Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chapman v. *the Oriental Bank Corporation, from Mauritins; delivered 29th March,* 1865.

Present:

LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.
LORD JUSTICE TURNER.

THIS is an Appeal from an Order of the Supreme Court of the Island of Mauritius, bearing date the 5th August, 1862, by which Order the Court, in distributing the proceeds of the sale of an estate called the "Queen Victoria Estate," gave priority to a mortgage of the estate in favour of the Respondents over a mortgage of it in favour of the Appellants, thereby overruling two Judgments of the Master of the Court bearing date respectively the 19th July, 1861, and the 7th February, 1862.

The facts of the case are shortly these:—Edward Chapman, for some years previous to and up to the time of his decease, carried on a large mercantile business in the island, in partnership with other persons, under the firm of Edward Chapman and Co., and for some short time before his decease Atholl Burnett was his only partner in this mercantile business. He was also the owner of large estates in the island, and amongst others of the Queen Victoria estate and of estates called Woodford and Louisa.

By a deed dated the 30th June, 1852, and registered in the island on the 23rd December, 1854, he mortgaged the Queen Victoria and Woodford estates to the Appellants (who are merchants in London), and to Messrs. J. and W. King (who afterwards transferred their interests in this mort-

gage to the Appellants), for securing the sum of 20,000*l.* He died in the island on the 24th June, 1854, leaving a widow and two children, a son George and a daughter Mary. Upon his death each of his children became entitled, accordiug to the laws of the island, to one-third of his real and personal estate, which fell to be distributed under those laws, the remaining third only of such estates being, according to such laws, subject to his testamentary disposition.

By his will bearing date the 3rd June, 1854, after reciting that at his decease each of his children would become entitled to one-third of his real and personal estate as above mentioned, and that it was not his intention to make any further provision for his children, he gave and bequeathed to his wife all his real and personal estate, whether in the island or elsewhere, of which he should by law have the power of disposal at the time of his decease, and subject to the above provisions, for his wife, and in the full confidence that his children (although he could not legally bind them by any further disposition of his real and personal estate distributable under the island laws) would consider themselves morally bound to carry out his intentions, he made certain provisions for other persons, dependent upon the amount of the income of his real and personal estate which should be so distributable after provision made for the payment or security of his debts, and he declared it to be his wish that the arrangement of his estates in the island should be entrusted to the said Atholl Burnett, and that the liquidation of his affairs should be carried on as far as practicable without any of his estates being sold, and that his wife and children should continue to cultivate his estates and not sell any part of them unless compelled by absolute necessity so to do; and he appointed his wife to be the sole executrix of his will.

Soon after the death of the testator his widow proved his will. Both the testators' children were minors at the time of his death. On the 7th August, 1854, they were duly emancipated by their mother, the widow, according to the provisions of Article 477 of the Code Civil; and on the 8th of August, 1854, at a family council held for the purpose, Sholto James Douglas was, in pursuance of Article 480 of the Code, appointed to be their curator.

On the 4th of September, 1854, Mary Chapman, the daughter, died. Upon her death her share of the testator's property devolved upon her mother and her brother, the mother taking one-fourth and the son three-fourths, and the testator's property in the island thus became vested in his widow and his son, as to five-twelfths in the widow and seven-twelfths in the son. On the 6th October, 1854, the widow, acting in her own right, and as executrix and legatee of her husband, and also as heiress of her daughter, by a power of attorney of that date appointed William Hervey to be her attorney to represent her during her absence from the island, and to act for her in all matters whatsoever, and in all affairs which might concern either herself personally or the estate of her husband, or the firm of Edward Chapman and Co., of which he was a member jointly with Atholl Burnett, with full powers to consent or agree amongst other things to the contraction of debts, and granting and inscription of mortgages; and on the 10th October, 1854, the son as heir of his father and his sister, and as being an emancipated minor acting under and with the sanction of Sholto James Douglas, his curator, who was present and consenting by another power of attorney of that date, also appointed Hervey to be his attorney for the same purposes and with the same powers as had been given to him by the widow. These powers of attorney were duly registered in the island on the 17th October, 1854, and soon after they had been executed the widow and the son left the island and came over to this country. On the 5th December, 1854, a Petition was presented to the Master of the Supreme Court in the names of the widow and the son, represented by Hervey, their attorney, the son petitioning as an emancipated minor acting by his curator, and Sholto James Douglas, the curator, also joining in the petition, stating that the testator, at the time of his decease, was at the head of a mercantile firm and in partnership with Atholl Burnett, trading and carrying on business under the firm of Edward Chapman and Co.; that the operations of the firm were of considerable importance, and its connections very extensive both in the Colony and in England; that the surviving partner, Atholl Burnett, had left the Colony for England on account of the external affairs of the house, and

