they say, that "whereas they have examined and investigated the several accounts of the said Henry McKellar with

the said firm of Gibson, McKellar and Co., rendered by or on behalf of the said Henry McKellar, up to the 31st day of January last, and the said Henry McKellar having agreed to grant such time for payment as in the condition hereunto written, the said William Leslie and John Wallace have admitted the sum of Company's Rs. 491,695 14a. 3p." (showing the extreme minuteness with which they had made the examination), "to have been due and owing by the said firm of Gibson, McKellar and Co. to the said Henry McKellar, on the 31st day of January last, but have refused to admit the further sum of £3757 15s. 1½d. sterling of lawful money of Great Britain, claimed as due to the said M'Kellar until satisfied on further investigation and examination."

Now, is it possible that there could be a more solemn adjustment of an account, as far as that adjustment went? The account begins with an account in 1836; a subsequent account in March, 1838; a [403] discussion for nearly six months on those accounts; a final admission of Rs. 491,695 being due, and an express reservation of an item of £3757, not as a disallowed item, but as an item which at that moment had not been ascertained, but which might be ascertained and would be ascertained by further investigation and examination. Well, this Bond was given, and the amount, as it appears, paid.

Now, not very long after, namely in the year 1839, Leslie, one of the partners, comes over to England. It appears that he brought with him a power of attorney for the settlement of the accounts; that it was a partnership matter that he had authority to deal with when he came to England, and which accordingly he did deal with. Now, observe, when he came to England, in what position these parties stood toward each other? There had been the fullest investigation and examination of these accounts, and the fullest time in respect of considering them in every point except one, and that point is one which cannot be cleared up at Calcutta, where Greenaway is the agent; it must be cleared up in England, unless the vouchers relating to those payments are sent over to India. Leslie comes over; he sees the Appellant, and no doubt he had the right then to say, Before I pay you a shilling of this £3757, or give security for it, you, who are my agent, are bound to give me the whole of the information you possess: you are bound to produce the vouchers which show what discounts you have received; I shall then claim that I am entitled to be allowed upon the Indian account all the discounts you have received, which are larger than are credited, and, therefore, to have the account corrected, by reducing each and every item of the account, according to that reduction. [404] That was his right, no doubt; but, on the other hand, if he thought fit, instead of insisting upon that right, he might say, Instead of going through these accounts; instead of comparing them; instead of ascertaining the balance which may increase or diminish that £3757; if you are willing to strike off £1200, and to accept the balance in full of all demands, I, on behalf of myself and my partner, am content to pay that sum, and I will give you my acceptance for the amount so reduced, and there will be an end of the transaction between us. Now, is it possible to conceive a more fair settlement of an account than this, as far as it had gone? A bill of exchange at eighteen months is accepted, allowing abundant time for the partners in Calcutta, if they objected to the settlement, to object to it, and if they could set it aside, to set it aside. Leslie goes out to India again in the beginning of the year 1840, and what is the evidence? When he is communicating with his partner, Wallace, does Wallace say he had no authority to make that settlement? Does Leslie say, I was coerced; I was under apprehension; I was misled by the representations of the Appellant, and, therefore, the settlement is not to stand? Wallace is proved distinctly to have said, on more than one occasion, This is a settlement which has been made, a Bill of exchange has been given in respect of that settlement. If I had been dealing with you, Mr. Greenaway, I think I could have made a better settlement; that is, if I had been dealing with you, who have not the vouchers, I could have made a better settlement than with the Appellant, who has the vouchers; but a settlement has been made, and I suppose the Bill must be paid.

But it does not rest here. The Bill being given on [405] the 31st of August, 1839, does not become due until the 3rd of March, 1841. In the interval, these parties, who had previously been on the best terms appear to have quarrelled. Of course, we know nothing of this case except from what appears upon the facts and correspondence. They appear to have been under great obligation to the Appellant.

Whatever their feelings previously had been, it is plain that a rupture had taken place, and feelings of the greatest hostility, to judge by the language of their letters, were entertained by the Respondents or by Wallace, the surviving partner, towards the Appellant. Independent of the account to which I have referred, the Calcutta firm had acted as the agents of the Appellant in collecting and getting in the debts due to him as representing the preceding partnership, and he makes repeated applications for an account of their receipts, in respect of that collection. In October, 1840, more than twelve months after that Bill had been given, they write him a letter in which they say, "We will not render you any account at all; we will not give you one shilling we have received from you, until you settle our outstanding claim against you." Greenaway writes, "What have you, as agents, collected? Do give me a notion." That is, what is due to the Appellant. They send him a letter enclosing a rough note of their claims, and neither in that letter, nor in the rough note from beginning to end, is there the slightest allusion to the settlement which had taken place in England.