that he had conferred his powers of attorney to represent him and to act for him in the Colony on George Rougier Lagune, the chief employé of the firm, and Robert Glaspoole Lancaster, the Manager of the branch of the Oriental Bank established in the Colony; that for carrying on the operations of the firm it had become necessary to obtain advances, and the representatives of the firm had obtained for that purpose from the Oriental Bank the assistance they had required; that the situation of affairs in the Colony was at that time a difficult one in consequence of the great accumulation of colonial produce, of the reduction of prices, and of the extreme difficulty of effecting sales; that it was consequently indispensable that assistance to the firm should be continued, and that the Oriental Bank was disposed to continue that which it had already given, provided sufficient security by mortgage against certain of the estates of the late Edward Chapman was handed to the Bank; that this condition was fair and just, and that the parties interested had no objection to consent to it, but that the son being still but an emancipated minor could not concur in granting the mortgages without being authorized to do so by the advice of a family council, and the Petition therefore prayed that the Master would fix a day for the meeting before him of a family council of the emancipated minor for the purpose of authorizing the emancipated minor to concur, with the assistance of his curator, in conferring the mortgages in favour of the Oriental Bank to the amount of 20,000*l*. against the estates Queen Victoria, Woodford, and Louisa, or against any other estates if necessary, in order to secure the reimbursement of the advances which the Oriental Bank had already made, or might thereafter make, to the firm of Edward Chapman and Co.

In consequence of this petition a family council was held on the 8th of December, 1854, at the Master's office, and under his presidency, of the friends of the emancipated minor, who being, as it appears, duly sworn to give their opinion on the matter submitted, after mature deliberation unanimously declared it to be their opinion that the emancipated minor should be authorized to concur, with the assistance of his curator, in conferring the mortgages in favour of the Oriental Bank to the amount of 20,000*l*. against the estates Queen Victoria,

Woodford, and Louisa, or against any other estates if necessary, in order to secure the reimbursement of the advances which the Oriental Bank had already made, or might thereafter make, to the firm of Edward Chapman and Co., as mentioned in the Petition. Application was then made to a Judge for an order to approve and confirm the resolution of this family council, and it is contended on the part of the Respondents that an order to this effect was made on the 22nd of December, 1854; but the Appellants insist that there is no sufficient proof of any such order having been made, and that if any such order was made it was not legally valid. We shall presently have occasion to refer more in detail to these matters; but it will be more convenient first to pursue the history of the case. In pursuance of the resolution of the family council of the 8th of December, 1854, a deed, dated the 23rd of December, 1854, was made between the widow, as executrix and legatee of her husband, and as heiress of her daughter, and acting by William Hervey her attorney, and the son as heir of his father and his sister, and as a minor emancipated, and acting with the assistance of his curator, and authorized to concur in the deed by deliberation of the family council held before the Master of the Supreme Court on the 8th December last, and also acting by William Hervey, his attorney, and Sholto James Douglas as curator of the emancipated minor, of the one part, and the Respondents of the other part, whereby, after reciting that the firm of Edward Chapman and Co. was indebted to the Respondents to a very large amount, for negotiable effects subscribed or endorsed by the said firm and other advances, exceeding in the whole *20,000l.*; and that the Respondents having required security to be given by mortgage, the representatives of the late Mr. Chapman could not but accede to that demand, and declared that they were ready to give the mortgage upon the estates, being the property of the late Edward Chapman personally, and that the minor Chapman being but emancipated was obliged to have recourse to a family council for the necessary authorization to concur in the grant of the mortgage in question, which necessary authorization had been given as thereinbefore related, the widow and the son, and

Sholto James Douglas, as curator upon the emancipation of the son, mortgaged the estates Queen Victoria, Woodford, and Louisa, to the Respondents for securing the sum of 20,000*l*. This mortgage was registered in the island on the 27th of December, 1854.