The Bill becomes due in March, 1841; it is dishonoured, and an action is brought on the 14th of March, 1841. Now, what is the course the Respondents take? They defend the action at law; they [406] obtain a commission for the examination of witnesses in England, and by that means they suspend that action from the month of March, 1841, to the month of February, 1842. That commission was never returned, an application was made with success to set down the cause for trial, and a verdict was then obtained in 1843, which the Plaintiff was manifestly entitled to in 1841; and then a few days afterwards they resort to what used to be, and I presume still is, the resource of desperate debtors; namely, having failed at law, they file a bill in equity, imputing all manner of fraud in the accounts or in the settlement of the accounts, and in obtaining the Bill of exchange by the Appellant, and they pray for a general account, for an injunction, and for the delivery up of the Bill of exchange to be cancelled. To that Bill the Appellant put in his answer; and what is the result of that answer? It has been read very fairly on both sides; there is no question upon the facts, but there was no evidence in favour of the Respondents, except upon that answer; and the result of it is this: the mode in which I have stated this account is, that from 1833 to 1834, I received no discount; from 1834 to 1836, I received discounts at rates varying from five per cent. to two-and-a-half per cent.; from 1836, I received no discount at all, in the name of discount; but I received a *del credere* commission at the rate of two-and-a-half per cent. Now, he says, I insist upon this, that not only according to a mercantile usage, these were fair and reasonable charges, such as I was entitled to make, but if the accounts had been made out according to ordinary mercantile usage in such cases; if I had drawn upon you for the purchasers instead of supplying you for [407] four years, at least, with the whole amount of capital by which your business was carried on; instead of being in your favour, I believe the account would have been £8000 or £10,000 more against you than it is.

Then it is said, that this is a case in which the transaction whereby the account was settled by the delivery of the Bill of exchange for Rs. 30,744 is to be set aside. On what possible ground is it, that this transaction is to be impeached? As I understand the judgment in the Court below, the Chief Justice, at the original hearing, or rather the re-hearing, seems to have entertained this opinion. He says, this cannot be a settled account, because one item was reserved for subsequent verification. (And if he took it on the Bond, so it was, but if he took on the Bond and the Bill of exchange together, then is it not a settlement?) I ascertain the amount to the extent of Rs. 491,695; there is another item which I cannot ascertain—I am content, both parties are content—not to have that, but that one party shall make an allowance, and the other party shall accept the allowance, and, accordingly, it is settled on that footing.

I confess, therefore, I cannot understand exactly upon what ground it was that the Court held that these accounts between the parties were not closed. The Chief Justice, in the note which he has sent of the grounds of his judgment on the re-hearing, states only the objection which arises from the nature of the Bond, as well as from the nature of the settlement, which is succeeded by the Bond, but he does not advert to the Bill of exchange at all. When Mr. Justice Colvile comes to give

what I quite agree with the Respondents in saying is such a judgment which, as far as clearness in expressing the grounds upon which [408] it rests is concerned, one would expect from him, he overrules the exceptions; but when he comes to deal with it, he seems to feel a little embarrassed by the form of the decree.

It is not necessary for us to consider that further, because we are clearly of opinion, that the transactions here are closed, the settlement being such as in our opinion was conclusive against all parties concerned, and the result being such, this bill cannot stand, and the Court, instead of making either of the decrees it made, ought to have regarded those accounts as settled, and ought to have dismissed the bill with costs, as far as it sought any account of the transactions included in those accounts, and so far as it sought to have the Bill of exchange delivered up to be cancelled.

The only point on which we have entertained some doubt, if any arises, is this: it is quite clear, that if the Appellant was right at the re-hearing, the second decree could not have been justified in our view of the case, any more than the decree which was made at the original hearing; and, therefore, up to that time he must have the costs, so far as they relate to that proceeding. But then comes the question as to the costs of the proceedings in the Master's office? Now, we are by no means bound to hold, that in all cases where the Defendant succeeds, he is to have the costs of the hearing; provided that the judgment is only to dismiss the bill. The Court directs an inquiry, by means of which inquiry the Plaintiff thinks by further evidence he can succeed in substantiating his case, and accordingly he goes to the Master's office and produces that further evidence. Of course a vast deal of expense will necessarily attend the operation, [409] and the consequence is, that usually we are by no means disposed to hold that the Defendant is to be compelled to pay costs because he should in a doubtful case have appealed to this Court and have succeeded in an appeal against the original decree.