On the 24th of March, 1855, the son attained twenty-one. By a deed poll under the hands and seals of the widow and the son, bearing date the 29th of March, 1855, and reciting amongst other things that they, together with Atholl Burnett, were jointly and severally entitled to several estates in the Island of Mauritius, and amongst others to the said estates Queen Victoria, Woodford, and Louisa, they appointed Atholl Burnett to be their attorney, with full powers to sell, mortgage, and deal with the estates. By an indenture bearing date the 7th May, 1855, and made between the widow of the first part, the son of the second part, Atholl Burnett as surviving partner of the firm of Edward Chapman and Co. of the third part, Joseph Whitehouse of the fourth part, the son of the fifth part, and Robert Michael Laffan of the sixth part, after reciting various transactions under which the said R. M. Laffan had acquired interests in and had come under liabilities in respect of the testator's estate, and that it had been agreed that all the testator's real and personal estate should be vested in Laffan and the son, subject to the prior subsisting charges affecting the same, particulars whereof were mentioned in a schedule to the deed, all the estates and property formerly of Edward Chapman deceased, or of Edward Chapman and Co., including the estates Queen Victoria, Woodford, and Louisa, were conveyed and assigned to the son and R. M. Laffan in equal shares, subject to the subsisting charges and incumbrances, the particulars whereof were mentioned in the schedule, and the exclusive control, management, and disposition thereof was exclusively vested in the said R. M. Laffan until such time as all the debts and liabilities in respect of the said estates and property should have been satisfied, with all proper and suitable powers and authorities for enabling the said R. M. Laffan to carry on, cultivate, and improve the same to the best advantage; and with full and uncontrolled power to make such arrangements, by sale or mortgage of the same or any part thereof, as

to him should from time to time seem meet for the purpose of paying off or otherwise discharging the said estates and properties from the several charges and incumbrances affecting the same. And by another indenture bearing date the 8th May, 1855, and made between the widow and the son of the first part, the said Atholl Burnett of the second part, the said R. M. Laffan of the third part, and David Barclay Chapman on behalf of the Appellants' firm and in his own individual capacity of the fourth part, after referring to the last-mentioned deed and reciting that on the 1st January, 1856, there would be due from the representatives of the said Edward Chapman and the said firm of Edward Chapman and Co. to the Appellants the sum of 62,092*l*. 18*s*. 2*d*., and that in order to assist the said R. M. Laffan in carrying out the liquidation of the claims on the estates the Appellants had in consideration of the estates of Queen Victoria, Woodford, and Louisa, and other estates, being made a security for the said sum of 62,092*l*. 18*s*. 2*d*., with interest, agreed to waive calling on the representatives of the said Edward Chapman deceased, and the said late firm of Edward Chapman and Co., for immediate payment of the said sum of 62,092*l*. 18*s*. 2*d*., the widow and son as such heirs of the said Edward Chapman, deceased, with the consent, concurrence, and confirmation of the said R. M. Laffan and Athol Burnett, charged and hypothecated unto the said D. B. Chapman, for and on behalf of the Appellants' firm, the estates and properties therein mentioned, including amongst others, the said estates Queen Victoria, Woodford and Louisa, with the payment of the said sum of 62,092*l*. 18*s*. 2*d*., with interest from the 1st January, 1856. These two last-mentioned deeds, however, were not registered in the island until November 1857. In the meantime the widow had married again, and she and her second husband had, by Deed Poll dated the 11th August, 1856, appointed James Canonville to be their attorney, with full powers to act in all things for them, both in their own characters and as representing the estate of the said Edward Chapman, and two instruments dated 16th of November, 1855, were made and entered into between the said Atholl Burnett as surviving member of the firm of Edward Chapman and Co., and as attorney for the son, and James Canonville as

attorney for the widow of the one part, and James Edward Arbuthnot acting for the Respondents of the other part, by one of which instruments the estates Queen Victoria, Woodford, and Louisa, and other estates therein mentioned, were charged with the sum of 33,333 piastres, and by the other of which instruments other property therein mentioned was charged with the sum of 66,666 piastres by way of security to the Respondents for the sum of 177,159 piastres in these instruments stated to be then due to them from the firm of Edward Chapman and Co. and the estate of Edward Chapman, and in consideration of the security thus given the Respondents agreed to take payment of the said sum of 177,159 piastres at distant days as therein mentioned. These instrnments were registered in the island on the 19th of November, 1855, before the registration of the Appellants' mortgage.