But this case is very peculiar in its circumstances. The objection which the Court seems to have taken was not to the nature of the evidence, but it was an objection which, if it prevailed at all, could not be removed in the Master's office. If it be decided that there was not a settlement of the accounts after the execution of the Bond, I think the Chief Justice was right in thinking, that the accounts could only be settled by the verification and ascertainment of each particular item: therefore, nothing that was done in the Master's office could ever remove that objection, and, consequently, it was not a case in which the Appellant could say, I have got, I think, a very good case, but I can make it better by going into the Master's office. If he had got a case that was good at all, it was as good at the hearing as it ever could be made. But there is this; and we very much agree with Mr. Justice Colvile in his luminous judgment on that point, that even if the accounts had been gone through in the Master's office, they would probably have been the same, or (if we can form a conjecture) rather more in favour of the Appellant than at present; because it is clear, those accounts must be taken as proof of the goods delivered and the invoices had for them, and as proof of everything, except the item which, it is said, remained outstanding, and the amount of which would possibly increase the claim on the other side, beyond the Rs. 491,695. Now, it appeared to the Appellant to be more to his [410] advantage to adopt the course of getting the account settled under the Decree, whether right or wrong, and he, therefore, goes in before the Master. He first gets a separate report, which probably it would have been difficult for the Master to have made in favour of the Appellant, having regard to what had been done by the Decree; but the Court having overruled the exceptions to that report, and told him that probably the result in the Master's office would be the same, he proceeds again under that Decree; but instead of working it out to the end, and trying what the result would be in that view of the case, in the middle of those proceedings he turns round and says, No, I do not think this is taking a favourable course; at all events there will be great delay and great expense; and now I will appeal against the Order made on the exceptions, and against the original Decree; and he makes a substantive application to this Court for that purpose. Now, it appears to us, under these circumstances, he had one of two courses to pursue—either to proceed under the Decree and work it out in the Master's office, or to appeal against the Decree, which if wrong at all, was wrong altogether.

Upon the whole, therefore, it is not necessary to refer to the cases which have

been alluded to, where, without granting the specific relief, a Court of Equity granted a relief, which, it was admitted, if applied to another state of circumstances, would be wholly improper. The Order, we shall humbly advise Her Majesty to make, will be, to vary the original Decree, by declaring that the accounts referred to, and included in the Appendix to this case, were settled by means of a Bond and the Bill of exchange, and ought not to be disturbed; and, that the bill, so far as it seeks an [411] account in respect of such transactions, and that the Bill of exchange should be given up, should be dismissed with costs, such costs to include the costs of the re-hearing; but that the Appellant ought to pay the costs of the proceedings in the Master's office with respect to the portions of the bill so ordered to be dismissed. No costs of the appeal.

The report of their Lordships, which was confirmed by Her Majesty in Council, was as follows:—

“ The decree of the Supreme Court of Judicature at Calcutta, dated the 22nd of February, 1848, ought to be varied by omitting therefrom that part thereof whereby it was referred to William Peter Grant, Esquire, the Master of the Court, to take an account of the dealings and transactions between the parties in the original and cross suits, and whereby it was directed, if, on taking such account he should find any settled account or accounts, to take the account on the footing of such settlement, with liberty to either party to surcharge and falsify such settled accounts, and whereby it was directed, that if it should appear that any balance of the accounts prayed by the original bill was carried forward into any account subsequently settled, then that he might take the account prayed for by the original bill, on the footing of such settlement, with the like liberty to either party to surcharge and falsify, and that in lieu thereof it ought to be declared and decreed as follows (that is to say), that the accounts, included in the documents, No. 1, 2 and 3, delivered by Greenaway to Gibson and Co., were settled by the Bond and Bill of exchange in the pleadings mentioned, and that the accounts ought not to be disturbed, and that it ought to be referred to the [412] Master to take an account of the dealings and transactions between the parties in the original and cross suits, having regard to their Lordships' declaration. And, that it ought to be further ordered, that the bill filed by Wallace and Spence, as far as it seeks relief in respect of the transactions comprised in the accounts No. 1, 2, and 3, and so far as it sought that the Bill of exchange ought to be cancelled, and so far as it sought an injunction in respect of the same, be dismissed with costs, including therein the costs of the re-hearing, and, it appearing that the Appellant has proceeded in the Master's office, under the Decree in respect of the matters included in the accounts, their Lordships recommend that the Appellant, under the special circumstances of this case, be ordered to pay the costs of such proceedings; and the costs payable to the Appellant, and the costs payable by him, are to be set off, the one against the other, and the balance to be paid to the party entitled to the same; and their Lordships do further recommend that the case be remitted to the Supreme Court of Judicature at Calcutta, to give effect to the foregoing declaration, and that both parties bear their own costs of the appeal to your Majesty in Council.”

[Mews' Dig. tit. ACCOUNTS AND INQUIRIES, A. ACCOUNTS, 4. *Settled Account, c. Re-opening, surcharging, and falsifying*, C. PROCEEDINGS UNDER JUDGMENTS OR ORDERS, 11. *Costs of Taking*; tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, m. *Security for damages and costs*, n. *Costs*; tit. PARTNERSHIP, II. RIGHTS AND OBLIGATIONS, 12. *Account*, e. *Settled and re-opening*. S.C. 8 Moo. P.C. 378; 1 Eq. R. 309.]