By a subsequent instrument, dated the 1st December, 1859, and registered in the island on the 2nd February, 1860, the said R. M. Laffan confirmed all the transactions which had taken place respecting the debt due to the Respondents, and a fresh arrangement was entered into for the liquidation of the debt by instalments, as therein mentioned, and by this instrument the debt was ascertained and declared to amount to 69,467 dollars and 90 cents. The Queen Victoria estate having been afterwards sold at the suit of the Appellants, the Master, in distributing the proceeds of the sale by the orders of the 19th July, 1861, and the 7th February, 1862, above-mentioned, gave priority to the Appellants' mortgage of the 8th May, 1855, over the mortgages made to the Respondents; but the Supreme Court, by its order of the 5th August, 1862, which is the subject of this Appeal, reversed the Judgment of the Master, and ordered that the mortgage of the Respondents, meaning, as we understand, their mortgage of the 23rd December, 1854, should have priority over that of the Appellants. It is, as we have already said, from this Order the Appeal before us has been brought. After the leave to appeal had been given, and on the 29th October, 1862, upon the application of the Respondents to have the order of the 5th August, 1862, carried into execution, a further Order was made in the matter with the consent of the Appellants and Respondents, by which order it

was, with their consent, ordered that the Order of the 5th August, 1862, should be carried into execution pending the Appeal, and it was with the like consent ordered that, upon the Respondents furnishing their own security for the due performance of such Judgment or Order as Her Majesty should think fit to make upon the said Appeal, a warrant for payment of the whole amount of the claim of the Respondents in principal, interest, and costs, including the costs in all the various suits and matters connected with the said claim, should be issued by the Master upon the sale price of the estate, and by the like consent it was further ordered that, upon the said warrant for payment being delivered to the Respondents, the objection made by them to the memorandum of distribution of the sale price of the estate Woodford should be withdrawn, and the said memorandum finally closed by the Master as it then stood, all rights of parties being duly reserved, and especially all the rights, claims, and mortgages of the Respondents upon the other property of the late Edward Chapman, until the Judgment or Order of Her Majesty should be made upon the said Appeal.

In determining this case, we may lay out of consideration the mortgage of the 30th June, 1852, in which the Appellants are now alone interested, there being no doubt that the fund to be distributed is more than sufficient to answer what is due upon that mortgage, and also what is due upon the mortgages under which the Respondents claim, and the amount which is claimed by the Respondents being covered by their mortgage of the 23rd December, 1854, we may also lay out of consideration all questions connected with their mortgage of the 16th of November, 1855, except the questions of novation and account to which we shall presently refer. These matters then being laid out of consideration, the principal question which we have to determine in this case is, the validity or invalidity of the Respondents' mortgage of the 23rd December, 1854, in determining which question it must be borne in mind, not only that that mortgage was prior in date to the mortgage of the 8th May, 1855, under which the Appellants claim, but was registered in the island long before the registration of that mortgage, and that according to the laws of

the island mortgages take priority according to the dates at which they are registered. There can be no doubt, therefore, that setting aside the matters above referred to, the Respondents, if their mortgage of the 23rd of December, 1854, be valid, are entitled to the priority which has been awarded to them by the Supreme Court, and it was upon the question of the validity or invalidity of this mortgage that the case appears to have been principally argued in the Supreme Court, and was mainly argued before us.

The validity of this mortgage is impeached on the part of the Appellants on several grounds. First, that there was no sufficient authority for convening the family council which was held on the 8th December, 1854. Secondly, that the transaction in question was not such as, according to the provisions of the Code, could be validated by the resolution of a family council. Thirdly, that there was no sufficient proof of the resolution having ever been homologated. Fourthly, that if it was ever homologated it was not homologated by the proper authority. And, fifthly, that the deed of the 23rd December, 1854, made in pursuance of the resolution, was not in conformity with it. As to the first of these objections, that there was no sufficient authority for convening the family council, this council was convened on the petition of the mother and the son by their attorney and of the curator of the son, and we find nothing in the Code or in the decisions upon it which throws any doubt upon the power of these parties to convene it, nor was any authority warranting such a doubt referred to in the course of the argument before us. It was said, however, that the powers of attorney given to Hervey did not authorize him to take this step on the part of the widow and the son; but looking to the terms of these instruments we have no doubt that they conferred upon him full power to do whatever the widow and the son could themselves have done in the matter. To hold that they did not authorize Hervey to concur in convening a family council would be to put too narrow a construction upon them, and to defeat one at least of the purposes which it is sufficiently clear they were intended to effect. As to the second objection, it was insisted on the part of the Appellants that the resolution of a family council could not give validity

to any transaction on behalf of a minor unless the transaction was for the minor's benefit, and that the security in this case being for an antecedent debt, without any provision for further advances, it could not be for the benefit of the minor that it should be given, even if there was sufficient proof of the debt being due, which it was insisted there was not. We have no doubt, however, that when this family council was held there was a debt due to the Respondents exceeding the sum for which the security was proposed to be given, and it was not disputed that the property of the minor was liable to the payment of this debt. There was this question, then, for the consideration of the family council, whether it was not more for the benefit of the minor that the security should be given than that his property should be exposed to proceedings for the recovery of the debt, and this was a question on which, in our opinion, a family council might, according to the provisions of the Code, be well called upon to deliberate, and were well entitled to decide. There is no ground whatever for supposing that the family council acted otherwise than in the *bonâ fide* exercise of their judgment, and we see no reason to think that they were even mistaken in the conclusion at which they arrived. It was urged on the part of the Appellants, in support of their contention on this part of the case, that before the mortgage in question was sanctioned preliminary inquiries ought to have been made as to the income and property of the minor, but we do not think that the provisions of the Code as to these preliminary inquiries have any reference to such a transaction as the present.

We come, then, to the questions of homologation. Upon this part of the case a preliminary question was raised on the part of the Respondents as to whether the resolutions of family councils for mortgages of minors' estates are in any case required by law to be homologated. Upon this point we do not find it necessary to give and do not give any opinion. Passing to the third objection, it is sufficient for us to say upon it that we are satisfied by the evidence that the resolution in question was in fact homologated by a Judge in Chambers. The fourth objection, that the homologation was not made by the proper tribunal, is open

to more serious question. By the Charter of Justice of the Colony dated the 13th April, 1831, it was ordered that the Supreme Court should thenceforth be holden before three Judges only, and that the Tribunal de Première Instance in the said island should thenceforth be holden by and before, and should consist of one Judge, to be called the President of the said Tribunal, and one other Judge, to be called a Judge Suppléant. By an Order in Council, dated the 26th April, 1845, power was given to the Governor of the Colony by any laws or ordinances to be by him from time to time made with the consent of the Legislative Council of the Colony, to make provision amongst other things for altering and amending the constitution of the Supreme Court, or of any other Court within the Colony, and for regulating the manner of proceeding in such Courts, and the powers and authorities of the Judges and officers of the said respective Courts. By an Ordinance bearing date the 20th March, 1851, and made by the Governor of the Colony, with the advice of the Legislative Council, for altering the organization of the Courts within the Colony, it was, amongst other things, enacted as follows:—Article 1. That the Supreme Court should consist of one Chief Judge and two or more Puisne Judges. Article 2. That the Supreme Court should have, and it was thereby invested with, all the powers, authority, and jurisdiction possessed and exercised by Her Majesty's Court of Queen's Bench in England. Article 3. That the Supreme Court should be a Court of Equity, and it was thereby invested with power and authority, and jurisdiction to administer justice, and to do all acts for the due execution of such equitable jurisdiction. Article 4. That the Supreme Court should have, and it was thereby invested with, full original jurisdiction to hear, conduct, and pass decisions on all matters that might be brought and might be depending before the said Court, and that the Supreme Court and the Judges thereof should sit and proceed to and conduct and carry on business in the same manner as the said Court of Queen's Bench and the Judges thereof; and inasmuch as two Judges at least of the said Supreme Court were required to form a quorum for all purposes of the full Court, provisions were made for the course of proceeding in the event of a difference of opinion between such

two Judges, and in other events therein mentioned; and it was further ordered that the Supreme Court should have an officer, to be styled the Master thereof, who should conduct and manage, amongst other things therein mentioned, assemblies of relations or of creditors, and should deal with matters of inquiry and accounts. Article 5. The Court of First Instance of the Colony was thereby abolished, and all matters then depending in the Court of First Instance were thereby removed to the Supreme Court to be continued, heard, and decided as if the same had been originally brought into that Court by way of appeal before the Supreme Court. Article 6. That the duties heretofore performed by the Registrar of the Court of First Instance should be thenceforth performed by the Registrar of the Supreme Court. By Article 8 District Courts were to be established, and by Articles 9 and 11 Appeals from the District Courts, and all suits and demands wherein the subject in litigation should not exceed in value 100*l.* were to be heard and determined before one Judge of the Supreme Court. By Article 12 the office and functions of the Ministère Public were abolished so far as the attendance of the Procureur-General or his substitute at the sitting of the Supreme Court was by the existing law required on pain of nullity, except, amongst other cases, in any matter connected with the guardianship of any minor.

By an Order in Council dated the 23rd October, 1851, and reciting that the provisions of this Ordinance were inconsistent with the Order in Council of the 13th April, 1831, and that doubts had been entertained whether all of such provisions were authorized by the further Order in Council of the 26th April, 1845, it was ordered that the said Ordinance should be and the same was thereby ratified, confirmed, and finally enacted; and it was provided that it should be lawful for the proper Legislative authority for the time being of the Colony to repeal, alter, or amend the Ordinance thereby confirmed, in like manner as it was or at any time might be lawful for such Legislative authority to repeal, alter, or amend any other Ordinance duly enacted in the said Colony. By a further Ordinance, bearing date the 14th November, 1855, and made by the Governor, with the advice and con-

sent of the Council of Government of the Colony, after reciting amongst other things that it was expedient to facilitate and promote the despatch of business before a Judge at Chambers, and to remove doubts touching the jurisdiction of a Judge at Chambers in certain matters, it was amongst other things enacted as follows :—Article 2. That the matters set out in the schedule to that Ordinance might, subject to the discretion of the Judge in any particular case to refer the same to the Court, be thenceforth finally disposed of at Chambers by a Judge's order, and that such order should be a sufficient authority to the Registrar of the Court to issue thereon a rule of Court *de plano*. Article 3. It is hereby declared that all matters in which a Judge's order or authority was formerly required from the President of the Court of First Instance or President of the Court of Appeal (the Supreme Court) previous to the introduction of any action before either Court, and all matters which were settled at Chambers by the President of either Court other than matters in which jurisdiction may have been given exclusively to the district Magistrate, are within the competence of a Judge of the Supreme Court. In the schedule to this Ordinance there were enumerated amongst other matters, applications for affirmations of deliberations of family councils, and applications for homologations of compromises (transactions) under Article 467 of the Code Civil.

Such are the Orders and Ordinances on which this question of homologation of the resolutions of family councils by a single Judge of the Supreme Court sitting in Chambers depends. It is only necessary to add that the evidence satisfies us that before the abolition of the Court of First Instance by the Ordinance of 1851, the resolutions of family councils were, according to the practice of that Court, homologated by the President of the Court sitting in Chambers. In support of the objection raised by the Appellants to the power of a single Judge of the Supreme Court sitting in Chambers to homologate the resolution in question, it was argued that the Court of First Instance having been abolished by the Ordinance of 1851, the powers and practice of that Court fell to the ground, and that the Ordinance gave no power to the Supreme Court

to act in such matters by a single Judge sitting in Chambers, and the Ordinance of 1855 was relied upon in support of this view.

It seems to us, however, that the Ordinance of 1851 operated to transfer to the Supreme Court the jurisdiction in these matters which had before been exercised by the Court of First Instance; and although that Court was abolished by this Ordinance we see nothing in the Ordinance which could prevent the Supreme Court from adopting, as it appears by the evidence to have done, the practice which had prevailed in such matters before the Court of First Instance was abolished, nor do we think that the Ordinance of 1855, passed, as it was, for the purpose of removing doubts, ought to be construed as an affirmative declaration of the non-existence of power in the Supreme Court to act in these matters by a single Judge sitting in Chambers. We are much confirmed in the opinion we have formed upon this question by the reference in Article 4 of the Ordinance to the practice of the Court of Queen's Bench in this country, much of the business of which Court is transacted by a Judge in Chambers. As to the fifth objection to the validity of the Respondents' mortgage deed, that it was not in conformity with the resolution of the family council, this objection depends, as it seems to us, upon the construction to be put upon the resolution.

It was argued for the Appellants that the resolution ought to be construed in connection with the petition for convening the family council, and that so construing it the purpose must be taken to have been to ensure further advances being made by the Respondents, and that the mortgage in question being only for securing the antecedent debt, without any express provision for further advances, did not fulfil that purpose; but the true construction of the resolution appears to us to be that a mortgage might be made either for the advances which had been already made or for those to be made, the security given for the past advances being the inducement for the making of further advances, and we think, therefore, that the mortgage, although made for the past advances only, was within the scope of the resolution.

Another objection was raised to the Respondents'

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claim under their mortgage of the 23rd December, 1854, upon the ground that the securities of 1855 operated a novation and extinction of the debt secured by this mortgage; but looking to the provisions of the Code on the subject of novation, we see no foundation for this argument.

These being our views upon the objections raised by the Appellants to the Respondents' mortgage of the 23rd December, 1854, it is not necessary to consider how their case would have stood had it rested only on their security of 1855, the priority of which was not discussed in the course of the argument before us, nor is it necessary to enter into the question of confirmation, which was so much discussed at the bar. Our opinion is, that the Order under Appeal is right in so far as it establishes the priority of the Respondents' mortgages over the mortgage to the Appellants. The question of priority being thus settled, there remains only to be considered the claim on the part of the Appellants to have the Order under Appeal amended by adding a direction for an account of what is due on the Respondents' mortgage. The Respondents insist that no such addition ought to be made to the Order upon the ground that by the Order of the 29th October, 1862, the amount to be paid to them was fixed at the sum which they claimed before the Master, and that this settlement was final and binding upon the Appellants. We have felt much difficulty upon this part of the case, nothing appearing upon the record as to the circumstances under which this Order was made. From the form of these proceedings, and from the Order under Appeal being confined to the question of priority, we think it highly probable that, according to the course of practice in the Supreme Court, the question of priority being settled, the question of account remained open in the Master's office, or that the account which is now asked was waived either upon the original hearing before the Supreme Court, or when the Order of the 29th July, 1862, was made, and in either of these cases it would not have been proper for the Supreme Court to have directed the account, and would be wrong for us to do so. Moreover, we think that in either of these cases the Appellants ought to be held bound by the Order of the 29th October, 1862, as settling the amount

due on the Respondents' mortgage. If, on the other hand, the question of account was not open and there was no such waiver as above suggested, we do not see why it was not competent to the Appellants to apply to the Supreme Court for the account which we are now asked to direct.

In this state of circumstances we think that the best course we can take is to keep this question open for the consideration of the Supreme Court, and the Order, therefore, which we shall recommend Her Majesty to make on this Appeal will be to dismiss the Appeal without prejudice to any question as to the Appellants' claim to have an account taken of what may be due upon the Respondents' mortgages, and with liberty to the Appellants to apply to the Supreme Court as they may be advised with respect to such account, and with a direction to the Supreme Court to deal with such application, in the event of the same being made, in such manner as, having regard to the course and practice of the said Court with respect to matters of account in the like cases, and to the circumstances of the case, to the said Court shall seem just.

As to the costs of this Appeal, we think that the Appeal having failed upon the principal question, they ought to be paid by the Appellants. It may be right for us to add that, in the event of an account being directed in consequence of this Order, we apprehend that it ought to extend to what is due on both the Respondents' mortgages, and that it is only in consequence of the form of the Order under Appeal we have said nothing as to the priority of the Respondents' mortgage of 1855, the priority of which over the Appellants' mortgage we see no reason to doubt.